The application of the German and UK de minimis regimes in theory and in practice—a comparative analysis

By

Dr Andreas Boos, Dr Gordon Christian and Dr Thorsten Pries

Reprinted from
European Competition Law Review
Issue 6, 2010

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

SWEET & MAXWELL

The application of the German and UK de minimis regimes in theory and in practice—a comparative analysis

Dr Andreas Boos, Dr Gordon Christian and Dr Thorsten Pries***

LT Comparative law; Competition policy; De minimis; Germany; Merger control

Introduction

Competition authorities worldwide are currently grappling with the thorny issue of how best to balance various competing interests. On the one hand, businesses are keen not to be subject to unduly burdensome antitrust regulation. However, on the other hand, competition authorities are unlikely to wish to create any other impression than that they are maintaining a credible and effective competition law enforcement regime, even during times of unprecedented economic turmoil.[1]

One area of competition law enforcement where this balancing act is constantly required is in the context of mergers, and this article analyses and contrasts the different de minimis merger regimes in place in Germany and the United Kingdom respectively.

* EU & Competition Department, SJ Berwin LLP.
** University of Bayreuth.

1 See, for example, Peter Freeman (Chairman of the UK's Competition Commission), *Keynote address to the Law Society Competition Section Annual Conference: The world turn'd upside down* (May 21, 2009), available at *http://www.competition-commission.org.uk/our_role/speeches/pdf/freeman_keynote_210509.pdf* [Accessed February 22, 2010]; Philip Collins (Chairman of the UK's Office of Fair Trading), *Keynote address to the British Institute of International and Comparative Law Ninth Trans-Atlantic Antitrust Dialogue: Persevering and Restoring Trust and Confidence in Markets* (April 30, 2009), available at *http://www.oft.gov.uk/shared_oft/speeches/2009/spe0809.pdf* [Accessed February 22, 2010]; and Neelie Kroes (Commissioner for Competition, European Commission), *Competition, the crisis and the road to recovery* (March 30, 2009), available at *http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/152&format=HTML&aged=0&language=EN&guiLanguage=en* [Accessed February 22, 2010].

The German merger control regime

According to para.35(1) of the *Gesetz gegen Wettbewerbsbeschränkungen* (the German Act against Restraints of Competition ("ARC")), the German merger control regime applies to transactions in which the merging parties have (in the last financial year before the completion of the transaction) generated worldwide turnover exceeding €500 million (para.35(1)(1) ARC), and at least one of the parties involved in the transaction (usually the acquirer or the target) has generated turnover in Germany that exceeds €25 million (para.35(1)(2) ARC). A second domestic turnover threshold was added on March 25, 2009, so that now a further party involved in the transaction must generate turnover in Germany exceeding €5 million.[2] Therefore, in future it will generally be necessary for the target to generate turnover in Germany in excess of €5 million before a transaction must be notified to the *Bundeskartellamt* (the German Federal Cartel Office ("BKartA")).

If, however, a transaction prima facie triggers an obligation to file a notification with the BKartA because the relevant turnover thresholds are met, the transaction need not be notified if the German de minimis exception (known as the *Bagatellmarktklausel* and found in para.35(2)(2) ARC) applies. This de minimis exception will apply if the market under consideration has existed for at least five years (in terms of goods or services being sold on a commercial scale) and the turnover generated in that market did not exceed €15 million in the last calendar year. However, the scope of the de minimis exception clearly depends to a significant extent on how the market under consideration is defined. The question of which product- and geographic-market definitions should be applied to a possible de minimis market has been a highly contentious issue between the BKartA and notifying parties for some time (as it directly affects the level of oversight that the BKartA has over merger activities).[3] It stands to reason that a restrictive approach to product- and geographic-market definition leads to narrow markets, and this in turn is likely to lead to an increased use of the de minimis exception. On the other hand, an expansive approach to product- and geographic-market definition leads to

2 The second domestic turnover threshold was introduced by the Third *Mittelstandsentlastungsgesetz* (Third Law for the Reduction of Burdens on Medium-sized Enterprises), *Federal Law Gazette*, Pt 1 No.1 (March 24, 2009), available at *http://frei.bundesgesetzblatt.de/index.php?teil=I&jahr=2009&nr=15* [Accessed February 22, 2010].

3 *Deutsche Bahn/KVS Saarlouis* (KVR 28/05) W.u.W./E DE-R 1797 July 11, 2006 Federal Supreme Court; *Sulzer/Kelmix* (KVR 19/07) W.u.W./E DE-R 2133 September 25, 2007 Federal Supreme Court; *Du-Pont/Pedex* (VI-Kart 10/06 (V)) W.u.W./E DE-R 1881 December 22, 2006 Higher Regional Court Düsseldorf; *Sulzer/Kelmix* (VI-Kart 3/07 (V)) W.u.W./E DE-R 1931, March 5, 2007, Higher Regional Court Düsseldorf.

wide markets, which in turn lead to higher total market turnover figures and consequently limit the use of the de minimis exception.

