

MERGER NOTIFICATION AND PROCEDURES TEMPLATE

Germany

Updated 15.05.2009

IMPORTANT NOTE: This template is intended to provide initial background on the jurisdiction's merger notification and review procedures. Reading the template is not a substitute for consulting the referenced statutes and regulations.

1. Merger notification and review materials (please provide title(s), popular name(s), and citation(s)/web address)

A. Notification provisions	Sections 35 ff. of the Act Against Restraints of Competition (ARC), http://bundesrecht.juris.de/bundesrecht/gwb/index.html . An English translation of the ARC can be found at http://www.bundeskartellamt.de/wEnglisch/index.php .
B. Notification forms or information requirements	Merger notifications must contain all the information required under Section 39 (3) of the ARC.
C. Substantive merger review provisions	Section 36 (1) of the ARC.
D. Implementing regulations	None.
E. Interpretive guidelines and notices	<ul style="list-style-type: none">- Principles of interpretation regarding the assessment of market dominance in German merger control- Brief notification guideline- Information leaflet on German merger control- Information leaflet on domestic effects- Fact sheet EU merger control- ECA principles http://www.bundeskartellamt.de/wDeutsch/merkblaetter/Fusionkontrolle/MerkblFusion.php

2. Authority or authorities responsible for merger enforcement.

<p>A. Name of authority. If there is more than one authority, please describe allocation of responsibilities.</p>	<p>Bundeskartellamt.</p>
<p>B. Address, telephone and fax (including country code), e-mail, website address and languages available.</p>	<p>Bundeskartellamt, Kaiser-Friedrich-Str. 16, 53113 Bonn, Germany; tel. ++49 (0)228-9499-0; fax: ++49 (0)228-9499-400; e-mail: info@bundeskartellamt.bund.de; WWW: http://www.bundeskartellamt.de/; German, English and French pages.</p>
<p>C. Is agency staff available for pre-notification consultation? If yes, please provide contact points for questions on merger filing requirements and/or consultations.</p>	<p>Yes. Contact points are the Decision Divisions, which can be contacted via switchboard +49 228/9499-0. For general questions on merger control, the responsible section can be contacted at +49 228/9499-388.</p>

3. Covered transactions

<p>A. Definitions of potentially covered transactions (i.e., concentration or merger)</p>	<p>According to Section 37 (1) of the ARC, a merger arises in the following cases:</p> <ol style="list-style-type: none"> 1. Acquisition of all or of a substantial part of the assets of another company. 2. Acquisition of direct or indirect control by one or several companies of the whole or parts of one or several other companies. 3. Acquisition of shares in another company if the shares, either separately or together with other shares already held by the company, reach 25 per cent or 50 per cent of the capital or the voting rights of the company to be acquired. 4. Any other combination of companies enabling one or several companies to directly or indirectly exercise a competitively significant influence on another company.
<p>B. If change of control is a determining factor, how is control defined?</p>	<p>Control is defined as the "possibility of exercising decisive influence on an undertaking". It is not relevant whether this decisive influence is actually exercised. The mere possibility is sufficient. Whether this possibility exists has to be examined on the basis of all legal and factual circumstances of an individual</p>

	case. Control can also be exercised jointly by several companies.
C. Are partial (less than 100%) stock acquisitions/minority shareholdings covered? At what levels?	Yes. A merger is subject to notification if the acquired shares, together with the shares already held by the acquiring company, reach 25 per cent or 50 per cent of the capital or the voting rights of the other company. However, an acquisition of less than 25 per cent of the capital or voting rights is subject to notification if the merger results in one or several companies being able to exercise a competitively significant influence on another company.
D. Do the notification requirements cover joint ventures? If so, what types (e.g., production joint ventures)?	Yes. Any foundation of a joint venture constitutes a merger between each parent company and the joint venture if the parent companies directly or indirectly acquire joint control of the whole or parts of the joint venture. Moreover, a merger arises between the joint venture and those parent companies which hold at least a 25 per cent share in the joint venture. In the latter case a merger also arises between those parent companies which hold a share of at least 25 per cent in the joint venture, however, only with respect to the markets in which the joint venture is active (cf. Section 37 (1) no. 3, sentence 3 of the ARC).

