

The Handbook of Competition Economics

2012

A Global Competition Review special report
published in association with:

E.CA Economics



Overview

Dennis Beling, Hans W Friederiszick and Rainer Nitsche

E.CA Economics

Introduction

Lagging behind for some while from a European perspective, nowadays a deeper economic analysis plays a decisive role in many areas of competition law enforcement in Germany. This trend is visible both institutionally and with respect to enforcement output.

The trend will most likely further accelerate with the new merger guidelines, if adopted, which foresee a further harmonisation with European provisions, in particular implementing a significant impediment of competition test and a holistic view on the facts of the case, thereby limiting further the role of an assessment focused on the notion of dominance or market share additions.

Institutional setting and enforcement output

The Bundeskartellamt increasingly builds up its capabilities to reassess or produce own work on complex, large datasets and based on state-of-the-art economic reasoning. In 2011 the chief economist team headed by Christian Ewald expanded again and now comprises five highly specialised economists (although still lacking an institutionalised veto right). The majority of freshly hired staff in 2011 come to the Bundeskartellamt with a degree in economics. Guidelines on the submission of economic data and analysis were adopted, professionalising the communication with outside economic consultancies.

Regarding enforcement output, an effects-based economic analysis played an important role, in particular in the Bundeskartellamt's sector inquiries covering the energy sector and the fuel sector. It will also potentially play a central role in the recently triggered sector inquiry into grocery retail. External economic experts contributed to the enforcement process by providing economic analyses to cases before the Bundeskartellamt and, in particular, through the quantification of damages for the long list of cartel cases pending before German courts, both in appeal actions within the administrative proceeding as well as in private litigation cases.

Application of economic methods

Two recently completed sector inquiries into electricity markets (generation and wholesale) and fuel featured in-depth economic and empirical analysis by the Bundeskartellamt as well as the Bundeskartellamt's discussion of independent economics expert opinions. During the electricity generation and wholesale inquiry, the Bundeskartellamt requested two years of quarter hourly data on capacity, dispatches and marginal costs from all generating units above 25MW in Germany, constructed a database to organise this information and wrote customised software to analyse it. During the fuel sector inquiry the Bundeskartellamt requested and analysed information on all price changes and daily sales volumes from 407 petrol stations, leading to a dataset with approximately 3 million observations. The final reports of both inquiries draw extensively on the analyses of the collected data.

Consolidation in the German grocery retail sector has led to increasing levels of concentration. Besides traditional competition concerns on end-consumer markets (including concerns related to retail price maintenance), the Bundeskartellamt increasingly pays close attention to questions of buyer power. This was already reflected in the Bundeskartellamt's assessment of the *EDEKA/trinkgut* merger, and it will also be the focus of the Bundeskartellamt's sector inquiry into grocery retail initiated in 2011. The application of bilateral bargaining models and the empirical validation of those models is a central theme here.

Starting with the annulment of the merger prohibition decision in the *GNPhonak* case in 2009 by the highest German court, the Bundeskartellamt struggles to find a court-robust enforcement approach to coordinated effects. While the *GNPhonak* decision in particular criticised the missing distinction between creation and strengthening of a collective dominant position, the *Total/OMV* decision by the higher regional court in Düsseldorf spotted limitations in the economic assessment of coordinated effects in the Bundeskartellamt's decision. Based on its sector inquiry in the fuel sector, the competition authority refined its

economic reasoning, but maintained its finding of collective dominance. A decision by the highest German court on this matter is pending. In March 2011 the Bundeskartellamt also prohibited, based on coordinated effects concerns, a joint venture between ProSiebenSat1 and RTL to create a joint video-on-demand platform. The parties appealed the decision.

