

**Case summary**

7 June 2021

Clearance of the merger between Charité and Deutsches Herzzentrum Berlin (German Heart Center Berlin)

Sector:	Hospitals
File number:	B3-67/21
Date of decision:	7 June 2021 (first phase clearance)

In the first phase of merger control the Bundeskartellamt has cleared plans to merge the cardiosurgical and cardiological services of the Charité – Universitätsmedizin Berlin, Körperschaft des öffentlichen Rechts (corporation under public law), Berlin (“Charité”) and Deutsches Herzzentrum Berlin, Stiftung des bürgerlichen Rechts (foundation under civil law), (with “DHZB-Stiftung” referring to the hospital operator and “DHZB” to the hospital operation services) under the future name “Deutsches Herzzentrum der Charité” (“DHZC”). According to the planned framework agreement between the federal state of Berlin, the Charité and DHZB-Stiftung, the DHZC is to become an internationally leading heart centre. A new building is to be erected at the site of the Charité at Campus Virchow-Klinikum to accommodate the DHZC, which is to be financed by the federal government and the federal state of Berlin. The Charité and DHZB are the only clinics in Berlin which, apart from internal medicine and cardiology departments, also have specialist departments for heart surgery.

1. The parties

The Charité is one of the most important university clinics in Europe with around 3,000 beds and around 150,000 (semi-) inpatient and around 700,000 outpatient cases per year. In 2020 it achieved a turnover of 1.5 billion euros. The Charité has the following inpatient departments in Berlin:

- “Campus Virchow-Klinikum” in the Mitte district/Wedding quarter,
- “Campus Charité Mitte” in the Mitte district/Mitte quarter,
- “Campus Benjamin Franklin” in the Steglitz-Zehlendorf district/Lichterfelde quarter.

Cardiosurgical and cardiological services are currently performed at all three Charité locations in several clinics, the focus of specialisation being on cardiology. At Campus Virchow-Klinikum the

Charité also operates a specialist department for heart surgery ("Klinik für Kardiovaskuläre Chirurgie", cardiovascular clinic), which in comparison to DHZB has significantly fewer cases and a limited variety of services.

The Charité is a public corporation and institution of the Free University of Berlin and the Humboldt University of Berlin, the administrative organisation of which is governed by the Berlin University Hospitals Act ("BerlUniMedG")¹. Under Section 36(2) of the German Competition Act (GWB) the Charité is considered as an affiliated undertaking of the federal State of Berlin. Via its right under Section 11(1) no. 1 to 3 BerlUniMedG to appoint at least half of the members of the supervisory board of the Charité, the federal state of Berlin exerts a controlling influence on them.

Apart from the Charité, in particular the clinics of the Vivantes network (Vivantes - Netzwerk für Gesundheit GmbH, "Vivantes"), are also to be considered as undertakings affiliated to the federal state of Berlin under Section 36(2) ,GWB. Vivantes operates nine hospitals in Berlin with a total of approx. 5,400 beds. Seven of these clinics have a specialist department for internal medicine and cardiology but no heart surgery department.

The DHZB-Stiftung was established in 1985 by the federal state of Berlin as a foundation under civil law with its seat in Berlin. The DHZB is also located at Campus Virchow-Klinikum. The DHZB offers the whole spectrum of cardiothoracic and vascular surgical operations including pediatric heart surgery, transplantations and other organ replacement procedures in three specialist departments for heart surgery, internal medicine and cardiology as well as pediatric and adolescent medicine. The DHZB has over 194 beds and treats around 8,000 inpatient and 22,000 outpatient cases every year. The DHZB's turnover in 2020 was 150-200 million euros.

