JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE DRAFT GUIDANCE ON TRANSACTION VALUE THRESHOLDS FOR MANDATORY PRE-MERGER NOTIFICATION (SECTION 35 (1A) GWB AND SECTION 9 (4) KARTG

JUNE 15, 2018

The American Bar Association Sections of Antitrust Law and of International Law (together "the Sections") appreciate the opportunity to submit these comments on the draft Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG) of the German Federal Cartel Office and the Austrian Federal Competition Authority ("Draft Guidance"). These comments reflect the Sections' collective experience and expertise with respect to the application of antitrust and merger review laws in the United States, the European Union, Germany, Austria, and other jurisdictions and with related international best practices. The Sections offer these comments to share our experience and provide suggestions to enhance the effectiveness of the guidance ultimately adopted and its conformity with international best practice. These comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

EXECUTIVE SUMMARY

The Sections' comments focus on the two core operative sections of the Draft Guidance, Section C (addressing the "value of the consideration") and Section D (addressing whether the target/acquired company has substantial domestic activities).

With respect to the value of consideration (Section C), the Sections believe that the Draft Guidance paper's discussion of the value of consideration could be further improved in four key areas.

- First, the methods outlined in the Draft Guidance regarding the relevant date for determining the value of the consideration appear overly complex for both parties and the agencies. The Sections believe that they can be further simplified without jeopardizing the effectiveness of the merger notification thresholds, which will enhance the efficiency and predictability of the German and Austrian merger notification systems.

- Second, similar concerns arise with the validation requirements outlined in the Draft Guidance.

- Third, the Sections suggest that certain payments for assets and consideration currently assessed as part of the value of consideration should be excluded from this calculation because they do not relate to payments for assets being transferred, or are not appropriately deemed consideration exchanged for the acquisition of the target

firm. The Sections consider this to be the case as regards certain elements of consideration for intangible assets, licenses and future licenses and payments for certain contracts related to non-competition.

- Fourth, the Sections suggest that the Draft Guidance's discussion of closely connected transactions and joint ventures and amalgamations would benefit from additional clarification.

With respect to Substantial Domestic Operations (Section D), the Sections note that there are different threshold tests and different existing case law regarding local nexus in each of Germany and Austria, so that common guidance on these subjects may create more confusion, rather than clarify this topic. In addition, the Sections point out that additional guidance regarding local nexus and the significance of domestic activities in the form of specific examples and concepts would assist parties in applying the tests.

I. SECTION C - THE VALUE OF CONSIDERATION

The Sections appreciate the detailed guidance developed by the German and Austrian agencies, and acknowledge that it will help parties to assess whether a transaction satisfies the new thresholds in a number of complex situations. However, as discussed below, the Sections believe that the Draft Guidance paper's treatment of the value of consideration could be further improved in four key areas. The Sections also note that the suggested approaches, identified below, would move the Draft Guidance to more uniform approaches used internationally, which would help facilitate merging parties' ability to gather multi-jurisdictional data on a consistent basis, as recommended by the International Competition Network.[1]

A. The Relevant Date for Determining the "Value of Consideration"

Paragraph 27 of the Draft Guidance recognizes that the value of the consideration can fluctuate between the time of signing a purchase agreement (or letter of intent) and closing the transaction, especially in transactions in which the consideration provided to the seller involves securities or cash held in foreign currencies. Yet, paragraph 27 states that "the value of the consideration has to be calculated for a specific point in time" and sets this at "the completion date of the merger."

The Sections believe that this rule will create unnecessary burdens for both the agencies and the merging parties without substantial benefits to the accuracy or effectiveness of legitimate enforcement objectives. Indeed, the Draft Guidance realizes that this rule will require parties to many transactions to monitor market fluctuations in the value of the consideration up until the time they intend to consummate a transaction or require the parties to submit precautionary filings to avoid the possibility of violating a

[1] *See* International Competition Network, Recommended Practices for Merger Notification Procedures (2002), RP II.E, http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf ("ICN Recommended Practices") at Cmt. 3.

notification requirement that might only arise just prior to closing due to some unexpected fluctuation in the value of consideration being paid at closing.

