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GERMANY'S NEW MERGER CONTROL REGIME – NEW FILING REQUIREMENTS TO COME

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Germany is about to enact a revised merger control regime which will result in extended filing requirements in Germany for M&A deals. The new law will likely come into force in Q2 of 2017. It is part of a major amendment to the German Act Against Restraints of Competition (ARC) (*Gesetz gegen Wettbewerbsbeschränkungen*). To a certain degree such reform is driven by requirements to harmonise German law with EU standards in the area of cartel damage claims and cartel enforcement. Also, it will adjust the German competition law framework to address

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some of the challenges that come with big data innovation, two-sided markets, and the digital economy more generally. From an M&A perspective, however, the most relevant element of the reform is the change to the thresholds that a transaction engenders in order to trigger merger clearance requirements as overseen by the German Federal Cartel Office (FCO) (*Bundeskartellamt*).

Today, German merger control follows a purely revenue-based approach to determine whether a proposed transaction is reportable for mandatory FCO clearance. Both parties must have combined worldwide revenues of more than EUR 500 million; one party to the transaction (e.g., the buyer) must have German revenues of more than EUR 25 million; and another party (e.g., the target) must have German revenues of more than EUR 5 million.

Going forward, these revenue thresholds will remain in place and, if a transaction meets all three of them, it will continue to be reportable on these grounds. But now, in addition, the new law introduces a transaction value test to capture transactions that only meet the higher of the two domestic thresholds, i.e., if the target has less than EUR 5 million in German revenue. These transactions shall now also require FCO clearance if (a) the transaction value exceeds EUR 400 million (to be determined on the basis of the purchase price as stipulated as cash compensation or in another form); and (b) the target has significant business in Germany, as demonstrated, for example, by a strong domestic customer base or substantial domestic R&D activities (the "local nexus test").

The purpose of this adjustment is to capture transactions that may not (yet) be sizable by revenue standards, but that may nevertheless have a competitive impact, e.g., because they concern some innovative startup firm. According to the new law's official reasoning, which explicitly refers to the Facebook/WhatsApp merger in that respect, it is this type of transaction that triggered the introduction of the additional transaction value test.

This supplemental transaction value test, however, adds uncertainty to M&A deals that affect Germany, as it is more complex than the existing revenue-based filing thresholds. Even where the lower domestic revenue threshold is not met, the parties to a transaction will still have to apply further efforts to determine whether the transaction value threshold is nonetheless reached, and whether significant business in Germany exists. At least until some further FCO guidance is available on the new local nexus test, we will expect to see more German filings even in smaller cases, because the merging parties will want to mitigate any potential risk of violating filing requirements and avoid jumping the gun.

With the new filing thresholds, as with the existing ones, it should be noted that German merger control does not only apply to transactions that result in a change of control over a target company. As long as the revenue thresholds are met (or, going forward, the transaction value test), even the acquisition of a minority shareholding in the target company would by necessity be reportable to the FCO, provided that the buyer acquires at least 25% of the capital or voting rights or otherwise gains relevant competitive influence over the target business.

CURRENT DEVELOPMENT

France, Germany and Italy Propose EU-Wide Restrictions on Foreign Investments

The three European Union (EU) and Eurozone members, France, Germany and Italy, in a joint proposal addressed to the EU Commissioner for Trade, Cecilia Malmström, have added an initiative for ensuring an improved level playing field in trade and investment to the EU Commission's agenda.

In their joint letter, the three countries stress that they are "worried about the lack of reciprocity" and about a potential selling off of European know-how and expertise, which the EU and its Member States "are currently unable to combat with effective instruments." The initiative explicitly refers to the takeover by non-EU investors in the last few years of "more and more European companies with key technological competences for strategic reasons." The proposal apparently aims to establish a review regime that would allow for restricting acquisitions that are directly or indirectly steered or financed by non-EU governments.

More information about the joint proposal can be found here.

MoFo will update you on this initiative once more details become available. If you have any queries on this matter, please contact *Felix Helmstädter*, Morrison & Foerster, Germany.

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NOTEWORTHY DEALS

Below we highlight for you some of the noteworthy transactions involving Europe that may provide you with valuable insights into recent trends or developments.

ARM acquired by SoftBank

Tokyo-based SoftBank acquired Britain's most valuable technology company ARM for USD 32 billion in cash. ARM, the manufacturer of semiconductor and software design technology that is used in nearly all smartphones, will play a central role in the shift in the so-called "Internet of Things." SoftBank agreed to pay 1,700 pence per share, which is a premium of approx. 41.1% on the all-time high closing price in March 2015, and approx. 43.0% on the closing price as of 15 July 2016. This deal constitutes not only one of Japan's biggest overseas ventures, but also the largest takeover to date by SoftBank. Also, the deal is considered the largest ever cash investment from Asia into the UK and is the first large-scale M&A deal following the Brexit vote.

