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Press release

Monopolies Commission discusses tightened criminal enforcement against cartelists

- The Monopolies Commission **doubts** that the existing sanctioning system in competition law has a **sufficient deterrence effect**
- Prevention can be enhanced through the **penalisation** of particularly serious cartels (so-called hardcore cartels)
- The Monopolies Commission proposes **accompanying measures**, in particular the introduction of a criminal immunity regime for cartelists

The Monopolies Commission has presented its XXth Main Report under § 44(1) of the Act Against Restraints on Competition (ARC) today, which is entitled: **"A competitive order for the financial markets"**. In that Report, the Monopolies Commission investigates the question whether the interest in improved cartel enforcement warrants the recommendation of penalising particularly serious competition law violations, so-called hardcore cartels. A particularly promising approach is seen in the criminal enforcement against the **natural persons responsible** for the formation and maintenance of cartels.

A reform directed at a tighter sanctioning system has to be considered where existing cartel enforcement tools do not prevent actual or potential cartelists effectively from forming or maintaining cartels. At present, the European Commission and the German competition authorities focus their cartel enforcement on the undertakings concerned and impose sometimes very high fines on these undertakings. A sufficient deterrence effect, however, might be doubtful as newly formed and extensive cartel schemes are still being detected again and again, despite the fines that have been drastically increased for several years – the European Commission has imposed fines in a billion-Euro range in more recent cases. It should be noted, though, that the legislative framework for public and private cartel enforemcent has continuously been developed in the past few years. These – in some respect topical – developments make it difficult to draw comprehensive conclusions from the deterrence effect exerted by the existing sanctioning system. This central question accordingly deserves further analysis in the medium term.

"Several indications do exist that the **deterrence effect of the sanctioning system under competition law should be increased**", said Professor Daniel Zimmer, the chairman of the Monopolies Commission. Firstly, theoretical work on the amount of efficient sanctions suggests that, in view of the limited detection risk for cartels (approx. 30 percent), the fines currently imposed on undertakings are well too low to produce a sufficient preventive effect. However, a further increase of fines could bring about negative social consequences, in particular for the creditors and the employees of the undertaking concerned, and therefore have to be viewed critically. Secondly, the undertakings can hope, due to the cartel leniency programmes, that they will be able to avoid a fine or to be imposed only a reduced fine; meaning that also the deterrence effect resulting from regulatory sanctions is reduced. Fines imposed on the cartel members' immediately acting employees are equally unlikely to produce a sufficient deterrence effect. The European Commission cannot impose fines on natural persons, and the German cartel authorities likewise focus their cartel enforcement on the involved undertakings. Further,

Monopolkommission
Heilsbachstraße 16 · 53123 Bonn · Tel +49 . 228 . 338882 -30 · vorsitzender@monopolkommission.bund.de
www.monopolkommission.de

it cannot be ruled out that employees receiving a fine are financially compensated for that fine by their employers.

In the Monopolies Commission's view, criminal sanctions imposed on the acting individuals are the first route to be explored if future analysis confirms the deficient deterrence effect of the existing sanctioning system. This would solve the problem that it is always natural persons who are responsible for cartel engagements, but that high monetary sanctions regularly hit the undertaking behind them (principal-agent problem). Criminal sanctions apply directly to the relevant employee and exercise an **increased deterrence effect** because they involve significantly higher societal disapproval than a mere fine. A criminal sanction implies a certain stigmatisation. Moreover, employers will find it much harder to compensate employees for a prison sentence than for a fine. In addition, an increased deterrence effect would ensue from the fact that criminal enforcement against hardcore cartels is also accompanied by a threat of disqualification.

To ensure the effectiveness of potential criminal sanctions, and to avoid negative repercussions on regulatory cartel enforcement, it would be neccessary to take accompanying measures. In particular the creation of **a criminal leniency system for cartelists** would be required. In addition, the **position of the competition agencies in criminal court cases** would have to be improved, for instance by empowering them – following the example of the fiscal authorities in tax crime cases – to conduct the investigation in the public prosecutor's stead.

Another option immediately directed at the acting individuals and intended to increase the preventive effect of cartel sanctions would be to empower the competition authorities to order disqualification. Additionally, it may be considered to increase the likelihood of cartel detection by introducing statutory remuneration for whistleblowers. Such a whistleblowing system could foresee that at least the whistleblowers not implicated in a cartel infringement should receive a premium. In contrast, the Monopolies Commission does not consider the introduction of a corporate criminal law to be an effective means, at least for the area of competition law. In that respect, a particularly relevant issue is that the connected incentives do not apply to the immediately acting individuals.