



BUNDESKARTELLAMT

**Prohibition Criteria in Merger Control –
Dominant Position versus
Substantial Lessening of Competition?**

- Discussion Paper -

Bundeskartellamt

Discussion paper

for the meeting of the Working Group on Competition Law¹

on 8 and 9 October 2001

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Substantial Lessening of Competition?**

translated version

¹ Each year in autumn the Bundeskartellamt invites the Working Group on Competition Law, a group of university professors from faculties of law and economics, to participate in a two-day discussion on a current issue relating to competition policy or competition law. As the basis for their discussion the participants receive a working paper prepared by the Bundeskartellamt in advance of the conference. The present document contains the working paper prepared for the 2001 conference as well as a brief summary of the conclusions of the conference.

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EVALUATION CRITERIA¹ IN MERGER CONTROL

(according to the respective legal provisions)

	Germany²	European Union³	United States⁴	Australia⁵
Prohibition criterion	A concentration which is expected to create or strengthen a dominant position	A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded	No person shall acquire [...] where [...] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly	A corporation must not acquire [...] if the acquisition would have the effect, or be likely to have the effect of substantially lessening competition in a market
Market share of the participating companies / Quantitative presumption thresholds	<p>Presumption of market dominance: ≥ 33 per cent</p> <p>Presumption of joint market dominance: CR 3 ≥ 50 per cent CR 5 ≥ 67 per cent</p>	<p>Market position of the undertakings concerned</p> <p>Impediment of competition unlikely: ≤ 25 per cent</p>	<p>Presumption of adverse competitive effects: ≥ 35 per cent (unless customers find alternative sources of supply)</p> <p>Presumption of an SLC: HHI > 1000 (+ > 100) OR HHI > 1800 (+ > 50)</p>	<p>Presumption of an SLC: > 15 per cent if CR 4 > 75 per cent OR > 40 per cent</p>
Market structure / Market concentration	<p>Presumption of joint market dominance: CR 3 ≥ 50 per cent CR 5 ≥ 67 per cent</p> <p>Market share differences and distribution</p>	Structure of all the markets concerned	<p>Presumption of an SLC: HHI > 1000 (+ > 100) OR HHI > 1800 (+ > 50)</p>	<p>Market concentration</p> <p>Presumption of an SLC : > 15 per cent if CR 4 > 75 per cent</p>

	Germany	European Union	United States	Australia
Actual or potential competition	Actual or potential competition by undertakings established within or outside the area of application [...] Competition from imperfect substitutes	Actual or potential competition from undertakings located either within or outwith the Community	Committed market entry (= new competition that requires significant sunk costs of entry and exit)	Actual and potential level of import competition in the market
Barriers to entry	Legal or factual barriers to entry by other undertakings	Legal or other barriers to entry	Timeliness, likelihood and sufficiency of market entry	Height of barriers to entry to the market
Market development	Market phase (growth, speed of innovation, change of the competitive conditions)	Supply and demand trends	Change in market conditions (new technologies, development of market shares)	Dynamic characteristics of the market (growth, innovation, product differentiation)
Alternatives and interests of the opposite side of the market	Ability of the opposite market side to resort to other undertakings	Alternatives available to suppliers and users Interests of intermediate and ultimate consumers	Level of substitutability with products / territories outside the relevant market	Actual or likely availability of substitutes Likelihood of acquirers increasing prices or profit margins significantly and sustainably

	Germany	European Union	United States	Australia
Further competition criteria	<p>Financial strength or superior resources</p> <p>Access to supply or sales markets (vertical integration, product line)</p> <p>Countervailing market power</p> <p>Interlocks with other companies</p> <p>Ability to shift supply</p> <p>Balancing clause</p> <p>List is non-exhaustive</p>	<p>Economic and financial power</p> <p>Access to supplies or markets</p> <p>List is non-exhaustive</p>	<p>Likelihood of coordinated interaction (availability of key information, product heterogeneity, pricing and marketing practices, transaction frequency)</p> <p>Likelihood of unilateral effects (in particular scope for price increases)</p> <p>List is non-exhaustive</p>	<p>Likelihood of coordination</p> <p>Nature and extent of vertical integration in the market</p> <p>Degree of countervailing power in the market</p> <p>Removal of a vigorous and effective competitor</p> <p>List is non-exhaustive</p>
Other factors	<p>Causality / reorganisation merger</p> <p>Possibility of Ministerial Authorisation in the case of prevailing advantages to the economy as a whole or an overriding public interest</p>	<p>Development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition</p> <p>Causality / reorganisation merger</p>	<p>Cognizable efficiencies sufficient to reverse the likely harm to competition / consumers</p> <p>Failing firm defence</p>	<p>Efficiencies that are likely to increase competition (lower prices / higher quantities / improved quality)</p> <p>Public benefits</p>

¹ Only those criteria have been considered which are substantial and explicitly mentioned in the laws or guidelines of the respective competition authorities, keeping largely to the original wording. Further evaluation criteria follow particularly from the decisions by authorities and courts.

