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PRACTICAL GUIDE TO GERMAN MERGER CONTROL

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PRACTICAL GUIDE TO GERMAN MERGER CONTROL

1. Introduction

German merger control is governed by sections 35 et seq. of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, "**GWB**"). Mergers of companies that meet the applicability criteria set forth in sections 35 and 37 GWB are subject to merger control and must be reported to the Bundeskartellamt (Federal Cartel Office) in Bonn. They must not be consummated until they are approved by the Bundeskartellamt or until certain waiting periods have expired. If mergers are consummated prematurely, considerable fines may be imposed and actions taken in the course of the merger's consummation may be void.

The German merger control regime is not applicable where the European Commission has exclusive jurisdiction under the EU Merger Regulation (Council Regulation (EC) No 139/2004).

This Guide describes the application scope of the German merger control regime and the most important criteria for applying it. In addition, the Annexes attached provide a summarising overview both of the criteria as to when a merger is notifiable to the Bundeskartellamt, and of the German merger control procedure.

2. Applicability criteria/turnover thresholds

A transaction is subject to German merger control and must be notified to the Bundeskartellamt prior to its implementation if

- it concerns a merger for the purpose of the GWB and
- the combined aggregate worldwide turnover of the undertakings involved amounted to more than EUR 500m in the previous financial year (i.e., the last financial year before the conclusion of the merger), and
- at least one undertaking involved achieved a turnover in Germany in the previous financial year of more than EUR 25m and
- another undertaking involved achieved a turnover of more than EUR 5m in the previous financial year, or
  - in case that neither the target company nor another undertaking involved achieved a turnover of more than EUR 5m respectively –, the value of the consideration paid in exchange for the merger amounts to more than EUR 400m and the target company is active on the domestic market to a significant extent (so-called transaction value threshold introduced by the 9th amendment to the GWB).

Depending on the specific form of the merger, "undertakings involved" generally refers to the acquiring undertaking(s) and either the target undertaking being acquired or the joint venture being created. When calculating the turnover, the turnover of undertakings or groups of undertakings that control or are controlled by an undertaking involved in the merger must be taken into account. Therefore, the total group turnover is decisive. The seller's turnover is only exceptionally taken into account (e.g., if it will continue to hold 25% of the shares in the target undertaking).

Section 277 para 1 German Commercial Code (*Handelsgesetzbuch*, "**HGB**") applies to the determination of the turnover. Turnover from deliveries and services performed between affiliated companies, so-called internal sales, and consumption taxes are not taken into account. For some industries, special provisions apply. As far as turnover from trading is concerned, for example, only three quarters shall be accounted for whilst the turnover in the field of press and broadcasting shall be multiplied by eight. Finally, pursuant to the so-called bank clause for credit institutions, finance institutions, building societies (*Bausparkassen*), as well as external capital management companies, turnover is replaced by income, particularly interest earnings, and for insurance companies the premium income.

The value of the consideration in the context of the new transaction value threshold encompasses all assets and other non-monetary benefits that the seller obtains from the acquirer in connection with the merger (including considerations made subject to the occurrence of certain events, as in so-called 'earn out' clauses) as well as the value of any liabilities taken over by the acquirer.

Significant domestic activities for example exist when the company has a large number of domestic users or when the company carries out research and development activities in Germany.

The Bundeskartellamt announced that it will publish a guidance paper in relation to the new transaction value threshold soon.

3. What constitutes a merger?

The following transactions are considered mergers within the meaning of the GWB:

- acquisition of all or a substantial part of the assets of another undertaking,
- acquisition of direct or indirect control over another undertaking, e.g., by rights, contracts, or other means that confer the possibility of exercising decisive influence on the undertaking,
- acquisition of shares in another undertaking if the shares, either separately or in combination with other shares already held by the acquirer, meet the threshold of 25% or 50% of the capital or voting rights of the other undertaking, and
- any other combination of undertakings, enabling one or several undertakings to exercise, directly or indirectly, a competitively significant influence on another undertaking.

4. Side note: Competitively significant influence

Germany differs from many other jurisdictions insofar as acquiring a minority interest of less than 25% that nevertheless confers a competitively significant influence also constitutes a notifiable merger.

