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Schmutzige Wäsche im Arbeitskreis – Reinigungshinweise des BGH an das OLG Frankfurt

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Kurz vor Weihnachten verkündete der BGH das Urteil zu einer Schadensersatzklage im Nachgang zum „Drogeriekartell", das nicht nur die Kartellrechtswelt, sondern auch die Gläubiger der insolventen Drogeriekette Anton Schlecker e.K. mit Spannung erwartet hatten. Der BGH stellt darin ausdrücklich klar, dass bei einem kartellrechtswidrigen Informationsaustausch über Preisverhalten eine tatsächliche Vermutung für die Entstehung eines Schadens spricht. ***Marie-Luise Heuer*** *und* ***Kai Woeste*** *besprechen für D'Kart die Urteilsgründe.*

Schmutzige Wäsche im Arbeitskreis „KWR"

Am sog. Drogeriekartell waren insgesamt 15 Hersteller von Marken-Drogerieartikeln beteiligt, die sich von mindestens 2004 bis 2006 im Rahmen des Arbeitskreises „Körperpflege, Wasch- und Reinigungsmittel" des Markenverbandes e.V. frei nach dem Motto "Eine Hand wäscht die andere" regelmäßig gegenseitig über (geplante) Bruttopreiserhöhungen und den Stand von Verhandlungen mit gemeinsamen Abnehmern informierten. Das Bundeskartellamt verhängte im Jahr 2013 gegen die beteiligten Unternehmen Geldbußen in Höhe von insgesamt EUR 63 Mio.[1] Der Insolvenzverwalter von Schlecker – ein Abnehmer der am Drogeriekartell beteiligten Hersteller – forderte anschließend von mehreren Kartellanten insgesamt EUR 212,2 Mio. Schadensersatz.

Vorinstanz

Das Schlecker-Verfahren kreiste um die Frage, unter welchen Umständen eine tatsächliche Vermutung im Sinne eines Erfahrungssatzes dafür spricht, dass ein Kartellrechtsverstoß zu einem Schaden der Marktgegenseite führt. Geklärt war dies bislang lediglich für Hardcore-Preisabsprachen sowie Quoten- und Kundenschutzkartelle, bei denen seit der Rechtsprechung zum Schienenkartell zwar kein Anscheinsbeweis, aber immerhin eine tatsächliche Vermutung für kartellbedingt erhöhte Preise streitet. Der BGH und vor ihm das OLG Frankfurt sahen sich im Schlecker-Verfahren nun aber mit einer anderen Art von Wettbewerbsbeschränkung konfrontiert: Erstreckt sich der beschriebene Erfahrungssatz auch auf Fälle eines „reinen" kartellrechtswidrigen Informationsaustauschs? Das OLG Frankfurt hatte hieran erhebliche Zweifel angemeldet, da der bloße Austausch von Informationen nicht unmittelbar auf eine Verhaltenskoordinierung hinsichtlich einzelner Wettbewerbsparameter hinauslaufe. Schlussendlich hat das OLG dem Erfahrungssatz jedenfalls im konkreten Fall kein maßgebliches Gewicht zugemessen, weil es zahlreiche gegenläufige Indizien für gewichtig hielt und den Drogeriekartellanten zumindest mit Blick auf die Schadensersatzhaftung eine reine Weste bescheinigte.

Schleudergang: Die Entscheidung des BGH

Die Entscheidung der Vorinstanz wurde nun vom BGH gehörig in die Mangel genommen. Ungeachtet der Bedenken des OLG Frankfurt stellt der BGH fest, dass auch bei einem Austausch geheimer Informationen, die – wie hier – das aktuelle oder geplante Preissetzungsverhalten gegenüber gemeinsamen Abnehmern betreffen, eine tatsächliche Vermutung für die Entstehung eines Schadens spricht. Zur Begründung verweist der BGH u.a. auf die EuGH-Rechtsprechung zum Begriff der aufeinander abgestimmten

[1] BKartA, Fallbericht vom 26.5.2015, Az. B11-17/06.

Verhaltensweisen im Sinne des Art. 101 Abs. 1 AEUV, nach der zu vermuten ist, dass Wettbewerber die zwischen ihnen ausgetauschten Informationen bei der Bestimmung ihres Marktverhaltens berücksichtigen. Der BGH beruft sich zudem auf die hohe Wahrscheinlichkeit und den ökonomischen Erfahrungssatz, dass Kenntnisse über künftiges Marktverhalten von Wettbewerbern bei unternehmerischen Entscheidungen typischerweise berücksichtigt werden. Welches Gewicht dem Erfahrungssatz im konkreten Fall zukommt und ob er bestätigt oder entkräftet wird, hängt sodann von einer Gesamtwürdigung aller Umstände des Einzelfalls ab.

In der Konsequenz und anknüpfend an *Schienenkartell V* hat der BGH die OLG-Entscheidung zudem insoweit als rechtsfehlerhaft abgebügelt, als es der Klägerin die Darlegung indizieller Umstände abverlangte, die für eine ausdrückliche oder konkludente *Verständigung* sprechen. Laut BGH folgt vielmehr aus der Bedeutung und Tragweite der tatsächlichen Vermutung eines Schadens, dass nicht die Klägerin, sondern die Beklagten für Umstände, die für eine Unerheblichkeit des Informationsaustauschs sprechen, darlegungs- und beweisbelastet sind.