The German de minimis regime

The de minimis exception is intended to exclude the application of the German merger-control regime to markets of insufficient economic importance.[4] One of the main reasons for this is to ensure that the principle of proportionality is respected[5]. The turnover thresholds contained in para.35(1) ARC, which only refer to turnover generated by the parties to the merger, did result (prior to the reform in March 2009) to the BKartA needing to review a large number of benign mergers.[6]

The second major reason for the de minimis exception is to relieve pressure on the BKartA.[7] It is intended that the BKartA should both have the capacity to review a large number of straightforward merger filings within the reasonably tight one month deadline from receipt of a complete filing (phase-I—para.40(1) ARC) as well as to have sufficient resources at its disposal to deal with the much more complex phase-II cases. As the BKartA's "*Beschlussabteilungen*" (decision divisions),[8] which are organised along economic sector lines, deal not only with mergers but also with cartel- and abuse-of-dominance cases in the relevant sectors, an easing of the merger control workload leads to a corresponding increase in resources that can be diverted towards a decision division's competition enforcement work.

A third major reason for the de minimis exception in the German merger-control regime is to ease the burden on merging parties, although it is noteworthy and somewhat surprising that (except in relation to the second domestic turnover threshold) this objective is not specifically mentioned either by the relevant statute or by the courts in their jurisprudence on the topic.

The UK merger regime

In contrast to the German merger control regime (and indeed most others), the UK regime is voluntary. This means that even if a merger triggers either the turnover threshold or the share of supply threshold, the merging parties can choose not to notify the merger to the Office of Fair Trading ("OFT") but rather to go ahead and complete the transaction. It is important to appreciate this dynamic in the UK merger control regime because, in contrast to many other merger control regimes, in the United Kingdom there are two ways to attempt to avoid merger control scrutiny: either the merging parties take a calculated risk and do not notify their merger to the OFT at all, or (in the case of small mergers) the merging parties may seek to argue that the OFT should make use of the United Kingdom's de minimis provisions (referred to in the Enterprise Act 2002 (the "Act") as provisions relating to "markets of insufficient importance").

The UK de minimis regime

The OFT's early guidance

Sections 22(2) and 33(2) of the Act provide that the OFT's duty to refer a merger that has resulted, or may result, in a substantial lessening of competition in a market or markets in the United Kingdom does *not* apply if the market or markets are not of sufficient importance to justify a reference to the United Kingdom's Competition Commission ("CC"). In the OFT's 2003 substantive guidance[9] (the "2003 Guidance"), the OFT explained that it would expect a normal CC reference to cost approximately £400,000,[10] and this was subsequently taken to suggest that the de minimis exception to the OFT's duty to refer would only apply to markets smaller than that amount.

Predictably, the de minimis exception as set out in the 2003 Guidance was never used by the OFT, and in June 2007 the OFT consulted on whether the £400,000

4 Government's reasoning for the de minimis exception, (*Official Journal BT-Drucks*). VI/2520, p.32; *Deutsche Bahn/KVS* (KVR 28/05) W.u.W./E DE-R 1797 July 11, 2006 Saarlouis Federal Supreme Court at [14]; Burholt, "Auswirkungen des BGH-Beschlusses "Staubsaugerbeutelmarkt" auf die Bagatellmarktklausel" [2005] W.u.W. 889, 892.

5 *Raiffeisen* (KVR 6/95) W.u.W./E BGH 3037 December 19, 1995 Federal Supreme Court at [23]; Bechtold, *Kartellgesetz*, 5th edn (2008), § 35 side number 33; Mestmäcker and Veelken in Immenga and Mestmäcker, *Wettbewerbsrecht GWB*, 4th edn (2007), § 35 side number 33.

6 In 2007, a total number of 1,675 notifications were made to the BKartA according to its bi-annual report 2007/2008, available at *http://dip21.bundestag.de/dip21/btd/16/135/1613500.pdf* [Accessed February 22, 2010]. According to Podszun, over 90% of those notifications did not give rise to competition issues; Podszun, "50 Jahre Bundeskartellamt: Welche Zukunft hat das Wettbewerbsprinzip?" [2007] Z.R.P. 269, 271. See also Podszun, "Die Bagatellmarktklausel in der deutschen Fusionskontrolle: Stolperstein für internationale Zusammenschlussvorhaben?" G.R.U.R. Int. 204, 205 and further materials cited there.

7 Mestmäcker and Veelken in Immenga and Mestmäcker, *Wettbewerbsrecht GWB*, 4th edn (2007), § 35 side number 36; Fuchs, "Grundlagen und Grenzen der "Bündeltheorie" im Rahmen der fusionskontrollrechtlichen Bagatellmarktklausel" [2008] W.u.W. 774, 776.

