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EUROPEAN SIZE OF TRANSACTION TESTS WITHIN THE EUMR'S CASE REFERRAL SYSTEM AND THE GERMAN-AUSTRIAN GUIDANCE PAPER[1]

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Abstract:

The acquisition of WhatsApp by Facebook in 2014 revealed that the internationally prevalent system of turnover-based merger control thresholds was struggling to cope with cases in the digital world in which merging parties, typically acquisition targets, do not generate sufficient turnover to fall under turnover thresholds of international merger control regimes. The German and Austrian legislators reacted by introducing new size of transaction tests in their merger control thresholds, with the NCA issuing respective guidelines in 2017/2018. In various jurisdictions and at the EU level, the question arose whether such thresholds should also be introduced, or whether it will suffice if Germany and Austria could control high value low turnover transactions and could refer them to the EU level under the existing EU Merger Regulation's referral mechanism. This article sheds light on this debate. It explains the details of the German and Austrian size of transaction tests and the joint German-Austrian guidelines, and analyses how they, and the typical transaction value merger cases, fit into the referral mechanism of the EU Merger Regulation.

Keywords:

transaction value threshold, merger control, referral mechanism, EU Merger Regulation

1 All views expressed in this article are strictly personal, and should not be construed as reflecting the opinion of the European Commission or the Bundeskartellamt.

NEW CHALLENGES FOR MERGER CONTROL

At least since the takeover of WhatsApp by Facebook in 2014, and the current debate about killer acquisitions, the global competition community has sought intensively for ways to cope with the challenges that the digital economy has brought about for merger control. Facebook/WhatsApp revealed that the prevalent system of turnover-based thresholds was struggling to cope with cases in which merging parties, typically merger targets, do not generate sufficient turnover to fall under turnover thresholds, but nevertheless play a prominent or paramount role in their respective markets.

In the good old merger control times, a company's turnover figures reflected its market position, and hence its competitive power. Without sufficient turnover, a company was typically not expected to have enough power to require its merger or takeover to be controlled. With business models in the digital economy, that perception changed. Like with WhatsApp, there are numerous cases in which a company's business model, especially in the case of a start-up, is aimed primarily at creating a market-leading position, in particular by relying heavily on network effects, and only at a second stage at generating cashflow and turnover with its market position.

The German and Austrian legislators reacted by introducing new 'size of transaction tests' in their merger control thresholds in 2017, not used before in the European Union and only rarely elsewhere. The ongoing international debate seems very interested in the German and Austrian experiences. In various jurisdictions and at the EU level, the question arose as to whether such thresholds should also be introduced, or whether it would be enough if Germany and Austria could control high value low turnover transactions and could refer them to the EU level.

This article intends to shed some light on this debate. Therefore, it first describes the merger control regime in Germany before the transaction value threshold was introduced. In section 2, it goes on to explain the new 'size of transaction test' that was introduced in Germany and Austria in 2017. The third step sets out respective guidelines for applying the test, and finally, in section 4, the EUMR's referral mechanism is explained, followed by a discussion on whether relying on the German and Austrian size of transaction tests is sufficient for merger control at the EU level, and whether these national regimes can compensate for the lack of such a test in the EUMR.

DEVELOPMENT OF NEW MERGER THRESHOLDS

The situation before the transaction value threshold: traditional turnover thresholds

Before the size of transaction test was introduced in Germany in 2017, the German merger control regime relied mainly on an entity's turnover as a measure of its market position, competitive strength and the local nexus of any of its transactions. Furthermore, according to section 185, paragraph 2 of the GWB, the effects doctrine applies.

A merger is therefore not subject to German merger control if it does not have any effects on German markets. Compared to other jurisdictions, the relevant German turnover figures that require a notification used to be very low, resulting in relatively high notification numbers of more than 1,200 transactions per year for the German Competition Authority – the Bundeskartellamt.[2] Prior to the new thresholds, a notification was required in Germany mainly if the following conditions were met in the business year preceding the concentration:

1) the combined aggregate worldwide turnover of all the undertakings concerned was more than EUR 500 million, and
2) the domestic turnover of at least one undertaking concerned was more than EUR 25 million, and that of another undertaking concerned was more than EUR 5 million.

However, even these comparably low thresholds were not suited to trigger a notification in the case of Facebook/WhatsApp, as WhatsApp did not achieve any substantial turnover. That led the German Monopolies Commission, a think tank and independent expert committee that advises the German government and legislature, to propose an alternative to the traditional turnover-based thresholds. It did so in 2015 in its *Sondergutachten 68: Wettbewerbspolitik: Herausforderung digitale Märkte* [Special Report 68: Competition policy: The challenge of digital markets] and proposed to complement the turnover thresholds of both the EUMR, the Regulation 139/2004, and the German Competition Act, the Gesetz gegen Wettbewerbsbeschränkungen,[3] by additional notification requirements based on the transaction volume.

