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Statement of the Institute for Competition Law (Professors Kersting, Meyer-Lindemann, Podszun)

on the Draft

"Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)"

of the German Federal Cartel Office and the Austrian Federal Competition Authority of 14.5.2018

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Scholars at the Institute for Competition Law at the Heinrich Heine University Düsseldorf conduct research on the topics of German, European and international competition law in close cooperation with the Düsseldorf competition law community. The Institute regards participation in the further development of competition law from an academic perspective as one of its core tasks. Thus, we have closely followed the development and enactment of the 9th Amendment to the German Act against Restraints of Competition (GWB) via participation in the legislative process,[1] publication of commentary on the amendment[2] and continuous publication on the Institute's blog[3].

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I. Aim of the merger control thresholds

The merger control thresholds aim to identify cases which have relevant competition aspects and subject them to merger control, without wasting state and corporate resources on completely innocuous cases. The effect of a proposed concentration on effective competition is measured by considering the restriction of freedom of competition, economic effects and impact on the domestic market.

[1] Statement of Prof. Dr. Rupprecht Podszun as an expert on the Economic Committee of the German Parliament, Committee Bulletin 18(9) 1092, available online at https://www.bundestag.de/blob/489168/effffe1ad50da2f28f43442b2d8be7c1/podszun-data.pdf; Kersting/Preuß, Umsetzung der Kartellschadensersatzrichtlinie (2014/104/EU) – Ein Gesetzgebungsvorschlag aus der Wissenschaft (2015); Kersting/Preuß, WuW-Onlinebeitrag of 15.8.2016 WuW 1211285, L 1 ff. [printed version WuW 2016, 394].
[2] Kersting/Podszun (Hg.), Die 9. GWB-Novelle, 2017; see in particular regarding § 35 para. 1a GWB the article of Meyer-Lindemann (chap. 12, p. 309 ff.).
[3] See http://www.d-kart.de/.

The merger control thresholds must be clear and comprehensible. They should be easy to apply, in order to avoid uncertainty for companies as to whether a concentration is subject to notification.[4] In view of the aims of achieving clarity quickly and avoiding time-consuming examinations in the preliminary stage of a merger, the guidance with its 114 paragraphs seems to be very complex and very detailed.

A purely precautionary notification can only be a second-best solution – such a notification incurs costs and loss of time for companies, even though it remains unclear whether there was an obligation to notify in the first place. The guidance should therefore create specific "safe harbours" for companies.

The assessment of the guidance paper is based on the following objectives. On the one hand, merger control should make concentrations of macroeconomic importance transparent and subject them to administrative control. On the other hand, thresholds should be applied in a way that enables the parties to assess their obligation to notify in a timely manner and with legal certainty.

II. Detailed Analysis

Paragraph 11:
According to this paragraph the term "asset" (*Vermögensgegenstand*) shall include the transfer of voting rights.
However, company law does not provide for an isolated transfer of voting rights (prohibition of separation), and so clarification may be necessary here.

Paragraph 13:
This paragraph deals with the combination of several acquisitions into one "overall acquisition decision" (*übergreifende Erwerbsentscheidung*), so that a "single merger" (*einheitlicher Zusammenschluss*) can be assumed.

The remarks seem to be too far-reaching. The focus should be on the acquisition of control, not on the existence of a close connection “in material terms and timing” (*enger sachlicher und zeitlicher Konnex*). Several transactions can only be treated as a single concentration if they fall under Sec. 38 para. 5 sentence 3 GWB or are linked by their condition. This is explicitly established in European merger control law (which, according to the explanatory memorandum, must be taken into account when considering the concept of acquisition of control)[5].[6] Any extension beyond this, with reference to the purpose of the law, seems to be too far-reaching.

