

Client Information

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German court rules on access to Federal Cartel Office's merger control files

In a decision handed down on May 9, 2019, the German Federal Administrative Court held that the votes of case handlers are exempt from requests for access to information under the German Freedom of Information Act under the provisions protecting the confidentiality of consultations of authorities.

The decision is a welcome development for parties that are, or may be, subject to merger control proceedings in Germany. The vote of a case handler is an integral part of a merger control file, in particular in phase 1 proceedings in which there is no detailed decision.

Decisions in merger control proceedings are made by the competent decision divisions within the Federal Cartel Office. Within the decision divisions, such decisions are made by the head of the division and two associate members, one of them being the case handler (or rapporteur). The vote prepared by the case handler is the basis for the decision to be made by the decision division. It usually includes the facts of the case, a legal assessment, considerations of evidence, a proposed decision and considerations of expediency.

Under the Freedom of Information Act, everyone has a right of access to information serving official purposes of federal authorities. This entitlement to access to information shall not apply if, and as long as, consultations of authorities are compromised. According to the Court, the vote of a case handler belongs directly to the consultation process in the narrower sense, *i.e.*, the actual process of official decision-making. The Court considered that the consultation process protected by the law is symbolized by an open exchange of views, which is characterized by elements of discussion, consultation and consideration. The opinion-forming process would be compromised if the written votes as a contribution to the discussion by a member of a decision division, which decides as a collegial body, were separately made available to the public and could be set against the decision taken.

Another essential part of a merger control file is the merger control filing submitted on behalf the (or one of the) parties. While such filings may be subject to requests for access to information under the Freedom of Information Act, access to business or trade secrets may only be granted if the concerned party consents hereto. In practice, this means that the Federal Cartel Office will not share information identified as business or trade secret by the parties.

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