# Summary

## More Competition, Few Exceptions

### The Eighteenth Biennial Report 2008/2009

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

***Current issues in competition policy***

- **Greater efficiency in the supply of drinking water?**

**1.*** The organizational structures of drinking water supply in Germany are in part extremely fragmented. This is difficult to justify on technological grounds and permits the assumption that merging water distribution networks and/or network administrations would result in considerable economies of scale, enabling other cost-lowering potential to be tapped. The local authorities have great influence on the water supply in their area stemming from their ownership rights. The Monopolies Commission (*Monopolkommission*) sees the existence of private-law price-setting side by side with public-law fee-setting as a serious problem of de facto unequal treatment of essentially equal situations. It is always the same homogeneous good, water, that is supplied at a charge to consumers by commercial enterprises, the water suppliers. As currently practised, the choice of legal form by the competent municipality or the competent association leads to considerable differences in supervisory powers, however. The level of fees is approved by the respective local government supervisory authority, while the prices of private water utilities are subject to the control of abusive practices under competition law. The concept of the costs of the efficient provision of goods and services plays no, or at best a subordinate, role for a Federal State's local government supervisory authority. Instead, the government supervisory authorities act first and foremost on the basis of the benefit principle *(Äquivalenzprinzip)* and the criterion of ensuring the sustainable financial management of local authorities. To the Monopolies Commission, the full cost standard underlying such supervision implies the danger of inefficiently high costs being accepted in the drinking water sector. However, the Monopolies Commission draws the attention particularly of consumers to the disputed but convincing view that in the water sector, fees as well are subject to the control of abusive practices under competition law.

**2.*** In connection with the Federal Court of Justice ruling on "Water Prices in Wetzlar" of 2 February 2010, the Monopolies Commission concludes that in proceedings against excessive pricing in the field of natural monopolies in the German drinking water sector, the situation examined is not the typical field of application of competition law. In this situation, a competition authority cannot ensure permanent remedy vis-à-vis a water supplier by taking a single decision on one occasion. Rather, it would have to monitor and compare charges in the water markets periodically. It makes sense for this task to be performed by a sector-specific regulator, however.

**3.*** The structure of the German water supply should be subjected to another examination in the near future. The question here must be the explicit orientation of the water supply to the costs of the efficient provision of goods and services. This should result in ending the de facto unequal treatment of water suppliers under public and private law in the Federal Republic of

* The Monopolies Commission would like to thank Mrs. Eileen Flügel for translating the original German text into English.

Germany, tapping advantages of economies of scale and reducing overheads as far as possible. The Monopolies Commission recommends that the Federal Government and the Federal States subject the German drinking water suppliers to standard sector-specific regulation that is orientated to supplying drinking water efficiently.

**4.*** The Monopolies Commission is of the opinion that during the phase of introducing a standard regulatory framework for the German drinking water supply, full competence should be transferred to the Federal Network Agency (*Bundesnetzagentur*) in the first instance. Technical regulation could then be limited to benchmarks relating to output quantities and water quality. Economic regulation should be undertaken as incentive regulation for all German water suppliers according to common standards in the near future. Where overheads are inefficiently high, this could give water suppliers incentives to increase their size by merging with another drinking water supplier, thus reducing these overheads. This does not necessarily require the physical amalgamation of networks. Increased outsourcing of certain tasks to highly specialized external enterprises can also contribute to increased efficiency in the German water market.

**5.*** The Monopolies Commission encourages local and regional authorities in particular to put out the water supply to tender more frequently. In order to simplify the tender concept, a separation of the distribution network from operations is conceivable. While the distribution network in private or local authority ownership would continue to be subject to incentive regulation, the operations market could be put up for tender. However, the Monopolies Commission also draws attention to the possible problems of implementing tender concepts. Licence holders are likely to delay proceedings, particularly when there are long licensing terms.

- **Competitive shortcomings of pharmacies engaged in the retail drug trade**

**6.*** The Monopolies Commission already dealt with competition between pharmacies and with the regulation of drug retailing in its Sixteenth Biennial Report in 2006 and made comprehensive reform proposals to the Federal Government of the time. It has now updated its analysis and recommendations for action in the context of developments during the last four years.

**7.*** On the basis of repeated analysis, the Monopolies Commission recalls and underlines its reform proposals of 2006. It brings to the fore the following measures, which it regards as particularly expedient for the development of competition in drug retailing. The Monopolies Commission quite intentionally does not advocate complete deregulation of drug retailing. It recommends facilitating “gentle” price competition, also for prescription drugs through (a) abolishing the obligatory co-payment by patients who have statutory health insurance and the current standard package fee of EUR 8.10 (minus a EUR 2.30 discount on sales invoiced to a statutory health insurance) while (b) at the same time imposing on patients a charge set within certain limits by the pharmacist himself for his service.

**8.*** This patient’s contribution to the price of pharmacies’ services can bring about effective price competition between pharmacies. While the current co-payments made by patients who have statutory health insurance do make them contribute to the costs of the medicine, they have little steering effect. It should be taken into account that while (a) patients have little influence on the selection of prescribed drugs since this selection is usually (and rightly) made by physicians, (b) patients do decide for themselves which pharmacist to go to. In order to give patients an incentive to go to a reasonably-priced pharmacist, patients should therefore not contribute to the overall costs of the medication, but only to the costs of the pharmacist's services.

The Monopolies Commission once again proposes that patients be made to contribute to the cost of the pharmacist's service in this way. The current co-payments should be abolished. Instead, pharmacies could charge patients a variable amount they could set themselves, with the legislator being able to set upper and lower limits. In addition, the outside and multiple pharmacy ownership ban should be lifted and the operation of pharmacies by joint stock companies made possible while at the same time provisionally tightening merger control on pharmacies to prevent the formation of regional monopolies. Ownership of more than the current maximum of four pharmacies should be permitted. This would make it possible for non-pharmacists to have an equity interest in pharmacy businesses, and in principle pharmacy chains of an unlimited size could be formed.

**9.*** The Monopolies Commission also advocates enabling self-employed pharmacists to practice within the legal form of a joint-stock company. There are no obvious reasons why pharmacies should not be run in this way. To guarantee possible damage claims by patients, thought should be given to having a statutory obligation to conclude third-party liability insurance. The provision that every pharmacy has to be responsibly managed by a pharmacist, who may be an employee, remains unaffected by this.

**10.*** The objection is sometimes raised to pharmacy chains owned by non-pharmacists that there is the danger in such a business that the pharmacist's professional diligence would be subordinate to the owners' interest in maximizing profits. The Monopolies Commission is not aware of any evidence that pharmacists are less interested in economic prosperity and affluence than anyone else, however, i.e. "a pharmacist in his pharmacy" is generally interested in having a flourishing business. Also, profit seeking in retailing does not automatically lead to misconduct, particularly when corresponding sanctions are likely.

**11.*** What must be prevented, however, is the creation of local or regional monopolies as a result of the establishment of pharmacy chains, particularly during the transition period. A temporary provision whereby an examination is carried out in accordance with merger control law as to whether a dominant position is created or strengthened and mergers of pharmacy chains are subjected to merger control even if they are below the usual merger control thresholds could remedy this situation. These special provisions could be lifted when intensive competition between pharmacy chains has developed.

**12.*** As regards the spatial integration of pharmacies into other shops, independent pharmacies could be operated within drug stores or department stores on the basis of a shop-in-shop system. As hitherto, there should be no self-service, but only over-the-counter sales of prescription drugs or medication particularly requiring consultation, thereby preventing incorrect use; in addition, only authorized staff should have access to the pharmacy premises themselves (storage room, laboratory). These pharmacies would also have to offer an emergency service outside shop opening hours. The complete ban on so-called pick-up outlets provided for in the coalition agreement should not be implemented. Such a complete ban on pick-up outlets seems disproportionate. Pick-up outlets enable mail-order companies to offer alternative sales channels, thereby raising competitive pressure on bricks-and-mortar pharmacies.

**13.*** The Monopolies Commission does not share the fear expressed in some quarters that mail-order pharmacies might select as their partners pick-up outlets that do not guarantee appropriate storage of the medicines or have unsound business practices, since this would run counter to the business interests of the mail-order pharmacies themselves. Should the legislator share the fear that has been voiced, however, it would in the view of the Monopolies Commission be preferable to regulate pick-up outlets or to set minimum standards rather than to impose a complete ban, which would also better do justice to the implications of the problem. The regulation of pick-up outlets could, for example, include requirements concerning the storage of medication and staff training.

- **Amendment to the Telecommunications Act**

**14.*** The Federal Ministry of Economics and Technology (*Bundesministerium für Wirtschaft und Technologie*) submitted first proposals for an amendment to the Telecommunications Act (*Telekommunikationsgesetz* – TKG) in March 2010. The amendment is intended to adapt national law to the changed European regulatory framework for electronic communication networks and services as well as to resolve problems arising in the application of the current rules. Essentially, the envisaged amendments concern the framework conditions for investment in infrastructure and competition, the regulatory instruments, and procedural questions in connection with the establishment of a Body of European Regulators of Electronic Communications (BEREC). In addition, changes are proposed to make frequency use technologically neutral and more flexible. Moreover measures to strengthen consumer rights and for data protection are being discussed.

**15.*** The Monopolies Commission opposes fundamentally restructuring regulation as the present legislative framework has been essentially successful and is capable of further promoting competition in the telecommunications markets and encouraging investments in new infrastructures. In order to avoid conflicts with the European Commission and the resulting legal uncertainty for market participants, orientation that is as close as possible to Community standards in making essential amendments to the Telecommunications Act is recommended. In addition, the amendment to the Telecommunications Act should take place within a short period of time as creating legal certainty is an important prerequisite for the rapid development of mobile broadband networks in the Federal Republic of Germany, which is economically desirable and aimed at by the Federal Government.

**16.*** As to the details, the Monopolies Commission takes a critical stance to some of the envisaged changes. That applies to enshrining in legislation the power to define regional markets, which seems unnecessary because defining sub-national markets does not counter applicable law, and the obligation to take into account specific risks of innovation within the context of price regulating, for which the regulatory authority does not usually have the required informations. It also makes little sense to introduce functional separation as an additional regulatory instrument. Both the late market phase and the favourable development of competition in telecommunications markets are arguments against introducing such a restrictive instrument. While transposition into national law is required, the exceptional character of this instrument should be emphasized.

**17.*** A positive assessment is made of the planned statutory clarification that the access regulation also applies to upstream infrastructures, such as ducts and building wiring, the transformation of the compulsory obligation to guarantee carrier selection and carrier pre-selection into an optional regulatory instrument and the strengthening of the independence of the regulatory authority through changing the rules on dismissing the authority’s president. An issue that was not addressed in the key points of the Federal Ministry of Economics and Technology but which in the view of the Monopolies Commission is mandatory in European legislation is the ban on any instructions being given to the national regulatory authority. That also applies explicitly to the instructions of the Federal Minister of Economics and Technology.

**18.*** The plan to prevent the hoarding of frequencies by means of fines and to prevent the faster revocability of usage rights is also positive in principle. It is to be considered, however, that there may be good reasons for temporarily not using frequencies, for example because a technology for frequency use is not available. It makes sense to improve the framework conditions for sales, leasing and the joint use of frequencies. For frequencies to be used efficiently, it has to be possible for rights to be transferred to third parties with as few restrictions as possible. It would also be conceivable to prescribe their sale, lease or co-use if the owner of frequency usage rights does not use them or does not use them within the time limits for the purpose associated with the granting of the rights.

- **New forms of cooperation with the Federal Statistical Office**

**19.*** In compiling statistics on concentration, the Monopolies Commission continues to cooperate closely with the Federal Statistical Office (*Statistisches Bundesamt*). Following first positive experiences of using the business register as the database for evaluating business concentration in the last Biennial Report, the current statistics on concentration also use this database. For the first time, the Monopolies Commission had the opportunity to work with factually anonymised official microdata.

**20.*** As regards official data, until March of this year, the Monopolies Commission was only able to take part in controlled teleprocessing. The sheer effort of all the monitoring and controlling involved led to delays that prevented any in-depth scientific analysis, however.

**21.*** This situation prompted the Monopolies Commission to once again apply for access to official microdata via workplace computers at the Research Data Centre (*Forschungsdatenzentrum – FDZ*) of the Federal Statistical Office and the statistical offices of the Federal States, allowing public data to be handled much more conveniently. Whether the Monopolies Commission can gain such access depends primarily on whether it falls under the scope of Section 16 (6) of the Federal Statistics Law (*Bundesstatistikgesetz – BStatG*). This has long been a subject of dispute.

**22.*** In the past, the Federal Statistical Office took the view that access by the Monopolies Commission to official data was conclusively provided for in Section 47 of the Act against Restraints of Competition (*Gesetz gegen Wettberwerbsbeschränkungen – GWB*), thus constituting a special provision to the extent that application of the general provision on access under Section 16 (6) of the Federal Statistics Law is excluded. This legal opinion is not convincing, however. In case of a conflict of laws, the special law can only prevail over general law if both laws cover the same circumstances and require mutually exclusive consequences. Neither of these conditions is fulfilled in the case concerned here. The Monopolies Commission already noted in its Seventeenth Biennial Report that, in particular, the substantiation of the law and the purpose and objective of Section 47 of the Act against Restraints of Competition also oppose the interpretation of the Federal Statistical Office.

**23.*** In December 2009, the Sub-Working Group on Law of the Federal Statistical Office and the statistical offices of the Federal States came to the conclusion that, taking into account the Monopolies Commission's legal opinion, which had been prepared in detail, nothing stood in the way of applying Section 16 (6) of the Federal Statistics Law. In order to reach final clarity on this point, the legislator could take into account the amendments proposed in the last Biennial Report in amending Section 47 of the Act against Restraints of Competition. In view of the project currently under way to modernize reporting on concentrations, however, it might be appropriate to wait for the expert recommendations on the subject.

**24.*** The Monopolies Commissions regards the access to workplace computers in the Research Data Centre which, to all intents and purposes, has been available since March 2010, as an outstanding improvement in the possibilities for analysis. The greater working efficiency resulting from direct access to data creates scope for additional surveys, thus improving reporting on concentrations. It is also to be noted positively that the Research Data Centre is represented by a department at the Monopolies Commission’s location in Bonn.

**25.*** In spite of all the advantages associated with processing official microdata at the Research Data Centre, attention is to be drawn to the fact that for extensive analyses, considerable financial expenditures continue to be likely, as it is anticipated that most of the expenses of collating public data in future will no longer be met largely by the Research Data Centre, but will be charged in full to the client. In addition, it continues to be practically impossible to react quickly to current issues because the Research Data Centre’s staffing and material resources are often already booked out for other research projects many months in advance. This can lead to the absurd situation that private research interests impair the quality of the Monopolies Commission’s public policy consultancy service.

**26.*** During the short period of practical cooperation over the last two months before this report was submitted, it was already evident that the Monopolies Commission’s requirements place an extremely heavy additional burden on the Research Data Centre which cannot be borne within the framework of its usual business processes. In particular, the enormous quantity of data that is needed and the requirement that they be extremely up-to-date present the Research Data Centre with a great challenge. While the great commitment of Research Data Centre staff often compensates for extremely large additional workloads, in the medium term the increased demands can only be met by adequately increasing resources to maintain smooth operations.

