

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Suspensory Effects of Merger Notifications and Gun Jumping - Note by Germany

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www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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1. Introduction

1. The topic of gun jumping has received a lot of attention recently. The term relates to the violation of procedural merger control provision either by failure of notification or violations of the standstill obligation. Certainly, this issue has always been on the Bundeskartellamt's enforcement agenda. This submission provides a short introduction of the German merger control regime (1.), describes the legal consequences of gun jumping (2.), gives an overview of investigated gun jumping cases (3.) and recent court rulings (4.) and closes with a conclusion (5.).¹

2. Mandatory pre-merger notification and standstill obligation

2. Under German competition law, concentrations pursuant to Section 37 of the German Competition Act that are subject to merger control must always be notified prior to being put into effect.² They must not be implemented unless cleared by the Bundeskartellamt. Legal transactions violating this prohibition shall be of no effect.³ The vast majority of the more than 1,200 merger cases notified to the Bundeskartellamt every year can be cleared during the first phase of merger control proceedings (one month). If the merger potentially causes competitive problems which cannot be dispelled during the first-phase proceedings, a formal in-depth investigation is initiated (so-called second phase), extending the timeframe to up to a total of four months from the date of notification.⁴

3. Concentrations that are not subject to German merger control need not be notified. There is no obligation to notify that the transaction has been put into effect, either.

4. Whether or not a concentration pursuant to Section 37 of the German Competition Act is subject to merger control depends on the turnover of the merging parties and on whether those turnovers meet certain thresholds.⁵

5. In Germany the formal ex-ante merger control regime was introduced in 1973. A broad set of experience and case law has been accumulated since and the corresponding legislation has been refined by a number of amendments. Until 1973 a system of ex-post notification only applied to certain types of concentrations. It was abolished because of its

¹ Parts of this paper are based on the Bundeskartellamt's information leaflet on German merger control, available at: <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20German%20Merger%20Control.html?nn=3590380> and the German OECD submission on "Investigations of consummated and non-notifiable mergers" in 2014 (DAF/COMP/WP3/WD(2014)20).

² Section 39 (1) German Competition Act.

³ Section 41 (1) sentence 2 German Competition Act.

⁴ Section 40 (2) German Competition Act.

⁵ Bundeskartellamt/BWB, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

deficiencies and replaced by a pre-notification system tied to a standstill obligation for all notifiable concentrations. The rationale behind this is to ensure that the Bundeskartellamt has the opportunity to review transactions that could substantially harm competition before they are closed. A further benefit of the pre-merger notification system is that the Bundeskartellamt receives market information on a continuous basis rather than having to allocate resources to systematic market monitoring. In contrast, the absence of a standstill obligation can have adverse effects on competition as soon as the acquisition takes place, which will last until a final decision prohibits the concentration and the structural link can be dissolved. This process can take a considerable amount of time. Even once a final decision has been delivered, the specific measures imposed to achieve dissolution can be difficult to implement (“unscramble the egg”) and again be challenged, causing them to be delayed even further. The time loss can harm competition permanently. In view of this, a voluntary ex-ante notification combined with a standstill obligation is not considered to be as effective, because the standstill obligation only applies to companies that decide to submit a voluntary pre-merger notification.

3. Legal consequences of gun jumping

6. According to German law, mergers that trigger a filing obligation have to be notified to the Bundeskartellamt and must not be implemented before clearance. Legal transactions violating this prohibition shall be void.⁶ A violation of these prohibitions constitutes an administrative offence punishable by severe fines of up to one million euros. If a fine is imposed on an undertaking or an association of undertakings, the fine for each undertaking or association of undertakings participating in the infringement must not, beyond the above-mentioned amount, exceed 10% of its total turnover in the preceding business year.⁷ Any person who intentionally or negligently fails to notify a planned concentration correctly or completely or in time, or intentionally or negligently fails to make a notification that a concentration has been put into effect correctly or completely or in time, commits an administrative offence which may be punished by a fine of up to 100,000 euros.⁸ Alternatively, the Bundeskartellamt may initiate administrative proceedings against merging parties who violate the above-mentioned merger-related obligations. Moreover, if merging parties share competitively sensitive information or coordinate their competitive conduct on the market before a merger notification or in the standstill period, this can also amount to an infringement of antitrust. As a result of the legal consequences in Germany, violations against the above-mentioned prohibitions are not known to be a widespread practice.

