

Competition 2022

XXIV. Biennial Report by the Monopolies Commission
in accordance with Section 44 Paragraph 1 Sentence 1
of the German Act against Restraints of Competition

Summary

Chapter I

The state and development of concentration among companies in Germany

K1. Under § 44(1) first sentence of the Act Against Restraints on Competition, the Monopolies Commission is tasked by law with assessing the state of and development of company concentration in Germany. The Monopolies Commission fulfils this mandate by, firstly, ascertaining the **concentration of companies** in the economy as a whole, that is in **aggregate** terms, and secondly by tracing developments in **industry concentration**. Furthermore, **firm-specific price mark-ups**, which may serve as an indicator of market power, are calculated and used to assess how competition is developing within the manufacturing industry, as well as in the services sector.

K2. In order to assess the aggregate company concentration, the Monopolies Commission regularly identifies the one hundred largest companies in Germany and their share of value added in the economy as a whole. **This share fell by roughly five percent** in the reporting period, and was 14 percent in the year under report 2020. This indicates a continuation of the downward trend that has been observed since reporting started. The Monopolies Commission identifies **the personnel cross-links and the cross-shareholdings between the “Top 100”** as another indicator. Nine companies from the group of the “Top 100” hold more than 1-percent shares in 26 companies from this group. The total number of capital cross-holdings in the “Top 100” is 42 in the reporting year. This makes eleven fewer holdings than in the reporting year 2018, but only two fewer holdings than in the year under report 2016. Developments in personnel cross-links are assessed via the cross-links between members of the management, i. e. the number of cases in which members of the management of one company were also part of supervisory bodies of other “Top 100”-firms, as well as cross-links via persons with no management mandate who have mandates in supervisory bodies of several “Top 100”-firms. In the reporting year 2020, both figures were at their lowest level since reporting started. The number of cross-links via members of the management was 32 (reporting year 2018: 42), and that of cross-links via persons with no management mandate was 71 (reporting year 2018: 88).

K3. The economy-wide average of **industry concentration** in Germany **continues flat**, and remains at a **low level**. Average **changes in economic price mark-ups are also moderate**, and do not indicate general growth in market power. The average price mark-up increased **by 1.8 percent in the manufacturing industry** between 2008 and 2017, and even went down by 6 percent in the services sector. Major differences however exist between individual industries. Counter to the average downward trend in the services sector, the concentration in some already highly concentrated industries within the sector rose by up to 60 percent between 2009 and 2019. These include the regulated industries telecommunications, post and long-distance rail services. **The steepest mark-up increase was observed** in the **manufacture of coke and refined petroleum products** from 2008 to 2017 (21 percent). In the services sector, high price mark-ups are generally accompanied by high levels of investment in productivity–boosting digitalisation. The manufacturing industry also shows a positive link between investment in digitalisation and increases in mark-ups, but does not exhibit similar increases in productivity. The **digital transformation** therefore appears to be accompanied by **competition** in the **services sector**, whilst in **manufacturing industry** it entails an **increase in market power**. Against the background of rising raw materials prices in the wake of the Russian invasion of Ukraine, energy-intensive industries in particular face the risk of this impacting competition.

K4. The **Monopolies Commission concludes** that the current trend of **concentration** in Germany **does not give cause for concern**, and thus that there is no immediate need for action in terms of competition policies. That having been said, there is a need to continue to observe the increasing concentration in highly-concentrated service industries, the growing price mark-ups of large corporations and in concentrated industries, as well as the high degree of common ownership of companies by institutional investors.

Chapter II

Review of competition decisions and judgments

K5. In Chapter II, 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.

K6. The European Commission should refrain from promoting and accepting such **referrals of proposed mergers** by Member States which are not subject to national merger control. Instead, the Monopolies Commission recommends **extending the scope of application of the German transaction value threshold** by deleting the requirement of having domestic operations or, at least, initially adapting it in such a way that **anticipated future domestic operations of the target undertaking** can also trigger a notification requirement. Accordingly, this appears as reasonable for the Austrian transaction value threshold as does the **introduction of a transaction value threshold at EU level and in the other Member States**.

K7. There are good reasons to assume that the German Federal Cartel Office can already assess an **existing cooperation with only regional effects in merger control proceedings** for its **compatibility with the ban on cartels** under current law. To increase legal certainty, the German Act against Restraints of Competition should nevertheless be supplemented by a corresponding **annex competence for the Federal Cartel Office**.

K8. The decisions of the General Court and the Dusseldorf Higher Regional Court on the application of the SIEC test on the basis of unilateral effects do **not yet** provide **legal certainty**. The final decisions in the respective cases are still pending. It remains to be seen whether the highest courts will confirm the high requirements for proof of a significant impediment to effective competition. **Once the court decisions have been made**, it will be necessary to **monitor** their impact on merger control practice.