**27.*** In view of the reporting on concentrations based on official data in accordance with Section 47 (1) of the Act against Restraints of Competition and the increasing significance of empirical evaluations for economic analyses, it would therefore be extremely useful if an official liaison office were to be set up for the Monopolies Commission at the Federal Statistical Office. This would not only be of benefit to the statistics on concentration, but also to all the Monopolies Commission’s other fields of operation, as such a liaison office would enable specific evaluations to be made on the basis of official data even without programming skills. Just one member of staff would be sufficient to bring about considerable improvements in the Commission’s quantitative work.

**28.*** It is also already evident that analyses based on official data will become more important in providing research-based policy consultancy in general and for concentration statistics in particular. It is already impossible to carry out even the surveys already requested from the Monopolies Commission to date within the framework of the usual working processes at the Research Data Centre. As a consequence, the Monopolies Commission has to wait for extremely long periods before access to the data is even made available. Finally, setting up a liaison office would have the great advantage of significantly reducing the reaction times to topical issues relating to competition policy using evidence-based analyses. In terms of organization, a liaison office could be set up as an administrative post with the President of the Federal Statistical Office by analogy with the Liaison Office of the German Council of

Economic Experts (*Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung*). Alternatively, it could be set up as an additional position in the Research Data Centre of the Federal Statistical Office.

### *I. Statistics on concentration before modernisation*

**29.*** "Traditional" statistics on concentration once again were compiled in close cooperation with the Federal Statistical Office in accordance with the statutory obligation of Section 44 (1) sentence 1 of the Act against Restraints of Competition. The focus of current reporting on concentration is also on preparing fundamental modernization, as the possibilities for interpreting "traditional" reporting for economic policy purposes continue to be extremely limited. This is mainly on account of two critical areas which cannot be removed simply by making additional investments in more extensive quantities of data or more complex calculation methods, but which require fundamental reconsideration.

**30.*** Firstly, this applies crucially to the problem of inadequate empirical market definitions, which is becoming more and more acute in the wake of globalization. This is highlighted by the Monopolies Commission's first analysis of the significance of trade within the EU's single market. According to this analysis, an estimated approximately 50 % of the more than 3.5 million companies in the official business register were involved in trade within the EU's single market during the reporting year 2007. The great significance of economic globalization is also confirmed by the fact that in 2007, some 12 % of employees subject to social insurance contributions in Germany were working in companies controlled by a foreign owner. In this context, one may well question whether there is still sufficient justification for compiling "traditional" concentration tables based solely on national data in the annexes to the Biennial Report. If the market definitions on which they are based continue to be made exclusively by classifying economic sectors, the concentration rates and Herfindahl-Hirschman Indices (HHI) will be of extremely low informative value. However, appropriately defining markets in all sectors is neither compatible with the Monopolies Commission's tasks, nor would it be even remotely possible with the resources available.

**31.*** The second significant reason for aiming to reconceive concentration statistics lies in the fact that there has been a fundamental change in the situation concerning the available company data in comparison with previous years. While nearly all business databases available and relevant to the Monopolies Commission were evaluated until the Sixteenth Biennial Report, the range of relevant public and private databases now already far exceeds the Monopolies Commission's financial and staffing capacities for analysis. In addition, numerous other concomitant indicators are available for many companies, enabling manifold new kinds of analyses to be made. Due to the continuing rapid developments in the data sector, the potential for analysis is growing constantly, shifting the focal areas of activity in reporting on concentration accordingly into fundamentally different areas of work than was the case in 2008 and previously.

**32.*** For example, recording the cross-shareholdings of German companies in the official statistics in accordance with the Commission Regulation for a standardized and secured system of registries, which was initiated by the Monopolies Commission on the basis of its own calculations in previous years, has been carried out by the Federal Statistical Office itself since 2005. In specific terms, this means that the relevant data are purchased from private suppliers in public tenders and linked with the official data of the Federal Statistical Office. The purchase and inclusion of additional data by the Monopolies Commission would lead to immense costs and at best marginal improvements. Quite apart from that, the much more serious problems of inadequate market definition discussed above would by no means be resolved, even rudimentarily. Thus, the extremely small amount of additional information likely to be gained by extending the data would be completely disproportionate to the immense likely costs. Moreover, evaluation of the spectrum of economic data currently available has turned attention to focal areas of significantly greater relevance to economic policy, which, until a few years ago, were impossible to analyse.

**33.*** In view of the great amount of newly acquired potential for analysis, the opportunity costs to the Monopolies Commission of traditional reporting on concentrations have increased enormously in comparison with previous Biennial Reports. Financial and staffing resources will be tied by the preparation of traditional concentration statistics until the problem of inadequate empirical market definitions is resolved for a major share of the German business sector at an acceptable cost. If used in other task areas, these resources could be of significantly greater informative value. In order to increase the informative value for competition policy of analyses of concentration statistics, the Monopolies Commission is therefore considering placing a stronger focus on particular markets or specific issues in competition policy, e.g. M&A activities, public subsidies, national funds, international corporate integration, enterprise start-ups and tasks, relocations abroad or nationally dominant corporations. Focusing on certain subjects or sectors would have the advantage that analyses could be made that go into greater depth with regard to their content and methodology, which is usually a prerequisite for being able to make statements and recommendations for action that are of relevance to economic policy. In principle, the Monopolies Commission considers it to be preferable to present more in-depth analyses on a particular question than to prepare very extensive statistics for a very large number of companies which are of less informative value.

**34.*** On account of the enormous diversity of issues of relevance to competition policy which it will be possible to analyse in the future, studies of many interesting subject areas and sets of data will inevitably not be carried out for capacity reasons. Thus, in the future, the question will increasingly be which data should be acquired and which analyses should be carried out with the scarce resources. In order to base the selection of subjects more strongly on user preferences, interested readers of concentration statistics are invited to make proposals to the Monopolies Commission for future focal areas and studies of specific subject areas.

**35.*** Both the problems discussed above of making an adequate empirical representation of markets and of the considerably increased potential for analysing public and private databases in recent years are arguments in favour of fundamentally restructuring concentration statistics. This situation has prompted the Federal Ministry of Economics and Technology to award the Centre for European Economic Research (*Zentrum für Europäische Wirtschaftsforschung – ZEW*) a contract to compile an expert report with the objective of developing a new conceptual basis for future reporting on concentration. In so doing, it successfully acquired the staff and financial resources as well as the requisite expertise required for an extensive task of this kind. If possible, initial results of the ZEW report are already to be taken into account in the Monopolies Commission's next Biennial Report.

**36.*** In parallel with the conceptual work of the Centre for European Economic Research, the Monopolies Commission is aiming to extend empirical evaluations to include the official company data now available. To what extent substantial progress can be made in this area depends decisively on the capacities of the Federal Statistical Office and the statistical offices of the Federal States, however, which cannot be influenced by the Monopolies Commission.

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

**37.*** The starting point for the Monopolies Commission's report assessing the state and development of aggregate concentration and corporate integration is the list of the 100 largest companies in the economy as a whole by domestic value added. In addition to domestic corporate divisions, the Monopolies Commission also analyses world value added by the large companies. The study of the hundred largest companies by domestic value added also covers the ties between these companies in the form of shareholdings, personnel links and cooperation through joint ventures. The consideration of the hundred largest companies is supplemented by identifying the largest companies in manufacturing, trade, transport and services, and banking and insurance, measured by their sector-specific volume of business. This part of the report concludes with a calculation of the involvement of the 100 largest companies in the corporate mergers reported on by the Federal Cartel Office (*Bundeskartell-amt*).

**38.*** The 100 largest companies showed domestic value added of around EUR 263 billion in the year reviewed, 2008. This was a fall of 6.3 % from 2006. The value added by all companies in Germany rose during the period observed by 6.6 %. The contribution of the large companies to total value added thus fell to 15.8 % after rising temporarily to 18.0 % in 2006.

The ten largest companies accounted for 39.3 % of the value added by all the large companies examined, and this was once again below the figure for the previous period (41.0 %). The share of the 20 largest companies in the value added by the 100 largest companies also fell, from 58.9 % in 2006 to 56.9 % in 2008. The reduction in the value added by the top 20 companies was responsible for approximately 88 % of the absolute reduction in the value added by the 100 largest companies between the reporting years 2006 and 2008.

**39.*** The analysis of the worldwide value added indicates that production and acquisition processes are becoming increasingly international in the wake of globalization and, possibly as a consequence, that corporate divisions are being shifted abroad. This also enables the economic weight of the decision-making centres responsible for these companies to be adequately identified. Of the 49 companies examined that had their corporate headquarters in Germany and that were among the 100 largest companies during both 2006 and 2008, the periods reviewed, and which were identified as operating primarily in the manufacturing, trade, transport and services sectors, the value added amounted to approximately 58.0 %. The share of domestic value added of worldwide value added by the ten largest companies increased slightly by 1.8 % to 59.1 %. The increase in the domestic share here is not due to an increase in the domestic value added, but results from a disproportionately large fall in the companies' total average value added.

**40.*** As far as data were available for the two years, the development of the large companies between 2006 and 2008 was also analysed by number of persons employed, fixed assets and cash flow. The adjusted study of the number of persons employed included 90 companies that were among the 100 largest companies in both years reviewed. Their share in the number employed by all companies fell from 13.6 % in 2006 to 12.7 % in 2008. The importance of large companies as employers has thus fallen again. The value added per person employed fell to an average of EUR 107.0 thousand in 2008 on account of the relatively small reduction of 7.9 % in the numbers of persons employed. The comparable indicator for the economy as a whole was EUR 66.6 thousand.

Since 2006, the Monopolies Commission has been developing a supplementary time series to that of the 100 largest companies, measured by the number of domestic employees. In 2008, the 100 largest employers in Germany employed 3.481 million members of staff, nearly unchanged on the previous report (2006: 3.523 million).

**41.*** As well as value added, supplementary sector-specific indicators are used to assess the size of companies in order to shed more light on the significance of large companies in the individual economic sectors. Turnover is used as a criterion to measure size for industrial, transport, service and trading companies. The balance sheet total is preferred as a measure of the size of banks, while income from policies is used for insurance companies. Value added must be regarded as a better criterion of size, however, as unlike the alternatives, which reflect the volume of business, it permits a cross-sectoral comparison of companies and reflects the degree of their vertical integration.

The growth in the volume of business of the 50 largest manufacturing companies was below the general market development. The share of the total volume of business of the top ten companies in the trade, transport, service and banking sectors also fell. Only the growth in the policy income of the ten largest insurance companies was above the average of industry as a whole. Of the business sectors examined, insurance and banking continued to have the highest levels of concentration.

**42.*** The shareholders of the large companies are analysed first with regard to the shareholder structure of the companies in the group under consideration, and secondly with regard to the cross-shareholdings among the 100 largest companies. In most of the companies under consideration, the ownership had not greatly changed. There were the following changes in the groups of shareholders holding the majority in the large companies examined. The number of companies where a single foreign owner held the majority fell to 27 companies from 28 in 2006. The number of companies with one individual, a family or family foundation holding the majority increased from 21 to 23. The number of companies where the majority of shareholdings was widely dispersed also increased to 21 (2006: 20 enterprises). The number of large companies with a majority of shares in public ownership remained unchanged at 12. In seven cases (2006: 12), the majority of equity could not be categorised as belonging to any one ownership category. Volkswagen AG and Evonik Industries AG were two companies in which another of the 100 largest companies had a majority shareholding during the period examined. In one other case (2006: two cases) the shares held by the 100 largest companies amounted to more than 50 %.

**43.*** During the period under review, the number of interlocked companies fell from 39 in 2006 to 37. If one observes the development since 1996, when there was the largest number of cross-shareholdings, a progressive tendency towards unravelling cross-shareholdings is to be observed. In comparison with the remaining 37 enterprises, there were still 62 companies in the network of cross-shareholdings in 1996. The total number of shareholders follows the same trend (1996: 39, 2008: 17) as does the number of companies with shareholdings (1996: 51, 2008: 29). The total number of shareholdings fell between 1996 and 2008 from 143 to 47. This development was largely due to the retreat of the financial service providers among the companies examined from the network. The total number of financial service providers' shareholdings fell from 103 shareholdings in 1996 to 37 in 2008. The total number of shareholdings of companies not to be categorized as belonging to the bank or insurance sectors fell by 75.0 % to ten between 1996 and 2008. The level of interdependency measured by the value added controlled by equity shareholdings as a share of the total value added by the 100 largest companies fell from 13.3 % to 7.6 % during the same period. Most of the shareholdings in other companies on the hundred largest companies list were, as in previous years, held by Allianz SE, with eleven (2006: 16), while Deutsche Bank AG had nine shareholdings on the day in question (2006: six). The decline in cross-shareholdings is due to various exogenous and endogenous factors, such as ongoing globalization and institutional changes within Germany. As well as cases involving the unravelling of cross-shareholdings, some of the reduction in the degree of cross-shareholdings may also be explained by mergers between formerly closely interlocked companies on the 100 largest companies list.

**44.*** In examining interlocking directorates, only those ties were included where one or more persons were on the management or controlling bodies of at least two of the 100 largest companies at the same time, In 2008, 33 (2006: 34) of the 100 largest companies had members of their management on the controlling bodies of 43 (2006: 44) of the other largest companies. The total number of ties through management board members was 76 in comparison with 84 in 2006. The network of interlocking directorates has become smaller since 1996; this is similar to the development of cross-shareholdings, although there is only a weak correlation between these two forms of interlock. Since 1996, the number of ties through management board members in controlling bodies fell by 59.1 %. The reduction of 35.3 % in the number of ties through managing directors with external controlling mandates in the manufacturing, trade, transport and services sectors was comparatively small, however. In 2008, 15 of the 76 (19.7 %) interlocking directorates identified were accompanied by a parallel shareholding. The number of corporate ties through other joint holders of controlling mandates fell by 48.8 % over a twelve-year period to 215 cases. The degree of integration, as the share of such links of the total number of possible ties, halved from 8.5 % in 1996 to 4.3 % in 2008.

**45.*** The result of the analysis of the various groups of elected representatives making up the controlling bodies was that the proportion of external managing directors among employer representatives in the controlling bodies of the 100 largest companies was 9.2 % (2006: 10.5 %). 10.7 % (2006: 10.8 %) of the elected shareholder representatives were also public representatives. For the first time, the Monopolies Commission also analysed the chairmen of the controlling bodies examined in greater depth on account of their outstanding position. 40.6 % (2006: 36.5 %) of the chairmen of the respective controlling body had previously held at least one other managing director’s or controlling mandate in one of the companies in the group of companies analysed. In 38.5 % (2006: 37.5 %) of cases, the presiding chairman of the controlling body had previously held a managing director’s mandate in the same company.

**46.*** The Monopolies Commission continues to see a considerable need for research with regard to the empirical analysis of the effects of interlocking directorates on parameters of relevance to competition policy as well as to issues of corporate governance from a business perspective. It will therefore increasingly subject interlocking directorates and capital interlocking at company level to empirical analysis in the future.

**47.*** The number of interlocks among the 20 largest companies through joint ventures once again fell significantly to 19 such corporate links, from 30 in 2006. The degree of integration was measured as the share of identified links of the total number of possible contacts between the 18 companies that were among the 20 largest companies in both years. This share fell by 5.9 % to 9.8 %. In all, 47 (2006: 58) joint ventures were counted. In some cases, the contact between two companies took place through a number of joint ventures.

