

Summary

More Competition in the Services Sector As Well

The Sixteenth Biennial Report 2004/2005

by the *Monopolkommission* (Monopolies Commission)
in accordance with Section 44 Paragraph 1 Sentence 1 of the Act Against
Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB)*

Current Issues in Competition Policy

◆ The Ministerial Authorisation Procedure – Information to the Monopolies Commission

1.* The Monopolies Commission has been criticised by applicants in the ministerial authorisation procedure for assuring participants in verbal hearings or respondents in written surveys that the information they give is confidential, while basing its published statements on the information thus obtained. The Monopolies Commission regards this criticism as unjustified. Unlike the Federal Minister of Economics it does not have powers to obtain information under threat of sanctions, and is thus dependent on voluntary cooperation from respondents. The legislature has taken due account of this by imposing on the members and staff of the Monopolies Commission the obligation not to disclose information given as confidential. The applicants have the possibility of objecting to the facts and opinions presented in the special reports. The Federal Minister of Economics can query this under his powers of investigation and form his own opinion.

◆ Competition and Regulation in the Energy Industry: Reform of the Energy Law

2.* On 7 July 2005 the Second Act to Amend the Energy Law (*Energiewirtschaftsgesetz, EnWG*) came into force, the core of which is fundamentally revised and considerably extended legislation on the supply of electricity and gas. The main material amendments to the Energy Law concern the implementation of the unbundling requirements in the European electricity and gas directive, and the introduction of regulated network access in the energy industry. Competence for regulatory supervision of these networks was transferred to the Federal Network Agency (*Bundesnetzagentur*).

3.* The introduction of sector-specific regulation in the energy transmission industry is on principle welcomed by the Monopolies Commission. It has already pointed out in the past that the failure of competition to develop in the electricity and gas industry is largely due to the regulatory framework in that sector, which is inadequate in many respects, and recommended the introduction of ex ante price regulation for the electricity and gas transmission grids. In the view of the Monopolies Commission the model of negotiated network access combined with supervision by the Federal Cartel Office (*Bundeskartellamt*) to prevent abuse has proved inadequate to deal appropriately with the problems of pricing and discrimination inherent in network monopolies.

* The Monopolies Commission would like to thank Mrs. Eileen Martin for translating the original German text into English.

4.* The amendment to the Energy Law completes the transition from negotiated to regulated network access in Germany as well. In the view of the Monopolies Commission, the introduction of ex ante control of network charges will fundamentally improve the regulatory framework for transmission competition in the electricity and gas industry. However, in view of the considerable weaknesses in the new regulatory framework as well, it remains to be seen, in the opinion of the Monopolies Commission, in how far the conditions for non-discriminatory and efficient competition in transmission can be created.

5.* The legal criteria in the Energy Law and the relevant ordinances on the calculation of network charges are unclear and in part contradictory, and this raises problems in regard to effective regulation of these charges. Cost and incentive-oriented criteria for charges are set directly side by side in § 21 of the Energy Law, but it is not sufficiently clear from the text of the law in what relation they stand to each other. All experience shows that the legal uncertainties this will entail can only be removed in lengthy court proceedings, and, as in the telecommunications or post sectors, will constitute a considerable obstacle to the development of competition.

6.* The Monopolies Commission still regards supervision of competition in the wholesale electricity and regulated energy markets as inadequate. The need for special supervision of competition on these markets is due to their particular vulnerability to supply strategies by generating companies that have sufficient market power to influence prices. Clearly, market manipulation by generating companies on the wholesale electricity markets cannot be tackled with the instruments of general competition law, as companies can acquire sufficient market power to influence prices even with market shares that are far below the thresholds for a dominant market position assumed in the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*). A specific norm for intervention, that would enable the Federal Network Agency to examine the actions of the market participants concerned if it suspected market manipulation, and if necessary prosecute, is not given in the Energy Law. In view of the great importance of these markets, and international experience with their vulnerability to manipulation, that is an incomprehensible oversight on the part of the German legislature.

7.* The new regulatory framework for the energy industry also has considerable shortcomings in regard to network access in the gas sector. On principle the transition to a model of network access that is independent of transactions and distance has been made, but the law does not contain an obligation to extend the entry-exit model beyond network ownership. The obligations on gas network operators fully to exploit all the possibilities for cooperation with other network operators in order to keep the number of grids or parts of grids and the balance zones as low as possible, can hardly be settled in court proceedings, and, in the view of the Monopolies Commission, this is hardly likely to establish a network access model for the gas sector within a short period that is suitable for competition and the mass business.

8.* Finally, in the view of the Monopolies Commission, exempting the long-distance gas networks from cost regulation will prove an obstacle to the ability of transmission competition to function in the gas sector. The Monopolies Commission believes there is no basis at all for the assumption that there is actually or potentially efficient competition in transmission in the long-distance gas sector that would make sector-specific cost regulation superfluous. Economically, long-distance gas networks must be classified as unassailable natural monopolies as they have considerable advantages of size and sunk costs. Hence, potential transmission competition cannot have a disciplinary effect on the market conduct of monopoly long-distance network operators. Wingas has built up a transmission network, parts of which run par-

allel to the existing network operated by the other long-distance gas suppliers, but that does not prove the argument that there are no structural barriers to market access in the long-distance gas supply sector. Wingas is a subsidiary of BASF, and it has built up a transmission infrastructure, not in order to compete for customers with other long-distance suppliers, but to serve internal supply interests of the BASF group. Apart from the Wingas case there has been no additional construction of parallel transmission lines of any significance in Germany since the liberalisation of the gas markets. Random examples of new lines are only fringe phenomena. To prevent competition in long-distance transmission from restriction through excessive charging by monopoly companies in future as well, the Monopolies Commission is in favour of the application of strict standards of examination in the application of § 3, Para.2, Sentence 2 of the Ordinance on Gas Networks (*Gasnetzentgeltverordnung, GasNEV*).

◆ Voice Over IP and Regulation

9.* Voice Over Internet Protocol (Voice over IP, VoIP) is regarded on the one side as a service with considerable competition potential, that can stimulate the introduction of new and innovative services and lower the costs for operators and users. On the other side VoIP is also a threat to traditional suppliers of speech communication, because large numbers of subscribers will leave the traditional network, and the income they have generated will be jeopardised. It will depend, not least, on the framework conditions, whether Internet telephoning will replace the traditional fixed lines or merely supplement them. The Monopolies Commission is therefore taking up the current economic and legal discussion and developing first recommendations for regulating VoIP.

Even if VoIP is not an entirely new service, it is still in the development phase. At present it is not possible to see whether any or which business models will become established. In this situation the Monopolies Commission, like the European Commission and the Federal Network Agency, is in favour of restrained regulation of VoIP. Nevertheless, there are competition policy problems on various levels.

10.* VoIP services can only be used by subscribers who have broadband connections, giving rapid Internet access. However, at present broadband connections based on the DSL digital connection are only available in Germany in combination with a traditional analogue or ISDN connection. The Monopolies Commission shares the view that the success of VoIP largely depends on whether subscribers can obtain DSL connections independently. It is an open question whether regulation could enforce such decoupling. It will depend on whether the practice of coupling so far is abusive in the meaning of the Telecommunications Law or general competition law.

So far, competitors can only offer DSL connections on the basis of their own infrastructures or rented subscriber lines, separate from the traditional telephone connections. Bitstream access is an alternative. According to the Federal Network Agency, Deutsche Telekom AG has considerable market power on the input market for IP-based bitstream access that is essential for supplying VoIP services. It is to be obliged to grant other companies access to bitstream without discrimination, and the charges for this input are to be made subject to approval. The Monopolies Commission welcomes this. To prevent distortion of competition at the expense of infrastructure-based suppliers of traditional fixed line telephone services in regulating the charges, the costs of the efficient provision of services for bitstream access should also include the costs of the access network.

11.* For suppliers of VoIP who want to offer a genuine substitute to the traditional telephone, connecting with the line network is essential. Legally it is not clear whether and under what conditions VoIP suppliers have a claim to such a connection. The Monopolies Commission is in favour of a strategy of reciprocity. A supplier using a connection should himself be willing to offer connection. Reciprocity should also apply to the conditions for these. Actually, no charges should be incurred for switching calls from the fixed line network on to the Internet. Conversely, the VoIP suppliers should pay for calls to be transferred into the fixed line network. In the phase of the coexistence of package and fixed line telephones this would work to the disadvantage of VoIP and should, in the view of the Monopolies Commission, be avoided.

12.* The Monopolies Commission shares the view of the Federal Network Agency that VoIP services that permit access to the fixed line telephone network are ultimately a substitute for the traditional fixed lines, and insofar are to be regarded as part of the markets for public connections to fixed locations at home and abroad. The regulatory authority is planning to make charges for domestic connections, including charges for VoIP connections, subject to ex post regulation. As the possibility cannot be excluded that Deutsche Telekom AG will transfer the dominant market position it still has on the market for fixed lines to the VoIP services segment, it should also report its charges to the regulatory authority two months before they come into force.

13.* Like the Federal Government and the Federal Network Agency the Monopolies Commission believes that the obligation to provide emergency call services must not be allowed to become a barrier to market entry for VoIP. At the same time it must remain possible for free emergency calls using the uniform European emergency number 112 to be handled in the public Internet telephone service. As long as it is still not technically possible for emergency calls on mobile VoIP phones to give information on the location of the caller this should not be introduced.

◆ **Privatising Air Traffic Control**

14.* On 7 April 2006 the Federal Parliament passed the Act on Air Traffic Control (*Flugsicherungs-gesetz, FSG*) with a big majority. The law will enable Deutsche Flugsicherung GmbH (DFS), the German air traffic control enterprise, to be privatised. Until now air traffic over Germany has been coordinated by DFS, which is owned by the Federal Government, and with its exclusive powers to operate it is equivalent to a state monopoly. In view of the Single European Sky initiative of the European Union (SES), the aim of which is to create a uniform European air space in the long term, DFS is now to be given the possibility, through privatisation, of preparing for competition for air traffic control services. Altogether 74.9% of the shares are to be available for sale to private companies. The remaining 25.1% are to remain in the hands of the Federal Government. It is intended that in future private companies will take over operating air traffic control, while control of these activities and the regulation of charges will be performed by a new Federal Supervisory Office for Air Traffic Control (*Bundesaufsichtsamt für Flugsicherung, BAF*). BAF was set up on 1 July 2006, and when the new air traffic control law comes into force on 1 January 2007 this supervisory authority will be able to allow private companies to perform air traffic control.

15.* The Monopolies Commission takes a critical view of the material part-privatisation of air traffic control. It doubts that the internal corporate steering mechanisms and the new legislation (in its present form) will suffice to guarantee the quality of privatised air traffic control. Inadequate implementation combined with neglect of security and quality requirements, if pri-

vate entrepreneurs cut costs and refrain from investment in order to maximise profits, would have very serious consequences and must absolutely be avoided. The Monopolies Commission expressly points out that the provision of air traffic control services is a sovereign task, which includes policing functions. Air traffic control is a service in the public interest, which protects both the users of air traffic and the population affected by aircraft flying overhead. Air traffic control must ensure safety in air space, and so it is also an essential element in the readiness for deployment and capability of the armed forces. The Monopolies Commission therefore sees the need to undertake the privatisation of DFS in accordance with the status of air traffic control as the “air traffic police”.

16.* In the view of the Monopolies Commission it is only possible to exercise adequate supervision and control of a company to which tasks have been assigned if the state has effective right of objection, not only through the new supervisory authority but also as a shareholder. After the privatisation the Federal Government will only hold 25.1% of the shares in DFS, which cannot be regarded as sufficient scope to exercise influence. With this minority shareholding the Federal Government’s influence will be limited essentially to preventing any possible change in the corporate objective of the privatised DFS. Admittedly, the Federal Government will have certain sanction mechanisms under the assignment of tasks, to cover a situation where a company fails to fulfil its contractual obligations, but if these can be applied at all then only with a considerable time lag. If there has been considerable infringement of obligations the Federal Government can, as a last resort, order the shares to be retransferred to its ownership. It is questionable whether that potential threat will suffice to discipline a privatised DFS. Should the shares really be returned, the Federal Government would face the problem of either providing the service itself or instructing another air traffic control company to do so. The first alternative would require considerable personnel and management, even if the armed forces were to take over air traffic control. In the second alternative the problem would be that there are no competitors in German air space that could take over the service. In either case a temporary risk to air space users and the population cannot be excluded.

17.* Other problems and risks arise in implementing the privatisation of air traffic control, precisely from the creation and staffing of the BAF and its extensive tasks, and the unforeseeable development of air traffic control on the European level. In regard to the timetable for the privatisation desirable for political reasons, it is questionable whether assumption of the services can be guaranteed without delay and without complications, as extensive preliminary work will be required to implement the privatisation project. The new supervisory authority has to be set up and staffed, it has to assign air traffic monitoring (ATM) services to third parties and grant DFS its certificate, draw up appropriate incentive regulations and finally ensure non-discriminatory access to ATM technology for other ATM services providers, e.g. at regional airports. The demands on the BAF are certainly high. Sufficient preparation of the users of air traffic control for the new system also hardly appears possible with the timetable chosen.

18.* Due account should be taken of these doubts when carrying out the privatisation. In the view of the Monopolies Commission a club model with a heterogeneous ownership structure would in principle appear advantageous for the envisaged privatisation of DFS. In such a model all air traffic control tasks would be performed by one or several companies that would be controlled by the users, that is mainly airlines and airport authorities. In this model internal control would be exercised by the owners. That would correspond to the previous DFS model in that air traffic control would be neutral, with the difference that with the heterogeneous ownership structure there would be appropriate balance of interests to ensure safety and effi-

ciency. However, with the obligatory separation of operational and regulatory tasks in the law or the SES regulations, and the formation of the BAF these necessitate, and with the present security risks, a club model of this kind is only feasible with some limitations.

19.* In the view of the Monopolies Commission the risks in implementing privatisation can only be minimised if the Federal Government initially continues to be the majority shareholder, and so has sufficient powers of influence, and if it also exercises these in the operative business. The Monopolies Commission also holds the view that a heterogeneous ownership structure should be chosen that takes sufficient account of the status of air traffic control as a service in the public interest. A single operator model should not be chosen, as it would create a one-sided interest situation, of which a critical view must be taken, particularly if this were a company that occupies a major market position in the value creation chain of the air traffic system. There is a danger here that insufficient safety precautions would be taken, and that competitors would be hindered and suffer abuse on other markets.

20.* One solution, in the view of the Monopolies Commission, could be a multi-stage model. Here the Federal Government would initially remain the majority shareholder of DFS with 50.1% of the shares. The remainder could be sold in equal lots to the various groups active in the air traffic system. Airlines, airport operators and other foreign air traffic controllers, and the staff of DFS, should be able to buy shares. By weighing the mutual interests of all involved it could be ensured that a syndicate model of this kind would guarantee adequate safety, an efficient use of resources and marked efforts at innovation in every area of these services, while air traffic control retained its neutrality in competition. In a second stage, after the first period of task assignment and when the first experience has been gained, the Federal Government's shareholding could be assessed in regard for its function. If BAF were successfully established as part of the effective regulation of incentives, and if non-discriminatory access to the ATM infrastructure were assured, the Federal Government's shareholding could be reduced to the minimum of 25.1% prescribed in the law. In the second stage other private investors could also be permitted to purchase shares in DFS on the stock market, to a maximum of 25%. During the assignment of tasks it must be ensured that the owners of a privatised DFS could only sell their shares to members of those groups of users to which they themselves belong. Otherwise the change in ownership could cause a shift in interests. In the view of the Monopolies Commission this two-stage procedure is necessary and appropriate in view of the importance of air traffic control for domestic and external security.

◆ **Merger Control and Media Supervision**

21.* In summer 2005 it became known that Axel Springer AG and ProSiebenSat.1 Media AG wished to merge. Under German competition law (*Act Against Restraints of Competition, GWB*) this project had to be approved by the Federal Cartel Office, and under the provisions in the German State Broadcasting Treaty (*Rundfunkstaatsvertrag, RStV*) by the Commission to Establish the Degree of Concentration in the Media Sector (*Kommission zur Ermittlung der Konzentration im Medienbereich, KEK*), and possibly the Conference of Directors of State Media Institutes (*Konferenz der Direktoren der Landesmedienanstalten, KDLM*) as well. Under the regulations in the State Broadcasting Treaty the Concentration Commission KEK must ensure variety of opinion in the media, and so it had to assess the merger with the objective of preventing a "dominant power of opinion". The criteria for the assessment are in § 26, Para. 2 of the State Broadcasting Treaty. In January 2006 the Concentration Commission stated that the enterprises involved would acquire a dominant power of opinion if the merger went ahead, and so they refused to confirm non-objection.

