

## Summary

### Strengthening Competition in Retailing and Services

#### The Nineteenth Biennial Report 2010/2011

by the Monopolies Commission (*Monopolkommission*)  
in accordance with Section 44 Paragraph 1 Sentence 1 of the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*)\*

#### *Current issues in competition policy*

##### ▪ Competition on markets for gambling

1.\* The market for gambling in Germany is strictly regulated, very much dominated by the State and offers little scope for competition. On 15 December 2011, the Minister-Presidents of all Federal *Länder* with the exception of Schleswig-Holstein signed the First Amendment to the State Treaty on Games of Chance (*Glücksspieländerungsstaatsvertrag*), which is to come into force on 1 July 2012 and which will renew the nationwide framework of the organisation of gambling. Schleswig-Holstein was the first Federal *Land* not to take part in a uniform provision on gambling, instead adopting derogating provisions in an Act on Games of Chance (*Glücksspielgesetz*) of its own. The strict regulation of the German gambling sector has led to many legal disputes and to constant adjustments being made to the State's stipulations. The Monopolies Commission has now reviewed in detail the most recent restrictions which have entered into force on the gambling markets in order to determine whether the societal objectives are efficiently achieved by the envisioned regulations. This is not the case. The Monopolies Commission hence considers it necessary to fundamentally revise them.

2.\* In a social market economy, the regulation of the gambling sector must be measured by the degree to which it is able to effectively and efficiently restrict possible errors of non-regulated market results. Such errors may lie primarily in the manipulation of the gaming facilities and be caused by the risk of gaming addiction. Various studies have analysed the critical addiction factors and their significance with regard to the risk of becoming addicted to gaming, prime attention attaching to a high incident frequency – also in the context of opportunities for multiple gaming and multiple bets. The socially-efficient regulation of gambling must be consistently orientated towards effectively and efficiently reducing these risk-enhancing characteristics. The risk factors are not the same in all forms of gambling, so that different games of chance, respectively, have a higher or lower addiction risk, depending on their gaming characteristics. This should be taken into account in a socially efficient regulatory framework. In contrast, the history of the changing regulation of gambling markets in Germany strongly suggests that social efficiency was not the primary goal. A large number of the restrictions or liberalisations of the markets which have been effected via the regulation of gambling can be explained more through historic rigidities and fiscal interests than via principled adhesion to the societal goals.

3.\* The Amendment to the State Treaty on Games of Chance now coming into force provides for several structural changes to be made to the previous gaming system in Germany. The State's monopoly is safeguarded in several areas. The monopoly is dispersed to some degree in the sports betting market by awarding 20 concessions, including to private providers, whilst commercial gaming services, for instance in amusement arcades, are subject to greater restrictions than was previously the case. What is more, the new State Treaty enables the state lottery

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\* The Monopolies Commission would like to thank Mr. Neil Mussett for translating the original German text into English.

and betting providers to offer their services on the Internet as a general rule, and expands possibilities for advertising. The Monopolies Commission however considers that there is considerable further need for change.

**4.\*** A growing problem of the restriction of various forms of gambling to combat gaming addiction lies in the fact that the expansion in opportunities to play online has ultimately led large numbers of gamblers to switch to illegal services from abroad which are not monitored by the agencies supervising gambling. Because of this lack of effectiveness, the state monopolisation of some forms of gaming, such as in the field of sports betting, can therefore no longer be justified in the interest of effectively combating gaming addiction. Against this background, the new experimentation clause on granting concessions to private sports betting-providers is to be welcomed, since it enables sports betting services to be channelled from the grey markets to the legal, state-supervised markets. However, this approach has not been pursued consistently. For instance, the Monopolies Commission sees no reason for the planned restriction of the number of concessions which can be granted to providers of sports betting since the risk of gaming addiction is determined not by the number of providers, but to a much greater extent by the number and frequency of the sports events. There is, rather, a risk that limitations will preserve the strength of the grey markets, which cannot be supervised. Furthermore, taxation of the providers to whom the concessions have been granted via the bet tax envisioned in the new State Treaty is much less suitable in the view of the Monopolies Commission to bring providers in the grey markets back into the legal market. A taxation system which selects gross returns as a basis for assessment, as envisioned in the Act on Games of Chance of the Federal *Land* Schleswig-Holstein, is hence to be preferred over the bet tax stipulated in the Amendment to the State Treaty on Games of Chance. What is more, the granting of sports betting concessions should make additional demands on the providers, setting out requirements adjusted to this kind of gaming which are to be taken to reduce gaming addiction.

**5.\*** A problem of growing grey markets which is basically comparable to that of sports betting also exists in certain other forms of gaming, such as in online poker and online casino games. Linking to the above considerations on granting concessions to sports betting-providers, the experimentation clause should also be expanded to cover those comparable forms of gaming including such a course of action to counter gaming addiction. Such a step could also increase the opportunity to channel grey market services into the legal market in sports betting since many providers are active on both markets, and hence it would be possible to grant concessions and legalise the entire range of services.

**6.\*** Another problem lies in the field of lotteries. In the past, commercial gaming brokers have repeatedly triggered competition between the *Land* lottery companies which, without including their operations as agents and organisers of lotteries such as “6 aus 49” (6 from 49), have *de facto* territorial monopolies in their respective *Länder*. The State has used increasing regulative restrictions to greatly restrict the field of operations of gaming brokers, and has prevented the arising competition between the *Land* lottery companies for commissions. This competition for the provision of lottery tickets acquired nationwide however does not appear to the Monopolies Commission to be socially efficient. By contrast, the Monopolies Commission does not consider sufficient reason to exist for the sale of lottery products not to be carried out efficiently in competition at private-sector level. State lottery operators should hence withdraw from sales; private points of sale should be merely supervised by issuing licences by the supervisory authorities. Instead of a sales fee, all sales offices should establish a sales mark-up the amount of which they should select themselves.

7.\* The new State Treaty also relaxes the previous restrictions of online sales and certain advertising activities with lottery and sports betting services. It is however not possible to identify a link between this change of course and prevention measures. The obligation to seek permission with regard to advertising and online sales for various forms of gaming should therefore be linked to common guidelines which can be adjusted at short notice to the results of authoritative studies on addiction prevention. Before licences are granted in lotteries, an addiction prevention study should be carried out by means of which substitution and the complementary effects of taking part in a lottery are investigated in particular.

8.\* As a matter of principle, the regulation of different forms of gambling should be reviewed as to which specific restrictions of competition are actually necessary, taking into account authoritative studies on addiction prevention. The proportionality of the restrictions on different forms of gaming should also be considered here. For instance, the different treatment which takes place with regard to the restricted approval of commercial slot machines, on one hand, and a state monopoly on casinos (with considerably relaxed advertising restrictions), on the other, does not appear to be justifiable by the goal of reducing gaming addiction.

▪ **Shortcomings in competition in the German sea pilots system**

9.\* The structure of the German sea pilots system is characterised by a variety of regulations on methods of market access and conduct. The market access regulations include prerequisites for admission (this also includes the requirement that candidate sea pilots must have a written and oral knowledge of German), admission restrictions depending on traffic volumes and local pilots who are already available, as well as mandatory membership of a pilots' association and of the Federal Pilots' Chamber (*Bundeslotsenkammer*) as a precondition for working as a pilot. The conduct regulations include price regulation and the obligation to conclude contracts (obligation to accept a pilot). Furthermore, this includes the *Börtfolge* sequence control system, which is intended to ensure that pilots are available at all times. It is particularly noticeable that, with regard to ship pilots, the *Börtfolge* denies clients the opportunity to freely choose a pilot. In connection with the obligation to conclude contracts and the prices stipulated for the services, clients are denied any latitude for negotiation. Competition takes place in marginal areas at best, for instance when tendering for transfer services using helicopters.

10.\* The intention expressed by the supervisory authorities, namely that the advisory activity of a pilot constitutes a sovereign task, cannot be concurred with, amongst other things because the pilot is only an adviser for the captain and, in accordance with section 23 subs. 1 of the Sea Pilots Act (*Seelotsgesetz*), has no power to give instructions. As a matter of principle, however, even sovereign tasks do not necessarily have to be excluded from competition. It is shown in the case of the transfer system, for instance, that the sovereign task of transporting pilots can certainly be awarded to private providers by issuing an invitation to tender and, in this respect, that the State only guarantees that the task is carried out (the idea of the State as a guarantor).

11.\* No major information asymmetries appear to the Monopolies Commission to be recognisable which in economic terms would give rise to the danger of adverse selection. This is caused, firstly, by the fact that the pilot and the captain are "at the same level". The advantage of the pilot's specific local knowledge can be not only reduced, but in fact completely cancelled, by the captain's having frequently travelled through the locality. Secondly, advances in navigation technology reduce the uncertainties of the captain in steering a ship. Potential major negative externalities, i.e. a markedly negative impact on uninvolved third parties caused by errors in running the ship, may in this respect only play a certain role where liability rules

either cannot be enforced or cannot be enforced in their entirety. It emerges as a result that the strict regulation of the German pilot system itself can hardly be justified for safety reasons.

**12.\*** In its recommendations for action, the Monopolies Commission favours changing the (first) local language from German to English. This would create better opportunities for non-German candidate pilots to enter the market. Furthermore, foreign captains could then more easily take advantage of regulations allowing them to sail without a pilot.

**13.\*** The restriction on the admission of candidate pilots appears to function as a means to divide the monopoly revenues among the smallest possible number of persons. The Monopolies Commission is critical vis-à-vis such *de facto* regulation of the number of pilots on the market – in particular in connection with the lack of price competition – since this has the effect of acting as a barrier to the market entry of candidate pilots. Hence, the restriction on the admission of the pilots depending on the staffing structure and traffic volume in the respective locality should be abolished, and freedom to choose pilots – derogating from the sequence control system – should be facilitated in order to ensure more competition between pilots.

**14.\*** The Monopolies Commission has also found that the connection between self-administration and supervision by the Federation has led to a closed, relatively intransparent system in which competition is ruled out in favour of apparent safety arguments. It therefore recommends greater transparency in self-administration, as well as in supervision by the Federation. This could take place through regularly publishing parameters, such as the salary composition, information on the contents of pilots' further training, quality assurance measures or indeed accident figures.

**15.\*** Furthermore, in the view of the Monopolies Commission, the type of company of the pilots' associations that is currently stipulated, i.e. as public-law corporations, should be re-considered. The Monopolies Commission sees no reason not to be able to also open up the current system of self-administration to the other forms of company. Moreover, it was not possible to find any authoritative arguments against licensing potentially competing pilots' associations. There is nothing in the medium term against the establishment of competition on this market, in particular against the background of a possibly larger number of licences in the future.

**16.\*** The interference in the freedom of pricing is particularly serious, and such action is legitimate in the pilots system in neither economic nor safety terms. For this reason, the Pilots' Tariff Ordinance (*Lotstarifverordnung*) should only apply if nothing else was agreed when the contract was concluded.

**17.\*** The Monopolies Commission is furthermore proposing to launch a debate on expanding the possibilities for exemptions from the obligation to accept a pilot. It is not possible to exhaustively assess at this point which explicit prerequisites should apply to the captain and the ship with regard to an expanded exemption from the obligation to accept a pilot. With regard to the reduction of possible information asymmetries, the Monopolies Commission favours the option of vertical integration in which pilots can also be employed by ship-owners.

▪ **Statement on the draft Act Reforming Regulation in the Railway Sector**

**18.\*** At the beginning of 2012, the Federal Ministry of Transport, Building and Urban Affairs submitted a Draft Act Reforming Regulation in the Railway Sector (*Gesetz zur Neuordnung der Regulierung im Eisenbahnbereich*). The Monopolies Commission has been in favour of a fundamental change to the statutory framework in the railway sector for a considerable period,

and against this background welcomes the planned revision of regulation in the railway sector. As a whole, this draft Act constitutes a step in the right direction. There is however an urgent need for improvement in some very major points.

