Bundeskartellamt

Guidance on Substantive Merger Control

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Courtesy translation. Only the German language version is authentic.

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A. Introduction

1 This document illustrates the analytical approach taken by the Bundeskartellamt (BKartA) in assessing mergers. In addition to economic considerations, it incorporates in particular the BKartA's case-practice and experience as well as the case-law of the Oberlandesgericht Düsseldorf (Düsseldorf Higher Regional Court, OLG) and the Bundesgerichtshof (Federal Court of Justice, BGH). Not all the criteria mentioned in this document play a role or are accorded the same importance in every merger case. When applying the guidance to merger cases it may sometimes be necessary to refine the concept. In this respect the BKartA's Decision Divisions will apply this text flexibly and develop the concepts further as appropriate.

2 Merger control can make a substantial contribution to preventing the restriction of competition brought about by concentration. Notwithstanding the importance of merger control, it should also be noted that most mergers[1] do not raise any competition concerns and, by contrast, some of them actually enhance competition. However, as mergers can change the market structure, they can have a major impact on companies' competitive behaviour and on market outcomes.

3 In most cases companies operating in concentrated markets enjoy a greater degree of market power than those active in markets with a large number of strong competitors. Market power enables a company to behave independently of competitive constraints by competitors, customers or suppliers. This can have a negative impact on the market outcome. It can lead to excessive prices, diminished product quality and less diversity as well as lower innovation. This applies not only at the level of consumers but also at the business customers' level. Even if the negative impact of market power initially only affects business customers directly, it can indirectly affect all downstream levels of the supply chain and ultimately harm the end consumer.[2]

4 The purpose of merger control is to protect **competition as an effective process.** Protecting competition at the same time protects the interests of consumers, not necessarily in the short term but rather in the longer term and on a more permanent

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[1] Throughout this document the terms "merger" and "concentration" are used as synonyms.

[2] The legislative intent of the original version of the Gesetz gegen Wettbewerbs-beschränkungen (GWB) (Act against Restraints of Competition) from 1958 already specified: The GWB "is intended to guarantee the freedom of competition and to eliminate economic power where it impairs the effectiveness of competition and threatens the best possible supply of consumers." Bundestagsdrucksache 2/1158, p. 21.

basis.[3] The general aim of merger control is to protect competition, not to create advantages for individual competitors or to protect them from competition. Without actual or potential competitors, however, effective competition is not possible. Therefore, protecting competition may sometimes coincide with protecting competitors. The merger control provisions in the Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition, GWB) also serve to secure the **freedom of competition** or the freedom of competitors to participate in this process.

I. Market power and dominance

5 The criterion for prohibiting a merger under German merger control is the question whether it **creates or strengthens a dominant position** (§ 36 (1) GWB). The law defines the term "dominance" as follows: An undertaking is dominant where, as a supplier or buyer on the relevant product and geographic market, it has no competitors, is not exposed to any substantial competition or has a paramount market position in relation to its competitors (§ 19 (2) GWB).

6 The term "dominance" can be associated with the concept of **market power**[4] applied in economic theory. A powerful company faces comparatively few competitive constraints, i.e. they are not sufficient to ensure that rivalry disciplines its commercial behaviour. Dominance exists if the company's market power attains a critical level.

7 A dominant company can take business decisions to a significant degree and over a sufficiently long period, independently from the reactions of its competitors, suppliers and customers. These include decisions about prices, output, quality as well as other parameters that are relevant for its position on the market such as e.g. the extent of investment in new technologies or research and development.

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[3] The legislative intent of the 2nd Amendment to the GWB from 1973, which introduced preventive merger control, in particular, contains the following wording: "Competition Policy is of central importance for maintaining the market economy. The market economy system not only promises the best possible economic result and cost-efficient supply of the consumers but also guarantees all citizens the greatest degree of economic freedom of action." Bundestagsdrucksache 7/76, p. 14.

[4] Market power is used to describe the ability of a company to achieve a price for its product or service in excess of the competitive price in the ideal model of perfect competition, i.e. above the costs of the last product unit which can be sold on the market (marginal costs). Whereas in the extreme case of perfect competition an individual provider has no influence on the price to be achieved and acts purely as a price taker (and quantity adjuster), the greatest degree of market power is achieved in the case of a monopoly when an individual provider can, autonomously and independently of his competitors, set the profit-maximising price (and at the same time the profit-maximum quantity) for a given structure of the overall market demand.

8 The intervention threshold for dominance therefore lies clearly below the monopoly level and is to be interpreted in conformity with the aim and purpose of the merger control provisions in the GWB. Intervention by the BKartA is not contingent upon the proof of an impairment of total welfare or consumer welfare, which is a typical consequence of dominance, in a specific case. Rather, it is sufficient to prove that the merger **threatens the functioning of competition**.[5]

II. Creation or strengthening of a dominant position

9 At the beginning of the substantive assessment of a transaction the market conditions pre merger are assessed with respect to the degree of market power or the existence of a dominant position. In a second stage it is examined whether the merger will create a (new) dominant position or (further) strengthen an existing dominant position. Here it is determined whether the change in market structure creates different conditions of competition and whether and to what extent these influence the companies' ability to behave independently of competitive constraints.[6]

10 The analysis is not limited to a comparison of market conditions before and after the merger, which would assume that the general market conditions were constant. However, the situation after the merger is compared to the situation absent the merger, which is referred to as the **counterfactual**. It includes market developments that can be expected in the near future and that are relevant for the competitive assessment.[7] As a consequence, the prognosis must be limited to the foreseeable future. What is deemed to be foreseeable in an individual case depends on the specific conditions of the relevant market concerned.[8]

11 In order to determine the creation of dominance, the magnitude of market power of the merging parties has to have increased as a result of the merger so much that their scope of action can be classified as being no longer sufficiently controlled by competition in future. A dominant position is strengthened if the intensity of

5 To examine in a merger control procedure whether the functioning of competition is seriously threatened a prognosis has to be done. On the role of the paramount market position as a threat to the functioning of competition see BGH, decision of 2.12.1980, WuW/E BGH 1749, 1755 – *Klöckner/Becorit*, para. 36 (*para. as cited by Juris*).

6 Possible longer-term effects are also taken into account because the structural changes brought about by a merger are irreversible. See BGH, decision of 21.02.1978, WuW/E BGH 1501, 1508 – *KFZ-Kupplungen.*

7 See BGH, decision of 21.02.1978, WuW/E BGH 1854, 1861 – *Straßenverkaufszeitungen, para. 27.*

8 There are a lot of examples in which a forecast period of around three years or three to five years has been assumed. However, special characteristics of the market concerned may provide reasons for other forecast periods. Considerably longer periods may be appropriate if there are no substantial structural changes in an industry over longer periods of time.

competition on the relevant market, which is already considered insufficient, is diminished even further, i.e. the competitive constraints which are already insufficient decrease further.

12 An increase in market power resulting from a merger is all the more problematic the greater the magnitude of market power before the planned merger already was.[9] The greater the pre-existing deficit of competition before the merger, the more important the protection of the remaining competitive constraints. If competition is already weak and the dominant player(s)'s market power accordingly very strong, even a small projected increase in market power can already constitute the strengthening of a dominant position.

13 An appreciable effect is not required.[10] It is sufficient if competition is weakened due to changes in the market structure and market power increases correspondingly. However, a **definite negative effect on competition** has to be ascertainable.[11] Whether the merger causes an increase in market power depends on the market conditions in the specific case.[12] Dominance can, for instance, also be strengthened without an increase in market share. This can be the case for example if the market position is secured or improved in another way, and market power is thereby further increased.[13]

14 The justification for this approach is firstly, that the remaining actual or potential competition on markets that are already dominated shall be protected from further restrictions (to be expected from the merger).[14] In addition, the conditions for a possible improvement of the market structure in the medium or long term should not

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9 See BGH, decision of 23.10.1979, WuW/E BGH 1655, 1659 – *Zementmahlanlage II,* para. 19; BGH, decision of 18.12.1979, WuW/E BGH 1685, 1691f. – *Springer/Elbe Wochenblatt,* para. 49; BGH, decision of 21.12.2004, WuW/E DE-R 1419, 1424 – *Deutsche Post/trans-o-flex,* para. 26.

10 See BGH, decision of 11.11.2008, WuW/E DE-R 2451, 2461 – *E.ON/Stadtwerke Eschwege*, para. 61 with further references.

11 This was, for example, rejected in BKartA, decision of 7.3.2008, B8-134/07 – *Shell/HPV*, para. 76ff. in the case of the acquisition of six petrol stations (market share increase of less than one percent). Indications for a strategy by which market foreclosure effects are achieved by gradual vertical integration were not identified.

12 Market share additions of 1.3% or 0.5% were, for instance, already considered sufficient to strengthen a dominant position. See BGH, decision of 18.12.1979, WuW/E BGH 1685, 1691 – *Springer/Elbe Wochenblatt,* para. 49; as well as KG, decision of 22.3.1990, WuW/E OLG 4537, 4545 – *Linde/Lansing*.

13 It was considered as sufficient, for example, that a certain limitation of scope of action by the co-partner ceases to apply after the acquisition of sole control over a previously jointly controlled joint venture as a result of the merger. See BGH, decision of 16.1.2007, WuW/E DE-R 1925 – *National Geographic II,* para. 8f.; BGH, decision of 10.12.1991, WuW/E BGH 2731, 2737 – *Inlandstochter,* para. 24 with further references.

14 See BGH, decision of 29.9.1981, WuW/E BGH 1854, 1861 – *Straßenverkaufszeitungen*, para. 27.

become even more unfavourable. Furthermore, companies which already enjoy a high degree of market power may subsequently make several small-scale acquisitions in close sequence. Any one of them may by itself be insignificant, but in an overall assessment of the acquisition strategy the acquisitions may have a substantially negative effect on the market. Such a strategy reduces further the limited competition that is left on the market and may create permanent damage.[15] Also, the market's potential to recover may be further diminished.

III. Types of mergers

15 Mergers can be categorized into three typical groups according to whether the merging parties are active on the same market (horizontal mergers), on upstream or downstream markets (vertical mergers), or on different and not vertically-related product markets (conglomerate mergers). Depending on the nature of the merger in question, the competition analysis focuses on different issues.[16]

16 In the case of **horizontal** mergers one previously independent competitor is eliminated. This reduces customers' ability to switch suppliers (or suppliers' ability to switch customers).[17] The merged company faces less competitive constraints and thus the anti-competitive effect occurs directly and immediately. During the investigation it is examined which factors determine the magnitude of market power on the relevant market and whether and how the merging parties' market power changes.

17 In contrast, in the case of **vertical** mergers, the merging parties are not direct competitors. They are rather in an actual or potential supplier-customer relationship. Parties of **conglomerate** mergers are active neither on the same nor on upstream or downstream markets but rather on different product markets. In these two categories of non-horizontal mergers competitive harm typically occurs only if the merger enables the acquiring company to behave strategically on the market in a way that reduces the competitive constraints that it is normally subject to. The typical examples are input foreclosure and customer foreclosure. In these cases it is also necessary to examine whether the merging parties have sufficiently strong

[15] See BGH, decision of 11.11.2008, WuW/E DE-R 2451, 2461 – *E.ON/Stadtwerke Eschwege*, para. 63.

[16] In practice mergers often have horizontal as well as non-horizontal elements. It is therefore not always possible and also not necessary to clearly define a project according to a merger type (horizontal, vertical, conglomerate). In individual cases the examination criteria mentioned in chapters B.-D. would have to be combined accordingly.

[17] Market power can be exercised from the supply side as well as from the demand side. For reasons of simplification buyer power will not always be mentioned explicitly. Chapter B.III. deals with the specifics in the assessment of buyer power.

incentives to implement such practices, e.g. because of the prospective profitability of such a strategy.

B. Horizontal mergers

18 In the case of a horizontal merger the companies concerned are active on the same product and geographic market and thus direct competitors. A similar analysis applies if the companies concerned are potential competitors, e.g. because they have so far only been active on neighbouring product or geographic markets. A horizontal merger generally increases the concentration in the markets affected by the merger. It eliminates the competitive pressure exerted by the merging parties on one another. As a consequence, the merging parties may gain, secure or expand market power, which in turn lessens competitive constraints by competitors, suppliers and customers. Depending on how market power and the competitive situation on the market change as a result of the merger, single firm dominance (I.) or collective dominance (II.) may be created or strengthened. It is also possible for a merger to create or strengthen a dominant position on the demand side, also referred to as "buyer power" or "monopsony power" (III.).

I. Single-firm dominance

19 The term single-firm dominance is used to describe a situation in which one company possesses such a high degree of market power that its behaviour is not sufficiently constrained by competition. Consequently, the company can be in a position to raise its prices profitably, decrease output, reduce the variety or quality of its products[18], or limit its efforts to innovate. Such strategies (or similar strategies) are only profitable if it can be expected that competitors or customers will not react to them in a way that would frustrate the economic advantage of such behaviour.

20 The competitive analysis of a merger generally takes into consideration all relevant factors, including market structure as well as all the other competitive conditions on the markets concerned. The changes brought about by the merger are always taken into account in an **overall assessment** of the individual case. Where necessary the overall appraisal also includes the effect on neighbouring markets or the interrelation between different markets concerned.[19] The following overview does not amount to a conclusive list of all the relevant factors. Neither are all the factors discussed in the following relevant in each individual case.

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[18] In the following the term 'product' stands for the respective offer of a firm. This can also be a service or a range of products comprising several goods.

[19] See e.g. BKartA, decision of 4.9.2009, B9-56/09 – *Air Berlin/TUIfly*, p. 17f. (the analysis of the individual flight routes was extended to include an analysis of domestic flights to the relevant destinations and the overall medium-haul flight sector); or BKartA, decision of 30.6.2008, B2-333/07 – *Edeka/Tengelmann,* p. 33f., 47ff. (Cluster analysis of adjacent food retail markets).

21 In addition to market share and concentration levels (1.) on the affected relevant market, various market- and company-related factors (2.) may be relevant for the assessment of the merging parties' market position post merger. Competitive pressure can also originate from outside the market. For example potential competition and imperfect substitution (3.) may be relevant in this respect. In this context barriers to entry have to be considered as well. Finally, market power can also be limited by countervailing buyer power (4.).

1. Market share and concentration levels

22 The examination of a merger normally begins with the market shares of the merging parties and their competitors. Market shares are an appropriate starting point for estimating market power. They are an important criterion for the assessment because they reflect the extent to which each company was able to actually satisfy demand in the relevant market during the relevant period of time. They therefore provide important indications of the magnitude of market power held by the merging parties. An assessment of the market shares also provides a rough proxy at the beginning of the examination as to whether a merger could be potentially problematic and whether it is likely to require further investigation.[20] If the market shares of the merging parties are small or the concentration level in the market is low, no thorough investigation is usually necessary.

23 Market shares are also important in respect of the statutory presumption (§ 19 (3) GWB), which provides for a **rebuttable presumption** of dominance, if certain market share thresholds are met.[21] According to § 19 (3) sentence 1 GWB, dominance is assumed if a company has a market share of one third. However, the fact that these thresholds have been reached or exceeded is not in itself sufficient proof of high market power or even dominance.[22] The presumption only applies if, after a thorough investigation, neither the existence nor the absence of dominance can be proved (non liquet). The provision is without prejudice to the BKartA's

[20] The presumption threshold for market dominance under competition law is not to be understood as a strict limitation in the sense that all cases with combined market shares of more than one third are categorized per se as problematic and all lower market shares as unproblematic.

[21] This requires either proof that the market share thresholds have already been attained or there must be objective indications that they will be attained during the forecast period. The mere assumption that future developments, such as the excess of the thresholds, cannot be ruled out, is not sufficient to warrant the application of the presumption regulation. See OLG Düsseldorf, decision of 30.7.2003, WuW/E DE-R 1559, 1561 – *BASF/NEPG.*

[22] See BGH, decision of 29.6.1982, WuW/E BGH 1949, 1951f. – *Braun/Almo,* para. 15.

obligation to investigate fully the competitive situation on the relevant market and to prove that all the requirements of dominance have been fulfilled.[23]

24 Although relatively high market shares are normally a necessary condition for market power, they do not render unnecessary a comprehensive competitive analysis and a balanced overall assessment of all relevant conditions. In accordance with § 19 (2) GWB the **actual conditions of competition** are decisive for the examination of dominance. § 19 (2) sentence 1 no. 2 GWB sets out some factors other than market shares which also influence the market position of the merging parties, in particular legal or factual barriers to entry, potential competition, the ability of customers to switch to other suppliers, supply side substitution, access to suppliers or customers as well as structural or personal links with other companies.[24] Hence, the value of market shares as an indication of the merging parties' market position and market power depends largely on the conditions prevailing on the individual market in question.

Calculation of market shares

25 As a rule, the BKartA calculates market shares according to the turnover or sales which the companies achieve on the relevant market affected by the merger. A calculation based on either turnover or sales can be more appropriate, depending on the nature and characteristics of the products concerned; possibly a comparison between the two approaches can also be informative. **Turnover-based** market shares often better reflect the relative competitive position and importance of suppliers because they automatically take account of price and quality differences between heterogeneous products.[25] An assessment **based on volume** can suffice if this provides an (equally) reliable picture of the market structure, e.g. on account of fewer differences in price and quality.

26 In certain cases it can also be useful to define market shares **in other ways**, e.g. according to production capacities, sector-specific measures or other standards appropriate in the particular case. In capital goods markets it can be appropriate to

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[23] See BGH, decision of 2.12.1980, WuW/E BGH 1749, 1753 – *Klöckner/Becorit,* para. 32; BGH, decision of 19.12.1995, WuW/E BGH 3037, 3039 – *Raiffeisen,* para. 11 with further references.

[24] Advantages derived from company-specific factors on the part of competitors can be adequate to ultimately rule out a scope of action which is not sufficiently controlled by competition although the parties to the merger hold high market shares.

[25] If, for example, a product is available in lower-priced variations, which can only be used for half as long as the more expensive variations, volume-based market shares would provide a distorted picture because the sales volume of the lower-priced product in the period under review can be twice as high as that of its durable alternative, whilst the turnover of the two products with the corresponding price difference can be equally high.

calculate market shares over longer periods than the usual one-year period.[26] Captive production is normally not included in the calculation of the market volume or the market shares,[27] but is taken into consideration in the examination of barriers to entry and potential competition.[28]

27 It can generally be expected that the merging parties' market share after the merger corresponds to the sum of their individual market shares before the merger. Where necessary, the BKartA examines whether **shrinkage effects** are sufficiently likely to occur in an individual case. This can be the case, for example, if major buyers with a high degree of bargaining power pursue dual or multi-sourcing strategies and if from their perspective sufficient and equally suitable alternative suppliers remain in the market post-merger.[29]

Evaluation of market shares and market concentration

28 In assessing the merging parties' combined market share calculated on this basis, it is also important to consider how the remaining part of the market is distributed among the competitors and in particular how large is the difference between the market shares of the merging parties and the largest competitor. In addition, the development of the market shares over time may also be significant. The increase in market share of the acquirer resulting from the merger is assessed against this background. If the acquirer is already dominant before the merger, even rather small increases in market shares may further strengthen the position of the dominant firm and harm competition.

29 Although the significance of market shares can differ depending on the situation on the particular market, very high (combined) market shares generally indicate

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[26] See e.g. BKartA, decision of 24.8.2007, B5-51/07 – *Cargotec/CVS Ferrari*, para. 88ff. (selected period of three years), confirmed by OLG Düsseldorf, decision of 28.11.2007, VI-Kart 13/07, p. 23.

