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JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Note by Germany --

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*More documents related to this discussion can be found at
www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm*

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GERMANY

1. Legal provisions in Germany

1. Multijurisdictional mergers often raise the question of whether merger control is limited to countries where merging parties or targets have their headquarters, their legal place of establishment, manufacturing sites, or where appreciable domestic effects can be expected.

2. German merger control relies on a worldwide turnover threshold of EUR 500 million to identify mergers that are significant enough for review. In this context the combined aggregate turnover of all companies concerned is relevant. In German merger control this is the most important filter. It applies to all merger cases, i.e. there is no notification obligation if this worldwide turnover threshold is not met. Additionally, a merger is only subject to notification if at least one participating company achieves a turnover in Germany of more than EUR 25 million and *one further company achieves a turnover in Germany of at least EUR 5 million*¹. The so-called second domestic turnover threshold (of EUR 5 million)² was introduced in March 2009. The second turnover threshold increased the local nexus because it ensures that at least two companies participating in the merger have a relevant turnover in Germany.³

3. In addition to the domestic turnover thresholds, German competition law includes a “domestic effects clause”. According to Section 185 (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 185 (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). The domestic effects clause has been an element of German competition law since the adoption of the GWB in 1957 and predates the introduction of merger control in 1973, as well as the introduction of the second domestic turnover threshold.

4. In order to clarify the meaning of the domestic effects clause and to provide guidance on how it should be applied the Bundeskartellamt published in 2014 a new guidance paper on domestic effects in merger control.⁴

2. The domestic effects clause in Germany

5. Domestic effects can be expected where a concentration is likely to have a direct influence⁵ on the conditions for competition in markets that cover part of or the entire territory of Germany. The

¹ Emphasis added.

² See „Drittes Gesetz zum Abbau bürokratischer Hemmnisse insbesondere in der mittelständischen Wirtschaft (Drittes Mittelstandsentslastungsgesetz)“, dated 17. March 2009, BGBl. 2009, Part 1 No. 15, p. 550, available at: <http://www.bmwi.de/BMWi/Redaktion/PDF/Gesetz/meg-3,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf> (German only).

³ Before the introduction of the second turnover threshold in 2009, the domestic turnover threshold of EUR 25 Mio. could be met by the same company meeting the worldwide turnover threshold.

⁴ “Guidance on domestic effects in merger control”, 30 September 2014, available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Guidance%20document%20domestic%20effects%202014.pdf?__blob=publicationFile&v=2

potential influence on market conditions must reach a certain minimum intensity, i.e. there has to be an appreciable effect.⁶ For the assessment of domestic effects the same factors are relevant that have to be considered in the substantive assessment of a merger.⁷ For the notification requirement it is neither required that the concentration's effects on competition are negative, nor that the threshold for intervention is possibly reached. These issues are only dealt with at the stage of the substantive examination.

6. Two cases in which the turnover thresholds were exceeded, might illustrate the meaning of the German domestic effects clause, which operates as an additional filter.

7. In the Phonak/ReSound case (2007),⁸ the merging parties argued that the centre of gravity of the merger was not in Germany but abroad. The companies' main headquarters were in Denmark and Switzerland and the parties claimed that their turnover in Germany amounted to less than 10% of their total turnover. Manufacturing sites were mainly outside of Germany. In addition the merger was notifiable neither in Denmark nor in Switzerland. On this basis, the parties claimed that public international law, more precisely the principle of non-intervention, required that the merger was not subject to merger control in Germany.⁹

8. The Bundeskartellamt opened proceedings and prohibited the planned acquisition. In terms of sales revenue, Germany was the second largest market for hearing aids after the United States. The merging parties achieved higher turnover in Germany than in the countries where they have their headquarters, i.e. Denmark and Switzerland. 20 percent of European turnover was realized in Germany, which accounted for EUR 70-100 mio. Siemens, Phonak and Oticon together held a share of more than 80% in this market. Their combined market share exceeded those of their next largest competitors GN ReSound and Widex by more than 70%.

