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**Working Party No. 3 on Co-operation and Enforcement**

**Efficiencies in Merger Control – Note by Germany**

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## Germany

### 1. Economic background

1. Mergers can both increase market power and create efficiencies.<sup>1</sup> Typical merger efficiencies include cost savings through economies of scale, quality improvements and enhanced innovation.<sup>2</sup> If the market power effect is dominant, a merger will reduce welfare. Conversely, it will enhance welfare if efficiency gains prevail. Accordingly, when assessing a merger, competition authorities may weigh the impediment to competition against the efficiencies related to the merger. Many authorities require such efficiencies to be passed on to consumers in order for them to qualify as a valid efficiency defence.

2. Consumer welfare improvements resulting from merger efficiencies depend on a variety of factors. The realisation of such merger efficiencies is itself uncertain due to the challenges involved in integrating the merging companies (e.g., combining workforces, production facilities, software, etc.).<sup>3</sup> Moreover, whether or not realised efficiencies are passed on to customers depends on factors such as the type of cost reductions (e.g., there usually is no short-term incentive to pass on reductions in fixed costs),<sup>4</sup> demand elasticity, and market structure.<sup>5</sup> In addition, mergers may prompt product repositioning or cause firms to enter or exit the market, which can partially offset the price effects resulting from efficiencies.<sup>6</sup>

3. The realisation of efficiencies that benefit consumers is uncertain not only from a theoretical perspective. The practical relevance of merger efficiencies is also mixed, as evidenced by empirical findings. Therefore, a certain degree of scepticism is warranted when assessing efficiency claims in the context of merger control. In a recent summary of the literature on merger efficiencies, Rose and Shapiro (2022) argue that there is “*no robust body of empirical evidence showing that most mergers realize cognizable efficiencies*”.<sup>7</sup>

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<sup>1</sup> Williamson, O. (1968): Economies as an Antitrust Defense: The Welfare Tradeoffs. *American Economic Review* 58 (1), 18-36.

<sup>2</sup> Röller, L. H., Stennek, J., & Verboven, F. (2006). Efficiency gains from mergers. *European merger control: do we need an efficiency defence*, 84-201.

<sup>3</sup> González, J., Lemus, J., & Marshall, G. (2024). Mergers and organizational disruption: Evidence from the US airline industry. *Journal of Economics & Management Strategy*, 33(1), 111-130.

<sup>4</sup> Rose, N. L. & Shapiro, C. (2022): What Next for the Horizontal Merger Guidelines? *Antitrust Magazine* 36 (2), 4-13.

<sup>5</sup> Werden, G. J., Froeb, L. M., & Tschantz, S. (2005). The effects of merger efficiencies on consumers of differentiated products. *European Competition Journal*, 1(2), 245-264.

<sup>6</sup> Ciliberto, F., Murry, C., & Tamer, E. (2021). Market structure and competition in airline markets. *Journal of Political Economy*, 129(11), 2995-3038.

<sup>7</sup> Rose, N. L. & Shapiro, C. (2022): What Next for the Horizontal Merger Guidelines? *Antitrust Magazine* 36 (2), 4-13.

The evidence on both cost-related efficiencies<sup>8</sup> and quality improvements<sup>9</sup> is mixed, highlighting the necessity of a cautious, case-by-case assessment of efficiencies in merger control.

## 2. Legal framework

4. The relevant provision in the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*) is Section 36(1) (principles for the appraisal of concentrations). It reads:

*“A concentration which would significantly impede effective competition, in particular a concentration which is expected to create or strengthen a dominant position, shall be prohibited by the Bundeskartellamt. This shall not apply if*  
*1. the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the impediment to competition; or [...]*”