Parallel to the Bundeskartellamt's ongoing intensive fight against cartels in 2011 (a new unit exclusively focusing on cartel enforcement was

established by the Bundeskartellamt), Germany has also developed as one of the preferred jurisdictions for private litigation action within Europe, leading to complex empirical work in quantification of damages by economists. A recent judgment by the highest German court, confirming the standing of indirect purchaser and the validity of a pass-on defence, might – from an economic perspective – lead to a richer set of economic tools being brought to use in the estimation of damages in order to empirically assess the pass-on effect.

e.CA economics
Experts in Competition Analysis

Schlossplatz 1
10178 Berlin
Germany
Tel: +49 30 212 31 7000
Fax: +49 30 212 31 7099
info@e-ca.com

Dennis Beling
beling@e-ca.com

Hans W Friederiszick
friederiszick@e-ca.com

Rainer Nitsche
nitsche@e-ca.com

www.e-ca.com

E.CA is an economics consultancy that provides case-related advice and research on key topics in the fields of competition policy and regulation. This includes economic analysis in national and European competition matters and regulatory procedures as well as studies of competition policy issues for international organisations. E.CA, formerly known as ESMT Competition Analysis, has been named in *Global Competition Review's* 'The Economics 20' survey since 2008 as one of the world's leading competition economics firms.

The two managing directors of E.CA, Dr Hans W Friederiszick, a former member of the chief economist team of DG Competition, and Dr Rainer Nitsche, a former vice president of the economics consultancy CRA International, combine extensive consulting experience with practical experience of regulators' approaches.

Founded at ESMT European School of Management and Technology in 2007 during the presidency of Professor Lars-Hendrik Röller, former chief economist to the Directorate General of the European Commission, E.CA Economics has become an independent, international economics consultancy in the areas of mergers, cartels, antitrust, state aid and regulation. Based on an exclusive partnership E.CA Economics works closely with ESMT's faculty on leading-edge research in industrial organisation and quantitative methods.

E.CA Economics cooperates with Bates White LLC, a leading US economic consulting firm with more than 150 professionals, to address clients' concerns arising in international and transnational competition matters within the purview of EU and US regulatory authorities.

Federal Cartel Office

Kaiser-Friedrich-Strasse 16, D-53113 Bonn, Germany

Tel: +49 228 9499 245

Fax: +49 228 9499 143

Contacts

Christian Ewald

christian.ewald@bundeskartellamt.bund.de

Questions and answers

How many economists do you employ?

The Federal Cartel Office employs 48 economists.

Do you have a separate economics unit, or 'bureau'?

The economic issues in competition policy unit was established in July 2007 within the general policy division. Its main task – without having formal veto rights in the decision-making process – is to support and advise the independent decision divisions in economic issues. Furthermore, the Federal Cartel Office's 12 decision divisions are staffed with lawyers and economists and six out of 12 heads of the decision divisions are economists.

Do you have a chief economist (please give name and qualifications)?

Should the term 'chief economist' refer to the head of an economics unit with formal veto rights, there is no such position within the Federal Cartel Office. The head of the economics unit mentioned above is Christian Ewald (economist).

To whom does the chief economist report?

The chief economist supports the decision divisions in economic matters, gives lectures on specific economic issues in the Federal Cartel Office and maintains contact with academics.

Does the chief economist have the power to hire his or her staff?

The head of the economics unit does not have the power to hire his staff, but (as any other head of unit) is involved in the decision-making process.

How many of your economists have PhDs in Industrial Organisation?

Among the 48 economists the Federal Cartel Office employs, 19 have a PhD with most of them having dealt with topics in IO and competition economics in their PhD thesis.

Does the agency include a specialist economist on every case team? If not, why?

As the Federal Cartel Office employs 46 economists and takes decisions in boards of three, each case is also judged under economic aspects. In addition, members of the economics unit support the case handlers in the decision divisions.

Is the economics unit a 'second pair of eyes' during cases – is it one of the agency's 'checks and balances'? If not, why not?

The economics unit supports and advises the decision divisions in specific economic issues. And, as the Federal Cartel Office employs 46 economists and takes decisions in boards of three, each case is also judged under economic aspects. This guarantees checks and balance in the decision-making process.

How much economics work is outsourced? What type of work is outsourced?

Due to the existence of an economics unit and the high number of economists among our staff, we can deal with most of the economic questions ourselves. External expertise is necessary only as an exception.