From the outset the DHZB-Stiftung was closely linked with its founder, the federal state of Berlin. Although the federal state of Berlin's existing possibilities under corporate law to influence the DHZB-Stiftung are insufficient to assume the existence of a company group within the meaning of Section 36(2) GWB, they can be seen as exerting a material competitive influence on another undertaking within the meaning of Section 37(1) no.4 GWB. According to the statutes of the DHZB-Stiftung, the federal state of Berlin is entitled to appoint four of 14 members of the foundation council. This possibility of exerting a structural influence is additionally increased by the de facto rights of influence of the federal state of Berlin which it is granted in its function as a

¹ <https://gesetze.berlin.de/bsbe/document/jlr-HSchulMedGBE2005rahmen>.

hospital planning authority and via the provision of investment assistance under Sections 8ff. of the German Hospital Financing Act (KHG²). Added to this are rights of the federal state of Berlin as the supervisory authority for foundations under Section 2(1) of the state of Berlin's Act on Foundations (Berliner Stiftungsgesetz)³.

The existing corporate link between the federal state of Berlin and the DHZB-Stiftung is also considered to be of material competitive influence within the meaning of Section 37(1) no. 4 GWB. The decisive factor here is that the links form the basis for a mutual balance of interests which can take the form of the acquirer actively influencing the resources and market behaviour of the acquired undertaking and ensuring that the acquired undertaking passively adapts its competitive behaviour to the interests of the acquirer (Düsseldorf Higher Regional Court, decision of 6 July 2005, VI-Kart 26/04 (V)⁴, paras. 20ff. - Bonner Zeitungsdruckerei). This is particularly likely where horizontal links exist between competitors. As both the federal state of Berlin, with the Charité and Vivantes clinics, and the DHZB-Stiftung are active in the area of acute inpatient hospital services, and in this case in particular in cardiac medicine, the existing rights of influence are material in terms of competition law. The federal state of Berlin is well placed to realise its interests in the council of the DHZB-Stiftung via the currently six members attributable to the federal state (four ex-officio and currently two other members) because the remaining members of the foundation council come from entirely different sectors, are not affiliated with one another and as such will not bring in any structurally opposing interests. Whether the federal state of Berlin has actually made use of this opportunity to exert a material competitive influence on the foundation council in the past can be left open in the present case. Alone the possibility to do so is sufficient to assume a material competitive influence under Section 37(1) no. 4 GWB. The occupancy of the head of department positions at the Charité and the DHZB with identical personnel would indicate such an influence.

2. The proposed merger

Within the scope of the proposed merger all assets and staff currently employed by the DHZB-Stiftung in hospital operation are to be transferred to the Charité. By merging these with Charité's key cardiac departments, the DHZC is to be established as a "Joint Centre with the special participation of the foundation" in accordance with Section 3 BerlUniMedG. This is to function as a legally dependent organisation unit within the Charité, which will though have extensive

² <https://www.gesetze-im-internet.de/khg/>.

³ <http://stiftungsgesetze.de/pdfs/stiftungsgesetz-berlin.pdf>.

⁴ http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2005/VI_Kart_26_04__V_beschluss20050706.html.

independence in strategic and operational management. The DHZC is to be managed by a divisional board of management which will be supervised by an administrative council. The Charité and DHZB-Stiftung are to be equally represented in the administrative council. The DHZB-Stiftung will also be granted a seat on Charité's supervisory board.

3. Assessment under competition law

The merger project will not significantly impede effective competition within the meaning of Section 36(1) GWB. This assessment applies irrespective of the definition of the product and geographic markets and the consideration of merger-specific efficiency gains.

a) Definition of the product market

In the product market definition it can remain open whether the merger primarily affects the market for the full range of acute inpatient hospital services acknowledged in the case law of the Federal Court of Justice or whether it is necessary by exception to define a narrower market for specialist departments for heart surgery treatment.

