

German Federal Cartel Office (Bundeskartellamt) Publishes Merger Remedies Guidance

IN SHORT

The Situation: Corporate mergers can bring many benefits to the parties involved in the transaction, but regulators often raise concerns regarding the effects the merger will have on competition.

The Action: A recent guidance published by the German Federal Cartel Office explains the criteria used to evaluate the remedies offered by companies involved in merger activity to address anticompetitive concerns.

Looking Ahead: The guidance explains the procedure for the proposal and implementation of remedies offered by the parties involved in the merger.

The German Federal Cartel Office (*Bundeskartellamt* or "FCO") has published guidance on the requirements placed on remedies in merger control and their implementation. Remedies are an important instrument in merger control practice. They can enable the clearance of a merger under conditions and obligations even if it might otherwise be blocked.

The guidance document explains the criteria the FCO uses to assess remedies offered by companies. This should allow companies to better assess which requirements they must fulfill to remedy a merger's anticompetitive effect and thus enable clearance of their merger. Finally, the guidance document describes the procedure for the proposal and implementation of remedies. It also deals in detail with the tasks of trustees that often play an important role in the implementation of remedies.

Types of Remedies

Remedies allow parties to a merger to modify their project postnotification to remove competition concerns, such that the transaction can be cleared and the parties can obtain some of the expected benefits of a merger. Remedies have to completely remove the competitive concerns in a timely manner and must be offered by the parties to the merger. These usually take the form of an up-front buyer solution to ensure that the competition problems can be effectively and quickly remedied. Where appropriate, other remedies may also be feasible in individual cases.

Clear Preference for Divestitures

As a rule, the FCO considers that remedies in the form of divestitures are best suited to remove competitive concerns. Divestitures lead to a structural change in the market that directly addresses a competition problem. In addition, divestitures are "self-policing" and do not require further monitoring by the FCO.

The FCO prefers up-front buyer divestitures. In this scenario, the merger can only be implemented once the up-front buyer condition precedent is fulfilled. The FCO prefers this type of remedy as it prevents any competitive harm during the period between completion of the merger and implementation of the remedy. Subsequent conditions are only acceptable in exceptional cases.

The FCO's position is stricter than that of the European Commission, as an up-front solution in Germany requires not only a binding agreement with a suitable buyer, but also completing the divestiture prior to closing of the merger. In addition, the German authority is skeptical of fix-it-first solutions, which are seen more favorably by the Commission.

Limited Role for Behavioral Remedies

Behavioral remedies traditionally play a less important role in German merger control. This is because the FCO or a third party would have to permanently monitor the merging parties' behavior. In addition, behavioral remedies may not be able to remove competitive concerns as noncompliance can only be identified in hindsight. Hence, the FCO and the legislator exclude remedies that would require constant control of the merging parties' conduct.

However, in certain circumstances behavioral remedies may be acceptable to the extent that they do not require permanent monitoring by the FCO or a third party. For instance, the guidance paper identifies termination of exclusive distribution agreements, granting access to infrastructure or granting IP licenses. These remedies are fact-specific and may not be acceptable in other circumstances.

Procedural Issues

The parties to a merger are under a duty to cooperate with the FCO and it is their task to propose remedies to the FCO. Remedies can generally be submitted at any stage of the procedure. However, a merger can only be cleared subject to remedies after an in-depth investigation (Phase II); conditional clearance in Phase I is not possible in Germany. An offer of remedies automatically extends the three months' statutory review period of Phase II by another month. In addition, the parties can agree to an extension of the review period, which is a very common practice, particularly in complex transactions. Any remedies will be market tested, during which important customers, competitors, suppliers, or other third parties can be asked to provide their views on different aspects of the remedy offer.

The FCO's May 30, 2017, guidance is available in [German](#) and [English](#).

THREE KEY TAKEAWAYS

1. Merger remedies allow parties to a merger to modify their project to remove competition concerns.
2. The FCO considers that remedies in the form of divestitures are best suited to remove competitive concerns, with up-front buyer divestitures preferred.
3. Behavioral remedies—primarily due to the need to permanently monitor the merging parties' behavior—are acceptable only under certain circumstances.

AUTHORS



Bernhard Hofer
Brussels



Philipp Werner
Brussels

[ALL CONTACTS >>](#)

YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)

[European Commission Sets its Sights on Allegedly Excessive Drug Prices](#)

[Global Merger Control Update](#)

[European Commission's Antitrust Concerns Lead to Syndicated Loans Market Study](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a legal institution with more than 2,500 lawyers on five continents. We are One Firm WorldwideSM.

Disclaimer: Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.