In lieu of this approach, the Sections recommend that the Austrian and German authorities adopt a standard for the relevant date that provides the merging parties with greater certainty and predictability sufficiently in advance of the planned closing date, such as the date the definitive agreements are executed or within a specified period prior to consummation of the transaction. The Sections note, for instance, that regulations promulgated under the U.S. Hart-Scott-Rodino ("HSR") Act ("HSR Rules") require parties to use the "market price" to value securities that are publicly traded when the "acquisition price" cannot be determined due to potential fluctuations in the value of consideration that may occur between signing a definitive agreement or letter of intent and the closing, as long as the closing will be within 45 days of executing a contract or letter of intent. The HSR Rules set out clear and objective definitions and criteria that parties may use to determine whether the value of the transaction exceeds the notification threshold.[2]

B. Validation of the Value Assessment

The Sections are concerned that the validation requirements outlined in paragraphs 18-26 of the Draft Guidance will be difficult to manage and create unnecessary burdens for both the reviewing agencies and the merging parties. Paragraph 21 provides that, when the value of the consideration is not readily determinable (*e.g.,* transactions involving contingent payments or stock consideration that may fluctuate after signing), both the buyer and seller must each independently explain how the consideration value was determined, to demonstrate that the calculation of the transaction value was appropriately below or above the threshold.

Buyers and sellers in negotiated transactions, however, often conduct multiple different valuation assessments and the materials relating to these analyses are highly confidential and not typically exchanged (even after a purchase agreement has been executed). Requiring merging parties to negotiate over the appropriate valuation method or the precise calculation to be used for merger control purposes will create additional costs, burdens, and delay to the process of finalizing transactions and making determinations on where merger control filings are necessary.[3]

[2] Under the HSR Rules, the "market price" is the lowest closing quotation during that portion of the same 45-day period that begins one day before execution of the contract or letter of intent. *See* 16 C.F.R §801.10(c)(1). If the closing is more than 45 days away, then the acquiring party is permitted to make and rely upon a determination of the "fair market value" of the securities being acquired at any time within 60 days prior to closing the transaction in order to establish whether its transaction meets the HSR "size-of-transaction" threshold. *See* 16 C.F.R §801.10(a); §801.10(c)(3). For acquisitions of assets, the HSR Rules similarly require that the acquiring party use the greater of the acquisition price or the fair market value of the non-exempt assets being acquired. Thus, when the acquisition price for non-exempt assets is not determinable, the acquiring party must make a fair market value determination in order to assess whether it meets the HSR "size-of-transaction" threshold. 16 C.F.R §801.10(b).

[3] The Draft Guidance recognizes that the calculation of the value of the consideration exchanged can be impacted by the merging parties' differing internal assumptions and expectations (*e.g.,* calculating the present value of contingent future payments). In fact, it is not unusual for a seller to have a higher

The Sections therefore recommend that the guidance on this point be revised to clarify that the ultimate responsibility for determining the transaction value rests with the acquiring party. In the Sections' experience, this is a more efficient and equally effective means for ensuring that appropriate and reasonable methods are used to make the value determination. The Sections note that, for example, under the HSR Rules, the responsibility rests with the acquiring party's board (or the board's designee) to make any market value determination when the acquisition price cannot be readily determined due to contingent payments or other factors. As long as the acquiring party has made a good faith and reasonable determination that the value of the consideration is below the relevant threshold, the acquired party or seller should be permitted to rely upon the acquiring party's determination and not be forced to create its own analysis solely for assessing merger control filing requirements.[4]

Furthermore, acquiring parties have significant incentives to conduct their value determinations in a reasonable manner. First, it is common for sellers to request and obtain representations in purchase agreements that confirm that buyers have made the necessary fair market valuation determinations to assess the applicability of the HSR filings rules in accordance with this obligation. Second, to the extent that an antitrust authority has concerns that a filing should have been made for a particular transaction, the authorities have the ability to investigate and request documents and explanations from the acquiring party to support its valuation methodology and calculation.

