

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

ECONOMIC EVIDENCE IN MERGER ANALYSIS

-- Germany --

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1. Introduction

1. The enforcement of antitrust law requires profound expertise not only in law but also in economics. Dealing with more and more economic evidence either of its own or submitted by the parties, the *Bundeskartellamt* has significantly strengthened its capacities in recent years to adequately handle economic evidence.

2. This paper explains the position and integration of economists within the structure of the *Bundeskartellamt* and its work (2.). It gives an overview of recent cases (3.), the *Bundeskartellamt*'s economic toolbox (4.) as well as of how data is obtained (5.) It finally discusses how courts have assessed the agency's use of economic evidence in merger proceedings (6.).

2. Integration of economists into the structure and the work of the *Bundeskartellamt*

3. Since the early days of merger control in Germany, the *Bundeskartellamt* has strived to integrate economists and lawyers as closely as possible in the case review process. The authority places great emphasis on maintaining the considerable expertise of both lawyers and economists in its case work.

4. The *Bundeskartellamt* has twelve Decision Divisions as its operative case-handling and decision bodies, of which ten deal with merger cases as well as other antitrust law enforcement issues, while two Decision Divisions are concerned exclusively with hard-core cartels. Typically, a merger case team will consist of both economists and lawyers. Due to this institutional framework, the economists' close participation in merger analysis is safeguarded.

5. Even though the *Bundeskartellamt* began integrating economic expertise into its merger control analysis at a very early stage, the need was seen to enhance advanced economic expertise. Consequently, the *Bundeskartellamt* established a General Policy Unit for "Economic Issues in Competition Policy" in the mid-2000s. Its main task is to support the Decision Divisions in their work and advise them on economic issues, without having any formal veto rights in the decision-making process. The support given to the Decision Divisions is multifaceted and consists *inter alia* of evaluating expert economic opinions submitted by the parties and carrying out forensic economic analyses in specific cases.

6. Due to the close integration of economic analysis into the review process, the *Bundeskartellamt* is in a position to deal with most economic questions by itself. The use of external expertise is rather an exception. However, the *Bundeskartellamt* maintains continuous relationships with academic economists in workshops or informal discussions.

3. Recent cases

7. In a number of recent cases of the *Bundeskartellamt* economic evidence has been of key importance. Although many of these cases concerned cartel prosecution, the importance of economic evidence has also been emphasized in merger control practice.

8. In 2009 the *Bundeskartellamt* prohibited a merger between the two largest producers of *curdled milk cheese*.¹ The core question of this case was the market definition for curdled milk cheese. In a first step, the *Bundeskartellamt* used qualitative investigatory tools to define the market. Based on questionnaire responses from competitors (other producers) and customers (esp. supermarkets), the relevant market

¹ See B2- 359/07 Müller/ Poelmeyer (Sauermilchkäse), decision of July 2, 2008, available only in German at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-359-07.pdf>.

definition was found to be a narrow one. Furthermore, precedents from other cases and other jurisdictions were considered and analysed. The parties to the merger project submitted a “customer survey”, which was supposed to show the “stated preferences” of the customers. The *Bundeskartellamt* examined the survey and found it to be biased. This assessment concerned not only the technique and the types of questions, but also the parties’ interpretation of the results.

9. The *Bundeskartellamt* used a quantitative tool to assess the merger and conducted an analysis of cross-price elasticity between the different types of (soft) cheese, which were relevant to this examination. Using a regression analysis the assessment showed, according to the *Bundeskartellamt*, that there was no evidence for systematic positive cross-price elasticity. This contradicted the parties’ perception of a wider market for soft cheese and indicated the existence of separate markets. Furthermore, the parties’ analysis of the customer survey was not confirmed by the analysis of other economic evidence (factual price quantity developments). The merger was prohibited.² This decision was confirmed by the relevant court of appeal, with explicit reference to the economic analysis conducted by the *Bundeskartellamt*.³

10. In another case the *Bundeskartellamt* had to assess the acquisition of the industrial sugar business of the Danish company *Danisco* by *Nordzucker*.⁴ Investigations showed that the market for industrial sugar in Germany is characterized by an uncompetitive duopoly between *Nordzucker* and the largest German sugar producer, *Südzucker AG*. Ultimately, the merger was cleared under the condition that *Danisco*’s production plant in Northern Germany was sold to a suitable purchaser before the acquisition was realized.

