

# Competition 2024

XXV. Biennial Report by the Monopolies Commission

Summary

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

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## Chapter I

### The state and development of concentration among companies in Germany

**K1.** According to Section 44 Paragraph 1 Sentence 1 of the German Act against Restraints on Competition (GWB), the Monopolies Commission is legally mandated to assess the state and development of corporate concentration in the Federal Republic of Germany. The Monopolies Commission fulfills this mandate by examining both the **overall economic, i.e. aggregated, corporate concentration**, and the development of **corporate concentration within specific economic sectors**. Furthermore, **firm-specific price markups**, which can serve as indicators of market power, are calculated and used to evaluate competitive developments in the manufacturing and service sectors.

**K2.** To assess aggregated corporate concentration, the Monopolies Commission regularly identifies the 100 largest companies ("Top 100") in Germany and their share of value added to the total economy. Compared to the base year 2020, their **share has increased by approximately ten percent**, reaching around 15 percent in the reporting year 2022. This marks a reversal of the decreasing trend that has been observed since 2012. As an additional indicator, the Monopolies Commission examines **personnel and capital interlocks among the "Top 100"**. Among these "Top 100," 11 companies hold stakes exceeding 1 percent in 25 other companies within this group. The total number of cross-ownerships among the "Top 100" amounted to 40 in the reporting year 2022, which is two fewer than in the reporting year 2020 and 13 fewer than in the reporting year 2018. The development of personnel interlocks is assessed based on connections through management board members, i.e. instances where management board members of one company serve on the supervisory boards of other companies within the "Top 100," and connections through individuals without management board mandates who hold positions on the supervisory boards of multiple companies within the "Top 100." In the reporting year 2022, both values remain at a low level. The number of interlocks through management board members amounted to 32, the same as in the reporting year 2020, while the number of interlocks through individuals without management board mandates increased to 81 (2020: 71).

**K3.** Both of these developments (the "Top 100" as well as the personal interlocks) hint at a slight increase of potential market power in some areas of the economy. However, these effects are moderate and can probably be explained by specific circumstances (end of Covid-related effects; Russian attack on Ukraine). Nevertheless, these developments should be monitored closely in the future.

**K4. The aggregated corporate concentration remains largely unchanged**, with a general increasing trend that is, however, flattening out. This trend is mainly driven by the industry and trade sectors. In contrast, the service sector shows a declining, also flattening trend in aggregated corporate concentration.

**K5.** A similar pattern is observed in the study of aggregated price markups, which remain at a moderate level. **While there is an increasing trend in the industry sector, markups in the service sector are declining.** A **new aspect** is the examination of **corporate monopsony power**

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**in labor markets (markdowns). Both the manufacturing and service sectors exhibit a similar downward trend since 2007.** At the beginning of the observation period, companies were able to set wages significantly below the contribution of employees to the company's success. However, monopsony power in the industry sector has continuously decreased. In the service sector, a declining trend is also observed, which has been relatively stable since 2014.

**K6.** Additionally, the relationship between markups and rising prices is examined. **On a macro-economic level, there is no evidence that increasing price markups are a major determinant of rising prices. On the contrary, the empirical findings are consistent with an incomplete pass-through of cost shocks:** cost reductions are correlated with price reductions and increasing markups, while cost increases are correlated with price increases and decreasing markups.

**K7.** An analysis of the food supply chain shows **that since 2007, there has been a shift in price markups from the agricultural sector to the downstream markets of food processing and food retail.** In food retail, a failure to pass on cost reductions has been observed, which indicates oligopolistic behavior. However, these aggregated investigations are not sufficient to implement effective policy measures due to the inherent complexity of various supply chains in the food sector. Therefore, conducting further analyses appears necessary and sensible in order to take tailored measures.

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## Chapter II

### Review of competition decisions and judgments

**K8.** In Chapter II, the Monopolies Commission develops recommendations for actions to be taken by legislators and competition authorities based on the German and the EU competition decision-making practice in the reporting period.

