Organisation for Economic Co-operation and Development

DAF/COMP/WD(2026)120

Unclassified

English - Or. English

18 November 2026

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Minority Shareholding and coordinated effects – Note by Germany

9 December 2026

This document reproduces a written contribution from Germany submitted for Item 8 of the 150th OECD Competition Committee meeting on 8-9 December 2026.

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JT03598406

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Germany

1. Introduction

1. Minority shareholdings may facilitate financing, innovation and strategic co-operation without full integration. They are not inherently anti-competitive. However, structural and informational links may weaken incentives to compete, affect strategic independence or facilitate co-ordination.

2. This contribution builds on Germany's contributions to the OECD discussions in 2008[1] and 2017[2] and focuses on merger control. Following an overview of the legal framework and analysis of institutional investors, it illustrates the risks associated with minority shareholdings in complementary technology markets by discussing a merger examined by the Bundeskartellamt in 2024. As part of the proposed merger, the software provider Ansys Inc., Canonburg, USA, (in the following: Ansys) intended to acquire a 35 per cent shareholding in Safe Parent Inc., Farmington Hills, USA, a provider of crash test dummies known under the "Humanetics" brand (in the following: Humanetics) (file number B7-24/24).[3] After the Bundeskartellamt had informed the parties of its competition concerns regarding the acquisition following an in-depth examination, the notification was withdrawn without a final decision being issued.

2. German legal framework and institutional investors

3. In Germany, transactions constituting a concentration are principally defined in Section 37 of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB).[4] Under Section 37(1) no 3 GWB, the acquisition of at least 25 per cent of the capital or the voting rights in another undertaking already constitutes a concentration. Reaching the 25 per cent threshold thus constitutes a concentration independently of the acquisition of control and triggers a full assessment under competition law.

4. Purely passive financial investments may be assessed differently from strategic shareholdings. However, the fact that an investment is purely passive does not preclude the acquisition of a 25 per cent shareholding from qualifying as a concentration. Section 37(3)

[1] Antitrust issues involving minority shareholding and interlocking directorates – Note by Germany, 12 February 2008 (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2008.02.12-Antitrust_Issues_Involving_Minority_Shareholding_Interlocking_Direcotrates.pdf?__blob=publicationFile&v=1).

[2] Common ownership by institutional investors and its impact on competition – Note by Germany, 29 November 2017 (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/OECD_2017_COMPETITION_COMMITTEE_Common_ownership_by_institutional_investors_and_its_impact_on_competition.pdf?__blob=publicationFile&v=1).

[3] Bundeskartellamt, case summary, B7-24/24, 26 August 2024, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2024/B7-24-24.html.

[4] https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html.

GWB exempts such acquisitions from merger control only under specific conditions. It covers certain temporary acquisitions by credit institutions, financial institutions or insurance companies for the purpose of resale, provided that the voting rights attached to the shares are not exercised and the shares are, in principle, resold within one year.

5. Where a combination of undertakings does not confer control and involves less than 25 per cent of the shares or voting rights, Section 37(1) no 4 GWB[5] may apply. It covers cases in which a party can exercise material competitive influence without acquiring control. This requires a lasting possibility of exercising influence based on a corporate-law relationship, together with additional circumstances ("plus factors"); a minority shareholding of less than 25 per cent alone is insufficient. The influence does not have to be actually exercised.

6. The substantive test is the same as for other concentrations: whether the concentration would significantly impede effective competition, in particular by creating or strengthening a dominant position. In 2013, Germany replaced the dominance test under Section 36(1) GWB with the significant impediment to effective competition (SIEC) test.[6] Horizontal, vertical and conglomerate effects may all be relevant to the assessment. Accompanying agreements and exchanges of competitively sensitive information may also be subject to Section 1 GWB and Article 101 TFEU.

7. Whether a shareholding confers a competitively significant influence is determined by an overall assessment of the size of the shareholding, the shareholder structure, voting rights and the level of attendance at shareholders' meetings, as well as information, consultation, appointment and veto rights. Pre-emption rights, options, co-operation arrangements and economic or personal interlocks may also be relevant. The decisive factors are the objective structure of the shareholding and the actual possibilities of exercising influence, rather than its designation as a financial investment.

