

Excerpt from the XXth Biennial Report (2012/2013)

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Summary

A competition system for the financial markets

The Twentieth Biennial Report 2012/2013

by the Monopolies Commission (Monopolkommission)

in accordance with Section 44 Paragraph (1) Sentence 1 of the Act Against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB)*

I. Current issues in competition policy

Google, Facebook & Co – a challenge for competition policy

1.* In an initial, preliminary analysis, the Monopolies Commission is studying the competitive effects on Internet service-providers that are caused by the increasing collection, availability and utilisation of data. Prominent examples of relevant companies here include Amazon, Apple, eBay, Facebook, Google, Microsoft and Yahoo!.

2.* The Internet services on which the debate focuses are intermediaries providing intermediary services between a variety of groups of users on bilateral or multilateral markets (platform markets). These markets are characterised by network effects. Network effects come about when the benefit of a platform for a group of customers increases if another group of customers grows in size. This makes it possible to offer a service for a group of customers free of charge in order to make the platform more attractive for another group of (paying) users through the resultant increase in the size of the user base. The service-providers in question also enjoy benefits of scale.

3.* The utilisation of personal data takes on a central role in the business model of many Internet services with regard to all user sites. By taking advantage of network effects and of personal data, service-providers can obtain advantages in competition with competing providers. Additionally, tendencies towards concentration are likely to be influenced by further factors; conglomerate and portfolio effects are also relevant in this regard.

4.* When it comes to the assessment of the market power of Internet services, particular importance attaches to the interdependences between different sides of the market of the platforms in question. The “free” services which these facilitate are difficult to depict in market definitions of competition law. Such platforms do not as a rule constitute an “essential facility” for users with regard to search services. This however does not preclude them having a special economic significance for their users with regard to other platform services (e.g. for content providers and advertisers).

5.* Previous sets of proceedings of the competition authorities focused on the suspicion that Google had abused its market power by impairing search neutrality and preventing competitors from obtaining economies of scale. The Monopolies Commission does not consider the criticism of the results of the competition authorities to be entirely justified. It is however noticeable that the competition authorities concentrate on addressing competition-related problems to the disadvantage of (commercial) content providers and advertisers (primary market level), on the basis of current law. Any problems related to access to user data (secondary market level) have so far only been addressed very indirectly.

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

6.* The problem of constraining excessively comprehensive data access needs to be examined in greater detail in terms of competition policy. First of all, a better understanding is needed at all levels (with regard to competition, to data protection, etc.) of the problems related to data access before comprehensive competition action (particularly amending the adjustment of the merger control regulations, expanding the possibilities regarding structural measures) can be approved. By contrast, the possibilities open to users for self-determined use of their data (data ownership) should be enhanced. It is for this reason that the speedy adoption of the European General Data Protection Regulation is also to be favoured from a competition policy perspective.

Recent developments in the energy sector

7.* On 8 April 2014, the Federal Cabinet adopted the draft of an Act to Fundamentally Reform the Renewable Energies Act and Amend other Provisions of Energy Law (Gesetz zur grundlegenden Reform des Erneuerbare-Energien-Gesetzes und zur Änderung weiterer Bestimmungen des Energiewirtschaftsrechts), which is to come into force as per 1 August 2014. Cabinet adopted an additional Act on 7 May 2014 (draft Act to Reform the Special compensation Scheme for Electricity-cost Intensive and Trade Intensive Companies [Gesetz zur Reform der Besonderen Ausgleichsregelung für stromkosten- und handelsintensive Unternehmen]). The new regulations in particular tie in with the requirements from the Guidelines on state aid for environmental protection and energy adopted by the European Commission on 9 April 2014. The Act was adopted by the German Federal Parliament on 27 June 2014.

8.* The reform of the Renewable Energies Act (EEG) is intended to continually increase the percentage of renewable energies in electricity supply in Germany (at least 80 percent of German gross electricity consumption is to be catered for by renewable energies by 2050), to considerably dampen further cost increases and manage the expansion of renewable energies according to a plan and push forward the market integration of renewable energies. Major new developments consist in annual paths for expansion for wind power, solar and bioenergy, as well as the gradual introduction of obligatory direct marketing for some of the new plants. It is furthermore intended to introduce technology-specific invitations to tender by 2017 at the latest, adjusting the promotion of large photovoltaic green-field plants as a pilot model making it possible to collect experience with the “invitation to tender” model. Furthermore, the costs are to be spread appropriately by including on-site generation and on-site electricity consumption, and changes are planned to the special compensation scheme for electricity-cost intensive and trade intensive companies in order to bring the arrangement in line with European law.

9.* In macroeconomic terms, the Monopolies Commission welcomes the reform of the Renewable Energy Sources Act (EEG) as a step in the right direction, and calls for the promotional mechanism of the invitation to tender model, which is only announced in the draft Act, to be adopted soon. The Monopolies Commission regrets that the Federal Government has rejected the quota scheme which it favours, given that competition for the cheapest and most efficient green technologies is needed in order to make the transformation of the energy system (the so-called Energy Turnaround, or *Energiewende*) affordable, and hence possibly a model project for other countries. The planned capping of the capacity increase of onshore wind energy, a cost effective source of energy, is also deserving criticism, as is the restriction of the future direct marketing obligation to large plants. The Monopolies Commission already pointed out in its most recent Special Energy Report that marketing is also possible for small plants, for instance with the aid of specialised electricity traders. As a matter of principle, it is positive that the Federal Government is steering a course towards an energy policy which will be more strongly entrenched in the European context. The Monopolies Commission considers it to be important in this context to link national emissions savings with the European Emission Trading System. In the view of the Monopolies Commission, the invitation to tender model envisioned by the

Federal Government is nonetheless an appreciable improvement in comparison to the currently dominant promotion system of fixed feed-in tariffs.

10.* The exemption schemes for electricity-cost intensive and trade intensive companies constitute a redistribution of the costs of the Energy Turnaround; an efficient subsidy regime is basically always the best way to reduce the burden of high electricity costs on companies and consumers equally. As a matter of principle, it appears to be empirically worthwhile examining the degree to which the exemption arrangements lead to distortions of competition. Exemptions for electricity-cost intensive companies from the high costs of the Energy Turnaround, which are not lastly the consequence of the subsidy regime, also reveal the problems caused by nations going it alone also in state aid legislation.

11.* In December 2013, the European Commission initiated state aid proceedings ex officio against Germany. The subject-matter is the Renewable Energies Act surcharge scheme (EEG surcharge) provided for by the Act of the same name. The European Commission has considered promotion of the generators of electricity from renewable energy sources (RES-E) and of mine gas via the feed-in tariff to constitute state aid. This state aid is however said not to meet with any reservations with regard to its compatibility with the Single Market. Several other elements of the subsidy and funding mechanism in accordance with the Renewable Energy Sources Act are also compatible with the Single Market according to the preliminary assessment of the European Commission.

12.* By contrast, it was necessary to examine in greater detail the restriction of the EEG surcharge for energy-intensive companies. Contrary to the view held by the Federal Republic, these are said to be an advantage ensuing from state funds which is relevant in terms of the law on state aid. It was said to be decisive in this regard that the Act obliges electricity consumers to pay a price surcharge and that the State had commissioned the transmission system operators to administer state aid. This was said to constitute state aid in two respects. The advantage gained by the restriction on the EEG surcharge was said to be supplemented by a further advantage ensuing from the increase in the EEG surcharge for the other companies.

13.* The justification of state aid related to the restriction of the EEG surcharge for energy-intensive companies is questionable according to the preliminary estimation of the European Commission. Such a justification cannot be ruled out in the sense that the effect of additional electricity costs may be that companies which are in international competition relocate out of the EU. Where the Federal Government however submits in this respect that the restriction of the EEG surcharge was necessary to safeguard German competitiveness within the EU, this was not a common interest objective.

14.* The European Commission has now revised its Guidelines on state aid for environmental protection and energy such that it has become possible to restructure the Renewable Energy Sources Act in conformity with the law on state aid. According to the Guidelines, companies from 68 industries which are in international competition may be exempted from making a contribution towards promoting renewable energies such as the EEG surcharge. This is however contingent on the companies continuing as a matter of principle to pay at least 15 percent of the surcharge in question. Energy-intensive companies should however have to pay a maximum of 0.5 percent of their gross value added (turnover minus intermediate consumption) for their energy consumption. These principles are also to be taken into consideration in the state aid proceedings with regard to the German Renewable Energies Act.

15.* In an assessment along the lines of competition policy, it can be presumed that the Energy Turnaround starts as a project of political design. In such a design project, policy-makers must however respect boundaries which emerge from the predefined legal framework and fundamental economic contexts.

16.* The view held by the Federal Government, namely that the Renewable Energy Sources Act does not contain any state aid because it does not provide for an advantage from state funds, is likely to be based on an outdated understanding of the state aid rules. The rules concerning the EEG surcharge, which so far related exclusively to national interests, are furthermore not easily compatible with the state aid rules. A justification under the law on state aid is likely to be considered when the distortion of competition entailed by a promotion system is based solely on the fact that it is a national system. In the case of the Renewable Energy Sources Act, it cannot however be ruled out that the promotional mechanism is linked to further distortions of competition because it does not have a market economy-type structure. Against this background, the Monopolies Commission remains in favour of further developing the Renewable Energy Sources Act towards the quota scheme which it has proposed.

17.* Finally, the Monopolies Commission points to risks posed under the law on state aid for German companies that may ensue by virtue of the fact that the Federal Republic had not registered the amendments to the 2012 Renewable Energy Sources Act for investigation under the law on state aid.

Criminalising breaches of competition law in Germany?

18.* The suitable structure of the public and private enforcement of competition law is currently being spotlighted in the debate within competition law and competition policy in Germany and Europe. Part of the discussion of an effective system of sanctions in recent years has increasingly also focused on the question of whether it is recommended in the interest of improving the enforcement of competition law to criminalise other major breaches of competition law over and above submission fraud. Criminalisation can concern particularly serious breaches of competition law, “hardcore cartels”, that is price-fixing, quota and regional cartels. There is unanimity that such cartels are highly damaging. What is more, there is sufficient clarity with regard to their prerequisites and to the fact that they are not permissible, so that there is no risk of decision-makers in the companies also being deterred from engaging in legitimate conduct because of the threat of criminal prosecution.

19.* Expanding the existing system of sanctions should be considered in particular where it can be ascertained that the tools that are currently available to enforce competition law do not effectively deter current and potential cartel members from establishing and maintaining cartels. A factor militating against an adequate preventive effect might be promoted by the fact that extensive new cartel cases repeatedly come to light despite the drastic increases in fines that have been imposed on companies engaging in cartels in recent years.

20.* It should however be taken into account that there have been major developments in the public and private enforcement of competition law in recent years, and that these are also continuing. These relate both to the legal framework and to the application practice of the competition authorities. For instance, the large number of cartel cases that have been detected and prosecuted is largely due to the introduction of leniency programmes by the European Commission and the German Federal Cartel Office. These programmes have also caused measures to counter cartels to form a focus of official action for some time, for which increasing resources are being provided. Additionally, turnover-related fines were not introduced in Germany until the Seventh Reform of the Act Against Restraints on Competition (ARC respectively Gesetz gegen Wettbewerbsbeschränkungen – GWB) of 2005. This helps to bring about a major increase in the fines, as well as changing the utilisation by the competition authorities of fines as a means of deterrent in terms of conduct that is in infringement of competition law. Over and above this, the improved cooperation and shared information in the network of the European competition authorities is likely to make it easier to successfully combat cartels.

21.* The legal framework for the private enforcement of competition law in Germany was improved in the Seventh Reform of the ARC, particularly by virtue of the fact that the official detection of an infringement of competition law has a binding effect on subsequent compensation proceedings. Furthermore, the European Commission's proposal for a directive on private compensation actions in case of breaches of competition law should be mentioned, which the European Parliament has already approved. Sentencing offenders to pay compensation remains the exception in practice, but it has been possible to obtain considerable financial compensation in individual cases by means of a settlement.

22.* These developments – which are very recent in some cases – make it difficult to conclusively assess the deterrent effect exerted by the existing system of sanctions. It can furthermore not be ruled out that this system has not yet developed its full preventive effect because a number of cartels which have been detected and prosecuted in recent years go back as far as the 1990s. The central question of suitable deterrent therefore requires further study in the medium term.

23.* Having said that, there are a number of indications that the deterrent effect of the system of sanctions under competition law should be increased. Theoretical considerations regarding the amount of effective sanctions suggest that the fines currently being imposed on companies which are involved in cartels are much too low to achieve sufficient prevention if one takes into account the limited likelihood of detection. A further increase in the fines could however have a negative social impact, and is hence to be regarded critically. Furthermore, the leniency programmes may lead companies to hope to yet escape fines or to only have to pay a reduced fine; this reduces the deterrent effect of public sanctions. Also fines imposed on the directly-acting employees of companies involved in cartels probably do not have a sufficient deterrent effect. It should be taken into consideration in this regard that the European Commission is unable to impose fines on natural entities, and that the German competition authorities only impose fines as sanctions on some of those who are personally responsible. Furthermore, it cannot be ruled out that companies' employees on whom a fine is imposed receive financial compensation from their employers. Considerations that companies demand compensation from employees who are responsible for cartels or impose consequences under personnel law are, in contrast, frequently still in their infancy. The same applies to the enforcement of cartel-related compensation claims under private law. Only a small number of cases have so far come to light in which compensation has been paid by companies that were involved in cartels.

24.* Should future analyses confirm that the existing system of sanctions does not act as a deterrent, in the view of the Monopolies Commission, primary consideration should be given to introducing measures with which conduct incentives directly target those who act personally. This can solve the problem that, in a company, it is always natural persons who are responsible for involvement in a cartel, but sanctions in the shape of large fines affect the companies which they represent (principal-agent problem). A criminal sanction directly affects the company employee in question, and has an increased deterrent effect because this entails a much more serious condemnation than a mere fine. A criminal fine has a certain stigmatic effect which will be particularly tangible for offenders in the field of economic crime, who are upstanding and socially-integrated in other respects. It should be taken into account here that even a suspended sentence is counted as a criminal record. A prison sentence certainly makes financial compensation much more difficult than does the imposition of a fine. The preventive effect would also be increased by criminal prosecution of hardcore cartels because this entails the threat of dismissal from the profession.

25.* Supplementary measures would have to be taken in order to ensure the effectiveness of any criminal sanctions and to avoid these backfiring on the enforcement of competition law by the authorities. It appears to be necessary above all to create a criminal law leniency programme for cartel members. Additionally, the

status of the competition authorities in criminal proceedings should be reinforced, for instance by permitting them to carry out the investigations in place of the public prosecution office.

26.* Another tool to increase the prevention of sanctions under competition law which also directly targets the persons acting would be the power of the competition authorities to impose dismissal from the profession. Dismissal from the profession, which could be combined with a fine, would have a strong preventive effect. Firstly, employers would find it difficult to provide financial compensation since the employee is no longer allowed to fulfill his or her official tasks. Secondly, it would constitute a considerable personal disadvantage particularly for persons who were previously working in (senior) management were they not able to engage in a suitable activity for a prolonged period.

27.* It should be additionally considered to increase the likelihood of cartels being detected by legally providing rewards for whistle-blowers. This kind of whistle-blowing system could provide that at least whistle-blowers who were not involved in an infringement of competition law receive a reward. By contrast, a whistle-blower who is the head of a cartel or who has forced others to commit an infringement of competition law should be precluded from receiving a reward.

28.* The Monopolies Commission however does not consider it to be expedient to introduce criminal law for companies, by contrast, at least within competition law. Problems are caused by the fact that the concomitant conduct incentives do not target the natural entities which act directly. From the point of view of a company, or of its owners, it could be of lesser importance whether it is punished with a criminal or with an administrative fine. In this regard, it appears to be more important for the conduct in infringement of competition law to become known in public because this will entail a loss of reputation. No shortcomings can however be observed in this regard, particularly in competition law, since the European Commission and the Federal Cartel Office report on cartel proceedings and sanctions against companies as a rule. Finally, no shortcomings are evident on the part of the European Commission and the German competition authorities when it comes to prosecuting illegal cartels.

Shortcomings as regards competition on taxi markets

29.* Transport by taxi in Germany is subject to a licence obligation and is strictly regulated under the Passenger Transport Act (Personenbeförderungsgesetz – PBefG). The issuance of a concession is conditional on satisfying subjective (qualitative) and objective (quantitative) licensing criteria. A licence may not be issued if the applicant does not meet the personal prerequisites for operating a taxi firm, or if the functioning of the local taxi trade would be threatened by issuing additional concessions, thereby impairing the public interests in transport. The licence is largely restricted to the area of the authority responsible for issuing licences. Taxi drivers may as a rule not collect passengers from the side of the road or from taxi ranks outside this mandatory coverage area.

30.* Over and above this, price competition in transport by taxi is largely precluded through the application of an mandatory tariff. The transport fees set by the licensing authority may not be deviated from in either direction within the mandatory coverage area, but prices may be set freely once a taxi leaves its mandatory coverage area. The mandatory tariff is combined with an obligation to operate and an obligation to carry.

31.* A distinction should be made in an economic analysis of transport by taxi between three market segments which may be affected by market failure to differing degrees. These are radio taxis which are ordered in advance, taxis which are hailed at the side of the road, and taxi ranks. As a matter of principle, there is virtually no need to regulate the radio taxi market, whilst taxis which are hailed and taxi ranks need to be judged in a somewhat more differentiated manner.

32.* The quantitative restriction of market entry (Sec. 13(4) of the Passenger Transport Act) constitutes a serious interference with the right to freely choose an occupation in accordance with Article 12 of the Basic Law (Grundgesetz) which cannot be justified and should be abolished. No risk to the functioning of the taxi sector ensues as a result of excess capacities because there are only slight barriers to leaving the market and there is a well-functioning used car market. There is, by contrast, a need for qualitative regulation of market entry because of information asymmetries with regard to the non-observable quality of the taxi transport service (e.g. safety of the passenger vehicle).

33.* The previous ban on picking up passengers from taxi ranks and from the side of the road, outside of the personal mandatory coverage area, should be abolished. Such a ban leads to unnecessary empty journeys and longer waiting periods for passengers, and is to be rejected for both ecological and economic reasons.