² Cf. Sections 19, 36 ARC, Principles of Interpretation of the Bundeskartellamt.

³ Cf. Article 2 EMCR and Recital 15 EMCR.

⁴ Cf. Section 7 Clayton Act and Horizontal Merger Guidelines (US), Sections 1 – 3.

⁵ Cf. Section 50 Trade Practices Act and Merger Guidelines (AU), Section 5.

BIBLIOGRAPHY

- Abbamonte**, Guisepe B. / **Rabassa**, Valérie: "Foreclosure and Vertical Mergers – The Commission's Review of Vertical Effects in the Last Wave of Media and Internet Mergers: AOL/Time Warner, Vivendi/Seagram, MCI Worldcom/Sprint", in: *European Competition Law Review*, Issue 6, 2001, p. 214 ff.
- Areeda**, Phillip / **Turner**, Donald F.: "Antitrust Law", Vol. 4, Boston / Toronto, 1980.
- Arquit**, Kevin J. / **Wolfram**, Richard: "Mergers and Acquisitions: United States Government Antitrust Analysis and Enforcement", in: International Bar Association / European Commission (ed.), "EC Merger Control: Ten Years On", London, 2000, p. 147 ff.
- ACCC (1999)**: "Merger Guidelines", as of: June 1999.
- ACCC (2001)**: "ACCC Publications – Three year overview" (<http://www.accc.gov.au/merger/mergbac2.htm>).
- Baker**, Simon / **Ridyard**, Derek: "Portfolio Power: A Rum Deal?", in: *European Competition Law Review*, Issue 4, 1999, p. 181 ff.
- Baxter**, William F.: "Responding to the Reaction: The Draftsman's View", 71 *University of California Law Review* (1983), p. 619 ff.
- Bishop, Bill**: "The Boeing / McDonnell Douglas Merger", in: *European Competition Law Review*, Issue 7, 1997, p. 417 ff.
- Bishop, Simon B.**: "Power and Responsibility: The ECJ's Kali-Salz Judgment", in: *European Competition Law Review*, Issue 1, 1999, p. 37 ff.
- Bishop**, Simon / **Walker**, Mike: "The Economics of EC Competition Law: Concepts, Application and Measurement", London, 2000.
- Bishop, William**: "Recent EC Merger Cases: An Economic Perspective", contribution to the IBC EC Competition Law Conference on 9 and 10 November 1999, London.
- Bok**, Derek: "Section 7 of the Clayton Act and the Merging of Law and Economics", 74 *Harvard Law Review* (1960), p. 226 ff.
- Bork**, Robert H.: "The Antitrust Paradox", New York, 1978.
- Bundeskartellamt (2001)**: "Tätigkeitsbericht 1999 / 2000", BT-Drucksache 14/6300 of 10 July 2001.
- Bundeskartellamt (2000a)**: "Auslegungsgrundsätze zur Prüfung von Marktbeherrschung in der deutschen Fusionskontrolle", as of 1 August 2000 (<http://bundeskartellamt/kartellrecht.html>).
- Bundeskartellamt (2000b)**: "Megafusionen – Eine neue Herausforderung für das Kartellrecht?" Documentation of the 1999 International Conference on Competition in Berlin, ed. Dr. Knud Hansen, Bonn, 2000.

Bundeskartellamt (1999): "Tätigkeitsbericht 1997 / 1998", BT-Drucksache 14/1139 of 25 June 1999.

Bundeskartellamt (1997): "Tätigkeitsbericht 1995 / 1996", BT-Drucksache 13/7900 of 19 June 1997.

Bundeskartellamt (1995): "Tätigkeitsbericht 1993 / 1994", BT-Drucksache 13/1660 vom 14 June 1995.

Bundeskartellamt (1985): "Tätigkeitsbericht 1983 / 1984", BT-Drucksache 10/3550 of 26 June 1985

Bundeskartellamt (1977): "Ergebnisprotokoll über die Sitzung des Arbeitskreises Kartellrecht vom 26. / 27. September 1977 zum Thema 'Die Erfassung wettbewerbsbeschränkender Macht im Rahmen der Fusionskontrolle'".