8 See the *Bundeskartellamt*'s description of its activities on its website, available at *http://www.bundeskartellamt.de/wEnglisch/GeneralInformation/GeneralInformation.php* [Accessed February 22, 2010].

9 See OFT, *Mergers—Substantive assessment guidance* (May 2003), available at *http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft516.pdf* [Accessed February 22, 2010].

10 It is important to note that this figure relates to the cost to the public purse of the CC's enquiry, not the costs for the parties having to undergo the CC enquiry process.

threshold should be increased to ensure that the OFT would have the opportunity, in appropriate cases, to use the de minimis exception.[11]

The 2007 restatement of the OFT's de minimis guidance

In November 2007, the OFT published new guidance on the de minimis issue which explained the approach that the OFT would take in future cases (the "2007 Guidance").[12] The OFT states that:

> "A key issue for the OFT in this regard is the expected impact of the transaction on consumer welfare, considering in particular market size, the magnitude of competition lost by the merger, and the likely duration of that loss, as well as other relevant market features."[13]

New de minimis threshold

In a sign of just how unrealistic the original £400,000 figure was, the result of the OFT's reconsideration of the appropriate threshold was to multiply it by a factor of 25, so that the new threshold was set at £10 million.[14] This widely expected development was welcomed by the business community as a step in the right direction to ensure that the OFT's resources were allocated to the review of mergers most deserving of detailed scrutiny.

The de minimis "graphic equalizer"

The OFT's likely approach was amplified in an interesting and novel manner by a senior OFT official (speaking in a personal capacity) during a conference presentation in November 2008, in which he referred to a "graphic equalizer". Essentially, one needs to imagine five factors and a sliding scale from the left hand to the right hand margin of the page. The five factors and the sliding scale are as follows: (i) size of market (£0 million–£5 million–£10 million); (ii) probability of harm (0 per cent–50 per cent–100 per cent); (iii) magnitude of effect ("Low"–"Av"–"High"); (iv) durability ("Short"–"Med"–"Long"); and (v) deterrence multiplier ("Zero"–"Av"–"High"). This "graphic equalizer" gives merging parties and their advisers an opportunity to gauge the likelihood that the de minimis exception will apply in their case. The size of the market factor can (using the methodology set out below) be plotted relatively easily on the graph. The other factors will require a more in-depth analysis of how likely it is that the merger will give rise to a substantial lessening of competition and what the scale of that effect may be. The "durability" factor relates to the likely duration of barriers to entry that the merger may create, and the deterrence multiplier relates to OFT research that suggests that for each transaction that is referred to the CC, a certain deterrence effect applies to five similar cases. The more a particular merger is restricted to its own facts, the less likely it is that the deterrence multiplier will apply to a significant extent or at all.

Once the merging parties and their advisers have considered the likely competitive effects of the transaction and have plotted the results of the five factors on the graphic equaliser, it seems that the idea is to see whether most of the points plotted are located around the lower (i.e. left) or the higher (i.e. right) side of the sliding scale. This will in turn give the merging parties and their advisers at least some idea as to whether or not the OFT will make use of the de minimis exception.

Calculation of market size

One of the key aspects of the 2007 Guidance is the section on how to calculate the market size, as this will determine whether or not the de minimis exception can apply to the transaction in question. There are a number of key points to bear in mind in this regard. First, a market or markets will not be an "affected market" (and therefore count towards the £10 million threshold) unless the OFT determines that there is a realistic prospect of a substantial lessening of competition in that (or those) market(s). Secondly, the 2007 Guidance is clear that the turnover that needs to be looked at for the purposes of the market size calculation is the annual turnover of all suppliers in the United Kingdom, even if the geographic market is wider than the United Kingdom. Thirdly, if the OFT determines that the merger will lead to a substantial lessening of competition in several markets, it is the aggregate total of UK turnover in all those "affected markets" that is relevant to the question of whether the de minimis exception can apply or not.

OFT consultation on exceptions to its duty to refer

A recent UK development has seen the OFT consulting on draft guidance on exceptions to its duty to refer

11 OFT, *Consultation on proposed revision to "Mergers—Substantive assessment guidance"—Exception to the duty to refer: markets of insufficient importance* (June 2007), available at *http://www.oft.gov.uk/shared_oft/consultations/oft933con.pdf* [Accessed February 22, 2010].

12 OFT, *Revision to "Mergers—Substantive assessment guidance"—Exception to the duty to refer: markets of insufficient importance* (November 2007), available at *http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft516b.pdf* [Accessed February 22, 2010].

13 OFT, *Revision to "Mergers—Substantive assessment guidance"*, November 2007, available at *http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft516b.pdf* [Accessed February 22, 2010], p.9.

