

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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ROUNDTABLE ON THE ROLE OF EFFICIENCY CLAIMS IN ANTITRUST PROCEEDINGS

-- Note by the Delegation of Germany --

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1. Introduction

1. This contribution is structured in two parts. The first part provides a brief overview of the ongoing international debate on the role of efficiency claims in antitrust proceedings with the aim of identifying some of the most relevant issues at stake. In the second part, the particular legal situation and experience gained in Germany are presented for each area of competition law enforcement, i.e. merger control, anticompetitive agreements and unilateral conduct. For each area, first the respective legal framework is briefly described to lay out the legal scope for the consideration of efficiency claims. Subsequently, the experience gained from case-practice is presented on the basis of several selected cases.

2. International debate and relevant issues

2. The international debate on efficiency claims in antitrust proceedings displays a certain peculiarity: there seems to be (almost complete) agreement between scholars and practitioners that mergers, anti-competitive agreements and unilateral conduct of dominant players can generate countervailing efficiency gains. Yet, there is much less agreement on the implications of this insight for the design of competition law provisions and procedures. On the one hand, the underlying economic concepts such as the classical *Williamson-Trade-off*¹ are widely accepted.² On the other hand, the question of how to best integrate efficiency considerations in law enforcement is the subject of continued discussions.

3. This applies in particular to the area of merger control. A number of jurisdictions allow for an explicit efficiency defence in merger control proceedings.³ However, despite this common ground, the specific design of the legal framework differs between these jurisdictions⁴ and its implementation in specific cases is subject to ongoing intense debates (examples are respective discussions in the United States⁵ and the EU about merger control practice).⁶ Also in other areas of competition law enforcement the

¹ Oliver E. Williamson, 1968, Economies as an Antitrust Defense: The Welfare Tradeoffs, *American Economic Review*, Vol. 58, No. 1, pp. 18-36.

² In very general terms, the Williamson-Tradeoff model discusses the trade-off between welfare gains through lower costs of production and welfare losses due to increased market power associated with mergers yielding economies.

³ See the respective country contributions in the Committee's 2009 Roundtable on Standard for Merger Review ([DAF/COMP\(2009\)21](#)) and the 2007 Roundtable on Dynamic Efficiencies in Merger Analysis ([DAF/COMP\(2007\)41](#)).

⁴ See e.g. An Renckens, 2007, Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense, *Journal of Competition Law & Economics*, Vol. 3, No. 2, pp. 149-179; Robert Pitofsky, 2006, Efficiency Consideration and Merger Enforcement: Comparison of U.S. and EU Approaches, *Fordham International Law Journal*, Vol. , No. 5, pp. 1413-1425.

⁵ See e.g. Daniel Sokol and James A. Fishkin, 2011, Response: Antitrust Merger Efficiencies in the Shadow of the Law, *Vanderbilt Law Review*, vol. 64, pp. 45-72; Jamie Henikoff Moffitt, 2010, Merging in the

debate on the appropriate integration of efficiency considerations seems far from being settled. The continuous debate on what is the appropriate legal framework for the assessment of vertical restraints, in particular resale price maintenance (RPM), provides one of the most prominent recent examples in this regard.⁷

4. Several explanations may be relevant for this current state of the debate on the appropriate role of efficiency claims in antitrust proceedings. First, it has to be recognized that from an economic point of view the seminal *Williamson trade-off* – despite being theoretically straightforward – at best seems to provide a very basic concept which, however, cannot provide sufficient guidance for law enforcement practice in individual cases. In addition, the framework of the *Williamson trade-off* exclusively focuses on short-term effects and thus neglects any dynamic efficiency considerations which are, however, even more difficult to determine and measure than short-term efficiencies and their passing-on in form of potential short-term price decreases.⁸

5. Furthermore, current economic analysis of potential efficiencies of specific types of mergers, agreements or unilateral conduct is characterized by a certain asymmetry. Whereas theoretical analysis is very well elaborated and sophisticated, there seems to be a continuous need for more empirical work. Again, merger control and the assessment of RPM may provide useful insights in this respect: With regard to horizontal and vertical mergers potential efficiencies are well understood in theory but there are relatively few empirical studies that analyse the determinants of whether and to what extent these potential efficiencies effectively materialize. At the same time the existing body of research shows that in a significant number of cases the expected efficiency gains have not been realised.⁹ Also for RPM the conclusion still holds that “*most of the [theoretical] pros and cons of RPM have been well-known for at least 20 years. What is needed is more empirical work.*”¹⁰ One reason for the lack of sufficient empirical

Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis, *Vanderbilt Law Review*, Vol. 63, pp. 1697-1754.

