

Competition 2018

The Twenty-second 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

Reforms to the system of remuneration for the supply of medicines by wholesalers and pharmacies

S1. In Germany the services of pharmacists and wholesalers for pharmaceuticals are extensively regulated. While existing regulation does not entirely disable the mechanisms of the market, it does alter the competition taking place significantly. In this context, an important part of the regulation is the fixing of pharmacy sales prices of medicines which are supplied at the expense of statutory health insurance. Medicines to which a uniform pharmacy sales price applies are mostly those which are only available on prescription (also referred to as Rx drugs). In the Medicines Price Regulation, the legislator specifies the margins for wholesalers and pharmacies on the basis of a cost calculation. The calculation of fixed prices on this basis has an impact on the results in the market, such as the geographic allocation of pharmacies and the financial expenses for patients and for the health insurance system.

S2. It must be observed with regard to the pharmaceutical sector that regulation can in principle be especially justified due to the enormous health risks of incorrect medication. However, this can only justify such regulation of medicines which serves to adequately contain these risks in a proportionate manner. Otherwise, there is a risk of inefficient or distorted prices and performances. Due to various developments, the question whether the restriction of price competition is appropriate in its existing form has recently become the focus of discussion. First of all, a judgment from the Court of Justice of the European Union (CJEU) of autumn 2016 enabled foreign mail-order pharmacies to grant discounts to German customers on orders of Rx drugs and thus to deviate from the German price regulation. In addition, in the following year the Federal Court of Justice confirmed that the full amount of wholesale surcharges stipulated under German price regulation can be subject to discounts. Lastly, especially in connection with the discussions around the ruling of the CJEU, a debate concerning the system of remuneration in the distribution of medicines arose as well. This discussion has been extended to the question of securing the nationwide supply of pharmacy services and maintaining the mail order business for Rx drugs.

S3. Arguments in favour of price regulation and even a ban on mail order are in particular the effects on the quality of advice and the nationwide supply. However, in spite of these arguments, the present analysis comes to the conclusion that the continuation of the existing system under the Medicines Price Regulation and the fixing of prices on the basis of a cost calculation without competition cannot be recommended. Instead, the structure of the remuneration system should be changed in such a way that that part of the remuneration for pharmacies will stay fixed, which concerns only the advisory service. That part must be financed and, if necessary, negotiated by the statutory health insurance. The remaining part of the remuneration relates to other services (for pharmacies, for example, very short distances on the basis of their location, the number of staff in order to achieve short waiting times, the pharmacy newspaper, office equipment, etc.). The level of remuneration for such services, which is to be paid by the patient, is part of the competitive process and should be individually determined by pharmacies.

S4. In order to restructure the remuneration system, pharmacies should, as a first step, be allowed to grant discounts on the surcharge which patients with statutory health insurance pay for Rx drugs. Due to the increased competitive pressure in metropolitan areas in which many pharmacies are active, it is to be expected that discounts will be granted especially in these regions. In this way, the remuneration system would also contribute to the regional allocation of pharmacies. In comparison to metropolitan areas, rural areas would benefit more than in the current system. If the supply of established pharmacies in rural areas were to be supported beyond that, specific measures compatible with competition law should be taken. However, the ban on the mail order of Rx drugs provided for in the coalition agreement should not be implemented, as mail order is an important component of the supply structure. It should be examined whether the further reduction of supply restrictions in the mail order business (ban on pick-up points and vending machines) can enable this business to contribute to the sustainable improvement in nationwide supply.

Legal exemptions under competition law

S5. Since the XXIst Biennial Report, the German legislature has defined a number of legal exemptions to German competition law. Also, discussions are ongoing on whether to entrust public broadcasters with services of general economic interest concerning their cooperation for the production and dissemination of programmes within the meaning of Sec. 11a to g of the State Broadcasting Treaty. Further special provisions are envisaged in the coalition agreement for the 19th legislative period.

S6. From the point of view of the Monopolies Commission, the introduction of new exemptions from the competition rules is generally problematic. The introduction of such exemptions establishes a new, blanket special treatment for individual economic sectors. Moreover, when existing economic sectors are exempted from competition law, this can indicate an ongoing decline or a lack of competitiveness in the sectors concerned. This is also true where proponents justify the exemptions with specific objectives which might not be achieved if competition rules applied.

S7. The press has long been subject to special treatment in German competition law. The background is, on the one hand, that the press fulfils constitutional functions. On the other hand, the pressure on the press to maintain its economic viability is increasing as a result of digitalisation and the resulting changes in the market environment. The new Sec. 30 Para. 2b German Act against Restraints of Competition (ARC) is likely to be particularly relevant for cooperation in the newspaper markets, where digitalisation is causing the most radical changes. However, the relevant cooperation may often be justified by accompanying efficiencies, which is why further legal exemption is not required. Therefore, the new Sec. 30 Para. 2b ARC is likely to affect particularly nationwide cooperation agreements concerning newspaper distribution and the online business. In these cases, however, the new section is unlikely to have any practical effect due to the primacy of EU competition law. Under EU law, press companies can only be exempted from EU competition rules in individual cases according to Art. 106 para. 2 TFEU if they were entrusted with tasks the pursuit of which would fall under this provision.

