

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Germany****4 June 2019**

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<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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1. Introduction

1. For historical reasons, Germany has a strong tradition of legal control of power in administrative law. As a result, the standard of review by courts has a huge impact on the exercise of power by the Bundeskartellamt and the parties' right to defence. This submission provides a brief introduction of the background of judicial review in Germany (2.), gives an overview of the different enforcement proceedings which can be subject to court review (3.), aims to provide insight into the standard of review by German courts (4.) and ends with a conclusion (5.).

2. General background of judicial review in Germany

2. Germany has a traditional civil law system. To analyse the standard of review by courts in competition cases it is necessary to distinguish between the relevant competition law proceedings before the German courts. Therefore, this submission will also touch upon the different proceedings of the Bundeskartellamt which can be subject to court review.¹

3. According to the German administrative system, the Bundeskartellamt investigates cases and makes decisions, which can be appealed before a court. Decisions taken in all competition matters are subject to judicial review.

4. Apart from legal protection with regard to the main proceedings, companies and individuals can also seek legal protection against compulsory investigative measures of the Bundeskartellamt during investigation proceedings, e.g. formal requests for information or testimony, dawn-raids and confiscations. The Local Court (Amtsgericht – "AG") in Bonn is responsible for search warrants and other measures of the Bundeskartellamt. However, this submission will focus on legal protection with regard to the main proceedings.

5. Therefore, litigation initiated by an individual or a legal entity to have a court establish an antitrust infringement and order the recovery of the damages suffered or impose injunctive relief (private enforcement) will only be given marginal consideration in this document.

3. Enforcement proceedings by the Bundeskartellamt

6. Public enforcement by the Bundeskartellamt can be subdivided into merger administrative proceedings, non-merger administrative proceedings and administrative offence proceedings².

¹ Parts of this paper are based on the 2011 OECD Note by Germany available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2011.10.10_Institutional%20and%20procedural%20aspects.html?nn=3590148.

² Also called "criminal" proceedings.

3.1. Merger Administrative Proceedings

7. Merger control proceedings (Section 37 to 43 German Competition Act³) of the Bundeskartellamt are conducted as administrative proceedings in accordance with the special procedural rules in Section 54 to 62 German Competition Act complemented by the more general rules of the Administrative Procedure Act (Verwaltungsverfahrensgesetz; hereinafter “VwVfG”).

8. The first phase of merger control⁴ ends with an informal letter or theoretically with the lapse of a specified time limit. The only possible decision at this stage is clearance. If the case could not be cleared in the first phase, the Bundeskartellamt will start an in-depth analysis of the case, mostly involving questionnaires to competitors and suppliers. The second phase ends with a formal decision: The Bundeskartellamt may prohibit a merger project, clear it or clear it subject to conditions.⁵

9. Parties to the concentration have the right to appeal against the prohibition or the conditions within one month after the Bundeskartellamt’s decision.⁶ If the merging parties appeal against a merger decision, in the first instance the appeal is filed with the Bundeskartellamt. At this stage the appeal is automatically pending before the Düsseldorf Higher Regional Court. The Bundeskartellamt is still allowed to review and amend the challenged decision.⁷

10. Beside the parties to the merger themselves, third parties may also have standing to appeal against merger decisions of the Bundeskartellamt. This procedure is e.g. permitted for companies and consumer associations which have been admitted to the proceedings by the Bundeskartellamt as an intervening party.⁸ Moreover, companies which applied to join the proceedings and satisfy all the statutory requirements but were not admitted by the Bundeskartellamt solely for reasons of procedural economy (i.e. in order to guarantee a swift and efficient procedure) also have standing to appeal. Competitors and customers of the merging parties in general fulfil the requirements to join the proceedings because their economic interests are usually significantly affected by the merger.⁹ The same applies to the additional requirement that they have standing for a legal action (materielle Beschwer), i.e. their interests are directly and individually affected by the conditional clearance.¹⁰ In

³ An English version is available at http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf.

⁴ Approximately 95% of all cases.

⁵ Section 40 German Competition Act.

⁶ Section 63 German Competition Act.

⁷ Section 63 German Competition Act.

⁸ Sections 54 (2) No. 3, 63 (2) German Competition Act.

⁹ Section 54 (2) no. 3 German Competition Act, cf. e.g. BGH (Federal Court of Justice), decision of 7.11.2006, KVR 37/05 – *pepcom*, para. 12 and 18 (juris)

¹⁰ These are the requirements set out for example in the judgement *HABET/Lekkerland* of the Federal Court of Justice (BGH). It must not be alleged that a subjective right vis-à-vis the public authorities to prohibit the merger is infringed (see Section 42 (2) 2 VwGO). See BGH (Federal Court of Justice),

their claim the third parties may argue that the remedies were not sufficient to clear the merger and that the Bundeskartellamt was therefore obliged to block the merger.