⁶ See e.g. Kocmut Mitja, 2006, Efficiency Considerations and Merger Control- Quo Vadis, Commission?, *European Competition Law Review*, Vol. 27, No. 1, pp. 19-27; Hanne Iversen, 2010, The Efficiency Defence in EC Merger Control, *European Competition Law Review*, Vol. 31, No. 9, pp. 370-376; Lars-Hendrik Röller, 2010, Efficiencies in EU Merger Control: Do They Matter?, in: Hans Jürgen Ramser and Manfred Stadler (eds.), *Marktmacht*, Tübingen, pp. 185-195; Peter L. Ormosi, 2010, Merger Remedies versus Efficiency Defence: An analysis of merging parties’ litigation strategy in EC merger cases, ESRC Centre for Competition Policy, CCP Working Paper 10-1, available at https://www.uea.ac.uk/polopoly_fs/1.141357!ccp10-1.pdf.

⁷ See e.g. the Committee’s 2008 Roundtable on Resale Price Maintenance ([DAF/COMP\(2008\)37](#)); Christian Ewald, 2012, The Economics of Resale Price Maintenance – Why Europe is right not to follow the USA on the ‘slippery slope’ of *Leegin*, *Journal of European Competition Law and Practice*, Vol. 3, pp. 300-307.

⁸ For a presentation of this problem see e.g. Alison Oldale and Jorge Padilla, 2010, For Welfare’s Sake? Balancing Rivalry and Efficiencies in Horizontal Mergers, *Antitrust Bulletin*, Vol. 55, No. 4, pp. 953-990.

⁹ See e.g. Michael D. Whinston, 2007, Antitrust Policy toward Horizontal Mergers, in: Mark Armstrong and Robert H. Porter (eds.): *Handbook of Industrial Organization*, Vol. 3, Amsterdam: North-Holland, pp. 2369-2440, here pp. 2424, et seq.; Röller, Lars-Hendrik, Johan Stennek and Frank Verboven, 2006, Efficiency Gains from Mergers, in: Fabienne Ilzkovitz and Roderick Meiklejohn (eds.): *European Merger Control. Do We Need an Efficiency Defense?*, Cheltenham: Edward Elgar, pp. 84-201; Mueller, Dennis C., 2004, Efficiency versus Market Power through Mergers, in: Manfred Neumann and Jürgen Weigand (eds.), *The International Handbook of Competition*, Cheltenham, pp. 65-87; Paul A. Pautler, 2001, Evidence on Mergers and Acquisitions, FTC Working Paper 243, available at <http://www1.ftc.gov/be/workpapers/wp243.pdf>.

¹⁰ 2008 Roundtable on Resale Price Maintenance ([DAF/COMP\(2008\)37](#)), p. 58; for a comprehensive overview of the available empirical evidence see e.g. Jürgen-Peter Kretschmer, 2011, How to Deal with

evidence may be the fact that a reliable *ex-post* assessment and measurement (let alone any reliable *ex-ante* estimation) of efficiency effects of a specific merger, agreement or unilateral conduct entails significant difficulties.

6. Considering this state of affairs in economics, it seems fairly unlikely that different jurisdictions will draw fully identical conclusions on how to integrate efficiency claims in antitrust proceedings. By contrast, it seems inevitable and necessary that policy considerations have a significant impact on a jurisdiction's approach to efficiency claims. If competition policy e.g. attaches significantly more weight to the risk of type-1 errors (i.e. the risk of over-enforcement in the sense of prohibiting pro-competitive mergers, agreements or conduct) than to the risk of type-2-errors (i.e. the risk of under-enforcement in the sense of permitting anti-competitive mergers, agreements or conduct), a regime with a stronger focus on potential efficiencies will most likely prevail. If on the contrary, more or even the preponderant weight is attached to the negative impact of anticompetitive mergers, agreements or unilateral conduct on effective competition (i.e. the risk of type-2-errors), the legal framework will most likely entail stricter requirements with regard to the assignment of the burden and the level of proof for any efficiency claim. Remaining differences in the legal approach to efficiency claims may to a large extent also reflect the divergence in the overall systems of competition law. Even complete agreement on the underlying (economic) concepts therefore most likely would neither imply uniform optimal rules¹¹ nor identical outcomes in individual cases.

