

English - Or. English

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

Cancels & replaces the same document of 7 June 2017

Working Party No. 3 on Co-operation and Enforcement

Methodologies for Conducting Market Studies – Note from Germany

20 June 2017

This document reproduces a written contribution from Germany submitted for Item 2 of the 125th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 20 June 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/market-study-methodologies-for-competition-authorities.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

JT03416694

Germany

1. Sector inquiries in the Bundeskartellamt

1. The Bundeskartellamt increasingly uses the instrument of sector inquiries. Since the 7th Amendment of the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen - GWB) in 2005 the Bundeskartellamt can conduct sector inquiries in order to determine the competition situation in individual sectors if there are indications that there is no effective competition in these markets. In accordance with § 32e GWB, the Bundeskartellamt can closely examine a specific branch of industry if rigid price structures or other circumstances give reason to assume that competition in the sector may be restricted or distorted.¹ Sector inquiries are not targeted against individual companies nor do they follow up a concrete suspicion of a cartel violation. Their purpose is to gain comprehensive information about the markets concerned or to review current case practice by means of a multi-stage and extensive market analysis.

2. Market knowledge acquired from a sector inquiry can also be used in subsequent proceedings. In merger control proceedings, this knowledge can be used to determine whether a merger is expected to create a dominant position or strengthen an existing dominant position. If a sector inquiry finds evidence of a cartel agreement or abuse of market power, the Bundeskartellamt can subsequently initiate specific proceedings.

3. The Bundeskartellamt uses the instrument of sector inquiries flexibly and on a regular basis. In the last four years (since 2012) the Bundeskartellamt concluded seven sector inquiries. The markets examined were: food retail, waste management, rolled asphalt, district heating, milk, gas concession fees and metering and billing of heating and water costs. A number of inquiries are ongoing in the markets for domestic waste, ready-mixed concrete and hospitals.

4. Sector inquiries differ in goal, scope and type of analysis performed. The methodologies used highly depend on the aim of the sector inquiry and the data availability in the sector to be analysed.

5. Section 2 describes the possible goals of a sector inquiry by providing examples of inquiries carried out by the Bundeskartellamt. Section 3 describes the main procedural phases when conducting a sector inquiry. Section 4 presents three large sector inquiries that the Bundeskartellamt has concluded in recent years, which differ in terms of methodology used/analysis performed. Section 5 concludes.

2. Types/ Goals of a sector inquiry

6. The Bundeskartellamt can initiate a sector inquiry when it suspects that competition is not working properly in a specific market. The finding of the inquiry can subsequently result in enforcement actions. In 2012, for example, the Bundeskartellamt

¹ The GWB provides that "if the rigidity of prices or other circumstances suggest that domestic competition may be restricted or distorted, the Bundeskartellamt may conduct an investigation into a specific sector of the economy or – across sectors – into a particular type of agreement" (§32e GWB).

conducted a sector inquiry into the market for rolled asphalt.² The sector inquiry revealed a Germany-wide closely-knit network of company interlocks in the rolled asphalt sector. In particular, the four major suppliers of asphalt were involved in a large number of joint ventures. Some of these interlocks were not compatible with competition law. After the sector inquiry the Bundeskartellamt started divestiture proceedings. In addition, numerous forms of information exchange which raised competition concerns were terminated, as well as other restrictive agreements between competing companies. In the same year, the Bundeskartellamt concluded a sector inquiry into the district heating market.³ The sector inquiry was initiated because within their distribution networks, district heating suppliers have a monopoly position which creates scope for setting excessive prices. The sector inquiry revealed that the locally established providers faced practically no competition. Price differences between network areas were considerable and in some cases amounted to over 100%. The Bundeskartellamt took a closer look at those network areas earning the highest revenue and initiated proceedings against seven district heating suppliers on suspicion of their charging abusively excessive prices.