22.* On principle the Monopolies Commission holds the view that in controlling concentration in the media a concrete appraisal of the flow of opinion and the dominant power of opinion should not be undertaken in any individual case. That view is based on the fact that dominant power of opinion is not a defined fact and cannot be concretised in any factual way. Hence preference must be given to the ban on the abstract jeopardy of variety of opinion through the achievement of a viewer percentage of more than 30% in § 26, Para. 2, Sentence 1 of the State Broadcasting Treaty. Applying that regulation undoubtedly gives greater legal certainty, and it is more likely to offer protection from arbitrary bureaucracy than any attempt to apply the concept of dominant power of opinion directly. If a media enterprise only achieves the threshold of 25% of viewers with its television transmissions, but not 30% § 26, Para. 2, Sentence 1, 1st Alternative of the State Broadcasting Treaty should have preference, taking into account the assumptions in the Act Against Restraints of Competition regarding a dominant market position.

23.* According to the concrete justification given by the Concentration Commission in the Springer/ProSiebenSat.1 case, a media enterprise with a total viewer share equivalent of 42% would have dominant power of opinion, although according to the Concentration Commission's calculations the public broadcasting corporations have a higher share (45.6%). But in the view of the Monopolies Commission power of opinion can only be said to exist if it also exists in case the public corporations' programmes are included in the calculation as well.

24.* An examination of several hypothetical cases shows that the method used by the Concentration Commission to calculate the viewer percentage equivalents does not stand up to closer scrutiny. Using this method Axel Springer AG would exceed the threshold for intervention of 25% in § 26, Para. 1, Sentence 2 of the State Broadcasting Treaty if it were to acquire a fringe channel in financial difficulties with a viewer percentage of less than 1%. In other words, Axel Springer AG could not now acquire any broadcasting enterprise in Germany without being subject to control. The question arises whether the requirement in § 26 of the treaty, which is intended to protect variety of opinion in broadcasting, is not being used contrary to its purpose to discipline other media sectors, for which the legislature has not issued any specific legal norms to ensure variety, and where it regards the play of market forces as sufficient.

25.* Another objection that must be raised to the Concentration Commission's calculation methods is that if individual enterprises involved in mergers have sufficiently high shares of several media markets, they must yield figures of 100% or more. That is to imply a power of opinion that greatly exaggerates the actual importance of many media. Moreover, other media, like books, whose potential for opinion formation is traditionally classified as very high, play no part in these calculations at all.

26.* The Monopolies Commission regards the doubts, which it expressed in July 2005 in a statement to the KEK on the interpretation and application of § 26, Para. 2 RStV, as confirmed. It remains to be said that the attempt to quantify the influence on opinion exercised through various media must be regarded as a failure.

◆ **The Obligatory Master Craftsman's Certificate – In Accordance with the Constitution?**

27.* In its decision of 5 December 2005 the Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), 3rd Chamber of the First Senate, expressed doubts beyond the case before the court whether on principle the requirement for a master craftsman's certificate, in

force until 2003, was in accordance with the Constitution. The present administrative practice in registering self-employed craftsmen has for years been counter to jurisdiction by the supreme court. Unfortunately, the practice, which is in part illegal, is not likely to change.

28.* The Federal Constitutional Court stated in its landmark decision of 17 July 1961 that the restriction on free choice of occupation contained in the Crafts Code is to be tolerated as long as the demands of the general welfare and the restriction on the freedom of the individual are in balanced relation. Hence, officials should not be “too miserly” in practice in utilising the possibility of granting an exception and permitting a craftsman to set up in self-employment without a master craftsman’s certificate. The amendments to the Crafts Code of 1994 and 1998 have not had the effect of opening access to the market, nor was that the intention. The “Leipzig Decisions” by the central and state governments of 21 November 2000 were intended to ensure recognition of exceptional cases in all the federal states through application of the Crafts Code in as uniform and liberal a way as possible, and facilitate the establishment of craft businesses. The Leipzig Decisions did not change the legal position, they merely followed the guidelines in various cases of supreme jurisdiction on liberal procedure in granting exceptions (which is in conformity with the Constitution). The 2004 amendment to the Crafts Code was intended to improve market access in crafts requiring registration. Among other things, the number of crafts in which a master craftsman’s certificate was obligatory was reduced from 94 to 41, and it was made easier for former journeymen, and engineers, university graduates and technicians with a state diploma to register without a master craftsman’s certificate. The justification of the law – unlike that of the regulation introduced in 1953 – recognised only the risk from hazardous occupations and the need to ensure training in certain crafts as a barrier to registration. This left the questions of the range and permissibility of a restriction on access to an occupation in the crafts open again.

29.* With the decision by the Federal Constitutional Court of 5 December 2005 a craftsman’s appeal against a fine for impermissible exercise of the craft of carpenter and roofer was allowed. The justification given by the Federal Constitutional Court went clearly beyond the minimum necessary for the case in question. In view of the change in economic and legal circumstances the court expressed doubts whether requiring a master craftsman’s certificate was in conformity with the Constitution under the law applying until 2003. The growing competition from other EU countries raises doubts whether the major certificate is still appropriate to ensure quality in craft work and whether the high level of expenditure of time and money which the master craftsman’s certificate requires is acceptable. Doubts were also expressed concerning the necessity for the certificate in regard for the objective of ensuring training, as well, based on the revised crafts legislation in force since the beginning of 2004.

30.* The decision of 5 December 2005 shows that the Federal Constitutional Court actually regards the obligatory master craftsman’s certificate as unconstitutional. The consequence should be to abolish the requirement, and this has long been demanded by many, including the Monopolies Commission. Otherwise, and unless the Crafts Code is amended, a continuation of the present practice is to be expected, with exceptions granted only rarely, and craftsmen without a master’s certificate denied access to the market, under pressure of unyielding “prosecution of non-legalised employment” by their established competitors aided by the craft chambers and district craft organisations.

31.* Unfortunately, current considerations by the Hesse State Government rather suggest that the development could move in the opposite direction. Under draft legislation in Hesse the amended § 124 b of the Crafts Code will also transfer powers to conduct procedures to forbid trading under § 16, Para. 3 of the Crafts Code to the crafts chambers. That would presumably

prevent competition by craftsmen without a master's certificate in trades requiring registration even more effectively.

32.* The Monopolies Commission is still in favour of entirely abolishing the requirement for a master craftsman's certificate for market access in the crafts. The conditions in that sector do not justify an exceptional economic status nor legal exceptions within the Trades Regulation Code. Nor does the fact that work in some of the crafts is hazardous, or the need to ensure training, constitute adequate reasons for regulating market access in the crafts. However, in the view of the Monopolies Commission there can be no objection to retaining the master craftsman's examination on a voluntary basis as a sign of quality for the general public and competitors in the crafts.

◆ **Persistent Shortcomings in the Statistics on Enterprise Groups**

The Need for Decision and Action in Economic Policy

33.* Analyses and decisions in economic and competition policy cannot be limited to the particular circumstances of individual cases. They must also include the general structural framework. This includes the size structures of companies in the relevant markets, the diversification of companies into different markets and their particularly mutual links creating complex business decision units. A reliable empirical data base covering the growing interconnection of companies and markets at national and international level is essential. Unless these are taken into account there will be no realistic basis, neither for merger control in individual cases, nor for a rational economic and competition policy in general.

In this connection the Monopolies Commission is instructed in § 44, Para. 1 of the Act Against Restraints of Competition to show and assess the current state and foreseeable development of corporate concentration. To fulfil this task it is dependent on input from the official statistics. In § 47, Para. 1 of the same law the legislature lays a particular obligation to provide this upon the Federal Statistical Office (*Statistisches Bundesamt*). However, cooperation between the Federal Statistical Office and the Monopolies Commission is still subject to considerable – although avoidable – empirical and legal restrictions. There is need for political decision and action to overcome those restrictions.

34.* The connections between companies, creating complex networks of shareholdings, and their particularly mutual interlinking into extensive networks, are a constituent structural element in the economy. The Monopolies Commission has established that at the end of 2003 more than 1 million German companies out of 3.3 million listed in the Commercial Register were subsidiaries. The greater majority was subject to dominant control, which in many cases was exercised through several tiers and chains of shareholdings. From around 50,000 companies in the producing sector with 20 and more employees over half belong to controlled groups which account for more than 80% of total turnover. This general empirical finding can already show that there is, for many reasons, national and European public interest in in-depth information on business links and ties.

Conceptual Shortcomings in the Official German Economic Statistics

35.* Despite the public need for information on corporate links, control relationships and enterprise groups there continues to be a gap on this in the official German economic statistics. Though there may be a number of methodological, administrative or technical reasons for this, they do not justify the gap.

Traditionally the enterprise is defined in the official statistics as the smallest legal unit in each case. In this concept the structural links between enterprises that create conglomerates, trading chains, associations, enterprise groups or other forms of complex business decision-making units are of no significance. Accordingly, divisions of companies that have become legally independent but are dependent economically – for example real estate, manpower or administrative companies – are treated as independent enterprises.

36.* Only recently, the Federal Statistical Office began to build up its own data base on enterprise groups, in order to meet the expected requirements in European law. However, the objective of a survey held to acquire the data was not achieved. The data acquired by the Federal Statistical Office covers only 251,540 enterprises, which is about half the number of 535,798 enterprises in groups now actually available. But the Federal Statistical Office decided – contrary to the recommendations of the Monopolies Commission – against a largely complete or representative data base.

37.* With the additional data acquired by the Monopolies Commission and the Federal Statistical Office almost complete figures are now available on more than half a million enterprises in groups, and more than 150,000 enterprise groups in Germany at the end of 2003. To combine the external data on enterprises in groups to the official business register data, more than 3 million units can be used.

However, only a small fragment of the comprehensive external and internal data available is being used in the official statistics for the Monopolies Commission's legal task. For this Biennial Report only around 24,000 enterprises in groups were included. That is less than 4.5% of the total of 535,798 enterprises in groups in the producing sector, and of these only around 7,500 were processed into statistics on concentration – that is 1.4%, or slightly more than one hundredth.

As even this low share can cause a significant rise in the degree of concentration in a considerable number of economic sectors – in some cases tripling it – it can be expected that the actual influence of group formation by enterprises on the level and development of concentration in the economy is considerably higher in many sectors. This was already indicated by the case figures on all sectors in the economy evaluated by the Monopolies Commission. They show that nearly half of all the enterprises in groups are in the services sector and 22% are in trade and transport. It is all the more serious that group formation by enterprises in these sectors is not taken into account in the official statistics.

38.* Beside the limited breadth and representation of the official data base there are doubts concerning the reliability of individual figures. In a number of major sectors that are of importance for the economy as a whole, e.g. foodstuffs, vehicle construction or petroleum processing, the data available to the Monopolies Commission deviates considerably from the figures given by the Federal Statistical Office. It is not enough for the official statistics to limit itself to purchasing data on corporate integration, and moreover, limiting itself to a single commercial data source, and neglecting to validate and qualify the figures. A range of instruments is needed for this to combine the external and internal data clearly and reliably.

39.* To summarise, in the view of the Monopolies Commission it cannot yet be said that the official statistics have a reliable and consistent data base on the ties, control relationships and groups formed by German enterprises. This applies to the extent, subject and reliability of the figures. In view of the uncertainties that still persist in the empirical data base, the Monopolies Commission is still not in a position to draw clear conclusions and derive concrete recom-

mendations on competition policy from the figures. There is still need for action for the official German statistics by the offices responsible for them, legally and in contents.

Applying § 47 of the Act Against Restraints of Competition (GWB): Differences between the Monopolies Commission and the Federal Statistical Office

40.* In the preparation of the Monopolies Commission's Fifteenth Biennial Report different opinions arose over the nature and extent of the legal obligation placed upon the Federal Statistical Office in § 47 of the Act Against Restraints of Competition. In particular, the Federal Statistical Office declined to prepare statistics for the Monopolies Commission, although it was obliged to do so even under the general legal regulations on statistics. The Federal Statistical Office made this cooperation dependent on being given unrestricted licensed access to the data on enterprise links provided by private suppliers and used by the Monopolies Commission, which would have constituted infringement of business confidentiality. For these reasons the Monopolies Commission was not able to draw up Chapter 1 of the Fifteenth Biennial Report, which is of fundamental importance both empirically and methodologically, for the significance in competition policy of the structure of shareholding networks and group formation by enterprises.

41.* For this Biennial Report the Federal Statistical Office originally intended to take over essential parts of the legal task of concentration reportage assigned to the Monopolies Commission. The Monopolies Commission decisively rejected this proposal for legal reasons and in regard for legal policy and expertise. Under current law the Federal Statistical Office cannot make a formal agreement with the Monopolies Commission to undermine the legal regulations on competences in §§ 44, 47 of the Act Against Restraints of Competition, take upon itself the task of reporting on concentration assigned to the Monopolies Commission, orient the methodological concept to general statistical purposes, reduce the necessary data base and limit the reporting to individual economic sectors. Moreover, the Federal Statistical Office does not have the special expertise needed to make empirical analyses in the context of the general order and competition policy, evaluate the results and derive recommendations for the government and the legislature.

42.* To prevent a repetition of earlier differences of opinion in preparing this Sixteenth Biennial Report, the Monopolies Commission asked the Federal Minister of Economics and Labour and the Federal Minister of the Interior for support. However, essential points of the agreements given by the Federal Statistical Office to the competent ministries were not kept in the preparation of the Sixteenth Biennial Report. Chief among these were failure to reach agreement on the joint conceptual and operative procedure, on the extent and quality of the figures obtained by the Federal Statistical Office for the Monopolies Commission on corporate networks and on observance of the deadlines given for drawing up this Biennial Report.

The Monopolies Commission's Proposal to Concretise §47 of the Act Against Restraints of Competition

43.* The Federal Government expects the Monopolies Commission to take account of enterprise group formation in an informative report on concentration, as an empirical basis for economic policy, and in its Biennial Report, which is now presented, to undertake a detailed examination of the development of concentration, at least in important sectors of the economy.

The Federal Parliament asked the Monopolies Commission and the Federal Statistical Office already in the year 2000 to examine the experience and results of interpreting and applying the new regulations in § 47 of the Act Against Restraints of Competition and to put forward

proposals for any improvement or extension of the regulations that might be necessary. The Monopolies Commission has now acquired sufficient experience and results from three Biennial Reports drawn up since the amendment was passed.

44.* The Federal Statistical Office's practice in applying § 47 GWB has not proved adequate. Material constraints were not recognised early enough and the necessary preliminary decisions were not taken. The data on the groups to which companies belong were acquired too late and in insufficient quantity, and there are no binding agreements on the security, integrity and earmarking for specific purposes of the data made available to the Federal Statistical office and the statistical offices of the Länder by the Monopolies Commission. The criteria applied by the Federal Statistical Office to calculate the costs of an efficient service that are to be assigned to the Monopolies Commission are not known. The tasks of the Federal-State Working Group on the application of § 47 GWB that has been set up, and of which the Monopolies Commission is a member, are not defined in detail. The necessary agreements with the Monopolies Commission on questions of the method and content of reportage on concentration were not always reached.

45.* The Monopolies Commission holds the view that combining individual official and private data, that is on principle sensitive, requires regulation by law by reasons of the rule of law. In discussions with the Federal Ministry of Economics and Labour, the Federal Interior Ministry and the Federal Statistical Office, and in its last Biennial Report, the Monopolies Commission has stated the need to concretise the application of § 47 GWB in an additional Para. 1a.

Proposal by the Monopolies Commission for an Addition to § 47 GWB

§ 47, Para. 1a GWB (new)

Sentence 1: To enable the joint task in Para. 1, Sentences 1 to 3 to be performed, and to enable the Monopolies Commission to take account of enterprise groups in assessing corporate concentration under § 44, Para. 1, the Monopolies Commission, The Federal Statistical Office and the statistical offices of the Länder will work in agreement together.