**19.\*** The goals pursued in the draft Act, namely of redesigning the regulation of prices, strengthening the Federal Network Agency as well as combining all relevant provisions from the General Railway Act (*Allgemeines Eisenbahngesetz*) and the Railway Infrastructure Use Ordinance (*Eisenbahninfrastruktur-Benutzungsverordnung*) in a comprehensible manner are to be evaluated positively as a matter of principle. Having said that, the draft Act does contain a large number of detailed provisions which do not serve to enhance competition, or to increase efficiency and hence social prosperity. To this end, in addition to some new items that should be rejected, in particular the retention of many unsuitable provisions may be the subject of complaint. For instance, the draft Act does not contain any further requirements as to the independence of railway infrastructure operators in legal and organisational terms, and with regard to their decision-making, although a strict separation between the provision of infrastructure and transport services is clearly preferable from an overall societal viewpoint. In the framework of the redesign of the provisions on the regulation of prices, the reorientation of the regulation of prices to adhere to the standard of the cost of efficiently providing services, the introduction of ex-ante approval for prices and the stipulation of return on investment instead of return on equity as the permissible method for measuring the yield of the capital employed, in conjunction with the orientation in line with the Capital Asset Pricing Model, are to be welcomed. Because of the failure to introduce incentive regulation and the removal of expenditure on investment and maintenance from efficiency control, the effects of the envisioned draft Bill which as such promote competition, are however considerably weakened. Some welcome amendments are planned in the field of access regulation, such as the adjustment of the provisions on the use of service facilities. Moreover, the Monopolies Commission considers there to be further need for reform. A comprehensive reform of provisions in framework agreements and further transparency obligations is required in order to improve the competition conditions.

**20.\*** The Monopolies Commission considers as a result that there is an urgent, concrete need to amend the existing draft Bill. Active competition development in the railway sector is contingent on the existence of an efficient market system. The current framework however shows many weaknesses which this draft Bill does not yet adequately address. The Monopolies Commission hence calls for a fundamental redesign of regulation in the railway sector to tackle known shortcomings in the existing framework in an ambitious, committed manner and to comprehensively resolve them. It is only then that effective, genuine competition, and hence an attractive rail transport service, can be achieved.

▪ **Statement regarding the main points of the reformed Postal Act**

**21.\*** The Federal Ministry of Economics and Technology submitted initial proposals for the reform of the Postal Act (*Postgesetz*) in March 2012. The reform aims to improve the regulatory framework and to reduce regulation on those markets on which competition has come about. The Monopolies Commission has been in favour of amending postal law for quite some time, and hence welcomes the coming reform of the Postal Act. The main points of the reformed Postal Act 2012 contain some proposed amendments which can be evaluated positively. All in all, the proposed amendments do not yet go far enough, so that the Monopolies Commission considers there still to be room for improvement.

**22.\*** Firstly, the Monopolies Commission welcomes the fact that the Federal Ministry of Economics – concurring with the recommendations of the Monopolies Commission – has come out explicitly against deregulation of the ex-ante licensing obligation of letter prices with a minimum posting volume below 50 items. A major new development consists of the planned introduction of an obligation incumbent on Deutsche Post AG to submit prices of bulk items from 50 items upwards to the Federal Network Agency prior to their planned introduction. With regard to individual contracts which Deutsche Post AG has with major customers, which relate to bulk items as a rule, the Monopolies Commission welcomes this submission obligation. The Federal Network Agency is currently unable to effectively verify individual contracts that Deutsche Post AG has with major customers. It cannot inspect these contracts at its own initiative, but without concrete indications also cannot initiate proceedings for subsequent price regulation. Because of the very considerable significance of access to sub-parts of services for competition on the letter mail markets, the Monopolies Commission however considers a need to exist for an ex-ante licensing obligation with regard to prices for sub-parts of services, which are stipulated in the General Terms and Conditions of Deutsche Post AG. No alternative letter mail service-provider has yet been able to build up its own blanket delivery network, including via cooperation. For this reason, as well as because of the stagnating volume of items in the letter mail sector and of the increase in the volume of items posted via access to sub-parts of services, access to sub-parts of such services provided by the market-dominating Deutsche Post AG can be considered to be decisive to the future development of competition. It is furthermore unfortunate that the main points do not contain any proposed amendments as regards the provisions on the regulation of prices. The Monopolies Commission considers it to be necessary to delete section 20 subs. 2 sentence 2 of the Postal Act, as well as section 3 subs. 4 sentence 3 of the Postal Prices Regulation Ordinance (*Post-Entgeltregulierungsverordnung – PEntgV*), in order to ensure that the costs of efficiently providing services are the only relevant standard for the regulation of prices in the future.

**23.\*** It should be furthermore positively stressed that third-party rights should be enhanced. The latter should be entitled to make an application to open abuse proceedings. The Monopolies Commission is however also in favour of granting a right of application to third parties with regard to pricing review in accordance with section 25 subs. 1 of the Postal Act. The Monopolies Commission also views positively the reduction of regulation in the field of orders for the formal service of documents through the post. There is provision to restrict the ex-ante approval obligation to the prices of the market-dominating enterprise, there being no publication of the approved price since these services are as a rule awarded through a tender process.

**24.\*** The intended adjustment of the references contained in the Postal Act to the Telecommunications Act (*Telekommunikationsgesetz*) is also to be welcomed, albeit the corresponding provisions of the Telecommunications Act should be directly included in the Postal Act. The Monopolies Commission would however like to point out that, in the main points, the Monopolies Commission is not explicitly entitled to inspect the files of the Federal Network Agency. However, it relies on such inspection of the files for the more detailed implementation of its mandate as an expert, and calls for the explicit inclusion of such a provision in the Postal Act.

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▪ **Statement on the planned establishment of a Market Transparency Agency in the Federal Government's draft Act of 2 May 2012**

**25.\*** The proposals made by the Monopolies Commission to establish a Market Transparency Agency for Wholesale in Electricity and Gas have now been transposed into a draft Act of the Federal Government. The Ninth Chapter (section 47a to k of the draft Act Amending the Act Against Restraints of Competition (*Entwurf zur Änderung des GWB – GWB-E*), which is hence to be inserted in the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) includes the legal basis of the Market Transparency Agency for Wholesale in Electricity and Gas, as well as of market observation in the fuels sector. There are proposals for the Market Transparency Agency to take up work as per 1 January 2013.

**26.\*** The tasks of the Market Transparency Agency are to be carried out by the Federal Cartel Office with input from the Federal Network Agency. The Market Transparency Agency is to act as a platform for broad cooperation between all relevant *Land* and federal authorities, and in this regard should create an added value vis-à-vis the cooperation provided by the REMIT Regulation only between ACER (Agency for the Cooperation of Energy Regulators) and the Federal Network Agency. The concrete pursuance of breaches of the law remains incumbent on the authority which has the respective competence here.

**27.\*** The Market Transparency Agency is to constantly monitor all wholesale trade in electricity and gas, regardless of whether it is aimed at physical or financial performance. Thus, abnormalities in pricing are to be discovered that result from abuse of market dominance, insider information or market manipulation. In addition to uncovering specific breaches, it is anticipated that transparency in the shape of timely, continuous market monitoring should have a disciplining impact on the stake-holders on the market. The Market Transparency Agency is largely to monitor the generation, plant deployment and marketing of electricity and gas by producers, as well as observing the marketing of control energy. The obligations to report here are incumbent above all on wholesalers, energy utilities, operators of power plants and trading platforms. The general obligations to report include trading, transport, capacity, generation and consumption data from the markets to be lent concrete form in detail by the Market Transparency Agency.

**28.\*** The Monopolies Commission is fundamentally in favour of the project to establish a Market Transparency Agency for Wholesale in Electricity and Gas, albeit it considers the number of permanent posts planned for this to be high at first sight. Against the background of their difficult-to-follow pricing mechanisms, electricity wholesale markets are particularly suited for intensified official supervision. In this respect, the Monopolies Commission hopes to make considerable progress in simplifying data collection, interfaces, processing and exchange and evaluation, as well as cooperation with other authorities and monitoring bodies. Equally, it welcomes the categorisation of the definition of the enterprises' duties to report: Thus, duties to report are to be lent concrete form via legal ordinances, determinations and information orders by the Market Transparency Agency. This facilitates dynamic tracking of these duties, enables the corresponding information to be collected and progress to be made in methods without having to adjust the law.

**29.\*** The Monopolies Commission urgently recommends to equip the planned Market Transparency Agency for Wholesale in Electricity and Gas with greater institutional independence than provided for in the Government's draft. This would make it as flexible and dynamic as possible, in particular when it comes to refining the collection and analysis of data. This would set the stage for the Market Transparency Agency actually serving as a cooperation

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platform between the relevant *Land* and federal authorities; it would enable it above all to provide a clear added value vis-à-vis the cooperation between the Federal Network Agency and ACER provided for in the REMIT Regulation. In the view of the Monopolies Commission, in this sense not least, the involvement of recognised external experts, in particular in the field of automatic data collection, could be beneficial. The goal should be to bring about effective, efficient cooperation at national and international level.

**30.\*** The Monopolies Commission explicitly points to the increasingly international nature of the wholesale electricity market particular. It however remains unclear to what extent the (limited) international competence of the Market Transparency Agency and cooperation with ACER and the regulatory authorities of other EU Member States are sufficient. Also in this regard, structuring the Market Transparency Agency as a cooperation platform could facilitate a real added value vis-à-vis ACER. All in all, particular attention could certainly be paid to the aspect of the cross-border impact of the implementation of data collection by the Market Transparency Agency. If the planned Market Transparency Agency were only to have data at its disposal on domestic electricity producers and clients in the field of wholesaling of electricity, the Monopolies Commission considers that its activities would be less promising since the electricity wholesale markets are increasingly international in their operations. The Monopolies Commission hence proposes to subject the activities of the Market Transparency Agency to an evaluation after three years and to only expand it in the case of a positive evaluation.

**31.\*** Fuel markets have a number of structural characteristics favouring parallel conduct. In addition to its tasks in the wholesale trade in electricity and gas, the Market Transparency Agency Act is to bring about certain relaxations in abuse proceedings in the mineral oil industry. The intention is to remedy information shortfalls by taking a more detailed look at price changes in the petrol station sector. The data collection here is to include not only every change in end consumer prices at public petrol stations, but also the sales prices from the mineral oil suppliers and wholesalers.

**32.\*** Observation of the fuel market by deploying a Market Transparency Agency appears to the Monopolies Commission to be somewhat of a toothless tiger given the current Government draft of 2 May 2012. According to the reasoning for the draft, an ongoing market observation in cooperation with other institutions is to bring about learning effects and synergies which can be put to use in the procedures used in the fuels sector where there is suspicion of price-cost squeezes and breaches of the ban on sales below cost price. However, the Monopolies Commission has already criticised these two prohibitions in the past, since they entail a number of problems. Furthermore, the sectoral study of the refinery level which has been repeatedly called for by the Monopolies Commission would only be time limited, and cannot justify the ongoing market observation given the considerable deployment of resources planned by the Market Transparency Agency.

**33.\*** The Government's draft makes no provision to make use of fuel prices at the petrol stations, which are collected in real time, for consumers. In the view of the Monopolies Commission, this part of the data in particular could achieve a real added value for end customers in the medium term. In the event of the establishment of a Market Transparency Agency in the field of fuels, the Monopolies Commission proposes to oblige petrol station operators to feed price changes in super petrol and diesel into a corresponding database enabling consumers in Germany to compare prices in real time, for instance using satnavs or smartphones. This would bring about a major added value for end customers. The task of data collection could



also be taken over by consumer institutions or private institutions, and hence does not require a separate Market Transparency Agency.

**34.\*** The Monopolies Commission needs a right to inspect the files of the Market Transparency Agency in order to carry out its tasks in the field of competition policy and regulation. It should therefore be urgently set out in a new subs. 5 in section 47c of the draft Act Amending the Act Against Restraints of Competition that the Market Transparency Agency is to make the current market data available to the Federal Statistical Office and to the Federal Ministry of Economics, as well as to the Monopolies Commission.

▪ **Right of the Monopolies Commission to inspect the files**

**35.\*** The core tasks of the Monopolies Commission provided for in the Act Against Restraints of Competition include examining the state and development of business concentration, evaluating the application of the provisions concerning the control of concentrations, as well as commenting on other topical issues of competition policy in the Biennial Reports (section 44 subs. 1 sentence 1 of the Act Against Restraints of Competition). In accordance with section 42 subs. 4 sentence 2 of the Act Against Restraints of Competition, a statement from the Monopolies Commission is also obligatory and must be commissioned by the Federal Minister of Economics in cases in which the Minister's consent is required. The Federal Government can instruct the Commission to draw up additional reports (section 44 subs. 1 sentence 3 of the Act Against Restraints of Competition). In addition to these obligatory reports, the statutory mandate of the Monopolies Commission includes delivering opinions at its discretion (section 44 subs. 1 sentence 4 of the Act Against Restraints of Competition).