9. The Düsseldorf Higher Regional Court confirmed that the German merger control rules were applicable in the case, even if the merger's centre of activity lay outside Germany.¹⁰ In line with the legislation the main question is whether the merger has an appreciable effect on markets that cover

⁵ 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.

⁶ 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).

⁷ § 36 GWB Principles for the Appraisal of Concentrations. For details see also “Guidance on Substantive Merger Control”, 29 March 2012, available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20-%20Substantive%20Merger%20Control.pdf?__blob=publicationFile&v=6

⁸ See Bundeskartellamt, Decision of 11. April 2007, B 3 - 578/06, WuW, DE-V 1365 - Phonak/ReSound; OLG Düsseldorf, Judgment of 26. November 2008, VI-Kart 8/07 (V), WuW, DE-R 2477 - Phonak/ReSound; BGH, Judgment of 20. April 2010, KVR 1/09, WuW, DE-R 2905 - Phonak/GN Store.

⁹ OLG Düsseldorf, Judgment of 26. November 2008, VI-Kart 8/07 (V), WuW, DE-R 2477 (2483) - Phonak/ReSound.

¹⁰ OLG Düsseldorf, Judgment of 26. November 2008, VI-Kart 8/07 (V), WuW, DE-R 2477 (2484) - Phonak/ReSound. The Court left open the question on where the transaction's center of gravity was located.

Germany. On this issue, the German Federal Court of Justice followed the Düsseldorf Higher Regional Court (in a decision that reversed the judgment on other grounds).¹¹

10. The BHP/Rio Tinto case (2010)¹² is another example where the domestic effects clause was applied and required effects were identified. BHP Billiton and Rio Tinto planned to set up a joint venture for the production of iron ore in Western Australia. The parties were two diversified, internationally active commodity companies with annual turnovers of approx. US\$ 50 billion (BHP) and US\$ 44 billion (Rio Tinto). In Germany each of the two company groups achieved turnovers totalling more than EUR 1 billion. Both companies held extensive iron ore deposits in the Pilbara Region in Western Australia and wanted to jointly operate their mines, railways and port facilities. Apart from Brazil, Western Australia is one of the largest mining regions for iron ore. After very intensive investigations Germany and Japan expressed serious concerns. The parties withdrew their notification. The merger had also been notified in Australia, Korea, China and Taiwan.

11. The merger would have combined number two and three in the production and sale of seaborne iron ore fines, making the merged entity the number one supplier. With regard to iron ore lumps, the merger would have combined the only two relevant suppliers. German customers were supplied mainly by BHP's and Rio Tinto's rival Vale from Brazil. The vast majority of the parties' turnover was achieved outside of Germany.

12. Nevertheless, in the Bundeskartellamt's opinion, it was in line with public international law to scrutinize this merger because it had a sufficient impact on Germany. The transaction would have had an effect on competition and on prices on the relevant world markets for seaborne iron ore fines and lumps, which encompassed Germany. In addition, the transaction also had a sufficient nexus to Germany, measured, inter alia by turnover achieved by each of the merging parties in Germany, which exceeded the relevant thresholds triggering the obligation to notify the merger.

3. The effects doctrine: the right of a state to intervene

13. Most jurisdictions, courts and scholars agree with the effects doctrine. According to this principle, if a merger has a relevant impact on all or part of the territory of one state, no matter where its premises are, that state has the right to intervene. This was also the approach of the Düsseldorf Higher Regional Court in the Phonak case.

14. The effects doctrine is the appropriate approach to the treatment of international mergers. In these types of transactions usually the merging parties' turnover is spread over many countries, often with no single country accounting for 50 percent or more of one merging party's turnover. It would clearly be awkward if, as a result of this fragmentation, transactions that may have an impact in many countries worldwide would be exempted from scrutiny. Neither would it be appropriate to limit merger control to the countries where the highest turnover in the typical multijurisdictional cases normally accrues (usually the United States).

