



Bundeskartellamt



**BUNDES**  
**WETTBEWERBS**  
**BEHÖRDE**

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

**Courtesy Translation – Please note that in case of discrepancies between the German and the English version of this guidance paper the German version prevails**

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## A. Introduction

- 1 The aim of the new provisions on transaction value thresholds, which were introduced in the area of merger control with the 9th amendment to the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB) and by the Austrian Cartel and Competition Law Amendment Act 2017 (Kartell- und Wettbewerbsrechts-Änderungsgesetz, KaWeRÄG), is to adapt competition law to the structural change triggered by technical developments and international competition.
- 2 Section 35 (1a) GWB and Section 9 (4) of the Austrian Cartel Act 2005 (Kartellgesetz, KartG) close a gap in the system of merger control so that it is able to perform its function to the fullest extent in an increasingly dynamic economic environment. This also takes account of the progressive digitalisation and integration of economy and society.
- 3 Section 35 (1a) GWB and Section 9 (4) KartG introduced the criterion of merger considerations as an additional, subsidiary threshold for the notification requirement. As a result, mergers where companies or assets, which (as yet) generate little or no turnover, are purchased at a high price can now be examined under competition law. The aim of the threshold is to cover cases where current turnover and the purchase price for the company differ to a disproportionate extent. The high purchase price in such takeovers is often an indication of innovative business ideas with great competitive market potential.
- 4 Market-leading companies are able to fully integrate emerging competitors or their assets into their own business by acquiring them in the early stage of their development and change or discontinue the original activities of the acquired company. From a competition policy perspective, such acquisitions may require a preventive merger investigation, especially with regard to protecting innovation potential and innovation competition in technology markets.
- 5 In view of the close interconnection between the national economies of Austria and Germany and the resulting, not inconsiderable number of merger projects, which must be notified both in Germany and in Austria, and the similar structure of the new thresholds, a level playing field for the companies involved should be created at the earliest opportunity. Within the framework of the close cooperation between the Bundeskartellamt (German competition authority) and the Bundeswettbewerbsbehörde (Austrian competition authority), the two authorities have taken on the task to publish a joint guidance paper for the first time. This project is made easier by the fact that Austrian lawmakers drew inspiration from the German government bill and associated documents. Unless stated otherwise, references to the explanatory memorandum should always be understood as referring to the German memorandum, however, for the reason mentioned

above, they are also relevant to the interpretation of the new Austrian provision. In case of differences between the German and Austrian legal situations, these will be dealt with separately below. The term “competition authority” refers to both the Bundeskartellamt and the Bundeswettbewerbsbehörde.

- 6 This guidance paper is based on initial experience with the new thresholds, discussions with selected lawyers specialising in competition law and mergers and acquisitions and submissions received during the public consultation on a draft version of the guidance paper. The paper aims to offer users first assistance with interpreting statutory provisions and represents the current legal opinion of the Bundeskartellamt and the Bundeswettbewerbsbehörde on the applicability of the new provisions. However, it cannot bind the German and Austrian courts in their interpretation of Section 35 (1a) GWB or Section 9 (4) KartG<sup>1</sup>. Furthermore, in the absence of sufficient case practice, it cannot yet model every possible case scenario or application-related issue and should be regarded as preliminary. As case practice evolves, this guidance paper will be updated, as necessary. In specific cases, the parties to the merger can contact the Bundeskartellamt or the Bundeswettbewerbsbehörde prior to a notification to resolve any queries regarding the notification requirement or discuss the description of their project in the notification.

## **B. Statutory provisions of Section 35 (1a) GWB and Section 9 (4) KartG**

- 7 The thresholds of Section 35 (1a) GWB and Section 9 (4) KartG are to be subsidiarily applied to the turnover-based criteria of Section 35 (1) GWB and Section 9 (1), (2) and (3) KartG. The thresholds of Section 35 (1a) GWB and Section 9 (4) KartG do not affect the practical application of the turnover-based criteria. No special rules apply to the turnover calculation of the turnover-based elements included in the new provisions.
- 8 With the new thresholds, projects will be subject to merger control in Austria and Germany if, subsidiary to the current requirements for turnover thresholds, among other things the value of a consideration reaches certain thresholds and the company, or part of the company, to be acquired shows significant domestic activity in Germany or Austria.
- 9 In addition to the thresholds described in this guidance paper, domestic effects are also a relevant factor for the applicability of competition law in Germany and Austria. In Germany, under Section 185 (2) GWB, the law covers all restraints of competition that have effects in Germany also if they were caused outside Germany. This also applies to

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<sup>1</sup> In Austria, it also cannot bind the Federal Cartel Prosecutor.

merger control and, in particular, to the notification requirement under Section 39 GWB. Mergers that exceed the turnover, transaction value and activity thresholds (and constitute a concentration) will only be subject to mandatory notification if they have domestic effects.<sup>2</sup> As regards Austria, reference is made to Section 24 (2) KartG, which states that the KartG only applies if the case has an effect on the domestic market regardless of whether it was implemented at home or abroad, and also to the associated practice of the Bundeswettbewerbsbehörde and relevant case law and literature on the domestic effects of mergers.<sup>3</sup> The Bundeswettbewerbsbehörde therefore takes the position that in Austria, the lack of a domestic effect as defined in Section 24 (2) KartG is excluded in cases where Section 9 (4) KartG applies.

10 The Bundeswettbewerbsbehörde and the Bundeskartellamt expect questions on the interpretation of the following three areas in particular:

- (a) Value of the consideration (see C. below)
- (b) Extent of domestic operations (see D. below)
- (c) Concentrations (see E. below)

The sections below aim to provide answers to these questions.

## C. Value of the consideration

### I. Value of the consideration within the meaning of Section 35 (1a) no. 3 GWB and Section 9 (4) KartG

#### 1. Definition and elements

##### a) Definition

11 The value of the consideration must be specified in euros. It encompasses **all assets and other monetary benefits** that the seller receives from the buyer in connection with the merger in question. As in commercial law (in Austria: company law), the term asset

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<sup>2</sup> Cf. the Bundeskartellamt's [Guidance on domestic effects in merger control](#) of 30 September 2014.

<sup>3</sup> Cf. *Urlesberger in Petsche/Urlesberger/Vartian*, KartG 2005, second edition (2016), Section 24 para. 1 et seqq.; the Bundeswettbewerbsbehörde's position on domestic effects (in German only): [https://www.bwb.gv.at/recht\\_publicationen/standpunkte/inlandsauswirkungen\\_von\\_zusammen-schlussen/](https://www.bwb.gv.at/recht_publicationen/standpunkte/inlandsauswirkungen_von_zusammen-schlussen/).

is to be interpreted in a broad sense. It covers all cash payments and the transfer of voting rights<sup>4</sup>, securities, tangible assets and intangible assets. This also includes considerations that are contingent on certain conditions, such as those specified in earn-out clauses<sup>5</sup>, or other additional payments to the seller agreed in connection with the merger that are conditional on the achievement of certain turnover or profit targets at a specific point in future (e.g. licence fees). Payments for non-competition by the seller must also be included unless they are already completely covered by other elements of the consideration.<sup>6</sup>

12 Generally speaking, a distinction must be drawn between the **company value** calculated on the basis of business methods and the purchase price and **consideration value** for a company. This is due to the fact that surcharges or premiums that exceed the determined value of the company are often paid for its acquisition. Consequently, they form part of the value of the consideration. The value of the consideration is therefore often higher than the value of a company calculated on the basis of a stand-alone valuation because the calculation of the consideration value is often critically influenced by the buyer's subjective assessments of the development of the company to be acquired after it will have been integrated in the buyer's company or corporate group.