7. All in all, the core issues concerning the appropriate role of efficiency claims in antitrust proceedings seem to be less rooted in fundamentally different perceptions of the relevant economic background. Instead, existing differences between jurisdictions are most likely mainly the result of different conclusions on the appropriate translation of the relevant economic insights into the legal framework and enforcement practice. In any event, it seems highly appropriate to thoroughly distinguish between both of these aspects – the (theoretical and empirical) economic background on the one hand and its translation into the legal process of competition law enforcement on the other – to allow for a fruitful and rewarding debate on the pros and cons of different approaches to the role of efficiency claims in antitrust proceedings.

3. Legal framework and decision practice in Germany

8. This section highlights the particular legal situation and decision practice in Germany in the different areas of competition law enforcement, i.e. merger control, anticompetitive agreements and unilateral conduct. With regard to each area, first the respective legal framework is sketched to describe the scope for the consideration of efficiency claims. Then, the experience gained from case-practice is discussed.

3.1 Merger Control

3.1.1 Legal framework under the German competition law

9. The substantive test in German merger control has been the market dominance test since it was first introduced into the Act against Restraints of Competition (ARC, in German: Gesetz gegen

Resale Price Maintenance: What can we learn from empirical results?, MAGKS Joint Discussion Paper Series in Economics, No. 16-2011; available at: http://www.uni-marburg.de/fb02/makro/forschung/magkspapers/16-2011_kretschmer.pdf.

¹¹ This insight has been recognized in the literature as well. See for example David S. Evans, 2009, Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules, available at <http://ssrn.com/abstract=134279710>; Brett H. McDonnell and Daniel A. Farber, 2003, Are Efficient Antitrust Rules Always Optimal?, Antitrust Bulletin, Vol. 48, No. 3, pp. 807-835.

Wettbewerbsbeschränkungen, GWB) in 1973. According to § 36 (1) ARC the BKartA shall prohibit a concentration which is expected to create or strengthen a dominant position. However, with the proposed 8th Amendment of the ARC the substantive test in German merger control will be changed (see below – 3.1.2). The underlying purpose of merger control is to protect competition as an effective process. Intervention by the BKartA is, therefore, not contingent upon the proof of any welfare impairment in a specific case.

10. The application of the dominance test is based on a detailed case-by-case analysis.¹² In addition, the ARC contains statutory presumptions for the existence of a dominant position in § 19 (3) ARC.¹³ The presumptions are, however, rebuttable and the BKartA still bears the obligation to fully investigate the competitive environment and the effects of the merger (ex officio principle; *Amtsermittlungsgrundsatz*). The presumptions effectively only apply if, after a thorough investigation, neither the existence nor the absence of dominance can be conclusively established (*non liquet*). These provisions are, thus, best understood as a device to incentivize the merging parties to provide the authority with all the necessary evidence in a timely manner and to substantiate any assertions brought forward in the course of the proceedings.

3.1.2 Role of efficiency claims

11. It has to be stressed that with the dominance test the intervention threshold is deliberately set high in German merger control. If a merger does not lead to the creation or strengthening of a dominant position, the merging firms are free to pursue their efficiency goals without interference by German merger control (general presumptions approach). Whether projected efficiencies effectively materialize ex post in any particular case is thus not the concern of German competition law.¹⁴

12. The ARC does not provide for an explicit efficiency defence. However, certain types of case-specific efficiencies and other positive merger-related effects can be taken into account under specific circumstances. For example, efficiencies can be considered with regard to the market in which competition concerns have been identified, but only if they have a structural impact on the competitive conditions in the market.¹⁵ Mere cost savings or improved capacity utilization are not sufficient.¹⁶

¹² The general analytical approach taken by the Bundeskartellamt (BKartA) in assessing whether mergers create or strengthen a dominant position is described at length in the Guidance paper on Substantive Merger Control from March 2012, which is available in English at http://www.bundeskartellamt.de/wEnglisch/Fusionskontrolle_e/Guidance_Document_on_Substantive_Merger_Control.php.

¹³ These presumptions are based on market shares: Single dominance is presumed if one undertaking has a market share of at least one third in the relevant market. Collective dominance is presumed if up to three undertakings reach a combined market share of 50% or if up to five undertakings reach a combined market share of two thirds.

