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Recent Developments in German Merger Control Law

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On February 13, 2009, the German Parliament passed legislation that will significantly reduce the number of transactions that must be notified to the German Federal Cartel Office (Bundeskartellamt, "FCO").

When the amendments to the German Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, "ARC") enter into force (which is expected to occur in early March 2009 at the latest), a new domestic turnover requirement will ensure that parties need not notify transactions when only one party has substantial turnover in Germany. This is a major change to the current notification thresholds, which require notification for many transactions based on the turnover in Germany of only one party and consequently capture many transactions that have negligible, if any, potential to affect competition in Germany.

Separately, the FCO has significantly increased its enforcement activities regarding pre-closing "gun-jumping", *i.e.* the consummation of a transaction without clearance from the FCO, and has imposed substantial fines on companies for running afoul of the "gun-jumping" prohibition.

Current and future jurisdictional turnover thresholds. Currently, mergers and acquisitions that qualify as a concentration for the purposes of German merger control and where the parties' combined worldwide turnover in the previous financial year exceeded € 500 million (about US $643 million) must, in principle, be notified to the FCO even if only one of the parties achieved revenues in Germany of more than € 25 million (about US $32 million). (Certain exemptions apply that will continue to be in place when the amendments enter into force.) While these thresholds will remain unchanged, the amended ARC will contain a second domestic turnover threshold. In the future, transactions will only be subject to review by the FCO if a *second party* to the transaction generated German revenues of more than € 5 million (about US $6.4 million) in the previous financial year.

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This amendment brings the German merger control rules in line with those of most other jurisdictions where notification requirements are triggered only if "at least two" parties exceed certain domestic turnover thresholds. Under the current thresholds, the merger control caseload of the FCO was significantly higher than those of other national competition agencies, totaling approximately 2,200 and 1,600 cases in 2007 and 2008, respectively. The amended turnover thresholds will substantially reduce the number of mergers and acquisitions subject to German merger control. In particular, the new thresholds are likely to exclude from notification many transactions involving only foreign parties (or a non-German acquirer or target company) that would have required notification under the old thresholds. The German Federal Government estimates that up to one third of the transactions notified to the FCO between 1997 and 2007 would not have been caught by German merger control law if the new, second domestic turnover threshold of € 5 million had already been in place.

Compared to many other jurisdictions, however, the amended German merger control turnover thresholds remain relatively low. Companies contemplating a merger or acquisition should therefore continue to examine carefully whether that transaction might require notification to the FCO. It is worth noting that Germany will continue to require only a relatively simple "letter" notification for many transactions that do not give rise to competition concerns.

Increased enforcement of "gun-jumping" prohibition. German merger control rules prohibit the consummation of a transaction that requires notification before receiving clearance from the FCO. (Indeed, according to recent case-law, parties can violate the "gun-jumping" rules with respect to a transaction that they have notified to the FCO, even if the FCO ultimately determines that the transaction is not caught by German merger control law.) The FCO may impose fines of up to 10% of the total worldwide turnover on companies that violate the "gun-jumping" prohibition. Two recent FCO decisions illustrate the agency's willingness to take a tough stance against "gun-jumping":

- In December 2008, the FCO imposed a fine of € 4.5 million (about US $5.8 million) on Mars Inc. ("Mars") for implementing its acquisition of US-based Nutro Products, Inc. ("Nutro") without clearance from the FCO. Mars had acquired the majority of the shares in Nutro after having obtained clearance from the US antitrust authorities, but while the German merger control review was still pending. Mars, however, had carved-out the distribution rights for Nutro's products in Germany, with a view to ensuring that the part of the transaction that was closed before being cleared by the FCO had no effect in Germany. Nevertheless, to the surprise of many observers, the FCO found that Mars had violated the "gun-jumping" prohibition by closing the transaction even though it carved out the German distribution rights. The decision of the FCO has been appealed.

- In February 2009, the FCO imposed a fine of € 4.13 million (about US $5.3 million) on a German printing and publishing house for "gun-jumping" in connection with an acquisition that had been closed since January 2001. The FCO learned about the violation in the context of another merger control proceeding concerning a subsequent sale of the acquired company. The decision of the FCO has been appealed.

Conclusion.

Although the amendment of the jurisdictional turnover thresholds may reduce the overall number of merger control notifications in Germany, the relevant thresholds are still relatively low and will continue to cover a large number of mergers and acquisitions. In light of the substantial financial risks associated with closing a notifiable transaction without clearance by the FCO, the parties to a transaction should examine carefully whether a merger control notification is required under German law and observe the statutory requirement that they refrain from consummating transactions before receiving FCO approval.

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