

# Germany and Austria introduce Transaction Value Merger Notification Thresholds

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Germany and Austria adopted transaction value merger notification thresholds. Based on these new thresholds, transactions involving a transaction valuation exceeding € 400 million (Germany) or € 200 million (Austria) will be notifiable under Germany's and Austria's merger control rules, provided that certain revenue thresholds are met and the target has "*significant*" activities in Germany or Austria.

The new thresholds are specifically intended to capture transactions in the digital economy involving targets with no, or only insignificant, revenues at the time of the acquisition. The adoption of these new thresholds will further increase the likelihood that transactions are notifiable in Germany or Austria. Both Germany and Austria already today have relatively low revenue-based notification thresholds, which remain in force unchanged as an alternative set of thresholds.

The new German threshold entered into force on June 9, 2017. The new Austrian threshold will enter into force on November 1, 2017.

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## Background

With these new transaction value thresholds, Germany and Austria intend to expand the scope of their merger control regimes to transactions that would otherwise not be notifiable on account of the target having no, or only insignificant, revenues at the time of the transaction.<sup>1</sup>

Both Germany and Austria had expressed concern that, transactions – especially in the digital economy – with a potentially significant impact on competition could escape *ex ante* review under merger control rules because such transactions would typically not meet jurisdictional thresholds that are based on revenues alone. In such circumstances, a “*particularly high*” purchase price can be an indicator of the target’s competitive potential and hence, would be an appropriate criterion to be used as a notification threshold.<sup>2</sup>

The case that has regularly been cited to demonstrate the need for a transaction value-based notification threshold is *Facebook / Whatsapp*. Despite a purchase price of c. US\$ 19 billion, the acquisition of Whatsapp by Facebook did not meet the revenue-based notification thresholds under the EU Merger Regulation or in Germany.<sup>3</sup>

## Germany

Based on the new German transaction value thresholds, a transaction that qualifies as a “concentration” under German merger control law requires notification if the following cumulative criteria are met:

- The parties’ combined worldwide revenues exceeded € 500 million; and
- One party’s revenues in Germany exceeded € 25 million, and neither the target’s nor any other party’s revenues in Germany exceeded € 5 million each; and
- The transaction consideration exceeds € 400 million; and
- The target undertaking has “*significant*” activities in Germany.

The law defines “*transaction consideration*” as “*any type of consideration of monetary value*” (such as the purchase price or assets) that the acquirer receives from the seller “*in connection with*” the transaction, including the value of any seller or target liabilities assumed by the acquirer.

The new transaction value threshold applies in the alternative to the pre-existing revenue-based thresholds, which will remain in force unchanged.<sup>4</sup>

The existing *de minimis* exemption – transactions where the acquirer’s or the target’s (in certain circumstances including the seller’s) worldwide revenues were below € 10 million do not require notification – does not apply to transactions that meet the transaction value threshold.

The new thresholds entered into force on June 9, 2017.

## Austria

Based on the new Austrian transaction value thresholds, a transaction that qualifies as a “concentration” under Austrian merger control law will require notification if the following cumulative criteria are met:

- The parties’ combined worldwide revenues exceeded € 300 million; and
- The parties’ combined revenues in Austria exceeded € 15 million; and

<sup>1</sup> In Austria, while a transaction can be notifiable even in the absence of any Austrian target revenues, the parties need to meet a combined Austrian revenue threshold and each party’s worldwide revenues must have exceeded € 5 million.

<sup>2</sup> See *Bundeskartellamt*, Paper on Platform Market Power – Results and Recommendations (2016) (available [here](#)). This point is also made in the explanatory notes to the draft German and Austrian laws.

<sup>3</sup> The transaction was, however, referred to the European Commission at the request of Facebook, as the transaction would have been notifiable in three Member States (possibly in the UK, Portugal, and Spain, all of which have market share / share of supply-based notification threshold, and possibly also in Austria); see Case M.7217 – *Facebook / Whatsapp* (2014), at ¶ 10.

<sup>4</sup> Under the pre-existing revenue-based thresholds, a transaction is notifiable if (i) the parties had combined worldwide revenues of more than € 500 million, and (ii) at least one party had revenues of more than € 25 million in Germany, and (iii) at least one other undertaking had revenues of more than € 5 million in Germany.

- The transaction consideration exceeds € 200 million; and
- The target undertaking has “*significant*” activities in Austria.

The Austrian law does not define “*transaction consideration*”, although the explanatory notes to the draft law clarify that the “*transaction consideration*” is meant to comprise, as in Germany, “*any type of consideration of monetary value*” (such as the purchase price or assets) that the acquirer receives from the seller “*in connection with*” the transaction, including the value of any seller or target liabilities assumed by the acquirer.