Außerdem hat der BGH dem OLG mit Blick auf dessen Würdigung der indiziell bedeutsamen Umstände gründlich den Kopf gewaschen. Insoweit sah er sich nämlich gezwungen, gleich eine Vielzahl an Fehlern zu bereinigen. Beispielsweise werde die tatsächliche Vermutung nicht dadurch in Zweifel gezogen, dass man im KWR-Arbeitskreis nicht notwendigerweise über konkrete Prozentsätze der Preiserhöhungen gesprochen hat. Denn allein das Wissen, dass eine Preisbewegung bei einem Wettbewerber ansteht und wie die Händler darauf reagieren, führe dazu, dass man als Hersteller mit einem gewissen Vorsprung in die nächste Verhandlung geht. Das heißt: Die wettbewerbliche Unsicherheit ist reduziert. Sprach nicht zumindest die Tatsache, dass sich die Teilnehmer des Drogeriekartells wohl nur über einen Zeitraum von etwas über zwei Jahren und zudem nicht allzu häufig getroffen haben, gegen einen Schaden? Auch insoweit wischt der BGH die Argumentation der Vorinstanz vom Tisch: Weder die geringe Frequenz noch die vergleichsweise kurze Dauer des Informationsaustauschs könne die tatsächliche Vermutung entkräften. Da es nämlich um hochaktuelle Informationen ging und die Vereinbarungen zwischen den Kartellanten und ihren Abnehmern im Jahresturnus neu verhandelt wurden, reiche grundsätzlich bereits ein einmaliger Informationsaustausch aus, um das Verhandlungsergebnis zu beeinflussen.

Eine weitere Passage des Urteils lässt aufhorchen: Nachdem der BGH bereits in *LKW-Kartell II* die (potenzielle) indizielle Bedeutung von Regressionsanalysen für die Schadensfeststellung hervorgehoben hat, wirft er im Schlecker-Verfahren der Vorinstanz nun vor, die Einholung eines gerichtlichen Sachverständigengutachtens zur Durchführung einer Regressionsanalyse vorschnell unter den Tisch gekehrt und wichtige Inputfaktoren nicht ausreichend gewürdigt zu haben.

Ausblick

Statt das Verfahren in einem Abwasch abzuhandeln war der BGH gezwungen, die Sache zur neuen Verhandlung und Entscheidung an das OLG Frankfurt zurückzuverweisen. Dieses dürfte nun einigermaßen baff aus der Wäsche gucken, nachdem seine Beweiswürdigung gehörig auf den Kopf gestellt wurde. Die Umsetzung der Maßgaben des BGH darf daher mit Spannung erwartet werden.

Kartellgeschädigten verleiht das Urteil jedenfalls weiteren Rückenwind. Die Erstreckung der tatsächlichen Vermutung auch auf den kartellrechtswidrigen Informationsaustausch ist nicht nur in der Sache überzeugend und eine konsequente Fortführung der Rechtsprechung des Kartellsenats. Nach einer Reihe klägerfreundlicher Urteile ist die Entscheidung auch als weiterer Fingerzeig in Richtung eines schlagkräftigen *private enforcement* zu lesen, der den teils noch zögerlichen Instanzgerichten weiter Dampf machen dürfte. Für Neufälle bringt künftig schon die Schadensvermutung des § 33a Abs. 2 GWB Klägern eine gewisse Erleichterung. Aber auch dort, wo die Rechtsprechung jetzt eine tatsächliche Vermutung für die Schadensentstehung annimmt, wird es jedenfalls auf zivilrechtlicher Ebene für Kartellanten zunehmend schwerer, ihre Hände in Unschuld zu waschen.

Natürlich klärt das Urteil nicht alle Fragen. Offen ist beispielsweise, ob eine Vermutung vergleichbaren Gewichts auch dann besteht, wenn der Informationsaustausch nicht das Preissetzungsverhalten, sondern andere Wettbewerbsparameter betrifft. Gestützt auf die Überlegung, dass Unternehmen die mit einem

Kartellrechtsverstoß verbundenen Risiken in der Regel nur dann eingehen, wenn sie ihnen einen ökonomischen Vorteil bringen, werben etwa Teile des Schrifttums für grundlegende Beweiserleichterungen bei allen Kartellverstößen. Auch die Anforderungen an den Umgang mit ökonomischer Evidenz (insbes. Regressionsanalysen) sind nach der Schlecker-Entscheidung bei Weitem nicht geklärt. Je mehr künftig tatsächlich Urteile der Instanzgerichte erwartet werden dürfen, die sich mit dem Schadensumfang und der -bemessung befassen, werden diese Fragen sicherlich zunehmend hochgespült.

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Dirty Laundry in the working group– Cleaning instructions from the Federal Court of Justice to the Frankfurt higher Regional Court (english version)

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*Shortly before Christmas, the Federal Court of Justice (FCJ) passed judgement on the follow-on lawsuit regarding the so-called "drugstore products cartel". It had been eagerly awaited not only by the antitrust world but also by the creditors of the insolvent drugstore chain Anton Schlecker e.K. In the ruling, the FCJ expressly clarifies that in the event of an anti-competitive information exchange on price behavior, there is a factual presumption that such information exchange caused damage. Meanwhile, the grounds of the FCJ's judgement were published and are discussed here by **Marie-Luise Heuer** and **Kai Woeste**.*

Dirty laundry in the "KWR" working group

A total of 15 manufacturers of branded drugstore products were involved in the so-called drugstore products cartel. From at least 2004 to 2006, they regularly informed each other about (planned) gross price increases and the status of negotiations with mutual customers within the framework of the working group on "Body Care, cleaning agents and detergents" (KWR) of the trademark association Markenverband e.V. In 2013, the German Federal Cartel Office imposed fines totaling EUR 63 million on the companies and their sales representatives involved (Case No. B11-17-06). The insolvency administrator of Schlecker – a retailer affected by the drugstore products cartel – seeks compensation amounting to EUR 212.2 from several cartel participants.

Preliminary proceedings

The Schlecker proceedings revolved around the question under what circumstances a factual presumption in the sense of an empirical principle indicates that an

antitrust infringement leads to damages to the market opponent. So far, this had only been clarified for hard-core price agreements and quota and customer protection cartels. In the rail cartel cases, the FCJ ruled that there is no prima facie evidence, but at least a factual presumption of cartel-related price increases. In the Schlecker case, however, both the FCJ and the Frankfurt Higher Regional Court (HRC) were confronted with a different type of restriction of competition: Does the described empirical principle also extend to cases of a "pure" anti-competitive information exchange? The Frankfurt HRC had expressed considerable doubts about this. According to the HRC, the mere exchange of information did not directly amount to a coordination of conduct with regard to individual competition parameters. In the end, the HRC did not attribute any substantial significance to the empirical evidence, at least not in this specific case. It attributed more significance to numerous contrary indications. It certified the drugstore products cartelists a clean slate, at least with regard to liability for damages.