¹⁴ For a diverging view see Dennis C. Mueller, 1996, Antimerger Policy in the United States: History and Lessons, *Empirica*, Vol. 23, No. 3, pp. 229-53; *ibid.*, 1997, Merger Policy in the United States: A Reconsideration, *Review of Industrial Organization*, Vol. 12, no. 5-6, pp. 655-685. With regard to the mixed evidence on merger efficiencies Mueller argues for a lowering of the intervention threshold to e. g. a market share of 20% combined with an efficiency defense. See also Daniel A. Crane, 2011, Rethinking Merger Efficiencies (March 4, 2011), *Michigan Law Review*, Vol. 110, 2011; University of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 11-001; University of Michigan Public Law Working Paper No. 230. Available at SSRN: <http://ssrn.com/abstract=1777204>. Crane argues for the symmetric treatment of anticompetitive effects and efficiencies.

¹⁵ See e.g. Bundeskartellamt, Case B7-22/05 - Iesy (Apollo) / Ish, decision of 20.6.2005, paras 160, et seq.

13. In addition, there is some scope for the consideration of certain efficiencies and other positive effects in the context of the balancing clause under § 36 (1) ARC and the ministerial authorization under § 42 ARC. Some of the considerations relevant in both cases overlap. There are, however, also noteworthy differences.

14. The balancing clause stipulates an exemption from the prohibition criterion. Under this exemption, a merger is cleared if the companies prove that the concentration will also have pro-competitive effects on a different market ("improved market"). The improvements must outweigh the negative effects on the market in which dominance is created or strengthened ("impaired market"). In principle, only improvements of the structural preconditions for effective competition may fulfil this requirement.¹⁷ § 36 (1) ARC imposes the burden of proof with respect to the applicability of the balancing clause on the merging parties. Only if the merging parties are not in a position to effectively prove the facts on which the expected pro-competitive effects are based, but at least assert all the relevant facts that are required, the BKartA is obliged to investigate these facts (ex officio principle).¹⁸

15. In recent years, the BKartA has applied the balancing clause in merger control decisions on, inter alia, cable networks¹⁹, satellite broadcasting and the provision of pay-TV services²⁰, local newspaper markets²¹ and markets for the supply of electricity and gas.²² In the case B7-200/07 - KDG/Orion²³, for example, the BKartA established that the proposed merger would strengthen Kabel Deutschland GmbH's (KDG) dominant position in the market for feeding in broadcast signals into broadband cable networks.²⁴ The notifying parties, however, were able to prove that the concentration would significantly improve the competitive conditions in the markets for broadband internet access (DSL) and fixed-line telephony.²⁵ As a result of the merger, KDG was considered to be able and have sufficient incentives to offer for the first time internet access and fixed-line telephony services to more than 800,000 households. This merger-specific effect was considered to outweigh the expected anti-competitive effects in the market for the provision of cable-TV-services.

16. The legal instrument of the ministerial authorization (MA) under § 42 ARC also provides scope for the consideration of efficiencies and positive merger effects. It has to be noted, however, that an MA is

¹⁶ See Bundeskartellamt, Case B1-275/98 - Pfeiderer / Coswig, decision of 21.4.1999, para 21.

¹⁷ See BGH Wirtschaft und Wettbewerb/E BGH 2425, 2431 - Niederrheinische Anzeigenblätter; BGH Wirtschaft und Wettbewerb/E BGH 2899, 2902 – Anzeigenblätter II.

¹⁸ See BGH Wirtschaft und Wettbewerb/E BGH 1533, 1539 - Erdgas Schwaben.

¹⁹ Bundeskartellamt, Case B7-200/07 - KDG / Orion, decision of 3.4.2008; Bundeskartellamt, Case B7 - 22/05 - Iesy (Apollo) / Ish, decision of 20.06.2005.

²⁰ Bundeskartellamt, Case B7 - 150/04 - SES / DPC, decision of 28.12.2004. This case was described in the Contribution by Germany to the 2007 Roundtable on Dynamic Efficiencies in Merger Analysis (DAF/COMP(2007)41), at p. 163.

²¹ Bundeskartellamt, Case B6 - 38/09 - Schleswig-Holsteiner Zeitungsverlag / Erwerb der Elmshorner Nachrichten u.a., decision of 09.07.2009.

