

Press release

Monopolies Commission presents its Main Report

The Monopolies Commission has submitted its XXth Main Report pursuant to § 44(1) of the Act Against Restraints on Competition (ARC) to the Federal Minister of the Economy and Energy. The Report is entitled: **“A competitive order for the financial markets”**.

The subject matters of the Report encompass the following:

- The analysis of **company concentration** and the **competition authorities’ decision practice**, as provided by law;
- In shorter form, the following subjects: **“Google, Facebook, and Co. – a challenge for competition-related policy”**, **“the penalisation of competition law violations”**, **“recent developments in the energy sector”**, **“competition deficits on the taxi markets”**, **„competition in German child and youth welfare services“**, as well as the **“the Monopolies Commission’s data access“**;
- In a special chapter, the Monopolies Commission assesses the **public local business activities and the trend towards „remunicipalisation“**;
- The detailed second special chapter of this Report assesses issues of **“competition on the financial markets”**.

Regarding the individual subjects:

Google, Facebook, and Co. - a challenge for competition-related policy

Large internet service providers such as Google, Facebook, or Amazon have attracted more and more attention in recent public debate. It is presumed, among others, that these companies have substantial market power. Partially, discomfort is created by the companies’ **ability to collect and connect large volumes of personal data**. The Monopolies Commission approaches these issues from a competition-related policy perspective (*see also separate press release*).

Recent developments in the energy sector

The federal government has taken up the **reform of the subsidies under the Renewable Energy Law** (*Erneuerbare-Energien-Gesetz – EEG*). This reform takes place in parallel to EU state aid proceedings related to the subsidy regime that existed so far. The Monopolies Commission recognises the reform of the Renewable Energy Law as **one step into the right direction**, and presses for the rapid implementation of the tender system which will be a substantial improvement as compared to the current subsidy system based on fixed supply tariffs. The Monopolies Commission further points out state aid risks that are materialising increasingly. Against this background, it promotes once more the evolution of the Renewable Energy Law in the direction of the quota model (*Quotenmodell*), which it has proposed before.

Monopolkommission

Heilsbachstraße 16 · 53123 Bonn · Tel +49 . 228 . 338882 -30 · vorsitzender@monopolkommission.bund.de

www.monopolkommission.de

The penalisation of competition law violations

In both Europe and Germany, current discussion about competition policy focuses, among others, on the adequate structure of the sanctioning system under competition law. The Monopolies Commission addresses the question whether it should be recommended, with a view to better competition law enforcement, to penalise **particularly serious competition law violations, so-called hardcore cartels**. It considers the criminal prosecution of the natural persons responsible for the formation and maintenance of cartels as a particularly promising measure (*see also separate press release*).

Competition deficits on the taxi markets

Competition on the **taxi markets** is still underdeveloped in Germany given the concession restrictions and the general prescription of tariffs that exist in many local territories. The Monopolies Commission's analysis shows that current regulation cannot be justified by the purpose to ensure the effectiveness of taxi services or necessary consumer protection. For that reason, it recommends the **abolition of concession restrictions and the introduction of price competition**, as a first step by introducing maximum prices. In addition, the **regulation of rental car services** should be adapted (*see also separate press release*).

Competition in German child and youth welfare services

In **child and youth welfare services**, the principle of **effective competition already finds a basis in the Social Code VIII (Sozialgesetzbuch VIII)** given the statutory right of the beneficiaries to claim and choose, and the statutory obligation to establish youth welfare services marked by multiple carriers, contents, methods and modes of working. Notwithstanding recognisable progress in the past few years, the Monopolies Commission sees a need for additional improvement to make sure that high-quality welfare services for children and adolescents can be offered on a cost-efficient basis also in the future, taking into account the limited public funds and increasing demand. To that end, **tax privileges distorting competition and financial subsidies for the benefit of established providers** should be reduced in order to ensure competitive service offers, and the participation rights in institutional bodies such as the **youth welfare committee (Jugendhilfeausschuss)** should be designed in a way that is neutral vis-à-vis individual providers. The application of public procurement, state aid and competition law, and the pursuance of the reform of fees can provide important competitive stimuli.

The Monopolies Commission's access to data

A problem persistently impairing the Monopolies Commission's working abilities results from the **Federal Cartel Office's (FCO's) refusal to allow the Monopolies Commission to use its statutory right of access to file to fully access the individual data** that exist at the FCO, e.g., prices and volumes. The right of access to file is meant to enable the Monopolies Commission to pursue its statutory mandate. This mandate includes, in particular, the comprehensive evaluation of the practice of the competition authorities, and opinions on other matters of relevance for competition policy. In this context, **the Monopolies Commission by law enjoys**

an unlimited right of access to file. The increasingly economic approach adopted by the FCO in its competition law enforcement requires the Monopolies Commission, for its own work, to have full access to the data existing at the FCO. This is a prerequisite for the Monopolies Commission to be able to evaluate the FCO's economic arguments and to conduct its own empirical research on additional questions of competition within the scope of its statutory mandate. It cannot be in the interest of the Federal Government or Legislature, as whose counsel the Monopolies Commission is acting, that the Monopolies Commission's capabilities are **curtailed such that it is severely limited in its core functions.** The Federal Ministry for Economic Affairs and Energy, as the highest relevant federal authority, is competent to clarify the issue quickly. Still, the Monopolies Commission submits a proposal for a statutory amendment if clarification by statute is considered to be the preferred option.

