Monopolkommission

Competition 2020

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in accordance with Section 44 Paragraph 1 Sentence 1
of the German Act against Restraints of Competition

Summary

Chapter I

Current issues in competition policy

Competition in the Corona crisis

S1. The Corona crisis (Covid-19 crisis) will change the German economy profoundly. In order to avoid permanent damage to market structures and to mitigate the consequences of the crisis for the labour markets, the German Federal Government, the federal states and the municipalities are have been intervening massively in the economy through financial aid, guarantees and equity investments in companies. Moreover, the companies have shown a need for partly strengthened cooperation and coordination during the lockdown and reactivation phase. All of this will have an impact on competition. It is to be expected that there will be a **rise in concentrations** overall and in individual sectors of the economy, **resulting in a decline in competition.** The market power of the large digital companies will increase and **direct State influence on the companies will grow.** In Germany and the European Union, this will create pressure for action in order to secure competitive structures.

S2. With regard to cooperation between companies that aims to avoid shortages of supply, the European Competition Network has promptly provided guidance. Legal certainty was increased by rapid decisions of the competition authorities. However, it was also important in this context to **ascertain that cooperation must not go beyond what is necessary to ensure supply.** Agreements on prices, conditions and the allocation of customers or territories must remain prohibited even in times of crisis. Consumers must also be protected against abusively excessive prices of medical products or other goods that are essential but scarce during the crisis.

S3. It can be assumed that the push on digitalisation caused by the Corona crisis will lead to a further increase in the market power of the large digital companies. Against this background, the Monopolies Commission recommends that the German government should use its presidency of the Council of the European Union to **introduce a platform regulation for dominant online platforms**.

S4. During the Corona crisis, **merger control rules should not be applied more generously than they have been so far**. The applicable law enables the competition authorities to react appropriately even in times of crisis, for example with the concept of the failing company defence. The **extension of the review periods for merger control**, applicable from March to May 2020, should be prolonged **until the end of 2020**, as a renewed increase in the number of merger control notifications is expected in case of continued application of the Corona protective measures.

S5. During the Corona crisis, too, **the control of State measures to support companies is indispensable in view of their potentially adverse effects on competition in the European single market.** Measures that selectively support companies are particularly problematic. The Monopolies Commission agrees with the European Commission that **the conditions and requirements in the case of State equity participations must be stricter than in the case of pure financial aid.** In particular, a State participation should be accompanied by pro-competitive measures, insofar as it concerns companies with a dominant position in one or more markets. In addition, the Monopolies Commission recommends that a **committee of independent experts be set up to advise the German Federal Government on the development of exit strategies from crisis-related State participations.**

Control of abusive practices in the digital platform economy

S6. The EU Council Presidency offers Germany an opportunity to contribute to the further development of the European **regulatory framework for digital markets**, as has been envisaged by the European Commission. The political objective of taking more effective action against competition problems in these markets has been formulated both at national and at EU level. Abuses of market power by online platform companies should be sanctioned more effectively and rapidly, enforcement procedures should be facilitated or accelerated and, where appropriate, regulatory instruments should be developed to protect platform users. In view of the above-mentioned objectives, several expert reports have developed potential solutions, which the Monopolies Commission supplements with its own considerations and recommendations in this Report.

S7. With regard to **competition problems related to market power**, the Monopolies Commission is concerned with several issues, namely the criteria for determining market power in the case of digital platforms, the necessary procedure in the case of conduct by which the market permanently tips in favour of a platform or by which more or less unassailable "ecosystems" are created, and the procedure in cases where the market structure has solidified permanently in favour of a platform. With regard to the criteria for determining market power in the case of digital platforms, the existing principles of Article 102 TFEU appear to be sufficient, notwithstanding the reforms currently underway at national level.

S8. With regard to the **problem of tipping markets**, a provision has been proposed in Germany (Section 20 (3a) ARC-E), pursuant to which the cartel authorities would be empowered to take action already when competition is endangered and independently of proof of concrete effects of the conduct in question. The provision in question could also be used to take action against European platform companies operating in Germany whose conduct may contribute to the collapse of markets. The Monopolies Commission therefore recommends that **the German application practice be observed** first and, if necessary, regulations for European law be considered on this basis.

