

## Press release

### **Monopolies Commission recommends a systematic evaluation of competition law decisions to improving competition policy**

- Monopolies Commission sees negative competition effects of best-price clauses and restrictions of online distributions only under certain conditions
- Monopolies Commission recommends a systematic evaluation of the Federal Cartel Office's decisions as an instrument of an evidence-based economic policy

In its twenty-first Biennial Report (*'Hauptgutachten'*), the Monopolies Commission evaluates the case practice of the German and European competition authorities and courts. In addition, it makes recommendations for statutory changes.

In German merger control, the 8th amendment to the German Act Against Restraints on Competition gave rise to new developments. Through the amendment, the market dominance test had been replaced by the so-called SIEC test (SIEC stands for: "significant impediment to effective competition"). Following this change, it has been necessary to consider the economic effects of a concentration to a higher degree, aside from the market shares of the parties to the concentration. The Monopolies Commission was in favour of that change as it would allow the Federal Cartel Office to conduct a profound economic assessment of the affected markets in cases of doubt. The experience with the application of the new rules shows that clearance has not been subject to a significantly more demanding standard since the change of the law. In the years 2014/2015, 2,308 concentrations were cleared and only two proposed concentrations were prohibited.

The prohibition in the Edeka/Kaiser's Tengelmann concentration was followed by a ministerial authorization proceeding in which the Monopolies Commission submitted an opinion. In that opinion, it came to the conclusion that the alleged public welfare benefits were not sufficient to compensate for the competition restrictions following from the concentration. It noted, in particular, that it was necessary to consider the labour market as a whole and not only the jobs at a particular company. At the moment, the case is before the courts for an assessment of whether the ministerial authorization was lawful.

In its anti-cartel and anti-abuse practice, the Federal Cartel Office has focused its attention on vertical competition restrictions at booking platforms and in online distribution. A lot of controversy exists regarding the competition effects of best-price clauses, e.g., of hotel booking platforms, and online distribution restrictions, e.g., by sports articles producers. For example, best-price clauses can also give rise to efficiencies, e.g., by reducing the search costs of consumers. Moreover, regarding restrictions of online distribution, negative effects on competition should be expected only where the relevant companies have high market shares and substantial market power. Given the disputed market delineation, it is unclear whether these conditions were fulfilled in the cases of booking portals and sports articles producers. For example, the Federal Cartel Office defined the relevant product market exclusively with regard to hotel booking portals offering a search/compare/booking service

bundle. In contrast, the Office excluded intermediary service providers from the relevant market, such as travel agencies, meta search engines, or the hotels' own websites.

“The Monopolies Commission recommends a systematic evaluation of competition law decisions with a view to improving competition policy”, said Prof. Achim Wambach, the chairman of the Monopolies Commission. The Monopolies Commission considers ex-post evaluations to be an instrument to make competition law and its enforcement more effective. Systematic evaluations of competition authority decisions can produce insights of high value for the future assessment of competition cases, and for further amendments to the German Act Against Restraints on Competition. So far, cartel decisions have been evaluated only in selected cases.

The Report is accessible at the Monopolies Commission's [home page](#) as of now.

The Monopolies Commission is a permanent, independent expert committee, which advises the German government and legislature in the areas of competition policy making, competition law and regulation. Its legal responsibilities encompass, among others, the preparation of a Main Report analysing the development of competition on a bi-annual basis. The Monopolies Commission has five Members appointed by the Federal President based on a proposal of the German government. Prof. Achim Wambach, Ph.D., is the chairman of the Monopolies Commission.