By advising merging companies to make precautionary filings for every transaction in which they cannot agree on a valuation determination (or even a reasonable range), the Sections believe the Draft Guidance will unnecessarily increase the number of filings and the burdens in both preparing and reviewing any such filings. Noting that the HRS Rules do not require parties to submit statements with the notification form explaining their valuation or calculation methods, the Sections respectfully request that Austria and Germany adopt a similar approach.

C. Certain Payments and Consideration Should be Excluded from the Value of Consideration

The Draft Guidance includes in the value of consideration certain payments or forms of consideration that do not relate to the transfer of assets or are not considered in exchange for the acquisition. For the reasons set forth below, and in light of international best practice, the Sections recommend that these elements be excluded from the

---

estimated value of the business being sold (or likelihood of events that would trigger contingent payments) since it is seeking to sell its company or business assets at the highest price.

[4] 16 C.F.R § 801.10(c)(3); *see also* ABA SECTION OF ANTITRUST LAW, PREMERGER NOTIFICATION PRACTICE MANUAL, 5TH EDITION, Int. 22 (2015).

calculation of the value of consideration for purposes of determining whether the transaction value threshold is met.[5]

a. *Elements of Consideration: Intangible Assets, Licenses, & Future License Payments*

Paragraphs 11 and 14 of the Draft Guidance provide that the value of the consideration for a transaction includes "all assets and monetary benefits that the seller receives from the buyer" as well as "different items exchanged between the buyer and seller in return for the acquisition of a target company." Paragraphs 11 and 14-15 indicate that "intangible assets (licences, usage rights, rights to the company name and trademark rights)" as well as "future and variable purchase price components" such as "future license payments" and "license fees" conditional on the achievement of certain turnover or profit targets are included within the scope of consideration that must be valued.

The Sections believe that it may be appropriate to require a buyer to determine the value of any intangible property, such as patents or trademarks, that is assigned, transferred, or exclusively licensed to a seller as consideration for the purchase of target company or business assets. However, we do not believe it appropriate to require parties to include the value associated with all fees or royalties that a buyer may agree to pay a seller under ancillary and non-exclusive license agreements that may be entered into simultaneously with the sale of a target company or business assets.

If a seller retains ownership of those intangible intellectual property ("IP") assets and has not granted the buyer an exclusive license, the current (or future) consideration paid (or to be paid) by the buyer for such a license should not be included in the determination of the "value of the consideration" to be paid for the entities or business assets that are being acquired. This is because these license fees and royalty payments would primarily relate to assets that are not being transferred and would not be distinguishable from ordinary course, arms-length agreements that could be entered into at any other time between the same parties. As such, these payments are not properly viewed as consideration for the business entities or assets that are being transferred to the buyer even though (i) the payments may result in some financial benefit to the seller, and (ii) the licensed IP may be used by or benefit the target company or acquired business.

The HSR Rules have several mechanisms that the Austrian and German authorities may wish to consider adopting to address concerns that payments for IP licenses may be inflated to avoid merger notification, *i.e.,* by enabling buyers to reduce the purchase price or consideration. First, the HSR rules require that the size-of-transaction be calculated based on the greater of (a) the acquisition price for the shares or

---

[5] *See e.g.,* ICN Recommended Practice II.E, http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf. (For example, Comment 3 identifies, in part, that "criteria should be defined in clear and understandable terms, including appropriate guidance as to included and/or excluded elements, such as taxes and intra-company transfers (as to sales), depreciation (as to assets)[…]".)

assets being purchased or (b) the market price of the securities or fair market value for the assets or securities being acquired.[6] Second, the HSR rules expressly prohibit parties from structuring a transaction for the purpose of avoiding a filing obligation.[7]