[27] For the general practice not to include captive production see BGH, decision of 21.2.1978, WuW/E BGH 1501, 1503 – *Kfz-Kupplungen.* See for certain market conditions where captive production may be included BKartA, decision of 29.9.2006, B1-169/05 – *FIMAG/Züblin*, para. 55; and KG, decision of 9.12.1981, WuW/E OLG 2633, 2638f. – *Bituminöses Mischgut*; KG, decision of 12.3.1982, WuW/E OLG 2655, 2661 – *Transportbetonagentur Sauerland*.

[28] See e.g. BKartA, decision of 29.9.2004, B5-170/03 – *Leggett & Platt/AGRO*, para. 111, 137ff.

[29] For the examination of market share losses after a merger see e.g. BKartA, decision of 2.3.2004, B10-102/03 – *Ontex/Rostam,* para. 76; BKartA, decision of 15.3.2005, B4-227/04 – *Smiths/MedVest,* p. 32, BKartA, decision of 28.10.2004, B10-86/04 – *Schneider/Classen,* para. 208f.; BKartA, decision of 4.6.2004, B7-36/04 – *Siemens/Moeller,* para. 75ff.

dominance.[30] A comprehensive analysis of all relevant factors can on the other hand reveal that there is no dominance in spite of high market shares.[31] In particular if the market shares have constantly fallen, this can already militate against dominance.[32] In contrast, the significance of high market shares is greater if the market shares have remained constant over several years and are appreciably larger than those of the largest competitor.[33] Vice-versa, low market shares indicate that there is no dominance. However, even moderate market shares do not necessarily preclude dominance in each and every case.[34] For example, if the market is highly fragmented and the largest competitor has a much weaker market position dominance may not be excluded.[35]

30 The **level of concentration** in a market and the distribution of market shares can be illustrated by means of the Herfindahl-Hirschman Index (HHI)[36].[37] In addition to the absolute level of the HHI post-merger, the change in the HHI gives an impression of how the merger changes concentration in the market. The BKartA has not set any presumptions based on particular HHI levels or changes in HHI levels, given that the legislator has chosen to use market share levels for the presumptions contained in

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30 See for German case-law, BGH, decision of 21.12.2004, WuW/E DE-R 1419, 1424 – *Deutsche Post/trans-o-flex,* para. 25 (market share of 65 %); BGH, decision of 13.7.2004, WuW/E DE-R, 1301, 1303f. – *Sanacorp/ANZAG,* para. 18 (market shares of more than 55 %). On European case-law see Court of First Instance (CFI), decision of 6.7.2010, Case T-342/07 – *Ryanair/Commission*, para. 41 with further references (market shares of 60-100%); as well as inter alia CFI, decision of.25.03.1999, Case T-102/96 – *Gencor/Commission*, para. 205 (market shares of 60-89%); CFI, decision of 28.04.1999, Case T-221/95 – *Endemol/Commission*, para. 134 (market shares of clearly beyond 50% with a clear gap to other competitors).

31 See BGH, decision of 29.6.1982, WuW/E BGH 1949, 1951f. – *Braun/Almo* para. 15.

32 See BKartA, decision of 24.1.2005, B4-227/04 – *Smiths/MedVest,* p. 58.

33 See BGH, decision of 21.12.2004, WuW/E DE-R 1301, 1303 – *Sanacorp/ANZAG,* para. 16; see also BKartA, decision of 4.6.2004, B7-36/04 – *Siemens/Moeller,* para. 69 (market shares of 50-60 %); BKartA, decision of 10.12.2002, B6-98/02 – *Tagesspiegel/Berliner Zeitung,* p. 22f. (market share of over 61 %).

34 As in BGH, decision of 23.6.1985, WuW/E BGH 2150, 2155ff. – *Edelstahlbestecke,* para. 39 (market shares of just below or above 30%); nevertheless cases in which dominance was identified in market shares of below or just over one third, are rather scarce; for an example see BKartA, decision of 23.2.2005, B10-122/04 – *Remondis/RWE Umwelt,* para. 164 (market shares of around 35 %).

35 See BGH, decision of 23.6.1985, WuW/E BGH 2150, 2155ff. – *Edelstahlbestecke,* para. 40; see also BKartA, decision of 24.1.2005, B4-227/04 – *Smiths/MedVest,* p. 32f.; BKartA, decision of 4.3.2004, B4-167/03 – *Synthes-Stratec/Mathys, para*. 68.

36 The HHI value is calculated by adding together the squared values of the percentage market shares of all competitors in the market or in the formal representation: $HHI = \sum s_j^2$ with s_j = market share of the supplier j.

37 A higher HHI represents not only a higher concentration but for the same number of companies also a more unequal distribution of the market shares. Due to the squaring of the shares, a disproportionately high amount of higher market shares is included in calculating the index value.

the GWB. However, in cases where the HHI appears to be helpful as a short-hand for concentration levels it can be included in the overall assessment.

31 Market shares in **bidding markets**[38] can change quickly and fundamentally once a sufficiently large contract is awarded to a different supplier. In many cases this does not involve a change in the market power of the different players competing for contracts.[39] Therefore, the market shares of merging parties (in a particular year) are much less indicative of market power than on other markets. However, if smaller contracts are awarded in short intervals, high market shares can indeed indicate an important and sustained market position, and as a result, possibly also the market power of a supplier.

32 Another specific situation presents itself if competition does not take place within the relevant market, but there is only **competition for the market**. This is the case, for example, if a one-time award is granted for a specific period, e.g. an exclusive right or a concession.[40] Despite a share of 100 percent, competition on such markets can be effective or weak depending on the circumstances. In this context an important element of the analysis is whether the company which has won the last contract for a particular service is also very likely to win the award for further or subsequent contracts, even if they are legally independent of one another.[41] If this is the case, there is a close relationship between supplier and contractor and suppliers will probably be able to benefit from reputation effects.

33 Equally, the significance of market shares (on individual markets) may only be limited on so-called platform markets or on markets that are linked by indirect network effects (both are sometimes referred to as **two-sided markets**). On two-sided markets a supplier acts as an intermediary between different customer

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38 These markets are characterised by buyers inviting offers in a call for tenders and suppliers competing for the acceptance of tender.

39 An analysis of past tenders can give an indication of how large and in some cases diverse the group of participating companies is. The order of priority of the bids submitted by buyers is also of great significance. On the analysis of tenders, see e.g. BKartA, decision of 15.5.2006, B5-185-05 – *Von Roll Inova/Alstom*, para. 40, 44ff.; or BKartA, decision of 15.11.2007, B1-190-07 – *Faber/BAG/AML*, para. 97ff.

40 This applies e.g. to the award of contracts for local public transport services. See BGH, decision of 11.7.2006, WuW/E DE-R 1797 – *Deutsche Bahn/KVS Saarlouis,* para. 26; BKartA, decision of 9.6.2004, B9-16/04 – *Deutsche Bahn/KVS Saarlouis,* p. 21f.

41 Due, for example, to the grandfathering clause under § 13 (3) of the German Passenger Transport Act (PBefG), which stipulates that adequate consideration is to be taken of a service operated over years by one company in a way which is consistent with public transport interests; see OLG Düsseldorf, decision of 22.12.2004, WuW/E DE-R 1397, 1409 – *ÖPNV Hannover*, para. 116. Accordingly, the grandfathering clause itself does not create a dominant position but can support an existing dominant position; see OLG Düsseldorf, decision of 4.5.2005, WuW/E DE-R 1495, 1500 – *ÖPNV Saarland,* para. 49, 53.

groups. For instance, a newspaper publisher can demand higher prices from advertisers depending on the number of its readers.[42] Moreover, the service provided by issuers of credit cards or debit cards is more attractive for end customers the more retailers accept the particular cards as a method for payment. In such cases, prices and quantities on both markets are interdependent. Therefore, the competitive constraints for platform operators or intermediaries are influenced by the market conditions and the interrelation between the markets concerned. In such cases it is thus not sufficient to assess the market position on one of the markets only. This would not provide a complete picture with regard to market power and dominance.

2. Further relevant factors within the market

34 Relevant factors within the market can as market-related factors generally define the intensity of competition in the market, or as company-related factors directly relate to the companies concerned, their competitive positions and constraints. In evaluating these factors, it is considered on the one hand that competitive advantages are an essential element of competition and in general benefit direct customers and ultimately end consumers, at least if the market is characterized by effective competition. On the other hand, company-specific competitive advantages can also increase the ability to act independently of competitive constraints on a permanent basis.

35 As a rule, the following factors and criteria are taken into consideration in the analysis: capacities and capacity constraints (a), customer preferences and switching costs (b), intellectual property rights and know-how (c), market phase (d), access to suppliers and customers (e), corporate and personal links with other companies (f), and financial resources (g).

a) Capacities and capacity constraints

36 Whether competitors exert sufficient competitive pressure on the merging parties also depends on competitors' ability to expand their production in reaction to a price increase or quality degradation of the merging parties.[43] If barriers to expansion are low, the competitive pressure tends to be high. In contrast, legal or structural barriers to expansion weaken the competitive pressure exerted by competitors. If actual competitors have to make considerable investments in order to expand their

[42] See BKartA, decision of 29.8.2008, B6-52/08 – *Intermedia/Health & Beauty*, p. 21ff.

[43] See e.g. BKartA, decision of 24.8.2007, B5-51/07 – *Cargotec/CVS Ferrari*, para. 120f.

existing capacities, this also limits the competitive pressure exerted by them.[44] The same applies if expansion requires significant lead times or is not feasible in a sufficient scale.[45] If the merger combines the player with the largest market share with a player that has substantial, free or underutilized capacity at its disposal, this can aggravate the effects of an increase in market share.

37 Vice-versa, the existence of overcapacities in the market may mitigate the high market shares of a company. This depends not least on whether homogeneous or differentiated products are concerned. In markets for homogeneous products, overcapacities of competitors may be able to constrain companies with high market shares at least to some extent because customers can switch relatively easily to other suppliers.

b) Customer preferences and switching costs

38 Customer preferences and switching costs can be important factors in the assessment of the market position of a company, especially in the case of differentiated products. Both considerably influence demand side substitution and consequently the competitive constraint exerted by suppliers on one another. A merger is the more likely to raise competition concerns the more similar the (differentiated) products of the merging companies are with regard to customer preferences ("**closeness of competition**"), i.e. the closer these products are as substitutes.[46] Due to the merger the companies may be able to internalise the best substitute and thus to eliminate the most important competitive constraint.

39 Customer preferences play a role, for instance, on markets which are characterized by the presence and great importance of established **brands**. If customers or dealers consider a branded product as a "must have" product, this shows that the supplier enjoys a degree of market power that goes beyond what its market share alone would suggest. Customer preferences need not relate solely to specific brands. Rather, all factors should be examined which may contribute to achieving customer loyalty. This includes, for example, the ability to offer a full **range of**

[44] See also e.g. BKartA, decision of 29.9.2004, B5-170/03 – Leggett&Platt/AGRO, para. 125ff.

[45] See e.g. BKartA, decision of 27.12.2010, B2-71/10 – *Van Drie/Alpuro*, para. 239ff.

[46] See e.g. BKartA, decision of 30.6.2008, B2-333/07 – *Edeka/Tengelmann*, p. 38ff.; BKartA, decision of 21.10.2010, B4-45/10 – *Sparkasse Karlsruhe/Sparkasse Ettlingen*, para. 125f., 137 (in this case the closeness refers to the density of the branch network and the range of services offered).

products or complete systems, if a considerable share of customers prefer such an offer to the purchase of single products or components.[47]

40 The term **switching costs** describes (subsequent) costs and the considerable time and effort which can be involved when a customer switches to another supplier.[48] If, as a result of switching costs, suppliers need not fear that many customers will divert to other suppliers following a small price increase or loss of quality, this will strengthen the suppliers' market position.

41 Switching costs can occur, for instance, if the search for and contract negotiations with a new supplier involve considerable time and effort. Training costs can also be part of switching costs, for example if new software is installed or machines of a different type are employed. All other migration costs,[49] which are incurred to make the necessary adjustments following a change of supplier, are also relevant. Switching costs can also be the intended result of suppliers' strategies, e.g. charges for the termination of a contract are imposed or customers are tied to the previous supplier by customer loyalty programmes (e.g. "bonus programmes"[50]).[51]

c) Intellectual property rights and know-how

42 Some companies are technology leaders, e.g. due to their higher or more effective expenditure on research and development. On this basis, some of them are able to produce at lower costs or to offer products of higher quality. This can give them an advantage compared to other suppliers.[52] This advantage is normally the result of competition on the merits and therefore seen as a positive effect on competition. Nonetheless, this advantage has to be taken into account when assessing a company's market power.[53] Similarly, controlling patents or intellectual property rights, which may play a crucial role in the future, also have to be taken into account. The same applies to licences, which relate to these technologies. However, these IP

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47 See e.g. KG, decision of 7.11.1985, WuW/E OLG 3761 – *Pilsbury/Sonnen-Bassermann;* or BKartA, decision of 14.2.2007, B5-10/07 – *Sulzer/Kelmix*, para. 55.

48 This is particularly true if several services are offered in one package, such as e.g. the triple play offers in the telecommunications sector, see e.g. BKartA, decision of 3.4.2008, B7-200/07 – *KDG/Orion*, para. 155.

49 Such costs are incurred, e.g. in the migration to a new software, as, among other things, existing sets of data have to be transferred or operational procedures adjusted.

50 Customer loyalty programmes such as "frequent flyer miles" can be considered as good examples.

51 In this respect opportunity costs may also constitute an obstacle to switching supplier.

52 See e.g. BKartA, decision of 25.10.2006, B7-97/06 – *Coherent/Excel*, para. 86ff.

53 A market share lead is e.g. of greater significance for further development if it is based on a technological lead and it is not expected that other competitors will be able to easily catch up. See e.g. BKartA, decision of 14.2.2007, B5-10/07 – *Sulzer/Kelmix*, para. 55ff.

rights only have an effect on market power if they play a significant role on the market concerned or for the market's future development. This may be the case, for example, if they concern a core technology or a proprietary interface technology. Another decisive factor in this context is whether competitors own comparable IP rights or have access to them via licences.[54]

d) Market phase

43 The market phase, which indicates the market's stage of development, also influences the market conditions. In expanding or dynamic markets high market shares do not necessarily indicate high market power. This is so because innovations can enable swift market entries or quick shifts in market share.[55] First mover advantages can play a role in nascent markets. They can regularly lead to dominance, in particular if the market is concentrated and permanently foreclosed as a result of the merger already at this early stage of its development.[56] The dynamics of competition can be weakened in this way, for example, if two leading and innovative competitors merge.[57] Often, such mergers also create market power on the respective markets that concern technology which is necessary for the production of the products. In contrast, if the market is in a phase of stagnation or downturn, market conditions are more stable and market entry is probably less likely. Therefore, on more mature markets a high market share is a much stronger indication of high market power.

e) Access to suppliers and customers

44 If a company enjoys a particularly good access to suppliers or customers, this can be an important factor for market power, provided that access to the suppliers or to the customers concerned is vital for competitors to survive on the relevant market and provided they are not able to obtain comparable access for themselves. Like

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[54] Leads in development and patent pools played a role, e.g. in BKartA, decision of 18.7.2008, B5-84/08 – *Stihl/ZAMA*, para. 29f., 54f.

[55] For an example in which the current market share of a supplier only minimally mirrored its future market opportunities, see BKartA, decision of 5.10.2006, B7-84/06 – *KLA-Tencor/ADE,* para. 47-51.

[56] See e.g. BKartA, decision of 8.6.2004, B7-29/04 – *Nokia/Symbian*, p. 12; BKartA, Case Summary B7-23/09 – *Vector Capital/Aladdin Knowledge Systems* (Digital Rights Management Systems), available at http://www.bundeskartellamt.de.

[57] The restriction provided under the minor market clause is also to be considered against this background; in order to prevent young markets from prematurely becoming concentrated by mergers, markets with a turnover of less than € 15 million are only excluded from merger control if they have been in existence for at least 5 years. See legal intent of 4th amendment to the GWB, Bundestagsdrucksache 8/2136 of 27.9.1978, p. 14.

other competitive advantages, superior access to suppliers or improved access as a result of a merger does not per se raise any competition concerns, in particular, if such advantages are expected to be passed on to the customers in the form of lower prices or improved products. However, superior or improved access can in some cases enable the merging parties to act on the market independently of competitive constraints and it can sometimes facilitate anti-competitive practices.

45 A company can have privileged **access to suppliers** if, in contrast to its competitors, it is vertically integrated and produces essential input products itself. Sometimes vertical integration leads to a more efficient procurement of essential input products. This can give a company a permanent competitive advantage. This applies in particular if its competitors are not able to integrate backwards or to procure the relevant input from third party suppliers at similarly favourable terms.[58] Another aspect is increased buyer power as a result of the merger. In this case, superior access to supplies is based on contractual relations with producers of input products. Above all, a merger may increase purchase volumes and this may enable the merging parties to negotiate favourable terms with their suppliers. Procurement conditions are often an important factor for a company's market position, for example for retailers.[59]

46 Companies may have a superior **access to customers** for example in the following circumstances: they are vertically integrated with an important customer or hold a share in an important customer, they have achieved a particularly high market penetration,[60] they have established a particularly effective distribution network or a distribution network that covers the complete territory[61], or a particularly good service network[62], or they have built up an important after sales business, or their existing business relations resulting from other product markets provide access to customers that are also major purchasers of the product concerned.[63]

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[58] For a more detailed explanation about the extent to which and under what conditions a vertical integration can increase market power, see also the statements on vertical mergers in para. 124ff. below.

[59] See e.g. BKartA, decision of 30.06.2008, B2 333/07 EDEKA/Tengelmann, p. 103ff.

[60] See e.g. BKartA, decision of 24.8.2007, B5-51/07 – *Cargotec/CVS Ferrari*, para. 98ff.

[61] See e.g. BKartA, decision of 5.11.2008, B5-25/08 – *Assa Abloy/SimonsVoss*, para. 185ff.; BKartA, decision of 21.6.2000, B10-25/00 – *Melitta Bentz/Schultink*, p. 27ff.; see also BKartA, decision of 24.3.2004, B4-167/03 – *Synthes-Stratec/Mathys*, para. 70ff. (access to medical decision-makers on the demand side in the osteosynthesis area).

[62] See e.g. BKartA, decision of 24.8.2007, B5-51/07 – *Cargotec/CVS Ferrari*, para. 73.

[63] See e.g. BKartA, decision of 21.8.2008, B5-77/08 – *MEP/DISA*, para. 54ff.

f) Structural links with other companies

47 Cross-shareholdings, shareholdings and other structural links with other companies can be relevant for the merging parties' market position, in particular if these links are with their competitors, customers or suppliers. This applies not only to structural links that meet the requirements under § 36 (2) GWB or which create a competitive unit ("wettbewerbliche Einheit"),[64] but to all legal, economic, personal or financial links.[65]

48 In the case of single firm dominance the significance of this criterion is limited,[66] however, because the effects on competition resulting from links with customers and suppliers are to a large extent already covered by other criteria.[67] Besides, links with actual or potential competitors or with suppliers of imperfect substitutes can be particularly relevant.[68]

g) Financial resources

49 In some cases, the market power of a company can also be influenced by its financial resources. This factor is explicitly mentioned in § 19 (2) sentence 2 GWB but only plays a minor role in case practice. It may be relevant, because a company with superior financial strength may be in a position to use its financial resources in order to deter actual competitors from taking competitive initiatives or potential competitors from entering the market.[69] In an extreme case, competitors can even be squeezed out of the market. Such an exclusionary or deterrent effect is not present every time a company has significant financial resources at its disposal.