K9. Distribution agreements between suppliers and retailers usually have the purpose of safeguarding or promoting the service quality of distribution networks. In some cases, dual pricing systems or service quality requirements might be used to **prevent the effective use of the Internet for sales**. However, this should **only** be assumed if **there is a serious risk that consumers will only be able to purchase products online on terms that are significantly worse than those in bricks-and-mortar retail**.

K10. If undertakings that become **immunity recipients** in cartel proceedings **are protected from private claims for damages, this can weaken the stability of cartels**. An **amendment to the law** in this regard should ensure that injured parties and their claims for damages are protected. If the immunity recipient is only subordinately liable to cartel victims, this is nevertheless guaranteed.

K11. The German Telecommunications Act (TKG) introduces new rules regarding the assessment of **co-operation models in its §§ 18 and 19**. The regulatory and competition **authorities should work together closely** to diminish inconsistencies in their judgement of co-operation models, if undertakings make use of the new rules. Therefore, it should be further **clarified how the authorities can work together**.

Chapter III

Outlook for the 11th GWB amendment

K12. In its competition policy agenda covering the period up to 2025, the Federal Ministry for Economic Affairs and Climate Action (i. e. BMWK) listed **ten points for sustainable competition** as cornerstones for a socio-ecological market economy. The Monopolies Commission discusses individual points of the agenda in several chapters of this report and summarizes its position in Chapter III.

K13. With regard to further considerations published by the BMWK in June 2022, the Monopolies Commission highlights that its position stated in its Special Report 58 on the question of **divestiture regardless of a competition infringement** remains and it still considers such an instrument to be **advisable as a last resort**. A divestiture remedy regardless of a competition infringement should **only** be used **in sectors** that have been **consolidated over a long period of time**. Regarding the **digital market**, the Monopolies Commission recommends to **await the practical implementations resulting from the new regulation** (i. e. Digital Market Act, Section 19a Act against Restraints of Competition (GWB)) and further application of Art. 102 TFEU, before considering further specific regulatory measures in this market.

K14. In order to identify markets where a divestiture regardless of a competition infringement may remedy competition concerns, the **Bundeskartellamt** should carry out **sector inquiries**. The **procedure** of such sector inquiries should be **further developed** in general. Therefore, the Monopolies Commission makes concrete proposals **based on UK legislation**. In particular, the procedures should be made more **transparent** and **statutory deadlines** should be introduced, the **participation** of and **legal protection for companies** should be **regulated** more precisely and the **ability to initiate** such an inquiry should be **given to a wider audience**, such as consumer protection bodies or the Monopolies Commission. On the other hand, a **new regulation of disgorgements** appears **unnecessary** if fines and compensations reflect the value of relevant benefits adequately.

Chapter IV

Sustainability and competition

K15. With the European Green Deal, the European Commission started the transition to a modern, resource-efficient and competitive economy. The core objective of the Green Deal is carbon-neutrality of the European Union's economy by 2050. In order to do so, all policy areas have to be reviewed to see how they can contribute. Thus, it is widely discussed among competition policy experts **how climate protection and other sustainability objectives can be better taken into account in antitrust law.**

K16. In March 2022, the European Commission published a draft version of the amended Horizontal Guidelines on Article 101 TFEU, in which it sets out how to balance the protection of competition against sustainability aspects. The draft is a good starting point to discuss how to deal with sustainability aspects in an antitrust context. Yet, relevant case practice is rare so far. In order to operationalise the many different sustainability objectives in antitrust law, **it appears feasible to narrow down the term initially along the two ecological dimensions of climate and environmental protection,** as these terms are fairly clearly defined in comparison to other sustainability goals. Once, there is sufficient experience with the quantitative assessment of the ecological goals, other sustainability objectives should also be considered.

K17. In many cases, there will be no trade-off between protecting competition and achieving sustainability objectives. Consumers increasingly prefer sustainable products and, therefore, companies compete to introduce innovative and sustainable products and technologies. Yet, there may be situations, where it is impossible for a company to introduce a sustainable or sustainably produced product independently. If, for example, consumers cannot accurately assess the positive impact of a product on sustainability, companies may have difficulties in introducing sustainable products and technologies that go above the legal minimum requirements.

K18. Cooperations, which are restraining competition, must also be measured against antitrust law. **It does not recommend a general exemption of sustainability initiatives from antitrust law. In many cases, sustainability objectives can be viewed as economic efficiencies.** Academic literature already discusses how externalities, especially in the area of climate protection, can be taken into account in an efficiency assessment.

K19. For the time being, the debate around sustainability and competition mainly focuses on the assessment of cooperations under antitrust law. In practice, there have been no mergers yet that justified a lessening in competition in order to achieve sustainability objectives. However, one option to **consider sustainability aspects in the context of merger control is by assessing efficiencies.** In German competition law, the possibility of making an efficiency defence argument by the merging parties, which the competition authority weighs against competition concerns, is not officially recognised, as it is in European competition law. If merging parties increasingly raise efficiency arguments relating to sustainability aspects in the future, the possibility of an efficiency defence should be incorporated in the German Act against Restraints of Competition (GWB) to increase legal certainty. It should be in line with recital 29 of the European Union's Merger Regulation. This ensures that competition enforcers are able to **systematically and uniformly examine sustainable efficiencies within German merger control.** However, the Monopolies Commission does not consider such an amendment to the law necessary as of yet.