34.* A mandatory tariff which prevents price competition (Sec. 51 in conjunction with Sec. 39(3) of the Passenger Transport Act) constitutes a particularly serious interference with pricing freedom, and is not necessary in the taxi trade to protect passengers against being placed at a disadvantage. Liberalising the fares could invigorate competition in the taxi trade and allow for a differentiation of price-quality combinations. The Monopolies Commission recommends familiarising passengers with liberalisation by initially introducing maximum prices to be set by the authorities for a transitional period of three years and oriented on current tariffs. Once this transitional period has run out, there should be free price competition on the radio taxi market since there is a particularly high level of price transparency here due to good opportunities to compare prices. Similar price liberalisation should be achieved in the other market segments, provided sufficient market transparency is assured.

35.* The Monopolies Commission furthermore looked at the competition relationship between taxis and car hire. It recommends abolishing the return obligation for rental cars, as well as the regulation that the transport order must be received at the place of operation of the car hire firm (Sec. 49(4)(2 and 3) of the Passenger Transport Act). Additionally, the turnover tax rates for taxis and hire cars should be harmonised. Further adjustments would be necessary in case of a liberalisation of the taxi markets. There are various possibilities here which ultimately would depend on the actual details of the liberalisation of the taxi trade.

36.* Finally, the Monopolies Commission observed the market for taxi intermediation services. It welcomes the positive competition development connected with the entry of alternative intermediation services which sell taxi rides using taxi applications. At the same time, it shares the view held by the German judiciary that the exclusivity clauses (“Doppelfunk-Verbote”, preventing drivers accepting calls from more than one control centre), and that bans on third-party advertisements that are applied by some taxi control centres constitute non-permissible restraints on competition.

Competition in German child and youth welfare

37.* Child and youth welfare includes both the promotion of children in day-care centres and in child day-care, including extensive advisory services, tasks of child protection and protection of juveniles (e.g. by taking children and juveniles into care in the case of violent parents), youth welfare services (e.g. by promoting youth centres), as well as educational and family assistance, e.g. in the shape of supervised accommodation groups.

38.* The foundation for child and youth welfare in federal law is Book Eight of the Social Code (Achtes Buch Sozialgesetzbuch – SGB VIII), which is fleshed out in implementation statutes under Land law. There are also further provisions, particular importance attaching in this regard to for instance the Kindergartens Acts and Childcare Funding Acts at Land level.

A distinction is made in child and youth welfare between public and independent social welfare, Sec. 3(2) of Book Eight of the Social Code. The “independent” entities include all non-public institutions, that is for instance company kindergartens, parents’ initiatives and facilities of the so-called independent entities of social welfare such as the National Society for Worker Welfare (Arbeiterwohlfahrt [AWO]), the Paritätische (voluntary welfare service umbrella organisation), the German Red Cross, the Diakonie Deutschland social welfare network, the German Caritas Society (Deutscher Caritasverband) as well as the Central Welfare Office for Jews in Germany (Zentralwohlfahrtsstelle der Juden in Deutschland – ZWST).

39.* In accordance with Sec. 3(2)(2) and Sec. 79(1 and (2) of Book Eight of the Social Code, the public child and youth welfare entities are responsible for guaranteeing the child and youth welfare services which are provided for by law. A distinction is made here between local and central public child and youth welfare entities. These functions are allocated by *Land* law; the local authorities in the broader sense of the term, that is rural districts, towns and municipalities constituting a district in their own right as well as in some cases towns and municipalities covered by district administration, as local public entities, and the *Land* are typically responsible as a central public entity. Sec. 4(2) of Book Eight of the Social Code provides for a special subsidiarity principle according to which the public youth welfare entities are to refrain from engaging in their own activities where recognised independent child and youth welfare entities can take on the tasks. The share of public entities in terms of institutions, care places and employees has been falling since 1990, which also enhances the effective exercise of beneficiaries’ options, Sec. 5 of Book Eight of the Social Code. Competition is hence explicitly integrated into Book Eight of the Social Code.

40.* Benefits in the field of child and youth welfare are largely administrated within the “triangular arrangement under youth welfare law” between beneficiaries, the obligated party and service-providers. This relationship between the various levels of the public authorities, the other entities providing benefits in kind (social insurance funds) and independent social welfare are characterised by a close-knit network of cooperation and exchanges which may give rise to reservations in terms of competition in isolated cases.

41.* The particularities of social services (it is thus a matter of credence products in the main) require particular market systems. Information shortfalls for clients can moreover be overcome successfully, in addition to regulatory solutions such as factual and geographic prerequisites for the operation of a facility (Sec. 45 of Book Eight of the Social Code), with market-based solutions such as (voluntary) proof of qualification on the part of the service-providers, reputation and transparency. It appears to be a matter of urgency to increase transparency with regard to economically relevant, disaggregated data (e.g. concrete promotion amounts provided by public authorities) in child and youth welfare.

42.* When it comes to services in child and youth welfare, there are a number of positive externalities, that is society as a whole benefits from a specific scheme. It was not lastly such reasons that were also decisive for the expansion of day-care options for children in Germany. For instance, the assessment has now become established that institutionalised childcare plays a major role when it comes to the integration, socialisation and foundation for the education of children. What is more, parents can work or avoid leaving gainful employment; this hence also benefits companies, which from time to time additionally attempt to tie their staff to the company with (loss-making) company kindergartens.

43.* In addition to the fundamental freedoms, particularly cartel, state aid and competition law are significant in the field of social services. Even if there has so far been little antitrust enforcement by the German and European competition authorities in this field, the Monopolies Commission would like to point the market players in question to the possibility of implementation via private initiative.

44.* German and European competition law, as well as European state aid legislation, are also applicable in the field of child and youth welfare, depending on the constellation, specific field and precise design of the individual relationships. This is only ruled out if non-economic activities are concerned, in particular where the benefits are determined as a part of the educational system by the State in the provision of its benefits. Where the benefit providers are however free to determine, in competition, the scope and quality of the services which they provide, as a rule this constitutes a commercial activity which is subject to legislation on competition and state aid.

45.* It has yet to be entirely clarified whether the law on public procurement applies to child and youth welfare. The decisive issue here is always the precise structure of the benefit provision relationship. The Monopolies Commission is not unaware of the difficulties encountered here when local authorities apply the law on public procurement. Building on model procedures and documents, best practices, etc., as well as on supra-institutional experience and learning effects, can however considerably minimise these transaction costs. The conversion to e-procurement in accordance with the new set of directives appears to be promising in this context since electronic means of information and communication are able to make it easier to publicise jobs and increase the efficiency and transparency of the procurement procedures.

European law on public procurement is currently undergoing a reform process. The Monopolies Commission welcomes the new set of European directives on procurement, given that it addresses past reservations against the application of the law on public procurement to child and youth welfare in the shape of a new “social procurement law”. Over and above the simplification of procurement provided for in the new directives on procurement, which is urgently required, the possibilities to establish a central knowledge base on procedures and to simplify the exchange of experience between institutions should be exhausted. It furthermore appears to the Monopolies Commission to be vital to use the potential to also enhance transparency in the social domain. Not lastly, the e-procurement that is prescribed by the new directives on procurement, and both public platforms and platforms within the administration that build on this, offer a wide variety of connecting factors here. It is to be expected that child and youth welfare benefits will be put out to tender more often in future, and in particular when the new social procurement law, which is to be enacted, comes to apply. Thus, from roughly 2016 onwards, service concessions will also be regarded as being relevant in terms of the law on procurement.

46.* Until the introduction of business elements in form of individual case-related performance, remuneration and quality development agreements, the financing of independent entities was largely carried out through grant funding. Market players report from practice that the implementation of the remuneration reform had stalled half-way. Cost- and quality-related aspects were said to be somewhat secondary, whilst players of local authorities were said to rely more on “blanket trust and the local rumour market” than on objectively-comprehensible content from performance agreements. The Monopolies Commission would like to encourage local authorities to push further the implementation of the remuneration reform. The Monopolies Commission is aware of the particular difficulties encountered here in the assessment of the quality of services. In the view of the Monopolies Commission, it appears to be helpful in this regard for local authorities to obtain an overview of the benefits provided by child and youth welfare in the shape of regional data bases at *Land* level, and possibly also national ones, enabling them to derive assessment rules and criteria for the future, improve cost transparency and hence better compare providers. In this context, the Monopolies Commission also considers the possibility for parents and children to assess performance, as well as standardised performance checks, to be helpful in measuring performance and quality.

47.* In view of increasing expenditure on the expansion of child day-care facilities and limited financial resources of public budgets, the question arises as to the provision of care services in a manner that does

justice to demand and is efficient. Voucher systems for granting care places, as have been successfully used in some cases in cities such as Hamburg and Berlin, can be an efficient tool of a targeted educational and social policy as an alternative to traditional supply-side subsidies. They enhance parents' options, and permit them to exert a greater influence on the quantitative and qualitative design of the care services. At the same time, competition between various providers is enhanced if, more than is the case in a system with supply-side subsidies, they have to orientate their services in line with parents' wishes, and if state promotion benefits not the entities behind the facilities, but is enjoyed by parents directly. Here, the positive effects of a voucher system are likely to be further enhanced the greater is the range of care places on offer. That said, it has yet to become clear whether similar successes as in Hamburg are also possible in rural areas, which tend to be under-supplied.

48.* The decades-old cooperation as partners between public agencies and independent social welfare entities has frequently made it difficult for third parties to offer services on the market for child and youth welfare, and this continues to be the case. Book Eight of the Social Code from 1990 led to at least a partial improvement for private entities which are not members of the six national associations. There are nonetheless still many privileges, which are closely related to the charitable status of the service-providers.

49.* Unlike providers working in the private economy, charitable organisations benefit from a large number of tax privileges, such as exemption from corporation tax, the donation privilege and the instructors' privilege. The Monopolies Commission is fundamentally critical with regard to this kind of privilege being offered to individual institutions. In economic terms, tax subsidies may be justified for instance in the field of charity if a benefit would not be offered by private providers, or only to a lesser extent than would be desirable from a macroeconomic point of view. Such under-supply may occur if the benefit which specific goods or services constitute for third parties is not sufficiently taken into account (internalised) in the provision of benefits. With many for-a-fee services in child and youth welfare for the receipt of which a legal right exists as a rule, however, one may presume that a tax incentive in the sense of charitable status is not only not necessary, but in many ways can be regarded as problematic. This is all the more the case where it causes distortions of competition.

50.* The Monopolies Commission criticises the fact that, at *Land* level, the promotion of kindergartens precludes private economic providers in some cases. In the view of the Monopolies Commission, necessary promotional measures are to be granted regardless of the type of entity, particularly with regard to the massive need for expansion in kindergartens. A diverse landscape of entities is provided for by the law in accordance with Sec. 3(1) of Book Eight of the Social Code, and has the advantage that a variety of needs can be catered for more quickly and more differentiatedly, and that the increase in competition between the providers increases the chances that innovative ideas and new specialist work concepts and forms of organisation are developed.

51.* The youth welfare committee takes on major significance as the central management body of the youth welfare office. It has a right to decide in matters related to youth welfare within the framework of the funds provided by the representative body, the articles of association which it has handed down and the resolutions which it has taken, Sec. 71(3)(1) of Book Eight of the Social Code. In the youth welfare committee, in addition to the public entities, the recognised independent ones have a major right of consultation with regard to youth welfare planning and the funding and the selection of the measures that are to be promoted. The Monopolies Commission considers a conflict of interests and a reduction in the quality of decision-making to exist if representatives of recognised independent youth welfare are involved in decisions which may affect them to a considerable degree. The Monopolies Commission is therefore calling for a voting right to be given exclusively to the members of the representative body of the entity of public youth welfare who are oblig-

ated to the public interest and politically legitimated or elected by the representative body who have experience in youth welfare. Other players should have an advisory role and contribute their experience and proposals by these means.

Access to data for the Monopolies Commission

52.* A problem which continuously impairs the Monopolies Commission's ability to operate follows from the refusal of the Federal Cartel Office to permit the Monopolies Commission, in accordance with its right to inspect the files under Sec. 46(2a) ARC, comprehensive access to the data which the Federal Cartel Office has at its disposal, for instance on costs, prices and sales volumes. The Federal Cartel Office conducts empirical analyses with the data, and includes the results in its considerations regarding competition law procedures and in sectoral studies.

53.* The provision contained in Sec. 46(2a) ARC entitles the Monopolies Commission to inspect the files kept by the cartel authority, including operational and business secrets and personal data, where this is necessary to properly carry out its tasks. The range of the right to inspect the files is only subject to a single restriction – it must be necessary for the Monopolies Commission to fulfil its tasks properly. In this context, the right to inspect the files, which is intended to enable the Monopolies Commission to carry out its tasks, which are set out by law, is comprehensive. The necessary protection of third parties is guaranteed by the confidentiality obligation pursuant to Sec. 46(3) ARC, which is incumbent on the members and of the employees of the Monopolies Commission. The secrecy obligation hence goes just as far as the corresponding obligations of the employees of the Federal Cartel Office.

54.* The right to inspect the files also includes unrestricted access to the data collected by the cartel authority or submitted by third parties. The increasing use of modern empirical methods is the most important development in the cartel authorities' recent enforcement practice. The Monopolies Commission is only able to continue to perform its statutory obligations – such as the well-founded assessment of the practice of the Federal Cartel Office – if it can also evaluate the methods and the results of the empirical analyses of the competition authority. Such an evaluation is contingent on access to the individual data, and hence on the possibility to carry out comparative calculations and do robustness tests. Merely “inspecting” the data and the methods used by the Federal Cartel Office is therefore just as inadequate as simple “recalculation”.

55.* The inspection of the files and access to the data which this involves is not a matter of serving “private” interests of the Monopolies Commission. The Monopolies Commission submits its reports and the included opinions on the practice of the Federal Cartel Office and on other topical issues of competition policy and law to the Federal Government, which submits them without delay to the legislative bodies. The Monopolies Commission consequently informs and advises constitutional bodies. It cannot be in the interest of the Federal Government and of the legislative bodies that the abilities of the Monopolies Commission are restricted to such a degree that it is severely constrained in fulfilling its essential tasks.

56.* The Monopolies Commission holds to its view, which it already expressed two years ago, that full access to individual data from competition law cases and sectoral studies, including their utilisation for the proper implementation of the tasks of the Monopolies Commission, is covered by the existing right to inspection of the files under Sec. 46(2a) ARC. It does not appear to be necessary that this be explicitly clarified in the ARC. As the highest federal authority, the Federal Ministry for Economic Affairs and Energy could quickly clarify the matter on the basis of its own competency. Should it nonetheless be considered preferable to clarify the Monopolies Commission's right to inspect by law, the Monopolies Commission proposes adding the following sentence to Sec. 46(2a) ARC:

“The right to inspect the files includes that the Monopolies Commission has full access to the data available at the cartel authority.”

II. The state and development of concentration and of interlocking among large companies

57.* With its investigations of the state and development of the 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, the Monopolies Commission is performing its statutory mandate to regularly monitor the development of concentration of undertakings in the Federal Republic of Germany (Sec. 44(1)(1) of the ARC). The analyses aim to identify the economic significance of the largest companies in Germany and to show internal and external growth events, as well as to evaluate interlocks between individual players.

58.* The Monopolies Commission's collections are based on the identification of the 100 largest companies of all sectors by domestic value added for the current year reviewed, namely 2012. In addition to value added, the characteristics of the number of workers, property, plant and equipment, as well as cash flow and the legal form, are also analysed. The analysis of the domestic corporate divisions is added to by the portrayal of the worldwide value added of the companies observed. Ties between the companies being studied in the form of shareholdings and personnel links are also evaluated. The significance of large companies is analysed 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 income from policies of insurance companies. The report concludes with an analysis of the holdings of the 100 largest companies in the corporate mergers reported to the Federal Cartel Office and the number of clearance decisions.

59.* The 100 largest companies increased their domestic value added by 5.9 percent as against the comparison year 2010, reaching around 289 billion EUR in the year reviewed, 2012. The contribution made by all the companies to total value added increased by 6.8 percent to reach 1,803 billion EUR from 2010 to 2012. The contribution made by the 100 largest companies to the value added by all companies thus fell only slightly, by 0.2 percentage points, to 16.0 %. The share however continues to be significantly lower than the long-term average of 18.1 %.

60.* A comparison of the domestic and worldwide value added of 54 companies which were identified as operating primarily in the manufacturing, trade, transport and services sectors that had their corporate headquarters in Germany and were among the 100 largest companies during both 2010 and 2012 shows that the domestic share fell only slightly, from an average of 55.5 percent to 54.1 percent. Ultimately, therefore, there is no indication of considerable parts of the value added chain being relocated abroad.

61.* In addition to the 100 largest companies by value added, the Monopolies Commission studies the 100 largest companies measured against the number of domestic workers. The 100 largest employers in Germany employed roughly 3.57 million persons as per the end of 2012. This corresponds to an increase of 3.6 percent vis-à-vis the previous period. The number of employees of the whole groups increased by 4.2 percent in the same period. The share of domestic employees among group employees stagnated at 34.4 percent in 2012 (2010: 34.6 percent).

62.* As an alternative to the analysis by domestic value added as a criterion in terms of size, 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 2010, the domestic turnover of the 50 largest industrial companies increased by 22.2 percent in nominal terms, the business volume of all companies in manufacturing increasing by 11.8 percent in the same period. The share of the "50 largest" among the aggregate benchmark subsequently increased by three percentage points to 34.8 percent. The share of the ten largest trade companies fell slightly to 9.5 in 2012 as a result of the relatively strong growth in turnover of all trade companies in Germany. For the same reason, the share accounted for by the ten largest insurance groups among nominal unconsolidated gross income from policies of all insurance groups

fell slightly to 59.11 percent. By contrast, the ten largest transport and service companies slightly increased their share among the turnover of all companies in the sector, reaching 13.7 percent. By contrast, the 12.2 percent increase in the domestic unconsolidated balance sheet total of the ten largest financial institutes between 2010 and 2012 is compared to a two percent fall in the balance sheet total of all financial institutes. The domestic share increased to 56.3 percent in 2012.