Sentence 2: They will each in their own sphere of competence create the conditions needed, in particular for the assignment of the individual items of information on enterprises in the official statistics, and the data from the Monopolies Commission on the groups to which these enterprises belong, required under Para. 1, Sentences 1 to 3.

Sentence 3: The Federal Statistical Office will inform the Monopolies Commission of those enterprises that are included in the preparation of the official statistics for the Monopolies Commission, taking into account group formation. This includes all the information needed to coordinate the data in the official statistics with the data from the Monopolies Commission in a way that is satisfactory, materially and in time, as well as technically reliable and efficient.

Sentence 4: The Monopolies Commission, the Federal Statistical Office and the statistical offices of the Länder will settle further details in an administrative agreement covering:

- the assignment of tasks
- planning expenditure and financing
- the principle of task-related cost calculation

- the exchange of information needed for a reliable assignment of the data sets external and internal to the statistics
- securing the quality of the empirical results
- measures to preserve confidentiality of the data, its earmarking for specific purposes and integrity, and
- any outsourcing of tasks to third parties that may be necessary.

Explanation of Sentences 1 to 4:

1. Beside the Federal Statistical Office the statistical offices of the Länder are to be included in the application of the law, insofar as they are responsible for collecting the required data and maintaining the Commercial Register.

In the performance of their statutory tasks the independence of the institutions will be preserved by the obligation to work in agreement.

2. On the basis of the principle of subsidiarity the federal and state institutions involved are required to create the actual conditions necessary for the application of the law.

3. The economical use of public funds requires the Federal Statistical Office to inform the Monopolies Commission for which enterprises it needs data on group membership.

Without this information the Monopolies Commission has in the past had to obtain data on around ten times the number of enterprises in groups that was actually used in the official statistics.

4. The range of tasks and the main objects of cooperation between the Monopolies Commission and the Federal Statistical Office will be laid down in law. Further details are to be settled between the two institutions in binding agreements.

The proposed regulation has proved valuable to-date, in both contents and practice, in a largely voluntary cooperation between the institutions concerned. It lacks a binding legal basis and the necessary planning certainty. It would also be conceivable to undertake and actually apply the concretisation of the interpretation and application of § 47, Para. 1 GWB in a legal authorisation.

The Research Data Centre: New Forms of Technical Cooperation between the Monopolies Commission and the Federal Statistical Office on Information and Data

46.* The administrative and empirical restrictions in the work of the Federal Statistical Office have restricted the conceptual fulfilment of the Monopolies Commission's legal obligations. Within this framework, however, cooperation with the staff of the specialised departments and the research data centre in the Federal Statistical Office was competent, efficient and committed. The same applies to the representatives of the statistical offices of the Länder in the joint Working Group formed to apply §§ 44 and 47 GWB.

47.* The first-time use by the Monopolies Commission of the Federal Statistical Office's research data centre constituted major progress in cooperation between the two institutions. It has enabled the Monopolies Commission to draw up major parts of the sections of this Biennial Report dealing with the statistics on concentration, preserving both the methodological autonomy of the Monopolies Commission and the confidentiality of individual items of infor-

mation. Should this procedure prove viable in future essential questions of operative cooperation would be solved as well. The present administrative and empirical restrictions, however, still need to be overcome.

However, access was only opened at the start of this year, leaving insufficient time to make full use of the data and evaluation programmes prepared for this Biennial Report. The time remaining to the Monopolies Commission only sufficed for a brief presentation of the main facts, not to make in-depth interpretation and evaluation, nor to formulate concrete conclusions for competition policy.

Data on Multinational Enterprise Groups: Developing European Law

48.* The Statistical Office of the European Communities (Eurostat) has for some time been preparing an amendment to EU Regulation 2186/93 of 22 July 1993 on business registers. In this context the most important aspect is that the optional inclusion of enterprise groups practised since 1993 is to be made obligatory for the national statistical offices.

When the Common Market was created, the objective was also to build up a European system of economic statistics to provide internationally comparable and aggregable data for the member states of the European Community. In its reasons the European Council described the compilation of data on enterprise groups as an essential instrument in the registers of the national statistical offices for the observation of structural changes in the economy that are due to measures like integration, shareholdings, acquisitions, mergers and takeovers.

The German Federal Government also based its support for this European project in its statement to the Upper House on the argument that information on the structure of companies and enterprise groups, especially mergers, takeovers or integration measures must be available.

The European regulation was at first optional, and the objective was to give member states the opportunity to compile information on the existing control relationships between companies, especially in the form of networks of shareholdings and groups. However, Germany did not make use of this option for a long time, and did not correspondingly modernise the official system of statistics.

49.* Once the statistical infrastructure in the European member states ceased to be a barrier to the obligatory listing of enterprise groups, the Statistical Office of the European Communities took the initiative in amending the EC regulation on business registers accordingly. The Monopolies Commission was assigned to explain the technical requirements of such a system in regard to method, information and data. The final version of the report has been available since beginning of 2005.

Under the Austrian presidency the consultations in the European Council on the European Commission's proposal to amend the EC regulation were concluded and presented to the European Parliament for decision. The presentation was made at the end of April 2006; it has been under discussion in the relevant committees since early May and is to be discussed in the European Parliament plenary session in summer 2006.

50.* For the Monopolies Commission's statutory tasks the intended amendment to European law has the advantage that German statistics law will have a binding legal framework for the compilation of information on integration networks and enterprise groups, while the area covered by the official German statistics will be correspondingly extended and the results of the Monopolies Commission's reports on concentration can be set in a multinational context.

I. Controlled Enterprise Groups in the Shareholding Networks of German Firms

Conceptual and Empirical Bases

51.* In this Biennial Report the Monopolies Commission for the first time presents a comprehensive data base that includes all the available information on equity links between German companies for the report year 2003. There are two sources for the data – the information acquired by the Monopolies Commission from the supplier VVC (Verband der Vereine Creditreform e.V.) and the information acquired, primarily for its own purposes, by the Federal Statistical Office from the supplier BvD (Bureau van Dijk Electronic Publishing GmbH). However, the data acquired by the Federal Statistical Office is not sufficient, in extent or structure, for the statutory tasks of the Monopolies Commission.

Using the data base relating to the date reported, end of 2003, the Monopolies Commission calculated a total of 535,798 companies in groups, which could be assigned to between 166,000 and 174,000 ultimate owners or enterprise groups, depending on the way the integration data was processed.

52.* The data base permits those companies to be grouped that are controlled by one ultimate, i.e. top, owner, possibly through several tiers and chains of shareholdings. This helps to identify the actual business decision-making units, which determine the size structures and degree of concentration in the economy. The Monopolies Commission has been working long to include these facts in its statutory reports on concentration.

53.* The two data sources were each combined into a comprehensive data base and used alternatively. They both show an intersection of 181,272 companies in groups. But as many of these companies are assigned to different groups the two sources were used alternatively. The other 274,758 (69,969) companies in the VVC (BvD) data sources were integrated.

The VVC data show 466,029 companies in 146,074 groups, while the BvD data show 251,042 in 79,621 groups. The intersection for the enterprise groups or ultimate owners is 8,490. That means that the two sets of data cannot necessarily be consistently combined into a uniform data base.

54.* The differences in the information on enterprise groups in the VVC and BvD data sets, which contain gaps and some contradictions, can only be clarified and corrected for each individual case. In view of the large number of cases it was not possible for the Monopolies Commission to do this, if only for reasons of time.

As random samples the German companies with the biggest turnover in the German Share Index, DAX, were examined. The DAX companies have more than 80% of the total equity of domestic companies traded on the stock market. Their extensive networks covered a total of 33,833 companies at the end of 2003, with 39,510 shareholdings. With size of this order simply for the DAX companies any gaps and inconsistencies in a data base that aimed to include every German company would inevitably have considerable influence on the figures on concentration in the economy. The examination of the 30 DAX companies gives a different picture depending on the data source used.

To summarise, it cannot be said that there is as yet a uniform, comprehensive and secure data base for the official statistics on controlling ties between German companies. However, the networks that are already known are so comprehensive and extensive that they cannot be ne-

glected, they need to be systematically taken into account to ensure a rational and empirically based economic and competition policy, and further clarification is needed.

55.* The Monopolies Commission has combined the individual items of information on companies' shareholdings from the available data sources into networks of holdings, structured these according to controlling shareholdings, established the ultimate owner of each controlled company and then grouped the individual companies accordingly. Complex calculations of corporate relations can be carried out analogous to input-output analyses.

The Importance of Enterprise Groups for Economic and Competition Policy

56.* The Monopolies Commission's genuine need to take account of enterprise groups is due to its need to base its report on concentration on the actual economic decision-making units, independent of their legal form or any other formal features. That means obtaining empirical proof of the influence of corporate group formation in the economic sectors, and taking this into account in establishing size structures and determining the degree of concentration. It is not sufficient here to establish the quantity structure of the companies in groups and their groups, the individual case figures must be weighted economically with the turnover or the number of persons employed.

Information that is largely precise and reliable on turnover by type and level, on the resultant assignment to an economic sector, on the number of persons employed or any other information on individual companies is only available as part of the official statistics on companies. The Monopolies Commission is therefore – as the legislature intended – dependent on cooperation with the Federal Statistical Office and the statistical offices of the Länder.

57.* The essential conceptual problem in cooperating with the official statistical offices to take account of enterprise groups in the statistics on concentration is that the necessary information on turnover and number employed is only available for the producing sector from official surveys. The development of the official register of companies, which has been proceeding since the end of the nineties, and which is to include more than 3 million units in every economic sector, is not yet ready for use.

58.* Owing to the shortcomings in the official statistics the Monopolies Commission is restricted to taking account of enterprise groups in selected areas of the producing sector. As a consequence it is only possible for a fraction of the full total – 7,556 or 1.4% of altogether 535,798 companies in groups – to identify business units that are members of an enterprise group with at least two units. In the cases where groups diversify beyond the producing sector only part-groups can be shown, moreover in the majority of cases they consist of only a single member. In addition, companies with less than 20 employees are not included because they fall below the threshold for inclusion in official surveys of the producing sector.

The Structure of German Companies in Groups by Economic Sector and Federal State, by Control by Public Authorities and by Foreign Ultimate Owners

59.* The Monopolies Commission has established a quantity structure of the companies in groups, assigned these according to various basic features and tabulated the results.

The evaluations of the share of companies in groups in one federal state whose ultimate owner is domiciled in the same state, in relation to all companies in groups, shows the special position of the new federal states, which differs clearly from that of the old. The majority of companies in groups in the new states are controlled by ultimate owners domiciled in the old states.

Conversely, only in a few cases are companies in groups with ultimate owners in the new federal states interlinked outside their state.

60.* To summarise, the empirical result obtained by the Monopolies Commission contains some remarkable facts:

- The greater majority of the subsidiaries (70.2%) are controlled by majority shareholders. That suggests that the shareholdings in companies are chiefly of structural importance. Nearly half (49.0%) of all the controlled subsidiaries are in groups with two and more members. In about one quarter of the cases the ultimate owner is itself a company. The average group size is two to three members, but this can vary widely, and some groups have more than 1,000 members.
- The integration of the two available data sets, VVC and BvD, with alternating use of the common average, leads in summarised form to comparable results. However, a direct comparison of the data sets reveals various contradictions, some considerable. That is particularly apparent from a comparison of the results for the DAX 30 companies. The assignment of the companies as ultimate owners and their groups is not congruent in size, composition or structure.
- The number of companies in groups, of which only one member can be assigned to an economic sector, is very low with a data base that covers all economic sectors and size classes – unlike the results for the areas of the producing sector selected from the official statistics. Measured by the number of companies the main group formation is in the services sector with 42.9%; this is followed by trade and transport (19.4%) and the producing sector (17.2%). Hence restricting the official statistics to the producing sector means that the figures are hardly representative.
- Among the federal states about half of the companies in groups are in North Rhine-Westphalia, Bavaria and Baden-Württemberg. That applies largely to all the economic sectors. It is particularly striking that the share of companies in groups in the new federal states, whose ultimate owner is domiciled in the same state, is very low. That is, the majority of the controlling owners are domiciled in the old federal states. That tendency is very marked in the producing sector as well.
- 8,018 companies are controlled by the central or state governments or municipal authorities, or by other state offices. On the Federal Government level there are many companies formerly controlled by the Treuhand agency. Half (49.8%) of the state controlled companies are in the services sector, a considerable share is in trade and transport (15.6%) and 897 or 11.2% in manufacturing. In this sector the official statistics do not show any companies in groups.
- 30,097 or 5.65% of the German companies in groups are controlled by foreign ultimate owners. The level and development of the share indicate Germany's standing as an international business location. About half of the share of companies controlled from abroad (48.6%) are controlled from the United States, the Netherlands and Switzerland. The average group size is 3.8 companies, bringing this above the average of three companies in groups with German ultimate owners.

The quantity structure of enterprise groups, which is prepared according to various aspects, only acquires its particular economic significance when the number of cases can be weighted by turnover or the number of persons employed. But in view of the shortcomings in the sys-

tem used for the official statistics as outlined above this was only possible for a few economic sectors.

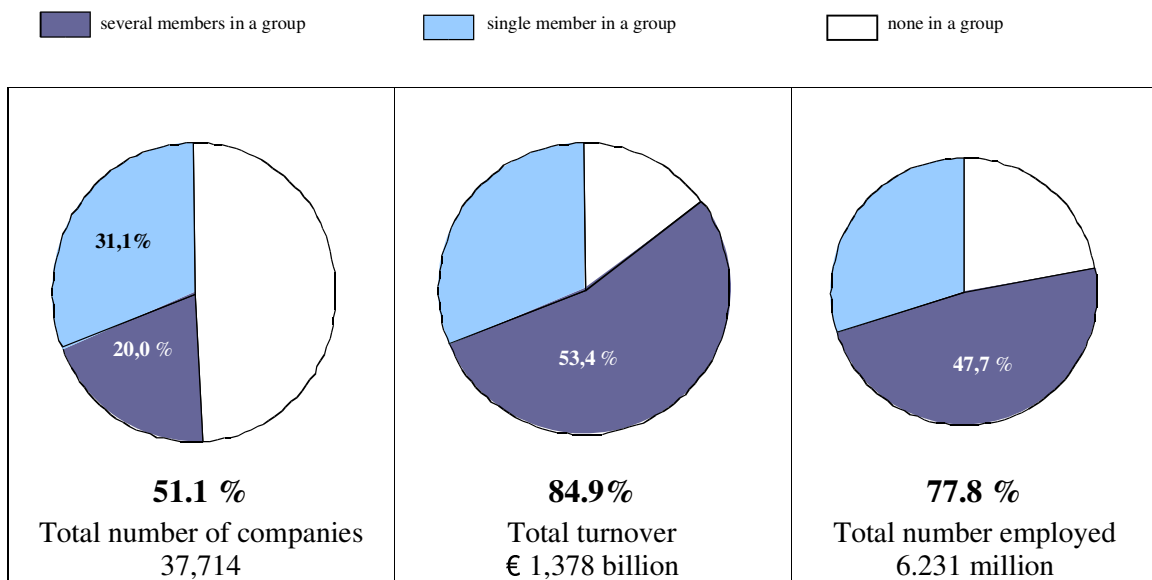
II. The Influence of Group Formation on the Degree of Concentration in the Producing Sector in 2003

61.* The Monopolies Commission made a closer examination of selected areas of the producing sector on the basis of the available information on 525,798 companies in groups. The areas include mining, the extraction of non-metallic minerals and manufacturing with 37,714 legally independent companies with 20 and more employees. The figures for construction, which has a further 14,203 companies, could not be included in this study for lack of time.

62.* Out of the total of 37,714 companies in the producing sector more than half (51.1%) are members of a group. Most are larger firms. The share of companies in groups in total turnover is 84.9%, and their share of the number of persons employed is 77.8%. The high shares among the larger companies show the high degree of equity interlinking in the producing sector.

Share of 17,295 Companies in Groups in Turnover, Number of Persons Employed and in the Number of 37,714 Companies in the Producing Sector

– Germany End-2003 –



Data sources:

Evaluation of the information on 466,029 companies in groups in the VVC data set and the overhang of information on 69,769 companies from the BvD data set.