8. Germany's 2017 OECD contribution presented the Monopolies Commission's analysis of institutional investors in its Main Report of 2016. Minority shareholdings held by institutional investors were deemed generally not to meet the conditions for merger control, as portfolio investments were generally assumed to have no strategic impact. According to the Monopolies Commission's analysis, however, the possession of shares in several competing companies (common ownership) could create incentives to weaken competition, even where individual shareholdings are small, if investors seek to maximise the return generated by their entire portfolio.[7]

9. Such incentive effects alone do not establish actual distortions of competition. The Monopolies Commission emphasised that the extent to which institutional investors could enforce their interests against the management of the portfolio companies and the extent to which corporate ties facilitated parallel behaviour also had to be considered. Influence could arise through the actual exercise of voting rights, membership of supervisory boards, the threat of share sales, financing needs and the role of proxy advisors. Long-term

[5] https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0436.

[6] Eighth Act amending the German Competition Act, 26 June 2013, Federal Law Gazette I, p. 1738 (no 32), available in German at https://www.bgbl.de/xaver/bgbl/start.xav#/switch/tocPane?_ts=1793008712628.

[7] Common ownership by institutional investors and its impact on competition – Note by Germany, 29 November 2017 (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/OECD_2017_COMPETITION_COMMITTEE_Common_ownership_by_institutional_investors_and_its_impact_on_competition.pdf?__blob=publicationFile&v=1), paras. 11 et seq.

investment and efficiency interests, however, could counteract these effects. The Monopolies Commission considered further clarification through sector-specific studies necessary before making concrete recommendations for action. Transparency requirements and new control mechanisms were discussed as possible approaches.[8]

3. Competitive assessment of minority shareholdings

10. Minority shareholdings may reduce actual or potential competition where the companies concerned take each other's strategic interests into account and no longer act independently on the market. Even an adjustment of the target company's competitive behaviour in line with the acquirer's interests may be relevant. The ability to exert influence may arise, in particular, from information and consultation rights, rights to appoint representatives to management bodies, personal interlocks, and agreements concerning pre-emption rights, distributions strategies or financing structures. The decisive factor in all cases is the actual ability to exercise influence. Such shareholdings may also give rise to foreclosure effects. The energy cases discussed in the 2008 contribution illustrate, for example, how a company might take its new shareholder's interests into account in procurement decisions, or how that shareholder, as a potential competitor, might refrain from entering the market.[9]

11. Furthermore, minority shareholdings and personal interlocks may enable access to competitively relevant information and facilitate co-ordination of market behaviour. Germany's 2008 contribution describes, for example, how information rights could provide knowledge of competitors' supply offers and enable the shareholder to make a counter-offer. In *Xella/Nord-KS*, despite lacking the ability to block decisions, Xella's representation on the advisory board enabled it to gain access to its competitor's business strategy decisions and the ability to influence them. The advisory board had discussed, among other things, pricing and discount decisions. The Bundeskartellamt therefore concluded that the parent companies co-ordinated their market behaviour and that competition based on independent decision-making had been eliminated. The competitive significance of a shareholding may thus lie in the ability to exert influence, as well as in access to information and the resulting facilitation of co-ordination of conduct.[10]

[8] Common ownership by institutional investors and its impact on competition – Note by Germany, 29 November 2017 (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/OECD_2017_COMPETITION_COMMITTEE_Common_ownership_by_institutional_investors_and_its_impact_on_competition.pdf?__blob=publicationFile&v=1), paras. 16 et seq.

[9] Antitrust issues involving minority shareholding and interlocking directorates – Note by Germany, 12 February 2008 (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2008.02.12-Antitrust_Issues_Involving_Minority_Shareholding_Interlocking_Direcotrates.pdf?__blob=publicationFile&v=1), paras. 1, 7, 11 and 16.

[10] Antitrust issues involving minority shareholding and interlocking directorate – Note by Germany, 12 February 2008 (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2008.02.12-Antitrust_Issues_Involving_Minority_Shareholding_Interlocking_Direcotrates.pdf?__blob=publicationFile&v=1), paras. 1, 13, 16 and 26.

