German Bundesgerichtshof (Federal Supreme Court) Gives Further Guidance on Procedural Rights of Third Parties in Merger Cases

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On November 7, the German Bundesgerichtshof issued a decision clarifying third parties’ procedural rights in merger cases. The Bundesgerichtshof approved the legal practice of the Higher Regional Courts in earlier case law that upheld the discretion of the Bundeskartellamt (Federal Cartel Office) to admit or reject an application by third parties to be granted the status of third party to the administrative proceedings at the Federal Cartel Office.

The Bundesgerichtshof specifically supported the Higher Regional Courts’ (Oberlandesgericht) view that such an application can be rejected on the mere basis of procedural (efficiency) considerations in cases where the applicant's interests are already sufficiently represented by other parties to the proceeding. On the other hand, the Bundesgerichtshof clarified that the rejection of such an application for this reason does not impair the respective party's rights to appeal against a clearance decision by the Bundeskartellamt, even though the wording of the relevant statute (section 62 (2) Act against Restraints of Competition) seems to exclude admissibility of claims by third parties which have not been admitted to participate in the administrative procedure.

Whilst it is disputed whether third parties have to be granted third party status in the administrative procedure to be entitled to challenge merger decisions (or whether it suffices that they are “affected in their rights”) the Federal Supreme Court has now clarified that having this status is dispensable if the application was refused for reasons of procedural efficiency. In any event, it is highly recommended for third parties having any interest in merger control cases to apply for third party status in the administrative procedure.

The full text of the decision has yet to be published.

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