63.* When analysing the shareholder structure, the companies observed are analysed firstly according to various groups of equity providers, and secondly with regard to the cross-shareholdings via minority holdings among the 100 largest companies. The majority was held by a single individual, families or family foundations in 26 companies in the current reporting year 2012. The majority of shareholdings were widely dispersed in 23 companies, and the majority was held by a single foreign owner in 21 companies. The public sector had a majority of voting rights in 15 cases. The highest average value added was made by companies where more than 50 percent of the shareholdings were widely dispersed, at almost five billion EUR.

64.* The number of shareholdings between the companies among the companies observed increased vis-à-vis the previous period, albeit comparability between the two observation periods 2010 and 2012 is restricted because of a change in the data basis. The total number of shareholdings increased from 37 to 58. The number of identified shareholders increased from 15 to 18, whilst the number of companies with shareholdings rose from 22 to 35. The results of the study however also show that 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 all 100 companies fell by another 0.5 points to its current level of 4.6 percent by 2012, after falling by three percentage points between 2008 and 2010. It should however also be taken into account in the interpretation of the results that a falling degree of integration as a result of company take-overs and mergers may at least partly reflect a concentration-enhancing event.

65.* The analysis of personnel links takes into consideration those cases in which one or several individuals belong to the management or controlling bodies of at least two of the companies in the group of companies analysed. In the reporting year 2012, 42 ties (2010: 62 ties) were established through management members in the controlling bodies of third companies. The total number of ties via other joint holders of control mandates fell from 176 to 155 cases between 2010 and 2012. Consequently, the share of existing contacts among the share of possible ties as an indicator of the degree of integration also fell from 3.6 percent to 3.1 percent. All in all, the constant process of the dissolution of connections between companies at personnel level, which has been observed since 1996, continued in 2012.

66.* Of the total of 1,520 members of the controlling bodies in 2012, 840 mandates (55.3 percent) were occupied by shareholder representatives. 5.8 percent of these 840 mandates were exercised by management members. 11.8 percent of the mandates can be attributed to the category representatives of the public sector, which exercised control mandates to supervise public shareholdings in the majority of cases. Almost one-third of the chairmen of the respective controlling body hold at least one other managing director's or controlling mandate in third companies. 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 percent of cases. 12 out of 32 of the companies in question are listed in the DAX 30. Major differences can be seen when it comes to the presence of women in the management and controlling bodies.

67.* The chapter on the aggregate concentration of large companies concludes with an analysis of the share of the 100 largest companies among the mergers which, in accordance with Sec. 39 ARC, must be notified to the Federal Cartel Office before being completed, and among the number of mergers cleared. The 100 largest companies were involved in 299 notified mergers in the period 2012/13 (2010/11: 341) and in 296 clearances (2010/11: 282). The concomitant shares in all notified mergers and in all clearances were 13.5 and 14.4 percent, respectively (2010/11: 16.3 and 14.9 percent, respectively).

III. European interlocking network

68.* Against the background of advancing internationalisation and the growing together of the markets, the Monopolies Commission is expanding in its Twentieth Biennial Report the empirical analysis of the state and development of company networks in and between selected EU Member States. The analysis supplements the investigation of the aggregate concentration and ties of large German companies provided in Chapter II to include an international perspective.

69.* For the current Biennial Report, the Monopolies Commission has systematically prepared an extensive dataset on 5,370 listed companies in the EU-15 Member States plus Norway and Switzerland for the period 2005 to 2011 in order to illustrate the national and international significance of interlocking directorates over time. 67,995 different persons in the management and controlling bodies were considered in order to show personnel ties. Additionally, the companies were given additional information on the ownership structure, balance sheet data as well as patenting activities. The available dataset hence permits both the analysis of personnel ties and company ties via capital holdings and initial analyses to be made of the connection between different types of interlock and benchmarks that are relevant to competition.

70.* Roughly 60 percent of all the companies included in the sample are large companies. It should however be taken into account that no conclusions can be drawn as to the overall corporate landscape on the basis of the dataset. The companies are headquartered in the United Kingdom in roughly one-third of cases, followed by Germany at 12.9 percent, France (12.2 percent) and Sweden (8.6 percent). Companies in the financial and insurance services sectors were removed from the dataset for the analyses. The largest number of companies in the sample, at 36.6 percent, can be attributed to manufacturing, followed by companies in the sectors “other services” (15.1 percent) and “trade and the hotel and restaurant industry” with a share of 10.6 percent.

71.* An average of 57.4 percent of all companies in the dataset in 2011 were tied via personnel with at least one other company via management and supervisory bodies. German companies are far below the international average, with a share of 43.4 percent. The results furthermore show that national contacts, at 53.3 percent, are the dominant pattern for ties. 19 percent of all companies show ties over national borders. International personnel company ties frequently exist between companies in neighbouring countries. In addition to the geographic vicinity, also the density of companies, a common language and only minor cultural differences are likely to favour personnel ties between two or more companies.

72.* The personnel ties which had been identified at sectoral level were evaluated in a further step in order to illustrate their significance in and between a variety of sectors. In doing so, in order to qualify the ties, not only the focus of activity, but indeed all sectors were taken into account in which a company achieves sizeable turnover. 53.3 percent of the companies show inter-sectoral ties in the vertical relationship. 17.7 percent of the companies are interlocked with other companies of the same sector. The greatest intensity of interlocking, with a share of 67.1 percent each, was found to exist for companies in the sectors “manufacture of chemical and pharmaceutical products” and “manufacture of metal and metal products”. The results of the analysis indicate that personnel ties are frequently used as a tool to coordinate supplier and client relationships between individual industries.

73.* The portrayal of capital interlocks via minority holdings for 2011 shows that 17 percent of the companies were interlocked via corresponding shareholdings (Germany: 12.1 percent). 5.3 percent of companies are tied in the interlocks network as shareholders and 12.9 percent as shareholdings. Companies in the sectors “gas, steam and air conditioning supply and environmental services”, “manufacture of wood, paper and printed goods and manufacture of petroleum”, as well as “construction and infrastructure” show the largest shares of interlocks via shareholdings. A comparison of personnel and capital interlocks shows that 66 out of

708 personnel ties through management members are accompanied by a parallel shareholding (total of 508 minority holdings).

74.* The connection between ties and financial performance factors is analysed in a further analysis. It is revealed that the median of the Lerner indices, as an indicator of the market power of companies interlocked through personnel, exceeds the median of non-interlocked companies. The results furthermore illustrate that companies which are horizontally interlocked have a statistically-significant higher return on sales and have a stronger market position than companies which are vertically interlocked. Qualitatively comparable findings are also revealed in the case of company ties through minority holdings. The highest returns on sales are observed among those companies which are interlocked on the same market level through minority holdings. Unlike personnel ties, however, no statistically significant difference can be demonstrated. All in all, the descriptive results point to a positive connection between interlocks and the performance of the companies. Since the sample analysed is not a representative selection, the results cannot be transferred to whole sectors. It can be furthermore anticipated that a number of further factors influence a company's competition position. For this reason, the descriptive comparisons carried out here can only be interpreted restrictedly, namely as an indication of the competition-reducing impacts of company ties.

75.* Finally, the connection between personnel ties and the innovativeness of companies is analysed in an empirical analysis in Chapter III. No statistically-significant connection can be found between the two characteristics for the entire sample. In sectors with below-average competition intensity, a growing share of non-commercial multiple mandate-holders in the controlling body reduces the number of patent applications. This result could indicate a restrictive supervisory activity on the part of the non-commercial directors. Comparatively greater competition pressure could, by contrast, force the management to expand the innovation activities. The explanation that sending companies used their potential to exert an influence via the personnel tie on markets on which competition is less intense to weaken the innovative activities of the target company would also fit the result.

76.* The method selected, particularly the relative aggregate portrayal, does not permit the question as to the impact of interlocking directorates to be conclusively resolved. The findings do however justify opining that the personnel and capital interlocks analysed should be taken into account from a competition-theory point of view, and should be the subject of more profound research in the context of further analyses on the basis of the available dataset. Further analyses should tackle a variety of areas in order to analyse in greater detail the potential connections which have been outlined. Firstly, a more precise qualification of the ties should be carried out in order to do justice in the empirical analyses to sending and receiving companies. As well as the direction of the tie, the institutional structure of the relationships (horizontal or vertical, upstream or downstream) and in particular also (parallel) personnel and capital ties through minority holdings, should additionally be taken into account. On the basis of corresponding refined dimensions of the interlocks, it would also be possible to carry out a differentiated analysis of the influence of specific interlock patterns on the competitive position and on the success of the companies involved with regard to innovation. Secondly, in order to assess the expertise of multiple mandate-holders in terms of supervision and advice, it appears to be expedient to systematically evaluate information on specific characteristics of the mandate-holders. These empirical studies make it clear that various groups of mandate-holders in the controlling body differ as to their competences and incentives.

Future studies will be required in order to implement some of these points and thus make it possible to gather further information. Accordingly, analyses of the motives for the establishment of company networks and their impact in terms of competition should be more intensively incorporated in the economic policy discussion and in theory-based empirical research work.

IV. Cartel case-law

German Merger Control

77.* The most important new development for merger control in the period under review by the Monopolies Commission was the introduction of the SIEC test (SIEC = Significant Impediment of Effective Competition), which was introduced into German law in the course of the 8th reform of the ARC. Since 30 June 2013, the SIEC test has replaced the previously-applicable market dominance test, which for a long time had constituted the substantive criterion for prohibition in German merger control.

78.* In accordance with the reformed Sec. 36(1) ARC, market dominance remains the (standard) example that is explicitly named in the Act for the legal presumption of a significant impediment of effective competition. The underlying relationship between rule and exception however poses questions. Both the legislative materials for the Act, and the Federal Cartel Office and Düsseldorf Higher Regional Court, presume that the establishment or strengthening of a market dominant position “always” constitutes a significant impediment of effective competition. Such an interpretation cannot be agreed with in this degree of absoluteness. If the conditions of a standard example are fulfilled, as a rule it is possible to infer a specific exception that is provided for by the law, but this is not imperative. The use of standard examples is to make it easier to apply the law, but it does not release legal practitioners from examining the presence of any unusual constellations in which an exception to the statutory rule is required.

79.* The new prohibition criterion becomes particularly important if a merger does not give rise to or reinforce a market dominant position, but may be expected to cause a significant impediment of effective competition. This in fact applies to oligopoly situations where unilateral modes of conduct on the part of individual companies beyond collective market dominance can now be better taken into account. Additionally, the new prohibition criterion makes it easier to assess vertical or conglomerate mergers where the focus is less on the deterioration of the market structure, and more on the enhanced possibilities and greater incentives to engage in conduct that is damaging to competition.

80.* The Federal Cartel Office only examined a comparatively small number of cases in accordance with the new law in the period under review. There has not yet been a merger which the Federal Cartel Office would have prohibited had the SIEC test continued to apply because of significant impediment of effective competition despite a lack of anticipated market dominance. When examining competition impact, the Federal Cartel Office has so far largely limited itself to examining a market dominant position without additionally analysing the significant impediment of effective competition. It is also adhering to its practice of initially defining relevant markets in factual and geographic terms. The latter is questioned since, as a result of the transition to the SIEC test as a criterion for intervention by merger control, the emphasis is placed more firmly on the competition impact than on the consequences for the market structures. The Monopolies Commission shares the view that a direct measurement of competition pressure or closeness of the parties to the merger in terms of competition using econometric procedures can be a good indicator of the presence of unilateral effects in specific cases, such as with horizontal mergers. This can however only replace the classical market definition in exceptional cases.

81.* The number of merger projects registered with the Federal Cartel Office for examination rose slightly in the period under review 2012/2013 vis-à-vis the period under review 2010/2011. After 2,095 registrations in the period under review 2010/11, 2,218 registrations were recorded in the years 2012/13.

82.* In April 2012, the Federal Cartel Office cleared the merger project of two metal packaging coating manufacturers Akzo Nobel (Netherlands) and Metlac Holding (Italy) in the second phase. The merger was furthermore examined in a number of other jurisdictions. Whilst the merger was cleared in Germany, Austria,

Cyprus, Turkey, Russia, Brazil, Pakistan and Columbia, the UK Competition Commission (CC) prohibited the merger in December 2012. The diverging rulings show two groups of topics as being relevant. Firstly, the problem is shown here of parallel international competences of different competition authorities for some merger projects. Secondly, the question arises of whether the different substantive evaluations of the same transaction can be justified by circumstances inherent to the procedure.

83.* The Monopolies Commission does not consider diverging rulings by different competition authorities on identical merger control projects to constitute a fundamental problem, even with identically-defined markets. These are, rather, an indication of competition between opinions and methods which guarantee the evolutionary openness and further development of merger control. Furthermore, the parties are enabled to work towards creating a (central) competence of the European Commission within the EU by means of referrals. Additionally, they can make a major contribution towards bringing about uniform rulings by means of appropriate registration dates, agreeing to deadline extensions and an exchange of information between the competition authorities involved.

84.* In the view of the Monopolies Commission, the differences in the market definition and in the competition assessment were vital to the divergence in the rulings in the specific case of Akzo/Metlac. The criterion for intervention under UK law on competition is the “substantial lessening of competition” (SLC). The Federal Cartel Office ruled on the case under the old law on the basis of a traditional market dominance test. The clearance by the Federal Cartel Office depends heavily on it not being ruled out that the remaining competition would prevent market dominance on the part of the merged unit. Equally, it could not be reliably predicted that the merger would lead to coordinated conduct, and hence joint market dominance. According to an analysis carried out by the Office, Akzo and Metlac are not particularly close competitors since they are largely active on different markets. By contrast, in applying the SLC test, which is orientated more closely towards the economic impact, the CC took into account that a much closer competition relationship existed between Akzo and Metlac in a specific market segment than shown by an analysis of the market as a whole. All in all, the intuition is confirmed that the market dominance that is required under the market dominance test is more difficult to prove than a substantial lessening of competition (SLC). The presumption can be made that, at least fundamentally, significant impediment of effective competition (SIEC), in particular on complex markets, is also easier to prove than market dominance.

85.* There were major structural adjustments and rulings under competition law in the German cable network sector. The Federal Cartel Office cleared the take-over of Kabel Baden-Württemberg by Liberty Global in November 2011, subject to ancillary conditions. The Düsseldorf Higher Regional Court rescinded the clearance decision in August 2013 because of inadequate ancillary conditions. The Federal Cartel Office prohibited another merger project of cable network operators, the take-over of Tele-Columbus by Kabel Germany, as early as in February 2013.

86.* Beginning with its decision in the case of Liberty/Kabel BW, the Federal Cartel Office has been applying a definition in merger proceedings of cable network operators of the end customer markets for supplying programme signals that is factually differentiated by groups of customers – single user versus multiple user. When it comes to single-user contracts, it is the geographic area of the cable network operator which is geographically relevant, and with multiple user contracts it is the national territory. The reason given for this market definition was that that the supply of single users was subject to different conditions than that of housing associations in the framework of licence agreements, and that there were significant differences in terms of how competition operated on the markets. The Düsseldorf Higher Regional Court did not concur with this view, neither with regard to the factual nor to the geographic market definition. Accordingly, both

market segments continue to belong to the same factually-relevant market, which is to be geographically defined in regions according to the geographic area of the respective cable network.

87.* The definition of the relevant markets for the supply of radio and TV signals to end customers is difficult because these markets are in a state of flux. The changing technical possibilities are changing the range of services offered by the network operators, and this must be taken into account in the market definition. In order to define geographically-relevant markets, holding onto a definition of regional markets is an expression of a more static view of end customer markets, and is orientated in line with current circumstances for the supply of radio and TV signals. In the view of the Monopolies Commission, it would be better to derive the market definition from a dynamic and more future-orientated perspective, which suggests a national market definition. The definition of separate relevant product markets is favoured by the fact that single users and housing associations are different groups of clients who are also targeted with different market strategies from the point of view of the providers.

88.* The Monopolies Commission considers that any evaluation of the competition impact of cable network mergers should take account of the fact that competitive pressure on the end customer markets for the supply of programme signals to housing associations and single users is also increasingly exerted by telecom companies. This is due above all to the fact that there is increasing demand for triple play products on the single-user market in particular. The prospect of network level 3 cable network operators actively competing in the footprint of another cable network operator is greater on the licensing market than on the market for single-user contracts. Similar to the Federal Cartel Office in the case of Liberty/Kabel BW, the Monopolies Commission considers the negative competitive effects of cable network mergers on the same network level as being less grievous. Unlike the Federal Cartel Office, the Monopolies Commission however considers that there is a considerable likelihood that such mergers would enliven competition on other markets, in particular on the telecoms markets.

89.* In February 2012, the Federal Cartel Office prohibited Haspa Finanzholding (Haspa), to which the Hamburg Sparkasse in particular belongs, from taking up a minority holding in the Herzogtum Lauenburg Kreissparkasse (KSK), and banned the holding and cooperation contract which this would have involved. According to the information available to the Office, the project would have led to reinforcing or at least establishing a market dominant position of Haspa on the factually relevant markets for private current accounts and for loans to business customers in the territory of the Lauenburg Kreissparkasse. The finding of the establishment or enforcement of a market dominant position in the case of mergers of Sparkassen is contingent on the institutes being in competition with one another, which is frequently not the case with Sparkassen that are owned by the local authorities because of statutory provisions contained in the Sparkassen Acts of the *Länder* and because of the “regional principle”. This was the case here because Haspa, which is organised as an “independent Sparkasse”, is not publicly-owned and is a public limited company under private law, claims a special role for itself in the metropolitan region of Hamburg. It has been pursuing a policy of expansion there for several years, including establishing branches in the neighbouring Federal *Länder*. It was however right to prohibit the planned merger because it would have led to a concentration of power in the markets in question.

90.* The *Abwägungsklausel*, or “balancing-test clause”, was analysed in two cases in the period under review. Accordingly, a merger which is expected to create or strengthen a market dominant position or significantly impede effective competition should not be prohibited if the merger will also lead to improvements of the conditions of competition and these improvements will outweigh the deterioration of competition. The companies must show this to be the case. The Federal Cartel Office rightly as a rule only recognises improvements in competition under the *Abwägungsklausel* if these occur on markets other than the relevant

markets in question. Improvements on the same market already relate to the comparison of the market structure before and after a merger. Were this to facilitate improvements in competition, no market dominant position would be created or reinforced.

