

A. Introduction

The preconditions for prohibiting company mergers are completely identical in only a few legal systems. However, according to the texts of the respective legal provisions prohibition criteria can basically be divided into two groups. When assessing a merger most Member States of the European Union and the European Commission itself focus on whether it will lead to the creation or strengthening of a dominant position (or market dominance - MD). In contrast, under regulations in the USA, Canada and Australia such mergers are to be prohibited which will lead to a "substantial lessening of competition" (SLC).

As early as 1977 a meeting of the Working Group on Competition Law was held at the Bundeskartellamt on the topic "Covering anti-competitive power within the framework of merger control". The discussion at that time resulted in a controversial formation of opinion about whether German merger control, introduced four years previously, should in future continue to focus on the market dominance criterion or be changed to the blanket clause "substantial impairment of competition conditions".¹

The issue of finding the "optimal" prohibition criterion for company mergers has now become of topical significance inter alia in light of the recent revisions of merger control regulations undertaken by the United Kingdom and New Zealand and the introduction of an SLC test in connection with this. The European Commission is also considering discussing the SLC concept² as part of its pending reform of the Merger Regulation and there are also some demands within Germany for the prohibition criterion to be changed.³ The discussion was ignited again not least by the different assessments of the planned merger of General Electric and Honeywell by the US Department of Justice (DOJ) on the one hand and the European Commission on the other.⁴

¹ Cf. BKartA (1977).

² Cf. Hoenig/Scheerer.

³ In respect of the covering of "mega mergers" e.g. by Schmidt at the 9th International Conference on Competition in Berlin in 1999 (BKartA (2000b), p. 84), backed by Lenel, p. 29.

⁴ Cf. e.g. Pries / Romani.

The main argument used by the advocates of the SLC test⁵ is that this is a broader assessment approach which, in contrast to the MD test takes more consideration of competition conditions in the market as a whole rather than the market position of the companies concerned. In their opinion this also offers the possibility to make a more flexible and effective assessment above all of oligopolistic dominance and also of vertical or conglomerate mergers. At the same time the SLC test is said to apply generally stricter standards than the MD test since a substantial lessening of competition could arise without the creation or strengthening of a dominant position of the companies participating in the merger and so constitute a lower intervention threshold. Finally, some advocates indicate that by applying the SLC test efficiency gains can be taken into consideration.

Although certain differences between the criteria “dominance” and “substantial lessening of competition” can be concluded from the mere wording of these terms the objective of the discussion paper is to examine whether and, if so, to what extent the two evaluation approaches actually diverge from one another in theory and lead to different results in practice.

B. Concepts for the evaluation of mergers

Firstly, in order to draw a comparison between the substantial content of the respective prohibition criteria, the merger control concepts in two countries applying the MD test and in two countries applying the SLC test are illustrated.⁶ This is followed by an analysis of the principal reasons for the recent decision to switch over to the SLC test in the United Kingdom and its introduction in New Zealand.

I. Germany

Under Section 36 (1) of the ARC, a merger is to be prohibited by the Bundeskartellamt if it is "expected to create or strengthen a dominant position." The concept of market dominance is put into concrete terms in Section 19 (2) of the ARC, according

⁵ Cf. following DTI (2000), p. 2 f. and Ministry of Economic Development / New Zealand – MED. (2000a), p. 4.

⁶ A direct comparison of the individual evaluation aspects of these four concepts is given in the Annex.

to which an undertaking, which either has no competitors or is not exposed to any substantial competition or has a paramount market position in relation to its competitors, is presumed to be dominant. Under Bundeskartellamt practice the third variant adopted with the introduction of merger control is the most significant. A paramount market position exists if an undertaking's scope of action is not sufficiently controlled by its competitors due to market or company-related structural criteria.⁷ Section 19 (2) sentence no. 1 (2) of the ARC stipulates the major factors which should be taken into account when examining a paramount market position.⁸

The market share always forms the basis for assessing market power. A dominant position is presumed to exist within the meaning of Section 19 (3) of the ARC if an undertaking has a market share of at least one third. In addition to the absolute level of the market share of the company concerned the differences in market share of the remaining competitors, the distribution and development of the market share are also taken into account when evaluating market power. A further important assessment criterion is the financial strength of a company or its resources, which could have a deterrent and discouraging effect on competitors and in this way extend the undertaking's scope of action. If the company has good access to supply or sales markets due to its vertical integration or an extensive range of products, possible market-foreclosure effects for competitors are to be taken into account. Legal or factual barriers to entry or the existence of potential competitors also play a crucial role. At the same time a company's interlocks, countervailing power, the market phase and the company's ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings are important factors in examining market dominance. Finally, the market position should be assessed under overall consideration of all the relevant circumstances.

According to Section 19 (2) sentence 2 of the ARC, two or more undertakings are dominant insofar as they jointly satisfy the conditions of market dominance and no substantial competition exists between them. In assessing an oligopolistic situation it is first examined, essentially on the basis of the above criteria, whether the conditions

⁷ Federal Supreme Court decision of 2 December 1980 WuW/E Federal Supreme Court 1749 ff. – "Klöckner/Becorit".

⁸ Cf. following detailed BKartA (2000a), p. 11 ff.

of internal competition favour anti-competitive parallel conduct. The presumption thresholds for oligopolistic dominance lie at a combined market share of 50 per cent in the case of a maximum of three companies or two-thirds for a maximum of five companies.⁹ As regards external competition advantages in market share and resources as well as interlocks or economic interdependence between the oligopolists and outsiders are of particular significance. Additional criteria applied in the assessment of oligopolistic dominance include the level of market transparency, the homogeneity of the products and the actual competitive activity in the market. A comprehensive appraisal of all the significant conditions of competition should also be made and considered in assessing collective dominance.

A merger can only be prohibited in Germany if it is causal for the creation or strengthening of a dominant position. The so-called reorganisation merger (failing company defence) is a special case where there is no direct cause.¹⁰ In addition to this the Bundeskartellamt can clear a merger which fulfils the prohibition requirements if the companies can prove that the merger – in a different market – will lead to improvements in the conditions of competition and that these improvements will “outweigh the disadvantages of dominance” (balancing clause of Section 36 (1) of the ARC). Finally, within the framework of the Ministerial Authorisation in Section 42 of the ARC it is possible to clear a merger prohibited by the Bundeskartellamt on the grounds of its advantages to the economy as a whole or because it is justified by an overriding public interest.

II. European Union

In accordance with Article 2 (3) of the current European Merger Control Regulation (EMCR) a concentration shall be declared incompatible with the Common Market “which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial

⁹ If the presumption thresholds have been reached, the burden of proof lies with the companies concerned.

¹⁰ Cf. in particular BKartA (2000a), p. 40 f.

part of it”.¹¹ As the EMCR offers no legal definition of a dominant position, the European Commission and the courts are guided by the jurisdiction in Article 82 of the EC Treaty. According to the definition of the European Court of Justice (ECJ) a dominant position means "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers".¹² This formulation corresponds in content with the paramount market position within the meaning of Section 19 (2) sentence 2 of the ARC.

The evaluation criteria in Article 2 (1) lit. a) and b) of the EMCR also correspond largely with those under German law. The market share of the companies concerned is also taken as the basis for the examination, whereby the EMCR does not however contain any explicit presumption thresholds.¹³ In its assessment of the structure of the respective markets and thereby the number and significance of the competitors the Commission has in several cases also applied the Hirschman Herfindahl Index (HHI),¹⁴ without however basing its assessment on this index.¹⁵ The existence of potential competition or barriers to entry also plays a crucial role in the examination undertaken by the Commission. Other factors are the financial strength of the companies involved, their access to supply and sales markets, the ability of suppliers and customers to choose alternatives, market development and the interests of intermediate and final customers. Here again an assessment is made under overall consideration of all relevant factors.¹⁶ Unlike the ARC the EMCR contains no explicit provisions for assessing oligopolies.

¹¹ In most of the relevant literature the phrase "as a result of which effective competition would be significantly impeded [...]" is not interpreted as an independent prohibition criterion (to be cumulatively satisfied), but rather as a clarification which emphasises the future-oriented, dynamic aspect of the control. Cf. Immenga in: Immenga / Mestmäcker, Section 2 EMCR, marginal note 18 ff.

¹² European Court of Justice decision of 14 February 1978, WuW/E EEC(425) – "United Brands/Commission", marginal notes 63/66.

¹³ According to Recital 15 of the EMCR competition is unlikely to be impeded if the market share of the undertakings concerned does not exceed 25%. In practice added market shares of 45 to 50% usually give rise to serious concerns and may represent a sufficient reason for the prohibition of a merger; cf. Wagemann in: Wiedemann, section 16, marginal note 47.