**36.\*** The statutory mandate of the Monopolies Commission has been supplemented since the mid-1990s to include additional tasks which are listed in several economic laws on the network-like state-regulated sectors (the Telecommunications Act (*Telekommunikationsgesetz*), the Postal Act (*Postgesetz*), the General Railway Act (*Allgemeines Eisenbahngesetz*) and the Energy Act (*Energiewirtschaftsgesetz*)). All the Acts provide, inter alia, that the Monopolies Commission is also to respect the application of provisions which relate to regulation by the regulatory authority.

**37.\*** The Monopolies Commission can only properly perform its statutory duty to take account of the case-law of the Federal Cartel Office and of the Federal Network Agency if it is able to have unrestricted access to the procedural files of the cases and proceedings to be reported on. The extent of the reporting would otherwise be limited to the generally-available publications on the decisions. The duty of confidentiality to which the members and staff of the Monopolies Commission are subject in accordance with section 46 subs. 3 sentence 2 of the Act Against Restraints of Competition ensures the confidential use of information which the enterprises consider to be confidential.

**38.\*** In the course of the 7th reform of the Act Against Restraints of Competition in 2005, a new provision was included in the shape of section 46 subs. 2a which regulates comprehensive access to the files of the cartel authority by the Monopolies Commission, including operational and commercial secrets and personal data. The new provision describes the basis of the practice that was customary until then, and contains an explicit clarification of the law in this respect as it now stands.

**39.\*** The need for a right to inspect the files arises in the Federal Network Agency's analysis of the regulatory practice in the same way as in evaluating the decisions of the Cartel Office because the statutory mandate borrows copiously from the corresponding provisions of the

law on cartels in all cases and implies that a comparable approach should be taken by the Monopolies Commission. The Federal Network Agency however considered itself to be unable, without a separate statutory basis, to provide confidential information on the authority's regulatory practice to the Monopolies Commission, as is possible for instance in conjunction with section 46 subs. 3 of the Act Against Restraints of Competition (duty of confidentiality) and which in the view of the Monopolies Commission is indeed permissible. The Federal Network Agency however held that this would have necessitated a separate provision empowering the Monopolies Commission to inspect the files of the Federal Network Agency in connection with the concrete assignment of tasks by the individual statute.

**40.\*** With the reform of 2007, a provision was added to the Telecommunications Act the wording of which corresponds to that of section 46 subs. 2a of the Act Against Restraints of Competition. Access by the Monopolies Commission to the corresponding files of the Federal Network Agency was also regulated in the case of the Energy Act. For confidential use, explicit reference is made to the corresponding application of section 46 subs. 3 of the Act Against Restraints of Competition. By contrast, no further right to inspect the files is granted to the Monopolies Commission in the case of the obligatory special reports on the postal and railway sectors. The Monopolies Commission proposes in the current proposals to reform the law on the railways and the Postal Act by inserting such a right.

**41.\*** Problems occurred in the short term during the preparation of this report with regard to access to the confidential data of the Federal Cartel Office. The Monopolies Commission had intended to subject its analyses to a stricter empirical examination, starting with this main report. This relates, firstly, to respect for the decision-making practice of the Federal Cartel Office under competition law; secondly, recent questions of competition policy were also to be analysed with the data that are available in the Federal Cartel Office for this Biennial Report. This relates both to the mineral oil industry and to the water sector.

The Federal Cartel Office has expressed fundamental reservations concerning the provision of data to the Monopolies Commission. On the one hand, the Office considers there to be a need to examine in detail whether an initial inspection by staff members of the Monopolies Commission is possible in ongoing proceedings. Secondly, the Federal Cartel Office fears an impact on its investigations if the Commission is provided with data "for its own use", that is to make its own analyses.

**42.\*** The Monopolies Commission does not share the legal reservations of the Federal Cartel Office in the current discussion. This applies both to the question of access to the files in the case of ongoing proceedings, and to the ad hoc use of data collections. The restriction of the use of data collected by the Federal Cartel Office in the case-law during sector enquiries affects both the statutory mandate and the independence of the Monopolies Commission. Moreover, it should be recalled that with the abovementioned duty of confidentiality in accordance with section 46 subs. 3 of the Act Against Restraints of Competition, adequate precautions were taken in order to sufficiently allow for eligible interests of enterprises.

**43.\*** The Monopolies Commission recommends in the course of the intended establishment of a Market Transparency Agency at the Federal Cartel Office that a clarifying provision of the facts should be made by the legislature. This would at the same time demand a broader interest on the part of economic policy-makers in independent empirical investigations regarding major competition policy issues on the basis of data collected by the Federal Cartel Office.

▪ **The 8th Act to reform the Act Against Restraints of Competition**

**44.\*** The Federal Ministry of Economics and Technology presented an internal draft of the 8th Act to reform the Act Against Restraints of Competition in November 2011. The Federal Government adopted the draft Act in March 2012; the Federal Ministry of Justice submitted in April 2012, in agreement with the Federal Ministry of Economics, a draft for discussion to amend the Act on Regulatory Offences with which the legal succession in regulatory fines proceedings is to be regulated. A statement was made by the *Bundesrat* on the 8th Act to reform the Act Against Restraints of Competition on 11 May 2012.

**45.\*** The national merger control provisions, the general control of abusive practices, as well as the procedural and regulatory offences law under competition law, are central concerns of the 8th Act to reform the Act Against Restraints of Competition. In addition, certain amendments to press merger control, as well as the special abuse control in the water industry and district heating, are under discussion. Over and above this, expanded application of the Act Against Restraints of Competition to the statutory health insurance funds will be discussed.

**46.\*** The Monopolies Commission made a statement on several major proposals in a special report in February 2012. The statement refers to the First draft of the ministry of Economics and established a further need for reform. In this report, it recommends in particular that the Act Against Restraints of Competition should be fundamentally applicable to the statutory health insurance funds in their relationship with one another, as well as in their relationship with their members. The Monopolies Commission hence explicitly welcomes the amendments to the law on health insurance proposed by the Federal Government as a major step in the right direction.

**47.\*** The Monopolies Commission still considers that there is a need for improvement with regard to the sector-specific abuse control in the water industry. It is essential that such provisions cover all water charges, that is prices and public administrated fees, since otherwise there is a risk of a flight into the law on public fees to the disadvantage of the consumer. The Monopolies Commission renews its opposition to the sector-specific regulation of drinking water.

**48.\*** The Monopolies Commission regrets the planned extension of the special abuse control for the energy markets in accordance with section 29 of the Act Against Restraints of Competition. It has repeatedly indicated the disadvantages of the provisions in the past and called for them to be repealed. The Monopolies Commission disadvises to expand the provision to cover the market for district heating. The latter should be subjected to sector-specific regulation instead.

**49.\*** The proposals by the Federal Ministry of Justice for changes to the regulatory offences procedure are to be welcomed. The Monopolies Commission had recommended the introduction of corresponding provisions because this would probably have made it more difficult for the enterprises concerned to avoid fines.

In other respects, the Monopolies Commission once more points to the information contained in its special report.

## ***I. Reorientation of reporting on market concentration***

**50.\*** The Monopolies Commission has already discussed the conceptual weaknesses of its classical reporting on market concentration in its previous Biennial Reports. For instance, a major problem area is that the concentration measures described are still not based on the definition of a relevant product and geographical market. Although many attempts have been made to take this problem into account in the past, basically no major progress has been made in the reporting on market concentration to date.

**51.\*** Furthermore, classical concentration measures only constitute one indicator to measure the intensity of competition in a market. Further major influencing factors, such as market entry barriers which make a market entry difficult or impossible, are not shown by the classical concentration statistics. Thus, it is not possible, and has not been possible, to derive any authoritative conclusions as to market power using the traditional concentration measures. A sensible interpretation was not possible in the past, so that the Monopolies Commission presented the data without a detailed competition policy analysis.

**52.\*** Hence, the Federal Ministry of Economics and Technology awarded a contract to the Centre for European Economic Research (*Zentrum für Europäische Wirtschaftsforschung – ZEW*) in Mannheim to compile an expert report with the objective of evaluating the economic and competition policy relevance of the Monopolies Commission's previous reporting on market concentration and to discuss possibilities of making these more contemporary and benefit-orientated. The project was completed at the end of 2011. The core statement of the report is that reporting on market concentration to date has not provided any useful indicators of the evaluation of real market and competition circumstances in terms of competition policy. It was not possible to identify any substantial arguments in favour of continuing to report on market concentration. Rather, the Centre for European Economic Research advises that the competition policy analyses of the Monopolies Commission should be carried out in a more evidence-based manner and that no resources should be expended on reporting on market concentration in its classical form in the future.

**53.\*** The reconceptualisation of the concentration statistics is orientated in line with the considerations of the Monopolies Commission contained in the previous main report, the added value of which has been verified in the ZEW's report. The Monopolies Commission hence shows in its current main report the "classical" concentration tables, which were drawn up in close cooperation with the Federal Statistical Office for the last time. The Monopolies Commission is planning in future to use resources becoming free for more evidence-based analyses. The use of modern empirical methods for instance enables the Monopolies Commission to validate and quantify their qualitative arguments on the individual topics discussed in the biennial and special reports.

**54.\*** The second part of the first chapter hence contains a special evaluation on the topic of energy in which the influencing factors are investigated to identify the sales margins of utilities on the end customer market for electricity. Particularly the sales margin in competition for end customers in the electricity market played a major role since, unlike the other elements of the electricity price, such as network access charges, electricity tax, etc., which are different for each energy utility and hence – unlike the vast majority of other price elements – cannot be regarded as competitively neutral. Above all a closer look at the utilities is interesting here since, although the standard contract remains a comparatively expensive type of electricity supply, a good half of all households still have standard contracts. These end customers have

not yet taken up the opportunity to switch which has been created by the competition as part of the liberalisation of the energy market.

**55.\*** It has been possible to carry out a detailed analysis on the basis of an extensive dataset which contains information on electricity prices, network access charges, the ownership structure of utilities, as well as further structure-specific characteristics. The descriptive statistics show that those standard contracts which are offered by one of the four major German energy companies exhibit the highest average price. However, the sales margin is on average highest among the public suppliers. In a next step, effects of factors of interest were investigated by using an econometric model. It is clearly shown that an increase in competition intensity leads to a decreasing sales margin of the utilities. The results indicate that also customers which are not keen on switching their energy provider profit from increasing competition since utilities also achieve lower sales margins in this case. Furthermore, this may also result from a reduction of the standard contract price.

## ***II. The state and development of concentration among large companies (aggregate concentration)***

**56.\*** The Monopolies Commission's investigation of concentration among large companies illustrates the state and development of the 100 largest companies in the Federal Republic of Germany in terms of their significance to the economy as a whole and of the degree of ties between them. By reporting on aggregate concentration, the Monopolies Commission is performing its statutory mandate to regularly monitor the development of business concentration in the Federal Republic of Germany (section 44 subs. 1 sentence 1 of the Act Against Restraints of Competition). The analyses permit a broad overview of the largest companies in Germany and their economic significance over time, and serve as a basis for the identification of external and internal growth events, as well as to evaluate interlocks between individual players.

**57.\*** The surveys on aggregate concentration and interlocks between large companies are based on the identification of the 100 largest companies of all sectors by domestic value added. In addition to domestic corporate divisions, the Monopolies Commission also analyses world value added by the large companies. Ties between these companies in the form of shareholdings and personnel links are also evaluated. The consideration of the hundred largest companies is supplemented by analysing the significance of large companies in individual sectors on the basis of the turnover of the largest industrial, trade and service companies, the balance sheet total of the largest financial institutes and the gross premiums written of insurance companies, as well as the calculation of their share in the total business volume of the respective industry. This part of the report concludes with a calculation of the involvement of the 100 largest companies in the corporate mergers reported on by the Federal Cartel Office.

**58.\*** The 100 largest companies showed domestic value added of around 273 billion EUR in the year reviewed, 2010. This was an increase of 3.8 % from 2008. The value added by all companies in Germany fell by 0.5 % during the same period, to roughly 1,669 billion EUR. The contribution made by the large companies observed to total value added thus rose slightly, to 16.4 % in 2010, after having fallen to 15.7 % in 2008.

The ten largest companies increased their share of the value added by all the large companies examined by 1.1 % to 40.4 %. This corresponds to a share of 6.6 % (2008: 6.2 %) in the aggregate total added value. The companies ranking 1 to 50 contributed a share of 81.8 % (2008: 81.5 %) of the value added of the "100 largest".

