

GERMAN CARTEL OFFICE IMPOSED A €4.5 MILLION FINE ON MARS, INC. FOR PREMATURE CONSUMMATION OF A MERGER (“GUN-JUMPING”) – EU AUTHORITIES STEP UP ENFORCEMENT ACTIVITIES

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To Our Clients and Friends:

Many EU jurisdictions prohibit the consummation of a merger subject to merger control before receiving clearance by the competition authority. The enforcement of these prohibitions has not been particularly thorough or vigorous in the past. Some recent European enforcement actions show a change. They provide an important reminder that parties to a notifiable transaction must observe waiting periods before closing the transaction and maintain their status as independent market actors prior to clearance.

GERMANY: THE MARS CASE

On December 15, 2008, the German Federal Cartel Office (“FCO”) imposed a record fine of €4.5 million against the U.S. company Mars, Inc. (“Mars”) for a violation of the pre-clearance suspension obligation under German merger control laws. The FCO’s decision concerned Mars’ acquisition of Nutro Products, Inc. (“Nutra”), a U.S. pet food producer with international operations. In Germany, Mars is by far the leading provider of cat and dog food. Nutro does not operate any facilities in Germany, but sells into the German market through independent distributors.

The competition authorities in Austria, Germany and the United States were notified about the transaction. After obtaining U.S. approval and with Austrian and German approvals still pending, Mars closed the transaction by acquiring the majority of the shares in Nutro. Consequently, Mars obtained control over Nutro’s trademarks and production facilities. Even though Nutro had no subsidiaries in Germany, the FCO assumed jurisdiction and concluded that the pre-clearance suspension obligation had been violated. The FCO reasoned that Mars had effectively acquired all assets relevant for successful competition. These assets were also crucial for Nutro’s competitive position in the German market. The FCO’s analysis remained unchanged by the fact that Mars had attempted to carve out Nutro’s Austrian and German businesses by temporarily assigning the distribution rights for these jurisdictions to a separate entity held by the seller. After the FCO informed Mars that it might prohibit the merger as it would increase Mars’ dominant position in the market for dry dog food, Mars abandoned its plans to acquire Nutro’s Austrian and German businesses.

The amount of the fine was reduced due to Mars' cooperation in eliminating the domestic effect of the transaction. Mars divested Nutro's Austrian and German businesses by selling its trademarks and licensing its recipes to a third party. The decision is still subject to appeal to the Higher Regional Court in Düsseldorf.

Pursuant to section 41(1) of the German Act against Restraints of Competition, companies shall not, before the expiry of the relevant time limit for review, put into effect a transaction not cleared by the FCO nor participate in putting into effect such a transaction. The suspension obligation relates to the purchaser, seller and any other participating party. The FCO may grant an exemption from this obligation in limited circumstances, *e.g.*, to prevent serious damage to a party to the transaction. In practice, however, such exemptions are rarely applied for or granted. Transactions consummated in violation of this obligation are invalid under German law. The FCO may fine individuals and companies for gun-jumping violations up to €1 million. For companies, fines may be even higher. According to the FCO's 2006 fining guidelines, fines for companies will be calculated on the basis of the domestic turnover achieved by the company in the markets affected by the merger. This basic amount may total up to 30% of the relevant turnover, taking into account the gravity and duration of the infringement. The basic amount may then be adjusted by factors such as deterrence and extenuating and mitigating circumstances. Fines must not exceed 10% of a group's worldwide turnover in the business year preceding the FCO's decision.

DEVELOPMENTS ON THE EU LEVEL

About a year earlier, on December 13, 2007, the European Commission ("Commission") announced that it had carried out unannounced inspections ("dawn raids") at the premises of two PVC manufacturers. While dawn raids are a common investigatory tool of competition agencies, these were the first dawn raids carried out by EU officials on the suspicion of gun-jumping by two companies that were seeking to merge and were in the middle of a merger control review pursuant to the EC Merger Regulation ("ECMR"). In its press release, the Commission stated that it had reason to believe that the companies concerned may have violated the suspension obligation by implementing the proposed transaction prior to clearance. The Commission also stated that information exchanged between undertakings prior to clearance may have violated the cartel prohibition contained in Article 81 EC Treaty. The investigation was ultimately concluded without a fine being levied.

The EU suspension obligation is contained in Article 7(1) of the ECMR and provides that, subject to certain exceptions, a transaction subject to notification must not be implemented, either before the Commission has cleared the merger or the relevant waiting period has elapsed. Exemptions from this requirement are possible but rarely granted. Breach of the suspension obligation may result in significant fines. Pursuant to Article 14(2) ECMR the

Commission may impose fines not exceeding 10% of a company's group worldwide turnover in the preceding business year. For determining the amount of the fine, the Commission will take into account the nature, gravity and duration of the infringement. Additionally, the validity of a transaction completed in breach of this obligation depends on the subsequent clearance of the transaction. If it is not cleared, it must be unwound.

LEGAL SITUATION IN FRANCE AND THE UNITED KINGDOM

While French law has a similar suspension obligation, the legal situation in the United Kingdom is different.

In **France**, Article L430-4 of the Commercial Code provides that a transaction subject to French merger control cannot be completed without the agreement of the Minister of the Economy and, where applicable, of the minister responsible for the sector concerned. An exemption may be granted under special circumstances. If a notifiable transaction is implemented before a decision has been made, the Minister of the Economy may impose a fine on the party/parties responsible for making the notification. The maximum amount of the fine for individuals is €1.5 million and for the acquiring company/companies it is 5% of their French turnover, increased, where applicable, by the French turnover of the target. In addition, transactions which have been completed without prior notification and clearance may be the object of an order, either to file a notification or to unwind the transaction with the possibility of daily fines of up to €20,000 until the unwinding is completed.

Regulations in the **United Kingdom** do not impose a requirement to seek or to obtain merger clearance before completing a transaction. Even if a merger notification is submitted voluntarily, the parties may complete the transaction. However, the Office of Fair Trading ("OFT") may investigate a merger and decide to impose orders (*e.g.*, a "hold separate" order). Moreover, if the OFT refers a transaction to the Competition Commission ("CC") for a second phase investigation, the parties may not complete the transaction, or, where the merger is already completed, they must refrain from further integrating their businesses without the consent of the CC.

CONCLUSIONS

The record fine imposed by the FCO and the Commission's readiness to use dawn raids confirm that European competition agencies are taking a serious look at gun-jumping now.

- Merging parties must await clearance before implementing the transaction when required. While it may be possible to carve out a jurisdiction in the context of an international transaction, the Mars case demonstrates that such attempts should be made with extreme caution.

- In Germany, the FCO regularly assumes that mergers completed abroad have a domestic effect as long as they affect the structural conditions of competition in Germany. This decision practice might require parties to structure a carve out at a very early stage of a transaction in order to prevent domestic effects.
- The merging parties should remain independent market actors (*i.e.*, they must not start to coordinate their competitive behavior) until clearance. Otherwise, the cartel prohibition (*e.g.*, Article 81 EC Treaty) may apply.
- These waiting requirements, however, should not be viewed as a prohibition against purchasers to conduct a thorough due diligence. But because Article 81 EC Treaty prohibits the exchange of competitively sensitive information between (potential) competitors, parties should implement safety measures to avoid competition problems, *e.g.*, by using “clean teams.”

Companies involved in mergers that will be reviewed within the EU should be vigilant in relation to their pre-clearance conduct. There are now more reasons than ever to consider merger control implications at an early stage of transaction planning.

Please feel free to contact us with any questions.

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