- 1) Verband der Vereine Creditreform e.V. (VVC), Neuss: Compilation of shareholding networks and information on groups to which companies belong, Dr. Jens Kammerath, Königswinter
- 2) Bureau van Dijk Electronic Publishing GmbH (BvD), Frankfurt am Main: Compilation of the shareholding networks and information on groups to which companies belong
- 3) Federal Statistical Office, Specialist Department IV A, M. Kreuzer (ed.).

Notes:

In the data base of altogether 535,798 companies in groups in all economic sectors, 19,287 companies with 20 and more employees have their main business activity in Sections C and D of the producing sector. Only 7,556 of these companies belong to 2,587 groups with two and more members. If these companies are taken as one group the number is reduced by 4,696 companies to 32,745 business units (companies and enterprise groups). Many of the groups are also part-groups, the other members of which employ fewer than 20 people or belong to a diversifying group whose members' business activities are in other sectors of the economy.

It is to be expected that the shares of the companies in groups will be correspondingly high, or even higher, in trade, transportation and the services sector, as around two thirds of the companies in groups have their main business activities there. It is generally known that the ten largest supplier groups in the food retail sector account for more than 80% of the total turnover.

63.* More than 19,000 companies in groups established in the segments of the producing sector examined belong to around 15,000 groups of two and more companies. However, their main business activities are not exclusively in the producing sector, they diversify into every sector of the economy. Moreover, companies employing fewer than 20 people are not included in the official statistics. The number of companies with 20 or more employees that belong to groups of two and more companies, at least as part-groups, in the producing sector, is 7,556.

Despite the relatively low number of companies in groups included, the absolute degree of concentration in many economic sectors is rising, and in some cases it is doubling or tripling. They include e.g. bakery products (266.4%), the production of transport concrete (261.7%) and hard coal mining (213.8%). If the data were more complete and included companies employing fewer than 20 people the rise would probably be higher.

64.* Most of the enterprise groups shown in the VVC data set (65.7%) are under direct majority control and around 30% by indirect majority shareholders. Only a low number is controlled through several chains of shareholdings or a minority share. Among the legal forms of companies in groups the GmbH (company limited by shares) and GmbH & Co.KG (company limited by shares with another company as limited partner) predominate with 94.7%. The composition of the groups by the legal form of their members corresponds to this. Within the producing sector the biggest number of enterprise groups is in mechanical engineering (969), metal goods production (682) and publishing and printing (611).

65.* The biggest number of companies in groups is domiciled in the Federal states North Rhine-Westphalia (4,385), Baden-Württemberg (3,165) and Bavaria (2,524). The majority of the enterprise groups is active in two Federal states (64.3%). The regional distribution of the companies in groups and their ultimate owners by federal states is remarkable. The share of companies in groups whose ultimate owner is domiciled in the same federal state is clearly lower in the new states than in the old. That means, that the system of "extended works benches" in the ratio of East to West Germany has not yet been overcome. Accordingly, the share of East German owners whose subsidiaries are located over their federal state border is relatively low. This corresponds to a general tendency among all 535,798 German companies in groups. The disparity between the old and the new federal states is even more marked when the case figures are weighted with turnover.

66.* Out of the 19,435 companies in groups about 13.7% are controlled by foreign ultimate owners. Most of these are larger companies and their share of turnover is 28.6% and of employment 21.7%. The biggest number of foreign owners are domiciled in the United States

(494), Switzerland (302) and the Netherlands (273). The information on the multinational ties of companies in groups is from the BvD data set, which is more comprehensive on this aspect.

67.* The Federal Statistical Office could not establish any companies in groups under state control. The Monopolies Commission takes leave to doubt this result.

68.* A problem with the available data sets is that they are in part contradictory. This produces some clearly deviating results in an examination of a number of aspects. In these cases the Monopolies Commission had recourse to alternative calculations in order to estimate the range of really possible values. This is not satisfactory and a uniform, consistent and reliable empirical data base is needed.

III. The Degree and Development of Concentration among Big Companies (Aggregate Concentration)

69.* The Monopolies Commission's reporting for the assessment of the degree and development of aggregate concentration is based on the list of the hundred biggest companies in all economic sectors by the criterion of value creation. In the past the analysis focussed exclusively on domestic concerns, but in this Biennial Report the Monopolies Commission also includes worldwide value creation by big companies. The examination of the hundred biggest companies measured by their domestic value creation also covers the ties between these companies through shareholdings, their cooperation in joint ventures and their personnel links. The consideration of the "100 biggest" is supplemented with the list of the hundred largest companies in the producing sector, trade and services, and banking and insurance, measured by their volume of business in that sector.

70.* Establishing the hundred biggest companies by the value creation of their domestic concerns permits a direct comparison between companies in different branches and sectors in regard to their contribution to the domestic product. In cases where the data needed to calculate the domestic value creation could not be taken from the annual report of the company, a survey was carried out. If neither the published data on the company nor the answers to the survey provided detailed information for the calculation of the domestic value creation of individual companies, this was estimated.

71.* Altogether the hundred biggest companies had a value creation of around € 248 billion. This had risen by 3.2% from 2002. The value creation of all companies rose during the period under review by 4.2%. Hence the contribution of the big companies to total value creation by all companies fell to 16.6% (from 17.0% in 2002), the lowest level since these statistics were first compiled. An additional analysis of worldwide value creation may indicate the reasons for the fall in domestic value creation, and give some insight into the "true" size of the companies under examination. The reduction in the share of domestic value creation in worldwide value creation from 69.8% in 2002 to 58.9% in 2004 suggests that the big companies are producing a lower and lower share of their value created in Germany. So the fall in domestic value creation can at least in part be explained by the shifting of business abroad.

72.* A consideration of the "100 biggest" by ranking groups of ten clearly shows that the reduction in the share of big companies in the net value creation of all companies is mainly due to the weak development in value creation in the group of the ten biggest. In the lower ranking groups the average value creation showed moderate growth.

The ten largest companies had a share of 42.45% in the value creation of all the big companies examined, which was below the figure for the previous period (43.69%). The share of the twenty largest companies in the value creation of the “100 biggest” also fell, from 61.95% in 2002 to 61.78% in 2004.

73.* As far as the data for the two years could be compiled the development of the big companies between 2002 and 2004 was also shown by number employed, fixed assets and cash flow.

The examination of number employed covered 81 companies that were on the list of the 100 biggest in both years. Their share in the number employed by all companies was 12.72% in 2004 compared with 13.29% in 2002. So the importance of big companies as employers had fallen again, which may again be due to the shifting of many business locations abroad.

Data on the fixed assets of domestic group companies for both years was available for 69 companies. Companies in banking and insurance were not included. The balance sheet value of the fixed assets and intangible assets of the companies considered rose during the period under review from about € 812 billion to about € 814 billion.

Data on the cash flow for 2004 and 2002 was available for 54 of the companies listed. For the companies considered it rose during the period under review from about € 68 billion in 2002 to about € 71 billion in 2004.

74.* Beside value creation other features that are sector-specific and can be read directly from the annual financial statements are often used to assess company size. For industrial, transport, services and trading companies turnover is used. The size of banks is chiefly assessed from the balance sheet total, and that of insurance companies from their income from policies. However, value creation is to be regarded as a better criterion of size, as unlike these other factors, which describe the volume of business, it permits a comparison of companies across sectors and reflects the degree of their vertical integration. The examination of the biggest companies by volume of business is therefore an additional examination, and its objective is to throw more light on the importance of big companies in the individual sectors of the economy.

There is agreement between the ranking lists by value creation and those by sector-specific volume of business in that at least 70% of the companies that have the highest volume of business in the individual economic sectors are always among the “100 biggest” by size of value creation.

The development of the volume of business of the biggest companies exceeded the general market trend in the producing sector and in trade. However, the aggregate concentration fell in the transport and services sectors and in insurance and banking. Measured by the share of the ten biggest companies in the total volume of business of all the companies in any one sector, insurance and banking still show the highest level of concentration.

In 2004 the fifty biggest industrial companies together had a turnover of € 617 billion, compared with € 591 billion in 2002. That corresponds to a growth rate of 4.4% (2000/2002: 0.5%). All the companies together in the producing sector achieved turnover of € 1,924 billion in 2004, according to the turnover tax figures, and an increase in turnover of 0.2% over 2002. The growth in turnover for the biggest industrial companies was thus much greater than the sectoral average. That supports the argument that shifting business abroad can be the reason for the reduction in value creation.

Turnover by the ten biggest trading companies rose by 20.6% between 2002 and 2004. This was far greater than the growth in the sector as a whole (5.2%). In total the ten biggest trading companies achieved turnover of € 152 billion compared with the turnover of all companies in the trade sector, which was € 1,402 billion. So again the biggest companies in the sector showed above-average development.

The ten companies in transport and services with the highest turnover registered total turnover of € 125 billion in 2004. That was growth of 0.1% over 2002, which was less than the development in turnover of all the companies in that sector (1.8%).

The balance sheet total of the ten biggest banks was € 3,564 billion in 2004, growth of 1.6% over 2002. The balance sheet total of all banks rose much more strongly, by 3.5%. The unconsolidated balance sheet total of the banks consolidated in banking groups was € 3,594 billion in 2004, so the share of the ten biggest banks in the balance sheet total of all banks had fallen from 50.38% in 2002 to 47.74%.

The ten biggest insurance companies together achieved income from policies of € 109 billion. The rate of change in their total income was -1.3%, compared with growth of 9.2% for all insurance companies. The share of the unconsolidated gross income from policies for the ten biggest insurance companies in gross policy income for all original and re-insurance companies was 59.33% for the 2004 business year (60% in 2002). So of the sectors examined here the insurance sector has the highest share of volume of business by big companies.

75.* Of the head companies of conglomerates among the hundred companies considered 75 were joint stock companies (*Aktiengesellschaften, AG*) in 2004 (2002: 74). So as in the past this was the predominant legal form among the companies reported. The number of limited liability companies (*Gesellschaften mit beschränkter Haftung, GmbH*) had fallen, as had the number of limited partnerships (*Kommanditgesellschaften, KG*) as defined in § 264a of the Commercial Code by one and two respectively, while there were no longer any companies in the categories of general partnership (*offene Handelsgesellschaft, oHG*) and “others”. The number of institutions or corporations under public law had risen by one to four.

76.* The shareholders of the big companies are examined first in regard to the interconnection among the hundred biggest companies, and then the whole ownership structure of the companies studied is analysed. There were particularly marked changes in the equity ties between the hundred biggest companies, and public authorities considerably reduced their shareholdings in their own large enterprises (Deutsche Telekom AG, Deutsche Post AG, Energie Baden-Württemberg AG, RWE AG).

There were only slight changes in the groups of shareholders constituting the majority in the big companies examined. As in 2002 the category “Majority in foreign ownership” was still the largest with 24 (2002: 25) companies. Private individuals, families and family foundations is a category of shareholder that is growing in importance (22 cases). The number of companies whose shareholders are widely distributed was only slightly lower at 21 cases. The fourth largest group measured by the number of companies it contained in 2004 had 13 big companies (2002: 15), the majority of whose equity could not be assigned to one other big company, a single foreign owner, a public authority, individuals, families and family foundations, widely distributed or other shareholders. In three (2002: four) cases the shares of the “100 biggest” amounted to more than 50%.

77.* For many years the big German companies were strongly interlinked, with shareholdings in big companies forming the core of the network. That may be due to the progressive globali-

sation, and to institutional changes within Germany as well. The shareholdings sold during the period under review continued the deconcentration trend observable since 1996. After including the data from the last Biennial Report it can be stated that the total number of shareholdings held by financial services providers has fallen steadily from 75 in 1996 to 30 in 2004. The total number of holdings by all companies on the “100 biggest” list followed the same trend (1996: 143, 2004: 45), as did the number of subsidiaries (1996: 51, 2004: 28) and shareholder companies (1996: 39, 2004: 17), indicating dissolution of the whole network of mutual holdings. The network visualisation technique which was also applied supports that finding.

78.* The deconcentration has the following competitive advantages for German firms. Company management is less dependent, the market for corporate control is strengthened, and the information asymmetries between insider and outsider firms are reduced, which also improves the allocation of capital on the financial markets. Competition in the financial sector is intensified and there is greater stability in the financial sector.

79.* In examining personnel links only those cases were considered where one or more persons belonged to the management or controlling organs of at least two companies on the “100 biggest” list. In 2004 34 companies (2000: 30) on this list had members of their management on the controlling organs of other companies on the same list. So they were on the controlling organs of 46 companies (2002: 49) on the list examined. The total number of links through management staff was 86 (2002: 103), so this number had also fallen from 2002 to 2004. The number of links through members of the management boards of banks and insurance companies was 30 in 2004, as in 2002. This number has fallen by 70.3% since 1996. It is difficult to assess at this point whether the degree of integration among financial services providers, that has not changed since our last report, is affected by a time delay in reporting personnel links or a strategy on the part of these enterprises to retain control of German companies by exercising their deposit voting rights without holding their shares. The question whether companies in the same sector are linked through mandates is of concern for competition policy. In the 2004 report year there were twelve links of this kind (2002: 17). The number of cases in which a personnel link was combined with a shareholding remained unchanged from 2002 at nine.

80.* The number of links between the twenty biggest companies through joint ventures had fallen in 2004, at 35 compared with 37 in 2002. Altogether there were 75 joint ventures (2002: 76). In some cases the contact between two companies was through several joint ventures and in one case more than two companies were involved in one joint venture. Again companies in the energy and chemical industries were distinguished by particularly intensive cooperation in joint ventures in the same branch as the head company.

Beside the twenty biggest companies the financial services companies on the “100 biggest” list were examined in regard to their links through joint ventures. In 2004 they showed a lower degree of interlinking with 21 (2002: 18) contacts in relation to the total number of possible links. The majority of the joint ventures were investment and administration companies, or active in other services areas and financial management.

81.* In its examination of the involvement of the “100 biggest” in the mergers completed and reported to the Federal Cartel Office in accordance with § 39, Para. 6 of the Act Against Restraints of Competition the Monopolies Commission lays stress on the importance for competition policy of the external growth of the “100 biggest”. Companies examined were involved in 661 (2002/03: 950) cases of the total of 2,207 (2002: 2,449) mergers reported in

2004/2005. The share of the “100 biggest” in the total number of mergers was thus reduced again from 39% to 30%.

82.* In the overall view the impression gained from the various size features and economic sectors examined is of a slightly falling degree of concentration during the period under review. The share of big companies in the total value creation fell, as in the previous Biennial Report. This can partly be explained by the shifting of business abroad. However, the development in concentration should be treated with caution, as the effects of shifting business abroad cannot be fully estimated from the available data. In trade the process of progressive concentration evident in earlier years continued. In the producing sector, as well, a greater degree of concentration was evident in 2004. In the services and transport sectors, on the other hand, the importance of the big companies fell, as it did in insurance and banking. Their importance as employers also fell. In 2004 links through shareholdings among the “100 biggest” declined strongly, leading to a dissolution of the greater part of the network of mutual ties. This development has positive consequences for competition policy in the German economy. Personnel links among the “100 biggest” also tended downwards.

IV. Antitrust and Merger Control

Abuse of Dominant Positions

83.* Abuses of dominant positions in the energy sector formed a major part of the work of the Federal Cartel Office during the period under review. In January 2006 it forbade E.ON/Ruhrgas AG to conclude supply contracts with onward gas distributors that cover more than 50% of demand for more than four years or 80% of demand for more than two years. In the view of the Federal Cartel Office the supply contracts between E.ON/Ruhrgas AG and the onward gas distributors infringe Art. 81 of the EC Treaty, because they restrict international trade on a market where access is difficult; they also act as considerable market barriers because more than 75% of the supply contracts in the E.ON/Ruhrgas network area are to be regarded as contracts to cover total long term demand, or quasi contracts of this kind. The Monopolies Commission on principle shares the view of the Federal Cartel Office that tying onward gas distributors to long term contracts does have considerable barrier effect and effectively blocks market access for competitors. In regard for competition the prohibition of long term contracts to cover total demand imposed by the Federal Cartel Office is therefore welcomed by the Monopolies Commission. Nevertheless, the Monopolies Commission sees a problem in that the ex post prohibition of long term supply contracts between the importing long-distance gas suppliers and the onward distributors can also have disadvantageous effects on the propensity to invest and on the readiness of long distance gas companies to sign new import contracts. The need to weigh the competition objectives of the prohibition of long term supply contracts against the possibly disadvantageous effects on the readiness to invest of the importing long distance gas companies should, in the view of the Monopolies Commission, have been given more comprehensive consideration by the Federal Cartel Office.