13 The value of the consideration relates **only to the proposed merger project in question**. The value assessment does not cover already held or exchanged company shares, for example. Instead, a case-by-case assessment has to be carried out to determine whether individual acquisitions that are closely connected in material terms and timing should be regarded as parts of a single merger, in which case the considerations of the individual transactions should also be included in the calculation of that merger's consideration value. This applies, in particular, if individual acquisitions are related in a way that they can be attributed to an overall acquisition decision or are interdependent. Consequently, acquisitions that constitute a single process from an economic perspective and could influence the structure of the market affected by the merger must be regarded as forming a single merger<sup>7</sup>. This may be the case, for

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<sup>4</sup> It has to be noted, though, that a separate transfer of voting rights without the transfer of the associated share in the company is in general prohibited under German and Austrian corporate law, which states that the right to vote may not be separated from the other membership rights granted by a share (Abspaltungsverbot).

<sup>5</sup> This term describes agreements on the performance-based adjustment of the purchase price for a company.

<sup>6</sup> Cf. Bundestag Printed Paper 18/10207, p. 77.

<sup>7</sup> The contrary intention of the parties to the merger would be irrelevant in this context. For German law, cf. Düsseldorf Higher Regional Court, decision of 23 August 2017, para. 27 - Edeka-Tengelmann (VI-Kart 5/16 (V)). In Austria, Section 20 KartG states that the relevant factor is the true economic content and not the external manifestation.

example, if the aim is to acquire control over the company by purchasing shares from different shareholders. In cases where the transaction value thresholds apply, typically these shares are purchased at the same time or in quick succession so that not just the buyer but also the target company and the sellers are fully aware of the economic connection between the acquisitions.<sup>8</sup> The combined assessment of these acquisitions meets the amendment's aim to safeguard competition also with regard to takeovers of new companies whose shares may be held or sold by different parties. In case of contractually agreed phased acquisitions, the Bundeskartellamt will examine the agreed overall merger in terms of all acquisition phases at the time of the first acquisition.<sup>9</sup> As for Austria, according to the Austrian Cartel Court's most recent case law, the first completed acquisition<sup>10</sup> in a line of successive acquisitions that form part of the overall project already puts the merger into effect.<sup>11</sup>

**Example I a:**

A company holds 25% of the shares in the target company and acquires another 26% of shares. In this case, the value of the consideration has to be calculated only for the 26% of the shares that are to be acquired under the current plans.

**Example I b:**

A company already holds 25% of the shares in the target company. A further 26% of shares are purchased in the course of two legally separate acquisitions involving two independent sellers each selling their 13% share in quick succession. Through the two acquisitions the buyer intends to acquire a 51% majority stake in the target company. The two acquisitions of 13% each are closely connected with each other and must therefore be assessed together to calculate the consideration value.

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<sup>8</sup> For instance, cases where the founders of a start-up withdraw from the company by selling their respective shares to one and the same buyer.

<sup>9</sup> Under German law, acquisitions between the same buyers and sellers are also governed by Section 38 (5) sentence 3 GWB.

<sup>10</sup> A merger will be regarded as implemented as soon as there is the possibility of influence; cf. Austrian Supreme Court as the Supreme Cartel Court, 7 December 2017, 16 Ok 2/17f.

<sup>11</sup> Cf. Vienna Higher Regional Court as Cartel Court, 6 October 2015, 29 Kt 44, 45/15 – *Europapier International*; however, this decision concerned an acquisition from a single seller.

*b) Elements of the consideration*

- 14 Considerations can consist of **different items exchanged** between buyer and seller in return for the acquisition of a target company. This can include cash, securities (para. 39 ff.), company shares not traded as securities, other assets (real estate, tangible assets, current assets), intangible assets<sup>12</sup> (licences, usage rights, rights to the company's name and trademark rights) and considerations for non-competition (para. 60 ff.), for example.
- 15 Considerations also include **future and variable purchase price components** (para. 29 ff.) whose amount and time of payment are contingent on the future development of certain company parameters or certain conditions. This covers earn-out payments, which depend on the development of corporate key figures, such as the EBIT, turnover or sales figures, for example. Also included are payments that are conditional on milestones agreed between the parties involved, such as the achievement of specific steps in a drug approval process, and future licence payments.
- 16 **Liabilities assumed** by the buyer (para. 52) also form part of the consideration for the acquisition of a target company. In line with Mergers & Acquisitions (M & A) practice, the Bundeskartellamt and the Bundeswettbewerbsbehörde will usually add the interest-bearing portions of the liabilities to the value of the consideration.
- 17 The value of the consideration does not include transaction costs, such as fees for legal advice, commission payments to investment banks and fees for the provision of capital.

**2. Basis of the value assessment – validation and explanation of the assessment**

*a) Validation of the value assessment*

- 18 The information below specifies the requirements, in particular, with regard to describing the consideration value to the competition authority in a transparent manner. The aim is to eliminate any doubts about the calculation and the resulting amount of the consideration and demonstrate the applicability of Section 35 (1a) GWB and Section 9 (4) KartG as clearly as possible. However, it remains the responsibility of the parties to the merger to check the value of the consideration and establish if it is subject to notification, and if so, comply with the standstill obligation.

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<sup>12</sup> In terms of the transaction value thresholds, intangible assets form part of the consideration in any event if they are included in the purchase price payment transferred to the seller in the course of the merger. Where agreements on the use of rights that remain with the seller are made in connection with the merger, a case-by-case assessment must be carried out to examine whether the resulting payments by the buyer should be regarded as part of the consideration.



- 19 The purpose of explaining this information to the competition authority is to enable the authority to check and evaluate the **plausibility of the consideration value**. The closer the value is to the Austrian threshold of €200m or the German threshold of €400m, the more important the accuracy of the companies' explanation becomes. The more clearly the value is above or below the thresholds, the more acceptable it is to simplify the detailed explanation of the value assessment, as described below.<sup>13</sup> However, if a merger is put into effect without notification because the companies have come to the conclusion that the thresholds have not been met and that there is no notification requirement, the competition authority will naturally be free to investigate whether this constitutes a potential infringement of the standstill obligation.
- 20 In a number of cases, the calculation of the value of the consideration can depend on the merging parties' internal assumptions and expectations about the future. A **written confirmation of the value and its assessment submitted by the buyer's management** can improve the reliability of the information and simplify the investigation of the consideration value. This applies, in particular, to precautionary notifications or cases of doubt. The management of the purchasing company or, if applicable, its parent company or a natural person performing a comparable function should provide sufficient confirmation, which must specify the amount of the consideration value as declared in the notification. The confirmation must not predate the date of submission to the competition authority by more than 90 days. If the companies declare – for instance, in response to a query by the competition authority – that the transaction value is below €200m or €400m, as applicable, this statement may dispel any doubts expressed by the authority about the notification requirement or infringements of the standstill obligation. The management is advised to also confirm the value assessment method.
- 21 The value of a consideration that includes earn-out payments or other uncertain components or components whose value fluctuates can be validated more easily if **not only the buyer but also the seller**<sup>14</sup>, independently of one another, describe and explain how each of them calculated the consideration value.

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<sup>13</sup> Notifications under German law, must take account of Section 39 (3) sentence 2 no. 3 GWB. Therefore information about the value of the consideration and its components (para. 14 ff.) should be provided in any event. If the value of the consideration clearly exceeds the €400m threshold of Section 35 (1a) no. 3 GWB, the Decision Division of the Bundeskartellamt that is competent for the case in question may dispense with the submission of a more detailed explanation of the basis of the calculation.

<sup>14</sup> In Austria, a fine cannot be imposed on the seller of a company (or a substantial part of a company) for the violation of the standstill obligation (cf. OLG Vienna as Cartel Court, 24 November 2008, 26 Kt 10/08). In Germany, the seller is subject to mandatory notification in cases governed by Section 37 (1) nos. 1 and 3 GWB.

