

**RESPONSE of CompetitionRx
to the
BUNDESKARTELLAMT 'DRAFT GUIDANCE ON SUBSTANTIVE MERGER CONTROL'**

1. This is the response of CompetitionRxⁱ to the draft guidance of the Bundeskartellamt (the "BKartA") on substantive merger control dated 21 July 2011 (the "Draft Guidance").
2. As expert advisors in the fields of competition law, merger remedies and compliance, we are pleased to contribute our experience of substantive merger control in different jurisdictions; notably the EC, US, UK and Germany.
3. Our comments particularly focus on the following aspects of the Draft Guidance:
 - Section 1: Overall scope and approach
 - Section 2: Approach to horizontal mergers
 - Section 3: Approach to non-horizontal mergers
 - Section 4: Treatment of efficiencies
 - Section 5: Treatment of remedies

Section 1 - Overall scope and approach

4. Given that German competition law differs in several key respects from other merger control regimes (e.g., the legal standard for dominance, the burden of proof in oligopoly cases, the balancing clause) we consider that the Draft Guidance offers useful assistance to companies and their advisors in the specific context of German competition law.
5. However, we note that the Draft Guidance only provides illustrative guidance about the approach to merger analysis taken by the various Decision Divisions of the BKartA. We believe that **a clearer commitment to consistently apply the Draft Guidance would offer companies and advisors more legal certainty and render merger reviews by the BKartA more predictable**. We note that other regulatory agencies have made such commitments in their guidance materials.¹
6. In terms of substance, the Draft Guidance distinguishes between horizontal, vertical and conglomerate mergers and between single firm dominance and collective dominance. The definition of dominance and the substantive assessment relies on standard theories of harm and recognised economic theories that are also used by other competition authorities such as the European Commission.

ⁱ These comments have been prepared by Justin Menezes, Matthew Gaved and Maurice de Valois Turk.

7. We endorse the remark that mergers are in general pro-competitive and efficiency enhancing and that relatively few transactions give rise to competition concerns.²
8. We also agree that the purpose of merger control is to protect the competitive process and maintain competitive market structures, and not to protect individual competitors. While it is correct that the aim of protecting competition might coincide with the protection of competitors, we would propose that the final version of the Guidance stresses the **importance of the principle that the protection of competitors should not influence merger assessments**.³
9. The Draft Guidance relates to the application of the standard set by s.36(1) of the Gesetz gegen Wettbewerbsbeschränkungen ("GWB") for prohibiting a merger that would result in the creation or strengthening of a dominant position.⁴ We understand that it is widely expected that the legislator will amend the GWB to adopt a new test equivalent to a "significant impediment to effective competition" standard applied under the European Merger Regulation ("ECMR").⁵
10. We recognise the historic significance of this planned change to German competition law which established the dominance standard for measuring competition concerns during the post-war period and which, until 2004, was the test applied under the European Merger Regulation. We assume that if and when the significant impediment to effective competition test is implemented, the Guidance would require revision. Assuming that this will be the case, to the extent possible, we recommend that **in order to provide certainty on the future pathway of substantive merger assessment in Germany, a commitment to revise the Guidance is made in the forthcoming final version of the Guidance**.
11. We agree with the approach described in the Draft Guidance to examine market conditions prior to and after the proposed acquisitions by reference to a counterfactual of the situation absent the merger and that in order to justify intervention, a "definite negative effect on competition has to be ascertainable".⁶

Section 2 - Approach to Horizontal Mergers

12. Although we recognise that the BKartA has decided not to set any presumptions based upon HHI⁷ levels because the GWB contains the market share threshold of one-third to establish a presumption of dominance, we suggest that **at least some information about the absolute level of HHI and change in the HHI (HHI Delta) caused by a concentration beyond which concerns may be raised could be provided in the final Guidance**. This information may provide companies and their advisors with another indicator with which to assess potential transactions.⁸ We note that the guidelines of the US DOJ and FTC and European Commission contain such guidance.
13. We also note that in contrast to the European Commission's guidance on horizontal mergers, there are no safe harbour market shares contained in the Draft Guidance. We suggest that to the extent possible under the GWB, **the final Guidance should address the issue of safe harbour market shares**.