For Germany the proposal foresaw a transaction value of EUR 500 million accompanied by a domestic turnover threshold for at least one undertaking of EUR 25 million.

For the EU level, the proposal foresaw a transaction value threshold of EUR 5 billion with a Community-wide turnover threshold for at least one undertaking of EUR 250 million (alternatively EUR 2.5 billion and a Community-wide turnover of at least one undertaking of at least EUR 100 million accompanied by a turnover of all undertakings concerned of at least EUR 100 million in at least three Member States and additionally in at least three of these Member States a turnover of EUR 25 million of at least one undertaking).

2 See Bundeskartellamt (2019) *Tätigkeitsberichtdes Bundeskartellamtes 2017/2018,* p. 133. Available from: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202017_2018.html [Accessed September, 12 2020].

3 See Monopolkommission (2015) *Sondergutachten 68: Wettbewerbspolitik: Herausforderung digitale Märkte*, para. 461, on p. 107, see also para. S54 of the summary. Available from: https://www.monopolkommission.de/de/gutachten/sondergutachten/sondergutachten-auf-eigene-initiative/117-sondergutachten-68.html [Accessed September, 12 2020].

New Size of transaction test

At the European level, the proposal was not implemented. In Germany, however, the legislator decided to introduce a new size of transaction test in 2017.[4] Therefore, a new section 35 para. 1 a was introduced in the German Competition Act, according to which the relevant transaction value thresholds are:

- in the last business year, the combined aggregate worldwide turnover of all undertakings concerned was more than EUR 500 million.
- in the last business year, the domestic turnover of one undertaking concerned was more than EUR 25 million. Neither the target undertaking nor any other undertaking concerned achieved a domestic turnover of more than EUR 5 million.
- the value of the consideration for the acquisition exceeds EUR 400 million.
- the target undertaking has substantial operations in Germany.
- Similarly, the Austrian Cartel and Competition Law Amendment Act 2017 (Kartell-und Wettbewerbsrechts-Änderungsgesetz, KaWeRÄG) introduced a new transaction-value-based threshold to the Austrian Cartel Act 2015 (Kartellgesetz, KartG). According to section 9, para. 4 of the amended Cartel Act, the relevant thresholds are:
- in the last business year, the combined aggregate worldwide turnover of all undertakings concerned was more than EUR 300 million.
- in the last business year, the domestic turnover of the undertakings concerned was more than EUR 15 million.
- the value of the consideration for the acquisition exceeds EUR 200 million.
- the target undertaking has substantial operations in Austria.

THE NEW GUIDANCE PAPER

Introduction

The new Guidance Paper is unprecedented in the sense that it is the first guidance document that the Bundeskartellamt (and the same is true for the Bundeswettbewerbsbehörde – the Austrian Competition Authority) has published together with a fellow National Competition Authority. While the Bundeskartellamt has previously published documents together with other NCAs, with one recent example being the 'Algorithms paper'[5] published jointly by the Bundeskartellamt and the French Autorité de la

4 See, for instance, MEYER-LINDEMANN, H.J. (2017) Die neue Aufgreifschwelle in der deutschen Fusionskontrolle. In: Kersting, C., Podszun R., *Die 9. GWB-Novelle*, München: C.H. Beck; SAUERMANN, M. (2018) New Merger Control Guidelines for Transaction Value Thresholds in Austria and Germany. Availabe from: https://www.competitionpolicyinternational.com/new-merger-control-guidelines-for-transaction-value-thresholds-in-austria-and-germany/ [Accessed September, 12 2020].

5 Joint study of [the French] Autorité de la concurrence and [German] Bundeskartellamt (2019) *Algorithms and Competition*. Availabe from: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf [Accessed September, 12 2020].

concurrence, this was a study paper published as a result of a joint conceptual project. The German-Austrian Guidance Paper on the Transaction Value Test is the first case of a joint guidance document in which two competition authorities explain how they intend to apply a newly enacted law.

This was only possible because of the broad consistency of the law in both countries. Not only is the wording of the law almost identical – the most notable difference being the amount of the value threshold, with the Austrian explanatory memorandum making reference to the German one – but also the two countries share a similar legal culture. There are only very few instances in which the joint Guidance Paper needs to differentiate between the two jurisdictions. Of course, the fact that both countries speak the same language was also helpful while drafting the text.

The guidance document is structured into six chapters. After an introductory chapter and a second chapter where the relevant German and Austrian legal provisions are presented, the following two chapters deal with the value of the concentration and with the concept of substantial domestic activity. These two chapters (Chapters C and D) will be discussed here. Finally, the two last chapters give some guidance on the concept of a concentration and on procedural matters.