4. Case study: Ansys/Humanetics (B7-24/24)[11]

12. In 2024, the Bundeskartellamt examined the proposed acquisition of a minority shareholding in the technology sector. Ansys intended to acquire shares in Humanetics. Ansys offers software used, among other things, to simulate crash tests in the automotive industry. Humanetics is the only company worldwide offering both physical crash test dummies (in the following: dummies) and virtual crash test dummies. The products of the two companies are jointly required by customers in order to carry out crash simulations. As the notification was withdrawn without a final decision being issued, the competitive assessment presented below remained provisional.

4.1. Proceedings

13. Ansys intended to acquire just under 35 per cent of the shares in Safe Parent Inc., known under the Humanetics brand, from Bridgepoint Group plc (in the following: Bridgepoint.[12] Bridgepoint would have retained around 56 per cent of the shares and thus a controlling majority. On the basis of the published transaction structure, Section 37(1) no 3(b) GWB was applicable: the acquisition exceeded the 25 per cent threshold without requiring an additional finding of control or a competitively material influence under no 4.

14. The purchase agreement granted Ansys the right to obtain extensive information from Humanetics on its financials and other details relevant to competition, as well as the temporary right to purchase all remaining shares. In addition, the companies entered into a strategic partnership and planned to expand their joint distribution. These circumstances were not additional "plus factors" required for the share acquisition to be covered by German merger control law, but links relevant to the substantive assessment. The minority shareholding therefore had to be assessed not solely by reference to its size, but together with the accompanying rights and strategic co-operation.

15. The Bundeskartellamt surveyed competitors and customers worldwide and took into account information provided by companies in EU countries, the UK, the US, Saudi Arabia, China, Japan and South Korea. It examined internal strategy documents, emails and an economic expert opinion submitted by the parties. The Bundeskartellamt also consulted on the proceedings with competition authorities from the UK, Austria and South Korea. After the authority expressed competition concerns, Ansys withdrew its notification on 17 July 2024.

16. Commitments proposed by Ansys were insufficient because they would only have restricted the behaviour of Ansys but not of Humanetics. Moreover, the commitments would have required constant monitoring of the acquiring company's conduct. This is relevant to the assessment of remedies where concerns arise from reciprocal incentives and possibilities to impede competitors. The extent to which the existing distribution and marketing agreements were permissible under competition law could be left open in the examination under merger control.

[11] Bundeskartellamt, case summary, B7-24/24, 26 August 2024, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2024/B7-24-24.html.

[12] Bridgepoint is an international investment firm specialising in private equity and financing mid-sized businesses.

4.2. Markets overview

17. Both companies operate in crash simulation; Ansys in software and Humanetics in dummies. Without reaching a definitive market definition, the Bundeskartellamt distinguished between three global markets: crash test simulation software with occupant protection (solvers), FE ATD models[13] and physical crash test dummies. The simulation software is used mainly by companies in the automotive industry to simulate car crashes virtually during the development of new model series. FE ATD models are sets of data describing the physical properties of a particular physical dummy. An FE ATD model's quality depends on how accurately the result of a simulation reflects the result of an actual crash with a physical dummy. The possible third market concerns physical crash test dummies. These replicate properties of the human body; sensors measure the physical forces exerted on individual body parts in a crash event. Ansys offers the LS-DYNA solver; Humanetics is the only company worldwide offering both crash test dummies and their digital twins, FE ATD models.

4.3. Preliminary theories of harm: incentives, information and influence

18. The Bundeskartellamt preliminarily considered that the minority shareholding could have strengthened both companies' dominant positions. According to its preliminary assessment, Ansys was dominant in the market for solvers and Humanetics in the markets for dummies and FE ATD models. In their respective markets, their shares clearly exceeded the 40 per cent threshold for the presumption of dominance under Section 18(4) GWB. In the market for FE ATD models, Humanetics was by far the largest provider, followed by Ansys.

19. Other competitive effects, including conglomerate and horizontal effects, were also relevant: changes in economic incentives, access to competitively sensitive information and the consideration of strategic interests despite the companies remaining legally independent. The assessment focused on specific foreclosure mechanisms, rather than on the size of the shareholding alone.