²² Bundeskartellamt, Case B8 - 93/07 - RWE / SWKN, decision of 23.10.2007.

²³ See Bundeskartellamt, Case B7-200/07 - KDG / Orion, decision of 3.4.2008. See also the press release from 4 April 2008 in English which is available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008_04_04.php.

²⁴ See paras 36, et seq. of the decision cited above.

²⁵ See paras 270, et seq. of the decision cited above.

only applicable in case of a prohibition decision by the BKartA.²⁶ Upon application, the Federal Minister of Economics and Technology can override the prohibition decision on the grounds of potential advantages to the economy as a whole or public interest considerations. Dynamic aspects may also play a role.

17. Since 1973 there have been 21 applications for an MA, of which 7 were granted, 4 subject to conditions.²⁷ The latest application concerned the merger between the university hospital Greifswald and the local hospital Wolgast in north-eastern Germany, which was authorized in April 2008. As part of the MA proceedings, an opinion by the Monopolies Commission is obtained (§ 42 (4) ARC).²⁸

18. Both the balancing clause as well as the MA may lead to the toleration of the creation or strengthening of market dominance, provided there are positive merger effects. As stated above, some of the economic effects to be considered in this context are the same as those considered in an explicit efficiency defence. There are, however, also important differences since, for example, under the balancing clause only merger effects on third markets can be taken into account.

19. With the proposed 8th Amendment of the ARC the substantive test in German merger control will be changed to the SIEC test ("significant impediment to effective competition").²⁹ Market dominance will, however, be maintained as the standard example. The balancing clause and the MA will also be maintained. An explicit efficiency defence will not be introduced. This approach in particular takes account of (1.) the scope for considering efficiencies already provided in the existing legal framework of the balancing clause and the MA and (2.) the fact that the (implementation) cost of an (additional) explicit efficiency defence therefore may be higher than the benefits of a more sophisticated assessment of the allegedly efficiency enhancing effects of individual merger cases. It also takes note of the rather limited practical relevance of the explicit efficiency defence for the final outcome of merger proceedings in other jurisdictions.³⁰

3.2 *Anti-competitive agreements*

3.2.1 *Legal framework in Germany*

20. The legal framework for the assessment of efficiency claims in the context of anticompetitive agreements is largely aligned with the respective European rules. In general, agreements between undertakings and concerted practices which restrict competition are governed by Art. 101 of the Treaty on

²⁶ See also the summary of the conditions for the ministerial authorization and the procedures on the website of the Federal Ministry of Economics and Technology at http://www.bmwi.de/DE/Themen/Wirtschaft/Wirtschaftspolitik/wettbewerbspolitik_did=6176.html (in German only).

²⁷ See the list of applications on the website of the Federal Ministry of Economics and Technology at <http://www.bmwi.de/BMWi/Redaktion/PDF/Wettbewerbspolitik/antraege-auf-ministererlaubnis,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>

²⁸ See the list of special reports by the Monopolies Commission at http://www.monopolkommission.de/sonder_gesamt.html.

²⁹ To date the bill has been introduced into parliament but the final readings and the passage are impending. The Government's draft legislation is available at <http://dipbt.bundestag.de/dip21/btd/17/098/1709852.pdf> (in German only).

³⁰ For these reasons, also the German Monopolies Commission, the advisory body of the German federal government for competition matters, in its special report on the envisaged amendment of the ARC, also argued against the introduction of an explicit efficiency defence in the course of the adoption of the new substantive test. Monopolkommission, Sondergutachten 63: Die 8. GWB-Novelle aus wettbewerbspolitischer Sicht, paras 29, et seq.

the Functioning of the European Union (TFEU) as well as § 1 et seq. ARC. The substantive law in § 1 ARC closely mirrors Art. 101 (1) TFEU, while § 2 ARC is virtually identical with Art. 101 (3) TFEU. Most importantly, other than in merger control, undertakings are not required to notify agreements in advance and there is no obligation for the competition authorities to decide on a potential exemption of an agreement. In terms of substance, Art. 101 (1) TFEU as well as § 1 ARC prohibit all agreements, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition. Agreements of minor importance fall outside the scope of this provision (*de-minimis* clause) with the precise conditions laid out in respective notices by the European Commission³¹ and the BKartA.³² As a general rule, agreements below certain market share thresholds are considered to fall within the scope of the *de-minimis* clause. Hard-core restrictions such as horizontal price-fixing or the allocation of markets or customers are, however, excluded from this exemption.