**48.*** In studying the involvement of the 100 largest companies in the mergers to be notified to the Federal Cartel Office before implementation in accordance with Section 39 of the Act against Restraints of Competition and the number of clearance decisions, the Monopolies Commission underlines the significance for competition policy of the external growth of the 100 largest companies. Companies on this list were involved in 483 (2006/07: 602) of the total of 2,675 mergers notified in 2008/09 (2006/07: 4,071). With a share of 18.1 % (2006/07: 14.8 %) of the total number of mergers, the companies on the hundred largest companies list were involved in merger activities to a greater extent than companies as a whole. The share of the 100 largest companies of the 2,484 clearances also rose during 2008/09, the period under review, to 16.5 % (2006/07: 14.0 %).

**49.*** Altogether, the impression is that there was a downward trend in concentration in the large companies' share of total value added over the period, which was temporarily interrupted in 2006. The share of large companies in total value added in 2008, 15.8 %, was significantly lower than the long-term average of 18.4 %. The number of persons employed by the 100 largest companies as a proportion of the total number of persons employed has also fallen steadily since 1994 to a current figure of 13.3 %. With regard to the different size indicators examined in particular economic sectors, an increase in concentration in comparison with the previous period under review was only established in the insurance sector.

It is also observed that there has been an increasing dissolution of the network of mutual cross-shareholdings and interlocking directorates among the largest 100 companies since 1996. The number of interlocks through joint ventures also fell during the period under review. A relative increase on the previous period was to be observed with regard to the participation of large companies in the mergers notified to the Federal Cartel Office and the number of mergers cleared.

### *III. International interlocking directorates*

**50.*** To supplement its analysis of the concentration and interlocks among large German companies in Chapter II, the Monopolies Commission evaluated the state and significance of interlocking directorates among companies in the OECD countries for the first time within the context of its report on concentration. In the wake of ongoing globalization and market integration, international corporate interlocks are becoming increasingly significant.

**51.*** Firstly, the intensity of interlocking directorates in and between individual OECD countries was investigated using a sample of more than 18,000 companies from selected OECD Member States in order to highlight the international significance of interlocking directorates. Secondly, international and national interlocks were analysed at sectoral level in order to show their relevance in different economic sectors.

**52.*** With a share of more than 98 %, the majority of the companies in the sample were listed on at least one international stock exchange. Also, most of the companies in the sample are ultimate parent companies within the group and of these some 72 % have more than 250 employees in the corporate group. Analysis was limited primarily to listed large companies on account of the stricter obligations applying to them world-wide to publish annual accounts and other relevant company information and the resulting better availability of data. No conclusions may be drawn concerning the corporate scene as a whole in the countries included in the study on account of the selection that was made. In 624 cases, a share of 3.5 % of the sample, the corporate headquarters were in Germany.

**53.*** As of January 2008, all 22 of the OECD Member States in the sample had both national and international interlocks. On average, 59.3 % of companies had interlocking directorates with at least one other company of the companies included in the study. With a share of 54.6 %, Germany is in the medium range, just under the international average. With a share of 49.8 %, approximately half of the German companies observed have ties with at least one other domestic company, while 21.3 % of companies have international ties. Measured by the number of possible contacts within the network, the highest interlock level of German companies was with companies from Switzerland and the Netherlands.

**54.*** For 11,300 companies from the sample, interlocking directorates in sectors in the manufacturing industry were identified using two-digit codes. Corporate groups that generally have operations in a number of sectors were classified as belonging to a particular sector on the basis of their relevant focal area of activity. As well as identifying the total number of interlocking companies, a differentiation was made between interlocking directorates within and outside a particular economic sector. The results show that intersectoral interlocks, with an average share of 64.3 %, are the dominant form of interlocks, in comparison with intrasectoral interlocks, with a share of 15.9 %. This finding is also reflected when differentiating between national and international interlocks, whereby the share of international interlocking directorates is significantly lower. While 61.1 % of companies has on average at least one national intersectoral interlock, just 19.5 % of the companies studied has international intersectoral interlocks. The average shares of international intrasectoral interlocks were 13.7 % and 3.4 % respectively.

**55.*** The descriptive findings concerning the companies included in the study suggest that interlocking directorates have a positive effect on the competitive position of the companies involved. In 24 of the 29 economic sectors covered by the study, the companies with interlocking directorates have a higher median turnover-yield ratio than the companies in the same sector that do not have interlocking directorates. Since corporate profits are influenced by a number of other factors and the study does not clarify the direction of causality, the profit comparison made can only be interpreted to a limited extent as an indication of the competitive effects of interlocking directorates. However, the empirical findings suggest that interlocking directorates should be analysed in greater depth, for example, to separate economic effects from competitive effects and to decipher causal processes.

**56.*** The descriptive analysis of international interlocking directorates has shown that interlocking directorates are not a German phenomenon. While in the majority of sectors, interlocking directorates are strongly influenced by national links, there is likely to be an increase in international interlocks in the wake of ongoing economic globalization. The results therefore give grounds for continuing to look at the subject of interlocking directorates in an international context in the future. In order to be able to better analyse interlocking directorates from the perspective of competition in the future, the empirical studies should ideally be extended at three different levels. First, the database should be improved. This should be followed by an extension of the analytical methods and observation of the temporal development of interlocking directorates from an international perspective.

**57.*** Using an improved database, extensions are also possible at the level of analytical methods, allowing reliable statements to be made. Thus, it would be beneficial, at least for all the enterprises operating in selected sectors, to study both interlocking directorates and cross-shareholdings in parallel in order to come closer to a market-based study. In this context, the findings of the current survey on interlocks could serve as the basis for further sectoral analysis. In addition, supplementary person-related concomitant indicators would be of interest to make better-qualified statements on the function of interlocking corporate directorates. In addition, the use of special network analyses could be useful in order to discover important key connections or special forms of interlocking such as triangular and circular interlocks. Regardless of the specific form of future analyses on interlocking directorates, it is certainly useful to devote particular attention to developments over time, since longitudinal observations are particularly well suited to highlighting causal connections and describing development trends. It remains for future studies to deliver results by implementing some of the points referred to above that enable a specific competition-related evaluation of interlocking directorates to be made. Since an extension of interlocking directorates and cross-shareholdings across national borders is also likely in the wake of ongoing globalization, the Monopolies Commission plans to examine this subject further and to address it again in the future.

### *IV. Control of abusive practices by dominant undertakings and merger control*

**58.*** Within the period under review, the creation of an area of exemption from competition law by Section 17 of the Financial-Market Stabilization Acceleration Act (*Finanzmarkt-stabilisierungsbeschleunigungsgesetz*) in October 2008 was significant from the point of view of competition policy. This exemption from general competition rules cannot be further-reaching than its objective, however, and therefore covers only the acquisitions of the financial market stabilization fund. For this reason, reprivatizations of state property acquired during the crisis for stabilization reasons are subject to the provisions of the Act against Restraints of Competition.

**59.*** To date, there is no evidence of cartels having been formed or market power having been abused on account of the crisis. To date, the Federal Cartel Office has also not had to clear any rescue mergers, although parties to mergers have more frequently referred to this legal possibility. The smaller number of notifications due to the crisis has enabled the Federal Cartel Office’s Decision Divisions to step up their activities in the fields of prosecuting cartels and controlling abusive practises by dominant undertakings. While the clearances of mergers between Deutsche Bank/Postbank, Commerzbank/Dresdner Bank and WGZ Bank/DZ Bank have further increased concentration in the German banking sector, there continues to be substantial competition in the narrower economic sense in the markets concerned.

**60.*** In the context of the crisis, the Monopolies Commission generally recalls that effective competitive structures are the best guarantee of speedy and smooth adaptation of economic structures to a changed environment. Even during the crisis, the focus of economic policy must be on maintaining self-supporting competitive structures that can meet the challenges of the future. Especially in difficult times, the basic principle of regulatory policy must be maintained of synchronizing property, responsibility and liability in order to guarantee effective social and economic exchange on a sustainable basis.

**61.*** The Federal Cartel Office is making prolific use of the newly-introduced instrument of sector enquiries under the Seventh Amendment to the Act against Restraints of Competition of 2005. During the period under review, two sector enquiries were completed, in the outdoor advertising and the gas transmission markets; enquiries are under way in the milk, fuel, electricity wholesale and electricity generation, and district heating markets. The changes prompted by the enquiry into the outdoor advertising sector, particularly concerning municipalities’ practices relating to awarding contracts and the contracts themselves, have already made this market more competitive. The sector enquiry of capacities in the German gas transmission networks enabled the Federal Cartel Office to gain new insight and to test hypotheses against reality and it has already had effects on decision-making practice under competition law. The enquiry into the electricity wholesale and electricity generation sector, which is carried out with the use of considerable staffing and data processing resources, analyses both incentives and possibilities in the electricity wholesale market for producers to abusively exploit their market power. In order to temper the weaknesses of mere ex-post control, the implementation of an independent market monitoring agency is now planned in line with an earlier demand by the Monopolies Commission. It is to gather realtime information relevant to exchange and OTC electricity wholesale and to monitor the bidding strategy of members of the stock exchange to ensure that their behaviour conforms to the market and to identify any attempts at manipulation. Overall, it may be stated that the sector enquiry enables structural barriers to competition in individual markets to be identified, constituting a valuable addition to the Federal Cartel Office's arsenal.

**62.*** First cases of application show the practical implementation of the new forms of action available to the Federal Cartel Office since 2005, above all the instrument of binding commitments. Negotiated binding commitments can eliminate barriers to competition with relatively little effort and also give an impetus for the creation of competition and they have already attained considerable significance in the practice of the Federal Cartel Office. In order to clarify the way in which this instrument functions and its advantages and disadvantages, two proceedings were examined: the attempt to create competitive structures in raw timber marketing, as well as making partial reimbursements or reductions and refraining from increasing excessive gas prices. This analysis leads the Monopolies Commission to the conclusion that ending proceedings by means of binding commitments is primarily worth considering when proceedings are based on a clear legal foundation. New legal questions and circumstances of great relevance to other market participants, on the other hand, should be subject to binding clarification and should be examined by a court in order to clarify the rules of conduct in the market, also for parties not involved in the proceedings.

**63.*** In the practice of the Federal Cartel Office and of other modern competition authorities, the more or less informal enhancement of the effectiveness of competition law and the idea of competition are gaining increasing significance. The term "competition advocacy" is used to mean extending the deterrence effect of competition law through public relations in the widest sense on the one hand and actively promoting the idea of competition within government organizational structures on the other. The range of market-related advocacy activities in the traditional area of application of competition law covers such things as the publication of guidelines, information leaflets, priority lists, "chairmen's letters", workshops, conference presentations, interviews, (targeted) press work, and publications of general information such as activity reports and case reports. The government-related side of competition advocacy is less well-established but is gaining significance as government structures and government action become more dynamic, and with a more general awareness of the need to a certain extent for efficiency even in government administration and of the need to use the advantages of competition in the border area between government and society. Here, first and foremost, unsolicited statements on laws and legislative projects, involvement in legislative processes, appearance in court as an *amicus curiae* and participation in the administrative procedures of other authorities are of significance. The Monopolies Commission welcomes the successes and achievements of the Federal Cartel Office in this field to date. It recommends the legislator to enshrine in the next amendment to the Act against Restraints of Competition the formal involvement of the Federal Cartel Office in legislative procedure.

**64.*** The assessment and evaluation of buyer concentration was the subject of a number of proceedings during the period under review. It is also currently gaining significance in the practice of other competition authorities and in the academic discussion. The Monopolies Commission is examining buyer concentration conceptually and on the basis of a number of examples. In the EDEKA/Tengelmann case, the merger was only cleared subject to the suspensive condition and obligation that the planned purchasing cooperation of the two retail companies was not carried out in order to prevent the creation of buyer concentration. Buyer concentration in the automotive industry was subjected to a detailed examination during the clearance of the merger of convertible roof system manufacturers Webasto and Edscha. Within the context of the milk sector enquiry, the distribution of market power is also being analysed in detail at the different stages in the value chain. In summary, it may be stated that the – abstract – evaluation of buyer concentration is strongly dependent on the basic assumptions of an analysis. In this context, the Monopolies Commission recalls that the Act against Restraints of Competition offers protection against exploitation in principle, regardless of whether advantages gained are passed on, but its aim cannot be to protect inefficient structures.

**65.*** The principles and some examples of the application of competition law in the control of abusive practises in government activities are presented and analysed. The details of the extent to which government activities are subject to competition law and the control of competition authorities has still not been completely clarified. Here, the lack of any explicit national statutory control on subsidies or monopolies like the one contained in Article 106 ff. of the Consolidated Version of the Treaty on the Functioning of the European Union (ex Article 86 ff. TEU) has an effect, as does the still too limited practical significance of the constitutional protection of free competition. There is agreement on far-reaching principles, however.

In addition to the analysis of antitrust enforcement in the drinking water supply in the introductory chapter of this report, three cases of application will be examined here: the confirmation of the Federal Cartel Office's prohibition in the "Lottoblock" case, the creation of competition in raw timber marketing by the Federal States, which frequently used to be organised in cartels, and abusive pricing proceedings against two Federal States in connection with below-cost charges for non-sovereign forestry services.

It has been explicitly laid down that the Act against Restraints of Competition is applicable to state-owned companies. The results of the analysis also conclude that this applies to all state activities that are not genuinely sovereign. It is not the form the activity takes that is relevant here, but the essence of the activity. In principle, this also applies where the government has a statutory supportive duty. Achieving such duties' objective may justify limiting competition. However, the more competition is limited, the greater is the need to have a clear statutory basis for any anticompetitive activity in realizing the supportive duties' objective.

In any case, German constitutional law, like European Union law, requires that a monopoly set up to perform sovereign tasks actually does do justice to the concern justifying it and that it pursues its objective in a coherent and systematic way. The Federal Cartel Office and the courts are also obliged to control these conditions in detail. In summary, the Monopolies Commission points out that on the one hand restrictions to free competition by public authorities are subject to narrow limits, and on the other, the requirement for government agencies to act efficiently and on the basis of constitutional principles requires them to use market mechanisms as far as possible.

**66.*** Unlike in the case of abusive behaviour, prosecuting abusive pricing often requires a precise attribution of costs and the identification of comparable markets, which almost always leads to the parties concerned and the Federal Cartel Office reaching different conclusions on the limits of what is permitted in individual cases. For these reasons, the availability of cost data and the (statutory) allocation of the burden of proof are of key significance for prosecuting abusive pricing in many cases. A clear yardstick also would facilitate quite considerably the classification of actual prices as abusive in the case of abusive pricing. In this context, the Monopolies Commission has been examining in particular four proceedings in the period under review.

The examination of a margin squeeze (sale by a dominant company of input materials to competitors in a downstream market at prices at which they cannot make a bid that can compete with the dominant company's end product prices) in the telecommunications sector led to proceedings being stopped on the basis of the dominant company's costs.

The quashing of the Federal Cartel Office's decision against the Rossmann drug store chain by the Higher Regional Court Düsseldorf underlines, as the Monopolies Commission has previously done, that in calculating cost price, the inclusion of contributions to advertising costs need not be attributed equally across the entire range purchased from the subsidizing manufacturer, but only to the articles actually advertised. This respect for entrepreneurial decisions makes the ban on selling articles below cost price, which was tightened in 2007, practically ineffectual, which merely highlights the practical limits of imposing such price controls.

30 proceedings based on Section 29 of the Act against Restraints of Competition (excessive pricing in the energy sector), which was adopted in 2007, relating to exploitatively abusive gas prices for household and industrial customers were concluded by the Federal Cartel Office in favour of consumers. Here, the Federal Cartel Office used complex calculations to produce a basis for comparison. However, in practice, the remedy is like a customer loyalty and bonus programme and it is unlikely to have promoted competition. If prices are lowered on account of proceedings by competition authorities, there are fewer incentives for new market entrants. The Monopolies Commission believes that the commitment made in one case, to make the local gas network transparent for competitors, has been more useful.

