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\(^1\) 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 GWB\(^2\) and reaches the turnover thresholds of Section 35 GWB. Another essential prerequisite under Section 130 (2) GWB is that the concentration has sufficient effects within Germany.

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) GWB\(^3\) and trigger the obligation to notify the concentration.\(^4\) For this purpose this document describes typical case scenarios in which domestic effects can either be clearly identified or ruled out (cf. part B I. and II.). The guidance paper 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

\(^1\) The obligation to notify a merger is provided for in Section 39 (1) GWB. According to Section 41 (1) 1 GWB a concentration must not be put into effect before the Bundeskartellamt has taken a clearance decision (or before the time limit has expired and the merger is cleared by law).

\(^2\) German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB).

\(^3\) In accordance with the effects doctrine of public 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 public 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 that 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.

\(^4\) 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.
mentioned above (cf. part B III.). Case examples and a flowchart illustrate how to apply the concept that is set out in this guidance document.\textsuperscript{5}

3 In some cases the assessment of a concentration’s domestic effects raises more complex questions than the assessment of its competitive effects. If, on the basis of a notification, and without conducting significant inquiries, it is obvious that the concentration will not raise any competition concerns, a more detailed 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, \textbf{leaving open the question 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 is based on 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.\textsuperscript{6}

5 The decisions of the Bundeskartellamt are subject to \textbf{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.

\textsuperscript{5} Should the flowchart or the examples as compared to the text of the guidance document appear to give rise to different interpretations of the applicable rules on domestic effects, the text of the guidance document takes precedence.

\textsuperscript{6} ICN, \textit{Recommended Practices for Merger Notification Procedures}, available at: \url{www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf}. The European Commission’s (current) decision-making practice on foreign-to-foreign mergers has also been evaluated. However, the (current) EU approach was not followed. Under the EC 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.
B. Domestic effects

6 According to Section 130 (2) GWB, the Act applies to all restraints of competition that have an effect in Germany, even if the restraints are caused outside Germany. Section 130 (2) GWB also applies to the system of merger control as a whole, and, in particular, to the obligation to notify under Section 39 GWB (as well as the corresponding standstill obligation). This means that, in contrast to the Commission's current merger control practice, mergers that exceed the turnover thresholds (and amount to a “concentration”), are not necessarily subject to the notification requirement in Germany.

7 The introduction of a second domestic turnover threshold by the third SME Relief Act 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 an

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


9 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.


exhaustive rule 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 aim and purpose of the particular provision of the GWB that is applied. Under Sections 35 et seqq. GWB it is the objective of merger control, and particularly of the notification requirement under Section 39 GWB, to examine transactions 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 part of or the entire territory of Germany. Concentrations can have an impact on supply markets and procurement markets.

9 Domestic effects can be found where a concentration is likely to have a direct influence on the conditions for competition in markets that cover part of or the entire territory of Germany. The potential influence on market conditions must reach a certain minimum intensity, i.e. there has to be an appreciable effect. For this evaluation the same factors are relevant that have to be considered in the substantive assessment under Section 36 (1) GWB. It is neither required that the concentration’s effects on competition are negative, nor that the

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13 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.


threshold for intervention is possibly reached. These issues will only be dealt with at the stage of the substantive examination.

10 In line with existing case law, the requirements for the appreciability of domestic effects should not be set too high. 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 led to the elimination of a competitor. The acquisition also gave the acquirer access to qualified know-how with the help of which he expected to achieve a better competitive position. Furthermore, when clarifying whether the notification obligation applies to a merger a lower standard of proof is required regarding the merger’s expected domestic effects as compared to a situation in which domestic effects are assessed in the context of the competition authority’s decision, at the end of its investigations, whether or not to intervene against a merger.