**59.\*** A comparison of domestic and worldwide value added serves to appropriately cover the actual economic weight and size of whole groups. Secondly, the comparison provides indications of the degree to which parts of the value added chain are being transferred abroad as a result of offshoring or outsourcing processes. The 53 companies examined that had their corporate headquarters in Germany and that were among the 100 largest companies during both 2008 and 2010, the periods reviewed, and which were identified as operating primarily in the manufacturing, trade, transport and services sectors, reduced their domestic share from a total of 58.5 % in 2008 to 55.6 % in 2010.

**60.\*** The development of the large companies was also analysed as to the characteristics of the number of workers, property, plant and equipment, as well as cash flow. 92 companies were included in the balanced survey regarding worker numbers which belonged to the group observed in the two years under report 2008 and 2010. The share of these 92 companies among the total number of workers with obligatory social insurance was virtually unchanged, at 12.4 % (2008: 12.6 %). The average value added per worker in the 92 companies surveyed in 2010 increased as a result of the rise in the domestic value added in conjunction with the slightly falling number of workers by 4.1 % to 85,000 EUR (2008: 81,000 EUR). The aggregate benchmark was 66,000 EUR per capita (2008: 67,000 EUR).

**61.\*** Since the year under report 2006, the Monopolies Commission has been studying the 100 largest companies measured against the number of domestic workers. The 100 largest employers in Germany employed almost 3.5 million persons in the year under report 2010, and hence roughly 7 % more than the “100 largest” by value added. 76 companies were among the group of the 100 largest companies in Germany in terms of both value added and workers.

**62.\*** Alternatively to the analysis by domestic value added, the Monopolies Commission observes sector-specific characteristics to evaluate the size of the company in order to illustrate the significance of large companies in individual sectors. In comparison to the year under report 2008, the turnover of the 50 largest industrial companies fell moderately in nominal terms by 1.7 %, as did the business volume of all companies in manufacturing, this time by 2.6 %. The share of the “50 largest” among the aggregate benchmark was 31.9 % (2008: 31.6 %). A comparable development can also be observed for the turnover of the ten largest trade and the ten largest transport and service companies as a share of the turnover of all companies in the respective sector observed (shares 2010: 10.0 % and 13.1 %, respectively). By contrast, the ten largest and all financial institutes increased their domestic unconsolidated balance sheet total and the ten largest and all insurance groups increased their nominal unconsolidated gross premiums written. The shares vis-à-vis 2008 increased by 0.8 % to 49.3 % and by 3.0 % to 59.6 % as a result of the relatively stronger growth of the respective aggregate benchmark.

**63.\*** The shareholders of the large companies observed are analysed first with regard to the shareholder structure of the companies by various groups of equity providers, and secondly with regard to the cross-shareholdings among the 100 largest companies. In most of the companies under consideration, the ownership had not greatly changed in overall terms. The majority was held by a single foreign owner in 26 companies in 2010, followed by companies with one individual, a family or family foundation holding the majority, or the majority of shareholdings was widely dispersed (21 cases each). 13 large companies had a majority of shares in public ownership. In seven cases (2008: 12), the majority of equity could not be categorised as belonging to any one ownership category.

An alternative categorisation of the shareholder structure further illustrates that 36.4 % of the average controlled value added was widely dispersed in 2010, with 995 million EUR per company. 16.7 % and 13.4 %, respectively, of the capital holdings weighted with the domestic

value added were held by domestic or foreign companies which cannot be mainly attributed to financial services or in public ownership. With shares of 4.1 % and 3.2 %, respectively, banks and insurance companies, as well as fund management companies, controlled a comparatively small share of the weighted value added of the large companies observed.

**64.\*** The tendency towards unravelling cross-shareholdings, observed since the year under report 1996, continued. Vis-à-vis the year under report 2008, the number of interlocked companies fell in the network from 37 to 34. In the same way, the total number of shareholders fell from 17 to 15, the number of companies with shareholdings dropping from 29 to 22 and the total number of shareholdings from 47 to 37. Consequently, the level of interdependency as a measure of the share of the value added controlled by equity shareholdings as a share of the total value added among the total value added of the “100 largest” fell clearly once more by three percentage points, from 8.1 % to 5.1 %.

**65.\*** When identifying connections between companies at personnel level, direct personnel connections are observed where one or more persons were on the management or controlling bodies of at least two of the 100 largest companies. In the year under report 2010, 27 companies (2008: 33 companies) had at least one member of their management on the controlling bodies of one or several of the companies observed. They exercised mandates in the controlling bodies of 43 (2008: 43) of the other largest companies.

The total number of ties through management members fell from 76 to 62 between 2008 and 2010. Similar to the unwinding of cross-shareholdings, the network of interlocking directorates has become steadily smaller since the year under report 1996. There is only a weak correlation between these two forms of interlock. In the year under report 2010, only 15 out of 62 personnel ties via members of the management (24.2 %) were covered by a capital holding. 68 companies were tied via other joint holders of control mandates in 2010. The total number of such ties fell from 215 cases in 2008 to 176 in 2010. The degree of integration, as the share of such links of the total theoretical maximum number of possible ties, fell by 0.8 percentage points, from 4.3 % to 3.6 %, in the two-year period.

**66.\*** The result of the analysis of the composition of the management and controlling bodies at personal level was that the proportion of external managing directors among the 849 shareholder representatives in the controlling bodies (2008: 868) of the 100 largest companies was 8.4 % (2008: 9.2 %). The proportion of shareholder representatives who can be attributed to the category “representatives of the public sector” was 11.3 % (2008: 10.7 %). In most cases, representatives of this group exercised control mandates to supervise public shareholdings. 35 and 36.5 %, respectively (2008: 39 and 40.6 %, respectively) of the chairmen of the respective controlling body held at least one other managing director’s or controlling mandate in one of the companies in the group of companies analysed. The results furthermore reveal that the presiding chairman of the controlling body had previously held a managing director’s mandate in the same company in 33 cases, that is in 34.4 % of the cases (2008: 37 and 38.5 %).

**67.\*** In studying the involvement of the 100 largest companies in the mergers to be notified to the Federal Cartel Office before implementation in accordance with section 39 of the Act against Restraints of Competition and the number of clearance decisions, the Monopolies Commission, finally, underlines the significance of external growth for competition policy. Companies on this list of the 100 largest companies were involved in 341 (2008/09: 483) of all mergers notified in 2010/11 (2008/09: 482) or a share of 16.3 % (2008/09: 18.1 %). What is more, 14.9 % (2008/09: 16.5 %) of all clearance decisions were accounted for by the 100 largest companies in the period under review.

**68.\*** The overall impression is that there was a slight increase in the large companies' share of total value added over the period. The share of large companies in total value added, at 16.4 %, continued to be significantly lower than the long-term average of 18.2 %. The number of persons employed by the 100 largest companies has continually fallen since the year under report 2004, reaching to its current level of 12.8 %. With regard to the different size indicators examined in particular economic sectors, only slight changes in concentration emerged in comparison with the previous period under review. Only in the insurance sector was a fall in concentration by three percentage points to 59.6 % noted. The increasing dissolution of the network of mutual cross-shareholdings and interlocking directorates among the largest 100 companies, which has been observed since 1996, continued. There was also a fall in the participation share of large companies in the mergers notified to the Federal Cartel Office and the number of mergers cleared.

### ***III. International interlocking directorates***

**69.\*** In the wake of ongoing globalisation and market integration, the Monopolies Commission is presenting for the Ninth Biennial Report a comprehensive special evaluation of the state and development of interlocking directorates via multiple mandate-holders between the "EU-15 Member States plus Norway and Switzerland" in the context of its reporting on market concentration.

**70.\*** The study constitutes an expansion of the analysis that is traditionally carried out in Chapter II on the state and significance of personnel ties between the 100 largest domestic companies to include an international perspective. As a result of the increasing international orientation of the procurement and sales markets, it can be presumed that personnel ties between companies over national borders are gaining significance. Because of the restricted availability of data, it was not possible in the past to carry out an appropriate systematic analysis of a larger sample of companies over time. On the basis of a comprehensive dataset of 7,195 listed companies, it was possible for the first time to record the intensity of personnel ties in and between selected European states in the 2006 to 2010 period in order to illustrate the international significance of personnel ties.

**71.\*** The analyses largely pursue three focal points. First of all, the state and the development of interlocking directorates in the EU States are presented in order to illustrate the national and international significance of corresponding ties and to reveal possible trends. In the next step, national and international ties are analysed at sectoral level in order to illustrate their significance in a variety of sectors. Finally, a detailed analysis of the sub-sample of German companies is carried out as regards the number and intensity of national and international personnel ties in individual sectors.

**72.\*** The focus on large listed companies results from the comparatively extensive availability of data resulting from stricter disclosure obligations, as well as the improved comparability of the structure of the highest executive or controlling bodies, on the basis of which the information on ties is drawn up. It is hence not a representative selection of all companies observed in the European countries. Direct conclusions as to the actual national degree of personnel ties in the companies in a country cannot be drawn because of the selection made. The corporate headquarters is in the United Kingdom in the case of 35 % among the total number of all companies in the sample. 16 % of the companies observed have their head office in Germany, followed by France with a share of almost 13 %.



**73.\*** In comparison to the year under report 2006, the share of companies in the dataset which are tied in terms of personnel increased by 1.8 percentage points in the average of all countries until the year under report 2010, reaching 72.9 %. A mixed picture is revealed at country level. Whilst the interlock level increased in twelve of the 17 countries observed in the period under observation, it fell in five cases. German companies were well below the international average in 2010, with a share of 61.9 %. Measured by the number of possible contacts within the network, the highest interlock level of German companies was with companies from Austria and Switzerland. The highest number of ties in absolute terms is measured between companies from Germany and the United Kingdom and Switzerland.

**74.\*** The investigation of interlocking directorates at sectoral level makes it clear that in all sectors observed more than half the companies covered have personnel ties with at least one more company. In the case of groups of companies whose business activities as a rule include several sectors, the attribution to sectors takes place in accordance with the corresponding focus of activity. The unweighted median value for the companies in the sample is 68.6 % in the year under report 2010, as against 68.4 % in 2006. The interlock level is largely caused by personnel ties between companies whose main activities lie in different sectors. The average share of these inter-sectoral ties in 2010 was 62.4 % (2006: 62.7 %). The share of those companies which are tied with a company of the same industry (intra-sectoral ties) was an average of 31.0 % in 2010 (2006: 30.2 %). The findings indicate that inter-sectoral ties constitute an attractive strategy for the companies in the sample. It can be presumed that these ties frequently reflect typical supplier and client relationships between individual industries. In agreement with the previous findings, inter-sectoral ties also dominate in a distinction between national and international company ties. Having said that, the shares of international personnel ties remain at a relatively low level. Whilst in 2010, an average of 65.3 % of companies has at least one national company tie (2006: 65.4 %), international ties were established for only 24.0 % of the companies (2006: 22.7 %). Amongst other things, this finding can be traced back to differences in the working language, cultural conditions or indeed the geographical distance between different companies. What is more, the degree of internationalisation in a sector is also decisive for the establishment of national or international personnel ties. The results show that the intensity of national and international ties varies clearly between the sectors observed. Further analyses show that the degree of interlocking at country level is frequently influenced to a not inconsiderable degree by the inclusion of financial service companies in the survey.

**75.\*** To sum up, the descriptive results show the high degree of relevance attaching to multiple mandate-holders as a tool for establishing ties between companies. The investigation of international personnel ties has shown that interlocking directorates are not a German phenomenon. Whilst interlocking directorates are influenced most strongly by national links, there is likely to be an increase in international interlocks in the wake of ongoing economic globalisation. The results therefore at least indicate a tendency towards an increase in interlocking directorates in an international context, albeit an interpretation of the results is only possible to a restricted degree because of the short survey period and of economic influencing factors.

**76.\*** It has been possible to create a basis for the ongoing empirical analyses by establishing a comprehensive panel dataset on national and international interlocking directorates in selected European countries. Further expansions primarily relate to the continuation and further expansion and improvement of the database, followed by an expansion of the analysis methods in order to be able to analyse personnel ties more effectively from a competition policy point of view in future. The comparison with detailed financial data should primarily be identified in

this context, as should the identification of the ownership structure and the recording of parallel capital interlocks.

**77.\*** A database supplemented by additional variables and observations sets the stage for deriving authoritative conclusions and statements using empirical analysis methods. There would be particular interest, taking into account the national legal and structural framework, in recording all active companies in selected sectors in order to come closer to a survey that is more market based. Furthermore, the additional evaluation of specific accompanying personal characteristics seeks to be able to qualify the function of personnel ties between companies more accurately. Furthermore, the use of network analysis procedures constitutes a sensible addition in order to identify important key ties or specific tie patterns. By implementing some of the points that have been named, future analyses should endeavour to carry out a theoretical and qualitative analysis of the motives behind the interlocks and to discover causal interactions of capital and interlocking directorates which permit a more competition-orientated analysis of national and international interlocks.

