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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Germany --

25 February 2014

This note is submitted by Germany to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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Introduction

1. The issue of how to deal with consummated and non-notifiable mergers addresses inter alia possible conflicts between the authority's options for action and the company's need for legal certainty. It is linked to the question of how to design an effective and efficient merger control regime – from the authority's as well as the company's perspective – that at best avoids the “scrambled eggs problem”.

2. This contribution highlights the benefits of a system of ex-ante notification tied to a standstill obligation (2.). Subsequently, it deals with mergers that do not trigger a filing obligation (3.), illustrates how the Bundeskartellamt handles mergers that should have been notified but were not (4.) and explains that German merger control rules do not provide for a subsequent review of cleared transactions (5.).

1. Mandatory pre-merger notification tied to a standstill obligation

3. Under German competition law concentrations that are subject to merger control must always be notified prior to being put into effect. Legal transactions violating this prohibition shall be of no effect.¹ They may only be implemented after clearance by the Bundeskartellamt. The vast majority of the more than 1,000 merger cases notified to the Bundeskartellamt every year can be cleared within the first phase of merger control proceedings (one month). If there is any indication that the merger may cause competitive problems which cannot be dispelled during the first phase proceedings, a formal in-depth investigation is initiated (so-called second phase), extending the time frame to up to a total of four months from the date of notification. Prolongations are subject to the approval by the parties.² Concentrations that are not subject to control need not be notified nor is there any obligation to notify that the concentration has been put into effect.

4. A formal merger control regime was introduced in 1973. A broad set of experience and case law has been accumulated since and the corresponding legislation has been refined by a number of amendments. At stages of this development a system of ex-post notification applied to certain types of concentrations. It was abolished because of its deficiencies and replaced with an ex-ante notification system tied to a standstill obligation for all concentrations. The Bundeskartellamt shares the view of the German legislator that mergers should be examined before possible damage to competition occurs. The absence of a standstill obligation can have adverse effects on competition as soon as the acquisition takes place which will last until the concentration has been prohibited by a final judgement and the structural link can be dissolved. This process can take a considerable amount of time. Even once a final judgement has been delivered, the specific measures imposed to achieve dissolution can be difficult to implement and again be challenged, causing them to be delayed even further. The time loss can lead to permanent harm to competition. In view of this a voluntary ex-ante notification combined with a standstill obligation is not considered to be as effective because the standstill obligation only applies to companies that decide to submit a voluntary ex-ante notification.

¹ Section 41 (1) Act Against Restraints of Competition (ARC)

² Section 40 (2) ARC

5. An obligation to notify only exists where a transaction is considered a concentration within the meaning of the Act against Restraints of Competition (ARC)³ and if the transaction is of a certain economic size. The merging companies must have a combined aggregate worldwide turnover of more than 500 million Euros. At least one of the companies must have a turnover of more than 25 million Euros in Germany and another of more than 5 million Euros in Germany.⁴ The second domestic turnover threshold was introduced by the third SME Relief Act⁵ and is in line with the ICN Recommended practices for merger notification procedures and the OECD Recommendation on merger review. In addition, there are legal exemptions for companies or markets whose size is considered to be of minor importance from a macroeconomic view.

6. However, not all concentrations fulfilling the turnover thresholds are subject to merger control in Germany. In the case of foreign-to-foreign mergers the Bundeskartellamt applies the domestic effects clause pursuant to Article 130 (2) ARC as a separate test in addition to the domestic turnover thresholds. No notification is necessary if a foreign-to-foreign merger is not expected to have appreciable effects in Germany. The Bundeskartellamt has published a draft of its guidance document “Domestic Effects in Merger Control“ which is to replace the previous document published in 1999 for public consultation. The guidance document is designed to help companies and their advisers assess whether a proposed concentration fulfils the requirements of the domestic effects clause. The draft is available on the Bundeskartellamt’s website.⁶

7. Mergers with a so-called “Community dimension” are examined under the EC Merger Regulation. In such cases the European Commission in Brussels is the competent authority to examine the merger. The Bundeskartellamt cooperates with the European Commission and is closely involved in the examination proceedings of potentially problematic cases.

2. Review of mergers that do not trigger a filing obligation

8. The Bundeskartellamt does not have the authority to review transactions that fall below the thresholds under merger control rules.

9. The turnover-related thresholds and the guidance documents published by the Bundeskartellamt e.g. regarding domestic effects in merger control, are designed to capture all transactions with potential negative effects on competition while at the same time providing sufficient clarity and legal certainty. It is therefore considered highly unlikely that a merger which does not trigger a filing obligation would lead to competitive concerns, i.e. significantly impede effective competition.

10. The Bundeskartellamt may however initiate proceedings against transactions that may violate other competition law provisions, e.g. Sections 1 et seq. ARC, Articles 101, 102 Treaty on the Functioning of the European Union (TFEU).

³ Section 37 ARC. See Contribution by the Federal Republic of Germany, Roundtable on 18 June 2013, „Definition of Transaction for the purpose of merger control review“, [DAF/COMP/WP3/WD\(2013\)5](http://www.dafcomp.de/DAF/COMP/WP3/WD(2013)5).

