

Competition 2016

The Twenty-first Biennial Report
by the Monopolies Commission (*Monopolkommission*)
in accordance with Section 44 Paragraph 1 Sentence 1
of the German Act against Restraints of Competition
(*Gesetz gegen Wettbewerbsbeschränkungen* – GWB)

Summary

Chapter I

Current issues in competition policy

Proposal for the Ninth Amendment to the Act against Restraints of Competition

S1. The legislative procedure on the Ninth Amendment to the Act against Restraints of Competition (German Competition Act - GWB) is ongoing. On 1 July 2016, the German Federal Ministry for Economic Affairs and Energy presented a proposal for a Ninth Amendment to the GWB, which will now be the starting point for coordination within the Government and parliamentary debate. In this chapter, the Monopolies Commission examines the Ministry's legislative proposal. Recommendations emerge from this analysis as to where and how the envisaged provisions can be further improved in the legislative procedure.

S2. One focus of the Ministry's proposal is on adaptation to advances in the digitalisation of the economy. The proposal envisages changes to merger and abuse control proceedings, simplifications in press cooperation and possibilities for improved cooperation between authorities. In its Special Report 68: *Competition Policy: The Challenge of Digital Markets*, the Monopolies Commission had already expressed its views and drawn up a number of recommendations. The proposal takes up its recommendation, among other things, to extend the scope of merger control to take transaction values into account. This is needed in order to close gaps existing in merger control which, under the applicable law, arise from the fact that companies involved in a merger have to exceed certain turnover thresholds before the merger is subject to control by the competition authorities. In the view of the Monopolies Commission, the text of the new applicability criterion is such that there is no danger of hindering the development of German start-ups. In the opinion of the Monopolies Commission, the planned amendments in the field of abuse control are reasonable. It evaluates more critically the easing of cooperation possibilities in the press sector. The primacy of European competition law means that the planned provision's scope of application is likely to remain narrowly limited. In contrast, a positive evaluation is to be made of the envisaged possibility of an exchange of data between competition authorities on the one hand and data protection authorities and *Land* media authorities on the other hand.

S3. Another central content of the proposal is the transposition of the EU Antitrust Damages Directive into German law. The Antitrust Damages Directive aims to improve the enforcement of actions for damages by companies that have been harmed by a cartel, thereby improving the enforcement of competition law. The Directive's provisions also aim to coordinate public and private law enforcement. In this chapter, the Monopolies Commission analyses where there is a need for transposition into German law. Taking the proposal into account, it presents how the Directive's provisions can be implemented to establish an economically appropriate and consistent regulatory system. The subjects of the disclosure of evidence, limitation periods, joint and several liability, the passing-on of overcharges and quantification of harm are of great practical relevance in civil proceedings. The Monopolies Commission also pursues the question of whether the concept of "undertakings" used in the Directive contradicts the liability principles of German civil law. Finally, the Monopolies Commission makes recommendations to strengthen collective redress in competition law.

S4. Furthermore, the proposal envisages that liability under German law for administrative fines for infringements of cartel law will be further aligned with the liability principles of European law. The proposal aims to avoid a departure from the consistent regulatory system of the German law on fines. That being said, the proposed legal amendment substantially makes companies liable as single economic entities for the fines imposed for cartel law infringements. Thus, the legal amendment corresponds to a recommendation in the Monopolies Commission's Special Report 72 and, in its view, is to be welcomed.

S5. The proposal contains placeholders for possible adaptation of the rules on the so-called *Anzapfverbot*, which prohibits retailers from inducing their suppliers to grant them benefits without any objective justification, and on the ban on sales below cost price in the food retail sector. The Monopolies Commission favours lifting the causality requirement in relation to the prohibition of retailers from inducing their suppliers to grant them benefits and opposes the removal of the time limits relating to the ban on selling food below cost price. It also takes a critical view of including a definition of below-cost prices in the law.

Airport regulation

S6. At the end of the 1980s, a gradual liberalisation process began in European air transport which fundamentally changed the previously heavily regulated air transport sector. The intensification of competition between airlines led to a significant expansion in the available flight connections and to passenger flights becoming increasingly affordable. Airports have developed from simple infrastructures to multi-product companies that make a large share of their turnover in the non-aviation sector e.g. by letting commercial properties.

