

Budzinski, Oliver; Wacker, Katharina

Working Paper

The prohibition of the proposed Springer-ProSiebenSat.1-Merger: how much economics in German merger control?

Diskussionsbeitrag, No. 160

Provided in Cooperation with:

University of Duisburg-Essen, Institute of Business and Economic Studie (IBES)

Suggested Citation: Budzinski, Oliver; Wacker, Katharina (2007) : The prohibition of the proposed Springer-ProSiebenSat.1-Merger: how much economics in German merger control?, Diskussionsbeitrag, No. 160, Universität Duisburg-Essen, Fachbereich Wirtschaftswissenschaften, Essen

This Version is available at:

<https://hdl.handle.net/10419/32114>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.

Diskussionsbeitrag aus dem
Fachbereich Wirtschaftswissenschaften
Universität Duisburg-Essen
Campus Essen

Nr. 160

März 2007

***The Prohibition of the Proposed Springer-
ProSiebenSat.1-Merger:
How much Economics in German Merger Con-
trol?***

Oliver Budzinski & Katharina Wacker

The Prohibition of the Proposed Springer-ProSiebenSat.1-Merger: How much Economics in German Merger Control?

*Oliver Budzinski & Katharina Wacker**

March 2007

Abstract: We review the Bundeskartellamt (Federal Cartel Office Germany) decision on the proposed merger between Springer and ProSiebenSat.1 from an economic point of view. In doing so, it is not our goal to analyse whether the controversial decision by the Bundeskartellamt has been correct or flawed from a legal point of view. Instead, we analyse whether the economic reasoning in the decision document reflects state-of-the-art economic theory on conglomerate mergers. Regarding such types of mergers, anticompetitive effects either do not occur regularly or are more often than not overcompensated by efficiency gains, so that a standard welfare perspective demands reluctance concerning antitrust interventions. This is particularly true if two-sided markets, like media markets, are involved. However, anticompetitive conglomerate mergers are not impossible, in particular in neighbouring markets where there is some relationship between the products of the merging companies. In line with the more-economic approach in European merger control, a particular thorough line of argumentation, backed with particularly convincing economic evidence, is necessary to justify a prohibition of a conglomerate merger from an economic point of view. Against this background, we do not find the reasoning of the Bundeskartellamt entirely convincing and sufficiently strong to justify a prohibition of the proposed combination from an economic perspective. The reasons are that (i) the Bundeskartellamt fails to continuously consider consumer and customer welfare as the relevant standards, (ii) positive efficiency and welfare effects of cross-media strategies are neglected, (iii) in contrast, the competition agency sometimes appears to view profitability of post-merger strategy options to be per se anticompetitive (efficiency offence), (iv) the incontestability of the relevant markets is not sufficiently substantiated, (v) inconsistencies occur regarding the symmetry of the TV advertising market duopoly versus the unique role of the BILD-Zeitung and (vi) the employment of modern economic instruments appears to be underdeveloped. Thus, we conclude that the Bundeskartellamt has not embraced the European more-economic approach in the analysed decision. However, one can discuss whether economic effects are overcompensated in this case by concerns about a reduction in diversity of opinion and threats to free speech. Similar to the Bundeskartellamt, we do not consider these concerns in our analysis.

Keywords: merger control, media markets, more-economic approach, conglomerate mergers, cross-promotion

JEL-Code: L82, L40, K21

* *Dr. Oliver Budzinski*, Visiting Professor, Philipps-University of Marburg, Department of Economics, email: oliver.budzinski@staff.uni-marburg.de. *Katharina Wacker*, Economist, Heinrich-Heine-University of Düsseldorf, Department of Economics, email: k.wacker@uni-duesseldorf.de. We thank Arndt Christiansen and Franziska Kohl for valuable comments on earlier versions of this paper and Barbara Güldenring for editorial assistance.

1 Introduction

During the recent reform process of European Merger Control, the so-called ‘more-economic approach’ has been introduced (*Christiansen 2006; Neven 2006; Röller/De La Mano 2006*). Its core idea is that merger decisions shall be based upon sound economic analysis with thorough reception of modern economic concepts, theories and instruments. The state-of-the-art of competition economics ought to be the yardstick for the assessment of mergers. According to the more-economic approach in European merger control, the net effect of a merger on consumer welfare represents the adequate criterion in order to distinguish between anti- and procompetitive mergers.

Merger control within the European Union, however, can be characterised as a two-level system of merger reviewing jurisdictions (*Budzinski/Christiansen 2005; Budzinski 2006*): next to merger control according to the EC Merger Regulation and enforced by the European Commission, the competition laws of the Member States apply to mergers with predominantly national scope (in terms of the geographical distribution of turnovers) and the competition authorities of the Member States enforce these rules. Since the Member States are extensively autonomous regarding the shape and practice of their merger control regimes, the more-economic approach merely affects the European level. However, it represents an interesting question, to what extent the Member State merger control regimes adhere to modern economic reasoning when reviewing and assessing a proposed merger. However, this is hardly touched upon in the literature so far. As a small step into this direction, we analyse the proposed merger between the Axel Springer AG and the ProSiebenSat.1 Media AG, two German media companies, which was notified to the Bundeskartellamt (German Federal Cartel Office) under the Gesetz gegen Wettbewerbsbeschränkungen (GWB; German Law against Restrictions of Competition) on August 12, 2005 and eventually prohibited by the Bundeskartellamt with its decision on January 19, 2006 (*Bundeskartellamt 2006*). The relevant prohibition criterion is that the merger must not create or strengthen a dominant position (§ 36 GWB). We review the prohibition decision against the background of the compatibility of its reasoning with modern economic theories and, in doing so, attempt to assess to what extent German merger control incorporated the more-economic approach in this particular case.

2 Springer-ProSiebenSat.1 and the Economics of Conglomerate Mergers

First of all, we present the parties involved in this case and the relevant markets identified by the Bundeskartellamt. As a second step we give a survey of the economics of conglomerate merger because this provides the basis for the prohibition arguments reviewed in section 3. Before that we explore the issue in how far media markets are different and what consequences this may have for the assessment of competition.

2.1 The Parties, the Relevant Markets, and Market Shares

The acquisition of the German TV-network ProSiebenSat.1 by Axel Springer, one of the largest German publishing companies, was announced and notified to the Bundeskartellamt in August 2005. Five months later, after several hearings and proceedings, the German competition authority eventually decided to block the merger. The commitments offered by the merging parties did not suffice to have the merger cleared. According to the Bundeskartellamt, the merger would have led to a strengthening of already existing dominant positions, in particular because of cross-market effects between TV and newspaper markets. More specifically, the Bundeskartellamt held (i) a strengthening of collective dominance on the TV advertising market, (ii) a strengthening of single-firm dominance on the national advertising market for newspapers and (iii) a strengthening of single-firm dominance on the national reader market for over-the-counter newspapers.

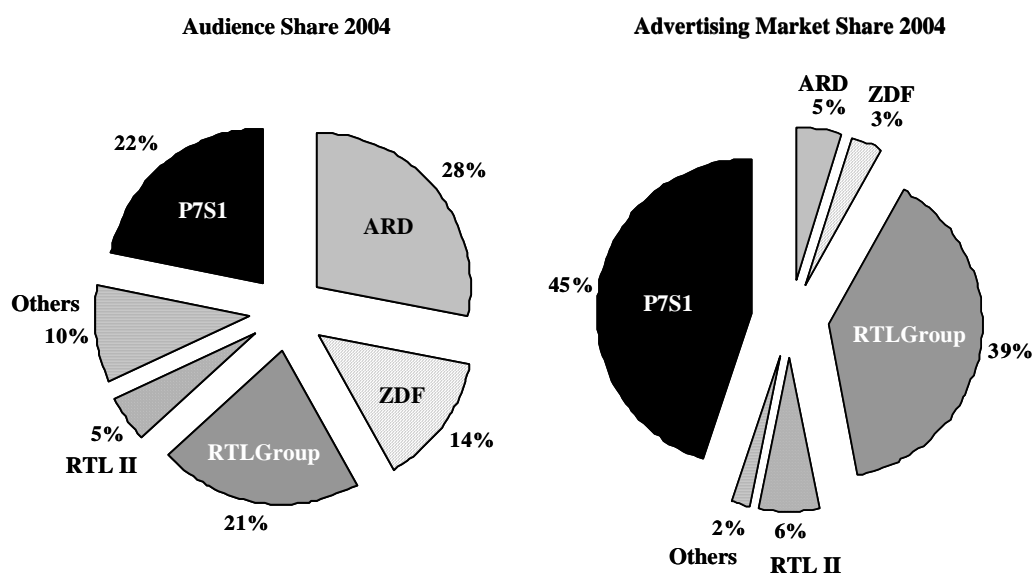
- Axel Springer AG (AS) is a listed German media company, particularly engaged in the business of newspapers, magazines and new media. Furthermore, AS is involved in various other areas of the media business, e.g. regional radio stations, printing and distribution of own and foreign print products, content production for private and public TV stations. In particular AS already holds a substantial share in one of the TV stations belonging to the ProSiebenSat.1-Group.
- ProSiebenSat.1 Media AG (P7S1) acts as holding for one of two leading private TV-Groups in Germany. P7S1 operates five Free-TV-stations and is engaged in the marketing and commercialisation of its stations as well as in audio-visual productions (news, magazines, talk shows, etc.), predominantly for its own stations.