S9. With regard to the **problem of "ecosystems"**, the prohibition of abuse in Article 102 TFEU seems to be sufficient in principle. The new abuse regulation proposed in Germany for companies of "paramount cross-market significance" for competition (Section 19a GWB-E) departs from Article 102 TFEU in several respects. However, from the perspective of EU law, experience with this new provision can be revealing under two aspects: In cases where the competition authorities of the Member States or national courts are obliged to apply Article 102 TFEU in parallel to national competition law (Art. 3 (1) sentence 2 of Regulation 1/2003), it remains to be seen whether the **new German provision** will facilitate or burden abuse control. Where the scope of application of the provision goes beyond Article 102 TFEU, it will be **revealed whether it is suitable to effectively close any previously unrecognised regulatory gaps at EU level**. Against this background, the Monopolies Commission considers it sensible to first gather practical experience in this respect as well before introducing a corresponding supplement to the European regulatory framework.

S10. In view of the fact that the **market position of large platforms can become permanently entrenched after a tipping of the market or as a result of the formation of ecosystems**, proposals have been made in several expert reports. One proposal is to oblige dominant platform companies to prove that they do not commit any abuse within the meaning of Article 102 TFEU. Another approach is to subject dominant online platform companies to additional obligations and stricter monitoring. The Monopolies Commission considers the second approach to be particularly effective and makes **proposals for a new Platform Regulation**. This Platform Regulation should contain **rules of conduct for dominant platforms**. For example, it could provide for a ban on self-preferencing and for more stringent interoperability and portability obligations, which should be aligned with the experience in data protection law. The Regulation could also include **remedies for abuses of market power with lasting effects on the market structure, and for breaches of the additional obligations of dominant platform companies laid down in the Platform Regulation**. The remedies should then also specify the conditions under which the divestiture of parts of the business (including forced access to algorithms or data) may be proportionate and the necessary characteristics of those parts of the business (e.g., viability and competitiveness).

S11. In addition to the market power-related problems described above, **information-related problems** may arise in platform markets, making effective protection of competition more difficult in practice. First, an information asymmetry exists between platform companies and outsiders (public authorities or commercial/non-commercial platform users). Second, online marketplaces (e.g., trading/booking portals) have information problems in the relationship between traders and consumers.

S12. In the relationship between platform companies and outsiders, the Monopolies Commission sees a need for additional regulation, particularly with regard to the **information asymmetry between platform companies and the authorities investigating the case**. Although the authorities have extensive powers to collect information, they may encounter considerable difficulties when using their investigative powers in proceedings. The Monopolies Commission therefore recommends **the tightening of the procedural obligations to cooperate** in cases where the authorities have made all reasonable efforts to investigate. Companies can prevent the **investigation of factual evidence** – without the prohibition of self-incrimination under EU law coming into play – if they do not disclose information on their own initiative in such cases. In those cases, the authorities should be empowered to draw conclusions from a lack of cooperation in the context of their free assessment of the evidence.

S13. With regard to the **relationship between merchants and consumers** in online marketplaces, it appears desirable to clarify the assessment criteria for automated pricing of online traders using pricing algorithms. The Monopolies Commission is in favour of **focusing on** the guidelines concerning the **market definition in online marketplaces** when the Commission notice on the definition of the relevant market is revised, **in so far as price differentiation by dealers indicates that relevant markets are becoming fragmented**. Furthermore, it recommends the introduction of a **statutory presumption of damage** in order to effectively protect consumers against harm caused by automatically fixed and unreasonably excessive prices within the meaning of Article 102 TFEU.

Efficient structure of the German hospital sector – is a sector exception in the ARC necessary?