S7. While liberalisation has led to significantly more intensive competition between airlines, government regulation continues to be necessary in principle at airport level. The Monopolies Commission sees potential for improvement in airport charge regulation, slot allocation and ground handling services

S8. Under the procedure for authorising charges currently practiced in Germany, many *Länder* have a dual role as both owner and regulatory authority, as a result of which conflicts of interest cannot be ruled out. The Monopolies Commission therefore recommends that an independent, central authority should supervise the authorisation of charges. In addition, a market power analysis should in future establish which airports in Germany require regulation. If there is no market power, extensive charge regulation should be avoided in favour of a solution negotiated between airports and airlines. If there is permanent market power, however, an incentive-based ex-ante regulation should be considered instead of the currently widespread cost-based charge regulation.

S9. In the view of the Monopolies Commission, the European airport slot allocation system should also be revised. The existing system, which provides for slot allocation on the basis of so-called grandfathering rights, cannot meet the requirement of efficient capacity use in the long term. Thus, slot allocation should be based to a greater extent than hitherto on market mechanisms. Instruments for primary slot allocation, such as auctions, and secondary trading between airlines, which already takes place in some cases, should both be explicitly permitted. The resulting limitation of grandfathering rights would also reduce barriers to market entry for airlines.

S10. Also, in the view of the Monopolies Commission, the liberalisation of the market for access to ground handling services should be consistently continued. Particularly at large airports with sufficient capacities, further independent third-party suppliers should be allowed. At German airports, there is often only one independent supplier for a number of services, generally with a market share of less than 25 per cent. The frequently-cited arguments that improved competition would be at the expense of quality and would be impossible to implement for logistical reasons are not convincing. In addition, legal separation of airport operations from ground handling services should be considered in order to prevent distortions of competition between service providers in awarding licences and in the later course of operations.

Joint selling of media rights in the German Football League (*Bundesliga*)

S11. Selling broadcasting media rights to football matches and highlights is an important source of income for professional German football. Rights are awarded centrally by the German Football League (DFL) to television broadcasters and other media providers. The joint selling of matches in the first and second football leagues (*Bundesliga* and *2. Bundesliga*), DFL cup, UEFA Champions League and UEFA European League with German participation has been the subject of examination by the Bundeskartellamt on a number of occasions, most recently in spring 2016 for matches from the 2017/2018 season onwards.

S12. Difficulties arise in the practice of the competition authorities on account of uncertainties that exist with regard to the products sold and the competitive situation. The tendered broadcasting rights are insufficiently defined in law, as regards both their content and right holders. The competitive situation is difficult to assess since media providers' demand is inferred from viewer preferences, at least in part, but individual football matches are not necessarily substitutable from the viewers' perspective. In addition, it must be considered that there is multi-levelled competitive relationship between the marketed broadcasting rights, in particular as regards live transmissions and highlight reporting. Moreover, there are interactions between the competitive conditions at national level and in international markets (e.g. for buying players), and between economic and sporting competition.

S13. In the present Report, the Monopolies Commission examines the joint selling of media rights, taking into account the case-law to date. In its view, the DFL's joint selling model involves significant competition restraints (so-called hard-core restraints). It recommends clarifying who is entitled to the rights and which restraints of competition are covered by means of a clear statutory definition of the tendered rights, enabling the legislator to ensure legal security.

S14. A final assessment cannot be made as to whether there is a competitive justification for the relevant joint selling model on the basis of the results of the Bundeskartellamt's investigations to date. This is not only on account of the fact that the Bundeskartellamt has only made a provisional evaluation of joint selling to date and ended proceedings by accepting commitments in each case. For reasons of legal security, the Monopolies Commission recommends discontinuing previous practice and instead concluding future proceedings on the basis of extensive investigations without accepting commitments. This could avoid the risk of the Bundeskartellamt's decision having an adverse effect on uninvolved third parties. In particular, viewer preferences should be more precisely identified in the future (e.g. through direct surveys) before a sales model involving only clubs and media providers is approved.