Media companies generally participate in two separate good markets: in the first one, some kind of content is marketed to consumers, whereas the second market involves the selling of advertising. Here, advertisers demand access to the audience using the media content. Basically, this dual product market structure characterizes every media product (partly) financed by advertising. So-called Free-TV-stations that are completely financed by advertising revenues (and/or public fees), so that consumers do not have to pay directly for the program or a specific broadcast (in contrast to Pay-TV and pay-per-view systems), also participate in these two markets. However, a direct monetary relationship only exists in the advertising market. Therefore, the *Bundeskartellamt* (2006: 23–29) denies a relevant audience market for Free-TV-programs. In consequence, the one relevant TV market is the TV advertising market. Nevertheless, the audience share is indirectly regarded as being an important factor (success measure) due to its influence on a station's advertising revenues and position on the advertising market.

Figure 1 shows the market shares of both the TV audience market and the TV advertising market. While the audience market is characterised by four similar strong play-

ers with considerable fringe competition, the TV advertising market is dominated by two private TV-networks (P7S1 and RTLGroup). Public television (ARD and ZDF) attracts more than 40 % of the overall audience but is restricted concerning its offering on the advertising market due to its character as predominantly financed through public fees. As a consequence, the TV advertising market shows a duopoly by P7S1 and the RTLGroup, each representing a 45 % market share. The RTLGroup is a subsidiary of Bertelsmann, the major media company in Germany and one of the largest world-wide. Besides the RTLGroup, other major subsidiaries of Bertelsmann are Random House (books), SonyBMG (music) and Gruner+Jahr (magazines).¹ Together with AS, Bertelsmann (via Gruner+Jahr) is engaged in the rotogravure company Prinovis. Apart from its pre-merger share in P7S1, AS is no considerable player on the TV market.²

Figure 1: TV Audience and TV Advertising Market Shares in 2004



ARD includes regional stations ("Dritte Programme").

Source: Compiled from *Bundeskartellamt* (2006).

Instead, AS core competence is the newspaper market, where the AS product "BILD-Zeitung", Germany's leading daily boulevard newspaper, stands out. As newspapers are not distributed freely, both the newspaper reader market and the newspaper advertising market are relevant. Concerning the reader market, the *Bundeskartellamt* (2006:

¹ Gruner+Jahr publishes numerous weekly and monthly magazines, the most well-known of which is STERN. Via Gruner+Jahr Bertelsmann also has an interest in the SPIEGEL Verlag.

² Additionally, AS holds a 27% share in "Hamburg 1", a regional TV station with negligible market shares.

41–42) distinguishes over-the-counter newspapers from subscription newspapers.³ This market delineation has been accepted by the German courts in the past⁴ but, nevertheless, received a controversial reception in the academic literature (*Wessely* 1995: 140-160; *Dewenter/Kaiser* 2005; *Säcker* 2005; *von Wallenberg* 2007). Sticking with the market definition of the competition agency, the reader market for over-the-counter newspapers is almost monopolized by AS's BILD, which is the only over-the-counter newspaper distributed nation-wide (see table 1). The market for newspaper advertising, by contrast, comprises all newspapers irrespective of the way they are offered.⁵ Here, AS reaches a market share of about 50 %, with BILD alone having a market share of more than 35 % (see table 1). AS doubles the share of the second largest newspaper (up to 25 %). P7S1 is not involved in the newspaper markets.

Table 1: Relevant Newspaper Market Shares in 2004

Newspaper	Reader Market Share (%)	Advertising Market Share (%)
BILD	77	40–45
Other AS newspapers	4	5
<i>AS in total</i>	<i>81</i>	<i>max. 50</i>
FAZ	–	20–25
Süddeutsche Zeitung	–	10–15
Handelsblatt	–	5–10
Express Köln/Bonn	4	< 1
Abendzeitung	3	< 1
Tz München	3	< 1
Berliner Kurier*	3	< 1
Hamburger MoPo*	2	< 1
MoPo für Sachsen ⁺	2	< 1
Financial Times D. ⁺	–	< 1
Others	2	< 10

*: Since 2006 belonging to BV Deutsche Zeitungsholding owned by the British Mecom Group; ⁺: belonging to Gruner+Jahn.

Data source: compiled from *Bundeskartellamt* (2006).

Consequently, the proposed merger of AS and P7S1 does not lead to an addition of market shares, neither on the TV markets, nor on the newspaper markets. There are, however, two other markets where both companies are doing business. On the market for online advertising, AS accomplishes a market share of less than 5 % with P7S1 attaining less than 1 %. Regarding the German market for the production of TV broadcasts (shows, magazines, etc.), AS accomplishes a market share of less than 10 % through its subsidiary Schwartzkopff TV. P7S1 remains under 1 % if in-house pro-

³ According to the *Bundeskartellamt* (2006: 41–42), subscription newspapers differ from over-the-counter newspapers regarding broadness and depth of coverage, design and illustration as well as the focal points of news and reports.

⁴ See WuW/E BGH 1854, 1857 "Zeitungsmarkt München" and WuW/E BGH 2425, 2428 "Niederrheinische Anzeigenblätter".

⁵ The Bundeskartellamt considers separating newspapers published on Sunday but that does not change market positions fundamentally.

ductions are neglected. In summary, the Bundeskartellamt (2006: 66) cannot identify any anticompetitive horizontal effects in these markets as a consequence of the proposed concentration. Thus, the prohibition of the merger rests on cross-market (conglomerate) effects.

2.2 The Economics of Conglomerate Mergers

Essentially, the proposed merger between Springer and ProSiebenSat.1 is characterised as being a conglomerate merger with the main relevant markets being TV advertising (ProSiebenSat.1) and over-the-counter newspapers (Springer) (*Bundeskartellamt* 2006: 23). According to the state-of-the-art of competition economics, conglomerate mergers are generally held to be less dangerous to competition than vertical and, particularly, horizontal ones. Moreover, conglomerate mergers are often believed to involve efficiency gains that generally exceed merely negligible competition effects (*Bishop et al.* 2005: 73-104). Therefore, since rational enterprises decide to engage in a conglomerate merger only if they expect efficiencies and since considerable anticompetitive effects are unlikely, competition authorities on the European level are required to prove adverse effects particularly diligent and precise in order to justify antitrust action against a conglomerate merger.⁶

However, from an economic perspective, this assessment – in its generality – merely holds for *pure conglomerate mergers* where the products of the merging companies are independent from each other, i.e. they do not stand in a horizontal or vertical relation with each other (*Church* 2004: 3). Things change if *conglomerate mergers in neighbouring markets* are concerned (*Church* 2004: 2–3). This refers to the recently frequent phenomenon of mergers between companies whose products do not fall into the same relevant market, but the different relevant markets are somewhat (complementary or substitutive) interrelated – though beneath the threshold to constitute a common relevant market. In Tetra Laval-Sidel, for instance, markets for carton beverage packaging and PET beverage packaging did not belong to the same relevant market according to standard SSNIP-styled analysis. However, they do not represent completely independent markets, like the markets for cars and refrigerators in the 1980s Daimler-Benz-AEG-merger. Similarly, the markets for aircraft engines and avionics in GE-Honeywell represent such neighbouring markets (while Tetra is about substitutive relation, GE is about complementary relation). Springer-ProSiebenSat.1 also belongs into the category of conglomerate mergers in neighbouring markets since TV and newspapers are not completely independent from each other. Therefore, we briefly review the economics of such types of conglomerate mergers in this section.

⁶ See for instance the recent CFI rulings in Tetra/Laval Sidel and General Electric/Honeywell (*Temple Lang* 2003; *Grant/Neven* 2005; *Howarth* 2005; *Baxter/Dethmers/Dodoo* 2006).

Anticompetitive concerns in neighbouring markets typically refer to leveraging problems, i.e. the leverage of market power from one market into another one (Nalebuff 2005). Standard instruments are fourfold (Church 2004: 130):

- *Tying* occurs when the purchase of good A requires that costumers also purchase good B.
- Pure *bundling* is quite similar to tying, referring to the case where customers can buy a good A only in a bundle with product B.⁷ Mixed bundling occurs if A and B can be bought individually but customers have to pay a higher price compared to the bundled offer.
- *Foreclosure* can occur in the meaning of “not supplying a rival with access to the complements controlled by the conglomerate: if consumers value variety, then the variety advantage can provide the conglomerate with market power or lead to monopolization” (Church 2004: 130) (Ma 1997; Church/Gandal 2000).
- *Financial leverage and predation*.