Spin cycle: The decision of the FCJ

The lower court's decision has now been overruled by the FCJ. Notwithstanding the concerns of the Frankfurt HRC, the FCJ found that even in the case of a secret information exchange relating to current or planned pricing behavior vis-à-vis mutual customers, there is a factual presumption that such information exchange caused damages. By way of justification, the FCJ refers, among other things, to the ECJ case law on the concept of concerted practices within the meaning of Article 101 (1) TFEU, according to which it must be presumed that competitors take into account the information exchanged between them when determining their ow market conduct. According to the FCJ, this is part of economic experience and in line with economic rationality. It is up to the courts to examine, within the framework of their overall assessment, whether the evidence at hand confirms or invalidates the empirical principle. As a consequence and following on from *Schienenkartell V* (rail cartel V), the FCJ also rejected the HRC decision as legally erroneous insofar as it required the plaintiff to present indicative circumstances that speak in favor of an express or implied understanding. According to the FCJ, it follows from the significance and scope of the actual presumption of damage that not the plaintiff, but the defendants bear the burden of proving and presenting circumstances indicating that the information exchange is irrelevant.

In addition, the FCJ gave the HRC a thorough dressing down regarding its assessment of the indicative circumstances. In this respect, the FCJ had to numerous mistakes. For example, the factual presumption was not called into question by the fact that it had not been proven that concrete percentages of the price increases had been discussed in the KWR working group. According to the FCJ, the mere knowledge that a competitor will change its prices and how retailers are going to react to this change leads to the manufacturer going into the next round of negotiations with a certain head start. Essentially, this means that competitive uncertainty is reduced. But didn't the fact that the participants in the drugstore products cartel probably only met over a period of slightly more than two years and, moreover, rather infrequently, argue against any harm done? The FCJ also rejects this reasoning of the lower court: Neither the low frequency nor the rather short duration of the information exchange could rebut the factual presumption. Since the information was highly topical and the agreements between the cartelists and their customers were renegotiated every year, a one-time exchange of information was sufficient to influence the outcome of the negotiations.

Another paragraph in the ruling is noteworthy: After having emphasized the (potential) indicative importance of regression analyses for the assessment of damages already in its *LKW-Kartell II* (trucks cartel II) ruling, the FCJ now finds that the lower court rashly swept under the rug in a premature move the possibility of obtaining a judicial expert opinion (incl. regression analysis) and did not sufficiently consider important input factors.

Outlook

The FCJ had to refer the case back to the HRC for further proceedings. The implementation of the FCJ's instructions is therefore eagerly awaited.

In any case, the ruling is a further boost for cartel victims. The extension of the factual presumption to anti-competitive information exchange is not only convincing and in line with the case law of the FCJ's cartel division. As part of a series of plaintiff-friendly rulings, the decision can also be read as a further call to the lower instance courts to contribute to an effective

private enforcement. When it comes to new cases, the presumption of damage under Section 33a (2) of the German Act against Restraints of Competition will simplify matters for plaintiffs to a certain extent. But even where case law provides for a factual presumption of damage, it will become increasingly difficult forsupposedly clean-cut cartelists to wash their hands of the matter at least with regard to damages claims.

Of course, the ruling does not clarify all questions. For example, it remains unclear whether the presumption also applies if the information exchange does not concern price-setting but other competition parameters. In principle, companies are only likely to take the risks associated with an antitrust violation if they expect to gain an economic advantage from it. Thus, some scholars advocate fundamental simplifications of evidence for all antitrust violations. Moreover, the legal requirements for the assessment of economic evidence (especially regression analyses) are far from being clarified after the Schlecker decision. With an increasing number of rulings by the courts of lower instance that deal with the scope of damages, these questions are likely to gain further importance in the future.

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A lot to digest, and more to come!

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*On 6 February 2023 the European Commission released a draft notification form as part of the draft Implementation Regulation to the FSR (EU Regulation 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market). This reminded **Merit Olthoff** and **Thomas Lübbig** of lines from a famous German poem:*

"Spirits that I've cited – my commands ignore." – These lines from a famous poem will certainly be well known to German-speaking readers of this blog. And the fortunate translation provided by Edwin Zeydel is just as poignant as Goethe's original. Why are we reminded of this when looking at the draft notification form released by the European Commission on 6 February 2023 as part of the draft Implementation Regulation to the FSR?

With the FSR, the European Commission seeks to control "foreign subsidies", which it broadly defines as a "direct or indirect financial contribution by a non-EU country, which is limited to one or more companies or industries and which confers a benefit on a company active in the Single Market" (quoted from the EU's dedicated FSR webpage). "Foreign subsidy" is an umbrella term which covers various financial instruments such as "interest-free loans, unlimited guarantees, capital injections, preferential tax treatment, tax credits, grants, etc.". Under the FSR, the Commission is empowered to review ex ante certain inbound investments in the event of (i) concentrations involving subsidies and (ii) bids in public tenders for major projects in an EU Member State where a bidder may be "supported by the government of a non-EU country through direct subsidies". These cases are to be brought to the attention of the Commission through a mandatory and suspensory ex ante notification. At the same time the Regulation provides for the own-initiative investigation of matters where the "EU subsidiary of a non-EU country parent company has access to cheap, State-supported financing in the non-EU country of the parent company" (as all the preceding citations also quoted from the EU's dedicated FSR website).

To carry out these kinds of investigations, the Commission will need three key resources: (i) data and information, (ii) dedicated staff, and (iii) sufficient time. While all three may be helpful at times, a large amount of information – which could be conducive to achieving optimum results in the substantive review – will necessitate even more staff and time. So, this looks a bit like a double (or perhaps even triple) bind for an authority which already finds it difficult to investigate expediently similar situations of State aid within the Internal Market. It took – to pick an illustrative (and not the worst) example – almost two years to investigate whether internal capital injections by group companies of PostNord (jointly controlled by the Kingdoms of Denmark and Sweden, Cases SA.49668 and SA.53403 of 10 September 2021) were or were not State aid. How much more difficult will it be to investigate a similar situation if the organisms that made the capital injection into a non-EU inbound investor or bidder in a major procurement project are, e.g., (i) holding companies of a central or provincial Government in the PRC or (ii) Sovereign Wealth Funds?