7. Especially with regard to merger control, sector inquiries can be useful for looking into specific issues about a market that cannot be examined within the tight deadlines of a merger investigation. The most recent example illustrating that sector inquiries provide a robust factual basis for case practice is the merger case Edeka/Kaiser's Tengelmann (2015).⁴ The Bundeskartellamt had been accused on several occasions by large retailers of exercising strict control over concentration processes or purchasing cooperations involving the major food retail companies, while - according to them - there was no actual evidence of structural advantages resulting from these factors. At the same time, manufacturers as well as smaller food retailers complained that large retailers engaged in abusive practices when negotiating conditions. The Bundeskartellamt therefore launched a sector inquiry (in the following Sector Inquiry Food Retail⁵), examined the structure of the food procurement market in Germany and analysed the results of negotiations between retailers and manufacturers. The Bundeskartellamt concluded that the leading group of retailers, consisting of Edeka, Rewe and the Schwarz group with Kaufland and Lidl have structural advantages in their negotiations with brand manufacturers of which they make use. The results of the sector inquiry were decisive in the examination of the merger Edeka/Kaiser's Tengelmann. The merger was prohibited because the elimination of Kaiser's Tengelmann as an independent retail company would have considerably worsened competition conditions on a large number of already highly concentrated regional markets.

8. Sector inquiries can also be used to confirm or refute the suspicion of anticompetitive practices in the market. In 2011 the Bundeskartellamt concluded a sector

² <http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Walzasphalt%20-%20Abschlussbericht.html?nn=3591074> (in German only).

³ <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Sector%20Inquiry%20District%20Heating%20-Final%20Report.html?nn=3599618>.

⁴ B2-96/14. A case summary is available at <http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2015/B2-96-14.html?nn=3591568>.

⁵ A summary of the final report of the sector inquiry into the food retail sector is available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Summary_Sector_Inquiry_food_retail_sector.pdf?__blob=publicationFile&v=3.

inquiry in the market for fuel (in the following Sector Inquiry Fuel⁶). The sector inquiry was initiated following indications received by the Bundeskartellamt in the course of its merger control activities of possible competition problems in the fuel sector. Furthermore, there were numerous consumer complaints about the level of fuel prices, as well as reports from independent petrol station operators on possibly anti-competitive practices by the large oil companies. The fuel retail market in Germany is dominated by an oligopoly of the five large oil companies and it was often complained that these companies agreed on final prices. The sector inquiry confirmed that there is no substantial competition between the five major oil companies. However, the Bundeskartellamt could not find evidence of explicit collusion. Product homogeneity, market transparency and retaliation opportunities enable the oligopolists to implicitly coordinate their conduct in a robust and simple way without communicating.

9. Sector inquiries can also help to advocate for competitive markets. In 2012 the Bundeskartellamt conducted a sector inquiry into the market for milk (in the following Sector Inquiry Milk⁷). With this inquiry the Bundeskartellamt conducted an extensive analysis of the milk sector, ranging from the procurement of raw milk through the dairy industry to the food retail sector. The milk sector is characterized by market information systems, which publish current and dairy-specific data on the price of raw milk. This high price transparency creates competition problems as it facilitates the standardisation of such prices by dairies competing with one another in the same region. Furthermore, the sector inquiry showed that the contracts between milk producers and dairies in Germany have long periods of notice and duration and that farmers in Germany are generally obliged to supply the milk they produce exclusively to their respective dairy. There is virtually no possibility for them to switch to another dairy. This might cause problems for farmers and might hinder possible newcomers on the dairy side or dairies wishing to extend their activities. The Bundeskartellamt used the results of this sector inquiry to provide input to the German and European legislative process in this sector to advocate an effective competitive system. Since April 2016 the Bundeskartellamt has also conducted proceedings on the conditions for the supply of conventionally produced raw milk.

10. Finally, sector inquiries can help to investigate the consequences of adopted legislation or regulation. In 2012 the Bundeskartellamt conducted a sector inquiry into the market of garbage collection (in the following Sector Inquiry Dual Systems⁸) in order to investigate the effects of the introduction of competition in the market for the recovery and recycling of sales packaging (for more details see below).

⁶ The final report of the Fuel Sector Inquiry is available at:

http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sektor%20Inquiries/Fuel%20Sector%20Inquiry%20-%20Final%20Report.pdf?__blob=publicationFile&v=14.

⁷ <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sektor%20Inquiries/Milk%20Sector%20Inquiry%20-%20Final%20Report.html?nn=3599618>

⁸ <http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Duale%20Systeme%20-%20Abschlussbericht.html?nn=3591074> (in Germany only).

3. Procedure

11. The decision on whether to start a sector inquiry is taken by the decision division in charge of the sector⁹ in consultation with the other units who are expected to provide support. Within that particular division a team is then created to carry out the inquiry. The General Policy Division advises the decision division in specific competition law and economic issues. In particular, the chief economist office assists the division in the development of the theory of harm and the process of data collection and evaluation.