Concentration of enterprises

The reporting of the **concentration and the interdependence of large enterprises**, § 44(1) ARC, is based on the largest 100 enterprises in all business sectors in the Federal Republic of Germany, which have been identified according to their contribution to domestic creation of value. The results indicate a continuing **downward trend of concentration.** The share of the relevant large companies in the domestic value creation of all enterprises declined between 2010 and 2012, and finally reached 16.0 percent. In 2000, it had still been at 20.1 percent. The share of the “100 largest employers” in the domestic employment relationships was 13.6 percent in 2012. The results also show that the dissolution process of the network of person-based company interdependence via multiple management posts and minority crossholdings among the “100 largest”, which started in 1996, is continuing.

In addition to the assessment of the concentration and the interdependence of German large enterprises, and continuing the analysis started in the XVIIIth Main Report, the Monopolies Commission has continued its analysis of **person-based company interdependence** via multiple management posts in and between the EU-15 Member States, Norway, and Switzerland, and has supplemented this analysis by **capital-based interdependence.** On the whole, 5,370 listed companies were assessed for the 2005–2011 period. In the reporting year of 2011, 57.4 percent of the companies were personally connected to at least one other enterprise via interlocking directorships, on average. The average interdependence based on minority shareholdings is considerably lower: Only 17 percent of the observed enterprises are interdependent via capital interests.

Decision practice in competition law

In German merger control, the most important change consisted in the **introduction of the SIEC test** as the test criterion for merger prohibitions. The SIEC test follows the previously existing market dominance test, but the creation or strengthening of a dominant position still exists as a rule example for a significant impediment to effective competition. In the Monopolies Commission's reporting period, the FCO has assessed only few cases under the new test. The assessment of market dominance remained primarily important. No gap case existed, i.e., a case where a significant impediment to effective competition could be established without a finding of a creation or strengthening of a dominant position.

Important merger control decisions were adopted in the **cable grid sector.** The product and geographic market definitions continue to be disputed, though they should be adapted to the

looming changes in market structure in the Monopolies Commission's view. Unlike the Düsseldorf Higher Regional Court, the Monopolies Commission deems the grant of extraordinary termination rights, under particular circumstances, to be sufficient as an ancillary condition of a clearance decision in order to compensate for the negative effects of a merger of cable network providers on competition.

An essential development in **European merger control** practice consists in the more pronounced use of theoretical and empirical analysis – usually so-called quantitative analysis – in merger control decisions. Another important development relates to the increasing submission of **efficiency arguments** by the parties to the concentration. However, efficiency arguments have in no case been able to dispel serious competition concerns raised by the European Commission. Whereas only one proposed transaction had been prohibited in the previous reporting period, Article 8(3) EUMR, the European Commission announced three prohibitions in the years 2012 and 2013.

The European Commission pursued two important legislative projects in the reporting period. First, it adopted a **package on the simplification of merger control procedure** in December 2013. Second, the European Commission aims for a rule that broadens its **competence to include the assessment of minority shareholdings without an acquisition of control**. In the Monopolies Commission's view, such an amendment should ensure that all cases raising competition concerns can be investigated. In addition, the new rule should be framed in a way keeping the additional regulatory burden for the market players and the competition agencies at a minimum, avoiding over-regulation, and ensuring substantial legal certainty also for the future.

The **evaluation of the FCO's cartel enforcement practice** is another focal point of this Report. Discussion focuses on three cases in the areas drugstore products, tracks and track switches, building materials, and the media. The Monopolies Commission also appraises the – partly controversial – enforcement practice in the area of **Internet distribution**. Further, it analyses the competition law enforcement in several areas of **intellectual property**. The Monopolies Commission renews its calls for a **reform of the fining and the administrative offense procedure**, and comments on the new **directive on private damage actions**. It considers the reluctance in **applying competition principles in the compulsory health insurance system** to be problematic.

Public local business activities and the trend towards “remunicipalisation”

In many municipalities, the local authorities are aspiring to expand their proper business activities into areas that have been organised privately to date. The Monopolies Commission reviews the economic effects of **public local business activities** in the areas of water supply, energy, telecommunications and waste disposal, and reaches differentiated conclusions (*see also separate press release*).

Competition on the financial markets

The evaluation of the competitive conditions on the financial markets centers on the banking markets. The assessment relates to **systemic competition distortions** to the benefit of banks and shadow banks, which are created by implicit state guarantees; **structural competition distortions** to the benefit of individual banking groups within the German three-pillar system; and topical **competition problems** with respect to **financial products and transactions** (*see also separate press release*).

An English summary of the Report and an English translation of the chapter on competition on the financial markets will be published later this year.

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