15. In the case of transnational mergers that have effects on several national markets, like the Phonak/ReSound case, it is obvious that the review cannot be centralized at one authority. Competition authorities from third countries will normally not be in a position to investigate and to remedy competition concerns that relate to markets in other countries. They usually lack the power to investigate and intervene against competitive harm outside their own jurisdiction. Equally or maybe even more importantly, they also lack the interest and incentive to do so.

¹¹ BGH, Judgment of 20. April 2010, KVR 1/09, WuW, DE-R 2905 - Phonak/GN Store; the decision of the OLG Düsseldorf was reversed on other grounds.

¹² BKartA, B1-10/10.

16. The BHP/Rio Tinto case also confirms that international law does not require affected jurisdictions worldwide to leave the case to the jurisdiction where most of the assets of both companies are located, where their headquarters are, or to the jurisdiction where the major and most direct impact of the merger was expected (in that case, China, the country that absorbed most of the exports of iron ore from Australia). This view was shared by many jurisdictions worldwide: The BHP/Rio Tinto merger triggered several review procedures in Asia, Australia and Europe. As mentioned above, on a worldwide market, the merger-induced price rises would have affected countries worldwide.¹³

17. A worldwide one-stop shop in merger control is unrealistic. All the countries that are affected by a merger need to have a chance to review it, even where worldwide markets are concerned. If prices rise after the merger, this would affect the whole market. Where only national markets are affected, it is even more obvious that the review cannot be limited to one central authority. Competition authorities from third countries will normally not be in a position to conduct investigations and remedy competition concerns in the country/ies affected. When a merger involves companies which are active worldwide, it is unavoidable that several competition authorities will take a look at the same case. In these cases cooperation is important.¹⁴ Competition authorities could probably inform each other more closely. However, this is only possible if the merging parties support this communication.

18. Whether public international law limits the sovereign right of a state to protect its markets and consumers against competitive harm is debatable, but in any case limited to extreme situations where an intervention against a merger would interfere with important interests of other states. Only in such cases, if any, does a balancing of interests seem to be required under public international law.¹⁵

19. If other interests play a role, they would need to be balanced against the interest of the state to examine the merger and they would have to be sufficiently serious to compensate for the competitive harm that may occur in that state. The fact that the merger control regime of another state does not apply to the transaction, for example because the domestic turnover is too low, is clearly not sufficient to exclude intervention. Clearance in other states can have many reasons, in particular that the merger causes competition problems only in the intervening state, for example, because the markets affected by it are national in scope and market conditions in the reviewing jurisdictions are very different.

20. Interests that could trigger the balancing test are vital interests of another state. Depending on the circumstances of the case, including the size of the economy and the relative size of the companies concerned, a massive loss of employment or the lapse of a major company, for example, could classify as vital interests. In this case, an important question would also be how the prohibition of the merger versus the implementation of the merger furthers this interest, and whether any alternatives are available, for example alternative purchasers. Another scenario that appears to be possible, yet exceptional, relates to mergers that are necessary for national security reasons. For example, if access to certain vital military technology could only be secured if a failing company is acquired by its main competitor, being the only viable candidate for an acquisition within this state,

¹³ The BHP/Rio Tinto case is atypical with respect to effects in the United States. The case did not raise any competition issues in the United States because sea borne iron ore is not consumed there. Sea borne iron can be sourced domestically from land-borne resources.

¹⁴ One recent example of successful international cooperation is the merger between Tokyo Electron Ltd. (Japan) and Applied Materials, Inc. (USA). The merger project was examined by eight national competition authorities: USA, Germany, South Korea, Japan, Taiwan, China, Singapore and Israel. In examining the merger the Bundeskartellamt worked closely together with several other competition authorities, especially with the United States Department of Justice.