- 22 If necessary, the value of the consideration must be determined by a valuation report. In principle, past **valuation reports** may also be used as long as no significant factors affecting the value have arisen in the period between the preparation of the report and the notification of the project. If the relevant valuation assessment refers to a time that predates the notification by more than six months, any potential effects on the value of the consideration caused by this time difference must be clearly stated. This can also be done by confirming that the value has not changed substantially since the preparation date of the valuation report.
- 23 There are two possible scenarios if the parties to the merger **disagree on the exact value of the consideration**.
- 1.) The parties agree that the value of the consideration exceeds €400m or €200m. In this case, the project can be notified and the precise value submitted at a later date. The notification must include an estimate of the value of the consideration and state clearly that the thresholds will definitely be exceeded.
  - 2.) It is not clear whether the threshold of €400m or €200m will be exceeded. In this case, the parties can notify the merger on a precautionary basis provided that the plans are otherwise ready for notification, i.e. that they have been worked out in sufficient detail. This way, the parties can avoid a later infringement of the standstill obligation.
- 24 The notification of a merger project generally requires that the underlying merger project has been worked out in sufficient detail to meet notification requirements. In Austria, the parties have to at least agree on the planned structure and the schedule.<sup>15</sup> For an assessment under Section 36 (1) GWB, the plans have to be specified in sufficient detail with regard to the form of the merger, the pursuit of a merger by the bodies appointed to the management of the buyer(s), the companies involved, the turnover thresholds or the consideration value before the project can be notified in Germany.
- 25 If a precise value cannot be established but its likely **upper or lower limits** indicate that it will be clearly above or below the threshold under Section 35 (1a) no. 3 GWB or Section 9 (4) no. 3 KartG in the overall appraisal of the merger in question, it will be sufficient to explain and validate these limits. If the value is above or below the transaction threshold, depending on different possible scenarios, the parties should proceed as described in para. 35.
- 26 Validations of value assessments of future considerations have to be regularly described in a standard spreadsheet application.

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<sup>15</sup> Cf. *Gugerbauer*, KartG<sup>3</sup>, Section 10 KartG para. 2.

27 In Germany and in Austria, the parties can request that **information provided in the course of a merger notification is to be treated as confidential**. This may also include information about the value of the consideration. The Bundeskartellamt and the Bundeswettbewerbsbehörde are obliged to protect company and business secrets in their merger control proceedings. In proceedings before the Austrian Cartel Court (Phase II), the parties have in addition the opportunity to designate parts of the decision that they wish to exclude from publication under the publication procedure (Section 37 (2) KartG).

*b) Explanation of the value assessment; relevant date*

28 The value of the consideration can fluctuate over time. This usually applies to securities but may also affect cash held in foreign currencies. In contrast to a turnover analysis for a specific period of time, the value of the consideration has to be calculated for a specific point in time. The relevant factor determining whether a merger project has to be notified is the **completion date of the merger**.<sup>16</sup> However, there may be cases where the value (of the consideration at the time of completion) has not been specified because of value fluctuations at the time of the notification. In this case, the value of the consideration submitted **in the notification** can relate to the time the notification requirement was reviewed by the parties to the merger. However, if the value falls below the €200m or €400m threshold after notification, the companies can withdraw their notification and complete their project without being subject to merger control. On the other hand, a merger project that was initially not subject to notification can become subject to notification, for example, if the price of the foreign currency or shares offered as a consideration rise to such an extent that they now exceed the thresholds. In these cases, an obligation to notify the merger may arise before the date of completion. If the companies believe this to be possible, they would be well advised to notify their project.<sup>17</sup> In this way, the parties involved would be able to avoid that the implementation of the merger project is delayed by a standstill obligation in case of a notification requirement that arises only shortly before the merger is put into effect. Ultimately, the responsibility for reviewing the notification requirement lies with the competition authorities.

29 If various components of the consideration are to be paid at different times, the value of all subsequent payments, such as payments resulting from an earn-out arrangement, has to be determined with regard to the time of completion of the merger. This requires a particular degree of transparency to allow the calculated values to be verified. The

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<sup>16</sup> An earlier date would not conform to statutory provisions in Germany or Austria.

<sup>17</sup> In Germany, a precautionary notification is possible so that the respective merger project can be examined and can, where appropriate, be cleared without the question of the notification requirement being fully resolved.

individual steps of the value assessment to guarantee this transparency are described below.

- 30 The current value of future payments at the time the notification requirement is reviewed must be calculated on the basis of **discounting methods commonly used in the financial sector**, such as those used in multi-period (or dynamic) capital budgeting.<sup>18</sup> **Future payments** must be discounted to a cash value to calculate the value of the payments for a uniform date.
- 31 The calculation of a consideration that includes a cash value is usually based on assumptions and scenarios. The **dates** on which future payments will be determined and the applied **interest rate** (discount rate) are important aspects of the calculation. For all payments or values whose payment and reference dates differ from the completion date, the dates, the interest rates applied to discounting and the cash values relating to the completion date have to be identified to allow the calculation of the consideration value to be verified. This applies to both fixed and variable purchase price components. If different variable purchase price components were agreed, such as payments conditional on the achievement of profit levels and payments depending on non-profit milestones, the individual **cash values** of each component have to be **added together**.
- 32 **Payments made during the financial year** may be combined into annual payments to provide details of payment dates and calculate the cash value of future payments. These combined payments can be discounted on an annual basis.
- 33 Information on future payments, payment dates and the interest rates used to calculate the cash value will normally be based on **assumptions**. The companies involved must describe and explain their assumptions in a transparent manner to enable the competition authority to verify the plausibility of the information. For example, if future payments and their payment dates depend on uncertain future turnover targets, these turnover targets and the turnover forecast forming the basis of the expected payments have to be specified and explained. Interest rates usually consist of different components that are incorporated on the basis of assumptions. The amount of individual components and assumptions has to be specified and explained.

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<sup>18</sup> The following information refers to the consideration of future payments. An equivalent discounting method should be applied if the consideration includes past values. This may be the case if the value of purchase price components was determined in the past.

### **Example II:**

A pharmaceutical company plans to take over the subsidiary of a biotechnology company that has developed promising active ingredients. A drug containing one of the ingredients has already been approved for use in the EU. The agreed purchase price consists of different components. (1) A one-off payment after merger control clearance had already been agreed (up-front payment). (2) A success-related component consists of annual payments amounting to 10% of the turnover generated by the pharmaceutical company with the products of the biotechnology company over a period of ten years from the date when the turnover exceeds the €200m mark for the first time (bonus payments).

The plans are notified immediately after the agreement is signed. In this case, the value of the consideration is calculated as follows. The current value of each component has to be determined. These cash values have to be added together to give the value of the consideration. In the above case, the value of the consideration consists of two components: (1) the initial one-off payment has to be included at its current value, i.e. to 100%. (2) The bonus payments have a future due date and are uncertain. They have to be discounted to the present date accordingly. For the bonus payments, the date on which the turnover is expected to exceed the €200m threshold must be identified. The anticipated turnover development must also be explained. The amount of the bonus payment has to be declared for each year in which a bonus payment is due. The cash value of each bonus payment must also be declared. The individual cash values of this component have to be added together.

The fact that these payments affect foreign markets is irrelevant. No distinction is made between “domestic” and “foreign” components of transaction values.

- 34 Payments expected in the future can be **uncertain** in terms of their probability. If future payments have been weighted according to their probabilities in order to calculate their value, these probabilities and their underlying assumptions must be explained. If uncertainties have been taken into account by adding a premium on the discount rate, the amount of the relevant component must be specified and explained in the interest rate statement.

### Example III:

A further component, (3) milestone payments of €10m each, has been added to the consideration in example II. These payments will be due when the products of the target company are approved in Brazil and South Africa and the total turnover generated with the products reaches the €400m and €600m thresholds for the first time.