11 On this basis, and in the context of the general obligation to notify a merger, several case scenarios can be identified in which appreciable domestic effects can clearly be expected (see part I.) or ruled out (see part 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 below (see part 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 million, the merger clearly qualifies as a merger with appreciable domestic effects. The domestic turnover

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17 Federal Court of Justice, decision of 29 May 1979, KZR 2/78 – Organische Pigmente, WuW/E BGH 1613, 1614 et seq.
18 Federal Court of Justice, decision of 29 May 1979, KZR 2/78 – Organische Pigmente, WuW/E BGH 1613, 1615 (obligation to notify ex-post confirmed). The same principles with regard to domestic effects are also applicable in the context of ex-ante notifications.
19 For the comparable issue whether a de-minimis market is affected by a concentration, which used to be a question that arose in the context of the obligation to notify (Section 35 (2) 1 No. 2 GWB in the version valid until 25 June 2013), see Federal Court of Justice, decision of 14 October 2008, KVR 30/08 – Faber/Basalt, WuW/E DE-R 2507, 2509 (para. 13) and the subsequent decision of the Higher Regional Court Düsseldorf concerning the same concentration, decision of 29 April 2009, VI-Kart 18/07 (V), WuW/E DE-R 2622, 2626 f. (para. 32 et seq.)
thresholds specify the requirements of domestic effects under Section 130 (2) GWB for an important group of mergers, i.e. **concentrations involving only two parties** (e.g. acquirer and target company in case of an acquisition of sole control). In these cases, provided the turnover thresholds of Section 35 GWB are exceeded, the concentrations 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.\(^{20}\)

13 If there are **more than two companies involved in the concentration**, not all cases in which the turnover thresholds are exceeded also lead to sufficient domestic effects. If a joint venture is active at least also in Germany, it will clearly have sufficient domestic effects if the turnover achieved by the joint venture exceeds € 5 million\(^{21}\) in Germany. In all other cases, i.e. if the joint venture’s domestic turnover is lower (especially in cases of newly formed joint ventures), the question of whether sufficient domestic effects can be expected requires a case-by-case assessment and will depend on the circumstances of each individual case (see part III. below).

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

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

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\(^{20}\) 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.

\(^{21}\) Also, a concentration is sufficient to establish appreciable domestic effects if the joint venture’s market share on a market that covers part of or the entire territory of Germany exceeds five percent. This assessment requires a market definition in the particular case. Hence, the present guidance document deals with this case in the context of the section on the case-by-case assessment (see para. 18).
1. Joint venture is only active on markets outside Germany

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

2. Parent companies do not compete on the joint venture’s relevant product market (or on upstream or downstream markets)

Not more than one parent company of the joint venture is active in the same domestic relevant product market than the one on which the joint venture is active abroad. (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, not more than one parent company is a potential competitor on this market, either. Finally, not more than one parent company is an actual competitor in a domestic market upstream or downstream of the joint venture’s product market abroad. In these cases it can be clearly ruled out for the purposes of merger review that relevant spillover effects between the parent companies would occur on these markets.

Example: Companies A and B acquire joint control over a retailer of consumer electronics that is active in Brazil. A operates department stores, shopping markets and specialised retail stores world-wide. Most of its sales are in Europe. Currently, A is expanding to several Latin American countries, inter alia, to Brazil. B is a Brazilian investment company. To date, B has invested in companies active in different fields in Brazil as well as in natural resources companies active world-wide. The sales of A and B exceed the turnover thresholds applicable in the German merger control regime. The

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22 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 percent in another company (concentration by acquisition of shares in accordance with Section 37 (1) no. 3 sentence 3 GWB).

23 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.

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

25 Ibid.

26 Spillover 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). Spillover effects can also have an impact on the parent companies’ incentives to compete and thus influence to what degree they compete with one another.
concentration has no domestic effects. Thus, it is not subject to notification in Germany. This would also apply if A were part of a conglomerate and if this conglomerate were partly active on the same natural resource markets as B.