5. Initially, the criterion for prohibiting a merger in Section 36(1) GWB was not based on a significant impediment to effective competition, but solely on the creation or strengthening of a dominant market position. A company was deemed to be dominant if its competitive behaviour (i.e. pricing) was not sufficiently restrained by competition.<sup>10</sup> By introducing the SIEC test into Section 36(1), the 8th amendment to the GWB in 2013 substantially aligned the German merger control regime with the EU Merger Regulation.<sup>11</sup> The introduction of the SIEC test made it possible to assess mergers which significantly impede effective competition but are not expected to create or strengthen a dominant position. While the adoption of the SIEC test was not accompanied by an explicit efficiency defence in German competition law, efficiencies which lead to an improvement in the

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<sup>8</sup> A recent meta-analysis catalogued the (net) price effects of 82 horizontal mergers from 52 retrospective merger studies. The analysis found price increases in 52 per cent of the analysed price effects. Price decreases were observed in 34 per cent of the cases, while no clear effect could be inferred in 14 per cent of the analysed price effects. In other words, market power effects seem to have dominated potential efficiency gains in most of the cases investigated. Stöhr, A. (2024): Price Effects of Horizontal Mergers: A Retrospective on Retrospectives. *Journal of Competition Law & Economics* 20 (1-2), 155-179.

<sup>9</sup> The recent evidence on non-price effects of mergers is mixed: For example, Demirer, M. & Karaduman, Ö. (2024): Do Mergers and Acquisitions Improve Efficiency? Evidence from Power Plants. NBER Working Paper No. 32727 found that acquisitions of US power plants increased their productive efficiency and output and led to a reduction of outages, because high-productivity firms tended to buy underperforming assets from low-productivity firms. La Forgia, A. & Bodner, J. (2024): Getting Down to Business: Chain Ownership and Fertility Clinic Performance. *Management Science* found that healthcare outcomes improved in the market for in vitro fertilisation (IVF) after the acquisition of fertility clinics by a fertility chain. In contrast, Eliason, P. J., Heebsh, B., McDevitt, R. C., & Roberts, J. W. (2020). How acquisitions affect firm behavior and performance: Evidence from the dialysis industry. *The Quarterly Journal of Economics*, 135(1), 221-267 found that healthcare outcomes such as hospitalisation and mortality rates deteriorated following the acquisition of independent dialysis facilities by larger chains. Gaynor, M., Sacarny, A., Sadun, R., Syverson, C., & Venkatesh, S. (2023). The anatomy of a hospital system merger: the patient did not respond well to treatment. *Review of Economics and Statistics*, 1-28 found no detectable improvements in hospital performance following a large hospital merger.

<sup>10</sup> See BGH, 12 December 1978, WuW/E BGH 1533, 1536 – *Erdgas Schwaben*.

<sup>11</sup> Immenga/Mestmäcker/Thomas GWB § 36 para. 1.

competitive conditions in the relevant market can be considered as a balancing factor within the SIEC test or dominance test.<sup>12</sup>

6. Under German competition law, the efficiencies claimed by the parties to the merger must be considered by the Bundeskartellamt on a case-by-case basis.<sup>13</sup> Since most of the information required to assess whether the merger will lead to efficiencies is exclusively in the possession of the merger parties, it is their responsibility to provide, in due time, all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific, verifiable and will benefit customers.<sup>14</sup>

7. Merger efficiencies may materialise either in the market in which the merging parties offer their products and services (relevant competition market) or in another market (out-of-market efficiencies). While efficiencies in the relevant competition market might be weighed against the impediment to competition in the overall balancing assessment under Section 36(1) GWB, out-of-market efficiencies are assessed under the ‘balancing clause’ of Section 36(1) sentence 2 no. 1 GWB, which will be discussed in more detail below. To be assessed in merger proceedings by the Bundeskartellamt, claimed efficiencies must affect the parameters of competition, such as price, quality or innovation. In contrast, broader economic benefits and public interest considerations may be taken into account in the context of ministerial authorisation under Section 42 GWB, which is also discussed below.<sup>15</sup>

## 2.1. Claims related to efficiencies in the relevant competition market

8. Section 36(1) sentence 1 GWB allows the SIEC and dominance tests to take into account efficiencies that are likely to arise at the company level during the forecast period and benefit consumers in the relevant market, even if this is not explicitly stated in the provision’s wording.<sup>16</sup> Efficiencies that may be assessed under the SIEC or dominance tests must be directly related to the competitive process and the parameters of competition, such as price decreases and quantity increases through cost savings, quality improvements and increased innovation.