S14. With the Covid-19 pandemic, the German hospital infrastructure has increasingly received media and political attention. The **hospital landscape in Germany is with its almost two thousand hospitals considered to be comparatively broad, particularly diverse and only concentrated in certain areas.** With 34 intensive care beds per 100,000 inhabitants (2017), Germany has higher capacities than many other industrialised nations, which is seen as a significant advantage in dealing with the Covid-19 pandemic. However, for years, criticism has been voiced about the existing hospital structures. In order to improve these structures, **there is often a call for faster consolidation of the hospital sector and facilitation of hospital mergers.**

S15. As part of the 10th amendment to the Act against Restraints of Competition (ARC), the debate about the structure of hospital care focused on an adjustment of merger control for hospitals. In this regard**, the German Federal Government is planning to adjust the requirements for the assessment of hospital mergers and cooperations**, which could influence the structure of German hospital care in the future. By defining separate antitrust regulations, hospital mergers that are considered particularly desirable from a health–political point of view are to be given competitive privileges.

S16. In this respect, although bed capacities are extremely high in Germany, these are spread over many small hospitals. The provision of many small hospitals implies that the number of patients in the individual hospitals is typically low. Hospitals with a low number of patients tend to have a lower medical experience, a shortage of personnel and poorer medical-technical equipment. Consequently, a number of indications suggest that **hospital mergers (possibly also hospital cooperations) can have quality-enhancing effects, at least in individual cases.**

S17. The Monopolies Commission sees great advantages in an effective merger control of hospitals. However, the **current form of merger control may partially hinders efficiency-enhancing consolidation and specialisation** of German hospitals. Against this background, a frequently discussed area exception for certain hospital mergers from competitive control by the German Federal Cartel Office is not necessary. This can even jeopardise the evident quality assurance of competition protection.

S18. However, **effects on the quality of care resulting from a hospital merger should be given more attention in merger control proceedings**. On the one hand, it is recommended that the German Federal Cartel Office examine its market definition, which is basically mature, but primarily based on past-related patient flow data on a case-by-case basis in order to determine whether changes in the supply situation will occur as a result of a specific merger project, which could lead to a change in demand behaviour. On the other hand – and much more importantly – **merger-related quality advantages should be better taken into account in the overall assessment of the merger effects**. The Monopolies Commission therefore recommends that the trade-off between competition-induced quality changes on the one hand and quality advantages resulting from synergy effects on the other hand be included in the Act against Restraints of Competition in the form of an efficiency assessment clause for hospital mergers.

Chapter II

The state and development of concentration among companies in Germany

S19. Under § 44(1) first sentence of the Act Against Restraints on Competition (ARC), the Monopolies Commission is tasked with regularly assessing the state and development of company concentration in Germany. Since its formation, the Monopolies Commission has been identifying the 100 largest companies in Germany in order to assess **aggregate macroeconomic concentration**. The share of the 100 largest companies in total value added is used as an indicator for the level of aggregate concentration. **For the reporting year 2018, this share has decreased slightly to 14.8 percent**, thus continuing its long-term downward trend. The Monopolies Commission also determines **personnel and capital linkages among the 100 largest companies.** Within this group, eight companies held more than 1 percent of the shares in 31 companies. Compared with 2016, this corresponds to fewer companies holding a significant stake in a larger number of companies within this group. With respect to personnel linkages in 2018, 42 of the 100 largest companies shared managing directors with other companies, i.e. managing directors of one company were represented in supervisory bodies of other companies. After observing 45 personnel links in 2014 and 34 in 2016, the long-term trend seems to be stabilizing. By contrast, the number of linkages via individuals without a management mandate – for example via supervisory board mandates in several companies from the group of the 100 largest companies – has decreased to 88 connections in 2018 (after a value of 113 in 2016).

S20. In addition to the analysis of aggregate company concentration, the Monopolies Commission determines the state and development of concentration among companies across economic sectors as well as firm-specific price mark-ups as indicators of market power. **The cross-sectoral company concentration in Germany remained largely flat between 2007 and 2015**. Between 2015 and 2017, however, an increasing concentration could be observed in some sectors. For example, a **significant increase in concentration could be observed in the services and construction sectors** by 17.1 percent and 10.3 percent, respectively (2015–2017). In the manufacturing sector, on the other hand, concentration decreased by an average of 8.3 percent over the same period; concentration in the trade sector remained virtually unchanged. In addition, a disproportionately high increase in concentration could be observed in branches of industry with the highest concentration values. **Against the background of the corona crisis, the economic contraction is expected to lead to an increase in concentration in heavily affected sectors in the medium term**. Comparable economic downturns increased the concentration of sectors by an average of 10 percent during the financial and economic crisis between 2008 and 2010. The **analysis of price mark-ups** based on representative firm-level data from official statistics shows an average **increase in manufacturing**, where the sales-weighted average mark-up rose by 17 percent between 2008 and 2017. In the services sector, on the other hand, the same measure decreased by about 14 percent.