**K9.** With regard to legislative developments, the Monopolies Commission first looks back at the **11th amendment to the GWB**. Its most significant change is the introduction of powers of intervention for the Federal Cartel Office that are not reliant on finding an infringement and that follow a sector inquiry. The Monopolies Commission has contributed to the new rules with various proposals, including on the substantive and formal requirements for the adoption of remedies. The **12th amendment to the GWB** is expected to include changes relating to merger control, the ministerial approval procedure and the enforcement of consumer law. The attempt to strengthen the collective enforcement of cartel damages through the **Consumer Rights Enforcement Act** (*Verbraucherrecht durchsetzungsgesetz*) is, at least, a step forward. In contrast, the planned **extension of the existing exemption from merger control for concentrations in the hospital sector** is to be rejected, as is the merely symbolic amendment to a provision **restricting the ban on cartels in the context of certain forestry co-operations**. At EU level, the entry into force of the **Digital Markets Act** and the **Foreign Subsidies Regulation** are particularly worth mentioning.

**K10.** In the decision-making practice, the **increasing digitalisation** of the economy is particularly noticeable in merger control and – even more so – in abuse control. The Federal Cartel Office has initiated **numerous proceedings against (potential) undertakings with paramount significance for competition across markets in accordance** with Section 19a Paragraphs 1 and 2 GWB, some of which have already been completed, including in relation to data processing by Alphabet/Google. The European Commission enforces the **general prohibition on abuse of dominance** against large digital undertakings.

**K11.** While the Monopolies Commission is **critical** of the European Commission's new practice of **below-threshold referrals by Member States**, it believes that an ex-post review of mergers under abuse **law in accordance with the ECJ judgment in the Towercast case is sensible** in individual cases. However, the focus should be on strengthening mandatory ex-ante merger control. The Monopolies Commission, therefore, **advises against a renewed increase in the domestic turnover thresholds in the GWB**. In addition, it continues to recommend **extending the scope of the German transaction value threshold** to anticipated future domestic activities of the target undertaking as well as **introducing a corresponding threshold at EU level**.

**K12.** In the view of the Monopolies Commission, restrictions of competition in the **sports sector should be in the focus of antitrust law enforcement**. There is usually a large imbalance in power in favour of the sports associations, which often take advantage by adopting far-reaching rules. Recent examples of this include blanket bans on alternative competitions as well as FIFA's new football agent regulations. According to ECJ case law, **privileges under antitrust law should be applied restrictively in such cases**. Enforcement of antitrust law under private law

certainly plays a major role in the sports sector. However, from the administrative side, **guidelines to be published by the European Commission** could add to this.

**K13.** The Monopolies Commission **welcomes the European Commission's initiative to publish guidelines on exclusionary abuses**. In the planned guidelines, the European Commission should work towards **shortening abuse proceedings and creating more legal certainty**. The Monopolies Commission recommends using certain groups of cases as well as abstract criteria to identify, or make identifiable, those **practices for which a (detailed) effects analysis can be dispensed with**.

**K14. Directors' and officers' liability** in corporations should also cover the case of damages caused by cartels that have been uncovered (e.g. fines) in order to maintain incentives for corporate governance to **comply with antitrust law**. However, the **cartel profit** of the undertaking should play a significant role in the assessment of damages in order not to undermine the profit-skimming effect of the cartel sanctions. The Monopolies Commission recommends placing the respective **burden of proof on the undertaking**. It must therefore not only prove the amount of damages it has suffered as a result of the cartel, but also that the claimed damages are not offset by an advantage of at least the same amount.

**K15.** A competition authority has to **assess the effects of a merger prior to its completion**. In this prognostic decision, there exists an **inevitable uncertainty regarding the correctness of the merger control decision, including the reliability of the assessment tools**. With **ex-post evaluations**, the **actual effects of merger control decisions, including the design and implementation of remedies**, can be assessed, and afterwards the practice of the competition authority can be improved. Therefore, ex-post evaluations are used by many competition authorities, but so far not by the Federal Cartel Office. The Monopolies Commission recommends a **stronger evaluation culture in merger control** to establish evidence-based economic policy.