Furthermore, some proceedings in which local authorities exploited statutory unclarities to impede competitors of the municipal utilities belonging to them demonstrated the need to amend the Ordinance on Concession Fees for Electricity and Gas (*Konzessionsabgaben-verordnung – KAV*).

Finally, the difficulties and de facto limits to establishing that abusive pricing has taken place are clearly illustrated in proceedings in the mobile telephone sector. These were so long and drawn-out that changes in the market led to behaviour that was originally problematic having only little market effect.

**67.*** The number of mergers notified to the Federal Cartel Office has fallen quite considerably; the number during the entire period under review is close to half the number during the previous period, and in a direct comparison between 2009 and 2007, the number was even smaller than half. This decline is only due in part to the economic situation however; the introduction of a second domestic turnover threshold for merger control also has had a major effect. Phase II proceedings were opened in 44 cases during the period under review, of which 20 were cleared without being subject to remedies, nine were cleared subject to remedies, seven were prohibited and eight were withdrawn.

**68.*** The application of merger control regulations to publicly owned companies is once again a subject of the Monopolies Commission's study. State-owned companies are explicitly subject to competition law. In view of the possible effects on competition, whether the merging units operate within public-law or private-law structures cannot be the factor that decides whether or not a transaction is subject to merger control. Otherwise, state players would be able to remove undertakings belonging to them from control under competition law as they pleased. Thus, it needs to be established that entrepreneurial structural measures are subject to the Act against Restraints on Competition, while only structural measures that genuinely fall under legislation on the organisation of government constitute sovereign measures that are exempt from merger control.

This also applies without exception to hospitals, as the Federal Court of Justice established in early 2008. The Higher Regional Court Düsseldorf went further in stating that even the binding inclusion of the merging hospitals as a single overall operating unit in the hospital plan under the Hospital Financing Act (*Krankenhausfinanzierungsgesetz*) does not prevent the application of merger control. In contrast, the Higher Regional Court assumed the existence of a legitimate monopoly in the gambling market without any special examination of the underlying rules and quashed the Federal Cartel Office's prohibition on Lotto Rheinland-Pfalz GmbH being taken over by Land Rhineland-Palatinate. The Higher Regional Court did not fulfil its obligation to carry out its own examination under European law in this case; instead, this decision cites rulings by other courts concerning these rules.

Overall, while the application of merger control regulations can be displaced by binding sovereign requirements that exclude competition in narrowly defined exceptional cases, the underlying regulations and decisions are to be measured against the requirements of the Basic Law and European Union law. They are subject to strict requirements with regard to the purpose pursued by the monopoly and the appropriacy, proportionality and coherence of this means, even when pursuing public objectives. The Federal Cartel Office and the courts are obliged to check these conditions in detail.

**69.*** The Third Small Business Relief Act (*Drittes Mittelstandsentlastungsgesetz*) added a second domestic turnover threshold to the merger control conditions. As well requiring the annual worldwide turnovers of all the undertakings involved to be more than EUR 500 million and for domestic turnovers of at least one of the undertakings involved to be more than EUR 25 million, it is now necessary for at least a second undertaking to have a domestic turnover of more than EUR 5 million in order for merger control obligations to apply. The change reduces the obligations placed on undertakings by the notification requirements and reduces the corresponding burden on the private sector as well as administration costs. These savings are usually likely to compensate for the resulting reduction in the protection of competition. Corrective action needs to be taken without delay on a follow-up problem, however. The second domestic turnover threshold has resulted in incentives for undertakings to avoid German merger control by dividing up larger transaction with a foreign connection so that each individual (partial) merger is no longer covered by the Act against Restraints of Competition. In order to prevent this evasive practice, the Monopolies Commission urgently advises that a statutory provision be added for counting the total turnovers of transactions carried out between the same parties within a certain period.

**70.*** Also in connection with international mergers, the Higher Regional Court Düsseldorf clarified that even mergers of undertakings that make only a fraction of their turnover in Germany may be completely prohibited under the Act against Restraints of Competition if the restraint on competition caused abroad is capable of "directly and appreciably" limiting free domestic competition on account of specific circumstances. This explicitly does not depend on the restraints being considerable.

**71.*** The minor market clause already discussed by the Monopolies Commission on a number of occasions once again caused considerable uncertainty in this period under review. It is not infrequently the case that the application of merger control rules depends on the question of whether turnover made by the parties to the merger in separate, but neighbouring markets is to be added up, which has led to legal disputes in a number of cases, some of them very extensive. The Monopolies Commission is analysing the recognized groups of cases where turnovers have been added up in this way and has established in agreement with the Federal Court of Justice that their prerequisites have not been sufficiently clarified in the Federal Cartel Office's practice, or in the academic discussion, even after decades. In order to reduce these uncertainties and to avoid pointless and complex legal disputes about them in the future, the Monopolies Commission recommends introducing a statutory rule on adding up turnovers.

**72.*** The Act against Restraints of Competition prohibits putting into effect a concentration that is subject to merger control that has not been cleared before the end of merger control periods and sanctions violations by making any such legal transactions null and void and by imposing fines. The Federal Court of Justice has now clarified that this prohibition on putting a concentration into effect derives directly from the law and is applicable to all notified mergers, i.e. even when there is a dispute as to the formal applicability of merger control rules and regardless of whether the formal and substantive conditions for prohibition are fulfilled.

**73.*** Further, the Federal Court of Justice has clarified competence for a provisional exemption of the parties involved from the prohibition of putting a concentration into effect. According to this, the appeals court has to decide on the exemption from a prohibition on putting a concentration into effect when a prohibition order is challenged. Thus, the Federal Court of Justice returns to the legal situation applying prior to the Sixth Amendment to the Act against Restraints on Competition. It also clarifies that in order to issue an exemption from the prohibition on putting a concentration into effect, serious doubts as to the validity of the challenged prohibition order do not in themselves suffice. Rather, what is of relevance is a consideration of the public interest in protecting the markets against deterioration in the structural conditions of competition on the one hand and the specific interests of private individuals meriting protection on the other. Maintaining the general prohibition on putting the concentration into effect must constitute a particular hardship for the parties concerned.

**74.*** On the basis of a legal amendment in the context of the Seventh Amendment to the Act against Restraints of Competition, the Federal Cartel Office revised its treatment of concentrations subject to notification which are not notified and are put into effect. The notification of such concentrations used to be treated as ex post notifications and the concentration was examined in merger control proceedings. Now, an examination takes place directly in the framework of divestiture proceedings. This new practice is not uncontroversial, particularly on account of the disadvantages associated with it for the undertakings concerned. None of the arguments brought forward against it is convincing, however. In order to remove any grounds for the dispute on this question in the literature, the Monopolies Commission recommends that the legislator inserts a clarification in the law.

**75.*** As it has already done in previous Biennial Reports, the Monopolies Commission examines the economic effects and legal treatment of joint ventures and the relevant practice by the Federal Cartel Office. On account of the ambivalence of positive and negative economic effects in founding joint ventures, these cannot be covered by one general formula; rather, in principle, each individual case has to be examined. Generally, it can only be stated that the coordinating effect of joint ventures should be limited to the minimum required to achieve the possible efficiencies. Legally, the concentration effect of joint ventures is subject to merger control when the conditions are fulfilled and the cooperative effects are covered by the ban on cartels. In principle, merger control and the ban on cartels may be applied in parallel. This dual control makes it possible to examine coordination effects both as part of merger control proceedings and subsequently separately. It does not make sense to carry out a final standard examination when taking the clearance decision because often the coordination effects of joint ventures only come about in the course of their implementation and are often difficult to predict.

Approximately one seventh of the Federal Cartel Office's merger control proceedings relate to joint ventures, but in the practice of sanctioning cartels, joint ventures play a disproportionately less important role. Occasionally in merger control decisions, the entire project is prohibited, or individual provisions of the notified basic agreement for the planned joint venture that are problematic from an antitrust perspective are prohibited. Breaking up interlocks through joint ventures does sometimes happen in practice, but it is very complicated.

In this connection, the Monopolies Commission is examining the foundation of joint ventures in milk marketing and in discount food retailing, which the Federal Cartel Office has addressed in its practical work. The second proceedings in particular clearly demonstrate how the Federal Cartel Office can significantly reduce the coordination effects of the network of relationships in merger clearance by influencing the joint venture's internal structure. Thus, it is vital that the joint venture cannot function as an information exchange and platform for coordination if at all possible.

Furthermore, a Federal Cartel Office information leaflet on guidelines on the limits and problems of joint ventures and cooperation practices under competition law could help to show undertakings the competition-law relevance of their structural cooperation more clearly. This would make the managers concerned more aware of the obligations and liability risks arising for them, thereby strengthening the deterrence effect of the ban on cartels.

Finally, the Monopolies Commission states that the coordination effects of joint ventures have a particularly damaging effect on competition in oligopoly markets since they lead to factors being strengthened which can considerably increase the probability of parallel conduct without competition: mutual transparency and information exchange, possibilities to sanction deviant behaviour and an alignment of the parent companies' interests. Such interlocks among oligopolists are quite common in practice. In this context, the Monopolies Commission particularly regrets that independent examinations of joint ventures that are separate from merger control proceedings are extremely rare. It suggests that the ban on cartels be made more effective in this area.

**76.*** The merger control regulations cover corporate shareholdings involving a share of less than 25 % of the voting rights which, on account of specific circumstances, still exercise a "competitively significant influence" on the associated undertaking's corporate policy. The Monopolies Commission analyses the prerequisites for the application of this omnibus clause, which are now well-established by twenty years of application and judicature, and concludes that it constitutes an indispensable part of merger control, even taking into account the concurrent insecurity costs for undertakings. During the period under review, two applications of this provision were of particular significance.

The Federal Cartel Office prohibited the acquisition of a 13.7 % share of voting rights by A-TEC in the Norddeutsche Affinerie, a decision confirmed by the Higher Regional Court Düsseldorf. The acquisition of influence of relevance under merger control law resulted from the nomination of three representatives to the supervisory board of Norddeutsche Affinerie planned by the parties and the fact that all the other shareholders of Norddeutsche Affinerie neither had A-TEC's in-depth knowledge of the copper industry nor were pursuing long-term strategic interests, as A-TEC is. Thus, it was likely that A-TEC would have a considerable de facto influence on Norddeutsche Affinerie's corporate and market policy.

In another case, a cross-shareholding between TUI/TUIfly and Air Berlin covered by the competitively significant influence criterion, which was initially notified as amounting to 19.9 %, was reduced to 9.9 % in the first instance on account of the Federal Cartel Office's concerns. While that meant that the merger control rules were no longer applicable, the Federal Cartel Office's concerns continued to exist on the basis of the prohibition of cartels, so that in the end, only a unilateral shareholding of 9.9 % was acquired, which does not raise any concerns under competition law.

While such minority shareholdings below the merger threshold are not regularly taken up in formal proceedings, they can have a coordinating effect, just as those covered by formal proceedings, particularly when there is mutual interlocking. The Monopolies Commission welcomes the fact that the Federal Cartel Office has explicitly taken up the issue of cross-shareholdings below the threshold, which once again makes the ban on cartels more effective in difficult territory, at least in terms of its signalling effect.

**77.*** Increasing use is being made of economic methods to define markets and in some cases also to make a direct assessment of competitive pressure in the decision-making practice of the European Commission, of foreign competition authorities and of the Federal Cartel Office. In principle, the Monopolies Commission advocates the use of such quantitative instruments in individual cases or in sector enquiries if the relevant applicable data are available or the significance of the market under observation justifies the effort involved. However, it is to be assumed at present that on account of practical limits to the informative value of such proceedings, they can only serve in most cases as an additional source of information, based on a conceptual market analysis. In individual cases, for example when useable data are available and there is a clear question to be addressed, such enquiries have already been able to provide additional information and have served in particular to confirm knowledge gained in the traditional way. The Monopolies Commission explicitly advocates the Federal Cartel Office building up expertise in this field and carrying out the relevant enquiries in appropriate cases. After all, the practical limits of applying quantitative techniques can only be pushed back by their application and improvement in practice.

**78.*** The Monopolies Commission is examining five prominent merger proceedings in connection with defining product markets, which is often of central importance in competition law cases. The decisions of the Federal Cartel Office and the Higher Regional Court Düsseldorf to impose a prohibition in the Assa Abloy/Simons Voss case are based on a total of three different market definitions and are unusually extensive. However, the situation in this case appears to be quite clear, even without a precise market definition. The absolute market leader in traditional lock technologies, which essentially dominates the sales chain with its contractual networks and distribution contracts, wished to take over the absolute market leader in an immediately neighbouring market; in addition, there was convergence of the two products concerned. In an integrated examination of the likely significant impediment to competition, a precise market definition could have remained open here, as the elimination of the potential and fringe competition of the respective other undertaking would certainly have made the strengthening of the dominant positions likely in the (individual) markets concerned. In view of the considerable effort made by the parties in this case, it may have been appropriate to examine the details of market definition in depth. Also, additional enquiries may generally enable more precise decisions to be taken with a higher guarantee of accuracy. However, the Monopolies Commission points out that in cases, where there is an extremely high level of long-term substitutability of two products and a key role is played by network and scale effects, which are already being used to the full by the parties to the merger and which would be reinforced as a result of the merger, long discussions on market definitions could be made dispensable by providing evidence that the merger could lead to a considerable reduction in potential competition.

**79.*** In the EDEKA/Tengelmann merger proceedings, the Federal Cartel Office assumes a uniform product market in the food retail trade with different levels of competitive pressure in the different sales channels (self-service supermarkets, full-line distributors, soft discounters and hard discounters). The Monopolies Commission welcomes the uniform market definition with the differentiated examination of different levels of competition. Neither the assumption that there are separate product markets based on lines of distribution nor an undifferentiated view of competitive pressure in a uniform food retail trade market would have been able to represent the market conditions in adequate detail. In the view of the Monopolies Commission, this decision is a good example of how varying strengths of competition can be taken into account in a differentiated way within a uniform market.

**80.*** In petrol station markets, contrary to its previous practice and the current decision-making practice of the European Commission, the Federal Cartel Office now assumes that there are separate product markets for petrol and diesel fuel in sales by petrol stations. The markets could be broken down still further according to petrol stations' other merchandise (mini-supermarket, bistro, café, workshop operations, car wash etc.), but this would require considerably greater effort to survey the competitive parameters. The Monopolies Commission generally welcomes increased differentiation in defining markets. In this case, however, the question arises as to whether the extra effort involved in collecting the information actually makes a different market definition in petrol station merger cases appear useful in the context of the actual competitive situation and its practical ascertainability.

