German Court of Appeals: adding more bite to the de minimis exception for merger control

By

Tobias Caspary

Reprinted from European Competition Law Review
Issue 4, 2009

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

SWEET & MAXWELL

German Court of Appeals: adding more bite to the de minimis exception for merger control

*Tobias Caspary**

LT Competition policy; De minimis; Germany; Mergers; Notification

Introduction

German merger control notification thresholds are extremely low and a large number of transactions are notified to the German Federal Cartel Office (FCO) every year. For example, 2,231 notifications were submitted to the FCO in 2007.[1] However, a notification is not required in Germany if the total size of the market affected by the transaction is de minimis, i.e. less than €15 million. In its recent interim ruling in the *Asphaltmischwerke Langenthal* case, the Düsseldorf Court of Appeals provided important guidance on the interpretation of the de minimis exemption and, in particular, on the application of the so-called "bundle theory" which constrains the application of the de minimis exemption.[2]

German merger control thresholds

Pursuant to §35(1) of the German Act Against Restraints of Competition (GWB), a transaction must be notified to the FCO if the parties' combined revenues exceed €500 million globally and at least one of the parties has revenues in Germany exceeding €25 million. A notification is required even if the thresholds are met by one of the parties (e.g. either the buyer or the target) as long as the transaction has a domestic effect.[3]

While these notification thresholds are extremely low, the GWB provides for an exemption from filing requirements if the transaction only affects markets in which goods or commercial services have been provided for at least five years and where the total market size was less than €15 million in the last calendar year (§35(2) No.2 GWB) *Bagatellmärkte*.[4] This is referred to as the de minimis rule and has given rise to considerable debate due to the ambiguity of when a market is "affected". Two approaches, in particular, have been taken to the meaning of affected market which has restricted the scope of the de minimis exemption.

First, the FCO had argued that for purposes of the exemption, the size of the "affected market" should be assessed based on the geographic market in which the parties to the transaction are active.[5] As a result, where the relevant geographic market was European or global in scope, the €15 million threshold was generally exceeded and the de minimis exemption was not available. However, in 2007, the German Supreme Court (*Bundesgerichtshof*) overruled this approach in *Sulzer/Kelmix*, holding that the *de minimis* market test refers solely to German markets.[6]

Secondly, German Courts and the FCO relied on the "bundle theory" to constrain the application of the de minimis exemption. This approach had been adopted in the following circumstances:

- "*Geographic Bundling*": the Supreme Court considered that where the transaction affects several neighbouring geographic markets in which the same products or services are supplied, these

* Dr Tobias Caspary is an Associate at Fried, Frank, Harris, Shriver & Jacobson. The author is greatly indebted to Dr Craig Arnott, Head of Competition/Antitrust at Fried, Frank, Harris, Shriver & Jacobson, for his review and invaluable comments.

1 See Federal Council printed matters (*Bundesratsdrucksache*). 558/08, p.23.

2 Court of Appeals Düsseldorf, decision of February 26, 2008, VI-Kart 18/07 (V)–*Asphaltmischwerke Langenthal*, published in WuW of October 9, 2008, p.1107, DE-R 2383.

3 The German parliament has recently adopted a revision of the German jurisdictional thresholds. Legislation is expected to come into force in March 2009, after signing of the bill by the German President. The new §35(1) GWB will introduce a second domestic revenue threshold requiring one party to achieve more than €5 million when the other achieves more than €25 million in German revenue. The amendment is expected to reduce the number of notifications by up to one-third, see *Bundesratsdrucksache* 558/08, p.23.

4 Another German de minimis exemption exists with regard to the parties' size: a transaction is exempted from merger review if one party to the transaction had global revenues of less than €10 million in the last calendar year (§35(1) No. 1 GWB). This exemption is not considered here.

5 This approach was adopted following a change to the GWB in 2005 which, in §19(2) 3 GWB, clarified that "the relevant geographic market *within the meaning of the [GWB]* may be broader than the scope of application of [the GWB]" (emphasis supplied). The FCO used this as a basis for arguing that de minimis markets defined in §35 GWB may also be broader than national.