Value of the consideration

The chapter on the value of the consideration explains in detail how the authorities intend to define the term 'consideration for the acquisition'. One of the main reasons the Guidance Paper is quite detailed in this chapter is that this topic was discussed extensively during the legislative process. In particular, concerns were voiced in the sense that, contrary to the concept of turnover, where an established administrative and judicial practice exists in Germany and Austria, no rules had been established on how to calculate the value of the consideration. However, it turned out that the calculation of the value of the consideration was, after all, not that difficult or controversial in most cases. In a very few cases that were presented to the Bundeskartellamt for consultation, the value of the consideration was a major topic of discussion between the parties and the authority. In addition, similar tests are regularly applied in other jurisdictions, like the 'size of transaction test' in the USA.

As regards the transaction value, the Austrian law sets a lower threshold than the German law (EUR 200 million as opposed to EUR 400 million in Germany), which takes into account the smaller size of the country and its economy. However, the rules for calculating the threshold are the same.

The Guidance Paper defines the value of the consideration as encompassing "all assets and other monetary benefits that the seller receives from the buyer in connection with the merger in question."[6] The term 'assets' should be interpreted in a broad sense.

6 Bundeskartellamt, BWB (2018): Guidance on transaction value thresholds for mandatory pre-merger notification (Section 35 (1a) GWB and Section 9 (4) KartG, para 11. Available from: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2 [Accessed September, 12 2020].

It covers all cash payments and the transfer of voting rights, securities, and tangible and intangible assets.

The value of the consideration relates only to the proposed merger in question. The value assessment does not cover shares already held by the acquirer, for example. If an acquirer buys different tranches of shares in the target company, a case-by-case assessment has to be carried out in order to establish whether individual transactions that are closely connected in timing or material terms are deemed to be part of a single merger. The Guidance Paper gives an example to illustrate this: A company holds 25% of the shares of a target company, and intends to enlarge its shareholding to a majority share. To this end, it buys another 26% of the shares from two independent sellers who sell 13% each in two different sale and purchase agreements concluded in quick succession. In this case, the two purchases are to be considered as a single merger, and the total consideration (paid to the two sellers) is relevant. However, the value of the 25% held from the outset is not part of the consideration.

One issue that is dealt with by the Guidance Paper is the question of how to deal with future payments and payments that are contingent on uncertain conditions. This can be especially relevant in mergers in the pharmaceutical sector, which often involve the acquisition of companies owning rights to future medicines or active ingredients. Typically, the purchase price includes various elements such as a down payment, milestone payments payable when and if certain milestones such as marketing authorisations in various jurisdictions are achieved, and royalties calculated as a percentage of the turnover.

Here, the Guidance Paper refers to the present value of future payments, i.e. future payments have to be discounted. If future payments are uncertain and contingent upon uncertain future events, they have to be weighted according to their probabilities, in order to establish their value. This can be a difficult exercise, and the parties might disagree between themselves. If, for example, part of the purchase price for a start-up company is dependent on future sales, the seller (often the founders) might be more convinced of the future market success of the target's products than the acquirer, who can be more sceptical, this disagreement can drive the parties to agree on a low down payment and high bonus payments if high turnover goals are met.

For such scenarios the Guidance Paper points out that it is up to the parties to validate their value assessment. It remains the responsibility of the parties to the merger to check the value of the consideration and establish whether it is subject to notification. 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. However, this does not change the fact that the burden of proof lies with the authority. If the parties come to the conclusion that the value of the consideration is below the threshold, and the competition authority is not in a position to prove the contrary, it cannot force the parties to make a notification (or to examine the merger *ex officio*).

However, if the parties wrongly assume that a merger is not notifiable, and therefore put the merger into force without notification and subsequent clearance, they violate the prohibition on implementing in section 41 GWB and risk a fine and the voidability of the contract under civil law. Because of this risk, the Bundeskartellamt offers a case-by-case guidance in case of doubt.

Finally, the Paper gives some guidance with respect to the point in time relevant for determining the value of the consideration. Basically, the reference date for determining the value is the date of closing the transaction. So what happens when the value changes between the signing and the closing? Among other things, this may be the case if the acquirer pays – partially or wholly – in its own shares, and these shares are listed on a stock exchange, or when the consideration is to be paid in foreign currency. This question arises because, contrary to the turnover achieved in a completed period of time, the transaction value has to be calculated with respect to a point in time.

In theory, two situations have to be differentiated. If, between signing and closing, the transaction value falls below the threshold, the merger can be consummated without needing to be notified (and hence without a waiting period). The Guidance Paper makes clear that, once the merger is put into effect exempt from notification, a subsequent rise in the value of the consideration does not lead to a reinstatement of the notification obligation. However, in the opposite case, the merger may not be consummated without clearance by the competition authority. This can be problematic if the parties did not anticipate an increase in the value of the consideration. In a situation where the value of the consideration fluctuates around the threshold a precautionary notification or pre-notification talks may be recommendable.