**81.*** The Federal Cartel Office prohibited the planned take-over of Poelmeyer Holding by Käserei Loose on the grounds that there is a separate product market for sour milk cheese. From the point of view of consumers, sour milk cheese cannot be substituted by other (soft) cheeses on account of its special characteristics, as extensive surveys and in particular an extensive quantitative data analysis showed; there is also no flexibility for a production changeover. The decision of the Higher Regional Court Düsseldorf, which confirmed the Federal Cartel Office's decision, is based decisively on the experience of the members of the

Senate concerned, which enabled them to establish that in the view of end consumers, sour milk cheese cannot be substituted by other soft cheeses on account of its special characteristics described above. Thus, the extensive quantitative data analysis carried out by the Federal Cartel Office had no major effect on the Court's decision, particularly since it confirmed the market definition already established by the Court on the basis of its own expert knowledge. In addition, the Higher Regional Court established that the Federal Cartel Office was not required to carry out a consumer survey in addition to the investigations it had carried out. It is only necessary to carry out a consumer survey in exceptional cases where no reliable statements on functional substitutability can be obtained by other methods. The Federal Cartel Office was also not required to take into decisive account the results of the consumer surveys carried out by those involved since they did not contain any reliable results, particularly since they were not of a representative group and the questioning methods did not guarantee an objective, uninfluenced result. Finally, the Federal Cartel Office was not bound by market definitions made in earlier cases, which were possibly divergent. The Monopolies Commission regrets that the Higher Regional Court did not address the regression analysis carried out by the Federal Cartel Office, particularly since in the present case there was a database that appeared to be particularly reliable – scanner data from retailers' checkout systems.

**82.*** The take-over of the Brockhaus encyclopaedia business by Bertelsmann was cleared, although this leads to a market share of more than 90 % and 60 to 75 % respectively in the two main markets concerned: general and subject-based reference works. The reasons for this are firstly that the markets concerned have become minor markets after a dramatic fall in turnover in recent years and are thus no longer subject to merger control. Secondly, it was established that there was considerable competitive pressure from online reference works available free of charge. Including them in the market definition is difficult due to their lack of turnover or other operable benchmarks, but it was possible to leave this question open here.

**83.*** In the energy industry, instead of municipal utilities being integrated by the major providers, an increasing number of mergers and cooperations by smaller providers are to be observed, in particular purchasing and distribution cooperations. In taking these into account, the Monopolies Commission believes that a distinction should be made between the competitive effects of purchasing and distribution cooperations. While purchasing cooperations appear to be largely unproblematic, distribution cooperations can lead to restraining potential competition. The Monopolies Commission therefore suggests that a very precise assessment be made of the motives for and effects of cooperation.

**84.*** Thüga, a subsidiary of the E.ON Group, was taken over by a consortium of municipal utilities, some of which are among the shareholding companies. The Federal Cartel Office based its clearance decision on a differentiated view of small energy customers. In contrast to the previous view, which saw the market for these final consumers whose consumption was not measured as one standard market, a distinction is now made between the supply of small energy consumers with household energy at general prices (basic supply market) and the supply of small energy customers with household energy on terms other than the general prices (special contracts market). In brief, this is intended to show the willingness of customers to switch suppliers and the attractiveness of customers to (discount) suppliers operating nation-wide. A market for heating electricity is also defined.

**85.*** In the RWE/Exxon Mobil merger proceedings, the Federal Cartel Office draws up principles for defining markets in the district heating sector for the first time. District heating suppliers are monopolist suppliers, both in their product and their geographic markets for supplying end customers and distributors with district heating, since competition is not possible in transmission and district heating cannot be substituted by other forms of heating once a decision has been taken for a particular system. On account of the different supply conditions and uses, a distinction is also made between household and industrial customers.

**86.*** Geographic market definitions were of particular significance in the food retail trade and in the petrol stations market during the period under review. In line with usual decision-making practice, clearance of the establishment of a joint venture between EDEKA and Tengelmann was based on the assumption that in the Federal Republic of Germany there are a total of 345 regional markets with a radius of 20 km or car journey times of 20 minutes around an influential main regional centre. In these proceedings, the market conditions in neighbouring regional markets were also systematically observed for the first time, enabling clusters of interconnected regional markets with considerable market shares of participants to be included in the assessment of competition. Thus, the assessment also covered geographic fringe competition, but particularly the securing of market domination through considerable market presence in geographically neighbouring regional markets. In the view of the Monopolies Commission, this also enables strengthening effects resulting from the combined effects of the market strength of parties to a merger in neighbouring but separate regional markets to be taken into account quantitatively, and thus verifiably.

**87.*** The regional market definition already usual in the petrol stations market was further refined during the period under review. The Federal Cartel Office now uses the so-called accessibility model of the Federal Office for Building and Regional Planning, which was developed for spatial planning purposes. It is based on the actual features of the local road infrastructure. Starting from each of the petrol stations affected by the merger plans, the Federal Cartel Office used this method to identify the petrol stations that can be reached within certain travel times. Assuming maximum travel times of 60 or 30 minutes, the Federal Cartel Office takes into account the turnover of petrol stations in the surrounding area, weighted according to the travel time required in each case. The Monopolies Commission welcomes this refined market definition in principle, but points out that there are other major competitive parameters not covered by this method.

**88.*** The Monopolies Commission analyses the market domination criteria in oligopoly markets on the basis of two fundamental rulings by the European Court of Justice and the Federal Court of Justice as well as a number of merger control decisions. The behavioural links of undertakings operating in a market that do not explicitly coordinate their behaviour as defined in the ban on cartels are the decisive factor here. Such parallel conduct as a result of strategic interdependence can result in considerably reduced welfare and can severely limit dynamism in the markets concerned. Partly for these reasons, the Act against Restraints of Competition facilitates the identification of collective market dominance by a presumption that constitutes a genuine change in the burden of proof following three decisions by the Higher Regional Court Düsseldorf. Although the burden of proof is very rarely decisive in merger control proceedings, it may be assumed that these decisions by the Higher Regional Court will have a major signalling effect.

**89.*** The Federal Cartel Office identified joint market domination by the companies BP/Aral, ConocoPhillips/Jet, ExxonMobil/Esso, Shell and Total in the retail fuel trade via petrol stations in a number of merger control proceedings. This assessment, which differed regionally in the details, was also confirmed in the course of the sector inquiry into the fuel sector. There are structural characteristics, particularly in the upstream stages of the market, which have a strongly dampening effect on internal and external competition as a whole and thus also on end consumer markets (petrol stations). On the one hand, a high level of transparency is created, opening up a high level of retributive potential while on the other, the paramount market position of the dominant undertakings is reinforced. The Monopolies Commission regards the diverse interlocks between oligopolists and their consistent vertical integration as being particularly significant in this market. On the one hand, these increase the existing transparency and create potential for sanctions, while on the other they greatly increase the incentive for parallel conduct without competition through the resulting symmetry and multiple contacts of the same undertakings in a large number of different markets. In this context, the Monopolies Commission suggests that a more comprehensive analysis be made of these interlocks from the point of competition law.

**90.*** Interlocks also promote behavioural links in the sugar market, in which there is little competition in any case. In the Nordzucker/Danisco merger proceedings, the Federal Cartel Office could have presumed market domination by the oligopoly on the basis of the oligopolists' market shares even without its detailed examination of market conditions; the parties to the merger would hardly have been able to successfully provide contrary evidence of the existence of substantial competition. However, the comprehensive observations in the conditional clearance decision are of significance to the extent that they could be the basis of further abuse and cartel proceedings in this rather uncompetitive market. After all, these proceedings show in exemplary fashion how market regulation with objectives not relating to competition often influence market structures such that efficient competition is greatly impaired. In this context, the Monopolies Commission once again points to the regulatory force of efficient competition and calls on European and German legislators to avoid anti-competitive rules as far as possible.

**91.*** In first merger control proceedings in the market for convertible roof systems, the Federal Cartel Office cleared the take-over of Edscha by Webasto, and thus the reduction of the oligopoly from four to three market participants. In the context of the fact that there was no indication of collusion within the oligopoly in the existing conditions of competition, it is likely that nothing will change, even if the market is narrowed to three suppliers; it was not sufficiently likely that the merger would lead to restraints in the conditions of competition. Any further narrowing of the oligopoly by a further merger was described in this decision on the basis of present knowledge as a matter of concern from the point of view of competition. In line with this early assessment, the merger of Magna and Karmann, which was subsequently notified, was prohibited. Such transaction would not only reduce the number of competitors to two. The two remaining competitors would also have particular incentives to engage in tacit collusion on account of their similar market shares and comparable company size. This analysis by the Federal Cartel Office is based in part on the findings of experimental industrial economics that duopolies are generally considerably less efficient than oligopolies with three members. It appears to the Monopolies Commission, however, that even taking into account these research findings, the details of the relevant tender procedures and optimistic buyers predominantly favouring a certain consolidation on the supplier side, the reduction of an oligopoly with four members to one with three members is already a matter of concern. In markets with a high level of concentration it is already sufficient to slightly curtail the remaining or potential competition in order to give rise to competition concerns.

**92.*** Two-sided markets are platforms where one supplier brings together two different user groups, for example a newspaper brings together readers and advertisers, a credit card company brings together shops that accept the credit card and credit card holders, or an auction house brings together buyers and sellers. The special features of two-sided markets have considerable influence on the probability and likely success of market entry. Thus, even for a superior product, there may be insurmountable barriers to market entry if user behaviour leads to de facto market saturation. During the period under review, two prohibitions in particular demonstrated how market domination functions in a two-sided market that is well-established as a result of network effects: the planned merger of two cosmetic journal publishers which also organize cosmetics fairs, and the planned take-over of a local daily newspaper by a group which itself publishes daily newspapers in neighbouring areas.

**93.*** The latter case, like another case involving a planned merger of daily newspapers that has been analysed, demonstrates how potential competition works and how it is to be assessed under competition law. The upheaval in the media landscape, particularly as a result of the internet, is leading to an increased number of mergers in the press sector. Taking potential competition into account usually plays a key role here, usually either because a dominant position would be strengthened through the elimination of a potential competitor or because no potential competition can be identified. In another case, a merger was cleared partly because, on account of specific circumstances, it was likely that a competitor would enter the market.

**94.*** Under the Act against Restraints of Competition a merger is to be prohibited if it is likely to lead to the creation or strengthening of a dominant position. Thus, there is no provision for any graduation on the basis of the degree of its adverse effects. The rulings of the Federal Court of Justice in merger control are not based on any appreciable adverse effect, unlike in the case of the effects of cartels, but only require there to be a strengthening effect that can be established on the basis of specific circumstances, which may be very small, depending on the existing residual competition. That means that even securing a dominant position without any specific increases in market share can justify a prohibition under merger control law. In the period under review, the Federal Court of Justice explicitly recalled the minimal requirements of the strengthening effect in one case, while the Federal Cartel Office's decision-making practice was not entirely clear in this respect.

**95.*** Merger remedies are modifications to a notified merger that remove the Federal Cartel Office's competition concerns and are undertaken as legally binding ancillary provisions for merger clearance. They may be conditions or obligations. Following the European example, the Federal Cartel Office published model texts of remedies in 2008 which were the basis of the individual Decision Divisions' clearance orders and which are adapted to individual cases. In addition, the distinctions between structural obligations, behavioural obligations and ongoing behavioural control were once again of significance during the period under review. Finally, a decision was taken in one case to take preparatory measures for divestiture in order to secure the status quo after a clearance subject to dissolving conditions had ceased to apply, which also highlights the problems of dissolving conditions.

**96.*** Particular demands were placed on European merger control in the period under review, 2008/2009, on account of the global financial crisis. Fortunately, the European Commission rejected demands that merger control examination standards be lowered early on. It reacted flexibly to the examination of individual cases, however, e.g. with regard to the suspension of concentrations. In European merger control practice – at least to date – the financial crisis has had few immediate effects. Firstly, the number of notifications fell by about 20 % in 2008/2009 (606) in comparison with the previous period reviewed (758). Secondly, significantly more notifications were withdrawn in comparison with the previous period under review (21 compared with 14). Moreover, very quick decisions were taken by the European Commission in some cases, mainly during the first phase of proceedings.

**97.*** Vertical mergers were a focal area of decision-making practice in 2008/2009, i.e. mergers between undertakings operating at different stages in the supply chain. The European Commission decided these cases on the basis of its Guidelines on the assessment of non-horizontal mergers, which it adopted in late 2007. The European Commission’s decision in the ABF/GBI case also deserves particular attention. In this case, after a long period of abstinence, the competition authority once again expressed competition concerns on account of coordinated effects, only clearing the merger subject to conditions and obligations. The Bertelsmann and Sony/Impala decision is also to be mentioned in this connection, in which, among other things, the European Court of Justice underlined the conditions for establishing the existence of coordinated effects. The increasing number of mergers in which the merging parties quoted efficiency aspects is also conspicuous. During the period under review, the European Commission also presented its revised notice on remedies acceptable under the Merger Regulation, in which it takes up a stricter position on commitments. This approach also had a practical effect in specific cases. Finally, the ruling in the MyTravel/Commission proceedings and in the Commission/Schneider Electric proceedings once again addressed the issue of claims for damages in merger control. In legislative respects, reference is to be made not only to the Guidelines on acceptable merger remedies referred to above but also to the European Commission’s report on the division of competence.

**98.*** In the Friesland/Campina proceedings, the European Commission rejected a market definition based on the current “working areas” of the parties to the merger. Also, in the view of the Monopolies Commission, what is important is first and foremost whether the conditions of competition are homogeneous within neighbouring regions. As a rule, current supply relations should only be the starting point of geographic market definition, while the actual alternatives of the opposite side of the market are the decisive aspect. In this connection, it is to be noted that the current extension of the respective working areas may also reflect the prevailing pressure of competition or tacit collusion.

**99.*** In the StatoilHydro/ConocoPhillips proceedings, the European Commission defined national markets for petrol and diesel sales at petrol stations on the basis of qualitative analysis, although its econometric analysis was based on the observation of local or regional clusters around particular petrol stations. In the view of the Monopolies Commission, empirical studies can certainly be useful in merger proceedings. However, the competition authorities have to take care to avoid inconsistencies between qualitative and quantitative analysis. The market definition also has to be made on the basis of the actual economic circumstances. If, from an economic point of view, local or regional markets exist, the European Commission is required to establish this and give explicit reasons why the markets analysed constitute a major part of the Common Market within the meaning of Article 2 (2) and (3) of the EC Merger Regulation, making the EC competent to deal with them.

**100.*** The Monopolies Commission explicitly welcomes the European Commission’s differentiated discussion of market definitions in the energy sector. It supports the European Commission’s cautious stance with regard to official definitions of markets larger than the markets traditionally defined. In defining markets too broadly there is the danger of underestimating undertakings' market power in their relevant markets. The Monopolies Commission observes the increasing concentration in energy generation at European level with concern. An application of merger control rules that is too generous could lead to a situation internationally that is similar to the current situation in Germany with its high concentration at producer level and with the gas supply concentrated in a few undertakings.

**101.*** In the Friesland/Campina proceedings, the European Commission, for the first time, ruled out considerable restraint to competition on the basis of the new substantive test, the so-called SIEC test, for the first time, although previously it had assumed that a dominant position would be created. It substantiated this result by saying that the parties to the merger were cooperatives. In the view of the Monopolies Commission, there are doubts concerning the European Commission's statement that the cooperatives had a dominant position vis-à-vis their suppliers. The facts that all suppliers were also members of the cooperative, the suppliers' great possibilities to influence the cooperative's management, and the cooperative's objectives lead one to deny that a dominant position was created vis-à-vis cooperative members. The Federal Cartel Office decided in this spirit in a similar case. A comparison of the two decisions highlights that a different result would not have been reached on the basis of the market domination test.