14 OFT, *Revision to "Mergers—Substantive assessment guidance"*, November 2007, available at *http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft516b.pdf* [Accessed February 22, 2010], p.2.

mergers that give rise to a realistic prospect of a substantial lessening of competition in the relevant market(s) to the CC for an in-depth investigation. The de minimis exception is one of a number of grounds on the basis of which the OFT can exercise this discretion. The OFT launched the consultation in October 2009, and it closed recently. The OFT intends to consolidate its recent de minimis practice and more detailed explanations of how it applies key concepts in the new guidance which is due to be published in the spring.

Issues related to the application of the German de minimis regime

Relevant product market

In contrast to the other turnover thresholds in paras 35(1)(1) and 35(1)(2) ARC, the de minimis exception turnover threshold does not relate to the individual turnover generated by the merging parties, but to the total turnover generated by all participants in the market under consideration. As a result, companies must already analyse substantive elements, namely the definition of the relevant market that may be affected by a proposed transaction, when considering whether the transaction must be notified to the BKartA or not.

However, the determination of the relevant market is one of the key factors causing uncertainty in relation to the scope of the de minimis exception. In contrast to the European Commission, the BKartA does not publish its phase-I merger-clearance decisions, and therefore there is very little market definition precedent for merging parties to rely on.[15]

In academic commentary on this issue, the advice frequently given is to discuss the notifiability or otherwise of each case with the BKartA in advance.[16] However, this approach would not lessen the burden of either the BKartA or the merging parties in relation to the merger control regime, and as a result, two of the major objectives of the de minimis exception are not fulfilled. It is also unlikely that the BKartA will provide a binding answer to the question of whether a particular transaction must be notified to it or not. A partial solution to the problems outlined above can be achieved by writing to the BKartA with a twin-track strategy. On the one hand, the correspondence will be seeking the BKartA's confirmation that the transaction need not be notified. Alternatively, in the event that the BKartA does believe that the transaction is notifiable, the correspondence can double up as a notification of the transaction. If the BKartA does not react to the complete notification within one month, the BKartA can no longer prohibit the transaction.

Geographic scope of the de minimis clause

After years of uncertainty for both the parties notifying a transaction and the BKartA, the Federal Supreme Court has now clarified, in the *Sulzer/Kelmix* judgment of September 25, 2007,[17] that it is only the turnover generated in Germany that is relevant when considering the de minimis exception's turnover threshold.

The BKartA had previously taken the view that the question of which turnover should be taken into account would depend on the relevant geographic market. This view meant that the application of the de minimis exception could usually be ruled out in EU-wide or worldwide markets, as with the exception of very rare "niche" markets, a broad geographic market definition would normally result in a total market volume in excess of €15 million.

The Federal Supreme Court's clarification of the de minimis turnover threshold calculation has two major consequences for merging parties that are considering whether the de minimis exception applies to their transaction. First, the Federal Supreme Court's judgment provides some much needed legal certainty in this area. Secondly, merging parties may now be able to avoid a costly and potentially lengthy merger control review by the BKartA in certain cases where the total size of the affected market is less than €15 million in Germany. In addition, if the de minimis exception applies it will be possible to avoid a BKartA clearance subject to conditions (or even a BKartA prohibition).

It is possible that the effect of the "domestic turnover only" approach to de minimis market size calculations will be reduced by the introduction of the second domestic turnover threshold reform in March 2009, particularly regarding foreign-to-foreign transactions where the target generates little or no turnover in Germany. However, the second domestic turnover threshold is set at a relatively low level (€5 million),[18] and therefore loses some of its relevance the more parties are involved in the transaction.[19]

15 There remains the possibility to review the BKartA's bi-annual reports (in which certain phase-I decisions are also described) for information on the BKartA's market definition approach in particular sectors. Recently, the BKartA has also started publishing "case summaries" about selected merger transactions on its website, and these summaries are also possible sources for the BKartA's market definition approach in particular sectors.

16 Ruppelt, in Langen and Bunte, *Deutsches Kartellrecht*, 10th edn (2006), Vol.1, § 35 side no.24; Schmidt, "Zur Bündelung von Märkten" [2003] W.u.W. 885, 886 et seq; Schröer in Lange, *Handbuch zum deutschen und europäischen Kartellrecht*, 2nd edn (2006), side no.1299. See also BKartA, *German merger filing guidance* ("*Merkblatt zur deutschen Fusionskontrolle*") (as at July 2005), p.4 (no longer available on the BKartA's website).

17 *Sulzer/Kelmix* (KVR 19/07) W.u.W./E DE-R 2133 September 25, 2007 Federal Supreme Court.

18 Unlike in other EU Member States such as France (€50 million), Belgium (€40 million) or the Netherlands (€30 million).

19 According to para.37(1)(3) (third sentence) ARC, all companies that hold 25% or more of the target's shares post-merger are considered to be parties involved in the transaction.