4. Thresholds for notification

A. What are the general thresholds for notification?	<p>In the last business year preceding the merger, the combined aggregate worldwide turnover of all participating companies must have been more than 500 million Euro and the domestic turnover of at least one participating company must have been more than 25 million Euro and the domestic turnover of another participating company must have been more than 5 million Euro (Section 35 (1) no. 1 and no. 2 of the ARC).</p> <p>Mergers reaching these thresholds are not subject to notification if the requirements of Section 35 (2) of the ARC are fulfilled (de minimis and minor market clause).</p>
B. To which entities do the merger notification thresholds apply, i.e., which entities are included in determining relevant undertakings/firms for threshold purposes? If based on control, how is control determined?	If a participating company is a controlled or controlling company, then the companies so affiliated have to be regarded as a single company. As regards the thresholds, the total turnovers of all affiliated companies are relevant, regardless of the ownership percentage. Turnovers between the affiliated companies are not taken into account.
C. Are the thresholds subject to adjustment: (e.g. annually for inflation)? If adjusted, state on what basis and	No.

how frequently.	
D. To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based tests, calendar year-end, fiscal year-end, other)?	Last business year preceding the merger.
E. Describe the methodology for identifying and calculating any values necessary to determine if notification is required, including the value of the transaction, the relevant sales or turnover, and/or the relevant assets?	<p>The methodology for calculating the turnover is defined in Section 38 ARC:</p> <p>(1) Section 277 (1) of the Commercial Code shall apply to the calculation of turnover. Revenues from the supply of goods and services between affiliated undertakings (intra-group revenues) as well as excise taxes shall not be taken into account.</p> <p>(2) For trade in goods, only three quarters of the turnover shall be taken into account.</p> <p>(3) For the publication, production and distribution of newspapers, magazines and parts thereof, the production, distribution and broadcasting of radio and television programmes, and the sale of radio and television advertising time, twenty times the amount of the turnover shall be taken into account.</p> <p>(4) The turnover shall be replaced, in the case of credit institutions, financial institutions and building and loan associations, by the total amount of the proceeds referred to in Section 34 (2) sentence 1 no. 1 a-e of the Ordinance on the Rendering of Accounts of Credit Institutions of 10 February 1992, minus value added tax and other taxes assessed directly on the basis of such proceeds. In the case of insurance undertakings, the premium income in the last completed business year shall be relevant. Premium income shall be income from insurance and reinsurance business including the portions ceded for cover.</p> <p>(5) In the case of an acquisition of the assets of another undertaking, the calculation of the market shares and the turnover of the seller shall take into account only the assets sold.</p>
F. Describe methodology for calculating exchange rates.	Foreign currencies are converted into Euro according to the historical official exchange rate as published in the monthly bulletin of the European Central Bank.
G. Do thresholds apply to worldwide sales/assets, to sales/assets within the jurisdiction, or both?	Both the participating companies' worldwide and domestic turnovers are relevant, see question 4 A above.
H. Can a single party trigger the notification threshold (e.g., one party's sales,	No, see questions 3 A and 4 A above.

assets, or market share)?	
I. How is the nexus to the jurisdiction determined (e.g., sales or assets in the jurisdiction)? If based on an “effects doctrine,” please describe how this is applied. Is there a requirement of local presence (local assets/affiliates/subsidiaries) or are import sales into the jurisdiction sufficient to meet an “effects” test?	<p>The local nexus is mainly determined through the requirement of a minimum turnover in Germany of 25 million Euro by one participating company and of 5 million Euro by another participating company, cf Section 35 (1) no. 2 ARC.</p> <p>However, there are some instances where a merger does not fall under German merger control, even if the domestic turnover exceeds the threshold of Section 35 (1) no. 2 ARC. According to Section 130 (2) of the ARC, the merger must have domestic effects. A merger has domestic effects if it results in the domestic market structure being changed. For more detailed information, see information leaflet on domestic effect at http://www.bundeskartellamt.de/wEnglisch/CompetitionAct/Information_leaflets.php.</p>
J. If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?	The relevant criterion is the location of the customers.
K. If market share tests are used, are there guidelines for calculating market shares?	The notification obligation is not dependent on market shares.
L. Are there special threshold calculations for particular sectors (e.g., banking, airlines, media) or particular types of transactions (e.g. joint ventures, partnerships, financial investments)?	Yes. See question 4 E above.
M. Are any sectors excluded from notification requirements? If so, which sectors?	If credit institutions, financial institutions or insurance companies acquire shares in another company for the purpose of resale, this does not constitute a merger, as long as they do not exercise the voting rights attached to the shares and provided the resale occurs within one year (Section 37 (3) of the ARC).
N. Are there special rules regarding jurisdictional thresholds for transactions in which both the acquiring and acquired parties are	No.

