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**Clearance of acquisition of publishing business of daily "Frankfurter Rundschau" by Frankfurter Allgemeine Zeitung GmbH and others**

Sector: Newspaper markets

Ref: B6 - 9/13

Date of decision: 27 February 2013

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The Bundeskartellamt has cleared plans by the Frankfurter Allgemeine Zeitung GmbH and the Frankfurter Societät GmbH (hereafter together referred to as "the purchaser") to buy the publishing business of the daily newspaper "Frankfurter Rundschau" ("FR") from the publishing company Druck- und Verlagshaus Frankfurt am Main GmbH ("the seller"). The project fulfilled the requirements for clearance under the failing company defence. The prohibition requirements under Section 36 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) did not therefore apply.

The purchaser belongs to the FAZIT foundation, whose subsidiaries, amongst other media activities, publish the subscription daily "Frankfurter Allgemeine Zeitung" and the weekly newspaper "Frankfurter Allgemeine Sonntagszeitung". In the Frankfurt area it additionally publishes the regional daily "Frankfurter Neue Presse" ("FNP") and an advertising paper.

FR is a national subscription daily with a strong concentration of sales in the Frankfurt area. The seller filed for insolvency in November 2012. The subject of the merger project was only the publishing business of FR, including editorial staff and title rights. The seller also owns a printing business which was not subject of the merger project.

The project was only notified at the end of January 2013 after the Bundeskartellamt had requested a notification. Previously, the creditors' committee had agreed to have business operations continued until the end of February. Upon expiry of this period it was to be expected that FR would have had to be discontinued. Also at the end of January 2013, the Turkish media entrepreneur Burak Akbay announced that he intended to acquire all the assets of the seller. His offer comprised both, the publishing business of FR and the printing business, including the premises.

The merger affects in particular the national and regional reader and advertising markets, on which FR is active. The project did not raise any competition concerns on the national markets which is why the Bundeskartellamt focused its investigations on the regional markets in the Frankfurt Rhein-Main area. On the reader market in the city of Frankfurt, FR is the only competitor for the newspapers of the purchaser. The transaction will also lead to rather high market shares on several regional advertising markets. However, there are a few possible competitors, namely the daily BILD with its regional placement units for the Frankfurt Rhein-Main area and several advertising papers. However, since their placement units slightly differ in the areas covered, it was doubtful whether they are interchangeable with those offered by the parties to the merger. According to current case law, placement units only belong to the same market if they are "essentially identical". The Bundeskartellamt could leave this question open as the requirements of the failing company defence were met in any case.

For a merger to be acknowledged under the failing company defence, the parties to the merger have to provide evidence that three requirements are fulfilled: The target company is a failing company, there is no alternative to the merger that would be less damaging to competition (in particular no alternative purchaser), and the market shares of the target company would in the event of its exit from the market largely fall to the purchasing company. FR's status as a failing company was indisputable after it had filed for insolvency. Therefore, only the last two requirements had to be verified.

There was an alternative purchase offer which did not raise any competition concerns because the interested party had previously not been active on the relevant market. However, although the Bundeskartellamt did not doubt the sincerity of the offer, the circumstances of the case did not make it likely that the interested party would actually have been able to purchase the target company and to do so in time. It could therefore not be expected that without the merger FR would have remained a competitor for the titles of the purchaser. This assessment was based in particular on two facts:

- First, it was not to be expected that an agreement with the interested party could have been reached before 1 March 2013, which would have made it possible to continue with the publication of the newspaper without interruption. The expected cessation of business on 1 March 2013 would have led to the discontinuation of the newspaper, including the subscription and advertising contracts. Since FR's circulation numbers had been seriously declining in recent years, and also in view of the specifics of the newspaper markets, it could not be expected that after an intermittent discontinuation of the newspaper it would be possible to re-establish it successfully in the market. The Bundeskartellamt could therefore not - as in other cases of a failing company defence - afford to await the outcome of the purchase negotiations. The mere fact that there was a serious alternative purchase offer could therefore not be used in this specific case as an argument against a failing company defence.
- Second, the alternative purchaser intended to buy not only the target company but also further assets of the seller, in particular its printing business including the premises. However, a potential purchaser is not considered an 'alternative' under the law if the breaking up and selling of assets of the company, in this case in particular the business premises, would serve the objective of the insolvency proceedings (which is to satisfy the creditors' claims) in a better way than the selling of the company to the alternative purchaser would. In view of the evidence provided and the interest of the purchaser in the acquisition of certain assets of the target company, this had to be assumed in the present case. Without the proposed merger it was therefore very likely that the seller would have been broken up, leading to FR's disappearance from the market.

Finally, the investigations revealed that even without the merger FR's market shares on the regional markets affected would largely have fallen to the purchaser. As regards the reader markets, there are no competing titles to those of the purchaser in the main distribution area of FR. As regards the advertising markets, there are other companies that could potentially have benefited from FR's exit from the market - in particular the daily BILD with its placement units. This is at least true of FR's economically significant regional placement units.

However, irrespective of whether their alternative placement units are part of the advertising markets or not, a shift of FR's previous market position to BILD or other advertising papers was not to be expected. According to a survey among advertising customers, the alternative placement units did at least not stand in close competition to those of FR, which was i.a. due to FR's position as a nationwide subscription daily and a high quality regional subscription daily. FR's

closest competitors on the regional advertising markets are, in fact, FAZ and FNP with their placement units. It was therefore not to be expected that BILD or other advertising papers would have been capable of securing a significant part of FR's advertising budget for themselves in the event of FR's exit from the market.