9. So far, there have been several cases where the Bundeskartellamt has considered efficiencies in the relevant market. However, in no case have the efficiencies been sufficiently significant to offset the harm caused by the merger. Therefore, the question whether and by what method efficiencies in the relevant market have to be assessed is still not finally decided. Cases investigated by the Bundeskartellamt where efficiencies from cost savings<sup>17</sup> and quality increases<sup>18</sup> were claimed are listed at the end of this contribution.

10. Further aspects of the assessment depend on the market structure resulting from the merger. The market structure in cases which are likely to create or strengthen a dominant

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<sup>12</sup> BKartA, Guidance on Substantive Merger Control para. 17. Further details below.

<sup>13</sup> Immenga/Mestmäcker/Thomas, § 36 para. 489.

<sup>14</sup> BGH WuW/E 1533 (1539 f.) – *Erdgas Schwaben*.

<sup>15</sup> MüKoEu WettbR/Christiansen/Knebel GWB § 36 para. 82.

<sup>16</sup> Bechtold/Bosch, 11th ed. 2025, GWB § 36 para. 41.

<sup>17</sup> BKartA, 17 December 2019, B9-80/19 *Loomis/Ziemann*, BKartA, 30 December 2019, B7-21/18 *Telekom/EWE*.

<sup>18</sup> BKartA, 24 July 2024, B3-37/24 *UK Heidelberg/UK Mannheim*.

market position usually differs from the one in cases which are likely to lead to an SIEC without dominance.

11. In mergers that are likely to create or strengthen a dominant market position, it is usually especially difficult to demonstrate that the claimed efficiencies resulting from cost savings in production or distribution affect the parameters of competition and outweigh the harm caused by the merger. This is due to the fact that dominant companies typically have little incentive to pass on potential cost savings resulting from the merger to customers, or to invest in improving product quality or increasing R&D spending in the relevant competition market, as they face comparatively few competitive constraints.<sup>19</sup>

12. Mergers assessed on the basis of a significant impediment to competition without dominance would usually result in a lower market concentration compared to mergers assessed on the basis of dominance. As a result, it is more likely in the former case that claimed cost savings may be passed on to consumers. Furthermore, in SIEC cases without dominance the substantive test focuses less on the competitive structure but more on adverse competitive effects, which may be weighed against effects relating to merger efficiencies.

13. Finally, it has to be stressed that the intervention threshold under German merger control is deliberately set high. This is apparent in the structural criteria for presuming market dominance. Mergers that do not meet these criteria and mergers where the impediment to competition is not significant are implicitly assumed to deliver efficiencies which outweigh the harm to competition.

## 2.2. Out-of-market efficiencies

14. While the Bundeskartellamt does not factor in out-of-market efficiencies in its primary analysis under Section 36(1) sentence 1 GWB, such efficiencies may be taken into account under the balancing clause of Section 36(1) sentence 2 no. 1 GWB.<sup>20</sup>

15. Under the balancing clause, a merger is cleared if the companies prove that the merger will improve the conditions of competition in a different market (“improved market”). The improvements must outweigh the impediment to competition in the relevant competition market (“impaired market”). For example, a merger that enables the expansion of a gas network competing in the heating market may be cleared even if it leads to the strengthening of a dominant position in the market for electricity supply.<sup>21</sup>

16. The merger parties must demonstrate the improvement based on concrete and verifiable facts. The improvement must be a causal consequence of the merger and sufficiently likely to occur.<sup>22</sup> The competitive effects must be weighed against the size of the market in which they occur, so that, for instance, relatively smaller improvements in

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<sup>19</sup> BKartA, 14 May 2014, B 3–135/13 »Kliniken Esslingen«, para. 300; BegrRegE 1971, BT-Drucks. VI/2520, p. 29.