For these milestone payments (3), the date on which the products are expected to be approved in Brazil and South Africa and an estimate of the likelihood of the approval in the two countries must be given. Based on this information, the probability-weighted cash value of these payments must also be specified. The calculation of the cash value therefore takes account of the fact that the payments will be due in future and that there is no certainty that the payments will become due at all. The fact that the payment is due in future is taken into account by discounting the amount. The uncertainty of the payment is taken into account by multiplying the value of the payment by its probability. If the product is expected to be approved in Brazil within three years with a probability of 85%, for example, by which time a payment of €10m would become due, the cash value would be €10m x 0.85 x  $(1/(1+\text{discount interest rate})^3)$ . In case of a discount interest rate of 10%, this would amount to just under €6.39m. Other milestones have to be calculated in the same way. The cash values of the individual milestone payments have to be added together.

35 Whenever considerations can fluctuate significantly in value, different scenarios resulting in different consideration values are usually discussed prior to a merger project. These alternative scenarios and their resulting consideration values must be specified and explained to validate the consideration value anticipated by the parties to the merger. The reason why these alternative scenarios do not match expectations and merely represent less likely alternatives to the anticipated consideration value must also be explained.

#### *c) Consequences of a change in value after a merger is put into effect*

36 If the value of the consideration for a merger project was determined according to this guidance paper and the 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 is put into effect**. This may be the case if securities are exchanged, for example. The consideration

can consist of shares whose value at the time the merger is put into effect was calculated according to this guidance paper and remained below the €200m threshold in Austria or the €400m threshold in Germany. If the value exceeds the thresholds later, i.e. after the merger is put into effect, this will **not constitute an infringement of the** standstill obligation. The parties to the merger are advised to document the value assessments made according to this guidance paper in case the competition authority intends to carry out an examination.

## II. Assessment methods/case scenarios

37 There are three particular case scenarios associated with the calculation of the consideration value: (1) the consideration consists of cash, (2) the consideration consists of securities and (3) the consideration consists of assets other than securities or cash. Various combinations of these three case scenarios are also possible. The specifics of the value assessment of these three case scenarios are described in the sections below.

### 1. Value of considerations in cash transactions

38 In solely cash-based transactions, the value of the consideration is equal to the value of the exchanged cash.

### 2. Value of considerations in securities transactions

39 In mergers where securities are transferred as a means of payment, for example if the seller receives the buyer's shares as a consideration, the calculation of the consideration value has to take account of the **fair value hierarchy** of these securities. The aim of the fair value hierarchy is to make the assessment of the consideration value as simple and reliable as possible for the parties.

40 According to the fair value hierarchy, the value of a security that is currently being traded on a **liquid market** must be based on its market value. This market value is presumed to reliably reflect the actual value of the relevant security.

41 If a security is currently **not being traded on a liquid market**, its value may be assessed on the basis of valuation reports. Valuation reports typically rely on assumptions used for value assessments. As a result, they do not necessarily reflect a value that would correspond to a market value on a liquid market.

42 Therefore, the key distinguishing criterion for the value assessment is whether a security is currently being traded on a liquid market. The relevant assessment method is described in the cases below.

43 **Case 1:** There **currently is a liquid market** for the security to be exchanged. In this case, the value of the security must be based on its market value. Since a simple snapshot market price could be the result of a random value fluctuation, value assessments based on market values must take the following into account: <sup>19</sup>

1. Security prices must equal the volume-weighted average market price during the last three months preceding the notification.
2. If the securities have not yet been admitted to trading on an exchange for a minimum period of three months, their value must be based on the weighted average market price since the security was admitted to trading.

44 If the market price of the securities that are to be exchanged as a consideration was observed on fewer than one third of the trading days in the previous three months and if several successively observed market prices deviate by more than five per cent from each other, the liquidity used to assess the market value will be regarded as insufficient for the purpose of notification (see case 2 below).

45 **Case 2:** There is **no liquid market** for the security to be exchanged. In this case, the value of the securities that are to be transferred as a consideration can be determined on the basis of a valuation report, which may include assessments that had already been prepared in the context of the implementation of the merger. This limits the burden on the companies involved and on the competition authority.

46 Assessments based on valuation reports are governed by the principles of the free choice of method, the presumption of correctness and the disclosure obligation.

47 Depending on the specifics of the case, it may be necessary to apply business methods to assess the value of companies and securities. This must take particular account of the principle of the **free choice of method**. According to the free choice of method, the notifying party is generally free to decide which assessment method to apply provided it is recognised in **company valuation practice seeking the continuation of the acquired company**. This means that a value assessment must not be based on liquidation values because it often produces lower values compared to an assessment based on the continuation of a company. In cases where securities are exchanged as a consideration for the acquisition of a company, there is no reason to assume that sellers would be interested in the liquidation value of a company whose shares they receive.

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<sup>19</sup> Similar to Section 5 of the German Securities Acquisition and Takeover Act Offer Ordinance, Section 26 of the Austrian Takeover Act refers to the weighted average market price during the last six months. However, a period of three months seems to be appropriate for both jurisdictions.



48 The value assessment is **usually presumed to be correct** if the amount of the consideration value, including any liabilities assumed, was calculated on the basis of an appropriate value assessment and confirmed by the company managements. However, this does not affect the competition authority's right to examine the information.

49 The **basis for the calculation of the value** must be disclosed to the competition authority. The choice of assessment method must be declared and justified. Valuation reports must assess the value in detail and in a comprehensible and plausible manner. The plausibility of the assumptions underlying the assessment must also be verified. For example, if comparative methods, such as a valuation based on multiples, are used, the composition of the comparison group must be specified. Where overall assessment methods, such as discounted cash flow methods or earning capacity value methods, are applied, the growth forecasts and discount rates, in particular, require explanation.

### **3. Value of considerations in mergers involving asset swaps**

50 The calculation of the consideration value in mergers where payment consists of the swapping of assets that are not securities or company shares but, for example, tangible fixed assets or current assets, real estate or intangible assets, such as licences, relies on an assessment of these assets. The relevant assessment method must be appropriate for the subject and reflect the intended use of the asset.<sup>20</sup> This has to take into account the value assessment principles set out in para. 18 to 26. In a corporate transaction, balance sheet values of the relevant assets often do not reliably reflect their current value as part of the consideration.

### **4. Mergers with cash, security and asset swap elements**

51 If the consideration consists of different elements, such as cash, securities and other assets, these will have to be assessed separately, added together and specified as a monetary value in euros. All the components of the consideration must be assessed on the same date. As described in para. 28, this must be the completion date of the merger or, as an auxiliary alternative, the date the notification requirement was reviewed by the parties to the merger.

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<sup>20</sup> Literature and case law refer to the earning capacity value method, various discounted cash flow methods and valuations based on multiples as examples in this context. Cf. Peemöller (2015), *Praxishandbuch der Unternehmensbewertung*; IDW (2008): *IDW Standard: Grundsätze zur Durchführung von Unternehmensbewertungen (IDW S 1 in the version of 2008)*.

## 5. Assumed liabilities

52 Liabilities assumed by the buyer must also be regarded part of the consideration for the acquisition of a target company and have to be added to the value of the purchase price (para. 14 ff.). This is set out explicitly in Section 38 (4a) GWB. The explanatory memorandum in Austria expressly incorporates a corresponding reference. This applies to **all liabilities assumed by the buyer in connection with a merger**, that is, to liabilities of the acquired company and to additionally assumed liabilities of the seller regardless of whether the acquisition involves assets or shares of the target company. In case of **asset acquisitions**, it should be noted that only individual assets are transferred. Accordingly, liabilities will be added to the purchase price only if in addition to acquiring the assets, the buyer also assumes liabilities of the seller. In case of **share acquisitions**, the **liabilities of the target company** are also relevant alongside any liabilities of the seller that the buyer may assume. The liabilities of the target company generally reduce the purchase price. The aim sought by the introduction of the transaction value threshold, which is to determine the value the buyer attaches to the merger on the basis of the consideration value, can be achieved only if these liabilities are added to the purchase price.<sup>21</sup> The fact whether the target company is primarily debt-financed or equity-financed has to be irrelevant in this context. The assumption of liabilities demonstrates that the buyer considers the merger well worth bearing this financial burden and/or accepting the debt of the target company.