S21. Overall, the **Monopolies Commission still sees no alarming trend** in the concentration of companies in Germany and thus no immediate need for action in competition policy. However, the rising trend in cross-sectoral company concentration and the increasing sales-weighted price mark-ups in manufacturing should be observed closely. This is particularly true against the background of possible effects of the corona crisis on market structures and market power of companies in Germany. There remains a need for further research to identify the causes of increasing concentration and mark-ups in some parts of the German economy; this will help to clarify whether the observed trends indicate an increase in market power or rather reflect efficiency improvements and increasing investment activity.

Chapter III

Review of competition decisions and judgments

S22. In Chapter III, the Monopolies Commission develops recommendations for actions to be taken by legislators and competition authorities on the basis of the German and the EU competition decision-making practice in the reporting period.

S23. The Monopolies Commission agrees with the **market definition** of the Bundesgerichtshof (German Federal Court of Justice) with regard to **advertising blockers**. However, the Monopolies Commission points out that, in determining a dominant market position, **all competitive forces must be taken into account,** thereby considering all relevant market participants and the network effects occurring between them in two-sided markets.

S24. In its analysis of the European Commission's ***Google Android*** **case**, the Monopolies Commission comes to the conclusion that **Article 102 TFEU** provides competition authorities with **an effective antitrust instrument** to bring infringements to an end. Yet, the case shows that such remedies, although stopping an abusive conduct, are likely to have no competitive effect if the market structure is already damaged.

S25. In the view of the Monopolies Commission, the German authorities and courts pay too little attention to the **provisions of European Union law** which are intended to ensure uniform application of the law. The courts of last instance are particularly responsible for preventing such undesirable developments.

S26. The Bundeskartellamt (German Federal Cartel Office) has relaxed the **rules on individual advertising at the Olympic Games** but has limited its decision to German athletes. The Monopolies Commission considers it necessary that the competition authorities **ensure equal conditions within the European Union** in such cases. It may thus be required that the European Commission takes action. The European Commission should also consider adopting guidelines for the application of EU competition law to the sports sector.

S27. The Bundeskartellamt has cleared the joint **expansion of fibre-optic networks** by Deutsche Telekom and EWE in north-west Germany. The Monopolies Commission concludes that the commitments accepted are in principle suitable to counteract the restrictions of competition resulting from the establishment of the joint venture. However, the Monopolies Commission recommends **excluding from the cooperation those areas in which a network rollout would be viable without cooperation** in similar cases in future.

S28. With regard to the **central marketing of the German Soccer League**, the Bundeskartellamt has approved the marketing model for the broadcasting rights covering the seasons from 2021/2022 on the basis of preliminary investigations. However, the decision does not sufficiently address the issue of **limited price competition**. It is recommended that the **economic effects of central marketing** be recorded more systematically.

S29. In view of the different assessment of most favoured nation ("MFN") clauses within the European Union, a referral to the European Court of Justice should be made if an appeal is lodged with the Bundesgerichtshof in the *Booking.com* case. Economic studies reach ambivalent conclusions on the competitive effects of **narrow MFN clauses**. Therefore, the Monopolies Commission recommends further analysis of efficiency gains and anticompetitive effects of narrow MFN clauses. **In any case, a general ban on such clauses should be avoided.**

S30. The Monopolies Commission recommends **supplementing the reasons for reopening commitment proceedings** with the possibility for the competition authority to adopt a commitment decision **with a reservation of withdrawal**. The provision should reflect the fact that a withdrawal is only possible if the effects intended by the commitments, but ultimately not achieved, are already specified in detail in the commitment decision.