When it comes to staffing, the Commission apparently needs 120 case officers to administer the new Regulation efficiently, and some of these resources may need to be drawn in from other units of DG COMP and elsewhere within the Commission. As to data, the Commission, in all cases which come to its attention by way of

an ex-ante notification, will primarily rely on the notifying party(ies). To this end, on 6 February 2023, the Commission published for consultation a draft Implementing Regulation to the FSR, with two draft notification forms in annex. Annex 1, which deals with concentrations bears certain similarities to the Form CO known under the EUMR, and, to the credit of the Commission, it is not overly long. Yet, when you look at the individual sections, you will see that the Commission's appetite for information is not easy to satiate. A central element of the form is section 5 which asks for a list of "foreign financial contributions", a term that in its substantive remit may go beyond the definition of a State aid under Article 107 (1) TFEU, and which could require notifying parties to screen hundreds or thousands of agreements or other financial relationships they may have with non-EU State Governments or Government-controlled bodies. On the other hand the Commission does make a laudable attempt to alleviate this burden through the establishment of two de minimis thresholds, which are that foreign financial contributions (i) below an individual amount of 200,000 EUR, or (ii) in total, per third county and per year, below 4 million EUR, do not need to be listed, but still count towards the notification thresholds.

Even more challenging if not controversial will be answering section 6 of the draft form. This deals with situations where the acquisition of a target occurs in a structured bidding process. It is not limited to privatizations but covers every private sector transaction meeting the FSR notification thresholds which is organized through a bidding process. In such a situation, and possibly even prior to submitting the final and binding bid in a bidding process, the notifying party has not only to provide a "detailed description of the bidding process" but also to indicate "how many other candidates were contacted" and how many of those candidates "expressed an interest" and provide "a detailed description of the profile of each of the other candidates" in the bidding process. Moreover, they have to "indicate how many letters of intent and non-binding offers were received and from whom". More information is requested on the basis of the due diligence carried out and corresponding reports and evaluations have to be provided.

Well, does this really look like a thought through concept?

While it is understandable that the Commission may appreciate this kind of information, why does it require it to be provided by the notifying party? It is odd because, under the general competition rules, the notifying party is not even supposed to know what the other bidders are doing, or even to know whether there are other bidders at all and how many. Hence, section 6 requires the party to rely on (i) (a dearth of) information in the public domain (if any), or (ii) mere conjecture. Alternatively, (iii) it may need to negotiate a clause in pre-SPA documents, such as NDAs or the like, for the seller to make this information available. But will the seller be prepared to agree to such a clause? Will the seller even be allowed to do that under Article 101 TFEU? In any event, this burdensome provision will put non-EU bidders which need to submit a filing under the FSR at an unfair disadvantage. Is that an intended consequence of section 6? Probably – and hopefully – not – but that does not solve the problem. If section 6 is not reduced in scope following the consultation, the Commission may still deal with this issue "pragmatically" as already indicated in recital 9(a) of the form, whereby waivers may be granted by the Commission in a situation where the notifying party(ies) "indicate where any of the requested information that is unavailable could be obtained by the Commission". This way of proceeding would not be unprecedented, and it is also used by the Commission under the EUMR in situations of a hostile takeover where certain information from the seller and the target can only be obtained through an RFI addressed to them directly.

Nonetheless, this would sound like bad news to bidders subject to the FSR who – unlike bidders not subject to the FSR – will depend on the goodwill of the Commission to obtain such a waiver and, of course, this information will most likely be kept confidential by the Commission. That notifying party will then be faced with a kind of in-camera process where the Commission takes its decision on the basis of information that is not disclosed to the notifying party.

So, in conclusion, the application of the FSR, both in terms of the scope of the foreign financial contributions to be listed under section 5 and the bidding market information requested under section 6, will require a lot of pragmatism on the part of the Commission, which may well be forthcoming in most cases, but perhaps not in all. This would then raise an issue of

fairness and, quite frankly, also the question why the EU legislator would enact a law which, in order for it to be reasonably applied, relies on the authority exercising a certain pragmatism (which inherently introduces an element of arbitrariness) from the start?

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Conference Debriefing (35): FIW-Symposium Innsbruck

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Wer nicht Teil der Kartellrechtsfamilie in der DACH-Region ist, wird mit der Tiroler Landeshauptstadt Innsbruck sicher primär die Alpen und den Wintersport verbinden und vielleicht auch an die phantastischen Abenteuer des Raumschiffes Orion denken, dessen Protagonist, Major Cliff Allister McLane, von Dietmar Schönherr, einem der prominenten Söhne der Stadt Innsbruck verkörpert wurde. Freundinnen und Freunde das Kartellrechts und der Wettbewerbsökonomie hingegen denken sofort an das jährliche Symposion des Forschungsinstituts für Wirtschaftsverfassung und Wettbewerb (kurz: FIW), das vom 22. bis 24. Februar 2023 schon zum 56. Mal stattfand und traditionell an Aschermittwoch startet, wenn auch die nicht völlig unbedeutende Kartellrechtsszene aus dem Rheinland wieder bei Sinnen ist. ***Prof. Dr. Justus Haucap*** *war vor Ort und berichtet.*

Nach zweijähriger Pause (genau, wegen Corona) trafen sich jetzt 120 Rechtswissenschaftler, Ökonomen, Anwälte, Enforcer und Industrievertreter, um im Hotel Grauer Bär über aktuelle Fragen des Kartellrechts zu diskutieren oder zu klagen, je nach Façon. Wer war denn da oder worum ging es genau? Wer eine nüchterne Übersicht bevorzugt, klicke bitte hier[2]. Wer sich hingegen eine subjektiv gefärbte, stark verzerrte Schilderung antun möchte, kann weiterlesen. Achtung: ich bin auch (noch) Vorsitzender des Wissenschaftlichen Beirats des FIW – die verzerrte Darstellung ist also garantiert. Doch nun zur Sache, liebe Leserinnen und Leser.