<sup>20</sup> Immenga/Mestmäcker/Thomas GWB § 36 para. 501.

<sup>21</sup> BGH, 12 December 1978 – KVR 6/77 – *Erdgas Schwaben*.

<sup>22</sup> BGH, 12 December 1978 – KVR 6/77 – *Erdgas Schwaben*.

larger markets may outweigh relatively larger impediments to competition in smaller markets.<sup>23</sup> The improvements must not be exclusively limited to foreign markets.<sup>24</sup>

17. However, under the balancing clause, only improvements to the conditions of competition can be taken into account as positive effects of a merger, such as a more balanced market structure in other markets.<sup>25</sup> Improvements and efficiency gains at company level which do not lead to an improvement in the conditions of competition,<sup>26</sup> or broader economic benefits that do not result in improved competition cannot be considered under the balancing clause. At the end of this contribution, two merger cases are listed where the merger parties claimed efficiencies within the framework of the balancing clause.

### 2.3. Ministerial authorisation

18. In the economic policy debate, the term ‘efficiencies’ is often used to refer to the positive effects of a merger that go well beyond such efficiencies and do not fulfil the strict criteria for consideration. In light of the European economy’s lagging international competitiveness in certain sectors, there has been a discussion at EU level about the extent to which further economic benefits should be taken into account in merger control.

19. In fact, there are many conceivable positive effects of a merger that are not considered by competition authorities in merger control: These include efficiencies that accrue at company level but do not have a positive impact on the relevant market, such as an improved position in international competition or in foreign markets. In addition, there are efficiency gains at a national economic level, such as an increase in domestic value creation or the preservation of a strong domestic company in markets prone to tipping. From a national perspective, other advantages can include increasing the resilience of important value chains or even ensuring self-sufficiency with regard to essential goods. However, this does not mean that competition authorities should automatically consider all of these efficiencies and advantages. Rather, it is important to critically assess which aspects should be taken into account in the competition authority’s assessment, which aspects should be taken into account within a different institutional framework, and which advantages should be excluded altogether from the assessment of a merger. If it is decided that some advantages are to be taken into account outside of the competition authority’s assessment, a stable institutional framework is needed to ensure transparency and safeguard the process against special interests.

20. Unlike European competition law, Germany’s ‘ministerial authorisation’ provides an instrument for considering positive effects and efficiencies in a much broader sense in merger reviews. The relevant provision in the GWB is Section 42(1). It reads:

*“The Federal Minister for Economic Affairs and Energy will, upon application, authorise a concentration prohibited by the Bundeskartellamt if, in the individual case, the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest. In this context, the competitiveness of the undertakings concerned in markets outside the area of application of this Act shall also be taken*

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<sup>23</sup> BGH, 29 September 1981 – KVR 2/80 – *Straßenverkaufszeitungen* para. 34.

<sup>24</sup> MüKoEuWettbR/Christiansen/Knebel, 4th ed. 2022, GWB § 36 para. 247.

<sup>25</sup> See BGH WuW/E BGH 2425, 2431 – *Niederrheinische Anzeigenblätter*; BGH WuW/E BGH 2899, 2902 – *Anzeigenblätter II*.

<sup>26</sup> KG WuW/E OLG 1921 (1924) – *Thyssen/Hüller*.