Domestic activity

A second topic that was widely discussed during the legislative process was the question of the local nexus. Regarding this topic, the legislator was in a dilemma. On the one hand, it was clear that the legislator wished to respect international law rules requiring a certain local nexus for a State to have jurisdiction over a specific matter. This is laid out more in detail in the ICN (International Competition Network) Recommended Practices for Merger Notification and Review Procedures, which under II.A. states that "Jurisdiction should be asserted only over transactions that have a material nexus to the reviewing jurisdiction[7]", and under II.B. that "Merger notification thresholds should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction."[8] During the legislative process, this discussion led to a substantial narrowing of the required domestic activities. The first draft (known as the Ministerial draft) foresaw that the new threshold is applicable if "one of the undertakings concerned is active in Germany or will be foreseeably active in Germany." After a public consultation, and also discussions within the ICN, the wording in the second draft ('the Government

7 WMG, ICN recommended practices for merger notification and review procedures (2017), point II.A. Available from: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf [Accessed September, 12 2020].

8 Ibid, point II.B

draft') was changed to "the target company has substantial operations in Germany"[9]. This wording was eventually adopted officially. Three differences stand out: firstly, it is now required that it is the 'target undertaking' that has substantial operations in Germany. The case of a German undertaking acquiring a foreign company that is not (yet) active in Germany is not caught by the new threshold. Secondly, the domestic operations need to be 'substantial'. Obviously, this concept is undetermined and needs to be clarified. Chapter D of the Guidance Paper attempts to perform such a clarification. Finally, it is no longer sufficient to assume that the undertaking concerned 'will be foreseeably active in Germany.' From a legal certainty point of view, it is understandable that such vague wording was removed from the draft. However, the requirement that the target company be active in Germany at the time of the notification, actually limits the effectiveness of the new threshold considerably. In particular, in the case of a group acquiring a nascent competitor, and in an industry where products are typically marketed worldwide, the location of this nascent competitor can be circumstantial and without relevance for the competitive assessment of the merger. Let's assume an internationally active pharmaceutical group holds patents and other IP rights to a certain molecule, and therefore enjoys, both in Germany and in other countries, a monopoly position on a certain product market. This group acquires a start-up company, e.g. a university spin-off that has discovered an alternative treatment and needs funds to carry out the relevant tests, and to develop and market a new drug. In that case, competition in Germany may be endangered independently of the place where the start-up company is located or active. Still, it can be said that if the start-up is not active domestically, even if the acquisition threatens local competition, then the competition authority might not be in a position to carry out the necessary investigations, and therefore should not have a jurisdiction in the first place.

In accordance with the principle that a sufficient local nexus is required to assert jurisdiction, the criterion of substantial domestic activities was introduced in the law with the aim of eliminating cases from the scope of the provision where the company acquired is primarily active abroad. The Guidance Paper makes it clear, therefore, that the acquisition of a company that is exclusively (or primarily) active in Germany meets the criterion, even if the activities of the target company are not very substantial in total. In fact, it would be difficult to argue that the activities of the target company are not 'substantial' if the acquirer agrees to pay more than EUR 400 million for it.

The Guidance Paper goes on to explain the measurement criteria and the assessment of the local nexus. It points out that domestic activity is generally not measured on the basis of domestic turnover. Other measurement criteria are relevant, and these can differ according to the economic sector in question. For example, in the digital sector, as explained in the explanatory memoranda, user numbers ('monthly active users') or

9 OECD (2020) DAF/COMP/WD(2020)20*, Start-ups, killer acquisitions and merger control –Note by Germany*, p. 3. Available from: https://one.oecd.org/document/DAF/COMP/WD(2020)20/en/pdf [Accessed September, 12 2020].

the access frequency of a website ('unique visitors') can be relevant indicators. However, a generally applicable measurement criterion cannot be given by the Guidance Paper.

However, if domestic turnover cannot be used as such to assess domestic activity, the comparison with the turnover thresholds can give an estimate of how important the local activity should be in order to qualify as sufficient to meet the local nexus requirement. In other words, if the turnover thresholds currently require one party to the concentration to have a domestic turnover of €5m, the domestic activity in the transaction value threshold should have a comparable weight.

In this context, the Guidance Paper explains that the Bundeskartellamt will find that there is no significant activity if the target company generated a turnover below €5m in Germany, and if this turnover adequately reflects its market position and its competitive potential. This is likely to be the case if the company's products generate significant turnover abroad, but not in Germany, for instance if the target company has not (yet) established a sales structure in Germany. In that case, it can be assumed that the 'traditional' turnover thresholds adequately filter out the cases worth assessing by the competition authority.

