

FAQ about the Bundeskartellamt's Sector Inquiry into Hospitals

What is a sector inquiry?

A sector inquiry is conducted to assess the competitive conditions in a specific economic sector. The legal basis for this is Section 32e of the German Competition Act (GWB). The Bundeskartellamt conducts a sector inquiry if there are indications that competition in a specific sector is restricted.

What is the subject matter of the sector inquiry into hospitals?

Hospitals, their conditions for competition and their conduct in competition. Medical care, patients, doctors, hospital staff, public funding etc. are NOT the subject of the inquiry. Although hospitals are an integral part of the healthcare sector and public services, they are at the same time undertakings. The economic significance of the hospital sector is considerable. The total revenue earned by hospitals in Germany is well over 100 billion euros per year.

What are the key findings of the sector inquiry?

The inquiry demonstrates the importance of competition in the hospital sector. In spite of all the state regulation, there is competition between the hospitals, which has positive effects on the healthcare of the population. Patients themselves choose a hospital, mostly on the recommendation of their physicians. According to the findings of the inquiry, the decisive selection criterion for patients and physicians is the quality of treatment. The hospitals' revenue is based on fixed DRG (diagnosis-related group) rates set according to the quantity of treatments provided. This gives hospital operators an incentive to win large numbers of patients by becoming more attractive i.e. offering better quality than neighbouring hospitals.

How was the information and data processed in the sector inquiry obtained?

The information was obtained from official sources and from the authority's own investigations. As a representative sample all the hospitals in a band across Germany (from Saarland to Saxony) i.e. over 400 hospitals at more than 500 locations (approx. 1/5 of all hospitals in Germany) and more than 600 doctors' practices in the Darmstadt region were surveyed. Several million anonymised hospital data were collected from the hospitals and then evaluated. The Bundeskartellamt could not access data collected by InEK GmbH for its sector inquiry. This data has only been available to the Bundeskartellamt to a limited extent - solely for merger control purposes.

The healthcare sector is strongly regulated by law. Why does the Bundeskartellamt have to become active?

The Bundeskartellamt protects competition in all economic sectors, including healthcare. In spite of state regulation, the German healthcare sector is characterised by competition. Economic competition prevails at every level of the healthcare sector, namely between hospitals, physicians established in Germany and other service providers, between pharmaceutical companies, pharmacies and also between health insurance funds/health insurance companies.

What is the objective of competition in the healthcare sector?

Irrespective of their owners (municipal authorities, church/non-profit, private), hospitals are independently active as entrepreneurs and compete with one another. Different hospitals compete with one another for patients. Patients decide themselves (usually on the recommendation and prescription of their physicians) what treatment they need and when. The necessary regulation for the protection of patients and their healthcare providers (health insurance funds and private health insurance companies) still leaves considerable scope for independent decisions. Due to strict legal provisions there is almost no price competition in this sector. It is therefore the main objective of merger control to maintain quality competition in healthcare for patients. It is crucial to ensure that patients have sufficient local options to choose from.

How does the Bundeskartellamt protect competition in the hospital sector?

How does merger control function?

Above certain thresholds mergers between different hospitals must be notified to the Bundeskartellamt for examination. In a merger control proceeding the Bundeskartellamt examines to what extent the proposed hospital merger will affect the choices available to patients. The market for acute hospitals, for instance, is defined as a separate market from the market for rehabilitation centres or senior citizens homes and nursing homes. Although the geographic market only covers those patient areas where a substantial number of patients choose a hospital of the parties to the merger, all patients, irrespective of where they live, are taken into account in the competitive assessment. In order to examine whether patients from the market area will have sufficient choice post merger, the Bundeskartellamt examines in particular whether the services provided by the merging hospitals are comparable from the patients' perspective and which other hospitals they would choose if they encountered limitations in terms of service or quality.

In merger projects between public service operators, in particular, the Bundeskartellamt also often conducts an informal preliminary examination of the plans. In this way any possible competition concerns about the merger can be considered at an early stage of the political decision-making processes of the individual regional or local authorities and, if necessary, alternative solutions can be sought.

What is the relevant geographic market from the patients' perspective?

It is necessary to take local/regional and not national healthcare provision into consideration. Although patients can choose any hospital in Germany, according to the results of the inquiry they tend to choose almost only hospitals in their close vicinity (Sector Inquiry, p. 234, fig. 89). On average more than 80% of the patients of a hospital come from a distance of up to 35 kms from their place of residence. Most patients do not simply choose the next hospital. However, they and the consulting physicians are basically only able to assess hospitals in the close vicinity and compare their strengths and weaknesses. They make their decision based on this knowledge. Patients also travel greater distances in the case of very specific diseases and treatments, but these are insignificant in statistical terms.

How can the selection decision of the patients, who generally have no medical knowledge, contribute to effective competition?

Patients enquire about suitable hospitals before their hospital treatment. Based on the findings of the sector inquiry the patients' physicians play an important role in this. They observe the developments in hospitals in their region and are able to professionally evaluate the medical services provided. They learn from their patients about their course of treatment and its success and whether follow-on treatment or another hospital stay is necessary. Based on this information they give their patients advice, which, as the study shows, is followed by the vast majority of the patients. The health insurance funds and the private health insurance companies are also increasingly providing comparison websites where patients can find information about different types of treatment and quality data.

What scope of action do hospitals have if they are in economic difficulties?

