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Bundeskartellamt publishes merger remedies guidelines

Silke Heinz (Heinz & Zagrosek Partner mbB, Germany) · Monday, June 12th, 2017

On May 30, 2017, the Bundeskartellamt (Federal Cartel Office, „FCO“) has published guidelines on remedies in German merger control, also available in an English translation, link here. The very detailed guidelines (87 pages) provide a comprehensive and helpful overview and summary of the FCO's standing remedies practice, as well as of related jurisprudence.

The timing is curious: the guidelines are published 12 years after the FCO first published the model divestiture texts applicable in remedies cases in 2005. In addition, the guidelines are published prior to an update of the current substantive merger guidelines. These date from 2012 and only reflect the dominance test, which is a subset of the SIEC test. So the FCO still has some work to do to have its "merger control package" up to date.

The remedy guidelines reflect both existing differences to EU law and the European Commission's practice, as well as similarities. The following highlights some significant elements of the guidelines.

I. Only structural remedies and preference for divestitures

The guidelines explain that German law only provides for structural remedies. This does not mean that behavioral remedies are entirely excluded, but they need to be of a structural nature. The guidelines confirm that the FCO clearly prefers divestitures.

In contrast to EU law, German law explicitly prohibits commitments that would require the FCO to ***continuously monitor*** (or control) the conduct of the parties post-proceedings, which limits the choice of behavioral remedies. The concept plays a significant role in practice in Germany. (It may be a ground for appeal against a clearance with commitments.) The European Commission is not limited in a similar way – even though in practice the Commission also has a clear preference for structural remedies and in particular divestitures.

The guidelines elaborate on ***behavioral remedies*** that have been accepted in individual cases in Germany in the past, including access to infrastructure, ceding airport slots, exceptionally (exclusive) IP licenses on a stand-alone basis, disclosure of interfaces of important soft- and/or hardware, and terminating or offering termination rights regarding long-term agreements with suppliers or customers. In contrast, the FCO (and courts) have rejected the shutdown of capacity, the creation of "Chinese walls" (for preventing flow of competitively sensitive information), or limiting the exercise of corporate influence (*e.g.*, through transferring voting rights to a trustee).

II. Up-front-buyer solution is the norm for divestitures

The guidelines confirm that in the FCO's practice an up-front-buyer solution is the norm in case of a divestiture commitment, because it prevents any negative effects of the merger on competition from the outset. A divestiture post-closing of the merger within certain time limits – which is still the normal case in the Commission's practice – is only accepted as an exception, because it involves transitionally tolerating a merger restricting competition.

The guidelines moreover clarify that the up-front-buyer solution in Germany typically does not only require entering into a binding agreement with a buyer (approved by the FCO) but also having ***completed the divestiture*** (including transfer of ownership) prior to closing of the merger. This also differs from the European Commission's practice, where a binding agreement with an authorized buyer is deemed sufficient. Even in a fix-it-first scenario in EU proceedings, there is no need to complete the divestiture prior to closing the merger.

The guidelines briefly deal with ***fix-it-first solutions***. If the feasibility of a divestiture is uncertain, in particular the availability of a suitable buyer, the guidelines acknowledge that it "may be useful" to identify the buyer, enter into a binding divestiture agreement (and potentially even complete the divestiture) already during the merger proceedings. There is then no need for the FCO to separately approve the buyer. However, the FCO seems skeptical about fix-it-first solutions: the guidelines state that they are only possible if indeed designed and appropriate to allow clearance, and they explicitly warn that changing the target's scope based on the acquirer's requirements during proceedings might infringe the stand-still obligation (gun jumping). The FCO's position thus differs from the European Commission's practice, in which fix-it-first solutions are rather welcomed and may indeed be required to obtain clearance in difficult cases. (Even though the FCO's concerns seem to relate to parties *de facto* changing the merger scope during the proceedings rather than to formal fix-it-first commitment.)