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

17 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. They all have in common that they 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:

18 If a joint venture's activities on markets covering part of or the entire territory of Germany are only marginal this is generally not sufficient to qualify as appreciable domestic effects (joint venture with minor business activity in domestic markets). In this case, in particular, the joint venture's actual turnover is to be taken into account.\(^{27}\) If the turnover achieved by the joint venture in Germany exceeds the € 5 million threshold, this will always be regarded as sufficient (see para. 13). In the context of the case-by-case assessment, the joint venture’s market share on a market that covers part of or the entire territory of Germany is also a relevant factor. If it exceeds the threshold of five percent, this is sufficient for the concentration to qualify as having sufficient domestic effects. However, a joint venture's business activity is not automatically regarded as "marginal" solely because its turnover achieved is below the € 5 million threshold and its market share is less than 5 percent.\(^{28}\) Indications for a market position that is more than “marginal” can also result from the transfer of resources to the joint venture, provided that the resources are relevant for the

\(^{27}\) Partial-function joint ventures (e.g. production joint ventures) only achieve turnover with their parent companies. In this case, the turnover threshold of € 5 million can also be helpful to assess whether the joint venture’s captive sales to its parent companies exceed the scope of a marginal business activity. Whereas internal transfer prices are of lesser importance for this assessment, it is of greater significance whether the quantities delivered correspond to a sales volume of € 5 million.

\(^{28}\) 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 following year) and thus led to the elimination of a competitor. However, further factors were also present in this case as the target company gave the acquirer access to qualified know-how with the help of which he expected to achieve a better competitive position (Federal Court of Justice, decision of 29 May 1979, KZR 2/78 – Organische Pigmente, WuW/E BGH 1613, 1615).
company’s market position, e.g. the transfer of intellectual property rights and know-how respectively. In all these cases, it is required that the resources transferred to the company are the basis for a market position that is more significant than what would be expected with regard to the joint venture’s actual turnover or market shares. It should be noted though, that in the opposite situation, i.e. if additional indications for sufficient effects of the concentration on the market structure are lacking, a turnover below € 5 million in Germany is not sufficient to constitute a non-marginal business activity of the joint venture. The same applies if the joint venture’s market shares are lower than five percent, provided the merger does not lead to horizontal overlaps, and, consequently, an addition of market shares.

Example: A Japanese investment bank (B) and a US hedge fund (H) acquire joint control over the Canadian undertaking A. B and H are active world-wide. They achieve significant sales also in Germany. B and H’s sales clearly exceed the turnover thresholds provided for in the German merger control regime. The Japanese investment bank and the US hedge fund compete on several German markets for financial services. On these markets, they achieve combined market shares of around 25 percent. The target A produces maple syrup and sells it world-wide. In Europe, only one fast food chain specialized in pancakes is supplied with maple syrup by A. The German subsidiary of the fast food chain runs three pancake restaurants in Germany. In the last financial year, A achieved a turnover of € 50,000 in Germany through sales to this subsidiary (on this basis A’s market share was significantly below 5 percent). Therefore, the joint venture’s business activity on domestic markets is marginal. The fact that the parent companies are competing on a different market, is not sufficient to expect the joint venture to bring about spill-over effects of a nature that would be relevant in the context of the merger control provisions. As a result, the concentration is not subject to merger control in Germany.

19 In the case of a newly established joint venture that has not achieved a turnover yet, the projected sales in Germany during the first three to five years after the joint venture’s establishment\(^\text{29}\) usually provide a useful benchmark as to whether the joint venture’s activity in Germany is more than marginal. In this context, it is possible, for example, to take into account the sales forecasts

\(^{29}\) Concerning the time frame for the assessment of the expected development of market conditions see Bundeskartellamt, Guidance on Substantive Merger Control, para. 12 footnote 13. When assessing the domestic effects of a concentration to determine whether it has to be notified, it is sufficient to look at the expected developments during the next three to five years. In this context it is not necessary to determine the relevant time frame for the prognosis on a case-by-case basis and in relation to the speed of market developments.
contained in the company’s business and financial plan. The estimated market position that the joint venture is likely to achieve during its first three to five years of operation (on a market that covers part or the entire territory of Germany) can equally provide indications as to the domestic effects.