12. The sector inquiries carried out by the Bundeskartellamt greatly differ in terms of scope and type of analysis performed. Consequently, there is no fixed procedure for conducting sector inquiries. Building on the Bundeskartellamt's experience with completed inquiries, the process of implementing a sector inquiry can ideally be divided into five phases:

- Preparation phase
- Substantiation phase
- Investigation phase (collection of information and evaluation/analysis)
- Documentation phase
- Publication and consultation phase

13. The different phases are not clearly separated. On the contrary, they usually overlap to some extent. They help, however, to illustrate chronologically the main successive tasks to be carried out and resources needed in the course of a sector inquiry.¹⁰ These are summarized in the table below and are explained in more detail in the following sub-sections.

Phase	Tasks
Preparation Phase	<ul style="list-style-type: none"> • Internal discussion about a first proposal to initiate a sector inquiry, which should consist of: <ol style="list-style-type: none"> a) Basic concept with concrete ideas about (1) the reasons, objectives and possible outcomes, (2) key aspects for determining the time frame, and (3) a blueprint of the investigation b) Indicative resource planning c) Preparation of appropriate documents for public relations d) Establishment of basic internal organizational structures and communication tools
Substantiation phase	<ul style="list-style-type: none"> • Development of a structured theory of harm • Development of an investigation strategy based on 5 basic questions: what is the goal of the inquiry? Who should be asked? How and when should they be asked? • Task distribution among units / team members and the establishment of internal communication rules
Investigation phase	<ul style="list-style-type: none"> • Step by step procedure based on a refined investigation concept (see substantiation phase) • Pre-investigation steps aimed at identifying:

⁹ Decisions on cartels, mergers and abusive practices are taken by a total of twelve decision divisions at the Bundeskartellamt. These are mainly organized according to sectors of the economy. Three decision divisions deal exclusively with the cross-sector prosecution of cartels.

¹⁰ In 2016 the ICN published the Market Studies Good Practice Handbook, which identifies a number of good practices in conducting sector inquiries that ICN members have found effective. The Handbook describes the market study process in successive steps. According to the Handbook "(...) Having a standardised process for carrying out and implementing market studies can help ensure that they are conducted in an efficient and transparent manner, and that the public resources invested in them are used to best effect." <http://www.internationalcompetitionnetwork.org/uploads/library/doc1088.pdf>

	<ul style="list-style-type: none"> • Respondents and their “structural characteristics” • Industry-specific technical / business terminology • Publicly available market information and (micro-) data • Availability of internal data (type and structure of the data) <p>Commonly used pre-investigation steps are:</p> <ul style="list-style-type: none"> • Preliminary discussions with stakeholders • Test runs of questionnaires • Collection/evaluation of sample data sets if needed <ul style="list-style-type: none"> • Methods of analysis depend on aim, scope and data availability and range from descriptive statistics to complex econometric analyses
Documentation phase	<ul style="list-style-type: none"> • Early preparation of an indicative structure of the interim / final report • Early definition of the (technical) formats of reports and contributions by all units involved • Consideration of third-party access to files and protection of business secrets in this context
Publication / Consultation phase	<ul style="list-style-type: none"> • Early procurement of tools that may be required (print orders, organization of conferences to present the results etc.) • Timely preparation of the documents and background information needed for the planned PR work / consultation • Early preparation of the public consultation, if needed.

3.1. Preparation phase

14. The preparation phase of a sector inquiry consists of all measures taken before the public announcement and actual start of the sector inquiry. Some considerations are particularly important in this phase.

15. The launching of a sector inquiry often attracts considerable attention both in politics and among the public, but especially in the sector concerned. A clear communication of the specific reasons why a sector inquiry is launched and what the objectives are is therefore crucial. This, together with appropriate public relations work in the form of press releases, speeches and conference contributions, also helps to increase the willingness of market participants to cooperate.

16. Resource requirements are another important consideration in the preparation phase. They should be determined prior to the initiation of a sector inquiry and the availability of resources should be carefully evaluated. There are several reasons for this: First, a sector inquiry is not bound to deadlines. However, the sector inquiry should be concluded within a reasonable time, also to avoid that the collected data become outdated. Second, since the decision division in charge of the sector inquiry also works on proceedings that are subject to deadlines (e.g. mergers), lack of personal resources due to other priorities may inevitably extend the duration of a sector inquiry. Third, resource planning is particularly important if other units with cross-section functions (chief economist, legal service, administrative units) are to be involved in the sector inquiry. These units often support several proceedings (relating to different sectors) at the same time, and it is therefore important to estimate the extent of their involvement in terms of time and number of staff. In view of this, the Bundeskartellamt considers the following steps important in the preparation phase of a sector inquiry: (i) developing a basic concept for the sector inquiry; (ii) resource planning; (iii) setting up basic structures and internal communication tools; and (iv) developing a public relations strategy.