foreign?	
O. Does the agency have the authority to review transactions that fall below the thresholds?	<p>The Bundeskartellamt does not have the authority to review transactions that fall below the thresholds under German merger control (Sections 35 ff. ARC).</p> <p>However, the Bundeskartellamt may initiate proceedings against transactions that may violate other competition law provisions, e.g. Articles 81, 82 EC Treaty or Sections 1 ff. ARC.</p>

5. Notification requirements and timing of notification

A. Is notification mandatory pre-merger?	Yes.
B. Is notification mandatory post-merger?	All mergers subject to notification have to be notified before they are completed and may not be completed until they have been cleared. The fact that a merger has been completed has to be notified to the Bundeskartellamt.
C. Can parties make a voluntary merger filing even if filing is not mandatory? If so, when?	No.
D. What is the earliest that a transaction can be notified (e.g., is a definitive agreement required; if so, when is an agreement considered definitive)?	Before a merger can be notified, the participating companies and the form of the merger have to be established, cf. Section 39 (3) of the ARC.
E. Must notification be made within a specified period following a triggering event? If so, describe the triggering event (e.g., definitive agreement) and the deadline following the event. Do the deadline and triggering event depend on the structure of the transaction? Are there special rules for public takeover bids?	No. However, the merger may not be put into effect before it has been notified and cleared.
F. Can parties request an	Not applicable.

<p>extension for the notification deadline? If yes, please describe the procedure and whether there is a maximum length of time for the extension.</p>	
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6. Simplified procedures

<p>Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, discretion to waive certain responses, etc.).</p>	<p>Not applicable.</p> <p>A clearance in the initial examination phase (see question 9 A below) can be regarded as the “simplified procedure”.</p>
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7. Documents to be submitted

<p>A. Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents).</p>	<p>No specific documents have to be submitted with the initial notification. However, a merger notification must contain the particulars stipulated under Section 39 (3) of the ARC. The Bundeskartellamt is entitled to request the companies to submit documents which it requires for examining the merger project, such as market studies, the acquisition agreement or by-laws (cf. Section 59 of the ARC).</p>
<p>B. Are there any document legalization requirements (e.g., notarization or apostille)?</p>	<p>No.</p>
<p>C. Are there special rules for exemptions from information requirements (e.g. information submitted or document legalization) for transactions in which the acquiring and acquired</p>	<p>No.</p>

parties are foreign?	
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8. Translation

A. In what language(s) can the notification forms be submitted?	The notification of merger projects must be submitted in German.
B. Describe any requirements to submit translations of documents with the initial notification, or later in response to requests for information, including the categories or types of documents for which translation is required, requirements for certification of the translation, language(s) accepted, and whether summaries or excerpts are allowed in lieu of complete translations.	<p>No specific documents have to be submitted with the initial notification (see question 7 A above).</p> <p>Documents which are submitted in response to requests for information must generally be submitted in German. As a rule the authority will refrain from insisting on this requirement if the relevant documents are in English and if the case handlers concerned have adequate language skills.</p> <p>If translations are required these need not be certified. In principle, submitted documents must be completely translated. This does not exclude the possibility that the Bundeskartellamt may also, in individual cases, accept documents in which only certain passages have been translated.</p>