53 The explanatory memorandum of the GWB clearly states that the addition of the liabilities is meant to take account of M & A practice.<sup>22</sup> In line with these considerations, the Bundeswettbewerbsbehörde and the Bundeskartellamt currently take the position that the addition of liabilities should, as a rule, apply to the **interest-bearing components** of the liabilities only. Therefore the addition would not include non-interest-bearing liabilities, such as payables for goods and services.<sup>23</sup> The information given here relates to the **liabilities shown in the balance sheet of the acquired company** regardless of their allocation to a balance sheet item under Section 266 of the German Commercial Code (HGB) or Section 224 of the Austrian Enterprise Code (UGB). If the buyer acquires 100% of the shares in the target company, the value of the consideration must include all liabilities. If only a part of the company is taken over, the value is reduced accordingly.

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<sup>21</sup> For German law cf. Bundestag Printed Paper 18/10207, p. 77/78.

<sup>22</sup> Cf. Bundestag Printed Paper 18/10207, p. 77.

<sup>23</sup> This limitation to interest-bearing liabilities only corresponds to the approach applied to gross capitalisation or to a free cash flow to the firm valuation during a company valuation. The company value is determined by discounting all cash flows to entitled investors, i.e. equity and debt capital providers. The distinguishing interest criterion is not based on current interest payments alone but must also take account of liabilities whose issue amount and settlement amount differ from one another.

54 The liabilities assumed from the seller must be included in the consideration value to the extent to which they are assumed. The amount of the liabilities assumed from the acquired company or from the seller must be specified according to their current value as indicated in the balance sheet before the takeover, i.e. the amount that has to be raised to meet the liabilities (Section 253 (1) sentence 2 HGB or Section 211 (1) sentence 1 UGB). A special interim balance sheet is not usually required as proof. If a precise calculation of the relevant amount of the liabilities is not crucial to establishing the notification requirement (cf. para. 19), the last audited balance sheet prepared before the takeover, supplemented, as necessary, by appropriate documents detailing the development of the liabilities since then, will be sufficient.

## 6. Formation of a new joint venture

55 In case of the formation of a new joint venture, it may not be immediately obvious who should be regarded as the buyer.<sup>24</sup> Under German law, a new formation in this context refers to the formation of a previously non-existent company.<sup>25</sup> This is the company to be acquired. This situation is different from the situation where an already existing and operative company is turned into a joint venture by the entry of a new shareholder. In this context, the latter must be regarded as an acquisition by the new shareholder if the partial processes do not have to be regarded as a single merger (cf. para. 58).

56 In Austria, two types of formations have to be distinguished: According to case law, the establishment of a joint undertaking (with or without joint control) on the basis of existing assets constitutes a merger as defined in Section 7 (1) KartG. The details below are fully applicable to these cases. By contrast, the *genuine* (“*originäre*”) new formation of a joint venture (Section 7 (2) KartG), which does not involve the transfer of significant assets, cannot be subject to Section 9 (4) KartG due to the absence of current domestic activity so that section 6 of this guidance paper does not apply in this respect.

57 A new formation can involve several parties investing capital and assets in the newly formed joint venture and receiving shares or joint control in return. Consequently, several parties that create a concentration through their respective acquisitions of shares or

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<sup>24</sup> The term joint venture as used in this guidance paper is not associated with any other conditions, such as joint control, for example. However, it should be noted that a joint venture within the meaning of the Austrian KartG requires that the parent companies exercise joint control (cf. OGH 15 December 1998, 16 Ok 15/98 – Asphalt Mixing Plant I). For German law cf. Section 37 (1) no. 3 sentence 3 GWB.

<sup>25</sup> This also includes cases where a previously inactive shelf company (empty shell) is being activated. While a consideration value could be determined in relation to the formation of an inactive shelf company, it would not be possible to establish significant domestic activity within the meaning of the transaction value thresholds, cf. para. 64.

control may be regarded as the buyer. The **capital and assets contributed by each party as part of the merger**<sup>26</sup> represent their individual considerations. At the same time, this also constitutes a single merger as set out in para. 13. The value of the consideration within the meaning of Section 35 (1a) no. 3 GWB or Section 9 (4) no. 3 KartG is represented by the total of capital and assets transferred to the prospective joint venture as consideration for acquisitions that each constitute a concentration.<sup>27</sup> During the public consultation on the draft version of the guidance paper, different legal opinions were expressed on this approach to calculating the consideration value for the new formation of joint ventures.<sup>28</sup> The Bundeskartellamt and the Bundeswettbewerbsbehörde have therefore decided not to present a final analysis in this guidance paper but to carry out a case-by-case assessment in potential notification cases that would exceed the transaction thresholds according to the above-mentioned method in order to determine whether the respective merger is subject to notification.

- 58 If a new, previously non-existent company is formed in the first step of a phased approach and at least one new shareholder joins it in a second step at which point the newly formed company is transformed into a joint venture, the calculation of the consideration value must be examined on a case-by-case basis. The examination must determine whether this phased approach constitutes a single process or if the second step should be regarded as a process that is separate from the formation of the company. Indications of a single process include a mutually dependent decision by the shareholders of the joint venture or a close temporal and commercial connection between the two stages. The consideration value of a single process would be determined as set out in para. 57 subject to the different legal opinions on the method described there.

## 7. Amalgamations

- 59 In mergers that take the form of corporate amalgamations, it may not be immediately obvious which party to the merger should be regarded as the buyer and which party should be regarded as the purchased party. This applies, in particular, to amalgamations created by the formation of a new company. An amalgamation by absorption typically

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<sup>26</sup> This can also include data such as customer data.

<sup>27</sup> The considerations transferred by companies that have no (joint) control and, with reference to German law, do not acquire sufficient shareholdings within the meaning of Section 37 GWB are therefore to be excluded from the calculation of the total consideration.

<sup>28</sup> Under German law, the approach described here would require that the newly formed joint venture was not just the target company but also the "seller" within the meaning of Section 38 (4a) no. 1 GWB insofar as shares in the joint venture are allocated to the shareholders, for which they transfer capital and/or assets as a consideration.

corresponds to asset acquisition. In case of doubt, the Bundeskartellamt or the Bundeswettbewerbsbehörde will be pleased to provide advice on individual cases.

## **8. Payments for non-competition**

60 Payments for non-competition must also be added to the value of the consideration.<sup>29</sup>

61 This applies to payments for non-competition in connection with the implementation of a merger. Such a connection exists if a different consideration value would have been agreed in the absence of non-competition. This is to be assumed if non-competition was agreed in conjunction with the merger project and the two are closely connected in material terms and timing.

62 This does not affect the question as to what extent non-competition agreed in conjunction with the merger project constitutes a permissible ancillary agreement.

63 The calculation of the value of the payments is governed by the assessment principles set out in C.I. Since non-competition is usually included in the purchase price, independent assessments of non-competition will be of little importance in practice.