A competitively significant influence is normally understood to be the ability of the acquirer to exercise a certain degree of influence over the competitive conduct of the target undertaking, which, on the basis of so-called "plus factors", is *de facto* equivalent to a 25% interest, even though the actual interest is less than 25%. Such plus factors are presumed where the minority shareholder has certain rights that go

beyond typical rights of a minority shareholder and enable him to exercise influence over the undertaking's competitive conduct. This may, for example, be the case where some of the shares of the target company are in free float and the attendance rate at the shareholders' meetings in the past was usually so low that in reality the minority shareholder's interest may be assumed to give it a share of the voting rights equivalent to an interest of 25% or more. It may also be considered a plus factor if the acquirer is able to designate a member of the management or supervisory board or if it receives other kinds of special rights.

However, such influence alone is insufficient. It must be accompanied by competitive significance, which may normally be presumed if the acquirer is a competitor (horizontal merger) or is active on an upstream or downstream market (vertical merger).

5. Exemptions

Mergers are not notifiable in Germany if

- the European Commission has exclusive jurisdiction under the EU Merger Regulation (Council Regulation (EC) No 139/2004);
- an undertaking (together with the sellers controlling it) with a worldwide turnover of less than EUR 10m in the last financial year merges with another undertaking (so-called "*de minimis* merger");
- they concern the merger of public entities and enterprises that takes place in connection with the territorial reform of municipalities;
- all undertakings involved are members of a banking association for the purpose of the Act on Corporate Tax (*Körperschaftssteuergesetz*), mainly performing services for the companies of this banking association and not maintaining any contractual relationships with end customers in doing so;
- they concern merely intra-group events, such as restructurings; or
- the target company is not active on the domestic market and the merger has no effect on domestic competition.

6. Side note: Foreign-to-foreign mergers

Foreign-to-foreign mergers, i.e., mergers of undertakings headquartered abroad, are only notifiable in Germany if they have an appreciable domestic effect within the meaning of section 185 para 2 GWB. In 2014, the Bundeskartellamt published a guidance document that on the one hand sets out scenarios in which a domestic effect can typically be ruled out and on the other describes the criteria on which to base a case-by-case assessment.

The Bundeskartellamt, for instance, assumes that there is no domestic effect in connection with the formation of a joint venture, provided that it is not active in a market comprising fully or partially Germany, and its parent companies are not current or potential competitors in Germany either on the relevant product market of the joint venture or on an upstream or downstream market.

For a case-by-case assessment, the Bundeskartellamt specifies several criteria on which basis no domestic effect may normally be expected, for example where a joint

venture in Germany has a turnover of less than EUR 5m or a market share of less than 5%. However, even in these cases, there are specific situations which, in the view of the Bundeskartellamt, would nevertheless establish a sufficient domestic effect, such as the transfer of important intellectual property rights to the joint venture.

The Bundeskartellamt has published a flowchart illustrating the assessment as to whether an appreciable domestic effect exists, which served as the basis for the diagram available in the Annex 3 of this brochure.

7. Notification

A merger notification must be submitted in writing. However, it is not necessary to use an official form. In order for the notification to be considered complete, it must contain information about the proposed merger and the undertakings involved.

The required information includes:

- description of the proposed merger, along with the names of the merging undertakings;
- information on the form of the merger; and
- in the case of an acquisition of shares: the size of the interest acquired and of the total interest held; under certain circumstances, the names of the companies holding the remaining shares, as well as information about the seller.

In addition, the following information must be provided for each of the undertakings (or groups of undertakings) involved in the merger:

- name, registered office, and description of the business;
- intra-group relationships as well as control relationships among and interests held by affiliated undertakings;
- turnover in Germany, in the European Union, and worldwide;
- value of the consideration for the merger, if the new transaction value threshold applies, including the basis of its calculation; and
- indications as to the kind and extent of the domestic activities, as the case may be;
- market shares, including the bases of their calculation or estimate if the undertakings involved have a combined market share of at least 20% on a market covering Germany; and
- a person authorised to accept service in Germany if the registered office of the undertaking is not located within Germany.

8. Procedure, time limits, and fee

The Bundeskartellamt will confirm the submission of the notification on its website within a few days of receipt.