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64 See BGH, decision of 19.12.1995, WuW/E BGH 3037, 3041 – *Raiffeisen,* para. 16.

65 See BGH, decision of 19.12.1995, WuW/E BGH 3037, 3040 – *Raiffeisen,* para. 13; BKartA, decision of 23.2.2005, B10-122/04 – *Remondis/RWE Umwelt*, para. 168.

66 This criterion gains importance in the case of collective dominance, see para. 91 and 100 below.

67 Links with customers or suppliers are, for example, taken into consideration as criteria for assessing access to sales and procurement markets, links with financially powerful companies are considered in assessing financial power.

68 See BKartA, decision of 23.2.2005, B10-122/04 – *Remondis/RWE Umwelt*, para. 168f. and para. 188f.; BKartA, decision of 15.12.1978, WuW/E BKartA 1831, 1831f. – *hydraulischer Schreitausbau*; BKartA, decision of 9.1.1981, WuW/E BKartA 1863, 1864f. – *Gruner+Jahr/Zeit*.

69 The deterrent effect already takes effect once such a strategy can be reasonably expected from the perspective of the competitors; see BGH, decision of 8.6.2010, WuW/E DE-R 3067 – *Springer/ProSieben II*, para. 47 (the deterrent effect results from the expectation, that in case of a competitive action by a rival firm, the parties could use cross-media advertising). See on deterrent effect also BGH, decision of 27.5.1976, WuW/E BGH 2276, 2283 – *Süddeutscher Verlag/Donau-Kurier,* para. 57; BGH, decision of 25.6.1985, WuW/E BGH 2150, 2157 – *Edelstahlbestecke,* para. 45ff.

However, financial resources do improve the ability of a company and its incentives to carry out corresponding strategies, e.g. predatory pricing.[70]

50 It is necessary to compare the financial resources available to the merging parties with the resources available to its actual or potential competitors. They may have sufficient resources to react with appropriate counter strategies. This would make exclusionary strategies less likely. If competitors' financial resources are limited it may be difficult for them to resist exclusionary strategies.[71] A successful exclusionary strategy of the merging parties also requires that they have sufficient spare capacity to meet the additional demand and that barriers to entry are relatively high so that new entries by other companies are unlikely following the successful squeeze-out of actual competitors.

51 The financial strength of a company can be measured by different indicators. Appropriate indicators are especially the cash flow,[72] availability of debt finance, including affiliated companies, and available liquidity.[73] These figures give an indication as to what extent financial resources are available at short notice to implement competitive strategies. In addition, the company's long-term financial capacity can also be relevant. It can be assessed in particular on the basis of the following financial indicators: annual surplus,[74] EBIT, EBITDA and gross margin. In addition, the past investment activity can also provide some indications because it reflects the company's financial strength in previous periods. Finally, the turnover may also provide useful information relevant for the company's resources.[75]

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[70] In the case of dominant firms, such strategies could possibly be dealt with under the control of abusive practices. However, in legal-systematic terms, it would hardly be comprehensible if power positions could not be dealt with beforehand under merger control as a preventative measure and if the competition authority, due to the deterrent effect of possible abuse proceedings, were hindered from preventing any situation which would provide sufficient incentive for abusive behaviour. See e.g. BKartA, decision of 30.06.2008, B2-333/07 – *EDEKA/Tengelmann*, p. 111.

[71] Whether the financing possibilities for the competitors are insufficient depends among other things on the level of information of the investors. If the investors consider the future development and success of smaller companies to be more uncertain, these smaller companies with less financial power often have to pay a premium for risk and consequently bear higher financing costs and are therefore vulnerable to possible predatory strategies. This is particularly true for young markets which are still in a development stage or technically sophisticated products which require great expense on R&D.

[72] See BKartA, decision of 18.5.1977, WuW/E BKartA 1685, 1687 – *Mannesmann/Brueninghaus*.

[73] See BKartA, decision of 24.1.1995, WuW/E BKartA 2729, 2748ff. – *Hochtief/Philipp Holzmann*.

[74] See OLG Düsseldorf, decision of 30.7.2003, WuW/E DE-R 1159, 1162 – *BASF/NEPG*.

[75] See BGH, decision of 25.6.1985, WuW/E BGH 2150, 2157 – *Edelstahlbestecke,* para. 41.

3. Competitive factors outside the relevant market

52 Another step in the analysis is to take into consideration factors which affect the relevant market from the outside. Apart from potential competition and barriers to entry (a), account is also taken of imperfect substitution (b).

a) Potential competition and barriers to entry

53 Potential competitors can also constrain the competitive behaviour of a company in a relevant market.[76] Candidates for market entry are in particular suppliers active on neighbouring markets or markets up- or downstream of the relevant market. Sometimes new firms, with no prior activity on related markets, also consider entering a market.

54 The extent of potential competition and hence the magnitude of competitive constraint imposed on market players depend in particular on the level of barriers to entry. Dominance is unlikely if market entry is feasible and likely in the case of price increases or a degradation of product quality. This is recognized by § 19 (2) GWB, which emphasizes that potential competition as well as legal or factual barriers to entry should be considered in the assessment of dominance.

55 In order to exclude the creation or strengthening of a dominant position on account of potential competition, it is not sufficient that market entry is possible in theory. A certain actual likelihood is necessary, which in turn requires sufficient incentives for market entry.[77] Market entry has to be likely, timely and sufficient. This determines to what extent incumbent suppliers are constrained by potential competition. If one of the merging parties was already dominant pre-merger, a small change in the market conditions can suffice to reach the threshold (strengthening a dominant position). Therefore the elimination of a potential competitor can sometimes suffice as a strengthening effect.[78] In contrast, if the market conditions to be expected post-merger point in the direction of dominance, the likelihood, timeliness and scope of

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[76] This is based on the consideration that the credible threat of a market entry would already induce competitive behaviour, meaning that potential competitors can also have a disciplinary effect on incumbent companies.

[77] See OLG Düsseldorf, decision of 4.5.2005, WuW/E DE-R 1495 – *ÖPNV Saarland,* para. 54. It can be assumed that there is insufficient incentive for a supplier which is integrated but produces solely for its own use, to enter the upstream market if an entry is not worthwhile because higher margins can be achieved on the downstream market. See e.g. BKartA, decision of 27.02.2008, B5-198/07 – *A-TEC/Norddeutsche Affinerie*, para. 117ff.

[78] In order to establish a strengthening effect it is not necessary for a market entry to be cogent without the merger, rather it is sufficient that it is likely to be expected. The OLG Düsseldorf reached a different conclusion on the degree of likelihood in its decision of 22.12.2010, VI-Kart 4/09 (V) – *NPG/ZVSH*, para. 100ff. However, an appeal is still pending.

potential competitors entering the market have to reach a rather high degree to justify a clearance of the merger. Therefore the requirements for potential competition and the likelihood, timeliness and scope of market entry depend on the specific context of the assessment.

Likelihood of market entry

56 Market entry is seldom impossible but sometimes not likely because of high costs or low expected profit. The likelihood of entry is generally assessed according to the possibility of and the incentive for market entry. It is essential how the costs associated with market entry and the expected revenues relate to each other and which risks are associated with either of them. It is generally not necessary to quantify all costs and revenues individually and in detail.[79] The ability of and the incentive for market entry are influenced in particular by different types of barriers to entry.[80] They can be categorized as legal, structural and strategic barriers to entry, depending on the underlying reasons for the hindrance of entry.

57 **Legal barriers to entry** exist if laws or government regulations make access to the market difficult or even impossible.[81] They include, inter alia, state-protected monopolies or licences awarded by the state (and restricted to a limited number of licences granted).[82] Furthermore, tariff and non-tariff trade barriers can constitute a barrier to entry for foreign suppliers.

58 Legal barriers to entry can also be created by patents, other types of intellectual property rights, or respective licences, which grant companies certain rights (of use) and are actually relevant for market entry or the further development of the market. In general patents only amount to a barrier if no other technical solutions are available that would be comparable[83] and if competitors have no comparable rights.[84] However, in some circumstances entry can be obstructed by the owner of

[79] Qualitative criteria can also provide good indications of the expected profit, which indicate the business attractiveness of the market. See e.g. BKartA, Case Summary of 20.1.2010, B6-79/09 – *Rheinische Post/Aachener Zeitung*.

[80] These kind of obstacles can also represent a barrier to expansion and prevent actual, in particular, smaller competitors from expanding their activity within the market. In the following the term barrier to entry will be used for both.

[81] These can take the form, in particular, of building permission for industrial installations. See e.g. BKartA, decision of 15.11.2007, B1-190/07 – *Faber/BAG/AML*, para. 69.

[82] These include, e.g. taxi licences, broadcasting or mobile phone licences. To what extent such statutory requirements act as barriers to entry depends in particular on how difficult or cost or time intensive it is to fulfil them and how many licences are available.

[83] See BKartA, decision of 20.6.2006, B4-32/06 – *Putzmeister/Esser*, p. 38f.

[84] However, such comparable rights do not necessarily help if there are network effects, the dominant company already has a lead in distribution and the gap cannot be easily closed by another competitor with another solution.

IP rights even when alternative technologies are available.[85] If patent holders are willing to grant licences for the technology, the licensing costs can amount to an entry barrier, depending on the level of the fees.

59 **Structural barriers to entry** result from the characteristics of the market, the production process of the goods concerned or on the special market position of a company. They generally have a direct effect on the cost of entry and/or on the level of the profit expected after entering the market.

60 Sunk costs are of particular importance. They are incurred when entering the market, but cannot be recovered when exiting the market. Sunk costs can include, inter alia, costs of research and development, advertising or training.[86] In addition, economies of scale can have an influence on whether entry is feasible.[87] Economies of scale arise in particular if the manufacturing of a product incurs high fixed costs but comparably low variable costs. Thus, average costs fall as production is expanded. This can in some cases have the effect that a minimum scale of entry is necessary, i.e. entry is only successful if a certain minimum volume of sales can be achieved within a very short period. Barriers to entry in connection to costs can also occur if particular facilities cannot – or not profitably – be duplicated. This applies in particular to networks, for example in the telecoms and energy sectors and other essential facilities.[88]

61 Cost advantages, which can amount to barriers to entry, can also result, inter alia, from learning effects[89], economies of scope or direct or indirect network effects[90].

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[85] On the de facto monopolistic position of a system provider, which is secured by patents for essential product interfaces, see e.g. BKartA, decision of 14.2.2007, B5-10/07 – *Sulzer/Kelmix/Werfo*, para. 55. Although it is technically possible to circumvent patent regulations, this can mean a significant loss of use for the customer with the result that the products of the competitors do not necessarily present an alternative.

[86] Costs for production facilities and equipment are not usually sunk costs because they can often be recovered to a large extent on exit from the market via the sale of the facilities. For examples of sunk costs see e.g. BKartA, decision of 25.10.2006, B7-97/96 – *Coherent/Excel*, para. 137ff. and fn. 143; OLG Düsseldorf, decision of 23.11.2005, WuW/E DE-R 1639, 1642 – *Mainova/Aschaffenburger Versorgungs GmbH,* para. 30-33.

[87] Economies of scale can also occur, e.g. in the case of technically very sophisticated products with a high degree of specialisation, which requires high development costs, see e.g. BKartA, decision of 11.4.2007, B3-578/06 – *Phonak/GN ReSound*, para. 261.

[88] See also § 19 (4) no. 4 GWB.

[89] Learning effects associated with the development or manufacture of a product give incumbent companies a lead over newcomers entering the market at a later date. The resulting cost disadvantage can create a barrier to entry. On learning effects see e.g. BKartA, decision of 25.10.2006, B7-97/06 – *Coherent/Excel*, para. 142 (development and manufacture of sealed-off CO_2-Laser); or BKartA, decision of 5.11.2008, B5-25/08 – *Assa Abloy/SimonsVoss*, para. 200ff.; also confirmed in this point by the OLG Düsseldorf, decision of 21.10.2009, WuW/E DE-R 2885, 2892 – *Assa Abloy/SimonsVoss*, para. 123.

[90] Network effects occur if the use of a product increases with its degree of distribution.

Indirect network effects are characteristic for platform markets or two-sided markets.[91] For example, the market position of a newspaper on the advertising market is influenced by its position on the reader market.[92] Therefore, due to these interactions the conditions for market entry on two-sided markets cannot be assessed separately. In general, market entry on both markets is necessary.

62 Structural barriers to entry can also be based on the particular presence a company has established in a market. A well established firm can have a particularly good access to supplies or resources,[93] to sales channels[94] or to networks of personal contacts.[95] These are all elements on which an entrant cannot rely. Furthermore, demand-side factors can also increase the cost of entry. This includes for example all costs that are necessary in order to overcome high brand loyalty,[96] the strong reputation of a well-established firm[97] or other lock-in effects[98].

63 **Strategic barriers to entry** can exist if the well-established firms are able to raise rivals' costs of entry or to lower their expected profits. This can deter potential entrants by making entry more difficult and risky.[99] For example, the well-established

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91 See para. 33 above.

92 On technical platform in pay-TV see BKartA, decision of 28.12.2004, B7-150/04 – *SES/DPC*, para. 90ff., 147ff., especially 151. On the operation of two target-group relevant platforms (cosmetic trade fairs and trade magazines) see BKartA, decision of 29.08.2008, B6-52/08 – *Intermedia/Health & Beauty*, p. 21ff.

93 See e.g. BKartA, decision of 30.9.2005, B9-50/05 – *Railion/RBH*, p. 43 (superior access to wagons for bulk goods as barrier to entry to the market for the transport of bulk goods); or see OLG Düsseldorf, decision of 15.6.2005, VI-Kart 25/04 (V) – *G+J/RBA*, para. 64, insofar not published in WuW/E DE-R 1501 (publication of a new popular science journal requires the use of not insignificant human and financial resources).

94 Links with important contractors or contracting entities can also create a barrier to entry. On links with other companies as barriers to entry see BGH, decision of 7.2.2006, WuW/E DE-R 1681, 1688 – *DB Regio/üstra*, para. 51; BKartA, decision of 9.6.2004, B9-16/04 – *ÖPNV Saarland*, para. 56 (links between local transport companies and contracting entities create barriers to entry to the market for scheduled services in the local public transport sector.

95 For example, established contacts to (regional) advertisers can facilitate the acquisition of new orders; see BKartA, decision of 29.08.2008, B6-52/08 – *Intermedia/Health & Beauty*, p. 60ff.

96 Since establishing a branded product is based on the strategy of product differentiation, this case could also be categorized as a strategic barrier to entry.

97 Reputation presents a particular obstacle where long development periods, critical components, long-standing contractual commitments or high follow-up costs resulting from mistakes are concerned, with the result that customers prefer to resort to incumbent suppliers in order to minimise risk. This can be observed e.g. in the case of convertible roofs for cars, see BKartA, decision of 22.12.2009, B9-84/09 – *Webasto/Edscha*, p. 44; and BKartA, decision of 21.5.2010, B9-13/10 – *Magna/Karmann*, p. 52.

98 A lock-in effect exists if switching supplier involves switching costs for customers, which make such a change uneconomical. These switching costs need not necessarily involve financial outlay but can also involve administrative or other types of expenditure. See BKartA, decision of 25.10.2006, B7-97/06 – *Coherent/Excel*, para. 145.

99 See e.g. BKartA, decision of 2.8.2004, B6-26/04 – *G+J/RBA*, p. 32f.

firm can increase its production volume specifically with a view to limiting potential entrants' opportunities to earn profits.[100] Strategies with similar effects are to build up or keep overcapacities or to buy up (currently not required) input factors. Both strategies can reduce the profit expected from market entry.[101]

64 Further strategic barriers to entry can be created by patenting all further developments of and improvements to a patented product and pursuing violations of these patents rigorously.[102] The strategy of the targeted and comprehensive use of intellectual property rights protection can also restrict the use of alternative technologies to such an extent that they are not available to competitors in some cases.[103] The expectation of substantial price cuts both as a reaction to entry and in anticipation of prospective entry,[104] also amounts to a barrier to entry.

65 Market entry may also be more difficult due to existing **barriers to exit,** if costs which would result from market exit, are already anticipated before entry. Barriers to exit also result in unprofitable or unsuccessful suppliers remaining in the market which may reduce the prospects of success for potential entrants. Such costs can arise e.g. from government regulations imposing additional obligations when closing down facilities or business activities.[105] Equally, long-term contracts can also delay an exit from the market.

66 How the different types of barriers to entry affect potential competition in a particular case depends on a number of factors such as market phase, current level of concentration in the market, foreseeable technological change and innovation, or incumbent firms' prospective response to entry. For example, entry to an expanding

[100] Such a strategy would be fostered if the cost benefit of the incumbent company increases due to economies of scale.

[101] See e.g. BKartA, decision of 15.11.2007, B1-190/07 – *Faber/Langenthal*, para. 81.

[102] See e.g. BKartA, decision of 23.8.2006, B4-91/06 – *Synthes Inc./Synthes AG*, p. 51.

[103] See on such patent clusters e.g. BKartA, decision of 20.9.1999, B3-20/99 – *Henkel/Luhns*, para. 44ff. *Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft und Technologie* (2007), Patentschutz und Innovation, Gutachten 1/07, especially p. 15ff.

[104] See BKartA, decision of 20.11.2001, B9-88/99 and B9-100/01 – *Deutsche Post/trans-o-flex,* p. 45.

[105] A barrier to exit can be, for example, environmental impact assessments that may be required in case of a shutdown of storage sites. Another example can be building approvals for sales locations that are sometimes tied to a specific range of products. As a consequence the designated use cannot be changed. See e.g. BKartA, decision of 5.12.2007, B9-125/07 – *Globus/Hela*, para. 76.

market tends to be more likely because of the revenue prospects[106] than on a mature or shrinking market, which might also be characterized by overcapacities.[107]

67 The history of past entry or exit can provide some indications how likely market entry may be in the future. Even if there have been no attempts to enter the market in the past, this does, however, not preclude potential competition. It often provides valuable information to analyse past entry attempts, including attempts that were successful, that failed and instances of entry plans that were not implemented. Of particular interest are the reasons why entry ultimately failed, entry plans were not implemented, or entry was not even considered.[108]

Timeliness and sufficiency of market entry

68 Potential competition only effectively constrains market power created or strengthened by a merger if entry is timely and sufficient. What is required for entry to be timely will depend upon the characteristics and dynamics of the particular market concerned in the individual case. The usual duration of customer contracts may give an indication for this assessment. Entry may not be timely if prolonged test phases[109] or extended certification procedures[110] are required before a product can be launched on the market.

69 Moreover, entry has to be sufficient, i.e. with sufficient volumes and competitive prices as well as a sufficient product range. Otherwise entry may be feasible but not sufficient to effectively impose competitive constraints on the incumbent or leading suppliers.[111] For example, a supplier may have to offer an entire product range in order to establish himself in the market permanently, but entry might only be feasible with some of those products.[112]

Merger with a potential competitor

70 A merger with a potential competitor can increase a company's market power because at least this potential competitor can no longer impose competitive

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[106] See BKartA, decision of 20.6.2006, B4-32/06 – *Putzmeister/Esser*, p. 42 (entry to the market concerned was likely because the downstream market was a growing market).