91.* In practice, rescue mergers are an exception from the causality between a merger and the creation or reinforcement of market power in accordance with Sec. 36 ARC. The Federal Cartel Office makes the acceptance of a rescue merger contingent on three preconditions which must be satisfied cumulatively. Firstly, the target company may not be able to survive without the merger. Secondly, there may not be any alternatives to the registered merger which are less harmful in terms of competition, and thirdly the market position of the target company must also largely accrue to the acquiring company, in the case of insolvency, without the merger. The burden of proof for satisfying these prerequisites lies with the companies. The 8th reform of the ARC makes press mergers easier by virtue of the inclusion of a specific press rescue clause in the new Sec. 36(1)(2) No. 3 ARC. The concept behind this is that a merger is frequently the better solution, in order to maintain the diversity of the press and of the range of products offered, in comparison with newspaper titles – or indeed entire newspaper publishing houses – leaving the market. The scope of the new press rescue clause is however restricted to the take-over of small or medium-sized newspaper publishing houses. The Federal Cartel Office examined compliance with the prerequisites for a rescue merger in two cases in the period under review. The prerequisites were rightly considered to have been complied with in the case of the take-over of the Frankfurter Rundschau (FR) by Frankfurter Allgemeine Zeitung GmbH (FAZ). It is questionable whether the wording of the new Sec. 36(1)(2) No. 3 ARC would have made it easier to approve the case of FAZ/FR as a rescue merger. The Monopolies Commission does not presume this to be so.

92.* The clearance of a merger may be contingent on conditions and obligations if there are competitive concerns. Clearance with ancillary conditions is only permissible if this is able to effectively prevent a worsening of the market structure. The Düsseldorf Higher Regional Court considered market-opening undertakings received by the Federal Cartel Office to be inadequate in the case of Liberty/Kabel BW, in particular the granting of special rights of termination. Since the control of concentrations targeted the structural deterioration of competition conditions, in the view of the court, therefore, only ancillary conditions could be considered that constituted structural measures. The Monopolies Commission tends to share the view put forward by the Federal Cartel Office that it is not a question of whether special opportunities of termination are actually exercised, but that it is decisive that these exist. If ex-post negotiations take place on this basis in order to defend against the exercise of the special right of termination, or if the previous licensee is successful when the licence agreement is re-contracted, this is an expression of competition and not of a structurally ineffective ancillary condition.

European merger control

93.* 560 merger projects were notified with the European Commission in Brussels in the period under review, 2012/2013. 283 notifications were accounted for in 2012 and 277 in 2013. The number of registered transactions fell slightly once more in comparison with the previous two periods under review. The European Commission ended the proceedings in the first phase in 506 cases (254 in 2012 and 252 in 2013) without raising any serious doubts as to compatibility of the merger projects with the common market. The European Commission expressed serious doubts in 20 cases and only approved the projects subject to conditions and instructions in the first phase of the proceedings. The European Commission initiated the second phase of the proceedings in accordance with Art. 6 para. (1) (c) of the Merger Regulation in 16 cases. It approved three projects in the formal investigation procedure without imposing conditions and obligations in accordance with Art. 8 para. (1) of the Merger Regulation. In eight cases, clearance was only given subject to conditions and obligations in accordance with Art. 8 para. (2) of the Merger Regulation.

94.* Whilst only one project had been prohibited in accordance with Art. 8 para. (3) of the Merger Regulation in the last period under review, the European Commission handed down three prohibitions in 2012 and 2013. This is as many prohibition rulings as in the past ten years prior to that. The Deutsche Börse/NYSE Euronext project was prohibited by ruling of 1 December 2012; the prohibition orders in the cases UPS/TNT Express and Ryanair/Aer Lingus III were handed down on 30 January 2013 and on 27 February 2013, respectively. This brought the total number of prohibitions since the creation of European merger control up to 24.

95.* By far the largest share of projects giving rise to reservations in terms of competition in the period under review and leading to rulings in accordance with Art. 6 para. (1) (b) in conjunction with para. (2) or Art. 8 of the Merger Regulation related to horizontal mergers. Both horizontal and vertical effects occurred in a number of cases. Only in individual cases, such as in the proceedings of GE/Avio, did the examination in terms of competition focus on the vertical effects of the merger project. As far as can be deduced, the European Commission only rarely examined conglomerate impacts and only in the interest of completeness, such as in the proceedings of Universal Music Group/EMI Music. Non-coordinated impacts were mainly analysed during the period under review; the European Commission also briefly explored the matter of coordinated effects in a small number of cases.

96.* European merger control practice was not characterised by fundamental new developments in the period under review, 2012/2013. For instance, the relevant product and geographic market definitions, as well as the market shares and further structural characteristics, continued to define the assessment of merger projects. This qualitative analysis took place on the basis of the European Commission's Horizontal Merger Guidelines, and took account amongst other things of the closeness between the parties to the merger and other market players, dynamics in competition between the parties, the alternatives open to clients, as well as the existing barriers to market entry.

97.* In the context of the qualitative analysis, the European Commission addressed the aspect of countervailing buying power in several cases. In none of these cases did the argumentation – put forward by the parties as a rule – of countervailing buying power lead to the reservations made as to competition being remedied. Two main reasons determined this: Firstly, the European Commission found in several cases that at best individual clients or groups of clients are able to exercise a certain buying power after the merger had been implemented. In the view of the European Commission, however, it must always be guaranteed that impairments of competition are ruled out for all clients. Secondly, the European Commission argued that current buying power had to exist not only prior to the merger, but also subsequently. It did not consider this precondition to be met in the above cases.

98.* A major development in the period under review 2012/2013 relates to the greater inclusion of theoretical and empirical analyses on the basis of economic models – “quantitative analyses” – in decisions on merger control. The European Commission carried out analyses of data from invitations to tender in several sets of proceedings in the first phase. Additionally, it primarily carried out quantitative analyses in sets of proceedings in the second phase. Particular mention is deserved by the Hutchison 3G Austria/Orange Austria proceedings, in which the European Commission used the GUPPI approach for the first time to analyse any possible price pressure that might be triggered by the merger. An alternative to this is the simulation of any price changes, which was carried out in the case of Outokumpu/Inoxum. In the case of Universal Music Group/EMI Music, an econometric analysis was carried out of the stronger negotiating position that might result from the merger. The case of Ryanair/Aer Lingus III showed that econometric methods can be used both for a market definition and for an evaluation in terms of competition – in this case of a relationship of closeness in terms of competition. Particular interest furthermore attaches to the case of Deutsche

Börse/NYSE Euronext, in which the European Commission for the first time carried out a quantification of efficiencies that were submitted.

99.* To what degree empirical analyses, above all using econometric methods, are used in examining mergers depends on the facts, on the availability of data and on the willingness of the European Commission and the companies involved to carry out such analyses. The Monopolies Commission has made fundamentally positive comments in previous expert reports with regard to greater involvement of quantitative analyses in merger control case-law. In particular where the qualitative analysis does not reach unambivalent results, quantitative analyses may provide additional indications and improve decision-making. The Monopolies Commission however also recognises the in some cases considerable costs caused by additional quantitative analyses; these are primarily drawn up through the necessary, and in some cases massive, use of resources by competition authorities, merging firms and other market players, as well as by frequently indispensable delays in the progress of the proceedings. The European Commission must therefore as a matter of principle weigh up, in each individual case, the benefit and costs of any quantitative analysis that it carries out. In the view of the Monopolies Commission, the competition authority is by no means obliged to carry out a quantitative analysis in each merger case that is being investigated. In several cases, the Monopolies Commission analysed in detail the quantitative analyses that had been carried out and found some potential for improvement on the basis of the information that was placed at its disposal.

100.* A further development that was worthy of note in the period under review relates to the increasing submission of efficiency claims by the parties to the merger, for instance in the cases of Deutsche Börse/NYSE Euronext, Ryanair/Aer Lingus III and UPS/TNT Express. In accordance with recital 29 of Regulation 139/2004, the European Commission should take account of substantiated and likely efficiencies when evaluating merger projects. The European Commission explains in greater detail in the Horizontal Merger Guidelines subject to what preconditions such advantages are to be taken into account in the assessment of a merger. The burden of proof for the existence of efficiencies is incumbent on the parties to the merger.

101.* In the result, the efficiency claim has not led to serious doubts that were initially raised as to competition being completely eliminated in any case. As a rule, at least one of the prerequisites set out in the Horizontal Merger Guidelines was not met. The efficiency claim was however successful in two cases, albeit also only partially. In the case of Deutsche Börse/NYSE Euronext, the European Commission partly affirmed the existence of the asserted efficiencies, but did not consider them to be adequate to eliminate the negative competitive effects that were forecast. In the – as yet unpublished – case of UPS/TNT Express, the efficiency objection evidently led to reservations as to competition ceasing to apply on some of the geographic markets in question. The parties to the merger were nonetheless not able to prevent the prohibition of their project.

102.* The Monopolies Commission explicitly welcomes the fact that the European Commission is holding as a matter of principle to the two-tier analysis of the potential negative and positive effects of a merger in the examination of possible efficiency gains. This approach guarantees optimum transparency of the reasoning for the rulings, and hence makes them more understandable for those involved and for third parties. Additionally, the application of the arrangement for the burden of proof that is set out in the Horizontal Merger Guidelines is ensured. The Monopolies Commission is not unaware of the fact that a two-tier approach is not always possible or practicable for methodical reasons in the context of quantitative analyses. This is acceptable, provided that the burden of proof for efficiencies also rests with the parties to the merger in this regard.

103.* The parties to the merger put forward the failing firm defence in a number of cases. The European Commission accepted the failing firm defence in the cases of Nynas/Shell/Harburg Refinery and Aegean Air-

lines/Olympic Air II, which it went on to permit unconditionally. In the proceedings IAG/BMI, by contrast, it denied the existence of a rescue merger and issued clearance subject to conditions and instructions.

104.* The European Commission concluded remarkably frequently during the period under review that a project would lead to a monopoly or monopoly-like position. This applies for instance to the prohibition of Ryanair/Aer Lingus III and Deutsche Börse/NYSE Euronext, but also to mergers which were permitted under Art. 8 para. (2) of the Merger Regulation subject to conditions and obligations, such as Munksjö/Ahlstrom, UTC/Goodrich, Syniverse/MACH and J&J/Synthes. Even in the first-phase procedure of US Airways/American Airlines, the European Commission ascertained a monopoly position of the parties after the merger. In a number of cases, the European Commission explicitly found both in the first and in the second phase of the procedure that there was market dominance on the part of the companies involved after the merger, for instance in the proceedings on Kinnevik/Billerud/Korsnäs and DS Smith/SCA Packaging. By contrast, as far as can be ascertained, there was only one gap case in the second phase of the procedure. This is the Hutchison 3G Austria/Orange Austria project, in which the parties also did not attain market leadership on the Austrian mobile communications market after the merger.

105.* A number of merger cases were cleared subject to conditions and obligations during the period under review. It is a positive indication that the European Commission as a very general rule has accepted sales offers with horizontal mergers. These structural remedies have already proved to be the most effective means in previous rulings to permanently remedy reservations as to competition. Unlike mere agreements regarding conduct, the sales undertakings, in line with the function of merger control in general, serve to maintain competitive market structures. The scope can vary widely with sales undertakings, and is always dependent on the competition situation on the market in question. The European Commission assigned particular significance during the period under review to the viability of the division to be sold. In order to ensure viability, it considered additional measures to be necessary in some cases, such as supply obligations, the provision of know-how or granting licences to the purchaser. In the context of sale offers, the European Commission also accepted alternative remedies. This approach is correct in the view of the Monopolies Commission where, should each of the alternatives be implemented, the reservations that have arisen as to competition are remedied. Subject to this prerequisite, it is to be evaluated positively that an alternative remedy conserves the commercial decision-making freedom of the companies in question to the greatest possible degree.

106.* The case of SCA/Georgia-Pacific Europe shows that the European Commission also accepts complex bundles of remedies consisting of structural and conduct-orientated undertakings in the first procedural phase, and in some cases indeed going beyond the competition-related problems that have arisen. The submission of such package solutions at such short notice is an indication that the informal preliminary proceedings take on a much more significant role than the designation would lead one to presume. The Monopolies Commission recognises a certain need among the parties to establish initial informal contacts. It however therefore regards further relocating of the proceedings into the pre-notification phase as problematic, amongst other things because this considerably restricts the rights of participation of the Member States, which are set out in the law.

107.* In the period under review, the European Commission only accepted remedies offered in some cases, such as in the case of Hutchison 3G Orange/Austria Orange, on condition that a binding agreement with a buyer was already submitted (upfront buyer solution). This method is fundamentally welcome since it makes it more likely that a remedy that has been imposed will actually be implemented. According to press reports, however, the competition situation on the market in question has worsened after the merger despite the upfront buyer agreement. A relevant reason for this is likely to be the fact that the purchaser has still not yet entered the market. In the view of the Monopolies Commission, the European Commission will need to pay

greater attention in future to ensuring that the success pursued with the upfront buyer solution does indeed occur and quickly, such as by the purchaser being set a deadline in the agreement under the law of obligations for its market entry and the utilisation of the capacities acquired on the market in question.

108.* Several rulings were handed down by the Court of Justice of the European Union in the field of merger control during the period under review. Particular importance attaches to the Court's judgments on *Agrofert Holding/European Commission* and *Édition Odile Jacob SAS/European Commission*, in which questions of access to the files in merger control procedures were ruled on. In conclusion, the Court of Justice held it to be decisive that fundamental access to the documents of merger proceedings would upset the balance established in the Merger Regulation between the obligation incumbent on the parties to disclose commercial secrets, on the one hand, and the guaranteed confidentiality of sensitive information on the other. The Court of Justice derived from this a general presumption according to which the disclosure of the documents exchanged with the applicants and third parties in the context of merger control proceedings as a matter of principle places at risk the protection of the commercial interests of the companies in question. By contrast, the Court of Justice considered that there was a danger that the purpose of the investigation activity might not be achieved, including where the application was made after conclusion of the merger control proceedings. In the view of the Monopolies Commission, this would further considerably restrain the possibility of third parties to successfully challenge merger control rulings, which already faces considerable hurdles because of the scope for discretion afforded by the Court to the European Commission where complex economic facts pertain.

109.* The European Commission pursued two major legislative projects in the period under review. Firstly, in December 2013 it accepted a bundle to simplify merger control proceedings. By these means, it extended the scope of the simplified procedure for unproblematic merger cases. Furthermore, the extent of the information to be submitted for an application was reduced.

110.* The new regulations are justifiable in the view of the Monopolies Commission. The European Commission shows on the one hand efforts to expand its area of competence (in particular in the field of minority holdings without acquisition of control), whilst it already dealt with approx. 60 percent of the cases in the simplified procedure prior to 2014; with the modification of the announcement, it is likely that roughly 70 percent of cases will fall within the scope of the simplified procedure. Having said that, experience with official practice shows that the European Commission has also expressed virtually no reservations as to competition since the SIEC tests became applicable in cases in which the now modified, higher market share thresholds of the simplified procedure have been achieved. The Monopolies Commission is more critical when it comes to the newly-introduced element of the lower HHI differential because this builds up a kind of *de minimis* threshold in the European control of concentrations which is somewhat alien to German merger control law. The newly-included threshold for the simplified procedure in European merger control however appears acceptable in light of the fact that the European Commission can return to the normal procedure at any time if the examination of a merger in fact proves to be more complex than was initially anticipated.

111.* It should therefore be primarily guaranteed in the view of the Monopolies Commission that the competition authority has all the information it needs on the respective merger project. This also appears to be the case after the slimming down of the registration forms. The information requirements in the European merger control procedure are generally considered to be highly demanding in comparison to national needs. Particularly the example of German competition law however shows that it is also possible to properly evaluate merger projects on the basis of less stringent information requirements.

112.* Secondly, the European Commission is implementing a comprehensive examination of the Merger Control Regulation and its application. This initiative focuses partly on the question of whether and to what

degree the competence of the European Commission for minority holdings without acquisition of control is to be expanded. Additionally, considerations are being made on a possible reform of the referral regime. The European Commission has refined its considerations on conclusion of the consultation process, and is planning to submit a white paper as early as in the summer of 2014.

113.* In the view of the European Commission, there is a need for legislative action to simplify and accelerate the procedure as to referrals to it. For instance, the parties to the merger should in future no longer address their applications (with the referral application) to the national competition authorities which have original competence, but directly to the European Commission. Furthermore, it is proposed to shorten the deadline for the exercise of the Member States' veto from 15 to 10 working days.

114.* The Monopolies Commission favours the planned simplification of the referral procedure. Directly submitting the registration and the application for referral to the European Commission, to which the referral is to be made, reduces the bureaucratic effort for the parties to the merger and the competition authorities concerned. These reasons may equally apply to applications to a referral to a Member State. However, it should be taken into account in this regard that the European Commission must be informed about such referral applications from the beginning since it is best able to establish whether the registered merger in fact only has an effect in this Member State. In the view of the Monopolies Commission, at least a simplification of the substantive prerequisites for submitting proceedings to the Member State in question is recommended. It suggests itself that the companies involved in the merger are to be prevented from filing applications in accordance with Art. 4 para. (4) of the Merger Regulation by having to explain as a prerequisite for a referral that their project will "significantly affect competition" in a Member State, thereby more or less incriminating themselves. The current manifestation of the prerequisites for referral is hence likely to be detrimental to an optimum spread of competence.

115.* Criticism of the European Commission's scope for discretion in referral decisions, which is based on the fear that the Commission might permit itself to be too much led in its decision by industrial policy aspects, and hence leave major principles of national regulatory policy disregarded in favour of European integration, certainly at least appears not to be justified after taking a look at the practice in referrals. Moreover, it should be recalled that individual Member States repeatedly make efforts with mergers to promote national solutions, through to forming "national champions". In the view of the Monopolies Commission, the European Commission can constitute a necessary counterweight to such efforts where it has competence as a competition authority. The Monopolies Commission hence sees no need to move the structure of the provisions contained in the Merger Regulation as to the distribution of competences and the possibility of referral as a matter of principle in favour of increased competence on the part of the Member States.