21. In addition, a legal exemption exists for certain types of agreements and concerted practices which fulfil the prerequisites laid down in Art. 101 (3) TFEU and § 2 ARC. The following cumulative conditions for exemption must be met:

- The agreement / concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, and
- allows consumers a fair share of the resulting benefit (pass-on to consumers).
- The agreed restrictions of competition are indispensable to attain these benefits, and
- do not lead to an elimination of competition for a substantial part of the products in question.

22. For the sake of efficient enforcement and to provide sufficient guidance to firms, these general conditions are further specified with regard to certain types of agreements in the form of Block Exemption Regulations (BERs) and guidelines. These Regulations and guidelines also apply *mutatis mutandis* to the assessment of agreements and concerted practices under German law (§ 2 (2) ARC).³³

23. Based on this legal framework, the scope for efficiency considerations is twofold. Below the thresholds laid down in the BERs and the *de-minimis* notices, companies may pursue the potential efficiency gains of agreements without any interference by competition law. In addition, the legal exemptions of Article 101 (3) TFEU and § 2 ARC may apply if the relevant thresholds are exceeded. The burden of proving that the agreement in question fulfils the conditions indicated above is on the parties of the agreement. In particular, expected efficiency gains and the resulting benefit to consumers (pass-on) must be put forward and sufficiently substantiated.

³¹ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), Official Journal C 368, 22.12.2001, pp. 13-15.

³² Notice no. 18/2007 of the Bundeskartellamt on the Non-Prosecution of Cooperation Agreements of Minor Importance (“*de minimis* Notice”) of 13 MGWBh 2007, available on the website of the Bundeskartellamt at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0703_Bagatellbekanntmachung_e_Logo.pdf.

³³ The relevant documents can be accessed via the website of the European Commission at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>.

3.2.2 *Decision-practice*

24. The BKartA regularly assesses efficiency claims under the legal framework described above. Current inquiries concern inter alia the potentially efficiency-enhancing effects of purchasing co-operations in the retail sector and the competitive assessment of best-price guarantees (most favoured customer clauses) in platform markets (hotel reservation systems). In the context of these ongoing proceedings the parties involved economic experts to substantiate the alleged efficiency effects. Two recently concluded cases concerning internet-based video-on-demand services and the collective marketing of TV-rights for major sport events will be described below.

25. In March 2011, the BKartA prohibited the creation and operation of a joint video-on-demand (VoD) platform by the two major private broadcasting groups RTL and Pro7Sat1.³⁴ Since the VoD-platform was intended to operate as a joint venture, the project was assessed under the relevant merger control provisions as well as under Article 101 TFEU and §§ 1 and 2 ARC. With regard to merger control, the BKartA ultimately concluded that the transaction would further strengthen the pre-existing collectively dominant position of RTL and Pro7Sat1 on the market for TV advertising. The assessment under Article 101 TFEU and §§ 1 and 2 ARC came to the conclusion that the parties would coordinate their business interests via the joint venture and agreements related to its operation. In its assessment the BKartA gave careful attention to the potential positive effects of a VoD-platform.³⁵ The BKartA in particular acknowledged the efficiency benefits resulting from an increased range of VoD-offers as well as the positive effects associated with a simplified navigation through the online-contents of the parties involved (“one stop-shop”). Furthermore, the positive impact on the available capacity for in-stream video advertising which in particular would have benefitted advertising clients was considered. These benefits were, however, not deemed sufficient to offset the anti-competitive effects. In particular, RTL and Pro7Sat1 had entered into ancillary agreements which served to restrict competition and which were not deemed indispensable for the attainment of the benefits mentioned. These agreements inter alia concerned the limitation of access to the platform to (German and Austrian) TV stations and restrictions with regard to the duration of availability and quality of the content. Finally, a prohibition was also inevitable since the parties involved were not prepared to agree to changes in the relevant contractual framework which would have allowed for a different assessment of the balance between the prospective efficiencies and anticompetitive effects of the project.