Under these rules, if a party attempted to structure the purchase of a target business by paying cash for the securities or assets being acquired at below a fair market value (or market price for the securities) and sought to offset this by providing the seller with an above market payment for a non-exclusive license, it would still be obliged to make an HSR filing, and would face a potential fine for structuring the deal solely to avoid a filing. The Sections believe it would be better to introduce similar provisions into the Austrian and German rules rather than require all license fees be included in the determination of the value of the transaction. Requiring all payments under ancillary licenses to be factored into the calculation will complicate the merger notification assessment for a large number of transactions and potentially lead to additional filings for transactions that do not have any structural impact on the affected markets, as the transaction value thresholds may only be satisfied due to the value attributed to licenses of IP that will not be transferred.

b. Payments for Non-Competition

With respect to the Draft Guidance paper's treatment of payments for non-competition, the Sections respectfully suggest that Austria and Germany consider excluding payments for employment contracts or consulting agreements with covenants not to compete, provided these payments were negotiated at arm's length with employees who are neither selling nor controlling shareholders in the company being sold. Since the value for these payments are directly related to the value of services to be performed in the future, the Sections believe they do not reflect disguised consideration for the assets or ownership interests being transferred. In the United States, it is permissible to exclude these types of payments under the HSR rules for this reason.[8]

c. Excluding Consideration for Acquired Cash or Cash Equivalents

The Sections recommend that the Austrian and German authorities consider adopting "value consideration" guidance that allow parties to exclude the value attributable to cash or cash equivalents being acquired from the target company. Adopting such a rule would likely reduce the number of filings for large transactions that are unlikely to raise competition concerns even if they don't meet the turnover-based thresholds but otherwise have a sufficiently significant local nexus to Austria or Germany. If an acquiring party is paying a significant amount of cash or other

---

[6] 16 C.F.R §801.10. Whether the market price or fair market value is used depends on whether the transaction involves an acquisition of shares and whether it will close within 45 days of signing the purchase agreement or letter of intent.

[7] 16 C.F.R §801.90.

[8] ABA SECTION OF ANTITRUST LAW, PREMERGER NOTIFICATION PRACTICE MANUAL, 5TH EDITION, Int. 29 (2015).

consideration primarily because the target company holds a large amount of cash on its balance sheet (rather than valuable intangible assets for a nascent product or for competitively significant web services that currently do not generate revenues), it would seem reasonable to adopt rules that allow acquiring parties to exclude the value of consideration being paid to acquire this cash because it is not a competitively significant asset. Indeed, under the HSR Rules, the value attributed to acquiring cash or cash equivalents does not need to be considered for purposes of calculating the size of transaction test.[9]

D. Recommendations for Clarification

a. Closely Connected Transactions

While the Draft Guidance makes clear that the assessment of the value of the consideration does not typically need to include the value attributable to shares in a target company that is already held by the acquiring party, the Sections believe that the discussion in Paragraph 13 regarding some circumstances under which separate individual acquisitions will be deemed to be "closely connected" as a "single merger project" and how those connected transactions should be valued "at the time of the last acquisition" would benefit from further detail and clarification.

The Sections recognize that a single concentration can arise under European Union law, as well as Austrian and German law in cases where control over one undertaking is acquired through a series of share acquisitions from one or several sellers taking place within a two-year period, as well as in transactions that are linked by condition. The Sections believe, however, that it would be beneficial for the Draft Guidance to describe in greater detail: (i) the types of related transactions that EU, Austrian, and German laws would deem to be "closely connected" and constitute a "single merger," and the period during which this is to be assessed; and (ii) how the value of previously acquired shares or assets should be determined when a firm acquires additional shares in (or assets from) the same target company.

As the Draft Guidance is silent on the valuation of previously acquired shares, the parties would benefit from clarity on this point. For example, although the "size-of-transaction" threshold in the U.S. is based on the value of securities held following the consummation of the proposed transaction (including shares that are held prior to the then current transaction), the HSR Rules make clear that an acquiring person should value previously held shares at either (a) "market price" if closing will occur within 45 days or (b) "fair market value" if the "market price" is "indeterminable" because closing is more than 45 days out or the shares are not publicly traded.[10]

---

[9] 16 C.F.R. §801.21(a); §802.4.

