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September 21, 2011

Via E-mail

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Joint Comments on the Bundeskartellamt's Draft Guidance on Substantive Merger Control, dated July 21, 2011

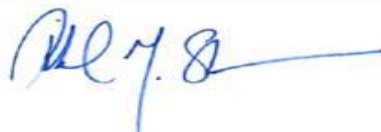
Dear Sirs:

On behalf of the American Bar Association Sections of Antitrust Law and International Law, we are pleased to submit the attached comments to the Bundeskartellamt regarding its Draft Guidance on Substantive Merger Control, dated July 21, 2011.

Please note that these views are being presented only on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,



Richard M. Steuer
Chair, Section of Antitrust Law



Michael E. Burke
Chair, Section of International Law

Attachment

**COMMENTS OF THE ABA SECTIONS OF ANTITRUST LAW AND
INTERNATIONAL LAW TO THE BUNDESKARTELLAMT'S DRAFT GUIDANCE ON
SUBSTANTIVE MERGER CONTROL DATED JULY 21, 2011**

September 21, 2011

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law ("Sections") of the American Bar Association (the "ABA") are pleased to submit these comments on the draft Guidance on Substantive Merger Control dated July 21, 2011 ("Draft Guidance") from the Bundeskartellamt ("BKartA"). The Sections endorse the BKartA's initiative to provide useful guidance on the analytical approach it uses in assessing mergers and applauds its invitation for public comments. The Sections appreciate the opportunity to participate in this process.

OVERVIEW

The Sections understand that proposals are currently being considered to amend the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) ("GWB") to harmonize the GWB with the EU Merger Regulation through the adoption of the SIEC test ("significant impediment to effective competition"). If an SIEC test is expected to be introduced in the near term, the Sections respectfully suggest that the BKartA delay publication of the final Guidance until after the proposal has been considered and either accepted or rejected. This additional time would provide the BKartA the opportunity to revise the Draft Guidance to reflect any change in underlying law.

The Sections commend the BKartA's efforts to update the Guidance to better reflect current BKartA merger review practices and incorporate recent developments in law and economics. The Draft Guidance makes substantial steps towards achieving these goals.

The Sections fully support the BKartA's elaboration of its competitive effects analysis for both single firm dominance and collective dominance, and believe that the Draft Guidance provides parties with a valuable new understanding of BKartA practices. Nevertheless, the Sections suggest that the discussion of market definition, market shares, and related presumptions in the Draft Guidance be revised to provide more information about the BKartA's method and practices. Particularly when compared to the much more detailed competitive effects analysis in the Draft Guidance, the market definition section appears underdeveloped and readers may not appreciate its fundamental importance to merger analysis.

The Sections also respectfully recommend that the Draft Guidance be revised to include a section dedicated to a discussion of the competitive benefits that may result from merger transactions. Most jurisdictions around the world now recognize merger efficiencies and have been providing increasingly detailed guidance about how merger control authorities measure and weigh efficiencies. While the Sections recognize that the framework for analyzing efficiencies is

a developing area of German law (and elsewhere, as well), the analysis of efficiencies is a vital aspect of merger control policy and, as such, should be specifically addressed.

With respect to non-horizontal mergers, the Guidance's discussion of vertical mergers is more precise and useful than the discussion of conglomerate mergers, and the Sections suggest that the Guidance expressly recognize that the vast majority of non-horizontal mergers are pro-competitive or competitively neutral.

Elaboration on the Section's views and recommendations on these and other issues is offered below.

COMMENTS ON SPECIFIC SECTIONS

Introduction

The Draft Guidance at paragraph 4 states that the purpose of merger control is to protect "competition as an effective process" and that "protecting competition at the same time protects the interest of consumers." These statements reflect a longstanding principle of German merger control law – as enforced by the BKartA and endorsed by the German courts – that the purpose of merger control is to protect the competitive process. This principle is not necessarily or always equivalent to the microeconomic concepts of either consumer welfare or total welfare. The German approach is sometimes contrasted with the European Commission's merger control practice, which focuses directly on consumer interests using a consumer welfare standard to guide merger control policy, or that of the United States agencies, which also use the economic concept of consumer welfare as the primary guide for merger antitrust policy. The Sections note that nowhere does the Draft Guidance reject consumer welfare as the relevant standard. Rather, paragraph 4 suggests that protection of the competitive process is a useful proxy for the protection of long-term consumer welfare.