¹⁴ The index is calculated by adding the squared market shares of all companies operating in the market, i.e. in a market in which five companies each hold a market share of 20%, the index amounts to $5 \times 20^2 = 2000$. As to the evaluation see section B III.

¹⁵ Cf. Christensen / Rabassa, p. 227/230.

¹⁶ Cf. e.g. ECJ "United Brands/Commission", loc. cit. (fn. 12).

There is at least no explicit provision in the ECMR for weighing up restraints of competition against the potential improvement of competitive conditions in other markets. However, when assessing a merger the Commission can take account of the development of technical and economic progress if this is beneficial to the consumer and does not hinder competition. This criterion has, however, never been drawn on in practice to clear a merger, in spite of the existence of a dominant position.¹⁷ As under German law the merger has to be the causal factor for the creation or strengthening of a dominant position. This is not the case if the requirements for a reorganisation merger are fulfilled.¹⁸ A separate evaluation phase for competition-unrelated considerations according to the German ministerial authorisation does not exist. Decisions at European level, however, are made by the Commission itself (a committee appointed on the basis of political criteria).

III. United States

The United States first made “substantial lessening of competition“ the criterion for prohibition under merger control within Section 7 of the Clayton Act of 1914. A series of inadequacies of the legal formulation were responsible for Section 7 of the Clayton Act achieving virtually no practical significance for decades. One of its chief deficits lay in the fact that the provision only covered the acquisition of shares but not the acquisition of assets and could thus be circumvented without difficulty. The focus on an SLC between seller and acquirer instead of on the affected markets, which, according to the wording should have led to the prohibition of every horizontal merger, also proved unsuccessful. At the same time, however, this provision at least left in doubt whether non-horizontal mergers should also be covered. Consequently, as during the period prior to the Clayton Act, merger control, even after 1914, was practically only effected on the basis of Section 1 of the 1890 Sherman Act, which forbids “every contract, combination or conspiracy in restraint of trade”.

As late as 1950 the obvious shortcomings of Section 7 of the Clayton Act¹⁹ were addressed by the Celler Kefauver Act, which largely gave Section 7 of the Clayton

¹⁷ Cf. BKartA (2000a), p. 10 f.

¹⁸ Cf. European Court of Justice decision of 31 March 1998, Slg. I-1375 ff. - "Kali und Salz".

¹⁹ Cf. on history of Celler-Kefauver Act Kintner, p. 194 ff., in particular 197 ff.; also Bok, p. 226/236 f.; Areeda / Turner, section 903 f.

Act its present form²⁰. The area of application of the norm was considerably extended in the new version. It now also applied to the acquisition of assets. Moreover, SLC was no longer restricted to the relationship between acquirer and company acquired, clarifying that the norm also covers non-horizontal mergers.

The “Brown Shoe” case²¹ is a landmark decision in the application of this provision. The Supreme Court hereby confirmed the prohibition of the acquisition of the Kinney shoe retail chain, which covered some of its requirements from its own production, by Brown Shoe Co., a shoe manufacturer which sold some of its shoes to end customers through its own retail outlets. In the opinion of the Supreme Court the vertical integration aspect, apart from horizontal aspects, justified the prohibition although Brown only had a 4 per cent share in the national shoe production and Kinney in national market definition terms only had a 1.2 per cent share of the shoe retail business in value terms. The Brown Shoe decision marked the beginning of a period which was characterised by the strictest application practice in the history of US competition law – prohibitions confirmed by the Supreme Court of horizontal and vertical mergers even with insignificant market shares.²² In 1968 the DOJ summed up its merger control practice at that time in its Merger Guidelines (administrative principles which are not binding on the courts), in order to provide companies and their advisers with a basis for assessment.²³

However this restrictive merger control practice lay open to increasing criticism from the advocates of the so-called Chicago School.²⁴ Their opinions were forewith

²⁰ The regulation then read: “No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”.

²¹ *Brown Shoe Co. v. United States*, 370 U.S. 294 ff. (1962)

²² This made one of the judges at the Supreme Court give the following statement in a dissenting vote: “The sole consistency that I can find is that in litigation under [Section] 7, the Government always wins.”, *United States v. Von’s Grocery Co.*, 384 U.S. 270/301 (1966) (Stewart, J., dissenting).

²³ Under the 1968 guidelines vertical concentrations were already critically assessed if the participants held market shares of 10 per cent (upstream market) or 6 per cent (downstream market) in the vertically involved markets, cf. *Williamson*, p. 604/616.

²⁴ Cf. e.g. Bork’s 1978 influential work according to which the Brown Shoe decision had a good chance of being awarded the title of “worst antitrust essay ever written” (p. 210). A good overview of the Chicago School’s concept as well as further literary references are to be found in *Schmidt*, p. 19 ff.

reflected in revised Merger Guidelines after the Republicans came to power in 1981 and the ensuing changes of personnel at the courts and competition authorities. The 1982 version focused in particular on horizontal mergers. The level of concentration in the market was no longer to be defined on the basis of the CR 4 test²⁵ but according to the HHI. The Guidelines were revised several times, the last time being in 1997. The section concerning non-horizontal mergers has been left unchanged since 1984.

The Guidelines in their current version²⁶ are meant to explain which criteria the competition authorities apply in determining whether a merger is likely to lead to a substantial lessening of competition. The latter is the case if the merger leads to the creation or strengthening of market power or facilitates its use. Market power on the supplier's side is defined as the power of a seller to keep the price of the product offered above the competitive price for a considerable period. On the demand side a buyer is seen to possess market power if he is able to push the price for the product demanded below the competitive price. Both the market power of individual market participants as well as the market power of several participants through explicit or implicit coordination are covered. The level of concentration of the relevant market measured under the HHI and the influence of the merger on the level of concentration constitute the fundamental starting point for determining market power, whereby changes in market conditions (inter alia development of market share, new technologies) are to be taken into account. The Guidelines distinguish between markets which are unconcentrated after the merger (HHI < 1000), moderately concentrated (HHI 1000 – 1800) and highly concentrated (HHI > 1800).²⁷ If after a merger a project affects moderately concentrated markets, serious competition concerns can occur according to the Guidelines if the merger produces an increase in HHI of more than 100 points. In the case of highly concentrated markets an increase of 50 points suffices, in the view of the competition authority, to give grounds for a refutable assumption that the merger creates, strengthens or facilitates the use

²⁵ Added market shares of the four leading companies, high degree of concentration starting from a joint market share of 75 per cent.

²⁶ DOJ / FTC (1992) and DOJ / FTC (1984).

²⁷ HHI values of 1000 or 1800 are the equivalent of approx. CR 4 values of 50 or 70, cf. Baxter, p. 619/627 and – differentiating - Schmidt / Reis, p. 525/527 ff.

of market power. If the level of concentration or market share increase lie below the thresholds indicated, it is unlikely that the competition authority will take action against the project.

Should the thresholds be exceeded, the authority examines whether competition would be lessened presumably by coordinated action or unilateral measures taken by the parties to the merger. It should then be examined whether entry barriers are so low as to rule out any such anti-competitive effects the merger might have by way of sufficiently probable and timely market entries of a sufficiently large scale. By virtue of the efficiency advantages created by the merger, which could not otherwise have been achieved, a planned merger can, according to the Guidelines, be considered not to be anticompetitive as long as the extent of the advantages is adequate. The possibility of efficiency advantages making price increases improbable or creating structural differences in the new unit vis-à-vis competitors, which reduce the coordination risk, is given as an example here. According to the Guidelines the emergence of market power is unlikely in cases in which the insolvency of the company acquired is imminent, there is little hope of restructuring under Chapter 11 of the Bankruptcy Act, no acquirer is available who would raise less concern in competition terms, and otherwise the assets of the company facing insolvency would disappear from the relevant market (failing firm defence).

As regards non-horizontal mergers (it is not deemed necessary to distinguish between vertical and conglomerate mergers) these can, according to the Guidelines, create competition problems, in that they raise barriers to entry, facilitate collusive practices or in price-regulated sectors allow the regulation to be undermined. However, this possibility only exists in such cases in which a high level of concentration ($HHI > 1800$) is apparent in at least one of the market levels involved. Greater importance is given to efficiency gains in non-horizontal mergers than in horizontal concentrations.