116.* In the view of the Monopolies Commission, a regulation which expands the competence of the European Commission to minority holdings without acquisition of control should be designed taking account of benefit and cost. It is important here for agreement to exist in research and practice that minority holdings without acquisition of control can also trigger negative competitive effects. Having said that, negative impacts are not to be expected to ensue from such minority holdings in every case; furthermore, such holdings can also give rise to efficiency gains. Such an arrangement should hence ensure, firstly, that all cases which give rise to reservations in terms of competition can be tackled. Secondly, it should be designed such that the additional bureaucratic burden for companies and competition authorities remains as light as possible, that there is no overregulation, and that a high degree of legal certainty continues to pertain. It should furthermore be considered that control of minority holdings is already taking place at present without acquisition of control in some Member States – including Germany. An expansion of the competences of the European Commission should not lead to the existing level of protection in these Member States being reduced.

117.* In the view of the Monopolies Commission, an arrangement in the Merger Regulation should hence contain both a relatively high-level quantitative condition for action and a qualitative condition for action which already operates when there is a low level of participation, on proviso of adherence to further influencing factors. The quantitative facts ensure rapid recognisability and legal security on the part of the companies and competition authorities. Using the qualitative action criterion prevents circumvention attempts and facilitates the monitoring of all problematic case constellations.

118.* In the view of the Monopolies Commission, the goal pursued here of creating as few additional bureaucratic burdens as possible for the companies involved with the expansion of the Commission's competence can be achieved by two means. Firstly, one should consider entrenching "safe harbours" in the law, that is constellations which do not fall within the scope of the Merger Regulation from the outset. One could for instance exempt conglomerate holdings from control by competition authorities. Secondly, it would be possible to limit the additional bureaucratic burden on the companies involved and the European Commission through suitable procedural rules. In the view of the Monopolies Commission, it would be possible to structure the procedure in such a way that the companies involved initially only have a limited obligation to report. This report could be subjected to a relatively tight deadline (e.g. ten working days), during which, firstly, the suspensory obligation applies and, secondly, the competence between the European Commission and the Member States' competition authorities is clarified. The procedural rules of the respective Member State or of the Merger Regulation would apply immediately subsequent to this clarification, that is, where appropriate, also the obligation to register and the suspensory obligation.

119.* In the view of the Monopolies Commission, the SIEC test stipulated in Art. 2 of the Merger Regulation should also apply as a substantive test to minority holdings without acquisition of control. The potential competition-related problems related to such minority holdings do not differ fundamentally from competition-related problems with minority holdings with acquisition of control or majority holdings. Hence, there is no factual reason to apply any other substantive yardstick in the first mentioned cases. Furthermore, the division of the yardstick is countered by the legal uncertainty which this would entail for the companies involved.

District heating

120.* District heating is understood as a form of supplying centrally-generated heat to industry and the population. District heating suppliers typically produce the heat in dedicated heating plants or as a by-product of electricity generation in combined heat-and-power plants and transport it through a large system of pipes in order to sell it primarily as heating energy for buildings. The providers of district heating are vertically-integrated companies and, as operators of district heating networks, are active in sales and frequently also as producers of heat. Customers are not able to change between different district heating suppliers.

121.* The Federal Cartel Office published a sectoral study of the district heating sector in 2012, in which it put forward the opinion that district heating also does not compete with other forms of heating sufficiently effectively. The Federal Cartel Office hence presumes that district heating suppliers have a market dominant position. In the view of the Monopolies Commission, the blend of many different institutional effects however makes it difficult to reliably assess the competitive pressure which emanates from alternative forms of heating. In order to further analyse the market definition, above all additional empirical analyses are needed in the view of the Monopolies Commission. The Commission is currently examining the possibility of carrying out an analysis of its own, and points in this context to the problem of access to the data of the Federal Cartel Office.

122.* Several sets of price abuse proceedings are ongoing against individual district heating suppliers which were initiated most recently in particular by the Federal Cartel Office as a result of the sectoral study. The Monopolies Commission takes the view that primarily the market definition in the district heating sector should be further strengthened in order to underpin the need for intervention. Having said that, proof of price abuse is difficult to provide, particularly because of potential structural cost differences between the supply areas. The problems also appear to occur locally and to be permanent. This suggests that a potentially market dominant position on the part of the district heating suppliers could require a sector-specific, permanent solution, in particular, price regulation.

Cartel prosecution

123.* In order to identify agreements that are in infringement of competition law in accordance with Sec. 1 ARC and Art. 101 TFEU, the Federal Cartel Office has at its disposal as a matter of principle sets of tools for reactive cartel prosecution and sets of tools for proactive cartel prosecution. With sets of tools for reactive cartel prosecution, the authority does not commence the investigation process until it has received reliable information from the market participants giving rise to well-founded suspicion of agreements that are in infringement of competition law (e.g. bonus applications, complaints). The investigation costs are hence incurred during the period when reliable information are provided. The effectiveness of reactive cartel prosecution depends heavily on the willingness of the market participants to participate. When it comes to sets of tools for proactive cartel prosecution, the authority initiates the investigation process. The tools primarily include empirical-based economic analyses. Investigation costs are also incurred with open-ended investigations. What is more, empirical analyses can initially only provide indications, but not proof. However, it is possible to recognise unlawful agreements early, which can reduce the damage to welfare speedily and heighten the deterrent effect of existing sanction measures.

124.* To date, the Federal Cartel Office has exclusively relied on reactive prosecution tools in cartel proceedings. Foreign competition authorities, in particular in the USA and sporadically in Europe, have already collected experience with proactive cartel prosecution. Although it has not yet been possible to ascertain that proactive cartel prosecution is of any considerable significance for the outcome of the proceedings, the increased use of such tools has been noted for quite some time.

125.* The Monopolies Commission considers that proactive cartel prosecution using economic analysis methods certainly has the potential to influence competition supervision more extensively, in particular as a complement to reactive cartel prosecution. However, at the present time it recommends observing developments in detail so far, above all in the European countries in which measures for proactive cartel prosecution are applied or are currently being implemented, and intensifying the exchange of experience with the authorities in question.

126.* The Federal Cartel Office continued its investigations in the consumer goods sector in the period under review, and implemented proceedings on branded consumer goods (beer, potatoes, chocolate goods, instant coffee and specialities, animal feed, frozen pizzas, detergents and cleaning and cosmetic materials). Further sets of cartel proceedings related to chemical wholesale, porcelain, wallpaper, railway lines and similar products for railways, as well as building materials. The Monopolies Commission particularly appraises the Office's practice with regard to cleaning and cosmetic materials, railway lines and other products for railways, as well as building materials, in order to demonstrate important current developments in German cartel prosecution practice.

127.* The proceedings on the cartel case regarding cleaning and cosmetic materials were conducted in the period 2007-2013. The cartel case was a separate case, but its matter was related to a number of sets of cartel

proceedings concerned with luxury cosmetics products and consumable chemicals which had been conducted in Germany and in other European Member States in recent years. The Federal Cartel Office furthermore initiated proceedings as long ago as 2008 against manufacturers of branded consumer goods on suspicion of exchanging information in several product areas (including confectionery, detergents and animal feed), and in one case on suspicion of coordinated price increases, in which fines have now also been imposed. These sets of proceedings overlap in some respects with regard to those involved in the proceedings.

128.* The Monopolies Commission welcomes cartel prosecution in the consumer goods sector, in particular in the case of cleaning and cosmetic materials taken as an example here. The coverage of such cases is highly important, not only to prosecute hardcore restraints pure and simple, but also in order to increase the preventive impact of the cartel regulations. The fines that have been imposed take account of the circumstance that the damage that is done to competition is all the greater as a rule the more intensively competitors coordinate their market conduct by exchanging strategic information.

129.* An extraordinarily serious, comprehensive breach of competition related to the cartel case concerned with the “friends of the rails” (*Schiene-freunde*). This was the name adopted by those involved in a cartel the origins of which might be fifteen to twenty years in the past, and in the context of which prices and/or volumes for rails, points and railway sleepers were agreed. The Federal Cartel Office analysed several groups of offences in two sets of proceedings covering a period of commission from at least 2001 to 2008 and in some instances up to 2011.

130.* The case relating to the rail cartel clearly indicates the risks and disadvantages of cartels for the offenders, the victims and other parties involved – also regardless of the imposition of fines on the cartel members. In this regard, it is interesting for the reporting of the Monopolies Commission for several reasons:

- Firstly, it makes clear the high degree of relevance now assumed by strategically-planned action in the context of the rules on official cartel prosecution for the companies that are involved in cartel proceedings.
- Secondly, it shows the potentially grievous risks taken by those in responsible positions within the companies in financial terms and with regard to the companies’ reputations if they underestimate the significance of breaches of competition and fail to enact compliance measures.
- Thirdly, this case indicates potential risks taken by those who are not involved in the cartel (clients, employees) if they themselves do not pay sufficient attention to possible breaches of competition law which are subsequently detected by the competent authorities.

131.* The prosecution of cartels in the building materials industry has for years constituted a focus of the activities of the Federal Cartel Office. This is due to the market structure and here in particular to many interlocks between the building material companies and in existing surplus capacities. The prosecution practice of recent decades shows that breaches of competition in the building materials sector are frequently very comprehensive and serious despite the fragmented market structure.

132.* The Federal Cartel Office also initiated or implemented several sets of cartel proceedings in the building materials sector in this period under review, namely in the sectors concrete paving stones and other concrete building components. Additionally, the Federal Cartel Office completed the sectoral study in the field of rolled asphalt which it had initiated in mid-2010. Following on from the sectoral study, sets of administrative proceedings were initiated and many joint ventures were unravelled nationwide. Furthermore, the Office initiated a sectoral study of the ready-mixed concrete sector at the end of 2013, and reserves the right to also carry out further sectoral studies and sets of individual proceedings in other fields of the building materials sector (e.g. sand and gravel, rising back-up masonry).

133.* The Monopolies Commission welcomes the systematic analysis of the market structures by the Federal Cartel Office and the associated continuation of cartel prosecution in the building materials sector. It recognises the willingness of the market players to examine established structures in the event of competition law concerns. Additionally, it is in favour of the public sector paying greater attention to competition risks in the building materials sector within public procurement procedures.

Limited distribution (in particular Internet sales)

134.* The control of the sales chain by manufacturers (or importers) is ambivalent if one takes an economic view. On the one hand, this limits the freedom of contracting partners in competition. On the other hand, such agreements facilitate efficiencies of vertical integration. It is recognised that some types of vertical restraint are particularly damaging as a rule. Such contractual conditions are however not simply in infringement of competition law; rather, considering the precise constellation, an individual exemption can be considered. Having said that, in this case the contracting parties or the users carry the burden of producing evidence and proof with regard to compliance with the prerequisites for the exemption.

135.* The Federal Cartel Office continued its prosecution of restraints of competition in distribution relationships in the period under review, and in doing so paid particular attention to the prosecution of breaches of competition in Internet sales. The proceedings of the Office can be allocated to a variety of groups of cases.

136.* The Federal Cartel Office in particular continued the prosecution of vertical price maintenance in several sets of proceedings (Festool, Dr. Hauschka). In these cases, the manufacturers exerted pressure on traders in the sales chain to enforce a price level fixed in advance.

137.* The Federal Cartel Office analysed the terms of business of Amazon with regard to ‘best price’ clauses. The company operates an Internet platform on which goods are sold firstly by Amazon itself, and secondly are offered by third-party traders. These traders have been obliged by Amazon to comply with a price parity clause. The Federal Cartel Office considered the price parity clause primarily as a horizontal restraint of competition since the platform operator (Amazon) and the third-party traders are direct competitors on the trade markets in question. It was possible to discontinue the proceedings at the end of 2013. The Monopolies Commission considers the evaluation of the case by the Federal Cartel Office in terms of competition to be correct on the basis of the outcome of the investigation.

138.* In further sets of proceedings, the Office took up the practice of several platform operators of obliging hotels which offer rooms on their platform to comply with a ‘best price’ clause. This ‘best price’ clause is exclusively to be examined as a vertical restraint of competition since the platform operators concerned do not maintain their own range of rooms. The requirement of the ‘best price’ clause limits competition between the providers of hotel rooms by taking away their freedom to offer hotel rooms outside the platform at a price that can be chosen freely.

139.* When evaluating the practice of the Office, it is necessary to take account of the development of Internet sales. ‘Best price’ clauses facilitate effective advertising vis-à-vis consumers who can be pointed to guaranteed best prices. Such clauses were hence an effective means of establishing hotel booking portals as a new service to make it easier to search for hotel rooms. At the same time, they protect the booking portal from hotels using them but room bookings nonetheless being made directly with the hotel (free-riding problem). It however remains unclear to what degree there is a free-riding problem here, and whether ‘best price’ clauses may be necessary in order to prevent hotels using the advantages connected with the platform (easier to find, etc.) without paying for them. The platform operators concerned by the proceedings have so far not been able to substantiate their submission in this regard. Having said that, proof appears to be difficult to provide here, so that the allocation of the burden of proof is likely to be decisive here as a rule.

140.* Competition has evidently increasingly shifted to the relationship between the booking platforms inter se. A free-riding problem is also unlikely to occur in this competition relationship. The Monopolies Commission considers the approach taken by the Federal Cartel Office to be correct from a legal point of view, but points out that many questions remain unresolved in economic terms.

141.* A further group of cases within the practice of the Office relates to cases in which a brand manufacturer attempts to exert an influence on the sales channels via which its products are (re)sold, namely to the disadvantage of online traders. It is able to do so particularly by charging different prices for supplying high-street retailers and online traders (dual price system; cases on domestic appliances and garden tools), or by establishing a selective distribution system with quality requirements which can be satisfied above all via retail sales (cases on sports articles). The establishment of a dual price system pursues the same goal, but unlike requirements for selective distribution does not link directly to the distribution of the product by the distributors, but to the prices for the products distributed (considerations).

142.* These cases relate to a grey area between brand and competition protection. There is contention in particular as to the degree to which manufacturers may restrict Internet sales in order to ensure a specific price signal (high price) towards consumers as an element of their brand strategy, which is orientated towards prestige and exclusivity. The Federal Cartel Office does not recognise sales criteria which are to protect the “aura of exclusiveness” or the prestige of the manufacturer’s brand. It refers in this regard to European case-law critically judging restraints of competition to protect any brand image and hence also questioning the statements in the Guidelines on Vertical Restraints.

143.* The Monopolies Commission does not necessarily share the Office’s view that the European case-law questions the Commission’s Guidelines. It stresses that the guidelines constitute a compromise as to the line, which is difficult to draw, between aspects of brand and competition protection, and that they are therefore as yet also regarded as a yardstick for commercial trade for the market players. Where the Guidelines do not do justice to the individual case as a general yardstick, the Monopolies Commission considers that it should be taken into account that the Internet in particular still constitutes a relatively new distribution channel which manufacturers integrate into their business models to constitute a part of a commercial strategy – as a matter of principle to be developed unilaterally by the manufacturer in question. It should furthermore be taken into account that distribution requirements as a matter of principle do not give rise to reservations in terms of competition where they strike a suitable balance between trademark protection and the interests of competition. Finally, an individual exemption for measures to protect a brand should be particularly considered when traders act as free-riders by obtaining and distributing branded products via grey channels in order to benefit from the good reputation of a branded product without however contributing to the investment made in creating the brand.

144.* In the view of the Monopolies Commission, the actions of the Federal Cartel Office in the concrete case practice so far are not objectionable. It is crucial here that these were typically cases in which manufacturers with a strong market position were able to exploit their latitude for conduct relating to requirements for Internet sales, or in which several manufacturers established the same form of selective distribution networks across the entire market. It should be ensured in such cases that brand manufacturers do not bring the sales channels under their control to such a degree that the independent development of Internet trade is tangibly prevented in the long term. The practice of the Office is orientated towards ruling out such a hindrance. Having said that, such regulation of the distribution channels may be favourable to vertical integration.

Sanctions and compensation

145.* The German courts had to rule in several cases on constitutional issues regarding the sanctions in cartel-related cases in the period under review. The Monopolies Commission presents its statement on this case-law from a competition policy perspective.

146.* In the “grey cement case” the Federal Court of Justice affirmed the constitutionality of individual provisions contained in the ARC on the level of fines, but without clarifying all the unresolved contentious issues. The Federal Cartel Office has revised its guidelines on fines in response to the case-law of the Federal Court of Justice in order to facilitate an adjustment of the procedural practice in line with that case-law. The Monopolies Commission nonetheless considers it to be necessary that the German law on cartel fines be revised. Problems are caused by the fact that the many contentious issues which have been open for a prolonged period prevent in the long term the development of a uniform, predictable fines practice and its acceptance by the parties subject to the law.

147.* The Federal Cartel Office brought proceedings to a conclusion in several cases in the period under review by agreeing on the discontinuation of the proceedings (“settlements”). Such settlement proceedings are an important tool for the Federal Cartel Office in order to ensure that resources are used efficiently, and have now taken on considerable practical significance. The Office recently set out the procedural principles which are applicable to the settlement procedure in an information sheet. In this sheet, it stresses that the prerequisites for agreeing on the discontinuation of the proceedings are not regulated by non-constitutional law, and in particular that the provision contained in the Code of Criminal Procedure (*StPO*) on negotiated agreements within criminal procedure does not apply within the competition authority’s settlement proceedings. With regard to the procedure for negotiated agreements under criminal law, the Federal Constitutional Court however found in the period under review that there were shortcomings in terms of the rule of law. A number of the risks which the Federal Constitutional Court considers to exist cannot be dismissed in an at least similar form also in the competition authority’s settlement procedure. The Monopolies Commission regards settlements as a tool that is necessary under competition policy, and calls for a reform of the provisions on the competition authority’s regulatory offences procedure to be carried out soon.

148.* The Federal Constitutional Court has, finally, confirmed the constitutionality of the obligation to apply interest to the competition authority’s fines in accordance with the provisions of the ARC. The Monopolies Commission welcomes the decision of the Federal Constitutional Court since it ensures legal security with regard to the obligation to apply interest to fines.

Private cartel prosecution

149.* The enforcement of compensation claims on this basis of breaches of competition continues to encounter considerable difficulties for private plaintiffs in practice. The European Commission has therefore put forward a new proposal for a directive on private compensation actions. The proposal takes account of decisions of the European and national courts handed down in the period under review on the relationship between public (= competition authority) and private cartel prosecution. It was possible to complete the legislative procedure in April 2014 in terms of its content, just before the end of the legislative period.