**102.*** In the KLM/Martinair proceedings, the purchaser acquired a share of Martinair even before the merger. The Monopolies Commission welcomes the fact that the European Commission nevertheless is undertaking an in-depth examination and does not reject out of hand the possibility that the merger may have adverse effects. A participation existing prior to a merger can have different effects and has to be assessed on the basis of the specific contractual relationship and market situation in the particular case. In the Arjowiggins/M-Real Zanders Reflex case, the European Commission took into account, at least incidentally, a kind of de minimis rule in making its analysis of competition. The Monopolies Commission recalls that the Merger Control Regulation does not contain a de minimis rule on which an analysis of small markets could be based. Joint market shares of 70 to 80 %, as identified in one of the markets concerned, should therefore trigger a detailed examination by the European Commission.

**103.*** At the end of 2007, the European Commission published Guidelines on the assessment of non-horizontal mergers, i.e. vertical and conglomerate mergers. The Monopolies Commission underlines its conviction that in practice there may be difficulties in distinguishing between horizontal and non-horizontal mergers, particularly in markets with heterogeneous goods. Thus, market structure criteria should also be taken into account when examining non-horizontal mergers. The Monopolies Commission supports the European Commission's approach of examining positive and negative incentives to market foreclosure. However, it rejects taking into account already at the time of the merger control proceedings the extent to which the incentives to engage in abusive practices can be effectively influenced or reduced by the threat of sanctions. On the basis of the Guidelines referred to above, the European Commission has clearly addressed the issue of the vertical effects of mergers more frequently and in more detail during the period under review. In a number of cases, it opened the second phase of proceedings, but cleared all the mergers unconditionally upon conclusion of the examination. The Monopolies Commission considers the assessment of competition in the TomTom/Tele Atlas and Nokia/Navteq proceedings to be deserving of criticism in part.

**104.*** The majority of the mergers notified mainly affected competition on the supply side. Occasionally, e.g. in the ABF/GBI and Rewe/Adeg cases, the European Commission also stated its position on monopsonistic power in procurement markets and on countervailing demand power, however. The European Commission's observations to the effect that the existence of countervailing power may only be taken into account if all purchasers are protected against the adverse effects of a merger are of particular interest in this connection. It means that it is not sufficient for a few strong demanders to defend themselves against price increases or impairments to quality instigated by the new merged entity. Since strong demanders rarely tend to have any incentive to protect their smaller competitors, it may be assumed that the European Commission will only view the existence of monopsonistic power as a counterweight to market power in the future if the purchaser market has a monopoly structure, all purchasers are in a position to exert monopsonistic power or suppliers have no opportunity to discriminate on price.

**105.*** During the period under review, as in previous years, the European Commission concentrated primarily on the non-coordinated effects of mergers. Only in a few individual cases did it express concerns from the point of competition on account of coordinated effects. Only in the ABF/GBI proceedings did the European Commission base an in-depth examination solely on the grounds of coordinated effects. It is to be evaluated positively that after a lengthy phase of reticence, cases with coordinated effects are once again being taken up. One reason for this may be the decision by the European Court of Justice in the Bertelsmann and Sony/Impala case confirming the criteria listed by the court of first instance in its Airtours judgement for proving coordinated effects and clarifying important questions concerning the European Commission's standard of proof and scope of discretion.

**106.*** What is also noteworthy is that the parties to the merger quoted efficiency aspects in seven out of a total of 17 second-phase cases. The European Commission has not confirmed the existence of efficiency gains that need to be taken into account in any horizontal merger, but only in two vertical mergers. In no case was the plea of efficiency of crucial relevance to the decision. The Lufthansa/SN Airholding order, in which restraints to competition on the one hand are balanced out against efficiency on the other, is of particular interest

**107.*** In the vertical cases TomTom/Tele Atlas and Nokia/Navteq, the European Commission states explicitly that the efficiency gains are to be taken into account within the context of an overall analysis of the effects of the merger covering both the anti-competitive effects and effects of benefit to competition. It is notable in this connection that the European Commission examined possible efficiency gains in both these cases, although previously it had already denied any capability and/or incentives for market foreclosure. The Monopolies Commission regards a two-stage examination, of possible anti-competitive effects and of efficiency gains, as a beneficial part of merger control. Whether certain efficiencies compensate for the anti-competitive effects of a merger can only be recognized, however, when the extent of these anti-competitive effects has been assessed. The situation regarding competition after the merger also influences the question of the extent to which efficiency gains are likely to be passed on to consumers. Also, the advantages of improved efficiency have to counter the specific anti-competitive effects caused by the merger. Finally, this kind of approach ensures the efficient use of resources by the competition authority. Thus, in cases where there are no competition concerns, it is to be desisted from dealing with possible efficiency aspects.

**108.*** The European Commission usually obtains the information it requires to assess mergers from the notification of the parties to the merger and from polls of competitors and market participants in upstream and downstream markets. During the period under review, the

European Commission also carried out an increasing number of consumer polls, e.g. in the KLM/Martinair and StatoilHydro/ConocoPhillips proceedings. In some cases, the need for and the focus of the polls carried out seems questionable. Internal documents of the parties to the mergers also played an important role. In the Thomson/Reuters and Arsenal/DSP cases, the European Commission successfully used such documents to weaken the arguments of the parties involved in merger control cases. In the context of evaluating efficiency, however, the European Commission complained on repeated occasions that internal documents dating back to the period prior to the merger proceedings and referring to the claimed efficiency gains were not available. In this connection, the competition authority considers documents compiled exclusively for the purposes of the merger control proceedings to be of little value as evidence. Finally, it is to be observed that economic studies and quantitative analyses were used more frequently during the period under review. As previously, the overwhelming majority of such studies and analyses are brought into merger control proceedings by the parties to the merger or the European Commission. This was the case, for example, in the Arjowiggins/M-Real Zanders Reflex, Arsenal/DSP, TomTom/Tele Atlas and Nokia/Navteq cases. Occasionally, however, third parties submit such documents to underpin their position, as in the Rewe/Adeg case.

**109.*** The European Commission carried out a number of econometric analyses during the Friesland/Campina proceedings, in particular an assessment of the elasticity of demand. The European Commission’s approach is to be welcomed from the point of view of procedural law. The competition authority informed the parties of the calculation methods and results of its analyses with the Statement of Objections, thus giving them sufficient opportunity to comment. In upholding the rights of the defence that are enshrined in Article 18 (3) of the EC Merger Regulation, also with regard to their quantitative arguments, the Commission not only avoided procedural errors in this connection. The criticism expressed by the parties also gave it an opportunity to correct the content of its approach, significantly reducing the probability of a court dispute following the Commission’s decision. In addition, the detailed documentation of the procedures and results of the analysis ensure greater transparency. At the same time, this process shows that the undertakings involved are certainly able to argue successfully against the results of the competition authority’s quantitative analysis.

**110.*** In the Omya/Commission proceedings, the Court of First Instance strengthened the Commission’s powers of investigation. The Monopolies Commission shares the view in this connection that the basis here should be the European Commission’s knowledge at the time of the request for information i.e. an ex-ante view. This is the only way to ensure that the competition authority can obtain all the information it requires in order to come to a decision.

**111.*** In October 2008, the European Commission published a revised Notice on remedies acceptable under the Merger Regulation. The new notice takes a more restrictive approach to commitment offers, as expressed for example in the merging parties’ extensive obligations to provide information and evidence. In addition, the preferability of structural merger remedies, particularly of divestiture obligations, is emphasized. Finally, the European Commission underlines the significance of up-front buyer and fix-it-first solutions and declares that there is a need for alternative commitments insofar as implementation of the initial commitment is uncertain. As far as can be ascertained, this stricter attitude of the European Commission also finds expression in its decision-making practice. In the period under review, the European Commission mainly received divestiture commitments, supplemented, if at all, by behavioural commitments. In the view of the Monopolies Commission, commitments containing a divestiture offer are to be evaluated positively in principle. Such commitments are of a structural nature and thus best suited to removing the structural concerns with regard to competition resulting from a merger. They are usually implemented within short periods and subsequently need no further control activity on the part of the competition authority. In spite of this basically positive attitude to divestiture commitments, the Monopolies Commission is of the opinion that some of the commitments accepted during the period under review gave grounds to doubt their effectiveness, e.g. in the ABF/GBI and Thomson/Reuters cases.

**112.*** In its last Biennial Report, the Monopolies Commission made a detailed statement on the problems associated with the usual commitments in passenger aviation. It therefore welcomes the fact that the European Commission has now admitted shortcomings in its past clearance practice, e.g. in the Lufthansa/Austrian Airlines and Lufthansa/SN Airholding proceedings and that it is endeavouring to eliminate them. In the view of the Monopolies Commission, however, considerable doubts remain about the effectiveness of the commitments that were accepted relating to the transfer of grandfather rights and the possibility of code sharing agreements. The Monopolies Commission's assessment of the effects of corresponding merger remedies is only more positive where there is already an active competitor to the parties to the merger and its position is strengthened.

**113.*** During the period under review, the European Commission usually only resorted to behavioural remedies as a supplementary measure. In particular, supply obligations by the divesting party or by a third party vis-à-vis the future purchaser are to be mentioned here. In the view of the Monopolies Commission, judging such supply obligations depends on the specific circumstances of the individual case. In this connection, long-term supply relationships that cause long-term dependence for the purchaser and enable the divesting party to gain long-term insights into its competitors' production processes and costs and hold ongoing potential for discrimination, for example in relation to supply deadlines and quality, are particularly problematical. In the decision-making practice, the form of supply obligations occasionally gives cause for criticism. Behavioural commitments were also offered in the KLM/Martinair proceedings, but these were rejected by the European Commission. The rejection of the commitments offered, which contain a very complicated arrangement for limiting prices, is to be welcomed.

**114.*** In addition, the European Commission insisted on alternative commitments or up-front buyer and fix-it-first solutions in some proceedings. It rightly called for alternative commitments in cases where the fulfilment of the commitments originally offered was dependent on third parties and thus was not enforceable by the European Commission. The Monopolies Commission advocates the European Commission securing the compulsory prior fulfilment of commitments or demanding an alternative merger remedy in cases where the fulfilment of a commitment depends on the behaviour of a third party.

**115.*** In the Arsenal/DSP proceedings, the last version of the draft decision with amended commitments was received by the national competition authority just two working days before the meeting of the Advisory Committee. As the Monopolies Commission has already stated in connection with comparable cases in the past, it is practically impossible for national competition authorities to carry out an in-depth examination under these circumstances. The Monopolies Commission holds the view that the pressure of time in merger control proceedings should not be unilaterally at the expense of the Member States' rights to participate in decision making. Rather, the European Commission should set deadlines so that the national authorities can be appropriately involved in the context of what are sometimes very extensive commitment packages.

**116.*** Three rulings by the European Court of Justice and the Court of First Instance of 2008/2009 are of particular interest, namely Bertelsmann and Sony/Impala, MyTravel/ Commission and Commission/Schneider Electric. In its judgement on Bertelsmann and Sony/Impala, the Court states its position on a number of important questions relating to substantive merger control and procedural law. First and foremost, its statements on collective market domination, on the legal nature and function of the Statement of Objectives, on the obligation to state reasons and on the standard of proof in merger control proceedings should be mentioned. The Court's statements on the standard of proof in merger control proceedings, particularly the clarification that the same standard applies to evidence both in clearance and prohibition decisions, as well as to different types of mergers, are to be welcomed. Its statement that the provision of Article 10 (6) of the EC Merger Regulation is an exceptional provision is also to be evaluated positively. The Court thus clearly rejects demands that the instrument of deemed clearance be regularly applied in order to prevent third-party appeals. In the Commission/Schneider Electric proceedings, the Court clearly places the financial risks of a premature implementation of the merger on the parties to the merger. The Monopolies Commission supports this view, as otherwise the principle of preventive merger control would be at risk. It also welcomes the fact that following this judgement, there is now clarity on the possible consequences of a premature merger for undertakings wishing to merge.

**117.*** The Monopolies Commission generally approves of the European Commission's Notice on remedies acceptable under the Merger Regulation. It supports the European Commission's positive attitude to divestiture commitments and shares its scepticism with regard to behavioural commitments. However, the Monopolies Commission doubts that the European Commission has adequately taken into account the disadvantages associated with access commitments, particularly the discriminatory potential of the parties to the merger. The results of the study of 2005, which show access commitments to be the least successful form of merger remedy, show that caution is required when accepting such commitments. The European Commission deserves agreement in so far as it underlines the significance of the future purchaser for the success of the merger remedy. The Monopolies Commission also evaluates positively the intention to insist to a greater extent in future on up-front buyer and fix-it-first commitments. It has already demanded making the up-front divestiture of parts of a company's assets a condition for implementing a merger. Both of the above solutions guarantee that a merger can only be implemented if a competitive purchaser is interested in the assets that are available for purchase. In the past, this was not always the case. Moreover, both the up-front buyer and the fix-it-first solutions ensure that the parties to the merger make serious efforts to find a suitable purchaser and to carry out the acquisition process as simply and quickly as possible.

**118.*** In addition, the Monopolies Commission reiterates its demand that the European Commission should report regularly in future on the implementation and effectiveness of the merger remedies it has imposed. As the study of 2005 highlights, a subsequent examination of this kind makes an essential contribution towards identifying shortcomings and setting the necessary reform process in motion. This consideration carries all the more weight because the European Commission has largely refrained from imposing prohibitions in the recent past and instead has aimed to resolve problematic cases with merger remedies, some of them extensive. In connection with the European Commission's Notice on acceptable remedies under the Merger Regulation that now applies, it is also of particular interest to see the extent to which the principles set out there are taken into account in decision-making practice, making the obligations imposed more effective. Future reports could also indicate if there is a further need for reform and if so in what areas.

**119.*** In July 2009, the European Commission published a report on the division of competence, establishing, among other things, that there was a need for reform with regard to the “two-thirds rule” of Article 1 (2) of the EC Merger Regulation. The Monopolies Commission already suggested an amendment to this provision in the context of the E.ON/Ruhrgas merger. Above all, it criticized the fact that the rule makes a connection with the turnover made in the past, thus taking a purely static view, without taking a merger’s foreseeable European dimension into account. This was seen as being problematical, above all in cases where previously foreclosed markets were concerned and the internationalization of the undertaking’s activity has not yet or has only just begun. The European Commission addresses the aspect of multiple filings both in connection with Article 1 (3) and with Article 4 (5) of the EC Merger Regulation. It favours cases being automatically referred to Brussels if otherwise at least three national competition authorities would be involved and in so doing once again takes up old plans. The Monopolies Commission once again speaks out against automatic transfer in the case of multiple filings. It is particularly to be taken into account that with the introduction of Article 4 (5) of the EC Merger Regulation in the course of the second EC Merger Regulation Reform, there is now the possibility for cases to be referred at the initiative of the participating undertakings. This option considerably mitigates the problems described in connection with multiple filings.

**120.*** The Monopolies Commission rejects the European Commission’s efforts implied in the report to harmonize national merger control laws. The European Commission proposes that the different national rules be converged and adapted in relation to the EC Merger Regulation in order to achieve the objective of a “level playing field”. This proposal relates primarily to procedural questions, but also covers substantive legal aspects. In the view of the Monopolies Commission, harmonization on the part of the individual Member States is preferable. In this connection, the planned Eighth Amendment to the Act against Restraints of Competition is recalled, in which the German legislator will decide, among other things, on readjusting the turnover thresholds and on adapting the substantive legal criteria of German merger control.

### *V. The labour market and competition in product markets*

**121.*** The Monopolies Commission dealt with the cartel structure of the markets for dependent labour in its Tenth Biennial Report 1992/1993. However, the focus at that time was on the employment effects of institutional regulations in the labour market. In this chapter, the main focus is on the competitive effects of the German collective bargaining system on downstream product markets. The Monopolies Commission does not call into question the freedom of association that is enshrined in the Basic Law.