The new transaction value threshold applies in the alternative to the existing revenue-based thresholds, which will remain in force unchanged.<sup>5</sup>

The existing *de minimis* exemption – transactions where only one party’s revenues in Austria exceeded € 5 million and all other parties’ combined worldwide revenues were below € 30 million do not require notification – will not apply to transactions that meet the transaction value threshold.

The new thresholds will enter into force on November 1, 2017.

### Broad Scope of the New Thresholds

Although the new thresholds are specifically intended to capture transactions in the digital economy, they apply to transactions in all industries. For example, in the pharmaceuticals sector, acquisitions of targets with substantial R&D pipelines (but not generating any meaningful revenues yet) will potentially require notification under the new thresholds.

The transaction value thresholds are not only set at relatively low levels (€ 400 million and € 200 million), the definition of “*transaction consideration*” also is relatively broad:

- Determining the relevant “*transaction consideration*” will potentially require separate

<sup>5</sup> Under the pre-existing revenue-based thresholds, a transaction is notifiable if (i) the parties had combined worldwide revenues of more than € 300 million, and (ii) the parties had combined revenues in Austria of more than € 30 million, and (iii) each of at least two parties had worldwide revenues of more than € 5 million.

valuations of assets or other non-cash elements of the transaction consideration (*e.g.*, in the contribution of assets (to a joint venture), the acquisition of cross-shareholdings, or other non-monetary transactions between the merging parties (such as the conclusion of supply agreements). According to the German explanatory notes, payments for non-compete covenants will also be considered to be part of the “*transaction consideration*”.

- It is not uncommon for a transaction consideration to be subject to pre- or post-closing adjustments, which will raise separate questions as to whether and how such adjustments should be taken into account at the time of notification.
- In cases where the thresholds may, or may not, be met depending on the exact valuation of certain assets, *etc.*, there will thus inevitably be considerable uncertainty in practice whether a given transaction is subject to a notification requirement in Germany or Austria.

The most critical question in practice however will be the assessment whether a target has “*significant*” activities in Germany or Austria:

- According to the German explanatory notes, a target undertaking will be considered to have “*significant*” activities in Germany if it has a “*place of business*” in Germany or if it conducts R&D activities there. In the absence of a local “*place of business*” or of local R&D activities, metrics that are usually used in the target’s industry (*e.g.*, number of users or unique visits) will need to be used to assess whether the target has “*significant*” activities.
- Importantly, a target can have “*significant*” activities for purposes of the new thresholds even with zero revenues in either Germany or Austria. (The new thresholds are expressly intended to capture such targets, provided the transaction value threshold is met.)
- The German explanatory notes provide the following specific example: A target that provides communication applications for smartphones would have “*significant*” activities

in Germany if it had at least 1 million users in Germany.

- The explanatory notes accept that target revenues remain a relevant indicator of the target’s competitive potential in industries where companies have generated revenues in the past and that the new threshold is not meant to capture transactions in such industries. By way of example, a target active in a non-digital sector where revenues have been generated for several years would thus not have “*significant*” activities in Germany if its revenues in Germany remain below € 5 million (and therefore would remain below the existing German revenue threshold).
- Although the Austrian explanatory notes do not provide similar examples, the guidance provided in the German notes will in practice likely also inform the interpretation of the new Austrian threshold.

## Conclusion

The German and Austrian revenue-based merger notification thresholds already today are relatively low and often capture transactions that are not notifiable in other jurisdictions. The new transaction value thresholds are an unwelcome development as they further expand the scope of German and Austrian merger control and will require an *ex ante*-assessment of whether the target has “*significant*” activities in Germany or Austria. Absent clear criteria to determine when that would be the case, the new thresholds regrettably introduce an element of legal uncertainty at the stage of the jurisdictional assessment. This development is not in line with the wide consensus that the assessment of jurisdiction in merger control cases should be based on clear and simple criteria.<sup>6</sup>

<sup>6</sup> See, for example, the International Competition Network’s Recommended Practices for Merger Notification Procedures, according to which jurisdictional thresholds should be “*clear, understandable, easily administrable, bright-line tests*”.

The European Commission also is currently considering the introduction of a similar transaction value notification threshold into the EU Merger Regulation.<sup>7</sup> It is to be hoped that the European Commission will ultimately refrain from adopting a similar transaction value threshold, as otherwise the mentioned element of legal uncertainty would apply also at the EU level.

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<sup>7</sup> See speech by Competition Commissioner Vestager. “*Refining the EU merger control system*” of March 10, 2016 (available [here](#)).