



Bundeskartellamt

Guidance on domestic effects in merger control

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Courtesy translation. Only the German language version is authentic.

A. Introduction

- 1 **Foreign-to-foreign mergers**, i.e. mergers between companies based abroad, often raise the question of whether they are subject to notification in Germany. Under German law the obligation to notify is not triggered by every transaction that amounts to a concentration within the meaning of Section 37 GWB¹ and reaches the turnover thresholds of Section 35 GWB. Sufficient effects on Germany are another essential prerequisite under Section 130 (2) GWB.
- 2 This guidance document is designed to help companies and their advisers assess whether the effects of a concentration in Germany are sufficient to fulfil the requirements of the domestic effects clause in Section 130 (2) GWB² and trigger the obligation to notify.³ For this purpose this document describes **typical case scenarios** in which domestic effects can either be clearly identified or ruled out (cf. para. B I. and II.). This guidance also identifies essential **criteria for the necessary case-by-case assessment** of domestic effects in all other cases which do not fall under the case categories mentioned above (cf. para. B.III).
- 3 In some cases the assessment of a concentration's domestic effects raises more complex questions than the assessment of its competitive effects. However, if it is possible to determine quickly on the basis of a notification that competition problems can be immediately excluded, a more detailed

¹ German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB).

² In accordance with the effects doctrine of international law, each jurisdiction is free to examine whether concentrations restrain competition within its territory if there is a sufficient nexus between the concentration and the state. With regard to the obligation to notify a concentration, the requirements under international law for an obligation to notify are in most cases less demanding than those under Section 130 (2) GWB. In order for a notification obligation to be compatible with the requirements under international law, it is sufficient if the domestic turnover thresholds are exceeded by at least two companies involved in the concentration. This guidance document deals exclusively with the requirements under Section 130 (2) GWB.

³ These are the only issues addressed in this guidance document. For information on the more general questions as to whether transactions are notifiable please consult the Bundeskartellamt's information leaflet on the control of concentrations under German law. It provides guidance as to which types of transactions amount to a concentration, which companies are companies concerned by the transactions and how the turnover thresholds are to be calculated.

examination of domestic effects is not necessary. From the Bundeskartellamt's point of view it is therefore preferable to adopt a pragmatic approach and to examine such cases in the framework of a merger control procedure, leaving open the issue of domestic effects. Such an approach is feasible provided that the merging parties are prepared to notify the particular transaction.

- 4 The present guidance document incorporates in particular the Bundeskartellamt's case-practice as well as the case-law of the competent courts. It also takes into account the International Competition Network's Recommended Practices for Merger Notification Procedures.⁴
- 5 The decisions of the Bundeskartellamt are subject to **judicial review** by the Oberlandesgericht Düsseldorf (Düsseldorf Higher Regional Court, OLG) and the Bundesgerichtshof (Federal Court of Justice, BGH). These courts are not bound by this guidance document. Furthermore, it may become necessary to further develop the analytical concept for the assessment of domestic effects outlined in this guidance document in the light of future developments in the Bundeskartellamt's case practice.

B. Domestic effects

- 6 According to Section 130 (2) GWB, the Act applies to all restraints of competition that have an effect in Germany, also if they are caused outside Germany. Section 130 (2) GWB also applies to the system of **merger control** as a whole,⁵ and, in particular, to the obligation to notify under Section 39 GWB (as well as the corresponding standstill obligation). This means that, different

⁴ ICN, Recommended Practices for Merger Notification Procedures, available at: www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf. The European Commission's decision-making practice on foreign-to-foreign mergers has also been evaluated. However, the EU approach was not followed. Under the Merger Regulation, all concentrations that meet the turnover thresholds have to be notified regardless of their effect on the EU. In contrast to the text of the EC Merger Regulation, the German competition Act includes specific rules on domestic effects. It is also a particular concern of the Bundeskartellamt to avoid notifications in cases which clearly do not affect Germany. This approach was taken in view of the higher case numbers in Germany in comparison to the EU, despite the extremely low information requirements for a German notification, and despite the fast merger control procedure which, inter alia, does not foresee any mandatory pre-notification contacts.

⁵ The term "restraints of competition" used in Section 130 (2) GWB is a summary term for all effects on competition that are provided for under the GWB's substantive rules.

from the Commission's practice in merger control so far,⁶ mergers that exceed the turnover thresholds⁷ (and amount to a "concentration"⁸), are not necessarily subject to the notification requirement in Germany.