#### ***IV. Application of competition law***

**78.\*** The special situation in the economic and financial crisis has so far only created challenges for the Federal Cartel Office in procedural terms, in particular by virtue of an increase in the number of urgent merger control proceedings. No crisis-related rescue mergers were observed; only in exceptional individual cases did a risk of the insolvency of parties subject to fines lead to an adjustment in the fine or of its enforcement.

**79.\*** The application of competition law in sectors shaped by special law is once more the subject of the survey in the present Biennial Report. Here, the Monopolies Commission stresses anew the influence of priority legal rules and the limited exceptional nature of such areas. It appears in particular that a statutory clarification of the applicability of the Act Against Restraints of Competition to the statutory health insurance funds remains necessary. In more general terms, the Monopolies Commission recommends to the legislature, in the case of an explicit restriction of competition law, to provide for a time-limit of the exceptional provision, linked where possible with corresponding evaluation requirements.

**80.\*** The application of competition law at the threshold to sovereign activity is also examined once more by the Monopolies Commission. In this, it refers again to the boundaries to which restrictions of competition law on a sovereign basis remain subject against the background of general principles and higher-ranking law. Two clarifying judgements of the Federal Court of Justice in this regard are appraised which relate to the merger of publicly-owned hospitals and to application of competition law to public-law water utilities.

**81.\*** Furthermore, the application practice of the Federal Cartel Office in relation to increased flexibility in the enforcement of competition law sought in the 7th reform of the Act Against Restraints of Competition is analysed. Here, the Monopolies Commission first and foremost devotes itself to the aspect of companies' compliance with competition law. Such systematic efforts on the part of a company which, in the field of competition law, aim to avoid breaches of competition law are promoted by cartel authorities in an international comparison in many cases. This valuable instrument to support the application of competition law is not taken up in Germany by the Federal Cartel Office at all, which the Monopolies Commission regrets. It however stresses that a liability of persons in responsible positions in companies to be fined can already be justified if no suitable precautions have been taken to avoid breaches of com-

petition law. All in all, in the view of the Monopolies Commission, a strengthening of the understanding for the requirements of competition law and the goals of competition protection by those in charge is decisive in this respect. Excessive formalisation of compliance efforts, by contrast, can lead to empty formalism and to an organised lack of responsibility in companies. Here, regardless of the size and sector of the company, the clear positioning of the company management in the sense of compliance with the provisions of competition law provisions can already form an effective basis for a compliance culture in companies.

**82.\*** The powers of the Federal Cartel Office to prescribe positive measures and to bindingly accept commitments have been fully established in the practice of the authority and frequently also act as a background in proceedings in which the companies concerned cease conduct that is in breach of competition law without the need for a formal ruling of the Office. Breaches of competition law can frequently be avoided efficiently using these instruments. That said, the Monopolies Commission recommends in cases on which new legal issues and/or facts with major relevance for other market stake-holders are based to bindingly clarify the legal situation and to subject it to judicial review in order to clarify the rules of conduct on the market even of those who are not involved in the proceedings.

**83.\*** As a matter of principle, block exemption regulations release all competition-restricting agreements from the prohibition of cartels if they meet their prerequisites. Since the particularities of individual markets are hardly depicted in these general regulations, both the Federal Cartel Office and the European Commission are empowered to withdraw their advantages in individual cases if the market structure justifies this in a specific case. The competition authorities have so far gathered very little experience in applying this power, which also has a negative influence on its practicability. The Monopolies Commission however presumes that the need for such rulings might increase in future.

**84.\*** The tool of sector enquiries is also fixedly established in official practice. In the period under review, final reports of sector enquiries were published in the fields of electricity generation and electricity wholesale, the car fuel trade and milk. The Monopolies Commission particularly highlights in this context the fact that the involvement of the specialist public and of external experts might be able to bring about further improvements in the enquiry process and its results.

**85.\*** The analyses carried out by the Monopolies Commission also relate to the spectrum of forms taken by the Office's notifications. In addition to forms and sample texts, above all notices, communications, fact sheets, references, standards, guidelines and instructions can be observed, which all make it easier for companies to cooperate with the authority, increase the transparency of official action and raise the efficiency of the application of competition law. Not lastly, the inclusion of the interested specialist public in the drawing up of such documents, already practised in some cases, for instance in the framework of a consultation, appears to the Monopolies Commission to make sense.

**86.\*** To take an overview, the Monopolies Commission observes developments in the application of economic terms, theories and methods in competition law practice. In doing so, a distinction is made between the classical economic basis of competition law and the increasing significance of more modern economic theories and methods, in particular of quantitative analyses. The Office's practice is studied, as is the publication of "standards" in relation to economic expert opinions. Against the background of the increasing significance of such opinions, the Monopolies Commission finally proposes to consider including economic experts among the personnel of the courts competent in competition matters.

**87.\*** The appraisal of cartel prosecution by the Federal Cartel Office constitutes a focus of this Biennial Report. In accordance with the conceptual distinction made between prohibited cartels and efficient cooperation, the institutional framework of cartel prosecution is illustrated, the Monopolies Commission currently not considering there to be a need of fundamental change in the latter. The examination of joint ventures and of the general coordinative impacts of planned concentrations in the context of double verification is regularly carried out by the Federal Cartel Office, and this is welcomed by the Monopolies Commission. A special appraisal is carried out of the cartel threshold in oligopoly markets, not lastly against the background of the abuse control carried out on these markets, which is rather restricted in practice. The link between the individual and economic damage accruing from a cartel, the amount of the fines and an efficient deterrent effect is illustrated; also on this basis, the Monopolies Commission does not consider there to be any sound reason to consider reducing the level of the fines. In this context, it is also being investigated how the Federal Cartel Office deals with payment difficulties of those who are fined. With regard to the criminalisation of cartel breaches discussed in the specialist public, the Monopolies Commission considers there to be a further need for discussions and recommends in this respect first and foremost to further clarify the impact of criminal prosecution on participation in concerted tendering. The currently important question of cartel damages is also briefly discussed; finally, a section is devoted to the bonus programme similar to a crown witness mechanism and the consent-based ending of procedures (“settlement”).

**88.\*** A number of the Office’s cartel proceedings are discussed in greater detail in this context, and decisional practice is evaluated in the context that they provide. A typical hardcore cartel was a cartel of fire engine manufacturers which has already led to a number of sets of compensation proceedings on the part of the municipalities concerned and might also be relevant under criminal law as concerted tendering. Examined are furthermore various sets of proceedings related to resale price maintenance. In particular, the distinction between permissible recommendation and non-permissible exercising of pressure is discussed in that light. The investigation also relates to restrictions of Internet sales, which have been the subject-matter of several sets of proceedings of the Federal Cartel Office; both direct and indirect restrictions cause problems here. The problems under competition law of the exchange of information both between enterprises and via market information systems are also the subject-matter of the investigation; in this respect, the different impacts of increased transparency according to horizontal and vertical relationships are demonstrated and the criteria illustrated which are relevant for their lawfulness under competition law. Furthermore, the resolution of competitive concerns by the design of tendering markets is analysed, specifically using the examples of the collection of packaging within the Dual System Germany, the granting of fuel supply rights for motorway service stations, as well as the central tendering of football television rights. Finally, a set of proceedings is illustrated in which Deutsche Bahn AG had promised an advantage to a competitor in order to avoid issues related to the law on the award of contracts being clarified by the Federal Court. All in all, the Monopolies Commission concludes that, on the one hand, the prohibition of cartels as set out in the 7th Act Reforming the Act Against Restraints of Competition appears efficient, whilst on the other its enforcement leaves room for improvement, particularly in grey areas.

**89.\*** Abuse control on oligopolistic markets is investigated using the fuels market as an example. Its range appears limited, but the Monopolies Commission nonetheless establishes some shortcomings in investigation and application in the Federal Cartel Office’s practice in this regard. As to the sovereign specification of pricing rules for this market, the Monopolies Commission is sceptical; nonetheless, it might be possible, were it to be designed correctly, to

avoid negative effects for consumers. In particular competition-increasing information services are also being analysed in this regard.

**90.\*** In the field of abuse control as market supervision akin to regulation, the Monopolies Commission is investigating a number of sets of proceedings in which the competition law was applied at the boundary to formal regulation. For instance, currently, more than twelve years after the initiation of the first set of proceedings by the Federal Cartel Office, the question as to the access of competitors to Puttgarden ferry harbour is once more pending before the Federal Court of Justice. In the field of charges for third-party withdrawals from cash point machines, the Office has already been able to achieve initial partial successes; further action on the basis of competition law might however involve a considerable amount of effort. The Monopolies Commission welcomes the application of competition law as a substitute for a lack of tendering obligations under the law on the awarding of contracts for the re-awarding of concessions. It however demonstrates that there is a discrepancy in the practice of the application of the law in comparison to contracts awarded in local rail and bus transport, and once more calls for a clarification in the law on the award of contracts.

**91.\*** The Federal Cartel Office and the *Land* cartel authorities have acted in various sectors, in particular in the framework of price abuse proceedings, against utilities holding market power. The abuse control which has been carried out here reveals considerable parallels to price regulation. In the drinking water sector, the Monopolies Commission shows various difficulties in the context of these procedures which stress its repeated call to subject the entire sector to ongoing regulation by the Federal Network Agency.

**92.\*** Price abuse control in the energy sector also points to a number of practical and conceptual problems which in particular have shown in the proceedings to control the prices of heating electricity suppliers. Methodical criticisms relate above all to the selection of the yardstick for comparison to ascertaining below-cost prices, as well as to the Federal Cartel Office's determination of the substantiality of the deviation. The Monopolies Commission is sceptical generally as to whether the overall impact of proceedings that have been carried out has led to an improvement in the competition conditions, and regrets once more that no greater effort was made to introduce remedies that would open up the market, which furthermore could have been enforced with less procedural effort.

**93.\*** Summing up, the Monopolies Commission finds that the boundaries between competition law and regulation cannot always be clearly defined, but that price abuse control under competition law has presumably an independent field of application in addition to regulation. In other cases, competition law replaces missing political decisions on concrete regulatory yardsticks which, were there the right political majorities, might be able to address the underlying problem more efficiently, extensively and sustainably.

**94.\*** The number of planned concentrations registered for the control of concentrations has stabilised at a low level in the period under review; in this respect, it was above all the introduction of a second domestic turnover threshold in mid-2009 which had a sustained impact. The number of cases that were investigated in second phase has also fallen vis-à-vis the previous period under review, as have both clearances with ancillary conditions and prohibitions, which are at their lowest level for decades.

**95.\*** The Monopolies Commission welcomes the underpinning of the gun jumping prohibition by virtue of it also being enforced in fine proceedings. The application of merger control regulations in the international context is illustrated using three cases revealing the significance of the participation of those who are involved in the merger in such situations.

**96.\*** The significance of the market definition is investigated in legal and heuristic terms. In doing so, the Monopolies Commission has reached the conclusion that, as a valuable tool of competition law, this also continues to be indispensable in most cases against the background of more recent methods and procedures. What is more, the de facto market definition is analysed in two merger projects, firstly between cable TV network operators (“licensing markets”) and, secondly, between companies operating in the slaughter of pigs (district markets for sows and pigs). The Monopolies Commission also devotes itself in detail to the problems and consequences of the definition of final customer markets in the electricity and gas sector, and calls for a better foundation for the action by the Federal Cartel Office here. Further, the impact of the watering down of the wholesale press distribution territorial monopolies by two civil court judgments on the geographical market definition in this area is illustrated. In this context, the Monopolies Commission strongly discourages enshrining in law the structures of the wholesale press distribution and thereby endangering their susceptibility to reform.

**97.\*** The guidelines of the Federal Cartel Office of 2012 with regard to market dominance are appraised. Two court judgments on oligopolistic market dominance are surveyed in view of which the Monopolies Commission concurs with the Federal Court of Justice in the latter’s calls not to overstate the demands as to evidence for such dominance and not to take individual factors as the sole basis. The overall view of the markets in question and of their structure is always of particular importance here.

**98.\*** With regard to the inclusion of future market changes in merger control rulings, the Monopolies Commission analyses the clearance of the merger of two book wholesalers and advises not to assume too generously that there will be a future enlivening of the competition damaged by the merger as a result of individual actions taken by individual market stakeholders.