*into account. Authorisation may be granted only if the scope of the restraint of competition does not jeopardize the market economy system. [...].”*

21. Section 42(1) GWB thus contains two essential criteria that can lead to the clearance of a merger that was previously prohibited by the Bundeskartellamt (where necessary with ancillary provisions): “advantages to the economy as a whole” or “an overriding public interest”, whereby the first criterion generally represents a variant of the second.<sup>27</sup> As the term ‘overriding public interest’ is not defined in more detail in the provision, it opens up a wide scope for assessment and can therefore also apply to advantages in policy areas relating, for example, to the labour market or healthcare. The criterion of ‘advantages to the economy as a whole’ inherently covers only the area of economic policy (such as ensuring the security of essential goods supply or securing key skills or know-how for the national economy), which corresponds with the area of responsibility of the minister making the decision. The minister can only consider advantages if they are caused by the merger in question and cannot be realised in another way that does not restrict competition.<sup>28</sup> The ‘advantages to the economy as a whole’ or the ‘overriding public interest’ must then be weighed against the significant impediment to competition that led to the prohibition under the SIEC test.<sup>29</sup>

22. The effects that can be taken into account are limited to Germany. The national perspective is only abandoned to the extent that the effects of the merger on the international competitiveness of the companies involved are included in the assessment (Section 42(1) sentence 2 GWB). Similarly, efficiencies arising at the level of the companies involved can only be considered under the German instrument of ministerial authorisation if they are relevant from a national point of view. Thus, a reduction in production costs or transaction costs related to a merger can only be taken into account in German merger control if it (i) either benefits consumers in the relevant market (consideration under the SIEC test) or (ii) results in the above-mentioned benefits considered in the context of ministerial authorisation.

23. Overall, the instrument of ministerial authorisation established in German merger control law allows the positive effects of a merger to be taken into account to a much greater extent than is possible under European competition law. In addition, it relieves the Bundeskartellamt from assessing the merger in an economic policy context and from forecasting its effects on the economy as a whole or on political aspects not related to competition policy. This strengthens the authority’s independence, enabling it to focus exclusively on the competitive effects of a merger. The overall assessment of a merger is assigned to the Federal Minister for Economic Affairs and Energy (if the merging parties file an application) who enjoys greater democratic legitimacy and has a significantly broader scope of responsibility. However, the introduction of ministerial authorisation into national competition law sets a very high standard for the instrument’s institutional structure. To prevent potential abuse, it is essential to have institutional safeguards that ensure transparency and accountability in decision-making processes. Moreover, the ministerial authorisation procedure involves a comprehensive assessment of each individual case, tying up significant resources for all parties involved in the process. As the requirements for granting ministerial authorisation are met in exceptional cases only, just 23 applications have been submitted since the instrument was introduced in 1973.

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<sup>27</sup> BeckOK KartellR/Picht, GWB § 42 para. 7.

<sup>28</sup> Bechtold/Bosch, GWB § 42 para. 8.

<sup>29</sup> Bechtold/Bosch, GWB § 42 para. 5 f.

Authorisations were granted in ten cases, seven of which were subject to ancillary provisions.

### 3. The Bundeskartellamt's case practice

24. Efficiencies were claimed by the merger parties on the grounds of national competition law in several cases examined by the Bundeskartellamt. The first three cases refer to claimed efficiencies in the impaired market. So far, claimed efficiencies in the impaired market have not changed the overall assessment of a case.

#### 3.1. Heidelberg/Mannheim University Hospitals (B3-37/24)

25. The Bundeskartellamt blocked a merger between Heidelberg University Hospital (UKHD) and Mannheim University Hospital (UKMA), two of the leading hospitals in the region. The Bundeskartellamt found that the merger would have led to an SIEC, specifically by strengthening the UKHD's dominant position in the Heidelberg hospital market and creating a dominant position in the Mannheim hospital market.

26. The parties claimed that the merger would lead to improved clinical quality and a variety of other efficiencies. These advantages included, for example, so-called volume-outcome effects in advanced treatments, where an increased case volume leads to an improvement in the quality of care. Such volume-outcome effects can occur through specialisation or learning effects, for example.