⁴ Section 35 (1) ARC.

⁵ Third Act to reduce bureaucratic impediments in particular for SMEs (Third SME Relief Act - *MEG III*), 17.03.2009, Federal Law Gazette I, p. 550.

⁶

http://www.bundeskartellamt.de/EN/Mergercontrol/Entwurf%20Konsultation%20Inlandsauswirkung/Konsultation_Inlandsauswirkungen_node.html.

3. Review of mergers that should have been notified but were not

11. Merger projects that trigger a filing obligation have to be notified to the Bundeskartellamt and must not be implemented during the course of the merger control proceeding. This prohibition prevents anticompetitive mergers from having to be subsequently dissolved. In return, the law provides for strict time limits for merger control proceedings (see above recital 3) and foresees an automatic clearance when the deadline is exceeded, i.e. without the need for a formal decision.

12. A violation of the prohibition constitutes an administrative offence which may be punished by severe fines of up to 100,000 Euros for any person – including external lawyers – who intentionally or negligently violates the prohibition and of up to 10 per cent of the worldwide turnover of the entire group for the undertakings concerned.⁷ Moreover, legal transactions violating this prohibition are of no effect.⁸ As a result, violations are rare.

13. The Bundeskartellamt may, upon application, grant an exemption from the prohibition of putting a concentration into effect if the participating undertakings put forward important reasons for this, in particular to prevent serious damage to a participating undertaking or to a third party. The prohibition does not apply in the case of a public bid or a series of transactions in securities listed on a stock exchange by various sellers provided that the concentration is notified without delay and the acquirer does not exercise the voting rights attached to the securities.⁹ This legal exemption was introduced in 2013 and corresponds to the EC merger regulation.¹⁰

14. In addition, a concentration must be notified without delay after it has been put into effect. A violation of this obligation also constitutes an administrative offence.¹¹ Any post-merger notification is deemed to be a notification that a concentration has been put into effect¹².

15. As in regular merger control proceedings the Bundeskartellamt investigates whether the unlawfully completed merger fulfils the conditions for prohibition, i.e. significantly impedes effective competition. However, the strict time limits for merger control proceedings do not apply. If the merger fulfils the conditions for prohibition the Bundeskartellamt orders the measures necessary to dissolve the concentration. The restraint of competition may be removed in other ways than by restoring the pre-merger situation.¹³ Initially, the investigation of the completed merger and the dissolution formed two separate and consecutive proceedings that could each be challenged before the courts. This was changed in 2005¹⁴ in order to shorten the duration of an illegally consummated merger.

16. The Bundeskartellamt imposes severe fines particularly if the parties deliberately conclude a transaction before clearance (see below *Mars*) or do not file a notification at all (see below *Nordwest*

⁷ Section 81 (2) no. 1 ARC.

⁸ Section 41 (1) sentence 2 ARC.

⁹ Section 41 (1) no. 1a ARC.

¹⁰ Article 7 (2) Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (EC merger regulation).

¹¹ Sections 39 (6) and 81 (2) no. 4 ARC.

¹² See Information leaflet on procedures for post-merger notifications (German Version): http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt%20-%20Behandlung%20nachtraeglich%20angemeldeter%20Zusammenschluesse.pdf?__blob=publicationFile&v=4

¹³ Section 41 (3) ARC.

¹⁴ 7th Amendment of the ARC, 1 July 2005.

Mediengruppe). This includes fines on individuals (see below *Mr. Tönnies*). Violations are frequently discovered in subsequent rounds of mergers. If a company is short of experience in merger control and the transaction does not raise concerns, the Bundeskartellamt typically informs the company of its filing obligation and refrains from imposing a fine.

3.1 The highest fine to date – 4.5 million Euros on Mars Inc., McLean (Virginia)

17. In 2008 the Bundeskartellamt fined the American company Mars Inc. for violating the prohibition to implement its acquisition of the American pet food manufacturer Nutro Products, Inc. Mars is a manufacturer of pet food, confectionary and foodstuffs. In Germany its pet food products are sold, among others, under the brand names Royal Canin, Pedigree, Frolic, Chappi, Cesar, Whiskas, Kitekat und Sheba. In terms of dog and cat food sales Mars is by far the leading supplier of these products in Germany. Nutro Products is an American producer of dog and cat food which in Europe distributed its products under the brand name Nutro Choice.

18. In May 2007 Mars notified its intention to acquire Nutro Products to the authorities in Germany, Austria and the USA. After clearance by the American authorities and during the period of ongoing examination by the German and Austrian authorities, Mars acquired the majority of the shares in Nutro Products. Only the distribution rights for Nutro products in Germany and Austria were transferred to a company belonging to the seller.

19. By realizing its share acquisition Mars consciously defied the prohibition to conclude an acquisition before clearance. The carve-out (distribution rights for Nutro products in Germany and Austria) did not eliminate domestic effects because by acquiring Nutro Products' trademark rights and production sites, Mars took possession of all the assets necessary to enable it to compete successfully and all the essential elements of competition potential behind Nutro's share of the domestic market. The acquisition of Nutro would have strengthened Mars' dominant position in the dry dog food market in Germany.