Chapter IV

Chinese state capitalism: A challenge for the European market economy

S31. The People's Republic of China has undergone impressive economic development since the introduction of market economy reforms several decades ago. Measured in terms of gross domestic product, which is adjusted in terms of purchasing power, China is the largest economy in the world. At the same time, **China's importance for the global economy has increased considerably** in recent decades; especially since China's accession to the World Trade Organization in 2001, there have been shifts in world trade. Excluding trade in goods between the Member States of the European Union, China's share (excluding Hong Kong) in global exports of goods rose from around 7% to around 17% between 2002 and 2018. In the same period, the shares of the EU and the United States have fallen from around 18.3% and 15.2% to around 15.6% and 11.3%, respectively. After the USA, China is currently the EU's **second largest trading partner and the EU is China's largest trading partner**.

S32. Today, China is neither a market economy nor a planned economy, but with its "Socialist Market Economy with Chinese Characteristics" it pursues a hybrid economic model that contains both state-economy and market-economy elements. **More strongly than in European market economies, the Chinese state intervenes in economic affairs in many different ways to achieve its industrial policy goals.** Of **particular importance** in this context are **economic benefits (subsidies)** which state or private undertakings enjoy. In the international context, such state intervention can lead to competitive advantages for Chinese undertakings over non-subsidised undertakings. Due to China's growing economic importance, such state intervention is increasingly affecting the EU economy and putting European undertakings at a competitive disadvantage vis-à-vis their Chinese competitors.

S33. In order to avoid **competitive disadvantages for European undertakings**, there has been an increasing debate for some time about possible reforms to European foreign trade and competition law. It should be noted that the **influence of third countries on the economy is already subject to rules**. In cross-border trade, European undertakings are already protected by **anti-dumping and anti-subsidy instruments**. The anti-dumping instrument takes into account the particularities of the Chinese economic system. Hence, comparative prices are not determined in the Chinese home country as long as they "do not result from the free play of market forces". However, it should be noted that especially when anti-dumping instruments are used, the protection of European undertakings in terms of a European industrial policy is in the foreground and the protection of competition takes a back seat. For consumers, this means that possible price competition from Chinese suppliers is also weakened. In order to preserve the positive effects of price competition from Chinese competitors, the protection of competition in the application of anti-dumping law should therefore be given greater weight in future. Anti-subsidy law also has an industrial policy focus. Against this backdrop, it gives little weight to the positive effects of subsidies, which are particularly evident in the form of lower import prices. On the other hand, there is a normative interest in the compensation of competitive advantages caused by subsidies.

S34. Complementing the trade instruments, the **EU competition rules** are not directly applicable to measures of third countries, but they are **applicable to the behaviour of undertakings from third countries in the EU**. When assessing the market position of such undertakings (in abuse and merger control) it can also be taken into account that a third country is behind them. Irrespective of this, the question of whether corporate conduct violates the prohibition of cartels or abuses (Art. 101 or Art. 102 TFEU) must be answered solely on the basis of the constituent elements of the relevant provisions. It is not possible to take into account, in addition to these prerequisites, that the conduct is due to the special circumstances in a third country or was even deliberately encouraged by that country.

S35. In the case of company acquisitions, a distinction must be made between the merger control assessment of whether the transaction gives rise to market power and any examination under State aid law of economic support for the acquisition by a Member State. Third-country subsidies for the acquisition are as such not yet subject to review. In view of this, a stronger use of **investment control** is also regularly discussed. This control has already been adapted and tightened several times in the meantime. However, it is primarily **aimed at protecting public safety and order** and should also be limited to this. Industrial policy use should be avoided.

S36. With regard to **Member State procurement**, the existing rules serve the dual objective of avoiding distortions in European procurement markets and contributing to maintaining reciprocity in access to foreign procurement markets. The fact that a bidder is subject to state control or financing and may therefore submit its bids according to criteria other than market economy criteria cannot be uniformly covered in the existing legal framework – apart from the possibility of taking into account “criteria other than those relating to the award of the contract”. Instead, there is a large number of individual rules that serve different objectives. This results in a confusing situation, which leaves it **questionable** whether it can actually guarantee **effective protection of equal opportunities against state-induced distortions of competition**.

