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The FCO continuously fines merger implementation without prior approval

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On May 10, 2011, the FCO fined Interseroh in the amount of €206,000 for having implemented a concentration without merger approval. The decision is the second instance this year in which the FCO imposed a fine for implementing a merger without approval, and the second in which the FCO settled dissolution proceedings. Interestingly, it seems to be one of the first cases in which a "voluntary" notice of a merger implementation without prior approval triggered a fine.

The concentration concerned the increase of a 40%-stake held by HHR Stahlschrott und Metallrecycling GmbH & Co. KG ("HHR") in fm Beteiligungsgesellschaft to 49%, through HHR exercising an option. At the same time, fm's partnership agreement was changed and HHR obtained a veto right regarding the company's important decisions, thereby conferring (joint) control to HHR over fm. The parties failed to notify this to the FCO, despite the fact that the FCO had apparently explicitly informed them in the preceding merger review process (presumably related to the acquisition of HHR's 40%-shareholding) that exercising the option could trigger a new filing obligation.

The concentration was implemented in 2008. In 2010, HHR, itself a joint venture between Alba/Interseroh and Scholz AG, was dissolved, and only then Interseroh gave notice to the FCO of the events described above. The FCO started proceedings and fined Interseroh, as the legal successor of fm, for having infringed the stand-still obligation. When setting the fine, the FCO took into account as mitigating factors that (i) the merger would not have raised any substantive concerns (even though there was a small horizontal overlap in the parties' activities); and (ii) the fact that Interseroh voluntarily reported the implemented concentration. In addition, the case was settled, which means that Interseroh probably obtained a further fine reduction, while the FCO did not have to carry out the entire proceedings.

The FCO press release mentions that the FCO engaged in "ensuing merger control proceedings", which seems a bit misleading, given that since 2008, the FCO has changed its practice and no longer accepts "retro-active merger filings", but examines these cases in the framework of so-called dissolution proceedings pursuant to Section 41 GWB, i.e., when investigating whether to undo the merger. These proceedings take place outside the strict time limits of the merger control rules.

The case seems to be one of the first in which the voluntary reporting of an implemented merger triggered a fine. There have been other cases in recent years, in which the FCO issued fines for

merger implementation without approval, and typically the fines imposed were higher. These cases raised serious substantive concerns (were prohibited or came close to prohibition) and mostly involved intentional infringement. Further, the cases were not disclosed by the parties, but discovered by the FCO, often in the context of (other) merger proceedings:

For example, in December 2008, the FCO fined Mars in the amount of €4.5 million for early implementation of the acquisition of Nutro Products, following clearance from the US authorities, but while the FCO's merger review was still pending. (In the end, the transaction was abandoned and undone as far as Germany was concerned. It is still the highest fine for this type of infringement.) In February 2009, the FCO fined publisher DuV for having implemented a merger without approval in the amount of € 4.13 million, because it had acquired another publisher in 2001 (which only came out in merger proceedings involving one of DuV's parent companies in 2008); and in January 2011, the FCO fined ZG Raiffeisen eG Karlsruhe for early implementation of a merger in the amount of €414,000. ZG Raiffaisen had only notified a second part of what the FCO considered to be one overall acquisition of Wurth Agrar, and had already implemented the first step. The case involved the first settlement of a fine in the context of early implementation cases.

The current case is different in that Interseroh apparently came forward on its own initiative and reported the infringement of the stand-still obligation. In the past, the FCO would not necessarily have imposed a fine in such a case, at least if the merger raised no concerns. The new case could thus either mark a policy change in that the FCO is now prepared to fine every infringement of the no-implementation-prior-to-approval rule – irrespective of the material aspects of the merger and of whether the infringement was voluntarily reported. Or the fine was triggered because the FCO had explicitly "warned" the merging parties in the preceding merger review process that the exercise of the option would be viewed as a new, notifiable concentration – and it could not tolerate the parties' failure to notify against that background. It is clear, however, that the case is another warning signal to all merging parties that the FCO takes the stand-still obligation serious.

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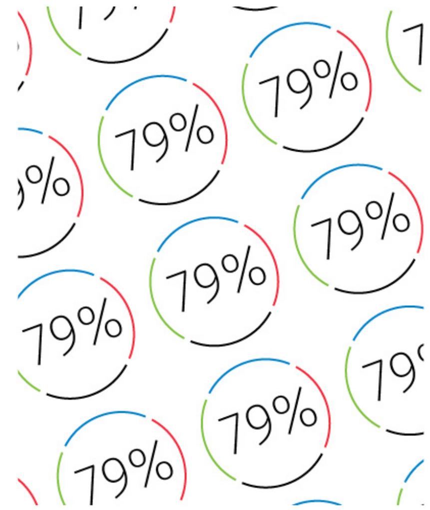

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