7. Upon application, the Bundeskartellamt can grant an exemption from the prohibition to put a concentration into effect. The exemption is subject to important reasons, which are to be provided by the merging parties. Such reasons include in particular preventing serious damage to a participating undertaking or to a third party. The exemption

⁶ Section 41 (1) sentence 2 German Competition Act.

⁷ Section 81 (4) German Competition Act.

⁸ Section 81 (2) no. 3 or 4 in conjunction with Section 81 (4) German Competition Act.

may be granted at any time, even prior to notification, and may be made subject to conditions and obligations.⁹

8. For the sake of completeness, it is noted that undertakings participating in the concentration shall inform the Bundeskartellamt without delay of the implementation of the concentration. A violation of this obligation also constitutes an administrative offence.¹⁰

9. Any post-merger notification is deemed to be a notification that a concentration has been put into effect.¹¹ Afterwards the Bundeskartellamt will institute divestiture proceedings to examine if the merger created or strengthened a dominant position. After closing these proceedings the post-merger notification can restore the ineffectiveness of a concentration *ex tunc*.¹² In the last five years the Bundeskartellamt received an average of 20 post-merger notifications per year.¹³

10. The Bundeskartellamt imposes severe fines, particularly if the parties deliberately conclude a transaction before clearance or do not file a notification at all. This also includes fines on individuals. Violations are mostly discovered in subsequent rounds of mergers. If a company has little or no experience in merger control and the transaction does not raise concerns, the Bundeskartellamt typically informs the company of its filing obligation and refrains from imposing a fine. This does not apply to repeat offenders.

4. Investigation of gun jumping

11. As already stated, the Bundeskartellamt has always paid attention to gun jumping. Previous Bundeskartellamt decisions addressed the failure to notify as well as violations of the standstill obligation.

12. In 2007 the Bundeskartellamt imposed fines of 2.5 million euros on Northwest-Mediengruppe and 200,000 euros on both the publisher and the CEO.¹⁴ This was due to the fact that since the end of the 1990s, Northwest-Mediengruppe had acquired stakes in more than a dozen companies active in the newspaper, advertising journals and radio stations. Although the acquisitions triggered filing obligations in Germany, they were not notified.

13. In 2008 the highest fine to date, 4.5 million euros, was imposed by the Bundeskartellamt on Mars Inc., McLean (Virginia/USA) for violating the prohibition to implement its acquisition of the American pet food manufacturer Nutro Products, Inc.¹⁵ In May 2007 Mars notified its intention to acquire Nutro Products to the authorities in Germany, Austria and the USA. After clearance by the American authorities, Mars

⁹ Section 41 (2) German Competition Act.

¹⁰ Section 39 (6) and 81 (2) no. 4 German Competition Act.

¹¹ See information leaflet on procedures for post-merger notifications (German version) <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt%20-%20Behandlung%20nachtraeglich%20angemeldeter%20Zusammenschluesse.html?nn=3590380>.

¹² Section 41 (1) sentence 3 no. 3 German Competition Act.

¹³ Bundeskartellamt, activity report 2015/2016 and 2013/2014 (German version).

¹⁴ Bundeskartellamt, activity report 2007/2008 (German version), page 21.

¹⁵ Bundeskartellamt, press release of 15 December 2018, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2008/15_12_2008_Mars_Vollzugsverbot.html?nn=3591568.

acquired the majority of the shares in Nutro Products while the examinations by the German and Austrian authorities were still ongoing. Only the distribution rights for Nutro Products in Germany and Austria were transferred to a company belonging to the seller (carve-out). By realizing its share acquisition, Mars consciously defied the prohibition to conclude an acquisition before clearance. The carve-out did not eliminate domestic effects, because by acquiring Nutro Products' trademark rights and production sites, Mars took possession of all the assets necessary to enable it to compete successfully and all the essential elements of competition potential associated with Nutro's domestic market share.