11. The economic analysis showed that the oligopolists had the possibility and the incentive to coordinate their behaviour. The switching analysis of the actual competitive activities showed that although industrial sugar could be supplied and distributed throughout Germany, in the majority of cases there were “sealed off” regional distribution areas. According to the *Bundeskartellamt*’s findings, *Nordzucker* and *Südzucker* in particular coordinated their behaviour and mutually respected their individual distribution areas. This assessment was based on a switching analysis that found that there was hardly any competition for these distribution areas or customers.

12. The unrestricted acquisition of *Danisco Sugar A/S* by *Nordzucker* would have further enhanced the joint dominant position held by *Nordzucker* and *Südzucker*. Not only the addition of the production capacities at the production plant in Northern Germany, but also the elimination of a capable maverick in the market would have strengthened the existing oligopoly. These effects were prevented by the obligation to sell the production plant to a suitable third party before the acquisition project was put into effect.

13. The *Bundeskartellamt* also dealt with two cases in the market for convertible roof systems.⁵ In the first case, *Webasto/ Edscha*, the *Bundeskartellamt* cleared the merger. This decision was backed up by

² The parties appealed against this decision to the Higher Regional Court in Düsseldorf. The Higher Regional Court confirmed the decision of the *Bundeskartellamt* on May 27, 2009, VI-Kart10/08(V).

³ OLG Düsseldorf, decision of May 27, 2009 - VI-Kart 10/08 (V) available only in German at http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2009/VI_Kart_10_08__V_beschluss20090527.html. The Federal Court of Justice rejected the appeal against denial of leave to appeal, BGH, decision of April 20, 2010 - KVVZ 35/09 available only in German at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=52375&pos=0&anz=1>.

⁴ See B2-46/08 *Nordzucker/Danisco*, decision of February 17, 2009, available in German at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion09/B2-46-08.pdf>. A case summary in English is available at <http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B2-46-08-E.pdf>.

⁵ See B9-84/09 *Webasto/ Edscha*, (clearance) decision of December 22, 2009, available only in German at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B9-84-09.pdf> and B9-13/10

a bidding analysis. At the time of the proceedings there was a total of four suppliers active in the European market for convertible roof systems. The *Bundeskartellamt* analysed the tendering procedures and concluded that the competitive situation did not give any indication of collusive practices between the parties, which were members of an oligopoly. In the second case, *Magna/ Karmann*, the *Bundeskartellamt* prohibited the merger. In this case the *Bundeskartellamt* concluded on the basis of its bidding analysis that the proposed merger, which would have reduced the number of competitors to two, would have resulted in a market with two similarly strong competitors, with similar market shares and comparable company size (symmetric duopoly). Due to the existing market transparency, competition between the two remaining competitors would have been unlikely; in addition the *Bundeskartellamt* saw a danger of the creation of a joint dominant market position through the merger.

4. The *Bundeskartellamt*'s economic toolbox

14. Economic evidence used in merger cases is manifold and differs from case to case. Economic analysis may be used for determining the potential for and the extent of anticompetitive effects, for example by examining the risk of price increases after a merger. Economic evidence may come into play for the assessment of the market definition, market shares, financial strength and entry barriers. Also, the issues of access to suppliers and customers (foreclosure effects) and countervailing market power can be assessed with the help of economic evidence.

15. A standard merger investigation will usually begin with the analysis of the qualitative evidence. This qualitative analysis is based on publicly available industry analysis, internal documents of the undertakings in question submitted by the parties, questionnaires and interviews with competitors and customers.

16. With regard to quantitative analysis the *Bundeskartellamt* decides on a case by case basis on the type of analysis which it considers appropriate. Given the general scarcity of resources, more in-depth economic analysis has to be focused on cases where the tools are relevant for reaching a reliable assessment. Experience has shown that in standard cases there is normally no need for advanced econometric analysis (e.g. merger simulation) to assess the effect of a merger on market positions. The *Bundeskartellamt* is aware of the fact that econometric analysis on its own cannot provide a definitive answer in assessing a case. It is one of several complementary tools used in case assessment, and econometric analysis may well turn out to be non-conclusive in some cases.