Foreign-to-foreign transactions

More and more countries across the world are introducing competition regimes (and merger-control regimes as a part of such reforms). This trend is particularly noticeable in emerging economies, with China and India being two prominent examples of very important economies that have introduced, or are in the process of introducing, merger control regimes as part of wider reforms of competition law. This leads to the fact that transactions need to be notified to national competition authorities before completion in more and more countries around the world.[20] The limitation of the BKartA's merger control jurisdiction, caused by the Federal Supreme Court's clarification that only German turnover should be taken into account, also has public international law consequences. The public international law principle of non-interference in other states' internal affairs means that domestic competition authorities should generally not prohibit transactions that primarily give rise to non-domestic effects.[21] The only exception to this principle applies when the relevant transaction creates substantial effects in the relevant domestic jurisdiction (the so-called "*Auswirkungsprinzip*" under German law).[22]

In the past, the BKartA has made headlines across the world and has gained notoriety as one of the toughest merger control enforcement authorities in the world. In the recent past, the BKartA has prohibited a number of acquisitions which primarily affected markets outside Germany and which had in part already been cleared by other competition authorities (e.g. *Coherent v Excel*,[23] *Phonak v GN ReSound*[24] and *CVS Ferrari v Cargotec*[25]). As a result of the BKartA's prohibition decisions, none of these transactions could be completed.

For the reasons set out above, the de minimis exception curtails the BKartA's merger control jurisdiction to a certain extent and provides a safe harbour for international mergers that cause little in terms of (German) domestic effects.

Temporal aspects

Timing can play an important part when applying the de minimis exception. It is certainly possible that the applicability of the de minimis exception to a transaction can change, for the benefit or to the detriment of the merging parties, during the course of that transaction.

The turnover threshold for the de minimis exception relates to the total market size, "in the last calendar year". However, the ARC does not specify what reference point one should take to determine the last calendar year. According to a purposive interpretation of the ARC, the relevant reference point should be the time at which the transaction is completed (para.41(1) ARC). Therefore, a transaction, which was intended to be completed in 2008 and which fell under the de minimis exemption due to a total market volume in 2007 of less than €15 million, could become notifiable if closing had to be postponed to 2009 and the total market volume in 2008 exceeded the €15 million threshold.

Bundling of de minimis markets

If, during the de minimis analysis, the "concept of demand-side substitutability" (*Bedarfsmarktkonzept*) leads to the identification of separate partial-product or geographic markets, the de minimis exception in principle applies to each of these separate partial markets.[26] In Germany, this led to increasing instances where a restrictive market definition led to local partial markets being defined with a total market volume of under €15 million and, as a result of the de minimis exception, these markets were not subject to the merger control regime.[27] The BKartA was concerned that its merger control jurisdiction was being limited by the restrictive market definition practices referred to above and, as a countervailing measure, it began aggregating different de minimis markets by adding together the turnover in each of the different markets (the so-called "bundling theory"). In the BKartA's view, this limitation of the de minimis exception's scope was justified in certain circumstances. The BKartA provided the following reasons in its decisional practice on this point that would justify bundling the turnover of

20 US Antitrust Modernization Commission, *Report and Recommendations* (April 2007), available at *http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf* [Accessed February 22, 2010].

21 *Synthetischer Kautschuk II* W.u.W./E OLG 2419, November 26, 1980, Higher Regional Court Berlin at 2420 et seq.

22 In German competition law, the "*Auswirkungsprinzip*" is provided for in section 130(2) ARC.

23 *Coherent/Excel* W.u.W./E DE-V 1365, available at: *http://www.bundeskartellamt.de/wEnglisch/download/pdf/07_Kurz_TB_e.pdf* [Accessed February 24, 2010].

24 *Phonak/GN ReSound*, October 25, 2006, W.u.W./E DE-V 1325, available at *http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2007/2007_04_12.php* [Accessed February 24, 2010].

25 *CVS Ferrari/Cargotec*, August 24, 2007, W.u.W./E DE-V 1442, available at *http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2007/2007_08_27.php* [Accessed February 24, 2010].

26 *Mannesmann-Brueninghaus* (KVR 5/79) W.u.W./E BGH 1711 June 24, 1980 Federal Supreme Court at [20]; Mestmäcker and Veelken in Immenga and Mestmäcker, *Wettbewerbsrecht GWB*, 4th edn (2007), § 35, side no.38.

27 Emmerich, *Kartellrecht*, 11th edn (2008), § 32, side no.29; Emmerich, "Fusionskontrolle 2006/2007" [2007] A.G. 517, 521 et seq.

separately defined markets[28]:

- where the merging parties, despite being active in different markets, follow a uniform market-orientated business approach towards customers and competitors;
- where the competitive dynamics and market structures are very similar due to the close relationships between different markets and it is impossible to analyse the neighbouring markets separately; or
- where the neighbouring markets are significant from a domestic economic point of view.