Büscher, Rolf: "Diagonale Unternehmenszusammenschlüsse im amerikanischen und deutschen Recht", Baden-Baden, 1983.

Camesasca, Peter D.: "The Explicit Efficiency Defence in Merger Control: Does it Make the Difference", in: European Competition Law Review, Issue 1, 1999, p. 14 ff.

Christensen, Peder / Rabassa, Valérie: "The Airtours decision: Is there a new Commission approach to collective dominance?", in: European Competition Law Review, Issue 6, 2001, p. 227 ff.

Coate, Malcolm B.: "Merger Enforcement at the Federal Trade Commission in Three Presidential Administrations", 45 Antitrust Bulletin (2000), p. 323 ff.

Commerce Commission (NZ): "Practice Note: 4 – The Commission's Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in Section 47 – A Test of Substantially Lessening Competition", 2001 ('<http://www.comcom.govt.nz/new/index.cfm>').

Competition Commission (UK): "Mergers: Dominance v. Substantial Lessening of Competition".

DOJ / FTC (1992): "U.S. Department of Justice / Federal Trade Commission, 1992 Horizontal Merger Guidelines", in the version of 8 April 1997 ('<http://www.ftc.gov/bc/docs/horizmer.htm>').

DOJ / FTC (1984): "U.S. Department of Justice / Federal Trade Commission, Non-Horizontal Merger Guidelines", originally published as part of the Merger Guidelines of 14 June 1984 ('<http://www.usdoj.gov/atr/public/guidelines/2614.htm>').

Dreher, Meinrad: „Konglomerate Zusammenschlüsse, Verbotsvermutungen und Widerlegungsgründe“, Berlin, 1987.

DTI (2001): "A World Class Competition Regime" - 5.) Modernising the Merger Regime", DTI white paper of 30 July 2001 ('<http://www.dti.gov.uk/cp/whitepaper/523308.htm>').

- DTI (2000):** "Mergers: The Response to the Consultation on Proposals for Reform - Section 2: The Competition-based Test", October 2000 ('<http://www.dti.gov.uk/cp/mergerresp/04.htm>').
- DTI (1999):** "Mergers: A Consultation Document on Proposals for Reform - Section 3: The Competition-based Test ", August 1999 (<http://www.dti.gov.uk/cacp/cp/mergercon/section3.htm>).
- Emmerich, Volker:** "Kartellrecht", 8th edition, München, 1999.
- European Commission:** Press release of 05 October 2000 regarding the withdrawal of the notification of the Time Warner/EMI merger.
- FTC:** Press release of 14 December 2000 incl. annexes (i.a. complaint and consent order) in the AOL/Time Warner case ('<http://www.ftc.gov/opa/2000/12/aol.htm>').
- González-Díaz, Francisco Enrique:** "Tenth Anniversary of the Merger Regulation: The Way Forward", in: International Bar Association / European Commission (ed.), "EC Merger Control: Ten Years On", London, 2000, p. 405 ff.
- Hoenig, Joachim / Scheerer, Michael:** "Die Reform der EU-Fusionsregeln nimmt langsam Konturen an", in: Handelsblatt of 13 February 2001.
- Immenga, Frank A.:** "Weniger Wettbewerber – mehr Wettbewerb?", in: Neue Züricher Zeitung of 5 July 2001.
- Immenga, Ulrich / Mestmäcker, Ernst-Joachim (eds.):** "Kommentar zum EG-Wettbewerbsrecht", Munich, 1997.
- Kinne, Konstanze:** "Effizienzvorteile in der Zusammenschlusskontrolle", Baden-Baden, 2000.
- Kintner, Earl:** "Primer on the Law of Mergers"
- Kloosterhuis, Erik:** "Joint Dominance and the Interaction Between Firms", in: European Competition Law Review, Issue 3, 2001, p. 79 ff.
- Korah, Valentine:** "Gencor v. Commission: Collective Dominance", in : European Competition Law Review, Issue 6, 1999, p. 337 ff.
- Kovacic, William E.:** "Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy", 68 Antitrust Law Journal (2001), p. 805 ff.
- Krattenmaker, Thomas G. / Pitofsky, Robert:** "Antitrust Merger Policy and the Reagan Administration", 33 Antitrust Bulletin (1988), p. 211 ff.
- Langen, Eugen / Bunte, Hermann-Josef (eds.):** "Kommentar zum deutschen und europäischen Kartellrecht", 9th edition, Neuwied, 2001.
- Lenel, Hans Otto:** "Zu den Megafusionen in den letzten Jahren", in: ORDO, vol. 51, 2000, p. 1 ff.