The example I b in para. 13 also appears to be too extensive. A purely temporal coincidence should not lead to a sale being blocked. An examination should only take place if the acquisition of certain shares leads to control, which is the case in the second acquisition in the given example. However, if

[4] cf. Meyer-Lindemann in: Kersting/Podszun, Die 9. GWB-Novelle, 2017, chap. 12 para. 1; Podszun, WuW 2010, 1128 ff.; OECD, Local nexus and jurisdictional thresholds in merger control, 2016, DAF/COMP/WP3(2016)4, p. 5 f.
[5] BT-Drucks. 13/9720, p. 57.
[6] EC Merger Regulation (EG) 139/2004, Recital 20; KOM, Commission Consolidated Jurisdictional Notice under Council Regulation EC No. 139/2004 on the control of concentrations between notice, (2009/C 43/09), para. 36 ff. referring to EuG, 23.3.2006, Rs. T-282/02, ECLI:EU:T:2006:64 – *Cementbouw*.

the transaction threshold for this second acquisition is not exceeded, no further examination will be possible.[7]

Paragraph 14:
The draft assumes that intangible assets (licenses, IP rights, goodwill or trademarks) must also be included in the calculation or valuation of the consideration.

This raises considerable difficulties. Such intangible assets should only be included in the calculation if their value can be clearly ascertained.

It should also be clarified (possibly also in para. 49) that classic patent, technology or data pools are not regarded as mergers. Otherwise, it seems possible that the threshold in Sec. 35 para. 1a GWB could be interpreted in this direction.[8]

Paragraphs 18-33:
Paras. 18-33 describe in detail the manner in which the transaction value is to be calculated and how this calculation is to be documented.

These specifications require considerable effort of the parties. On the one hand, this is understandable in order to allow the Office to make the most accurate assessment possible in the face of a complex matter. It is also conceivable that this will encourage the parties involved, in the interests of good corporate governance, to establish in advance the facts upon which the valuation is based. On the other hand, the effort for the parties could also be regarded as disproportionate and not corresponding to a real negotiation situation.

On the basis of the aims of the merger control thresholds – allowing quick decisions to be taken on the obligation to notify – we therefore advocate simplification. Burdening the relationship between the parties with mutual disclosure of their considerations in the negotiations should be avoided. Such a burden could arise, for example, if it turns out that buyers and sellers have internally valued a certain risk or a certain production plant differently. Furthermore, assessment and disclosure could lead to an exchange of information that is problematic under competition law.

For the sake of simplification, it should be considered to require presentation of the purchase contract only. In case of doubt, a closer examination will be warranted.

Paragraph 46:
Paragraph 46 stipulates that "in case of an examination" (*im Falle einer Überprüfung*), the applicants must demonstrate that the threshold value has not been exceeded.

[7] cf. KOM, Commission Consolidated Jurisdictional Notice under Council Regulation EC No. 139/2004 on the control of concentrations between notice, (2009/C 43/09), para. 44.
[8] cf. German Monopoly Commission, Special Report 68, BT-Drucks. 18/5080, p. 147, para. 455.

This unilateral allocation of the burden of proof "in case of an examination" deviates unduly from the inquisitorial principle[9], meaning that the German Federal Cartel Office bears the burden of proof. A simple "examination" (*Überprüfung*) should not lead to a reversal of the burden of proof.

In this respect, paragraph 46 does not seem to be consistent: a presumption of correctness cannot simply be disregarded in every case of examination. This would, in effect, nullify the presumption in the first place. The purpose of the presumption of correctness would then be limited to justifying the decision of the German Federal Cartel Office not to carry out a review.

Paragraph 47:
The disclosure of the transaction value and its calculation to the competition authorities provided for in para 47 corresponds to Sec. 39 para. 3 sentence 1 no. 3 GWB.

However, the practical implementation should be particularly generous with regard to trade secrets and the principle of data minimisation. Companies often have a significant interest in keeping the purchase price confidential.[10] The publication of the notification by the German Federal Cartel Office in its list of ongoing merger control proceedings signals to the market that the purchaser has paid an amount exceeding EUR 400 million. If the purchase price and the basis of the valuation are documented in detail in the files of the German Federal Cartel Office, this only increases the requirements for redactions in the event of claims of information against the Cartel Office, without providing any additional value for the competitive examination.