Because the concept of "competition as an effective process" is unfamiliar to many antitrust practitioners outside of Germany, further clarification is recommended. It would be helpful to elaborate on the differences between an approach that protects "competition as an effective process" with that of a consumer (or total) welfare standard, as it would to explain the extent to which (if at all) the approach identified in the Draft Guidance may lead to different results in specific merger cases. In addition, if certain factors are likely to be given more weight under BKartA's approach than under a consumer welfare standard, then we recommend that BKartA identify those factors and explain why they are afforded such weight. It also would be helpful to explain how the BKartA will evaluate product quality, choice of products, and innovation, and whether and how BKartA's analysis of qualitative metrics of competition differs from the approach of jurisdictions that follow the consumer welfare standard.

The Draft Guidance at paragraph 8 states that intervention by the BKartA is contingent not on proof that the merger impairs total welfare or consumer welfare, but rather on a finding that "the merger threatens the functioning of competition." In the original German version of paragraph 8, the term "threatens" is phrased as "*konkreten Gefährdungslage*" (in a literal translation "concrete situation of threat"). The current English translation suggests a lower or more speculative standard for intervention. The Sections propose that the English translation be

revised to include "concretely" or "actually," so that the last sentence of paragraph 8 of the English language version would read: "Rather, it is sufficient to prove that the merger concretely [or actually] threatens the functioning of competition." This change is consistent with the Draft Guidance's overall development of an empirical, or evidence-based, merger control policy.

The definition in paragraph 7 of a "dominant company" as one that can make business decisions "independently" from the reactions of its competitors, suppliers and customers could be usefully clarified.¹ The relevant factor is not the "independence" of the dominant firm but the fact that the constraints the firm faces from competitors, customers, and suppliers are *insufficient* to constrain its ability to exercise market power. The Sections respectfully suggest that dominance be defined as the ability to raise quality-adjusted prices or reduce output profitably because of the insufficiency of competitive constraints.

The Draft Guidance at paragraph 13 states that enforcement actions against a proposed merger do not require an "appreciable effect" but that a "definite negative effect on competition" must be ascertainable. Footnote 11 indicates that in one matter, the BKartA found no increased risk of foreclosure where the downstream market share increased by less than 1%. Footnote 12 suggests, however, that market share additions as small as 0.5% have been considered sufficient to strengthen a dominant position. The Sections respectfully suggest that the Draft Guidance clarify the distinction between an "appreciable effect" and a "definite negative effect on competition." These phrases may be terms of art familiar to German lawyers, but the nature or degree of distinction between them will likely not be clear to others. Likewise, additional guidance would be welcome with respect to the facts that led the BKartA to reject an "appreciable effect" in the case cited in footnote 11 and to bring an enforcement action in the matter cited in footnote 12. Simply noting that results can differ in cases involving small share increases provides little concrete guidance.

Horizontal Mergers – Introductory Comments

The Draft Guidance helpfully identifies various factors that may be relevant in a BKartA merger review, but provides only limited explanation of how the various factors will be weighed and applied in practice. The Draft Guidance would be even more helpful if it explained more fully how the BKartA applies the various factors in different matters, and the types of evidence it considers in the process.

The Sections also would welcome additional information regarding market definition. The Draft Guidance stresses that market shares are just the starting point in any merger analysis, but provides limited insight regarding the principles that the BKartA uses to delineate the boundaries of the relevant product and geographic markets. The Sections recommend that the Draft Guidance be revised to include discussion of the analytical methods the BKartA employs in defining relevant markets. Such guidance would enable firms considering entering into a merger or acquisition to better assess the relevance of the Draft Guidance's market share thresholds in connection with the BKartA's assessment of whether a merger is likely to create or enhance single-firm dominance.

¹ This construct is also present in footnote 4 and in paragraphs 3 and 9.

Moreover, additional guidance concerning methods of market definition will elucidate other concepts discussed in the Draft Guidance. For instance, the Draft Guidance at paragraphs 72 and 73 discusses the concept of imperfect substitution. It notes that imperfect substitution from products outside the relevant market should be taken into account, but that the competitive pressure in such cases is "weaker than the constraints imposed by suppliers in the affected market itself." Parties would better understand this aspect of the analytical framework if the BKartA's methods of defining relevant markets were specified more precisely at the outset.