S15. To date, proceedings on joint selling of media rights for major football events have been carried out in a similar way by the competition authorities in other EU Member States, but differ with regard to the conditions that the authorities have imposed for clearance. However, the international market for football players and the international competition between football associations give rise to interdependencies between the individual models for the marketing of broadcasting rights and the resulting financial strength of the associations. With a view to these international aspects of joint selling, the Monopolies Commission recommends that the European Commission sets out at least general principles in guidelines for defining official requirements for carrying out joint selling in the EU.

Chapter II

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

S16. Every two years, the Monopolies Commission has the task under Section 44 Paragraph 1 first sentence GWB to examine the state and development of concentration among companies in the Federal Republic of Germany. Within this statutory mandate, the Monopolies Commission has devoted a chapter of its Biennial Report to aggregated concentration of undertakings since reporting began. In this Report, the term aggregated concentration of undertakings is used to describe the cross-sectoral concentration of economic power, which need not necessarily involve a dominant position in markets of relevance to competition. The analysis of aggregate concentration of undertakings aims to identify the economic significance of the largest companies in Germany.

S17. To this end, the Monopolies Commission identifies the 100 largest companies in the Federal Republic of Germany by the classification criterion of domestic value added. Macroeconomic analyses are regularly based on gross domestic product (GDP) as an economically relevant value because it is regarded as a measure of a country's economic performance. When GDP is adjusted for taxes, subsidies and the state sector, it corresponds to the value added of all the companies within an economy. Thus, one single large undertaking's value added allows not only a direct connection to be made to the overall economic value added that is significant to the economy, but also enables a comparison to be made of the significance of companies in different sectors.

S18. In order to judge the state and development of the aggregate concentration of undertakings in the Federal Republic of Germany, and thus the significance of large companies for the German economy, the Monopolies Commission compares the total domestic value added of the 100 largest companies with the value added of all companies in Germany for the current year and the past years reviewed. The contribution made by the 100 largest companies to the value added by all companies in Germany has fallen over time. During the period from 1978 to 2014 it averaged 17.9 per cent, while it was lower, at 16.1 per cent, when viewing only the reporting years 2004 to 2014. In the reporting year 2014, the share of the 100 largest companies was 15.8 per cent of the value added by all companies, thus 0.1 per cent down on the previous reporting year 2012. Thus, cross-sectoral concentration of undertakings fell slightly in the period reviewed.

S19. As well as a high proportion of overall economic value added, cross-shareholdings and personnel links between companies can point to a concentration of economic power. The Monopolies Commission has noted a decline in such links between large companies in Germany in the last ten years. While in 1996, 62 of the 100 largest companies in Germany had shareholdings in at least one other company in this group, this was the case for only 38 companies in the reporting year 2014. Also during this period, the number of ties via serial non-executive directors fell steadily. During the current period reviewed, a decline in the level of interlocking is to be observed as well. Thus, the number of cases of shareholding fell in comparison with the reporting year 2012, from 58 to 47, as did the number of ties via serial non-executive directors, from 154 to 140. Thus, the results of the analysis of shareholdings and personnel links between the 100 largest companies in Germany also indicate a moderate decline in the cross-sectoral concentration of undertakings during the period reviewed.

Chapter III

European interlocking network

S20. In Chapter III, the Monopolies Commission supplements its investigation of the largest companies in Germany traditionally carried out in Chapter II within the framework of its statutory task of reporting on the concentration of undertakings under Section 44 Paragraph 1 first sentence GWB by an analysis of European interlocking of undertakings via minority shareholdings. This cross-border perspective takes into account the advancing internationalisation of procurement and sales markets. The examination of minority shareholdings illuminates a specific aspect of the concentration of economic activity which is seen as significant in two particular respects: firstly within the context of the discussion on the role of institutional investors for competition between companies in their portfolio, which has hitherto taken place mainly in the United States context, and secondly within the context of efforts by the European Commission to extend the scope of the European Merger Control Regulation (EMCR) to include non-controlling minority shareholdings.