84.* Two earlier decisions on abuse by the Federal Cartel Office were confirmed by the Federal Supreme Court (*Bundesgerichtshof, BGH*). In the first case the Federal Cartel Office had instructed Mainova not to refuse connection to its medium tension network to two area network operators. The court rejected Mainova’s appeal on points of law. In the case of the Mainz municipal provider (*Stadtwerke Mainz*) the court decided that it was on principle permissible to set an upper limit for proceeds on sales. It sent the case back to the Court of Appeal (*Oberlandesgericht, OLG*) for review.

85.* In the Coalition Treaty the present Federal Government states its intention to ban the sale of foodstuffs below cost price on principle. So far sales below cost price are permitted under § 20, Para. 4, Sentence 2 of the Act Against Restraints on Competition as long as they occur only occasionally. The Monopolies Commission, on the other hand, wishes to see the ban on sales below cost repealed altogether. One difficulty at least is that under § 20, Para. 4, Sentence 2 of the Act Against Restraints of Competition a relative market power is enough for a company to come under this provision. The concept of “relative market power” is interpreted very widely by the Federal Cartel Office. During the period under review, for example, it proceeded against several drug store chains that were competing with each other and so cannot be regarded as dominant in the meaning of § 19 of the Act.

Merger Control

86.* The Federal Cartel Office’s statistics on merger control again show a slight decline in the number of cases for the period under review. However, the number of new cases reported in 2005 has risen clearly, so an increase in the number is to be expected in the next review period. In 51 cases the Federal Cartel Office completed the main assessment process in its review of a merger. Of these, 33 mergers were cleared, 6 with conditions and remedies attached, while 18 were blocked. Nearly half of all the mergers reported meet the criteria of acquisition of both a controlling interest and a shareholding.

87.* During the period under review the Federal Cartel Office examined whether a merger was involved in the meaning of § 37, Para. 1, No. 4 of the Act Against Restraints of Competition in several cases. Under this clause a shareholding of less than 25% can constitute a merger if other aspects of the concentration suggest that the acquiring company will be able to exert influence on the will formation and thus on the market conduct of the other company through its acquisition of this shareholding. In the case of the acquisition of about 9% of the Bonner Zeitungsdruckerei (a newspaper printing company) by the publisher M. DuMont Schauberg-Verlag the office confirmed that this did constitute a merger. A number of so-called “plus factors” suggested that the merger would strengthen the market power of both companies on various markets for readership and advertising in the Cologne/Bonn region. Hence the merger could not be cleared. However, the Office decided that EnBW’s 15% shareholding of MVV Energie AG, Mannheim, was not a merger under § 37, Para. 1, No. 4 of the above Act. As the acquisition of the share entailed no additional rights at all for EnBW the plus factors necessary to constitute a merger were lacking. The Monopolies Commission does not share that view. Rather, it believes that the circumstances on the markets in question suggest that EnBW’s shareholding is a strategic, not a financial holding, the result of which will be that the fierce competition between EnBW and MVV for corporate clients and households in the area in and around Mannheim will in future be rather mild.

88.* For several years Gruner + Jahr published a German edition of the magazine “National Geographic” in cooperation with RBA Germany. In 2005 the publisher stated that it had taken over sole control of the joint venture. The Federal Cartel Office blocked the merger, rightly in the view of the Monopolies Commission. If it became the sole publisher of the German edition of “National Geographic”, Gruner + Jahr would have greater strategic scope to direct its scientific journals GEO, P.M. and National Geographic so that they were competing with each other as little as possible but as much as possible with other magazines. At the same time as appraising this merger the Federal Cartel Office started ex post proceedings to forbid the establishment of the Gruner + Jahr/RBA Germany joint venture to publish a German edition of “National Geographic”. It decided that the purchase of the licence to publish the German

edition was a merger that strengthened the dominant position of Gruner + Jahr on the market for scientific magazines. The Appeal Court contested this, rightly in the view of the Monopolies Commission. The granting of a licence can certainly on principle confer control, but for this to happen a market position must also be transferred. But as there was no German edition of “National Geographic” before the joint venture was established, the granting of the licence did not transfer a market position. A new market position was established.

89.* In what has become known as the “vacuum cleaner bag verdict” the Federal Supreme Court gave up its restriction of the geographically relevant market on the area of the Federal Republic of Germany. The judgement was confirmed by the legislature in the Seventh Amendment to the Act Against Restraints of Competition (*GWB*) in a supplementary clause to § 19, Para. 2, which states “The geographically relevant market in the meaning of this Act can be larger than the area in which this act of legislation applies.” The Monopolies Commission welcomes this amendment.

90.* The possible wider definition of the geographically relevant market raises the question whether in future cases will be subject to the merger control of the Federal Cartel Office if turnover of less than € 15 million is achieved on the markets concerned in Germany, but as a whole goods to the value of more than this amount are sold. The latter would de facto mean that the € 15 million threshold in § 35, Para. 2, Sentence 2 *GWB* was lowered in the cases concerned. In the view of the Monopolies Commission this does not at present appear to be required. Accordingly, it would welcome clarification from the legislature that only domestic turnover counts in calculating the market threshold for minor items. The Monopolies Commission warns against underestimating the investigation problems which the extension of the geographically relevant market will cause. As the Federal Cartel Office does not have any powers to obtain information abroad, it is dependent on the cooperation of the companies concerned and other cartel authorities in cases involving larger geographical markets.

91.* In many cases the geographically relevant markets for the assessment of a merger are clearly smaller than the full territory of the Federal Republic. In view of heavy transport costs generally only suppliers that have a warehouse or production plant geographically close to the customers are used. In its judgement on the Sanacorp/Anzag case the Federal Supreme Court stated that dividing the Federal territory into markets by simply drawing circles is not permissible. Consequently the Federal Cartel Office takes into account i.a. road conditions and the positions of other suppliers and customers in delimiting geographical markets, as in the Schneider/Classen case. The Federal Cartel Office is not consistent in its starting point for market delimitation. In the Sanacorp/Anzag case the business premises of the acquiring company, Sanacorp, were used as the starting point for the market delimitation, but in the Schneider/Classen case the warehouses of the company to be acquired, Classen, formed the centre of the market as defined. But differences in the choice of the company to form the starting point lead to different markets and can thus lead to differences in the evaluation of market conditions. The Monopolies Commission is in favour of a geographical market delimitation where the customer is in the centre. This is the best way to identify the areas in which a merger could cause or intensify competition problems. The Federal Cartel Office used that approach in the H&R WASAG/Sprengstoffwerke Gnaschwitz case. The two companies in the merger are both engaged in the production of industrial explosives. In analysing the merger the Office asked who are the relevant suppliers for the operators of stone quarries in Germany. The stone quarries, that is, the customers for industrial explosives, formed the centre of the geographical markets thus defined. This method is not practicable if the number of customers is disproportional.

tionately great, and in that case geographical markets can be formed by drawing circles round main centres. The Office used this method in the Edeka/Spar case.

92.* In analysing mergers that affect heterogeneous goods the Federal Cartel Office still takes too little account of the possibilities of substituting between goods. In the Edeka/Spar case, for example, a product market for “retail trade in foodstuffs” was defined, which includes both enterprises selling the full range and discount stores. The fact that Edeka and Spar are two retail chains which must seem very similar to consumers was not seen as problematic. But from the consumers’ standpoint a merger between two so similar businesses as Edeka and Spar would mean a much greater reduction in the range of choice than a merger between Edeka and a discount store. In assessing mergers in the hospital sector, as well, the traditional two-tier analysis, in which markets are first defined and then assessed with the help of market shares and other criteria could be extended by taking into account the alternatives available to patients. A merger between two hospitals creates more problems the higher the share of patients in both who see the other hospital as the best alternative to the one they have chosen.

93.* In the local public transport sector the Düsseldorf Appeal Court proposed dividing the market into two, and this has now been confirmed by the Federal Supreme Court. A distinction must now be drawn between a market for the contracting authority and a market for passengers. The territorial authorities that hold tenders for the local public transport network constitute the demand on the market for the contracting authority, where the suppliers are the companies operating local transport networks, like DG Regio. Geographically, the market for the contracting authority should be defined regionally, according to the Federal Supreme Court. On the market for passengers, passengers demand public transport rides. Geographically, these markets are limited to individual lines. In the view of the Federal Supreme Court every single line constitutes a monopoly – if only because of the legal ban on multiple operators on lines. Hence, on the market for passengers there can only be indirect competition through competition for the market when a new tender is held. In the view of the Monopolies Commission this eliminates the distinction between a market for the contracting authority and a market for passengers. Alternatively, substitution relations between the local public transport network and other means of transport could also be taken into account in the analysis of passenger markets. It is not unlikely that other means of transport, like cars, bicycles or taxis could offer a relevant alternative to local public transport on some passenger markets, and so limit the competitive scope for its suppliers.

94.* In several cases during the period under review the Federal Cartel Office assessed whether collective market power had been created or strengthened. The cases, involving oligopolies with up to four members, were on various markets in the waste treatment industry, the wholesale paper trade and fruit processing. The Monopolies Commission is against the division into internal and external competition purely by criteria of market shares. In analysing oligopolistic market power on several geographical markets it is striking that the Federal Cartel Office considers each of these markets in isolation, as it seems very likely that cooperation between companies that are jointly active on several geographical markets transcends individual markets.

95.* In connection with the E.ON Mitte/Stadtwerke Eschwege appeal procedure that is still pending the Federal Cartel Office again carried out an extensive market survey of the electricity markets in Germany. Owing to the growing importance of trade in electricity the method used so far of distinguishing between markets for onward distributors, big customers, and households and small customers is no longer practicable. In future, the Federal Cartel Office will in future orient to the tiered analysis used by the European Commission in defining mar-

kets. The forward integration of electricity generating companies through their holdings in municipal providers continued during the period under review when some acquisitions that affected small quantities only were cleared.

96.* In the media sector the Federal Cartel Office examined some mergers in the second phase where the non-horizontal effects were the focus of attention in analysing competition. The proposed Springer/ProSiebenSat.1 merger was blocked because it would have strengthened the collective market dominance of ProSiebenSat.1 and RTL on the market for television advertising, and the dominant market position of Axel Springer on the markets for newspaper advertising and readers of newspapers sold on the street. The Office considered the project as a conglomerate merger. On none of the markets affected would there be additions to market shares, the Office stated, but the merger would strengthen dominant market positions because it would have market-transcending effects. A horizontal merger with an addition to a market share on the advertising markets would result if the advertising markets were differently delimited. The Office distinguished between a market for television and a market for newspaper advertising. But since it regarded Bild-Zeitung as a relevant alternative to television for advertisers because of its nation-wide sales, a market for advertising with national range could be identified, where the merger would add the market shares of ProSiebenSat.1 to those of Axel Springer. In taking account of synergy effects in merger control procedures it must be made clear, which patterns of conduct will hinder competitors and so strengthen the market power of a company, and which will increase efficiency. In the view of the Monopolies Commission the latter should not explicitly be taken into account in the Cartel Office's procedures, as they are already implicitly taken into account through the fixing of a threshold for market dominance.

97.* The takeover of DPC Digital Playout Center by the satellite operator Astra was cleared by the Federal Cartel Office using the balancing test. DPC was formerly a subsidiary of Premiere, a supplier of pay TV programmes. The merger has conglomerate character, as it will lead to integration of the markets for the two complementary inputs of technical services and transponder capacity for pay TV suppliers. At the same time the separation of the market for technical services from the end-consumer market for pay TV will set in motion vertical integration. Finally, a number of mergers to extend markets in the German broadband cable network were examined. The takeover of ish, the cable supplier in North Rhine-Westphalia, by iesy, the cable supplier in Hesse, was cleared and has now been completed.

98.* For the first time the Federal Cartel Office appointed a trustee during the period under review to implement divestment remedies. The Monopolies Commission welcomes this. The European Commission has published a study on the implementation of merger remedies imposed on the European level which concludes that such conditions generally have very little effect. Against that background it seems particularly important to pay more attention to ensuring that remedies are implemented in such a way that the structural objectives involved can really be achieved.

99.* In one case during the period under review the Federal Cartel Office ordered a factory to be closed. This was Wilhelm Werhahn/Norddeutsche Mischwerke, a merger between two companies that among other things produce asphalt mix. While the divestment remedies applied in this case were appropriate to solve the competition problems on the markets concerned, the implementation of closure requirements restricts the range of choice for customers on the markets concerned even more than it would have been restricted had no conditions been imposed. The Monopolies Commission accordingly regards instructions to close a plant as not a suitable way of dealing with doubts regarding competition raised by a projected merger.

100.* Finally, the Monopolies Commission refers to two court proceedings in which the question to be settled was no longer relevant. The court also rejected the appellant's request for public interest under § 71, Para. 2, Sentence 2 GWB. As courts should clarify current and not former disputes, if only for reasons of efficiency, a narrow interpretation of the regulation in question is to be welcomed. In the case of the takeover of a state hospital by Rhön-Klinikum AG, however, it is to be expected that the principle question, whether merger control can be applied in the hospital sector, will in any case have to be settled in court. A decision by the court in this question would not therefore tie additional resources.

101.* In a number of cases during the period under review the Federal Cartel Office proceeded against infringements of the prohibition to merge without prior notification. In some cases it imposed fines. In others, it examined the merger ex post. This resulted in one merger being forbidden, and one instruction to divest. While the parties in one case hold the view that the statute of limitation applies, as the merger in question took place more than five years ago, the Federal Cartel Office holds the view that infringement of the ban on a merger is a permanent offence that exists at least as long as the illegal state created by the merger exists. The damage created by a merger that establishes or strengthens a dominant market position is indeed permanent. The Monopolies Commission would therefore also regard it as appropriate if the level of the fine imposed by the Office when a ban on a merger has been infringed were oriented to how long the merger has already been in existence, and what level of additional profits the companies involved have been able to achieve.

European Merger Control

102.* The period under review, 2004/2005, was dominated by the second reform of the European regulations on merger control. On 1 May 2004 Regulation 139/2004 came into force, replacing Regulation 4064/89. In regard for procedure, the fundamental change in the regulations on referral deserves special mention. The most important change in substantive law was to the criterion on prohibition in Art. 2 of the Merger Regulation, that was widened to include the significant impediment of effective competition test (SIEC). During the period under review the European Commission was able to gather its first experience with the new regulations. It also pursued a "more economic approach". Another important area was the discussion on the application of the rules on merger control to conglomerate and vertical mergers, which received important stimulus from jurisdiction.

103.* The new regulation 139/2004 firstly fundamentally widened the rules on referral, and secondly modified existing regulations. The regulations in Art. 4, Paras. 4 and 5 are entirely new. They empower companies involved in a merger to request referral to Brussels or a member state. The large number of applications – nearly 60 since the regulation was introduced – shows that there is a big need among companies to break through the quantitative criteria in Art. 1 of the Regulation. Altogether, a clear tendency to assign competence to Brussels is recognisable, which probably reflects i.a. the desire of companies wishing to merge for a "one stop shop" and the pressure for less stringent control. Where companies have also gone the opposite way, to the national authorities, the reasons may be the greater proximity to the markets affected and less bureaucracy on national level in some cases. The hope that competition law will be overlaid by a national industry policy may be another motive for requesting referral. These undesirable outcrops of "forum shopping" should, in the view of the Monopolies Commission, on principle be countered by the member states' right of veto, or that of the European Commission, which can prevent the competition authority originally responsible from handing over the procedure.

104.* Regrettable, however, is the lack of transparency of the procedures under Art. 4, Paras. 4 and 5. The data published does not enable a reliable picture to be formed of the extent to which the individual member states are affected by referrals to Brussels. A further point of criticism is that the European Commission does not give information on the cases where member states have vetoed handing over the procedure. In the view of the Monopolies Commission the Federal Government should endeavour to induce the European Commission to improve its information policy in this area.