20. Humanetics could have released FE ATD models for solvers other than LS-DYNA only at a later date, raised its prices for these models or stopped offering certain models for certain competing software. This would have made it difficult to effectively use Humanetics's models with competing solvers. Humanetics's strong position in complementary models could thus have been used to strengthen Ansys's position in the market for solvers.

21. In addition, Humanetics could have passed on to Ansys information about the further development of competing solvers obtained from Ansys's competitors in the context of developing FE ATD models, enabling Ansys to better adapt to competitive moves or prevent them from the outset. The authority expected that Humanetics would take into account Ansys's strategic interests and would have an incentive to strengthen Ansys's position in the market for solvers. The strategic partnership supported this expectation.

22. Conversely, Ansys could have made it technically more difficult for Humanetics's competitors to develop FE ATD models for LS-DYNA. As a result, it would have been difficult for customers to effectively use LS-DYNA with models from competing providers. Ansys could also have passed on information about the use of Humanetics's models and about its competitors. Such usage information would have increased Humanetics's price setting power, for example by enabling it to change its licensing model.

[13] FE = finite element; ATD = anthropomorphic test device = crash test dummy.

Ansys would have had an incentive to do so, in particular because it would have participated in Humanetics's profits: even without a controlling majority, Ansys would have benefited financially from a strengthening of Humanetics's market position.

23. The parties would also have had the possibility and incentive to jointly decide to bundle their products. Internal documents suggested that the LS-DYNA software and the FE ATD models would have been jointly marketed and distributed. This could have resulted in a jointly co-ordinated effort to impede the parties' respective competitors exceeding the effects of their individual behaviour. Unilateral strategies, but even more so joint strategies, could have shifted buyers, at least in the medium term, towards LS-DYNA software and Humanetics's models.

24. The co-ordinated effort to impede competitors concerns the interaction of two suppliers of complementary products. It is not necessarily equivalent to tacit horizontal co-ordination in an oligopoly. In addition, the Bundeskartellamt expected competition between the parties in FE ATD models to be weakened. A strengthening in this market would also have affected the market for dummies: those customers wishing to purchase dummies and FE ATD models from one single provider would have tended to purchase their dummies from Humanetics rather than from a competitor. A strengthening of the parties' dominant positions would not have been offset by the buyer power of automotive manufacturers.

5. Conclusion

25. German merger control law provides a broad framework for examining the competitive risks of minority shareholdings. In addition to formal shareholding thresholds, the criterion of competitively material influence allows transactions below the control threshold to be examined. This makes it possible to assess structural links between companies on a preventive basis before they permanently alter market behaviour, information flows or incentives to compete.

26. Competitive assessments must not be limited to the nominal shareholding percentage. What matters is an overall assessment of the shareholding and the accompanying circumstances. These include, in particular, governance and information rights, personal interlocks, acquisition options, joint development, distribution and marketing, exclusive or discriminatory access conditions, as well as the parties' market positions and the role of their products within an ecosystem.

27. *Ansys/Humanetics* shows that minority shareholdings in markets for complementary products can give rise to particular competitive risks. Where both companies have strong market positions and their products are jointly required by customers, incentives and opportunities for reciprocal foreclosure, bundling and a reduction in strategic independence may be reinforced. This applies in particular where the shareholding is accompanied by extensive information rights, strategic co-operation and the prospect of a future acquisition of all shares.

28. For further discussion, this implies that minority shareholdings should be treated neither as inherently harmless financial investments nor as inherently anti-competitive structural links. A case-specific and forward-looking assessment of incentives, information and influence is required. In particular, this assessment should consider whether a minority shareholding increases the likelihood, stability or effectiveness of co-ordinated behaviour, or strengthens the parties' ability and incentive to impede effective competition in related markets.

29. *Ansys/Humanetics* thus illustrates the distinct significance of German merger control in cases involving non-controlling minority shareholdings: reaching the 25 per cent threshold already allows the share acquisition to be reviewed. The subsequent substantive assessment must examine whether and how the shareholding, together with information rights, strategic co-operation and other contractual links, alters competitive incentives and creates opportunities to impede effective competition. In *Ansys/Humanetics*, this assessment remained provisional because the notification was withdrawn after the Bundeskartellamt informed the parties about its competition concerns and no final decision was issued.