German Merger Control

Germany Introduces New Thresholds for Merger Notifications and Steps Up Enforcement Activities against “Gun Jumping”

SUMMARY
On March 25, 2009, Germany introduced new thresholds that will eliminate the need for notifying some mergers to the German Federal Cartel Office for pre-merger review. The change will eliminate the need to notify where only one of two parties has substantial activities in Germany.

In addition, the Federal Cartel Office has stepped up its enforcement activities against “gun jumping”. Recently, it imposed substantial fines on companies found to have implemented a merger before Federal Cartel Office approval.

NEW THRESHOLDS FOR MERGER NOTIFICATIONS IN GERMANY
On March 25, 2009, a new domestic turnover threshold for merger notifications to the Federal Cartel Office (“FCO”) took effect in Germany.

A transaction now requires prior notification to, and approval by, the FCO if, during the previous business year,

- all parties to the transaction together had global turnover of more than EUR 500 million;
- at least one party had turnover in Germany of more than EUR 25 million; and
- at least one other party had turnover in Germany of more than EUR 5 million.

Previously, transactions required notification to the FCO if merely the first two thresholds were met. Transactions that are caught by the turnover thresholds can qualify for certain exemptions from notification which will continue to apply under the new thresholds.
The introduction of the EUR 5 million domestic turnover threshold constitutes a major change for the application of German merger control law. Previously, the thresholds for notification could be satisfied by one party only. In practice, this required the notification of a substantial number of transactions that had limited impact in Germany. German merger control was (and remains) inapplicable to transactions that do not have a certain minimum impact on competition in Germany and therefore lack so-called “domestic effect”. However, very few transactions have escaped notification on the basis of insufficient “domestic effect” because this concept was interpreted broadly by the FCO. Consequently, many transactions have been notified to the FCO where only one party was active in Germany and the other generated only insubstantial or even zero turnover in Germany.

The introduction of the EUR 5 million turnover threshold will eliminate the obligation to notify transactions where only one of two parties to a transaction has substantial activities in Germany. It is expected that the introduction of the new threshold will significantly reduce the number of merger notifications in Germany. In the past, the FCO received a comparatively large number of merger notifications each year (1,829 notifications in 2006 and 2,231 notifications in 2007), putting it well ahead of other European merger control agencies in terms of case load. It has been estimated that around a third of the transactions that were notified to the FCO before 2007 would not have been notifiable if the EUR 5 million domestic turnover threshold had been in effect at that time.

GERMANY STEPS UP ENFORCEMENT ACTIVITIES AGAINST “GUN JUMPING”

In December 2008, the FCO imposed a fine of EUR 4.5 million against Mars Inc. (“Mars”), the US-based manufacturer of confectionary and pet food, for “gun jumping”.¹ Mars was found to have implemented a transaction before it had been approved by the FCO. In 2007, Mars entered into an agreement to acquire Nutro Products, Inc. (“Nutro”), a rival US manufacturer of pet food. The intended acquisition was notified for merger review both in the US and in Germany. After having received approval of the transaction in the US, the parties consummated the transaction and Mars acquired the shares in Nutro, before the FCO had granted approval. The parties had transferred the distribution rights for Nutro’s products in Germany to a subsidiary of the seller prior to closing in order to carve out the parts of the acquired business that directly related to Germany. The FCO nevertheless held Mars to have “intentionally” breached the suspensory obligation.

In February 2009, the FCO imposed a fine of EUR 4.13 million against a German publishing house for “gun jumping”.² The publishing house had acquired another company in 2001 and had not notified this

transaction to the FCO. The FCO learnt about this transaction in the context of a subsequent notification filed in early 2008.

**IMPLICATIONS**

The introduction of the second domestic turnover threshold will significantly reduce the number of merger notifications in Germany, thus easing the administrative burden on companies engaging in international mergers and acquisitions. However, the thresholds for notification in Germany still remain comparatively low. In addition, through its recent enforcement activities, the FCO has made clear that it takes violations of the suspensory obligation seriously, and it is showing no reluctance to impose fines for “gun jumping” even in foreign-to-foreign transactions. For these reasons, it remains important in the context of international mergers to carefully assess whether the transaction qualifies for notification in Germany and to ensure that the parties do not “jump the gun” by implementing the transaction before the requisite approval has been received.

* * *
ABOUT SULLIVAN & CROMWELL LLP
Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance and corporate transactions, significant litigation and corporate investigations, and complex regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 700 lawyers on four continents, with four offices in the U.S., including its headquarters in New York, three offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP
This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future related publications from Jennifer Rish (+1-212-558-3715; rishj@sullcrom.com) or Alison Alifano (+1-212-558-4896; alifanoa@sullcrom.com) in our New York office.

CONTACTS

<table>
<thead>
<tr>
<th>Location</th>
<th>Name</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>London</td>
<td>Juan A. Rodriguez</td>
<td>+44-20-7959-8499</td>
<td><a href="mailto:rodriguezja@sullcrom.com">rodriguezja@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>Axel Beckmerhagen</td>
<td>+44-20-7959-8418</td>
<td><a href="mailto:beckmerhagena@sullcrom.com">beckmerhagena@sullcrom.com</a></td>
</tr>
<tr>
<td>Frankfurt</td>
<td>Konstantin Technau</td>
<td>+49-69-4272-5521</td>
<td><a href="mailto:technauk@sullcrom.com">technauk@sullcrom.com</a></td>
</tr>
</tbody>
</table>