¹⁵ Stockmann, in Loewenheim/Meessen/Riesenkampff, *GWB*, 2009 (2nd. ed.), para. 47.

the merger may be necessary to protect national security interests. In practice such overriding interests exist in very exceptional situations.

4. The introduction of a second domestic turnover threshold in Germany

21. When a second domestic turnover threshold was introduced in 2009 the number of notified mergers in Germany decreased by about 40% in comparison to the previous year. Most likely the reduction was also due to the impact of the financial crisis on merger activity. Although it is difficult to accurately allocate the outcome to the change in legislation versus the downturn of the economy, it is probably fair to say that the second domestic turnover threshold led to a decrease of about one third of the notified cases.¹⁶

22. The second domestic turnover threshold has not replaced the German domestic effects clause, which remains applicable. With regard to concentrations involving two parties of which only one has achieved a turnover in Germany, the domestic effects clause does not play a role anymore, because this type of case now clearly falls outside the scope of German merger control. For the remaining mergers, the domestic effects clause remains an important filter in particular with regard to joint venture cases. In many instances, newly established joint ventures do not meet the turnover thresholds, but if their parents are two major companies, the turnover criteria are often met. Yet, many joint ventures target markets outside Germany and in many cases spill-over effects, due to the joint-venture, can also be excluded. The domestic effects clause makes sure that these cases do not have to be notified in Germany.

23. The introduction of a domestic turnover threshold is also an important element of comity. The ICN Merger Recommended Practices for Merger Notification Procedures¹⁷ were an important argument that helped to convince the German legislator that this change was the right step.¹⁸ The Recommended Practices (RP) provide that “jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned”. The level of local nexus should be “material” and should be “based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the acquired business in the local territory.” The RP also included exceptions that covered the situation in Germany and allowed for an approach that is based on the role of a domestic effects clause. The RP explained that jurisdictional thresholds that apply only to one party should be “set at a very high level” or, if not, that sufficient “other objectively limited filters” should be adopted. In essence, these requirements translate the principle of comity into practical rules for the design of national jurisdiction in merger control. Although Germany was covered by the exceptions in the RP, the introduction of the domestic threshold in 2009 represented a further step towards comity, because the local nexus requirement is now fulfilled more clearly.

5. The German thresholds in international comparison

24. The thresholds for domestic turnover in Germany (EUR 25 mio and EUR 5 mio.) are lower compared to those of other jurisdictions. When the domestic thresholds were introduced, the question was raised why the German legislator opted for relatively low thresholds. In this context it is helpful

¹⁶ This is in line with the foreseen impact as described in the explanatory memorandum to the bill, BT.-Drs. 16/10490, dated 7. October 2008, p. 15 (left column), available at: <http://dip21.bundestag.de/dip21/btd/16/104/1610490.pdf> (German only).

¹⁷ ICN Merger Recommended Practices for Merger Notification Procedures, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

¹⁸ Another important reason for the change was to reduce unnecessary red tape.

to consider the ICN report on “Setting notification thresholds for merger review” (2008).¹⁹ The report outlines the experience of 21 countries in fine tuning the jurisdictional thresholds. While the report focuses on the requirements of local nexus, it also contains some thoughts on the general objectives of merger control: a) to make sure that merger regimes catch as many cases as feasible and manageable that raise competition concerns;²⁰ b) to minimize the number of transactions that must be notified and that are unlikely to raise competitive concerns.²¹ This means in practice that neither the authority nor the merging parties should be overburdened with unproblematic cases. The report recognizes that the trade-off between casting the net wider or narrower also depends on the speed of the procedure and the amount of information required in standard cases.²²

