

# The devil is in the details: transaction value draft guidelines

May 24 2018 | Contributed by [Preslmayr Attorneys at Law](#)

## Introduction

## Issues

## Comment

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In 2017 Austria and Germany implemented an additional merger threshold to catch cases that fall below existing turnover thresholds but where the consideration for the transaction exceeds €200 million (Austria) or €400 million (Germany), respectively, and the target is active in the respective country to a significant extent.<sup>(1)</sup> The first cases and legal discussions have shown that there is considerable uncertainty regarding the application of these rules. The legislators do not appear to have fully considered all of the issues and consequences. However, the Austrian Federal Competition Authority<sup>(2)</sup> and the German Federal Cartel Office<sup>(3)</sup> have now published joint draft guidelines on the application of the new, short but nonetheless quite difficult piece of legislation. The draft guidelines are available on the competition authorities' websites and are open for consultation until June 8 2018. English versions are also available. The draft guidelines reflect the opinions of the authorities and cannot bind national courts that may have to rule on individual transactions.

### Issues

The draft guidelines deal with three major issues:

#### ***Calculation and documentation of consideration***

- 'Consideration' is defined quite extensively to cover money, shares or all other assets, whether present, future, conditional or unconditional, and liabilities accepted by the purchaser.
- The liabilities accepted by the purchaser must be added up to the consideration. The authorities have stated that any liability bearing interest, if shown in the target's balance sheet, must be considered as part of the consideration.
- Only the consideration for the specific transaction is relevant; in certain discussed cases, several transactions had to be considered as one transaction.
- Parties are free to use accepted methods of evaluation and calculation, provided that these methods and their application are transparent and sufficiently documented.
- The evaluation must be done at the point of implementation of the merger.
- The current value of future payments will be calculated on the basis of discounting methods commonly used in the financial sector. Payments made during the financial year may be combined into annual payments.
- Future payments can be weighted according to their probabilities if these probabilities and their underlying assumptions are sufficiently explained and documented.
- If the value of the consideration for a merger project was determined according to the guidelines and a merger was considered exempt from notification as a result, the notification requirement will not be reinstated if the components of the consideration value that had already been taken into account change in value after the merger has taken effect.
- Special rules apply to the formation of a new joint venture or amalgamation.

AUTHOR

[Dieter Hauck](#)



## ***Substantial domestic operations***

- The criteria applied to measure domestic operations may differ from case to case, but will usually exclude domestic turnover.
- In Austria, the target's location generally creates a presumption of domestic activity, taking into account the extent to which the activities of this site have domestic market orientation. Research and development activities can also constitute relevant activity.
- Domestic activities must be current; future or anticipated activities alone are insufficient. However, domestic activity is also deemed to be current if it is carried out for the purpose of market entry (eg. a drug approval on the domestic market).
- In general, for the assessment of local nexus an activity is attributable to the place of intended use, which is usually where the customer is located.
- The significance of domestic activities may be judged differently on a case-by-case basis, or from industry sector to industry sector, since the laws set down no quantitative limits.
- In Austria, turnover may be a significant factor; but in contrast to Germany, legislators in Austria have not set an absolute threshold of €5 million.

## ***Concept of concentration***

By eliminating the requirement that the target have at least some turnover, the new law may have a significant impact on the concept of concentration. While this makes no difference if company shares are bought, it might make a significant difference when acquiring individual assets as part of an asset deal. Under present case law, the acquisition of assets is relevant only if the assets are purchased in full or to a substantial extent, meaning that the asset had to offer the possibility for the buyer to assume the seller's existing market position. Potentially this criterion can no longer be maintained unreservedly. However, as this is a highly complex question, final confirmation by the courts may be necessary.

## **Comment**

The unique and highly commendable draft guidelines published by the Austrian Federal Competition Authority and the German Federal Cartel Office significantly reduce the uncertainty inherent in the new laws. However, such uncertainty is not completely eliminated. While things will be easier for many parties to a transaction and their lawyers, some difficult questions still need final clarification by the courts. This is likely to happen when the parties decide that a merger need not be notified to the competition authorities, which then may take a different view.

*For further information on this topic please contact [Dieter Hauck](#) at Preslmayr Attorneys at Law by telephone (+431 533 16 95) or email ([hauck@preslmayr.at](mailto:hauck@preslmayr.at)). The Preslmayr Attorneys at Law website can be accessed at [www.preslmayr.at](http://www.preslmayr.at).*

## **Endnotes**

(1) For further details please see "[Fixing the WhatsApp gap?](#)".

(2) See [www.bwb.gv.at](http://www.bwb.gv.at).

(3) See [www.bundeskartellamt.de](http://www.bundeskartellamt.de).

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