150.* The directive is to be regarded as a reform of civil cartel procedures showing the way forward and governing a number of questions which have been disputed for all Member States for some time (e.g. the passing on of charges and the rights of indirect victims, presumption of damage). It would nonetheless have been desirable with regard to some individual questions if more time had remained after the publication of

the proposal for working out the final wording of the directive. For instance, in particular the statutory restrictions raise questions when it comes to disclosing specific categories of evidence (Art. 6).

151.* A question that was a subject of particular contention in the legislative procedure related to the legal position of direct and indirect victims *inter se*. The question needs to be asked as to why the directive carries out full harmonisation in this respect and does not leave any latitude to the Member States.

152.* According to the final version of the directive, deliberate overcompensation caused by multiple compensation (such as in the shape of punitive damages) only remains possible under national law on the basis of an explicit statutory order. The Monopolies Commission previously favoured such a provision. The directive selects a different approach in legal policy terms by enabling the competition authorities to allow a voluntary compensation arrangement on the part of cartel members towards any cartel fines. It remains to be seen what the impact of this regulation would be.

153.* Some questions also remain open after the directive has been accepted which, whilst they have become relevant in compensation proceedings, also play a role outside them. This particularly relates to the liability of parts of companies to which a breach of competition is attributable without their being the addressees of a fining decision. According to the quoted European case-law, this question is a matter of substantive law (on the factual side) and not merely a question of the addressee of the liability in terms of fines (in terms of the legal consequences). There is an urgent need for a statutory clarification that German law is not opposed to liability being attributed in accordance with European law.

154.* With regard to the legal position of compensation plaintiffs in the context of the sets of cartel proceedings, the Monopolies Commission considers the decision of the parliament adopting the directive for an exemption from liability to be justifiable. The practicability of the liability privilege for small and medium-sized enterprises with a small market share, by contrast, appears questionable.

155.* The directive is accompanied by a recommendation from the European Commission on injunctive and compensatory collective redress mechanisms. Depending on the implementation of the recommendation in other Member States, the Monopolies Commission is in favour of examining the applicable procedural rules for damages actions with a view to the Commission's recommendation on collective injunction and compensation proceedings.

The significance of compliance

156.* The prosecution practice of the Federal Cartel Office is likely to encourage the development of a compliance culture among the market players. Largely refraining from dealing with the topic of compliance in the Office's public relations work however leaves unused an effective means to additionally encourage companies to engage in conduct which is lawful under competition law. The Monopolies Commission gives several limited recommendations in this regard.

Specific sectors – intellectual property in competition

157.* Protective rights lend to the owner a right of exclusivity regarding intellectual creations, and are hence also subsumed as Intellectual Property (IP). Competition law can counter a closing of markets through intellectual property rights being exercised in an anti-competitive manner. Here, competition law as a rule leaves these rights as such unaffected in their existence, and merely restricts their exercise, by for instance, merely permitting to claim non-discriminatory licence fees instead of allowing the prevention of market entries.

158.* Several special features are however to be taken into consideration when applying competition law here. These emerge above all from the fact that the law on intellectual property is mainly focussed on a spe-

cific facet of innovation efficiency and on legal certainty, whilst competition law pursues a much broader list of goals and strongly distinguishes in relation to the facts of the concrete individual case.

159.* Access to standard-essential patents (SEP), facilitated by competition law, places the market position of the owners of these rights into perspective, since such position was not acquired on the market, but by means of the standardisation agreement. Particular importance attaches in this regard to the possibility for users of an SEP to counter its owner by means of a “competition law compulsory licence objection”. The possibility basically provided by patent law, namely for the patent owner to exclude third parties, arbitrarily and unconditionally, from the utilisation of the patent's subject matter, can appreciably hinder competitors, preclude all competition and thus enable the patent owner to obtain unjustified monopoly gains.

160.* The Monopolies Commission acknowledges the internationally-recognised pioneering role played by the Federal Court of Justice in the development of this objection in the “Orange Book” judgment. It however shows that the requirements called for by the Federal Court of Justice, and particularly by the lower courts that were subsequently called on to address it, do not lend adequate significance to the protective purposes of competition law.

161.* The ECJ is currently called on to clarify in preliminary ruling proceedings originating in Düsseldorf Regional Court whether and under what conditions the owner of an SEP which has undertaken to licence it to third parties at fair, reasonable and non-discriminatory (= FRAND) rates must be called on to accept the compulsory licence objection.

162.* Parallel to the development that has been described, the European Commission discontinued proceedings against Google/Motorola and Samsung, primarily in return for commitments that no further bans on use would be enforced for SEPs (that are subject to the FRAND principle). In accordance with this decisional practice, it suffices if the licence-seeker has in principle declared their willingness to conclude a licensing agreement subject to “FRAND” conditions.

163.* The Monopolies Commission welcomes the establishment of the compulsory licence objection, and emphasizes the platform character of SEPs. It also appears to be decisive in this regard that the patent owner, by bringing this patent into the standard, particularly declares (conclusively) that he/she wishes it to be used. As long as patent law does not have any (effective) tools for the inclusion of such particularities, the courts, as well as the competition authorities, must take this into account on the basis of competition law. At least with SEPs that are subject to the FRAND principle, hence, it appears to be dispensable as a rule to pay or deposit the licence fee prior to using the patent if the licence-seeker is concretely willing to negotiate.

164.* Several potential solutions are analysed in the outlook beyond competition law for SEP-specific problems. In addition to the widespread introduction of FRAND obligations in the framework of inclusion of IP in standards, in particular improved transparency in connection with standardisation processes and standards appears to be desirable. Not lastly in an international comparison, it also appears that intensification of the cooperation already existing in some cases between standardisation organisations, patent and competition authorities could counter shortcomings in information and realise considerable steering potential.

165.* The revised rules for technology transfer (TT) agreements were adopted at European level in March 2014, encompassing a block exemption regulation and guidelines. The significance of these rules also emerges from the fact that contracts that have been concluded by the companies for the competition authorities are at best transparent with regard to certain aspects, and that disputes in this regard only rarely come before the courts. The TT reform constitutes a careful modernisation which treats individual, previously-approved agreements much more critically in some respects, but for instance also establishes a kind of “safe harbour” for specific technology pools.

166.* The Monopolies Commission welcomes both the proceedings and the outcome of the TT reform. A fundamental criticism of the Monopolies Commission, which does not only relate to the TT regulations, however targets the competition authorities' general lack of an overview over contractual structures actually prevalent on individual markets. In the view of the Monopolies Commission, it appears to be problematic that the generally-provided withdrawal of the advantages of block exemption regulations in relation to specific market structures has taken on virtually no practical significance as yet, primarily for this reason as well as because of the lack of precedences.

167.* A recurring, increasingly significant problem can be caused by the fact that data definitions created by companies and protected as intellectual property come to apply as market standards. If it is impossible or virtually impossible to participate in (derived) markets without using such data standards, the refusal of a licence may constitute abuse of a market dominant position.

168.* The most recent development of one of the best-known European cases in this field, namely IMS Health, serves to illustrate the problems that are related to such proprietary data standards. The legal dispute has been going on since 2000; the case is currently before the Federal Court of Justice for a (first) ruling. The underlying legal problem derives from copyright protection for a database structure which had divided the territory of the Federal Republic Germany into 1860 individual regional segments. The subject matter of the dispute is the market introduction of information compatible with these data definitions by a competitor. The ECJ handed down a landmark ruling in the case as early as in 2004 which recalled that refusal to grant a licence only constitutes abusive conduct within the meaning of competition law under unusual circumstances. Three criteria were derived from the case-law the fulfilment of which the national courts had to answer themselves. The Frankfurt Regional Court and the Higher Regional Court as a matter of principle presumed copyright protection of the underlying data definitions and denied the creation of a new product as well as the application of an objection of a compulsory licence.

169.* The Monopolies Commission points out in this context that the criteria repeatedly referred to in the previous case-law of the ECJ, unlike as widely assumed, likely only constitute examples of the requirements of competition law abuse. The decisive aspect in this respect is damage to consumer interests. The high degree of similarity between standard-essential patents and data standards also appears to be of particular significance here. Accordingly, in relation to database rights, it may already be possible under certain circumstances to rule out a copyright prohibition of use from the point of view of competition law abuse of market power if this would unjustifiably harm consumer interests.

170.* Comparable cases were related to the licensing of securities codes, which have caught on as market standards in some instances on the basis of standard setting processes, and partly through path dependencies, while being protected by copyright. The European Commission achieved a partial waiver of the exercise of partly disputed exclusivity rights here by means of undertakings, as well as the partial opening of a data standard for competition. Thus, in addition to facilitating competition, in particular the pricing power of the right holders is restricted.

171.* The Monopolies Commission fundamentally welcomes the application of competition law to open up proprietary data standards. It points out that the holder of a market dominant position has an increased duty of care for the competition (remaining) on the markets concerned. If the owner of the right however abuses its market dominant position counter to this special responsibility, it can be considered in particular to push forward interoperability through competition law. The application of the prohibition of cartels can also be considered regardless of an instance of concrete abuse where a market-closing exercise of rights is based on competition-restricting agreements.

172.* The opening of a large number of markets that are currently closed off appears to be made possible by means of a general rule based on the Federal Court of Justice's Orange Book standard, which draws the legal consequence from the factual comparability of essentially commercial rights concerning data definitions to patents. Such a rule appears to be justified in macroeconomic terms, at least if the monopoly-like market positions provided by rights to data definitions are based not on special innovativeness or special investments, but above all on time priority and on network effects. In such cases, it may appear necessary not only on the basis of competition law, but also of the Constitution, to constrain the as yet largely unrestricted exercise of copyright by application of competition law. Appropriate licence fees and recognition of authorship can certainly do justice to the legitimate interests of the authors in such exceptional cases.

173.* In particular in the medium and long term, it appears preferable to include interoperability aspects and competitive openness at the planning, establishment, introduction and refining stages of data and interface standards as against a subsequent restriction of the exercise of individual rights in individual cases. This is favoured not solely by the concomitant legal certainty *ex ante* and the considerable savings in transaction and uncertainty costs. In particular the positive dynamic effects of designing data and interface standards as a platform that is open to competition can exceed the static advantages several times.

174.* The ECJ's Premier League judgment has revealed the boundaries imposed on the right of the licensor of audiovisual intellectual property rights on the basis of the fundamental freedoms and competition rules of the European Treaties to make requirements of licensees over and above the protected area of the intellectual property right. This judgment was wrongly partly interpreted as the prelude to the Europeanisation of audiovisual intellectual property rights based on competition law. Right owners may continue to restrict licences in factual and geographic terms within the (national) basis of the intellectual property rights. However, such restrictions, where they relate to fundamental freedoms and/or competition, must be suitable and necessary to protect the right in question.

175.* The ECJ listed and confirmed these principles in detail in a number of further judgments. Particular importance appears to attach here to the fact that restrictions imposed by collecting societies may also be justified by virtue of the fact that they ensure effective control of the utilisation of protected works in the context of the licence and the proper payment of the fees that are owed. Despite the enforcement of fundamental freedoms and competition rules, this European case-law can however also entail new market distortions and disadvantages for consumers. Against this background, the Monopolies Commission welcomes the consultation of the European Commission to examine the regulations on EU copyright law.

Specific sectors – The media

176.* It is very widely felt that the media provide services of general interest by transmitting opinions and content. The exercise of freedom of opinion, information, the press and broadcasting is particularly protected in terms of fundamental rights. If the State permits competition between media providers in broadcasting, it must however prevent concentration developments leading to a constitutionally-problematic restriction of the channels to transmit content and opinions.

177.* The Federal Cartel Office continued its procedural practice on the establishment of online video portals within joint ventures in the period under review. In this context, it raised concerns against a joint video platform of ARD and ZDF ("Germany's Gold"). The two groups of broadcasters have now given up the project. In a further case, Düsseldorf Higher Regional Court confirmed an earlier order of the Federal Cartel Office in which the stations RTL and ProSiebenSat.1 were prohibited from establishing and running a joint video platform ("Amazonas").

178.* The case-law on video platforms has provoked severe criticism among the market players. Whilst the Monopolies Commission considers this criticism to be understandable, it does not appear to be justified. The platform project of the private groups of broadcasters RTL and ProSiebenSat1 was not exemptible, not lastly because of the cross-media effects on the television advertising market which were exerted against those concerned in this case. The Federal Cartel Office also took into account impacts across markets in the case of the video platform of ARD and ZDF, in this case by including the state aid-related competitive advantage which accrues to the state broadcasting companies because of their contribution-based financing. The central problem in both cases with regard to competition was the fact that the agreements were to go far beyond the degree that was necessary for the operation of the platforms and standardise the market presentation of those concerned. In view of the dynamic in this field, the Monopolies Commission reserves the right to undertake a more detailed survey of the competition situation on the media markets.

179.* A court ruling in the period under review also related to the question of whether the central negotiation monopoly of the Federal Press Distribution Association (Bundesverband Presse-Grosso) violates European competition law. The Düsseldorf Higher Regional Court confirmed a ruling of the Cologne Regional Court in terms of its outcome according to which the restraint of competition on price and terms provided for in the press distribution system is incompatible with European competition law. The Monopolies Commission considers the rulings of both courts to be correct in terms of their outcome, and is calling on the legislature once more to remove the special arrangement for wholesale press distribution, which has been inserted into the ARC by means of the Eighth Reform.

Special sectors - health insurance

180.* The German competition rules in the field of health insurance are also not satisfactory after the 8th reform of the ARC. Particular criticism attaches to the ongoing splintering of the legal channels in procedural law on competition. The reform has brought about improvements in substantive law, but it is a matter for criticism that the scope of general competition law has not yet been extended to cover the relationship between the health insurance funds inter se and in the relationship with the insured parties.

181.* With regard to European law, the legal view of the legislative bodies on the basis of European case-law in the period under review and the relevant Commission's Guidelines is incorrect. As a partly commercial activity, statutory health insurance is designed as a commercial activity within the meaning of European law, and in this respect is already subject to European competition regulations.

182.* Indications of structural competition problems have however also arisen in private health insurance in the period under review since changing insurers continues to cause considerable difficulties in practice there. The Monopolies Commission hence reserves the right to analyse the health insurance markets again in the foreseeable future.

The procedural relevance of quantitative methods

183.* There is a procedural requirement for the Federal Cartel Office to collect reliable information within the deadlines set for a ruling that does justice to the facts. Multifaceted quantitative methods were applied in individual cases in the current period under review within data analysis in proceedings of the Federal Cartel Office. The quantitative methods were selected by individual cases in all sets of proceedings, and largely focused on descriptive statistics; relatively complex methods of inductive statistics, such as econometric methods in the form of regression analyses, were the exception in this regard. Descriptive statistics already plays a major role, for instance when it comes to the market definition and in sectoral studies for the practice of the Federal Cartel Office. What is more, the Federal Cartel Office is examining the analyses in accordance with

the standards for economic expert reports, increasing numbers of which are being submitted. The fact that the Federal Cartel Office appears to attach greater significance to empirical analyses and to the application of quantitative methods, and that it regards them as constituting an integral component of the exercise of its official activities, is demonstrated by the creation of a new G 3A “Data collection and econometrics” division in January 2014.

184.* The Monopolies Commission welcomes the willingness of the Federal Cartel Office to involve quantitative methods more intensively. The quantitative analyses carried out so far helped supporting the decisions of the Federal Cartel Office. The Monopolies Commission emphasizes that, in order to establish novel, complex methods, they absolutely must be applied in a manner that is continuously precise and consistent. In particular, the consistent application of methods should be favourable to efficiency increases and increased transparency in the practice of the Federal Cartel Office. For instance, in the context of merger rulings to assess the degree of closeness between of the companies in question in terms of competition on markets with heterogeneous products, “diversion ratios” could be calculated for which there is no need of any a priori specified market definition. The validity of empirical analyses is largely contingent on the quality and quantity of the available data. In the view of the Monopolies Commission, and taking budgets into account, it might also be possible for private data sources, such as scanning data in food retail, to be a high-quality alternative here to the data specifically collected and to those transmitted by the companies.

Ex-post evaluation of the practice of the Federal Cartel Office

185.* An ex-post evaluation of the practice of the Federal Cartel Office offers the possibility to measure the de facto impact of an act of the Federal Cartel Office after a period of time has passed. According to the OECD, the goals pursued in ex-post evaluations vary between reporting on the (overall) activity of the authority to be accordingly evaluated, detailed ex-post analyses on specific procedural decisions and their impact on the markets concerned, as well as of an investigation of the influence exerted by competition policy on the economy as a whole. By conducting ex-post evaluations, the authorities in question can inform the legislative bodies, consumers and companies of the past practice of the Federal Cartel Office, document the macroeconomic benefit of effective competition supervision, obtain information on making the decisional practice more effective and parse impulses on macroeconomic factors emanating from the Federal Cartel Office’s decisions.

186.* The advantages of ex-post evaluations in opposition to costs – in particular to the resources needed. The Monopolies Commission nonetheless considers as a matter of principle a stronger ex-post evaluation of the procedural decisions of the Federal Cartel Office – for instance with regard to merger control proceedings on oligopolistic markets, but also cartel and abuse proceedings – to be desirable. Possible loss of reputation, or actions for damages based on negative ex-post evaluations, by contrast, do not constitute convincing counterarguments from the point of view of the Monopolies Commission. Rather, the long-term benefit of optimised decisional practice and of increased credibility that is due to objective and also critical evaluations is supposed to eliminate any reservations and more than compensate for any costs incurred. One might consider an evaluation by the Federal Cartel Office, albeit it cannot be denied that such action entails the risk of bias on the part of the institution, which would be evaluating itself. This objection would not apply if another institution than the Federal Cartel Office were to be entrusted with the evaluation. Here, one could consider firstly commissioning the Monopolies Commission; secondly another institution could be considered. The fact that the Monopolies Commission already carries out a form of evaluation by evaluating the practice of the Federal Cartel Office principally favours its being commissioned.

The Market Transparency Unit for Fuels

187.* The Federal Cartel Office's Market Transparency Unit for Fuels (MTS-K) went into operation on 31 August 2013. In accordance with Sec. 47k (2) ARC, operators of public petrol stations, as well as companies which are entitled to set prices at public petrol stations, are obliged in Germany to report the sales prices for the fuel types Super E5, Super E10 and Diesel to the MTS-K by electronic means within five minutes of making a change. The fuel prices that are collected by these means are then passed on to providers of private consumer information services that are registered with the MTS-K, which make them available to consumers on request via an electronic information platform. A complaint unit is always attached to the respective information services at the same time to which consumers can complain about incorrect fuel prices. In general, there is growing demand so far for the information provided by the MTS-K from the consumer information services and from consumers.