IV. Australia

Australia restructured its merger control regime in 1993, replacing the prohibition criterion of market dominance, which had been in force since 1977, by an SLC test,²⁸ which had already been applied from 1974 to 1977. The reason for this appears to have been doubts as to whether the concept of market dominance also comprised oligopolistic market dominance.²⁹ According to the Merger Guidelines of 1999³⁰ competition is inhibited where the structure of the market gives rise to market power, i.e. if one or several companies are in a position to divert prices, quality, variety, service or innovation from their competitive levels for a significant period of time.

The basis for the competitive assessment are the market shares held by the participating companies, taking into account the level of concentration in the relevant market which is measured on the basis of the CR 4 test. If, in a highly-concentrated market (CR 4 > 75 per cent), the participating companies have a combined market share of less than 15 per cent, the competition authority does not in principle take action against the merger (safe harbour). If the level of market concentration is lower, a closer examination of the merger is only likely if the combined market share of the participants exceeds 40 per cent. If the participating companies exceed these market share thresholds, the competition authority first examines whether the level of imports is sufficient to prevent the use of market power. In general, this is already considered to be the case if the import quota is at a permanent level of at least 10 per cent.

During further examination stages, the level of the barriers to entry, the existence of countervailing market power and the question as to whether the merger would result in the removal of a vigorous and effective competitor are assessed. Furthermore, it has to be examined whether market power is encouraged by vertical integration, which, however, is only considered to be possible if there is a high level of concentration at least at one market level. In addition, the dynamic characteristics of the market (growth rate, product differentiation, level of innovation), other factors relevant to competition – in particular such that increase risks of coordination (e.g.

²⁸ Cf. Section 50 of the Trade Practices Act (TPA) of 21 January 1993.

²⁹ Cf. ACCC (2001), p. 1.

³⁰ ACCC (1999).

interlocks, close cooperation within economic associations) – and the likely effects of the merger on prices and profits have to be taken into account. According to the Guidelines, efficiency advantages created by the merger have to be assessed for their competitive significance. They become of additional particular importance, however, if the companies request the competition authority under Section 90 of the Trade Practices Act (TPA) to authorise a project which would lead to a “substantial lessening of competition” within the meaning of Section 1 of the TPA. Such an authorisation can be granted in such cases where in weighing up the advantages and disadvantages the project is found to be of overriding public interest.

V. United Kingdom / New Zealand

Recently, the United Kingdom and New Zealand also decided to introduce the SLC criterion.³¹ While in the United Kingdom mergers have so far been evaluated on the basis of the “public interest” criterion, New Zealand applied an MD test until the revision.

The two main objectives of the current reform of merger control in the United Kingdom are firstly to transfer the decision-making competence from the Ministry to more independent competition authorities in the majority of cases, and secondly to switch from the rather vague public interest test to a clear and competition-based test as the relevant criterion for assessing company mergers.³² Before the decision it was stipulated that the new test had to fulfil two requirements in particular: It should allow the control of mergers which would probably lead to a “significant loss of competition” and (as was already required under the previous regime) leave room for taking into account such efficiency advantages that benefit consumers in general. The Department of Trade and Industry (DTI) mentions as additional essential evaluation criteria the market power held by the participating companies, the development of market conditions, competition from abroad, the possibility for customers to switch to

³¹ Cf. MED (2000b), p. 1 and DTI (2001), p. 3. The corresponding reform of the New Zealand Commerce Act came into effect in May 2001. In the United Kingdom, the change to the SLC test has been decided but has as yet not been implemented.

³² Only in a few exceptional cases of public interest, decisions on mergers are still to be taken by the ministers in the future. Regarding this issue and the following, cf. DTI (2001), p. 1 ff., DTI (1999), p. 1 ff., DTI (2000), p. 1 ff. and Competition Commission, p. 1 ff.

alternative suppliers, barriers to entry, the countervailing power of the demand side and the rapid technological change in the market.

In October 2000, the decision to introduce an SLC test was announced. As grounds for rejecting the MD criterion the DTI stated above all that the SLC criterion is broader-based, more effective, more flexible and less legalistic due to its overall market assessment and the absence of a rigid market share threshold. Accordingly, the SLC test is supposed to particularly facilitate the covering of oligopolistic market power, increase the companies' legal security in such cases and allow the restraint of competition to be weighed up against the benefit to the consumer resulting from efficiency gains. In addition, it is also expected to prevent large established companies from taking over small competitors having an important new technology at their disposal, or new innovative companies in high-tech markets from merging at an early stage of market development. As yet it is not clear from the DTI's statements what specific form the SLC test will take and why these advantages over the MD test are expected from it. In contrast to calls from industry to bring the test into line with the MD criterion of the European Commission, this is not considered to be necessary due to the separate areas of application of European and national merger control. The DTI generally assumes that switching over to the SLC test will not substantially alter decision practice since the assessment of mergers under the public interest test was already based primarily on competitive aspects.

When the SLC test was introduced in New Zealand, the starting situation was entirely different and the objectives differed from those of the reform in the United Kingdom. According to the old Merger Guidelines of the New Zealand Commerce Commission, no creation or strengthening of a dominant position was in principle assumed if the parties held a combined market share of less than 40 per cent, or if their combined market share was less than 60 per cent and another competitor with a market share of at least 15 per cent was simultaneously active in that market (safe harbours).³³ In practice, however, there were only some cases where the competition authority and the courts established market dominance and in those cases the relevant market share was over 70 per cent.

³³ Cf. MED (1999a), p. 5 f.

Switching from the MD test to the SLC test is intended to extend the possibilities of intervention under merger control and to adapt these to the corresponding rules of New Zealand's most important trade partner, Australia.³⁴ In the future, it should above all be possible to assess in more detail or, if necessary, prohibit such mergers that lead to significant market power without simultaneously constituting single-firm dominance as well as mergers that increase the likelihood of agreements or parallel conduct between the companies remaining in the market. Hence, the new "Practice Note" of the New Zealand Commerce Commission provides in particular for oligopoly thresholds³⁵ and the explicit consideration of the likelihood of coordination. The New Zealand Ministry of Economic Development (MED) specifically refers to two mergers which were cleared in the past but would probably be prohibited under the new SLC test.³⁶ At the same time, however, the Ministry points out that the new control threshold will probably not lead to many prohibitions since such mergers, inter alia, which have efficiency advantages outweighing the damage to competition should continue to be cleared in the future.

VI. Intermediate result

The comparison of those legal systems which apply an SLC test under their merger control regimes with those applying an MD test and the examination of the background and arguments in favour of switching to the SLC test show two things: On the one hand there are considerable differences within each of the two groups in terms of the substantial content of the respective test applied. While the ARC stipulates quantitative presumption thresholds both for single-firm and collective dominance, the European Merger Regulation does not provide for explicit thresholds. While the US regime concentrates above all on the HHI and any changes in this, i.e. the level of concentration in the entire market, the assessment by the Australian competition authority focuses more predominantly on the market shares of the companies involved in the merger. Whereas the SLC test is to be introduced in the United Kingdom, inter alia, because it does not set rigid market share thresholds,

³⁴ Cf. MED (2000a), p. 4 f. and MED (2000b), p. 1.

³⁵ Accordingly, an SLC is unlikely if the parties' combined market share is less than 20 per cent or less than 40 per cent provided the CR 3 is at the same time below 70 per cent (safe harbours); cf. Commerce Commission, p. 28.

³⁶ TransAlta/Contact and BP/Top Group as well as BP/Solo; cf. MED (2000a), p. 5 and MED (1999b), p. 2.

New Zealand has merely appreciably reduced the old presumption thresholds of the MD test under the reform.³⁷ Some merger control tests cannot even be clearly assigned to either of the two groups.³⁸ Consequently, neither *the* SLC test nor *the* MD test exists.

On the other hand, a comparison of the various concepts also shows some similarities. The most outstanding one is that both the US and the Australian Guidelines fulfil the characteristic of the SLC by referring to the term market power.³⁹ Market power, in turn, is defined as the possibility to act differently from what would be expected under the conditions of effective competition. This would mean, however, that the SLC test assesses precisely this “scope of action which is not sufficiently controlled by competition” which is usually used to define “dominant position” in European merger control⁴⁰ and “paramount market position” as a special case of the dominant position under the ARC. At the same time, the MD test - like the SLC criterion - in addition to evaluating the market shares of the participating companies, assesses the level of concentration, the overall structure of the market, market development, barriers to entry, countervailing power etc.⁴¹

The fact that efficiency considerations are explicitly mentioned both in the American and Australian merger control regulations does not seem to constitute a clear distinguishing criterion between the SLC test and the MD test either. First of all there is no uniform definition of the term “efficiencies”. Theoretically, this criterion could thus cover the most varying effects from pure company profits (as appears to be the case in the USA) to overall economic advantages (as is the case in Germany or the United Kingdom). This means, however, that statutory regulations such as those on the Ministerial Authorisation under Section 42 of the ARC do actually allow certain types of efficiency advantages to be taken into account even under the MD test. A generally positive evaluation of efficiency gains resulting from mergers is also reflec-

³⁷ What is interesting in this respect is that the New Zealand MED comes to the conclusion that Germany, with its double MD test, has probably the most rigorous evaluation criterion within the OECD, cf. MED (1999c), p. 4.

