

German Merger Control

New “Size-of-Transaction” Test for Merger Control in Germany

SUMMARY

On 9 June 2017, the Ninth Amendment to the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) entered into force. Among other changes to German competition law, it supplements (and partially replaces) the current filing thresholds with a new EUR 400 million size-of-transaction test.

STATUS QUO AND THE NEW SIZE-OF-TRANSACTION TEST

The main aim of the new size-of-transaction test is to attune German merger control law to the digital economy and innovation-driven industries such as high-tech and pharma/healthcare. Given that the competitive relevance was previously solely determined by turnover, transactions including businesses in a start-up phase with low turnover were often not captured by the German merger control rules. Nevertheless, those mergers might have significant economic impact due to the business, technology or pipeline product that the target is developing, see Facebook’s USD 19 billion acquisition of WhatsApp, which fell below the German merger filing thresholds.

Previously, merger transactions required prior notification to, and approval by, the Federal Cartel Office (“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.

The new size-of-transaction test now also gives the FCO jurisdiction over transactions if:

- all parties to the transaction together had global turnover of more than EUR 500 million;

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- at least one party had turnover in Germany of more than EUR 25 million; and
- the value of the consideration for the transaction exceeds EUR 400 million and the target company has significant activities in Germany.

The new threshold consists of two limbs: (i) the transaction value; and (ii) the local nexus test, and applies only if the EUR 5 million threshold mentioned above is not met. The *de minimis* exemption does not apply to transactions that meet the new size-of-transaction threshold.

I. Transaction Value

The transaction value is generally determined by reference to the value of the consideration for the target company (*Wert der Gegenleistung für den Zusammenschluss*), comprising all monetary payments, tangible and intangible assets, shares and other payments in kind or otherwise that the seller receives from the purchaser in connection with the transaction. The value of all liabilities assumed by the purchaser will also be included (contrary to the treatment of such liabilities under the U.S. merger filing rules applicable to stock and non-corporate interest acquisitions). Applying the new thresholds to transactions with a fixed purchase price (including any assumed liabilities) should, therefore, be unproblematic. However, uncertainty will arise, for example, in transactions where the precise consideration may depend on certain conditions being met, will be determined partially at a later point in time, or is in the form of options to receive the purchaser's shares linked to agreed holding periods, where their value may be difficult to determine.

II. Local Nexus

The new threshold also requires the target to have sufficient local nexus through "significant activities" (*Tätigkeiten in erheblichem Umfang im Inland*) in Germany at the time the notification is submitted. The interpretation of whether a target has significant activities in Germany depends on factors such as (i) the type of industry and (ii) the maturity of the specific business sector, and will thus require a case-by-case assessment.

For traditional industries where goods and services are exchanged for consideration, the EUR 5 million threshold continues to be the benchmark for determining whether the target's activities are significant in Germany. In nascent industries, by contrast, the target's activities may be more readily regarded as "significant" where the product is often provided free of charge or for a limited fee only (at least during the start-up phase), such as the development of mobile phone apps or social media platforms. In these cases, the authorities may also consider qualitative criteria, such as the number of "monthly active users" (MAU) for a free app, or the number of "unique visitors" on a website.

The FCO is, however, expected to issue written guidelines in due course to enable the parties to make a preliminary assessment of notifiability. In case of doubt, undertakings are well advised to seek guidance from the FCO or to notify their transactions on a precautionary basis.

III. No Transitional Period

The new size-of-transaction test entered into force on 9 June 2017 without any transitional arrangements. This means that the new rules apply to all mergers that are not yet completed. It is therefore advisable to check whether the new rules apply to any ongoing transactions.

OUTLOOK

The introduction of a size-of-transaction test is a further step towards adapting the German competition law to the challenges of the digital economy. Similar developments are taking place in other member states of the European Union as well, e.g. in Austria, where a EUR 200 million size-of-transaction test will enter into force on 1 November 2017. The European Commission will keep a close eye on how those new thresholds stand the test in practice and is indeed currently considering incorporating a similar transaction value-based filing threshold in the EU Merger Regulation.

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