Tying and bundling can produce anticompetitive effects if the merger involves (or creates) a dominant firm in one of the markets, which is additionally protected by entry barriers (Church 2004: 148–219; Tirole 2005). Then, under certain circumstances, market power in market A can be leveraged into market B through tying strategies (Whinston 1990; Tirole 2005). Furthermore, tying can be employed to maintain or enhance market power in market A, for instance, by preventing entry into market A (Whinston 1990; Carlton/Waldman 2002). Additionally, negative welfare effects might result from the effects of tying strategies on innovation (Farrell/Katz 2000; Choi/Stefanadis 2001; Choi 2004). Under the aforementioned assumptions, bundling strategies, on the one hand, might lead to relaxing price competition through segmenting the market with competitive pressure, creating niches of monopoly (Carbajo et al. 1990; Seidmann 1990; Chen 1997). On the other hand, bundling might create strategic substitutes (i.e. the bundles being more substitutional than the original products) (Martin 1999), thus offering scope for quasi-horizontal exclusionary effects. If the affected markets can be viewed as markets for components of a system, then a conglomerate merger across the component markets creates one integrated system supplier (which cannot be copied because it incontestably dominates one of the component markets; remember assumptions at the beginning of this paragraph), offering various avenues to employ exclusionary practices including artificial incompatibilities (Denicolo 2000; Nalebuff 2000; Choi 2004).

Although conglomerate mergers in neighbouring markets entail an increased probability of anticompetitive effects of these types when compared to conglomerate mergers in non-related markets, still efficiency rationales may speak in favour of such a combination of assets. Consumers might benefit from distribution cost savings, compatibility cost savings, information and liability advantages as well as market

⁷ The difference occurs in terms of divisibility: bundling includes prescribed quantity relations (e.g. you can buy two units of A in a bundle with four units of B). Tying does not allow this.

segmentation and creation resulting from tying and bundling. Additionally, socially desirable improvements of the protection of intellectual property might occur (generally and comprehensively: *Bishop et al.* 2005: 73-104; *Tirole* 2005: 14–17). *Kolasky* (2005: 164) summarizes: “U.S. law has long considered that antitrust agencies should very rarely interfere with conglomerate mergers. On the contrary, it is recognized that such mergers have the potential to generate significant efficiencies: the injection of capital; the improvement of management efficiency; the transfer of know-how and best practices across traditional industry boundaries; and the increased ability to get by during economic downturns through diversification. In addition, conglomerate mergers provide a market for owner-managers to sell the businesses that they create, thereby encouraging enterprise and risk-taking. The European Community’s concern with theories that have been long abandoned in the United States is probably misplaced. Greater faith should be placed in the competitive process rather than worrying about competitors who may be less efficient than the merged entity.”

With imperfect capital markets, a conglomerate merger may create scope for financial leverage and predation (*Church* 2004: 260–280). If the conglomerate enjoys incontestable market power in market A, it can finance a predatory pricing strategy on market B through cross-subsidization in order to leverage its market power to the pre-merger competitive market B. Furthermore, credible threats (referring to its ‘deep pocket’) might deter potential competitors from entering market B. However, a number of additional elements are required in order to make a financial predation strategy sufficiently probable (*Bolton/Brodley/Riordan* 2000): the prey company depends on external financing, based on its performance, and predation sufficiently reduces its performance, thus threatening its continuing financing and thus its viability; a facilitating market structure (high concentration and entry barriers in market B); probable recoupment; absence of a credible efficiency justification.

A different line of thought claims that conglomerate mergers may favour coordinated effects by creating additional punishment instruments, in particular multimarket contact (*Church* 2004: 254–259). Post-merger coordination becomes facilitated if the merger makes the multimarket competitors more symmetric. If company I pre-merger competed on market A with company III and company II pre-merger competed on market B with company III, a merger I+II creates two symmetric companies, both competing on markets A and B with each other. However, several more conditions must be fulfilled (e.g. homogeneous products on each market A and B, sufficient market transparency, few competitors in both markets, considerable entry barriers, stable economic environment, past experience with coordination) in order to establish likely coordinated effects.

2.3 Economic Competition on Media Markets

Media markets are characterized by a number of specific features that distinguishes them from ‘ordinary’ markets. First, we briefly review some economic specifics, and then we briefly address the interrelation of economic competition and journalistic diversity that frustrates an economics-only analysis of media markets. Nevertheless,

economic competition represents an important element of media markets and, therefore, a competitive analysis is definitely part of the story of a media merger.

Considering the characteristics of public goods, one must distinguish between information or content itself and the means by which it is distributed. While there is no rivalry for information itself and no one can be excluded from an information once it is published, there are means to exclude individuals from a print product containing information. Even a television program broadcasted free-to-air is supplied although viewers are not excluded through the price mechanism. Instead a second product, namely advertising space as a normal private good is tied with the public good content, in order to finance it. So, the problem of public goods is solved by the market itself through bundling content with advertising. Improved exclusion techniques, like cable television and the digitalisation of distribution channels, make it even easier to supply subscription-based TV-programs.

However, the dualism of content and advertising establishes a so-called two-sided market characterised by a strong economic correlation between the outcome in the two markets, e.g. audience share and advertising revenue (*Dewenter 2004; Anderson/Gabszewicz 2006*). If a TV-program reaches a high audience share advertisers are very interested in transmitting their commercials in this program. The great demand for advertising space leads to high advertising revenue that enables the station to further improve its attractiveness. This again will boost the advertising demand and so on. As a consequence, media enterprises face the task of optimising its price structure in order to maximise the combined revenue of the two market sides. This is true for the newspaper market but not entirely true for Free-TV because of the missing price relationship between stations and viewers.⁸ From an economic point of view the bias of market outcome in media markets caused by externalities is presumably of no greater importance than in many other markets. The same applies to imperfect information. Like utilities in the energy or transportation sector, some media distribution channels are characterised by subadditive cost structures. This may lead to natural monopoly, e.g. in cable television, but it is of no relevance in the present case because no distribution market is regarded.⁹

In summary, despite some market imperfections and sector specifics, media markets in principle can be subject to competition-economics analysis (*Dewenter 2004; Anderson/Gabszewicz 2006*). However, inextricably intertwined with the economic aspects of media markets, there exist important non-economic goals, such as freedom of speech and pluralism, that give reasons for a media-specific regulatory framework in addition to general competition law. The interrelation of economic competition and journalistic pluralism on media markets remains a difficult and insufficiently explored

⁸ Consequently, the Free-TV market fails to match the definition of two-sided markets by *Rochet/Tirole (2004: 26)*.

⁹ For a more detailed analysis of the question in how far market failure in the TV market justifies sector-specific regulation see *Wacker (2007)*.

subject. As a consequence, the co-existence of competition policy and sectoral media policy is quite typical. Sectoral policy is said to be superior in order to achieve objectives, like diversity and the promotion of pluralism of views (supporting the democratic formation of public opinion) (*Motta/Polo* 1997). The competitive market equilibrium may show a differentiation of contents, but this outcome does not necessarily involve the representation of political views. Moreover persistent concentration, driven by the high cost of the more attractive contents, remains a major limit to the realisation of pluralism within the market. Due to lobbying motivations of media owners, pluralism within a single media cannot be expected either. (*Polo* 2005). Divergences and incompatibilities between economic efficiency oriented policies (for instance, tolerating a higher degree of concentration in the name of higher efficiency) and such that promote pluralism support a separation of powers (*Motta/Polo* 1997: 321).

In Germany, this is reflected by two different institutions and the laws involved in media mergers. The Bundeskartellamt reviews the economic effects of media mergers according to the general competition law (GWB). Besides, the Kommission zur Ermittlung der Konzentration im Medienbereich (KEK, sector-specific regulatory authority commissioned to investigate concentration in broadcasting) examines, if pluralism and diversity are threatened according to the requirements of the Rundfunkstaatsvertrag (RStV, broadcast-specific regulatory framework). As this paper focuses on the decision of the Bundeskartellamt, we will only analyse the economic effects of the proposed merger on competition in the markets involved. This neither implies that economic effects are more important than non-economic effects, nor that the prohibition by the *KEK* (2006) is less controversial.¹⁰ Our choice merely reflects the goal of the paper to analyse the extent and quality of economic reasoning in a landmark decision on the Member-State level of the European Merger Control System.

3 A Review of the Prohibition Arguments of the German Cartel Office from an Economic Perspective

The decision of the Bundeskartellamt is founded particularly on two arguments:

- the merger stabilizes and increases the collective dominance of P7S1 and RTLGroup on the TV advertising market by enhancing incentives for coordinated behaviour within the duopoly (section 3.1).
- the merger strengthens the already dominant position of AS on the reader and on the advertising market for newspapers because of cross-media strategies, which can profitably be employed by AS-P7S1 post-merger (section 3.2).

¹⁰ See for controversial assessments of the (quality of the) KEK-decision *Lange* (2005), *Möschel* (2005), *Bornemann* (2006), *Gounalakis/Zagouras* (2006), *Hain* (2006), and *Säcker* (2006).