On the other hand, there are cases in which the turnover does not reflect the significance of the target company's market position. This might be the case, for example, in the digital domain when the target company has not (yet) developed a monetisation strategy, or if the end customer does not pay with cash or liquid assets, but with data or attention. In that case, other criteria need to be taken into consideration, like the number of users of an app or service. Another area where the target undertakings often do not achieve significant turnover is the pharmaceutical industry, when the rights to drugs in development are acquired. Here the target does not achieve any turnover by definition. In such a case, the Bundeskartellamt will typically ask whether R&D activities are performed in Germany, e.g. clinical trials. In addition, activities in preparation of entering the German market (e.g. applications for a marketing authorisation) can establish the required local nexus.

THE GERMAN AND AUSTRIAN SIZE OF TRANSACTION TESTS AS BUILDING BLOCKS FOR EU MERGER CONTROL OF DIGITAL CASES

In recently published policy reports, it has been argued that EU Merger Control could count on German and Austrian digital transaction value cases to be referred to the EU level.[10] Hence, it could be argued that there would be no need for an EU size of transaction test. This argument is based on experience from the takeover case of Facebook/WhatsApp, which was indeed referred from national level to the EU level with the approval of several Member States, even from jurisdictions without a size of trans-

10 See *Unlocking Digital Competition – Report of the Digital Competition Expert Panel,* March 2019, London: [HMTreasury], p. 94. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [Accessed September, 12 2020].

action test.[11] This approach would have the advantage that a potentially burdensome overhaul process of the European Union's Merger Regulation need not be started. Looking at the case Facebook/WhatsApp and the referral mechanism in detail reveals that this approach is highly dependent on cooperation between the Member States or merging parties. In the case of Facebook/WhatsApp, the referral was based on Article 4(5) EUMR, which required that the transaction be capable of being reviewed under the national competition laws of three Member States.[12] A closer look at the EUMR's referral mechanism and practice is therefore interesting.

At first sight, looking at the statistics of the European Commission, it can be stated that referrals from Member State level to EU level are not uncommon.[13]

From 1990 to February 2020, there have been 371 requests to refer a case from the national level to the EU level initiated by merging parties before a formal notification according to Article 4(5) EUMR. In 358 of these requests, a referral was accepted. In only seven cases was a referral refused. Post notification, the absolute numbers are lower, though the overall picture remains the same. There were 41 referral requests initiated by Member States after a national notification according to Article 22 EUMR,[14] of which 37 were accepted. In only four cases was a referral refused. Looking at the timeline of the referral requests and decisions taken by the European Commission, it can be seen that these cases are relatively evenly distributed. There was a surge in cases after the introduction of Regulation 139/2004, the new EUMR in 2004, which may well be due to the EU enlargement of 2004, but after the initial years of the new regulation, with its introduction of the referral mechanism of Articles 4(4) and 4(5) the number of cases declined. Since 2010, there have been between 11 and 24 accepted referrals according to Article 4(5) EUMR, and between zero and three accepted referrals according to Article 22 EUMR per year. So from a practical perspective, the referral mechanism seems well established and a routine process with hardly any frictions. When a referral was requested, it was likely implemented.

Guiding principles and Legal requirements for referrals

The European Commission laid down some guiding principles for merger case referrals in its Commission Notice on Case Referral in respect of concentrations.[15]

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11 See EC (2014) COMP/M.7217, *Facebook/ WhatsApp* Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004. Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

12 See Ibid, para 10.

13 See EC (2020) [Statistic of merger in period since 21 September 1990 to 31 August 2020]. Available from: https://ec.europa.eu/competition/mergers/statistics.pdf [Accessed September, 12 2020].

14 Or its predecessor Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, pp. 1–12.

15 See here and for the following Commission notice on case referral in respect of concentrations, OJ C 56, 5.03.2005, pp. 2-23, para. 8 et seq. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(01)&from=EN [Accessed September, 12 2020].

Here the European Commission points out that reattributing cases between the Commission and Member States is consistent with the principle of subsidiarity as enshrined in the EC Treaty.[16] Therefore, for a referral of cases all aspects of the application of this principle should be taken into account. This involves, in particular, the questions of whether the Commission or a national competition authority is the more appropriate authority to carry out a merger investigation, whether a referral is in line with the one-stop-shop system, and whether legal certainty with regard to jurisdiction is ensured.

Regarding the appropriateness of the authority, the notice points out that reattributing jurisdiction should take the specific characteristics of the case, as well as the tools and expertise available to the authority, into account. Moreover, the importance of the likely locus of any impact on competition resulting from the merger, and the implications in terms of administrative effort are pointed out. In this context, it is also mentioned that referrals are more compelling for cases that may have a significant impact on competition, and so may deserve careful scrutiny.

With respect to the principle of a one-stop-shop, the notice explains that the handling of a merger by a single competition authority normally increases administrative efficiency, by avoiding the duplication and fragmentation of the enforcement effort, as well as potentially incoherent treatment by multiple authorities. In particular for merging firms, the one-stop-shop system should help reduce the costs and burdens arising from multiple filing obligations, and the risk of conflicting decisions taken by a number of competition authorities under diverse legal regimes should be eliminated.