³⁸ Cf. for example González-Díaz, p. 408 (fn. 2) where Germany, due to the “paramount market position” criterion, is placed within the group of countries with an SLC test.

³⁹ See for example DOJ/FTC (1992), p. 3: “The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.”

⁴⁰ Cf. Wagemann in: Wiedemann, section 16, marginal note 44 and further references in fn. 114.

⁴¹ Cf. in particular the overview in the annex.

ted by the fact that both under German and European law company mergers are subject to less strict rules than other restraints of competition between companies (concentration privilege).

As an intermediate result it can therefore be concluded that neither the SLC test nor the MD test is principally tied to a specific, uniform catalogue of criteria and that the concepts under consideration have more similarities in substance than the mere wording of each prohibition criterion would suggest.⁴²

C. Evaluation of “problematic” mergers in practice

The MD test is criticised in particular with regard to its suitability as a method of effective, flexible and comprehensive evaluation of such mergers which are not, or not exclusively characterised by high market shares and considerable additions in market shares of the participating companies. This “problem“ arises particularly in the case of oligopolies as well as vertical and conglomerate mergers.⁴³ The potential anticompetitive effects of such types of mergers cannot be sufficiently covered by a prohibition criterion which focusses exclusively on the market share of the participants. The present chapter will therefore examine, on the basis of concrete individual cases from the categories mentioned, to what extent the alleged deficits of the MD criterion vis-à-vis the SLC criterion can be proved in the practical application of the respective competition authorities.⁴⁴

I. Oligopolies

Covering oligopolistic market dominance⁴⁵ is the problem most frequently referred to in discussions on the effectiveness of the various prohibition criteria in merger control. A collective dominant position of several companies can arise if the number

⁴² The DTI also comes to the following conclusion in its analysis: "To some extent the differences between these alternative formulations may be more apparent than real.", see DTI (1999), p. 3 f.

⁴³ “Simple” horizontal mergers in which oligopoly aspects are not relevant will not be considered here.

⁴⁴ The analysis is limited to practical cases in Germany, the European Union and the United States.

⁴⁵ The terms oligopolistic, joint and collective market dominance will be used as synonyms in the following.

of competitors in the market concerned is small and a strong interdependence exists between them, so that strategic decisions are made taking into account the (likely) action of competitors. Hence, horizontal mergers in oligopolistic situations can also lead to restraints of competition even if the market shares or additions to the market share of the participating companies do not suggest single-firm dominance.

1. Economic background

In the case of an oligopoly the market result (price, quantity) can range anywhere between the extremes monopoly and perfect competition. In this respect, the extent of a competition restraint caused by an oligopoly depends crucially on the specific conditions of an individual case. According to the economic model of tacit collusion, the oligopolists realise that they can achieve higher profits than in a situation where competition exists if all the parties involved set higher prices or produce lower quantities. However, the moment one of the competitors sets a lower price in a subsequent period, he might be able to further increase his own profit at the expense of the other oligopolists.⁴⁶ Whether such conditions actually lead to collective dominance and, therefore, excessive prices as a result of the high level of market concentration, depends particularly on the oligopolists' ability to promptly detect possible deviations and penalise them effectively. Apart from a high level of concentration, the main conditions that may favour tacit collusion are symmetrical market positions, stable and inelastic demand, high market transparency, product homogeneity, similar cost structures as well as the existence of structural or contractual links between the oligopolists.⁴⁷ These factors largely correspond to those market conditions which facilitate the creation and maintenance of explicit cartel agreements.

⁴⁶ The companies are thus trapped in a classic prisoners' dilemma where all the parties involved achieve the second best result if they pursue a joint (high pricing) strategy while each of them could separately improve his own result if he "cheated" on the others, cf. for example Niels, p. 170 ff.

⁴⁷ Cf. Kloosterhuis, p. 82.

2. Evaluation in practice

Germany

Existing interlocks and agreements between Osram and Philips contributed crucially to the Bundeskartellamt's assumption in 1994 that internal competition was significantly restricted in structural terms and that a collective dominant position of the two companies existed in the market for all-purpose light bulbs.⁴⁸ Osram and Philips held market shares of 50 and 25 per cent, respectively. The Bundeskartellamt therefore prohibited the takeover of **Lindner Licht**, the fourth largest competitor with a market share of 7 per cent, by **Philips**, since it would have resulted in a considerable reduction of external competition in a market characterised by a highly concentrated and largely stable market structure, a low level of innovation competition and high barriers to entry, thus strengthening Osram's and Philip's joint dominant position. The German MD test allowed a comprehensive appraisal of all the relevant conditions of competition to be carried out in this case irrespective of high market shares or considerable additions to the market share of the parties involved, thus enabling a strict evaluation of the oligopolistic situation.⁴⁹

A more recent prohibition decision given by the Bundeskartellamt in 1998 on the grounds of oligopolistic market dominance related to the intentions of **Bertelsmann** and **Kirch** to increase their respective shares in the pay-TV channel **Premiere** to 50 per cent each.⁵⁰ The planned creation of a parity joint venture would not only have led to a strengthening of Premiere's dominant position in the pay-TV viewers' market but – on account of the group effect that was likely to occur – also to an uncompetitive oligopoly between Kirch and Bertelsmann in the free-TV sector where the two companies held a share of approximately 90 per cent in advertising revenues. In

⁴⁸ Bundeskartellamt decision of 11 August 1994, WuW/E BKartA 2669 ff. – "Lindner Licht GmbH". Cf. also BKartA (1995), p. 88. This assumption was confirmed by the fact that the prices charged by the two leading suppliers were clearly above those charged by the competitors.

⁴⁹ As early as 1983 the Berlin Court of Appeals had in principle confirmed the prohibition in the Morris/Rothmans case concerning the reduction of an oligopoly from five to four oligopolists; however, on account of concerns relating to international law it limited its decision to the domestic part of the merger; Berlin Court of Appeals decision of 1 July 1983, WuW/E Higher Regional Court 3051 ff. After the shares had been reorganised, the Federal Supreme Court declared that the cause of action had been disposed of; cf. BKartA (1985), p. 94 f.

⁵⁰ BKartA decision of 1 October 1998, WuW/E DE-V 53 ff. - "Premiere". Cf. also BKartA (1999), p. 163 f.

addition to the high market shares, the improved possibilities of the two participating parties to coordinate their conduct in a neighbouring market were a decisive factor in this prohibition.

In the Bundeskartellamt's view, the merger of **RWE** and **VEW** in 1999 threatened to create an uncompetitive duopoly consisting of RWE/VEW on the one hand and Veba/Viag (now E.ON) on the other in the electricity markets concerned.⁵¹ The main arguments for presuming a lack of domestic competition in this case were the high combined market shares (between 55 and 85 per cent in the various product markets), similar vertical integration and resources, multiple interlocks, the homogeneity of the product electricity, high cost and price transparency as well as the stagnating and inelastic demand. Like the Veba/Viag merger examined by the European Commission, the project could only be cleared subject to far-reaching obligations which concerned particularly the dissolution of interlocks between the two new entities and the sale of shares in other electricity providers.⁵² Although no prohibition decision was given in this case, the application of the German MD criterion led to an effective evaluation, taking into account the specific conditions of the individual case, and finally to the restriction of oligopolistic market dominance.

European Union

The European Commission which as early as 1991 had applied the concept of market dominance of the Merger Regulation to collective market dominance in the **Nestlé/Perrier** case⁵³, established in 1993 in the **Kali & Salz/MdK/Treuhand** merger case that it created oligopolistic market dominance.⁵⁴ The new entity and the state-owned French company SCPA would have held a combined market share of 80 per cent in one of the two relevant geographic markets for the mineral fertiliser kali.⁵⁵ The

⁵¹ BKartA decision of 3 July 2000, WuW/E DE-V 301 ff. - "RWE/VEW". See also BkartA (2001), p.1 and p. 132 ff.

⁵² This paved the way for the creation of a fourth, financially-strong, vertically-integrated and independent power besides RWE/VEW, Veba/Viag and the third-largest company, EnBW, and thus for the development of a market structure that is able to create sufficient external competition at all market levels; for a critical view, see Möschel (2001), p. 131 ff.