III. Proceedings

The guidelines confirm that – in contrast to the European Commission – the FCO can only clear merger subject to commitments in ***phase II proceedings***, not in phase I. Merging parties are encouraged to submit commitments as soon as possible, but the FCO will typically only deal with these after the statement of objections. While at EU level commitment proposals can be submitted even in pre-notification discussions, in practice the Commission typically also only seriously deals with these after establishing and communicating the analysis and theory of harm.

Offering commitments extends the regulatory deadline in phase II by one month (to four months in total). The guidelines explain that the regulatory extension is often not sufficient to allow for the requisite market test, and if necessary additional investigation. They refer to the possibility to further ***extending the deadline*** with the parties' consent, which may also be helpful for international cooperation of competition agencies in the case of multiple filings.

The guidelines deal with the requirements for commitments. In this context, they also refer to the existing model divestiture texts and confirm that the merging parties must identify any deviation from the model texts and explain the reasons – illustrating that the model texts may indeed have some strait jacket effect.

Interestingly, the guidelines point out that following a first proposal by the parties the FCO may, if it has experience with commitments in the same industry, provide a ***"cornerstone paper"***, substantiating the actual requirements for suitable commitments and their implementation in the case. This could indeed be a helpful and efficient measure in remedy negotiations.

IV. Impact of the recent competition law reform

The guidelines mostly reflect the *status quo*, but they also refer to changes brought about by the latest competition law reform (in force as of June 8, 2017) regarding the notion of market power in digital platform markets, including the need to take into account access to data and network effects. The guidelines hint that the FCO may adapt its commitment practice accordingly in the future, which may leave some room for creative remedies involving granting access to user data or terminating/limiting network effects – of course as long as they are structural and do not require continuous monitoring by the FCO.

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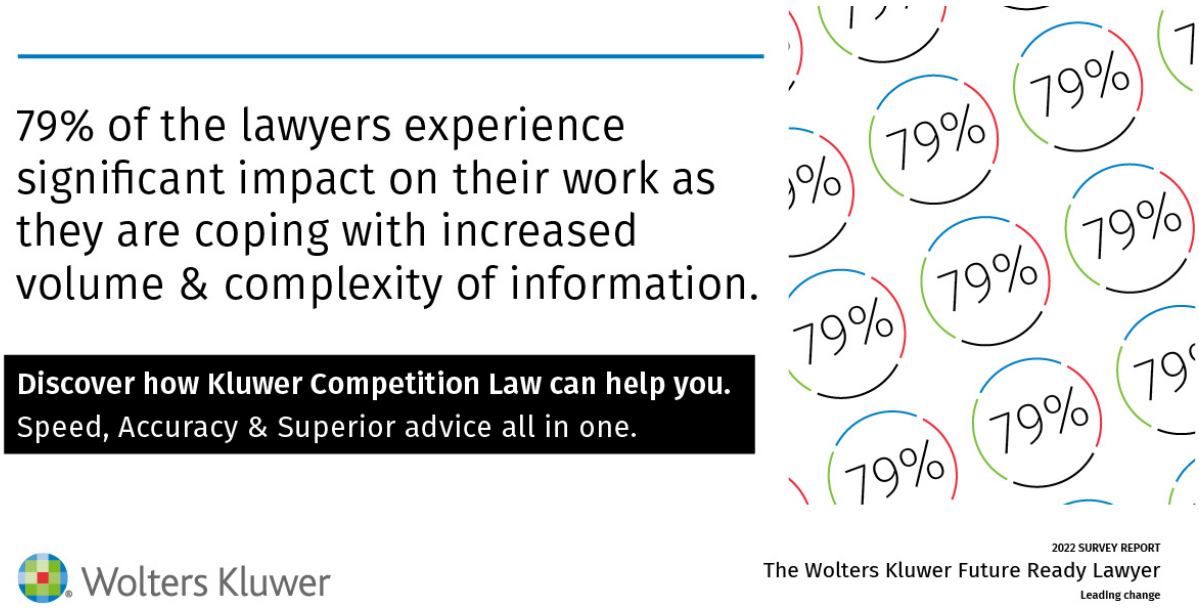

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