For the Commission's assessment in this regard it is inter alia emphasised that, for a referral request to be appoved, the Member State has to have accurately identified the competition concerns raised by the concentration on the relevant markets in that Member State. In this context, the relative cost, time delay, legal uncertainty and risk of conflicting assessment associated with a referral may be considered.

Concerning legal certainty, the notice further points out that a referral should normally only be made when there is a compelling reason for departing from the original jurisdiction.

In addition to the Commission's notice, the European Competition Authorities ECA issued principles on the application of Articles 4(5) and 22 of the EUMR.[17] Here the authorities stress the importance of close cooperation and efficient information-sharing and consultation between the European Commission and the national competition authorities when applying their respective competencies regarding referrals.

16 See Article 5 of the Treaty establishing the European Community (Consolidated version 2002) OJ C 325, 24.12.2002, pp. 33–184.

17 See European Competition Authorities ECA principles on the application, by National Competition Authorities within the ECA, of Articles 4(5) and 22 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1–22.

With respect to referrals under Article 4(5) EUMR, the principles make clear that national competition authorities will take account of the various factors of a transaction.[18] They will take into account whether the market in which there may be a potentially significant impact on competition is wider than national in scope, and whether the main competitive impact of the concentration is linked to that market. Furthermore, it will be considered whether national competition authorities expect to encounter difficulties in information-gathering. This might be the case if merging parties or relevant market participants are not based within a Member State's borders. Potentially significant competition concerns in a number of national or subnational markets located in the EEA are a further factor regarded as relevant for a referral, as well as potentially expected problems in identifying or enforcing suitable remedies.

The competition authorities also point out that there are circumstances under which they might be less inclined to agree to a referral request under Article 4(5) EUMR.[19] Examples include cases in which the national competition authority is already examining a concentration that involves the same parties or the same product markets, or where the concentration's main competitive impact is in that authority's national or a subnational market.

Concerning referrals under Article 22 EUMR, the principles explain that, in addition to the legal criteria of Article 22(1) EUMR, national competition authorities will take further factors into account.[20] One factor is whether the relevant geographic market affected by the concentration is wider than national in scope, and whether the main competitive impact of the concentration is linked to that market. As for assessments of Article 4(5) referrals, potential difficulties in information gathering are also taken into account.

Finally, for Article 4(5) referrals, the location of potentially significant competition concerns and expected problems in identifying or enforcing suitable remedies will also be considered when assessing Article 22 referrals. It is also acknowledged that such analyses can only be made on a prima facie basis at this stage and with the time constraints.

The legal requirements for a referral from Member State level to EU level are laid down in detail in Article 4(5) EUMR and in Article 22 EUMR. Moreover, according to Recital 11 of the EUMR, the overarching principle of the referral mechanism is that it should operate as an effective corrective mechanism in the light of the principle of subsidiarity. The rules governing the referral mechanism are accordingly intended to protect the competition interests of the Member States in an adequate manner and, as also mentioned in the Commission notice, take due account of legal certainty and the one-stop-shop principle.

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18 See European Competition Authorities ECA principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation, para. 8.

19 See Ibid, para. 9.

20 See Ibid, para. 19.

Referrals according to Article 4(5) EUMR

Referrals according to Article 4 EUMR take place at the initiative of the merging parties and before a formal notification is made.[21]

According to Article 4(5) EUMR, the European Commission may be informed by the merging parties that a concentration without a Community dimension, capable of being reviewed under the national competition laws of at least three Member States, should be examined by the Commission at EU level. Therefore, the merging parties may file a reasoned submission before any notification to the national competition authorites takes place.[22]

At the next step, the European Commission will transmit this submission to all the Member States. Any Member State competent to examine the concentration under its national competition law may then, within 15 working days, express its disagreement as regards the request to refer the case. If at least one such Member State has expressed its disagreement within the period of 15 working days, the case shall not be referred.

Only if no Member State has expressed its disagreement within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission, which then has jurisdiction. Accordingly, no Member State shall apply its national competition law to the referred case.

Referrals according to Article 22 EUMR

Referrals on the basis of Article 22 EUMR take place after a notification has been submitted to the Member States and at the initiative of a notified Member State.[23]

According to Article 22 EUMR, Member States may ask the Commission to examine any concentration that does not have a Community dimension, but which affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or the Member States making the request. The first criterion is further clarified in the Commission's referral notice, according to which a concentration is deemed to affect trade between Member States to the extent that it is liable to have some discernible influence on the pattern of trade between them.[24] Such a request shall be made within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.[25] In the next step, the Commission shall inform the competent authorities of

21 See also HELLMANN, H.-J. (2004) Das neue Verweisungsregime in Art. 4 FKVO aus Sicht der Praxis. *Europäisches Wirtschafts- und Steuerrecht*, 7, p. 289.