**99.\*** The Monopolies Commission devotes a separate section to the evaluation of potential competition, not lastly against the background of the particular significance attaching to this legal figure for the press markets. A procedure is also being investigated here in which the Federal Cartel Office had issued a prohibition since major potential competition would have been lost as a result of the merger, whilst the Higher Regional Court applied a high probability standard for this which it did not consider to have been met. In this regard, the Monopolies Commission recalls the function of the control of concentrations as a structural control and the long-term impact of structural diversity, and asks in this regard that the requirements as to evidence should not be exaggerated. What is more, it is investigated whether the remaining competition in markets with existing cooperation agreements is particularly eligible for protection, or conversely the structural entrenchment of such agreements does not constitute a major deterioration in competition within the meaning of the control of concentrations. In this context, the protection of residual potential competition appears to the Monopolies Commission to be important above all.

**100.\*** The investigation of remedies to compensate for deteriorations in competition relevant under the law on mergers is, as always, a focus of the investigations carried out by the Monopolies Commission. In this report, firstly ancillary provisions are illustrated targeting specific conduct on the part of the enterprises, such as licence obligations concerning software patents, the design of a video-on-demand platform as a joint venture of the two largest groups of television stations in Germany, as well as foregoing basic Free-TV encryption in cable networks. Secondly, ancillary provisions to open up the market, such as the renunciation of exclusive rights and the granting of special termination rights on the cable TV licensing market, as well

as the release of mast capacities, are analysed. All in all, the Monopolies Commission reaches the conclusion that the Federal Cartel Office must prohibit merger projects if considerable reservations as to competition, which may be partly caused by the structure of the market, and partly by the inadequacy of commitments offered by those concerned, cannot be completely and sustainably dismissed.

**101.\*** The case-law of the European Commission on merger control covered the further development of the SIEC test in the period under review 2010/2011, which has constituted the main prohibition criterion since the reform of the Merger Regulation in May 2004. Mergers are assessed to determine whether they lead to a significant impediment of effective competition. The creation or strengthening of market dominance remains relevant as the standard example of a significant impediment to competition.

**102.\*** The prohibition decision relating to Olympic/Aegean Airways attracted particular attention during the period under review. It is the first prohibition ruling of the European Commission in accordance with Art. 8 para. 3 of the Merger Regulation for a good three years. In its last report, the Monopolies Commission continued to express its view that the European Commission has tended, even in the face of considerable reservations as to competition, to make clearance decisions – albeit subject to conditions and instructions which are very extensive in some cases – rather than issuing a prohibition order. In view of the ruling that has been mentioned, and of a further prohibition in February 2012, when the European Commission prohibited the planned merger of Deutsche Börse/NYSE Euronext, it has become questionable whether this statement can be maintained. It can however be noted that, in this period under review, mergers were in some cases also permitted subject to remedies which were highly extensive in some cases. For a more precise analysis of this, therefore, the further development of the case-law must be awaited over a longer period of time.

**103.\*** Under the SIEC test, the European Commission attaches less significance as a matter of principle to the review criteria of market definition and market share than under the market dominance test. This expresses the approach adopted by the European Commission in the framework of the SIEC test, namely of carrying out an overall observation in which other factors – such as the closeness of the parties to the merger in competition, capacity utilisation and customers' opportunities of switching to other suppliers – are weighted more heavily. The European Commission endeavours to ascertain the effects of mergers directly, and not via the "detour" of market delimitation and calculation of market shares.

**104.\*** Having said that, the European Commission also regularly investigated the market delimitation and the market share in the current period under review. In part, the market definition serves more here as a qualitative filter for the description of the functioning of the market and for the identification of possible competitors. Market shares also continue to be used for the purposes of merger control. Firstly, the information available in the involved companies on market shares is regarded as a good starting point for analysis by the competition authority, and secondly, it can be used for specific empirical analysis methods. The Monopolies Commission considers further reasons why the European Commission does not completely renounce the qualitative ascertainment of the market delimitation and the market shares to lie in the fact that the direct, quantitative analysis of merger effects which is sought cannot be implemented in many cases for the lack of an adequate database. Additionally, the European Commission itself has admitted the limited validity of such analyses several times, and has stressed the need to take an overall view. Finally, it is uncertain whether the European Court of Justice would approve of a jurisprudential practice in which there was no market definition and no determination of the market share whatever.

**105.\*** The European Commission left the market delimitation open in several cases in the period under review, such as in the case of CAT/MWM. The Monopolies Commission welcomes this approach in cases in which no complete market definition is needed in order to analyse the effects of the merger. From a point of view of efficiency, only the various possibilities to define should be shown in such cases, and it may be explained why it is not necessary to precisely determine the relevant markets in order to further analyse the merger.

**106.\*** In the case of DB/Arriva, which related to several national transport markets, the European Commission also left open many details as to market delimitation. Where the European Commission made a statement on the market definition, one aspect is particularly worth mentioning. It made out two separate markets on the German scheduled bus market, consisting of municipal operators on the one hand and private operators on the other. It reasoned this by stating that ordering authorities (“Aufgabenträger”) awarded the concessions not on a purely economic, but also on a politically-motivated basis. This reminds one of the arguments put forward by the Federal Cartel Office in relation to the definition of end customer markets in the electricity sector. The Federal Cartel Office distinguishes here as a matter of principle between customers willing to switch and those who as a matter of principle were unwilling to switch, although in purely physical terms both delimited markets delivered the same homogeneous product, namely electricity. In terms of the market delimitation, both competition authorities hence rely on the view of an informed consumer (“Bedarfsmarktkonzept”, demand market concept). They do not however regard functional or technical substitutability as being decisive, but the switching inertia of the clients present in both constellations.

**107.\*** The SSNIP test is a concept for market definition in which it is investigated whether it would be profitable for a hypothetical monopolistic provider of all products to carry out a small but significant and permanent price increase. The ruling on Syngenta/Monsanto is one of the very few cases in which the European Commission has implemented the SSNIP test in the context of an econometric analysis. Usually it is considered sufficient to carry out a survey of the market stakeholders who are to estimate how they react to a possible price increase of a specific product, and to which other product they might change. It is characteristic that the econometric investigation of the market delimitation was carried out in this case in connection with an econometric effect analysis. It was possible to implement a quantitative SSNIP test in the context of this analysis with limited additional effort.

**108.\*** The case of Oracle/Sun Microsystems is remarkable when it comes to the competition assessment. In its review, and counter to the criticism of the parties to the merger, the European Commission exclusively took as a basis the criterion of a significant impediment to effective competition, and did not concentrate on the possible creation and strengthening of market dominance. The Monopolies Commission concurs with the European Commission that it is not necessary to prove the creation or strengthening of a market-dominating position in order to assume a significant impediment of competition under the SIEC test. It is sufficient to prove that Sun constitutes a major competition force with its MySQL database and that it exerted competition pressure prior to the merger which would cease to apply after the merger. Since the analysis of the European Commission however revealed that the currently exercised competition pressure on MySQL could be replaced soon and adequately by other open source databases, it concluded that the merger did not lead to an impediment to competition on the database market.

The T-Mobile/Orange proceedings should also be mentioned in this context, in which the application of the SIEC test is also likely to have made it easier for the competition authority to make its decision. At least in one of the two markets concerned, the finding of market domin-



ance might have failed as a result of the relatively small market shares of the parties to the merger and the closeness to the subsequent competitors. What is more, the European Commission reviewed separately both points which are objectionable in terms of competition and established market shares independently of the markets previously defined. Under the market dominance test it would have had to discuss these items of each market concerned, which means that the SIEC test facilitated a simpler, more practical analysis of the competition reservation.

**109.\*** Market shares remain a major indication as a rule in the case-law practice of the European Commission. In the Ryanair/Aer Lingus proceedings, the case-law also confirmed its view according to which market shares of 50 % can in themselves provide proof of the existence of a dominant position. However, there are a number of rulings of the European Commission in which the market shares were placed into perspective because of the special circumstances of the specific case. In the proceedings on BASF/Cognis, despite high joint market shares of the parties to the merger, this appropriately led to a decision in which no reservations of competition were claimed. In the case of Oracle/Sun Microsystems, the European Commission's statement can be accepted that the market shares ascertained using the turnover of the respective enterprises do not properly reflect the competitive position of an open source product. In the DB/Arriva ruling, the European Commission's differentiated view of the established market shares is also to be assessed positively as a matter of principle.

**110.\*** A comparison between the situation prior to and subsequent to the merger is needed in order to assess whether a merger will give rise to a negative competition impact. The question as to the right comparative yardstick prior to the merger ("counterfactual") was of particular relevance in the almost simultaneously notified merger projects Seagate/Samsung and Western Digital/Viviti Technologies, as well as in the case of SNCF/LCR/Eurostar. The Merger Regulation does not contain a statutory requirement on what to do in the case of parallel notified mergers. As a matter of principle, the competition authority hence has two options at its disposal. It can act in accordance with the principle of priority or select a combined approach. Since both possibilities have advantages and disadvantages, the Monopolies Commission is in favour of making the decision dependent on the application of the principle of priority or on the combined approach on the circumstances of the concrete case.

In the SNCF/LCR/Eurostar proceedings, the Monopolies Commission criticises the comparative yardstick used by the European Commission. The European Commission used as the basis for its ruling the situation prior to the merger as "counterfactual", without paying attention to whether the statutory framework in international railway transport had undergone major changes between an earlier cooperation agreement between the companies involved and the merger now planned. In the view of the Monopolies Commission, this circumstance should be taken into account in determining the comparative scenario.

**111.\*** The enhanced economic approach which the European Commission has pursued in the case-law for several years – as in the previous period under review – was also expressed in the application of quantitative assessment methods on the part of the competition authority and of the parties to the proceedings. In this respect, the case of the merger of Unilever/Sara Lee, in which, in addition to a qualitative assessment, the European Commission also carried out quantitative analyses as to the market delimitation and the merger effects, should be highlighted. It is worth noting in this context that the European Commission has repeatedly pointed to the inherent restrictions of quantitative analysis methods.

**112.\*** In the view of the Monopolies Commission, quantitative assessment methods can also help assess more precisely the intensity of the competition between the parties to the merger in individual cases. They can furthermore help the competition authority to verify and interpret qualitative data and evaluations and contribute towards increasing the reliability of the analysis and the quality of the rulings. Whether and what quantitative investigation methods are applied in the specific case depends materially on the availability of the necessary data. The corresponding data are frequently either not available at all, or not to the necessary degree and/or in the necessary quality, or not within the merger control deadlines. For this very reason, the European Commission cannot be obliged to carry out extensive quantitative surveys in each merger case.

The Monopolies Commission would however also have it borne in mind that the implementation of quantitative analyses as a rule involves considerable costs for both the competition authority and the companies in question. In addition to the deployment of personnel resources, the time frequently required for quantitative analyses should be taken into account, which may lead to an extension of the informal preliminary proceedings and of the merger control procedure in accordance with Art. 10 para. 3 of the Merger Regulation.

**113.\*** Against this background, a supplement to the qualitative evaluation makes particular sense if its outcome appears insufficient and not unambiguous. In such cases, the quantitative effect analysis, which is comparatively independent of the presumptions of qualitative analysis, can provide a contribution towards validation. The European Commission could furthermore consider focussing its resources on those cases which relate to a considerable market volume. The benefit of the quantitative analysis could be increased by focussing on such cases.

**114.\*** Furthermore, the inherent shortcomings in the respective investigation method and the underlying models are always to be observed. The European Commission has itself pointed to the limits of quantitative analyses and correctly derived from this the need to always relate quantitative results to qualitative assessments. It hence concurred with the findings of the Court of Justice of the European Union in the Ryanair/Aer Lingus proceedings. In the view of the Court, the European Commission is furthermore permitted when taking an overall view to pay greater attention to certain circumstances than to others. This provides considerable scope for the European Commission in the assessment of various qualitative and quantitative factors. Particular significance hence attaches to the transparency of the grounds for the ruling and the causes of the different evaluation of certain factors in the specific case. Thus, the approach taken by the European Commission in the Unilever/Sara Lee proceedings, namely to both touch on the quantitative analyses in the decision itself and explain them in detail in the appendix to the decision is to be welcomed explicitly.