3.1 Strengthening of Collective Dominance (TV-Markets)

As outlined in the last paragraph of section 2.2, a conglomerate merger can potentially strengthen an existing collective dominance and, thus, increase concerns about anticompetitive coordinated oligopoly effects. Since a conglomerate merger does not reduce the number of competitors, an increased probability of coordinated effects predominantly arises if the merger leads to multimarket contact (improved retaliation mechanism), (thereby) making the oligopolists more symmetric, and increases barriers to entry. In order to derive anticompetitive effects, two steps of analysis are necessary: first, an existing collective dominance of the RTLGroup-P7S1 duopoly on the TV advertising market must be proved, i.e. a lack of competition between RTLGroup and P7S1 pre-merger (*Bundeskartellamt* 2006: 29-38), and, second, it must be demonstrated how this coordinated behaviour becomes stabilised or increased post-merger (*Bundeskartellamt* 2006: 38-41).

3.1.1 Uncompetitive Duopoly?

The task of identifying coordinated effects belongs to the most challenging ones in merger control, because tight oligopolies tend to the extremes: the recognition of strong mutual interdependence of the competitors can either induce fierce competition or coordinated behaviour (uncompetitive co-existence). Economic oligopoly theory has identified a set of market characteristics that increase the likelihood of coordinated equilibria at the expense of competitive rivalry, namely (i) a limited number of competitors, (ii) a high degree of homogeneity in terms of products and cost structures, (iii) a high level of market transparency, (iv) significant barriers to entry, (v) the absence of significant buyer power, (vi) a low probability of detection and legal sanctions, (vii) multi-market contacts, (viii) past experience with coordination, and (ix) a stable economic environment.¹¹

In line with contemporary economic thinking, the *Bundeskartellamt* (2006: 29-38) convincingly identifies a considerable number of market characteristics that facilitate coordinated effects. In the first place, the TV advertising market is without doubt highly concentrated and dominated by two players – RTLGroup and P7S1 with more or less constant market shares over the last years of about 40 % each. It seems to be less obvious, however, that the marketed products are homogeneous since it matters whether an advertising minute is aired during a popular movie at prime time or a special interest broadcast at midnight. However, similar to other media markets, like the music industry¹², RTLGroup and P7S1 can be viewed to offer a comparable range of products, so that the complete package of offered advertising environment is rather homogeneous. Consequently, a homogeneous average cost structure result. Addition-

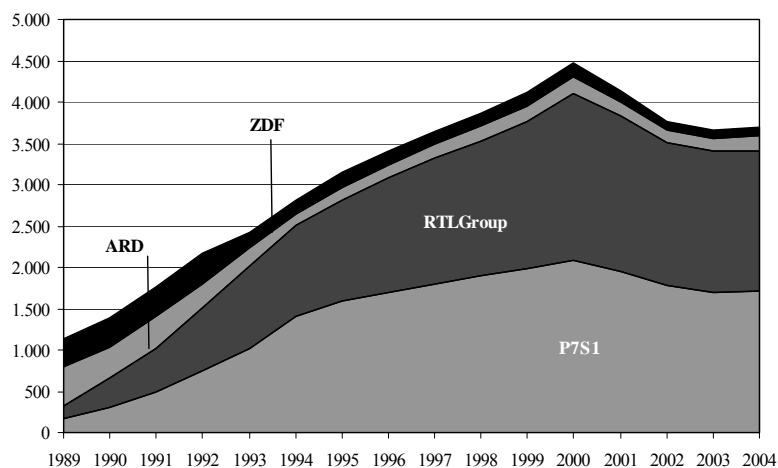
¹¹ See *Aigner/Budzinski/Christiansen* (2006: 312-319) for a review of the economic theory of coordinated effects and the evolution of the European Commission's collective dominance policy.

¹² See, for instance, the reasoning in the Sony-BMG merger case (*Aigner/Budzinski/Christiansen* 2006).

ally, market transparency is considerably high and sufficient buyer power cannot be identified.

Two other assessments seem to be more problematic from an economic perspective. Firstly, the *Bundeskartellamt* (2006: 31–34) substantiates its assessment that RTLGroup and P7S1 form an ‘uncompetitive duopoly’ by the parallel development of market shares and prices. Figure 2 shows the development of TV advertising revenues in Germany for the major players.

Figure 2: Development of TV Advertising Revenues 1989–2004 (in mio. Eur)



Source: *SevenOne Media* 2006.

The *Bundeskartellamt* (2006: 31) points out that in a market environment of declining advertising revenues, constant market shares persisting over several years argue against substantial competition between the actual players. In fact, however, the market volume is not declining in general. After a steady market expansion in the eighties and nineties due to the market entries of private stations, in the last years it is more likely to show a kind of cyclical movement because the demand for advertising is not irrespective of business cycles. Nevertheless, the market shares have not varied significantly during the last years, neither for the whole groups as shown in figure 2 nor for single stations. According to economic theory, however, constant market shares (on an annual basis) and parallel movements of average prices do not suffice for the conclusion that no competition takes place (*Buccirossi* 2006).

Concerning parallel price movements, it should be considered that prices are usually adjusted during a year according to the success of a program, which is not visible in prices averaged over all programs of one station (or group of stations) for one year. The competition agency relies on the latter indicator, which might be problematic. Furthermore, the higher price level after 8 p.m. is not only (and maybe to a lesser extent) caused by lessening competition due to the restriction for public stations not to show spots after 8 p.m. as argued by *Bundeskartellamt* (2006: 34). Instead, it is driven by the goal of reaching a greater audience at this prime time, particularly concerning

the preferred target group of individuals between the ages of 14–49. Consequently, the most attractive content is then broadcasted. Due to this preference for the prime time period, firms demanding advertising capacities are willing to pay a higher price per contact (or per thousand contacts as it is commonly standardized). The preference for greater audience and the higher willingness to pay can also be recognized by comparing the prices per thousand contacts of the minor stations (e.g. Vox, Kabel 1) with those of the main stations of each group (e.g. RTL, Sat.1). Interestingly, the prices of the public stations reach a level significantly above those of the most attractive private stations¹³, which is not discussed by the cartel office.

Nevertheless, the striking convergence of prices during the 1990s and a simultaneous announcement of price increase (justified by almost identical wording) led to earlier investigations by the Bundeskartellamt in 1999 (*KEK* 2000: 206). This indication of past experience with anticompetitive conduct strengthens the case of the competition agency. However, at the same time, there are great incentives to break a collusion. Because TV stations face a cost structure characterized by a great share of fixed costs for programming and very small marginal costs for advertisement booking, the stations are interested in using their full capacity. Therefore, the incentive to cut prices at short notice and thereby break the cartel agreement is comparatively high. The incentives for cheating are also supported by practices to allow ex post discounts (*Kruse* 2000: 40). As a consequence, the observed simultaneous movements of prices may also be a case of justified parallel behaviour (*Rott* 2003: 250). Another neglected issue is whether the noted parallel development of audience market shares (*Bundeskartellamt* 2006: 33) might cause (justify) a parallel development of advertising market shares.

Furthermore, competitive actions concerning programming should be taken into account. As the *Bundeskartellamt* (2006: 23) declares there is no separate ‘market’ for audiences but there is a strong link between the two because the success on the advertising market is determined by the audience shares. And in fact the program content is maybe the most important means a station can adapt to influence not only its audience level and share but also its advertising revenues. It happens frequently that shows not fulfilling expectations are stopped or moved to time periods with generally less audience. Beyond that, sequences of innovation and imitation can be observed as well. So, on closer examination the competitive situation may be more differentiated than illustrated by a glance at advertising market shares and average prices.

Secondly, the issue of entry barriers deserves a closer look. The *Bundeskartellamt* (2006: 36–37) is certainly right to conclude that the other competitors on the TV advertising market are currently not able to exert sufficient competitive pressure on the duopolists. This includes the mighty public stations since they are not allowed to broadcast advertisement spots beyond the time frame from 5 to 8 p.m. on weekdays.

¹³ While the public stations must not broadcast commercials after 8 p.m., they legally engage in program sponsorship, for instance “company X presents the movie Y”.

The competition agency is certainly correct in refraining from taking into consideration that this regulation might be (or might not be) liberalised in the long run in the face of an increasingly controversial discussion about the value and height of TV financing through public fees. Furthermore, the remaining private stations are specialised on specific niches.