In principle, the product market to be defined is one for the full range of acute inpatient hospital services provided by general hospitals and specialist clinics (Federal Court of Justice (BGH), decision of 16 January 2008, KVR 26/07⁵, para. 49 – Kreiskrankenhaus Bad Neustadt). This is because special treatments are often carried out in different specialist departments or in general departments such as internal medicine and surgery (cf. BKartA, decision of 8 January 2009, B3-174/08⁶ – Universitätsklinikum Freiburg/Herzzentrum Bad Krozingen, - in German only). Also in the present case an analysis of the data collected under Section 21 of the German hospital remuneration act (Krankenhausentgeltgesetz, KHEntG) and transmitted to the Bundeskartellamt by the institute which oversees the hospital remuneration system ("InEK") showed that only almost 40% of the diagnosis-related group "DRG" rates charged by a department for heart surgery were carried out to at least 50% in a specialist department for heart surgery. In other words: More than 60% of the DRGs which the specialist departments for heart surgery invoice cannot be considered as heart-surgery specific because they are mainly invoiced in other specialist departments.

⁵ <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=16.01.2008&Aktenzeichen=KVR%2026%2F07>

⁶ <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2009/B3-174-08.pdf>

However, an argument in favour of defining a narrower product market for specialist departments for heart surgery treatments is that such a market definition has already been considered by the Federal Court of Justice for cases such as the present one, where the acquisition target was not a general hospital but a specialist clinic (BGH decision of 16 January 2008, KVR 26/07, paras. 51, 59 – Kreiskrankenhaus Bad Neustadt). Heart surgery is an independent specialist area of medicine which, among other characteristics, requires specialist medical training and is considered separately in Berlin's hospital plan.

An evaluation of the InEK data showed that some DRG services are provided *exclusively* in specialist departments for heart surgery. These amount in total to 19 DRGs e.g. heart valve procedures performed with a heart-lung machine (DRGs: F03A to F03F), coronary bypass operations (DRGs: F06A to F06E) and complex minimally invasive heart valve surgery (DRGs: F98A and F98B). These 19 DRGs represent the core of heart surgery treatment, in which specialist heart surgery departments compete exclusively with one another and not with other specialist departments. The relevant DRGs could therefore be referred to as essential elements in the definition of a possible product market for heart surgery treatments. However, in the present case such a definition was irrelevant because with both possible market definitions the assessment of the merger would ultimately remain the same (see below).

b) Geographic market definition

There was also no conclusive decision about the geographic market definition in the present case. Acute inpatient hospital services are usually provided in regional markets. Assuming a full-range market for acute inpatient hospital services, the Bundeskartellamt examined Berlin as the overall market as well as four geographic submarkets within Berlin.

However, according to the result of the examination, a market for purely heart surgery treatments covers the Berlin area and large areas in the surrounding federal state of Brandenburg. In this case the relevant geographic market is defined based on an evaluation of the InEK data which determined all five-digit postcode areas in which at least 15% of the cases of the 19 heart surgery-specific DRGs were treated in one of the two heart surgery departments in Berlin.

Overall it was found that as regards the general hospital market (full-range market for acute inpatient hospital services), more than 95% of the Berlin population choose hospitals in their own city or the federal state of Berlin.

The result of the examination showed that also around 85% of the heart surgery patients in Berlin are treated in Berlin itself - and up to now exclusively at the joint location at Virchow-Klinikum.

c) No significant impediment to effective competition

Irrespective of the product and geographic market definitions selected, the proposed merger will not significantly impede effective competition within the meaning of Section 36(1) GWB.

In consideration of all the possible geographic market definitions, the acquisition of DHZB would result in only a minor market share addition of less than 1% (in cases) and less than 3% (in turnover) on the full-range market for acute inpatient hospital services. Even though its clinics, especially Charité and Vivantes, already provide the federal state of Berlin with a market share of more than 40% in several possible regional markets, i.e. exceeding the threshold for the assumption of single firm dominance, the merger will not result in the loss of any considerable competitive pressure. It can be assumed that in addition to the narrow product specialisation and DHZB's low market shares, the federal State of Berlin had considerable structural influence on the DHZB-Stiftung even before the merger (see above). There was thus only limited competition between the two before the merger. In addition, there are many other hospitals in Berlin which on a full-range market are closer competitors to the clinics of the federal State of Berlin than the DHZB. With Helios, DRK and Sana, other hospital operators that are active throughout Germany also compete on the overall Berlin market, each with market shares of up to 10% (in cases) on the overall market in Berlin and, in some cases, up to 20% on submarkets in Berlin.