⁵³ Commission decision of 22 July 1992, OJ (1992) L 356/1 ff. – "Nestle/Perrier".

⁵⁴ Commission decision of 14 December 1993, OJ (1994) L 186/38 ff. – "Kali+Salz/MdK/ Treuhand". Cf. also Bishop, Simon B., p. 37 and Lofaro / Ridyard, p. 548 f.

⁵⁵ In the other relevant geographic market the Commission, in applying the "failing firm defense", considered the merger unproblematic in spite of a combined market share of 98 per cent.

Commission gave the close structural links between the two duopolists in particular as grounds for presuming a lack of internal competition. Moreover, by considering the market maturity, the homogeneity of the product, the lack of technical innovation and the high level of market transparency, further crucial criteria for the overall market situation were taken into account in this case under the European MD test. The merger was cleared subject to the condition that Kali & Salz breaks its links with SCPA. The European Court of Justice subsequently revoked the Commission's decision. However, it confirmed that the Merger Regulation in principle is applicable not only to single-firm dominance but also to cases of oligopolistic market dominance by two or more competitors.⁵⁶

The assumption voiced by some parties that the European Court of Justice limited the possibility of the existence of oligopolistic market dominance to cases where there were contractual or structural links exist between the companies evaluated⁵⁷ was opposed by the European Court of First Instance in the Gencor/Commission case in 1999.⁵⁸ The court confirmed the Commission's prohibition decision according to which the **Gencor/Lonrho** merger would have led to the creation of a dominant duopoly in the global market for platinum and rhodium, by the new entity – which, with a market share of 35 per cent, would (only) have become the second largest company – and the largest competitor, Amplats. In addition, the Commission also based its decision in this case on the homogeneity of the product, the high market transparency, the low level of elasticity and the moderate growth of demand, the maturity of the production technology, the high barriers to entry as well as the two competitors' similar cost structures.

In prohibiting the takeover of **First Choice** by **Airtours** in 1999 the European Commission went beyond its previous practice in oligopoly cases.⁵⁹ The merger would have reduced the number of providers in the package tours market in the Uni-

⁵⁶ European Court of Justice decision of 31 March 1998, Slg. I-1375 ff. - "Kali und Salz".

⁵⁷ Cf. Korah, p. 337.

⁵⁸ European Court of First Instance decision of 25 March 1999, Slg II-753 ff. – "Gencor Ltd./Kommission".

⁵⁹ Commission decision of 22 September 1999, OJ (2000) L 93/1 ff. – "Airtours / First Choice". For a critical view see Bishop, William, p. 8 f. and Lofaro / Ridyard, p. 551 ff.

ted Kingdom from four to three.⁶⁰ Although none of the companies would have held a dominant position by itself, the combined market share of the three large competitors would have increased to 85 per cent. In addition, the market under consideration underwent substantial changes in its market structures in the past, in particular significant market entries and exits. Moreover, this case related to package tours, i.e. a heterogeneous product, and therefore to a market with a low level of transparency. Should this decision be confirmed by the Court of First Instance, the area of application of the MD test would be significantly extended in terms of the covering of oligopolistic market dominance.

United States

In the previous US practice of evaluating oligopoly cases, factors such as product homogeneity, elasticity and stability of demand, symmetry of cost structures, barriers to market entry and price transparency played a role in addition to the market shares of the participants and the level of market concentration.⁶¹ Moreover, oligopolistic market structures and concerted practices in the past as well as alleviating effects resulting from the merger (e.g. elimination of an outsider) are seen as further indications of the great likelihood of a coordination of conduct. In 1998, two mergers of US pharmaceutical wholesalers were stopped because of the great likelihood of a coordination of conduct between the participating parties.⁶² **McKesson/Ameri-Source** and **Cardinal Health/Bergen-Brunswig** would have achieved a combined market share of more than 80 per cent through the mergers. The District Court granted the FTC's request for a preliminary injunction since in its view the efficiency advantages put forward by the parties (particularly cost savings) could not make up for the restraints of competition the case involved. The parties subsequently abandoned both merger projects.⁶³

⁶⁰ In the Time Warner / EMI merger project, which was eventually abandoned, the Commission, supported by the majority of the Member States, even assumed a joint dominant position by four companies in the market for recorded sound carriers. Cf. European Commission and BKartA (2001), p. 70.

⁶¹ Cf. OECD, p. 235 ff. and p. 264 f. also concerning the following.

⁶² United States District Court for the District of Columbia, Civil Action No. 98-595 and Civil Action No. 98-596, <http://www.ftc.gov/os/1998/9807/98cv0595.htm>. (28 August 1998)

⁶³ On 24 August 2001, however, the FTC cleared the acquisition of the fourth-largest company, Bergen-Brunswig, by the third-largest company, McKesson, <http://www.ftc.gov/os/2001/08/index.htm>.

Recently, the planned acquisition by the **Heinz** food group of the baby food producer **Beech-Nut** created a stir even outside the United States.⁶⁴ Heinz is the world leader in the baby food sector. In the domestic US market, however, the company, which holds a market share of about 15 per cent, lies just behind Beech-Nut (approx. 17 per cent) and well behind the market leader, Gerber, which holds the remaining market share of almost 70 per cent. This market structure has existed for decades. Supermarkets principally only offer baby food from two producers; Gerber is represented in almost every supermarket. In the FTC's estimation the merger would have resulted in an SLC since the risk of coordination would have considerably increased in view of the fact that only two competitors would have remained. The very high level of concentration of 4775 HHI points in the market would have increased significantly, i.e. by 510 to 5285 points, and the competition between Heinz and Beech-Nut for the "second place" on the supermarket shelves, which in the FTC's view has up to then been quite intense, would have been eliminated.

Nevertheless, the FTC's request for a preliminary injunction against the merger was not granted in the first instance since the District Court judge was of the opinion that the efficiency gains pointed out by Heinz would promote competition in the market.⁶⁵ However, this decision, which was perceived as a milestone in the consideration of efficiency gains, was not judged valid by the Court of Appeals.⁶⁶ According to the Court of Appeals there were no circumstances which made coordinated conduct unlikely in the relevant market which was characterised by a high level of concentration and high barriers to entry. The court was of the opinion that under such conditions the danger of an SLC could only be denied on the basis of efficiency gains if these were sufficiently certain, extraordinarily significant and could not be achieved without the merger. The Court of Appeals therefore revoked the District Court decision and ordered it to issue the much sought-after preliminary injunction against the merger. The parties to the planned merger subsequently abandoned their project. If an MD test had been carried out in this case, the merger either could have been prohibited on the grounds that it would have created a dominant duopoly consisting of Gerber/Heinz, or cleared as a catch-up merger – depending on the specific cir-

⁶⁴ Cf. Immenga, Frank A.

⁶⁵ Cf. United States District Court for the District of Columbia, Civil Action No. 00-1688 (JR), <http://www.dcd.uscourts.gov/00-1688.pdf> (October 2000).

⁶⁶ Cf. United States Court of Appeals for the District of Columbia decision of 27 April 2001, No. 00-5362, <http://pacer.cadc.uscourts.gov/common/opinions/200104/00-5362a.txt>.

cumstances. The differing judgements of the case by the US courts should, at least in this respect, not be seen as a specific result of the prohibition criterion they applied.

United States / European Union

In 1997, the merger of **Boeing** and **McDonnell Douglas (MDD)**, two American manufacturers of large-capacity commercial aircraft, was cleared both by the FTC and the European Commission.⁶⁷ The project was judged as unproblematic by an FTC majority at an early stage. The Commission, on the other hand, which had already prepared a prohibition, only cleared the merger after the parties had made commitments at the last minute.⁶⁸ The merger led to a reduction in the number of suppliers in the relevant market from three to two companies. Boeing's market share increased from just over 60 per cent to around 70 per cent while Airbus, as the only remaining competitor, held about 30 per cent. Both competition authorities were of the opinion that no further competitive impulses were to be expected from MDD although it was not a failing firm, since the company did not stand a chance in the competition for new orders. In contrast to the FTC the European Commission still judged the merger as critical since it would have strengthened Boeing's dominant position. According to the Commission this was due to the extension of the clientele, advantages which could possibly be achieved in the new business with Boeing aircraft by maintaining and repairing those MDD aircraft still in operation, and the possibility of using technical know-how from MDD's military line of business for the civil sector. These strengthening effects were – in the view of the Commission - only ruled out by the commitments made by the companies. Such considerations were irrelevant for the FTC decision, however. The FTC did not examine whether Boeing held a dominant position and how the merger would affect the relationship with Airbus in terms of competition.