**115.\*** The European Commission presented in October 2011 Best practices for the submission of economic evidence in which it established specific minimum requirements as to the drawing up and presentation of economic analyses and to the transmission of data. The Monopolies Commission welcomes the presentation of these best practices by the European Commission. The requirements put forward are likely to help ensure that a certain minimum standard is adhered to in the implementation and presentation of quantitative analyses as well as in the transmission of data. This is likely to facilitate the comprehensibility and use of economic analyses and information by the European Commission and optimise the utilisation of resources. Comparable positive impacts are likely to arise in the European Court of Justice if it has to deal with quantitative analyses provided by the parties to the merger or other parties to

the proceedings. The companies in question should be recommended in their own interest to respect the requirements in future.

**116.\*** It is worth noting that – as far as can be ascertained – no efficiency gains were claimed as justification in any of the cases which were ruled on during the period under review after implementation of the main review phase. There are also no indications in the decisions which have been released in the preliminary review phase under conditions of an efficiency objection on the part of the parties to the merger. The European Commission addressed alleged efficiency benefits several times back in 2008/2009. The merger projects which were decided in the present period under review possibly did not suggest themselves for the achievement of efficiencies. The reticence on the part of the companies might however also be caused by the fact that, so far, in no single case were the results of the competition analysis revised because of the asserted efficiencies. Moreover, it cannot be ruled out that companies concerned forego submitting efficiency benefits in order to avoid the European Commission reaching the conclusion that the companies were themselves assuming the existence of negative competition effects from their intended mergers.

**117.\*** During the period under review 2010/2011, the European Commission firstly also continued to strive to improve the effectiveness of the commitments offered by the parties to the merger. It imposed divestiture commitments in the majority of merger cases which would cause competition problems. In order to increase the effectiveness of these remedies, it accepted commitments in some cases which – also – referred to markets which did not cause any problems as to competition, such as in the cases of Kraft Foods/Cadbury, BASF/Cognis and Syngenta/Monsanto. This was to ensure the viability of the division that was to be sold. As a further measure to increase the effectiveness of remedies, the European Commission imposed up-front buyer commitments on the parties to the merger in the cases of Western Digital/Viviti Technologies and Agilent/Varian.

**118.\*** On the other hand, the impression is created that the European Commission accepted conduct-related commitments somewhat more frequently than in the previous period under review; for instance, several decisions were handed down in which such commitments formed one of the main elements of the commitment package. The Monopolies Commission considers conduct-related commitments to cause problems in general terms if they are highly complex and require long-term, extensive controls. What is more, conduct-related commitments fix the conduct of the companies for a certain duration only, after which time they are no longer bound by them. For this reason, the conduct-related commitments accepted in the case of Intel/McAfee gave rise to criticism. They were conduct-related commitments pure and simple which did not contain any structural element. What is more, the conduct-related commitments are only set for five years, and do not remedy the competition reservations of the European Commission in the long term. The commitments and provisions established in the remedies are highly complex and extensive, which makes it appear difficult for the Monopolies Commission to reliably control and monitor them.

In comparison to this, the conduct-related commitment issued in the case of T-Mobile/Orange was judged by the Monopolies Commission to be less problematic. The parties to the merger had already signed an agreement with a competitor prior to the clearance of the merger which remedied the competition reservations of the European Commission. It was included in the binding remedies that the contract would already be concluded. This contract contains a clause providing that the parties to the merger will conclude a further contract relating to a network integration plan, so that this second contract conclusion still needs to be supervised by a trust-

ee. All in all, the Monopolies Commission however considers these conduct-related commitments to have been rapidly implemented and not linked with excessively long control.

**119.\*** In the case of Oracle/Sun Microsystems, the European Commission considered public statements on the part of Oracle to be sufficient to remedy its competition reservations or not to give rise to any in the first place; it did without assurances in accordance with Art. 8 para. 2 of the Merger Regulation. The European Commission stated that the public announcements made by Oracle, as well as their partial implementation, constituted facts which it had to take into account, together with the further facts of the case, in evaluating the question of the impact of the merger projects. The Monopolies Commission considers the legal evaluation of the public announcements by Oracle by the European Commission in a critical light. The recognition of a public statement as a change to the merger project could lead to a situation in which the companies cease submitting formal commitment offers, but only had to make public announcements. This would lead to a situation in which the competition reservations would cease to apply and no remedies could be imposed. The outcome of the assessment of public announcements carried out by the European Commission is that it would be possible for the parties to the merger to circumvent formal commitment offers.

**120.\*** In the case of SNCF/LCR/Eurostar, the remedies imposed leave the impression that the European Commission takes the merger as an opportunity to correct shortcomings in the regulatory framework of international rail transport and the Member States' implementation of the corresponding European directives. Accordingly, the remedy measures read like regulatory provisions. For instance, in addition to the obligation to provide fair, non-discriminatory access, the collection of cost-based prices is demanded. Furthermore, the remedies are set for ten years. It should be pointed out critically that the problems and the low level of efficiency of access commitments in the practice of the control of concentrations are sufficiently well known. The key concerns here are the discrimination potential of those obliged to give access, the problems in the control of pricing and the difficulties involved in monitoring because of the long-term nature of the commitments named. In view of these problems, it is questionable whether the access commitments which have been given are able to remedy the shortcomings of national regulatory law indicated by the European Commission. Greater promise appears to attach to fundamental methods for a solution, which the European Commission is already pursuing. For instance, in September 2010, it carried out a legislative proposal to revise the "first railway package", covering the Directive 2001/14/EC. Moreover, the European Commission initiated infringement proceedings against France because of a lack of proper implementation of Directive 2001/14/EC.

**121.\*** In the case of Hoffmann-La Roche/Boehringer Mannheim, the European Commission subsequently waives the remedies that had originally been imposed. This ruling provides an occasion to cast a critical eye over the communication of the European Commission regarding remedies. Just as problematic is the need established here for a "sufficient long time-span" between the issuance of the conditional clearance decision and the application of the companies concerned for waiver or modification of the remedies, "normally at least several years". This prerequisite is very vaguely-worded and not explained in greater detail, so that major uncertainties remain for the companies concerned. In particular, it should be pointed out that the competition relationship on dynamic markets can undergo fundamental changes, even in a much shorter period, for instance within two years. It would hence be more proper to evaluate these in a manner which, independently of a certain period, aims solely to ascertain whether the assurances have achieved their purpose, namely to effectively and permanently remedy the original competition reservations.

Moreover, better information for the public on the subsequent change of assurances would be desirable, such as in the shape of detailed press releases or by publishing the letters from the European Commission to the applying companies in this regard. By these means, companies could also obtain detailed information on the European Commission's evaluation criteria, thus reducing legal uncertainty and increasing the predictability of future decisions.

**122.\*** Two judgments of the Court of Justice of the European Union during the period under review should be particularly stressed. The European Commission's decision to issue a prohibition in the case of Ryanair/Aer Lingus was confirmed in its entirety with the judgment in the case of Ryanair/European Commission. Particular attention should be paid to the Court's statements on the status and relationship between the qualitative and quantitative investigation methods of the European Commission. The Court explicitly rejected priority of quantitative evidence vis-à-vis the qualitative evaluation. Rather, it was said to be possible for econometric investigations only to supplement, but not supplant, qualitative analysis. The Court went on to find that the European Commission had to take into account the set of factors which it uses to evaluate the competitive situation as a whole, and in doing so was entitled to lend more weight to specific circumstances and less to other factors. Furthermore, the Court established the procedural boundaries in the submission of commitment offers by the parties to the merger. The Monopolies Commission is pleased that, accordingly, a commitment offer which is submitted at a far-advanced stage of the proceedings must be binding and permit an evaluation by the European Commission without the latter having to implement a renewed market survey.

**123.\*** The judgment in the case of Aer Lingus/European Commission relates to issues on the applicability of the Merger Regulation to minority holdings. Here too, the Court confirmed the previous ruling of the European Commission with which the latter had rejected the unravelling of Ryanair's minority holding in Aer Lingus applied for by Aer Lingus. The Court stated in detail subject to what prerequisites minority holdings which do not entail any acquisition of control are subject to the provisions contained in the Merger Regulation and why, in the specific case, unravelling could not be considered. The Monopolies Commission analyses the Court's findings critically.

**124.\*** No legislative developments were observed in the field of the Merger Regulation in 2010/2011. The judgment mentioned in the case of Aer Lingus/European Commission, as well as the subsequent taking up of the minority holding of Ryanair in Aer Lingus by the UK competition authority, however triggered a discussion of whether and under what conditions minority holdings not entailing any acquisition of control were to be included in the scope of the Merger Regulation. The competition theory shows that minority holdings between competitors and in the vertical relationship have the potential to exert negative competition effects. Both not coordinated and coordinated effects can occur here. Having said that, restrictions of competition do not follow from all minority holdings. The scope and probability of negative competition effects, rather, depend essentially on a whole range of factors, such as the homogeneity of the products in question, the degree of concentration on the relevant market, the size of the minority holding and whether a particularly aggressive competitor has the minority holding.

**125.\*** In the view of the Monopolies Commission, a cost-benefit consideration should be carried out in order to answer the question of whether the scope of the Merger Regulation should be expanded to cover minority holdings without acquisition of control. The anticipated benefit of such an extension lies largely in the fact that the creation of negative competition effects is prevented; the costs primarily emerge from the additional bureaucratic strain placed on the

companies and the competition authority, as well as from the risk of over-regulation. The procedural design of an appropriate provision should prove decisive against this background. With regard to a future condition for action, a balancing up should be carried out between the introduction of a quantitative merger element as in section 37 subs. 1 No. 3 (b) of the Act Against Restraints of Competition and a qualitative element as in US and UK law, as well as in section 37 subs. 1 No. 4 of the Act Against Restraints of Competition. A third possibility lies in combining the two elements, as in German competition law. Additionally, the modifications of procedural law determined in the review of minority holdings could be considered, for instance a restriction or renunciation of the notification duty, a reduction in duties to provide information in the context of the notification or a limitation of the review obligation incumbent on the European Commission. Moreover, the possibility to foresee the ruling of the European Commission should be increased using guidelines.

### ***V. Competition and buyer power in food retailing***

**126.\*** The extensive discussion of the existence of buyer power in relation to companies engaged in food retailing and producers of foodstuffs, beverages and tobacco during the last two years in both the political arena and in academic circles, caused the Monopolies Commission to take up this topic once more. The statement is made on the basis of a current assessment of the intensity of competition in food retailing. It cannot however answer the question as to whether, where and to what degree there is buyer power in food retailing. Instead, it is a matter of analysing the causes and effects of buyer power in the context of recent economic theory, illustrating empirical findings that have already been discovered and discussing consequences for competition policy and the application of competition law.

**127.\*** Major developments in German food retailing are the increasing market concentration, the advancing centralisation of the cooperative groups, an ongoing change in forms of operation and here in particular the growing significance of discounters, as well as an increasing expansion of retail brands. Food retailing in Germany is mainly dominated by five companies or groups of companies (ALDI, EDEKA, the REWE and Schwarz groups, as well as METRO AG), which held a joint market share of roughly 73 % in 2010. If the Schwarz group (LIDL, KAUF LAND) is not viewed as a competition unit, as suggested by its separate, non-coordinated appearance on the procurement and sales markets, the concentration of the leading five retail companies falls to almost 68 %. External company growth remains the main driver of concentration. The only company from the group of leading retailers growing only organically in Germany remains ALDI.

**128.\*** Despite the increasing concentration and only slight prospects that the remaining smaller retailers might be able to increase their market shares, the Monopolies Commission does not record any tangible reduction in the intensity of competition on the sales side of food retailing. This conclusion is supported by several arguments: The market concentration of food retailing in Germany, depending on the market delimitation and affiliation of the groups of companies as a competition unit, is very much overestimated in some cases. The level of market concentration is higher than in Germany in many European countries without any disruptions of competition being recognisable there. Where the increase in concentration is caused by technological progress – in particular in information technology and logistics – as well as by efficiency improvements, it is in any case relatively unproblematic in economic terms. Also the relatively favourable price level, the relatively slight price increases, as well as in an international comparison the moderate margins of the national retailers, suggest that there is intensive competition in German food retailing. Not lastly, the obstacles to market access in

food retailing are lower than is frequently presumed. This does not apply to the formation of new retailers, since large companies would be required here, but it does apply to market access through company take-overs. Large foreign companies repeatedly entered the German food retailing market last year. The fact that some of these companies have once more left the German market is a result less of the existence of obstacles to entry than of the high intensity of competition, the comparatively low margins, as well as the high level of performance of the domestic retailers.