As these reasons are all highly abstract and unspecific, it may be helpful to summarise the factual scenarios in which the BKartA has applied the bundling theory[29]:

- where there is a moderate to high degree of supply side substitutability between neighbouring markets;
- where the main suppliers and customers are similar or identical in neighbouring markets;
- where products are sold through similar distribution channels and competitors' marketing strategies are similar or identical;
- where companies have similar or identical investment and financing plans for the neighbouring markets; or
- where customer support extends across different product ranges or product markets and discounts are granted on spend across such product ranges or markets.

The BKartA's consistent decisional practice in this area has shown that only one of these elements needs to be present in order to apply the bundling theory—in other words, the conditions are alternative rather than cumulative.[30] This fact, as well as the inconsistent application of the bundling theory and the missing theoretical underpinning of the factors referred to above, has led to the BKartA being strongly criticised by academic commentators.[31]

The Federal Supreme Court has now attempted, in its key judgment on the bundling theory, to introduce a logical theoretical underpinning by first referring to three cases it has decided previously and then by analysing further categories of cases in which it can imagine that the bundling theory might apply. Accordingly, different individual markets can in principle be bundled in a geographic, in a vertical and in a horizontal manner.[32]

Geographic bundling

Cases falling into this category include instances where a merging party has, prior to the transaction, artificially separated local partial markets.[33] This category also includes cases in which geographically neighbouring partial markets are served by the merging parties through an organisational structure that covers the entire geographic area and where the aggregated turnover for that area significantly exceeds the de minimis exception turnover threshold.[34]

Vertical bundling

Cases in this category consist of different product markets insofar as: (i) the merging parties are active at the same time both on the de minimis market and on a non-de minimis upstream or downstream market; and (ii) if the competitive dynamics on the de minimis market directly influence which competitors are de jure and/or de facto capable of being active on a non-de minimis market.[35]

Horizontal bundling

The Federal Supreme Court also expressed the view that even different horizontal product markets can be aggregated when they are not just similar but key characteristics such as market structure are the same.[36]

28 *Krautkrämer/Nutronik* (B4-106/99) W.u.W./E DE-V 203 December 9, 1999 BKartA at [11]; *Marzipan-Rohmasse* (B2-75/01) W.u.W./E DE-V 527 December 20, 2001 BKartA at [32]; *Schwartau/Zentis* (B2-93/02) W.u.W./E DE-V 717 February 14, 2003 BKartA at [28]; *Legett & Platt/AGRO* (B5-170/03) W.u.W./E DE-V 1048 September 29, 2004 BKartA at [119]; *Thermo/Kendro* (B4-30/05) W.u.W./E DE-V 1078 June 24, 2005 BKartA s.20.

29 See also Schmidt, "Zur Bündelung von Märkten" [2003] W.u.W. 885, 891 et seq with further references. By way of example, see also the *Homag* judgment (B4-136/01) W.u.W./E DE-V 864 September 24, 2003 BKartA at [26].

30 See, e.g. *Strabag/Werbahn* (B1-186/06) W.u.W./E DE-V 1306, September 19, 2006, BKartA at [23], in which the de minimis exception was not applied for the sole reason that the neighbouring markets were of economic significance.

31 Emmerich, *Kartellrecht*, 11th edn (2008), § 32, side no.30. In addition, the Federal Supreme Court observed in its *Sulzer/Kelmix* judgment that the appellant had correctly pointed out that the conditions under which the de minimis exception applied had not been clarified sufficiently either by the BKartA's decisional practice or by academic commentators (*Sulzer/Kelmix* (KVR 19/07) W.u.W./E DE-R 2133, September 25, 2007, Federal Supreme Court at [22]).

32 *Sulzer/Kelmix* W.u.W./E DE-R 2133 at [21]. It should be noted that the judgment does not specifically use the phrases geographical, vertical and horizontal bundling.

33 *Transportbeton Sauerland* (KVR 7/80) W.u.W./E BGH 1810 June 22, 1981 Federal Supreme Court at 1812. In this case a merging party that was dominant had used its strong market position to artificially separate geographically close partial markets and had as a result dampened competition in the market.

34 *Raiffeisen* W.u.W./E BGH 3037. In this case the merging parties had comprehensive coverage in all of the relevant localities that had created a clear dominant position in the connected regional markets. In addition, turnover of the merging parties in these markets was significant, and amounted to DM (as it then was) 804 million and 739 million respectively.

35 *Deutsche Bahn/KVS* (KVR 28/05) W.u.W./E DE-R 1797 July 11, 2006 Saarlouis Federal Supreme Court. In this case the relevant market in the local public transport sector was upstream for the provision of such services to passengers in the locality.

36 *Sulzer/Kelmix* (VI-Kart 3/07 (V)) W.u.W./E DE-R 1931 March 5, 2007 Higher Regional Court Düsseldorf at [25].