9. Review periods

A. Describe any applicable review periods following notification.	<p>An initial examination phase of one month starts as soon as a complete notification has been received ("first phase"). During this phase the Bundeskartellamt can inform the notifying companies that it has initiated so-called main examination proceedings ("second phase", cf. Section 40 (1) of the ARC). Main examination proceedings are initiated if a further examination of the merger is required. If no such notification is given by the authority within the time limit of one month the merger may be put into effect.</p> <p>The main examination proceedings last for a maximum of four months starting from the date on which the complete notification was received and are concluded by a clearance decision (possibly subject to conditions/obligations) or a prohibition decision. Mergers may not be put into effect before the main examination proceedings have been concluded either by a clearance decision or by the expiry of the four-months period provided that no prohibition decision was issued.</p>
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<p>B. Are there different rules for public tenders (e.g. open market stock purchases or hostile bids)?</p>	<p>No.</p>
<p>C. What are the procedures for an extension of the review periods, if any (e.g., suspended by requests for additional information, suspended at the authority's discretion or with the parties' consent)? Is there a statutory maximum for extensions?</p>	<p>The Bundeskartellamt may extend the review periods if the notifying undertakings have consented to an extension (Section 40 (2) Sentence 1 of the ARC). There is no statutory maximum for such extensions.</p>
<p>D. What are the procedures for accelerated review of non-problematic transactions, if any?</p>	<p>Not applicable. Non-problematic transactions are cleared expeditiously within the initial examination phase (see question 9 A above).</p>

10. Waiting periods / suspension obligations

<p>A. Describe any waiting periods/suspension obligations following notification, including whether closing is suspended or whether the implementation of the transaction is suspended or whether the parties are prevented from adopting specific measures (e.g., measures that make the transaction irreversible, or measures that change the market structure), during any initial review period and/or further review period.</p>	<p>The merger may only be put into effect after conclusion of the proceedings described in question 9A above.</p>
<p>B. Can parties request a derogation from waiting periods/suspension obligations? If so, under</p>	<p>The Bundeskartellamt may, upon application, grant derogations from the prohibition of putting a merger into effect if the participating companies put forward important reasons for this, Section 41 (2) sentence 1 of the ARC.</p>

what circumstances?	
<p>C. Are the applicable waiting periods/suspension obligations limited to aspects of the transaction that occur within the jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent do they apply to the parties' ability to proceed with the transaction outside the jurisdiction? Describe any procedures available to permit consummation outside the jurisdiction prior to the expiration of the local waiting period and/or clearance (e.g. request for a derogation from the suspension obligations, commitment to hold separate the local business operations, escrow agents.)</p>	<p>No. The waiting periods described in question 9 A are applicable to the proposed merger as a whole. The parties may apply for a derogation from the suspension obligations (see question 10 B above).</p>
<p>D. Are parties allowed to close the transaction if no decision is issued within the statutory period?</p>	<p>Yes. See question 9 A above.</p>
<p>E. Describe any provisions or procedures available to the enforcement authority, the parties and/or third parties to extend the waiting period/suspension obligation.</p>	<p>See question 9 C above.</p>
<p>F. Describe any procedures for obtaining early termination of the applicable waiting period/suspension obligation, and the criteria and timetable for deciding whether to grant</p>	<p>See questions 9 A and 9 D above.</p>

early termination.	
G. Describe any provisions or procedures allowing the parties to close at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no "irreversible measures" are taken).	Not applicable.

11. Responsibility for notification / representation

A. Who is responsible for notifying – the acquiring person(s), acquired person(s), or both? Does each party have to make its own filing?	Under the ARC all companies participating in a merger are obliged to notify (Section 39 (2) no. 1 of the ARC). In the case of acquisition of assets or shares this obligation is also upon the seller (Section 39 (2) no. 2 of the ARC). In practice, however, it is sufficient if one of these companies notifies the proposed merger and provides all necessary data on behalf of all participating companies. If, however, no notification has been made or if a notification is incorrect in terms of its content, each party subject to notification will be liable.
B. Do different rules apply to public tenders (e.g. open market stock purchases or hostile bids)?	No.
C. Are there any rules as to who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?	No.
D. How does the validity of the representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized or apostilled?	Upon request by the Bundeskartellamt lawyers must submit written proof of their power of attorney. A legalisation is not required. Foreign companies must name a person authorised to accept service in Germany, Section 39 (3) no. 6 of the ARC.