A cross-office team of MoFo acted as lead counsel, including attorneys from Tokyo, London, Washington D.C., Berlin and Brussels.

Buffett to invest again in German "Mittelstand"

Warren Buffett continues his shopping tour in Germany following his announcement in October 2015: Precision Castparts Corporation, a subsidiary of the holding company Berkshire Hathaway owned by Buffett and specialised in the supply of complex parts in the aircraft and oil industry, reached an agreement for the takeover of Germany-based Wilhelm Schulz GmbH, a global leader in manufacturing accessory parts in pipes, with a sales revenue of EUR 172 million in 2014 and 450 employees. The deal is considered to be an ingenious transaction. The stainless steel parts of Wilhelm Schulz are in great demand in the oil industry, where there is a huge demand for corrosion resistant pipe accessories and valves (especially in the Middle East) in order to ensure long-term operations with sulfurous crude oil in the future. The U.S. subsidiary Schulz Xtruded Products, a manufacturer of seamless stainless steel pipes and raw materials for the aviation industry, is also part of the transaction. The details of the transaction are not disclosed and the deal is pending regulatory approval by the Federal Cartel Office in Germany. However, if the deal is successfully concluded, it would constitute the second acquisition of Warren Buffett after the takeover of Hamburg-based motorcycle parts company Louis for EUR 400 million. During the shareholder meeting in May 2016, Buffett declared that he would acquire at least one more company in Germany by 2020, and emphasised again his strong interest in German midsize companies as "hidden champions."

Johnson & Johnson to acquire Swiss Actelion

U.S. pharmaceutical company Johnson & Johnson successfully reached an agreement for the acquisition of Actelion, a Switzerland-based biotechnology company manufacturing drugs for a life-threatening disorder, characterised by high blood pressure in the pulmonary circulation system. The target had a sales revenue of CHF 2 billion and a return of approximately CHF 552 million. Analysts assume an annual sales revenue to the tune of CHF 4.6 billion from the company's two drugs, Opsumit and Uptravi, by 2020. The deal is said to have a volume of USD 30 billion, by offering CHF 280 per share in cash, a 23% premium compared to the last market price, and is considered to be one of the biggest deals in the pharmaceutical field since the beginning of 2016. The deal structure provides for the spin-off of Actelion's research business with the aim to list the new company on the Swiss stock exchange, SIX. Shareholders of Actelion are offered shares in the new company, and Johnson & Johnson will also hold a stake of 16%, with the possibility to acquire an additional 16% by exercising a convertible bond option.

Linde and Praxair to become world's biggest group for industrial gases

Linde, Germany's biggest supplier of industrial gases, and its competitor Praxair, the U.S. leading supplier of industrial gases, reached an agreement for a merger to become the world's largest industrial gas group. The deal structure provides for the formation of a new holding company with a listing in both Frankfurt and New York. Shareholders of both companies will receive half of the stakes in the new company. The combined sales revenue of the two companies would be EUR 28 billion and would have a market value of EUR 61 billion. The merger is expected to have synergy effects in the amount of up to USD 1 billion. The deal is pending and will require both shareholders' and regulatory approval.

SmartRecruiters acquires Berlin-based startup

SmartRecruiters, a U.S. company based in Silicon Valley, has acquired Berlin-based startup Jobspotting, a platform offering suitable job openings using big data. The transaction is likely to create synergies. SmartRecruiters collaborates with employers providing software solutions to find talented employees whilst

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Jobspotting, on the other hand, supports job seekers. After the creation of a profile on the platform, the self-learning algorithm filters job openings from other common job exchanges. With the merging of the two technologies, employers and companies will more easily find the right candidate for the position. Details of the transaction have not been disclosed.

General Motors to sell its car manufacturing subsidiaries in Europe

U.S. car manufacturer General Motors Inc. reached an agreement for the sale of its car manufacturing subsidiaries Opel (Germany) and Vauxhall (UK) to French Peugeot S.A. for an aggregate of EUR 1.3 billion. In addition, Peugeot agreed to acquire the European operations of GM Financial for EUR 900 million. The turnover from operations of Opel and Vauxhall amounted to EUR 17.7 million in 2016. After the merger, Peugeot will become the second largest car manufacturer in Europe with a market stake of 17%. The transaction is pending, will require both governmental and regulatory approval and is expected to be closed by the end of 2017.

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