The Draft Guidance would also benefit from enhanced discussion of how particular market factors might enable the merging parties to gain, secure, or expand market power. The Draft Guidance primarily focuses on how each factor may assist in the identification of *single-firm dominance*. For example, the Draft Guidance discusses the roles of market shares and concentration levels generally, market shares in bidding markets (§ 31), market shares in two-sided markets (§ 33), capacity constraints (§ 36), customer switching costs (§ 38), and the financial resources of a firm (§ 49). These are valuable contributions, but the Draft Guidance would be more useful if the discussion were not limited to single-firm dominance but applied to market power generally.

Horizontal Mergers – Single-Firm Dominance

Market shares and concentration

The Sections' understanding is that the Draft Guidance's discussion of structural presumptions is driven largely by German law. Nonetheless, the Draft Guidance could be enhanced by elaboration of when the reliability of the presumptions should be called into question. For example, market-share-based presumptions may be particularly misleading in differentiated product markets, where the closeness of substitution is critical to the assessment of a proposed transaction's competitive effect. Although combined market shares might initially suggest dominance, consideration of the closeness of competition between the parties may reveal that the products of the merging firms are not close substitutes and, therefore, that the merger is unlikely to lead to anticompetitive effects.²

The Draft Guidance at paragraph 31 provides that market shares in bidding markets can change quickly, so that a high current market share may not reflect market power. The Sections are in accord with this general statement, but observe that a more robust analysis of competition in bidding markets would be beneficial. The BKartA may wish to discuss the competitive implications of, for example, the nature of the bidding/negotiation (sealed or open bid), the typical size of the contract relative to total market demand, the frequency of bidding, and the closeness of competition between bidders (how often the merging firms bid against each other, and how often the merging firms are next-best choices), among other factors. Similarly, more elaboration would be useful in the discussion of shares and "market positions" in two-sided markets.

Further Relevant Factors

² Inclusion in the Draft Guidance of a detailed discussion of market definition and differentiated product analysis would also inform the role "imperfect substitution" (§§ 72 & 73) plays in the BKartA's merger analysis.

The Draft Guidance at paragraphs 34-35 discusses additional factors that should be considered in an assessment of single-firm dominance. The Sections respectfully suggest that the BKartA consider revising this section to include a more specific analysis of the relevance of these factors in the merger context. For example, paragraph 34 states that "[C]ompany specific competitive advantages can also increase the ability to act independently of competitive constraints on a permanent basis," but does not indicate whether the competitive advantages enable the firm profitably to act independently of customer demand, such as by raising prices or reducing output. Also, it would be useful for the Draft Guidance to acknowledge that the merger must alter (i.e. create or increase) the incentive or ability of the merged firm profitably to act independently of customer demand for the competitive process to be harmed.

Similarly, the Draft Guidance could benefit from further elaboration of the relationship between unilateral effects and dominance. In the discussion at paragraph 38 of customer preferences and "closeness of competition," the Draft Guidance is instructive in explaining a competitive constraint and how the elimination of that constraint through merger may create or reinforce single-firm dominance. The extent to which unilateral effects concerns will be examined once market share presumptions for single-firm dominance have been triggered, however, remains unclear. As we note earlier in our discussion of market share presumptions, combined market shares might initially appear to indicate dominance, but consideration of the closeness of competition may reveal that the products of the merging firms are not close substitutes and that a merger is therefore unlikely to lead to a price increase or other anticompetitive effect.

In the discussion of "must have" products in paragraph 39, the Draft Guidance asserts that the supplier of such products "enjoys a degree of market power that goes beyond what its market share alone would suggest." The Sections respectfully question the analytical accuracy of that statement. If a product is "must have," then its share of sales in a relevant market likely will reflect the degree to which customers have a strong preference for the product (i.e., its share is likely to be quite high). The remainder of paragraph 39 would benefit from additional detail elaborating on the manner in which BKartA's merger analysis incorporates brands, "must have" products, "the ability to offer a full range of products or complete systems," and other factors that contribute to customer loyalty. The discussion also should be reconciled with paragraph 169, where the Draft Guidance recognizes that a merged firm may be constrained by the ability of its rivals to respond by teaming to provide bundles or engaging in an "aggressive pricing policy." The ability of rivals to reposition (through internal development or acquisition) is also worth highlighting.

