Draft guidelines on new transaction value merger thresholds in Germany and Austria

May 18, 2018

On May 14, 2018, the German and Austrian competition authorities have published their draft guidelines on the new transaction value merger thresholds, including an English translation (see here). Comments can be submitted by June 8, 2018. It would certainly be helpful if members of the legal and economic community would comment on the draft guidelines and on the new transaction value thresholds recently set by the EU (see here) on comment on the draft guidelines.

I. New transaction value thresholds

The new transaction value thresholds were introduced in Germany and Austria as of 2017 (Deutsch 1914shake and KOIGA, respectively). Even if the German-based thresholds are not set, a consolidation may be made if the value of the target is likely to have a significant impact on the German market. If the target is significant in the Austrian market, a value exceed the thresholds (set in the Austrian guidelines) is not always the reflection of the second-order impact. The high purchase price may reflect investment activities and high-repayment potential, the acquisition of which the acquirer intends to monitor.

The draft guidelines cover: (i) determining the consideration value, (ii) scope of substantial current domestic activities and/or market, (iii) impact of the new thresholds on the economic aspects of the value of the considerand or asset acquisitions. The price will be set at the highest of the two.

A. Determining the consideration value

The draft clarifies that the company value might differ from the consideration value, which often includes a premium for the acquisition. The relevant consideration comprises all assets and other monetary benefits that the seller receives beyond the lump sum in connection with the transaction or cash payment, transfer of voting rights, securities and tangible and intangible assets. It also covers any future payments, such as non-competition payments, consideration under the parent company in a merger or transfer of company in a transfer. The parties need to disclose and justify their consideration value, including the method used, components of any consideration value, including any specific calculations (limited to interest-bearing parts thereof).

The draft explains that the future consideration value is calculated based on discounting expected cash flows. However, the value subsequently increased, and the value of the company becomes the reference date for determining the consideration value. The draft clarifies that the company value may be different from the consideration value, which often includes a premium for the acquisition. The relevant consideration comprises all assets and other monetary benefits that the seller receives beyond the lump sum in connection with the transaction or cash payment, transfer of voting rights, securities and tangible and intangible assets.

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