25. Germany’s regime strikes the right balance between effectiveness and efficiency. First, the information requirements for the merging parties are extremely low.²³ Second, the Bundeskartellamt’s merger procedures are very fast. In most cases, there is no pre-notification phase and the filing of a draft is rarely required. In addition, the first-phase review is often completed in less than the one month foreseen by the law. Therefore, despite the high number of notifications, the burden on businesses and on the authority’s administrative resources is manageable and reasonable. Third, German law requires a mandatory worldwide turnover threshold. Many other jurisdictions do not, or not in all cases. The worldwide turnover threshold of EUR 500 mio. is quite high compared to other countries. The EU Merger control regulation foresees a higher worldwide threshold for obvious reasons. In China²⁴ and Poland²⁵ the worldwide thresholds are still higher than in the German system, but in these jurisdictions the worldwide thresholds are not necessary requirements but only an alternative to trigger the notification obligation. In Germany it is the worldwide threshold, not the domestic turnover thresholds, which is the tool that is used to filter out transactions that are not important enough to be scrutinized. Therefore, it is not surprising that the domestic turnover thresholds in some other countries without worldwide thresholds are much higher, for example in Italy, Spain, and Portugal.²⁶

26. Before the second domestic turnover threshold was introduced, the Bundeskartellamt evaluated the turnover data of past merger cases.²⁷ The figures showed that the collateral damage of missing cases that raise significant competition issues was low. Looking at second phase proceedings

¹⁹ ICN, Setting Notification Thresholds for Merger Review, Report to the ICN Annual Conference Kyoto, 2008, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf>.

²⁰ Ibid., cp. p. 4 “Invariably, objective thresholds cast a very wide net to catch the few transactions that merit a closer review. Nonetheless, it is important that thresholds are set at a level calculated to minimize the number of transactions that must be notified that are unlikely to raise competitive concerns, *without allowing transactions that do raise concerns to fall outside the notification requirement.*” (emphasis added)

²¹ Ibid.

²² Ibid. pp. 4 et seq.

²³ This is recognized in the ICN report on “Information requirements for merger notification” of 2009 and in the ICN report on setting notification thresholds for merger review. ICN, Setting Notification Thresholds for Merger Review, Report to the ICN Annual Conference Kyoto, Japan (2008), p. 5, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf>

²⁴ 10 billion renminbi (approximately EUR 1.4 billion), see Merger Control 2016, Getting the Deal Through, p. 98.

²⁵ EUR 1 billion, see Merger Control 2016, Getting the Deal through, p. 317.

²⁶ Italy = EUR 492 mio.; Spain = EUR 240 mio. and Portugal = EUR 100 mio, see Merger Control 2016, Getting the Deal Through, pp. 228, 374 and 322.

²⁷ For details see also Andreas Bardong, “Die zweite Inlandsumsatzschwelle, kein Änderungsbedarf!”, (2011) WuW, issue 04, pp. 350–359.

since 2003, about 8% of cases would not have been reportable under the new regime. A higher first domestic turnover threshold (EUR 25 mio.) would lose about one third of second phase cases. A higher second domestic turnover threshold (EUR 5 mio.) would significantly increase the number of mergers that have a potential to cause competitive harm but fall outside the scope of merger control.

27. To conclude, the function of the domestic turnover thresholds in Germany is to make sure that the cases have a sufficient nexus to Germany. This was, however, guaranteed also before the introduction of the second domestic threshold by the domestic effect clause. Yet, in practice, the introduction of the second domestic turnover threshold has facilitated the application of Section 185 (2) GWB to a significant extent.

6. The German guidance paper on domestic effects in merger control

28. In 2014 the Bundeskartellamt published a guidance paper on domestic effects in merger control which aims at helping 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 185 (2) GWB and trigger the obligation to notify the concentration. For this purpose the guidance paper identifies several case scenarios in which appreciable domestic effects can clearly be expected or ruled out. 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 clear-cut categories.²⁸

29. Cases in which domestic effects can clearly be identified are cases where the target company is active in Germany and its turnover exceeds at least the second domestic turnover threshold of EUR 5 million. In concentrations involving only two parties (e.g. acquirer and target company in case of an acquisition of sole control), provided the turnover thresholds of Section 35 GWB are exceeded, the concentrations always have sufficient domestic effects. 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 have sufficient domestic effects if the turnover achieved by the joint venture exceeds EUR 5 million 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.