**122.*** Specifically, the effects of declarations of universal applicability in accordance with the Collective Agreements Act (*Tarifvertragsgesetz*) and the Employee Secondment Act (*Arbeitnehmer-Entsendegesetz*) as well as the fixing of minimum wages in accordance with the Minimum Working Conditions Act (*Mindestarbeitsbedingungengesetz*) are examined in product markets. Declarations of universal applicability are provisions under collective agreements covering entire sectors; the Minimum Working Conditions Act allows the government to set minimum wages in an economic sector. Problems relating to competition arise here in that sector-wide wage cartels are created or extended, offering established undertakings in a market the opportunity to squeeze out competitors, especially newcomers, from the market through increased staffing costs. Secondly, the Monopolies Commission is examining the phenomenon of occupational trade unions, which are of significance from the point of view of competition policy on account of their grossly disproportionate strike demands and collective agreements concluded at the expense of third parties.

**123.*** In German collective bargaining, a distinction is made between three different kinds of trade unions: unified trade unions, professional or occupational trade unions and Christian trade unions. While on the one hand, large unified trade unions with a pluralist membership structure are losing members, increased competition is to be observed in collective bargaining through the occupational and Christian trade unions, which are gaining strength. They are increasingly enforcing collective agreements of their own, leading to the fragmentation of German collective bargaining.

**124.*** The net level of organization of the trade unions (proportion of all people employed who are trade union members) and also the coverage of employees by collective pay agreements (all employees to whom the collective agreement applies, regardless of whether they are trade union members) are in overall decline in Germany. This is not primarily a result of trade unions losing their organizational power, however, something that is also to be observed in a similar form in other countries. The difference in Germany is rather that, unlike in most EU countries, there has hardly been any effective political support to stabilize or extend industry-wide collective wage agreements. The Ghent System, for example, which is still to be found in Sweden, Finland and Denmark, whereby the trade unions administer unemployment insurance, results in a high degree of coverage by collective wage agreements and a relatively high level of trade union membership, more than 70 % in each country. Moreover, outside Scandinavia, the prevalence of the instrument of the universal applicability of collective agreements is the most important factor to explain the high level of coverage by collective pay agreements.

**125.*** The German collective bargaining system is characterized by two conflicting lines of development. On the one hand, it may be confirmed that the industry-wide collective bargaining system is breaking down. This is particularly highlighted by the burgeoning plurality of wage agreements in practice. In its decisions of 23 June 2010, the Tenth Senate of the Federal Labour Court recently confirmed the legal view expressed by the Fourth Senate in a decision of 27 January 2010 in response to an enquiry and abandoned the principle of “one company – one collective wage agreement”. According to this decision taken at the highest judicial level, a number of collective wage agreements may now be applicable for different occupational groups within one company. A break-up of the collective bargaining system is also evident in enabling clauses allowing working conditions provided for under collective wage agreements to be made more flexible. While on the one hand this requires the external structure of the collective bargaining system to be stabilized, it is on the other hand a common option to make the collective bargaining system more flexible and more individual, thereby enabling companies to submit to market pressure to adapt. As well as the breaking up of the collective bargaining system, however, there is evidence of measures with the opposite effect which serve to stabilize and restabilize the traditional industry-wide collective bargaining system. These include declarations of universal applicability in accordance with the Collective Agreements Act, and more recently also in accordance with the Employee Secondment Act, minimum wages in accordance with the Minimum Working Conditions Act, the continuing validity and after-effect of collective wage agreements, the strict requirements applying to collective bargaining capacity developed by the Labour Courts, the principle previously developed by the Federal Labour Court of uniform collective agreements, or the former categorical ban by the Federal Labour Court on differentiation clauses in collective agreements. Particularly recently, the legislator has been making greater efforts to counter the increasing erosion of the German industry-wide collective bargaining system by means of new or revised laws (Employee Secondment Act, Minimum Working Conditions Act). While the legislator can use these to achieve the wider coverage of collective pay commitments or a commitment to statutory minimum wages, in so doing it comes into direct competition with the parties involved in collective bargaining, thereby weakening their autonomy in reaching collective wage agreements.

**126.*** If one views the labour and product markets from the point of view of competition, the following conditions in product markets, which often occur in combination, appear to be problematic: (1) the lack or shortage of competition in domestic product markets in combination with a low price elasticity of demand, (2) the possibility to abuse an industry’s collectively agreed minimum wage when undertakings in a market have different productivity levels and (3) the emergence of occupational trade unions that are in a strong negotiating position. The following comments shall be made concerning (1) above: the lack or shortage of competition and a low price elasticity of demand in the product market give undertakings incentives to collude on product prices. Undertakings operating in monopoly sales markets not only make higher profits, but generally also pay wages above market-clearing level. The extent to which wages are above the market-clearing level depends on the amount of monopoly rents and the relative negotiating power of the parties to the collective wage agreement. The following comments shall be made regarding (2) above: if the market is one where there are large productivity differences between the undertakings, a collective minimum wage agreement negotiated with employees by more productive undertakings can be abused as an effective barrier to market entry. Less productive undertakings, i.e. usually new entrants, are not in a position to pay the minimum wages negotiated in collective wage agreements. Making the production factor of labour more expensive weakens their competitiveness or they have to leave the market. The following comments shall be made regarding (3) above: powerful occupational trade unions have the advantage that their members are often to be found in strategically important hubs in the economic process and as a result they can cause great economic damage in case of strike; consider, for example, the strikes by train-drivers' or physicians’ trade unions. The Monopolies Commission considers the abuse of negotiating and striking power here at the expense of third parties (consumers, trade unions in a weak negotiating position, but also employers and the unemployed) to be problematical.

**127.*** Within the framework of current developments in German collective bargaining, three issues are of particular relevance to competition policy: declarations of universal applicability under the Collective Agreements Act and Employee Secondment Act, minimum wages under the Minimum Working Conditions Act and occupational trade unions. The instruments of the “declaration of universal applicability” and “statutory minimum wage” on the one hand constitute state interventions in the freedom of association. The phenomenon of occupational trade unions on the other hand, is a result of the restructuring of the framework conditions in product markets. Occupational trade unions are concentrated in Germany in undertakings in the transport and health sectors (aviation, railways, hospitals), and are thus to be found in product markets that have long been dominated by monopoly structures.

**128.*** In the context of the collective agreements conditional on government subsidies for private or occupational supplementary pension plans, the Monopolies Commission sees the increasingly strong political influence on wage fixing as a matter of general concern. It points out that the declarations of universal applicability under the Collective Agreements Act and Employee Secondment Act constitute major state competition to unions and employers in regulating wages and that they can thus lead to weakening their autonomy to decide on wages. In particular, the Monopolies Commission opposes existing collective wage agreements being allowed to be displaced by regulations due to the possibility of this considerably limiting competition in product markets and on account of concerns under constitutional law. It is no coincidence that the Employee Secondment Act and the Minimum Working Conditions Act were amended simultaneously, since the two laws were the focus of the legislative debate from the outset when the political objective of introducing minimum wages was under discussion. Minimum wages are also not unproblematic economically because they can have considerable adverse effects on downstream product markets. The Monopolies Commission views the application of the declaration of universal applicability as particularly problematic in the case of limited or non-existent competition in the relevant product markets, a low price elasticity of demand and differing levels of productivity in the undertakings in the product market concerned. The declaration of universal applicability helps more productive undertakings to make strategic use of high collective wage agreements, using minimum wages to impede the competitiveness of less productive undertakings. Declarations of universal applicability can thereby result in a greater concentration of undertakings in the product market concerned.

**129.*** The Monopolies Commission advocates tight restrictions from the point of view of regulatory policy on declarations of universal applicability in collective wage agreements on account of the considerable risk of competitive abuse of this instrument. In any case, an examination of the foreseeable effects of declarations of universal applicability on competition should take place before they are enjoined. Thus, the Monopolies Commission favours the planned implementation of a general right for the Federal Cartel Office to make a statement in the legislative procedure, as the Monopolies Commission has already stated in its two special reports on postal services of 2007 and 2009 and in its special report on legal unbundling published in 2010. The exercise of such a right by an authority that is independent vis-à-vis the matter in hand and whose sole obligation is to protect competition would make the possible effects on the product market more transparent and considerably improve the basis for a decision. The Monopolies Commission assumes that taking competition aspects into account in the legislative process will have a positive effect. In this context it points out that a number of national competition authorities currently have the statutory task of making a follow-up assessment of competition (e.g. France, Great Britain, Italy and Spain).

**130.*** The possibility of setting minimum wages under the Minimum Working Conditions Act also constitutes competition to the parties to collective wage agreements to make their own provisions, a problematic aspect in the context of autonomy in collective bargaining. The fact that there is a low level of adherence to collective wage agreements in a particular industry merely illustrates the freedom of the parties to the agreement and this does not necessarily require reform. The intervention is intensified by not only fixing a sector's lower limit of remuneration, but also being able to differentiate on the basis of the type of activity, employees' qualifications and regions. Thus, minimum wages do not function as a general, uniform way of securing livelihoods, but are an "appropriate wage" for the activity in question. A minimum wage based on the Minimum Working Conditions Act leads to an increase in labour costs in the respective economic sector. In particular, this weakens the competitiveness of new entrants to the product market. Thus, this instrument aims to limit wage and product competition, as does the instrument of universal applicability, and it is to be rejected from the point of view of competition.

**131.*** The Monopolies Commission sees no need for a construct of this kind to be in competition with the regulatory autonomy of the parties to collective bargaining agreements. In particular, the displacement of existing collective wage agreements is to be rejected, particularly in the context of the freedom of association guaranteed under the constitution, involving the freedom to join or not to join a trade union. The Monopolies Commission therefore favours abolishing the possibility of being able to set minimum wages under the Minimum Working Conditions Act.

**132.*** Successful occupational trade unions have greater negotiating power than a large heterogeneous unified trade union. Thus, it is rational for occupational groups that are in a strong negotiating position to hold separate wage negotiations with the employer or the employer's association. The increased activity of occupational trade unions to be observed is associated with a whole number of problems, however. Mention may be made of the complementary competition on setting wages at the expense of groups of employees in a weaker negotiating position. However, the very purpose of collective wage negotiations is to compensate for the weakness of certain groups of employees in negotiations with the employer side. Moreover, it appears to be no coincidence that occupational trade unions are mainly concentrated in markets in the transport and health sectors, i.e. in markets with a long prevalence of monopolistic structures. In markets where undertakings receive subsidies (such as regional rail transport undertakings) or where there is a general insurance obligation, such as the obligation to take out health insurance in the health sector, the problem also arises that the cost of higher wages can easily be passed on to others through demands for higher subsidies or higher health insurance fund contributions. This means that in such services of public interest, the cost of higher wages can be simply passed on automatically to defenceless third parties. In addition, it is to be feared that a domino effect on other occupational groups represented by trade unions could result from a multiplicity of wage negotiations by competing trade unions outbidding each other and, if there is stronger competition between the trade unions, there could be an increase in the number of strikes.

**133.*** Although problems are associated with the existence of a plurality of collective wage negotiations, the application of the principle of uniform wages constitutes a highly problematical intervention from the point of view of constitutional law into the freedom of association protected by Article 9 (3) of the Basic Law. On the basis of this constitutional precept, the judicial principle of "one company – one collective wage agreement" could not be upheld and the highest court departed from it. It is the urgent task of the legislator and the labour courts to develop instruments to limit plurality of collective bargaining, which has de facto already come into effect. The fundamental right of freedom of association must be appropriately balanced against the interests of third parties protected under constitutional law. The Monopolies Commission cannot predict to what extent the problems associated with the emergence of occupational trade unions will escalate in the future. It therefore makes a cautious statement with regard to possible recommendations for action and has discussed five different proposals for the problematic issues relating to occupational trade unions.

**134.*** In order to reduce the disadvantages resulting from the unequal power relations between the trade unions, one option is to conduct binding temporally synchronised collective wage negotiations. This solution allows collective bargaining parties to retain their independence on content and requires temporal coordination. This makes it more difficult for the negotiations of a strong occupational trade union to be at the expense of another trade union and strike activities are pooled, preventing staggered ongoing strikes by different trade unions. For collective wage bargaining to be temporally coordinated, the duration of the collective wage agreements would also have to be standardized or at least the end of collective wage agreements would have to be identical. At the least, one trade union should be under an obligation not to take industrial action as long as the collective wage agreement of the other is still valid. The positive aspect of this instrument is that it does not greatly intervene with the autonomy of collective bargaining. However, the success of temporally coordinating the collective wage agreements of individual trade unions is ultimately uncertain.

**135.*** Cooperation obligations involve greater intervention in the autonomy of collective bargaining than the temporal coordination of collective wage negotiations. In the case of binding cooperation obligations, all the trade unions involved would have to agree on common demands prior to or during the collective wage negotiations and to come to an ultimate agreement. This may also make it more difficult for a strong occupational trade union to negotiate to the detriment of another trade union and strikes can be combined. However, this instrument is a "compulsory cartel", a "compulsory wage negotiation partnership", and as such, it is likely to be an infringement of Article 9 (3) of the Basic Law. The outcome of the use of this instrument, too, is uncertain. It is also an open question what consequences any failure of the collective bargaining parties to reach an agreement should have.

**136.*** Another possible solution is a comprehensive exclusion right. This would give the employer the possibility not only to exclude trade union members and outsiders, but also to be allowed to exclude employees who are members of other trade unions. This would enable great pressure to be exerted on the striking trade union by those who have no claim to wages on account of the exclusion, but who do not benefit in any way from the strike and do not receive any strike benefit from their trade union. The positive aspect of this instrument appears to be the significant pressure that can be exerted by employees who are members of other trade unions or who are not members of any trade union on the striking occupational trade union. In principle, complete exclusion is already possible on the basis of a ruling by the Federal Labour Court (although this is controversial). Thus, the employer is free to decide whether he will temporarily close down a company or part of a company where a strike is taking place, regardless of whether this is economically acceptable. A critical objection to be made in this connection is that the means of exclusion has not been used in practice for a long time since it is associated with considerable financial risks for the employer. Also, employers wish to prevent different trade unions acting in solidarity. It has also not been clarified whether extending the exclusion of employees to those who are not on strike is in conflict with the obligation to maintain the peace under labour law.

**137.*** Another proposal is for trade unions to be placed under an obligation to go to arbitration in case of a pending strike, reducing in particular the problems in the transport and health sectors referred to above. In these sectors, not only can considerable damage be caused by strikes, but wage increases can also be compensated for in practice by higher subsidies or higher contributions to health insurance funds. Thus, under this recommendation, strikes may only take place when an arbitration proposal has been made and has been rejected. An arbitration proceeding of this kind appears to be useful particularly in services of public interest, as here the general public is affected to an exceptional extent and on account of the often imperfect competition in public service they often cannot turn to alternative suppliers. However, it is disputed whether such an amendment of strike law can be implemented. Also, answering the question of what constitutes an adequate wage demand is likely to be a difficult task.

**138.*** It is also conceivable that the power potential arising from a plurality of collective wage negotiations could be limited by means of controlling abusive practices. In this connection, the Monopolies Commission points out that the provisions relating to abusive practices under competition law already prohibit the making and enforcement of grossly disproportionate strike demands and collective wage agreements, although this view is disputed. Unlike in the case of the related but hitherto ineffective principle of the equality of the parties to an industrial dispute under labour law, the ordinary jurisdictions could be competent to enforce the prohibition on abusive practices under competition law. Given the fact that some of the appointments to labour courts are made in agreement with trade unions and employer associations, it may seem appropriate to make such referrals to courts that are competent to deal with questions of competition in other cases as well.