Issues related to the application of the UK de minimis regime

Recent OFT decisional practice and clawback issues

It did not take the OFT long after publishing the 2007 Guidance to use the de minimis exception for the first time. In two cases in the passenger transport sector where the markets were very small (less than £1 million and just over £1 million respectively) decided in December 2007, the OFT, for the first time, used its discretion not to refer a merger which prima facie gave rise to concerns of a substantial lessening of competition to the CC.[37] Out of the remaining seven instances in which the de minimis exception has been used at the time of writing, two also related to the passenger transport sector (where the restricted geographic market definition generally leads to small affected markets and the unique nature of those markets means that the OFT appears more ready to use the de minimis exception).[38] The remaining de minimis cases have related to narrowly defined (and therefore small) markets in the chemicals sector, bulk delivery of brochure packs to travel agents and airport ancillary services.[39]

However, at the time of writing, there have also been eight cases in which the OFT has discussed using the de minimis exception but ultimately decided not to do so for a variety of reasons. In many ways, it is more instructive to analyse these cases for their underlying reasons, as these are likely to provide better pointers to how the OFT's decisional practice on the de minimis exception will develop in future.

In certain cases, although the markets in question were reasonably small, the £10 million threshold was exceeded either by individual affected markets or in aggregate.[40]

In the first case where the OFT discussed the de minimis exception but did not apply it,[41] the reason was straightforward. The OFT considered that the substantial lessening of competition concern in the affected market identified could be properly and effectively dealt with by way of undertakings in lieu of a reference to the CC.

The first time that the OFT's decision not to use the de minimis exception was somewhat contentious was in the *BOC/Ineos Chlor* case.[42] The OFT had made it very clear in its 2007 Guidance that it reserved a "clawback" right so that in certain cases, even if the affected market was valued at less than £10 million, the de minimis exception would still not apply. This would primarily occur in very highly concentrated markets where new entry was unlikely and/or where there was evidence of past, or the possibility of future, co-ordination. The *BOC/Ineos Chlor* case was such a case, as the market was highly concentrated and the OFT had received a significant amount of adverse third party comments on the effect that the merger would have on competition in the affected market. In particular, the concerns revolved around the fact that the transaction would effectively be taking a recently entered "maverick", BOC, out of the market and that this could lead to higher prices and reduced service levels from the merged entity. The OFT did not believe that suitable undertakings in lieu were achievable given the specific structure of the market under consideration. Given the strength of both the third parties' and the OFT's concerns about the competitive impact of the merger, the OFT decided not to make use

37 OFT Decision of December 20, 2007 (*National Express Group Plc/Intercity East Coast Rail franchise*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/NationalExpress.pdf* [Accessed February 22, 2010] and OFT Decision of December 20, 2007 (*Arriva Plc (through Arriva Trains Cross Country Ltd)/Cross Country Passenger Rail Franchise*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/361227/Arriva2.pdf* [Accessed February 22, 2010].

38 OFT Decision of February 4, 2008 (*Stagecoach Group Plc/East Midlands passenger rail franchise*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/stagecoach.pdf* [Accessed February 22, 2010] and OFT Decision of September 19, 2008 (*Stagecoach Bus Holdings Ltd/Cavalier Contracts Ltd*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/Stagecoach2.pdf* [Accessed February 22, 2010].

39 OFT Decision of July 30, 2008 (*FMC Corp/the alginates business of ISP holdings (UK) Ltd*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/FMC.pdf* [Accessed February 22, 2010]; OFT Decision of September 24, 2008 (*Chiral Technologies Europe SAS/Chromtech Ltd*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/Chiral.pdf* [Accessed February 22, 2010]; OFT Decision of November 14, 2008 (*Orbital Marketing Services Group Ltd/Ocean Park Ltd*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/Orbital-Ocean.pdf* [Accessed February 22, 2010]; OFT Decision of January 29, 2009 (*Spectris Plc/Lochard Ltd*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2009/Spectris.pdf* [Accessed February 22, 2010]; and Decision of May 6, 2009 (*Prince Minerals Ltd/Castle Colours Ltd*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2009/Prince_Minerals.pdf* [Accessed February 22, 2010].

40 OFT Decision of March 17, 2008 (*Cineworld Group Plc, through its subsidiary Cine-UK Ltd/the cinema business operating at Hollywood Green Leisure Park, Wood Green*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/CineWorld.pdf* [Accessed February 22, 2010]; OFT Decision of August 8, 2008 (*Global Radio UK Ltd/GCap Media Plc*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/Global_GCap.pdf* [Accessed February 22, 2010]; Decision of November 19, 2008 (*Capital Group Plc/IBS OPENSystems Plc*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/Capita-IBS.pdf* [Accessed February 22, 2010]; and OFT Decision of May 28, 2009 (*Stagecoach Group Plc/Preston Bus Ltd*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2009/StagecoachPreston.pdf* [Accessed February 22, 2010].