[107] See BKartA, decision of 25.10.2006, B7-97/06 – *Coherent/Excel*, para. 144.

[108] The past provides pointers for forecasting future market entries if the reasons established are still relevant.

[109] See BKartA, decision of 25.10.2006, B7-97/96 – *Coherent/Excel*, para. 139.

[110] Such certification can be necessary e.g. in the automotive supply sector. See e.g. BKartA, decision of 16.12.2009, B3-91/09 – *Celanese (Ticona)/FACT*, para. 75.

[111] See e.g. BKartA, decision of 24.3.2004, B4-167/03 – *Synthes-Stratec/Mathys,* para. 80.

[112] See BKartA, decision of 25.10.2006, B7-97/96 – *Coherent/Excel*, para. 140.

constraints.[113] If the acquiring company already has a high degree of market power, the acquisition of a potential competitor can in certain cases be sufficient to meet the threshold for intervention (creation or strengthening of a dominant position), provided that after the acquisition the remaining potential competition is not significant. The same can be true if a dominant company is acquired by a potential competitor.

71 These considerations often play a role in mergers between companies which are active on neighbouring (product or geographic) markets and are dominant or even monopolists on these markets. As a result of their product or geographical proximity to the relevant market, the barriers to entry should generally be lower for these companies than for others. However, it always requires a case-by-case assessment based on the particular conditions of the relevant market whether the merging companies are potential competitors and whether and to what extent competitive pressure is diminished as a result of the merger.[114] This cannot be concluded merely from the fact that the merging parties are active in neighbouring markets.[115]

b) Imperfect substitution

72 To some extent, suppliers which operate on neighbouring product or geographic markets can also impose a disciplinary effect in terms of competitive constraints. If prices rise above a certain level or if quality deteriorates below a certain level, at least some customers will consider switching to a neighbouring product or a product available at a greater distance. Neighbouring products can create some degree of competitive pressure which, although insufficient for inclusion in the market definition, can be taken into account as fringe substitution when the competitive effects of the merger are assessed.[116]

73 Competitive pressure emanating from neighbouring markets is weaker than the constraints imposed by suppliers in the affected market itself. Hence, fringe

[113] See BGH, decision of 21.12.2004, WuW/E DE-R 1419, 1424 – *Deutsche Post/trans-o-flex,* para. 23ff.; BKartA, decision of 20.11.2001, B9-88/1999 and B9-100/2001 – *Deutsche Post/trans-o-flex*, p. 47.

[114] On how a potential competitive relationship is determined, see e.g. BKartA, decision of 21.4.2009, B6-150/08 – *Neue Pressegesellschaft/Zeitungsverlag Schwäbisch Hall*, para. 46-61. For a different approach see OLG Düsseldorf, decision of 22.12.2010, VI-Kart 4/09 (V) – *NPG/ZVSH*, para. 98ff. (not yet final).

[115] The merger of two newspaper publishers was cleared although the parties are active in neighbouring districts. See BKartA, Case Summary, B6-10/09 – *Zeitungsverlag Schwerin/Kurierverlag*, available at http://www.bundeskartellamt.de.

[116] This interaction is apparent in BKartA, decision of 20.6.2005, B7-22/05 – *Iesy/Ish*, para. 207 und 215 (no consideration of substitutional competition in defining the market) and para. 240ff. (consideration of substitutional competition in the competitive assessment).

substitution on its own will normally not be sufficient to prevent the creation or strengthening of a dominant position. For the same reason the elimination of fringe substitution as a consequence of a merger will normally not be sufficient to create a dominant position.[117] However, it may be sufficient in a particular case to meet the threshold for the strengthening of a dominant position, if the level of dominance in the affected market is already very high.

4. Countervailing buyer power

74 The market power of companies can also be limited by its customers if they have sufficient buyer power.[118] This can be the case, e.g. if the parties face a few large companies as customers, which purchase strategically.[119] However, if countervailing buyer power is limited to certain customers or certain parameters, it normally cannot sufficiently limit market power.[120] Furthermore, the market power of a natural monopoly can only in exceptional cases be constrained effectively by countervailing buyer power, if at all.[121]

75 For buyers to be able to prevent dominance, a number of preconditions have to be fulfilled.[122] Firstly, the buyer has to be a sufficiently important customer, i.e. the merging parties, if losing this customer, could not compensate for this loss in the short term by finding alternative customers. Secondly, the buyer is able to switch to other sources of supply, or to sponsor new entry or to vertically integrate. In this case, alternative suppliers have to be able to offer products that are equal in terms of quality[123] and in addition have sufficient capacities to provide the required

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[117] However, this is also not ruled out, see BGH, decision of 2.10.1984, WuW/E DE-R 2112, 2123 – *Gruner+Jahr/Zeit,* para. 54ff.

[118] See e.g. BKartA, decision of 14.12.2004, B9-101/04 – *Belgian New Fruit Wharf/HHLA/Stein*, para. 34f.

[119] See on strategic buying behaviour BKartA, decision of 15.3.2005, B4-227/04 – *Smiths Group/MedVest,* p. 43ff.; BKartA, decision of 24.3.2004, B4-167/03 – *Synthes-Stratec/Mathys,* para. 89ff. (in both cases, however, the investigations found no indications for strategic purchasing behaviour on the part of the customers); BGH, decision of 2.12.1980, WuW/E BGH 1749 – *Klöckner/Becorit,* para. 28-31.

[120] See e.g. BKartA, decision of 20.6.2005, B7-22/05 – *Iesy (Apollo)/Ish,* para. 152ff.; BKartA, decision of 21.6.2005, B7-38/05 – *Tele Columbus (BC Partners)/Ish,* para. 143ff.

[121] See e.g. BKartA, decision of 20.6.2005, B7-22/05 – *Iesy (Apollo)/Ish*, para. 153f.; BKartA, decision of 21.6.2005, B7-38/05 – *Tele Columbus (BC Partners)/Ish*, para. 144f.

[122] See explanation in BKartA, decision of 22.12.2009, B9-84/09 – *Webasto/Edscha*, p. 62ff., especially p. 64.

[123] See e.g. BKartA, decision of 12.4.2010, B2-117/09 – *Heiner Kamps/Nadler Feinkost*, p. 43ff., where the supply of private label salads (even in product segments offered at higher prices) demonstrates the countervailing buyer power of the retailers vis a vis the producers.

volumes.[124] Alternative suppliers need not necessarily be available immediately because the threat that a customer might sponsor entry or vertically integrate can also have similar disciplinary effects. How credible and thus effective such a threat is, is assessed on a case by case basis. Ultimately the credibility of the threat will depend, inter alia, on the financial resources necessary and the time required.

[124] Under such circumstances a meltdown in the aggregate market share post merger can also be expected.

II. Collective dominance

76 The concept of collective dominance[125] describes a market situation in which few companies within an oligopolistic setting engage in **tacit coordination or collusion** with the effect that they do not effectively compete against each other, although they would be able to do so. Mergers in such an environment may harm competition if they provide merging parties with the ability and incentive to coordinate their (future) behaviour in the market (creation of collective dominance) or if they facilitate existing coordination or make it more stable (strengthening of collective dominance).

77 According to § 19 (2) sentence 2 GWB, two or more undertakings are dominant in so far as no substantial competition exists between them and they collectively satisfy the conditions of (single) dominance under § 19 (2) sentence 1.[126] Accordingly, collective dominance exists where there is no substantial competition between the group of coordinating firms, and where their behaviour is not substantially constrained by competition from outsiders.

78 The following sections will set out in more detail what characterizes tacit collusion and will discuss which characteristics of the market are to be analysed more closely due to their effect on market players' incentives (1.). In line with the legal provisions the assessment is based on two analytical steps: First, it will be examined whether there is significant competition between and among the group of coordinating companies ("Innenwettbewerb") (2.). For this assessment, the characteristics of the market have to be evaluated. In this context it has to be determined whether coordination between the coordinating firms is achievable and adequately sustainable, so that it can be expected that substantial competition between them will be eliminated. Secondly, a precondition for stable coordination is that competitive constraints by outsiders ("Aussenwettbewerb") do not jeopardize the common strategy. (3.). If on the basis of an overall assessment of all those characteristics substantial competition cannot be expected, the actual competitive behaviour of the coordinating firms will also be examined (4.). Finally, in the overall assessment of all elements relevant in the particular case it will be determined whether the merger would result in the creation or strengthening of collective dominance (5.).

[125] In the German language version the terms collective and olipolistic dominance are used as synonyms.

[126] Sentence 1 defines market dominance as a position without competitors or without substantial competition (no. 1) or as a paramount market position in relation to the competitors (no. 2).

1. Tacit collusion and the relevant characteristics of the market

79 Tacit collusion that can be qualified as collective dominance can only be expected if a coordination of competitive behaviour is **adequately stable**. This can be expected if the coordinating firms have no incentive to unilaterally deviate from the terms of the coordination. In fact, there is an individual incentive for each of the companies to deviate from the coordination as they may thereby achieve a one-time increase in profit. However, in the long run a company will be worse off if its competitors become aware of the deviation and punish it by returning (at least temporarily) to competitive, non-coordinated behaviour. The one-time increase in profit would be offset by significantly lower profits in future periods.

80 A prerequisite for sustainable coordination is therefore that companies **repeatedly interact with one another in the market** and potentially compete with one another. If, however, interaction only occurs sporadically or at long intervals, the companies can only react with great delay which might eliminate the deterrent effect.

81 Like explicit agreements, tacit coordination can also affect **any aspect of competition**: Companies may agree to raise prices, reduce output, or divide markets according to regions, product features or customer groups. With regard to differentiated products also the pricing mechanism, the pricing strategy or the form of differentiation may, instead of prices as such, be the subject of coordination, as the pricing of differentiated products depend on several factors.

82 As in the case of single-firm dominance, it is of crucial importance to carry out an **overall assessment** of all relevant circumstances of each individual case when it comes to determining the likelihood and the stability of tacit collusion.[127] In merger control the characteristics of the market, including its structure, play a particularly important role.[128] This is mainly due to the fact that (tacit) collusion is not equally likely in any market environment. Certain market-related or company-related factors facilitate or impede tacit collusion. The different structural factors may have different significance depending on the relevant market conditions. It is therefore of crucial importance to provide an overall assessment. Here, the individual structural factors are evaluated with regard to their significance for the market concerned. In addition,

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[127] See BGHZ 49, 367, 377 – *Fensterglas II*; BGH, decision of 22.6.1981, WuW/E BGH 1824, 1827f. – *Tonolli Blei- und Silberhütte Braubach*; and BGH, decision of 11.11.2008, WuW/E DE-R 2451, 2457 – *E.ON/Stadtwerke Eschwege,* para. 39.

[128] See BGH, decision of 2.12.1980, WuW/E BGH 1749, 1753 – *Klöckner/Becorit*; BGH, decision of 4.10.1983, BGHZ 88, 284, 289f. – *Gemeinschaftunternehmen für Mineralölprodukte;* and BGH, decision of 11.11.2008, WuW/E DE-R 2451, 2457 – *E.ON/Stadtwerke Eschwege,* para. 39.

it is examined whether and to what extent these factors in fact encourage coordinated conduct.[129]

83 Market shares are a good starting point for the analysis, also with regard to collective dominance. The higher their combined market shares, the lower the likelihood that the coordinating firms are constrained by outsiders. As for single firm dominance, the GWB also contains a **rebuttable presumption** of collective dominance, based on market share thresholds (§ 19 (3) sentence 2 GWB). According to this provision, companies are presumed to be collectively dominant if three or fewer companies reach a combined market share of 50 percent; or if five or fewer companies reach a combined market share of two thirds. For the calculation of the thresholds the companies are generally considered in the order of the size of their market shares.[130]

84 In the BKartA's decision practice the presumption is only applied in circumstances of a non-liquet, i.e. if despite thorough investigation neither collective dominance nor its absence can be proved definitively. The approach of the OLG Düsseldorf is slightly stricter. In its interpretation the presumption leads to a full shifting of the burden of proof which includes the companies having to come forward with all the necessary facts available to them and produce evidence if needed. In this respect, according to the OLG Düsseldorf, the BKartA's obligation to make all the necessary investigations does not apply. However, the OLG Düsseldorf does impose an obligation to investigate on the BKartA to the extent that the merging parties cannot reasonably be aware of or have access to any facts that are substantial for the assessment of collective dominance. The BKartA has to conduct further investigations if they appear crucial on the basis of the BKartA's special knowledge of the facts.[131]

85 Apart from the level of the market shares a number of other structural characteristics of the market determine the likelihood and stability of coordination. The following factors, in particular, have proved conducive to coordination: A small number of competitors, high barriers to entry, frequent interaction in the market, sufficient market transparency, product homogeneity, low buyer power, symmetry between

[129] See BGH, decision of 8.6.2010, WuW/E DE-R 3067 – *Springer/ProSieben II*, para. 21. Regarding the indication that instead of individual criteria the overall economic mechanism was to be examined see ECJ, judgment of 10.7.2008, C-413/06 P – *Impala/Kommission*, para. 125.

[130] The presumption rule can also be applied if there are sufficient indications that instead of the three or five biggest competitors there are one or two smaller undertakings participating in the tacit collusion; e.g. if the two largest companies hold a substantial interest in a considerably smaller company.

[131] See OLG Düsseldorf, decision of 7.5.2008, VI-Kart 13/07 (V) – *Cargotec*, p. 21f. The issue of the burden of proof has not yet been clarified by the BGH.

the coordinating firms as well as existing links between them, and stable market conditions. In each case the individual factors may carry a different weight depending on their importance in the market concerned.[132] Taking into account the conditions prevailing on the markets concerned, some factors can be hardly relevant for one market while they are decisive for the outcome of the overall assessment of another.

2. Stable coordination within the group of coordinating firms

86 Assessing whether effective competition between the coordinating firms is likely, it is particularly significant whether the market conditions are conducive to coordination.[133] Stable coordination is particularly likely if the following conditions are met:

- **terms of coordination** can be reached sufficiently easy (see a),
- deviation by one member of the group of coordinating firm can be detected by the other members without too much effort (on **market transparency**, see b), and
- credible mechanisms are available to punish deviation from the terms of coordination (on the **deterrent mechanisms**, see c).

87 These preconditions can take various forms depending on the respective market conditions. It is decisive whether the companies are sufficiently incentivized not to deviate. This can only be determined on the basis of an overall assessment of the particular circumstances in each individual case.[134] The preconditions mentioned above are outline below and the market structure factors which typically play a role in the analysis are explained.

a) Reaching terms of coordination

88 The fewer participants are required to establish a sustainable coordination, the more likely coordination will be. A **low number of competitors** makes it easier to reach

[132] See BGH, decision of 8.6.2010, WuW/E DE-R 3067, 3070 – *Springer/ProSieben II*, para. 21, with reference to ECJ, judgment of 10.7.2008, WuW/E EU-R 1498 – *Bertelsmann/Impala*, para. 125f.

[133] See BGH, decision of 8.6.2010, WuW/E DE-R 3067, 3070 – *Springer/ProSieben II*, para. 20, with reference, inter alia, to ECJ, judgment of 10.7.2008, WuW/E EU-R 1498 – *Bertelsmann/Impala*, para. 121f.

[134] See BGH, decision of 11.11.2008, WuW/E DE-R 2451 – *E.ON/Stadtwerke Eschwege*, para. 39; BGH, decision of 20.4.2010, WuW/E DE-R 2905 – *Phonak/GN Store*, para. 55; BGH, decision of 8.6.2010, WuW/E DE-R 3067 – *Springer/ProSieben II*, para. 20f.

and monitor coordination as collusion is normally not explicitly negotiated, but must be achieved tacitly. This correlation is also reflected in the statutory provision on the presumption of dominance under § 19 (3) no. 2 GWB which refers to the number of coordinating firms and their joint market share.

89 In markets with **homogeneous products** it is easier to reach terms of coordination as only few competitive parameters must be coordinated.[135] If, however, the products in a market are vertically or horizontally differentiated,[136] coordination may become difficult. Nevertheless, coordination is still possible. If, for example, each of the coordinating firms has a vertically differentiated product portfolio, coordination becomes more likely, just as in the case of homogeneous products. The same applies if the customer makes detailed specifications in a tender process so that quality competition between the suppliers is more or less eliminated.[137] Horizontal product differentiation can also reinforce anti-competitive tacit collusion. For example, suppliers have less incentive to lower prices, if only few customers could be obtained from rival suppliers due to strong customer preferences.

90 Moreover, extensive **symmetry** of the coordinating firms facilitates their common understanding on the terms of coordination, due to similar interests and incentives. This symmetry can apply to various factors whose significance can vary in each individual case.[138] In this respect, not only market shares have to be taken into account, but also all other factors which are relevant for the suppliers' market position and their competitive interests and incentives. These include in particular the product portfolio, the technology used, the cost structures, the capacities and financial resources available as well as the degree of vertical integration.[139]

91 **Links** between the coordinating firms can also promote tacit collusion. These include structural links in the form of cross-shareholdings or participation in a joint

135 See e.g. BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 267ff. BKartA, decision of 29.4.2009, B8-175/08 – *Total/OMV*, para. 38, 55f.

136 Vertical differentiation means that customers agree which product is better (concerning quality). E.g., (almost) all customers would rather buy a faster than a slower computer if they were sold at the same price.

137 See BKartA, decision of 21.5.2010, B9-13/10 – *Magna/Karmann*, p. 72f. and BKartA, decision of 22.12.2009, B9-84/09 – *Webasto/Edscha*, p. 55.

138 On aspects of symmetry, see BKartA, decision of 11.4.2007, B3-578/06 – *Phonak/GN ReSound*, para. 135ff.; BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 286ff.; BKartA, decision of 16.11.2004, B10-74/04 – *Rethmann/Tönsmeier/GfA Köthen*, para. 81ff.

139 On the symmetry of members of an oligopoly, see e.g. BKartA, decision of 12.3.2007, B8-62/06 – *RWE/Saar Ferngas*, p. 38f.

venture as well as strategic alliances or other contractual cooperations.[140] These links do not have to fulfil the requirements defining affiliated companies under § 36 (2), nor do they have to be based on company law. Links can generally facilitate the exchange of information between the parties on business activities and their objectives. Cross-shareholdings create mutual trust. They can also influence the companies' interests, and thus incentives for tacit coordination, if the potential profits for one's own company (achieved by aggressive competitive conduct) are countervailed by proportional losses resulting from the participation in a competitor. Licensing which provides competitors insights into each others' technology can also facilitate coordination.[141]

92 **Stable market conditions** make markets more susceptible to coordination. If market participants can predict market developments more precisely, they can better identify and punish possible attempts to deviate from the coordination.[142] For the same reason, it is also relevant which market phase is concerned. In early market phases coordination is less likely as market volumes increase dynamically and there is a greater chance to achieve sustainable high profits through competitive action. By offering innovative products or employing innovative processes companies can obtain an advantage while making it harder for competitors to keep up. An innovative company would forego this competitive advantage in the case of coordination.[143] However, even in an innovative market coordination cannot be ruled out, in particular if it specifically targets the innovation strategies.