## **D. Substantial domestic operations**

### **I. Domestic operations within the meaning of Section 35 (1a) GWB and Section 9 (4) KartG**

#### **1. Preliminary notes on domestic activity**

64 In accordance with Section 35 (1a) no. 4 GWB and Section 9 (4) KartG, these cases are subject to merger control if the **company to be acquired**, or significant parts of the company or assets to be acquired,<sup>30</sup> have substantial operations in Germany or Austria. This is meant to eliminate cases from the scope of the provisions, which at their core relate to the takeover of a company only operating abroad. If a company that exclusively or primarily operates on the domestic market is taken over, it is usually safe to assume a substantial level of domestic activity. The criteria discussed below, which relate to the measurement of domestic activity, geographical allocation of domestic activity (local nexus), market orientation and significance<sup>31</sup>, enter into the systematic analysis when

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<sup>29</sup> Cf. Bundestag Printed Paper 18/10207, p. 77.

<sup>30</sup> In this context, it is therefore irrelevant whether other parts of the seller's company not taken over by the buyer are engaged in substantial domestic activity.

<sup>31</sup> The breakdown should therefore not be interpreted as a weighting or evaluation of these partial aspects of substantial domestic activity.

assessing whether the target company has substantial domestic operations. Since case practice is still at an early stage, the following points represent preliminary considerations.

## 2. Measurement criteria

- 65 Domestic activity within the meaning of Section 35 (1a) no. 4 GWB and Section 9 (4) no. 4 KartG has to be measured on the basis of the market-related activities of the target company. The measurement of domestic activity requires an appropriate **indicator** to determine the extent to which the target company is operating on the domestic markets. In contrast to Section 35 (1) GWB and Section 9 (1) KartG, domestic activity is **generally not measured on the basis of domestic turnover** even though this could very well be used as a criterion in mature markets that are characterised by turnover generation.<sup>32</sup> In the case scenarios addressed in the amendments, domestic activity will have to be primarily measured on the basis of indicators other than turnover.
- 66 Different criteria to measure activities may be applied to **different sectors** and activities. A definitive list of possible criteria cannot be provided here. The measurement should be carried out in line with industry standards that cannot be easily manipulated.
- 67 In the **digital sector**, the explanatory memoranda in Germany and Austria refer to user numbers (“monthly active users”) or the access frequency of a website (“unique visitors”) as examples of possible indicators.<sup>33</sup> In proceedings of the Bundeskartellamt, other industry key figures, such as “daily active users” (DAU), have also been used.
- 68 In Austria, the **location** of the target company is also a reference point and significant domestic activity as defined in Section 9 (4), no. 4 KartG must generally be presumed to exist if the company to be acquired has a site in Austria. However, this must also take account of the extent to which the activities at this site have domestic market orientation (see D.I.4). Accordingly, the acquisition of a holding company based in Austria with no market-related operations in Austria and with participations in companies that are only active abroad will not have sufficient market orientation despite its location.
- 69 In Germany, location alone is also not a sufficient indicator: when establishing domestic activity as defined in Section 35 (1a) GWB, the key factor is the **use of the asset for business activities and not just the local allocation of the asset**.
- 70 Domestic activity must be a **current activity**. In contrast to the examination of turnover thresholds under Section 35 (1) and (1a) no. 2 GWB and Section 9 (1), (2) and (4) nos. 1 and 2 KartG, the point of reference is not the last full financial year preceding the merger

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<sup>32</sup> Cf. para. 82.

<sup>33</sup> For a discussion of measures for online platforms and networks see, for example, Bundeskartellamt (2016): [Working Paper – Market Power of Platforms and Networks](#), p.70.

but the target company's activity at the time the merger is put into effect. Future or anticipated activities are not sufficient. This is a consequence of the fact that the link with "current or *anticipated*" domestic activity, as envisaged in the draft bill, was not included in the wording of the law. Domestic activity is also deemed "current" if it is carried out for the purpose of market entry, e.g. a drug approval on the domestic market.

### 3. Assessment of local nexus

71 In order to assess the local nexus of the activity, the specific form of the indicator of a local nexus in the respective jurisdiction has to be established.

72 This must be done in such a way that the activity of a company is attributable to the place of intended use. This is usually the **place where the customer is located**, i.e. where the customer's offices are, because this is where competition with alternative providers takes place. This location is generally the place at which the characteristic action of the legal relationship in question is performed, i.e. the place where services are actually provided or products are actually delivered.<sup>34</sup> Consequently, domestic activity must be presumed to exist, for example, if the company's products and services are taken up to a significant extent by domestic users even if this happens free of charge.

73 In Austria, local nexus can result from the location of the target company, as described, provided it has relevant domestic market orientation (cf. para. 68). As mentioned above, the key factor when establishing domestic activity as defined in Section 35 (1a) GWB is the use of the asset in terms of business activity and not just the local allocation of the asset. The two aspects need not necessarily coincide. In case of doubt, the relevant factor is the location of the activity.

74 **Research and development** can also constitute a relevant activity. Since this involves a very wide range of business activities, special requirements apply to the criteria relating to local nexus and significance. In this context, a local nexus requires not only that the research results are essentially marketable (cf. para. 79) but also that the products or services in question are likely to be sold domestically. Another prerequisite for the local nexus of a research and development activity is that the activity itself takes place in Germany or Austria respectively, or that there is another domestic activity that relates to market entry in Germany or Austria respectively:

1.) The location where the research and development activities take place is the location where the staff engaged in the relevant research and development carry out their activities. It is safe to assume that the equipment and infrastructure necessary for these activities, such as laboratories and instruments will be at this location. The address

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<sup>34</sup> Cf. Bundestag Printed Paper 18/10207, p. 75.

details of the inventor of a patent application can also be an indication of the geographical allocation of the research and development activities.

2.) Activities that relate to an entry into the domestic market can also constitute a relevant domestic activity. For example, this will apply to activities specifically aiming to obtain approval for a drug in Germany or Austria respectively, or to establish a domestic sales structure, such as the recruitment of staff or the conclusion of sales agreements. However, international registration in a third country under the Patent Cooperation Treaty (PCT)<sup>35</sup>, which includes Germany and Austria among its signatories, is not sufficient.

75 The general conditions for the application of Section 185 (2) GWB in Germany<sup>36</sup> and Section 24 (1) KartG in Austria apply regardless of whether a local nexus meets the conditions for the application of Section 35 (1a) no. 4 GWB and Section 9 (4) no. 4 KartG. As regards Austria, the Bundeswettbewerbsbehörde takes the position that the lack of a domestic effect as defined in Section 24 (1) KartG is excluded in cases where Section 9 (4) KartG applies (cf. para. 9 on the subject of domestic effect).

#### 4. Marketability of domestic activities

76 Domestic activities within the meaning of Section 35 (1a) no. 4 GWB and Section 9 (4) no. 4 KartG must have market orientation. Market orientation definitely exists if the target company provides a service against payment on an existing market. The application of the transaction threshold focuses on scenarios where this is not (yet) the case. Despite the absence of monetisation, an activity could conceivably still have market orientation, especially in the following potentially overlapping scenarios:

- A service is remunerated by means other than monetary payment.
- A service is offered free of charge but is monetised in a different way or can be expected to require payment in future or be monetised in a different way in future.
- The activity consists of research and development of (future) products or services.

77 The **first category** includes considerations that consist, for example, of a user of a free app supplying data or consuming advertising.

78 The **second category** is particularly common in digital services. A conceivable case could involve an app that is initially offered for free until it reaches a certain level of

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<sup>35</sup> Intentionally left blank

<sup>36</sup> Cf. in principle Bundeskartellamt (2014): [Guidance on domestic effects in merger control](#), 30 September 2014. However, the current version of the leaflet, which was prepared before the entry into force of the transaction value threshold, does not cover the relationship between Section 185 (2) GWB and Section 35 (1a) GWB.



proliferation and a certain degree of popularity. At that time it will be offered against payment, otherwise monetised, e.g. through advertising revenue, or provided both as a free version and as a paid premium version.