While the discussion of switching costs in paragraphs 40 and 41 is useful it would benefit from a clarifying statement that the presence of switching costs does not necessarily suggest market power, because in many if not virtually all cases suppliers fight aggressively to win customers and thereby capture the future benefits of any consumer "lock in." Furthermore, it would be helpful for the BKartA to explain in the Draft Guidance how switching costs will affect its merger analysis. For example, a merger should have little impact on "locked in" customers, which by definition must rely on their current supplier because of very high switching costs. To the extent, however, that competition affects pricing and other terms of sale despite high switching costs, the Draft Guidance might highlight that the BKartA will examine the competitive constraints on the merging firms and whether those would be weakened sufficiently

as a result of the merger so as to permit the merged firm to raise prices or otherwise harm customers.

The discussion of other factors also suggests that a highly successful firm engaged in a merger likely will receive greater scrutiny in merger review than less successful firms, and that public financial statements may form the basis of the determination regarding the financial strength of firms. The Sections respectfully suggest that financial criteria are less useful and accurate than more direct screens for the existence or potential strengthening of dominance for evaluating mergers. The mere fact that a company is strong financially does not mean it has quality products, is particularly cost-competitive or is good at innovation. Nor does it have a direct correlation to the likely competitive impact of the proposed transaction.

Merger Involving Potential Competition

Paragraphs 70-71 of the Draft Guidance discuss mergers involving potential competitors. The Sections believe that the Draft Guidance would benefit by expanding this discussion to include additional detail regarding the particular circumstances in which the BKartA may seek to challenge a merger involving a potential competitor. For example, the Draft Guidance might be revised to note that a merger involving a potential entrant is unlikely to harm competition unless the relevant market is highly concentrated (i.e., already characterized by single firm or collective dominance), the potential competitor was likely to enter in the near term, entry by the firm would significantly increase competition, and there are no or few other potential entrants also likely to enter in the near term that would have a similar impact on competition. The Draft Guidance also could be revised to clarify the standard of proof that must be met to show that the potential competitor would have entered the market but for the merger.

Horizontal Mergers – Collective Dominance

The Sections commend the Draft Guidance's discussion of collective dominance, which overall is grounded in widely accepted economic principles, well articulated, and sensibly structured. The Draft Guidance sets forth a practical outline of the many factors relevant to firms' ability to achieve and maintain coordination without resorting to a rote checklist of factors, which could be applied mechanically without understanding the particular market context at issue. Specifically, the Sections note the acknowledgment in paragraph 85 that "[i]n each case the individual factors may carry a different weight depending on their importance in the market concerned" and that "some factors can be hardly relevant for one market while they are decisive for the outcome of the overall assessment of another." The proposed sensitivity to facts and context is realistic and appropriate.

The Sections respectfully suggest that the BKartA adjust the Draft Guidance to better highlight the important topics of a "maverick firm" and "multimarket contacts." Paragraphs 110 and 116 discuss maverick firms in the context of constraints by outside competitors and of the evaluation of the effect of the concentration. The concept of a maverick firm, however, is also relevant to the discussion in Section 2.a of reaching terms of coordination. To the extent a maverick firm lacks a strong incentive to enter collusive arrangements, it may well, as the Draft Guidance notes, undermine tacit collusion or other coordination by its competitors, because typically firms can't successfully collude without the participation of all significant firms. Thus,

it may be worthwhile to modify section 2.a of the Draft Guidance to highlight market characteristics that might provide a maverick with the incentive to join a collusive arrangement.

In paragraph 89, the Draft Guidance states that "[i]f, 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 Sections respectfully suggest that the Draft Guidance explain why mergers among sellers of differentiated products create increased likelihood of coordination. It would appear that the more differentiated and, thus, less substitutable are the products of the merging firms, the smaller the likely gains from coordination.

Likewise, the Draft Guidance's discussion of "multi-market contact," which is currently covered only in section 2.c regarding deterrence mechanisms, could be introduced in section 2.a. Multi-market contacts increase the frequency of the interaction between the firms (see para. 85), may mitigate the effects of asymmetries that arise in individual markets, which otherwise would impede reaching terms of coordination (see ¶ 90), and may allow firms to sustain collusion notwithstanding the fact that analysis of individual markets suggests that incentives to collude in Section 2.a are weak. For these reasons, multi-market contacts also are relevant to the discussion of reaching terms of coordination.