93 Furthermore, the market phase is significant because coordination has to take into account not only the current market conditions, but also the future **market development**. This is more difficult to predict during a market's early phases, i.e. when the market is characterized by experimentation and when it expands, than during its later phases, i.e. when the market matures, stagnates or declines.[144] For the same reason, markets with mature products, where neither sustainable product

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[140] See e.g. BKartA, decision of 7.3.2008, B8-134/07 – *Shell/HPV,* para. 44ff.; BKartA, decision of 29.4.2009, B8-175/08 – *Total/OMV*, para. 62ff.; BKartA, decision of 16.11.2004, B10-74/04 – *Rethmann/Tönsmeier/GfA Köthen*, para. 108ff.

[141] On cross-licensing as a factor supporting oligopolistic parallel conduct see BKartA, decision of 11.4.2007, B3-578/06 – *Phonak/GN ReSound*, para. 180ff.

[142] See BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 257ff.

[143] See also BKartA, decision of 16.12.2009, B3-91/09 – *Celanese (Ticona)/FACT*, para. 85ff.

[144] See e.g. BKartA, decision of 13.8.2007, B7-61/07 – *O2/T-Mobile/Vodafone*, para. 59ff.

innovations nor process innovations take place (any longer), are generally more susceptible to coordination than dynamic markets that are driven by innovation.[145]

94 The characteristics of **demand** also represent a key factor of market stability. Tacit coordination is easier when demand remains stable and is not subject to any major (cyclical) fluctuations.[146] In contrast, if developments in demand are hard to predict, coordination is difficult to achieve. This is because the relevant competitive parameters must be readjusted more often than in the case of constant demand or in the case of demand that develops steadily (rising or falling demand). Lower price elasticity of demand[147] tends to increase the incentives for coordination: The more inelastic the demand, the greater the potential profits from coordination as price increases result only in a minimal decrease in quantities sold. However, the effect of price elasticity on the stability of coordination points in both directions: a given price reduction results in a large increase in demand which, on the one hand, makes deviations more attractive and on the other hand renders retaliatory measures more effective.

95 **Buyer power**, exerted by a few large buyers or several small customers bundling their demand, can make it difficult to establish tacit collusion. Customers can use their bargaining power to obtain the most favourable terms and constrain suppliers' ability to set prices.[148] Powerful buyers may also be in a position to induce individual suppliers to deviate from the terms of coordination.[149] Moreover, if a market is characterized by lumpy orders, i.e. large infrequent orders, companies have a stronger incentive to deviate and coordination becomes less stable. In addition, powerful buyers can threaten to integrate vertically or sponsor entry.[150] In contrast,

[145] On a matured market, see e.g. BKartA, decision of 16.11.2004, B10-74/04 – *Rethmann/Tönsmeier/GfA Köthen*, para. 78ff.

[146] Seasonal and thus predictable fluctuations, however, usually do not affect market stability significantly. See e.g. BKartA, decision 27.12.2010, B2-71-10 – *Van Drie/Alpuro*, para. 156.

[147] In particular, low price elasticity can emanate from the fact that in the case of price increases there are no alternatives which customers can or would like to switch to. See e.g. BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 266.

[148] See e.g. BKartA, decision of 16.12.2009, B3-91/09 – *Celanese (Ticona)/FACT*, para. 105ff.

[149] A precondition for this is that at least substantial parts of the demand can be easily shifted and that the demand does not necessarily have to be divided up between several companies. See BGH, decision of 8.6.2010, WuW/E DE-R 3067,*Springer/ProSieben II*, para. 31; BKartA, decision of 17.3.2011, B6-94/10 – *ProSiebenSat.1 Media/RTL interactive*, para. 124f.

[150] Vertical integration does not represent an effective threat if e.g. it is not economically feasible for a company to produce the relevant product itself, or not possible because of a lack of expertise. See e.g. BKartA, decision of 21.5.2010, B9-13/10 – *Magna/Karmann*, p. 86ff. and BKartA, decision of 22.12.2009, B9-84/09 – *Webasto/Edscha*, p. 62ff.

fragmented demand and low interest in the competitive award of orders can favour coordination.[151]

b) Transparency

96 A further condition for stable coordination is that deviation from the terms of coordination can be detected without any substantial effort. This requires a sufficient level of transparency.[152] In some markets transparency is already relatively high on account of the market conditions; still, sometimes market players can also influence and further increase transparency. If the level of transparency enables the coordinating firms to detect any deviation by other competitors, this is sufficient to allow for and facilitate tacit collusion.[153] Complete transparency of the coordinated parameters is not required. It is sufficient that there is a serious risk that deviations will be detected.

97 In particular the following characteristics of a market are conducive to transparency: A small **number of competitors** leads to higher transparency as the effort to monitor the conduct of the other coordinating firms decreases. In markets with **homogeneous products** for instance transparency generally tends to be higher because it is easier to detect deviation from the terms of coordination, if fewer parameters of competition have to be monitored.[154] In contrast, it can be more difficult to detect deviation in the case of products that are manufactured according to the specific requirements of individual customers.[155]

98 Furthermore, regulatory requirements can increase transparency.[156] The same applies if **market conditions** are very stable because this makes it easier to identify changes quickly and interpret them correctly. In contrast, if demand fluctuates considerably in a market, it is more difficult to detect changes in other suppliers'

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[151] See e.g. BKartA, decision of 16.11.2004, B10-74/04 – *Rethmann/Tönsmeier/GfA Köthen*, para. 131f.

[152] On transparency in internal competition, see e.g. BKartA, decision of 7.3.2008, B8-134/07 – *Shell/HPV,* para. 40f.; or BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 270ff.; BKartA, decision of 11.4.2007, B3-578/06 – *Phonak/GN ReSound*, para. 186ff.

[153] On the required degree of market transparency see CFI, decision of 13.7.2006, T-464/04 – *Impala/Commission*, para. 440.

[154] On product homogeneity and price and cost transparency related to this, see e.g. BKartA, decision of 12.3.2007, B8-62/06 – *RWE/Saar Ferngas,* p. 40; BKartA, decision of 29.9.2006, B1-169/05 – *FIMAG /Züblin*, para. 60ff.

[155] See e.g. BKartA, decision of 5.12.2007, B3-169/07 – *Renolit/Benecke/Kaliko*, para. 58.

[156] Examples of this can be found in particular in agricultural markets; see e.g. BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 103ff., 274ff.

market behaviour and evaluate them in a reliable way.[157] For example, cyclical variations in sales could be misinterpreted as the result of deviation by other companies, although they are the result of cyclical changes.

99 Transparency also depends on **how transactions are entered into**. If suppliers and purchasers negotiate their transactions bilaterally, the market is less transparent than in the case of business transactions that are carried out publicly, e.g. through stock exchanges or tender procedures.[158] Bilateral negotiations provide an opportunity for example to agree on secret rebates. Other companies will find it hard to detect these. However, market players may, to some extent, obtain information on bilateral negotiations of their competitors from customers.[159] In a duopoly situation, suppliers can draw conclusions on their competitor's offers from the reactions of customers to their own offers.

100 **Structural links** between the coordinating firms can also facilitate the detection of deviations, because such links can be favourable to the exchange of information. The following activities may also increase transparency (**transparency mechanisms**): activities of industry associations and information exchanges, in particular relating to prices,[160] the publication of price lists or market statistics, public announcements of future conduct, and the agreement of most favoured-customer clauses. The faster and the more detailed information is made available, the greater the effect on transparency.

c) Credible deterrent mechanism

101 For coordination to be stable it is necessary that deviation of a coordinating firm can not only be detected, but also punished.[161] In this context it is sufficient that the other coordinating firms stop complying with the coordinated conduct and (at least

[157] This applies e.g. to natural products which depend on harvest results and are thus subject to large fluctuations, see e.g. BKartA, decision of 19.7.2006, B2-41/06 – *BayWa/NSP*, para. 40.

[158] On transparency through tender procedures see e.g. BKartA, decision of 16.11.2004, B10-74/04 – *Rethmann/Tönsmeier/GfA Köthen*, para. 75; BKartA, decision of 21.5.2010, B9-13/10 – *Magna/Karmann*, p. 66ff.; BKartA, decision of 22.12.2009, B9-84/09 – *Webasto/Edscha*, p. 55, 65ff.

[159] See OLG Düsseldorf, decision of 3.12.2008, WuW/E DE-R 2593 – *Springer/ProSieben*, para. 88; BKartA, decision of 17.3.2011, B6-94/10 – *ProSiebenSat.1 Media/RTL interactive*, para. 82.

[160] See BKartA, decision of 11.4.2007, B3-578/06 – *Phonak/GN ReSound*, para. 196ff.

[161] However, retaliation is clearly not possible in all cases, see e.g. BKartA, decision of 13.11.2008, B3-88/09 – *Sonic Healthcare/Labor Lademannbogen*, para. 116.

temporarily) return to normal competitive behaviour.[162] This already amounts to a **punishment**. The quicker and more targeted the other coordinating firms can react, the lower is the deviating company's benefit or profit that it achieves by deviating from the terms of coordination. If the coordinating companies predict this reaction, they do not have an incentive to deviate.[163]

102 For retaliatory measures to have a **deterrent effect,** they must be must be credible and it must be feasible to impose them in a sufficiently timely manner after the deviation. Deterrence is particularly effective if future profits, which would be foregone as a result of the retaliation, are particularly important to the deviating company.[164] It is not necessary that retaliatory measures have already been actually applied in the market in order to prove that effective retaliatory mechanisms are in place. It is sufficient that retaliation is feasible and it appears likely that it would be applied.

103 In this context, in particular the following factors may play a role: whether the coordinating firms compete for sales frequently and within shorter time intervals, whether there are "multi-market contacts" between them, whether their capacity utilisation is high, and whether market conditions are sufficiently stable. Furthermore, retaliation can also become easier if homogenous products are concerned, if there is some symmetry between the coordinating companies, or if there are structural links between them.[165]

104 **Lumpy orders**, which involve long intervals between the transactions, create a situation where "punishment" can only be imposed with a time lag and, given the volumes of the transactions, at significantly higher costs. As a consequence, the retaliation mechanism loses effectiveness. In contrast, the coordinating firms are able to detect and to react to deviation timely, if many transactions are concluded within short time intervals and each transaction has a typical volume and only accounts for a relatively low transaction volume compared with the overall market

[162] In individual cases other retaliatory measures may be feasible, e.g. the withdrawal of orders. See e.g. BKartA, decision of 16.11.2004, B10-74/04 – *Rethmann/Tönsmeier/GfA Köthen*, para. 95.

[163] See e.g. BKartA, decision of 21.5.2010, B9-13/10 – *Magna/Karmann*, p. 115f.

[164] Whether the expected overall loss is higher than the additional profit that could be achieved by deviating from the coordinated conduct depends, among other factors, on the time intervals in which additional profits or losses occur. On the deterrent effect resulting from the significance of a possible loss of orders, see BKartA, decision of 16.11.2004, B10-74/04 – *Rethmann/Tönsmeier/GfA Köthen*, para. 90ff.

[165] See e.g. BKartA, decision of 20.11.2003, B8-84/03 – *E.ON/Stadtwerke Lübeck,* p. 32; BKartA, decision of 2.12.2003, B9-91/03 – *DB Regio u.a./üstra intalliance AG*, p. 56; BKartA, decision of 28.10.2004, B10-86/04 – *Schneider & Söhne/Classen*, para. 176f. 199, 245, 262, 306 und 322; BKartA, decision of 7.3.2008, B8-134/07 – *Shell/HPV*, para. 61, 64.

volume.[166] Furthermore, if the coordinating firms interact in several markets (**multi-market contacts**) the potential for retaliation increases. In this case, deviations from the terms of coordination cannot only be punished in the market affected, but also in any of the other markets.

105 The more **spare capacity** is available to them, the more effectively the coordinating firms can punish deviating conduct. Overcapacities can thus increase the credibility of threatened retaliation and therefore increase its deterrent effect.[167] On the other hand, effective retaliation becomes more difficult with rapidly changing **market conditions**, e.g. in high-tech industries with short product life cycles. In this case, a reaction based on previous market conditions can lose credibility or become impracticable due to the change. In many cases it can be easier to punish deviating conduct, if **homogenous products** are at stake. In contrast, in the case of differentiated products, strong customer preferences can limit the effectiveness of retaliation.

106 The **symmetry** of the coordinating firms can facilitate coordination, because for companies with similar market positions it is often easier to punish a deviating company.[168] The more symmetric the coordinating firms are, the more likely it is that their incentives are similar. This is because the effects on profits gained from competitive action, i.e. deviating conduct, and of ensuing retaliatory measures are also comparable. Therefore, it is likely that they will refrain from deviating conduct. However, if a smaller coordinating firm (e.g. in terms of current market share) has sufficient spare capacity available, it can also effectively punish a larger coordinating firm.[169] An asymmetrical allocation of capacities or capacity utilisation tends to have a destabilising effect because companies with spare capacity do not only have the incentive to increase demand by deviating, but also hardly have to fear retaliation from companies with very restricted capacities. If there are multi-market contacts, asymmetry in one market can also be compensated for in another.

107 **Structural links** between the coordinating firms can also increase the potential for retaliation. If the coordinating firms are linked via a joint venture for instance, they

[166] See e.g BKartA, decision of 17.3.2011, B6-94/10 – *ProSiebenSat.1 Media/RTL interactive*, para. 85ff., 99.

[167] However, the effect of free capacities on the stability of coordination is ambivalent: On the one hand, overcapacities can have a stabilising effect as they add more credibility to the threat of retaliation. On the other hand, overcapacities can result in destabilisation as they provide scope for competitive initiatives and an incentive for deviation.

[168] See e.g. BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 299.

[169] The threat by a smaller supplier could also become more credible if the opportunities for additional profits resulting from a price reduction (with corresponding capacities) are relatively attractive while losses based on the quantities sold so far are relatively low.

can punish deviating conduct by reducing their investments in the joint venture or by disregarding the deviating company's interests when taking decisions in the joint venture's board.[170]

3. Constraints by outside competitors

108 In general, tacit coordination is unstable and cannot be maintained if competitors outside the group of coordinating firms are able to exert sufficient competitive pressure on this group (external competition). In this case it may not be feasible to realize the advantages of coordination or at least the benefits of coordination will be less significant. Both current competitors and potential competitors may be in a position to call stable coordination into question. Both groups of companies must therefore be taken into account as outsiders.[171] Customers can play a similar role. Their effect on coordination is described above in the context of the coordination mechanism (B.II.2.a)).[172]

109 Competitive constraints exerted by outsiders are assessed in a similar methodology as in the context of single firm dominance. In order to evaluate the competitive pressure exerted by **current competitors**, market shares are again a suitable starting point, i.e. the joint market share held by the coordinating firms on the one hand and the individual market shares of the outsiders on the other hand.

110 A smaller competitor is in a particularly good position to exert competitive pressure on the coordinating firms in particular in the following circumstances: he has spare capacities available, can rely on more favourable cost structures, is able to pursue a different market strategy for other reasons, or is known to have already taken innovative competitive initiatives in the past (**maverick firm**).[173] However, outsiders are less likely to restrain the coordinating firms if they are linked to one or several of the coordinating firms, i.e. through minority interests or ongoing business relations (in the markets affected or in other markets), as these links will be taken into

[170] On the significance of interlocks see e.g. BKartA, Sektoruntersuchung Kraftstoffe, Abschlussbericht, May 2011, p. 55ff., available at http://www.bundeskartellamt.de; also BKartA, decision of 7.3.2008, B8-134/07 – *Shell/HPV*, para. 44ff.; BKartA, decision of 29.4.2009, B8-175/08 – *Total/OMV*, para. 62ff.

[171] Under certain circumstances a potential control function may already be sufficient to curb oligopolistic market dominance, see BKartA, decision of 3.8.2006, B2-90/05 – *Pfeifer & Langen/Jülich*, para. 121.

[172] See para. 95 above.

[173] For this reason, the fact that a competitor's market share is small does not mean that the competitive pressure he exerts is insignificant; see e.g. BKartA, decision of 16.12.2009, B3-91/09 – *Celanese (Ticona)/FACT*, para. 113.

account when the outsiders decide on their business strategy. As a consequence, competition will be less intense.[174]

111 Barriers to entry play an important role as to whether **potential competition** is sufficient to constrain the coordinating firms and to destabilize coordination.[175] Higher profits, which are achieved due to coordination in a certain market, create incentives for new entry. If there are no barriers to entry, a new entrant can gain customers by deviating from the prevailing coordinated behaviour. Even if the new entrant largely adopts the coordinated conduct, entry can destabilize tacit coordination. This is the case because the increasing number of participants results in declining profits for each coordinating firm.[176]

4. Actual competitive behaviour

112 If it has been ascertained that the characteristics of the market point to sustainable tacit collusion, the actual competitive behaviour in the affected market also has to be taken into account.[177] In particular, if the investigation focuses on the strengthening of existing collective dominance, the pre-merger competitive behaviour of the coordinating firms as well as the market outcome can give indications whether there is in fact collective dominance, i.e. whether the incentives predicted on the basis of the market's characteristics are indeed effective and have lead to coordinated behaviour.[178] However, when the observed market reality is interpreted it must be taken into account that it is not possible to unambiguously deduce neither tacit collusion nor effective competition from the market outcome.

113 The following factors indicate the presence of stable coordination: no significant long-term changes in market shares occur,[179] there are hardly any market entries or exits, prices move in parallel, and neither repeated aggressive competitive action

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[174] See e.g. BKartA, decision of 16.11.2004, B10-74/04 – *Rethmann/Tönsmeier/GfA Köthen*, para. 123ff. On interlocks as an element of external competition, see also BKartA, decision of 7.3.2008, B8-134/07 – *Shell/HPV,* para. 44 ff.

[175] On high barriers to entry see e.g. BKartA, decision of 13.8.2007, B7-61/07 – *O2/T-Mobile/Vodafone*, para. 149.

[176] A market entry, which in theory would easily be possible, may not be able to prevent the coordination of conduct if the members of an oligopoly can credibly threaten to take aggressive competitive action and thereby prevent new suppliers from entering the market.

[177] See BGH, decision of 20.4.2010, WuW/E DE-R 2905 – *Phonak/GN Store*, para. 72.

[178] On the evaluation of the pre-merger competitive behaviour see e.g. BKartA, decision of 13.8.2007, B7-61/07 – *O2/T-Mobile/Vodafone*, para. 153f.; BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 300ff.; BKartA, decision of 11.4.2007, B3-578/06 – *Phonak/GN ReSound*, para. 202ff.; revoked by BGH, decision of 20.4.2010, WuW/E DE-R 2905 – *Phonak/GN Store.*

[179] See e.g. BKartA, decision of 16.11.2004, B10-74/04 – *Rethmann/Tönsmeier/GfA Köthen*, para. 74.

nor substantial competition on the basis of product innovation can be observed. How much weight is to be attributed to each of those observations depends on the respective competitive environment and the competitive parameters used on the market.[180] However, individual price movements do not necessarily count against stable coordination as they could for example also reflect retaliation by one of the coordinating firms against deviation from the terms of coordination. Moreover, the prices of homogeneous products do not have to match completely in order to indicate coordination. Rather, they may vary within a narrow range. The more substantially the merger changes the market conditions, the less significant the actual competitive process pre-merger is to predict the competitive conditions post merger.

114 If a market has long been regulated, the market outcome (in terms of prices or territories) achieved under those conditions could serve as a focal point of reference for tacit collusion. A past cartel can also indicate the presence of sustainable coordination in the market concerned, unless the market conditions have changed significantly since or can be expected to change in the near future.