6 German Supreme Court, decision of September 25, 2007, KVR 19/07-*Sulzer/Kelmix* at 14–18; notably, the judgment also rebutted the view expressed by the German Government in favour of the FCO's position, see comment by the German Government on the FCO's 2005/2006 activity report, Federal Parliament printed matters (*Bundestagsdrucksache*) 16/5710, p.VII.

geographic markets should be aggregated together when calculating the €15 million threshold. The history of Supreme Court rulings on this issue shows how the concept of geographic bundling has been gradually expanded:

— In 1981, the Court ruled that neighbouring markets should be "bundled", where one affected product market was artificially split up by the parties, while they maintained a strong position in each local market (in that case, to avoid overlaps with the neighbouring supply areas of affiliated companies, the target company had allegedly limited its actual supply area to a radius smaller than the potential supply area).[7]

— In 1995, the Court held that bundling was also possible where neighbouring affected markets had similar market structures and were covered by one comprehensive organisational structure of the parties.[8]

— In 2006, the Supreme Court held that neighbouring affected markets could be "bundled" if they were homogenous. While the Court did not further define what it meant by "homogenous", it seemed to consider the fact that geographic markets related to the same products or services as sufficient.[9]

● "*Vertical Bundling*": The Supreme Court has also applied the "bundle theory" to vertically related markets, i.e. the Court aggregated market sizes of upstream and downstream product markets relating to the same geographic area. The Supreme Court has applied this approach where:

— a party to a concentration is active in a de minimis market, which is upstream or downstream of a non-de minimis market in which any other party to the concentration is engaged; and

— market conditions on the de minimis market "directly determine" which competitors are able to also offer their products and services on the other market.

In *Deutsche Bahn/KVS Saarlouis*, the Supreme Court held that the success of a company active in an upstream market for the acquisition of passenger transportation rights "directly determines" whether and to what extent it will be able to offer its passenger transportation services to customers in the downstream market.[10]

The Asphaltmischwerk Langenthal case: the FCO prohibition decision

In the *Asphaltmischwerk Langenthal* case, the FCO applied the geographic and, alternatively, the vertical bundling concepts in rejecting the de minimis exception and asserting jurisdiction.

Faber Schlierscheid ("Faber"), a leading road and foundation constructor, intended to acquire a 30 per cent minority shareholding in an asphalt mixer, Asphaltmischwerk Langenthal ("AML"). AML, a subsidiary of the Werhahn group, was active in the district of Langenthal. The Werhahn group, together with the Faber group, also controlled another local asphalt mixer which was active in Kichheimbolanden, approximately 35km away from Langenthal.

The FCO identified two relevant local markets for the provision of asphalt ready mix, limited to a 25km radius centring around the two mixing plants in Langenthal and Kirchheimbolanden, respectively.[11] The size of each market was well below €15 million and, therefore, if viewed separately, both markets were de minimis. Nevertheless, the FCO asserted jurisdiction on the basis of the bundle theory, in particular by aggregating the neighbouring territories of Langenthal and Kirchheimbolanden, were total combined sales exceeded €15 million.

The FCO considered that both areas were "affected" by the transaction despite the target, AML, not being active in Kirchheimbolanden, because Faber was active in Kirchheimbolanden through another asphalt mixer it controlled with the Werhahn group.[12] Since the areas supplied by the two asphalt plants partly overlapped, the FCO said that it could not rule out a priori that the acquisition of a minority stake in AML by Faber would strengthen the market position of the Faber group in Kirchheimbolanden. According to the FCO, this was sufficient to find that the Kirchheimbolanden market was "affected" along with the Langenthal market and the two markets could be "bundled" together. In addition, Faber's investment in AML would also strengthen Werhahn's market position in Kirchheimbolanden, as it would add another link between Faber and Werhahn and thereby reinforce customer relations between the two groups.

The FCO further argued that it could assert jurisdiction on the basis of vertical bundling for the

7 German Supreme Court, decision of June 22, 1981, KVR 7/80-*Transportbeton Sauerland* at 21.

8 German Supreme Court, decision of December 19, 1995, KVR 6/95-*Raiffeisen* at 23.

9 German Supreme Court, decision of July 11, 2006, KVR 28/05-*Deutsche Bahn/KVS Saarlouis* at 15.

10 KVR 28/05-*Deutsche Bahn/KVS Saarlouis* at 16. In addition, the FCO has suggested aggregating "neighbouring" product markets relating to the same geographic market if the parties pursue a common business strategy across various de minimis product markets and market conditions on the de minimis markets cannot be assessed independently from each other, see FCO's 1999/2000 activity report, *Bundestagsdrucksache* 14/6300, p.18. However, German courts have not confirmed whether bundling of markets, which goes beyond the above categories of geographic and vertical bundling is permissible.

