

July 23, 2018

# German and Austrian Merger Control

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## Joint Guidelines on the New “Size-of-Transaction” Tests

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### SUMMARY

On July 9, 2018, the German and the Austrian competition authorities published—for the first time jointly—jurisdictional merger control guidelines on how to calculate the transaction value and assess the local nexus requirements under the size-of-transaction tests introduced in Germany and Austria in June and November last year. The recently introduced tests, which supplement the established turnover thresholds, aim to adapt the German and Austrian merger control regimes to the digital economy and innovation-driven industries, including in particular tech and pharma, where certain transactions involving high-profile start-ups and other targets with no or limited revenues previously escaped review (see, e.g., Facebook’s USD 19 billion acquisition of WhatsApp that fell below the German filing thresholds).

Even though the joint guidelines provide welcome practical guidance and contribute to greater legal certainty, they remain unclear in several important respects. The authorities recognize this in committing to update the guidelines going forward. Parties active in the relevant industries are therefore well advised to carefully consider early on how the recently introduced size-of-transaction tests apply in the specific context of their transactions. Moreover, and regardless of whether a notification is ultimately required, parties should document in detail their method of calculating the transaction value in the course of their multi-jurisdictional filing analyses.

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### SIZE-OF-TRANSACTION TESTS

Germany and Austria introduced size-of-transaction tests on June 9, 2017 and November 1, 2017, respectively.

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## A. GERMANY

In Germany, transactions traditionally required prior notification to, and approval by, the German *Bundeskartellamt* 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 recently introduced size-of-transaction test now also gives the authority jurisdiction over transactions if:

- 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
- The value of the consideration for the transaction exceeds EUR 400 million and the target company has significant activities in Germany.

For more information on the German test, see the S&C Memo on [German Merger Control: New “Size-of-Transaction” Test for Merger Control in Germany](#) dated July 5, 2017.

## B. AUSTRIA

In Austria, transactions traditionally required prior notification to, and approval by, the Austrian *Bundeswettbewerbsbehörde* if, during the previous business year:

- All parties to the transaction together had global turnover of more than EUR 300 million;
- All parties to the transaction together had turnover in Austria of more than EUR 30 million; and
- At least two parties to the transaction had global turnovers of more than EUR 5 million each.

The recently introduced size-of-transaction test now also gives the authority jurisdiction over transactions if, during the previous business year:

- All parties to the transaction together had global turnover of more than EUR 300 million;
- All parties to the transaction together had turnover in Austria of more than EUR 15 million; and
- The value of the consideration for the transaction exceeds EUR 200 million and the target company has significant activities in Austria.

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## JOINT GUIDELINES

Even though the joint guidelines provide welcome practical guidance on how to calculate the transaction value and assess the local nexus requirements under the recently introduced rules, they remain unclear in several important respects. If, ultimately, it cannot be determined with certainty whether a filing is required, the guidelines advise parties to seek informal guidance from the authorities or notify their proposed transaction as a precaution and withdraw it if necessary.

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## A. TRANSACTION VALUE

The transaction value is determined by reference to the total value of the consideration received by the seller in connection with a given transaction. This may include cash, other monetary benefits like non-compete payments, and non-cash assets such as securities. Transacting parties must, in addition, take into account variable or conditional purchase price components that may be due only in the future. These may include earn-out payments, which usually depend on the level of post-transaction earnings, and payments conditional on other agreed milestones like product launches. Unlike U.S. merger control rules, German and Austrian merger control also requires any interest-bearing portions of liabilities assumed by the buyer to be added to the value of the consideration.

Importantly, the relevant date for establishing jurisdiction in both Germany and Austria is the day of closing. Under the EU Merger Regulation, by contrast, the relevant date is the day of signing. In Germany and Austria, transacting parties and their advisors must therefore forecast the value of the consideration at that day. This creates considerable practical challenges. The day of closing is often difficult to determine during the initial filing analysis several months in advance, especially for large and complex transactions that require notification in multiple jurisdictions around the world. The same is true for the forecast consideration value, in particular where the consideration is conditional or comprises assets or liabilities that fluctuate in value. Parties are required to monitor the situation after the initial filing analysis and account for possible last-minute revelations that transactions are notifiable.

Parties are well advised to create a detailed and transparent record of their consideration value assessment irrespective of whether or not the merger is ultimately notifiable. This assessment must be submitted to the relevant competition authority upon notification, and may also be requested by the authority in the context of an investigation of whether the non-notification of a transaction was based on an incorrect consideration valuation (failure to report a notifiable transaction can incur a fine, and closing without the requisite approval constitutes gun jumping). In case of doubt, a written confirmation of the consideration value and its assessment by the management of the buyer (and in some cases by both buyer and seller independently) may be required to improve the reliability of the information and simplify the authorities' review.

## B. LOCAL NEXUS

According to the guidelines, a local nexus exists where the target has domestic market activities with customers located in either Germany or Austria. This is where competition takes place. In Austria in particular, a local nexus also arises if the target has a site or assets in the country. R&D activities may give rise to a local nexus where staff engaged in the relevant research carry out their activities in either Germany or Austria, or these activities relate to an entry into the domestic market.

More specifically, domestic market activities in Germany or Austria will exist where the target already provides a product or service against payment on an existing market, but may also exist where a product

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or service (i) is “paid for” other than by monetary payment (e.g., by consuming ads), (ii) is or will be offered free of charge, but is or will be monetized in a different manner (e.g., by ad sales), or is offered free of charge only during an initial period (as is the case under “freemium” app marketing), or (iii) consists of local R&D. In the first two cases, the authorities will look to other criteria, such as the number of “monthly active users” for a free app, or the number of “unique visitors” to a website. R&D activities only satisfy the local nexus component provided they are (i) domestic, (ii) any results are generally marketable, and (iii) any results will likely be marketed in the relevant jurisdiction.

Finally, market-oriented local nexus, once established, must be “significant” to trigger a notification requirement. According to the guidelines, the assessment of sufficiency may focus on qualitative rather than quantitative criteria. But even though the guidelines include several examples of what constitutes sufficient domestic activity in the tech and pharma industries, the language remains vague and unspecific. The guidelines, for example, state that the authorities will generally conclude that there is no sufficient local nexus where the target generated a turnover below EUR 5 million in Germany and EUR 500,000 in Austria, provided, however, that this turnover adequately reflects the target’s market position and competitive potential. In other words, in an established market, where the relevant competitors generate sales, the authorities will consider sales below these thresholds to be insignificant and the transaction value threshold therefore inapplicable. The transaction value threshold will apply only where a company’s (lack of) sales do not reflect its competitive position and potential, for example where a product has only recently come onto the market or the target is active in a market “not characterized” by turnover. For R&D activities, the guidelines point to the numbers of domestic researchers and patents, without, however, providing any indications beyond that.

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## OUTLOOK

The joint guidelines are a further step towards adapting German and Austrian merger control to the challenges of the digital economy and innovation-driven industries. The European Commission will keep a close eye on how these guidelines and the recently introduced size-of-transaction tests more generally stand the test of practice. It is understood, however, that the European Commission, following a public consultation last year, is less likely to incorporate a similar size-of-transaction test in the EU Merger Regulation in the near term. This is not least the case because, following the adoption of the German and Austrian rules, the European Commission can invite the German or Austrian authorities to refer to it cases that are notifiable under the recently introduced thresholds.

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