S8. The new exemption introduced in Sec. 35 Para. 2 third sentence ARC removes both innocuous as well as disputable restructurings of credit associations from the review of merger control by the Bundeskartellamt (Federal Cartel Office). However, this makes it necessary to have the competition authorities monitor the overall development more closely. If the associative structures were to concentrate any further, this could, at least for the German savings banks, mean that the association or at least parts of it would no longer be regarded as an association of independent companies, but rather as a single undertaking.

S9. The compatibility of Sec. 46 Para. 2 of the Federal Forest Act with EU law should be clarified by means of a preliminary ruling by the European Court of Justice. That being said, it must be welcomed that the Bundeskartellamt and the Länder seek an agreement regardless of Sec. 46 Para. 2 Federal Forest Act. Instead of trying to undermine the application of the EU competition rules through such a provision, the objectives defined in the Federal Forest Act and the forest acts of the Länder should be reviewed and generally be limited to the objectives of general interest and hazard prevention. Conflicts with EU law would then be avoided. This does not preclude legislature from entrusting forestry undertakings with tasks of general economic interest in order to achieve legally defined objectives, the pursuit of which may justify an exemption from the competition rules in individual cases under Art. 106 para. 2 TFEU.

S10. With regard to the currently debated provision entrusting public service broadcasters with general-interest services provided in cooperation, it should be noted that such a provision would not change the requirement for a case-by-case examination of whether the cooperation concerned is subject to EU competition rules and whether it is compatible with those rules. In this respect, the legislature would have to explain what additional benefits the provision would bring – in particular, regarding the fulfilment of the special tasks of the public service broadcasters. The gain in legal certainty through such a regulation would therefore be limited.

Algorithms and collusion

S11. Despite the numerous advantages associated with the use of price algorithms, potential disadvantages are likewise increasingly being discussed. Commentators consider anti-competitive effects in connection with collusion possible where price algorithms are used. Collusion is typically understood as a market result in which companies achieve higher profits than in competition where they coordinate, for example in relation to prices or quantities. Collusive behaviour is therefore to the detriment of the demand side of the market and is undesirable from the point of view of society as a whole.

S12. The influence of price algorithms on collusion largely depends on the structural characteristics of the respective market and on other supply and demand factors. Depending on how these factors are shaped, price algorithms as one further element can promote collusion. However, from today's perspective, no reliable predictions can be made as to whether collusion will occur more frequently in the future. In the end, collusion can be expected primarily in markets that offer favourable conditions for collusion. Such conditions include high barriers to market entry, a relatively small number of companies and a high degree of market transparency.

S13. In data-intensive sectors such as the Internet economy, price algorithms can facilitate collusion by automating collusive behaviour and, thus, accelerating it technically. For example, they can stabilise collusion by collecting information on competitors' prices and sanctioning deviations from collusive market outcomes more quickly. The use of price algorithms can also make explicit agreements or agreements restricting competition unnecessary. Lastly, in the case of self-learning algorithms, the relevant business decision is already made at the time of the decision regarding the price algorithm and is not made in the price-setting process.

S14. The discovery of collusive behaviour of companies by competition authorities is generally difficult. This holds true for the determination of concerted practices as such. These difficulties tend to increase when price algorithms are used. This also concerns the proof of potentially excessive prices.

S15. Therefore, markets should be monitored for collusive risks. In particular, the Monopolies Commission considers it necessary to strengthen market monitoring through competition sector inquiries. As information on possibly collusive excessive pricing is most likely to emerge through consumer associations, the Monopolies Commission recommends that consumer associations receive a right to initiate competition sector inquiries. Where the competition authorities reject the application, they would have to provide detailed reasons for their decision. If, in the context of market observation, concrete indications were to arise that the use of price algorithms favours collusive market results to a considerable extent and that the enforcement of the competition rules is insufficient, a reversal of the burden of proof with regard to the damage caused by an infringement of competition law could be considered. In that way, the liability for financial losses which the collusive use of price algorithms can entail could, in case of doubt, be assigned to the users of such algorithms.

S16. Finally, price algorithms are often not designed by the companies themselves but are provided by IT service providers with special expertise. Whether such a third party is liable for violations of competition law typically depends on the responsibility of the companies using the price algorithm. This means that IT service providers can either be subject to particularly far-reaching liability or, conversely, benefit from liability gaps, depending on whether the decision on the design of the price algorithm in question lies more with the user or with the respective IT service provider. The liability of such third parties should be generally reviewed.

