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Austria to introduce Transaction Value Merger Notification Threshold

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Austria will introduce a transaction value merger notification threshold, which will enter into force on 1 November 2017. The draft law and explanatory notes are available [here](#) (in German). In essence, transactions with a transaction value of more than € 200 million, provided the target has “*significant*” activities in Austria, will potentially require notification.

The new threshold is specifically intended to capture transactions in the digital economy. The threshold will however apply to acquisitions in any industry sector involving targets with no, or only insignificant, revenues at the time of the transaction (*e.g.*, to acquisitions of targets with significant R&D activities, but no or only limited revenues, in the pharmaceuticals or other research-based sectors).

With the introduction of this new threshold Austria follows the example of Germany, which adopted a similar transaction value threshold in March 2017 (see [here](#) and [here](#)).

The new Austrian transaction value threshold

Pursuant to the new Austrian transaction value threshold, 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
- The “*transaction consideration*” exceeds € 200 million;and
- The target undertaking has “*significant*” activities in Austria.

The new transaction value threshold will apply in the alternative to the existing revenue-based threshold, which will remain in force unchanged, and pursuant to which a transaction requires notification if:

- The parties’ combined worldwide revenues exceeded € 300 million;and
- The parties’ combined revenues in Austria exceeded € 30 million;and
- The worldwide revenues of each of at least two parties exceeded € 5 million.

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.

“Transaction consideration”

The Austrian draft law does not define “*transaction consideration*”. The explanatory notes to the draft law clarify that the “*transaction consideration*” comprises “*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 liabilities assumed by the acquirer.

This definition mirrors the definition of “*transaction consideration*” in the draft German law (“*all assets and any other consideration of monetary value that the acquirer receives from the seller in connection with the transaction, including any liabilities assumed by the acquirer*”). The explanatory notes to the German draft law provide some additional guidance on the notion of “*transaction consideration*”. For example, conditional payments (such as payments based on earn-out clauses) or payments made in exchange for non-compete covenants also form part of the relevant “*transaction consideration*”.

Given the similarity of the Austrian and German thresholds, the German explanatory notes will likely serve as a relevant reference for the interpretation and application of the new Austrian threshold.

“Significant” target activities

The explanatory notes provide some general guidance as to when a target would have “*significant*” activities in Austria:

- A target has “*significant*” activities in Austria if it has a “*business site*” (e.g., a sales office, a production site, or local R&D activities) in Austria.
- Absent a business site, the “*significance*” of the target’s activities would need to be assessed based on “*generally accepted*” metrics used in the relevant industry sector. In the digital sector, relevant metrics would include, for example, monthly active users or a website’s unique visits.
- The explanatory notes helpfully clarify that a target undertaking with “*marginal*” activities in Austria would not meet the “*significance*” threshold.

Unlike the German explanatory notes, the Austrian explanatory notes do not provide any specific examples for transactions that would meet the “*significance*” threshold. According to the German explanatory notes, a target active in the digital economy would be considered to have “*significant*” activities in Germany when it has at least 1 million users in Germany. Based on the relative proportion of the German and Austrian economies and population sizes (Germany is roughly 10x larger than Austria based on both criteria), as few as 100,000 Austrian users or unique visits might conceivably be sufficient for a target to have “*significant*” activities in Austria.

The German explanatory notes also acknowledge that, in industries where products have been sold for several years and companies have generated significant revenues in the past, the target’s

revenues remain an appropriate indicator of the target's competitive potential. Accordingly, in circumstances where a target active in such an industry had revenues of less than € 5 million in Germany (and thus would fall below the existing German revenue threshold), this target would not be considered to have “*significant*” activities in Germany. Similar considerations would seem relevant also for purposes of applying the new Austrian thresholds, *i.e.*, if a target is active in an industry where sizeable revenues have been generated in the past and the parties do not meet the existing revenue-based thresholds (*i.e.*, combined worldwide revenues of more than € 300 million, combined revenues in Austria of more than € 30 million, and worldwide revenues of more than € 5 million each), no notification should be required even if the new transaction value threshold (with its lower revenue threshold limbs) is met.

The “*significance*” threshold will need to be met at the time the notification is submitted and should not require a forward-looking assessment. While the Austrian explanatory notes to the Austrian draft law are silent on this question, the German explanatory notes expressly confirm this understanding.

Entry into force

Pursuant to the draft law, the new Austrian threshold will enter into force on 1 November 2017. In the absence of any specific transitional rules, the new threshold will thus apply to all transactions not yet closed on 1 November 2017.

Appraisal

The new threshold not only expands the jurisdictional scope of Austrian merger control, which already today is particularly – some would argue unreasonably – broad. It also introduces additional legal uncertainty: The determination of the relevant “*transaction consideration*” will not always be straightforward in practice, and whether a target has “*significant*” activities in Austria will necessarily require a subjective case-by-case assessment.

Jurisdictional thresholds involving subjective assessments are in tension with the International Competition Network's “Recommended Practices for Merger Notification Procedures”. According to the ICN's recommendations, notification thresholds should be “*clear, understandable, easily administrable, bright-line*” tests based on “*objectively quantifiable criteria*”. The new threshold falls short of this standard.

There also does not appear to be a compelling policy reason for the introduction of the new threshold:

- Many transactions that will be caught by the new threshold would likely be caught already by the existing set of thresholds (which, based on the Austrian competition authority's practice, can be met even without the target having any revenues in Austria).
- The new threshold's additional local nexus requirement – *e.*, that the target must have “*significant*” activities in Austria – does not affect this conclusion: Austrian merger control rules apply to transactions “*only insofar as they have an effect on the market in Austria*” (see Section 24(2) of the Austrian Cartel Act). Austrian case law takes an expansive view of when a

transaction is liable to have an effect in Austria and considers the “*abstract possibility*” of an impact on competition in Austria as sufficient (see, *e.g.*, the Cartel Court’s judgment in [Case 27 Kt 238/03](#)). Accordingly, if a target has “*significant*” activities in Austria, the effects threshold (especially as applied by the case law) would typically be met already under the existing rules.

In conclusion, the new threshold is an unwelcome development, as it introduces additional legal uncertainty at the stage of the jurisdictional assessment and unnecessarily expands the jurisdictional scope of Austrian merger control.

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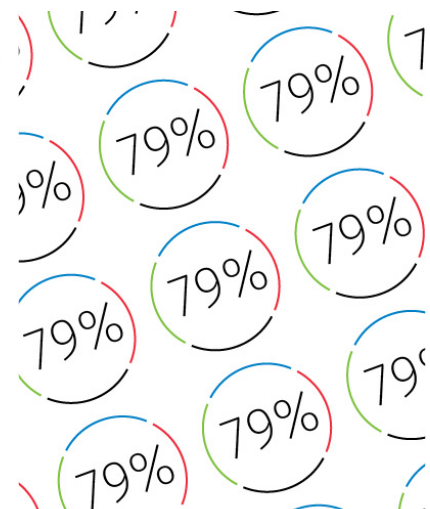
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