14. In calculating the amount of the fine, the Bundeskartellamt took into consideration that Mars had been cooperative in eliminating the existing domestic effects of the merger by selling Nutro Products' trademark rights for Germany and Austria to an independent manufacturer, which was thus also granted a licence for formulas and manufacturing expertise.

15. In the 2009 case of Druck- und Verlagshaus Frankfurt am Main GmbH (DuV) the failure to notify was subject to a fine of 4.13 million euros.¹⁶ Despite the fact that DuV knew about the obligation to notify from a previous merger control proceeding in 2008, it did not notify the acquisition.

16. In January 2011 the Bundeskartellamt imposed a fine of 414,000 euros on the ZG Raiffeisen central cooperative which is active at the wholesale level of the agricultural trade sector.¹⁷ In May 2009 ZG Raiffeisen acquired substantial assets (company premises) from Wurth Agrar which has a strong market position in the distribution of plant protection products. The transaction triggered a filing obligation but was not notified. In July 2009 ZG Raiffeisen notified the acquisition of further assets of Wurth Agrar. The companies abandoned their project after the Bundeskartellamt issued a statement of objections because of the dominant position of both companies. The Bundeskartellamt terminated its divestiture proceedings concerning the company premises after they had been sold to a third party.

17. In summer of 2011, the Bundeskartellamt imposed a fine of 206,000 euros on Interseroh Scrap and Metals Holding.¹⁸ The company's legal predecessor had failed to notify an acquisition although the Bundeskartellamt had informed the companies concerned of the obligation to do so in a previous merger control proceeding. In 2010 Interseroh informed the Bundeskartellamt of the transaction. The fact that the concentration raised no competition concerns as well as Interseroh's subsequent notification of the merger was taken into account as a mitigating factor in the calculation of the fine. Ultimately, the case was settled.

¹⁶ Bundeskartellamt, press release of 13 February 2009, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2009/13_02_2009_DuV-Bu%C3%9Fgeld.html.

¹⁷ Bundeskartellamt, press release of 12 January 2011, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2011/28_01_2011_ZG-Raiffeisen.html?nn=3591568.

¹⁸ Bundeskartellamt, press release of 10 May 2011, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2011/10_05_2011_Interseroh.html?nn=3591568.

18. In 2013 the Bundeskartellamt issued a notice of penalty of 90,000 euros on Mr Clemens Tönnies (senior) for the incomplete notification of the acquisition of the slaughtering company Tummel by his company group and for the failure to notify several acquisitions.¹⁹ The notification omitted information on the majority holdings which Mr Tönnies had gradually acquired in companies of the zur Mühlen group since 1998 via a trustee. The zur Mühlen group is one of the leading companies in the European meat and sausage industry. It was only in the course of its merger control proceeding that the Bundeskartellamt became aware of the link between Mr Tönnies and the zur Mühlen group. This participation, however, was highly relevant for the assessment of the merger. The merger project was prohibited in November 2011. Mr Tönnies agreed to have the proceedings terminated by settlement. The Bundeskartellamt has therefore not fully exhausted the full scope of fine of 100,000 euros.

19. In a recent judgment, the Bundeskartellamt decided that a partial implementation of a concentration before clearance also violates the requirement to suspend the merger until clearance. With the prohibition of the merger of Edeka and Kaiser's Tengelmann (hereafter referred to as Tengelmann) in 2015, the Bundeskartellamt imposed conditions to prevent Edeka and Tengelmann, two German food retailers, from implementing parts of the intended merger before the authority had concluded its examination proceedings.²⁰ The intention was to maintain the independence and competitive potential of Tengelmann until the end of the merger control proceedings.

20. In October 2014, Edeka had announced its intention to acquire Tengelmann's supermarket chain. Before notifying the merger, both retailers had already agreed upon concrete measures on the joint purchasing and invoicing of goods as well as on changes to parts of the branch network, warehouses and meat processing plants, and related staff measures. The Bundeskartellamt clarified that it would not allow the implementation of the measures agreed upon by Edeka and Tengelmann prior to the end of the merger control proceedings. The authority specified that the standstill obligation applies in any case to all restructuring measures which exceed usual restructuring measures taken by merging parties. In its principal decision, the Bundeskartellamt renewed its prohibition with regard to the procurement agreement, the closing of warehouses and meat processing plants and carve-out locations.