The fact that the FTC did not prohibit the merger although it created a duopoly and clearly increased the HHI, led to the assumption that the FTC decision was crucially

⁶⁷ Commission decision of 30 July 1997, OJ (1997) L 336/16 ff. – “Boeing / Mc Donnell Douglas”. Even though the examination of oligopolistic dominance was not a main factor in this case, it is very enlightening for the problem under consideration.

⁶⁸ Cf. the analyses of the case by Bishop, Bill, p. 418 f. and – in detail - Kovacic, p. 805 ff., particularly 829 ff., 852 ff.

influenced by the fact that there were no specific complaints by any US airlines, meaning that the body of evidence presented to the US courts was therefore unfavourable.⁶⁹ Both competition authorities were also suspected of having based their initially different judgements of the case on industry policy motives, i.e. each authority wanted to protect its domestic company, that is either Boeing or Airbus. The question as to whether procedural or political considerations influenced the outcome of the proceedings cannot be conclusively clarified. In any case, it can be concluded that the application of the MD criterion would not have prevented a prohibition of the project.

3. Intermediate result

Practical experience in Germany and the European Union shows that it is indeed possible to achieve an effective, comprehensive and flexible assessment of restraints of competition which are associated with collective market dominance by applying an MD test.⁷⁰ The essential criteria used for assessing an oligopoly and the likelihood of tacit parallel conduct resulting from it appear to be largely the same in the practice of all the competition authorities under consideration, and to correspond to the findings of economic theory. Usually, the starting point of the assessment are the market shares of the companies participating in a merger and the remaining oligopoly members. However, this aspect can be relativised by other evaluation criteria both under the SLC and the MD test. A comparison with US practice shows that the extent to which efficiency gains can be considered is also limited under an SLC test and that applying an MD test can indeed lead to a more rigorous evaluation. Furthermore, the Boeing/MDD case shows that factors other than the substantive prohibition criterion may have a crucial influence on the decision of an authority. What is striking in this respect is that cases of oligopolistic market power are often cleared subject to obligations to eliminate existing interlocks between the competi-

⁶⁹ Kovacic points out in this connection that the European Commission attaches greater importance to the competitors' arguments than the US authorities and courts (p. 805/838, 844, 846).

⁷⁰ In the relevant literature, some views have been expressed according to which the European Commission tries, with the help of the oligopolistic market dominance concept, to extend the market dominance test to cases below the market dominance threshold and thus close the "gap" associated with this issue; cf. Korah, p. 337. González-Díaz, p. 409, does not consider it necessary to introduce an SLC test into the EMCR in view of the jurisdiction of the European courts.

tors. However, this practice does also not appear to be dependent on whether an SLC or an MD test is used.

II. Vertical integration

In assessing vertical concentrations it is naturally impossible to simply add up the participants' market shares as the companies concerned operate at downstream market levels, i.e. in different product markets. Competition analyses must concentrate instead on possible interactions between these market levels. A prohibition criterion focussing solely on increases in market shares would therefore be inadequate.

1. Economic background

In today's literature the potential negative effects of vertical integration are largely undisputed.⁷¹ Competition may be restricted particularly due to improved access to the supply or sales markets, if this access enables the participants to raise their competitors' costs or to seal off the market for other companies.⁷² Moreover vertical concentrations can facilitate the coordination of competition parameters between companies operating on the same market level, if for example price transparency at the downstream level (e.g. retail trade) is greater than at the upstream level (e.g. wholesale trade). Finally, a pooling of the participating companies' resources may also play a role in the competitive assessment. In general restraints of competition on account of vertical concentration are only then to be expected if at least one of the parties concerned already has a certain (horizontal) market power or if the merger favours a change in the participants' behaviour in one of the markets concerned.⁷³

⁷¹ This does not apply, however, to the representatives of the (classical) Chicago School in whose opinion vertical concentrations can merely lead to insignificant competition restraints; cf. e.g. Bork, p. 226 ff., 245.

⁷² Cf. e.g. Ruppelt in: Langen / Bunte, section 36, marginal note 31 f., and Richter in: Wiedemann, section 20, marginal note 137 ff.

⁷³ Cf. Bishop / Walker, p. 157 f.

2. Evaluation in practice

Germany

In Germany the assessment of vertical concentrations has recently played an important role particularly in the participation of dominant energy providers in municipal utilities. In 1995, for instance, the Bundeskartellamt prohibited the establishment of the joint venture **Stromversorgung Aggertal** by RWE and municipal authorities in the Oberbergischer Kreis district because this joint venture would have foreclosed the market for third-party competition in the energy supply sector in the regional market concerned, and RWE's dominant position would have been further strengthened.⁷⁴ The Federal Supreme Court revoked the Berlin Court of Appeals' different verdict and confirmed the prohibition decision as, in its view, ownership of the transmission facilities, access to sales and supply markets, financial strength and high investment costs still indicated that the established energy providers held a paramount market position.⁷⁵ Thus the German MD criterion was fulfilled in this case, although the merger did not result in an addition of market shares.

A minority participation of the German publishing house **Springer Verlag in Stilke**, a company operating railway station bookshops, was also finally prohibited in 1997. In the view of the Bundeskartellamt Springer's dominant position in various reader and advertising markets would have been strengthened or secured due to an improved access to the sales markets (sales promotion, information advantage) associated with the acquisition of shares. The Berlin Court of Appeals and the Federal Supreme Court confirmed the decisions referring, among other factors, to the existing neutrality of the German press distribution system vis-à-vis the publishing firms.⁷⁶ The Supreme Court's decision also clarified that the concentration element of a "compe

⁷⁴ Bundeskartellamt decision of 22 February 1995, WuW/E BkartA 2713 ff. – „Stromversorgung Aggertal“. Cf. also BKartA (1997), p. 118 ff. and BKartA (1999), p. 121.

⁷⁵ Federal Supreme Court decision of 15 July 1997, WuW/E Federal Supreme Court 24 ff. – "Stromversorgung Aggertal".

⁷⁶ Bundeskartellamt decision of 6 November 1997, WuW/E DE-V 1 ff. – "Axel-Springer-Verlag/Stilke"; cf. also Bundeskartellamt (1999), p. 90 f.; Berlin Court of Appeals decision of 28 October 1998, WuW/E Higher Regional Court 270 ff.; Federal Supreme Court decision of 21 November 2000, WuW/E DE-R 607 ff.

tively significant influence” may also be fulfilled in cases of vertical integration if the acquirer is in a position to influence purchasing and marketing behaviour on the demand side.

European Union

In 2000 the European Union examined the creation of a joint venture by **Vivendi** and **Seagram**. Among other consequences this project resulted in the vertical integration of the pay-TV provider Canal+ and the content provider Universal.⁷⁷ In the view of the Commission in particular the existing market power of Canal+ would have been further strengthened by exclusive access to premium films produced and co-financed by Universal as well as by the joint venture’s improved negotiating position in view of Universal’s financial strength. Due to the control thus gained over substantial contents some of the national pay-TV markets would have been sealed off for competitors of Canal+. In the view of the Commission, however, the commitments made by the firms were sufficient to keep the market open to access. The concentration could thus be cleared in the first phase. This case exemplifies that the specific restraints of competition associated with the vertical integration of companies can also be effectively covered and limited by applying the European MD criterion.

United States

The 1984 guidelines on non-horizontal concentrations reflected the revised conviction that competition was only rarely threatened by vertical integration. It is only since 1993 that vertical concentrations have increasingly been taken up by the competition authorities.⁷⁸ In that year the FTC expressed concerns regarding the envisaged indirect acquisition of the **Paramount** film studios by **TCI** and **Liberty Media**, which are both engaged in large-scale activities in the cable TV sector. This transaction would have enabled TCI and Liberty to have access to Paramount films and would have made it even more difficult for competing cable-TV providers to have access to the quality-film segment. The competitive problems were to be removed by imposing commitments, but the parties concerned meanwhile abandoned their project. In order

⁷⁷ Cf. Abbamonte / Rabassa, p. 218 ff.

⁷⁸ In this matter and the following cf. Arquit / Wolfram, p. 147/212 f., 215 ff.

to counter possible sealing-off effects in the cable-TV sector the FTC only accepted the acquisition of **Turner Broadcasting System** by **Time Warner** in 1997 subject to conditions. If one compares these two cases to the European Commission's decision in the Vivendi/Seagram case mentioned above, large similarities are apparent in the competitive assessment of the problems associated with markets being sealed off.