[10] 16 C.F.R. §801.10, §801.13. Similarly, the HSR Rules specify that the value of assets purchased by a buyer from a single seller within the prior 180 days are aggregated with the value of newly-purchased assets unless an HSR filing was made on the previous acquisition. In addition, if a single agreement calls for multiple closings on purchases of assets from the same person, the purchases must be aggregated if the closings are within one year. *See* 16 C.F.R §801.13(b). The Sections believe it would be useful for Austria

b. JVs & Amalgamations

The Sections recommend that the Draft Guidance provide additional detail and examples to clarify how the transaction value threshold applies in the context of new joint ventures and amalgamations. The Sections believe the Draft Guidance does not provide sufficient distinctions between similar transactions and combinations for which the value of the consideration would appear to be calculated differently. This could result in transactions with similar impact being notified in some circumstances, but not others. Moreover, this may allow parties to structure transactions to take advantage of formalistic distinctions in the notification guidance.

For example, the Draft Guidance takes the view that the contribution of capital and assets to a newly formed, joint venture in return for shares or joint control requires the parties to aggregate the value of consideration contributed to the new entity. At the same time, paragraph 52 indicates that this is fundamentally different from the situation under which an existing, operative company is turned into a joint venture by the entry of a new shareholder.

Thus, under the Draft Guidance, if Company A contributed €200 million in cash to acquire 50% of NewCo, and Company B contributed certain operative assets to NewCo for the remaining 50% interest, the transaction value would appear to be ~€400 million. Yet, if Company A structured its investment by acquiring 50% of Company B's existing stock, the value of consideration would appear to be only €200 million and not include the value of Company B's existing assets. Under both transactions, however, Company A and B would jointly control the same business assets.

The Sections recommend that the Austrian and German authorities consider adopting more detailed rules to reduce the risk of different treatment for transactions resulting in a similar economic impact, and suggest that the approaches adopted by the HSR Rules with respect to joint ventures, mergers, and consolidations may offer helpful models. For example, the Draft Guidance paper's approach to aggregation of all contributions to a newly formed joint venture differs from the approach used in the United States to determine whether the HSR size-of-transaction threshold is satisfied. Under the U.S. approach, each JV partner would be treated as an acquiring entity and the JV is treated as the acquired entity, and each JV partner would assess whether its acquisition of JV interests exceeds the size of transaction threshold.[11] For the purpose of assessing whether the size-of-transaction threshold is met in acquiring the voting securities of a newly formed joint venture, the transaction value for each acquiring JV partner would be assessed separately, and the transaction value would be the acquisition price for the JV interests or the fair market value of all assets transferred to the joint

---

and Germany to have similarly clear examples and time periods so that merging parties can more easily determine when and how they need to determine and aggregate the values of any consideration paid for a target company's shares or assets.

[11] 16 C.F.R. §801.40

venture by that acquiring person.[12] Similarly, for mergers and consolidations, the HSR Rules may deem a party to be an acquiring person and an acquired person with respect to separate acquisitions that comprise a single transaction.[13]

II. Section D – Substantial Domestic Operations

The Sections welcome the aim of the German and Austrian authorities to harmonize, to the extent possible, the interpretation of the concept of "substantial domestic operations." The Sections' main concern is that due to the different threshold tests in each of the two jurisdictions and the differences in the jurisdictions' local nexus requirement, a common notice for these subjects may create more confusion than clarity. In addition, the Sections point out that some additional guidance regarding local nexus and the significance of domestic activities in the form of specific examples and concepts would be appreciated.

A. Separate Notices or Harmonization of Tests

The Sections welcome the joint German-Austrian initiative to produce a single guidance document applicable to their common alternative merger threshold. Nevertheless, the Sections caution that given significant differences in the legal regimes applicable to the assessment of local nexus in the two jurisdictions, a single document pertaining to the concept of substantial domestic operations, may lead to interpretative difficulties and confusion in practice.