3.1.1. Developing a basic concept for the sector inquiry

17. At first, the Bundeskartellamt determines what needs to be investigated and how. For this purpose, the Bundeskartellamt delineates (i) the reasons for, objectives and

possible results of the sector inquiry; (ii) key aspects for determining the timeframe; and (iii) a blueprint of the investigation.

Reasons for, objectives and possible results of the sector inquiry

18. As explained in Section 2, a sector inquiry may be carried out for several reasons: complaints by market participants, intensive political and public debate about possible competition problems in an industry, planned or past changes in the regulatory framework, clarification of fundamental questions for competition enforcement, a pragmatic insight into considerable structural market developments and possible need for enforcement. The reasons for starting a sector inquiry correspond in a broader sense to the "theory of harm". As a rule, this can be formulated as a set of questions which the sector inquiry should provide answers to.¹¹

Key aspects determining the time frame

19. At the beginning of a sector inquiry it is usually only possible to specify a rough time frame for the inquiry. The form and extent of the involvement of stakeholders can, however, usually be determined in advance. In the preparation phase, the Bundeskartellamt often determines which stakeholders (type and number) are affected by the sector inquiry, which of these should be consulted and to what extent it is possible or intended to discuss the fundamental conception and the questions posed by the sector inquiry with the industry. The Bundeskartellamt also considers whether and when to publish an interim report with the preliminary results of the sector inquiry.

Blueprint of the investigation

20. The investigation carried out in the course of a sector inquiry, i.e. the collection of information and its evaluation, determines the time and resources required for the inquiry. This is not only relevant for the authority, but also for the affected market participants, particularly when extensive data collection and econometric analyses are envisaged. The blueprint of the investigation aims at identifying which (empirical) methods can be used to answer different types of questions, which stakeholders should be involved in the investigations, whether the sector inquiry should be conducted in several steps and, if so, which steps.

3.1.2. Resource planning

21. In the preparation phase, the Bundeskartellamt determines which employees of the competent decision division and which employees of other organizational units should be involved in the sector inquiry, how topics and tasks should be assigned to the various units or employees and – as far as foreseeable - whether external resources (consultants, academics, but also temporary staff) should be involved and, if so, for which questions or investigations. In the preparation phase, the Bundeskartellamt also considers whether the sector inquiry requires other resources, e.g. technical resources, to be able to carry out

¹¹ Several actions may follow: opening of proceedings; confirmation or rejection of a hypothesis on the competition problem in a particular industry; better knowledge on the functioning of a particular industry with the aim of developing / adapting / refining (established) investigations and testing concepts in (not yet specified) individual cases; assessment of the competitive effects of specific changes in the regulatory framework or legislation, advocacy initiatives.

extensive data surveys and evaluations and how much effort / time is required for the procurement of such resources.

3.1.3. Setting up basic structures and internal communication tools

22. All the units involved in the sector inquiry should be informed about the aspects set out in a) and b) above. At this stage, a detailed discussion on whether and to what extent the intended basic concept can be implemented with the available resources within a reasonable timeframe is useful. In order to make this internal communication as efficient as possible, basic project-related facilities should already be set up before the launch of a sector inquiry (e.g. email list, meetings schedule, etc.). Team members should regularly keep each other informed on the state of the respective tasks and, if necessary, their adaptation as the sector inquiry proceeds.

3.1.4. Developing a public relations strategy

23. The willingness of market participants to cooperate is crucially important for the success of a sector inquiry. This willingness is strongly influenced by how the objectives of a sector inquiry are communicated to the affected stakeholders. Furthermore, when a sector inquiry is announced, the Bundeskartellamt is likely to receive a number of queries, calls for discussion and/or inputs from market participants or interested stakeholders. Therefore, it is always useful to define a strategy for external communication. The question of at what date the sector inquiry should be publicly announced and, if informal preliminary discussions are held prior to the public announcement, how the authority should react to possible questions about the authority's plans to launch a sector inquiry is quite relevant in this context.

