

Newsletter, 24 April 2012

German merger control also applies to concentrations completed abroad

Violation of the prohibition to put a concentration into effect by creating a foreign joint venture with effects in Germany - Case Summary: *EMC/Cisco*

The German Federal Cartel Office („FCO“) has reproved the founders of a joint venture („JV“) completed abroad for having violated the prohibition of putting a concentration into effect, but has refrained from imposing a fine.¹ In doing so, the FCO explicitly confirmed its broad understanding of possible domestic effects as a precondition for the application of German merger control.

Case Summary *EMC/Cisco*

Facts of the case

In November 2009, EMC Corporation („EMC“) and Cisco Systems Inc. („Cisco“) founded the JV VCE Company LLC. The JV sells integrated IT infrastructure. While both US parents were active in Germany at the time of the JV's creation, activities by the JV in Germany were initially not intended. However, the Articles of the JV did not restrict its field of business, i.e. did not exclude activities in Germany. The FCO initiated so-called divestiture proceedings against the parents for having violated the prohibition to put a concentration into effect.² As the concentration did not raise any competitive concerns, the proceedings were closed. Once the 8th Amendment of the German Act Against Restraints of Competition („ARC“) has entered into force (expected 1st January 2013), this will have the effect of an ex-post clearance. Applying its discretionary powers, the FCO decided not to fine the at least negligent violation because it had only marginal effects in Germany.³

The FCO's assessment

The creation of the JV had to be notified pursuant to Sec. 35 (1) ARC. EMC and Cisco did not only achieve worldwide but also significant turnover in Germany exceeding the *thresholds* of German merger control (combined worldwide turnover of more than € 500m; one company achieving a turnover of more than € 25m and another achieving a turnover of more than € 5m in Germany). However, even if the above thresholds are met, the ARC only applies to concentrations wholly or partly completed abroad if they have an effect in Germany, Sec. 130 (2) ARC. In the case of *EMC/Cisco, effects in Germany* were to be expected due to the specific circumstances of the matter: Firstly, both parents were already operating in Germany. Secondly, the JV was active on a worldwide IT-market which comprises Germany. Domestic effects were not excluded by the fact that the JV was initially only active in the US. The Articles of the JV did not limit the geographical scope of its field of business, even though the JV initially did not perform all functions it was entitled to according to its Articles.

Even if no domestic effects were to be expected by the creation of the JV, EMC and Cisco should, in the view of the FCO, have notified the concentration in any case in 2010 when they transferred further assets to the JV and *extended its activities* to Europe and Germany respectively.

Domestic effects

For assessing the possible domestic effects, the FCO followed principles put down in an information leaflet published by the FCO in

¹ FCO, [Case Summary of 25/1/2012, file no. B7 - 38/11](#).

² There are no time limits for the FCO to initiate ex-post proceedings and to declare a concentration which has already been implemented null and void pursuant to Sec. 41 (3) ARC.

³ The violation of the prohibition to put a concentration into effect may be punished by a fine of up to 10% of an

undertaking's total turnover in the preceding business year, Sec. 81 (2) No. 1 and (4) ARC.

1999.⁴ According to this leaflet, concentrations completed abroad have domestic effects if the „*structural conditions of competition*“ in Germany are affected. This is in particular the case if both undertakings have already been operating in Germany before the concentration.⁵ As regards the creation of a JV, the domestic effects primarily depend on the relevant product and geographic markets on which it operates: there are domestic effects not only if the JV is to operate on a German market, but also if it starts operating abroad where the relevant geographical market is worldwide or European-wide in scope.⁶

Even after the introduction of the second domestic turnover threshold in 2009, the FCO correctly still holds that domestic effects are a prerequisite for the application of German merger control for concentrations completed abroad. This is in accordance with European merger control for which the European Courts have recognized the effects doctrine under international law.⁷ However, in practice the European Commission („Commission“) regularly demands a notification based on the mere fact of the merger filing thresholds being met.

Changes in the activities of the JV

The FCO explicitly points out in the Case Summary that the transfer of further assets to the JV in 2010 would have been notifiable in any case. In doing so, the FCO follows a legally disputed rule of the Commission. In its Consolidated Jurisdictional Notice on the control of concentrations between undertakings⁸ the Commission states that a concentration may arise if the parents transfer „*significant additional assets, contracts, know-how or other rights*“ to the JV and if these assets or rights constitute „*the basis or nucleus*“ of an extension of the activities of the JV into other product or geographic markets which were not object of the original JV. Provided that the JV performs such activities on a full-function basis, the extension will be „*considered in the same way as the creation of a new joint venture*“ within the meaning of Art. 3 (4) EC Merger Regulation. The Local Court Cologne was the first German court to

apply this rule in 2009.⁹ The court held that the transfer of further rights to a JV (which had been approved by the Commission) was null and void since the subsequently transferred rights concerned a new product market (which was not covered by the Commission's approval) and therefore their transfer would have been subject to notification. The Commission as well as the Local Court argue that the rule was necessary to prevent the abusive circumvention of notification requirements. The approval of a concentration solely applies to the markets referred to in the notification. In cases where the Articles of an undertaking do not define the field of its business, it is questionable which markets are covered by the authority's approval and which are not. The (even hypothetical) application of this rule to the case of *EMC/Cisco* is not convincing as the JV - based on the FCO's argument in the first place - was active on a worldwide market. The transfer of further assets could therefore not concern a new geographic market.

Comment

If wholly or partly completing a concentration abroad, it should always be checked whether a notification is required in Germany. The subject matter of domestic effects is complex - which is also shown by the fact that the FCO's information leaflet on domestic effects is under review since the introduction of the second domestic turnover threshold in 2009. In view of the current legal uncertainty as regards the application of the effects doctrine by the FCO and also the Commission, it is indispensable that the authorities put down their application principles in writing. This is not only true for merger control. The increasing internationalization of production and distribution processes also raises questions with regard to the application of the effects doctrine to agreements and unilateral conduct in third countries.

Thus, changes in the activities of JVs which may possibly only become noticeable gradually should be watched out for. However, the parents must be the players behind the extension of a JV's scope. Organic growth as such is not subject to merger control.

In case of doubt concentrations will need to be notified. The FCO generally engages in discussions on notification requirements only if a notification has already been submitted.

⁴ [Information leaflet on domestic effect](#) of January 1999.

⁵ *Ibid.*, p. 2

⁶ *Ibid.*, p. 3.

⁷ Judgment of 25/3/1999, [T-102/96](#) - *Gencor*, para 76ff., 89ff. The Court assessed whether the concentration had „*immediate, substantial and foreseeable effects*“ on the common market.

⁸ [OJ 2009, C 43/09](#), para 106ff.

⁹ Local Court Cologne, judgment of 23/12/2009, 28 O (Kart) 479/08 - *EPG*.

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