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Takeaways From German Case Of Missing Merger Info

In January 2013, the German Bundeskartellamt (Federal Cartel Office) imposed a fine of €90,000 (approx. \$120,000) on the German entrepreneur Clemens Tönnies, for providing incomplete information in merger filing proceedings. This is the highest fine ever imposed on an individual under German merger control law. Under the German Act against Restraints of Competition (ARC) the Bundeskartellamt may impose a fine of up to €100,000 (approx. \$133,000) for incomplete or misleading information given in merger control notifications. The Bundeskartellamt and Mr. Tönnies have agreed to terminate the proceedings by settlement, and Mr. Tönnies will pay a fine close to the maximum envisaged for this administrative offence.

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The background of the merger control notification was Clemens Tönnies' plan to acquire a minority share in Tummel. Tönnies is the majority shareholder of Tönnies Group, Germany's leading slaughterhouse operator for pigs and sows, while Tummel is mainly active in the slaughtering of sows and has a dominant position in the German sow slaughtering and processing market. The reason for the administrative fine was Clemens Tönnies' failure to disclose his personal majority shareholding in the zur Mühlen Group in the merger notification. The zur Mühlen Group is a major German sausage manufacturer that sells its products under well-known brand names like Böklunder, Könecke, Redlefsen, Schulte and Plumrose, and claims to be the number one supplier of pre-packed and canned sausage in Germany. In 1998 Mr. Tönnies began to gradually acquire shares in companies belonging to the zur Mühlen Group, not directly, but through the Group's trustee Peter zur Mühlen.

The Bundeskartellamt became aware of Tönnies' personal shareholding in zur Mühlen Group during its investigation of the proposed merger. In order to enable the Bundeskartellamt to understand which product markets will be affected by an acquisition, the German ARC stipulates that the parties to a merger provide details in the notification of all affiliated companies and their activities. This duty also applies to the companies, shareholders and individuals that control the notifying company. Although the notification included

information about the structure of the Tönnies Group, the notifying parties did not provide details on

the majority holdings which Tönnies as controlling shareholder of the Tönnies Group had acquired in companies of the zur Mühlen Group since 1998 via the trustee.

“The German ARC stipulates that the parties to a merger provide details in the notification of all affiliated companies and their activities.”

The result of this non-compliance with the German ARC was the highest fine ever in the area of German merger control law against an individual. The un-disclosed information regarding Mr. Tönnies’ indirect control rights of the zur Mühlen Group was highly relevant for the evaluation of the merger and led Bundeskartellamt to prohibit the merger once they discovered the link in November 2011. Since the Tönnies Group and its majority shareholder Tönnies hold a dominant position in the procurement of cull sows and distribution of sow meat to meat processors in Germany, the acquisition of a majority share in the slaughterhouse operator Tummel would have further strengthened this dominant position.

Even though fines for incomplete filings have been rare in practice, this settlement sends out a clear signal that if a notifying party intentionally submits incorrect information, the Bundeskartellamt is likely to impose significant fines (among others, a fine of € 250,000 has previously been imposed on a foreign company that provided incorrect information on its market share).

The Bundeskartellamt has also previously imposed several fines for “gun-jumping.” In 2008, the German authority imposed a fine of €4.5 million (approx. US\$6 million) on Mars Inc. for implementing its acquisition of Nutro Products, Inc. without prior clearance by the Bundeskartellamt. While the German merger control review was still pending, Mars tried to carve-out the distribution rights for Nutro's products in Germany to ensure that the part of the transaction that was closed before receiving the German clearance had no effects in Germany. The Bundeskartellamt did not accept this type of carve-out. The Bundeskartellamt also imposed a fine of €4.13 million (about US\$5.5 million) on the German printing and publishing house Druck- und Verlagshaus Frankfurt am Main GmbH for jumping the gun in connection with an acquisition that had been closed years before. In 2011 the Bundeskartellamt imposed two other fines for the failure to notify: a fine of €414,000 on the agricultural cooperative ZG Raiffeisen eG for failing to notify about the acquisition of assets, and a fine of €206,000 on the German waste management operator Interseroh Scrap and Metals Holding GmbH for violating the prohibition to put a merger into effect before notification after making use of an option to raise its share in another company.

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At the European level merger cases have other dimensions, which is usually true for fines as well. Even though fines for gun-jumping from the European Commission also remain rare, in 2009 the Commission fined France-based electricity company Electrabel €20 million (approx. US\$26.8 million) for having committed gun-jumping. In December 2012, the General Court of the European Union handed down a

judgment dismissing an appeal by Electrabel against this fining decision. This case was instigated by the acquisition by Electrabel of nearly 50% of CNR in December 2003. These shares were previously held by EDF. Electrabel closed this transaction without notifying the European Commission under the EU Merger Regulation, presumably because Electrabel considered that its minority shareholding was insufficient to confer “control” within the meaning of the EU Merger Regulation.

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It is essential for merging parties and their advisers to take merger control laws and related guidelines seriously. This is true not only in regards to the essential act of filing a merger, but also in ensuring a correct and complete filing containing the correct data-basis. The German ACR as well as the EU Merger Regulation require parties to a merger to provide details in the notification regarding all affiliated companies and their activities. This obligation also extends to the companies, groups, shareholders and individuals which control the notifying company. In principle, all parties involved in a merger, which are usually the purchaser and the target, are responsible for submitting the notification. Even though the vendor has to notify as well, in practice the filing is often done by the acquiring firm on behalf of all other parties involved. A German notification does not have to follow a certain template or form such as the EU Form CO, or a short Form CO. However, a merger control practitioner has to be aware of the level of details which are required under the law and which may be important in order for the Bundeskartellamt to evaluate the case. Quite often the Bundeskartellamt comes back with questions if they feel they did not receive all information necessary to understand which markets will be affected by a merger and to what extent the parties are involved. Sometimes in-house attorneys, as well as their external advisors, may face an investigation by the Bundeskartellamt if they do not submit the complete or correct data in a notification or a submission after having received specific questions. Even though some questions may only be answered by the client, it is always advisable for practitioners to also do some research on sources available to avoid risky situations and to help to avoid submitting wrong or misleading data in an investigation. Today a lot of information is freely available on the internet, and if an advisor can find it easily, an antitrust authority may be able to do so as well.

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The Bundeskartellamt’s decision to prohibit Tönnies from acquiring the slaughterhouse operator Tummel is not yet final as it has been appealed. The appeal is pending before the Higher Regional Court of Düsseldorf. The settlement reached with Clemens Tönnies regarding the administrative fine for providing incomplete information is binding and not subject of the appeal.