The Bundeskartellamt initially has one month to assess a notifiable transaction, starting on the date on which the complete notification is received (so-called “Phase I”). However, the Bundeskartellamt can extend this time limit by another three months by giving notice to the parties involved during the initial one-month period (so-called

"one-month letter"), insofar as it considers an in-depth investigation necessary (so-called "main assessment proceedings" or "Phase II"). The entire procedure (Phases I and II) can thus take up to four months from receipt of the complete notification. This time limit is automatically extended by an additional month if the parties offer remedies to the Bundeskartellamt for the first time in Phase II. Moreover, given the consent of the undertakings involved, the Bundeskartellamt can extend the time limit for Phase II even further.

In Phase II, the Bundeskartellamt decides by way of a formal decision, whereas in Phase I clearance is generally given by a brief letter without further explanation.

If a decision is not rendered within four months of receipt of the complete notification and the time limit not duly extended, the merger is deemed to be cleared. The same applies to Phase I if the Bundeskartellamt does not make a decision or does not send the one-month letter within one month of receipt of the complete notification.This, however, only rarely occurs in practice.

The notification of a proposed merger as well as the subsequent assessment of the proposed merger by the Bundeskartellamt are subject to a fee. In the clearance decision, the Bundeskartellamt usually sets a single fee covering both steps. The amount of the fee depends on the expenses in terms of staff and materials associated with the assessment, taking into account the economic significance of the merger. The fee shall generally not exceed EUR 50,000, but in exceptional cases may amount to as much as EUR 100,000.

Fees in unproblematic cases regularly range from EUR 5,000 to EUR 15,000.

Once the proposed merger is consummated following clearance, the Bundeskartellamt shall be notified of the consummation. This notice may be given in the form of a brief letter (without any formal requirements) with reference to the notification.

9. Prohibition of implementation

Notifiable transactions may not be consummated until the Bundeskartellamt has issued its approval or the relevant procedural time limit has expired (the so-called "prohibition of putting a concentration into effect"). An infringement of the prohibition of putting a concentration into effect is an administrative offence and subject to a fine of up to EUR 1m and, for fines levied against undertakings subject to an additional fine of up to 10% of the total turnover achieved in the previous financial year.

Based on publicly available sources, the highest fine ever imposed by the Bundeskartellamt for infringing the completion prohibition amounted to approx. EUR 4.5m.

Transactions that infringe the prohibition of putting a concentration into effect are provisionally ineffective and, thus, not enforceable under civil law. However, the transaction may be cured with *ex tunc* effect, i.e., retroactively, if the so-called divestiture proceeding is closed (section 41 para 1 sentence 3 no 3 GWB).

In exceptional cases, an application may be made for an exemption from the prohibition of putting a concentration into effect. In this regard, the Bundeskartellamt,

however, tends to be rather reserved. It may be helpful to make timely contact with the responsible decision division and to explain the reason for the urgency. Under certain circumstances, shares may be acquired in connection with public takeovers even before clearance, provided that the voting rights are not exercised.

10. Decision-making criteria

The Bundeskartellamt will prohibit a proposed merger if it substantially impedes effective competition, particularly if it may be expected that it leads to the creation or strengthening of a dominant position.

The above does not apply if

- the undertakings involved can prove that the merger will result in improved competitive conditions and that such improvements outweigh the downsides associated with the restraint of competition or
- the proposed merger exclusively affects a market in Germany on which products and services have been offered for at least five years and on which the total turnover achieved by all suppliers in the last calendar year was less than EUR 15m (unless it, for example, concerns a market on which the services are performed free of charge).

Insofar as the Bundeskartellamt does not have any concerns, it will clear the proposed merger, which may then be consummated.

The Bundeskartellamt may also make the clearance subject to conditions or obligations based on commitments offered by the undertakings involved. In this regard, there is a growing tendency of granting clearance subject to a condition precedent, i.e. the respective remedies must first be fulfilled before the transaction may be consummated.

11. Legal remedies

A decision prohibiting the merger may be challenged by the undertakings involved in the merger before the Higher Regional Court in Düsseldorf. Third parties may file an appeal against a clearance decision if their interests are substantially affected by the decision and they have been invited to join the proceedings by the Bundeskartellamt. The latter can be requested; the respective thresholds are rather low.