Chapter II

The state and development of concentration among companies in Germany

S17. Every two years, the Monopolies Commission has the task under Sec. 44 Para. 1 first sentence ARC to examine the state and development of concentration among companies in the Federal Republic of Germany. Since the beginning of its reporting, it has identified the 100 largest companies in Germany as part of its statutory mandate in order to assess aggregate, i.e. cross-sectoral, macroeconomic concentration. The share of the 100 largest companies in overall economic value added is used as an indicator for the level of aggregate concentration. In the reporting year 2016, this share was 14.9 percent, 0.7 percentage points lower than in 2014. The downward trend tendency since the beginning of reporting has thus continued in the current reporting period. Other indicators also point to a decrease in aggregate concentration. With regard to the links between the 100 largest companies for the reporting year 2016, a continuing downward trend can be noted. This is reflected in a decrease in the number of companies that were affiliated with at least one other company through capital shares to 32 companies (as against 38 in the reporting year 2014). The number of links of companies via members of the management board has also declined significantly from 45 connections in 2014 to only 34 connections in 2016.

S18. Concentration reporting has been supplemented in this Report by two further aspects with a current relevance. In the first place, in the USA a long-term increase in concentration among companies and market power has been observed and a corresponding need for action in terms of competition policy is being discussed. In order to analyse the transferability of this observation to Germany and Europe, the Monopolies Commission has, among other things, evaluated concentration statistics and determined company-specific price mark-ups. The development of concentration in Germany does not show an upward trend, as is the case in the USA. However, in contrast to the relatively constant development of concentration, the average price mark-up in Germany has risen since 2013. In 2015, it was at a higher level than before the economic and financial crisis in 2007. However, the picture for Germany differs significantly from that for the USA, where a – much stronger – increase in price mark-ups can be observed, particularly in the sectors where price mark-ups are already high.

S19. In addition, the possibility is being discussed that indirect corporate links via institutional investors may have anti-competitive effects. The Monopolies Commission has addressed this issue again and still sees a significant potential for problems. The reason for this is that indirect corporate links within a market via joint institutional investors can impede the intensity of competition between competitors by facilitating coordinated behaviour or can make competitors avoid intensive competition unilaterally. However, the Monopolies Commission considers it premature at this moment to take far-reaching measures of (competition) law or regulation. But the Monopolies Commission does welcome the announcement by the European Commission's Directorate-General for Competition to address the issue in more detail. Also, the effort of taking the possible effects of indirect horizontal links into account within the framework of the merger control review of proposed mergers, which is already under way, is to be noted positively.

S20. Overall, the Monopolies Commission does not see a worrying trend in the concentration of companies in Germany. In particular, the indicators of concentration examined remain stable or show a downward trend. This impression that the competitive intensity in the Federal Republic of Germany remains stable is restricted only by the observed increases in price mark-ups and corporate links via indirect minority shareholdings. Such increases will be monitored closely in the future.

Chapter III

Review of competition decisions and judgments

S21. In Chapter III (formerly Chapter IV) of the Biennial Report, the Monopolies Commission develops recommendations on actions for legislators and competition authorities on the basis of the German and EU competition decision-making practice for the reporting years 2016/2017.

S22. With the increasing importance of Internet-based business models, the question of the correct definition of multi-sided platform markets has become more relevant in decision-making practice as well. The Monopolies Commission welcomes the clarifications provided in the context of the 9th amendment of the German Act against Restraints of Competition (ARC), but currently sees no need for further provisions in this area.

S23. On the basis of current case-law and decision-making, the Monopolies Commission investigates new developments in competition theories of harm. In this context, topics such as the relationship between data protection and abuse control, competition in innovation, network effects and “sneaky takeovers” are being dealt with. Among other things, a cautious application of the prohibition of abuse of a dominant position with regard to the handling of data is recommended, as well as a revision of the European Commission’s horizontal merger guidelines on the basis of the findings on competition in innovation.

S24. Out-of-court settlements which result in the withdrawal of appeals against competition cases may restrict competition. Such settlements should at least be closely examined by the competition authorities if they concern serious restrictions of competition, if high compensation is paid for the withdrawal of an appeal or if the parties to the settlement expect high chances of success for the appeal.

S25. In its Coty judgment, the European Court of Justice clarified various issues concerning contracts on selective distribution agreements. In particular, the judgment contains explanations on the relevance under competition law of maintaining a certain product or brand image as well as on the assessment of third-party platform prohibitions. The Monopolies Commission welcomes the clarification of these issues by the European Court of Justice. Among other things, it recommends recognising the image of brand products beyond the luxury segment under EU competition law.