3.2. Substantiation phase

24. This phase must be understood as the refinement all the steps and measures which, after the preparation phase, serve the preparation of the actual market investigation. Even though objectives, resources and investigation tools are decided upon already in the preparation phase, further concretization is usually required. A better definition of the questions that the sector inquiry is supposed to answer, as well as a refinement of the relevant theory of harm, helps structuring and focusing the surveys and the collection of information in general. This refinement aims at avoiding the risk that very comprehensive market investigations are carried out which, in the end, contribute little to the result of the sector inquiry. The investigation can be structured in phases. In particular, more complex data surveys or econometric analyses generally require the clarification of certain preliminary questions so that they can be carried out as efficiently as possible. The Bundeskartellamt has the power to request information to carry out sector inquiries. This means that (German) stakeholders are obliged to reply to the requests for information of the authority.

25. The substantiation phase is particularly important in sectors of the economy of which the authority does not have in-depth knowledge. Contacts (inter alia, interviews) with stakeholders may be necessary to adequately clarify the subject matter of the sector inquiry as well as the investigative tools that can possibly be used (data availability). The refinement of questions and investigation tools is followed by an adjustment of the schedule of the sector inquiry, a clearer division of tasks and responsibilities within the team, a more concrete plan for the involvement of stakeholders and, as the case may be, of external consultants.

3.3. Investigation phase (data collection and evaluation)

26. The actual investigation is - as in other forms of antitrust proceedings – the most time and resource intensive phase of a sector inquiry. In this phase efficiency is particularly important which means, in particular, that collecting data which cannot or do not need to be evaluated in the end should be avoided. This means that the questions included in the surveys should be clear, focused and well structured.¹² The method of investigation is chosen taking due account of the principle of proportionality and is based on a costs/benefits analysis. A well-informed decision on the most efficient investigation methods generally requires in-depth market knowledge and, in particular, information on the availability of data. This is especially the case where the complexity of the surveys and analyses increases. The Bundeskartellamt seeks to clarify with stakeholders which data are available and in which form, and which data, on the contrary, can be compiled only with considerable efforts. Depending on the data and information collected, the adequate protection of business secrets is another possible source of costs. This is particularly true for complex data surveys with a large amount of customer-specific individual data. The better the Bundeskartellamt can guarantee the security of confidential data, both technically (data storage and processing), as well as in terms of internal processes (access rights), the greater is the willingness to cooperate among stakeholders.

27. A step-by-step approach is likely to be the rule, particularly in sectors where the authority has limited market knowledge. This approach provides sufficient scope for a resource-efficient but at the same time effective collection and evaluation of data. Preliminary investigations may facilitate the preparation of further, and possibly more complex, inquiries and surveys. Preliminary investigations may serve to identify the group of eligible respondents and their essential "structural features" (whether they would be representative for the industry), the terminology generally used in the industry and data availability.

28. The analyses carried out in a sector inquiry differ considerably in complexity. Analyses range from simple descriptive statistics presenting the quantitative data collected to complex econometric analyses used to understand or explain how different factors can have an impact on market outcomes. Some examples of analyses carried out by the Bundeskartellamt are presented in Section 4.

3.4. Documentation phase

29. The documentation phase covers, in particular, the process of drafting the interim and the final report, but it also includes the appropriate documentation of the surveys. This phase may include: early preparation of an indicative table of contents of the interim and/or final report; early definition of the (technical) formats of reports and contributions in particular in view of the right of third parties to access the files; establishment of procedures for joint writing, possibly appointment of a "master of the final document". The documentation rules should also take into account possible future requests of access to files by third parties. Protection of business secrets plays a crucial role, also in view of the increasing willingness to cooperate among the market participants. In the documentation phase the Bundeskartellamt decides whether a formal consultation should

¹² Reasons that may cause uncertainties are for example: terminological ambiguities, problems with the technical format or the structure of the data, ambiguous formulation of the question.

follow the sector inquiry and in which form stakeholders should be given an opportunity to comment.

3.5. Publication and consultation phase

30. When the report is published and public consultation is launched, public relations become very important. The work in this phase includes the organization of a (possible) press conference to present the results of the sector inquiry and the preparation of all relevant documentation and background information needed for the public consultation.

4. Examples of sector inquiries

31. This section presents three sector inquiries that the Bundeskartellamt concluded in recent years, relating to fuel, waste management and food retail. They provide three examples of analyses (price analysis, ex-post evaluation and econometric analysis) that the Bundeskartellamt may apply in its sector inquiries.