Regarding potential newcomers, the *Bundeskartellamt* (2006: 36–37, 41) holds without much reasoning that they will find it hard to compete with the established stations because of substantial barriers to entry and barriers of mobility in the German TV market. This stands in line with previous analyses of media markets (e.g. *Rott* 2003: 161). However, one must wonder whether this is still valid. One prominent reason for entry barriers has always been frequency scarcity. In the face of satellite TV and the increased role of digital technologies in terrestrial and cable broadcasting, this problem has already lost and will further lose much of its significance.¹⁴ Another remarkable entry barrier is represented by the ability to offer a full-range program, which in the first place is restricted by the availability and price of intellectual property rights (shows, concepts, etc.). However, existing entry barriers must be compared to the abilities and resources of potential entrants in order to assess their deterrence effect. TV markets have been national and so was the scope of the players. However, more recently a wave of internationalisation activities by big media companies has accelerated (*Nikolinakos* 2004; *Idot* 2006). Potential entrants into the German TV market include big European and American TV networks, which dispose over substantial financial resources as well as comprehensive broadcasting rights, etc. The decision of the German competition agency does not clarify sufficiently why entry barriers should be too high for such potential competitors. The *Bundeskartellamt* (2006: 37–38) merely hints to the fact that no successful major entry has taken place in the last couple of years. Apart from not being entirely indicative for future entries in and of itself, the lack of entries can alternatively be explained pro-competitively: the absence of supra-competitive profits might have rendered entry into the German TV market less attractive.¹⁵ Eventually, the ongoing trend towards a convergence of media might lead to a more integrated media market – both regarding different media types (e.g. internet TV) and the geographic scope – thereby bringing new dynamics and new competitors into the market (*Chon et al.* 2003; *Bernitz* 2006: 198–199;

¹⁴ Besides, the need for a broadcast licence from one of the regional authorities (Landesmedienanstalten) constitutes some kind of an institutional barrier to entry. In fact, the conditions that must be met in order to get a licence can be characterized as general minimum requirements that are the same for all market participants and their fulfilment constitutes a claim for the licence. Thus, the licensing procedure is not *per se* discriminatory. Furthermore, the KEK must consider possible risks for the diversity of opinion (e.g. caused by concentration of ownership). For detailed information see the relevant wording of the law in the RStV (Rundfunkstaatsvertrag), available at http://www.lfm-nrw.de/downloads/rstv_8.pdf, and in addition for example in the Landesmediengesetz NRW, available at <http://www.lfm-nrw.de/recht/landesmediengesetz/>.

¹⁵ Interpreted this way, the allegedly anticompetitive parallel movement of prices discussed in the preceding paragraphs may well be viewed as a result of fierce competition, driving prices to their competitive level.

Bohne 2006: 546–548; *Idot* 2006: 185–186). However, this can also be abused to create monopolies in distinct media markets, as the Italian example shows (*Kremmyda* 2006: 194). Taking all this into consideration, one must conclude that it is not satisfying to simply claim prohibitive entry barriers in tradition with past cases. Instead, the subject of entry barriers to the German TV advertising market would have merited a more elaborate and insightful economic analysis.

3.1.2 Conglomerate Effects, Symmetry, and the Role of “BILD”

So, to what extent does the conglomerate combination of P7S1’s TV stations and AS’s newspaper BILD strengthen the collective dominance on the TV advertising markets? Since the barriers to entry-problematic basically runs along the same lines as discussed in the preceding section, we will concentrate on multimarket contacts and an enhanced symmetry of Bertelsmann-RTLGroup and AS-P7S1 post-merger.

The *Bundeskartellamt* (2006: 38–41) outlines that the merger would lead to a further assimilation of the corporate structures of the two conglomerates (Bertelsmann-RTLGroup, AS-P7S1), which post-merger both include TV and print markets (AS-P7S1 predominantly newspapers and magazines, Bertelsmann-RTLGroup predominantly magazines and books). The merger would also result in a number of interlocks between them. All in all this would further secure and strengthen the duopoly in the TV advertising market (*Bundeskartellamt* 2006: 38). The more the market and corporate structures of oligopolists resemble each other, the more likely they will be able to stabilize parallel behaviour. The increasing symmetry between the two conglomerates raises the number of fields in which the duopolists are able to retaliate divergent behaviour (disciplining force of multimarket contact). Last but not least the cartel office stresses the unique potential of AS’s newspaper BILD to serve as a substitute for TV advertising, which would be omitted if AS and P7S1 merged.

Stressing the unique market position and characteristics of BILD is a recurrent pattern in the line of argumentation of the *Bundeskartellamt* (2006: 18, 39, 42, 43, 55, 57, 58, 62, 64). This position as the single nationwide daily over-the-counter newspaper, reaching much more consumers than any single other newspaper, is responsible for a large part of the allegedly anticompetitive effects of the merger.¹⁶ Indeed, if BILD had not possessed such a unique market position, most of the anticompetitive concerns would not have played a role at all. However, the extraordinary, incommensurable character of BILD stands in contrast to the claim that the merger makes the TV advertising oligopolists more symmetric. Bertelsmann produces a prominent (weekly) political magazine (DER SPIEGEL) as well as some regional newspapers¹⁷ but fundamentally nothing comparable to BILD¹⁸. Therefore, one could argue in favour of an

¹⁶ See next to the reasoning so far in particular section 3.2.

¹⁷ These are Sächsische Zeitung, MoPo Sachsen.

¹⁸ The only nationwide newspaper of Bertelsmann is the Financial Times Deutschland, a niche product with a negligible market share on the newspapers advertising market.

improved multimarket contact because both conglomerates now combine TV and print media¹⁹, but only at the expense of qualifying the incontestable one-of-a-kind character of BILD, which, then, must be viewed under stronger competitive pressure by other print media. Thus, on the one hand, the Bundeskartellamt argues that the merger is anticompetitive because of the exceptional position of BILD, on the other hand the merger is deemed anticompetitive because it makes Bertelsmann-RTLGroup and AS-P7S1 more symmetric.

This obvious contradiction is addressed by claiming that BILD represents a fringe competitor to the duopoly on the TV advertising market. “The Bild-Zeitung currently represents the sole alternative – outside the relevant market – for advertisers concerning TV advertisement with Bertelsmann and P7S1. To some extent there is a fringe substitution. If AS merges with P7S1, this fringe substitution is omitted. Then, P7S1 and Bertelsmann are not forced anymore to consider the prices of advertisement space in the Bild-Zeitung when setting their prices for TV advertising, which leads to a strengthening of the duopoly. The omission of the fringe substitution cannot be limited in effect on P7S1. These are effects that affect competition on the overall TV advertising market and, thus, benefit the duopoly as a whole. Therefore, it cannot be expected that the Bild-Zeitung creates an asymmetry within the duopoly” (*Bundeskartellamt* 2006: 39–40; our translation). Unfortunately, this reasoning cannot convince from an economic perspective. In the first place, an empirical, preferably econometric analysis of the substitution elasticity between TV advertising and advertising in BILD is completely missing. The claim seems to rest on plausibility considerations, which could have easily done the other way around. Notwithstanding, the economic theory of two-sided markets provides indication for the existence of outside competition between two platforms (e.g. TV channels and newspapers) (*Roson* 2005: 149). However, even if one accepts a (weak) substitutional relation²⁰, it remains unclear why its erosion in the course of the merger alleviates the asymmetry. Still, concerning the post-merger situation, one of the oligopolists possesses a unique newspaper and the other one does not. This could entail incentives for AS-P7S1 to employ the (incontestable) market power of BILD to strive for the market leading position in the TV market. With the background of a trump of the BILD calibre, why should AS-P7S1 stay satisfied with the balanced duopoly situation? Bertelsmann-RTLGroup, on the other hand, can be expected to rationally anticipate the new situation. Why is it improbable that Bertelsmann-RTLGroup would react in a fiercely competitive way in order to counter AS-P7S1-threat? Altogether, several characteristics of the case sup-

¹⁹ This entails a different problem, however. If both conglomerates became truly symmetric because of the merger and if the competition agency prohibited the merger on these grounds, the competitive advantage of Bertelsmann-RTLGroup – being the only TV-print-media conglomerate – would be cemented by the competition agency. This could lead to the allegation of protecting competitors instead of competition.

²⁰ BILD is assessed as being outside the relevant market. Note that other parts of the Bundeskartellamt decision view BILD and P7S1 as complementary products. See section 3.2.3.

port the possibility that the merger would create incentives for more competition on the TV advertising market.

Interestingly enough, the Bundeskartellamt completely ignores each of these scenarios. Surprisingly, it also does not analyse the possibility of a BILD-based predatory strategy in the TV advertising market, which would represent a possible anticompetitive consequence of the conglomerate merger. It is not our aim to demonstrate the potential procompetitive character of the blocked merger, and we cannot preclude that it does not create scope for coordinated effects. However, we do not find sufficient economic evidence in the Bundeskartellamt decision to justify its verdict.

3.2 Cross-media Strategies, Leveraging, and Bundling

The analysis of the reader and advertising market for newspapers focuses on various possibilities of cross-media strategies as an industry-specific consequence of a conglomerate merger including different media markets. Albeit the proposed merger does not lead to a strengthening of dominant position in anyone of the affected markets, it may enable discrimination and bundling strategies, causing anticompetitive leverage effects across markets (see section 2.2). In its detailed documentation, the *Bundeskartellamt* (2006: 41–66) distinguishes three types of (allegedly) anticompetitive cross-media strategies: (a) price-discrimination in cross-media advertising, (b) content-related cross-promotion, and (c) cross-media advertising campaigns.