S26. The central marketing of the broadcasting rights for the UEFA Champions League for the seasons as of 2018/19 seems critical from a competitive point of view – also in comparison with the earlier marketing of football competitions. The Monopolies Commission recommends that the Bundeskartellamt (Federal Cartel Office) should supervise the marketing of the Champions League in the future. In particular, the Bundeskartellamt should work towards ensuring that the marketing models have sufficient competitive elements and securing a fair share for consumers in the resulting benefit.

S27. In recent case-law, the defence raised by cartelists in civil law proceedings that damages have been passed on was rejected in some instances. This rejection was based on arguments which were not very convincing in the individual cases. However, the admission of the so-called “passing-on” defence in these cases could lead to an unfair relief for cartelists. In the opinion of the Monopolies Commission, this risk can be countered by strengthening private enforcement of competition law for consumers through the introduction of a general class action.

S28. With regard to the amendments to the ministerial authorisation procedure on the occasion of the 9th amendment to the ARC, the introduction of a comparatively short deadline for the mandatory opinion of the Monopolies Commission is problematic. In addition, the restriction of the legal remedies for third parties against ministerial authorisations sends the wrong signal. The Monopolies Commission therefore recommends that the relevant provisions be removed in the course of the next amendment to the ARC.

S29. The necessity of a general public enforcement of consumer protection in Germany is controversial. If a consumer protection authority is created at federal level, there are reasons for and against transferring enforcement powers in consumer protection to the Bundeskartellamt. Should the Bundeskartellamt’s tasks be extended, then the authority should provide for an organisational separation between the application of consumer protection and competition law.

Chapter IV

Competition of audiovisual media in the age of convergence

S30. In this chapter, the Monopolies Commission examines the developments concerning the market and competition in the sector for audiovisual media. The analysis focuses on the online activities of public broadcasters and the existing regulatory framework for audiovisual media services.

S31. The German State and the public broadcasters must observe constitutional and EU law limits when offering journalistic content via online media. Public broadcasters fulfil a universal service mission that includes a guarantee for their existence and development. However, public broadcasters are not only constitutionally entitled, but in principle also obliged under EU law to specify the universal service mission in such a way that private competitors can plan their activities and that supervision is possible. The State has the duty to secure the fulfilment of this obligation.

S32. According to the State aid compromise between the EU and Germany (2007), the financing of the public broadcasters is existing aid, which must be continuously reviewed for compatibility with the EU internal market. The parameters for financing of the public broadcasters' online services leave room for interpretation. It cannot be excluded that activities are financed through which public broadcasters can drive competitors out of the market by exercising market power. The three-step test, which is to ensure compliance with the aid compromise at national level, has shortcomings which have an appreciable impact on its practical effectiveness.

S33. Apart from the requirements of EU State aid provisions, further limits for the protection of competition must be observed in the expansion of the public broadcasters' online services. Public broadcasters are not allowed to force other media companies out of economic and journalistic competition by abusing their market power. Such exclusionary practices are possible insofar as the broadcasters do not limit their offer to socially and culturally relevant content with an added value compared with privately offered content (so-called "public value" content). Such activities could commercially impede private media companies in providing their own online services and might also violate the freedom of broadcasting and the freedom of the press of such media companies. The recently agreed adjustments to the Inter-State Broadcasting Treaty (Rundfunkstaatsvertrag) do not take sufficient account of this, either.

S34. Media convergence and the market entries of new providers of audiovisual media, especially in the field of online media, have led to an increase in the intensity of competition. This tends to increase the diversity of opinions, the safeguarding of which is an important goal of media regulation. However, regulation has not kept pace with market developments and changes in consumer behaviour. It should be examined particularly whether the regulation still serves the objectives pursued (in particular, the protection of opinion-forming and decision-making) without disproportionately distorting the conditions of competition. Overall, there is scope for modifying and reducing media regulation.

S35. At the national level, particularly the design of media concentration control should be revised. In the regulation of broadcasting platforms, the regulations discussed on privileged prominence and the existing regulations on allocation of platform capacities and must-carry regulations for infrastructure-based platforms (e.g., cable network operators) appear to be unnecessary. At present, media law regulation of intermediaries (e.g., search engines, social networks) is not necessary either to ensure the diversity of opinions.

S36. At the EU level, the amendment of the Audiovisual Media Services Directive (AVMS Directive) will lead to an overall convergence of the conditions of competition between linear and non-linear media services. However, in view of the regulatory requirements for advertising, the abolition of quantitative advertising restrictions would have been preferable for television broadcasters. The minimum quota for European works for video-on-demand services is questionable, at least in its current form. The extension of the country of origin principle and the collective management of rights in the planned SatCab Regulation has not yet been made competition-neutral. In the currently planned data protection regulations (in particular, the ePrivacy Regulation), a fair balance between the personal data interests of users and the economic interests of companies must be sought.