

Germany's Proposal to Introduce "size-of-transaction" Merger Review Thresholds Steps up Wider European Debate over Acquisitions of Start-ups

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Antitrust Transactions

On July 1, 2016, the German Federal Ministry of Economic Affairs and Energy published a proposed draft amendment to the German Act against Restraints of Competition, which would introduce a new merger control notification threshold based on transaction value. The draft (i) introduces a new merger control notification threshold based on transaction value, (ii) introduces specific criteria for the appraisal of market power in multi-sided markets (which involve products that create value by enabling direct interaction by distinct groups of customers. Examples include credit cards, health networks, software operating systems, search engines, and communications systems), (iii) aligns parental liability with EU law (joint and several liability of companies which form a single economic entity) and expands liability of legal successors (including succession by asset acquisition), and (iv) implements the EU Damages Directive.

The draft introduces a new filing threshold, essentially a size-of-transaction test. It proposes that transactions be notifiable even if the second domestic turnover threshold (of €5 million) is not met, but the transaction value exceeds €350 million. The worldwide turnover of all the undertaking involved would still need to exceed €500 million, and at least one undertaking involved would need to generate German turnover in excess of €25 million. This new threshold would enable the German Federal Cartel Office to review transactions in the digital economy involving at least one party with insufficient turnover to currently require notification. The transaction would be valued by taking into account all assets and other payments in kind that the seller receives from the buyer in connection with the transaction, including the value of assumed liabilities. The size-of-transaction test would only apply where the target undertaking is active or intends to become active on the German market. Further, the draft makes clear that the *de minimis* exception would not apply if the 'size-of-transaction' criterion is met.

In a 2014 report, the German Monopolies Commission (GMC), an independent advisory body on competition law, had recommended "additional notification requirements based on the transaction volume." The GMC noted that, in digital markets, purchase prices would often better reflect the economic impact of a transaction. In January 2016, the German government's annual economic report announced that the German merger control thresholds would be amended to take account of transaction value. The new rules would confer jurisdiction over transactions whose value is "particularly high", even where the sales thresholds are not met. The Bundeskartellamt (BKartA) has indicated that it wants to introduce the new rules to cover the digital sector where low company turnover may not reflect valuable assets such as customer data, and the BKartA's president Andreas Mundt has endorsed the proposal, including in a February 2016 interview with [Handelsblatt](#).

The explanatory memorandum that accompanies the draft follows this approach. Having noted that innovative business models in digital markets can depend on the attraction of a

large quantity of users, leading to low cost or even free-of-charge services, it concludes that it is not surprising that such market participants generate little or no revenue, but that this does not mean that they are not valuable. The explanatory memorandum also notes that it may be appropriate to take high-value pipeline products into account when valuing entities in the pharmaceutical sector. It is also worth noting that the proposal is intended to address acquisitions of small start-ups by large corporations, where such consolidation can be detrimental to innovation.

This debate has not been limited to Germany. The European Commission has raised the issue a number of times since Facebook's acquisition of WhatsApp (which the Commission reviewed on referral, rather than through the exercise of original jurisdiction). In February 2015, in its Competition Merger Brief (Issue 1/2015-February), the European Commission questioned "whether turnover-based thresholds are still an appropriate yardstick for identifying mergers with an EU dimension in the digital sector, as opposed to thresholds mainly based, for example, on the value of the transaction (as applied in the US)." It noted that "turnover-based thresholds do not properly reflect the future market potential of an IT company" or may "overlook the fact that personal data – as opposed to money – can be seen as the new 'currency' with which consumers pay for the free services they receive via the Internet."

On March 10, 2016, EU competition Commissioner Vestager said that the Commission is considering whether the current turnover-based notification thresholds should be complemented by a value-based threshold. The Commissioner is concerned that the current turnover-based system "may not always be the best way to judge the size and impact of a transaction" and that the Commission "might [therefore] be missing deals that [it] ought to review." The Commissioner stressed that the value of a merger could be a good guide to its importance. However, she was careful to note that the relevant threshold should be carefully considered and very clear, so that there is no doubt over notifiability.

In its Staff Working Document 'Towards More Effective EU Merger Control' of June 25, 2013, the Commission consulted as to whether the existing system of case referrals from Member States to the Commission (and vice versa), on the basis of which the Commission took jurisdiction over *Facebook/WhatsApp*, for example, remains appropriate. However, the Commission did not propose augmenting the turnover-based threshold with a size-of-transaction test.

The incoming EU Chief Economist of the Directorate General for Competition, Tommaso Valletti, recently expressed some views regarding the value of big data (*i.e.*, that knowing a lot about your customers is a valuable asset that can confer market power). While he expressed the view that the Commission already has the "economic tools" to analyse mergers involving online platforms that hold large amounts of data, he suggested that new metrics might be useful to ensure that a transaction will not generate anticompetitive effects. For example, he suggested looking at market capitalisation, the number of customers a company has and how much investors think it is worth (in addition to market share) in carrying out market analyses. His remarks, while not going to the jurisdictional issues, affirm the Commission's unease over the fitness for purpose of its current approach to certain types of technology transactions.

While the proposed amendment to the Act is the first concrete proposal to come out of this debate, it is likely to be followed elsewhere. It will be important that companies active in relevant sectors become and stay involved in discussions over such thresholds, to ensure that they are clear, and are not unnecessarily burdensome.

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