**129.\*** The competition in regional food retailing markets causes much greater concerns. The examination of the regional competition conditions in the context of the control of concentrations shows that individual companies and groups of companies have dominant positions or are able to obtain them by merging. The cartel authority's control of concentrations prevents the creation of market-dominating positions by permitting mergers which frequently only involve leading retailers subject to requirements to sell some retail shops in the regions in question. If they are sold to other companies from the top group of food retailing, the deconcentrative effect of such instructions is limited. This aspect should be taken into account in future decisions on retail mergers more than has previously been the case.

**130.\*** The Federal Cartel Office presumes the existence of a tiered competition relationship between the leading food retailers in the evaluation of mergers under competition law. In accordance with this concept, for instance ALDI, which is known as a "hard discounter" because it almost exclusively lists retail brands, is only in competition with the full-range suppliers to a minor degree, and also only competes to a limited degree with the soft discounters. In the view of the Monopolies Commission, this concept can be challenged because the pricing of retail brands has an indirect impact on pricing among producer brands. This is because discounters directly compete with the retail brands, which in turn limit the scope for pricing for the producer brands. What is more, whilst discounters have a much smaller range of products, they nonetheless cover almost all high-turnover goods areas, and hence also exert competition pressure on the full-range forms of sale.

**131.\*** Concentrated demand and largely small and medium-sized firms compete on the food retailing procurement markets, which are tiered by product groups. The Federal Cartel Office ascertained for individual product groups during the control of concentrations procedures production market shares which indicate that leading retailers have market-dominating positions. Moreover, the concentration of demand in procurement markets is increased by the involvement of leading retailers in purchasing cooperation. This causes the leading retailers' bargaining power to increase.

**132.\*** The Monopolies Commission examines the causes and effects of buyer power within economic theory and in the light of the existing empirical findings. It emerged here that buyer power can be suitably analysed in the economic bargaining theory. Buyer power exists in a situation in which a retailer can enforce prices in procurement markets (and possibly other conditions) which are below the competitive level or indeed – without offering anything in return – below the prices of a comparable competitor. This definition relies on the bargaining power within bilateral exchange relations. The outcome of the negotiations depends on a large number of factors, in particular the size of the players involved, as well as the frequency and the specifics of the interactions which manifest themselves in the quantity and quality of outside options.

**133.\*** Furthermore, it can be found that many factors tend to exist in German food retailing favouring buyer power, and also the incentives to exert buyer power tend to be present. The

buyer power of retailers is hence likely to be present, and even strong. This does not however say anything about whether and how buyer power is in fact actually exercised. It can also be stated that the bargaining position of many suppliers with a whole number of products, in particular with branded articles, is strong. Because of the existence of countervailing power, it is hence conceivable that there is a mutual “neutralisation” of the bargaining power, hence making it possible to bring about market outcomes comparable to those under intensive competition.

**134.\*** It can also be found that the negative competitive impact of buyer power, discussed in economic theory, such as the waterbed, foreclosure and spiral effects, as well as the incentive-reducing investment, innovation and quality effects, largely occur only under specific conditions, and can only seldom be demonstrated in reality. The few empirical studies carried out in Germany and other European countries on the topic of the buyer power of food retailing can partly prove the existence of buyer power, but no proof of the associated negative effects has been found. Against the background of the empirical shortcomings in particular, the Monopolies Commission welcomes the sector enquiry currently being implemented by the Federal Cartel Office since this gives an opportunity for the German market to obtain sound empirical statements on the existence and the possible exercise of buyer power in food retailing.

**135.\*** Discussions have been ongoing for a prolonged time, both in Germany and at the level of the European Union, as to the possibilities to effectively control buyer power, in particular in food retailing. Changes in the law on competition and the introduction of additional measures are proposed, such as a code of conduct, an ombudsman or a transparency agency.

**136.\*** It is however questionable whether buyer power is a competition problem at all. The exercise of buyer power can increase social welfare, but it can also act as a distortion of competition. The competition effects of buyer power differ from those which can be expected to arise from market power in sales markets. Unlike the market power exerted by firms vis-à-vis consumers, buyer power does not imply higher prices, a lower consumer surplus and less social welfare. If the market power-related improvements in conditions are passed on to the retailers’ customers, which decisively depends on the intensity of competition on the trade level, social welfare tends to increase.

**137.\*** Buyer power is currently being examined in competition law practice in the framework of merger control, in the context of the abuse control of market-dominating companies and in the evaluation of purchasing co-operations. It is proposed to expand the existing competition law tools and to permanently retain those expansions that have been carried out. Thus, for instance, the trade-specific requirements in the field of abuse control taken up in 2007, restricted to the end of 2012 and included in the Act Against Restraints of Competition – expansion of the area protected by section 20 subs. 3 sentence 2 of the Act Against Restraints of Competition to major companies and the across-the-board prohibition of the sale of food under the purchase price in accordance with section 20 subs. 4 sentence 2 No. 1 of the Act Against Restraints of Competition – is to be permanently retained. The latter provision is moreover to be made easier to apply by a more precise definition of the purchase price and rendered “able to stand up in court”. It is furthermore proposed to introduce a far-reaching right to information on the part of associations vis-à-vis retailers in the Act Against Restraints of Competition. The Monopolies Commission rejects these proposals.

**138.\*** The expansion in 2007 of section 20 subs. 3 sentence 2 of the Act Against Restraints of Competition to cover large producers is superfluous because the latter are as a rule better equipped than small and medium-sized producers to defend themselves against de facto unjust-



tified demands on the part of retailers. They can produce more cheaply in most cases, and frequently have better alternatives than their smaller competitors. They are also better able because of their better financial resources to shoulder the costs involved in change of customers. There is therefore no need for special protection from competition law and the competition authorities. The Federal Government intends to permit the expansion of the area protected by section 20 subs. 3 sentence 2 of the Act Against Restraints of Competition to run out at the end of 2012. The Monopolies Commission welcomes this intention.

**139.\*** The prohibition of sales below purchasing prices is not suited to protect suppliers against retailers' alleged buyer power. In the view of the Monopolies Commission, there are, rather, a number of justified arguments in favour of selling products below the procurement prices. These include, for instance, the implementation of deliberate marketing activities in which products which are particularly the focus of consumers' attention are offered below the procurement price. Such a price policy is also unrelated with an anti-competitive suppression strategy. It is, rather, a sign of competition which is moreover advantageous to consumers since they benefit from lower prices. In economic terms, it is furthermore unclear in what manner a strict ban on sales below procurement prices is to protect producer companies against unjustified terms and conditions. The expectation that such a ban prevents retailers whose demand is strong from exerting pressure on manufacturers is relatively implausible. One should rather anticipate that retailers will make use of their bargaining power in order to further push down the procurement prices where appropriate if they do not wish to drop their end customer prices or do not wish to increase them when other costs increase.

**140.\*** The fact that abusive procurement practices vis-à-vis dependent suppliers are in any case not permitted in accordance with the Act Against Restraints of Competition, and that independent suppliers do not need to be protected, already constitutes an argument against the banning of certain purchasing practices as a matter of principle.. The more problematic aspect would however be that, in the event of a ban, companies are pushed towards inefficient circumvention strategies. In the view of the Monopolies Commission, objectionable procurement practices should, as a matter of principle, tend to be listed in the Federal Cartel Office's interpretation principles. It should however remain the case that such practices are not abusive per se, but to examine them in individual cases.

**141.\*** The introduction of a far-reaching right to information on the part of the associations vis-à-vis retailers in section 33 of the Act Against Restraints of Competition would be unsuited to reduce the problem of naming names. Experience shows that guaranteeing the anonymity of the applicant is insufficient to protect the companies concerned from undesirable reactions on the part of retailers. What is more, such a right to information of associations would encroach on the core of retailers' business activity. The design of the conditions is a central competitive factor for retailers and suppliers, and is one of the best-kept secrets of the sector. If detailed information on the conditions were to be made public or passed on to members of the association, this might, amongst other things, make collusive conduct between the market participants much easier.

**142.\*** The Monopolies Commission is also largely critical of the additional measures proposed. A code of conduct containing requirements as to the formation of contractual relationships between suppliers and retailers might in principle be suited to reduce the bargaining power of retailers. The success of such a code would however decisively depend on how it was shaped and how it could be enforced. For instance, a non-binding code of conduct would largely be a toothless tiger, and an obligatory code would require effective control and sanc-

tioning mechanisms. A code of conduct further facilitates collusion among retailers in food retailing since the restricted scope in contracting between producers and retailers may give rise to a tendency towards uniform conditions of business, thus weakening competition on the trade level. One should also take account of the fact that the question of optimum sanctions in the event of non-compliance with the code of conduct depends on the control mechanism that is selected. Experience to date with this tool, such as with the “supermarket code of practice” implemented in the UK, shows that the latter was largely ineffective. In the view of the Monopolies Commission, however, the publication of breaches of the code of conduct – naming the active companies – could have a certain deterrent effect on retailers who abuse their buyer power.

**143.\*** The control of the code of conduct could take place via an ombudsman or a compliance management system in the companies. Having said that, little experience has so far been gathered with an ombudsman dealing with disputes between companies (“business-to-business”, B2B). The impact of this tool is hence hard to forecast. All in all, however, one may presume that it tends to remain restricted since the distribution of bargaining power is not affected in structural terms.

**144.\*** Also the establishment of a transparency agency which is to observe and analyse the development of prices and where appropriate other contractual conditions, as discussed at European level, is to be treated with scepticism. Its success is said to depend heavily, in turn, on the concrete design and additionally on the level of aggregation of the data collected, the data frequency, the number of variables collected and the possibilities of access to the data. The significance of highly-aggregated data is likely to be slight. The greatest insight would be provided by highly-disaggregated, up-to-date, detailed data. It would however entail a massive bureaucratic effort to collect such data, and this would hardly be justified by the benefit it would offer.

## ***VI. The influence exerted by planning law on competition in (food) retailing***

**145.\*** The influence exerted by public planning law on competition in (food) retailing constitutes a further focus of the analysis of the competition situation in food retailing by the Monopolies Commission. The examination concentrates on the provisions, procedures and approval requirements of planning law which are effective on a variety of legislative levels, and which help determine decisions on new establishments or expansions of (food) retailers. In addition to extensive own research, the analysis is also based on questioning a large number of Ministries, associations, experts and market stake-holders.

There is an only partly resolvable tension between foreseeing sovereign planning on the one hand and open-ended competition on the other: Competition ensures compensation for the powers acting in a spontaneous order, and is of necessity an open-ended process, whilst regional and town planning are particularly to act to foresee, guide and shape future developments. Regional and construction planning law provides for special rules in retail locations, which in turn have an impact on general competition in retail. Here, national and *Land* law provisions structure the planning decisions of the municipalities in advance. This legislative landscape is continually changing in a manner that does justice to both the higher-ranking provisions and to the goals that are regarded as being politically desirable. So-called inner city, centre, retail and market concepts or masterplans are increasingly being relied upon below the formal tiering of regulations which make it possible to plan and organise (retail) development

in a broader context. The direct involvement of citizens and other parties concerned in planning plays an increasingly important role here.

Planning law endeavours via various mechanisms to achieve a tiered core of retailers which is expressed above all in the determination and protection of central supply areas. To this end, for instance, determinations of sales ceilings, range restrictions and exclusion plans can be observed. The “large-scale threshold” is also significant in this regard, which means making it more difficult to obtain approval for retail locations with more than 800 m<sup>2</sup> in sales area.

This and other provisions that are relevant to retail may have a highly-differing impact, depending on the exercise of the discretion of the local planners and the concrete land availability in individual locations. The examination carried out by the Monopolies Commission however establishes clear tendencies. For instance, planning law protection of existing retail locations means anchoring existing structures. In particular where a company relies on sales areas of more than 800 m<sup>2</sup>, planning requirements may make it impossible to enter the market. All in all, the Monopolies Commission finds that there is a tendency in the planning regulations relevant to retail to further promote concentration in retailing.

In its application relevant to retailing, construction planning law is also an area of political weighing up of highly-divergent objectives which in many cases cannot be precisely quantified. However, the objectives thus pursued frequently do not necessarily clash with well-functioning competition. Rather, competition can be promoted in many planning situations with no major loss of the guidance which is provided by planning.

The Monopolies Commission makes the following detailed recommendations:

- The dynamic competition effects of planning that is related to retailing should be more closely considered when making the planning decision.
- Latitude under the law on competition should be taken into account for future developments where possible, particularly when it comes to establishing central supply areas.
- Contracts and promotional measures of urban planning should be made as competition neutral as possible.
- Planning objectives should be made as integrated and incentive-compatible as possible.