12. Filing fees

A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined (e.g., flat fee, fees for services, tiered fees based on complexity, tiered fees based on size of transaction)?	The notification of a merger project is subject to fees. The maximum fee generally amounts to 50,000 Euro. In exceptional cases the fee may amount to a maximum of 100,000 Euro. The exact amount of the fee depends on the economic significance of the merger as well as on the personnel and material expenses of the Bundeskartellamt. The economic significance of the merger is mainly determined by the turnovers achieved by the participating companies in the market concerned and by the market shares held by the participating companies. Filing fees for a clearance decision in the initial examination phase typically range between 1,000 Euro and 10,000 Euro.
B. Who is responsible for payment?	The notifying company is liable to pay the fees. If several companies notify a merger they are jointly and severally liable.
C. When is payment required?	Fees must be paid upon receipt of the note of fees.
D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?	Fees must be paid by transfer.

13. Confidentiality

A. To what extent, if any, does your agency make public the fact that a pre-merger notification filing was made or the contents of the notification?	The fact as such that a notification has been made is announced by the Bundeskartellamt on its website. Details of the notification are not published.
B. Do notifying parties have access to the authority's file? If so, under what circumstances can the right of access be exercised?	Notifying parties have the right to inspect files. Draft decisions, documents which directly serve to prepare decisions and third parties' business secrets are, however, not subject to the right to inspect files. Files may be inspected at the Bundeskartellamt's premises. In individual cases the possibility of sending out copies at the expense of the party requesting to inspect files can be considered.
C. Can third parties or other	Third parties have the right to inspect files if they have been admitted to the proceedings in accordance with Section 54 (2) no.

<p>government agencies obtain access to notification materials? If so, under what circumstances?</p>	<p>3 of the ARC. Draft decisions, documents serving directly to prepare decisions and third parties' business secrets are not subject to the right to inspect files in this case either.</p> <p>Third parties which have not been admitted to the proceedings have no claim to inspect the files. However, the Bundeskartellamt can grant permission to inspect the files at its discretion if the parties concerned put forward a legitimate interest. Again, draft decisions, documents serving directly to prepare decisions and business secrets are not subject to the right to inspect files.</p> <p>Similarly, other national authorities can be given access to the files in individual cases. Business secrets can only be disclosed to other national authorities in exceptional cases (i.e. for the use in criminal proceedings).</p>
<p>D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.</p>	<p>The fact as such that a notification has been made cannot be treated confidentially. Business secrets are treated confidentially in any case, cf. 13 B and C.</p>
<p>E. Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?</p>	<p>The Bundeskartellamt may exchange non-confidential information with foreign competition authorities.</p> <p>Agreements that permit or facilitate the exchange of non-confidential information include, e.g.: (1) the decision made at the European Competition Authorities' (ECA) meeting on 20 April 2001, (2) the 1995 OECD Council Recommendation concerning co-operation between member countries on anticompetitive practices affecting international trade, and (3) bilateral agreements with Austria, France and the USA. All these agreements are publicly available.</p>
<p>F. Can the agency exchange documents or information with other reviewing agencies? If so, does it need the consent from the parties who have submitted confidential information to exchange such information?</p>	<p>The Bundeskartellamt may exchange non-confidential information with foreign competition authorities.</p> <p>The Bundeskartellamt may not exchange confidential information with foreign competition authorities unless the parties grant a confidentiality waiver (Section 50b ARC).</p>

