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MERGER CONTROL
IN THE EUROPEAN UNION

The European Union and virtually all of its Member States impose merger control laws which require that regulatory approval is obtained prior to closing if a transaction exceeds certain turnover or market share thresholds. Assessing merger notifications is therefore key when determining the transaction timetable, even if there are no apparent substantive competition concerns because the parties' businesses do not overlap.

We set out below a very brief overview of the first steps to consider when carrying out a merger control assessment of a proposed transaction.[1]

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; and
- the creation of a joint venture.[2]

In addition, some countries, including Germany and Austria, extend their merger control laws also to acquisitions of a 25% interest.[3]

Do I Have to Notify and Where?

Merger filings are required in a particular jurisdiction if the parties exceed the relevant turnover or market share thresholds. We have set out below the turnover thresholds that apply at European level. If a transaction meets the thresholds at European level, the parties do not need to notify the transaction to any of the 28 EU Member States individually, even if the national jurisdictional thresholds are exceeded (known as 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 the transaction does not meet the EU thresholds, it falls upon the parties to assess whether one or more filings at Member State level are necessary.[4] By way of example, we have provided below the thresholds for Germany as it is a jurisdiction with very low thresholds (in light of its GDP and economic importance). It is also the Member State with by far the highest number of notifications.

1 We did not attempt to address all issues and companies should always seek legal advice tailored to any proposed transaction

2 The concept of a joint venture does not only include 50:50 joint ventures but may also apply in a situation where a minority shareholder acquires veto rights over strategic business decisions. At EU level only joint ventures that will be able to act independently on the market (known as full-function joint ventures) are subject to the merger control laws. This excludes, for instance, production joint ventures where the JV company is selling a product only to its parents. However, in Germany, the merger control laws also apply to such non-full function joint ventures.

3 This also applies to the UK, however, the UK system is based on a voluntary filing, as opposed to Germany and Austria where filing is mandatory.

4 Most Member States have turnover thresholds, however, there also exist a number of Member States where the thresholds for merger control are based (at least partially) on the parties' market shares. The latter applies notably to Spain (where notification is mandatory) and the UK (where notification is voluntary). Country-specific market share data would ultimately be required to assess whether merger notification thresholds are met in these countries.

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European Union

First Threshold:

- The parties achieve a combined worldwide turnover of more than €5 billion; and
- At least two parties achieve a turnover of more than €250 million in the EU;

or

Second Threshold:

- The parties' combined worldwide turnover exceeds €2.5 billion; and
- In each of three Member States the parties' combined turnover exceeds €100 million; and
- In each of the same three Member States the turnover of each of the parties exceeds €25 million; and
- The EU turnover of each of the parties exceeds €100 million.[5]

Germany

A transaction requires approval in Germany if **all three** of the following conditions are satisfied:

- The parties have a combined worldwide turnover of more than €500 million; and
- One party has turnover in Germany of more than €25 million; and
- One other party has turnover in Germany of more than €5 million.

How Is the Relevant Turnover Calculated?

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

a. Companies to be Taken Into Account

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

For the Buyer

The turnover of the entire group, not only that of the acquiring entity. This will involve all subsidiaries including, for private equity investors, the turnover of all portfolio companies if they are controlled by the buyer.

For the Seller

Only the target's turnover, not the seller group's turnover (unless the seller retains 25% or more, in which case specific rules apply in Germany and Austria).

5 An EU filing is not required, even if either alternative set of thresholds is met, if each of the parties achieves more than 2/3 of its EU turnover within one single Member State.

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.

b. Definition of Turnover

For merger control assessment purposes, turnover comprises the amounts derived from the sales of all products and the provision of all services falling within the companies' ordinary activities after deducting sales rebates, value-added tax and other taxes directly related to turnover. Intra-group and captive sales are excluded.

c. Geographical Allocation

Geographically, sales are allocated to those countries in which the customer is located. In practice, this means that if a product is delivered from your German subsidiary to a customer located in France, for the purposes of merger control, this sale is considered to be French turnover (even though it would appear in the German subsidiary's books).

What Are the Waiting Periods?

The European Commission has an initial review period of 25 working days from receipt of a complete notification (the First Phase). During the investigation the authority will assess whether the transaction will significantly impede effective competition. If the authority finds that there is a competition risk, for instance the parties have a very high combined market share or the transaction would foreclose competitors from access to a raw material, it may enter into an extended review period (the Second Phase, which would add at least an additional 90 working days) and may ultimately prohibit the transaction or impose remedies, such as divestitures. Otherwise it will approve the transaction within the First Phase.

However, in practice a notification before the European Commission can take significantly longer, because of the requirement for pre-notification discussions with the Commission even in straightforward cases.

In Germany, the initial investigation period is one month but straightforward transactions with no competition concerns are often approved more quickly. The review period for a Second Phase investigation is 4 months from the date of notification.

What Effort and Cost is Involved for the Business?

The effort involved in preparing a merger notification depends on whether the proposed transaction poses any substantive competition concerns. A great deal, however, also depends on the authority being notified. Particular authorities, including the European Commission, request a large amount of information. Other authorities, such as the German competition authority, require less information and they have no notification forms or the forms are less onerous.

Some jurisdictions apply filing fees. The European Commission does not apply a filing fee; however, the German regulator applies a filing fee of at least €5,000 in straight-forward cases, and as much as €100,000 in complex second phase cases.

How Can We Help?

The EU competition team at Squire Sanders is well placed to determine when merger control requirements are triggered and to evaluate and assess the competitive implications of specific business combinations. Our lawyers have extensive experience of advising on deal risk and in securing merger control approval from the European Commission, the German Federal Cartel Office and competition authorities around the globe. Our experience enables us to structure transactions so as to minimize regulatory hurdles and ensure a timely closing.

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