26. In January 2012 the BKartA furthermore concluded its assessment of several agreements on the joint marketing of the media rights for the major German football leagues.³⁶ In principle, the pooling and central marketing of the clubs' media rights by the German Football League (Deutsche Fußball-Liga; DFL) constitutes a restriction of competition according to Art. 101 (1) TFEU and § 1 ARC. After detailed investigations, the BKartA however considered the marketing arrangements eligible for exemption under

³⁴ Bundeskartellamt, Case B6 - 94/10 - ProSiebenSat1 Media AG / RTL Interactive GmbH, decision of 17.03.2011, (accessible online via <http://www.bundeskartellamt.de/wDeutsch/archiv/EntschFusArchiv/2011/EntschFusion.php>). See also the case summary in English which is available at <http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B06-094-10-ENGLISH.pdf?navid=47>. On 8 August 2012 the Higher Regional Court in Düsseldorf on appeal by the parties upheld the prohibition decision (Case VI-Kart 4/11 (V); not yet published).

³⁵ See paras 227, et seq. of the decision cited above.

³⁶ Bundeskartellamt, Case B6 - 114/10 - Zentralvermarktung der Medienrechte der Fußball-Bundesliga und 2. Bundesliga ab der Saison 2013/2014, decision of 12.01.2012 (accessible online via <http://www.bundeskartellamt.de/wDeutsch/entscheidungen/Kartellrecht/EntschKartellW3DnavidW2639.php>). See also the press release from 13 January 2012 in English which is available at http://www.bundeskartellamt.de/wEnglisch/News/press/2012_01_13-II.php.

certain circumstances and finally declared several commitments by the parties binding according to § 32b ARC. The relevant commitments also referred to the design of packages to be offered as well as to the design of the auction applied by the DFL. In terms of substance, the pooling and central marketing of media rights for the 1st and 2nd German football league was found to result in a number of advantages and efficiencies compared to an individual marketing of the media rights by the respective clubs.³⁷ It was further held that the efficiencies would not only benefit the direct purchasers of the media rights but also the final consumer, i.e. the viewers. The main efficiency effect was considered to stem from the offer of a combined league product which was recognized as an improved product and, hence, a qualitative efficiency effect. This finding was confirmed by an in-depth analysis of viewers' behaviour and preferences. In addition, a more comprehensive coverage of all matches was considered. Finally, central marketing was considered to facilitate the offer of popular formats such as combined live broadcasting of all games and timely highlight coverage which were both found to conform specifically to the preferences of final consumers.

3.3 *Unilateral conduct / abuse of dominance*

27. The German rules on unilateral conduct of dominant firms (abuse of a dominant position) have been in force, with some modifications, since the introduction of the in 1958. § 19 (1) ARC stipulates a general prohibition of abuse of market power by dominant companies similar to Article 102 TFEU. Besides § 19 ARC, another provision (§ 20 ARC) addresses abusive behaviour. It prohibits some abusive practices not covered by § 19 ARC and contains some special national prohibition rules that are not covered by Article 102 TFEU (e.g. sales below cost). Several other rules (e.g. "unfair hindrance") in substance significantly overlap with § 19 (4) ARC.

28. §§ 19, 20 ARC prohibit exclusionary and exploitative abuses of dominance. While § 19 (4) No. 1 and 4 and § 20 (1) and (2) ARC relate to exclusionary abuses, § 19 (4) No. 2 and 3 ARC relate to exploitative abuses. Effectively, the provisions on exclusionary abusive practices cover all relevant types of conduct which may substantially impair effective competition.

3.3.2 *Scope for efficiency claims*

29. The German provisions governing unilateral conduct do not contain a statutory efficiency defence. However, the provisions of §§ 19, 20 ARC include the requirement of an objective justification for the abusive behaviour. Some provisions expressly state the requirement of such objective justification (e.g. § 19 (4) No. 1 and 3; § 20 (1) ARC), in other cases this requirement has been developed by the decision practice of the courts. According to established case law, to determine whether a certain behaviour of a dominant firm may be considered objectively justified, an overall assessment and weighing of its "effects"³⁸ has to take place while the general purpose of the ARC, which is to protect the freedom of competition, must be given particular weight. This very broad interpretation of the legal requirement of an objective justification for the allegedly abusive behaviour in principle also provides scope for the consideration of efficiency claims. In this context, it should, however, also be noted that, according to established case law, the protection of effective competition ultimately has to be given particular weight.

³⁷ See paras 59, et seq. of the decision cited above.

³⁸ The relevant jurisprudence of the German Federal Court of Justice in this context in fact does not use the term "effects" but instead refers to the assessment and weighing of the "interests" of all the relevant parties involved.