105.* The large number of referred cases gives rise to the question whether the regulations on referral are really still “exception rulings” and whether the principle of legal certainty is sufficiently guaranteed. This appears all the more doubtful in view of the foreseeable tendency for the number of applications to rise. Should this development continue or even intensify the Monopolies Commission recommends the Federal Government to work within the revision process planned for 2009 to ensure that the conditions for referral upon application from companies involved in mergers are made more stringent.

106.* The exercise of the right of veto by member states developed quite differently from the number of applications for referral. As far as can be seen, the national competition authorities have only made use of their legal right of veto in two cases altogether. The Monopolies Commission recommends the competent German authorities to examine carefully in future in all applications for referral that affect them whether handing the procedure over to Brussels will best serve the case. If not, for instance if the effects of the merger will be largely within Germany, Germany should exercise its right of veto. Only in this way can it be ensured that the provision in Art. 4, Para. 5 of the Merger Regulation will improve fine tuning and not simply contribute to an arbitrary shift of competence limits.

107.* The two thirds ruling in Art. 1 of the Merger Regulation was not affected by Regulation 139/2004. However, the case of Gas Natural/Endesa, which was reported in Spain, caused the European Commission to consider amending or repealing this provision. In its view the case showed that under the two thirds regulation even mergers with considerable cross-frontier effects could be withdrawn from European jurisdiction. The Monopolies Commission regards the two thirds regulation as suitable on principle to delimit national and Community competences efficiently, but it sees a need to widen it to take proper account of the Community dimension that can attach to purely national mergers as well. A change in the present division of competences is to be recommended, in particular in regard for mergers in network industries. On traditionally monopolistic markets the two thirds regulation leads to a regressive assessment of the division of competences, oriented mainly to the conditions in the past.

However, projected mergers in these sectors are planned precisely with a view to operating on a European scale in future, and against the background of the opening of national markets they acquire a Community-wide dimension. Moreover, particularly the latest developments in some member states again show the big risk of industrial policy interests predominating when national authorities are assessing such mergers. The Monopolies Commission therefore urges a solution from the legislature that would in certain cases permit the European Commission to examine mergers of this kind independent of the two thirds ruling. This exception ruling should be based on two criteria: firstly, the merger must have repercussions on a market that was in the past closed to cross-frontier competition, and secondly, this market must in the meantime have been opened to cross-frontier competition through regulations in European law.

108.* Regulation 139/2004 has fundamentally changed the criterion in European merger control for prohibiting mergers. The SIEC test is now the centrepiece of Art. 2, Paras. 2 and 3 of

the Merger Regulation. The market dominance criterion used in the past remains as an essential concretisation of “considerable impediment of effective competition”, but the possibility has been added of expressly taking into account the efficiency gains of mergers. The new Merger Regulation has been extended to include guidelines on horizontal mergers under which the European Commission gives information on which criteria it applies when assessing such projects. The guidelines on vertical and conglomerate mergers are still to be published.

109.* The discussion on a new prohibition criterion was closely connected with considerations of anchoring a more economic approach in merger control. The SIEC test is not designed to be an essential condition of the more economic approach, and in the view of the Monopolies Commission a more economic approach in merger control would also be possible using the market dominance criterion. That is evident from several cases in Brussels in recent years, in which the European Commission did pursue a more economic approach while at the same time applying the market dominance test. In the view of the Monopolies Commission, however, there can be no doubt that the discussion over the SIEC test has greatly encouraged considerations of a more economic approach. The European Commission’s decision-making practice has also recognisably changed since the introduction of the new criterion for prohibition, in its justifications if not in the results.

110.* Where the criterion on prohibition is affected the change to the SIEC test came at first relatively slowly, because Regulation 139/2004 only came into force on 1 May 2004, and under Art. 26 the old version of the rules on merger control could still be applied to certain “old cases”. In the course of time the application of the SIEC criterion increased markedly, whereby in its decisions the European Commission frequently only repeated the legal text of the criterion on prohibition and left open whether, beside considerable impediment of competition, the emergence or strengthening of a dominant market position was also to be feared. Beside this time component a certain tendency is recognisable on the part of the European Commission to prefer the market dominance test where there are high absolute and relative market shares. The SIEC test, on the other hand, is preferred when the companies concerned would not acquire market leadership through the merger or where there is not a big gap in market shares to their nearest competitors.

111.* The more economic approach had more influence than the new criterion on prohibition on decision-making practice, where the development to a more economic approach is reflected in various changes. Firstly, it is striking that the market shares calculated are still in most cases the starting point for the assessment, but their importance is increasingly being questioned. The European Commission is more frequently expressly relativising the market shares, and in doing so drawing more on arguments like the presence of tender markets or the existence of free production capacities. It used such considerations for example in the cases Continental/Phoenix, Siemens/VA Tech and Air Liquide/Messer Targets, and in the mergers Blackstone/Acetex, Bertelsmann/Springer and Sonoco/Ahlstrom. In cases with differentiated products the substitution relations were regularly examined, and on this basis in some cases the previously established market shares were also relativised. Considerations of this kind were evident in the procedures on Bayer Healthcare/Roche and Piaggio/Aprilia.

112.* In addition, market studies and quantitative analyses play a much bigger role in the decisions by the European Commission than in the past. They include calculating market concentration by the Hirschman-Herfindahl index, carrying out surveys of market participants and evaluating tender data. The European Commission is also increasingly underpinning its statements with economic analyses that supplement the qualitative assessment of mergers or

may actually be in the forefront of the considerations. It is also evident that surveys and quantitative analyses – for example relating to the questions examined, the method used or the results obtained – were frequently explained in more detail than in earlier decisions.

113.* On principle the more economic approach also finds expression in the new possibility allowed in the law for companies involved in mergers to present as argument the efficiency gains the merger would create. However, this possibility played little part during the period under review. Only in a second phase decision – on Areva/Urenco/ETC JV – was the problematic nature addressed, but the European Commission refrained from more detailed comments. The fears that the European Commission could prove too generous in taking account of efficiency gains have not so far been confirmed.

114.* The Monopolies Commission approves on principle of the use of quantitative analyses in merger control. They can be a meaningful addition to the qualitative assessment, and where the traditional approach does not hold out hope of success, they can actually replace it. That the traditional approach to analysing market dominance is difficult where products are different can be seen from the case of Oracle/PeopleSoft. The previous approach provides for two steps - market delimitation and market analysis. However, delimiting a market from the standpoint of the sensible consumer always entails a certain risk of arbitrariness where products are different, because clear and definite limits to markets cannot be drawn owing to the heterogeneity of consumers' interests. The importance of fringe competition for customers where there is a risk of losing them to neighbouring products is not sufficiently taken into account. These problems can be partly avoided, in the view of the Monopolies Commission, by concentrating directly on demand elasticities and using them to calculate what scope there is for price increases as a result of the merger. However, this procedure requires the separation of market delimitation and market analysis to be blurred, if not eliminated altogether.

115.* In the view of the Monopolies Commission quantitative analyses are an important means of obtaining evidence that can help the European Commission to present convincing proof of its qualitative assessment. However, if the competition authority makes use of economic studies it must make sure that the qualitative and quantitative analyses are coherent in one and the same case. In its decision on Lagardère/Natexis/VUP, for example, the European Commission identified different markets for large books and pocket books, and for the different distribution channels. In the econometric study, on the other hand, it was assumed that all the sales of general literature can be explained in one general model. However, the European Commission did not discuss this discrepancy in its decision.

The Monopolies Commission also warns to expect too much of the European Commission's quantitative evidence. Rather, the use of quantitative methods should be made dependent on which data – its amount, quality and comparability – is available to the European Commission in any individual case or can be obtained with acceptable expenditure. The cases of Blackstone/Acetex and Siemens/VA Tech, for example, show that even with an unfavourable data situation important results can be achieved with quantitative analyses. They can help to clarify doubts, increase the transparency of official decisions and facilitate their implementation.

116.* The Monopolies Commission does not deny that the more economic approach also raises problems. It requires the collection of data that has not been collected before, and its detailed analysis. In this process the selection of the data, the procedure for collecting it and its evaluation can all be made the subject of legal proceedings. It is to be hoped that jurisdiction will set standards as soon as possible that will to that extent make decisions more foreseeable and ensure legal certainty.

117.* In October 2005 the European Commission presented a study in which it discussed the problems that had arisen in implementing commitments and their efficiency. It enumerated a large number of serious problems related to the conception and implementation of merger remedies. The study reaches the conclusion that only 57% of the measures were effective, in 24% they were partly effective, and in 7% they were ineffective. 12% of the cases could not be assessed. The Monopolies Commission expressly welcomes the publication of this study. In its view it would be desirable for the European Commission to report regularly on the implementation of such measures. An ex post consideration can yield important information on the effectiveness of commitments in individual cases and also provide necessary indications for designing these in general. The Monopolies Commission recommends incorporating the initial improvements contained in the study as soon as possible into the statement on commitments and incorporating them into the specimen forms for divestment remedies. In particular, it supports the proposal put forward several times in the study to make greater use of up-front buyer agreements.

118.* In addition, the results of the study strengthen the Monopolies Commission's reserve towards commitments concerning the access of competitors to the infrastructure of the parties to the merger. Among all the types of commitments they have proved least effective. Moreover, the study also shows that some scepticism towards divestment remedies is appropriate as well. It reveals that many of the difficulties that arose over divestment remedies could only be cleared up several years later, and that 30% of them were never resolved. Judging by the results of this study the effectiveness of commitments altogether must be regarded as very limited, as only a good half of the measures examined achieved their aim. That should induce the European Commission fundamentally to reconsider its attitude to remedies and commitments, and use them more sparingly than hitherto. That must apply all the more in cases where a merger can only be approved as part of an extensive package of measures. The difficulties evident in forecasting the results of commitments, in determining the appropriate extent of the conditions to be imposed and in supervising their implementation are likely to be even higher in such cases.

119.* Against the background of this study the Monopolies Commission also recommends limiting the legally permissible extent of remedies and commitments. In the Lagardère/Natexis/VUP case the object to be sold was more than half the company acquired. That raises the question whether the provisions in the Merger Regulation fully cover the issue of approving a merger on condition that the greater part of the business thus acquired must be sold again. In the view of the Monopolies Commission it would be better to prohibit a merger that raises such doubts regarding competition. Setting extensive packages of remedies and commitments seems a very doubtful practice, particularly in view of the above study. It should be remembered that the European Commission's studies have shown that only 57% of the commitments given have proved effective. The difficulties involved in implementing commitments may be expected to increase with the extent of the conditions imposed. Moreover, as the extent increases the risk also increases of the competition authorities acquiring excessive influence in shaping market structures. The upper limit for conditions and commitments should be about 50% of the object acquired. Some flexibility should be allowed to the European Commission to enable practicable solutions to be found in individual cases as well.

120.* In a number of cases during the period under review the European Commission combined decisions to approve a merger with the imposition of divestment remedies. Divestment remedies are of a structural nature, and are therefore on principle a suitable way of removing obstacles to competition that are based on changes to market structures. Nevertheless, in indi-

vidual cases the detail may give cause for doubt. In the Johnson & Johnson/Guidant case some of the divestment remedies included strongly conduct-related components, like the obligation to support the acquiring company in building up its own production, or to make available research and development data. In the view of the Monopolies Commission these obligations offer numerous possibilities for hindering the acquiring company and can hardly be controlled.

121.* In regard for conduct-oriented commitments the European Court confirmed in its decision on the European Commission/Tetra Laval case the criteria set by the Court of First Instance on 15 February 2005. The European Court had explained earlier that structure-oriented measures should on principle be preferred in decisions under merger control law, but the possibility could not be a priori excluded that conduct-related obligations would at first glance also appear to be a suitable way of preventing the emergence or strengthening of a dominant market position. Hence commitments offered in an individual case must be examined regardless of whether they should be classified as conduct-related or structure-oriented. The European Commission put this requirement into practice during the period under review, e.g. in the EDP/ENI/GDP case, which was confirmed by the Court of First Instance in the EDP/European Commission case.

122.* The European Commission imposed conduct-oriented obligations on the parties in the Total/Gaz de France, Areva/Urenco/ETC JV and Piaggio/Aprilia cases, for example. The Total/Gaz de France merger was only permitted by the European Commission on condition that Total guaranteed non-discriminatory and transparent access to its gas transport and storage facilities in Southwest France. A number of other conditions were attached to the commitment. Although such conduct-related commitments are on principle declared permissible in jurisdiction, there are, in the view of the Monopolies Commission, fundamental doubts whether they are appropriate. They have considerable potential for abuse and hindrance, and they require extensive control by the authorities. The considerable difficulties in implementing such obligations are confirmed by the European Commission study mentioned above, which concludes that access commitments have proved particularly ineffectual in the past.

123.* In the Areva/Urenco/ETC JV merger, which affected the market for uranium enrichment, the commitments proposed by the parties included, among other things, the obligation to hand information on to the Euratom Supply Agency ESA. The data provided was to enable the agency to supervise prices for uranium enrichment and if necessary intervene to correct these. A commitment of this kind, which is based on the consideration that should there be abuse of a dominant market position the ESA will intervene and correct, raises considerable doubts. The basic consideration is contrary to the aims of the Merger Regulation, under which a merger must be prohibited if it creates or increases the risk of uncontrolled scope for conduct. Measures that only take effect when the emerging or strengthened dominant market position is abused should be handled under the abuse control in Art. 82 of the EC Treaty. However, they are not likely to remove doubts concerning the implementation of a merger that will establish or strengthen a dominant market position.

124.* A critical view must also be taken of the European Commission's action in the cases Siemens/VA Tech and Continental/Phoenix. The European Commission has left open the question of whether there is restraint of competition on the grounds that the commitments given remove any possible doubts concerning the merger. In the Areva/Urenco/ETC JV case the question of possible efficiency gains was not pursued for the same reasons. In the view of the Monopolies Commission it is systematically wrong not to make an in-depth examination and a clear evaluation of the consequences of a merger when the proposal to merge is reported at an

early stage. Only this examination and the resulting establishment of the nature and extent of any future restraint of competition will show whether an offer of commitments is sufficient to remove any doubts regarding competition. In addition, Art. 8, Para. 2 of the Merger Regulation permits conditions and obligations to be imposed only if otherwise the merger would lead to considerable restraint of competition. Comparable considerations apply in regard for the assessment of possible efficiency gains in the Areva/Urenco/ETC JV case.

125.* The European Court and the Court of First Instance have given a number of judgements during the period under review that are of importance for competition law. The judgements in the cases in which the treatment of conglomerate mergers was the centrepiece of the court proceedings have been awaited eagerly. On 15 February 2005 the European Court confirmed the decision of the Court of First Instance of October 2002 to repeal the decision by the European Commission to prohibit the Tetra Laval/Sidel merger and to require divestiture. In the view of the European Court the Court of First Instance did not require excessive proof from the European Commission. The European Commission does have scope for assessment in business matters, but that does not mean that the Community judge need not control the interpretation of business data by the European Commission. Such control was all the more necessary if the expected development on the markets affected by conglomerate mergers was to be examined. Hence the judgement confirms that the judiciary expects particularly careful justification by the European Commission in cases with conglomerate effects.

126.* In its appeal the European Commission also objected to the decision by the European Court that in assessing incentives to exploit a leverage effect it must also take into account the illegality of certain practices under Art. 82 EC Treaty. On that point the European Court accepted the European Commission's argument and established an error on a point of law by the Court of First Instance. It had rightly required the European Commission to examine the likelihood of conduct that would enable a leverage effect to be exerted. However, it would be contrary to the aim of prevention in the Merger Regulation if the European Commission were required to examine to what extent the incentives to conduct in an anti-competitive way would be reduced or even removed on the basis of their illegality, the likelihood of their discovery and their prosecution by the Community and national authorities, or on the basis of possible financial sanctions. The Monopolies Commission expressly welcomes these statements by the European Court. It had already pointed out the problems that would be entailed for the European Commission if all the conceivable infringements of Art. 82 EC Treaty and national competition rules had to be simulated and the incentives they entail estimated.