- 7 The introduction of a **second domestic turnover threshold** by the third SME Relief Act⁹ has not changed the legal situation with regard to domestic effects. Although the second domestic turnover threshold specified the requirements of domestic effects under Section 130 (2) GWB for some mergers (i.e. concentrations involving two parties of which only one has achieved a turnover in Germany are clearly not subject to mandatory notification as the turnover thresholds are not met), for the remaining mergers it does not provide for a more specific rule (*lex specialis*) that would override the general requirements under Section 130 (2) GWB. Ultimately, the introduction of the second domestic turnover threshold has considerably facilitated the application of Section 130 (2) GWB.
- 8 The term 'domestic effect' within the meaning of Section 130 (2) GWB is to be interpreted according to the particular provision's **aim and purpose**.¹⁰ Under Sections 35 et seqq. GWB it is the purpose of merger control, and particularly the notification requirement under Section 39 GWB, to examine transactions

⁶ European Commission, Towards more effective EU merger control (Commission staff working document), 25 June 2013 (available at: www.ec.europa.eu/competition/consultations/2013_merger_control/merger_control_en.pdf), p.22 et seq., cp. question 1.

⁷ Concentrations are only subject to German merger control if the combined aggregate turnover of the companies involved is more than € 500 million, the domestic turnover of at least one company involved is more than € 25 million and that of another company involved more than € 5 million (Section 35 GWB). This applies to the acquiring company, the company to be acquired or a joint venture company. It is irrelevant whether the criterion is fulfilled by a domestic or a foreign company participating in the concentration.

⁸ Cf. Section 37 GWB, cf. BKartA, Information leaflet on the German control of concentrations (available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20German%20Merger%20Control.pdf?__blob=publicationFile&v=3); for questions regarding the concept of acquisition of control as derived from European law, cf. Commission, Consolidated Jurisdictional Notice (available at <http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=de&lng1=de,en&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=468617:cs>).

⁹ Third Act to reduce bureaucratic impediments in particular for SMEs (Third SME Relief Act - *MEG III*), 17.03.2009, Federal Law Gazette I, p. 550.

¹⁰ Cf. Federal Court of Justice, decision of 12 July 1973, KRB 2/72, - Ölfeldrohre, WuW/E BGH 1276 (on Section 98(2) GWB, now Section 130(2)); Federal Court of Justice, decision of 29 May 1979, KVR 2/78 – Organische Pigmente, WuW/E BGH 1613.

that will result in a change of market structures before they are implemented, with a view to establishing whether they are likely to significantly impede effective competition. The starting point for assessing domestic effects is thus the **concentration of the merging parties** and its **relation to markets** that cover parts of or the entire territory of Germany. Concentrations can have an impact on supply markets and procurement markets¹¹.

9 Domestic effects can be found where a concentration is **likely** to have a **direct**¹² influence on the conditions for competition in markets that cover parts of or the entire territory of Germany. The potential influence on market conditions must have a certain minimum intensity, i.e. this has to be an **appreciable**¹³ effect. For this evaluation all factors are relevant that have to be considered in the substantive assessment under Section 36 (1) GWB. It is neither required that the concentration leads to competitive conditions that are worse than before the merger nor that the threshold for intervention appears to have been reached.¹⁴ These issues will only be dealt with in the substantive examination.

10 In line with existing case law it is **not warranted** to place **high demands** on the appreciability of domestic effects. This applies in particular with regard to the notification requirement. For example, domestic effects were established in a merger which had resulted in modest market share additions in Germany (4.4% plus 0.14% in one year, and 3.5% plus 0.23% in the next) and thus led to the elimination of a competitor. It is important to add that the acquisition gave the acquirer access to qualified know-how that he expected would put him in a better competitive position.¹⁵ Furthermore, when clarifying whether the

¹¹ For example, a joint purchasing arrangement in the form of a joint venture can affect domestic procurement markets if the joint venture purchases domestic products which, possibly after further processing, are to be sold on foreign markets.

¹² Federal Court of Justice, decision of 29 May 1979, KZR 2/78 - Organische Pigmente, WuW/E BGH 1613, 1615; Berlin Court of Appeals, decision of 5 April 1978, Kart 22/78 - Organische Pigmente, WuW/E OLG 1993, 1996.

¹³ Ibid., cf. also Federal Court of Justice, decision of 25 September 2007, KVR 19/07 – Sulzer/Kelmix, WuW/E DE-R 2133, 2136; Düsseldorf Higher Regional Court, decision (on the merits) of 26 November 2008, VI-Kart 8/07 (V) – Phonak II, WuW/E DE-R 2478, 2482; confirmed by the Federal Court of Justice, decision of 20 April 2010, KVR 1/09 – Phonak/GN Store, WuW/E DE-R 2905 (but no findings on this specific issue).

¹⁴ Federal Court of Justice, decision of 29 May 1979, KZR 2/78 – Organische Pigmente, WuW/E BGH 1613, 1614 et seq.