3.2.1 Price-Discrimination in Cross-media Advertising

Concerning the reader market for newspapers, the *Bundeskartellamt* (2006: 51–53) is concerned that special offers, lower spot prices or corporate discounts by the TV stations of P7S1 in favour of BILD would further stabilise the newspaper's already unchallenged dominant position. Taking into account opportunity costs, one might question, however, whether such a price discrimination represents a favourable strategy for the stations (*Möschel* 2005; *Kuchinke/Schubert* 2006). Economically, the significance of opportunity costs sensitively depends on capacity limits in such cases. If P7S1 has free capacities or the ability to fill up advertising time slots not demanded by third parties on short notice with spots for BILD, then anticompetitive concerns might be justified. The capacity issue was subjected to controversy between the parties with the *Bundeskartellamt* (2006: 52) stressing the availability of low-opportunity cost capacities for cross-media advertising. The overall media presence of the Springer media could further be enhanced by means of product placement in various TV shows, which is expected to be further facilitated by a new EU directive (*Bundeskartellamt* 2006: 53). In return the TV stations could also take advantage of the wide circulation of BILD to promote their program.

However, next to the supply-side analysis of capacities, a demand-side analysis is needed. Given the already extremely dominant position and ubiquitous presence of

BILD, it is not self-evident that the percentage of readers, who decides to read a different newspaper, is prone to switch to BILD once the frequency of BILD advertising spots on P7S1 increases. While the Bundeskartellamt (2006: 46–49) engages in a general analysis demonstrating that overlaps between the readers of BILD and the viewers of P7S1 exist, it refrains from analysing the willingness of non-BILD-readers to switch to BILD. The switching elasticity might be considerably low due to an explicitly deliberate decision of these readers to avoid BILD because of its political bias and controversial journalistic methods (*Kuchinke/Schubert* 2006: 483).

The context of price discrimination and conglomerate markets represents to some extent a media-specific complex of problems, which is not particularly well analysed in economics. Standard economic theory on price discrimination generally relates more to vertical relations. Thus, in summary, while additional economic analysis along the outlined lines could have been helpful for clarification, the assessment of the Bundeskartellamt does not stand in contrast to a ‘more-economic focused’ perspective.

3.2.2 *Content-related Cross-Promotion*

Besides these promotional measures, similar effects could be achieved in a more indirect way through editorial measures (*Bundeskartellamt* 2006: 53–58). In contrast to the promotional measures of the previous section, the corporate media are not promoted through TV spots or advertisements but within the edited content. It can be assumed that advertising hidden in editorial content attracts higher attention and reputation than frequent TV spots (that could easily be avoided by zapping to other stations) (*Gounalakis/Zagouras* 2006: 1625–1626). A coherent cross-media content strategy, e.g. complementing and escorting each other’s ‘stories’, could enhance consumer loyalty and induce P7S1-viewers to buy BILD in order to see how the story continues to unfold. Furthermore, established brand names, like “BILD”, could also be used to launch a TV show called “BILD TV”, the profitability of which is elaborately discussed in the Bundeskartellamt decision, finding enhanced incentives to launch such a show post-merger.

In the academic controversy accompanying the merger prohibition, *Bohne* (2006: 545) and *Säcker* (2006) raise doubts whether journalistic cross-promotion would automatically strengthen AS’s dominant position on the newspapers reader market, referring to deviating consumer behaviour in regard to the two different media newspapers and TV as well as to adverse reactions of consumers that well realise the common background of the conglomerate. Even if one accepts the prospects of cross-promotion, however, it does not suffice to find that a merger creates scope for profitable business strategies. Quite the contrary, one would expect higher profitability to be both major motivation and major benefit (efficiency gains) of mergers. It becomes the decisive issue whether the profitable strategy decreases or enhances consumer welfare. Therefore, from a more-economic approach perspective, the relevant question is not merely whether cross-promotion is “commercially reasonable” (*Bundeskartellamt* 2006: 483).

tellamt 2006: 55) but, instead, whether such a strategy is profitable at the expense of consumers or because of better matching the consumer preferences. If consumers have a preference for a coherent journalistic offer across different media, then the profitability of cross-promotion goes along with increased consumer welfare and, thus, represents an efficient outcome. On the other hand, consumers might well value diversity of journalistic content. It seems probable to assume that both kinds of preferences are distributed among the consumers. However, if a coherent cross-media journalistic offer is missing pre-merger *and* independent journalistic offers both in TV and in newspapers still exist post-merger, then an improved matching of consumer preferences can be concluded. Since the TV audience market is characterised by four independent oligopolists with comparable markets shares plus several fringe competitors (see fig. 1 in section 2.1), the crucial market is the newspapers reader market. According to the market definition of the Bundeskartellamt, over-the-counter newspapers and subscription newspapers represent distinguishable, separate markets. If this is an adequate market delineation, worries about a decreasing match of diversity preferences might be justified. However, some authors criticise this market definition and emphasise that over-the-counter and subscription newspapers represent substitutes to a sufficient degree.²¹

Altogether, possible beneficial effects of cross-promotion are neglected by the Bundeskartellamt. Instead, a *form-based* argumentation – which might stand in line with the hitherto (pre-more-economic approach) practice of assessing ‘strengthening dominant positions’ – is applied, and the mere prospect that BILD could improve its performance post-merger by a rather indirect (content) bundling strategy is assessed to be an anticompetitive strengthening of its dominant position – without balancing positive and negative welfare *effects*. A deeper theoretical and empirical analysis might or might not eventually supported the assessment of the competition agency. In any case, the assessment would have been rooted more thoroughly in economic reasoning.

3.2.3 Cross-media Advertising Campaigns

The Bundeskartellamt (2006: 62–66) pictures the scenario that the new conglomerate could profitably offer integrated advertising campaigns to third parties that comprise a coordinated media mix of TV and print media. It holds that the AS-P7S1-merger would allow providing advertisers with a unique cross-media bundle and expects two types of anticompetitive effects from this: (a) the dominant position of AS (BILD) in the newspaper advertising market would be strengthened and (b) the collective dominance of the P7S1-RTLGroup-duopoly on the TV advertising market would be strengthened. Different from the previous sections, cross-media advertising campaigns relate to advertising companies as customers instead of consumers as in the newspaper readers market.

²¹ See e.g. *Wessely* (1995: 140-160); *Dewenter/Kaiser* (2005); *Säcker* (2005); *von Wallenberg* (2007).

In economic terms, combining the products TV advertising (via P7S1) with newspaper advertising (via BILD) in order to create a new product – an integrated cross-media advertising campaign – represents a bundling strategy (see section 2.2). Somewhat along the lines of the cross-promotion reasoning (see above section 3.2.2), the Bundeskartellamt concentrates on demonstrating that offering cross-media advertising campaigns from one source – as a bundle – represents a profitable business strategy. In doing so, the competition agency cites several industry studies, which show an increasing demand for such integrated campaigns by the advertising industry. Inter alia, it is emphasised that “concerning introductory campaigns, price promotions as well as openings, a mix of advertising in TV and in newspapers is essential” and, explicitly from one of the studies, “pure TV or print campaigns are less efficient than mix campaigns”.²² Thus, the alleged anticompetitive character of cross-media advertising campaigns is established precisely because they are efficient, i.e. offers a customer surplus! This stands perfectly in line with economic theory identifying particular strong efficiency effects of cross-market bundling strategies when both markets are two-sided in character (advertising plus reader/viewer) (*Rochet/Tirole* 2003; *Roson* 2005: 156). To put it modestly, the Bundeskartellamt comes close to an efficiency offence. Obviously, the profitability of this type of cross-media strategies rests on customer-benefiting efficiency gains instead of market power.

Theoretical economic reasoning holds that bundling is generally efficient and welfare-enhancing except of specific cases, in particular when pure bundling serves to leverage existing (single-firm) market power across the affected markets by squeezing out or deterring competitors from the target market (see above section 2.2). In the AS-P7S1-case, the necessary market power might exist on the newspaper advertising market (market share AS ~ 50 % compared to next best competitor ~ 25 %). It does, however, not exist on the TV advertising market (market shares of both P7S1 and RTLGroup about 45 % each). Consequently, a leveraging of AS’s market power on the newspaper advertising market onto the TV advertising market, in an attempt to push back RTLGroup, could be subject to analysis. This could be backed by the (alleged) unique and unassailable market position of the BILD, which requires customers of big cross-media advertising campaigns to include advertising in BILD in their campaign and, thus, makes them prone to the bundle offer. However, this is not considered by the competition agency because it would obviously contradict with its assessment of an uncompetitive duopoly situation on the TV advertising market that would become further strengthened through the merger (see above section 3.1).