***VI. Perspectives for more competition and efficiency in the statutory health insurance***

**139.*** The Monopolies Commission has examined the system of the statutory health insurance and the conditions of competition between the statutory health insurance funds. It is to be stated that on the one hand, the basis for active competition has been created in recent years, but on the other, various major barriers to such competition have remained. These barriers quite considerably limit the active development of competition within the statutory health insurance system and its efficiency-raising effects.

**140.*** The significance of more competition and efficiency in the system of the statutory health insurance is particularly clear in the context of current and future developments in the German health system. Progress in medical technology in particular leads to permanent cost increases in the health sector. At the same time, an analysis of OECD indicators concludes that Germany invests a comparatively large amount of money in its health system without this resulting in an equally high-quality result. If the health sector were to be guided more strongly by competition, however, this could contribute to giving greater scope to innovations with regard to efficient and high-quality care. Cost-reducing innovations should also be able to take effect in the health system, health insurance funds should be given greater performance incentives and the remuneration of health service providers should be based on their performance to a greater extent. Competition is therefore a suitable instrument for bringing about an overall improvement in the performance of the German health care system.

**141.*** Competition and solidarity in the health care system are not mutually exclusive. The solidarity principle specific to the statutory health insurance is the basis of a health insurance system that is intended always to achieve equalization between weak and strong groups or individuals in society. On the basis of this equalization, however, every necessary measure is to be taken so that competition can have the desired effects. The measures proposed by the Monopolies Commission are always based on the premise of underlying solidarity in the statutory health insurance system. On this basis, competition within the system needs to have various constitutive elements which are to be implemented consistently and in a target-orientated fashion. They include regulation on the one hand, enabling undesirable effects of the coordinating instrument of the market to be corrected, and freedom, with competition leading to the development of innovative solutions to problems in the health system.

**142.*** The health system involves a number of markets. The funds have to compete for the insured in the insurance market, while having to procure services in the service market from physicians, hospitals, pharmaceutical companies and other health service providers, which, in turn, are used by insured patients in the treatment market. Competition is intended to provide an incentive for efficient conduct by the health insurance funds and health service providers in all the markets concerned. Imperfect competition in one market leads to reduced efficiency in all the markets concerned. In all the sectors examined by the Monopolies Commission – services provided by physicians, price regulation in contributions to health insurance funds and the competitive framework – it is therefore absolutely essential for the legislator to create the necessary conditions for effective competition in the statutory health insurance system.

**143.*** On the supply side, there are few individual incentives for health insurance funds and health service providers to organize care efficiently in all sectors. All the health insurance funds grant services in accordance with the areas of health care laid out in Section 11 of Book V of the Social Code (*Sozialgesetzbuch – SGB*). In the sector of care by physicians, the services are not bought individually by health insurance funds, however, but to a major extent within the context of collective contracts between all the health insurance funds on the one hand and all the health service providers on the other. Collective contracts give the health insurance funds little room to differentiate. Also, active competition among the health insurance funds can have little effect on positively developing cost and quality in the provision of care by physicians if all the funds measure their services by uniform standards.

**144.*** Health insurance funds use collective contracts in out-patient care to buy services, particularly the services of registered physicians. Since all physicians accredited to the health insurance funds are covered equally under the collective contracts, uniform standards essentially apply to them to determine their remuneration. To this end, the national confederations of the statutory health insurance funds and the regional associations of statutory health insurance physicians agree overall remuneration for all the services provided within a calendar year. The overall remuneration is distributed by the regional Associations of Statutory Health Insurance Physicians on the basis of the services invoiced. Following a fundamental reform of the remuneration provision, overall remuneration no longer fluctuates exclusively as a result of external or political factors, but also in relation to the volume of treatment. That means that the risk of increasing volumes of treatment has been transferred from physicians to the health insurance funds. This is appropriate insofar as the volume of treatment is due only to changed morbidity rates and not to inaccurate invoicing or inefficiency for which the health service provider is responsible. As a consequence, the Monopolies Commission therefore recommends that the task of invoicing the services provided be transferred from the Associations of Statutory Health Insurance Physicians to the health insurance funds. Health insurance funds should also acquire the right to inform patients of the services that have been invoiced. In this way, the funds are given important instruments to be able to ensure the objective accuracy of their invoices themselves.

**145.*** The key to more competition in care by physicians is to be found in areas of service that are the subject of selective contracts. Selective contracts can be used by health insurance funds to contract individual health service providers or groups of such providers. Selective contracts leave the funds with far-reaching freedoms to organize efficiently both the provision of services and the remuneration for them. The resulting heterogeneity in organizing the sovereign duty to provide health care leads the funds that develop the best ideas in this process to prevail in the market. Selective contracts also provide incentives to health service providers, as they no longer receive standard remuneration but are in competition for lucrative contracts. Book V of the Social Code already recognizes different areas in which individual health insurance funds are allowed to conclude selective contracts with health service providers. A particularly promising area is the integrated health care sector. Here, the health insurance fund concludes contracts with regional networks of doctors, hospitals and other health service providers, which cooperate either in treating specific indications or in providing all-round patient care. Lump-sum remuneration of the health service providers gives them strong incentives to ensure optimally coordinated patient care. The innovative potential of integrated agreements provides a promising opportunity to improve the quality of care and/or to lower costs.

**146.*** There are currently two main major hurdles to the development of health care sectors that are subject to selective contracts. One problem relates to the authorized contractual structure. In many forms of care, for example care focusing on the primary physician, explicit provision is made for cooperation by the two contracting parties. While this certainly may be beneficial during a limited cooperation, e.g. in the integrated health care sector, uncontrolled cooperation may lead to both sides gaining market power. In this way, competition may be undermined both by the health insurance funds and also by the health service providers, thereby leading to reduced efficiency. Cooperations in health care sectors covered by selective contracts are therefore not permitted across the board, but only if they do not oppose competitive objectives in health care. The Monopolies Commission therefore calls for the statutory possibility of cooperation among contracting parties to be eliminated, thereby clarifying, as in other sectors, that any form of cooperation by contracting parties is only permissible within the framework of the applicable provisions under competition law.

**147.*** A second quite fundamental problem for competition resulting from selective contracts is that of budget equalization. Health insurance funds should be able to resort to individual care contracts if this results in a care alternative that is more efficient than standard care because it is cheaper or of better quality. The collective contract system stands in the way of this, however. Under this system, the health insurance funds are required to pay an annual budget to the National Association of Statutory Health Insurance Physicians for the out-patient care of their patients. Following the conclusion of a selective contract, services based on an individual contract have to be subtracted from this total budget. Theoretically, there has only been an exact adjustment of the collective budget since 2009. The amount of the adjustment for a collective contract is a matter of individual negotiation, however. The health insurance funds can never be sure what savings they are making on standard care when they organise future care within the framework of selective contracts. This decelerating effect on the development of integrated care is also evident in the contracts most recently concluded. After start-up financing ran out, the number of new integrated care contracts concluded fell considerably.

**148.*** The Monopolies Commission proposes standardizing the conditions for adjusting the budget in order to offer the health insurance funds calculable conditions for concluding selective contracts for health care by physicians. To this end, standardized deductions from the collective budget should be calculated by a state agency corresponding to the treatment needs covered by a selective agreement, with the amount deducted being calculated according to the standards used for calculating the collective total remuneration. The standardized deductions are to be set per patient and are to be morbidity-related. The number of patients to receive care on the basis of selective contracts is to be estimated in the first instance. The morbidity-related overall remuneration should then always be adjusted ex ante by the estimated reduced need for care. The actual values are determined ex post and the total amount balanced out against future overall remuneration.

**149.*** In the view of the Monopolies Commission, effective competition between the funds requires contributors to the statutory health insurance funds to be able to recognize the funds' and care tariffs' relative ability to provide services by the amount of their contribution to insurance cover. The Monopolies Commission is therefore of the opinion that the price is an essential competitive parameter which should be available for the funds to use in full when offering their insurance benefit. The contribution must therefore give those insured an overview that is as transparent and simple as possible of the insurance premiums of various funds and of various tariffs. The present contribution system is only able to do this to a limited extent, however. The cost of insurance with a health insurance fund for standard care currently derives from an income-related contribution, a uniform standard contribution and an additional contribution or premium refund set individually by each health insurance fund. The income-related contribution is first put into a fund where it is collected and it is then paid to the health insurance funds in the form of morbidity-adjusted payments per insured person. For members, differences in the contribution rate to be paid to different health insurance funds are to be seen not in the general contribution rate, but only in differences in the additional contributions or premium refunds. This part of the contribution, which each health insurance fund sets individually, is limited by a hardship clause in accordance with Section 242 (1) Sentences 2 and 3 of Book V of the Social Code, however. If the possible additional amount exceeds an amount of EUR 8 per month, the health insurance fund has to check whether this amount exceeds 1 % of the member's income that is liable to contributions, since this proportion constitutes the statutory upper limit. The clause in its current form limits the health insurance funds' room for manoeuvre on price policy and also has anti-competitive effects, since the health insurance funds are given incentives to try to attract members who have a high income liable to contributions.

Also, in principle, the additional contribution to or premium refund from a health insurance fund does not cover the differences in contributions resulting from the choice of special tariffs. If the price of care is divided up into different components by a health insurance fund in a particular tariff, this lowers the price transparency for insured persons. If, for example, as well as offering standard care, a health insurance fund offers other selectively contracted forms of care in accordance with Section 53 (3) of Book V of the Social Code, it has the possibility to provide a premium refund or reduced user's fees. These are to be adjusted in accordance with the income of those insured under Section 53 (8) Sentence 3 of Book V of the Social Code.

**150.*** Proposals to change the present form of collecting contributions often aim to replace the essentially income-dependent contributions by an additional contribution per insured person that is independent of income. Since this would lead to the equalization of income on the basis of solidarity ceasing to exist in the collection of contributions, it is proposed that it be replaced by a tax transfer. There are essentially two arguments for this proposal. The first is that it is appropriate from the point of view of allocation theory not to finance a social equalization of incomes from the income that is liable to contributions of people insured under the statutory health insurance scheme. Rather, it is the task of society as a whole to secure the health of people on a low income, which is to be fulfilled by all members of society regardless of the type of their income. Economically appropriate social equalization is therefore to be financed from the tax transfer system. A second competition-based argument for calculating contributions independently from income derives from the transparent price signals associated with the prices of insurance services indicated in Euro. It is assumed here that prices in Euro improve the clarity of differences between contributions, thus increasing competitive pressure on the funds.

**151.*** The Monopolies Commission believes there are economic advantages in increasing the contributions that are independent of income. However, making contributions completely independent of income requires considerable tax transfers for social equalization on the one hand, and on the other hand, the administrative work involved has to be taken into account. The Monopolies Commission therefore proposes concentrating in the first instance on the competitive advantages of having a share of contributions that is independent of income. The present additional contribution can also generate the competitive advantages of lump-sum contributions. To make this happen, however, the barriers resulting from the current contribution regime need to be overcome.

**152.*** The Monopolies Commission proposes structuring the additional contributions in such a way that members of statutory health insurance need only compare one single price, the additional contribution, when selecting their health insurance fund and care tariff. To this end, the additional employee contribution of 0.9 % to the general contribution rate should be abolished, thereby stimulating competition via additional contributions and doing away with the opaque price differences of different premium refunds and additional contributions or the lack of premium refunds or contributions. The hardship clause, under which an additional contribution of EUR 8 may not exceed 1 % of a member's income that is liable to contributions, is to be replaced by a competitive equalization system based on solidarity with reduced contributions. For every fund member who is insured at the reduced rate, the difference between that amount and the full contribution should be supplemented from tax revenues. For the voluntary participation of a fund member in an optional tariff under Section 53 (3) of Book V of the Social Code, the funds should be given the opportunity to demand different additional contributions. Section 53 (8) sentence 3 of Book V of the Social Code, which connects the amount of the contribution change in the case of optional tariffs with the absolute amount of a member's contribution, cannot be substantiated on the basis of considerations of economic efficiency and, in the view of the Monopolies Commission, it should be abolished entirely.

**153.*** As the framework for a new competitive structure in the statutory health insurance funds, competition processes are also to be protected against restraints. In other markets, this protection is guaranteed by competition law. In the statutory health insurance fund sector, there is not yet any comparably sufficient protection of competition. This is due to three main factors. Firstly, there is a lack of clarity both under European and under German legal practice as to the extent to which health insurance funds act entrepreneurially in the market. In order to apply competition law, however, it is necessary for health insurance funds to be defined as enterprises. A second problem concerns the areas excluded by Section 69 of Book V of the Social Code, under which parts of the legal relations between health insurance funds and health service providers are excluded from the application of German competition law. Thirdly, Book V of the Social Code contains various cooperation obligations which counter competitive activities by health insurance funds. The obligation to cooperate closely in accordance with Section 4 (3) of Book V of the Social Code deserves special mention in this context. The regulatory authorities interpret these obligations to mean that health insurance funds are not allowed to be authorized to submit cancellations of contracts, for example. Thus, the formalities of changing one's care provider may not be taken from fund members by competitors, which is the case in other markets.

**154.*** The Monopolies Commission proposes adapting the provisions to a model according to which a competitive relationship between the funds is the rule unless the funds' special care obligation requires specific exceptions. To this end, a new paragraph should be inserted in Section 4 of Book V of the Social Code between Paragraphs 1 and 2 which could read as follows:

"The activities of the health insurance funds are entrepreneurial activities within the meaning of the Act against Restraints of Competition. Exceptions are sectors where the funds are required to act collectively in order to fulfil their care obligations. This applies in particular to contracts between health insurance funds or their associations and health service providers which the health insurance funds or their associations are obliged by law to conclude and for which an arbitration procedure applies in such case as they are not concluded."

At the same time, Section 69 of Book V of the Social Code and Section 87 (1) sentence 3 of the Act against Restraints of Competition are to be deleted. The general duty of cooperation under Section 4 (3) of Book V of the Social Code should also be deleted. Insofar as the health insurance funds can assert a need for special cooperation in connection with special obligations under their care obligation, detailed provision is to be made for such exceptions in Book V of the Social Code.

**155.*** The Monopolies Commission continues to regard it as desirable to supplement the health system by the element of compulsory participation by patients in the costs they cause. This seems necessary in order to enable patients to reach cost-orientated decisions in keeping with the market. In contrast, patients today take their decisions concerning their use of treatment services largely independently from cost considerations. The optional tariffs under Section 53 Paragraphs 1 and 2 of Book V of the Social Code, which aim to have a controlling effect on patients' demand behaviour by introducing personal contributions, are unsuited to achieving this objective, however. Personal contributions made exclusively within the context of optional tariffs result in self-selection as the patients opting for these tariffs are particularly those who have little need or tendency to make use of the provisions of the statutory health insurance in any case. The Monopolies Commission proposes that these optional tariffs be abolished. If an appropriate regulatory effect on patients' demand behaviour is to be achieved, however, general obligatory personal contributions, in the form of a relative share of the physician's invoice, are an appropriate instrument. The health insurance funds should be responsible for invoicing. The Monopolies Commission explicitly points out that in such case as obligatory personal contributions are introduced, social equalization systems will also become necessary that meet the demands of the principle of solidarity in this case.