79 The **third category** must be distinguished from basic research<sup>37</sup>. The determining factor is whether the research result will be marketable. It is irrelevant whether turnover has already been generated or whether the product has been launched. In pharmaceutical research, for example, this applies to the planned acquisition of rights to substances that are already in an advanced phase of clinical trials. Research results can generally be assumed to be marketable if Phase III of clinical trials, which examines the efficacy of a substance among a large group of patients, has commenced. This does not apply if the companies involved can plausibly demonstrate that the research result in the case in question is not sufficiently close to commercialisation despite having entered Phase III. In medical or medical engineering research, this may involve the acquisition of property rights (especially licences), which may be required for the development of new diagnostic procedures, new imaging procedures, orthopaedic aids or surgical instruments. The same applies to plant protection, where the acquisition of rights to recently discovered molecules that are now in the product development stage (“development” as opposed to “discovery”) can constitute a market-related domestic activity. A similar tiered assessment must be applied to research and development activities in other industries.

### **5. Significance of domestic activities**

80 Domestic activity within the meaning of Section 35 (1a) no. 4 GWB and Section 9 (4) no. 4 KartG must reach a significant level in addition to market orientation. Marginal activity on a domestic market is not sufficient.

81 While no quantitative limits have been defined by law, some guidance is provided by the legislative scheme and the purpose of the provision. The transaction threshold is to cover all those cases that have so far not been subject to merger control because the target company is not (yet) generating appreciable turnover but shows a high degree of economic and competitive potential. This may be the case, for example, because the target company’s product is not yet ready for the market or because the buyer is interested in it for reasons other than potential turnover. A purely future nexus alone is not sufficient. The wording of the Austrian and German provisions refers to existing domestic activity (cf. para. 70).

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<sup>37</sup> In case of basic research, a case-by-case assessment will have to be carried out to examine whether domestic activity on research/innovation markets is to be assumed, regardless of the applicability of the transaction value thresholds; cf. the decision of the European Commission of 27 March 2017, M.7932 Dow/Dupont.

82 Against this background, the Bundeskartellamt will find that there is no significance if the target company generated a turnover below €5m in **Germany** and if this turnover adequately reflects its market position and competitive potential. This is likely to be the case if the company's products generate significant turnover abroad but not in Germany, for instance, because the company has not (yet) established a sales structure in Germany. The threshold of Section 35 (1) no. 2 GWB therefore continues to be relevant in this respect. The catch-all element of the transaction value threshold does not apply here and notification is not required. The situation is different if domestic turnover is not an adequate indicator, for instance, because the company is active on a market that is not characterised by turnover or because its product has only recently come onto the market so that the low turnover generated so far does not reflect the competitive potential. In this case, significance must be determined on the basis of other criteria within the meaning of para. 65 ff.

83 The factors and criteria must be regularly modified for each sector to assess the significance of the domestic activity as defined in Section 9 (4) KartG. In these cases, turnover can also be used as a recognised benchmark in **Austria**. In contrast to Germany, lawmakers in Austria have not set an absolute threshold of €5m. However, the Bundeswettbewerbsbehörde will routinely find that there is no domestic activity if the turnover of domestic target companies is below €500,000 provided that this turnover adequately reflects the market position and the competitive potential of the target company.

84 The assessment of the degree of significance associated with the planned acquisition of **research and development activities** can be based on various conceivable criteria. These can include the number of staff engaged in research and development or the research and development budget, for example. The number of patents or patent citations can also be an indication. If a transaction primarily involves the acquisition of a domestic research site with sufficient domestic market orientation, it is safe to assume significant domestic activity.

## II. Case examples

### 1. The digital economy

#### a) *Smartphone communication app*

85 A global company plans to acquire the provider of a smartphone communication app. The app is targeted at end users worldwide, including those in Germany and Austria, and is currently being offered free of charge or almost free of charge by the company to be acquired.

- 86 **Local nexus:** the target company's app is being used by one million users in Germany and 100,000 users in Austria.
- 87 **Market orientation:** the product in question is offered to users, albeit free of charge or almost free of charge. The latter does not preclude market orientation.<sup>38</sup> Turnover is not a suitable benchmark in this case.
- 88 **Significance:** the app is targeted at end users in Germany and Austria, that is, at all consumers in the two countries. The target company has over one million users in Germany and 100,000 users in Austria. At the time of notification the "monthly active users" (MAU) figure for this product had been established as the industry's standard measure<sup>39</sup> for calculating the number of users. It can therefore be used for measuring its significance. Based on the ratios between users and consumers in both countries, the significance threshold has been exceeded.<sup>40</sup>
- 89 **Conclusion:** this case has to be notified to the Bundeskartellamt and the Bundeswettbewerbsbehörde when the value of the consideration is reached.

*b) International sports goods manufacturer buys software company*

- 90 An international sports goods manufacturer acquires a sports app developer.
- 91 The acquiring company is an international sports goods manufacturer, whose 60,000 employees generate a global turnover of €19bn; turnover in Austria exceeds the €15m threshold many times over. The acquiring company generates a turnover well above €25m in Germany. The buyer pays €500m for a 100% share in the software manufacturer.
- 92 The software company was founded by four Austrians several years ago and is one of the most successful providers of mobile sports apps worldwide. The company, which employs 120 people, reported 140 million app downloads and 70 million registered users.
- 93 **Local nexus:** the apps are targeted at end users, that is, all consumers in Germany and Austria.
- 94 **Market orientation:** the products are made available to users free of charge or as paid premium versions.

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<sup>38</sup> Cf. para.76.

<sup>39</sup> Other industry key figures, such as "daily active users" (DAU) may also be used.

<sup>40</sup> A threshold cannot be quantified in the abstract at present because there is as yet little case practice. A reference value other than the total number of end customers or consumers may be appropriate for special applications.

95 **Significance:** the apps are used by 70,000 customers in Austria and one million customers in Germany. The significance threshold has been exceeded in both countries.

96 **Conclusion:** the merger has to be notified in Austria and in Germany.

## **2. Mechanical engineering company buys established custom motor manufacturer**

97 A company is selling its established custom motor business to a mechanical engineering company for a purchase price of over €400m. The global turnovers of the acquired company and the buyer each exceeded €300m last year. The buyer generated a turnover well over €25m in Germany and over €15m in Austria. However the turnovers of the acquired company were only around €1m each in Germany and Austria. The industry has been characterised by interrelationships based on payment and high turnover volumes for many years. The company has a production site in Austria.

98 **Local nexus:** the turnovers of the acquired company were around €1m each in Germany and Austria.

99 **Market orientation:** the industry has been characterised by interrelationships based on payment and high turnover volumes for many years. Therefore, the turnover generated so far reliably reflects the market position.

100 **Significance:** since the market position of a company in this industry is reliably reflected in the generated turnover, the turnover must be used to assess the significance of the domestic activity in Germany. However, the target company's €1m turnover is not sufficient to presume significant activity. In this case, the relevant threshold in Germany would be the second domestic turnover threshold of €5m. However, the production site in Austria is a relevant factor.

101 **Conclusion:** this case does not have to be notified to the Bundeskartellamt. The merger has to be notified in Austria because the company has a site in Austria which is a production site. The question as to whether seen in isolation the turnover generated in Austria should be considered as significant domestic activity can be left open in this case.