3.2. Non-merger proceedings

11. The Bundeskartellamt also conducts administrative proceedings with regard to anticompetitive agreements¹¹ and the abuse of a dominant or powerful position¹².

12. Depending on the seriousness of the infringement, the complexity of the legal assessment and the likelihood of proving intention or negligence, the Bundeskartellamt has the discretion to decide on how to handle the case procedurally. Firstly, by means of administrative proceedings it can order the objected conduct to be discontinued. If a company has charged excessive prices, it can order the company to reimburse its customers. The companies can also undertake commitments to end the conduct in question. Secondly, the authority can impose fines within the framework of administrative offence proceedings (see section 3.3).

13. Administrative proceedings with regard to anticompetitive agreements and abuse are likewise governed by the special procedural rules as described in Section 54 to 62 German Competition Act together with the more general rules of the VwVfG.

14. According to Section 54 German Competition Act the Bundeskartellamt can initiate such proceedings either on its own accord or following a complaint. The formal steps following the initiation of proceedings are modelled on judicial procedure. The German Competition Act and the VwVfG therefore stipulate for the parties to the proceedings the right to be heard and further provisions ensuring fair proceedings.

15. The normal legal outcome of administrative proceedings is a cease and desist order, by which the respective anti-competitive behaviour has to be abandoned.¹³ In excessive pricing cases the provision can also be invoked to impose reimbursement orders. The Bundeskartellamt furthermore has the possibility to order interim measures in urgent cases if there is a danger of a serious, irreparable damage to competition.¹⁴ The Bundeskartellamt also has the possibility to issue commitment orders.¹⁵ This enables companies to avoid a decision by the Bundeskartellamt by committing themselves to adopt a certain conduct.

16. Companies can appeal against any of those decisions by the Bundeskartellamt.¹⁶ However, a complainant cannot oblige the Bundeskartellamt to start a proceeding due to the Bundeskartellamt's margin of discretion.¹⁷ There is no judicial review against the respective decision of the Bundeskartellamt. But the complainant is able to initiate private

decision of June 24, 2003, KVR 14/01 – *HABET/Lekkerland*, para. 15 (juris); BGH (Federal Court of Justice), decision of September 25, 2007, KVR 25/06 – *Anteilsveräußerung*, para. 14 (juris).

¹¹ Section 1 and 2 German Competition Act; Article 101 TFEU.

¹² Sections 19, 20 German Competition Act, Article 102 TFEU.

¹³ Section 32 German Competition Act.

¹⁴ Section 32a German Competition Act.

¹⁵ Section 32b German Competition Act.

¹⁶ Section 63, 95 German Competition Act.

¹⁷ Section 63 (3) German Competition Act.

enforcement actions. The Bundeskartellamt's decision to open or close enforcement proceedings is also not appealable. Complainants are also limited to private enforcement actions.

3.3. Administrative offence proceedings

17. As said above, in cases of clear-cut and serious infringements, the Bundeskartellamt can also decide to initiate administrative offence proceedings. The Bundeskartellamt opens such proceedings in particular in cases of cartel agreements which lead to particularly severe distortions of competition. Such agreements will often take the form of agreements between competitors on prices, quantities, geographic areas or customer groups ("hard-core cartels").

18. In administrative offence proceedings not only the provisions of the German Competition Act apply, but also the provisions of the Federal Administrative Offences Act (Gesetz über Ordnungswidrigkeiten; hereinafter "OWiG"¹⁸). The OWiG contains the general provisions for most enforcement activities of the German Federal Government or Länder (federal states) against violations of public law (not including criminal law). Since the OWiG refers to the German Code of Criminal Procedure (Strafprozessordnung; hereinafter "StPO"¹⁹), procedural law is closely linked to criminal law²⁰

19. The legal outcome of administrative offence proceedings is the imposition of a fine by formal decision on companies and individuals. Criminal sanctions, and in particular jail sentences, cannot be imposed. The sole exception to this general rule is provided for bid-rigging offences where an individual can be convicted. These constitute criminal offences under German criminal law and are prosecuted by the public prosecutor. If the undertakings concerned agree, cases may also be ended by settlement. The Bundeskartellamt's decision is appealable.²¹

4. Standard of review

20. In what follows, the note will describe the standard of review by courts in competition cases including some outstanding features of the German law system.