11 FCO, decision of November 15, 2007, B 1—190/07-*Faber/BAG/AML* at 18 and 29.

12 B 1—190/07-*Faber/BAG/AML* at 17.

Langenthal area, by aggregating the upstream asphalt ready mix market with the downstream market for road construction services. The combined size of these two markets also exceeded €15 million. The FCO noted that this bundling was justified because asphalt constituted a "very important upstream input" for road constructors, such as Faber.[13]

Having asserted jurisdiction, the FCO found that the transaction would strengthen Werhahn's dominant position in the asphalt ready mix market in Langenthal because Werhahn's customer access would be improved through the additional co-operation with its customer Faber. As a consequence, the FCO prohibited the transaction.

The Court's interim ruling

Faber appealed against the prohibition decision and simultaneously requested, by way of interim measures, a derogation of the suspensive effect of its appeal, i.e. it sought an exemption to consummate the transaction despite the pending appeal. The Düsseldorf Court of Appeals granted Faber's request and thereby allowed Faber to acquire the minority stake in AML. The competence to grant a waiver from the stand-still obligation generally rests exclusively with the FCO.[14] However, the Court held that the present transaction was not subject to merger control, hence not to the stand-still obligation, and it could therefore grant Faber's request.[15]

In its ruling, the Court made important determinations about the scope of the de minimis exception.

Geographic bundling

The Court of Appeals analysed the Supreme Court's case law and concluded that the only requirements for geographic bundling were that markets should be homogenous, neighbouring and that each market is "affected" by the transaction.[16]

The Court further ruled that it was not necessary to consider whether neighbouring affected markets had similar market structures and whether they were covered by one comprehensive organisational structure of the parties to allow a bundling. The Court found that the Supreme Court had overruled such a requirement in *Deutsche Bahn/KVS Saarlois* where it held that the only requirement would be whether "homogenous markets that are neighbouring are each affected by the concentration" exceed the €15 million market size threshold.[17]

However, the Court rejected the FCO's very broad interpretation of an affected market. The Court ruled that a market is "affected" by a transaction where the transaction may create or strengthen a dominant position in the market. A "mere theoretical possibility" in this regard would not suffice.[18] Conversely, it would not be necessary to show that a transaction would "significantly" affect market conditions.[19] Rather, a market may be affected if there is a "sufficiently fact and experience based possibility" that the concentration is likely to create or strengthen a dominant position in a given market.[20]

On this basis, the Court of Appeals rejected the FCO's view that the asphalt ready mix market in Kirchheimbolanden was "affected". The Court found that the possibility that links between Faber and Werhahn would be reinforced was merely theoretical, given that AML was not active in Kirchheimbolanden and a "much more intense" co-operation already existed there between Faber and Werhahn through their joint venture.[21] The Court could not find what it considered the requisite sufficiently fact-based possibility that the concentration could strengthen Werhahn's dominant position.[22] The Court therefore decided that the Kirchheimbolanden market was not affected and that the sales in that area should not have been aggregated with the sales in Langenthal for the purposes of the de minimis exemption.

Vertical bundling

In addition, the Court held that the FCO was wrong in bundling the upstream asphalt ready mix market with the downstream market for road construction solely because asphalt ready mix was an important upstream input. In line with *Deutsche Bahn/KVS Saarlois*, the Court found that these markets could not be bundled because the market conditions on the asphalt ready mix market did not "directly determine" which road constructor could offer services in the downstream market.[23]