Die Behörden-Chefs

Den informellen Auftakt machte Mittwochabend die hochgeschätzte Interims-Generaldirektorin der Bundeswettbewerbsbehörde (BWB), Dr. Natalie Harsdorf-Borsch. Beim Empfang auf Einladung der BWB wies sie Andreas Mundt darauf hin, dass die BWB die Sektoruntersuchung zum Großhandel mit Mineralöl in nur drei Monaten abgeschlossen habe. Aber dass man den Gästen einen einschenkt ist als Gastgeberin natürlich in Ordnung. Gut gefallen hat mir auch ihre Anmerkung zu gerichtlichen Fehlurteilen, dass in diesen Fällen das Gericht nun rechtssicher geirrt hätten.

Formell machte Andreas Mundet den Auftakt am Donnerstagmorgen und sprach über „aktuelle Entwicklungen der Kartellrechtspraxis des Bundeskartellamtes“. Der Präsident des Amtes betonte zunächst, dass trotz DMA § 19a GWB seine Bedeutung behalten werde. Für den Bereich der Kartellverfolgung wies Mundt darauf hin, dass weltweit – mit der bemerkenswerten Ausnahme Österreichs – Kronzeugenanträge rückläufig seien. Das Amt verfolge daher bei der Kartellverfolgung nun eine Doppelstrategie. Zum einen gebe es ein intensiveres Screening von Märkten durch das Amt, um die Wahrscheinlichkeit der Kartellaufdeckung zu steigern, zum anderen sprach sich Mundt für eine Privilegierung bis hin zur Freistellung von Kronzeugen bei Schadensersatzansprüchen im Innenverhältnis zu den anderen Kartellanten aus.

Im Bereich der Fusionskontrolle wies der Präsident darauf hin, dass er als „Jurist aus Deutschland“ mit der Interpretation des Artikels 22 der EU-Fusionskontrollverordnung durch die Europäische Kommission durchaus seine Probleme habe. Wie durch den Verweis einer Fusion durch eine *nicht* zuständige Wettbewerbsbehörde an eine andere *nicht* zuständige Wettbewerbsbehörde eine Zuständigkeit entstehen könne, erschließe sich ihm bislang nicht. Mundt stellte auch die Frage, wohin das Bundeskartellamt selbst in der Zukunft wolle. Er stehe zwar weiteren Erweiterungen des Bundeskartellamtes – das ist nun nicht wirklich überraschend – aufgeschlossen gegenüber, doch mache er sich durchaus auch Sorge um den „Markenkern“ des

[2] http://fiw-online.de/de/veranstaltungen/fiw-symposion.

Amtes, wenn dem Amt immer weitere Aufgaben übertragen würden.

Fusionskontrolle außerhalb der Schwellenwerte

Im anschließenden Panel diskutierten die schon erwähnte Natalie Harsdorf-Borsch (BWB), Konrad Ost (Vizepräsident des Bundeskartellamtes) und Birthe Panhans (GD Wettbewerb) unter der Leitung meines Kollegen im FIW-Beirat, Torsten Körber (Uni Köln), über „Fusionskontrolle außerhalb der Schwellenwerte". Die kommissarische Generaldirektorin der BWB präsentierte – vielleicht noch beeindruckt vom Treffen akademischer Wettbewerbsökonomen in der BWB in der Vorwoche – zahlreiche Zahlen. Seit 2015 habe es 14 Anträge nach Art. 22 FKVO in der EU gegeben. Die BWB sei dabei EU-weit Spitzenreiterin mit vier Erstanträgen (bei insgesamt 14 Anträgen). Zudem habe die BWB sich drei weiteren Anträgen angeschlossen, sei also in die Hälfte aller Fälle involviert gewesen. Das Bundeskartellamt habe drei Erstanträge gestellt, Frankreich und Spanien je 2 und Finnland, Dänemark und Großbritannien jeweils einen. Zudem verwies (passendes Wort in diesem Kontext) Harsdorf-Borsch auf den gemeinsamen Leitfaden von BWB und Bundeskartellamt zu Transaktionswert-Schwellen. Von November 2017 bis Dezember 2022 habe es in Österreich 121 Fusionsvorhaben gegeben, die aufgrund der Transaktionswertschwelle angemeldet wurden. Das sind in jedem Jahr deutlich weniger als 10 Prozent der angemeldeten Fusionen. Knapp die Hälfte entfalle auf digitale Märkte und die Gesundheitsbranche.

Mit Ausnahme von zwei Fällen (*Meta/Giphy* und eine dann zurückgezogene Transaktion) wurden alle dieser Anmeldungen in Phase I freigegeben. In Bezug auf Artikel 22 FKVO beabsichtige die BWB allerdings an der bisherigen Praxis festzuhalten, nur Fälle nach Artikel 22 FKVO an die Kommission zu verweisen, wenn auch eine nationale Anmeldepflicht in Österreich bestehe. Ganz ähnlich sah das Konrad Ost, der Vizepräsident des Bundeskartellamtes. Birthe Panhans (EU Kommission) hingegen verwies auf die Notwendigkeit, potenzielle Killer-Akquisitionen besser kontrollieren zu können. Sie verwies auf den diesbezüglichen Leitfaden der Kommission und insbesondere Textziffer 19 des Leitfadens, wo Indikatoren aufgezählt werden, die herangezogen werden, um zu beurteilen, ob eine Kille-Akquisition vorliegen könnte. Namentlich nannte Panhans den Transaktionswert als einen Indikator (unter vielen), das innovationsgeschehen sowie den Zugang zu wettbewerbsrelevanten Assets (wie etwa Daten). Bisher sei nur ein Fall von 35 geprüften Fusionsvorhaben intensiver geprüft worden.

