Federal Court of Justice limits judicial review of merger clearances subject to commitments in Germany (EDEKA/Plus)

Kluwer Competition Law Blog
January 25, 2011

Silke Heinz (Heinz & Zagrosek Partner mbB, Germany)

Please refer to this post as: Silke Heinz, 'Federal Court of Justice limits judicial review of merger clearances subject to commitments in Germany (EDEKA/Plus)', Kluwer Competition Law Blog, January 25 2011, http://competitionlawblog.kluwercompetitionlaw.com/2011/01/25/federal-court-of-justice-limits-judicial-review-of-merger-clearances-subject-to-commitments-in-germany-edekaplus/

On October 5, 2010, the Federal Court of Justice upheld the Düsseldorf Court of Appeals' rejection of an appeal against the conditions of a merger clearance decision brought by the merging parties (*EDEKA/Plus*, KVR 33/09). The Court of Appeals considered the action as inadmissible, because the parties had already implemented the merger and thus lacked the specific interest for declaratory judgment that the conditions had been illegal. The decision further limits access to judicial review in merger cases in Germany, and reflects that the German courts still follow a very formalistic approach.
Food retailers Edeka and Tengelmann had intended to pool their German food discounter activities. The FCO had only cleared the transaction subject to substantial commitments, including that Tengelmann had to divest or close several of its discount outlets prior to closing, and neither Tengelmann nor Edeka were to open new food retail outlets in the proximity of the divested discounters (or to re- open closed outlets) for a period of two years following the decision.

The parties implemented the merger, but appealed the conditions with the Düsseldorf Court of Appeals. The Court of Appeals found that the conditions no longer had any legal effect after the parties had satisfied them. Accordingly, the parties could only pursue a request for declaratory judgment that the conditions had been illegal (*Fortsetzungsfeststellungsbeschwerde*), similar to a situation in which the parties had abandoned the transaction. German law stipulates a specific interest for such a request. There needs to be the risk that the FCO will issue the same decision in the future, or the attacked decision leads to legal uncertainty, and the parties can claim that they require certainty for their future conduct. The Court of Justice now confirmed in the case at hand that the parties lacked such interest, because following the implementation of the conditions, in particular the divestitures, the same transaction would no longer be possible again.

The German courts always took a very narrow and strict approach with abandoned transactions in the past. Parties could only claim the specific interest for judicial review if they could demonstrate that they actually planned to pursue the same merger again meaning that the same parties would be involved and the market conditions would be the same (so in practice stick to the merger plan). The Federal Court of Justice has only slightly changed this position in 2007 in *Axel Springer/ProSieben* (confirmed in 2010 in *Phonak/GN Store Nord*). Since then, it is required that the same transaction is possible again in the future (even if there are no actual plans), and that a prohibition would be likely again. This shift aimed to facilitate access to judicial review in cases when parties abandon a transaction after a prohibition only due to practical economic reasons (like in a public takeover scenario), but would, absent the prohibition decision, still pursue the transaction. The Federal Court thus recognized that in such cases their chances to be considered as a suitable buyer again would be impaired.

The Federal Court now clarified that there is no legitimate interest for judicial review of a merger decision, however, if the relevant market conditions have changed so significantly that the appealed decision would no longer have a decisive impact for a future transaction. The Court found that it is not sufficient that some aspects of the appealed decision may be relevant again, because it is not the jurisprudence's task to issue legal opinions on abstract questions, even if such opinions could have an impact on future decisions. In the case here, the target no longer existed as such after the merger's implementation, so it could also no longer be subject to the same transaction again. The Federal Court explained that this would typically happen in any merger which, cleared subject to conditions, has been implemented. That certain aspects of the FCO's reasoning of the appealed decision may be repeated in a new (but different) transaction should not suffice to assume that the entire decision would serve as a precedent.

The judgment is unfortunate, as it unnecessarily limits judicial review for the merging parties in the case of clearance subject to commitments. It seems that unless the parties decide not to implement the clearance subject to conditions, they will have no legal standing in court. The Federal Court's approach seems overly formalistic, and does not seem to reflect the impact of merger control decisions in practice. That the market conditions should not have changed so significantly that the decision can no longer serve as a precedent, reflects a general principle of German law. However, finding that implementing a merger subject to conditions regularly leads to such changes, in particular because the target then no longer exists in its original form, is not very convincing. Of course, each case involves a new investigation, but the FCO would most likely, either directly or de facto, use the appealed decision as a precedent in any future case that involves the same product markets and a similar situation (probably even if other parties were involved). Arguably, similar reasons why the Federal Court extended the approach in *Axel Springer/ProSieben* are typically also present in the type of cases here: the parties implement the transaction for practical economic reasons, because they can typically not afford to leave the transaction in limbo until they have obtained a final judgment, which takes a couple of years. Further, the "non-precedent" will in practice be held against them, both by the FCO and by sellers in future transactions, so that their chances to be considered as a suitable buyer are diminished by the decision.