

Dr. Ulf Böge  
President of the Bundeskartellamt

# “Modernisation of Art. 82 EC”

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## Introduction

- Modernisation and more economic approach of Art. 82 EC
- The role and position of the Bundeskartellamt
- The economic approach of the Bundeskartellamt
- More economic approach with regard to quality or quantity

## Per-se rules

- Per se rules: Abstracts from economic facts and prognoses which have been investigated empirically
- Examples: fidelity discounts, predatory pricing
- Per se rules laid down in guidelines
- Guidelines result in self-commitment

## Per-se rules

- Per-se rules can be adjusted to new economic insights and developed further
- Flexible instruments – enough scope for diverging solutions in individual cases
- Per se rules make sense and ensure legal certainty and predictability

## Efficiencies

- Justifying abusive practices by efficiency gains?
- Example: increasing production of dominant company by ousting smaller competitors
- But: which incentives ensure that efficiency gains are passed on to customers – if not competition?
- Quantification of efficiency gains is complex especially considering their dynamics

## Efficiencies

- Assessing efficiency gains can prolong proceedings – urgency versus diligence
- Paralysis in enforcement
- Lufthansa/Germania case
  - predatory pricing strategy applied by Lufthansa
  - Urgent decision needed

## Effects on the market

- Discussion whether potential threat or actual effect on the market needs to be proved
- Market-based analysis is always ex-post-analysis which is not suitable to assess actual effects
- Proof of actual effect is only possible if negative effects have already taken place – At this stage competition could already have been damaged
- Example: Rebate systems
- Abusive practices discontinued at an early stage – Deutsche Bahn case

## Conclusion

- Economic analysis needed in applying Art. 82 EC but caution is required
- More economic approach is positive for greater awareness and consideration of economic effects
- Per-se rules are useful but must be developed further and adjusted to new economic insights
- Long established tradition of per-se rules and economic thinking in German competition law