

# Kluwer Competition Law Blog

## Government Proposal Amends Local Nexus Requirement for New Transaction Value Threshold – Update

Werner Berg (Baker McKenzie) · Wednesday, November 9th, 2016

On 21 September 2016, the German Government has introduced a formal legislative proposal (*Gesetzesvorschlag* – “*Government Proposal*”) for the reform of the Act against Restraint of Competition (“ARC”; 9th amendment) which builds on the draft proposal (*Referentenentwurf* – “*Ministerial Draft*”) of the Federal Ministry of Economics. It still includes the proposed extension of German merger notification thresholds by implementation of an additional ‘size of the transaction’ test but the draft carries two notable amendments: The value threshold has been increased from EUR 350 million to EUR 400 million and, more importantly, the local nexus requirement has been narrowed down substantially.

### *New threshold slightly increased*

The value threshold still remains below the suggestion of the Monopolies Commission (EUR 500 million) and seems rather low. The impact assessment remains largely the same: The German Government expects that the additional threshold will trigger three additional filings per year of which one case would be treated in the main proceedings, i.e. the so-called second phase.

### *Improved local nexus criteria*

In practical terms, the amendment of the local nexus requirement seems more important. Whilst the Ministerial Draft required that (1) one company has generated € 25 million of turnover in Germany in the preceding financial year and (2) at least one of the “other undertakings” (i.e. not the one that achieved the EUR 25 million in Germany) is active or will presumably be active in Germany this second limb has now been replaced. According to the Government Proposal, the target company has to be active on a large scale (“*in erheblichem Umfang*“) in Germany. Although this wording leaves room for interpretation and thus creates uncertainty, it is a substantial improvement from the Ministerial Draft.

As to the determination of the local nexus, the Government Proposal clarifies that the place of the designated use is the decisive criterion. If, for example, an app for smartphones is offered (free of charge) by the target company, and utilized by a large number of users in Germany, the local nexus requirement would be fulfilled. The same will probably hold true if R&D activities for new

products, for example new pharmaceuticals, are carried out in Germany for the purpose of entering the German market. Activities that are not market-related would, however, not suffice.

In addition, such activity needs to have a large scale. According to the Government Proposal, a number of one million users for the app in Germany suffices to be considered large scale. For the pharmaceutical R&D example, the situation would be less clear. There is little doubt that the mere intention to market a product in Germany (and even the respective marketing authorization) would not trigger the local nexus requirement absent the R&D activity undertaken in the country. The question remains, however, whether actual R&D activities would suffice to constitute “large scale activity” in Germany. After all, R&D is only a preparatory step towards market entry. In practice companies that undertake their R&D in Germany will be well advised to file a concentration the closer they get to market authorization.

For products that have been offered in Germany for several years already, the Government Proposal is largely clear. If turnover generated with the relevant products is below € 5 million in a mature market, then this turnover reflects appropriately the market potential of these products and since the second German turnover threshold is € 5 million, the acquisition of the respective business is not notifiable. The ‘minor market clause’ may provide guidance on how long the product must have been in the market. According to this clause, a market is mature if goods or commercial services have been offered for at least five years.

Finally, the Government Proposal clarifies that the ‘large scale activity’ in Germany is required at the time of notification, and not – as for the turnover thresholds – in the last completed business year.

### *Conclusion*

The Government Proposal includes a substantial improvement of the local nexus requirement and provides signposts for self-assessment, such as the analogy to the € 5 million threshold. It leaves questions regarding the interpretation of ‘being active on a large scale’, i.e. of what quality and scope domestic activities need to have in order to be caught by the local nexus. This will have to be clarified in practice. The value threshold has been slightly increased but still appears too low, also in light of the Monopolies Commission’s initial suggestion. Both aspects will likely be primary points of review when the application of the new threshold will be evaluated by the Federal Ministry of Economics three years from entering into force of the new law.

*This post provides an update to the Kluwer Competition Law Blog Post of 22 July 2016 entitled “Germany Proposes Transaction Value Threshold to Require Notification of High Value Deals Even with No/De Minimis Sales in Germany“*

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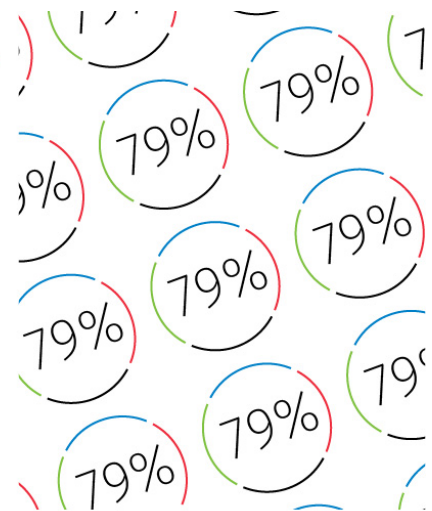
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