

Antitrust & Competition Germany, Austria, EU

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New value-based filing thresholds in European merger control regimes – implications for healthcare and life sciences companies

Germany and Austria recently introduced new alternative merger control thresholds based on transaction value. At EU level the introduction of a value-based filing threshold is also being discussed. The new value-based filing thresholds are designed to capture deals in the digital and healthcare sectors in particular, where the target generates little if any revenue. For healthcare and life sciences companies this means that acquisitions of start-ups as well as potentially licensing transactions involving upfront payments, milestone and royalty payments may require upfront merger control. Failing to notify a transaction or implementing a transaction before receiving merger clearance (so-called "gun jumping") can result in the imposition of very high fines by the relevant competition authorities.

Germany

On June 9, 2017, the 9th amendment to the German Act against Restraints of Competition ("ARC") came into force, which inter alia, introduces a new alternative merger control filing threshold based on the value of a transaction.

Under the new merger control regime (cf. section 35 (1a) ARC), a merger filing is required if:

- the combined aggregate worldwide annual turnover of all parties concerned exceeded EUR 500 million; and
- the turnover in Germany of one party concerned exceeded EUR 25 million; and
- no other party concerned had turnover exceeding EUR 5 million; and
- **the "value of the consideration paid in return for the transaction" is more than EUR 400 million; and**
- **the target is significantly active in Germany.**

According to the explanatory memorandum to the amendment, the new value-based threshold shall enable the German Federal Cartel Office ("FCO") to review high-value transactions involving target companies without significant turnover – e.g. the acquisition of pharmaceutical, medical device, and life-sciences targets with innovative products which have not yet come to market.

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Austria

In Austria, a new alternative transaction value threshold will enter into force on November 1, 2017 triggering notification if:

- the parties' combined worldwide annual turnover exceeded EUR 300 million; and
- the parties' combined turnover in Austria exceeded EUR 15 million; and
- **the "value of consideration paid in return for the transaction" exceeds EUR 200 million; and**
- **the target undertaking has "significant" activities in Austria.**

"Value of consideration paid in return for the transaction" and "significant domestic activities" under the new German and Austrian merger control law

Under the new German law, the "value of the consideration paid in return for the transaction" will include all consideration paid for the assets and any other consideration of monetary value that the acquirer receives from the seller in connection with the transaction, including any liabilities assumed by the acquirer (cf. section 38 (4a) ARC).

The German explanatory memorandum clearly states that milestone payments and consideration based on earn-out clauses etc. also have to be taken into account when calculating the value of the transaction. The exact calculation of the value of the transaction, however, – in particular with regard to milestone and royalty payments – is hotly debated. Based on our experience in one of the first merger control proceedings concerning the new value-based filing threshold, the FCO takes into account the so-called net present value ("**NPV**") with regard to earn-out payments (including milestone payments) – i.e. the FCO considers the time value of money.

The "value of consideration paid in return for the transaction" is not defined under the Austrian draft law, but the explanatory memorandum uses wording similar to that of the German amendment.

The FCO has indicated in the above mentioned precedent that there are strong indications for "significant activities in Germany" if it can be expected that the German turnover of the target will exceed EUR 5 million in the current business year.

Please note, however, that both the calculation of the value of consideration as well as the requirement of significant domestic activities under the new German and Austrian merger control law has to be assessed on the merits of each individual case.

Acknowledging that uncertainties persist, the FCO and the Austrian Federal Competition Authority (Bundewettbewerbsbehörde, "BWB") are currently both working on a joint information memorandum they intend to publish which will contain guidance on how the consideration, as well as the domestic activities of an undertaking, should be assessed. It would be welcome if the FCO and the BWB would take an uniform approach and would publish a joint guideline memorandum."

EU

Back in 2016, Margrethe Vestager, European Commissioner for Competition, announced that the European Commission is considering whether the current turnover-based thresholds under EU merger control law should be complemented by a value-based threshold (https://ec.europa.eu/commission/2014-2019/vestager/announcements/refining-eu-merger-control-system_en): *"The issue seems to be that it's not always turnover that makes a company an attractive merger partner (...) In the pharmaceutical sector, it might be a new drug that's been developed but not yet approved for sale. (...)".*

From October 2016 – January 2017, the European Commission conducted a public consultation on the "evaluation of procedural and jurisdictional aspects of EU merger control".

It remains to be seen whether the discussion at EU level will result in a legislative proposal comparable to the recent developments in Germany and Austria. While there is support for change initial signs are that the introduction of a new value-based filing threshold under EU merger control appears unlikely in the short term.

Nevertheless, healthcare and life sciences companies have to consider German and Austrian merger control laws even if they acquire a target or a license with no or minimal turnover. In cases of doubt, it is possible to send a non-jurisdiction letter to the German and/or Austrian competition authority in order to confirm that no filing(s) will be required. But there are neither statutory deadlines for answering a non-jurisdiction letter by the competition authority nor will the submission of such a letter affect the statutory deadlines of a potential subsequent merger control filing. Companies are on notice to factor in such filings in terms of deal timing and feasibility.

Baker McKenzie's Global Merger Analysis Platform (GMAP) provides in-depth guidance on the multi-jurisdictional assessment of merger control requirements – also with regard to the new filing thresholds in Germany and Austria.

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