Example: The Swiss chemical company A and the American technology company B intend to establish a joint venture. The joint venture will produce and sell particular speciality chemicals. A and B’s sales exceed the turnover thresholds provided for in the German merger control regime. It is planned that the joint venture’s production facilities will be located in Asia. The joint venture will target its sales initially, i.e. during the first five years, on Europe. The financial plan foresees that the joint venture’s sales on the European market will reach a volume of around € 100 million during the first three to five years. How the expected turnover will geographically break down to individual Member States is not clear. Based on available estimates of the expected market volume, the joint venture’s planned turnover corresponds to a market share of around 15 percent on an EEA-wide market for the chemical products in question. Given the joint venture’s expected position on the relevant market that covers Germany, the concentration has sufficient effects on Germany and is therefore subject to notification.

If the joint venture’s activities on a market that covers part of or the entire territory of Germany are only marginal, domestic effects can be the consequence of possible spillover effects between or among the parent companies. The same applies if the joint venture is neither active on a market that covers part of or the entire territory of Germany, nor a potential competitor on such a market.

The degree to which parent companies of a joint venture compete with one another is potentially reduced, in particular, if they are actual or potential competitors on the same domestic 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’ combined market shares do not exceed 20 percent. If both parent companies are competitors on a market

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

31 When calculating the market shares, the correct reference is the economically relevant market. This also applies if this market is geographically wider than Germany.
upstream or downstream of the joint venture's relevant product market, this can also result in spillover effects. In this case, the same principles apply.

C. Procedural issues

22 The assessment of a concentration’s domestic effects sometimes raises more complex questions than the assessment of its competitive effects. In these borderline cases an intensive fact-based and detailed examination of the circumstances of the case is unnecessary if it is obvious that the concentration does not raise any competition concerns. The question as to whether a concentration will have domestic effects can be left open in such situations, provided the companies are prepared to notify the concentration. As in its past practice, the Bundeskartellamt continues to stand ready in such borderline cases 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 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 a notification in informal contacts with the Bundeskartellamt’s respective decision division in charge of the relevant industry. If questions are of a more 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.

23 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 of legal documents in Germany (Section 39 (3) No. 6 GWB).

24 The Bundeskartellamt does not make the clearance of foreign-to-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 if it is clear from the submitted documents or from information available to the Bundeskartellamt that a prohibition of the concentration is definitely not to be expected.\textsuperscript{32}

\textsuperscript{32} 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).
Does the concentration (according to Sec. 37 GWB) exceed the turnover thresholds (under Sec. 35 GWB)? (para. 1)

No

NO obligation to notify to BKartA. (Question of domestic effects can be left open.)

Yes

Are more than two companies involved in the concentration? (para. 12 et seq., 15)

No

Concentration has appreciable domestic effects and has to be notified to BKartA.

Yes

Does the joint venture achieve net sales of more than €5 million in Germany? (para. 13)

Yes

In the case of a newly established joint venture, are net sales of more than €5 million expected during its first three to five years of operation? (para. 19)

Concentration has appreciable domestic effects and has to be notified to BKartA.

No

No

Are the joint venture’s activities on domestic markets (i.e. markets that cover part of or the entire territory of Germany) only marginal? Relevant factors:
- joint venture’s market share < 5% (para. 18)
- No indications for a market position of the joint venture that is more important than its market share would suggest, in particular, no transfer of significant resources, such as IP-rights and know-how that would be the basis for such a market position (para. 18)

Yes

Concentration has appreciable domestic effects and has to be notified to BKartA.

No

Are any two parent companies (i)
- actual or potential competitors on the joint venture’s product market? (para. 16)
- actual competitors on a market that is upstream or downstream of the joint venture’s product market (para. 16)

OR

(ii) actual competitors on a market that relates to a market that covers part of or the entire territory of Germany.)

Yes

Concentration has appreciable domestic effects and has to be notified to BKartA.

No

Does the parent companies’ combined market share exceed 20%? (para. 21)

Yes

Concentration has appreciable domestic effects and has to be notified to BKartA.

No

No

Concentration has NO appreciable domestic effects and does not have to be notified to BKartA.