5. Effects of the concentration

115 In order to specify whether a concentration creates or strengthens collective dominance, it is essential to determine to what extent it changes market conditions in a way for them to **enable, facilitate, or stabilize coordination or make it more effective**. Thus, the analysis of the concentration has to consider not only the preconditions and incentives for tacit collusion in the relevant market. It also has to assess in how far the concentration causes any changes to market conditions that facilitate stable coordination.

116 Effective competition pre-merger can be transformed into a situation of collective dominance if the concentration changes the market conditions to the extent that stable coordination is likely post merger. This can be the case, for instance, if coordination has failed so far mainly because a maverick has been present on the market with aggressive competitive initiatives. If the concentration targets the maverick, it can be expected to facilitate coordination in the future.

117 Existing collective dominance can be strengthened if the concentration further improves the preconditions for stable coordination. For example, a merger between coordinating firms reduces the number of the group's members and may also

[180] E.g. the structure of a rebate system which protects the other oligopolists can also be an indication of "peaceful" oligopolistic behaviour. See OLG Düsseldorf, decision of 3.12.2008, WuW/E DE-R 2593 – *Springer/ProSieben*, para. 90.

increase the group's symmetry.[181] However, not every change in the market conditions, which generally has a favourable effect on tacit coordination, will always result in the strengthening of collective dominance.[182] As a rule, collective dominance is strengthened if an outside competitor is acquired by one of the coordinating firms, thereby improving its market position. Reducing the competitive restraints imposed by outside competitors usually stabilises coordination between all the coordinating firms unless the concentration changes the balance of power within this group in such a way that deviation from the terms of coordination is to be expected.[183]

118 Where empirical evidence is available on past tacit collusion, the standard of proof with regard to market conditions that are conducive to coordination is lower in comparison to a situation where the creation of collective dominance is at stake.

III. Buyer power

119 While countervailing buyer power can impose competitive constraints on dominant suppliers, it is equally possible that as a result of a concentration one or more companies can gain or strengthen a dominant position on the demand side.

120 For the purposes of merger control, demand-side dominance is assessed in the same way as supply-side dominance according to the criteria set out in § 19 (2) sentence 1 GWB. In the assessment of demand-side dominance, one criterion is particularly relevant, i.e. whether "the counterparties cannot switch to other customers" (this criterion was added by the 5th amendment to the GWB).[184] In each case, it has to be evaluated whether there is one or several customers that are indispensable for suppliers on a particular product and geographic market. This is the case, in particular, if suppliers cannot switch to a different distribution channel.

121 As merger control assesses lasting changes in market structure, it is not the bilateral relations between individual suppliers and customers that are relevant but the overall market position of the demand side. It is sufficient to detect a competition problem in its initial stage, when anti-competitive effects are seldom certain

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181 On increasing symmetry see e.g. BKartA, decision of 21.5.2010, B9-13/10 – *Magna/Karmann*, p. 63f.

182 On negation of a strengthening effect although a joint venture was established in a neighbouring product market see e.g. BKartA, decision of 13.8.2007, B7-61/07 – *O2/T-Mobile/Vodafone*, para. 161ff.

183 See BGH, decision of 8.6.2010, WuW/E DE-R 3067 – *Springer/ProSieben II*, para. 45.

184 See Bundestagsdrucksache 11/4610, p. 10f., 17 (then: § 22 (2) no. 2 GWB, now: § 19 (2) no. 2 GWB is ammended "to include demand side elements especially in order to improve merger control").

(*Gefährdungstatbestand*). This tends to be the case if a substantial number of companies depend on individual customers or a group of customers because they cannot switch to any adequate or reasonable alternative customers. In addition, in the case of demand-side dominance, it has to be assessed whether the dominant company has a paramount position as a customer compared to the other customers. As in the case of dominant suppliers, it is also necessary to assess all market conditions in order to determine whether a buyer is dominant. In this overall assessment, the relative negotiating power of the parties within their bilateral supply relations is of particular importance.[185]

122 In certain cases the monopsony model, which mirrors the concept of supply-side monopoly, provides a useful reference point to assess supply-side dominance.[186] In many cases, however, the monopsony model cannot adequately describe the situation in more complex procurement markets because in these markets it is not always clear how market power is distributed between suppliers and customers. Often, both sides of the market are concentrated to a certain level. Furthermore, procurement is conducted in the framework of bilateral negotiations, which provide some scope for the agreement of individual contractual conditions on prices, quantities and other terms of supply.

123 If a customer has both, buyer power and a paramount market position on the downstream market, he can utilize his market power as a customer in order to strengthen his market position on the downstream market, provided that his competitors on the downstream market cannot obtain similar advantages from a comparable situation of dependency. This is particularly relevant if procurement prices are a significant competitive parameter on the downstream market (e.g. if the value added at this level is limited). The market position on the downstream market which has been strengthened this way can in turn be used to strengthen buyer power even further. This may accelerate concentration both on the supply-side and on the demand-side.[187] Moreover, increasing buyer power can also reduce the competitive pressure exerted by other competitors even further. For example, they may have to pay higher procurement prices than before because suppliers may

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[185] Whether and to what extent a party has excessive negotiating power in bilateral relations will depend on the relative economic consequence of a failure of negotiations on the one hand and remaining outside options on the other. These are the factors that determine the balance of negotiating power between the parties in bilateral negotiations. But this will differ from supplier to supplier depending on the circumstances.

[186] This is the case if one powerful customer faces a large number of small suppliers who are completely interchangeable from his point of view. A monopsonist can then enforce a price below the competitive level by reducing his demand.

[187] This effect is often referred to as "spiral effect". The consequence of this is that smaller competitors are forced out of the market.

compensate for powerful buyers' low prices by increasing prices for less powerful customers.[188]

[188] This is referred to as "waterbed effect".

C. Vertical mergers

124 In a vertical merger, the merging parties are active on different (product) markets along the value chain of a product. Consequently, they have at least a potential supplier-customer relationship.[189] The company active on the downstream market buys products from the company active on the upstream market to use them as input for its own production. A vertical merger exists, for example, where a manufacturer takes over the supplier of a primary product (primary product supplier) by means of a so-called backward integration, or the buyer (retailer or processor) of one of its products by means of a forward integration.

125 Compared to horizontal mergers, vertical mergers have a less pronounced and more indirect effect on competition because they do not lead to a reduction of the number of actual competitors in the market. Nevertheless, vertical mergers can also lead to competitive restraints and thus create or strengthen single firm dominance (I.) or collective dominance (II.). The anti-competitive effects described below may not only arise if a company becomes vertically integrated for the first time. They can also occur if a company that is already vertically integrated acquires another company which operates on a level of the value chain on which the acquirer is already active. In such a case, both the horizontal and the vertical effects of the merger are examined.[190]

126 Vertical integration can enable a company to be active at several stages of the production chain or supply chain and thus avoid inefficiencies. For example, transaction costs can be reduced or coordination problems and uncertainties with regard to security of supply, product quality, etc. can be avoided. Such efficiencies usually strengthen the competitive position of the company but - provided there is enough competitive pressure - these efficiencies can also be beneficial for customers.

127 Vertical integration also changes the incentives of suppliers which are relevant for their market behaviour. For example, a vertically integrated company usually imposes a mark-up only on its final products, while it is able to procure the primary products in-house at manufacturing costs. Consequently, integrated companies can avoid the additional mark-up on primary products which would usually be applied by suppliers with market power. In addition, the company in general has an incentive to charge a mark-up on the final product that is lower than the sum of the mark-ups on

[189] An actual customer relationship is not required for a merger to be classified as a vertical merger.

[190] See also information in fn. 16.

the primary and the final product absent the merger.[191] In this respect, vertical integration tends to have a dampening effect on prices and may contribute to an improved supply situation.

I. Single-firm dominance

128 Anti-competitive effects can, however, occur if the merger enables the company to impede actual or potential competition. Such impediments can be the result of strategies that raise rivals' costs, lower rivals' revenues or raise barriers to entry.

129 Depending on the type of vertical merger, there are different ways for these anti-competitive effects to emerge: Input foreclosure denotes a scenario where competitors' access to an upstream market or to products sold thereon is hampered or eliminated (1.). Customer foreclosure denotes a scenario where competitors' access to a downstream market or customers who purchase goods thereon is hampered or eliminated (2.). By vertical integration a company in addition may gain access to confidential business information on the activities of its competitors which may impede them in their competitive activities (3.). To assess the effects of a vertical merger, it has to be considered in which way the merger affects the ability and incentives for such strategies (4.).

130 With regard to input or customer foreclosure, anti-competitive effects may occur in the event of complete or partial foreclosure. In the case of partial foreclosure it can be sufficient that competitors suffer a distinct impairment of their cost or revenue situation. With respect to potential competition and the level of barriers to entry it is relevant to what extent the vertically integrated company is able to influence the purchase conditions for and the available quantities of inputs or the sales opportunities on the downstream market. This is important because the profitability of potential entrants depends on whether they will be able to purchase significant inputs in sufficient quantities and at competitive conditions or whether they can expect satisfactory sales opportunities, and their expected profitability determines how likely their market entry will be.

131 Anti-competitive effects may not be limited to circumstances in which the merger creates new links to upstream or downstream markets for the acquiring company. Competition may also be impeded if the acquiring company safeguards or strengthens pre-existing business or contractual relations by establishing a structural link. Potential competitors could be discouraged from entry or actual

[191] In economic literature this aspect is summarized under the term 'double mark-up' or 'double marginalization'.

competitors may refrain from expansion or reduce their competitive initiatives.[192] In particular if the acquiring company is already dominant on one of the affected markets, it may be sufficient for the strengthening of this market position if established demand or supply relations are safeguarded or strengthened as a result of a vertical merger (e.g. through the acquisition of a minority share).[193]

132 As a rule, a vertical merger will not give rise to competition concerns unless at least one of the merging parties has significant market power on at least one of the affected markets. The stronger the pre-existing market position of one or both of the merging companies, the greater the risk that the merger will lead to anti-competitive vertical effects.

1. Input foreclosure

133 If a company acquires a major supplier of an essential input, this may lead to foreclosure effects on the upstream market. The vertically integrated company may hamper the access of its competitors on the downstream market to these inputs by, in particular, raising prices, degrading quality, making supply conditions less favourable, supplying with a significant delay or refusing to supply at all. Such a foreclosure strategy of the integrated company is the more likely, the better its ability (a) and the greater its incentive (b) to pursue such a strategy.

a) Ability to foreclose

134 The ability to hamper competitors on the downstream market by foreclosing access to essential inputs is mainly determined by two factors, the relevance of the input with regard to production cost in the downstream market and the possibilities for competitors to switch to alternative suppliers.

135 The lower the respective input's share in the total cost of downstream production, the less the integrated company is able to effectively harm its competitors e.g. by raising prices. In contrast, the more the competitors on the downstream market **depend on the input** from the vertically integrated company, the more likely it is

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[192] See BGH, decision of 7.2.2006, WuW/E DE-R 1681 – *DB Regio/üstra*, para. 49 with further references.

[193] See e.g. OLG Düsseldorf, decision of 6.6.2007, WuW/E DE-R 2094ff. – *E.ON/Eschwege*, para. 85ff.; as well as BGH, decision of 11.11.2008 WuW/E DE-R 2451ff. – *E.ON/Stadtwerke Eschwege*, para. 61f.

that their market position may be negatively affected.[194] This is the case, for example, if there is no equivalent supplier on the upstream market or if switching costs are substantial.[195] The same applies if the merging company operating on the upstream market already holds a dominant position.

b) Incentive to foreclose

136 The incentive of the integrated company to foreclose its competitors from essential inputs depends on the degree to which such a strategy would be profitable. As a rule, a foreclosure strategy has two **effects on profits,** which point in opposite directions: If the vertically integrated company raises prices and reduces sales to its downstream competitors, this may lead to reduced profits on the upstream market. On the other hand, its sales and profits on the downstream market may increase to the extent that it succeeds in hampering its competitors, capturing at least some of their customers, and diverting (all or part of) their sales to its own products.[196] A foreclosure strategy is profitable if the rise in profits on the downstream market outweighs the fall in profits on the upstream market.[197]

137 Different factors contribute to the prospective changes in profits, in particular, the (relative) margins and the sales volume of the different products concerned.[198] In addition, the ability to increase profits on the downstream market also depends on the elasticity of demand and thus the extent to which the integrated company can

[194] When considering the ability to switch suppliers, imminent market entries of potential competitors can, where applicable, also be taken into account; see e.g., BKartA, Case Summary of 18.5.2009, B5-45/09 – *KSB/Kagema*, available at http://www.bundeskartellamt.de.

[195] See e.g. BKartA, decision of 18.7.2008, B5-84/08 – *STIHL/ZAMA*, para. 17.

[196] If there is a sufficient number of alternative suppliers for customers to switch to and if suppliers are interested in a high capacity utilization, the risk that the integrated company will pursue a foreclosure strategy is rather low. See e.g. BKartA, decision of 26.09.2006, B3-121/06 – *Kemira Oyl/Cytec Industries*, p. 15f.

[197] A foreclosure strategy will be unlikely, for example, if the integrated company is mainly active on the upstream market and does not have (and will not be able to develop in the short term) the necessary capacities in the downstream market to entice customers away from their previous suppliers. See e.g. BKartA, decision of 20.5.2010, B5-17/10 – *Hunter Douglas/Faber-Benthin*, para. 111ff.

[198] Profit reductions on the upstream market are harder to compensate for if, e.g., a substantially larger sales volume is achieved on the upstream market than on the downstream market (for example, because the company is active on the upstream global market but only on a downstream domestic market).

gain customers. The incentives of the vertically integrated company also depend on the size of shareholding in the upstream or downstream company.[199]

2. Customer foreclosure

138 Customer foreclosure may occur if a manufacturer acquires an important customer of its products or acquires control of a significant distribution channel as a result of the merger.[200] The vertically integrated company could impede access to these customers to the detriment of its competitors. The acquired customer or distributor may cease or reduce purchases from competitors on the upstream market or purchase products only at terms that are less favourable for them. In addition, the vertically integrated distributor may hamper the sales of its competitors on the upstream market by selling their products only at a higher price or less favourable terms on the downstream market.

a) Ability to foreclosure

139 The ability of the integrated company to impede its competitors on the upstream market by foreclosing access to (potential) customers depends in particular on the competitors' ability to switch to alternative customers, the extent to which their sales may be reduced as a consequence of the foreclosure strategy and the resulting effects on their costs.

140 The possibilities for competitors to switch to alternative customers are the more limited, the more market power the merging company already has on the downstream market.[201] This applies in particular, if the vertically integrated company is an **indispensable customer** on the downstream market. In such a case, the vertically integrated company is in a position to foreclose its competitors. To assess whether foreclosure is feasible it has to be taken into account whether and to what extent competitors still have access to a sufficient number of customers or whether

[199] In the case of input foreclosure, the incentive to foreclose will be increased if e.g. a 50% share in a supplier of a primary product is acquired, since the acquiring company completely participates in the profit increase on the downstream market, but only partially participates in the profit loss suffered by the input supplier.

[200] Other foreclosure effects are possible if a customer acquires shares in an input supplier and thus gains an incentive to purchase from this supplier, since he will also have a share of the supplier's profits. See e.g. BKartA, decision of 15.11.2007, B1-190/07 – *Faber/Langenthal*, p. 31ff.

[201] In general, it is not sufficient that the vertically integrated company is merely capable of foreclosing its competitors on the upstream market from a sales channel which so far has basically only been a potential option and in which the competitors are largely not interested; see BKartA, decision of 21.6.2005, B7-38/05 – *TeleColumbus (BC Partners)/Ish*, para. 247.

the latter are already locked-in to the vertically integrated company or other competitors.[202]

141 If, as a result of a foreclosure strategy, the sales volumes of the competitors on the upstream market are reduced, their competitive position may even further deteriorate in cases where efficiencies of scale and scope or network effects exist.

b) Incentive to foreclose

142 As in the case of input foreclosure, the incentive to foreclose customers is determined by the potential benefits (additional profits) of hampering or eliminating competitors on the upstream market and the costs (foregone profits) such a strategy entails on the downstream market. The costs of a foreclosure strategy will for example be higher if competitors are able to produce the inputs at lower costs or in better quality or if the merging companies' capacity to produce the input is constrained.

143 If the vertically integrated company reduces the quantities it purchases from its competitors on the upstream market post-merger in order to raise its own sales on this market, it has to consider the following: On the one hand, production and distribution costs on the downstream market may rise if its competitors can offer the input at a lower price. On the other hand, the company may strengthen its market position on the upstream market. This may enable the company to raise its prices and thus its profits on the upstream market.

3. Access to commercially sensitive information

144 In addition, after the vertical merger, the merging company may have access to confidential data on the business activities of its competitors. From the perspective of the vertically integrated company, competitors on the downstream market are at the same time customers on the upstream market. By acquiring a **supplier** the merged company may gain competitively-relevant information on its competitors on the downstream market, provided it supplies or continues to supply them with inputs.[203] If a competitor plans competitive initiatives, this might necessitate some coordination with the supplier of the input because, for example, the specifications of the input need to be adapted to the changes planned for the end product[204] or

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[202] See BKartA, decision of 15.11.2007, B1-190/07 – *Faber/Langenthal*, para. 87, 108, 112.

[203] See e.g. BKartA, decision of 20.6.2006, B4-32/06 – *Putzmeister/Esser*, p. 44f.

[204] See e.g. BKartA, decision of 18.7.2008, B5-84/08 – *STIHL/ZAMA*, para. 65-71.

additional supplies are required to satisfy the increased demand expected after promotional activities.

145 By acquiring a **customer**, the merged company could for example gain information on offers of its competitors (on the upstream market).[205] It would thus be able to detect their competitive initiatives at an early stage and react accordingly. This may have a negative impact on the ability and incentive of the merging parties' competitors to compete.

4. Effects of the merger

146 In order to assess whether a vertical merger will create or strengthen a dominant position the impact of the merger on the merging parties' ability and incentive to pursue foreclosure strategies and on their access to confidential data of competitors has to be determined. The more market power the integrated company has pre-merger on one of the affected markets, the more likely are anti-competitive effects post-merger.

147 While it is not impossible that a vertical merger will lead to the creation of dominance, it is more common for a vertical merger to strengthen already pre-existing dominance. If a dominant company integrates (backwards) into the upstream market by acquiring a major input supplier, its position on the downstream market will, in many cases, improve, provided it has the ability and incentive to pursue a foreclosure strategy. Depending on the magnitude of market power the likelihood of increased barriers to entry and the risk that potential competitors are deterred from market entry may already justify a critical assessment. Moreover, dominance can be strengthened even by the (partial) acquisition of a relatively small customer if a company pursues a long-term business strategy to permanently safeguard its distribution channels by acquiring minority stakes[206]. A typical examples here is the strategy pursued in the past by the large German electricity producers, which acquired stakes in municipal utilities distributing electricity.[207] This strategy has deterred market entry by other producers of electricity.

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[205] See BGH, decision of 11.11.2008, WuW/E DE-R 2451, 2461 – *E.ON/Stadtwerke Eschwege*, para. 62.

[206] See BGH, decision of 11.11.2008, WuW/E DE-R 2451, 2461 – *E.ON/Stadtwerke Eschwege*, para. 63. The same applies if existing business relations with a major customer are structurally secured.

[207] If there is a high level of vertical integration between energy suppliers and municipal utilities, market entry becomes virtually impossible for new suppliers because there are no 'free' municipal utilities available as customers.