4.1. Sector Inquiry Fuel

32. In May 2011 the Bundeskartellamt concluded a sector inquiry into the markets for the retail sale of petrol and diesel through petrol stations (fuel retail markets). The sector inquiry was initiated following indications received by the Bundeskartellamt in the course of its merger control activities of possible competition law problems in the fuel sector. Furthermore, there were numerous consumer complaints about the level of fuel prices, as well as reports from independent petrol station operators on possibly anti-competitive practices by the large oil companies.

33. The Bundeskartellamt collected and analysed data on all price changes from 1 January 2007 to 30 June 2010 at over 400 petrol stations of 19 oil companies in 4 German cities: Hamburg, Leipzig, Cologne and Munich. The Bundeskartellamt examined how price monitoring was done by the licensees of petrol stations or their staff, price patterns during the week, price developments at weekends and in holiday periods, the number, magnitude and frequency of price changes, the timing of the price increases (price increase rounds) and the gross retail margins. In general, the patterns and developments identified tallied with the finding of collective dominance. They were to be interpreted as an attempt by the five major oil companies BP (Aral), Jet ExxonMobil (Esso), Total and Shell to establish a new equilibrium. The Bundeskartellamt concluded that the retail prices of the majority of off-motorway petrol stations were higher in the oligopolistic setting than they would have been if effective competition had been in place.

34. The inquiry also examined several individual issues relevant to competition (fuel and service cards, brand partnership and brand dealership agreements as well as predatory pricing) and carried out an analysis of petrol station prices.

35. Within the context of its price analysis the Bundeskartellamt examined in further detail two expert economic opinions commissioned by the oil sector on pricing at petrol stations, and in particular the theoretical models and empirical studies on which they were based. The experts all maintained that they had proved the existence of Edgeworth cycles¹³ and their alteration in a certain manner in the petrol station markets in Germany

¹³ Cf. Maskin/Tirole, A Theory of Dynamic Oligopoly II: Price Competition, Kinked Demand Curves and Edgeworth Cycles, *Econometrica*, Vol. 56, No. 3, May 1988, p. 571-599.

during the periods under consideration. They interpreted these findings as proof of substantial competition. The empirical findings as such did not contradict the results of the Bundeskartellamt's investigation. Nevertheless, the Bundeskartellamt interpreted (in line with different authors) the existence of Edgeworth cycles as the result of implicit coordination rather than competition.

36. The results of the sector inquiry are of prime significance for the activities of the Bundeskartellamt in the fuel sector. The Bundeskartellamt monitors further merger plans in the petrol station markets very closely on the basis of these findings and prevents abusive practices by the oligopolists, e. g. by making sure that the independent petrol stations are supplied by the oligopolists at fair conditions. Due not least to the findings of the Fuel Sector Inquiry and based on a decision taken by the Federal Government, the Market Transparency Unit for Fuels commenced operations in September 2013 at the Bundeskartellamt. This unit enables consumers to get an updated and comprehensive picture at all times of the petrol prices in their vicinity and consequently to select the petrol station with the lowest prices.

4.2. Sector Inquiry Dual Systems

37. The sector inquiry into compliance schemes ("dual systems") was carried out in 2012 to evaluate the effects of de-monopolization in the market for the collection and recycling of packaging waste in Germany.¹⁴

38. The Bundeskartellamt carried out an ex-post evaluation using detailed data covering a period of 19 years (11 years of monopoly and 8 years of competition). The data set covered 100% of the market since all nine compliance schemes provided all requested data. The compliance schemes were asked about their license quantities, waste collection quantities, recycling quantities, turnover, cost data and some other figures. The data collected were supplemented by information already known by the Bundeskartellamt. The requested data were previously verified by auditing firms and public authorities: Since 2003 the tenders for the collection, sorting and recycling of garbage are monitored yearly; therefore, in-depth cost and quantity data are available for each municipality throughout Germany. Finally, the Bundeskartellamt used findings and data from its enforcement activity in recent years.¹⁵

39. The Bundeskartellamt analysed market shares, market entries, collection amounts, recycling quotas and quantities, disposal costs, sales and prices. Consumer benefits resulting from the market opening were also estimated.¹⁶ The sector inquiry revealed that competition reduced prices by more than 50%, the market share of DSD dropped down to

¹⁴ Compliance schemes („dual systems“) organize the collection and recycling of packaging waste in Germany. DSD (Duales System Deutschland GmbH) enjoyed a nationwide monopoly in packaging waste until 2003, when the first competing compliance schemes received regulatory approval (on a regional scope), and 2006 (nationwide). The main costs of the system are covered by manufacturers and distributors, who place packaging on the market.

