

CLIENT ALERT

German Bundesgerichtshof (Federal Supreme Court) Provides Guidance on the Definition of the *De Minimis* Clause in Determining Whether a Merger Is Subject to German Merger Control

Dec.17.2007

Last Friday, in a controversial and long-awaited decision, the German Bundesgerichtshof clarified the *de minimis* merger filing exception in Germany. In Germany, merger filings are required if the thresholds are met and the concentration has an impact on the market unless the market affected by the merger is a *de minimis* market. What constitutes a *de minimis* market has been the subject of considerable debate. In its judgment the Bundesgerichtshof clarifies the so-called “minor market clause” (section 35 (2), no. 2 Act against Restraints of Competition (“ARC”)).

In order to be considered *de minimis*, two factors must be met. First, the affected market must be one in which goods or commercial services have been offered for at least five years. By requiring the market to be in existence for at least five years, newly developed and still expanding markets are subject to German merger control. Second, in order for a merger to be exempt from German merger control under the *de minimis* exception, the annual sales volume for the relevant market must have been less than € 15 million in the previous calendar year. Since July 1, 2005, the German Federal Cartel Office (Bundeskartellamt) has interpreted this second requirement rather broadly, taking the position that the relevant market, for purposes of determining sales volume, may - as the case may be - extend beyond Germany.

Based on this interpretation, the Bundeskartellamt prohibited a concentration between Du Pont and Pedex & Co. GmbH because the total market turnover exceeded the sales volume threshold. The first instance court (Higher Regional Court of Düsseldorf), however, overturned this decision and held that, for the purpose of the *de minimis* or “minor market clause,” the geographical scope of the market can only extend to Germany. The Bundeskartellamt subsequently appealed this decision.

The Bundesgerichtshof upheld the decision of the Higher Regional Court of Düsseldorf. As in previous decisions, the Bundesgerichtshof upheld the practice of bundling groups of minor product markets together provided that the products are close neighbours (supply side substitutable), the market players are largely the same and the products are sold through the same distribution channel.

The Bundesgerichtshof decision has not yet been published.

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