

German-Austrian Draft Guidance on Transaction Value Thresholds for Pre-Merger Notification

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On 14 May 2018, Germany's and Austria's competition authorities published a draft guidance paper on the transaction value-based merger control thresholds which had been introduced last year. Under these new thresholds, a transaction has to be notified if the value of the consideration exceeds EUR 400 million in Germany / EUR 200 million in Austria, and the target has a significant domestic activity. The rule was designed to catch mergers that have a substantial impact on competition but do not meet the classic turnover thresholds. It may affect in particular start-ups, the digital sector where undertakings offer free – but highly successful – services to their users, or R&D-related transactions (e.g. a pharmaceutical company acquiring a still small market player with a promising pipeline product).

While the value of a cash consideration may be easy to determine, transactions can involve multiple “payment” methods whose value is less obvious.

Besides basic principles like the relevant point in time to determine the value or which advantages have to be taken into account (e.g. the value of a non-compete agreement), the draft Guidance Paper takes a closer look at a number of possible arrangements. These include future payments, considerations in securities, asset swaps, and assuming liabilities.

While the draft provides a clear view on joint ventures, it remains almost silent on amalgamations. If two or more market players intend to set up a new joint venture, the authorities consider the parties' respective capital and asset contributions as considerations. Regarding amalgamations (except for cases of one company absorbing another) it may not be clear who should be regarded as buyer and who as seller but the authorities will offer individual advice.

Another chapter is dedicated to the determination of whether the target has “substantial domestic operations” (which should not be mixed up with the notion of domestic effects in foreign-to-foreign mergers). Local turnover is naturally no reliable indicator in these transactions – otherwise, they would be caught by the regular turnover thresholds. The draft suggests to take into account e.g. user numbers (in the digital sector), use of local assets for business activities, or location of the target's customers.

It concludes with guidance on how to determine whether the acquisition of individual assets can be

considered as concentration that may be subject to merger control, and procedural issues.

The draft guidance is accessible via the [Bundeskartellamt](#)'s and [BWB](#)'s websites. Comments can be submitted until 8 June 2018.

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