22 See also BERG, W. (2004) New EC Merger Regulation: A First Assessment of Its Practical Impact, The Symposium on European Competition Law, *Northwestern Journal of International Law & Business*, 24, p. 695.

23 See also DE STEFANO, G., MOTTA, R., ZUEHLKE, S. (2011) Merger Referrals in Practice – Analysis of the Cases under Article 22 of the Merger Regulation. *Journal of European Competition Law & Practice*, 2 (6), pp. 537-550. Available from: https://www.lw.com/thoughtLeadership/merger-referrals-in-practice [Accessed September, 12 2020].

24 See Commission notice on case referral in respect of concentrations (2005), para. 45.

25 See also BERG, W. (2004), p. 692.

the Member States and the merging parties without delay. These other Member States then have the right to join the initial request within a period of 15 working days. The referral decision is then taken by the Commission, which has another 10 working days to decide to examine the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the requesting Member State or States.

The referral mechanism and transaction value cases

The referral practice and the applicable regulation and procedures make clear that the referral system is a well established instrument, strictly regulated as a corrective mechanism. One could argue that using referrals on a regular basis to make use of different national notification thresholds counterdicts the potentially intended exceptional character of the referral mechanism. However, there has been only one case referred to the EU level that was subject to a size of transaction test on a national level, even after two years after the introduction of such threshholds in Germany and Austria. This was the Microsoft/Github case.[26] The concentration was notifiable in four Member States, including Germany and Austria, and was referred to the Commission on the basis of Article 4(5) EUMR. In Germany, the case was notifiable on the basis of the new transaction-value-based threshold. So, especially when compared to the number of notified cases at a national level in the European Union and at EU level, a referral will still be an exception, even with potentially more size of transaction cases. However, the rules of Article 4(5) and Article 22 EUMR also show that this instrument is based on cooperation and certain preconditions.

For Article 4(5) EUMR, this means that a case has to be capable of being reviewed in at least three Member States. If that criterion is not met there will be no referral. The case of Facebook/WhatsApp made clear that, even in cases deemed to be outstanding, it can be hard to meet this criterion. And, although the newly introduced size of transaction tests should provide some relief in that regard, with Austria and Germany there are still only two jurisdictions applying such a test. A look at other European jurisdictions reveals that the vast majority of other Member States base their notification thresholds on turnover figures. Spain, with its market share test, and the United Kingdom, with its share of supply test, are exceptions in that regard, though the Spanish exception might soon be alone, given that the UK has left the EU. Moreover, a market share test might be difficult to be applied to highly valued R&D cases, where probably only a portfolio of patents or a promising but as yet unreleased new drug is transferred.

Furthermore, the merging parties have to be willing to see their case examined at the European level, since it is them who have to initiate the proces. For various reasons, companies may be reluctant to do so. They may prefer national notification requirements

26 See EC (2018) Case M.8994 - *Microsoft / GitHub* Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/20041 and Article 57 of the Agreement on the European Economic Area. Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m8994_257_3.pdf [Accessed September, 12 2020].

and timelines, or aim for a strategic step-by-step clearance in individual Member States. They may also try to avoid the investigative resources of the European Commission. This means that, especially in cases expected to be problematic, it will be difficult to convince merging parties to move their case to the European Commission.

In the next step, the competent national authorities will have to agree to a proposed referral. Thus, for a referral to take place, the national competition authorities' interests have to be aligned with those of the parties requesting the referral, in all of the Member States that are competent to examine the concentration. So at least three Member States have to be convinced to refer their case to the European level.

Past practice shows that cooperation between national competition authorities and the European Commission is well established in that regard. However, as the Commission Notice on Case Referrals points out, it should be considered whether a case referral is appropriate. Therefore, the guiding principles referred to above should be taken into account, and in particular whether the Commission is the more appropriate authority for dealing with the case.[27] This question of the more appropriate authority, which also takes case experience into account, might be difficult to answer in the area of innovative business models at which the German and Austrian size of transaction tests are aimed. However, the European Commission's advances in the area of innovation in merger control in recent years, especially in the cases of Bayer/Monsanto[28] and Dow/Dupont[29] might bring some relief when arguing for a referral in certain cases.[30]

Looking at the ECA referral principals, it furthermore becomes clear that cases in which the national competition authority is already examining a concentration that involves the same parties or the same product markets, or where the concentration's main competitive impact is in that NCA's national or subnational market, arguing for a referral might become particularly challenging.