Paragraphs 92-94 cover several distinct issues that affect firms' ability to reach terms of coordination in different ways. The Sections read these paragraphs to address at least the following topics: (1) the stability and predictability of market conditions; (2) the effect of demand growth (or contraction) on firms' incentive to collude; (3) innovation; and (4) price elasticity of demand. The BKartA may want to distinguish these topics more clearly and address each factor separately. For example, the first three sentences of Paragraph 94 may fit better within the discussion in paragraph 92 of the stability and predictability of market conditions. Further, unlike the stability and predictability of market conditions, demand growth may have mixed effects on firms' ability to achieve coordination. Growing demand may invite new entry and innovation, but may also increase the future rewards from successful coordination, which may heighten incentives to collude. Conversely, shrinking demand may encourage firms to deviate from a collusive arrangement, because the immediate reward from additional sales outweighs the future loss of a smaller number of sales in a dwindling market.

Buyer Power

The Draft Guidance addresses the potential for demand-side dominance using the same analytical framework applied to mergers potentially creating a supply-side dominant position – defining demand-side dominance as "a situation in which one company possesses such a high degree of market power that its behaviour is not sufficiently constrained by competition." The Draft Guidance at paragraph 120 suggests that the inability of counterparties to switch to other customers is particularly relevant to an assessment of demand-side dominance. The Sections would welcome greater clarity in the Draft Guidance concerning the BKartA's approach to several issues that arise in the context of such mergers.

One welcome revision would be a formal statement that the BKartA will generally have competition concerns only with respect to mergers that are likely to result in the power to depress

upstream purchase prices below competitive levels, such that output decreases are likely, including a deterioration in the quality of the output.³ There should generally be no competition concerns if a merger results simply in increased bargaining ability such that prices are not reduced below a competitive level. A reduction in prices paid by the merging firm might be significant in assessing the efficiencies associated with the merger and should be analyzed in that context. Guidance on the factors upon which the BKartA relies to draw distinctions between bargaining power and monopsony or oligopsony power would be beneficial. The Draft Guidance at paragraph 122 hints at this distinction; further guidance on what factors will lead to a distinction between mergers to which the monopsony model will apply would be illuminating.

It would also be helpful for the BKartA to explain the framework within which it considers competitive effects in this context, as well as its views with respect to mergers that increase buyer power without necessarily affecting output. The Draft Guidance at paragraph 123 expresses concern about buyers with paramount market position getting better deals than smaller buyers. However, in many industries, larger buyers are able to receive volume discounts for purchases that are simply unavailable to smaller buyers due to cost savings attendant on larger orders; such a scenario does not normally raise competition concerns. It would therefore be useful if the BKartA articulated a clear distinction between bargaining power that leads to low prices and higher output, versus abuse of monopsony power that leads to low prices and lower output, including an articulation of more rigorous criteria for determining the abuse of buyer power.

The Sections further recommend that the BKartA explain what, if any, balancing it believes is necessary between upstream and downstream markets when there are upstream output effects. Although the Draft Guidance notes that market power on the downstream market may be strengthened through the use of an upstream dominant position, the BKartA has appropriately recognized that this is likely to occur only where procurement prices are a significant competitive factor in the downstream market. It would be helpful for the BKartA to provide guidance on the factors it would consider in this regard, e.g., how it will balance the potential upstream output reduction with possible benefits to consumers that can be attributable to a price reduction to buyers, and more generally, on the merging parties' burden in showing that reduced buyer prices will be passed on to consumers or will otherwise negate the potential "spiral effect."

Vertical Mergers

The Draft Guidance provides useful insight into how the BKartA views and investigates vertical mergers. The Sections generally concur with the BKartA's provisions contained within this section of the Draft Guidance, and appreciate the BKartA's efforts in drafting a detailed and thoughtful assessment. We do, however, offer the following suggestions for the BKartA's consideration with respect to Part C.

³ Typically (in the case of merger review as opposed to abuse of dominance), increases in market power are determined with reference to pre-merger prices – and not ideal "competitive" prices. An assessment of buyer power with reference to competitive prices could be appropriate where pre-existing supplier power has resulted in market distortions and deadweight loss. Provided that any acquired monopsony power as a result of a merger does not drive prices below competitive levels, a strong case exists that the merger does not harm, but may enhance, competition.