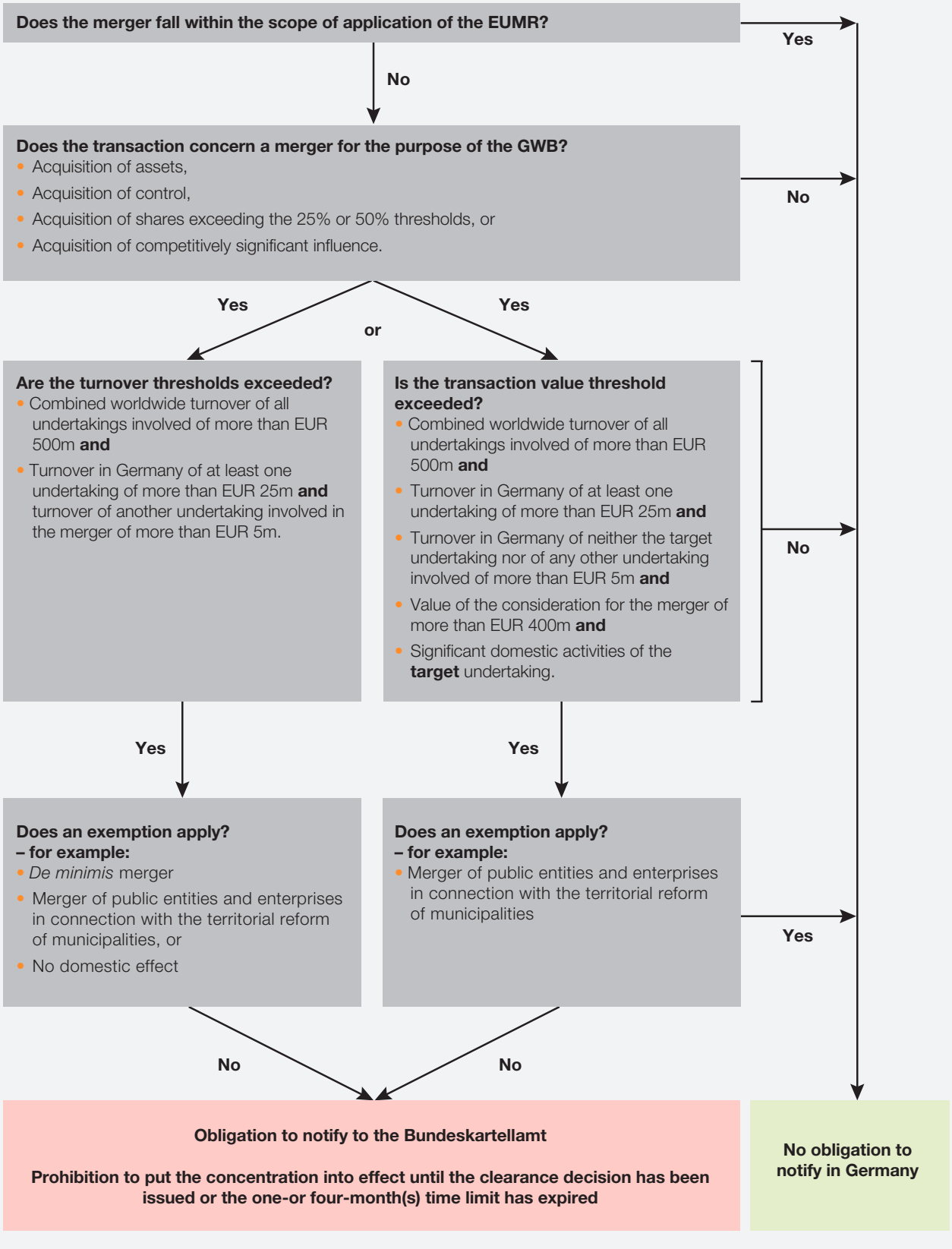
Appeals generally do not have any suspensory effect. Upon request, the Higher Regional Court in Düsseldorf can temporarily reinstate the prohibition to consummate. However, in practice, the prerequisites for a successful application are rarely met.