¹⁵ Since 2000, the Bundeskartellamt has conducted more than 20 antitrust cases in the area of packaging waste. In 2003 the authority also carried out dawn raids at the premises of waste service operators on suspicion of bid rigging.

¹⁶ Despite very conservative assumptions, it was estimated that consumers have saved at least 1 bn. euro per year since 2008. Consumer savings for the years 2003-2011 amounted to at least 5.6 bn. euro, possibly up to more than 10 bn. Euro.

44% and that the introduction of competition did not have any of the feared effects: Recycling quotas did not fall and competition unleashed a wave of innovation in recycling technology.¹⁷

40. The market presented almost ideal conditions for conducting an ex-post evaluation. The service is homogeneous and clearly defined: The collection and recycling of packaging waste is defined by the Packaging Ordinance. Customers (=retailer/producer) are obliged to procure the service and are only interested in the price. Quality effects do not distort the analysis, as the quality of collection is defined by the municipality (minimum recycling quotas are defined by the Packaging Ordinance). Neither do quantity effects distort the analysis because quantities of collected waste are roughly constant. Apart from the de-monopolization measures, market conditions have remained unchanged for the past 20 years. In contrast to other ex-post evaluations, where causality is typically established only indirectly (comparison with a control group), this ex-post evaluation study was therefore able to establish causality directly (through cost data, bidding data, etc.).

4.3. Sector Inquiry Food Retail

41. In 2014 the Bundeskartellamt concluded a sector inquiry into buyer power in the food retail sector in Germany.¹⁸ One of the main objectives of the inquiry was to gain insights for the Bundeskartellamt's future case practice in this sector.

42. The inquiry focused on the conditions of competition between the food retail companies on the one hand and their suppliers on the other. Buyer power in the food retail sector had been the subject of many complaints received by the Bundeskartellamt and the subject of intensive political debate. The Bundeskartellamt focused in particular on the results of the negotiations between food retailers and brand manufacturers. The authority requested information from more than 200 manufacturers and 21 retail companies and carried out a comprehensive evaluation of the answers received.

43. The sector inquiry was conducted over a period of three years in a two-stage procedure, following an extensive phase of preliminary investigations and taking account of the approaches used in the sector inquiries of other European competition authorities.¹⁹ In the first stage the Bundeskartellamt investigated structures in the market for the procurement of food in Germany based on a number of criteria: market size, supplier and

¹⁷ Operators of sorting plants made significant investments after the introduction of competition. The investments led to a rapid transition from manual sorting of waste towards automated sorting and an increase of sorting depth, e.g. separation of plastics by type, thus enabling higher quality recycling. The aggregate cost of sorting and recycling dropped from 715 mn. Euro (2003) to 173 mn. Euro (2011).

¹⁸ A summary of the sector inquiry (in English) is available here: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Summary_Sector_Inquiry_food_retail_sector.html?nn=3599618. The complete text of the report (in German) can be found here: http://www.bundeskartellamt.de/Sektoruntersuchung_LEH.html?nn=3591074.

¹⁹ The investigative approaches of and experience gained from sector inquiries conducted by other European states were used and developed further in the conceptual design of the sector inquiry. Already since 2004 sector inquiries with different objectives and approaches have been conducted by various European competition authorities. Important information has been gained from these inquiries, most particularly those carried out by the UK Competition Commission in 2008 and the Portuguese competition authority in 2006 and 2010. Some of this information was taken as a basis for the conceptual framework of the empirical econometric part of the Bundeskartellamt's sector inquiry.

buyer structure, the importance of private labels and the position of food retailers. The procurement shares of the individual retailers and the conditions of competition were examined both in terms of larger product categories and with regard to seven procurement markets selected from various product categories: sparkling wine, frozen pizza, roasted coffee, jam, red delicatessen sauces, milk and cold coffee beverages (with milk). The analysis of the food retailers according to supra-regional structural factors (turnover, total sales floor space, outlet density, customer reach, distribution channel concepts etc.) confirmed the dominance of the companies Edeka, Rewe, the Schwarz Group and Aldi: These companies account for well over three-quarters of the total turnover achieved with final customers in the German food retail sector.