Paragraph 126 notes, in part, that "efficiencies [resulting from vertical integration] usually strengthen the competitive position of the company but – provided there is enough competitive pressure – these efficiencies can also be beneficial for customers." This appears to suggest a qualified view of various categories of efficiencies arising from vertical mergers that can individually lead to significant cost-savings, quality improvements, innovation, and output expansion. Although paragraph 127 explicitly recognizes the benefits of avoiding double-marginalization, the efficiencies noted in paragraph 126 also tend to have the effect of lowering costs and thus lowering prices and expanding output.

Merger-induced efficiencies typically benefit competition, because when the merged firm's cost structure is improved, both the merged firm and its competitors are likely to attempt to improve their own competitive positions. It is only in rare circumstances that a vertical merger results in anticompetitive harm, and fewer still where the anticompetitive harm outweighs the competitive benefits.⁴ It would thus be helpful if the BKartA would clarify the analysis it undertakes to assess whether the efficiencies identified in paragraphs 126-127 are sufficient to outweigh any perceived potential adverse competitive effects from the vertical merger.

This issue is only partially addressed in the BKartA's discussion of the balancing clauses within Section F, as that discussion is focused solely on the counterbalancing effect of efficiencies in markets distinct from the market in which the competitive harm might be felt. As a result, the Sections believe that the Draft Guidance would benefit from a comprehensive discussion devoted to the approach the BKartA will use to recognize and weigh the likely efficiencies in the same market as that in which it assesses the potential for negative effects.

With respect to the BKartA's acknowledgement in paragraphs 125-127 that non-horizontal mergers do not lessen direct competition between firms in the same market, the Draft Guidance could go further by noting that non-horizontal transactions rarely give rise to competitive concerns. These concepts are generally accepted in the U.S. and are discussed in significant detail in the European Commission's Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings ("EC Non-Horizontal Guidelines").⁵ The Sections respectfully suggest that the Draft Guidance more explicitly acknowledge in this section – as it does to an extent in paragraph 17 – that the vast majority of non-horizontal mergers are pro-competitive or competitively neutral.

⁴ See, e.g., Lafontaine and Slade, Vertical Integration and Firm Boundaries: The Evidence, *Journal of Economic Literature* (2007) ("The weight of the evidence says that . . . under most circumstances, profit-maximizing vertical-integration and merger decisions are efficient, not just from the firms' but also from the consumers' point of view." See also Jeffrey Church, Vertical Mergers, *Issues in Competition Law and Policy* (2008) ("The overview strongly supports, on both theoretical and empirical grounds, a presumption that vertical mergers are welfare enhancing and good for consumers."

⁵ See Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (Nov. 2007), at ¶¶ 10-14, available at <http://ec.europa.eu/competition/mergers/legislation/nonhorizontalguidelines.pdf> (noting that "[n]on-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers").

Paragraphs 144 and 145 provide useful guidance regarding the potential pitfalls and enforcement concerns associated with an increase in the availability of commercially sensitive information as a result of a vertical merger. However, this discussion does not discuss potential procedural safeguards such as firewalls by which any adverse effects from the exchange of such information can be limited. Such methods may be used to limit coordination and the exchange of information between the upstream and downstream operations of a vertically integrated firm.⁶ As such, they may effectively prevent the creation or strengthening of dominance as a result of a merger, while allowing the competitive process to benefit from the efficiencies that will result from the merger (which would not be possible in the case if the transaction were blocked). It would be useful for the BKartA to acknowledge and discuss the value of these non-structural remedies.

Conglomerate Mergers

The Sections recognize that conglomerate mergers receive scrutiny in merger control, including under the European Commission's Non-Horizontal Merger Guidelines. However, as recognized in the text of the Draft Guidance, conglomerate mergers seldom raise competition concerns and often result in significant efficiencies. We therefore urge that the Draft Guidance articulate a rigorous analytical approach to conglomerate mergers, including the balancing of merger-induced efficiencies against potential antitrust harms. If the BKartA is to consider conglomerate effects in evaluating mergers, then the Draft Guidance should be expanded to state limiting principles that identify the set of specific conditions under which an evaluation will be necessary.