13 B 1—190/07-*Faber/BAG/AML* at 22.
14 See VI-Kart 18/07 (V)-*Asphaltmischwerke Langenthal* at 16, citing Court of Appeals Düsseldorf, decision of October 2, 2007, VI-Kart 8/07(V)-*Phonak/ReSound*.
15 The Court noted that the interim decision did not prejudge the main proceeding where it would confirm its view of the relevant law, *cf*. VI-Kart 18/07 (V)-*Asphaltmischwerke Langenthal* at 49. A different outcome from its summary determination is very rare and particularly unlikely in this case given the nature of the Court's reasoning.
16 VI-Kart 18/07 (V)-*Asphaltmischwerke Langenthal* at 31.
17 Note the relevant threshold is meeting, not exceeding a turnover of €15 million as the Court said, VI-Kart 18/07 (V)-*Asphaltmischwerke Langenthal* at 31; correct KVR 28/05-*Deutsche Bahn/KVS Saarlouis* at 15.
18 VI-Kart 18/07 (V)-*Asphaltmischwerke Langenthal* at 21.
19 VI-Kart 18/07 (V)-*Asphaltmischwerke Langenthal* at 20.
20 VI-Kart 18/07 (V)-*Asphaltmischwerke Langenthal* at 21.
21 VI-Kart 18/07 (V)-*Asphaltmischwerke Langenthal* at 37.
22 VI-Kart 18/07 (V)-*Asphaltmischwerke Langenthal* at 34.
23 VI-Kart 18/07 (V)-*Asphaltmischwerke Langenthal* at 42.

Conclusion

In its ruling, the Court of Appeals has provided important guidance on the following issues relating to the de minimis exemption:

- The concept of "affected" market: to establish that a market is affected by the transaction, and therefore its turnover is considered for purposes of the de minimis exception, the FCO is required to demonstrate that there is a sufficiently fact and experience based possibility that the transaction is likely to create or strengthen a dominant position in that market.
- Geographic bundling: the Court of Appeals considers that under the *Deutsche Bahn/KVS Saarlouis* case law, geographic markets can be bundled if they are homogenous, neighbouring, and each market is "affected" by the transaction.
- Vertical bundling: in a chain of supply, access to important upstream input is not sufficient for a finding that the upstream market "directly determines" the competition in the downstream market (within the meaning of the Supreme Court's *Deutsche Bahn/KVS Saarlouis* judgment).

However, the Court of Appeals left open the definition of "homogenous" markets. In the present case, little effort was spent by the FCO in analysing whether the two markets in Langenthal and Kirchheimbolanden were sufficiently homogenous, because they both related to the supply of asphalt ready mix. Homogeneity of geographic markets was determined by merely looking at whether the products offered in both areas were homogenous. It is questionable, however, whether this is sufficient to determine geographical homogeneity[24] or if that concept makes sense at all if markets have been considered geographically distinct. For instance, in the *Asphaltmischwerk Langenthal* case itself the FCO found that between Langenthal and Kirchheimbolanden there were "different geographical circumstances and differences in the market structures".[25]

Moreover, the Supreme Court has yet to rule whether it agrees with the Court that it has given up the *Raiffeisen* criteria for geographic bundling, i.e. (i) similar market structures; and (ii) one comprehensive organisational structure of the parties covering all markets.[26] In any event, it should be recalled that *Raiffeisen* did not suggest that one comprehensive organisational structure by the parties across all affected markets is a *necessary* condition for geographic bundling. Rather, the Supreme Court considered it as a *sufficient* factor, i.e. if present it would "in any event" prevent the application of the de minimis clause.[27]

The determinations in the Court's interim ruling, in particular with regard to the concept of "affected" markets and on vertical bundling, will make it more difficult for the FCO to assert jurisdiction under the bundle theory. It will thus be more difficult for the FCO to constrain the application of the de minimis exemption. While certain questions remain, the de minimis clause has therefore become a more effective tool to escape a filing obligation.

24 Notably, in another decision, the Court denied homogeneity of geographic markets based on other factors, such as market shares, competitors, customers and flexibility to switch production; see Court of Appeals Düsseldorf, decision of March 5, 2007, VI-Kart 3/07(V) confirmed by KVR 6/95-*Raiffeisen* at 24.

25 B 1—190/07-*Faber/BAG/AML* at 30.

26 While *Deutsche Bahn/KVS Saarlois*, to which the Court of Appeals refers to in this regard, could suggest a turning away from *Raiffeisen*, the German Supreme Court in a more recent decision—*Sulzer/Kelmix*—again referred to *Raiffeisen*; see KVR 19/07-*Sulzer/Kelmix* at 21. However, in both judgments the references to *Raiffeisen* were rendered rather incidentally in obiter dicta.

27 KVR 6/95-*Raiffeisen* at 23. Also, the Supreme Court has subsequently reiterated the relevance of market structures in the context of geographic bundling, see KVR 19/07-*Sulzer/Kelmix* at 26 where the German Supreme Court denied geographic bundling "in view of existing structural differences".