44. The first phase was followed by an econometric analysis of approx. 3 000 individual negotiations relating to a representative sample of 250 branded products from different product categories. The authority processed approx. 65 000 data sets including a large number of individual data.²⁰ This unique data set was the only possible basis for gaining data for the empirical analysis: the bargaining on terms and conditions of procurement in the food retail sector is done within the internal sphere of the companies and there are no reliable secondary data sources.

45. The actual data collection was preceded by very detailed preliminary discussions with numerous market participants in order to clarify the relevant terminology for the definition of "conditions" and the existing data structure of the companies when recording these conditions. The Bundeskartellamt sent "test" questionnaires to a limited number of representative respondents and asked for concrete suggestions for possible improvement. The Bundeskartellamt also requested the transmission of sample data sets for the preparation / calibration of the complex data analyses that followed.

46. Retailers as well as manufacturers were asked about the results of their negotiations on the individual EAN articles,²¹ the switching possibilities of the negotiating partners and the competitive environment. Responses from the manufacturers and retailers were validated in an elaborate process. The purpose of this broad-based econometric examination was to examine whether and to what extent the leading retail companies enjoy purchasing advantages over their competitors, and what form these advantages take in individual cases. The analysis showed which factors (independent variables) influence purchasing terms and conditions. The econometric analysis confirmed - not surprisingly - that in the negotiations between retailers and manufacturers, large purchasing volumes have a beneficial effect on the conditions granted to the retailer.²² Well known branded products can be a key factor for successful negotiations on the part of the manufacturer. However, only few branded products are

²⁰ The Bundeskartellamt developed and implemented a tool for the secure transmission and storage of the highly sensitive data as well as for the limited access of employees to the data stocks.

²¹ The European Article Number or EAN is standard describing a barcode symbology and numbering system used in global trade to identify a specific retail product type, in a specific packaging configuration, from a specific manufacturer.

²² The empirical survey has taken into account that the advantages resulting from large purchasing volumes cannot be viewed in an isolated manner but may also be the result of other efficiencies. However, even if the sole focus on purchasing volumes bears, from an econometric perspective, the risk that too little importance is attached to other efficiencies such as economies of scale, one can assume that independent variables in any case lead to more beneficial negotiation results, and thus offer a valuable indicator for a first assessment of how significant a retail company is for its negotiating partners in the food sector.

truly essential. In most situations, retailers have outside options. As a result, large retail companies have structural advantages in their negotiations with brand manufacturers of which they make use.

5. Conclusion

47. The Bundeskartellamt can conduct sector inquiries in order to determine the competition situation in individual sectors if there are indications that there is no effective competition in these markets. The market knowledge acquired from sector inquiries can also be used by the Bundeskartellamt in other proceedings. The results of sector inquiries are an important basis for the case work in merger control and the control of abusive practices. Sometimes they also have an impact on legislation.

48. Sector inquiries differ in goal, scope and type of analysis performed. The methodologies for carrying out sector inquiries highly depend on the aim of the sector inquiry and the data availability in the relevant sector. Although the Bundeskartellamt does not apply a fixed procedure for conducting sector inquiries, previous experience shows that the process of implementing a sector inquiry can be divided into five phases: a preparation phase where objectives, resources and investigation tools are internally discussed; a substantiation phase where theory of harm and methodology are refined; an investigation phase where the actual data collection and evaluation takes place; a documentation phase, i.e. the drafting of the report and preparation of all relevant documentation; and finally a publication and consultation phase.

49. Previous experience has shown that some practices significantly improve the quality of a sector inquiry and contribute to its success:

- As sector inquiries require a considerable amount of time and resources, the decision on whether to start an inquiry should be evaluated carefully.
- The scope and the aim of the sector inquiry should be clear and well-defined.
- The type and availability of data determine the analytical methodologies that can be used.
- Extensive data collection is extremely burdensome for businesses as well as for the authority itself. The request of data/information should therefore be as focused as possible.
- In general, stakeholders should be consulted from the very beginning. They should also be consulted in order to test data availability.
- The accurate evaluation of the collected data is crucial for the reliability of the conclusions.

50. The process of building know-how on how best to conduct sector inquiries will continue in the future, both as a result of the Bundeskartellamt's own work and based on experience shared among agencies in charge of conducting sector inquiries.