**K16.** The Monopolies Commission recommends the prompt establishment of a **comprehensive procedural database** for German merger control decisions by the Federal Cartel Office with regard to future decisions. This allows the evaluation of procedural practice, facilitates day-to-day operations, and supports the strategic development of the competition authority. These advantages justify the effort associated with setting up the database.

## Chapter III

### An economic test concept for digital ecosystems

**K17.** Digital ecosystems are characterized by the fact that actors/services/platforms/products are in a compatible and complementary relationship with each other. The players are linked to each other through the shared use of certain standards and databases – where applicable – and can offer their added value across products, services, markets or sectors. **Digital ecosystems differ conceptually from regular digital platforms and networks and should therefore also be identified using specific criteria.** Against this background, the question arises as to what an economic analysis should look like. **An economic test concept for the identification of digital ecosystems is proposed based on three test steps: 1) Examine systemic factors; 2) Determine ecosystem power; and 3) Identify potential for discrimination and leverage practices.**

**K18.** Digital ecosystems pose particular threats to competition that go far beyond the threats posed by simple digital platform and network services. **The Monopolies Commission therefore recommends that Section 19a GWB should be explicitly focused on digital ecosystems.** In order for the criteria of Section 19a Paragraph 1 GWB to be in a recognizable context and to correspond to the economic concept of the digital ecosystem, the Monopolies Commission considers it necessary to show how they relate to each other and how they work together in relation to the creation and expansion of economic power (i.e. ecosystem power).

**K19.** **The legislator should draft Section 19a Paragraph 1 GWB in such a way that a comprehensive analysis of non-generic complementarities is carried out.** This is because these lead to intermediation power for the orchestrator of a centralized ecosystem, create incentives for leverage strategies and discrimination practices, create considerable dependencies for third-party companies and make the essential difference between the phenomenon of the digital ecosystem and regular digital services, networks and platforms from an economic perspective.

**K20.** The Monopolies Commission therefore recommends that Section 19a Paragraph 1 GWB should be clearly aligned with the analytical framework corresponding to the state of economic literature in order to be able to adequately identify and address digital ecosystems and the resulting special threats to competition in an overall view. **The Monopolies Commission proposes that the list of criteria in Section 19a Paragraph 1 Sentence 2 GWB should be revised accordingly: "In determining the paramount significance of an undertaking for competition across markets, account shall be taken in particular of: 1. the non-generic complementarities between actors, data, services, platforms and products of the digital ecosystem, 2. the existence of autonomous actors with a common value proposition for consumers, 3. the existence of a modular organizational structure with a central ecosystem operator."** The three criteria proposed would anchor the ecosystem concept in Section 19a Paragraph 1 GWB. This contributes to a more concrete position as an addressee of that provision and enables a more precise economic identification of digital ecosystems. **The Monopolies Commission is of the opinion that a clear concept enables putting a focus on the actual problems and that, re-**

**ardless of the legislative implementation, the scope of the provision should already be focused on this, especially in the further application of the provision, including Section 19a Paragraph 2 GWB.**

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## Chapter IV

### Data access from a competition policy perspective

**K21. Control over data as a competitive factor** is becoming increasingly important not only in digital but also in traditional markets. Improving companies' access to other companies' data may therefore be desirable from a competition policy perspective. The aim of this chapter is - analogous to the previous chapter on an economic test concept for digital ecosystems - to provide more conceptual clarity in the assessment of data access claims in order to identify relevant problems and possible solutions.

**K22. There are already several statutory provisions that deal with data access.** A right to data access can arise, for example, from the provisions of general competition law. In addition, for example, more specific data access rules have been created inter alia for digital platforms, and there are cross-sector data access rules in the Data Act for interconnected products and related services. In terms of application, on the one hand, more specialised statutory provisions take precedence and, on the other, the principle of the hierarchy of statutory provisions applies, notably the primacy of European Union law over national law. **However, as many statutory provisions do not explicitly regulate the conditions of access to data, but only mention it as a possible application, it is often unclear in practice how exactly they should be applied.** This chapter therefore sets out test schemes for merger and abuse control, which are a first step towards more sophisticated schemes in the future.