¹⁵ Federal Court of Justice, decision of 29 May 1979, KZR 2/78 – Organische Pigmente, WuW/E BGH 1613, 1615 (obligation to notify confirmed).

notification obligation applies to a merger a lower standard of proof is to be applied regarding domestic effects than when the requirements for an intervention are evaluated.

- 11 On this basis, and in the context of the notification obligation of mergers, several case scenarios can be identified in which appreciable domestic effects can clearly be expected (see para. I.) or ruled out (see para. II.). In all other cases it will be necessary to make a case-by-case assessment. Some important considerations that are relevant in the context of this assessment will be discussed in the following (see para. III).

I. Cases in which domestic effects can clearly be identified

- 12 If the **target company** is active in Germany and if its turnover exceeds at least the second domestic turnover threshold of € 5 Mio., the merger is clearly sufficient to establish appreciable domestic effects. The second domestic turnover threshold specified the requirements of domestic effects under Section 130 (2) GWB for some mergers, i.e. concentrations involving only two parties (e.g. acquirer and target company in case of an acquisition of sole control), which fulfil the turnover thresholds of Section 35 GWB, always have sufficient domestic effects. According to Section 36 (2) GWB the relevant turnover of the companies involved in the concentration includes the turnover of all the companies that belong to the same group.¹⁶
- 13 If there are more than two parties to the merger, not all concentrations that exceed the turnover thresholds have sufficient domestic effects. If a joint venture is or is to be active at least also in Germany, it will clearly have sufficient domestic effects if the turnover achieved (or expected to be achieved over the foreseeable future, i.e. normally during the next 3-5 years) by the joint venture exceeds € 5 million. In all other cases, i.e. if the joint venture's domestic turnover is lower, the question of whether sufficient domestic effects can be

¹⁶ In this context, double counting of turnover should be avoided. In addition, parent companies and subsidiaries that will no longer be connected (according to Section 36 (2) GWB) to the target company after the implementation of the merger should not be included when calculating the target's turnover.

expected is a case-by-case assessment and will depend on the circumstances of each individual case (see para. III below).

II. Cases in which domestic effects can clearly be ruled out

14 In cases involving more than two parties domestic effects can be clearly ruled out if the following (cumulative) conditions are met:

1. Joint venture is only active abroad

15 The joint venture¹⁷ is neither currently active on a domestic market (i.e. on a relevant geographic market that covers parts of or the entire territory of Germany) nor is it a potential competitor.¹⁸ In the case of newly established joint ventures this applies to their intended business activities.

2. Parent companies do not compete on domestic markets

a) No spill-over effects on the joint venture's relevant product market (or on upstream or downstream markets)

16 Any two parent companies of the joint venture are both neither active in the same domestic¹⁹ relevant product market than the one on which the joint venture is active abroad, nor in a domestic²⁰ upstream or downstream market. (It should be noted that activities of companies belonging to the same group have to be taken into account according to Section 36 (2) GWB.) Furthermore, the parent companies are not potential competitors on these markets, either. In

¹⁷ In the context of merger control the following situations are described as joint ventures according to German law: a) a company is controlled by several other companies (concentration by acquisition of control in accordance with Section 37 (1) no. 2 GWB) and b) at least two companies hold shares (or voting rights) of at least 25% in another company (concentration by acquisition of shares in accordance with Section 37 (1) no. 3 sentence 3 GWB).

¹⁸ As to the requirements for potential competition, cf. e.g. Federal Court of Justice, decision of 19 June 2012, KVR 15/11 – Haller Tagblatt, WuW/E DE-R 3695.

¹⁹ Cf. above para. 15: a domestic market is a market that covers parts of or the entire territory of Germany.

²⁰ Ibid.

these cases it can be clearly ruled out that spill-over²¹ effects between the parent companies would occur on these markets.

b) No spill-over effects on other domestic markets

17 Any two parent companies are not actual or potential competitors on any other relevant product market that covers parts of or the entire territory of Germany, either. If this is the case, it can also be clearly ruled out that spill-over effects between the parent companies would occur on these further domestic markets

III. Case-by-case assessment of all other cases

18 For all case scenarios which cannot be attributed to one of the categories identified above, it will depend on the circumstances of each individual case whether they can be expected to have sufficient domestic effects. All these cases involve more than two parties to the concentration. In these case scenarios the following information may be useful for assessing domestic effects in individual cases:

19 If a joint venture's activities on markets covering parts of or the entire territory of Germany are only marginal this is generally not sufficient to qualify as appreciable domestic effects (**joint venture with minimal business activity in the domestic markets**). In this case, in particular, the actual or expected turnover of the joint venture is to be taken into account. If the turnover achieved by the joint venture in Germany exceeds the € 5 million threshold, this will always be regarded as sufficient. However, the joint venture's business activity is not regarded as "**marginal**" solely because the turnover achieved is below the € 5 million threshold or because its market share is less than 5%.²² An

²¹ Spill-over effects are relevant in the context of the examination of a concentration in merger control proceedings, in particular with regards to coordinated effects (tacit collusion). Spill-over effects can also have an impact on the parent companies' incentives to compete and thus influence to what degree they compete with one another.