S37. Thus, the protection of European undertakings or the European market economy under the existing rules is incomplete in certain situations. This is **particularly** the case **if third countries provide subsidies** which give undertakings a competitive advantage over undertakings not subsidised by third countries when operating in the EU, and if those subsidised undertakings can subsequently gain market share at the expense of these competitors. Competitive disadvantages for European undertakings not covered by the existing legal framework (i.e., the foreign trade and competition rules) may be assumed, for example, if undertakings subsidised by third countries **relocate their production to the EU** and sell their products here in order to circumvent anti-dumping or countervailing duties. The same applies if they provide subsidised **services**, since services – unlike goods – cannot be covered by foreign trade instruments. Competitive disadvantages also exist if undertakings subsidised by third countries are able to submit better bids than their non-subsidised competitors due to the subsidy in **company acquisition** or **procurement transactions**. It is true that the EU benefits from subsidies financed by the Chinese taxpayer, which result in low-priced input products or consumer goods for the manufacturing industry or European consumers. However, the understanding of competition in the EU, which is shaped by the European Treaties, also includes a competitive level playing field for undertakings operating in the internal market. To this end, the EU internal market is subject to State aid control in accordance with Article 107 et seq. TFEU. This is not applicable to third-country support measures with effects on the internal market. This is true even if companies are able to successively build up market power due to third party subsidies or if, conversely, companies withdraw from competition with subsidised competitors or abandon their own research and development efforts. In these cases there are regulatory gaps because the existing instruments do not cover third country subsidies.

S38. To close the existing gaps, various **proposals** have recently been made, either to ensure **equal treatment of third country and Member State subsidies or to ensure fair competition by subjecting subsidised undertakings to stricter behavioural requirements (e.g., dominant undertakings)**. The European Commission has presented a White Paper on ensuring fair competition conditions for subsidies from third countries. In this White Paper, three instrumental modules are proposed that should neutralise third-country subsidies in the sense of aid equivalence. One of the sub-instruments should generally allow for ex officio review of third-country subsidies, while the other two would specifically address the review of acquisitions and procurement transactions and would lead to a review upon notification. If a distortion of the EU internal market is found to exist, the subsidy could be required to be repaid or remedial action could be imposed on undertakings. The European Commission would be responsible for the application of the second sub-instrument, and responsibility would be shared between the Commission and Member State authorities. The White Paper had been preceded by proposals from the Netherlands and from associations, among others.

S39. Based on the preceding considerations, the **Monopolies Commission advocates the introduction of an instrument for third-party aid, which would put third-country subsidies and Member State aid on an equal footing** as far as possible. In contrast to the considerations of the European Commission, however, this should be a **single instrument** without a breakdown into several sub-instruments. The modules proposed by the European Commission moreover relate to subsidies within the meaning of the Anti-Subsidy Regulation and sectoral competition law. The instrument advocated by the Monopolies Commission, on the other hand, would apply to all third-country subsidies which, as a Member State measure, would violate Article 107 (1) TFEU. Such an instrument **could be based on**

Articles 103, 109 in conjunction with Article 352 TFEU and would likely be compatible with WTO law. The instrument would only ensure that all undertakings are treated equally in their economic activities in the EU internal market. The existing self-discrimination with regard to State aid would be reduced. The **possibility of recognising subsidy control regimes** comparable to EU State aid law would moreover limit the application of the newly proposed instrument to cases in which undertakings are effectively disadvantaged in their economic activities due to different treatment of subsidies. However, in order to minimise the potential for conflict with existing regulations, the instrument should be applied **subordinate to existing regulations under foreign trade and EU competition law**. To this end, the Monopolies Commission advocates the **procedural design as a power to intervene**. Especially **in cases of company acquisitions and** in the case of **Member State procurement** procedures where the subsidy is passed on to third parties, a **standstill obligation** should apply to all parties concerned, i.e. the procedure should be suspended pending the examination of the third country aid. This would prevent the subsidy from flowing to the seller in cases of business acquisition or, in the case of purchases, to the agent of the tendering body, which would then have to impose a possible countervailing duty on this indirect beneficiary.