Therefore, (allegedly) anticompetitive bundling can merely serve to maintain or enhance AS’s market power in the newspaper advertising market (see section 2.2). However, since the market position of BILD has been characterised as intangible in any event (*Bundeskartellamt* 2006: 43), it remains unclear whether this effect might be considerable. It is hard to see how campaign customers who refrain from advertis-

²² Both citations are our translations from the original German text in *Bundeskartellamt* (2006: 64).

ing in BILD pre-merger can now be forced or induced to include BILD in their cross-media advertising campaign: if they wanted to advertise in a nationwide over-the-counter newspaper, then they would be forced to BILD both pre- and post-merger. If they wanted to advertise in other, different print products (e.g. magazines, non-boulevard newspapers, etc.), then the merger would not make BILD more attractive to them.²³ Moreover, only a mixed bundling strategy can be expected, since a significant part of the demand by advertisers will continue to refer either to TV advertising or to newspaper advertising, rendering a pure bundling strategy economically unalluring. As a consequence, it is not convincing from an economic perspective that the resulting and emphasised procompetitive efficiency and customer surplus effects are (over-) compensated by anticompetitive deterring effects. Although a thorough balancing of pro- and anticompetitive effects of cross-media advertising campaigns is not provided by the German competition agency and, therefore, appropriate data is not available, it seems highly doubtful that the net effect is welfare decreasing.

As to the alleged strengthening of the collectively dominant position on the TV advertising market, the *Bundeskartellamt* (2006: 64–66) argues that because of increased offers of cross-media advertising campaigns, the competitive pressure that BILD with its unique market position and geographic scope exerts on the TV advertising duopoly is removed. However, the inclusion of this argument here seems problematic and misplaced. The economic logic of cross-media advertising campaigns rests on the complementary character of TV and newspaper advertising for the purposes of the customers of these bundles. In the eyes of these customers, no substitute is removed. Nevertheless, *other* customers may well view BILD as a (weak) substitute for TV advertising (which is why solely a mixed bundling strategy makes economically sense). Thus, a possible anticompetitive effect results merely for the customers *not* demanding cross-media campaigns. Furthermore, the economic literature on platform competition across two-sided markets emphasises that substitutional relations between two platforms (here: Free-TV channels and over-the-counter newspapers) alleviates market power concerns and renders anticompetitive effects of tying and bundling more implausible (*Roson* 2005: 149–156).

4 Conclusions

In this article, we reviewed the *Bundeskartellamt* decision on the proposed merger between Springer and ProSiebenSat.1 from an economic point of view. It was not our goal to analyse whether the controversial decision by the *Bundeskartellamt* was correct or flawed from a legal point of view. Instead, we analysed whether the economic reasoning in the decision document reflects state-of-the-art economic theory on conglomerate mergers. Regarding such types of mergers, anticompetitive effects either do

²³ Once again, the actually unique market position of BILD makes leveraging strategies from the newspapers market to the TV market plausible or at least debatable (see the preceding paragraph), but not vice versa.

not occur regularly or are more often than not overcompensated by efficiency gains, so that a welfare perspective demands reluctance concerning antitrust interventions. This is particularly true if two-sided markets like media markets are involved. However, anticompetitive conglomerate mergers are not impossible, in particular in neighbouring markets where there is some relationship between the products of the merging companies. In line with the more-economic approach in European merger control, a particular thorough line of argumentation, backed with particularly convincing economic evidence, is necessary to justify a prohibition of a conglomerate merger from an economic point of view.

We do not find the reasoning of the Bundeskartellamt entirely convincing and sufficiently strong to justify a prohibition of the proposed combination from an economic perspective. The reasons are the following:

- the Bundeskartellamt fails to continuously consider consumer and customer welfare as the relevant standards.
- positive efficiency and welfare effects of cross-media strategies are neglected.
- in contrast, the competition agency sometimes appears to view profitability of post-merger strategy options to be per se anticompetitive (efficiency offense).
- the incontestability of the relevant markets is not sufficiently substantiated.
- inconsistencies occur regarding the symmetry of the TV advertising market duopoly versus the unique role of BILD.
- the employment of modern economic instruments appears to be underdeveloped.

Our analysis does not imply that the proposed AS-P7S1-merger would necessarily have been procompetitive. The requested deeper analysis could have destroyed some of the concerns of the competition agency, but it could also have substantiated specific concerns or even entailed neglected ones. The presented evidence against the merger, however, is not very convincing against the background of state-of-the-art competition economics.

Thus, we conclude that the Bundeskartellamt has not embraced the European more-economic approach in the analysed decision. It does not seem to be daring to suppose that the presented evidence and reasoning would not have sufficed to block the merger on the European level, given the ambitious standards for a prohibition of a conglomerate merger laid out by Tetra Laval/Sidel and GE/Honeywell.

Eventually, two different qualifications can be raised in order to put our assessment into perspective. First, one can question whether the current state-of-the-art in competition economics provides an adequate framework for the treatment of conglomerate mergers. Perhaps, the anticompetitive risks of such mergers are underestimated in the current mainstream and future research will reveal contrasting insights. Second, one can discuss whether economic effects are overcompensated in this case by concerns about a reduction in diversity of opinion and threats to free speech. We do not make a value judgement about the relative importance of economic and non-economic as-

pects of media concentration in this paper. However, concerns along the latter line did not play a role in the assessment of the Bundeskartellamt either – according to its own reasoning – and, therefore, cannot justify a merger prohibition against the background of purely economic competition concerns.

5 References

- Aigner, Gisela, Budzinski, Oliver, and Christiansen, Arndt (2006), The Analysis of Coordinated Effects in EU Merger Control: Where Do We Stand After *Sony/BMG* and *Impala*?, in: *European Competition Journal*, Vol. 2 (2), pp. 311–336.
- Anderson, Simon P. and Gabszewicz, Jean J. (2006), The Media and Advertising: a Tale of Two-Sided Markets, in: *Handbook of the Economics of Art and Culture*, Vol. 1, Amsterdam: Elsevier, pp. 567–614.
- Baxter, Simon, Dethmers, Frances and Dodoo, Nadine (2006), The GE/Honeywell Judgement and the Assessment Conglomerate Effects: What's New in EC Practice?, in: *European Competition Journal*, Vol. 2 (1), pp. 141–167.
- Bernitz, Ulf (2006), On the Need and Advantages of Specific Media Regulation: Some Critical Remarks, in: Hanns Ullrich (ed.), *The Evolution of European Competition Law*, Cheltenham: Elgar, pp. 197–200.
- Bishop, Simon et al. (2005), *The Efficiency-Enhancing Effects of Non-Horizontal Mergers*, Luxembourg: Office for Official Publications of the European Communities, available at http://ec.europa.eu/enterprise/library/lib-competition/doc/non_horizontal_mergers.pdf.
- Bohne, Michael (2006), Cross-mediale Effekte in der Fusionskontrolle, in: *Wettbewerb in Recht und Praxis*, Vol. 52 (5), pp. 540–548.
- Bolton, Patrick, Brodley, Joseph F., and Riordan, Michael H. (2000), Predatory Pricing: Strategic Theory and Legal Policy, in: *The Georgetown Law Journal*, Vol. 88 (8), pp. 2239–2330.
- Bornemann, Roland (2006), Wie die KEK gefühlte Meinungsmacht in eine Eingriffskompetenz umrechnet, in: *MultiMedia und Recht*, Vol. 9 (5), pp. 275–279.
- Buccirossi, Paolo (2006), Does Parallel Behavior Provide Some Evidence of Collusion?, in: *Review of Law & Economics*, Vol. 2 (1), pp. 85–102.
- Budzinski, Oliver (2006), An Economic Perspective on the Jurisdictional Reform of the European Merger Control System, in: *European Competition Journal*, Vol. 2 (1), pp. 119–140.
- Budzinski, Oliver and Christiansen, Arndt (2005), Competence Allocation in the EU Competition Policy System as an Interest-Driven Process, in: *Journal of Public Policy*, Vol. 25 (3), pp. 313–337.
- Bundeskartellamt (2006), Beschluss B6-103/05 (Axel Springer/ProSiebenSat1 Media) vom 19.1.2006, available at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion06/B6-103-05.pdf>.
- Carbajo, Jose, De Meza, David, and Seidmann, Daniel J. (1990), A Strategic Motivation for Commodity Bundling, in: *Journal of Industrial Economics*, Vol. 38 (3), pp. 283–298.
- Carlton, Dennis W. and Waldman, Michael (2002), The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries, in: *Rand Journal of Economics*, Vol. 33 (2), pp. 194–220.
- Chen, Yongmin (1997), Equilibrium Product Bundling, in: *Journal of Business*, Vol. 70 (1), pp. 85–103.