²² For example, in the case Organische Pigmente mentioned above, domestic effects were found to exist in the context of a concentration which resulted in minimal market share additions in Germany (4.4% plus 0.14% in one year, and 3.5% plus 0.23% in the next) and thus led to the elimination of a competitor. However, further factors also had to be considered as the target company gave the acquirer access to qualified know-how that he expected would put him in a better competitive position (Federal Court of Justice, decision of 29 May 1979, KZR 2/78 – Organische Pigmente, WuW/E BGH 1613, 1615).

appreciable domestic effect can also result from the transfer of resources that are relevant for the company's market position to the joint venture, e.g. intellectual property rights and know-how.

- 20 If the joint venture's activities on a market that covers parts of or the entire territory of Germany are only marginal, domestic effects can be the consequence of possible **spill-over effects among the parent companies**. The same applies if the joint venture is neither active on a market that covers parts of or the entire territory of Germany, nor a potential competitor on such a market. Negative effects on the degree to which the parent companies compete with each other can occur, in particular, if the parent companies are active on the same domestic²³ product market on which the joint venture is active abroad (and/or domestically). These effects are not sufficiently important to meet the appreciability requirement if the parent companies' market positions are limited and thus only marginal effects can be expected. This applies in particular in cases where the parent companies' joint market shares do not exceed 10 percent. The same applies for activities of both parent companies on a market upstream or downstream of the joint venture's relevant product market.
- 21 Effects on the degree to which parent companies compete with each other occur less often in cases where any two of them are both active only in a different domestic market, i.e. neither the joint venture's relevant product market nor a market upstream or downstream. Spill-over effects are, however, feasible if the joint venture acts as a hinge between the parent companies, facilitating (implicit) coordination between them on a market which covers parts of or the entire territory of Germany and where the parent companies are competitors. The **economic significance of the joint venture** for its parent companies is particularly decisive. If it only plays a marginal role, sufficient domestic effects cannot be expected. For this assessment it is particularly important to consider the joint venture's current or expected (worldwide) turnover in comparison to its parent companies' (worldwide) turnover. If the joint venture plays a strategic role this can also mean that it is of economic significance to its parent companies,

²³ See above para. 15: a domestic market is a market that covers parts of or the entire territory of Germany.

e.g. if the joint venture provides key technologies which are particularly important for the specific sector or the parent companies involved.

C. Procedural issues

23 In some cases the assessment of a concentration's domestic effects raises more complex questions than the assessment of its competitive effects. In most of these borderline cases a detailed examination of the circumstances of the case is therefore unnecessary if it is clear that the case does not raise any competition issues. The question of whether a concentration will have domestic effects can **be left open** in such situations, if the companies are prepared to notify the concentration. As in its past practice, the Bundeskartellamt continues to stand ready to examine the planned concentrations in question with a focus on the relevant competition issues, after they have been notified. This approach ensures that the companies concerned can obtain legal certainty with a minimum of bureaucracy. As is the case with regard to other unproblematic merger cases, a clearance can be obtained within at the most one month after notification (and without any mandatory pre-notification contacts), provided that the required information is submitted in the notification. It should be noted that the information requirements under Section 39 GWB are very limited. If necessary, questions regarding the possible domestic effects of a concentration can be discussed in advance of notification in **informal contacts** with the Bundeskartellamt's respective decision division in charge of the relevant industry. If questions are more of a general nature, in particular, if they concern the interpretation of Section 130 (2) GWB they can also be discussed with the Merger Control Unit within the Bundeskartellamt's General Policy Division.

24 If one of the companies concerned is not registered in Germany, a **person** should be named in the notification who is **authorised to accept service in Germany** (Section 39 (3) No. 6 GWB).

25 The Bundeskartellamt does not make the clearance of foreign mergers conditional upon the **completeness** of the submitted **notification** if the parties concerned are able to demonstrate that they are prevented by provisions of foreign law or other circumstances from submitting all the mandatory information requested in Section 39 and that it is clear from the submitted documents or from information available to the

Bundeskartellamt that a prohibition of the concentration can definitely not be expected.²⁴

²⁴ This simplified procedure for handling foreign-to-foreign mergers is based on the general instruction issued by the Ministry of Economics on 30 May 1980 (Federal Gazette No. 103/80 of 7 June 1980).

Domestic effects according to Section 130 (2) GWB