S40. The **competence** for the application of the instrument should **lie uniformly with the European Commission**. The procedure should be triggered by a **notification of the receipt of third-country subsidies** by the undertakings concerned. The European Commission would then have **to decide whether to open an investigation procedure**. This would be based on the likelihood that intervention may be necessary to eliminate the subsidy advantage in order to protect the EU internal market. In the investigation procedure, the European Commission would examine whether the subsidy is compatible with the EU internal market, taking into account the Union interest. If the answer is no, the European Commission would **oblige the undertakings concerned to pay a compensatory levy** to the EU budget. Alternatively, the undertakings concerned should be allowed to repatriate the economic advantage received to the third country. **Fines could be imposed** in the event of **non-cooperation**.

S41. The EU authorities' **lack of information on** third-country subsidies for **state-owned enterprises (SOEs)** should be addressed by a presumption that undertakings with a third-country shareholding above a certain threshold (e.g., 20%) are benefiting from subsidies. It should also be possible to impose special **transparency obligations** on such undertakings in the event of intervention. Where information is not fully and accurately provided on request, the European Commission should generally be entitled to **rely on the facts available**. This could relate to accounting, the cost of goods and services or the volume or value of third country financing.

S42. In this Biennial Report, the Monopolies Commission presents its **own draft regulation** in which it sets out its ideas on an instrument of third-country aid. The instrument could be set out in an EU regulation which would address both the distortions of competition in favour of undertakings subsidised by third countries and the information deficits regarding the subsidies.

S43. The Monopolies Commission also proposes to adapt the **European merger control rules**. Where undertakings merge that may be exposed to potential competition from third-country undertakings, greater account should be taken in future of the fact that the **market entry of** such **undertakings may depend on political-strategic** and not just economic **considerations**. It should therefore be considered to make a corresponding addition to the Commission guidelines on the assessment of horizontal mergers.

S44. In addition to the protection of competition in the EU internal market (defensive instruments), measures to protect European companies in the event of distortions of competition caused by third countries and to **enforce European competition principles in relation to third countries** (offensive instruments) are also being discussed. The Monopolies Commission points out that "defensive mergers" for the protection against companies subsidised by third countries - if necessary with political support - can pose similar competition problems as defensive or export cartels or defensive aid (use of so-called matching clauses). Apart from this, the Monopolies Commission comments on three partial aspects of the discussion on instruments that can be used to regulate relations with third countries: (i) the introduction of an international public procurement instrument, (ii) the EU connectivity strategy and (iii) the envisaged EU–China investment agreement.

S45. The **International Procurement Instrument** (IPI), which has been discussed for some time, could help to address the existing inequalities in access to procurement markets in the EU and China. The purpose of the IPI is to allow price adjustment measures for bids from third country bidders in cases where third countries are not prepared to negotiate reciprocal market access and themselves disadvantage EU companies in public procurement. However, in dealing with Chinese state capitalism, the **creation of a competitive level playing field** in the EU internal market should be considered **a priority**.

S46. The **EU connectivity strategy** is a counterpart to the Chinese project of a "Belt and Road" Initiative in relation to third countries. The EU connectivity strategy includes financial instruments to be used for investments in third countries, which can be used to fill gaps in financing for investments in the common interest, but also to offset competition-distorting Chinese financial measures. The EU should ensure that the EU connectivity strategy focuses on **pursuing common interests with the third countries concerned**. The pursuit of a unilateral interest in promoting European undertakings could hinder the development of markets in the third countries concerned and thus also their rapprochement to the EU internal market.

S47. Finally, it would be desirable for a possible **agreement on EU–China economic relations to cover in particular state subsidies**. This should not be limited to the investment sector, but should also cover goods and services in general. In negotiations on investment protection, it must be avoided that possible adjustments to the European legal framework as a result of a possible agreement conflict with standards of investment protection law. Conversely, effective enforcement must be ensured.