S21. For the Twenty-first Biennial Report, the Monopolies Commission has extended the European corporate dataset on which the empirical analysis was based, thus improving its information value. In this connection, particular emphasis is given to including non-listed companies and companies from nearly all the 28 EU Member States plus Norway and Switzerland. The dataset of 2012/2013 has also been extended, not only improving the representativeness of the data, but also the potential for content analysis.

S22. The empirical evaluations show that at European level, the “energy supply and environmental services” sector has the highest level of interlocks, followed by “pharmaceuticals” and “mining and quarrying”. The “pharmaceuticals” and “mining and quarrying” sectors are also among the three sectors with the lowest comparative competition intensity in Germany, as measured by the empirical Lerner index. In addition, the “real estate and renting” sector is also represented, whereby there is a conspicuously significant difference to the European level in the latter two sectors. However, a clear negative connection between the interlocking of an undertaking and the intensity of competition facing it cannot be identified. At most, there are very weak indications of input foreclosure strategies through partial backward integration.

S23. With regard to considerations to extend the scope of the EMCR to non-controlling minority shareholdings, the Monopolies Commission sees the potential of horizontal and vertical non-controlling minority shareholdings to distort competition. However, on the basis of its empirical analysis, it does not see any clear indications of effects on competition that would suggest a need for urgent action. Thus, the Monopolies Commission follows the current view of the European Commission.

S24. By contrast, the Monopolies Commission sees the potential to distort competition of indirect horizontal shareholdings between portfolio companies of the same sector via institutional investors. In the present Report, the Monopolies Commission presents an investigation for the first time. The anticompetitive potential of indirect horizontal interlocking is exacerbated by additional factors, such as the homogenous interests of the institutional investors and institutionalised voting rights consultation. Cross-border and cross-sectoral empirical analyses on the spread of indirect horizontal interlocking via institutional investors also demonstrate the quantitative relevance of such shareholding concentrations in Germany and Europe. Thus, it would be welcomed if indirect minority shareholdings via institutional investors were to receive more attention, also within the context of the possible further development of the EMCR at European level.

Chapter IV

Cartel case-law

S25. In Chapter IV of its Biennial Report, the Monopolies Commission develops recommendations for action for legislators and the competition authorities on the basis of the German and European cartel case-law in the years 2014/2015. In particular, the Monopolies Commission addresses the issues of legislative developments, the implementation of quantitative analyses, the efficiency defence, the compliance defence and questions of causality in the case of rescue mergers.

S26. This chapter focuses on dealing with the competitive treatment of digital phenomena, specifically merger proceeding on dating platforms, real estate platforms and comparison platforms as well as vertical restraints of online sales. Already last year, the Monopolies Commission made proposals in its Special Report 68 as to how the legislator can meet the challenges of digital markets. Specifically, it recommended extending the conditions specified under merger control for taking action in order to be able to subject to an examination under competition law takeovers of companies with only low turnover. In view of the dynamism of digital markets and the highly complex competition problems arising in this sector, it also advocated amendments to the procedural law for abuse proceedings under competition law. The implementation of these recommendations is currently being examined at German and European level.

S27. During the period under review, European merger control was characterised by further consolidation in the telecommunications sector; a prohibition was declared in the telecommunications sector in May 2016. In addition, maintaining competition in innovation was a particular focus of the European Commission. In the automotive supplier industry, the European Commission examined the largest cartel complex in its history and imposed fines amounting to billions of euro on a multitude of companies that were involved in the cartel. The Monopolies Commission recommends a sectoral inquiry in the automotive supplier industry.

S28. In Germany, the food retail trade played a significant role in case-law. The takeover of more than 450 Kaiser's Tengelmann outlets by Edeka was of particular interest because it was the first case in the practice of the national competition authority in which a prohibition was issued because the takeover significantly hindered effective competition without a dominant position being created or strengthened. The possibility of prohibition under the so-called SIEC test (Significant Impediment to Effective Competition) was introduced in 2013 within the context of the 8th Amendment to the GWB. The case also gained outstanding significance because the takeover plan was later allowed by means of ministerial authorisation subject to obligations. The lawfulness of the ministerial authorisation is currently examined by the Düsseldorf Higher Regional Court. In its obligatory statement under Section 42 Paragraph 4 of the GWB, the Monopolies Commission had opposed ministerial authorisation. The assessment of the Bundeskartellamt's sectoral inquiry into the food retail trade also played a significant role in the merger proceedings. In the present chapter, the Monopolies Commission therefore discusses the assessment and conclusions of the sectoral inquiry. In line with recent economic research the possible causes of buyer power are analysed within the context of economic negotiation theory. This is to be assessed positively. In order to be able to make statements on the distribution of the profit gained along the value chain between the manufacturer and the retail companies, the inclusion of the demand side in the analysis would have been required, however. Within the context of the sectoral inquiry, it is not possible to sufficiently distinguish between improvements in the conditions made to improve efficiency and those achieved on account of buyer power.