4.1. Higher Regional Court

21. The Düsseldorf Higher Regional Court has competence for all the administrative and "criminal" cases that are based on proceedings of the Bundeskartellamt. At present,

¹⁸ An English version is available at http://www.gesetze-im-internet.de/englisch_owig/englisch_owig.pdf.

¹⁹ An English version is available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.pdf.

²⁰ E.g., rights of defence like "nemo tenetur principle" or "benefit of doubt" have to be observed.

²¹ Section 83 German Competition Act.

there are six divisions specialized in competition matters.²² The special competition law divisions are each staffed with three specialised judges.

22. The competence of this court is somewhat unusual. The decisions made by the Bundeskartellamt in administrative (merger/non-merger) proceedings correspond by their nature with administrative acts and can be eliminated if the company or individual affected initiates an action for annulment. However, to reflect the interface between economy and public administration the appeal procedure takes place before the Düsseldorf Higher Regional Court, a civil rather than an administrative court.²³ In addition, the German legislator wanted to ensure that competition cases are dealt with by specialized competition courts which have access to sufficient expertise. Therefore the legislator deviated from Section 68 OWiG according to which the local courts would have been in charge of administrative offence proceedings instead of the Higher Regional Court.²⁴

23. In the case of merger control proceedings and non-merger administrative proceedings, the Bundeskartellamt is party to the proceedings.²⁵ The court may nullify the clearance or conditions. In accordance, the Bundeskartellamt would have to make a new decision. The court itself may not prohibit a merger. If the court nullifies a prohibition by the Bundeskartellamt, the proceeding is terminated instead.

24. In the case of administrative offence proceedings, the situation differs. If an order of the Bundeskartellamt imposing a fine in an antitrust or cartel case is appealed against, the Bundeskartellamt first examines whether the order must be changed or revoked (intermediate proceedings).

25. If the Bundeskartellamt decides not to change its decision and the complaint is substantiated, the Bundeskartellamt's decision will also be subject to full review of its factual and legal basis.

26. This review, in the first place, is conducted by the Düsseldorf public prosecutor's office. After examination by this office the proceedings are referred to the Düsseldorf Higher Regional Court.

27. At all hearings the Bundeskartellamt is represented in court, in addition to the public prosecutor's office. The Bundeskartellamt is thereby able to contribute its case knowledge to the proceedings and to assist the public prosecutor's office.²⁶ It is, however, not party to the proceedings before the court.

28. The procedural law in these appeal cases is complemented by the German Code of Criminal Procedure²⁷ (Strafprozessordnung; hereinafter "StPO"). The procedural rights and safeguards for the companies are thus more or less equivalent to those under criminal law²⁸. Due to the principle of oral presentation and the principle of immediacy as characteristics

²² Section 91 German Competition Act.

²³ Section 63 German Competition Act.

²⁴ Section 83 German Competition Act.

²⁵ Section 67 (1) (2) German Competition Act.

²⁶ Section 82a German Competition Act.

²⁷ An English version is available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.pdf.

²⁸ E.g., rights of defence like "nemo tenetur principle" or "benefit of doubt" have to be observed.

of formal evidence (Strengbeweis), the proceedings are often complicated and resource consuming: the public prosecutor has to get acquainted with often complex cases, witnesses and parties have to be heard afresh, except for Section 257a StPO formal requests have to be read out, evidence and procedures can be examined according to very high criminal law standards.

29. The decision of the Higher Regional Court will usually be issued within approximately one year starting from the beginning of the main proceedings. The duration between the Bundeskartellamt's decision and the court's decision is likely to take several years.

4.1.1. Scope of review

30. The appeal may be lodged on a factual and legal basis, providing the companies with a full factual and legal review of the preceding decision.²⁹ Therefore, the Bundeskartellamt's decisions will be subject to full review.

31. The court is competent to fully investigate the facts itself and may even request the Bundeskartellamt to provide or collect further data to analyse the case in more detail or with a different focus³⁰. This investigation principle is unusual before civil courts but similar to the strict judicial review in administrative courts and in administrative offence proceedings. This guarantees a high supervision of the Bundeskartellamts' exercise of power and the parties' right to defence.

4.1.2. Standard of proof

32. Unlike common law, German law does not distinguish between the standard of proof applicable in civil, administrative and criminal matters. Judges are supposed to use the same high standard of full conviction beyond reasonable doubt ("Vollbeweis") in all cases. The above-mentioned stricter procedural rules of evidence in criminal court proceedings leave the standard of proof unaffected. However, it must be noted that the rules of burden of proof are different in civil matters. Unlike in administrative and criminal matters, in civil matters, the system is adversarial. The court only considers facts presented by the parties.