Wettbewerbspolitik in den nächsten 10 Jahren

Nach der Mittagspause hatte ich meinen Auftritt und durfte über (einige) „Herausforderungen für die Wettbewerbspolitik in den nächsten 10 Jahren" sprechen, konkret über digitale Märkte, Nachhaltigkeit und Arbeitsmärkte. Im Bereich der digitalen Märkte ist mein Plädoyer, mit einer etwaigen Verschärfung der Fusionskontrolle zu warten, bis wir mehr Klarheit darüber haben, welche Wirkung die nun deutlich verbesserte Missbrauchskontrolle (speziell durch DMA, §§ 19a und 20 GWB) entfaltet. Prinzipiell scheint mir die deutlich aufgerüstete Verhaltenskontrolle besser geeignet zu sein, möglichen Missbrauch von Marktmacht zu unterbinden. Für Wettbewerbsbehörden dürfte es zumindest auf digitalen Märkten kaum möglich sein, Killer-Akquisitionen *ex ante* oder selbst *ex post* verlässlich zu identifizieren. Das kontrafaktische Szenario ist dazu viel zu unklar. Besser gelingt dies aufgrund der vergleichsweise langen Forschungspipeline in der Pharmabranche oder der Agrochemie. Aber dort kann dies heute auch ohne Verschärfung der Fusionskontrolle adressiert werden, etwa durch die Einführung des Schwellenwertes für Transaktionswerte in Deutschland und Österreich.

Zudem äußerte ich mich skeptisch dazu, den Wettbewerbsbehörden immer weitere Ziele aufzugeben, wie Nachhaltigkeit oder Arbeitsmarktziele. Letzteres beginnt sich gerade in den USA abzuzeichnen, wo lebhaft diskutiert wird, ob in Fusionskontrollverfahren auch Arbeitsmarktbelange wie etwa die Entlohnung der Arbeitnehmerinnen und Arbeitnehmer berücksichtigt werden sollen.

Die 11. GWB-Novelle

Endlich ging es dann auch ganz direkt um die 11. GWB-Novelle. Jürgen Kühling (Monopolkommission, Uni Regensburg) stritt mit Torsten Körber, der für den kurzfristig verhinderten Stefan Thomas (Tübingen) einsprang, über „Wettbewerbsstörung als neuen Parameter für strukturelle Eingriffe durch die Wettbewerbsaufsicht". Beiden gemein war das Anliegen,

Verbesserungen gegenüber dem aktuellen Referentenentwurf herbeizuführen. Während der Vorsitzende der Monopolkommission die Rolle seiner Kommission gestärkt sehen wollte (und dazu immer wieder lobend das 58. Sondergutachten der Kommission zum damaligen Brüderle-Entwurf lobte – hat mir natürlich hervorragend gefallen) und zudem auf Kompensation pochte, sprach sich Torsten Körber für grundlegendere Änderungen aus, wie etwa die Einführung des aus § 11 TKG bekannten „Drei-Kriterien-Tests" und eine genauere und engere Definition des Begriffs der Wettbewerbsstörung, damit das GWB nicht zu einem Wettbewerbsverwaltungsgesetz werde. Thorsten Käseberg vom BMWK durfte dann das Podium stürmen und sich als dritter Referent zu den beiden Kollegen gesellen. Gegenüber einer verbesserten Kompensation zeigte er sich offen, nicht aber für die Einführung des „Drei-Kriterien-Tests", der hier konzeptionell aus seiner Sicht nicht passe.

Reisebegleitung des Bundeskanzlers

Eigentlich sollte am Freitagmorgen – nach ausschweifendem Dinner im Kaisersaal des Stiftskellers (siehe Titeloto oben) – Martina Merz, die Vorstandsvorsitzende der thyssenkrupp AG, sprechen. Sie musste sich jedoch kurzfristig von Group General Counsel Sebastian Lochen vertreten lassen, um mit Kanzler Scholz auf Auslandsreise zu gehen. Letzteres passte eigentlich gut zum Thema ihres Vortrags, der vor allem auf die neuen globalen Herausforderungen durch China, aber auch die USA (Stichwort: Inflation Reduction Act) einging. Hier wiederum kann ich ja nicht anders als auf unsere Podcast-Folge mit der hochgeschätzten Kollegin Katharina Erhardt hinzuweisen (wobei allein ihr Nachname allen Freundinnen und Freunden des Wettbewerbs Anreiz zum Reinhören sein müsste!)

Kartellschadensersatz beim BGH

Schweifen wir nicht ab. Weiter ging es mit Wolfgang Kirchhoff, bekanntermaßen Vorsitzender Richter am BGH, der zur aktuellen Rechtsprechung des Kartellsenats ausführte. Konkret ging es um zwei Urteile zum Kartellschadensersatz (Urteil vom 28.6.2022, KZR 46/20 – *Stahl-Strahlmittel* und Urteil vom 29.11.2022, KZR 42/20 – *Schlecker*) sowie einen Beschluss vom 27.9.2022 (KZB 75/21 – *Kartellrecht im Schiedsverfahren*). Im Urteil *Stahl-Strahlmittel* geht es um die Frage, ob einer Käuferin ein Kartellschaden entstanden sein kann, wenn sie nicht direkt bei Kartellanten gekauft hat, sondern bei einem Tochterunternehmen eines Kartellbeteiligten. Wie Kirchhoff erklärte, ist es aufgrund möglicher Preisschirmeffekte ausreichend, dass Waren erworben wurden, die Gegenstand der Kartellabsprache waren – allemal, wenn die Verkäuferin Tochter eines Kartellbeteiligten war. Der Umstand, dass die gezahlten Preise und Preisbestandteile (Schrottzuschlag, Energieaufschlag) unter den Kartellpreisen lagen, reiche nicht aus, einen kartellbedingten Preiseffekt auszuschließen, denn ohne Kartell hätten sich ggf. noch bessere Preise aushandeln lassen.

