

Press release

Monopolies Commission makes recommendations for the 9th amendment to the German competition act

- Monopolies Commission welcomes the broadened application of German merger control
- Monopolies Commission advocates the facilitation of damage actions by claimants harmed by a cartel
- Monopolies Commission in favour of measures to close gaps in cartel fining rules

The ministerial proposal for a 9th amendment to the Act Against Restraints on Competition (ARC) of July 2016 is intended to adapt the law to the advancing digitalization of the economy. In addition, it will transpose the EU damages directive into national law and close gaps in the rules on cartel fines. The proposed amendment will implement several recommendations made by the Monopolies Commission.

“Introducing another notification threshold in merger control is necessary to forestall the development of risks to competition in the digital markets and other particularly innovative markets”, said the chair of the Monopolies Commission, Prof. Achim Wambach. At the moment, the competition authorities are frequently not able to review the acquisition of companies with high market potential but low turnover. This is even the case if the acquiror is a market leader. For that reason, the new notification threshold will be based on the transaction volume of a relevant deal/acquisition – typically on the purchase price. The purchase price usually reflects the growth potential of the target company. The Monopolies Commission also recommends a similar threshold for European merger control, where similar issues can arise.

The transposition of the EU damages directive into German law will make it easier for companies and consumers to initiate actions for the damage caused by a cartel. The Monopolies Commission welcomes this legal development. It makes recommendations as to how the position of market participants harmed by cartels could be improved further. Among others, it recommends to extend the limitation periods because companies and consumers often become aware of the damage incurred only late. In addition, collective redress should be strengthened because it makes it easier for damage claimants to get justice and could diminish the burdens on the justice system. To this end, the option of a group action could be introduced, in which interested parties could participate without substantial efforts and costs (opt-in model). Another problem is that the damage incurred on the level of consumers may be so small that individual consumers shy away from claiming damages. In these instances, associations, e.g. the consumer protection agencies, should be entitled to seek the disgorgement of the economic benefit of the violation. This option only exists theoretically at the moment, and should be made more attractive.

At the moment, corporate groups can escape fines for cartel violations in Germany by resorting to restructuring measures, for instance by taking the liable subsidiary out of the market. This liability gap was dubbed the “sausage gap” following a well-known cartel case.

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In October 2015 the Monopolies Commission recommended to close this gap by extending the liability, among others, of parent entities in a corporate group, and the liability of successors. The proposed amendment accordingly includes rules to extend the liability for cartel fines. This amendment is overdue. It will improve the enforcement of the law and will end the current privileges for corporate groups vis-à-vis individual merchants.

The proposed amendment to the ARC includes exceptions from the cartel prohibition for press cooperation outside editorial work. The Monopolies Commission takes a critical position regarding these exceptions. The reasoning behind the proposed amendment, which is based on economies of scale and scope, is not convincing. The relevant economies can normally already be taken into account under the existing law. In addition, the scope of application of the proposed amendment will be limited in practice given the primacy of the – stricter – competition rules of EU law.

The Report is accessible at the Monopolies Commission's [home page](#) as of now.

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. Achim Wambach, Ph.D., is the chairman of the Monopolies Commission.