127.* After the European Court's decision on the European Commission/Tetra Laval case the Court of First Instance again considered the conglomerate effects of mergers, this time in the GE/European Commission case. It again accused the European Commission of ignoring possible sanctions under Art. 82 EC Treaty in forecasting future conduct. A certain contradiction between the considerations of the European Court in the European Commission/Tetra Laval case and the explanations by the European Court – which came later – cannot therefore be denied. As long as no clarification has come from the Supreme Court on this question the European Commission should, in future decisions, at least include a reference to the possible deterrent effects of Art. 82 EC Treaty and expressly take account of these in weighing the positive and negative factors. What effects the decisions outlined above will have on the European Commission's future decision practice regarding conglomerate mergers remains to be seen. Possibly the European Commission will in future exercise even greater restraint in its intensive examination of conglomerate mergers.

128.* In the case GE/European Commission the Court of First Instance also considered vertical effects and again established that in assessing the future conduct of the parties to the merger the European Commission must take into account a possible deterrant effect of Art. 82 EC Treaty. So here, too, the court shifted the examination that was to be made away from the market structures towards the future conduct of the companies involved. The Monopolies Commission takes a critical view of this approach, like the European Court in the Tetra Laval/European Commission case. It is the aim of merger control to make subsequent control of conduct superfluous and free both the competition authorities and the companies from being subject to supervision of conduct. If the Court of First Instance were to demand consideration of the future conduct of the companies in its merger control it would risk losing the very point of merger control. If the focus is shifted on to future conduct there is a risk that not enough attention will be paid to the negative effects of mergers on competition.

129.* On 21 September 2005 the European Court confirmed the decision by the European Commission to forbid the merger of EDP/ENI/GDP in the Portuguese energy sector. So for the first time the judiciary upheld a ban by the European Commission, after in 2001 and 2002 declaring three such decisions invalid in quick succession. The Court confirmed the ban because the European Commission had rightly assumed that dominant market positions on certain electricity markets would be strengthened. However, the Court did not accept the European Commission's decision on the gas markets examined. In its view the Portuguese Government can restructure its domestic gas market at will as long as the exception allowed under Art. 28 of the second EU gas directive is still in force. The Court considered the exception allowed as a *lex specialis* to the Merger Regulation. In regard for the legislation on merger control a critical view should certainly be taken of this exception. An inclusion of the future effects of the merger that would occur when the market was opened would have helped to prevent negative developments on the Portuguese gas market. Ultimately, however, the exception must be respected – as the Court did – as a political decision by the European legislature with the aim of enabling member states like Portugal to build up a domestic incumbent before opening their market. A positive factor that must be noted is that at the time of the European Commission's decision the liberalisation process was already underway, at least in the Portuguese electricity sector. Otherwise the ban would not have stood up to legal examination.

130.* In the case of EDP/European Commission the Court also examined the question whether positive effects of the merger on the gas market could compensate for the negative effects on the electricity market. The Court stressed that a ban must be imposed if the conditions for a ban were fulfilled on a single market, and so it made clear that a balancing clause, as in § 36, Para. 1, 2nd half-sentence of the Act Against Restraints of Competition (*GWB*), has no counterpart in European legislation on merger control. The Monopolies Commission, on the other hand, regards the balancing clause as a meaningful instrument to assess mergers. It enables all the competition effects necessary to an overall consideration of the merger to be included in the assessment. Moreover, in its view a balancing clause would also benefit the transparency and the viability of decisions under merger control law. As the examination of the positive and negative aspects in the application of a balancing clause is limited to purely competitive, that is commensurable, aspects, the competition authorities and the courts are on principle also in a position to undertake the necessary evaluation. The inclusion of macroeconomic or general political aspects, on the other hand, is not connected with the use of a balancing clause as this is meant here.

V. Competition Problems in the Broadcasting Sector

131.* The media sector is undergoing far-reaching change. The digitalisation of broadcasting is creating new possibilities for use and new forms of programme. It has also eased the competition policy problem caused by a shortage of frequencies. The upheavals in the media sector require some ability to adjust on the part of market participants, and an appropriate measure of creativity to stay competitive. This process of adjustment to the new market conditions must not be held up by bureaucracy or shortcomings in policy.

132.* On the market for programme software (films, series, news broadcasts) independent producers and producers employed by the various channels are competing for contracts from the programmers. For the independent suppliers there is a risk that the public programmers will give preference to their subsidiaries or the producers they employ in awarding contracts, in setting fees and in the conditions of contract, so causing distortion to competition. Problems arise when the supplier belongs to a public corporation which gives preference to its own production companies in awarding contracts. For if the income from broadcasting fees is used to subsidise activities on production level by subsidiaries in the private sector competition is distorted to the disadvantage of independent producers.

To prevent the public corporations from awarding contracts only to their subsidiaries at the expense of competitors it must be ensured that production contracts are awarded by the public programmers in a way that is neutral and open to all. At present it is difficult for outsiders to check this, as the contracts with the private subsidiaries cannot be inspected by the usual supervisory bodies for the public corporations – namely the Administration and Broadcasting Council (*Verwaltungs- und Rundfunkrat*), and the Television Council (*Fernsehrat*) for ZDF, Germany's Channel Two. To create as much transparency here as possible the Monopolies Commission would firstly like to see a clear separation between the public task and the commercial business activities of the various channels, and secondly, an extension of the rights of inspection of the broadcasting supervisory bodies and the audit offices.

133.* It is to be expected that the developments in the broadcasting sector will help to establish new forms of entertainment and advertising (split screens, virtual and interactive advertising). Which forms will become established in future depends on the creativity of those involved, on the legal conditions and the willingness of producers, programmers and the advertising industry to increase cooperation. However, the development of new advertising concepts and the shift of advertising money into new forms of advertising are being made more difficult by the restrictions on product advertising laid down in the broadcasting legislation. As a result flexible financing of audiovisual contents through new forms of advertising is almost impossible, and stimulus to growth for media enterprises can hardly be created.

For that reason the Monopolies Commission welcomes the European Commission's impetus to slim down the density of regulations in the media market through the revised "Television Directive" (Proposal to amend Directive 89/552/EEC in the version of Directive 97/36/EC). Liberalisation of the present regulations on advertising would improve the earnings possibilities for the channels that are financed from advertising, and consequently also improve their situation in competition with other television channels for attractive programmes and viewers. The admission of new forms of advertising, like product placing in media productions, is to be supported, in the view of the Monopolies Commission, if transparency is maintained; it would enable new business ideas and models to be evolved and increase the competitiveness of the audiovisual media.

134.* The programme level in Germany is organised as a dual broadcasting system. Beside the public corporations, which are backed by the state technically, in their programming and financially, there are private commercial stations. They are subject to regulations and have to observe requirements on advertising to fund their activities. The German Broadcasting Code has been shaped and formed by the Federal Constitutional Court, that has now given ten judgements on broadcasting since 1961. The Court bases its decisions on the principle of freedom in broadcasting that is guaranteed in Art. 5, Para. 1, Sentence 2 of the Basic Law and protects all the activities connected with broadcasting. The jurisdiction by the Federal Constitutional Court and the consequent shaping of the Broadcasting Code has given the public broadcasting corporations a special position. This special position in constitutional law has in turn meant not only that the legislature cannot assess the activities of the public channels in regard to merit – which is essential for reasons of efficiency and cost – it also means that competition between the various channels loses its effect as a mechanism of governance to eliminate and avoid inefficiencies in the German broadcasting system.

135.* In recent years the public corporations have widened their activities by setting up fringe channels and online offers. Thus, the overlap of contents with commercial channels has become increasingly evident. Far-reaching expansion activities, the legality of which is increasingly controversial, have distorted competition to a considerable extent, primarily at the expense of the development of an efficient and internationally competitive private media industry. The assignment of tasks in the dual broadcasting system needs to be reconsidered. The task assigned to the public broadcasting sector should be formulated more precisely. The redirection of the dual Broadcasting Code must proceed from the different circumstances. The technical conditions for viable competition in the broadcasting sector have improved markedly. A move away from market steering principles in the present form can no longer be justified by arguing that this sector is in a special position. Instead of cultivating balance an open market model can operate in most areas. There is at most definite need to control programming in meritorious programme areas in which private suppliers cannot be expected to operate. Linking the compulsory broadcasting fee to the possession of broadcasting sets runs the risk, in the age of convergence, of uncoupling this entirely from the intention to receive broadcasting transmissions, and as a measure with the same effect as quantity steering, would presumably be an infringement of Art. 28 EC Treaty. The introduction of a general charge independent of use should be considered. Moreover, in the longer term the fee should be made dependent on pertinent assessments of programme quality and performance.

136.* There is a suspicion that the financing of the public broadcasting corporations in Germany is an infringement of the ban on aids in Art. 87 EC Treaty. The European Commission has examined the links between the channels financed with broadcasting fees in Germany and their commercial subsidiaries. It concluded that the broadcasting fee is a parafiscal compulsory charge, and thus state financial aid. Consequently, special justification is needed for broadcasting fees and they are subject to control by the European Commission. The national governments have been very unwilling to recognise control of their broadcasting financing by the European Commission and in the supplementary protocol of Amsterdam they stated their intention to continue financing the public broadcasting corporations. Hence there is some tension between the market economy concept of the European Community as an economic community and the justification of the broadcasting fee in cultural policy.

In the view of the Monopolies Commission Art. 87 EC Treaty offers a suitable basis for the resolution of these conflicts. The Monopolies Commission agrees with the European Commission that the broadcasting fee is financial aid, for financing through a fee is ultimately a

substitute for financing from tax revenue, and so it must be seen as financial aid in just the same way in the meaning of Art. 87, Para. 1 EC Treaty. That certainly does not mean that financing through a broadcasting fee cannot be justified on cultural policy grounds, in accordance with Art. 87, Para. 3, Letter d) EC Treaty. In the view of the Monopolies Commission this clause permits a more differentiated view of the broadcasting fee in regard for individual purposes. If Art. 87, Para. 3, Letter d) EC Treaty is interpreted in the light of the Amsterdam supplementary protocol, no doubts can be entertained of financing through a broadcasting fee as such to support national broadcasting provision. There may admittedly be problems in fringe areas, where the public corporations are expanding into areas for which there is no longer any justification in cultural policy. Where the border to what is permissible should be drawn depends on the particular nature of the area in question. To reduce the uncertainty regarding the legal position and investment that this inevitably entails the legislature should incorporate the recommendations of the European Commission on the publicly funded broadcasting sector into their national legislation.

137.* In addition, budgeting the activities of the public broadcasting corporations should be considered. They should also be obliged to give concrete information on how much money they need for their programmes, which projects they are planning and what quality criteria they intend to observe. This should be done as part of a voluntary undertaking to the general public for a specific period. At the end of the period they could be assessed by in how far the promises have been kept and any corrections needed could be deduced.

138.* Data compression has enabled the main competition problem in the broadcasting sector, namely shortage of frequencies, to be eased, and for the actors in the media value creation chain this has opened up new possibilities for television programmes and greater use of television. As every kind of information (texts, photos, moving images and speech) can be transformed into digital signals, and transmitted through broadband television cables, by broadcasting satellite and through narrow band telephone lines, the telephone and cable networks will in the long term develop into universal digital networks. That development is welcome in regard for competition policy, as the disciplinary effect of intensive competition between transmission media will reduce the need for state regulation of individual networks, like the telecommunications network, to a minimum.

139.* Digital transmission requires technical and administrative services on the way from the channel to the viewer that can work as new barriers to market access, depending on their design. To ensure permanent open market access and a wide range of programmes for the recipients competition policy corrections are needed. However, this state intervention should not take the form of detailed rules on the utilisation of the transmission capacities, it should guarantee open access to the market, or the viewers, with equality of opportunity and no discrimination.

140.* In recent years a growing number of companies tries to be present on every stage of the media value creation chain. From the standpoint of competition policy this may cause problems. If the operator of a transmission platform is active as a programmer he has an incentive only to transmit his own programmes through his medium and not to include programmes from other suppliers, or only to do so at worse conditions. The Monopolies Commission holds the view that as in the case of access to the technical facilities on the basis of the current regulations, there is no need for action by the legislature to ensure variety of opinion in the German broadcasting sector. There is only need for action in regard to the division of competences between the Federal Network Agency, the Federal Cartel Office and the state media corporations. Under the present legislation it is possible for the institutions to reach divergent

decisions in their assessments of one and the same issue, and the legislature has not yet provided a practicable procedure for such cases. So it remains to hope that the offices involved will be able to agree on a practice that is in accordance with the current legislation and will implement regulation projects so that digital television can develop freely.

141.* The expansion and digitalisation of the broadband cable network have only recently made progress in Germany. The hesitant development can partly be explained by factors that have hampered the market and so held up the development, like companies' uncertainty over whether viewers would accept new digital offers, lack of a common marketing strategy for digital television and different strategies pursued by cable operators and programmers. Beside the market-driven factors there are, however, a large number of legal regulations that are still hindering the dynamic of market participants and so holding up a rapid development of the cable network. To intensify infrastructure competition for the telephone network further investment is needed throughout Germany to expand the cable network. However, at present this is being hampered by the current market structure, the ownership conditions and the regulatory requirements. A particular feature of the German situation is that different network levels belong to different owners. While network level 3, which takes the signals to the border of the property, is mainly owned by regional cable companies, connection from the border into the living room (network level 4) is operated by a large number of different companies, some of which are tiny. The necessary investment could be better coordinated by a single source, and market consolidation here would be welcome, particularly as there are very few competition policy doubts concerning vertical and horizontal market adjustment. The dependence of a household on its cable network operator is not increased if he merges with an operator from a different region. A cable connection is always a single item, and this is not changed by vertical and horizontal mergers.

142.* Another obstacle for future cable network operators is the uncertainty over the regulatory environment. The broadband cable network is subject to both media and telecommunications law. The media legislation limits, in a way that cannot at present be fully estimated, the scope for using the capacities which the operator creates by investing in the cable network. It is not clear in how far the State media institutes will influence the utilisation of channels beyond the "must carry" range. In the past the capacities have been used to extend transmission by public corporations. The third programmes, for example, which were designed for local viewers, have been transmitted throughout Germany through the additional "must carry" channels. If the local orientation of these programmes is taken seriously, it is hard to see why nation-wide transmission is needed. The load of "must carry" regulations on the cable network operators limits the use of their channels for alternative purposes, and reduces the incentive to expand the networks.

143.* The crucial question in applying the telecommunications legislation is whether on the side of the end customer, i.e. the viewer, cable television is an independent market, and the cable network operator necessarily has a monopoly in his region, or whether it is part of a larger market which includes satellite and terrestrial television, and now Internet television as well. In contrast to the Federal Cartel Office and the Federal Network Agency the Monopolies Commission is in favour of a broad definition of the relevant market, and of including other transmission routes in this common market. The market definition as given by the Federal Cartel Office and the Federal Network Agency should be reconsidered, as during digitalisation, media converge, and alternative means of access exist or develop for multimedia services, including the television business by satellite or on the Internet. Assuming that a broad definition of the market is used, the Monopolies Commission is against the application of telecom-

munications law to regulate charges in the broadband cable network, as regulation of charges would reduce the incentive to expand the infrastructure.

144.* The Federal Cartel Office and the Federal Network Agency agree with the Federal Supreme Court in assuming that cable network operators have a monopoly over programmers as well. This definition of the market is not without problems, as it does not take into account the customers' interests in adequate choice of programmes, nor that on the customers' side substitution between the different transmission modes is very possible. The customers' interests in a wide range of programmes means that the infrastructure providers are also interested in transmitting a large number of programmes. This has indirect effects for the programmers, caused by competition between network operators for customers. This competition effect is of particular significance where several infrastructures exist side by side. It is better to trust to infrastructure competition and not to limit the incentive to invest for infrastructure providers through excessive regulation.

145.* It is difficult at present exactly to predict the development of the market and corporate structures in the media sector. Owing to the dynamics of the market it is advisable to exercise restraint over regulatory intervention. Dirigistic market intervention always runs the risk of causing distortion to competition on dynamic markets, or limiting investment incentives and entrepreneurial commitment. Any possible developments on the media markets that are undesirable in competition policy should be corrected solely through the flexible clauses in the Act Against Restraints of Competition. In cases that raise doubts in competition policy it will then be the task of the Federal Cartel Office to instigate suitable counter measures. It should prepare itself in good time for this task, follow the coming changes carefully and incorporate them flexibly into its decision practice.

VI. Competition Problems in the Liberal Professions

146.* The many regulations on access to certain liberal professions, which limit competition for business, are increasingly being seen in a critical light. The Monopolies Commission has therefore decided to examine liberal professions in competition policy. As well as general considerations selected liberal professions, namely lawyers, pharmacists, independent architects and structural engineers, are to be examined in detail.