30. In cases involving more than two parties; domestic effects can be clearly ruled out if the following (cumulative) conditions are met: First, 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. Secondly, not more than one parent company of the joint venture is active in the same domestic relevant product market as the one on which the joint venture is active abroad nor in a domestic market upstream or downstream of the joint venture's product market abroad.

31. For all case scenarios which cannot be attributed to one of the categories identified above, the guidance paper provides information that may be useful for assessing domestic effects in individual cases. All non-clear cut cases have in common that they involve more than two parties to the concentration.

32. The guidance paper explains that, 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

²⁸ For a detailed explanation on the content of the guideline paper, see also "Foreign-to-Foreign Mergers: The German Guidance, a Blueprint for a European Reform?", A. Bardong, *Journal of European Competition Law & Practice*, 2015, Vol. 6, No. 7.

case, in particular, the joint venture's actual turnover is to be taken into account. If the turnover achieved by the joint venture in Germany exceeds the EUR 5 million threshold, this will always be regarded as sufficient (see above). 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 EUR 5 million threshold and its market share is less than 5 percent. 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 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.

33. In the case of a newly established joint venture that has not achieved a turnover yet, the guidance paper suggests to look at the projected sales in Germany during the first three to five years after the joint venture's establishment, as these 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 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.

34. 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 spill-over 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 upstream or downstream of the joint venture's relevant product market, this can also result in spill-over effects. In this case, the same principles apply.

35. 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 guidance paper explains the Bundeskartellamt's pragmatic approach in such situations: the question as to whether a concentration will have domestic effects can be left open, provided the companies are prepared to notify the concentration. As in its past practice, the Bundeskartellamt examines planned concentrations with a focus on the relevant competition issues. 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. As mentioned before, the information requirements under Section 39 GWB are very limited.

36. If necessary, the parties can informally discuss questions regarding the possible domestic effects in advance with the decision division in charge of the economic sector in which the concentration takes place. If questions are of a more general nature, for example, if they concern the interpretation of Section 185 (2) GWB, they can also be discussed with the Merger Control Unit within the Bundeskartellamt's General Policy Division.

7. Conclusion

37. Under German competition law the obligation to notify a merger is triggered by a worldwide turnover threshold of all the participating undertakings of EUR 500 million. The domestic turnover thresholds of at least two companies involved in the merger ensure that the merger has a sufficient nexus to Germany. In addition to the domestic turnover thresholds, another provision guarantees the local nexus of the concentration: Section 185 (2) GWB requires domestic effects as a prerequisite for the application of German competition law, including merger control. This means that in Germany mergers that exceed the turnover thresholds are not necessarily subject to notification. Mergers have to be notified only if they have sufficient effects within Germany. However, the main filters for the Bundeskartellamt's jurisdiction are the turnover thresholds. The function of the domestic effects clause is merely to fine-tune the jurisdictional thresholds. In practice, the impact of the domestic effects clause is most significant for assessing joint venture cases.

38. The Bundeskartellamt's 2014 guidance paper on domestic effects in merger control 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 185 (2) GWB and thus trigger the obligation to notify the concentration in Germany. The guidance paper identifies several case scenarios in which appreciable domestic effects can clearly be expected or clearly ruled out. In all other cases, the paper lists important considerations that are relevant in the context of a case-by-case assessment.

39. The guidance paper was apparently successful: in practice, cases without appreciable domestic effects have not been notified in Germany since the publication of the document. Questions from practitioners on the issue have also become extremely rare.

40. The introduction of a second domestic turnover threshold in Germany brought the merger regime even more in line with the ICN Merger Recommended Practices for Merger Notification Procedures and therefore marked an important step towards procedural convergence. More importantly, the legislative change defers the review of many foreign-to-foreign mergers with limited impact on Germany, which can be seen as an application of comity principles.