United States / European Union

In the course of examining the project of the internationally operating internet-service provider **AOL** and the media group **Time Warner (TW)** to merge into AOL Time Warner Inc. (AOL/TW), however, differences in the competitive assessment of the merger by the FTC and the European Commission became obvious, although both competition authorities finally cleared the project in view of the commitments made to them. The FTC's concerns focussed on the fact that the incentive for AOL to promote the digital subscriber line technology (DSL) as an alternative to the broad-band cable would be lessened since TW is one of the largest broad-band cable networks in the USA and also has an interest in internet access via broad-band cable. The FTC's consent order therefore aimed at opening up the TW cable network for other providers of internet services⁷⁹

Although neither AOL nor TW possess broad-band cable networks in Europe, the European Commission also had reservations about the concentration with regard to the aspect of vertical integration.⁸⁰ These concerns were based primarily on the fact that, as a result of its links with TW, AOL as an internet service provider would have access to particularly attractive content, in particular in the music sector. Taking into account the existing links with Bertelsmann AG, it would be possible for the parties concerned to determine the conditions for the on-line transmission of music, thus gaining a dominant position in the on-line music sector. This position could in turn be used to further improve AOL's position as an internet service provider (ISP), e.g. by means of package offers. Furthermore, AOL might be developed into an indispensable channel of distribution for other content providers, and by accordingly formatting the music catalogues of the companies concerned, AOL's own software

⁷⁹ Cf. FTC.

⁸⁰ Cf. Commission, decision of 11 October 2000 – "AOL/Time Warner".

Winamp could be established as the only software able to play all the pieces of music. This would enable AOL to gain a monopoly position in the sector of media player software. The object of the commitments made to the European Commission were the dissolution of links between AOL and Bertelsmann, the commitment to keep TW's music programme available for playing music by alternative software and the commitment not to discriminate against other content providers.

As the cooperation between Bertelsmann and AOL concentrated on Europe, it is not possible to clarify on the basis of this case whether the fact that the Commission's concerns did not play any role in the FTC's decision was based solely on this actual difference, or whether, in contrast to the Commission, the FTC attributes less importance to the possibilities to pursue anti-competitive exclusiveness strategies created by vertical integration. Furthermore it should be pointed out that also a minority of Member States did not agree with the Commission's analysis, because in their opinion exclusiveness strategies promised little chance of success in view of AOL's relatively weak position in Europe. The FTC's different evaluation of the case thus cannot be simply put down to circumstances relating to the prohibition criterion.

3. Intermediate result

The examples presented so far demonstrate that vertical concentrations, especially with regard to the *strengthening* of a dominant position, can be just as effectively covered and flexibly evaluated with an MB test as by using an SLC test. The criteria which influence the assessment of specific restraints of competition in Germany and the European Union largely correspond in this respect and take into account the concerns identified by economic theory. However, the main problem posed by the sealing-off effects plays a decisive role in the USA as well. The AOL/Time Warner case in particular contradicts the presumption that an MD test is generally less suitable to cover anti-competitive effects of vertical mergers than an SLC test. As in oligopoly cases the competition authorities' practice regarding commitments also plays a very important role in vertical cases, particularly with regard to the competitors' possibilities for market access.

III. Conglomerate mergers

So-called conglomerate, diagonal or diversifying mergers are concluded by companies which are neither competitors nor parties involved in a customer/supplier relationship. Market share assessments alone cannot bring about reasonable results in these cases either as the companies concerned operate in (largely) separate geographical or product markets.

1. Economic background

Conglomerate mergers have to be distinguished according to the extent to which the markets in which the participating companies operate actually differ from one another. Mergers of potential competitors or suppliers of so-called substitute goods are often described as market-extension concentrations.⁸¹ Competition restraints can arise in such cases particularly if the competitive pressure on the parties is diminished or if their capacity to discourage or deter competitors is increased.⁸² If the companies' products are not substitutable, but belong to the same product range, conglomerate mergers can result in a so-called portfolio effect. If it is typical for the products to be bought in combination with one another, the companies concerned can enjoy an advantage over their competitors by offering the complete product range. (Successful) tying or bundling strategies are thus facilitated which may lead to competitors being squeezed out of the market.⁸³ If companies which actually operate in totally different markets engage in a merger, only their increased financial power, irrespective of new market developments, may give rise to competition concerns, provided that financial resources are of relevance in the markets concerned.⁸⁴

⁸¹ The definition of such mergers in contrast to horizontal mergers largely depends on the definition of the relevant product or geographic markets.

⁸² Cf. Emmerich, p. 314 f.

⁸³ Cf. Bishop / Walker, p. 158 f.

⁸⁴ In the opinion of the classical Chicago School, however, even conglomerate mergers are widely unproblematic from a competition point of view, cf. Bork, p. 246 ff.

2. Evaluation in practice

Germany

The effects resulting from an increase in financial strength as well as portfolio effects play a significant role in the Bundeskartellamt's decision-making practice. The 1981 prohibition of the proposed concentration of **Rheinmetall/WMF** was confirmed by the Berlin Court of Appeals as well as by the Federal Supreme Court.⁸⁵ The prohibition was based on the assessment that WMF's dominant position in the market for stainless steel cutlery would be strengthened by the increase in financial strength associated with the merger.⁸⁶ As early as 1978, the Federal Supreme Court confirmed the Bundeskartellamt's opinion in the **GKN/Sachs** case that the increase in financial strength resulting from Sachs' merger with the financially-strong GKN group strengthened Sachs' dominant position in the market for motor vehicle clutches, because it was suitable to deter new competitors from entering the market or existing competitors from adopting an aggressive pricing policy.⁸⁷

In 1985 the Bundeskartellamt's prohibition decision regarding the take-over of **Sonnen-Bassermann** by the American food group **Pillsbury** was confirmed by the Berlin Court of Appeals.⁸⁸ What played a major role in this decision, apart from the joint market share of 35.8 per cent and the fragmentation of the remaining market shares, were the expansion of the companies' product range for fluid convenience foods at all price levels as well as the fact that significantly improved access to the sales markets (trade) would be associated with this expansion. The decision also emphasised the fact that the companies were enabled to bundle different types of products due to their activities in neighbouring markets. In the view of the Bundeskartellamt the 1999 take-over of **Alcan**, a piston manufacturer, by the leading supplier of piston rings, **Federal Mogul**, was likely to create a dominant position in a

⁸⁵ Cf. Bundeskartellamt decision of 4 March 1981, WuW/E BKartA 1867 ff.; Berlin Court of Appeals decision of 9 September 1983, WuW/E Higher Regional Court 3137 ff.; Federal Supreme Court decision of 25 June 1985, WuW/E 2150 ff. – "Edelstahlbestecke".

⁸⁶ For a critical view see Möschel (1984), p. 257 ff.

⁸⁷ Cf. Federal Supreme Court decision of 21 February 1978, WuW/E Federal Supreme Court 1501/1510 ff. - „KFZ-Kupplungen“.

⁸⁸ Bundeskartellamt decision of 26 March 1985, Berlin Court of Appeals decision of 7 November 1985, WuW/E Higher Regional Court 3759 – "Pillsbury/Sonnen-Bassermann".

new market for complete pistons. This new market could, however, be opened up to competition by imposing the obligation on Federal Mogul to license its patent on piston rings.⁸⁹

European Union

The issue of market power based on product ranges also played a decisive role in the European Commission's decision regarding the **Guinness/Grand Metropolitan** case in 1997.⁹⁰ The concentration of the spirits sectors of both companies was cleared subject to obligations which also concerned such geographic markets where there was no overlap in offers. The reason the Commission gave for this decision was that the creation of portfolio power would provide the new entity with greater flexibility in its pricing policy, economies of scale, economies of scope and, in particular, with better opportunities for tying-in so-called "must-stock" products with less attractive brands. Ultimately the new entity would have more potential to threaten the trade sector by refusing to deliver, thus increasing the likelihood of competitors being squeezed out of the market.⁹¹ The decision also took into account the increase in resources. In this case, the application of the European MD criterion did not prevent conglomerate restraints of competition from being widely covered.

United States

During the 1960s and 1970s action was taken by the US authorities, and also by an increasing number of individual plaintiffs, against a series of conglomerate concentrations. The concentrations involved were almost exclusively market-extension mergers by which an acquirer expanded its operations to neighbouring geographic or product markets. Aspects discussed in these cases as effects restraining competition were in particular the consolidation of a leading market position of the acquired firm achieved by deterring competitors as a consequence of increased resources (so-called entrenchment doctrine), the elimination of potential competitors by the acquirer, and the threat posed by "reciprocity dealings". Subject to

⁸⁹ Bundeskartellamt decision of 27 May 1999 - "Federal Mogul/Alcan", cf. BKartA (2001), p. 125 f.