20. In calculating the level of the fine, the Bundeskartellamt took consideration of the fact that Mars had been cooperative in eliminating the ongoing domestic effects of the merger. This happened in the summer of 2008 with the sale of Nutro Products' trademark rights for Germany and Austria to an independent manufacturer, which was also granted a licence for formulas and manufacturing expertise.

21. Northwest Mediengruppe: 2.5 Mio.

22. Since the end of the 1990s Northwest-Mediengruppe – publishing inter alia the newspaper Northwest-Zeitung – has acquired stakes in more than a dozen companies active in the newspaper, advertising journals and radio sectors partly via concealed trustee relationships in order to avoid transparency. Though the acquisitions triggered filing obligations in Germany, they were not notified. In 2007 the Bundeskartellamt imposed fines of 2.5 million Euros on Northwest-Mediengruppe and 200,000 Euros on the publisher and the CEO.

23. In the cases in which the acquisitions fulfilled the conditions for prohibition, Northwest-Mediengruppe had to sell the corresponding participations.

3.2 Recent cases

24. In January 2011, the Bundeskartellamt imposed a fine of 414,000 Euros on the ZG Raiffeisen central cooperative which is active at the wholesale level of the agricultural trade sector. In May 2009 ZG Raiffeisen acquired substantial assets (company premises) from Wurth Agrar which has a strong market position in the distribution of plant protection products. The transaction triggered a filing obligation but was not notified. In July 2009 ZG Raiffeisen notified the acquisition of further assets of Wurth Agrar. The

project was abandoned after the Bundeskartellamt issued a statement of objections because of the dominant position of both companies. The Bundeskartellamt terminated its divestiture proceedings concerning the company premises after they had been sold to a third party.

25. In May 2011 the Bundeskartellamt imposed a fine of 206,000 Euros on Interseroh Scrap and Metals Holding. In 2008 the company's legal predecessor had failed to notify an acquisition although the Bundeskartellamt had informed the companies concerned of the obligation to do so in a previous merger control proceeding. In 2010 Interseroh informed the Bundeskartellamt of the transaction. The fact that the concentration raised no competition concerns was taken into account as a mitigating factor in the calculation of the fine. Interseroh's subsequent notification of the merger also worked in the company's favour.

26. In January 2013 the Bundeskartellamt imposed a fine of 90,000 Euros on Mr Clemens Tönnies (senior) for the incomplete notification of the acquisition of the slaughtering company Tummel by his company group and for the failure to notify several acquisitions. The notification omitted information on the majority holdings which Mr Tönnies has gradually acquired in companies of the zur Mühlen group since 1998 via a trustee. The zur Mühlen group is one of the leading companies in the European meat and sausage industry. It was only in the course of its merger control proceeding that the Bundeskartellamt became aware of the link between Mr Tönnies and the zur Mühlen group. This participation, however, was highly relevant for the assessment of the merger. The merger project was prohibited in November 2011. Mr Tönnies agreed to have the proceedings terminated by settlement. The Bundeskartellamt has therefore not fully exhausted the full scope of fine of 100,000 Euros.

4. Subsequent review of previously cleared and consummated mergers

27. German merger control rules do not provide for a subsequent review of cleared transactions. A clearance may only be revoked or modified if it is based on incorrect particulars, has been obtained by means of deceit or if the undertakings concerned do not comply with an obligation attached to the clearance.

28. The prohibition of agreements restricting competition¹⁵ follows a different approach. Agreements that infringe antitrust law are invalid and void. No corresponding decision of the authorities is required. Accordingly, there is no ex-ante assessment and no regime of strict deadlines. A merger control clearance does not automatically mean that there are no grounds for the Bundeskartellamt to take any action based on the prohibition of agreements restricting competition. (European Union legislation¹⁶ precludes the competition authorities of the EC Member States from taking a decision stating that there has been no breach of the prohibition of agreements restricting competition.)¹⁷ In any case such a decision would be subject to new findings.¹⁸

29. With regard to joint ventures – German merger control is not limited to full-function joint ventures – the prohibition of agreements restricting competition is applied alongside merger control if the transaction gives cause for concern in this regard while not being bound by the same deadlines. Where possible and appropriate the Bundeskartellamt aims to conduct the assessment in parallel with its merger investigation.

¹⁵ Section 1 ARC, 101 TFEU.

¹⁶ Council Regulation (EC) No 1/2003.

¹⁷ Judgment of the Court, Case C-375/09, 3 May 2011, Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., now Netia SA, para 30 (re 102 TFEU).

¹⁸ Section 32 c ARC.

30. A recent example concerns plans by the two broadcasting groups RTL and Pro7Sat1 to form a joint venture for the creation and operation of an online video platform: In March 2011 the Bundeskartellamt prohibited the project and based its decision on merger control rules and in addition on the prohibition of anti-competitive agreements as the creation of the joint platform would have further strengthened the dominant duopoly between RTL and Pro7Sat1 on the market for TV advertising and a coordination of business interests via the joint venture would have been very likely.

31. This approach has proven to be practical and initiates the control of potentially harmful transactions at an early stage.