According to Article 22 EUMR, a referral request by Member States after notification will also have to meet a set of preconditions. A referral request may take place if a notified transaction affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or the Member States making the request. One might argue that there is no need for a referral in case these conditions are not met, but as the newly introduced size of transaction tests were intended to deal

27 See Commission notice on case referral in respect of concentrations (2005), para. 25 et seq.

28 See Commission decision C(2018) 1709 final of March, 21 2018 declaring a concentration to be compatible with the internal market and the EEA agreement (case M.8084 – *Bayer/Monsanto*), para 61 et seq. Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m8084_13335_3.pdf [Accessed September, 12 2020].

29 See Commission decision C(2017) 1946 final of March, 27 2017 declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.7932 – *Dow/DuPont*), Annex 4. Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf [Accessed September, 12 2020].

30 See EC Competition Directorate–General (2016) EU merger control and innovation. *Competition Policy Brief*, 1. Available from: https://ec.europa.eu/competition/publications/cpb/2016/2016_001_en.pdf [Accessed September, 12 2020].

with merger cases in the rapidly developing data economy or R&D intensive industries, there is a chance that Member States might only discover the full potential threat to competition after the referral request deadline of 15 working days after notification has lapsed. Moreover, it may be difficult to substantiate that the acquisition of a software app with a certain number of domestic users or a portfolio of innovative research projects is affecting trade between Member States. This might prove particularly challenging for R&D projects that have not resulted in a product yet, like a new pharmaceutical substance that is still in phase III of its clinical trials. The acquisition of such substances can fall under the German size of transaction test,[31] though might be difficult to be referred to the Commission.

Whether the Commission is the more appropriate authority for dealing with a case might also be debated in case of the Article 22 referral request.[32] A closer look at the German size of transaction test reveals that, in course of determining jurisdiction, the Bundeskartellamt will probably already gain detailed insights into a merging party's business. Since the size of transaction test is also based on establishing significant domestic activity in Germany as a way of ensuring a local nexus, this very activity and its measurement will surely be discussed as part of the notification, and probably even before filing a notification. This knowledge might then be used to argue against a referral. The same could hold true for establishing jurisdiction under the Austrian size of transaction test.

Moreover, according to the ECA principles, arguing in favour of a referral might be less straightforward if a case does not meet certain criteria, such as a market wider than national, the location of the main competitive impact, difficulties in information gathering and potential problems in identifying or enforcing suitable remedies.

Ongoing debate

The debate goes on, and one interesting alternative instrument aimed at digital mergers that are not caught by the traditional turnover thresholds has been proposed by the French Autorité de la concurrence.[33] It has considered the relevance of introducing a mandatory information requirement of every merger carried out by digital structuring platforms. In addition, it suggests vesting in competition authorities the power to order the notification of mergers below turnover thresholds when such transactions are likely to raise competition concerns, provided that specific conditions are met. Such an order to notify would be issued after providing information on the merger, but before implementing it. The relevant national competition authority would therefore still be in a position to refer the merger to the European Commission. The future will show

31 See Bundeskartellamt, BWB (2018): Guidance on transaction value thresholds for mandatory pre-merger notification (Section 35 (1a) GWB and Section 9 (4) KartG, para 105.

32 See Commission Notice on Case Referral in respect of concentrations (2005), para. 25 et seq.

33 Autorité de la concurrence (2020) *The Autorité de la concurrence's contribution to the debate on competition policy and digital challenges*. Available from: https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en.pdf [Accessed September, 12 2020].

whether such legislation will be adopted by the French legislator, and if so, how such an instrument will fit into the referral mechanism of the EU Merger Regulation, and what the results on the national level will be.

Germany is also again amending its merger regime in 2020 and has proposed a rule – aimed primarily at regional mergers – giving the Bundeskartellamt the possibility to order specific companies to report smaller mergers.[34] However, with its focus on small regional mergers, the importance of this rule will presumably be quite limited for international digital mergers and the EU merger control regime.

CONCLUSIONS

The past referral practice on basis of Article 4(5) and Article 22 EUMR proved that merger cases caught by national merger thresholds are regularly scrutinised on the European level, and that the referral of suitable cases is well established and takes place in a transparent and cooperative manner between the authorities. However, as details of the relevant provisions of the Merger Regulation and the respective guidelines point out, referrals are regarded as a corrective measure only, whereby the referral process has to take hurdles that are particularly challenging for mergers involving new, innovative business models. As the Austrian-German guidelines on the transaction value test make clear, even the establishment of a notification requirement can sometimes be difficult, which is due to the very nature of a size of transaction test. In particular, establishing the value of a transaction and its local nexus cannot always simply be derived from a company's financial statements, unlike its turnover. The first example of a referral of such a case, the referral of Microsoft/Github, proved that these challenges can be overcome. However, it is difficult to already derive a general judgement from that single case.

34 PODSZUN R. (2020) *It's official: The draft bill GWB10*. Available from: https://www.d-kart.de/en/blog/2020/01/24/offiziell-gwb10-refe/ [Accessed September, 12 2020].