188.* The Monopolies Commission in principle acknowledges the efforts made by the legislature to enhance consumers' market position by disseminating price information. The dissemination of information could enable consumers to exert pressure on providers and hence promote competition. It remains questionable, however, whether it can be the job of state entities to support consumers' position by collecting and disseminating price data on a specific market. Against this background, the Monopolies Commission welcomes the fact that Sec. 47l(3) ARC provides for the MTS-K to be evaluated three years after commencement of the duty to report.

189.* With regard to the oligopolistic market structures, which are currently characterised by vertical integration, the Monopolies Commission recommends expanding the duty to report to include the fuel quantities sold and the corresponding refinery, transfer and wholesale prices. In order to maintain the oil companies' operational and commercial secrets, and because of the lack of direct significance for consumers, it should however not be possible to forward the sales volumes collected to the consumer information services. For the purposes of analysis and in the interest of practicability, it should be sufficient for the data on the volumes sold not to be reported in real time as with price data, but bundled and with a time lag, for instance, once per week. The Monopolies Commission furthermore welcomes the initiation of a sectoral study on refineries and oil wholesale by the Federal Cartel Office in September 2012. This sectoral study is to analyse competition conditions in the oil industry's production and wholesale levels that are upstream from the petrol station markets. In this context, the Monopolies Commission once more points to the significance of an analysis of the sales prices of oil suppliers and wholesalers, as well as of the vertical and volume exchange contracts.

V. Economic activity on the part of local authorities and the trend towards remunicipalisation

190.* Efforts have been observed for several years in a large number of local authorities and in many sectors to expand own economic activities. The share of the revenue of local authority companies as part of nominal gross domestic product rose by nearly 60 percent in the period from 2000 to 2011. The expansion of the economic activities on the part of local authorities in recent years is however not limited to local authorities "remunicipalise" the activities which they had previously privatised. Additionally, local authorities are acting by also expanding their activities in fields which were previously organised on a private economic basis. Local authorities are active in virtually all sectors here, but their economic activity is not growing to the same degree in all sectors. The Monopolies Commission places the focus of this analysis on the expansion of economic activities on the part of local authorities in the sectors energy and water supply, telecommunication and refuse disposal. In general, it is possible to observe three central motives for the expansion of economic activities on the part of local authorities: the desire to provide a better service, fiscal interests and the pursuance of local policy goals, especially as regards industrial, social and environmental policy.

191.* The law imposes boundaries on the activities of local authorities when it comes to establishing, managing and remunicipalisation economically-active companies. These legal boundaries are to do justice in particular to regulatory and competition policy motives. Important requirements for the activity of the public sector lie in the regulations on competition, public procurement and state aid legislation. As a matter of principle, restrictions furthermore arise for commercial activity on the part of local authorities in terms of the scope of the right of local self-government in accordance with Article 28 of the Basic Law, for which for instance the Federal *Länder* have enacted special regulations contained in the local government regulations. Here, a central restriction on each economic activity on the part of local authorities lies in the requirement that such activity must be carried out on the basis of a public purpose.

192.* In principle, the requirement that the economic activity of local authorities must be necessary is to be understood such that a public institution can better take on the task than a private one. Scientific studies show very clearly that – if no special conditions apply – the performance of public companies is less efficient in general than that of private companies. It must therefore be considered in the individual case whether there is a major disturbance of the market function necessitating activity on the part of local authorities in order to improve welfare. Against this background, local authorities' economic activities should above all focus on fields of natural monopolies, such as operating networks, where quality criteria difficult to establish in contracts play a major role and a failure of competition is not countered by regulation. By contrast, the pursuance of other local political goals does not constitute a public purpose requiring economic activity on the part of the local authorities. The enforcement of municipal goals such as safeguarding jobs or of a local value added frequently means inefficiently deploying resources which could be put to better use elsewhere. What is more, considerable shortcomings arise in terms of transparency and hence control.

193.* The Monopolies Commission has analysed the general situation and competitive interaction of economic activity on the part of local authorities. A core aspect here relates to the transparency of municipal action. In order to reduce information-related problems, and so that both citizens and policy-makers can evaluate the risks arising from economic activity on the part of local authorities, action on the part of local authorities in particular should be as transparent as possible, and should be steered by an efficient regulatory framework. As a matter of principle, a large number of transparency regulations apply to public budgeting. The relatively complex regulations however do not always facilitate sufficient transparency regarding the risks shouldered by the local authority, particularly with regard to company holdings. With the exception of state-run enterprises, the income and expenditure of local authority companies are not recorded in the core budget and its annual financial report.

194.* An overview of local authority holdings is provided above all by the “municipal consolidated financial accounts”. This is an approach recently adopted by public budget management in order to improve the transparency of public holdings. The consolidated financial accounts is based on the concept that a local authority – comparable to a group holding – maintains both the core administration and various holdings the individual financial statements of which are combined in the consolidated financial accounts of the holding company. Although the local authority consolidated financial accounts tends to considerably improve the transparency of the local authorities' holdings, it is only being gradually introduced by the Federal *Länder* as being obligatory.

195.* As long as not all local authorities are yet obliged to submit a local authority consolidated financial accounts, transparency of economic activity on the part of local authorities is created above all by the “holdings report”. This report, which is customarily to be prepared on an annual basis, primarily serves to provide a compressed, structured overview of the economic situation of all those companies in which the reporting public municipal administration has taken a direct or indirect holding. The drafting and publication of a hold-

ings report is in principle provided for in almost all local government regulations of the Federal *Länder*, but is not regulated with the same degree of comprehensiveness in all places.

196.* Where no corresponding regulations yet exist, the Monopolies Commission recommends the Federal *Länder* to standardise in their respective local government regulations that local authority consolidated financial accounts, including all individual financial statements, are to be drawn up and that the holdings reports of the local authorities must contain information on all local authority holdings, regardless of the legal form or the amount of the holding. Furthermore, the holdings reports are to disclose all measures of success, the assets situation and all financial relationships of local authority companies with the local authorities and between the holdings. In the reports, the local authorities should be obliged to describe the public purpose of the holdings and to evaluate the public value added of these companies in the current year. Finally, local authority consolidated financial accounts and holdings reports are to be published on the Internet in a transparent manner for all citizens.

197.* Another aspect related to the transparency and verifiability of local authority activity concerns the fees charged by local authority companies. A problem with regard to many services provided by local authority companies lies in the fact that they frequently are not exposed to sufficient or indeed any effective price or quality competition. If, however, competition is not applied as a control instrument for the fees, the question arises of whether there are other tools protecting citizens against excessive fees. Account is taken of a variety of problems related to the general democratic legitimation of fees for public services by not subjecting the pricing of local authority companies solely to indirect decision-making by citizens. Rather, the legal system has a variety of protective and supervisory mechanisms in the shape of competition law fee supervision, price regulation and fee supervision under local by-laws. They are however not equally effective, but in some cases this also depends on the conditions for control and the possibilities to calculate a fictitious competition fee as a yardstick for such fees.

198.* In particular the supervision of fees appears to the Monopolies Commission to be inadequate in this context. In the same way as taxes and contributions, fees are a typical source of income of the public sector. Particularly many utilisation fees constitute a service in return for a service provided by local authority companies and are comparable with private commercial pricing. The exercise of control tasks is two-fold within fee supervision: On the one hand, local government regulations provide for *Land*-specific corresponding tasks of the supervisory authorities, whilst on the other hand the administrative courts also exercise fee supervision in response to actions filed by citizens. The Monopolies Commission considers a particularly serious hurdle for their effectiveness to lie in the lack of centrality of the review of the charges. The competent institutions must examine the fee amount on the basis of an undetermined cost standard which is difficult to operationalise, such as the local authority fees acts. The effective application of a cost standard however requires special economic expertise and specialised staff resources, which it is frequently not possible to properly establish and maintain in many individual, local institutions.

199.* Against this background, the Monopolies Commission recommends improving transparency with regard to the amount of fees for local politicians, informed citizens, the municipal supervisory authority and the administrative courts. What is more, the yardsticks for examination stipulated by the administrative courts as to the fees for use, the particularities of public tasks, and possible efficiency potentials in particular, should be more specifically taken into account. The efficiency of fees can be best made examinable under the extant conditions by taking a comparative market approach, which however requires the fee revenue to be standardised. This is why the Federal *Länder* should standardise an obligation to publish the revenue per volume unit of the service with use fees. This should create a relatively strong impact, whilst the effort for the local authorities would remain relatively slight since the necessary data should already be available. Such a requirement in the local authority fee laws of the *Länder* could read as follows:

“The local authorities shall be obliged to publish, within the following year, the revenue accounted for within a year by a unit of the relevant fee yardstick of a use fee. Details of the fees yardstick to be applied in the revenue calculation for specific services shall be governed by an ordinance.”

200.* Specific competition-related problems in various sectors are to be pointed out in connection with local authority activities. With regard to drinking water supply, the Monopolies Commission first of all points to the analysis that it made in its eighteenth Biennial Report. In this, it had particularly recommended the introduction in the medium term of a sector-specific (incentive) regulation orientated towards the efficient provision of drinking water by German drinking water suppliers. It should however be noted that the Federal and *Land* Governments have not so far made any recognisable efforts to further explore the above requirements as to investigation. In the meantime, competition law price abuse proceedings have been a major starting point in recent years for encountering the market power problem in the water sector. As a result of the new provisions contained in the 8th reform of the ARC and of the explicit removal of fee details from the competence to investigate abuse, the effectiveness of the proceedings now however appears to be impaired. Rather, the above amendment of the ARC now provides a certain degree of legal certainty that a (bogus) remunicipalisation facilitates the “circumvention” of fee supervision under competition law. The Monopolies Commission fundamentally welcomes further initiatives, such as the resistance of citizens’ initiatives against excessive water fees or various benchmarking projects of the water suppliers. Having said that, these approaches cannot be regarded as being sufficiently effective for a variety of reasons. This is why there is an urgent need to publish the fees in accordance with the fee standard that has been described above so that the fee supervisory bodies can monitor efficiency in the long term. Over and above this, the Monopolies Commission holds to its statement that price regulation of German drinking water suppliers is necessary in the medium term.

201.* Local authority companies have taken on an active role on telecommunications markets since the beginning of liberalisation as wholesale operators, as network operators and in recent years also increasingly as integrated providers of a broad spectrum of telecommunication services. Focussing on the expansion of fibreglass infrastructures, they are a major player when it comes to achieving the broadband objectives of the Federal Government and the European Commission. It should nonetheless be ensured that distortions of competition as a consequence of an increasing local commitment should be avoided. It is largely unproblematic when local authority companies restrict themselves to building and running passive network infrastructures. Should they operate as integrated network operators and service-providers, anti-competitive cross-subsidies must be ruled out within local authority companies or groups. To this end, there is an urgent need for utilities to organise their activities in a separate company or division. In the interest of subsidiarity, local authority commitment should be limited where these services can be provided by private companies.

202.* Considerable growth in local authority activities has been observed in the energy industry for several years. Its share of revenue among nominal gross domestic product more than doubled between 2000 and

2011. Since possibilities to affect conditions for local authorities on the markets for grid-based energy are much smaller than is frequently presumed, there are no particular circumstances here able to justify commercial activities on the part of the public sector, especially in competition with private companies. Hence, the Monopolies Commission does not consider any convincing reasons to exist to expand local authorities' energy-industry commitment. The remunicipalisation trend that can be observed is currently being enhanced by the fact that many network operation concessions are expiring and need to be re-assigned. Concession contracts are not subject to the provisions of the ARC on public procurement, so that a competition-based procurement procedure is not always guaranteed. This causes particular problems when the right of access is transferred to a local authority-owned company. Therefore, the legislature should examine including concessions to operate energy supply networks in the field of application of the formal procurement procedure. A major competition parameter should be the amount of a deduction offered from the network utilisation fee or the annual revenue ceiling.

203.* There is currently discussion in the waste management sector of distributing roles among local authority and private companies in a variety of areas. When it comes to waste from private households, first of all as a matter of principle the local authorities, as public-law waste management service-providers, are responsible for disposal, with the justification of this constituting a general interest service. The Packaging Ordinance (*Verpackungsverordnung*) enhanced the role of private industry in the nineties since it was obliged to take back packaging that was in circulation after its use, and to see to it that it was disposed of. The intention here was for much greater consideration to be given to environmental aspects when designing products. A third major area of the disposal landscape is constituted by the "commercial collections" whose purpose is to generate revenue, and which therefore primarily focus on profitable substances such as recovered paper, electrical scrap or used clothes. Private disposal firms traditionally operate in this field. The collection and recovery of municipal waste, the dual system for disposing of packaging and commercial collections form the three core areas of the waste management sector, each with its own competition conditions and different roles played by the local authorities and private industry.

204.* In the field of the disposal of municipal waste, and of domestic waste in particular, a considerable increase has been observed for several years when it comes to the activity of local authority companies. Local authority companies are concentrated here in densely-populated areas, whilst almost exclusively private companies operate in rural districts. All in all, the situation as regards competition is currently not satisfactory when it comes to domestic waste disposal. Here, the local authorities have de facto monopoly rights, which can be transferred to the local authority waste management service-providers via the possibilities of in-house procurement. The Monopolies Commission rejects the uncompetitive basic system to which this leads. There is a need for competition "for the market" to be stepped up by local authorities which are currently still carrying out disposal on their own striving for a transition towards putting out domestic waste disposal to tender. Invitations to tender, which have been highly successful for a long time, particularly in rural areas, show that private companies can provide the necessary services at least as well as local authority waste management service-providers. An invitation to tender would also have the advantage of better control of ecological standards since it would facilitate a clear separation between the waste management service-providers that were commissioned and the entity executing the local authorities' responsibility for disposal. In general terms, the Monopolies Commission considers the waste management sector to have a highly suitable framework for establishing quality criteria in contracts in a transparent and verifiable manner. That said, no convincing reasons can be found why tasks must be exclusively carried out by local authority companies. In any case, transparency of the amount of local authority use fees should be increased by local authorities having to report the revenue per item according to the revenue standard set out below.

205.* With regard to alternative models of competition between competing domestic waste disposal companies, one possibility worth examining would be to permit each household to select freely whether to take part in the fundamentally local authority-organised disposal system or instead to regulate waste disposal itself with the help of licensed disposal providers. In such a competitive system, a company commissioned by the public-law waste management service-providers, as the “basic disposal firm”, would provide the disposal services, but citizens could themselves elect to change to another disposal firm.

206.* Unlike domestic waste disposal, the dual system for packaging disposal is under private industry responsibility. Counter to some portrayals and complaints, the transfer of the responsibility of the disposal of packaging to the manufacturers and the opening of the dual system to competition has fundamentally proven to be successful. In the view of the Monopolies Commission, opening to competition and the subsequent market entry also halved the disposal costs whilst at the same time raising the quality of packaging disposal. Having said that, considerable problems have arisen recently. Current developments indicate that companies have in some cases used exceptions provided in order to circumvent their obligation to take part in a dual system and thereby save costs. This leads to considerable distortions between the individual dual systems, and can even endanger the stability of the universal collection service as a whole. The Federal Government has already reacted to the developments and decided to amend the Packaging Ordinance. The planned reform will considerably restrict the existing possibilities to remove volumes of packaging from the licence obligation. The Monopolies Commission trusts that the intended amendments to the Packaging Ordinance will cause the system to become stable once more.

207.* Also indicating these recently occurring problems in the dual system, local authority waste management service-providers and parts of private industry are calling to do away with competition. Whilst the private waste management sector would like to see a partial transfer of responsibility to a central body, and hence a kind of return to the system with only one operator, local authorities are endeavouring to ensure that they themselves are responsible for disposal. The Monopolies Commission is unambiguously opposed to all efforts that would primarily lead to a restraint of competition and to an enhancement of market positions. The procurement of disposal services by the public-law waste management service-providers would create considerable risks, and even incentives for less efficient service-provision. This system is hence particularly disadvantageous, and should be emphatically rejected.

208.* The Monopolies Commission regards as problematic the current development of competition in commercial collections. Local authority waste management service-providers have been considerably expanding their activities here recently. This is particularly caused by court rulings and legal reforms favouring the public-law disposal of waste from private households. Particularly caused by the more extensive duty to report as a result of the amendment of the Closed Cycle Management Act (*Kreislaufwirtschaftsgesetz*), the activities of the private collectors have been made much more difficult. Whilst the Monopolies Commission welcomes the intention of the legislature to have this report prepared by an authority that is independent of the public-law waste management service-providers, this independence is however not sufficiently guaranteed by the decision taken by some Federal *Länder* to transfer responsibility for this to the lower waste authorities. It cannot hence be ruled out that conflicts of interest will occur at local authority level. In the view of the Monopolies Commission, it is therefore essential to ensure the independence of the authority which can prohibit commercial collections. In line with the original version of the amendment, this task is therefore to be transferred to a central agency in all Federal *Länder*.

209.* In the view of the Monopolies Commission, the regulatory framework for commercial collections should as a matter of principle be re-structured in the long term in order to facilitate fair, effective competition, and at the same time to permit local authorities to fulfil their guarantee responsibility. In such a system,

the local authorities should only operate in the commercial collection sector in clearly defined cases since a public activity is not generally required here.

210.* In the result of the detailed analysis, the Monopolies Commission tends to be sceptical as to excessive public economic activity and tendencies towards increasing remunicipalisation. Against this background, it considers it to be primarily important to enable decision-makers and supervisory bodies to carry out an evaluation in individual cases by virtue of greater transparency and the tools that have been shown to carry out an evaluation in the individual case.

VI. Competition in the financial markets

211.* The financial and economic crisis, as well as the ensuing regulatory initiatives, have caused the Monopolies Commission to analyse competition on the financial markets, and in particular on the banking markets. In this context, it studies the impact of regulation on implicit state guarantees, the structure of the German three-pillar model when it comes to the associated groups, as well as selected competition-related issues related to financial products and transactions.