In the discussion of portfolio effects at paragraph 171, the Draft Guidance states that "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')," and that "[u]nder these circumstances, a supplier may increase its market power, if it is able to expand its product portfolio due to conglomerate merger." The Draft Guidance appears to suggest that customer benefit and preference may be outweighed in certain transactions by increased market power. The Sections urge the BKartA explicitly to clarify the circumstances under which a portfolio expansion will be viewed as posing sufficient risk of market power to justify negating customer preferences.

Efficiencies

The Sections respectfully recommend that the Draft Guidance be revised to include a section dedicated to a discussion of the competitive benefits that may result from merger transactions. Most jurisdictions around the world, including the EU, the United States, Canada, the UK, and other European countries recognize merger efficiencies and have provided

⁶ See, e.g., In the Matter of The Coca-Cola Company (FTC November 5, 2010), available at <http://www.ftc.gov/os/caselist/1010107/index.shtm>; In the Matter of PesiCo, Inc. (FTC September 28, 2010), available at <http://www.ftc.gov/os/caselist/0910133/index.shtm>.

increasingly detailed guidance about how merger control authorities measure and weigh efficiencies.⁷ Several jurisdictions have established a formal “efficiency defense.”

The Sections understand that the Draft Guidance does not suggest that the BKartA will not consider efficiencies, nor does it necessarily exclude the possibility of an efficiency defense. Paragraph 1 provides that “[w]hen applying the guidance to merger cases it may sometimes be necessary to refine the concept” and that BKartA’s “Decisions Division will apply this text flexibly and develop the concepts further as appropriate.” Paragraph 20 is clear that the text “does not amount to a conclusive list of all the relevant factors.” Nonetheless, the analysis of efficiencies is a vital aspect of merger control policy and, as such, should be specifically addressed.

In the discussion of vertical mergers at paragraph 126, BKartA notes that, “[s]uch efficiencies usually strengthen the competitive position of the company but – provided there is enough competitive pressure – these efficiencies can also be beneficial for customers.” This principle is also applicable to efficiencies that flow from horizontal and conglomerate mergers. Footnote 260 includes a brief reference and citation to case law regarding the “assessment of efficiencies in the same market within the context of assessing market dominance,” but does not elaborate on how the BKartA will undertake such an assessment.

The Sections understand and commend the BKartA’s practice of considering significant efficiencies to be a generally positive factor in its overall assessment of a merger, but respectfully suggest that the Draft Guidance provide detail on the full scope of BKartA’s efficiencies analysis. For example, the Draft Guidance should clarify that efficiencies in certain cases may tip the balance in favor of a merger that might otherwise be viewed as having a moderate adverse competitive effect. Moreover, if the legislative proposal to adopt an SIEC criterion effective 2013 is adopted, BKartA should take the opportunity to expand the analysis of efficiencies in merger review to harmonize its treatment of efficiencies with other jurisdictions such as the European Commission.

The Sections’ concern about the absence of an express acknowledgement of efficiencies in the Draft Guidance is heightened by language that could be read to suggest that merger efficiencies themselves can be harmful to competition. For example, paragraph 126 could be read to suggest that common efficiency-enhancing effects of vertical mergers might, in some circumstances, harm competition by “strengthening the competitive position of the company.” Similarly, paragraphs 171 and 172 might be read to suggest that the efficiency benefits of a broader portfolio favored by the merged firm’s customers may be anticompetitive. In the absence of a general discussion of the benefits flowing from merger efficiencies, such language could discourage parties from highlighting efficiency benefits; in rare cases the resulting lack of information concerning expected efficiencies could cause the BKartA to stop or restructure a beneficial merger, which would be harmful to competition and consumers.

⁷ See, e.g., U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines 2010, Section 10, available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>; Canadian draft Merger Enforcement Guidelines, June 2011, Part 12, available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/mergers-enforcement-guidelines-2011-draft-e.pdf/\\$FILE/mergers-enforcement-guidelines-2011-draft-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/mergers-enforcement-guidelines-2011-draft-e.pdf/$FILE/mergers-enforcement-guidelines-2011-draft-e.pdf).

CONCLUSION

The Sections applaud the BKartA for its efforts to update the Guidance to reflect current practices and its openness and transparency throughout the process of revising the Guidance. We hope the BKartA finds value in these comments and appreciate this opportunity to submit our views for your consideration.