- Lofaro**, Andrea / **Ridyard**, Derek: "The Economic Analysis of Joint Dominance under the EC Merger Regulation", in: European Business Organization Law Review, 1/2000, p. 539 ff.
- Markert**, Kurt: „Beurteilungsgesichtspunkte diagonaler Zusammenschlüsse anhand amerikanischer Fälle“, in: Gutzler, Helmut (ed.), "Wettbewerb im Wandel, Eberhard Günther zum 65. Geburtstag", 1976.
- MED (2000a)**: "Backgrounder on the Commerce Act Reforms", 5 April 2000 (http://www.med.govt.nz/buslt/bus_pol/comref/backgrounder.html)
- MED (2000b)**: "Commerce Act Strengthened", Acting Minister of Commerce - Media Release, 5 April 2000 (http://www.med.govt.nz/buslt/bus_pol/comref/index.html).
- MED (1999a)**: "Review of the Competition Thresholds in the Commerce Act 1986 and Related Issues: A Discussion Document - 2.) The Current Regime ", April 1999 (http://www.med.govt.nz/buslt/bus_pol/thresholds/thresholds-01.html).
- MED (1999b)**: "Review of the Competition Thresholds in the Commerce Act 1986 and Related Issues: A Discussion Document - 4.) Concerns with the Current Thresholds", April 1999 (http://www.med.govt.nz/buslt/bus_pol/thresholds/thresholds-03.html).
- MED (1999c)**: "Review of the Competition Thresholds in the Commerce Act 1986 and Related Issues: A Discussion Document - 5.) Thresholds in Other Jurisdictions", April 1999 (http://www.med.govt.nz/buslt/bus_pol/thresholds/thresholds-04.html).
- Möschel**, Wernhard (2001): "Großfusionen in engen Oligopolen", in: Der Betrieb, Issue 3, 2001, p. 131 ff.
- Möschel**, Wernhard (1984): "Finanzkraft und konglomerater Zusammenschluss – Zur Rheinmetall/WMF-Entscheidung des Kammergerichts", in: Die Aktiengesellschaft, 1984, p. 257 ff.
- Niels**, Gunnar: "Collective Dominance: More Than Just Oligopolistic Interdependence", in: European Competition Law Review, Issue 5, 2001, p. 168 ff.
- OECD**, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy: "Roundtable on Oligopoly", Document DAFPE / CLP (99)25 of 19 October 1999.
- Pries**, George L. / **Romani**, Franco: "The GE/Honeywell Precedent", in: The Wall Street Journal Europe of 21 June 2001.
- Schmidt**, Ingo: "Wettbewerbspolitik und Kartellrecht", 6th edition, Stuttgart, 1999.
- Schmidt**, Ingo / **Reis**, Wolfgang: "Der Herfindahl-Hirschman-Index (HHI) als wettbewerbspolitisches Instrument der neuen US-Fusionsrichtlinien“, in: WuW 1983, p. 525 ff.
- Sullivan**, Lawrence Anthony: "Handbook of the Law of Antitrust", St. Paul / Minnesota, 1977.

Wiedemann, Gerhard (ed.): "Handbuch des Kartellrechts", Munich, 1999.

Williamson, Oliver E.: "Vertical Merger Guidelines: Interpreting the 1982 Reforms", 71
University of California Law Review (1983), p. 604 ff.

LIST OF ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
AU	Australia
BKartA	Bundeskartellamt
CR	Concentration Ratio
DOJ	Department of Justice (USA)
DTI	Department of Trade and Industry (United Kingdom)
EC	Treaty establishing the European Community (EC) (in the version of 2 October 1997)
ECJ	European Court of Justice
Fn.	Footnote
FTC	Federal Trade Commission (USA)
ARC	Act Against Restraints of Competition (in the version of 26 August 1998)
HHI	Hirschman-Herfindahl-Index
MD	Market dominance
MED	Ministry of Economic Development (New Zealand)
NERA	National Economic Research Associates
NZ	New Zealand
OECD	Organisation for Economic Cooperation and Development
SLC	Substantial Lessening of Competition
Slg.	Compilation of decisions by the European Court of Justice / European Court of First Instance
TPA	Trade Practices Act (Australia)
U.S.	Compilation of decisions by the US Supreme Court
WuW/E	Wirtschaft und Wettbewerb / Entscheidungssammlung