5. Recent court rulings with regard to gun jumping

21. The decision of the Bundeskartellamt regarding Edeka/Tengelmann was ultimately confirmed by the Federal Court of Justice (Bundesgerichtshof) in November 2017 after the merging parties had filed an appeal. The court decided that while measures or behaviour themselves cannot constitute a concentration per se, they still constitute gun jumping because they are connected to the intended concentration and could be suitable to at least partly implement its effects. Accordingly, the court pointed out that if a measure leads to a

¹⁹ Bundeskartellamt, press release of 15 January 2013, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/15_01_2013_T%C3%B6nnies-Bu%C3%9Fgeld.html?nn=3591568.

²⁰ Bundeskartellamt, decision of 3 December 2014, B2-96/14-EA; decision of 31 May 2015, B2-96/14.

conduct that would otherwise not be expected of an independent undertaking, this could be considered relevant to the assessment of a violation of the standstill obligation.²¹

22. However, the Bundeskartellamt took this decision prior to the ruling of the European Court of Justice (ECJ) with regard to gun jumping in the Ernst&Young case. The ECJ ruled that the main criterion relevant to the interpretation of the reach of the standstill obligation in Art. 7 (1) EU Merger Regulation (ECMR) is whether a transaction will contribute in whole or in part, in fact or in law, to a change of control in the target undertaking. While the ECJ acknowledged that any partial implementation falls within the scope of the gun jumping prohibition, it held that not all transactions in the context of a concentration necessarily cause a change in control.²²

23. Despite the ECJ ruling in the above-mentioned Ernst&Young case, the Federal Court of Justice confirmed its decision in a subsequent ruling regarding the merger of Edeka and Tengelmann. The Federal Court of Justice argued that since merger control in Germany is not fully harmonised with EU law, the court is allowed to derogate from the ECJ by way of interpretation. Concentrations as defined in Section 37 of the German Competition Act deviate from transactions defined in Art. 7 (1) ECMR.²³ The concept of "competitively significant influence" is much broader under German law and may also cover acquisitions of minority shareholdings of less than 25%, particularly in the case of transactions involving strategic buyers.²⁴

6. Conclusion

24. Gun jumping is not a widespread practice in Germany. This is mainly attributable to the above-mentioned legal consequences of gun jumping and the consistent pursuit by the Bundeskartellamt. Therefore, the Bundeskartellamt has a limited enforcement record in gun jumping cases. As the above-listed cases show, however, gun jumping has always been on the Bundeskartellamt's enforcement agenda. While clear cases are often resolved by way of fine proceedings, the amount of fines has been limited so far.

25. Certainly, the Bundeskartellamt acknowledges the challenge for companies to comply with legal standards when it comes to gun jumping, particularly in view of mergers that have to be notified in different jurisdictions. It is often complex for merging parties to distinguish between measures that implement the transaction and are therefore prohibited and measures that qualify as mere and thus permissible preparation measures.

26. Even against the backdrop of the latest court rulings, merging parties still have room to satisfy information and coordination needs that are justifiable in the context of a transaction. However, such measures need to be accompanied by appropriate safeguards in order to avoid gun jumping. Some uncertainty with regard to permissible pre-closing conduct will always remain. The different rulings of the ECJ and the Federal Court of

²¹ Federal Court of Justice, judgement of 11 November 2017, KVR 57/16, paras. 55, 61 – Edeka/Kaiser's Tengelmann.

²² European Court of Justice, judgement of 31 May 2018, C-633/16, Ernst & Young P/S v Konkurrencerådet.

²³ Federal Court of Justice, judgement of 17 July 2018, KVR 64/17 - Edeka/Kaiser's Tengelmann II.

²⁴ Section 37 (1) no. 3 and 4 German Competition Act.

Justice have not increased the legal uncertainty of the merging parties. Following the Federal Court of Justice, merging parties should initially question if their pre-closing conduct would be suitable to at least partly implement the effects of a transaction. In addition to that, merging parties should consider if their behaviour leads to a conduct that would not be expected of an independent undertaking. Answering these two questions will provide undertakings with valuable guidance to determine if their intended action is allowed or not.