14. Transparency

<p>A. Does the agency publish an annual report? Please provide the web address if available.</p>	<p>Yes.</p> <p>http://www.bundeskartellamt.de/wDeutsch/publikationen/Taetigkeitsbericht.php</p>
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<p>B. Does the agency publish press releases related to merger policy or investigations?</p>	<p>Yes. http://www.bundeskartellamt.de</p>
<p>C. Does the agency publish decisions on why it cleared / blocked a transaction?</p>	<p>The Bundeskartellamt publishes all decisions made after an in-depth review of the merger (second phase reviews): http://www.bundeskartellamt.de/wDeutsch/entscheidungen/fusion/skontrolle/EntschFusion.php and http://www.bundeskartellamt.de/wDeutsch/archiv/EntschFusArchiv/ArchivFusion.php</p>
	<p>Upon request, the Bundeskartellamt can inform interested parties on the main reasons for a clearance decision in the initial examination phase.</p>

15. Sanctions/penalties

<p>A. What are the sanctions/penalties for failure to file a notification and/or failure to observe any mandatory waiting periods/suspension obligations?</p>	<p>Violations of the prohibition of putting a concentration into effect under Section 41 (1) Sentence 1 of the ARC can be punished by imposing a fine of up to 1 million Euro. In excess of this amount a violation can be punished by a fine up to 10 % of the turnover of the undertaking concerned.</p>
<p>B. Which party/ies are potentially liable?</p>	<p>All persons or parties who put a merger into effect or participate in putting a merger into effect without prior notification and clearance , e.g. the owners, legal representatives or managers of the participating companies and the participating companies themselves.</p>
<p>C. Can the agency impose/order these sanctions/penalties directly, or is it required to bring judicial action against the infringing party? If the latter, please describe the procedure and indicate how long this procedure can take.</p>	<p>The Bundeskartellamt can impose these sanctions directly. The sanctions are subject to judicial review.</p>

16. Judicial review

<p>Describe the provisions and timetable for judicial review or other rights of appeal/review of agency decisions on merger notification and review.</p>	<p>All parties participating in the merger control proceedings, i.e. also third parties admitted to the proceedings, may appeal to the Düsseldorf Higher Regional Court against the Bundeskartellamt's clearance or prohibition decisions made in the main examination proceedings within one month from service of the decision. An appeal to the Düsseldorf Higher Regional Court may also be based upon new facts and evidence. Under certain preconditions appeals on points of law against decisions of the Higher Regional Court can be lodged with the Federal Supreme Court. The Federal Supreme Court only examines whether the decision of the Düsseldorf Higher Regional Court is based on a violation of the law.</p> <p>A concentration prohibited by the Bundeskartellamt may, upon application, be cleared by the Minister of Economics and Technology if, in a specific case, the restraint of competition concerned is outweighed by advantages to the economy as a whole or if the concentration is justified by an overriding public interest (Section 42 (1) of the ARC).</p>
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17. Additional filings

<p>Are any additional filings/clearances required for some types of transactions, e.g., sectoral regulators, securities regulator?</p>	<p>Mergers affecting the broadcasting or television sector must be additionally notified to the Commission on Concentration in the Media ("Kommission zur Ermittlung der Konzentration im Medienbereich", "KEK"). The task of this Commission is to ensure diversity of opinion in the broadcasting and television sector. More details on the KEK's tasks and activities are available at http://www.kek-online.de .</p>
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18. Closing deadlines

<p>When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorized?</p>	<p>There is no time limit for putting a merger into effect. However, clearance decisions are only effective until the end of the Bundeskartellamt's prognosis period which normally covers a maximum of three years. The prognosis period may be extended to more than three years under specific circumstances and in individual cases. Clearance decisions cease to be effective upon expiry of the prognosis period at the latest and mergers can then no longer be put into effect.</p>
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19. Post merger review of transactions

<p>Can the agency reopen an investigation of a</p>	<p>The Bundeskartellamt cannot normally reopen an investigation of a transaction that it previously cleared.</p>
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transaction that it previously cleared or allowed to proceed with conditions? If so, are there any limitations, including a time limit on this authority?	However, the Bundeskartellamt can reopen an investigation, for example, if obligations contained in the clearance decision are not met, if the clearance decision was based on false information, or if the clearance decision was obtained through other malicious action. In such cases, there is no time limit to reopening the investigation.
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