### 3. Acquisition of a pharmaceutical ingredient<sup>41</sup>

102 The following cases deal with the acquisition of a domestic company, which owns an innovative pharmaceutical ingredient.<sup>42</sup>

#### *a) Newly approved drug*

103 A foreign pharmaceutical company acquires a company in Germany. The object of the company's activities is a drug that was approved in the EU and the US shortly before the planned merger. In the US, the company achieved a turnover of €15m in the first year after approval and €40m in the following year. In Germany, turnover was only around €1m in the first months after approval. The buyer expects that turnover could reach €10m annually after a full-scale market launch. No turnover was generated in Austria and no preparations were made to enter the Austrian market. It is safe to assume that domestic activity currently occurs in Germany because the drug is already being offered on the German market. Despite the small amount of turnover achieved so far, this activity can also be assumed to be significant. The turnover generated to date may be low, however, since the drug is only at the initial stage of commercialisation, the small amount of turnover achieved so far in Germany does not accurately reflect its competitive potential. The competitive potential reflected in the expected future turnover is an indication of significant domestic activity occurring already at this stage. This result would not hold if the companies could plausibly demonstrate that no appreciable further growth in turnover was to be expected.

104 **Conclusion:** the merger has to be notified in Germany but not in Austria because of insufficient domestic activity.

#### *b) Drug development*

105 A foreign company acquires a company that grew out of the research laboratory of a German university ("spin-off"). The main object of the company's activities is the development of a drug that has just entered phase III of clinical trials; the rights to the ingredient and drug will also be transferred. In this case, turnover cannot be used as a benchmark of domestic activity. However, since the transfer involves an ingredient/drug in an advanced phase of clinical trials and a research site in Germany, significant domestic activity can be presumed to exist in Germany. The fact that the buyer is prepared to pay €400m is an indication of significant activity; this is also true if this is a "small" research laboratory according to the number of researchers or patents. The

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<sup>41</sup> The following information relates to significant domestic activity. With regard to the review of the notification requirement, the following examples presume that all other conditions have been met.

<sup>42</sup> For the importance of the protection of innovation activity in the 9th amendment to the GWB, also see Bundestag Printed Paper 18/10207, p. 70.

requirement for significant domestic activity aims to ensure that only cases with a sufficient local nexus become subject to national merger control. This will usually be the case for a company that is primarily active in the respective jurisdiction. Since the target company has no sites or approved drugs in Austria, it is safe to assume that there is no sufficient local nexus in Austria.

- 106 **Conclusion:** the merger has to be notified in Germany but not in Austria because of insufficient local nexus.

## E. Concentrations

- 107 If the provisions of merger control apply, the question whether a project is subject to examination has to be answered also by establishing whether it constitutes a concentration.
- 108 An affirmative answer to the question should not represent a problem if the value of the purchased **company shares** meets the thresholds of Section 37 (1) no. 2 GWB or Section 7 (1) KartG. To this end, this case is no different to any others.
- 109 However, a merger that has been structured in the form of an acquisition of **individual assets** (as part of an asset deal) may raise the question whether this amounts to a concentration in terms of the acquisition of a substantial part or asset of another company or the acquisition of control.
- 110 According to the **GWB and German case law**<sup>43</sup>, the acquisition of assets is only relevant if the assets are purchased in full or to a substantial extent. Before the 9th amendment to the GWB, the question whether an asset was substantial depended, in particular, on whether it was notionally capable (in qualitative terms) of changing the buyer's position on the relevant market. In addition, the asset had to offer the possibility for the buyer to assume the existing market position of the seller.
- 111 The 9th amendment to the GWB not only introduced the new transaction value threshold, lawmakers also made it clear that the presumption of a market does not conflict with the fact that a **service is being provided free of charge** (Section 18 (2a) GWB).<sup>44</sup> This means that services remunerated by means other than monetary payment can create a market position that a buyer could assume when acquiring an asset.

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<sup>43</sup> Federal Court of Justice (BGH), 7 July 1992, KVR 14/91 – trademark acquisition; BGH 10 October 2006, KVR 32/05 – National Geographic I.

<sup>44</sup> Bundestag Printed Paper 18/10207, p. 76

- 112 However, the question as to whether the requirement that the buyer be enabled to assume an *existing* market position of the seller can be maintained unconditionally even in the case of research and development activities has not been resolved yet. In this case, there is no current market position that could be transferred to the buyer. In accordance with Section 37 (1) no.1 partial sentence 2 GWB and Section 37 (1) no. 2 sentence 2 final partial sentence GWB, an acquisition of assets or control can also exist if the target company has not generated any turnover yet. Therefore, the acquisition of a future market position through asset acquisition could be sufficient at least in cases involving research and development. Moreover, according to the explanatory memorandum, cases that involve the acquisition of companies whose turnover potential develops only after they have been sold should also be covered by the merger control provisions of the GWB. Companies whose business model is specifically oriented towards developing technologies or products (e.g. pharmaceutical ingredients) are given as an example.<sup>45</sup>
- 113 The mere possibility that a company with a high turnover could establish a market position with the acquired (part of the) asset or might not use the acquired (part of the) asset on a relevant market is to be subject to merger control, in particular, with regard to protecting innovation potential in technology markets. The government's reasoning on Section 35 (1a) GWB points out that "such acquisitions [...] (could) lead to market foreclosure effects, create market entry barriers and seriously restrict the competitiveness of innovation potential, for instance, as a consequence of market-leading companies fully integrating emerging competitors in an early development stage into their own business, changing or completely discontinuing the original activity of the acquired company."<sup>46</sup> This applies irrespective of whether this involves the acquisition of shares in a legal entity or the transfer of licences or other rights to research results. It would result in conflicting interpretations, if, for example, a pharmaceutical company's acquisition of all shares in a biotechnology start-up, which was developing a promising drug, was subject to merger control while the transfer of the rights to the new drug from the start-up company to the pharmaceutical company was exempt.
- 114 According to the explanatory memorandum of the 9th amendment to the GWB, the continuity of case law on asset acquisition, which states that a concentration exists only if the asset to be acquired is the basis of a *current* market position, is therefore in doubt. It might also be sufficient that the *future* market position of the seller can be influenced. The Bundeskartellamt will examine this on a case-by-case basis. Subject to specific case

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<sup>45</sup> Bundestag Printed Paper 18/10207, p. 71.

<sup>46</sup> Bundestag Printed Paper 18/10207, p. 72.

practice and case law, a preliminary enquiry or precautionary notification would be advisable.

- 115 With regard to the question of significance, **Austrian** case law and literature relating to Section 7 (1) KartG (full or partial acquisition of a company in the form of a merger) follow on from the possibility of assuming the seller's market position.<sup>47</sup> The adoption of Section 9 (4) KartG has not changed the legal situation in Austria with regard to the existence of a concentration.
- 116 In Austria, the KartG does not provide for a provision comparable to Section 18 (2a) GWB, as amended. However, the wording of the act does not conflict with such interpretation.

## F. Procedural issues

- 117 The new thresholds introduced with the 9th amendment to the GWB and the KaWeRÄG 2017 demand additional information when notifying a merger. Section 39 (3) no. 3 GWB, as amended, specifies that if Section 35 (1a) GWB applies, the value of the consideration for the merger under Section 38 (4a) GWB, including the basis of its calculation, must additionally be declared. The explanatory memorandum states in this context that the parties to the merger are themselves responsible for the value assessment even in complex mergers, which may involve an exchange of securities, other holdings and assets. According to Section 39 (3) no. 3a GWB, this must include information on the type of domestic activity. In Austria, the requisite teleological interpretation of Section 10 KartG also specifies that this information must be provided for notifications under Section 9 (4) KartG.
- 118 In accordance with Section 39 (5) GWB, as amended, the Bundeskartellamt can also request information about the domestic activity of a company, including details of figures, customer locations and the locations where its services are provided and used as intended. The Bundeswettbewerbsbehörde is already authorised to request similar information on the basis of the general power to obtain information in accordance with Section 11a of the Austrian Competition Act (WettbG).
- 119 The two authorities will always be pleased to discuss any issues arising from a specific transaction project and not dealt with in this guidance paper on an informal basis.

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<sup>47</sup> Austrian Cartel Court, 7 September 1995, 1 Kt 417/95.