If the parties consider that a notification is required, this finding should generally be sufficient for the authorities. The risk of unnecessary notification of transactions seems non-existent. Consequently, the requirements in paragraph 47 should be significantly reduced.

Paragraphs 53-54:
Paras. 53-54 contain general explanations on the meaning and purpose of the thresholds.

These remarks seem dispensable at this point and their deletion may therefore be considered.

Paragraphs 61-103:
Section D of the draft guidance contains remarks on substantial domestic operations within the meaning of Section 35 para. 1a No. 4 GWB.

This is a matter of particular directional importance which gives the German Federal Cartel Office significant room for interpretation. The criterion of “substantial domestic effect” in particular should not be interpreted extensively, but with regard to international comity. Rather, one might take the opportunity to create a "safe harbour" for unproblematic cases.[11] The criterion of substan-

[9] cf. Quellmalz in: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann, Kartellrecht, 3. Aufl. 2016, § 57 GWB para. 1.
[10] critical therefore Podszun/Schwalbe, NZKart 2017, 98, 104.
[11] cf. Meyer-Lindemann in: Kersting/Podszun, Die 9. GWB-Novelle, 2017, chap. 12 para. 43 ff. see also Podszun/Franz/Marx, Stellungnahme zum Merkblatt Inlands-

tial domestic effects could otherwise lead to extensive, time-consuming investigations that are entirely unhelpful when determining the obligation to notify.

Mergers should primarily be examined where they substantially affect markets. In view of the proliferation of merger control regimes in the world, there are almost no regulatory gaps left internationally, even though standards may still differ.

Particularly in cases of international joint ventures with German participation, there is a risk that Sec. 35 para. 1a GWB will be considered, despite of the fact that effects in Germany may be marginal. A pertinent example would be a German company acquiring, together with an Indian investor, a target company in Malaysia, which on a small scale also supplies to Germany and carries out significant research. Should such a case really be examined in Germany, if the German company and the Indian investor acquire joint control through veto rights and jointly invest more than EUR 400 million?

The actual competitive risks in other joint venture cases can also be assessed under Sec. 1 GWB/Art. 101 TFEU, so that merger control could be dispensed with more easily. A corresponding clarification would be desirable.

Paragraphs 71, 73, 76:
Paras. 71, 73, 76 explain the evaluation of substantial domestic effects in cases of research and development activities.

These remarks may, in some respects, be given a clearer focus.

Firstly, given the link to the effects doctrine, it seems questionable whether the location of R&D activity should be the primary decisive factor. The focus should rather lie on the market relevance of these activities.

Secondly, there is no reference to the forecasting period of merger control, which could define the time period in which market effects are to be taken into consideration. It seems questionable to create the impression that research on products that may only be marketable in six years' time will already be part of merger control with respect to the transaction value threshold.[12]

The criterion could therefore be formulated more simply: development activities will be covered if it is expected that a product or service will be launched on the market in Germany within the forecast period of the merger control.

Thirdly, cases not classically associated with R&D activity should also be covered. In this respect, it could be made clear that, for example, the development of a simple new app or a new business model is also included. These cases in particular have prompted discussions in the digital sector under the heading of "buying out competition".

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auswirkungen in der Fusionskontrolle des Bundeskartellamts, 2014, available online at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Stellungnahmen/Stell Stellungnahme%20-%20Konsultation_Leitfaden_Marktbeherrschung_Rupprecht_Podszun_2014.html.

[12] However, it has to be acknowledge that in the latest practice of the commission (e.g. KOM, 27.3.2017, Fall M.7932 – Dow/DuPont) innovation activity has been given a more important role and as such should be subject to audit by the competition authority.

Paragraph 81:
Paragraph 81 explains how to determine the significance of the domestic effect of research and development activities.

The required effort seems to be disproportionate in the context of determining the obligation to notify the merger, for example for patents and patent quotations. An analysis of the patent portfolio may take too long and be too cost-intensive.