12. Ministerial authorisation

If the Bundeskartellamt prohibits the merger, the undertakings involved may request the issuance of a ministerial authorisation. The Federal Minister of Economics and Technology, who is responsible pursuant to section 42 GWB, may clear the merger if the merger‘s benefits to the economy as a whole outweigh the restraint of competition or if there is an overriding public interest.

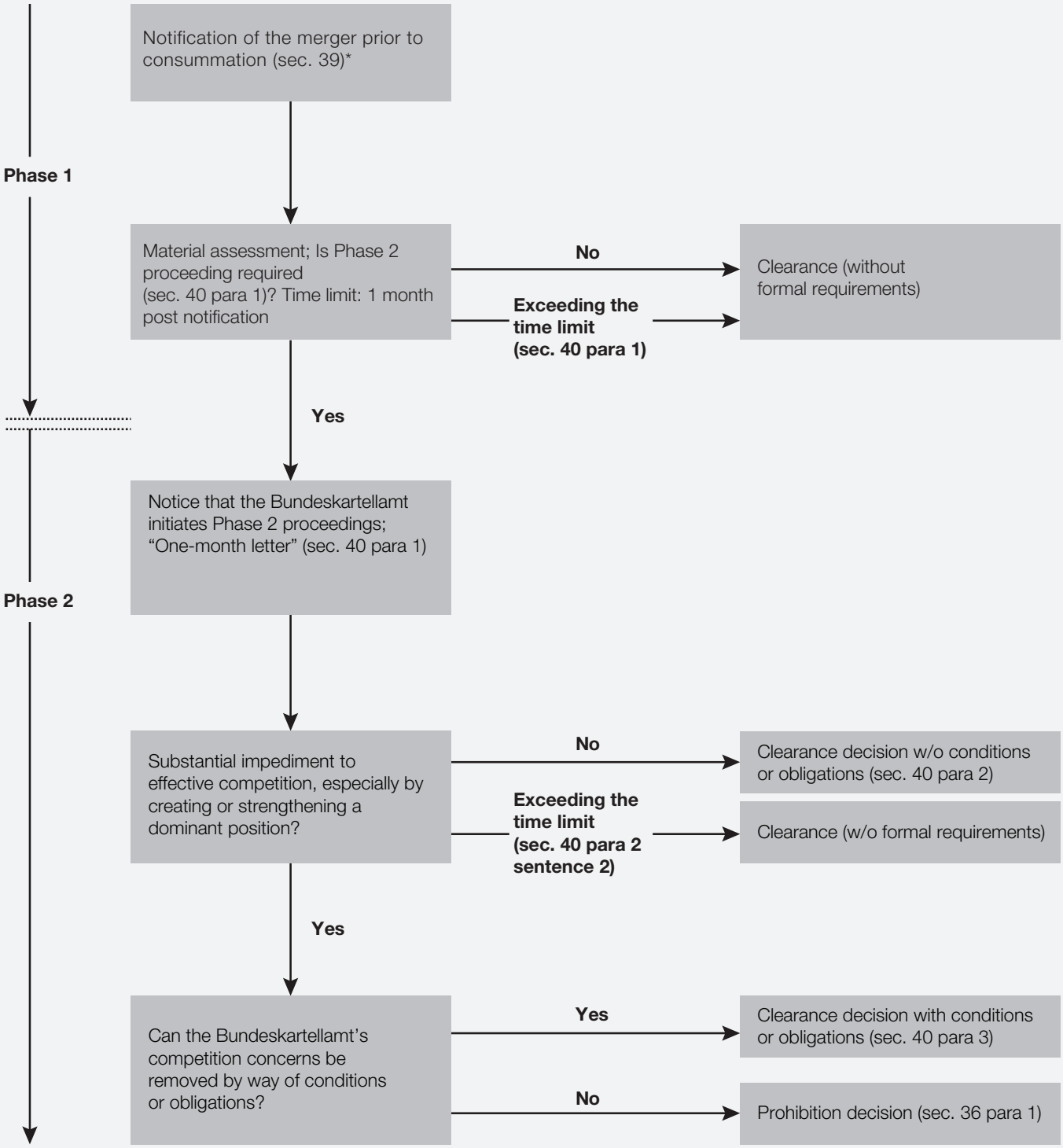
ANNEX 1:

Obligation to notify a merger to the Bundeskartellamt



ANNEX 2:

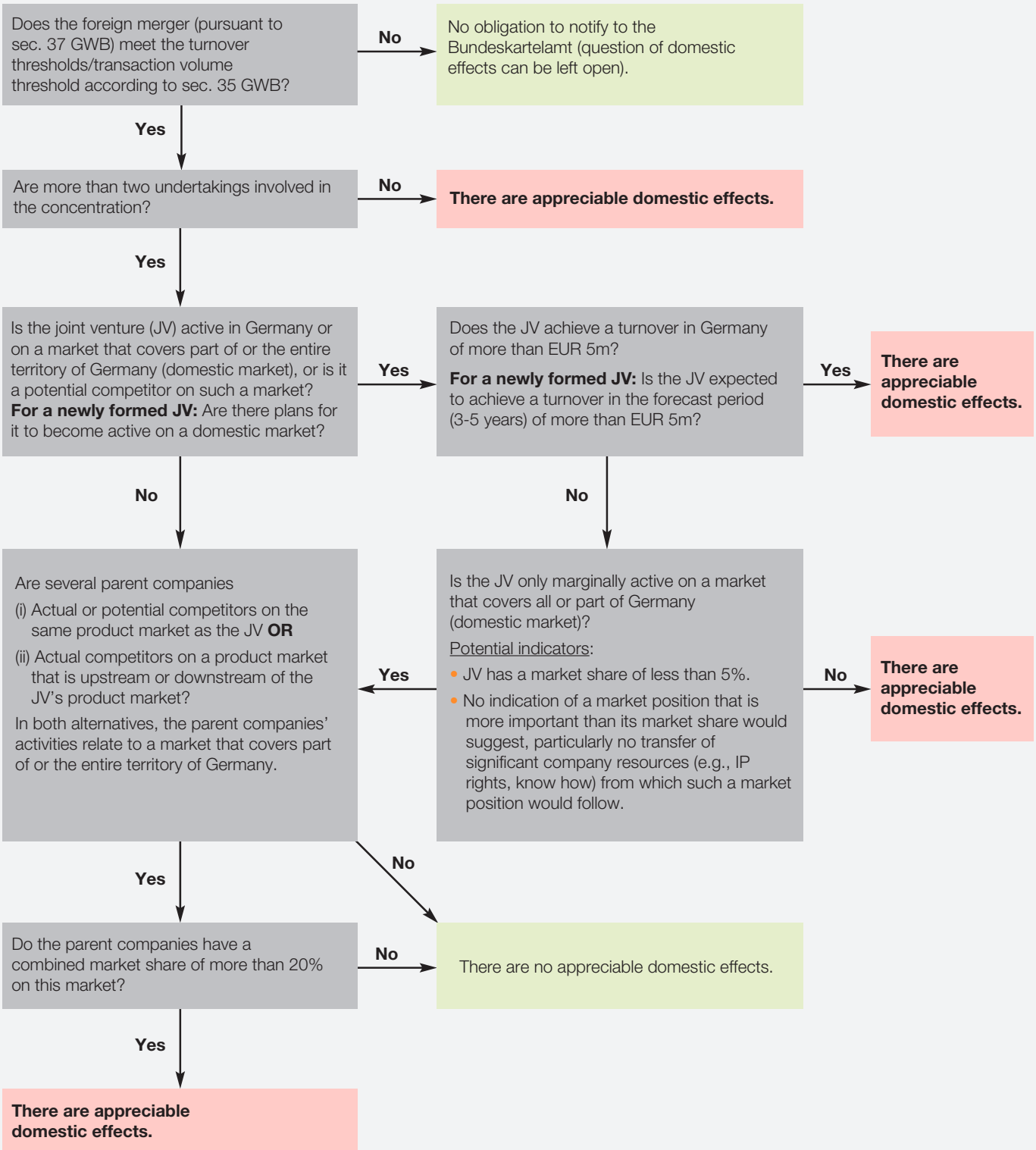
Sequence of the German merger control process



* Sections without reference refer to those of the GWB.

ANNEX 3:

Foreign-to-foreign mergers and domestic effects (Sec. 185, para. 2 GWB)*



* Source: Bundeskartellamt

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