Im Fall *Schlecker* führte Kirchhoff aus, dass „bei Weitergabe geheimer Informationen eine hohe Wahrscheinlichkeit besteht, dass Marktverhalten der Kartellbeteiligten nicht dem hypothetischen Marktverhalten entspricht". Weiter: „Betreffen die geheimen Informationen Preissetzungsverhalten, liegen die nach Informationsaustausch erzielten Preise ***sehr wahrscheinlich*** im Schnitt über denjenigen, die sich sonst gebildet hätten." Für Ökonomen besonders relevante Mitteilung: „Methodische Fehler und fehlerhafte Tatsachenermittlung in Parteigutachten rechtfertigen nicht ohne Weiteres, Antrag auf Einholung einer solchen Regressionsanalyse abzulehnen oder von deren Einholung von Amts wegen abzusehen". Anders als Christian Lindner es wohl sagen würde gilt also für Kartellgeschädigte: Schlechte Gutachten sind wohl immer noch besser als gar kein Gutachten.

In der Frage der kartellrechtlichen Kontrolle von Schiedssprüchen schließlich machte Kirchhoff unmissverständlich klar, dass – trotz teilweise geäußerter Kritik – es keine Rechtsordnung hinnehmen könne, wenn Verstöße gegen ihre grundlegendsten Normen (und dazu zählt er insbesondere §§ 19, 20, 21 GWB) durch ihre eigenen Gerichte bestätigt würden. Daher sei eine Überprüfung von Schiedssprüchen in der Sache erforderlich.

Das Ende fand das Innsbrucker Symposion mit Berichten aus drei Arbeitsgruppen des FIW zum Wettbewerbspolitischen Leitbild (Berichterstatter Justus Herrlinger, DLA Piper UK), zu Kriterien für Wettbewerbsbeschränkungen (Berichterstatter Georg Böttcher, Siemens AG) und Nachhaltigkeit und Kartellrecht (Berichterstatter Georg Götz, Justus-Liebig-Universität Gießen). Dazu aber mehr demnächst auf den Internetseiten des FIW direkt.

Justus Haucap, Düsseldorf

Conference Debriefing (35): FIW-Symposium Innsbruck (English version)

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Those who are not part of the antitrust family in the DACH region will certainly associate the Tyrolean capital Innsbruck primarily with the Alps and winter sports and perhaps also think of the fantastic adventures of the spaceship Orion, whose protagonist, Major Cliff Allister McLane, was impersonated by actor Dietmar Schönherr, one of the prominent sons of the city of Innsbruck. Friends of antitrust law and competition economics, on the other hand, immediately think of the annual symposium of the Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb (a research institute, FIW for short), which took place for the 56th time from 22 to 24 February 2023 and traditionally starts three days after the famous Rhineland carnival culminates in the big processions called "Rosenmontagszug". That is good timing with regard to the not entirely insignificant antitrust community from the Rhineland – they are back to their senses. ***Prof. Dr. Justus Haucap*** *was there and reports here.*

After a two-year break (because of Corona, exactly), 120 legal scholars, economists, lawyers, enforcers and industry representatives met at the Hotel Grauer Bär to discuss current issues of antitrust law, or to complain, depending on one's mood. Who was there or what exactly was it about? If you prefer a sober overview, please click here.[3] If, on the other hand, you would like to listen to a subjectively coloured, highly distorted account, you can read on. Please watch out: I am also (still) the chairman of the Scientific Advisory Board of FIW – so the distorted presentation is guaranteed. But now to the point, dear readers.

The heads of the authorities

The informal start was made on Wednesday evening by the highly esteemed interim Director General of the Austrian Federal Competition Authority (BWB), Dr. Natalie Harsdorf-Borsch. At the reception hosted by the BWB, she pointed out to Andreas Mundt that the BWB had completed the sector enquiry into the wholesale trade in mineral oil in just three months. But as a host to the event, it is of course all right to pour the guests a drink. I also liked her comment on miscarriages of justice, that in these cases the court had now erred with legal certainty.

Formally, Andreas Mundt kicked off the conference on Thursday morning and spoke on "Current developments in the Bundeskartellamt's antitrust practice". The President of the Office first emphasised that despite the DMA, Section 19a of the German GWB, the competition act, would retain its importance. In the field of cartel prosecution, Mundt pointed out that worldwide – with the notable exception of Austria – leniency applications are declining. Therefore, the Bundeskartellamt is now pursuing a double strategy in cartel prosecution: On the one hand, there is a more intensive screening of markets in order to increase the probability of cartel detection, on the other hand, Mundt spoke out in favour of a privileged treatment up to exemption of leniency applicants with regard to claims for damages in relation to the other cartel applicants.

In the field of merger control, the President pointed out that as a "lawyer from Germany" he certainly had his problems with the European Commission's interpretation of Article 22 of the EU Merger Regulation. How jurisdiction could arise from the referral of a merger by one competition authority without jurisdiction to another competition authority without jurisdiction

[3] http://fiw-online.de/de/veranstaltungen/fiw-symposion.

is not yet clear to him. Mundt also raised the question of where the Bundeskartellamt itself wanted to head in the future. Although he was open to further expansions of the Bundeskartellamt – this is not really surprising – he was also concerned about the "core brand" of the Bundeskartellamt if more and more tasks were transferred to it.

Merger control beyond the thresholds

In the following panel, Natalie Harsdorf-Borsch (BWB), Konrad Ost (Vice-President of the Bundeskartellamt) and Birthe Panhans (DG Competition) discussed "Merger control outside the thresholds", chaired by my colleague on the FIW Advisory Board, Torsten Körber (University of Cologne). The acting Director General of the BWB – perhaps still impressed by the meeting of academic competition economists at the BWB the previous week – presented numerous figures. Since 2015, there have been 14 applications under Article 22 of the ECMR in the EU. The BWB is the EU-wide frontrunner with four initial applications (out of a total of 14 applications). In addition, the BWB had joined three other applications, i.e. it had been involved in half of all cases. The Bundeskartellamt had filed three initial applications, France and Spain two each and Finland, Denmark and the UK one each. In addition, Harsdorf-Borsch referred (appropriate word in this context) to the joint guidance of the BWB and the Bundeskartellamt on transaction value thresholds. From November 2017 to December 2022, there were 121 merger projects in Austria that were notified due to the transaction value threshold. That is significantly less than 10 percent of the notified mergers in each year. Almost half of them were in digital markets and the healthcare sector.