II. Collective dominance

148 A vertical merger may also create or strengthen collective dominance if it has an impact on the characteristics of the market that are conducive to coordination. Vertical mergers may soften competition between the leading players in a market or further weaken the competitive pressure exerted by outside competitors and by customers. Collective dominance may be created or strengthened if tacit coordination becomes more likely because the companies in the market are more inclined, as a result of the vertical merger, to coordinate their conduct, or because such coordination becomes easier, more effective or more stable.[208]

149 A vertical merger can increase the probability of a stable coordination if it opens up or improves opportunities to reach terms of coordination, facilitates the detection of deviations from these terms, offers credible means of retaliation or improves their use or effectiveness, or if the merger reduces competitive pressure from third parties, i.e. outside competitors or buyers.[209]

150 A vertical merger may open up or improve the **ability to reach terms of coordination** if the other leading market players are already vertically integrated and the symmetry within the group of coordinating firms is thus further increased. Mergers that create, strengthen or deepen structural links between the companies in this group can also make it easier to agree on terms of coordination. This could be the case if, for example, the company integrates vertically by entering into a joint venture with one of the other coordinating companies.

151 **Market transparency** may increase as a consequence of a vertical merger if vertical integration provides access to sensitive information on competitors or if it increases price transparency. If, for example, price transparency is higher on the downstream market than on the upstream market, a vertical merger may improve the ability of the upstream manufacturer to effectively monitor price deviations. It may also become easier to mutually monitor market conduct if the number of market participants decreases due to the merger. Where structural links between the

[208] If there is a high degree of market dominance pre-merger, this market position can already be strengthened if the market position of only one company is strengthened (e.g. through improved sales opportunities).

[209] For a detailed elaboration of the concept of collective dominance, see chapter B.II. above, para. 76ff. The present chapter only refers to specific aspects of collective dominance with respect to vertical mergers.

coordinating companies are established,[210] information exchange between these companies can also facilitate effective monitoring.[211]

152 A vertical merger may also improve the ability to **punish deviations**, which has a stronger deterrent effect. One possible scenario is that the merger leads to multi-market contacts between the leading players which increase the potential for sanctions.[212] A company within the group of coordinating companies with a less important market position may also improve its ability to punish deviations vis-à-vis a company in this group with a more important market position, for example if cost advantages in the distribution of its products or in the procurement of inputs are created by the merger. As a consequence, the merging parties are able to catch up with the larger competitors in the group of coordinating companies.

153 Competitive constraints exerted by fringe players or by **potential competitors** may also be weakened by a vertical merger. For example, barriers to entry may be raised. If all the major competitors in a market are vertically integrated as a consequence of a vertical merger, this can create a barrier to entry because an entrant might have to enter the respective upstream or downstream market as well in order to be able to compete.

154 In addition, a vertical merger may also **reduce countervailing buyer power**. A major customer may be in a position to induce upstream companies to deviate from the terms of coordination by promising substantial or long-term contracts. Such an incentive has a destabilising effect on tacit collusion. If such a major customer is acquired by one of the coordinating firms, the risk of deviation decreases and in turn the stability of tacit coordination increases.

[210] See para. 100 above.

[211] This can be the case if, for example, the vertical integration is the result of a participation in a joint venture with one or several of the leading players.

[212] See para. 104 above.

D. Conglomerate mergers

155 In a conglomerate merger the merging companies operate neither on the same product market, nor on the respective upstream or downstream markets.[213] Conglomerate mergers may raise competitive concerns, in particular, if the participating companies are active on economically related markets, e.g. if the production or distribution of products requires the same inputs or if the products are targeted at the same customer groups. In particular, the products of the merging companies may be complements or imperfect substitutes to each other.[214]

156 Even though conglomerate mergers raise competition concerns less often than other types of mergers, under specific circumstances they can also create or strengthen single firm dominance (I.) or collective dominance (II.).

I. Single-firm dominance

157 Competitive concerns resulting from conglomerate mergers vary depending on the relationship between the affected relevant markets. There are basically four potential mechanisms by which a dominant position may be created or strengthened by a conglomerate merger. If the merging parties offer imperfect substitutes, the merger may reduce fringe competition or potential competition (1.). If the products concerned are complements or are offered to the same customer groups, conglomerate mergers may entail the risk that tying or bundling strategies leverage market power from one market to another market (2.). An increase in market power may also stem from portfolio effects if customers have a strong preference for suppliers which offer a broad portfolio of product or brands (3.). In some cases a conglomerate merger may also have an important impact on the market position of one of the merging companies, if it significantly strengthens the company's resources (4.).[215]

[213] If the merging companies are active on the same product market but on different geographic markets, the merger is not considered a conglomerate merger. However, a clear distinction in this respect can sometimes be difficult. The distinction between a horizontal and a conglomerate merger, for example, may depend on the level of substitutability between the products and the corresponding delineation of the relevant markets. In addition, suppliers of products in neighbouring markets may have to be considered as potential competitors.

[214] Products are considered to be complements if a combined consumption of the products has an additional benefit for the customers. Products are considered to be substitutes if they are interchangeable for (at least) a significant number of customers or applications.

[215] See for an overview BKartA (2006), 'Conglomerate Mergers in Merger Control – Review and Prospects', Discussion paper for the meeting of the Working Group on Competition Law 2006, p. 21, available at http://www.bundeskartellamt.de/wEnglisch/index.php.

1. Weakening of fringe competition or potential competition

158 A conglomerate merger may weaken or even eliminate **fringe competition** if the products of the merging companies are imperfect substitutes, e.g. because the products are substitutable only for a specific type of customers or for specific types of product applications.[216] However, imperfect substitutes usually impose only rather weak competitive constraints on each other.[217] Accordingly, the elimination of fringe competition as a result of a conglomerate merger will by itself normally not create but, at the most, strengthen a dominant position.[218]

159 If the merging companies are **potential competitors**, a conglomerate merger may also weaken competition. The significance of this effect depends, among other things, on the likelihood of market entry by the acquired company and the likelihood of market entry by other potential competitors. If the acquiring company is already dominant pre-merger, the acquisition of a potential competitor may further strengthen this dominant position.[219]

2. Tying and bundling

160 The merged company might expand its product portfolio with complementary products as a result of a conglomerate merger. This effect may raise competition concerns if it induces the merged company to engage in anti-competitive tying or bundling strategies.[220] Tying and bundling strategies have in common that the purchase of one product requires the simultaneous purchase of the other (or that the price for the bundle is such that it is not reasonable to buy the products separately). Since bundling and tying strategies have quite similar effects on competition, in the following both terms will be used synonymously.

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216 For a conglomerate merger eliminating competition from imperfect substitutes, see e.g. BKartA, decision of 19.1.2006, B6-103/05 – *Springer/ProSiebenSat.1*, p. 39. With the merger imperfect substitution on the national TV advertising market provided by the tabloid BILD would have been eliminated.

217 For the same reason, the fact that competition by imperfect substitutes remains after the merger is by itself not sufficient to rule out that a dominant position may be created or strengthened.

218 For an assessment of imperfect substitution in the case of horizontal mergers, see also para. 73 above.

219 See para. 70f. above.

220 In economic theory, the term **tying** is used if two products can only be purchased or used together, but in varying ratios. One example are those products which need some basic item and additional operating supplies (e.g. printer and toner). If products are offered in a fixed ratio, economic theory uses the term **bundling**. In case of 'pure bundling' the products can only be purchased together, while in case of 'mixed bundling' they can also be purchased separately, however, at less favourable conditions.

161 Under certain circumstances, market power on one market may be leveraged to another market by means of tying strategies. If the merged company succeeds in diverting demand from a competitor's product to its bundled product, it may strategically use bundling to hinder actual competitors or to prevent potential competitors from entering the market.[221] Accordingly, conglomerate mergers may create or strengthen a dominant position on the market for the bundled product.[222]

162 In order to assess whether it is likely that a conglomerate merger will have such an effect, both the ability (a) and the incentive (b) of the merged company to pursue a bundling strategy have to be examined.

a) Ability to tie or bundle

163 In general it is more likely that the merged company will be able to apply bundling strategies successfully in order to hinder actual competitors or prevent market entry, if it already has significant market power on at least one of the affected markets pre-merger. In addition, the likelihood of anti-competitive effects increases if a larger proportion of customers buys both products affected, customers have a relatively strong preference for buying product bundles, and the merged company can credibly commit itself to such a strategy.

164 In order to weaken the market position of an actual competitor or even drive it out of one of the affected markets, the merged company needs to have sufficient **market power** on the other market affected: The more customers consider one of the products of the merging company to be of particular significance while at the same time having only very limited options to switch, the easier it is to engage in tying in order to divert demand also to the other product.

165 Such a strategy is all the more feasible if largely the **same customers** purchase both products. The more customers demand both products, the easier it is for the merged company to leverage its strong market position from one market to the other. Vice versa, if a large number of customers have a strong preference to purchase only the tied product, this should render a tying strategy largely ineffective.

166 Tying or bundling may deter **potential competitors** from entering the market. The effectiveness of such a strategy depends in particular on the potential competitors'

[221] The same effect may be the result of predatory pricing. However, compared with a predatory pricing strategy, a tying or bundling strategy may also be profitable in the short term as it does not necessarily require price cuts.

[222] For a conglomerate merger which, on account of a product portfolio expansion, raised respective competitive concerns, see BKartA, decision of 29.5.2002, B4-171/01 – *Getinge/Heraeus*, p. 37ff.

ability to enter both markets and on the likelihood that the merging company would maintain such a strategy after market entry has occurred. The merged company is able to create a barrier to entry for potential competitors by pursuing a bundling strategy, provided that it is not feasible or economically viable for the potential competitor to enter both markets. However, tying only deters potential competitors if the incumbent company can be expected to maintain this strategy post market entry. The more customers demand only one of the products, the less credible is such a strategy. In contrast, if the incumbent company is committed to continue to tie its products even after new entry has occurred (e.g. in the case of a technological tying) it might run an aggressive pricing policy post market entry. This prospect may reduce the profitability of market entry and potential competitors may be deterred from entering the market.

b) Incentive to tie or bundle

167 Whether a conglomerate merger creates an incentive to bundle products depends on whether such a strategy would be **profitable**. The merged company will therefore weigh the expected costs and additional profits of such a strategy. Costs occur in the form of revenue and profit losses if a significant number of customers only want to purchase one of the products, and therefore refrain from purchasing the package containing both products. If the merged company reduces the price for the package in order to counteract this development, its revenues and profits may decrease as well. Additional profits can occur in the long run if the merged company is able to expand its market power on one of the two markets affected. Whether the costs or the additional profits of a bundling strategy prevail depends inter alia on the value and the profit margins of the products concerned.[223]

168 An incentive to bundle can also result from **network effects** or **economies of scale** on the market for the bundled product. If one of the products concerned has a network effect, the merged company may be able to benefit from its wider distribution (achieved by bundling) even after the company has dropped this strategy.

169 If, however, the merged company has to expect counter strategies by other companies in response to its bundling strategy, this prospect will diminish its incentive to pursue such a strategy. Other suppliers could, for example, cooperate or enter into in a strategic alliance, in order to sell both products. Competitors of the

[223] A bundling strategy will most likely be unprofitable, for example, if a company is required to forego sales on a highly profitable market in order to generate additional sales on a market with small sales volumes and low profit margins.

merged company could also try to counter the (imminent) loss of sales with an aggressive pricing policy.[224]

170 With respect to tying and bundling it has to be stressed that it is not part of the merger assessment to examine whether and to what extent the legal provisions which prohibit an abuse of a dominant position decreases the incentive to pursue a bundling strategy. The aim and purpose of merger control is rather to prevent market conditions that amount to dominance and can later be used by the merging parties to abuse this market position. This avoids the creation of dominance in the first place and makes it unnecessary to take repressive action at a later stage against allegedly abusive practices. A potential deterrent effect of other provisions of competition law therefore does not have to be taken into account in the context of merger control.[225]

3. Portfolio effects

171 Even if the products of the merging parties are neither complements nor (imperfect) substitutes, and if the merging companies are not potential competitors, a conglomerate merger may in specific circumstances increase the market power of the merged company on one of the affected markets. In particular, portfolio effects may be significant if consumers find a wider range of products advantageous and prefer to buy these products from one supplier ('one-stop shopping'). Some manufacturers, for example, try to have as few suppliers as possible, so that only those suppliers with a sufficiently wide product portfolio will be considered as a suitable supplier.[226] Under these circumstances, a supplier may increase its market power, if it is able to expand its product portfolio due to a conglomerate merger.

4. Strengthening of resources

172 In specific circumstances, a conglomerate merger may also lead to an increase in market power because it strengthens the financial or industry-specific resources of the merged company. This has been described in detail above in the context of

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[224] Here it has to be considered, however, that the revenue losses resulting from an aggressive pricing policy diminish the competitive potential of the companies and can therefore impair the success of such a counter strategy.

[225] See *Nothdurft, J.* (2006), Die Entscheidung des EuGH im Fall Tetra Laval, in: ZWeR, p. 306-320.

[226] Such portfolio effects are e.g. conceivable for a supplier which is able to offer its customers several (input) products that do not have to be used together but are used by (many) customers (possibly for different purposes).

horizontal mergers (see above B.I.2.g).[227] The same principles apply in the context of conglomerate mergers. [228]

II. Collective Dominance

173 A conglomerate merger may create or strengthen collective dominance if it has an impact on the characteristics of the market that are conducive to coordination. Conglomerate mergers may soften competition between the leading players in a market or further weaken the competitive pressure exerted by outside competitors and by customers Collective dominance can be created or strengthened if the likelihood of tacit collusion increases because the leading market players are more inclined, as a result of the conglomerate merger, to coordinate their conduct, or because such coordination becomes easier, more effective or more stable as a result of the merger.[229]

174 A conglomerate merger can make it easier to **reach terms of coordination**, for example, if it increases the symmetry of the coordinating firms. This can be the case, e.g., if a company merges with another company that already operates in a market in which other members of the group of coordinating firms are active as well. Tacit collusion can also become easier if the merger establishes structural links[230] between the market participants; one example here is a situation where a company enters into a joint venture with its competitors.[231]

175 A conglomerate merger which creates structural links between the relevant players can also increase **market transparency** and thus make it easier to detect deviations from the terms of coordination.[232] If a merger leads to multi-market contacts (i.e. companies interact on a larger number of markets than pre-merger)

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[227] See para. 49ff. above.

[228] For an example of conglomerate mergers that have expanded the scope of action of the merged company by strengthening its financial strength, see BKartA, decision of 12.5.1976, B7-67/75, WuW/E BKartA 1625ff. – *GKN/Sachs;* BGH, decision of 21.2.1978, WuW/E BGH 1501ff. – *Kfz-Kupplungen*; BKartA, decision of 4.3.1981, B7-35/80, WuW/E BKartA 1867ff. – *Rheinmetall/WMF*; BGH, decision of 23.6.1985, WuW/E BGH 2150ff. – *Edelstahlbestecke*. For the acquisition of sector-specific resources in the media sector, see e.g. BGH, decision of 27.5.1986, WuW/E BGH 2276, 2283 – *Süddeutscher Verlag/Donau Kurier,* para. 54ff.

[229] For a detailed elaboration of the concept of collective dominance, see chapter B.II. above, para. 76ff. The present chapter only refers to specific aspects of collective dominance in the context of conglomerate mergers.

[230] See para. 91 above.

[231] On the approximation of business areas and company-related structural parameters, as well as interlocks via joint ventures on third markets, see BKartA, decision of 19.1.2006, B6-103/05 – *Springer/ProSiebenSat.1*, p. 38ff.

[232] See para. 100 above.

this can enhance the ability to **punish** deviations from the terms of coordination more effectively.[233]

176 The competitive constraints exerted by **potential competitors** may be diminished or eliminated if a conglomerate merger establishes or increases barriers to entry. Such a barrier can for example result from potential competitors having to enter both markets in which the merged company is active. In addition, a conglomerate merger can reduce competitive constraints from outsiders if one of the merging parties is a company which so far has exerted some competitive constraint on the group of coordinating firms.[234]

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[233] See para. 104 above.

[234] Such was the reasoning in the Springer/ProSiebenSat.1 case: The merger of the tabloid BILD with one of the duopolists in the German TV advertising market would have eliminated competition by an imperfect substitute on the duopoly emanating from BILD. See BKartA, decision of 19.1.2006, B6-103/05 – *Springer/ProSiebenSat.1,* p. 39.

E. Causation

177 A merger will be prohibited if it creates or strengthens a dominant position. The creation or strengthening of the dominant position must be directly caused by the merger. It is sufficient that the merger is one of several causes.[235] Causation is assessed at the time of the BKartA's decision on the merger, or – if an appeal has been lodged – at the date of the last oral hearing in (the trial) court, i.e. the Oberlandesgericht Düsseldorf.

178 A merger does not cause the creation or strengthening of a dominant position if the market conditions would deteriorate irrespective of the merger.[236] Assessing causation requires comparing the market conditions expected after the merger to the **counterfactual**, i.e. the probable market conditions without the merger. Thus, it is necessary to compare two scenarios concerning the future development of market conditions. Only where this comparison shows that the competitive conditions post-merger would be worse than the conditions absent the merger, the merger can be regarded as the cause for this change and may be prohibited or cleared with commitments.[237]

179 There is no causation between a merger and the deterioration of market conditions if the conditions for the **failing firm** defence apply.[238] The merging parties have to invoke the failing firm defence and prove that its requirements are fullfilled. Even though a merger leads to the creation or strengthening of dominance, it has to be cleared if the following conditions are cumulatively satisfied:

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[235] See BGH, decision of 15.10.1991, WuW/E BGH 2743/2748 – *Stormarner Tageblatt.*

[236] See KG, decision of 1.3.1989, WuW/E OLG 4379, 4386f. – *Schleswig-Holsteinischer Anzeigenverlag*; OLG Düsseldorf, decision of 11.4.2007, WuW/E DE-R 1958, 1972f. – *Rhön-Grabfeld*.

[237] To answer the question which competition conditions are to be expected if the merger does not take place, the same criteria have to be applied as are used to prove 1dominance.

[238] See BGH, decision of 23.10.1979, WuW/E BGH 1655, 1660 – *Zementmahlanlage II*. On the decision practice of the Bundeskartellamt see in particular BKartA, decision of 10.12.2002, B6-98/02 – *Tagesspiegel/Berliner Zeitung*, p. 37f.; BKartA, decision of 2.5.2003, B3-8/03 – *Ajinomoto/Orsan*, p. 16f.; BKartA, decision of 21.10.2003, B7-100/03 – *Imation/EMTEC,* para. 54ff.; BKartA, decision of 10.3.2005, B10-123/04 – *Rhön/Rhön-Grabfeld,* para. 232ff.; BKartA, decision of 11.4.2006, B6-142/05 – *RTL/n-tv*, p. 39ff.; BKartA, decision of 6.6.2007, B3-6/07 – *LBK Hamburg/Mariahilf*, para. 231ff.; BKartA, Case Summary, B6-67/09 – *Eberbacher Zeitung/Rhein-Neckar-Zeitung,* available at http://www.bundeskartellamt.de; BKartA, decision of 21.5.2010, B9-13/10 – *Magna/Karmann*, p. 122ff.

