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

- Discussion Paper -
Discussion paper

for the meeting of the Working Group on Competition Law\(^1\)

on 8 and 9 October 2001

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

translated version

---

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

A. Introduction                          1

B. Concepts for the evaluation of mergers                2
   I. Germany                          2
   II. European Union                       4
   III. United States                       6
   IV. Australia                       10
   V. United Kingdom / New Zealand               11
   VI. Intermediate result                  13

C. Evaluation of "problematic" mergers in practice        15
   I. Oligopolies                      15
      1. Economic background                16
      2. Evaluation in practice                 17
      3. Intermediate result                  23
   II. Vertical integration                    24
      1. Economic background                24
      2. Evaluation in practice                 25
      3. Intermediate result                  28
   III. Conglomerate mergers                  29
      1. Economic background                29
      2. Evaluation in practice                 30
      3. Intermediate result                  33

D. Conclusions                        34

ANNEX: Evaluation criteria in merger control            II
BIBLIOGRAPHY                                       VI
ABBREVIATIONS                                      X
## EVALUATION CRITERIA IN MERGER CONTROL
(according to the respective legal provisions)

<table>
<thead>
<tr>
<th></th>
<th>Germany²</th>
<th>European Union³</th>
<th>United States⁴</th>
<th>Australia⁵</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prohibition criterion</strong></td>
<td>A concentration which is expected to create or strengthen a dominant position</td>
<td>A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded</td>
<td>No person shall acquire [...] where [...] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly</td>
<td>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</td>
</tr>
<tr>
<td><strong>Market share of the participating companies / Quantitative presumption thresholds</strong></td>
<td>Presumption of market dominance: ≥ 33 per cent</td>
<td>Market position of the undertakings concerned</td>
<td>Presumption of adverse competitive effects: ≥ 35 per cent (unless customers find alternative sources of supply)</td>
<td>Presumption of an SLC: &gt; 15 per cent if CR 4 &gt; 75 per cent OR &gt; 40 per cent</td>
</tr>
<tr>
<td></td>
<td>Presumption of joint market dominance: CR 3 ≥ 50 per cent CR 5 ≥ 67 per cent</td>
<td>Impediment of competition unlikely: ≤ 25 per cent</td>
<td>Presumption of an SLC: HHI &gt; 1000 (+ &gt; 100) OR HHI &gt; 1800 (+ &gt; 50)</td>
<td></td>
</tr>
<tr>
<td><strong>Market structure / Market concentration</strong></td>
<td>Presumption of joint market dominance: CR 3 ≥ 50 per cent CR 5 ≥ 67 per cent</td>
<td>Structure of all the markets concerned</td>
<td>Presumption of an SLC: HHI &gt; 1000 (+ &gt; 100) OR HHI &gt; 1800 (+ &gt; 50)</td>
<td>Market concentration</td>
</tr>
<tr>
<td></td>
<td>Market share differences and distribution</td>
<td></td>
<td></td>
<td>Presumption of an SLC : &gt; 15 per cent if CR 4 &gt; 75 per cent</td>
</tr>
<tr>
<td>Actual or potential competition</td>
<td>Germany</td>
<td>European Union</td>
<td>United States</td>
<td>Australia</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>-------------------------------------------------------------------------</td>
<td>-----------------------------------------------------</td>
<td>------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>Actual or potential competition by undertakings established within or outside the area of application [...] Competition from imperfect substitutes</td>
<td>Actual or potential competition from undertakings located either within or outwith the Community</td>
<td>Committed market entry (= new competition that requires significant sunk costs of entry and exit)</td>
<td>Actual and potential level of import competition in the market</td>
</tr>
<tr>
<td>Barriers to entry</td>
<td>Legal or factual barriers to entry by other undertakings</td>
<td>Legal or other barriers to entry</td>
<td>Timeliness, likelihood and sufficiency of market entry</td>
<td>Height of barriers to entry to the market</td>
</tr>
<tr>
<td>Market development</td>
<td>Market phase (growth, speed of innovation, change of the competitive conditions)</td>
<td>Supply and demand trends</td>
<td>Change in market conditions (new technologies, development of market shares)</td>
<td>Dynamic characteristics of the market (growth, innovation, product differentiation)</td>
</tr>
<tr>
<td>Alternatives and interests of the opposite side of the market</td>
<td>Ability of the opposite market side to resort to other undertakings</td>
<td>Alternatives available to suppliers and users, interests of intermediate and ultimate consumers</td>
<td>Level of substitutability with products / territories outside the relevant market</td>
<td>Actual or likely availability of substitutes, likelihood of acquirers increasing prices or profit margins significantly and sustainably</td>
</tr>
<tr>
<td>Further competition criteria</td>
<td>Germany</td>
<td>European Union</td>
<td>United States</td>
<td>Australia</td>
</tr>
<tr>
<td>------------------------------</td>
<td>---------</td>
<td>----------------</td>
<td>---------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Causality / reorganisation merger</td>
<td>Development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition</td>
<td>Cognizable efficiencies sufficient to reverse the likely harm to competition / consumers</td>
<td>Efficiencies that are likely to increase competition (lower prices / higher quantities / improved quality)</td>
<td>Public benefits</td>
</tr>
<tr>
<td>Possibility of Ministerial Authorisation in the case of prevailing advantages to the economy as a whole or an overriding public interest</td>
<td>Causality / reorganisation merger</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial strength or superior resources Access to supply or sales markets (vertical integration, product line)</td>
<td>Economic and financial power Access to supplies or markets</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Countervailing market power Interlocks with other companies Ability to shift supply Balancing clause</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>List is non-exhaustive</td>
<td>List is non-exhaustive</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Likelihood of coordinated interaction (availability of key information, product heterogeneity, pricing and marketing practices, transaction frequency) Likelihood of unilateral effects (in particular scope for price increases)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nature and extent of vertical integration in the market Degree of countervailing power in the market Removal of a vigorous and effective competitor</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>List is non-exhaustive</td>
<td>List is non-exhaustive</td>
<td>List is non-exhaustive</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
1 Only those criteria have been considered which are substantial and explicitly mentioned in the laws or guidelines of the respective competition authorities, keeping largely to the original wording. Further evaluation criteria follow particularly from the decisions by authorities and courts.

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

3 Cf. Article 2 EMCR and Recital 15 EMCR.

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

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


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


European Commission: Press release of 05 October 2000 regarding the withdrawal of the notification of the Time Warner/EMI merger.


Kintner, Earl: "Primer on the Law of Mergers"


**LIST OF ABBREVIATIONS**

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