---

[12] Thus, under the example discussed earlier, Company A's acquisition of a 50% interest in NewCo would be deemed a €200 million acquisition that requires an HSR filing; however, Company B's acquisition of a 50% interest in NewCo would be assessed separately. Even though the value of the operative assets contributed by Company B to NewCo are also likely worth ~€200 million, Company B's acquisition of 50% of NewCo would not meet the size-of-transaction threshold or require a filing under the HSR Rules. This is because: (a) Company B's transfer of its assets to NewCo would be considered an exempt intracompany transaction and (b) Company B would not be deemed to be acquiring any non-exempt assets contributed by Company A to NewCo that have a value greater than the HSR size-of-transaction threshold ($84.4 million), as the only asset contributed by Company A to NewCo was the €200 million in cash (considered an exempt asset under the HSR rules). Therefore, unlike the proposal in the Draft Guidance, the HSR Rules would produce the same outcome regardless of whether the transaction is structured as an acquisition by Company A of 50% of the stock of Company B (rather than the formation of a new joint venture), as this transaction would also be valued at the same €200 million level. Similarly, in the context of a joint venture formation, the HSR Rules also treat future commitments to contribute cash and hard assets differently from the Draft Guidance. A commitment to contribute additional cash does not create potential competitive concerns, so the FTC has advised that a forming shareholder's commitment to make future cash contributions to working capital is not included in the size of transaction for the joint venture formation. *See, e.g.,* HSR Informal Interpretations Letters, #1210002 (Oct. 2, 2012) ("Future commitments to contribute cash are only taken into account in determining the size of person for the Newco. They would not be considered in determining the size of transaction."). Future commitments to contribute hard assets, however, could have competitive consequences and could be taken into account in determining the size-of-transaction of the newly formed joint venture.

[13] 16 C.F.R. §801.2. For example, if Company X and Company Y propose to consolidate into Company Z, a newly formed corporation, and all shareholders of X and Y will receive shares of Z, both X and Y would be acquiring and acquired persons that are required to separately assess the value of the securities each is acquiring in Company Z.

The German and Austrian approaches also differ with respect to criteria relating to the significance of domestic activities. Whereas both identify that "marginal activity on a domestic market is not sufficient," which the Sections welcome, due to their different threshold turnover tests, the two jurisdictions have also very different approaches to assessing the significance of domestic activities when these can be measured in terms of turnover. The Draft Guidance explicitly clarifies that in Germany, domestic turnover of the target below €5 million will not be considered a significant activity if the turnover adequately reflects the target's market potential and competitive potential.[14] By contrast, the Draft Guidance merely states that "turnover can also be used as a recognized benchmark in Austria,"[15] though it does not specify precise criteria and there is no reference to a second domestic threshold as Austria does not have such a test. The Draft Guidance provides insufficient indicia of the level of turnover resulting from the domestic activity that would be considered significant in Austria in such a case. The Sections recommend that the Austrian Federal Competition Authority consider providing more guidance on the significance (or insignificance) of domestic turnover of the target in the Draft Guidance.

Alternatively, given the differences between the jurisdictions, the agencies could consider publishing a separate notice on the interpretation of its own law or amend the Local Nexus Notice by the Federal Cartel Office in Germany[16] and the Statement on Local Nexus of the Austrian Competition Authority,[17] to clarify that the application of the substantial domestic operations test is the same in each jurisdiction. If this is not possible, the agencies could restructure Section D to more clearly delineate the application of separate approaches by country.