33. The standard of proof in German civil litigation is defined in Section 286 German Procedure Rules (Zivilprozessordnung, hereinafter "ZPO"). According to this provision "the court is to decide, at its discretion and conviction, and taking account of the entire content of the hearings and the results obtained by evidence taken, if any, whether an allegation as to fact is deemed true or untrue." Hence, a certain fact is only proven if the judge is personally fully convinced that this certain fact is indeed true. This is a higher threshold than the concept of "power of probabilities" which is used in common law systems.

4.1.3. Review of economic evidence

34. The review of economic evidence is subject to the same standard of proof. In appeal procedures, all economic evidence used by the Bundeskartellamt is evaluated again by the courts. Typically, the economic facts as such are not much disputed. It is rather the relative

²⁹ Section 70 German Competition Act.

³⁰ See, for example, OLG Düsseldorf, decision of April 11, 2007, Kart 6/05.

weight of different market factors or their legal interpretation which are controversial. For complex economic analysis, the court may also appoint economists to obtain expert knowledge if necessary.

35. The review of economic evidence requires profound expertise not only in law but also in economics. While preparing the presentation of a case and complex economic arguments in court the Bundeskartellamt takes into account that these economic arguments should be incorporated in an understandable written submission.

36. Since the Bundeskartellamt faces similar challenges, it is aware of the difficulties with regard to the review of economic evidence. Antitrust decisions of the Bundeskartellamt often involve a substantial body of economic analysis, e.g. economic theories, estimation methods, simulation etc. This is why the Bundeskartellamt strives to integrate economists and lawyers as closely as possible in the case review and drafting process. However, presenting complex economic evidence and reasoning in court proceedings in a comprehensible manner is an ongoing challenge for a competition authority and its economists.

37. In this context it should be noted, that the antitrust divisions of the Düsseldorf Higher Regional Court³¹ and antitrust panels of the Federal Court of Justice also deal with claims of private parties based on competition law and other civil law suits which give them a broad knowledge of competition cases as well as the underlying economics. Both, specialisation and experience, mean that those chambers are well familiar with competition law and economics. Members of both courts also regularly contribute to the scientific discussions on competition law in the form of publications and speeches.

4.2. Federal Court of Justice

38. A judgement of the Düsseldorf Higher Regional Court may be appealed on points of law (Rechtsbeschwerde) to the Federal Court of Justice (Bundesgerichtshof – BGH).³² All competition law cases are assigned to a specialised cartel panel.³³ The panel is manned with five highly specialised judges and chaired by the president of the court.

39. If the Higher Regional Court does not grant leave to appeal its judgement, the merging parties need, as a preliminary step, to challenge the refusal of leave to appeal with a separate legal action before the BGH (Nichtzulassungsbeschwerde).³⁴

40. The Federal Court of Justice has the competence for all administrative and “criminal” cases concerning competition law. Hence, only two courts specialising in competition law rule on decisions of the Bundeskartellamt. The BGH as the highest ordinary court is also competent for the appeal on questions of law in all civil matters including appeals against decisions in private enforcement actions. It delivers a final judgement or remits the case to the Higher Regional Court. The standard of proof is the same as mentioned for the Higher Regional Court. The decision of the BGH will usually be issued within approximately one year.

³¹ Except for one division that is only competent for competition matters.

³² Section 74 and 75 German Competition Act.

³³ Section 94 German Competition Act.

³⁴ Section 74 and 75 German Competition Act.

41. In appeals against court decisions in private enforcement actions, the Bundeskartellamt has the right to assist as “amicus curiae” in all instances but focuses on cases brought before the BGH.

5. Conclusion

42. In Germany, parties have access to an impartial review of decisions by an independent judge. The higher regional court’s duty to reinvestigate the facts is unique to the German system. The standard of full conviction in civil litigation is also notable.

43. The centralisation of all competition cases within the jurisdiction of ordinary courts by the German legislator ensures that courts acquire sufficient expertise to adjudicate competition law and economic matters. These specialised courts can be considered as one of the major advantages of the German review system.

44. The courts exercise a high level of supervision over the Bundeskartellamt. Court review of the enforcement of competition law ensures that the enforcement process and decisions are lawful and the parties’ rights are observed. In this way the judicial review complements the internal procedures that the Bundeskartellamt puts in place to grant due process. This ultimately contributes to ensuring the consistency and credibility of enforcement.