K20. Therefore, Competition policy can also contribute to making the European economy carbon-neutral. However, a greater contribution is certainly expected from instruments outside of competition policy, e.g., such as by regulation and statutory requirements of minimum standards.

Chapter V

Further need for regulation with a view to the problem of unassailable digital ecosystems?

K21. With the Digital Markets Act (DMA), the EU is introducing a new type of regulation for operators of large platforms and digital ecosystems. In this respect, the EU has indeed placed itself at the forefront of a global development. Being a hybrid between conventional competition law and a regulatory instrument, the DMA fulfills a **filtering function** by providing a set of rules that largely does not require official intervention in individual cases.

K22. The German legislator can support the enforcement of the DMA in particular with rules to facilitate **private actions for injunctive relief and damages**. As an accompanying regulatory measure, it could foresee **administrative restitution orders** according to which gatekeepers must reimburse the profits gained from DMA violations to the damaged market participants – potentially on a lump-sum basis. In addition, the introduction of a **fine or criminal liability of the responsible management** should be examined.

K23. In procedural terms, the DMA provides for a **concentration of responsibility at the European Commission**. In this respect, it is to be interlinked with national competition supervision in the digital markets. If the German legislature authorizes the Federal Cartel Office (FCO) to conduct preliminary investigations into violations of the DMA's conduct obligations and the FCO uses this power, the public impression that the companies concerned are already accused of such a violation must be avoided. The conduct of formal investigations under the DMA and their disclosure is the sole task of the European Commission. This being said, **German abuse control will also retain its own scope of application** alongside the DMA. The Monopolies Commission recommends that the authorization of the FCO in Section 19a GWB be used in the event of cross-market competition problems and that interim measures be used in the event of imminent threats to competition in individual markets. At the same time, the FCO should examine in the relevant cases whether the problem may arise beyond individual cases and whether measures should therefore be taken under Articles 12, 16 and 19 of the DMA. In this case, the European Commission should be informed accordingly about the ECN in accordance with Art. 38 DMA.

K24. The new special regulations on digital markets and the DMA in particular are unlikely to change the fact that the traditional European **abuse control pursuant to Art. 102 TFEU remains necessary**. This will be the case – potentially in parallel with German abuse law – where Gatekeepers have a dominant position in individual markets and also the EU single market is affected. Art. 102 TFEU remains relevant, for example, if the Gatekeepers in question behave abusively without the behavior relating to a designated “core platform service” and/or being regarded as circumventing the behavioral requirements of the DMA. Here, interim measures would also be desirable at the EU level. However, the traditional abuse control under Art. 102 TFEU is also likely to remain relevant if non-compliance with the requirements of the DMA also constitutes an infringement of Art. 102 TFEU and if serious damage to the market structure in the EU single market can be ascertained or is imminent.

K25. Indeed, in cases of **persistent effects** of abuses on competitive conditions, the competition authorities remain competent, according to the European Court of Justice, to act to **eliminate or neutralize these effects**. The Monopolies Commission uses an FTC action against Facebook over its acquisition of WhatsApp as a hypothetical example to illustrate the scope of existing regulatory powers. These have not yet been fully exploited in the digital markets. Therefore, further application practice should first be awaited. Under these circumstances, an **abuse-independent divestiture instrument is not needed at EU level** for the time being.

Chapter VI

"Trademark abuse" in Internet search

K26. The Monopolies Commission is taking a stand on its own initiative on the problem of “trademark search abuse” after the Bundestag requested the German government to commission it to issue a statement on this subject. In the case of search-based advertising, **a distinction must be made between possible abuses by the platform operator and conflicts (related to trademarks or unfair competition) between the platform users** placing search-based advertisements. A “trademark search abuse” can become relevant, e.g., if several hotel or flight booking portals compete for the attention of end users. In this case, a portal operator as advertiser can name keywords that are so similar to the trademark of another portal operator that the advertiser must expect that the search algorithm relevant in this case will establish a connection to the trademark. The advertiser can use this to make the search algorithm weight its own portal as relevant even in cases where the search query actually refers to the competitor portal.

K27. **Section 19a GWB**, which entered into force after the issue came up, **relates to abuses by a platform operator** and is therefore only likely to apply to the practices in question if the platform operator itself benefits in some way in the competitive context. **In the relationship between platform users**, however, **Article 101 TFEU protects**, within the scope of what is permissible under trademark law, **the freedom to bid on a brand name** in search engine advertising. According to the current state of affairs, the German legislator was to right refrain from further rules.
