

# News

EU, Competition & Trade

February 2009



## German merger control – German FCO comes down on companies “jumping the gun” just before amendments to the merger filing thresholds pass Germany’s State Council

With revised merger filing thresholds due to enter into force shortly, the German Federal Cartel Office (FCO) has fined two companies, Mars Inc. (Mars) and Druck- und Verlagshaus Frankfurt am Main GmbH (DuV), €4.5 million and €4.13 million respectively for gun-jumping ie, implementing a transaction that requires notification without prior clearance from the FCO. These two cases in quick succession send out a strong message from the FCO to merging parties to observe the standstill obligation in the future or bear the consequences in terms of fines.

### NEW MERGER FILING THRESHOLDS

On 13 February 2009 the German legislator approved amendments to the merger filing regime with a view to reducing the number of unproblematic transactions that currently have to be filed due to the existing low filing thresholds. The amendments, which currently await the signature of the German President, are expected to enter into force in the second half of March this year.

Under the new law, the current thresholds of section 35(1) of the German Act against Restraints of Competition (ARC) will be extended by a third criteria. Accordingly, mergers will only have to be notified to the FCO where (i) parties to the transaction achieved a combined worldwide turnover of more than €500 million, (ii) at least one party to the transaction achieved a turnover in Germany of more than €25 million and (iii) at least one other party to the transaction achieved a turnover in Germany of more than €5 million.

The amendment is to be welcomed and brings the German merger control rules in line with those of most other jurisdictions in Europe requiring “at least two parties” to a proposed transaction to exceed certain domestic turnover thresholds. It will allow the FCO to concentrate on the most important cases in the future instead of spending time and resources on mergers with only limited impact on the competitive market structure in Germany. This is also good news for merging parties, eliminating the mandatory filing requirement in Germany for truly unproblematic mergers and limiting the grey area of the domestic effects requirement.

### TWO RECENT GUN-JUMPING CASES

Shortly before the revised merger filing thresholds enter into force, the FCO re-emphasised its willingness to take a tough stance against companies violating the gun-jumping prohibition laid down in section 41(1) ARC.

- In December 2008, the FCO fined Mars €4.5 million for implementing its acquisition of the US pet food producer Nutro Products without prior clearance from the FCO. The US competition authorities had approved the acquisition at a time when the German and Austrian merger proceedings were still pending. Mars subsequently acquired the majority of shares in Nutro without waiting for the two outstanding clearance decisions. Instead, Mars merely carved-out the German and Austrian distribution rights for Nutro products from the transaction with the aim of ensuring that the parts of the transaction that were implemented did not produce effects in Germany. The FCO did not accept that approach and considered that Mars thereby consciously violated its obligation to await clearance of the transaction according to section 41(1) ARC.

Hammonds LLP has substantial expertise in the area of merger control in general and gun-jumping in particular.

The FCO has been critical of such (or similar) carve-outs in the past, citing the artificial character of separating transactions this way to avoid domestic effects. The FCO also cited concerns that domestic effects could still materialize (eg, through sales into Germany from third countries where the new entity already operates) thereby resulting in the very situation that the standstill obligation is meant to prevent.

- In a further case, in February 2009 the FCO imposed a €4.13 million fine on the publishing house DuV for its failure to notify the acquisition of the publishing company Frankfurter Stadtanzeiger GmbH (FSG) that was closed in 2001. The FCO discovered the alleged gun-jumping when examining another merger notified by DuV in 2008.

It should be noted that although DuV entirely failed in its legal duty, Mars had initially duly notified its acquisition of Nutro. The FCO however made it clear that implementing half-hearted measures such as the carve-out of distribution rights may not be sufficient to comply with section 41(1) ARC. Rather, it is the entire transaction that has to await clearance.

The FCO re-emphasises with these decisions that it is among those competition authorities that take compliance with their national laws very seriously and will enforce them whenever necessary. Companies are, therefore, well advised to observe the standstill obligation enshrined in the ARC as otherwise they risk significant fines. Under section 81 ARC, the FCO can impose fines on companies of up to 10% of their annual worldwide turnover for putting a concentration into effect before obtaining clearance by the authority. Additionally, individuals found to have played an active role in the infringement can personally face fines of up to €1 million.

A further procedural development that is important to note in connection with the above is the recent FCO communication on the FCO's handling of post-completion "notifications"<sup>1</sup>. In essence the FCO will, in the future, not treat such approaches as formal notifications any more but they will rather be treated as notices of implementation (Vollzugsanzeigen) according to section 36(9) ARC. The FCO will assess the competitive impact of the transaction in a divestiture procedure according to section 41(3) ARC<sup>2</sup>. If the FCO comes to the conclusion that the transaction should have been prohibited, it will be entitled to order its dissolution. If it comes to the conclusion that the prohibition requirements are not met, it will terminate the divestiture procedure and will communicate this to the parties informally or by way of formal decision. The disadvantage for companies notifying after implementation is that such proceedings are not subject to the strict deadlines contained in section 40(1) and (2) ARC for first and second phase merger investigations. This may cause legal uncertainty for the parties, given that a transaction already implemented will have no legal effect until it has received clearance from the FCO. The future handling of such cases by the FCO should hopefully provide much needed clarity. The FCO's power to impose fines for gun jumping, of course, remains in place irrespective of the outcome of the divestiture procedure.

Hammonds LLP has substantial expertise in the area of merger control in general and gun-jumping in particular. We assist clients in a wide range of industries in merger filings before the European Commission, national competition authorities in inter alia Germany, Italy, France, Greece and the UK as well as in China and Eastern European jurisdictions. In December 2007, Hammonds assisted a major chemical company in the first dawn-raid that we are aware of that the European Commission has ever conducted on the grounds of alleged gun-jumping.

## FURTHER INFORMATION

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1 „Mitteilung zur Behandlung nachträgliche angemeldeter Zusammenschlüsse“, available only in German at [http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter\\_deutsch/Mitteilung\\_zur\\_Behandlung\\_nachtraeglich\\_angemeldeter\\_Zusammenschluesse.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Mitteilung_zur_Behandlung_nachtraeglich_angemeldeter_Zusammenschluesse.pdf).

2 Merging parties are in all cases obliged to submit such notices to the FCO once a notified transaction has been implemented subsequent to clearance by the FCO.

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