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Revised German Merger Control Thresholds Will Lessen Regulatory Hurdles for Many Cross-Border Deals and Focus Greater Attention on Those with Competitive Implications

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Effective January 19, 2021, German domestic turnover thresholds for merger control have significantly increased as a result of the "German Competition Digitalization Act," which amended the German Act against Restraints of Competition (the "ARC"). Prior to this amendment, under the primary set of thresholds in the ARC, a concentration was subject to German merger control if, in the year preceding the transaction, the parties had aggregate worldwide revenues in excess of €500 million (approx. \$571.10 million), one party had German revenues in excess of €25 million (approx. \$28.56 million), and the other party in excess of €5 million (approx. \$5.71 million). While the combined threshold remains unchanged, the first party domestic turnover has doubled (up to €50 million (approx. \$57.11 million)) and the second party threshold more than tripled (up to €17.5 million (approx. \$19.99 million)).

Germany will, however, retain its secondary merger control threshold, which is relevant for larger deals (those with transaction values above €400 million (approx. \$456.88 million)). Following the amendment, the threshold is met where one party has in excess of €50 million (approx. \$57.11 million) in German revenue, the other party has less than €17.5 million (approx. \$19.99 million) in German revenue, and the target is active "to an appreciable extent" in Germany.

The amended ARC also contains further changes to German merger control, including:

- Extension of the in-depth investigations review period (Phase 2) from four to five months.
- Enhanced merger control over successive acquisition strategies (under the so-called "*Remondis clause*"). Germany may now require companies to notify future acquisitions that take place in a given sector, provided that (i) the target company has revenues in excess of €2 million (approx. \$2.28 million), of which at least two-thirds were generated in Germany, (ii) the sector has already been subject to a sector investigation, and (iii) the acquirer has a share of at least 15% of the supply or demand of the relevant goods or services in Germany.
- Elimination of the obligation to inform the FCO about the closing of notified transactions.

- An increase of the *de minimis*-markets clause from €15 million (approx. \$17.13 million) to €20 million (approx. \$22.84 million).

For ease of reference, a table laying out the current German merger control notification thresholds is included at the end of this note.

Background

Transactions meeting German merger control thresholds are subject to a mandatory notification requirement. The German Bundeskartellamt (known as the Federal Cartel Office, or the “FCO”) reviews these notifications. The Phase 1 review in Germany is limited to one month from the date of notification, and the FCO has historically been able to clear most non-problematic transactions in advance of the statutory deadline. However, pending regulatory clearance, parties are precluded from closing their transaction or taking steps to integrate the businesses (often referred to as “gun-jumping”).

Implications

The revised thresholds are expected to reduce the number of German merger control notifications by 25-30%, as well as focus the FCO’s attention on those deals likely to have competitive concerns. Given the immediate effectiveness of this change, parties with pending transactions would be well advised to revisit their analysis of whether a German merger control notification is required.

In the past, the German merger control thresholds have been relatively low compared to other worldwide merger control regimes. For example, in neighboring France, the primary merger control threshold requires that two parties to the transaction have at least €50 million (approx. \$57.11 million) in French revenue in the preceding year, in addition to other requirements. As a result, cross-border deals often triggered mandatory premerger notification filings in Germany, even in cases where they did not require such notices in other jurisdictions. This has meant that, very often, the timing for transactions has been dependent on the German regulatory clearance process, even in deals that only tangentially affected the German economy.

With these new thresholds, many cross-border deals may have one less regulatory clearance hurdle and may be able to avoid the corresponding time and expense of preparing a German notification. We see this as a positive development, and one that is unlikely to cause the FCO to miss an ability to review deals that have significant implications for the German market, particularly given the retention of the secondary threshold for deals where the target is significantly active in Germany and the creation of a potential notification requirement for successive deals in the same sector under the so-called “*Remondis clause*”.

At the same time, we note that the “*Remondis clause*” aims to enable the FCO to prevent large companies gradually acquiring a dominant position over the course of a series of acquisitions. It will be important to consider how the FCO implements this new tool in the coming months.

Broader Context

Merger control is an ever-evolving area of international practice. In addition to this update in Germany, two other major factors are affecting global transactions in the near term. First, the U.K. merger control authority, the Competition and Markets Authority (the “CMA”), is expanding its review to include deals that previously would have been subject to review only by the European Commission under the “one stop shop” principle in the European Union Merger Regulation. The CMA anticipates that it will double its caseload in the coming year.

Second, in addition to merger control regimes targeting deals that may reduce competition, numerous jurisdictions around the world have begun implementing Foreign Direct Investment (“FDI”) notification requirements. While not directly tied to merger control, these FDI notice obligations often create similar risk and timing implications for cross-border M&A.

In light of these and other changes, it is increasingly essential that parties to international deals ensure that they are following changes in relevant thresholds and notice requirements so that they can plan for regulatory review and timing implications accordingly. Paul Hastings’ Antitrust and Competition team has expertise in managing both merger control and FDI notifications in global deals, and can advise on strategies to minimize closing risk and avoid potential delay.

New Jurisdictional Thresholds

	Revised 2021 Thresholds	2020 Thresholds
Threshold 1 – The General Threshold	1. The combined worldwide turnover of the undertakings involved exceeds €500 million (approx. \$571.10 million); and	1. The combined worldwide turnover of the undertakings involved exceeds €500 million (approx. \$571.10 million); and
	2. One undertaking has German turnover exceeding €50 million (approx. \$57.11 million); and	2. One undertaking has German turnover exceeding €25 million (approx. \$28.56 million); and
	3. One undertaking has German turnover exceeding €17.5 million (approx. \$19.99 million); unless	3. One undertaking has German turnover exceeding €5 million (approx. \$5.71 million); unless
	4. The undertaking meeting the third threshold is not “dependent” within the meaning of ARC and has worldwide turnover of less than €10 million (approx. \$11.42 million)	4. The undertaking meeting the third threshold is not “dependent” within the meaning of ARC and has worldwide turnover of less than €10 million (approx. \$11.42 million)

	Revised 2021 Thresholds	2020 Thresholds
Threshold 2 – The Transaction Value Threshold	1. The combined worldwide turnover of the undertakings involved exceeds €500 million (approx. \$571.10 million); and	1. The combined worldwide turnover of the undertakings involved exceeds €500 million (approx. \$571.10 million); and
	2. One undertaking has German turnover exceeding €50 million (approx. \$57.11 million); and	2. One undertaking has German turnover exceeding €25 million (approx. \$28.56 million); and
	3. Neither the German turnover of the target nor the German turnover of another undertaking concerned exceeds €17.5 million (approx. \$19.99 million); and	3. Neither the German turnover of the target nor the German turnover of another undertaking concerned exceeds €5 million (approx. \$5.71 million); and
	4. The value of consideration received is €400 million (approx. \$456.88 million) or more; and	4. The value of consideration received is €400 million (approx. \$456.88 million) or more; and
	5. The target is active “to an appreciable extent” in Germany.	5. The target is active “to an appreciable extent” in Germany.

Note: Approximate USD figures are provided for convenience based on the European Central Bank’s annual average rate for the last complete calendar year (2020: EUR 1 = USD 1.1422).



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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