S29. The proceedings on the joint marketing of round timber by *Land* Baden-Württemberg focused on the distinction between sovereign and economic activities. The Monopolies Commission states that the forestry activities upstream from timber sales are of an economic nature under applicable law. It opposes planned legislation which would exclude timber sales from the scope of competition law.

S30. The Monopolies Commission regards ex post evaluations in the field of competition policy as an instrument for improving the enforcement of competition regulations and competition law. In particular, it regards as essential in principle the systematic implementation of ex post evaluations of specific decisions by the Bundeskartellamt to improve future decision-making practice and by the Federal Ministry of Economics and Energy to improve the effectiveness of competition law.

Chapter V

Digital markets: Sharing economy and Fintechs

S31. The digitalisation of the economy continues to be a current focus of competition policy. The Monopolies Commission has already dealt intensively with the challenges of digitalisation to competition policy in its Special Report 68. In the present Report, it extends its competitive assessment to include issues of the sharing economy on the one hand and on the other hand it makes a statement on digitalisation in the financial markets, supplementing the special chapter in the Twentieth Biennial Report on competition on the financial markets.

Sharing economy

S32. At the heart of the sharing economy are digital intermediation platforms used to market the temporary use or to facilitate the shared, often sequential use of goods or services. P2P services, enabling private individuals to offer goods or services commercially, are particularly relevant. The market entry of P2P services leads to increased competition in the sectors concerned and can contribute to reduced prices, enhanced quality and a greater diversity of supply.

S33. From the point of view of competition, distortions of competition between traditional and new providers on account of asymmetrical regulation should be avoided. To this end, an appropriate regulatory framework should be created for suppliers of P2P services, taking into account the type and extent of the activity. On the other hand, the regulation of traditional suppliers should be reviewed and, if necessary, regulations that are no longer necessary revised. A disproportionate restriction of only occasional activities on P2P services through excessive regulations should be avoided.

S34. Intermediation services enabling private drivers to offer passenger transport for remuneration using their personal motor vehicles, and intermediation services for the short-term letting of private property are currently a particular focus of public discussion. From the point of view of competition, prohibiting or placing very restrictive limits on such services is not advisable. Instead, potential security risks should be addressed by appropriate regulation and distortions to competition vis-à-vis traditional providers avoided.

Digitalisation in the financial markets

S35. The Internet makes it easier for customers to find alternative offers and information services, particularly standardisable financial services in the private customer sector, and to make their own product comparison. Information via the Internet not only leads to more informed customer choices, but also fundamentally changes the relationship between customers and financial product suppliers: previous trust-based loyalty to particular product suppliers is reduced, while customers' scope of action is increased.

S36. The fact that traditional financial service providers took some time to react to market developments may have enabled new suppliers to enter the market with alternative services. Direct banks, for example, have won customers by providing banking services whereby financial transactions can be completed directly online without the detour of going to a branch. So-called financial-technology companies (Fintechs) have begun to optimise specific financial services to customer needs. New-generation Fintechs are meanwhile focusing on optimising the digital customer interface and are making it simpler to put together financial services of different suppliers as required.

S37. As well as an understanding of market development, the primary question of interest from the perspective of competition policy is the extent to which regulation by statute and by the public authorities is to be adapted in order to create standardised conditions of competition. Market interventions should in principle take place only to improve competitive framework conditions and not, for example, to protect individual market participants that fail to adapt to market changes on time against such changes. The recommendations made in this section aim to achieve a balanced and innovation-friendly regulation of digital financial services.