- The acquired company is **failing**. It would exit the market absent the merger because it needs restructuring and cannot survive on its own.[239] As a rule, this appears to be the case if insolvency proceedings have already been initiated or are imminent and this can be verified. The need for restructuring has to be proved by adequate documentation, a mere claim to that effect by the parties is not sufficient. Documents that have been compiled for other purposes or by independent third parties before the merger project was contemplated are particularly significant in this context. Documents containing, inter alia, the following information can be particularly useful for the assessment: Profit and loss accounts, balance sheets, credit ratings, ratings by rating agencies or suppliers, information on performance indicators (in particular in comparison to the industry average), such as EBIT,[240] ROI,[241] cash flow, liquidity, debt to equity ratio, return on equity, equity ratio. It is also relevant whether restructuring or refinancing appears to be feasible.[242] The assessment has to be based on the particular circumstances of each case.

- There is **no less anti-competitive alternative** to the merger project.[243] In particular, there is **no alternative purchaser** that would not raise comparable competition issues.[244] This requires proof that the seller has made sufficient good faith efforts to find an alternative buyer.[245] In this context, it can also be relevant why negotiations have failed. In particular, a potential buyer cannot be disregarded as a viable alternative only on the basis that he has offered a lower purchase price. A potential buyer may however be ruled out as a viable alternative, for instance, if he is not able to provide a sustainable long-term

[239] For a rejection of the need for financial restructuring see e.g. BKartA, decision of 6.6.2007, B3-6/07 – *LBK Hamburg/Mariahilf*, para. 235ff.; BKartA, decision of 10.3.2005, B10-123/04 – *Rhön/Rhön-Grabfeld*, para. 33ff. The fact that the company in need of financial restructuring is an affiliated or controlled company and the controlling company does not need financial restructuring itself does not exclude per se the application of the failing firm defence provisions; see e.g. BKartA, decision of 11.4.2006, B6-142/05 – *RTL/n-tv*, p. 39ff.

[240] This figure stands for "Earnings before interest and tax".

[241] This figure stands for "Return on investment".

[242] See BKartA, decision of 29.11.2007, B6-158/07 – *Land Rheinland-Pfalz/Lotto Rheinland-Pfalz*, para. 202ff.

[243] See OLG Düsseldorf, decision of 11.4.2007, WuW/E DE-R 1958, 1972f. – *Rhön-Grabfeld*.

[244] On proving the existence of an alternative buyer see e.g. BKartA, decision of 6.6.2007, B3-6/07 – *LBK Hamburg/Mariahilf*, para. 254ff.; BKartA, decision of 21.5.2010, B9-13/10 – *Magna/Karmann*, p. 122.

[245] See BKartA, decision of 12.11.1998, B6-81/98 – *M. DuMont Schauberg/Kölnische Rundschau,* in: Tätigkeitsbericht 1997/98, BT-Drs. 14/1139, p. 88f.; BKartA, decision of 10.3.2005, B10-123/04 – *Rhön/Rhön-Grabfeld*, para. 240ff.; BKartA, decision of 6.6.2007, B3-6/07 – *LBK Hamburg/Mariahilf*, para. 254f.

business strategy (including financing) for the development of the acquired company.[246]

- Without the merger, the **acquiring company would also largely gain the failing firm's market position**.[247] This can in particular be expected if the merging parties are the only significant competitors in the market and therefore customers cannot switch to an adequate alternative supplier.[248] If several other competitors remain in the market, it is generally to be expected that the acquiring company will not gain the failing company's market shares in total. Instead, it is likely that the remaining companies will also be able to gain a significant part of the market shares.[249] However, in some cases this may not be the case, i.e. if it is likely that absent the merger the acquiring company will largely (but not entirely) gain the failing firm's market position and in particular if also shrinkage effects in favour of the competitors are likely after the merger.[250] Insolvency can be more beneficial than a merger with regard to the impact on competition, if the other suppliers would compete for the market shares and assets of the insolvent company.[251] Insolvency is not a preferable alternative, however, if it is likely to result in the exit of the target company's assets - and consequently of its competitive potential - from the market. In this case, the merger will usually not lead to market conditions that are less favourable from a competition perspective than those that would result from the failing firm's exit from the market. On this basis a merger can be cleared.[252]

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[246] See e.g. BKartA, decision of 21.10.2003, B7-100/03 – *Imation/EMTEC*, para. 56ff.

[247] See BGH, decision of 23.10.1979, WuW/E BGH 1655, 1660 – *Zementmahlanlage II*.

[248] See e.g. BKartA, decision of 21.10.2003, B7-100/03 – *Imation/EMTEC*, para. 62f.

[249] See e.g. BKartA, decision of 10.3.2005, B10-123/04 – *Rhön/Rhön-Grabfeld*, para. 244f.; BKartA, decision of 6.6.2007, B3-6/07 – *LBK Hamburg/Mariahilf*, para. 262ff.

[250] This aspect was debated in the *Eberbacher Zeitung/Rhein-Neckar-Zeitung* proceedings; however, ultimately it was not relevant for the decision. See BKartA, Case Summary, B6-67/09 – *Eberbacher Zeitung/Rhein-Neckar-Zeitung*, available at http://www.bundeskartellamt.de, referring to Monopolkommission (2004), Sondergutachten No. 42, *Die Pressefusionskontrolle in der 7. GWB-Novelle*, para. 140.

[251] See e.g. BKartA, decision of 2.5.2003, B3-8/03 – *Ajinomoto/Orsan*, p. 16f.; BKartA, decision of 21.5.2010, B9-13/10 – *Magna/Karmann*, p. 135.

[252] See OLG Düsseldorf, decision of 11.4.2007, WuW/E DE-R 1958, 1972f. – *Rhön-Grabfeld*; as well as Monopolkommission (2004), Sondergutachten No. 42, *Die Pressefusionskontrolle in der 7. GWB-Novelle*, para. 140.

F. Balancing clause

180 A merger which creates or strengthens a dominant position on the relevant market will not be prohibited if the conditions of the so-called balancing clause under § 36 (1) GWB are fulfilled. Under this exemption, a merger is cleared if the companies prove that the concentration will also have pro-competitive effects on a different market, and that these will outweigh the negative effects on the first market.

181 The balancing clause stipulates that the anti-competitive effects on the market on which a dominant position is created or strengthened ("impaired market") are weighed against pro-competitive effects on another market ("improved market"). From the perspective of competition, it is not justified to prohibit a merger if it results in pro-competitive effects in one market to an extent that outweighs the anti-competitive effects in another market. Nevertheless, the application of the balancing clause means that dominance in one market is tolerated. Therefore, the requirements of this provision must be applied strictly. In principle, only improvements to the market structures are sufficient to justify the application of the balancing clause.

182 Only the **effects on competition** are relevant in the context of the balancing clause. Potential advantages to the economy as a whole, other policy objectives[253] and public interest considerations cannot be taken into account by the BKartA, but would have to be considered by the Federal Minister of Economics and Technology within ministerial authorisation proceedings (§ 42 GWB).

183 The pro-competitive effects of a merger must be of a **structural nature** to counterbalance the anti-competitive effects, which also need to have an impact on market structure in that they create or strengthen a dominant position.[254] Consequently, in principle the same criteria are relevant for pro-competitive as for anti-competitive effects. Examples of pro-competitive effects are the following: the maintenance of a larger number of companies in the market, the removal or

[253] If, for example, the merger of two cable network operators speeds up broadband expansion, the political objective "promotion of broadband expansion" alone is not sufficient to apply the balancing clause. If, however, the merger strengthens substitutional competition from other networks because it opens up (by reaching the necessary network sizes and connections) the possibility to offer Internet access, this can be assessed as a competitively relevant benefit. See BKartA, decision of 3.4.2008, B7-200/07 – *KDG/Orion*, para. 270ff.

[254] See BGH, decision of 8.2.1994, WuW/E BGH 2899, 2902 – *Anzeigenblätter II*; OLG Düsseldorf, decision of 18.10.2006, WuW/E DE-R 1845, 1853 – *SES/DPC;* BKartA, decision of 28.12.2004, B7-150/04 – *SES/DPC*, para. 176; BKartA, decision of 3.4.2008, B7-200/07 – *KDG/Orion*, para. 227.

lowering of barriers to entry, and the survival of a brand and with it, of rival products.[255]

184 Aspects which cannot be taken into account, because they do not concern the market structure are, e.g., expected price cuts, intended conduct according to a business plan or the willingness to invest.[256] Such conduct cannot be made obligatory – not even by means of remedies. They could not be enforced should the need arise. On the other hand, a structural effect should not be denied solely because it does not occur as a direct effect of the merger, but requires also a certain conduct of the merging parties (such as investments, or entry) that is made possible or easier as a consequence of the merger. In such a case the impact of the merger on the market participants' incentives is crucial: If the market conditions post-merger create incentives for the market participants to a degree that they render the particular conduct sufficiently likely, the market structure is improved as required by the balancing clause.[257]

185 Mere commercial benefits for the merging parties, such as improved capacity utilisation or cost savings, are also not sufficient.[258] Nor are, per se, efficiencies resulting from the merger, unless these efficiencies also have a structural impact.[259]

186 The effects on competition have to occur **on different markets**. If they concern *the same* market, they are not to be taken into account in the context of the balancing clause, but in the preceding assessment of whether a dominant position is created or strengthened.[260]

187 A merger that has a negative impact on the market structure of the impaired market is only to be prohibited where, within an overall assessment, the anti-competitive effects outweigh the pro-competitive effects on the improved market.[261] The balancing clause provides for an exemption in a case that would normally be prohibited. Therefore, the improvements created by the merger have to be significant. Accordingly, the BKartA's established case practice only accepts

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[255] See BKartA, decision of 3.4.2008, B7-200/07 – *KDG/Orion*, para. 227; BKartA, decision of 28.12.2004, B7-150/04 – SES*/DPC*, para. 176.

[256] See BKartA, decision of 3.4.2008, B7-200/07 – *KDG/Orion*, para. 245.

[257] See BGH, decision of 8.2.1994, WuW/E BGH 2899, 2902 – *Anzeigenblätter II*.

[258] See BKartA, decision of 21.4.1999, B1-275/98 – *Pfleiderer/Coswig*, para. 21.

[259] This could be the case if, for example, the merger of networks makes the offer of Internet access easier or possible, where before such offers were dependent on the use of monopolistic infrastructure.

[260] On the assessment of pro-competitive effects in the same market within the context of assessing market dominance see e.g. BKartA, decision of 20.6.2005, B7-22/05 – *iesy/ish*, para. 203ff.

[261] See BKartA, decision of 3.4.2008, B7-200/07 – *KDG/Orion*, para. 227, fn. 15.

improvements on markets where one or several market players are **dominant**.[262] This is based on the understanding that an improvement can only outweigh the disadvantages of the creation or strengthening of a dominant position if it eliminates or at least reduces dominance (on the improved market).

188 The improved market must **cover the territory of Germany**, either entirely or in part. This is the case, because, according to § 130 (2) GWB, the BKartA's jurisdiction is limited to domestic effects. This also applies to the assessment of pro-competitive effects in the context of the balancing clause.

189 The balancing clause covers improvements that only occur as a consequence of the merger (causation). According to the jurisprudence of the courts, this means that an equivalent improvement of the competitive conditions will most probably not occur without the merger. This assessment takes into account the market conditions existing before the merger as well as the market conditions expected after the merger, and all the circumstances of the particular case. It is based on the general experience of how undertakings behave in accordance with their economic interests.[263] There is no causation, if equivalent improvements of the competitive conditions are to be expected also absent the merger or if they can also be achieved in a different way, i.e. without the merger. If improvements occur more rapidly with the merger, however, this is relevant in the balancing process.[264] This involves forecasting when improvements will occur in the future. The period of time for which such a forecast can be made with a sufficient degree of reliability depends on the dynamics of the markets affected by the merger. This is in principle the same situation as forecasting the anti-competitive effects of a merger.

190 In addition, causation requires some kind of link between the improvements and the detriments to competition brought about by the merger. For such a connection it is not sufficient that the merging parties merely create a formal link by offering a remedy package that includes improvements that are otherwise unrelated to the merger or simply restructure the merger in a similar way. Thus, the causation

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[262] See BKartA, decision of 28.12.2004, B7-150/04 – *SES/DPC*, para. 158; BKartA, decision of 22.2.2002, B7-168/01 – *Liberty/KDG*, para. 103f. The OLG Düsseldorf takes a different view, see decision of 18.10.2006, WuW/E DE-R 1845, 1851 – *SES/DPC*. The question has not as yet been clarified by the BGH.

[263] See BGH, decision of 12.12.1978, WuW/E BGH, 1533, 1539 f. – *Erdgas Schwaben;* KG, decision of 7.11.1985, WuW/E OLG, 3759, 3767 – *Pillsbury/Sonnen-Bassermann.* It is sufficient that, based on the market conditions and specific circumstances and according to general experience, an equivalent improvement is most probably not to be expected absent the merger.

[264] See BGH, decision of 12.12.1978, WuW/E BGH 1533, 1541 – *Erdgas Schwaben;* BKartA, decision of 3.4.2008, B7-200/07 – *KDG/Orion*, para. 256ff.; BKartA, decision of 4.4.2001, B7-205/00 – *Callahan/NetCologne*, p. 24.

requirement also ensures that there is a connection between the improved and the impaired markets. However, more than this genuine causation of the improvements by the merger is not required, in particular a further nexus between the markets, such as identical customers, is not necessary.[265]

191 Thus, in order to meet the causation requirement, the necessary pro-competitive effects cannot simply be "negotiated" in the form of remedies.[266] Nevertheless, in some cases remedies can contribute to a merger project meeting the requirements of the balancing clause.[267] However, the pro-competitive effects have to be directly connected to the merger itself. In some cases it can be sufficient that remedies have an impact on the conduct of market participants, if the market structure is influenced in a sufficiently effective and sustainable way.[268] Yet, there are limits on what can be achieved by remedies in this way, because the improvements have to be expected on the basis of the economic conditions on the market (and not merely on the basis of promises or plans by the merging parties).[269] In individual cases remedies may increase the likelihood of changes in the market structure or ensure that markets remain open, and thereby facilitate that pro-competitive effects materialize.

192 The pro-competitive effects have to **outweigh** the anti-competitive effects. According to the unambiguous wording of § 36 (1) GWB a mere counterbalancing of the anti-competitive effects is not sufficient.[270] In this balancing process the BKartA takes quantitative and qualitative aspects into consideration. This requires an overall assessment which comprises an appraisal of both, criteria that relate to the respective markets and criteria that relate to the expected improvements.

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[265] In the case of newspapers, for example, different customers are affected, whereas in the case of cable networks customers are (potentially) identical.

[266] This opinion was already expressed in the *Tätigkeitsbericht* (Activity Report) of the Bundeskartellamt for the period 1987/1988, BT-Drs. 11/4611, p. 15.

[267] For examples of corresponding practice see BKartA, decision of 19.12.2997, B8-123/07 – *E.ON Avacon/WEVG*, para. 25; BKartA, decision of 23.10.2007, B8-93/07 – *RWE/SWKN*, para. 34f.; in principle also BKartA, decision of 12.3.2007, B8-62/06 – *RWE Energie/SaarFerngas*, p. 48; however, in this case the improvements achievable through the commitments offered would not have outweighed the anti-competitive effects of the merger.

[268] For example, remedies that obliged the parties to award transport service contracts in future exclusively through invitations to tender were accepted as a structural cause for effective competition by the BGH. See BGH, decision of 7.2.2006, WuW/E BGH 1681f. – *DB Regio/üstra*, para. 57ff.

[269] See BGH, decision of 8.2.1994, WuW/E BGH 2899, 2902 – *Anzeigenblätter II*.

[270] See BGH, decision of 29.9.1981, WuW/E BGH 1854, 1861 – *Straßenverkaufszeitungen*; OLG Düsseldorf, decision of 18.10.2006, WuW/E DE-R 1845, 1853 – *SES/DPC;* BKartA, decision of 23.10.2007, B8–93/07 – *RWE/SWKN*, para. 34; BKartA, decision of 12.3.2007, B8-62/06 – *RWE Energie/SaarFerngas*, p. 54; BKartA, decision of 19.12.2007, B8-123/07 – *E.ON Avacon/WEVG*, para. 24.

193 With regard to the markets, the quantitative assessment will in particular focus on their significance for the economy as a whole. This is determined in particular by the market volume.[271] The geographic scope of the markets affected by the merger can also play a role.[272] Furthermore, it has to be taken into account to what extent those markets have a key function for the whole sector or for numerous other markets.[273]

194 Structural improvements can be assessed for example by looking at the market shares of suppliers that compete with the dominant player, and how their market shares and, consequently, competition in the market increase as a result of the merger.[274] The size of the shareholdings (or other types of participation) involved in the transaction can also play a role. For example, the improvements resulting from the complete sale of an existing shareholding can outweigh the negative effects of a mere increase in an existing shareholding.[275] When assessing the qualitative value of an improvement resulting from such a sale, it makes a difference whether the business is sold to an active and potent competitor pursuing strategic interests of its own or merely to a financial investor.[276]

195 According to its unambiguous wording in § 36 (1) GWB, the law imposes the **burden of proof** on the merging parties with respect to the expected pro-competitive effects, the fact that they are caused by the merger and that they outweigh the negative effects on competition. This requires the merging parties to provide substantial and consistent explanations in particular with regard to the pro-competitive effects that will occur on the improved market. The merging parties have to prove that implementing the merger will trigger the desired pro-competitive effects.

196 If the merging parties are not in a position to prove the facts on which the expected pro-competitive effects are based, but at least assert all the facts that are required for this assessment, the BKartA is obliged to investigate these facts due to the ex officio principle. Generally, the BKartA is better placed to investigate facts relating to

[271] See BKartA, decision of 3.4.2008, B7-200/07 – *KDG/Orion*, para. 271; BKartA, decision of 12.10.2007, B8-59/07 – *VNG/EWE/E-ON/Thyssengas/trac-x*, para. 51f.; in BKartA, decision of 23.10.2007, B8-93/07 – *RWE/SWKN*, para. 41 the gas volumes affected by improvements or impairments were decisive in quantitative terms.

[272] For example, improvements on the Munich newspaper market could not outweigh structural impairments on the German market for over-the-counter newspapers. See BGH, decision of 29.9.1981, WuW/E BGH 1854, 1860f. – *Straßenverkaufszeitungen*.

[273] See BKartA, decision of 3.4.2008, B7-200/07 – *KDG/Orion*, para. 272.

[274] See BKartA, decision of 8.2.2007, B5-1003/06 – *Atlas Copco/ABAC*, para. 131.

[275] See BKartA, decision of 19.12.2007, B8-123/07 – *E.ON Avacon/WEVG*, para. 26; BKartA, decision of 23.10.2007, B8-93/07 – *RWE / SWKN*, para. 41.

[276] See BKartA, decision of 12.3.2007, B8-62/06 – *RWE Energie/SaarFerngas*, p. 52.

the market conditions.[277] However, investigations are only possible and necessary to the extent that the merging parties have asserted the underlying facts, and only if they have done that early enough in the proceedings in order to allow the BKartA to complete the necessary investigations before the end of the statutory time limit. Otherwise the BKartA is only obliged to conduct further investigations if the merging parties agree to a sufficient extension of the deadline.

277 The capabilities of the parties to the merger to investigate are limited in particular with regard to proving market dominance. See OLG Düsseldorf, decision of 18.10.2006, WuW/E DE-R 1845 – *SES/DPC*, para. 63.