17. When determining the relevant product market the *Bundeskartellamt* assesses the substitutability of products or services from a customer's perspective. The flexibility of producers to switch production is also taken into account. For both market sides the relative extent of switching costs is of great importance. Another area of application of economic analysis is the assessment of the geographic market. Here the analysis of transport costs may be a considerable part of the assessment.

18. The *Bundeskartellamt* may also estimate elasticities. It may thus be necessary to identify which goods, if any, are sufficiently close substitutes for the goods under consideration to warrant their inclusion in the relevant market. The *Bundeskartellamt* may also consider price correlation. The *Bundeskartellamt* is generally open-minded with regard to which method should be used in a specific case. It weighs the factors of the case (e.g. complexity and availability of data) and the available resources to determine the right *modus operandi*.

Magna/ Karmann, (prohibition) decision of May 21, 2010, available only in German at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B9-13-10-OeFneu.pdf>.

5. Obtaining data

19. The *Bundeskartellamt* so far has not faced any significant problems in obtaining data to carry out its economic analyses as described above. The data is provided by and collected from the parties to the merger, competitors, customers and suppliers. The *Bundeskartellamt* is statutorily entitled to make informal and formal information requests to obtain a comprehensive picture of the market conditions. In addition to the information requests the *Bundeskartellamt* also has the investigatory powers to inspect business documents.⁶ In the past the merging parties and the competitors have generally been forthcoming in submitting requested data. Furthermore, the *Bundeskartellamt* may make use of data introduced into the proceedings by way of a party's economic expert opinion, to test their robustness or conduct its own quantitative analysis.⁷

6. Interaction with parties' economists and assessment of the courts of the use of economic evidence

20. Generally the parties have the possibility to submit expert economic opinions throughout the entire merger control procedure. These expert opinions are closely studied and analysed by the case team and, where deemed necessary, also by the General Policy Unit for Economic Issues. Subsequently, the case team discusses the results with the merging parties as part of the review process.

21. Recently the number of expert economic opinions submitted by the parties in merger cases has increased significantly. The *Bundeskartellamt* expects that common and transparent procedures for evaluating expert economic opinions will allow for a fair and efficient application of this type of evidence to specific competition law proceedings. Therefore in 2010 the *Bundeskartellamt* published a notice on binding quality standards for expert economic opinions.⁸ The aim of these standards is to ensure that expert economic opinions which are submitted to the authority for assessing the facts of a case under competition law satisfy minimum quality requirements. First experiences with the notice indicate that even though there may be further need for improvement, the notice has already served as a useful reference for efficient discussions with the parties and the economic experts.

22. Upon appeal, decisions of the *Bundeskartellamt* are reviewed by the Düsseldorf Higher Regional Court as the court of first instance. The Higher Regional Court has jurisdiction to decide on a case both with regard to the facts and points of law. Decisions by the Düsseldorf Higher Regional Court can be appealed to the Federal Court of Justice on points of law.

23. The courts assessing the cases and consequently the *Bundeskartellamt's* use of quantitative evidence deal with a wide range of cases (be it appeals against the agency's decisions or claims by private parties). This gives them a broad knowledge of competition matters as well as the underlying economic issues. Relevant economic evidence is incorporated in the written submissions which allows the court to become thoroughly acquainted with the economic reasoning in the specific case.

⁶ Section 57-59 Act against Restraints of Competition (ARC). An English version of the ARC is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/110120_GWB_7_Novelle_E.pdf.

⁷ In the case B2- 71/10 Van Drie/ Alpuro, decision of December 27, 2010, available only in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B2_10130_Fa_71-10.pdf the *Bundeskartellamt* conducted a price-correlation analysis by using the data submitted by the parties.

⁸ The *Bundeskartellamt's* notice is available in English at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bekanntmachung_Standards_Englisch_final.pdf.

24. However, presenting complex economic evidence and reasoning in court proceedings in a comprehensible manner for the non-expert is an ongoing challenge for a competition authority and its economists.