In purely mathematical terms the merger results in a considerable market share addition of 70-75% in terms of cases and turnover (DHZB: 50-60%, Charité 10-20%) on a specialised market for heart surgery treatments in Berlin and the surrounding region. The most important competitor of the parties is Herzzentrum Brandenburg in Bernau with a market share of 10-20% (in cases and turnover), followed by Sana-Herzzentrum Cottbus with a market share of 5-10% (in cases and turnover). Other heart centres in Germany only have market shares of less than 1% in the relevant market area. However, there are also no serious competition concerns as regards the specialised market for heart surgery treatments. In this respect the intensity of competition between the Charité and DHZB is reduced from the outset because of the structural relations which already existed before the merger and because of DHZB's higher level of specialisation.

4. Efficiency gains

During the proceedings the parties presented extensive arguments in favour of possible merger-specific efficiency gains. The Bundeskartellamt has closely examined their arguments. Overall the notified merger showed a comparatively high potential for generating efficiency gains. As illustrated above, efficiency aspects were ultimately irrelevant for the clearance of the merger because it was not expected to significantly impede effective competition.

In the Bundeskartellamt's practice and with reference to the European Commission's Guidelines on the Assessment of Horizontal Mergers, efficiency gains can be taken into consideration in the examination of a merger if they benefit the consumer, are merger-specific and verifiable (cf. recent Bundeskartellamt decision of 30 July 2020, B3-33/20⁷, paras. 402ff. – Malteser/Diakonissen Flensburg; in German only).

According to the parties concerned, the merger primarily serves to facilitate and improve research and teaching, and hence to promote advancement in medicine. However, the efficiency argument was not sufficiently specific and adequately substantiated with facts with the result that it did not (yet) meet the requirements of verifiability. The question as to what extent the resulting opportunities for medical innovation are efficiency gains which can be taken into account in the examination of a merger under the requirements of Section 36(1) GWB, or rather advantages to the economy as a whole within the meaning of Section 42(1) GWB, did not have to be decided in the present case.

The parties see the increase in case numbers and the resulting possibility of the sub-specialisation of medical staff as a further efficiency gain created by the merger. In this respect the parties could soundly prove, based on scientific studies, that there is a positive relation between the number of cases and the quality of treatment in terms of reduced fatality and a lower rate of complications (so-called volume-outcome-relation) in numerous heart surgery treatments (e.g. bypass surgery, surgical aortic valve replacement, operative reconstruction of the mitral valve and aortic valve, and trans-catheter aortic valve intervention). As both the Charité and the DHZB nearly always reach the minimum number of cases for each of the relevant types of surgery examined in the studies, it was very difficult in the present case to prove that merger-specific

⁷ <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2020/B3-33-20.pdf>,

efficiencies were achieved with higher case numbers. Only in rare cases (e.g. aortic valve reconstruction) do the parties reach case numbers as a result of the merger from which (based on the studies available) an additional increase in treatment quality can be proven.

Further efficiency gains of the merger could possibly be created by the planned construction of a new building which is to replace the existing, partly obsolete building fabric of the DHZB and the Charité. The consumer benefit from the new building must also be sufficiently defined in order to be considered in the merger control examination as a factor outweighing the negative effects on competition. In any case the parties' argument about efficiencies from the planned helicopter pad on the roof of the new building meets these requirements. In this respect the parties could convincingly demonstrate that transportation time after arrival at the helicopter pad will be reduced by 10 to 15 minutes and less transfers on campus will be necessary in future for up to 600 emergency patients per year (270 of which are heart emergencies) who are admitted from Berlin, Brandenburg and Mecklenburg-West Pomerania and to some extent from Saxony and Saxony-Anhalt. This represents a clear improvement under medical aspects. Faster patient treatment increases the probability of the treatment's success and prevents the risks associated with additional transfers (e.g. loosened tubes, fractures).