41 OFT Decision of February 4, 2008 (*Dunfermline Press Ltd/the Berkshire regional newspapers business from Trinity Mirror Plc*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/dunfermline.pdf* [Accessed February 22, 2010].

42 OFT Decision of May 29, 2008 (*BOC Ltd/the packaged chlorine business and assets carried on by Ineos Chlor Ltd*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/BOC.pdf* [Accessed February 22, 2010].

of the de minimis exception as the consumer benefit of referring the transaction to the CC outweighed the costs involved. In the end, the CC took the (relatively rare) decision to block the merger.[43]

In the *Nufarm/AH Marks* case,[44] the OFT again set out what has become its standard language in a case where it considers the de minimis exception, namely that the "pivotal issue" in determining whether to use the exception or not depends on, "whether the impact of the merger is likely to be particularly significant".[45] The OFT then went through the five key factors (market size, strength of the OFT's concern, magnitude of competition lost by the merger, durability of the merger's impact and the transaction rationale/value of deterrence) and concluded (mainly based on the fact that the merger was, in relation to some of the affected markets, a merger to monopoly and that entry or expansion was unlikely to counteract the merger's competitive effects) that it was not appropriate to use the de minimis exception in this case.

Finally, in the most recent case (at the time of writing) in which the OFT had refused to use the de minimis exception,[46] the OFT disagreed with the parties' submissions on market definition. On the narrower market definition preferred by the parties, the market size would not have exceeded the £10 million threshold. However, on the market definition that the OFT found in the end to be the appropriate one, the £10 million threshold was clearly exceeded and therefore the de minimis exception simply did not apply.[47]

Comparison of the German and the UK de minimis regimes

Whilst the respective de minimis regimes have substantial common elements (such as the focus on domestic turnover only, and the possibility to aggregate turnover from related markets), there are also important differences.

Some of these differences relate to fundamental underlying differences of approach from a systemic perspective. For example, whereas the German de minimis exception can result in merging parties not needing to notify a transaction to the BKartA at all, and the German de minimis exception has become a battleground between the BKartA (trying to maintain the widest possible merger-control jurisdiction) and merging parties (trying to restrict that jurisdiction as much as possible), this is not an issue under the UK regime. This is because the United Kingdom operates a voluntary merger-control regime, and therefore the UK de minimis concept does not relate to whether or not the OFT reviews a transaction, but rather whether the CC (and therefore the public purse) should shoulder the cost of a detailed investigation where those costs may not outweigh the consumer benefits that a detailed investigation (and any possible remedies imposed) may bring about.

Another important difference can be seen in the approach to the competitive dynamics on a possible de minimis market. Whereas the OFT clearly states in its 2007 Guidance that a de minimis exception will be overruled if the transaction is likely to give rise to significant competition issues, and the OFT has consistently applied this principle in its decisional practice, the BKartA seems concerned only with an analysis of whether or not the de minimis exception turnover threshold has been exceeded (and the BKartA therefore has jurisdiction) or not. As has been demonstrated above, the BKartA has spent considerable time and effort trying to ensure that as few cases as possible lead to a loss of its merger-control jurisdiction due to the applicability of the de minimis exception. One would have thought that one solution to this would be for the BKartA to adopt a similar approach to the OFT, i.e. to introduce a "clawback" provision so that the German de minimis exception does not apply if the prima facie de minimis transaction will in fact lead to significant competition issues. However, and unfortunately for the BKartA, there does not appear to be a legal basis in German competition law for the BKartA to adopt that approach.

In any event, the area of de minimis rules is likely to continue to be a battleground between competition authorities on the one hand trying to safeguard their merger-control jurisdiction whereas merging parties will continue to attempt to use the rules to avoid the notification process in its entirety in Germany or to avoid a CC reference in the United Kingdom.

43 CC, *BOC and Ineos Chlor—A report on the anticipated acquisition by BOC Limited of the packaged chlorine business and assets of Ineos Chlor Limited* (December 18, 2008), available at *http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/540.pdf* [Accessed February 22, 2010].

44 OFT Decision of August 29, 2008 (*Nufarm Ltd/AH Marks Holdings Ltd*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/Nufarm.pdf* [Accessed February 22, 2010].

45 OFT Decisision in *Nufarm Ltd/AH Marks Holdings Ltd*, available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/Nufarm.pdf* [Accessed February 22, 2010], para.93.

46 OFT Decision of May 28, 2009 (*Stagecoach Group Plc/Preston Bus Ltd*), available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2009/StagecoachPreston.pdf* [Accessed February 22, 2010].

47 OFT Decision in *Stagecoach Group Plc/Preston Bus Ltd*, available at *http://www.oft.gov.uk/shared_oft/mergers_ea02/2009/StagecoachPreston.pdf* [Accessed February 22, 2010], paras 105–111.