



BUNDESKARTELLAMT

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

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**- Discussion Paper -**

**Bundeskartellamt**

**Discussion paper**

for the meeting of the Working Group on Competition Law<sup>1</sup>

on 8 and 9 October 2001

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Dominant Position versus  
Substantial Lessening of Competition?**

translated version

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<sup>1</sup> 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 CRITERIA<sup>1</sup> IN MERGER CONTROL**

(according to the respective legal provisions)

	<b>Germany<sup>2</sup></b>	<b>European Union<sup>3</sup></b>	<b>United States<sup>4</sup></b>	<b>Australia<sup>5</sup></b>
<b>Prohibition criterion</b>	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
<b>Market share of the participating companies / Quantitative presumption thresholds</b>	<p>Presumption of market dominance:  <math>\geq 33</math> per cent</p> <p>Presumption of joint market dominance:  CR 3 <math>\geq 50</math> per cent  CR 5 <math>\geq 67</math> per cent</p>	<p>Market position of the undertakings concerned</p> <p>Impediment of competition unlikely:  <math>\leq 25</math> per cent</p>	<p>Presumption of adverse competitive effects:  <math>\geq 35</math> per cent  (unless customers find alternative sources of supply)</p> <p>Presumption of an SLC:  HHI <math>&gt; 1000</math> (+ <math>&gt; 100</math>)  OR  HHI <math>&gt; 1800</math> (+ <math>&gt; 50</math>)</p>	<p>Presumption of an SLC:  <math>&gt; 15</math> per cent if  CR 4 <math>&gt; 75</math> per cent  OR  <math>&gt; 40</math> per cent</p>
<b>Market structure / Market concentration</b>	<p>Presumption of joint market dominance:  CR 3 <math>\geq 50</math> per cent  CR 5 <math>\geq 67</math> per cent</p> <p>Market share differences and distribution</p>	Structure of all the markets concerned	<p>Presumption of an SLC:  HHI <math>&gt; 1000</math> (+ <math>&gt; 100</math>)  OR  HHI <math>&gt; 1800</math> (+ <math>&gt; 50</math>)</p>	<p>Market concentration</p> <p>Presumption of an SLC :  <math>&gt; 15</math> per cent if  CR 4 <math>&gt; 75</math> per cent</p>

	Germany	European Union	United States	Australia
<b>Actual or potential competition</b>	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
<b>Barriers to entry</b>	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
<b>Market development</b>	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)
<b>Alternatives and interests of the opposite side of the market</b>	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
<b>Further competition criteria</b>	<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><b>List is non-exhaustive</b></p>	<p>Economic and financial power</p> <p>Access to supplies or markets</p> <p><b>List is non-exhaustive</b></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><b>List is non-exhaustive</b></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><b>List is non-exhaustive</b></p>
<b>Other factors</b>	<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>

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<sup>1</sup> 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.

<sup>2</sup> Cf. Sections 19, 36 ARC, Principles of Interpretation of the Bundeskartellamt.

<sup>3</sup> Cf. Article 2 EMCR and Recital 15 EMCR.

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

<sup>5</sup> Cf. Section 50 Trade Practices Act and Merger Guidelines (AU), Section 5.

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## LIST OF ABBREVIATIONS

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