27. The Bundeskartellamt acknowledged the theoretical basis of these claims, provided that the volume-outcome effect had been confirmed for the specific treatment in peer-reviewed studies. In this case, however, the volume-outcome effects were not sufficient to offset the negative effects on competition. The reason for this was that the additional quality effect usually decreases with size. For most of the treatments considered, one of the merging parties had already achieved high treatment volumes prior to the merger, making any quantity-induced quality increase unlikely.

28. When examining the possible efficiency gains, the Bundeskartellamt also had to assess the essential question of whether the merger was actually indispensable for achieving the desired effects. This was not found to be the case. The claimed efficiency gains could also be achieved through medical and scientific cooperation.

29. In summary, the Bundeskartellamt rejected the efficiency claims related to improved hospital quality, concluding that they were neither sufficiently certain nor merger-specific.

#### 3.2. Loomis/Ziemann (B9-80/19)

30. The Bundeskartellamt prohibited the proposed acquisition of Ziemann, Germany's second-largest cash handling provider at the time, by Loomis, a Swedish competitor.<sup>30</sup> The transaction was expected to significantly impede effective competition in several already highly concentrated local markets. Following the merger, Loomis/Ziemann and Prosegur would have basically been the only two companies active in the markets affected, while the remaining small regional providers would have had minimal market shares and been largely

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<sup>30</sup> Press release of 18 December 2019, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/18\\_12\\_2019\\_Geldtransporter.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/18_12_2019_Geldtransporter.html).

disregarded by key customers. This reduction in competition was expected to result in higher prices for cash handling services used by banks and retail businesses, ultimately affecting consumers.

31. The merging parties claimed that the transaction would yield substantial efficiencies, primarily through cost savings resulting from optimised route planning and a more effective utilisation of the combined network of locations.

32. Although the Bundeskartellamt acknowledged that network density could produce cost advantages, it found the claimed efficiencies to be unverifiable. The parties failed to submit supporting internal documents or detailed calculations. Given the already high density of stops in the relevant markets, it remained speculative whether further scale effects could be realised.

33. With regard to whether cost savings would be passed on to consumers, the parties relied on general economic theory suggesting that even monopolists reduce prices when marginal costs fall. However, this did not demonstrate an actual incentive to pass on cost reductions in practice, which depends on factors specific to each case, such as demand elasticity and market structure.

34. The Bundeskartellamt therefore concluded that the claimed efficiencies were neither verifiable nor shown to benefit consumers, and were thus insufficient to offset the expected significant impediment to effective competition.

### 3.3. Telekom/EWE (B7-21/18)

35. The Bundeskartellamt cleared a joint venture between the telecommunications companies Telekom Deutschland and EWE, established for the purpose of jointly expanding fibre-optic network connections.<sup>31</sup> The permission was subject to the parties providing commitments to build networks, including in rural areas, maintain competition, for example through independent tender participation, and grant non-discriminatory access to the new network.

36. The parties claimed that the joint venture would generate cost efficiencies, for example through synergy effects resulting from the use of the two parent companies' existing infrastructure. However, the parties stated that they were unable to quantify these cost savings in detail.

37. The Bundeskartellamt found that the efficiencies were not sufficiently verifiable. The claimed cost savings were neither well quantified nor benchmarked against a plausible counterfactual. For example, the use of the two parent companies' existing infrastructure was not expected to yield substantial cost savings, given the significant regional overlap in existing infrastructure. Moreover, most of the asserted benefits could be achieved independently, as telecommunications regulation already requires infrastructure sharing, even if the network is expanded by a single provider.

38. The parties further argued that the joint venture would improve network utilisation, as both parent companies would transfer their customers to the new fibre network. In contrast, if they remained in competition, each firm might incentivise customers to remain

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<sup>31</sup> Press release of 5 December 2019, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/05\\_12\\_2019\\_Telekom\\_EWE.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/05_12_2019_Telekom_EWE.html) and press release of 30 December 2019 [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/30\\_12\\_2019\\_DTAG-EWE.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/30_12_2019_DTAG-EWE.html).

on their respective legacy networks, potentially resulting in two sets of underutilised infrastructure.