**K23.** With regard to **merger control** proceedings, the Monopolies Commission recommends (1) **identifying for each of the merging parties the competitively relevant data** to which third parties are already granted access, to which third parties are not yet granted access, although the data is already collected, and to which third parties access could be granted if the data were collected. In a next step, the Monopolies Commission recommends (2) clarifying for each of the identified (potential) data access options **whether the merger is likely to bring about changes that would have a significant impact on the competitive situation.** Finally, the Monopolies Commission recommends (3) examining **whether the expected changes will have a negative or positive effect on the competitive situation.** Data used as input for services or products could both strengthen and reduce the intensity of competition. Data on market dynamics could be used by companies for anti-competitive coordination, for example on prices or quality.

**K24.** In the view of the Monopolies Commission, the **key question in abuse proceedings** should be **whether there is special access to data** through which a company with a strong market position can evade competitive pressure. To this end, the Monopolies Commission recommends an examination of relevant criteria in relation to data access based on six steps: **(1) an analysis of the initial situation, (2) the identification of context-specific factors, (3) the assessment of the effects on the market structure and the competitive process, (4) the balancing of interests when deciding on data access claims, (5) the specification of an appropriate fee, and (6) the specification of the technical design of the data access.**



## Chapter V

### Competition in the district heating market

**K25.** District heating is currently experiencing a significant transformation: On the one hand, existing networks need to **switch to climate-neutral energy supply** by 2045. On the other hand, they are considered an important part of the 'Wärmewende' (the process of transitioning building heating from carbonized to climate friendly fuels) and shall be **further expanded** in the future. To ensure a successful transformation, the Monopolies Commission strongly recommends either establishing **an effective competition framework**, or, where this is not feasible, implementing an **appropriate regulatory framework**. Competition within the context of the 'Wärmewende' can ensure that the most efficient technologies are implemented for heating. In this way, it contributes to reducing heating prices and fosters the urgently needed public acceptance of transformation efforts.

**K26.** District heating networks are **fully vertically integrated natural monopolies** that do not compete with each other. The only form of competition between district heating and other heating technologies can occur when homeowners make their initial decision on which type of heating system to install. In many cases, however, there is no economically viable alternative to connecting to a district heating network due to technical or structural constraints. After installing a heating technology, homeowners are highly committed to their choice due to lock-in effects.

**K27.** For the first time, the Monopolies Commission conducted **empirical studies** on the district heating market. For this purpose, price data from 251 district heating areas representing roughly 85 percent of German district heating customers was collected. The data indicates that prices correlate with those of neighboring regions in a statistically significant way. It can also be observed that regional differences in district heating prices are greater than those for other energy carriers. This may indicate a lower level of competition in the district heating sector compared to gas and heat pump electricity. Additionally, there is no statistically significant correlation between district heating prices and gas prices within the same region. This might suggest a low level of competition between district heating and other heating systems.

**K28.** In the future, the competition between different heating systems will be further reduced by the **limitation of admissible heating technologies**. Oil and gas need to exit the market in due time, leaving heat pump systems as the sole major competitor to district heating. This process is further reinforced by **local heat planning**, which obliges municipalities to divide their area according to available heating technologies. The Monopolies Commission is concerned that this development may further consolidate the **market position of district heating**, even in the face of competition from other heating technologies.

**K29.** The **existing regulatory framework** does not address these issues adequately. Currently, the only effective regulations are those concerning price developments through price escalation clauses. Therefore, the Monopolies Commission suggests the introduction of additional regulatory instruments. One such instrument could be a **central transparency platform**, which

would enable customers to better compare prices and reduce information asymmetries. Additionally, the existing price regulation framework should be further developed. To achieve this, the **rules on price escalation clauses** could more closely reflect developments in the general heating market to better account for the competition between different heating systems. Alternatively, a **simplified price cap regulation** could be introduced to limit district heating prices.

**K30.** Besides, the Monopolies Commission also suggests considering **structural changes to the competitive market design** of the district heating market. A separation of heat generation, transportation, and retailing could successfully introduce competition into the district heating system making regulation of end user prices unnecessary. Besides, a light-handed **access-regulation** might be an option to open up access for producers beyond negotiated grid access.