Good service is not only dependent on financial resources but also on the appropriate use of the funds available. Hospitals with little money have fewer possibilities to invest. However, there are other ways to improve quality, such as quick and lean administrative processes or good staff management and good medical care. According to the inquiry's findings, this is what is of particular importance for patients when choosing a hospital and for the consulting physicians. Moreover, a hospital which is favoured by patients and therefore well utilised is more likely to find a strong investor.

Are there not enough institutions which are responsible for quality control in hospitals, e.g. the medical service of the health insurance funds, regional hospital planning institutions, etc.?

These institutions are very important for identifying and addressing systematic misdevelopments. However, they can only ensure a minimum quality standard (e.g. in terms of staff qualification, hygiene, minimum number of staff, opening times, etc.). Fine-tuning hospital services and assuring the highest possible quality are thus not possible. This would involve too much cost, time and red tape. In addition to the equally necessary systematic controls, patients' decision-making on the choice of hospital is much more effective in achieving such goals.

Why is the minimum quantity requirement set by the state or public institutions not sufficient to ensure quality in the hospitals?

Based on the relevant studies available, minimum quantity requirements are set only for very few treatments. These are mainly for complex and serious diseases which only account for a small share of all hospital treatments. In addition, up to now there has only been evidence of a connection between the number of treatments per year and their quality in very few cases. Such a connection has not been observed in the case of a hernia operation, for instance, but certainly in the case of some transplants or treatments for esophageal or pancreatic ailments (Sector Inquiry, p. 162 f., fig. 37 und 38).

What is the Bundeskartellamt's role vis-a-vis the hospital planning authorities?

The federal states and their hospital planning authorities are tasked with ensuring hospital care throughout the country, including rural areas, even if the operation of hospitals in those areas is not as profitable as in large cities. If necessary, these hospitals can receive financial assistance in the form of service guarantee incentives.

Irrespective of this, effective competition helps to promote the quality of service. No state controlling mechanism could assess the performance of hospitals so quickly and efficiently as the many patients, physicians and other healthcare providers who help to form the opinion of patients. However, this opinion forming would have no effect if there were no alternative hospitals to choose from.

How does the Bundeskartellamt's aim to protect options to choose between different hospitals hold up against health policy plans to close hospitals?

A differentiation has to be made here: To what extent there are overcapacities in the German hospital sector is a very controversial issue, especially in times of Corona and depends on how this issue is assessed. Nonetheless, in normal times and in spite of large seasonal fluctuations (low influenza incidence in the summer), beds at existing hospitals are occupied at an average annual rate of 77% (national average) or 74-84% (average rate in the federal states), although the hospitals already have

an incentive to and actually discharge patients as quickly as possible (see also Sector Inquiry, p. 145, fig. 23). In Corona times significantly fewer patients are in hospital (on average 67% of the occupancy rate). However, there was a strong decline not only in the number of less urgent operations that can be planned in advance, but also in cancer surgery which is often done after cancer screening, in particular in the case of colon cancer. Moreover, with a high occupancy rate, Corona distance rules and hygienic protective measures which are both time-consuming and require a lot of staff, would hardly be possible.

The Bundeskartellamt does not object to the closure of hospitals which are no longer needed. On the contrary, it is a sign of effective competition if inefficient hospitals or hospitals which are no longer chosen by patients exit the market. Neither a hospital closure nor the merging of different hospitals by the same hospital owner is subject to examination by the competition authority. Both are neutral in competition terms. Insofar only the hospital planning authority examines whether a hospital closure would lead to a shortage of medical care in the local area. So legally speaking the Bundeskartellamt cannot prevent any hospital closures.

From a competitive perspective it is not the mere number of hospitals or hospital beds in a region which is at stake but who owns the different institutions. The Bundeskartellamt ensures that not too many hospitals in any one region belong to the same owner and operator. If patients have no competitive alternatives at a reasonable distance, they might be dependent on a single owner and operator, even if there is a decline in quality in the services its hospitals provide. According to experience, it is not bureaucratic control but rather the patients' decision which can provide the necessary performance incentives. In the absence of competitors (market dominance or even a monopoly), the dominant undertaking in the market has a high incentive to cut costs (e.g. for staff) to the detriment of patients.

InEK data:

What are InEK data?

Hospitals in Germany receive a certain fee based on a Diagnosis Related Group (DRG) system in return for the treatment which they provide. The InEK - Institut für

das Entgeltsystem im Krankenhaus GmbH, which oversees the hospital remuneration system, is tasked with the introduction, further development and maintenance of the system. The institute regularly collects data from the hospitals which can also be used by the Bundeskartellamt for its competition assessments. The InEK data includes in particular information for each individual hospital on the postal code areas in which its patients live and based on which DRG the respective treatment was remunerated.

On what basis can the Bundeskartellamt request the InEK data?

There is a special legal basis for this. Previously the Bundeskartellamt had to request these data individually from each hospital. The central request for the InEK data for all the hospitals actually concerned in the merger control proceeding has already accelerated proceedings and made them easier. It would be even more efficient if the Bundeskartellamt could request the anonymised data of all the German hospitals, including the medical diagnosis data, from InEK GmbH once a year. This would allow for the consolidation of many recurring steps in each individual case (data encryption, specification) and the data could be made available for use more quickly. However, this would require a corresponding change to the legal bases.