147.* The wide range of liberal professions makes it difficult to give a general definition of this group. Nor is there a uniform concept for the liberal professions in legislation. However, there is general agreement that a number of professions should be defined as independent. They include those examined in detail by the Monopolies Commission. An liberal profession does not necessarily mean economic independence, as is particularly evident in the medical profession. Historically, the term "liberal profession" refers not so much to the freedom to exercise the profession, it is intended rather to emphasise the significance of the activity. The use of the term "liberal profession" still serves to mark these occupations off from commercial or craft occupations.

148.* In 2002 the Competition General Directorate of the European Commission commenced an indepth examination of the regulations covering the liberal professions in relation to competition. It identified as the most important regulations binding fixed prices, price recommendations, regulations on advertising and on access to the profession, reserved activities and regulations on the permissible form of enterprise and on cooperation with other professions. After first undertaking an extensive study the European Commission has now also published two

reports on this question; it has already issued the first authorisation to impose a ban under cartel law, which is on the code on fees of the Belgian Architects Chamber.

Justifications for Regulating Professional Activities

149.* Regulations on professional activities are now very rarely justified by the especial dignity of a profession. Rather, it is argued that they serve particular social objectives, like eliminating imperfections on a market, ensuring fair distribution or other non-economic aims. However, simply referring to these objectives is not sufficient to justify the regulation. It must be shown that a regulation will actually promote the objective in question and that these positive effects will outweigh the negative effects of regulation.

150.* If the conditions on a market deviate from those of perfect competition, for example because information is being distributed asymmetrically, or external effects are evident, it can be said that there are imperfections on the market. In this case it cannot be expected that unregulated competition will lead to an optimal market result. It is claimed that many regulations on professional activities are justified by market imperfections. In some cases terms like “securing quality” or “protecting consumers” are used. But simply the existence of market imperfections is not enough to justify professional regulation. For that only shows that a market deviates from the theoretical ideal of perfect competition. It is not certain that state intervention will bring about any improvement in the market conditions that would be great enough to outweigh the problems which state intervention entails. To bring about optimal market conditions a state office not only needs sufficiently precise information, there must also be certainty that the office is really aiming to maximise welfare and not perhaps just pursuing the interests of some market participants.

151.* In the view of the Monopolies Commission the obligation to prove justification should lie upon those who are in favour of a particular regulation on professional activity. This is evident from both experience in economic policy and the fundamental clauses in the German Basic Law and the EC Treaty. However, the proof need not necessarily be given in the form of rigorous economic studies, historical or international comparisons can as well be very helpful in such argumentation.

152.* The market imperfections most frequently cited in the discussion over the justification of regulations on the liberal professions are asymmetric information, externalities and public goods. Information on services available from practitioners of liberal professions may be asymmetrical if the client cannot form an adequate judgement of the quality of the services, or if he is not sure whether and to what extent he needs such a service at all. Asymmetric information can mean that there is too little demand for a specific professional service, or even that the market for this service breaks down altogether. Asymmetric information can be a justification for professional regulation, but it must always be examined whether the regulations in general legislation will suffice to counter the problems caused. There are externalities when the consumption or production of a commodity has effects on third parties who are not involved. Both positive and negative externalities are conceivable. One example of externalities on services offered by the liberal professions is the security of a building. This not only affects the client and the architect, it also affects passers-by. The classical solution to the problem of externalities is legal norms, taxation or subsidies that either directly or indirectly compel consideration of the interests of third parties. Public goods are characterised by “non-rivalry in consumption”. The production of public goods by a professional group can be a justification for state regulation, however there is a risk that certain slogans, like “Smooth progress through

the bureaucracy and the courts” can be declared public goods in order to serve as general justification for market intervention.

153.* Probably the most frequently cited justification for professional regulation is the need to secure quality on a market where there is asymmetric information. Regulations like protected professional designations and reserved areas of operation, and the practice of fixing quality features under threat of fines for infringement, are on principle means of countering asymmetric information, however they must be proportionate. A very critical view, on the other hand, must be taken of fixed minimum prices as a means of securing quality, for the connection between binding minimum prices and securing high quality argued by those in favour of this measure remains unclear, or it depends on other conditions, the fulfilment of which is doubtful. It must also be remembered that not every kind of increased quality is desirable, especially if higher prices prevent some people from using the service at all.

154.* A further reason for regulation that is closely connected to the information problem is that regulation facilitates the conclusion of contracts. This applies firstly to contracts between the client and the professional supplier, and secondly insurance contracts to cover the need for the professional service, like legal expenses or hospitalisation costs. It is easier to agree these contracts if the legislature prescribes the level and structure of appropriate fees, which do not then necessarily have to be agreed in the contract. However, binding prices are not needed for this, it is enough to set a reference scale of fees which would only apply by default.

155.* Apart from market imperfections, aspects of fair distribution are also cited to justify professional regulation. The regulation should ensure that the professional service is available to everyone when needed. The legitimacy of state redistribution objectives lies in the decision by the democratically legitimised legislature, and so is outside the sphere of competition policy. However, the question of how these objectives can best be implemented is relevant for competition policy. On principle the institutions of the state tax and social systems are to be preferred to direct intervention in the market and competition process. So a critical view must be taken of attempts to justify codes on fees for professional services with a cross-subsidisation argument, according to which the individual member of a profession subsidises less profitable commissions with his earnings on the more lucrative contracts. Cross-subsidisation presupposes that these two kinds of commission are equally distributed among the members of the profession. If the more lucrative commissions are concentrated among a few members of the profession there will be no cross-subsidisation. Moreover, charging more prosperous clients higher fees may constitute a case of legally prescribed price discrimination, while services that do not cover costs – especially for persons starting out in these professions – may be of the character of investment to build up a list of clients. However, price regulation may be justified in the liberal professions if it is intended to regulate state recourse to professional services for the purposes of redistribution. If, for example, a lawyer is legally obliged to give advice he cannot negotiate a suitable fee for the service. Consequently, the fee must be determined by the state. However, that argument cannot be used to justify the regulation of fees outside this area. Binding regulations on fees are still being justified by the need to ensure national supply. In the view of the Monopolies Commission, however, they are not suitable to achieve that end – fixed prices can actually set false incentives for professionals’ choice of location.

156.* Another important question regarding regulation of the liberal professions is who should be entrusted with designing and implementing the regulations. Self-regulation by the members of the profession does have the advantage of their greater familiarity with the condi-

tions, but it creates the risk that only the interests of that professional group, or even only one section of it, are taken into account in decision-making.

Assessment of Professional Regulation with Regard to Cartel Law

157.* It is uncontested today that the liberal professions are also subject to cartel law. Now that Regulation 1/2003 and the Seventh Amendment to the Act Against Restraints of Competition are in force the issue is no longer whether European cartel law or only the Act Against Restraints of Competition applies to any individual regulation, because they must both be applied according to the same principles. However, regulations of the liberal professions issued in the form of laws or ordinances are, as state legislation, exempt from cartel law. Professional codes, on the other hand, issued by chambers in the form of statutes have to be checked for conformity with cartel law. These regulations can infringe Art. 81 of the EC Treaty or § 1 of the Act Against Restraints of Competition if they limit competition or result in doing so. However, they are exempt from the ban on cartels if they are necessary to ensure the proper exercise of the profession (the Wouters exception) or if they fulfil the conditions on exemption under Art. 81, Para. 3 of the EC Treaty or § 2 of the Act Against Restraints of Competition. There may also be infringement by the state of its obligation to loyalty under Art. 10 EC Treaty if it prescribes a cartel agreement counter to Art. 81 EC Treaty, facilitates one or strengthens its effects. However, such an infringement always presupposes a connection with conduct by companies that is against cartel law. Thus, it is not sufficient for a state regulation, like a minimum price regulation, to have the same effect as a cartel between companies.

The Basic Freedoms in the EC Treaty

158.* Unlike cartel law the basic freedoms in the EC Treaty apply without restriction precisely to state law. In questions of the provision of services from the liberal professions across frontiers the freedom to provide services will generally apply. For pharmacists the free movement of goods is particularly relevant. These basic freedoms only cover regulations that restrict cross-frontier movements, but these may also include regulations that do not make a formal distinction between domestic and foreign market participants, if they put greater restraint on foreign market participants or cross-frontier transactions than domestic ones. This may particularly affect codes on fees for professional services if they make market access more difficult for foreign suppliers. If there is an infringement of a basic freedom it must be examined whether the regulation falls outside the area of application of the basic freedom because it is a simple “sales modality”, or if it is justified by compelling public interest.

Lawyers

159.* The Monopolies Commission regards it as appropriate, that the permission to provide legal advice outside the courts depends on proof of the relevant qualification. However, this restriction of access should only apply to the core area of legal advice and legal services. The amended legislation on legal advice must make it clear that advisory services which will evidently include commercial, technical or other non-legal areas are exceptions to the law. Moreover, the list of activities that are expressly exempt should be extended. Persons who have a relevant qualification should not be excluded from access to the market. The legislature should therefore permit business lawyers with a diploma and lawyers with their first state certificate to give legal advice outside the courts. Should the “Bologna” master’s and bachelor’s qualifications become established in law, persons holding the bachelor’s qualification in law should also be permitted to offer these services.

160.* In the area of regulating lawyers' fees the Monopolies Commission is in favour of lifting the ban on undercutting established fees, in court work as well. However, the legislation on the remuneration of lawyers should be maintained as a reference scale to be applied by default. The arguments given to justify the ban on undercutting fees are not convincing. For the ban is neither suitable nor necessary to secure free choice of lawyer, to establish cost transparency, for insurance cover, or for assistance with court costs and legal fees. Instead, it is enough for the code on fees to be available as a reference scale, or for special criteria to be set for charges for court costs and advisory services. Moreover, it is doubtful to what extent relevant cross-subsidisation between more and less lucrative mandates will occur.

161.* The Monopolies Commission is also in favour of permitting fees to lawyers to be dependent on winning a case. That includes the special case of *quota litis*, in which the lawyer's fee consists of part of the amount in dispute. This would have the advantage of creating a possible incentive for the lawyer to make greater efforts, and reducing the risk of court costs for the plaintiff. It is already possible for court proceedings to be financed by a third party, but linking the lawyer's input to financing the court costs may be more cost-effective. The ban on fees for success is justified by the legislature with the need to protect the independence of the lawyer. This would be jeopardised, it is argued, if he had a financial interest in the outcome of the case. But there are already a number of cases where fees dependent on success are allowed or even prescribed by law, and the legislature does not see them as jeopardising legal independence. In fact, the independence of the lawyer must primarily be seen as independence from the state. However, the legislation is also based on the assumption that the lawyer represents partial interests. Moreover, he has a financial interest in the outcome of the case even if his fee does not depend on this, for only if his client is satisfied he can hope for further commissions or recommendations. Permitting fees dependent on success and the *quota litis* would, in the view of the Monopolies Commission, not lead to "American conditions" on damages and compensation in German law, as other features of American law, like punitive damages and juries are not used in German civil law. To protect the client, however, subsequent control by the courts of whether the level of fees for success is appropriate should be possible.

162.* In advertising the Monopolies Commission recommends that the rules on advertising by the legal profession should be repealed and advertising by members of this profession made subject only to the Act Against Unfair Competition. Only an aggressive or misleading approach to individual persons should still be banned under the legislation on the liberal professions. The regulations in force to date are not needed for consumer protection, which can be achieved by applying the Act Against Unfair Competition. Moreover, these regulations have contributed little to legal certainty in this area, and for the rest most lawyers will exercise a certain restraint in advertising in their own interest – in order not to call their seriousness in question.

163.* In regard to the rules on the work of lawyers within a joint stock company the Monopolies Commission recommends the introduction of uniform requirements for all professions that can be exercised within an institution or company. The majority rules in force so far should be abandoned in inter-professional cooperation within joint stock companies, and it should also be possible for persons who are not lawyers and do not exercise any other such profession to become managers of a firm of lawyers in the legal form of a company limited by shares (GmbH). However, at least one of the managers should be a lawyer. Finally the Monopolies Commission is in favour of allowing persons who are not lawyers and do not belong to any other profession that can be exercised within an institution or company to take a share in a

firm of lawyers limited by shares. To prevent conflicts of interest the list of shareholders must be open to public inspection; but flotation on the stock market should not be possible. Appraisal of the reliability of the shareholders from outside the legal profession could also be considered. If the legislature regards it as meaningful it would also be possible to limit the shareholding allowed to non-lawyers.

Pharmacists

164.* The Monopolies Commission recommends a reappraisal of the list of drugs that can only be sold in a pharmacy in the light of international experience. Certain products that can be sold outside a pharmacy in Great Britain or the United States might possibly also be released for sale in supermarkets and drug stores in Germany. It should at least be possible to put them on sale in the self-service section of a pharmacist's shop. However, where the pharmacist still needs to give advice to the purchaser of drugs introducing, it could be considered to introduce obligatory documentation of this advice by the pharmacist.

165.* In future access to the profession of pharmacist should also be possible through technical college.

166.* The price regulations for ethical drugs cannot easily be abolished. As the costs of these drugs are borne by the health insurance companies there is insufficient incentive for the patient to look for a lower-priced pharmacy. The imposition of prescription charges by the statutory health insurance companies will not greatly change this.

167.* One possible way of enabling price competition in this area would be to admit only certain pharmacies – with particularly favourable pricing – to supply the patients from one health insurance company. The pharmacies would then be in price competition for registration to supply the patients of this insurance fund. However, it would be difficult to realise this model, at least in rural areas, as it would either involve a considerable increase in the average distance to the closest pharmacy, or the health insurance companies would have to permit almost all the local pharmacies to dispense drugs, which would reduce the stress of competition.

168.* The Monopolies Commission therefore regards a different model as preferable, in which the patient would bear the costs of the pharmaceutical service, while the health insurance company would still bear the costs of the drugs. This model could be realised if the pharmacist charged the patient a general fee for his service, the level of which he could fix himself. The legislature could set upper and lower limits for this charge. In return the supplement paid over the cost of the drugs would be dropped. As the patient would bear the costs of the pharmaceutical service himself he would have an incentive to look for a favourably-priced pharmacy. It is to be expected that in districts where pharmacies are scarce higher fees will be charged, because competition between the pharmacies is not so fierce. However, this would create incentives for new pharmacies to locate there.

169.* The Monopolies Commission is in favour of repealing the present ban on outside ownership of pharmacies. This would allow persons who are not pharmacists to buy a pharmacist's shop. However, the business would still have to be managed by a responsible pharmacist – possibly an employee. Ownership of several pharmacies beyond the current limit of four should also be allowed. The formation of pharmacy chains could increase efficiency and lead to livelier competition between pharmacies. To prevent local and regional monopolies, however, merger control should also apply on the pharmaceutical market – for a transitional period – below the usual threshold for intervention as well. The appropriate procedures should be carried out by the State cartel authorities. Independent of this the Monopolies Commission

is in favour of allowing pharmacists to exercise their profession in the form of a company limited by shares (GmbH) as well; should the legislature decide against lifting the ban on outside ownership only pharmacists would be able to take shares.

170.* The Monopolies Commission is still in favour of enabling pharmacies to operate within other retail premises. They could then be operated as departments of a drug store or department store. The sale of drugs requiring prescription or that can only be taken after advice has been given would still only be available from the pharmacist and not in the self-service section.

171.* In advertising the Monopolies Commission is in favour of abolishing the rules on advertising specific to the profession of pharmacist as well. Pharmacists' advertising would then only be subject to the Act Against Unfair Competition and the Act on Advertising Medicines.

Architects and Engineers

172.* The Code of Fees for Architects and Engineers should also, in the view of the Monopolies Commission, in future function only as a reference scale. On historical and international comparison a connection between binding minimum prices and a high quality of building is not evident – nor did the “Status Report 2000 Plus” commissioned by the Federal Government provide such evidence. It must in particular be remembered that minimum prices cannot ensure “sufficient income” if they bring more entrants to the market. In some circles it is argued that the special requirements of public offices that commission planning services make binding minimum price regulation necessary. The Monopolies Commission is not convinced by that argument. For the rest it could only justify minimum price regulation for the public sector, not for private clients.