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## Chapter VI

### Competitive control of DB InfraGO AG

**K31.** At the end of 2023, **DB InfraGO AG was created from the merger of the two infrastructure divisions DB Netz AG and DB Station&Service AG**. In future, rail infrastructure should be oriented less towards business interests and **more towards public welfare objectives**. In order to achieve this, the federal government is focusing on stronger political control of the railroad infrastructure and is developing corresponding control instruments. In this report, the Monopolies Commission takes a position on this and makes proposals for a competitive alignment of DB InfraGO AG.

**K32.** The current poor condition of the rail network and the negative records for punctuality and customer satisfaction clearly show that the **existing management and regulatory instruments are not sufficient** to ensure high-quality and reliable train services for the benefit of passengers and shippers. The future management of DB InfraGO AG, as well as the entire DB Group, must now be **consistently focused on customer satisfaction**.

**K33.** This is a mandatory prerequisite for finally making progress with the shift of traffic to rail, which is necessary in terms of climate policy. In the opinion of the Monopolies Commission, **the goal of consumer satisfaction and other rail policy objectives must now be defined by law**, for example in the Deutsche Bahn Foundation Act. This is to clarify towards which objectives the management of DB InfraGO AG should be geared. **A definition of the common good must not be left to the Supervisory Board of DB AG, as has been the case to date**. This is the task of the Bundestag and Bundesrat as legislative bodies.

**K34.** The prerequisite for a political control is that the federal government's **railroad policy objectives are clearly defined**. In the opinion of the Monopolies Commission, these **should be regulated by law**, for example in the Deutsche Bahn Founding Act („Deutsche Bahn Gründungsgesetz“). This will make it clearer which objectives DB InfraGO AG's management should be geared towards. **This definition of the public welfare objectives should not be left to the Supervisory Board of DB AG**, but is the task of the Bundestag and Bundesrat as the legislative bodies.

**K35.** In order to operationalize the public welfare objectives, the so-called Infraplan should develop a concrete work programme for DB InfraGO AG with a time horizon of five years. Corresponding legal regulations in the neighboring countries of Austria and Switzerland could serve as a model. The Monopolies Commission recommends **enshrining the Infraplan in law**, as has been done in the neighboring countries. **It expects that this will make it more binding**, which is lacking in current plans in Germany.

**K36.** In order to enforce the achievement of targets more effectively than before, the Infraplan should be harmonized with existing control instruments, especially the Performance and Financing Agreement („LuFV“) and the incentive regulation. In the opinion of the Monopolies Commission, the existing control instruments are not sufficiently coordinated and are therefore not sufficiently effective. **In particular, the quality requirements of the LuFV have not led to any improvement in quality**.

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**K37.** To this end, the Monopolies Commission proposes **adding a quality component to the incentive regulation of track access charges**. The price cap for track access charges should also depend on the minutes of delay caused by the infrastructure, and failure to meet the target values should lead to corresponding reductions in track access charges. This will create an incentive for DB InfraGO AG to reduce the infrastructure-related minutes of delay, which is currently not the case in the LuFV.

**K38. Management remuneration should also be linked closely to the achievement of quality indicators.** It is common to have short-term and long-term bonuses. The achievement of **punctuality targets should be decisive for determining short-term bonuses. The long-term bonuses** (running over three to five years) should be determined by the **achievement of the expansion and maintenance targets of the Infracaplan and adherence to the cost plans**.

**K39.** The Monopolies Commission continues to consider it necessary **for DB InfraGO AG to be as independent as possible from the other DB AG Group companies in organizational terms**. If the existing group structures of DB AG are retained, there is a risk that DB InfraGO AG will focus more on the group's interests than on the common good. Only by **separating ownership of the railroad infrastructure** it can be ensured that DB InfraGO AG is sustainably oriented towards the common good. If this is currently not politically feasible, the Monopolies Commission **urgently recommends the strongest possible separation of the management positions of DB InfraGO AG from the other Group companies**.

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