14. In markets in which significant customers are capable of disciplining the merging firms in response to attempts to raise prices following a concentration due to "Shrinkage Effects", such claims should be properly assessed.⁹ While the European Commission has sometimes been sceptical of such claims by notifying parties (e.g., Case M.1672 Volvo/Scania) as lacking credibility, we agree with the approach taken in the Draft Guidance that arguments in relation to Shrinkage Effects should be properly considered in the assessment of mergers by the BKartA.¹⁰
15. With respect to the discussion of intellectual property rights at section 2(c) of the Draft Guidance, we accept that IP rights and ownership of intellectual property, interfaces or proprietary technology may represent barriers to entry and could provide an opportunity for exclusionary conduct.
16. However, markets in which new technologies are a key competitive parameter typically include a mix of existing and potential new competitors that are able to produce competing, comparable technologies very rapidly in response to new innovations. We therefore, believe that the ownership of technologies and know-how should be seen in the dynamic context of fast moving markets. The final Guidance should therefore **recognise that the significance of an advantage gained as a result of the ownership or acquisition of intellectual property rights and know-how may diminish within a relatively short time span.**
17. We suggest that the discussion of the significance of financial resources in the Draft Guidance (section 2(g)) as currently worded may have broad, unforeseen and unintended consequences for firms with significant financial resources. In our view, the fact that an undertaking has financial resources (whether at a business unit, divisional, company or group level) does not necessarily imply that it would be more likely to engage in exclusionary practices than any other undertaking. We also consider that **the definition and objective measurement of 'significant financial resources' presents severe methodological and definitional problems.** The discussion of significant financial resources should therefore be accorded less importance in the final Guidance.

Section 3 - Approach to non-horizontal mergers

18. We note that in most cases, vertical mergers are regarded as efficiency enhancing without negative effects on competition. We would suggest that **more emphasis should be placed on the possible benefits of vertical mergers that may well be passed on to consumers before focusing on the potential anti-competitive effects.**¹¹

Section 4 – Treatment of Efficiencies

19. We note that according to the Draft Guidance, efficiencies resulting from the merger will not be taken into account, unless these efficiencies also have a structural impact.¹² This is a stricter standard required by for example, the European Commission where efficiencies must be passed on to consumers, be verifiable and merger-specific.¹³

20. **We consider the approach taken by the European Commission to the assessment of efficiencies brought about directly as a result of a transaction to be more pragmatic and recommend that the BKartA reviews this opportunity to take the same approach as the European Commission.**

Section 5 - Treatment of remedies

21. We agree with the notion that remedies should address the theory of harm in relation to a proposed merger and should not create an offsetting positive effect in another market where no competition issues have been identified.
22. With regard to the discussion of remedies in the context of the application of the balancing clause, we agree with the statement that certain behavioural commitments (e.g., expected price cuts or intended conduct according to a business plan) should not be accepted because they are difficult to enforce.¹⁴
23. Our experience as monitoring trustees suggests that **future commitments need to be rigorously defined in relation to the state of the affected businesses at the time that remedies are agreed**; not in relation to prospective behaviour which cannot be precisely defined at the time of the merger decision and therefore subsequently cannot be independently monitored.

Summary

24. A clearer commitment to consistently apply the Draft Guidance would offer companies and advisors more legal certainty and render merger reviews by the BKartA more predictable.
25. The final version of the Guidance should stress the importance of the principle that the protection of competitors should not influence merger assessments.
26. To the extent possible, we recommend that in order to provide certainty on the future pathway of substantive merger assessment in Germany, a commitment to revise the Guidance is made in the forthcoming final version of the Guidance.
27. At least some information about the absolute level of HHI and change in the HHI (HHI Delta) caused by a concentration beyond which concerns may be raised could be provided in the final Guidance.
28. We suggest that to the extent possible under the GWB, the final Guidance should address the issue of safe harbour market shares.
29. We consider that the significance of an advantage gained as a result of the ownership or acquisition of intellectual property rights and know-how may diminish within a relatively short time span.

30. The discussion of significant financial resources should be accorded less importance in the final Guidance.
31. We suggest that more emphasis should be placed on the possible benefits of vertical mergers that may well be passed on to consumers before focusing on the potential anti-competitive effects.
32. We consider the approach taken by the European Commission to the assessment of efficiencies brought about directly as a result of a transaction to be more pragmatic and recommend that the BKartA reviews this opportunity to take the same approach as the European Commission.
33. Future commitments need to be rigorously defined in relation to the state of the affected businesses at the time that remedies are agreed; not in relation to prospective behaviour which cannot be precisely defined at the time of the merger decision and therefore subsequently can not be independently monitored.

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- ¹ For example, the European Commission's Guidelines on Non-Horizontal mergers provide that "*The principles contained here will be applied and further developed and refined by the Commission in individual cases. The Commission may revise the notice on non-horizontal mergers from time to time in the light of future developments and of evolving insight.*" Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6–25, at paragraph 8.
- ² Paragraph 2, Draft Guidance.
- ³ Paragraph 4, Draft Guidance.
- ⁴ Paragraph 5-8, Draft Guidance.
- ⁵ Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p.1.
- ⁶ Paragraph 13, Draft Guidance.
- ⁷ Herfindahl-Hirschman Index (HHI)
- ⁸ Paragraph 30, Draft Guidance.
- ⁹ Paragraph 27, Draft Guidance.
- ¹⁰ However, arguments to the BkartA about Shinkage Effects lessening or elimintaing a potential competition concern may run counter to public statements about the rationale for the merger.
- ¹¹ Paragraph 125-126, Draft Guidance.
- ¹² Paragraph 183, Draft Guidance.
- ¹³ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5–18, paragraphs 76-88.
- ¹⁴ Paragraph 184, Draft Guidance.