B. Additional Guidance on the Assessment of Local Nexus / Significance of Domestic Activities

(i) Assessment of Local Nexus

The Draft Guidance helpfully sets forth the principle that local nexus is attributable to the place of intended use, which is usually the place in which the customer is located.[18] However, this statement is rendered unclear by provisions that refer vaguely to the sufficiency of the location of the target company in Austria.[19] The Draft Guidance attempts to further explain that the key factor is "the use of the asset for business activities and not the mere local allocation of the asset," but this statement no longer relates to customer location. The application of these factors to research and

---

[14] *See* Draft Guidance at para. 79.
[15] *Id*. at para. 80.
[16] *See* Merkblatt Inlandsauswirkungen in der Fusionskontrolle, 30 September 2014 ("Local Nexus Notice"), https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt%20-%20Inlandsauswirkungen_2014.pdf?__blob=publicationFile&v=2.
[17] *See* Standpunkt: Inlandsauswirkungen von Zusammenschlüssen ("Statement on Local Nexus"), https://www.bwb.gv.at/de/recht_publikationen/standpunkte/inlandsauswirkungen_von_zusammenschluessen/.
[18] *See* Draft Guidance, para. 69.
[19] *Id*. paras. 65, 69.

development is also unclear. The Draft Guidance states that local nexus may be established on the basis of the location where the research and development activity takes place,[20] and goes on to state that the address of the inventor of a patent application can also be an indication of the geographical allocation of the research and development activities. The Sections suggest that the agencies clarify the application and interaction of these potentially conflicting approaches. The Sections further submit that absent other elements, in a global economy, the mere place of residence of an inventor should not be considered an element relevant to local nexus as concerns research and development.

In addition, regarding the assessment of local nexus, the Sections recommend that the Guidance include more examples in the list of activities necessary to gain access to the local market that could trigger a filing requirement. For example, the Sections believe the Guidance should clary that an EU patent or a global or EU or regional license that merely includes Germany and Austria is not sufficient, unless other elements suggest that the parties intend to bring the product to the local market.

Finally, the Sections recommend that the Federal Cartel Office clarify the relationship between Section 35 para. 1 (a) GWB and Section 185 paragraph 2 GWB, including the Local Nexus Notice of transactions that involve more than two undertakings concerned.[21] For example: the reference in paragraph 72 stipulates that Section 185 para. 2 GWB and the Local Nexus Notice apply in addition to the present notice. However, the local nexus analysis in both provisions is much broader than the concept in the Draft Guidance. The reference in paragraph 72 therefore creates uncertainty.

(ii) Significance of Domestic Activities

The Sections appreciate the Austrian and German agencies' efforts to clarify the elements that they will consider to assess the significance of domestic activities. In Part II.A above, we addressed concerns regarding the potential for confusion relating to the differentiated approaches of Germany and Austria regarding the use of turnover in the assessment of domestic activity. In addition, the Draft Guidance outlines other measurement criteria for assessment of domestic activity in cases where turnover is an inappropriate means of assessment. For example, the Draft Guidance provides that user numbers or the frequency of access to a website are possible indicators of domestic activity in the digital sector.[22] Yet, the Draft Guidance provides limited information as to how to determine the domestic significance of such indicators. The first case example identifies 1 million users in Germany and 100,000 users in Austria as significant, based on the ratios between users and consumers in both countries,[23] but it is unclear how these factors are applied to make this determination. What ratio is sufficient to determine

[20] See also paras. 81, 102.

[21] According to para. 14 et seq. of the Local Nexus Notice, there is no local nexus in case of at least three undertakings concerned if (i) the joint venture is neither actually nor potentially active in Germany and (ii) if the parent companies are no competitors on the relevant market of the joint venture (or any up- or downstream market hereof).

[22] *See* Draft Guidance at para. 64.

[23] *See* Draft Guidance at para. 85.

significance, and why? Is this as a percentage of the consumer population of the jurisdiction? Would 1,000 active users in Germany also meet this standard? What about 100 active users in Austria? The Sections suggest that the German and Austrian agencies further expand on these important points, and consider adding explanatory examples.

III. Conclusion

The Sections appreciate the opportunity to comment on the Draft Guidance. The Sections would be pleased to respond to any questions that German Federal Cartel Office or the Austrian Federal Competition Authority may have regarding these comments, or to provide any additional comments or information that may assist them in finalizing the proposed amendments.