39. The Bundeskartellamt questioned whether this constituted a merger-specific efficiency. The improved utilisation appeared to be the result of reduced competitive pressure rather than increased productive efficiency. It also remained unclear whether better infrastructure coordination would significantly alter the incentives to pass on cost savings, given that the legacy networks would continue to compete with the fibre network even in the joint venture scenario.

40. The following cases refer to efficiencies within the framework of the balancing clause. In particular, these were cases where the identified impediment to effective competition was outweighed by merger-specific out-of-market efficiencies.

### 3.4. RheinEnergie/Westenergie (B8-134/21)

41. On 30 September 2022, the Bundeskartellamt cleared a strategic merger between the two energy companies Westenergie (an E.ON subsidiary) and RheinEnergie, subject to the condition that RheinEnergie divests significant parts of its heating electricity business. Otherwise, the transaction would have significantly impeded competition in several local market areas around Cologne in the heating electricity sector and in the operation of normal charging stations for electric vehicles. To address these competition concerns, RheinEnergie offered to transfer all special heating electricity contracts in some of the markets where the requirements for prohibiting the merger were fulfilled, as well as a significant proportion of these contracts in Cologne and another municipality, to an independent buyer.<sup>32</sup>

42. The Bundeskartellamt found that the conditions of the balancing clause had been met, as the positive effects on the competitive conditions in the improved markets (in this case, the heating electricity markets) outweighed the proposed merger's negative effects on the competitive conditions in the remaining markets where the prohibition requirements were fulfilled.

43. The efficiencies identified under the balancing clause were the result of the binding remedies. These remedies achieved competitive improvements that also outweighed the competitive problems in the remaining heating electricity markets where the prohibition requirements were fulfilled and in the markets for the operation of standard charging stations. Specifically, the proposed merger, as modified by the remedies, resulted in excessive sales of heating electricity contracts in the improved markets.

44. The decision was confirmed by the Düsseldorf Higher Regional Court on 10 August 2023. The consideration of efficiencies resulting from binding remedies also corresponds to the legislature's intention to preserve the possibility of taking all the competitive effects of a proposed merger into account when examining it.

### 3.5. Medien holding:nord/Elmshorner Nachrichten (B6-38/09)

45. In 2009, the Bundeskartellamt permitted the publishing house Schleswig-Holsteiner Zeitungsverlag to acquire the Elmshorner Nachrichten newspaper from Axel

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<sup>32</sup> Press release of 30 September 2022, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/30\\_09\\_2022\\_Rhenag.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/30_09_2022_Rhenag.html).

Springer AG under the balancing clause.<sup>33</sup> In a comparative overall assessment, the authority found that the improvements in the readership market structure in the Elmshorner Nachrichten distribution area resulting from the merger (improvement market) outweighed the deterioration in the advertising and readership markets in the Steinburg district (impaired markets).

46. The efficiencies identified in the improved market in connection with the merger proposal were primarily due to the weakening of Axel Springer AG's previously dominant position in the region affected. Following the change in ownership of the Elmshorner Nachrichten newspaper due to the merger, the primary and secondary newspapers in this region were published by different, financially robust publishers. It was assumed that these structural improvements would directly stimulate competition in the readership market in the Elmshorner Nachrichten distribution area.

47. Financially robust Axel Springer AG maintained its presence with the Pinneberger Zeitung, whose distribution area borders the impaired markets, and thus also remained a source of potential competition. The significant improvement in the context of the balancing clause was that, as a direct consequence of the merger, competition could arise throughout the entire Elmshorner Nachrichten distribution area.

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<sup>33</sup> Press release of 9 July 2009, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2009/09\\_07\\_2009\\_SHZ-Elmshorn.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2009/09_07_2009_SHZ-Elmshorn.html).