SQUIRE PATTON BOGGS

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FIVE MINUTES ON…
EU MERGER CONTROL

The European Union and virtually all of its Member States enforce merger control laws which require that approval be obtained before closing any deal that exceeds certain turnover or market share thresholds. These laws also allow regulators to impose conditions on closing or even block transactions, if they raise competition concerns. Even in the case of an unproblematic deal, the merger control process can have a significant impact on the transaction timetable.

Which Transactions May Require Notification?

The following transactions may be subject to EU and Member State merger control:

- Acquisitions of shareholdings of 50% or more
- Acquisitions of assets
- Creation of a joint venture

At the EU level, only joint ventures that will be able to act independently on the market ("full-function" joint ventures) require notification. This excludes, for example, production joint ventures which only supply their parents. This can be different at the Member State level. In Germany, by far the country most actively monitoring transactions, merger control laws apply to all joint ventures provided that they involve a corporate entity.

Some Member States, but not the European Commission, require notification of any acquisition of 25% or more in a business. This is the case in the UK, where notification is voluntary, and also in Germany and Austria, where it is mandatory. The European Commission is currently considering introducing the review of minority acquisitions.

Where Do I Have to Notify?

The requirement to notify a deal is triggered if it exceeds the thresholds of a given Member State, or of the EU. These thresholds are typically based on the turnover of the parties. Some countries, notably the UK and Spain, use market shares tests. We have set out below the turnover thresholds that trigger a filing to the European Commission. If a transaction meets the EU thresholds, the parties will not need to notify any of the 28 EU Member States individually even if their national thresholds are exceeded (the "one-stop-shop" principle). There may, however, be filing obligations outside of the EU, e.g. in Turkey, a country with a particularly low filing threshold.

If a transaction does not meet the EU thresholds, the parties may need to make one or more filings at the Member State level. If three or more Member State notifications are triggered, the parties may choose to notify the European Commission instead (a further application of the one-stop-shop principle).

<table>
<tr><th colspan="2">European Union</th></tr>
<tr><td>First Threshold:
• The parties' combined worldwide turnover exceeds €5 billion; and
• The EU turnover of at least two parties exceeds €250 million.</td><td>Second Threshold:
• The parties' combined worldwide turnover exceeds €2.5 billion; and
• The parties' combined turnover exceeds €100 million in each of at least three Member States; and
• In each of the same three Member States, the turnover of each of at least two parties exceeds €25 million; and
• The EU turnover of each of at least two parties exceeds €100 million.</td></tr>
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As an exception, an EU filing is not required if each of the parties achieves more than 2/3 of its EU turnover in one and the same Member State.

How Is the Turnover Calculated?

There are specific rules on how turnover should be calculated for the purposes of a merger control assessment.

Entities to be Taken into Account

If the transaction involves the acquisition of shares or assets by one buyer, the relevant turnover to be taken into account comprises the following:

For the Buyer	For the Seller
The turnover for the entire group (not just the acquiring entity), comprising all parent companies, subsidiaries and sister companies. In the case of a private equity buyer, this includes all portfolio companies controlled by the buyer.	The turnover of the target only, not the seller's group. If the seller or any other third party retains an interest of 25% or more, specific rules apply in Germany and Austria.

In a joint venture situation, the group turnover of all parties exercising control is relevant. This means that in a 50:50 joint venture, the total group turnover has to be taken into account for each party.

Definition of Turnover

For the purposes of merger control, turnover is the income derived from the sales of all products/services falling within a company's ordinary activities, less rebates, value-added tax and other taxes directly related to turnover. Intra-group sales are excluded.

Geographical Allocation

Turnover is allocated to the country where the customer is located. In practice, this means that if a product is delivered from a German subsidiary to a customer located in France, this is considered to be French turnover (even though it would appear in the German subsidiary's books).

What if Market Share Thresholds Apply?

Market share thresholds apply in Spain and Portugal (where notification is mandatory) and the UK (where notification is voluntary). In the UK, for example, the Competition and Markets Authority can examine any merger where the parties supply 25% or more of the market and the merger will increase that share of supply.

Country-specific market share data is required to assess whether the notification thresholds are met in these jurisdictions. The problem is that there is a subjective element – the market definition – which creates uncertainties even for transactions with limited sales, in Spain for example.

What Are the Waiting Periods?

The European Commission has an initial period of 25 working days to complete its Phase One review. During the investigation, the authority assesses whether the transaction will significantly impede effective competition. If it finds that there is a competition risk, for instance because the parties have a very high combined market share or the deal would foreclose competitors from access to an input, it will open a Phase Two review. This lasts at least another 90 working days at the EU level and a roughly similar duration at the Member State level.

At the end of Phase One or Phase Two, the Commission can approve a deal either unconditionally or on the basis of remedies such as a commitment to divest assets. Alternatively, at the end of Phase Two, the Commission may deny approval and block the deal from closing.

The majority of Member States operate a two-phase review, with most unproblematic deals being approved within around one month.

What Effort and Cost is Involved for the Business?

The effort involved in preparing a merger notification will be determined largely by whether the deal raises any substantive competition concerns. However, some jurisdictions are generally more labor-intensive than others. Certain authorities, including the European Commission, require the parties to gather a large amount of data and follow lengthy notification forms. Other authorities, such as in Germany, require less information and either have no set notification form or a form that is less onerous.

The European Commission does not charge the parties a fee for notification, but filing fees are payable in some EU Member States.

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