⁹⁰ Commission decision of 15 October 1997, OJ. (1998) L 288/24 – "Guinness/Grand Metropolitan".

⁹¹ The relevant literature critically notes that a greater likelihood for a successful tying strategy would not automatically constitute a restraint of competition and should therefore rather be checked (subsequently) within the framework of a control of abusive practices; cf. Baker / Ridyard, p. 183.

certain preconditions these effects were also acknowledged by the relevant courts.⁹² The 1984 Merger Guidelines, on the other hand, focus solely on the danger of elimination of potential competitors.⁹³

United States / European Union

Very recently **General Electric's (GE)** proposed acquisition of all the shares in **Honeywell**, which received considerable attention from the media and the political sector, sparked off controversial discussion. GE and Honeywell are diversified large-scale enterprises. GE dominates inter alia the aircraft engine market for large commercial and regional airplanes. Honeywell manufactures aircraft electronics and other parts required by the aerospace industry and holds very high market shares in some of these sectors. The European Commission's competitive analysis focused on vertical and conglomerate aspects. In terms of vertical aspects the Commission was concerned about possible market foreclosure effects in the market for aircraft engine starters which one of GE's competitors had so far purchased from Honeywell, the only manufacturer in the free market. The Commission was particularly convinced that, after the merger, GE, as a firm with extraordinary financial strength, would in the long term be able to squeeze its competitors out of the markets for aircraft electronics and other aircraft parts with the assistance of its leasing firm GECAS. The Commission believed that, in the future, GECAS would only purchase airplanes which are equipped with aircraft electronics etc. manufactured by Honeywell. In terms of conglomerate aspects, the merger would, according to the European Commission, enable GE to bundle aircraft engines, aircraft electronics and other aircraft parts and to grant price reductions for customers who accepted this package offer. Despite the fact that these products could still have been ordered individually,⁹⁴ this development would, in the long term, have resulted in the competitors being squeezed out of the markets for aircraft engines, aircraft electronics and other aircraft parts. In the view of the Commission these problems were not solved by the

⁹² Cf. in particular *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); cf. Markert, p. 407 ff.; Sullivan (1977), §§ 205, 207; Bork, p. 246 ff.; Dreher, p. 29 ff. and Büscher, p. 157 ff.

⁹³ Cf. DOJ / FTC (1984), point 4.1.

⁹⁴ So-called "mixed bundling" in contrast to "pure bundling" where customers are not granted such a choice.

commitments submitted. The proposed concentration was therefore prohibited⁹⁵ In the United States, however, it had already been cleared by the DOJ several months before the Commission's decision subject to relatively minor obligations.

As global markets were involved in this matter, the different assessments of the two authorities were not based on differences in the underlying facts. From what is known, the DOJ, in contrast to the Commission, was of the opinion that under vertical aspects GECAS' market share (below 15 per cent) was too small to have a market foreclosure effect. As far as conglomerate aspects are concerned, the DOJ believed at least initially that customers could only benefit from the possibility of bundle orders (lower prices) and that the long-term consequences feared by the Commission were too speculative to be considered. All these points were also the subject of intensive and, in some aspects, controversial discussions in the Member States' Advisory Committee. It is not evident that the controversial assessment was based on any conceptual differences which would have been the result of the different prohibition criteria. Even if such a connection were to be drawn, one would indeed find that the MD criterion does not appear to stand in the way of an extensive consideration of vertical and conglomerate aspects of concentrations.

3. Intermediate result

In practice, the specific restraints of competition caused by concentrations with conglomerate aspects can be effectively covered by applying either the SLC criterion or the MD criterion and can be assessed in a flexible way by taking into account the overall situation of the individual case. Germany and the European Union basically apply the same assessment criteria in this process. The GE/Honeywell case suggests that, in comparison to the US authorities, the European Commission is generally more inclined to take into account potential effects on the companies' future behaviour (bundling strategies). The alleged deficits of the MD test with regard to this type of concentrations could not be proved on the basis of the cases examined here.

⁹⁵ Commission decision of 3 July 2001 – "General Electric/Honeywell".

D. Conclusions

The comparison of the merger control regimes of Germany, the European Union, the United States and Australia as well as the analysis of the basic grounds of the reforms in the United Kingdom and New Zealand in Chapter B have shown that neither the MD test nor the SLC test is principally bound by a specific uniform catalogue of criteria. At the same time it has become clear that the essential substantive evaluation criteria such as market shares, market structure, barriers to entry, market phase, countervailing power etc. are taken into account in all the legal systems considered. These similarities are above all due to the fact that both types of prohibition criteria ultimately have the same prime objective, i.e. to prevent undesirable market power.

The analysis in Chapter C of the various competition authorities' decision-making practices with regard to oligopolistic market dominance, vertical integration and conglomerate mergers does not suggest that applying either the MD criterion or the SLC criterion leads to substantial differences in terms of the rigour, flexibility or effectiveness of the competitive assessment of problematic company mergers. In particular, the alleged deficits of the MD test have not been confirmed. This may partly be due to a broader interpretation of the MD test or a narrower interpretation of the SLC test. In any case, the specific restraints of competition identified in the examined case constellations on the basis of economic theory, are taken into account in the practice of all the competition authorities under consideration even though the evaluations achieved may be different in individual cases.

There are also no indications suggesting that other problematic cases which have not been considered here, can be better covered with an SLC test than by using an MD test: The UK Competition Commission, for example, considered the hypothetical case of a large established company acquiring a new innovative competitor in order to prevent the further use of its innovation.⁹⁶ Such a situation can principally only occur if there is no effective competition in the market concerned because otherwise the established company would make use of the innovation to its own advantage. In this case, however, taking up this merger with regard to the question of whether it

⁹⁶ Cf. Competition Commission, p. 2.

would strengthen a dominant position would also be possible by applying the MD test. Furthermore, mergers are conceivable which only create or strengthen dominant positions of third companies that are not affiliated or interlocked with the participating companies. The fact that the European Commission examined this question several times shows that a prohibition is not ruled out even if the participants themselves are not or shall not become dominant.⁹⁷ The accusation that the MD test concentrates too much on the participants seems therefore unjustified. Finally, efficiency advantages – if the term is more widely interpreted – can in principle also be taken into account in all the merger control regimes considered⁹⁸ even though it appears that those legal systems applying the SLC test currently attach more weight to efficiency arguments in the assessment of merger cases in practice.

It is undisputed that the competition authorities under consideration do sometimes come to differing results in the practical application of their merger control regulations. However, the analysis made here of the substantial contents of the SLC test and the MD test as well as of the practical application of the two approaches rather suggests that differing evaluations or decisions are due to other factors. Some of the factors that should be mentioned in this context are for example potential differences in the competition policy “schools” or purposes of protection, political or personnel influences,⁹⁹ different approaches in defining the relevant market, the willingness to apply new economic theories, the requirements of the courts or other control instruments.

In view of these results there are currently no convincing reasons for changing the prohibition criterion in European or German merger control from the MD test to the SLC test. Instead, differences in the practical assessment of mergers should be dealt with by way of in-depth discussion of the different views on the general competition

⁹⁷ Cf. Commission decision of 19 March 2001 – “RWE/Hidroelectrica del Cantabrico”, marginal note 10 ff.; see also Ruppelt in: Lange / Bunte, Section 36, marginal note 24.

⁹⁸ Camesasca, p. 27, comes to the same conclusion. In his view, the explicit assessment of efficiencies under US merger control (in contrast to their implicit consideration by the European Commission) makes up for the stricter approach with regard to the prevention of market power. Cf. also Kinne, p. 177 f.

⁹⁹ Analyses of American merger control practice showed, for example, that during President Reagan’s term of office, action against a merger by the competition authorities was only likely if the HHI value increased by more than 250 points to more than 1800 points, cf. Krattenmaker / Pitofsky, p. 211/227 f.; during George W. Bush’s (Senior) presidency between 1988 and 1992 this was only likely if the HHI value increased by more than 500 points to above 2400 points; cf. Coate, p. 323/335 f.

policy concept or the economical or political evaluation of specific restraints of competition. Likewise, a more intensified exchange of information and cooperation in practical cases are the key both to improving mutual understanding and to further developing competition law. Apart from cooperation within the framework of the European Union organisations such as the WTO, OECD or the European Competition Authorities initiative (ECA) in particular and new global forums – as suggested by the USA or under the auspices of the OECD - provide competition authorities with appropriate platforms for both international as well as bilateral discussion and cooperation.