- Choi, Jay P. (2004), Tying and Innovation: A Dynamic Analysis of Tying Arrangements, in: *Economic Journal*, Vol. 114 (1), pp. 83-101.
- Choi, Jay P. and Stefanadis, Christodoulos (2001), Tying, Investment, and the Dynamic Leverage Theory, in: *Rand Journal of Economics*, Vol. 32 (1), pp. 52–71.
- Chon, Bum Soo, Choi, Junho H., Barnett, George A., Danowski, James A., and Joo, Sung-hee (2003), A Structural Analysis of Media Convergence: Cross-Industry Mergers and Acquisitions in the Information Industries, in: *The Journal of Media Economics*, Vol. 16 (3), pp. 141–157.
- Christiansen, Arndt (2006), The Reform of EU Merger Control: Fundamental Reversal or Mere Refinement?, available at <http://ssrn.com/abstract=898845>.
- Church, Jeffrey (2004), The Impact of Vertical and Conglomerate Mergers on Competition, Final Report for the European Commission, available at http://ec.europa.eu/comm/competition/mergers/studies_reports/merger_impact.pdf.
- Church, Jeffrey and Gandal, Neil (2000), Systems Competition, Vertical Merger, and Foreclosure, in: *Journal of Economics and Management Strategy*, Vol. 9 (1), pp. 25-51.
- Denicolo, Vincenzo (2000), Compatibility and Bundling with Generalist and Specialist Firms, in: *Journal of Industrial Economics*, Vol. 48 (2), pp. 177-188.
- Dewenter, Ralf (2004), Essays on Interrelated Media Markets, Nomos: Baden Baden.
- Dewenter, Ralf and Kaiser, Ulrich (2005), Fusionen auf dem Printmedienmarkt aus wirtschaftstheoretischer Sicht, in: *Vierteljahreshefte zur Wirtschaftsforschung*, Vol. 74 (3), pp. 51-63.
- Farrell, Joseph and Katz, Michael L. (2000), Innovation, Rent Extraction, and Integration in Systems Markets, in: *Journal of Industrial Economics*, Vol. 48 (4), pp. 413-432.
- Gounalakis, Georgios and Zagouras, Georgios (2006), Konglomerate Medienkonzerne und die Wettbewerbsaufsicht – Eine Nachlese zum Fall Springer/ProSiebenSat.1, in: *Neue Juristische Wochenzeitschrift*, Vol. 59 (23), pp. 1624–1627.
- Grant, James and Neven, Damien J. (2005), The Attempted Merger between General Electric and Honeywell: A Case Study of Transatlantic Conflict, in: *Journal of Competition Law and Economics*, Vol. 1 (3), pp. 595-633.
- Hain, Karl-E. (2006), Springer, ProSiebenSat.1 und die KEK – eine Nachlese, in: *Kommunikation & Recht*, Vol. 9 (4), pp. 150–155.
- Howarth, David (2005), Tetra Laval/Sidel: Microeconomics or Microlaw?, in: *European Competition Law Review*, Vol. 26 (7), pp. 369-375.
- Idot, Laurence (2006), Mergers in the Media Sector: Business as Usual?, in: Hanns Ullrich (ed.), *The Evolution of European Competition Law*, Cheltenham: Elgar, pp. 170–190.
- KEK (2000), Fortschreitende Medienkonzentration im Zeichen der Konvergenz – Konzentrationsbericht der Kommission zur Ermittlung der Konzentration im Medienbereich, Berlin 2000.
- KEK (2006), Entscheidung vom 10.01.2007: Beteiligungsveränderungen bei Tochtergesellschaften der ProSiebenSat.1 Media AG, Aktenzeichen 293-1 bis -5, available at <http://www.kek-online.de/kek/verfahren/kek293prosieben-sat1.pdf>.
- Kolasky, William J. (2005), Mario Monti's Legacy: A U.S. Perspective, in: *Competition Policy International*, Vol. 1 (1), pp. 155-177.
- Kremmyda, Peristera (2006), Comment, in: Hanns Ullrich (ed.), *The Evolution of European Competition Law*, Cheltenham: Elgar, pp. 191–196.

- Kruse, Jörn (2000), Ökonomische Probleme der deutschen Fernsehlandschaft, in: Kruse, Jörn (ed.), *Ökonomische Perspektiven des Fernsehens in Deutschland*, München, pp. 7–47.
- Kuchinke, Björn A. and Schubert, Jens M. (2006), Der Beschluss des Bundeskartellamts in Sachen Springer – ProSiebenSat.1, in: *Wirtschaft und Wettbewerb*, Vol. 56 (5), pp. 477–485.
- Lange, Bernd-Peter (2005), Die Übernahme von ProSiebenSat.1 durch den Axel-Springer-Konzern, in: *Media-Perspektiven*, 11/2007, pp. 546–557.
- Ma, C. Albert (1997), Option Contracts and Vertical Foreclosure, in: *Journal of Economics and Management Strategy*, Vol. 6 (4), pp. 725–753.
- Martin, Stephen (1999), Strategic and Welfare Implications of Bundling, in: *Economics Letters*, Vol. 62 (3), pp. 371–376.
- Möschel, Wernhard (2005), Springer-ProSiebenSat.1: Viel Lärm um nichts, in: FAZ, 24.10.2005.
- Motta, Massimo and Polo, Michele (1997), Concentration and Public Policies in the Broadcasting Industry: the Future of Television, in: *Economic Policy*, Vol. 12 (25), pp. 295–334.
- Nalebuff, Barry J. (2000), Competing Against Bundles, Yale School of Management - Working Paper Series H No. 7.
- Nalebuff, Barry J. (2005), Tied and True Exclusion, in: *Competition Policy International*, Vol. 1 (1), pp. 40–53.
- Neven, Damien J. (2006), Competition Economics and Antitrust in Europe, in: *Economic Policy*, Vol. 21 (48), pp. 742–791.
- Nikolinakos, Nikos T. (2004), Mergers and Strategic Alliances in the Emerging Multi-Media Sector: The EU Competition Policy, in: *European Competition Law Review*, Vol. 25 (10), pp. 625–637.
- Polo, Michele (2005), Regulation for Pluralism in the Media Markets, Bocconi University and IGIER, mimeo, available at http://www.igier.uni-bocconi.it/whos.php?vedi=1072&tbn=albero&id_doc=177.
- Rochet, Jean-Charles and Tirole, Jean (2003), Tying in Two-Sided Markets, Discussion Paper, IDEI University of Toulouse.
- Rochet, Jean-Charles and Tirole, Jean (2004), Defining Two-Sided Markets, Discussion Paper, http://www.brousseau.info/semnum/pdf/2004-03-01_tirole.pdf.
- Röller, Lars-Hendrik and De La Mano, Miguel (2006), The Impact of the New Substantive Test in European Merger Control, in: *European Competition Journal*, Vol. 2 (1), pp. 9–28.
- Roson, Roberto (2005), Two-Sided Markets: A Tentative Survey, in: *Review of Network Economics*, Vol. 4 (2), pp. 142–160.
- Rott, Armin (2003), *Werbefinanzierung und Wettbewerb auf dem deutschen Fernsehmarkt*, Berlin 2003.
- Säcker, Franz Jürgen (2005), Fusions- und Kartellerleichterungen für Zeitungsverlage aus wettbewerbsrechtlicher Sicht, in: *Vierteljahreshefte zur Wirtschaftsforschung*, Vol. 74 (3), pp. 19–32.
- Säcker, Franz Jürgen (2006), Zur Ablehnung des Zusammenschlussvorhabens Axel Springer AG/ProSiebenSat.1 Media AG durch KEK und Bundeskartellamt, in: *Kommunikation & Recht*, Vol. 9 (2), pp. 49–54.
- Seidmann, Daniel J. (1991), Bundling as a Facilitating Device: A Reinterpretation of Leverage Theory, in: *Economica*, Vol. 58, pp. 491–499.

- SevenOne Media* (2006): Daten zur Entwicklung des Werbemarktes: TV-Sendersplit netto, available at http://www.sevenonemedia.de/imperia/md/content/content/Research/Downloads/werbemarkt/netto_sendersplit_2004.xls.
- Temple Lang, John* (2003), Two important Merger Regulation Judgments: the Implications of "Schneider-Legrand" and "Tetra Laval-Sidel", in: *European Law Review*, Vol. 28 (2), pp. 259-272.
- Tirole, Jean* (2005), The Analysis of Tying Cases: A Primer, in: *Competition Policy International*, Vol. 1 (1), pp. 1–25.
- Von Wallenberg, Gabriela* (2007), Eine "Heuschrecke" steigt bei ProSiebenSat.1 Media ein, in: *Wirtschaft und Wettbewerb*, Vol. 57 (3), p. 115.
- Wacker, Katharina* (2007), Wettbewerb und Regulierung im deutschen Fernsehmarkt: Deregulierungsbedarf und Umsetzungsbedingungen, Stuttgart: Lucius & Lucius, forthcoming.
- Wessely, Karin* (1995), Das Recht der Fusionskontrolle und Medienfusionskontrolle, Wien: Manz 1995.
- Whinston, Michael D.* (1990), Tying, Foreclosure, and Exclusion, in: *American Economic Review*, Vol. 80 (4), pp. 837–859.