212.* Germany largely has a bank-based financial system, that is, banks play a much more important role when it comes to capital allocation than the capital markets do. The German banking system is characterised by the three pillars of private, state and cooperative banks. The particularities of this system include the development banks and the savings and cooperative associated groups. The associated groups are characterised by a considerable degree of division of tasks. What is more, because of their regional orientation, the institutions belonging to the respective associated groups only compete with one another to a limited degree.

213.* An unambiguous consolidation process has taken place in the German banking sector in the last two decades. Due to the strict separation between the three pillars, this primarily took place within the pillars, and not between the pillars. The falling number of institutions has led to an increase in the average size of German banks, as well as to greater market concentration. Nonetheless, the German banking system remains highly fragmented in an international comparison. This does not however necessarily permit one to conclude that the German banking system is per se more intensive in terms of competition than are systems in other states. International comparative studies have at most established a slightly above-average competition intensity for the German banking sector in the past. It should furthermore be taken into account that competition in the banking sector is product specific and frequently regionally flavoured, and can vary greatly within an economy. Studies for Germany show an intensity of competition which increases from the North East to the South West.

Implicit guarantees

214.* During the financial crisis, in particular the development banks and the savings banks (Sparkassen) and cooperative banks ensured at the local level that it was possible to successfully maintain the supply of credit. The associated groups however have a division of tasks which is similar to that of corporate groups in some regards. The balance is particularly less advantageous with the savings bank group if one takes into account the fact that the Landesbanken also belong to this group. Apart from individual private banks, in particular most Landesbanken have had massive problems during the financial crisis which necessitated extensive state aid.

215.* The financial crisis showed that so-called “implicit state guarantees” constitute an unacceptable systemic distortion of competition. This distortion results from banks not being able to leave the market as other market players can because they are too big to fail, because they are too connected to fail or because they have a large number of similar business models (“too many to fail”), and because their business hence entails

such risks that uncontrolled domino effects might be triggered should they leave the market. Banks and other financial market players who other market players consider to be systemically relevant benefit from an implicit state guarantee. This implicit guarantee directly acts as a guarantee of survival. What is more, it entails indirect advantages (in particular refinancing advantages) since it is continuously taken account of by the other market players. This state guarantee is implicit because, unlike state aid, it is not based on explicit state action.

216.* It is difficult to measure implicit guarantees. One possibility is the empirical investigation of market players' expectations with regard to rescuing possibly systemically relevant financial market players. The Monopolies Commission commissioned an expert report with this aim in mind, which concluded that a higher-than-average expectation of a rescue significantly increases both the willingness to take risks of the individuals responsible and the market power of the banks which have already got into dire straits. The study furthermore provided indications that the comprehensive rescue actions by the FMSA in comparison to those of the bank-specific security systems had an additional amplifying effect on the tendency to take risks and the market power of the banks in question. Studies by the OECD using credit ratings furthermore show that the refinancing advantage increased markedly as a result of the implicit guarantees over the financial crisis, but that it has been falling since mid-2011. For the ten German institutions observed, a value of the implicit guarantee of EUR 10 billion was recorded as per mid-2013. The scope of existing rescue expectations can moreover be derived from the ratings which investors use as a basis when investing in products to refinance the systemically relevant companies. The publications of systemically relevant banks themselves also indicate the existence of implicit guarantees at times.

217.* The rescue expectations, which are based on an implicit state guarantee, may have a variety of causes. A major reason however lies in a regulation which is not sufficiently orientated in line with the commercial risks and which enables financial market players to establish systemic risks and to pass them on to the State, and hence ultimately to the general public. A central lesson that is taught by the financial crisis is that regulation absolutely must aim to remove the implicit guarantees from the companies that benefit from them and to eliminate them. As a matter of principle, competition or supervisory measures can be considered to eliminate implicit guarantees.

218.* The competitive advantage associated with an implicit guarantee cannot however be directly defined via the existing competition law. Competition law relates to advantages which companies have because, alone or together, they create scope for conduct or exploit such scope which cannot be questioned by other market players. In the case of implicit guarantees, financial market players can by contrast make the State (and thus other market players) liable for their losses.

219.* Implicit guarantees were also not regarded as a supervisory problem prior to the financial crisis because the dangers posed to the stability of the system by the collection of systemic risks were neglected for a long time. The financial crisis however made it clear that financial market players who have an implicit guarantee can thus make the State liable for their losses in a way that may place individual states under extreme stress or even exceed their capacities.

220.* The European Commission attempted to do justice to the problem of implicit guarantees in the financial crisis within its state aid proceedings. State aid legislation is at least indirectly suited to counter the competitive advantage resulting from the implicit guarantee. As a matter of principle, state aid legislation does not pursue any direct compensation for the implicit guarantee of survival which the individual financial market players have. In the case of making use of an implicit guarantee, however, it requires compensation for the state aid that is provided. Moreover, in these cases the European Commission also demanded compensa-

tion for distortions of competition which resulted from banks with an implicit guarantee suffering from endogenous problems and only being able to survive in the crisis by claiming on this guarantee.

221.* The legislation that was introduced as a result of the financial crisis is to reduce the risk of the State being claimed against by neutralising existing implicit guarantees or preventing new ones from being created. The primary goal of regulation here is to make it indispensable for the State to act to safeguard financial stability. Absorbing the competitive advantage and the related market distortion is not yet in the foreground of this regulation.

222.* There is agreement that, within regulation, a combined approach has the best prospects of remedying the problem of implicit guarantees. The following regulation is relevant here with regard to implicit state guarantees:

- Regulation to neutralise such guarantees, in particular rules on resolution and divestiture (including regulations on the separation of banks), as well as regulation regarding security systems (e.g. statutory deposit protection):
- Regulation to avoid the creation of implicit guarantees by collecting systemic risks, in particular equity and liquidity rules, accompanying regulations on monetary and capital market-based leverage (e.g. via securities lending and derivative transactions), bonus limits and sanction rules, the introduction of an (anticyclical) financial transaction tax, possibly absolute transaction ceilings and the introduction of financial merger control with a view to establishing or strengthening a systemically relevant position; and finally
- Regulation to increase transparency when it comes to the accumulation of systemic risks, both for authorities and for professional and non-professional market players (including regulation on rating agencies and their ratings).

A further relevant field is the expansion of regulation to cover “shadow banks” and shadow bank transactions. Most of these regulatory fields have been the subject of fundamental reforms since the financial crisis.

223.* The Monopolies Commission has analysed the legislation with regard to the degree to which it can reduce distortions of competition that were revealed in the crisis through implicit guarantees. As the probably most effective means of neutralising implicit guarantees, the Monopolies Commission favours the establishment of a resolution mechanism. In this regard, an important first step has now been taken both at EU level and at national level. The close connection with the rules on EU state aid proceedings appears noteworthy as a positive feature. The resolution mechanism will however only be effective if, when the next crisis breaks out, sufficient sources of finance capitalised by the market players are available (security systems, resolution fund) and if the State’s discretion as to exemption from liability for individual market participants is reduced to a minimum. In the view of the Monopolies Commission, ongoing monitoring and refining of the existing resolution and restructuring mechanisms is needed to this end.

224.* In contrast, the legislation on the separation of banks favoured by policy-makers appears to be symbolic and of dubious benefit. The refinement of statutory deposit protection as an element of the existing private security systems, by contrast, is capable of making an effective contribution towards reducing implicit state guarantees.

225.* The capital rules are at the core of the regulation to make it difficult to build up risks which can lead to an implicit state guarantee. Since January 2014, new legislation has been in force at EU level in this regard which largely implements the recommendations of the Basel Committee (Basel III) and leads to a quantitative increase in the risk-weighted minimum capital ratio. The Monopolies Commission essentially welcomes

these measures to strengthen banks' capital base. It is regrettable that Germany has favoured "maximum harmonisation" in the reform of the capital requirements, and has been opposed to individual Member States introducing more stringent rules. The equity rules now in force are a step in the right direction, but they are still too low in the view of the Monopolies Commission.

226.* The risk-weighted capital requirements are to be supplemented by the introduction of a (maximum) leverage ratio in order to limit absolute indebtedness in the banking sector and to prevent destabilising debt-reduction processes resulting from this. As a simple, non-risk-based benchmark, the leverage ratio places the core capital in a ratio with the unweighted total assets. The leverage ratio is not to be introduced bindingly in the EU until 2018, when experience has been gathered with this tool. The Monopolies Commission essentially welcomes the introduction of a leverage ratio, but considers the contemplated amount of three percent as too low.

227.* The financial crisis has revealed that risks for financial stability may ensue not only from inadequate capital backing, but also from liquidity bottlenecks. Liquidity requirements are therefore to be introduced in the EU within the implementation of Basel III. In the case of crisis-enhancing (procyclical) modes of conduct, they have a preventive effect against the market drying out and implicit guarantees being taken up. The introduction of a liquidity coverage ratio is to strengthen the short-term resistance of banks' liquidity risk profile, and to ensure that they can meet their short-term payment obligations. It is to be gradually introduced in the EU between 2015 and 2019. The introduction of a liquidity coverage ratio in the EU is fundamentally welcome, but its manifestation is not without its problems in terms of competition policy. The planned net stable funding ratio, which is to make banks more resilient by improving medium- to long-term financing, currently still causes a number of questions. With regard to the two liquidity benchmarks, at least from today's point of view, a manifestation that is in harmony with the proposals of the Basel Committee appears to be required in order to avoid international distortions of competition.

228.* The existing capital and liquidity rules must be supplemented by special rules for leverage financing on the monetary and capital markets. Leverage encompasses transactions such as securities lending transactions and repurchase agreements and derivative transactions. In this respect, the Monopolies Commission is in favour of the consistent implementation of the recommendation which the Liikanen Commission had put forward as an alternative to its proposal on the separation of banks. This recommendation provides for a general risk restriction via non-risk-weighted capital requirements for assets held for trading. Additionally, the supervisory authorities should have the power to demand that high-risk commercial transactions be separated off in individual cases. Moreover, a mix of risk-limiting or transparency-enhancing provisions and conduct on the part of the authorities would make sense in individual cases, as is recommended by the Financial Stability Board, amongst others.

229.* It is necessary to await the impact of the regulation of bonuses as an accompanying measure. The planned financial transaction tax is the object of criticism, particularly if the tax were not to be designed anti-cyclically. As an alternative to this, the introduction of a financial stability levy should be considered as has been brought into the debate by the International Monetary Fund. Punitive sanctions should address the actual problem, namely the exploitation of implicit guarantees, and not only – as at present – violations of administrative requirements.

230.* As a further tool to limit the expansion of systemic risks, the Monopolies Commission suggests, similar to competition law, the introduction of financial merger control for take-overs which establish or strengthen a systemically relevant position.

231.* In the view of the Monopolies Commission, there is an urgent need for transparency to be increased on the financial markets in a coherent manner in order to enable the authorities and the market players to evaluate risks better. One-sidedly attributing ever more individual competences to the authorities is however to be seen critically.

232.* The development of the regulation of shadow banks remains to be awaited. The Monopolies Commission is positive about the approaches taken to date.

233.* The regulatory structure examined here can help to reduce the systemic distortions of competition connected with implicit guarantees. When shaping the regulatory structure, policy-makers should use the available latitude in order to counter a one-sided regulatory preference of capital-market-based company financing, where this is accompanied by unjustified regulatory competitive disadvantages, particularly for small institutions. International regulatory convergence should be enhanced in order to promote the competitiveness of the European financial markets and to counter any further fragmentation of the financial markets. National measures which go further should remain possible in an international comparison.

The three-pillar system

234.* Following on from the systemic competition-related questions, the Monopolies Commission has taken a closer look at the structure of the German banking system from a competition law and economics perspective.

235.* The German three-pillar system is characterised by a juxtaposition of private, state and cooperative banks. Regardless of their public mandate, the state banks are fundamentally subject to competition rules where they act on a commercial basis. This public mandate is however defined in such a vague manner that the concrete content of this mandate has been unrecognisable for quite some time. The Monopolies Commission recommends a clearer definition of the concrete mandate of the state banks in order to prevent unjustified distortions of competition in view of only allegedly public tasks. The guideline should be whether the tasks have demonstrable advantages for consumers which go beyond the market outcomes that can be generated in competition.

236.* The savings bank group and the cooperative FinanzGruppe have refined their combined structures since the turn of the millennium in a manner which comes relatively close in certain respects to the formation of an economic unit. The Monopolies Commission acknowledges the efficiencies that can be generated by engaging in cooperation within associated groups as a positive element of such cooperation. In view of the so far strongly regional market position of the associated groups, cooperation within the associated groups is however not without problems (risk of closing off of markets). It is therefore all the more important that competition rules be adhered to in cooperation within the associated groups. In this regard, a major problem consists in the lack of external transparency of cooperation within the associated groups. The Monopolies Commission urgently recommends increasing this transparency. At the same time, it is in favour of the competition authorities attentively observing the further developments of the cooperation within the associated groups.

237.* The Monopolies Commission has fundamental reservations with regard to the regional principle under savings bank law. These reservations only relate to the statutory provisions, and not to the autonomous decision of each savings bank for or against a regionally-limited business activity. The statutory regional principle was originally justified by virtue of the fact that the savings banks were to carry out public tasks in the region of their controlling entities for which the latter therefore took on a statutory liability guarantee. The liability of the entities had to be abolished for reasons of state aid law. Simply to ensure the public mandate, the regional principle is however as little necessary among the savings banks as with other municipal com-

panies for which there are no such special provisions. The equally regionally-active cooperative banks are also not subject to a statutory regional principle.

238.* The connection of the state banks to the public sector continues to cause problems, at least in view of the only vaguely-defined public mandate of these banks. The Monopolies Commission presumes that the advantage entailed by the institutional liability and liability of the guarantor for the institutions of the savings bank group probably no longer exists. The provisions contained in the savings bank acts on surplus appropriation and tax exemptions are however likely to entail advantages that are relevant in terms of state aid the justification of which is questionable. As to the Landesbanken, the Monopolies Commission calls for consistent adherence to state aid law. The same applies as to the development banks where these are not only active in cases of market failure (in particular the KfW development bank).

239.* The Monopolies Commission finally favours – irrespective of the prevailing trend – greater facilitation of the participation of private individuals in the savings bank group. The previous initiatives to open up the savings bank group for private investors make it possible to strengthen the savings bank group in line with the market, and are fundamentally welcome. The reservations expressed by policy-makers against a continuation of the opening of the savings bank group can be understood, but appear to be unjustified or exaggerated. Such an opening can take place so that compliance with the public mandate is permanently assured to the institutions of the savings bank group. The previous situation in which they were public entities pure and simple appears unsatisfactory both with regard to economic efficiency and to the implementation of the public mandate. An obstacle to better supervision of the financial institutions belonging to the savings bank group is finally likely to emanate from the close interlocks between the group and the political arena. The definition of the public mandate of the savings banks by policy-makers, and the exercise of supervisory responsibility in the administrative council of the savings banks, should be separated from one another in personnel terms.

Financial products and transactions

240.* Competition with financial products is very much characterised by the structural framework on the financial markets, namely by intensive regulation, and in Germany by the three-pillar structure of the German banking system. The market is admittedly in a state of flux. Both demand for and supply of financial services are becoming increasingly highly differentiated. This should be taken into account when assessing the competition situation with regard to financial products and transactions. The Monopolies Commission restricts itself here to addressing current market developments in which structural problems reveal themselves.

241.* The supervisory and competition authorities have already concluded investigations, partly worldwide. In several cases, against major international banks and other financial market enterprises for manipulations of interest benchmarks have come to light (e.g. Libor, ISDAfix) and reference rates (for currency). The Monopolies Commission has reservations that there could be a structurally founded cartel tendency on some markets of international financial business. The cases of manipulation that have come to light are being investigated at present, whilst in addition to sanctions, measures are also being taken in order to resolve the structural causes of the manipulations that have been revealed. It is nonetheless questionable whether the action that has been taken so far is sufficient. The Monopolies Commission favours the permanent introduction of stronger supervisory and competition authority control of the setting of reference values by the market players. Additionally, the Monopolies Commission recommends examining the spectrum of sanctions for cartel breaches since the fines that have been imposed so far evidently do not constitute an adequate deterrent.

242.* Competition-related problems in trading on the capital markets have been the subject of increasing international observation for some time, be they submission cartels in take-over cases, coordinated “creeping” take-overs, coordination of stock exchange flotations or of trade transactions (e.g. by circular trading) or abuse of market power (cornering). The Monopolies Commission considers a need for clarification to exist in this regard.

243.* The European and German competition authorities have been dealing with competition problems in connection with payment transaction services for quite some time. Both the European Commission and the Federal Cartel Office have carried out a number of sets of proceedings in recent years against the operators of card systems (e.g. credit card companies) and other payment infrastructures. The various payment systems are platforms and are characterised by network effects. Problems are caused in particular by “interchange fees” with card payments and restrictive agreements in the sets of clauses of the payment systems. Experience with the countermeasures that have been adopted so far has been mixed. The Monopolies Commission is observing the developments on the market.

244.* A structural problem which is directly tangible for consumers, but which is difficult to solve with the tools available under competition law, exists with regard to fees for cash machine withdrawals. The Federal Cartel Office is aware of this problem, and it is being investigated. Irrespective of that, it is vital in the view of the Monopolies Commission to further improve cost and fee transparency for consumers.

245.* Questions of investor and consumer protection vis-à-vis financial service-providers have a competition policy component if any problems are caused by distortions of competition against individual consumers or consumers as the “opposite side of the market”. The Monopolies Commission welcomes the statutory measures implemented by the EU to make it easier to change accounts and to compare account fees, as well as to increase the cost transparency of financial investments. Furthermore, it is suggesting examining in detail the actions taken to date for consumer protection in financial advice against the backdrop of the Regulation on key information documents for investment products.

246.* Finally, the Monopolies Commission sees indications that implicit state guarantees exist not only for banks and other market players, but also for financial products. This applies in particular with regard to Pfandbriefe and similar “covered bonds” and sovereign bonds and other bonds to finance public spending. The Monopolies Commission favours where possible abolishing regulatory privileges associated with such implicit guarantees and eliminating disadvantages to competing financial products (in particular ABS), unless they are objectively justified.

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Hauptgutachten VII:	(1986/1987):	Die Wettbewerbsordnung erweitern. 1988.
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