It seems simpler and more relevant to have regard to entrepreneurial planning, e.g. whether a market entry is planned in Germany and whether the aim is to achieve a relevant market share. This may be drawn from existing business plans.[13]

Paragraphs 85, 92:
The case studies in paras. 85 and 92 indicate the substantiality of the domestic effect concerning apps.

The examples would be more informative if the authorities were to indicate a number of users up to which the domestic effect is not considered substantial. Instead, the values mentioned here (1 million users in Germany, 100,000 or 70,000 users in Austria) appear to be within a scale that could be considered "insubstantial" (*nicht-erheblich*). By comparison, the number of users of WhatsApp, the communication app whose acquisition by Facebook ultimately promoted the introduction of the transaction volume threshold, is estimated at 40-50 million in Germany.[14] It is also unclear in what respect the substantiality has to be seen at all, i.e. what should be the reference point for assessing substantiality (especially if a market definition is to be avoided when determining the thresholds).[15]

III. Prospects

According to Sec. 43a GWB, an evaluation of Sec. 35 para. 1a GWB is planned for 2020. In addition to the points raised here, the following considerations should be taken into account:

- It is to be expected that other jurisdictions will include such a threshold in their merger control laws. Within the EU, efforts should be made to harmonise both the threshold value and interpretation of the provisions.
- The threshold value may be set too high, as the case of Microsoft/6Wunderkinder demonstrates.[16]
- The current regulation leads to a policy contradiction with turnover thresholds in Sec. 35 GWB, which should be avoided.[17]

[13] cf. Podszun, Innovation, Vielfalt und freie Wahlmöglichkeiten – Neue Regeln für die digitale Wirtschaft, 2018, p. 55 f.
[14] see https://de.statista.com/themen/1995/whatsapp/.
[15] cf. Podszun/Schwalbe, NZKart 2017, 98, 104.
[16] cf. Meyer-Lindemann in: Kersting/Podszun, Die 9. GWB-Novelle, 2017, chap. 12 para. 51 ff.
[17] cf. Pohlmann/Wismann, NZKart 2016, 555, 561; Meyer-Lindemann in: Kersting/Podszun, Die 9. GWB-Novelle, 2017, chap. 12 para. 21 ff.; Podszun/Schwalbe, NZKart 2017, 98, 104.

Competition authorities should review their practice on a regular basis and re-evaluate the guidance at a designated time.

It should be noted that the competition authorities were faced with an extremely difficult task. They were required to provide practical guidance for a new regulation that had not yet been tested in the EU, and which also found only brief expression in the law. As practical experience with this regulation is still limited, this task was indeed demanding. It is therefore all the more commendable that the authorities have taken on this task. The guidance creates a greater degree of legal certainty for companies. This also counteracts the risk of initially taking decisions based on, perhaps unfortunate, individual cases which are subsequently given too much weight by legal practice.

Notwithstanding diverging views regarding the details, it is essential that the transaction volume-based threshold be considered an important building block for the reform of competition law in the digital age. The competition authorities' guidance can make a significant contribution to the application of new standards in Austria and Germany.

The cooperation between the German Federal Cartel Office and the Austrian Federal Competition Authority is an excellent example of the harmonisation of antitrust practice through soft law. The aim should be to achieve convergence between the two jurisdictions – Germany and Austria – in order to minimise transaction costs. In the future, an agreement on substantive standards could also be considered with regard to the threshold value, the de minimis rule and significant domestic activity. We very much welcome the fact that the German Federal Cartel Office is continuously reaching out to foreign authorities.

Finally, it should be noted that the mere examination of a concentration increases transparency in the economy but also creates increased transaction costs and loss of time for the parties if no significant impediment to effective competition can be found.[18] The fact that the European Commission was ultimately given jurisdiction for reviewing Facebook/WhatsApp did not lead to a competitive intervention. The case has been cleared without concern. The new threshold is a formal hurdle – no less, but certainly no more.

[18] The preventive function of the merger control has to be considered, some proposed transactions may not be pursued further because of the possible intervention of the competition authority.