With the exception of two cases (*Meta/Giphy* and a transaction that was then withdrawn), all of these notifications were cleared in Phase I. With regard to Article 22 ECMR, however, the BWB intends to adhere to its previous practice of only referring cases under Article 22 ECMR to the Commission if there is also a national duty to notify in Austria. Konrad Ost took a very similar view. Birthe Panhans (EU Commission), on the other hand, referred to the necessity of being able to better control potential killer acquisitions. She referred to the Commission's guidelines on the subject and in particular to paragraph 19 of the guidelines, which lists indicators that are used to assess whether a killer acquisition could exist. Panhans mentioned the transaction value as one indicator (among many), innovation and access to competition-relevant assets (such as data). So far, only one case out of 35 merger proposals examined had been examined more intensively.

Competition policy in the next 10 years

After the lunch break, I had my appearance on stage and was allowed to speak about (some of) the "challenges for competition policy in the next 10 years", specifically about digital markets, sustainability and labour markets. In the area of digital markets, my plea is to wait with a possible tightening of merger control until we have more clarity about what effect the now significantly improved abuse control (especially through DMA, Sections 19a and 20 GWB) will have. In principle, the significantly upgraded behavioural control seems to me to be better suited to prevent possible abuse of market power. For competition authorities, at least in digital markets, it should hardly be possible to reliably identify killer acquisitions *ex ante* or even *ex post*. The counterfactual scenario is far too unclear for this. This is more feasible due to the comparatively long research pipeline in the pharmaceutical industry or agrochemicals. But there, this can be addressed today without tightening merger control, for example by introducing the transaction value threshold as in Germany and Austria.

Finally, the planned 11th amendment of the German competition act GWB was discussed directly. Jürgen Kühling (Monopolies Commission, University of Regensburg) argued with Torsten Körber, who stood in for Stefan Thomas (Tübingen), who was prevented from attending at short notice, about "Disturbance of Competition as a New Parameter for Structural Interventions by the Competition Authority". Both had in common the concern to bring about improvements compared to the current draft bill. While the Chairman of the Monopolies Commission wanted to see the role of his Commission strengthened (and repeatedly praised the Comission´s 58th special report on the then *Brüderle draft* – I liked it very much, of course) and also insisted on compensation, Torsten Körber argued for more fundamental changes, such as the introduction of the "three-criteria test" known from telecoms regulation (section 11 in the German telco act) and a more precise and narrower definition of the concept of distortion of competition, so that the GWB does

not become a competition administration law. Thorsten Käseberg from the Ministry was then allowed to storm the podium and join the two colleagues in defense of the draft. He was open to improved compensation, but not to the introduction of the "three criteria test", which in his view did not fit conceptually.

Gone with the Chancellor

On Friday morning – after a lavish dinner in the Kaisersaal of the Stiftskeller (see our photo at the top) – Martina Merz, CEO of thyssenkrupp AG, was supposed to speak. However, she had to be replaced at short notice by her Group General Counsel Sebastian Lochen in order to go on a trip abroad with Chancellor Scholz. That excuse was actually well suited to the topic of her speech, which focused on the new global challenges posed by China, but also by the USA (keyword: Inflation Reduction Act). I can't help but refer to our podcast episode with the highly esteemed colleague Katharina Erhardt (her surname alone, reminding us of a former German minister for economics, should be an incentive for all friends of competition to listen in!)

Cartel damages at the BGH

Let's not digress. We continued with Wolfgang Kirchhoff, known as the presiding judge at the Federal Supreme Court, who spoke about the current case law of the Cartel Senate. Specifically, it was about two judgements on cartel damages (judgement of 28.6.2022, KZR 46/20 – *Stahl-Strahlmittel* and judgement of 29.11.2022, KZR 42/20 – *Schlecker*) as well as a decision of 27.9.2022 (KZB 75/21 – *Kartellrecht im Schiedsverfahren*). In the *Stahl-Strahlmittel* judgement, the question is whether a buyer may have suffered cartel damage if it did not buy directly from cartel participants but from a subsidiary of a cartel participant. As Kirchhoff explained, due to possible price umbrella effects, it is sufficient that goods were purchased which were the subject of the cartel agreement – especially if the seller was the subsidiary of a cartel participant. The fact that the prices paid and price components (scrap surcharge, energy surcharge) were below the cartel prices was not sufficient to exclude a cartel-related price effect, because without a cartel it might have been possible to negotiate even better prices.

In the *Schlecker* case, Kirchhoff stated that "if secret information is passed on, there is a high probability that the market behaviour of the cartel participants does not correspond to the hypothetical market behaviour". Further: "If the secret information concerns price-setting behaviour, the prices achieved after the exchange of information are *very likely* to be on average higher than those that would otherwise have been formed." For economists, this is a particularly relevant message: "Methodological errors and faulty fact-finding in party expert opinions do not justify rejecting applications for such regression analyses or refraining from obtaining them ex officio". It seems that bad expert opinions are still better than no expert opinion at all for cartel victims.

Finally, on the question of antitrust review of arbitral awards, Kirchhoff made it unmistakably clear that – despite criticism voiced by some – no legal system could accept violations of its most fundamental norms (and he counted in particular Sections 19, 20, 21 GWB among these) being confirmed by its own courts. Therefore, a review of arbitral awards on the merits was necessary.

The Innsbruck symposium ended with reports from three FIW working groups on the Competition Policy Model (rapporteur Justus Herrlinger, DLA Piper UK), on Criteria for Restraints of Competition (rapporteur Georg Böttcher, Siemens AG) and Sustainability and Antitrust Law (rapporteur Georg Götz, Justus Liebig University Giessen). More about this soon on the FIW website.

Rupprecht Podszun, Düsseldorf

Vor der blauen Wand: Wettbewerb und Nachhaltigkeit in Berlin

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Dürfen Unternehmen sich mit anderen Unternehmen absprechen, um gemeinsam die CO_2-Emissionen zu verringern? Kaum eine Frage ist auf kartellrechtlichen Konferenzen landauf landab in den letzten Jahren mehr diskutiert worden. Das hängt auch damit zusammen, dass das erstmals grün geführte Bundesministerium für Wirtschaft und Klimaschutz in seiner Wettbewerbsrechtlichen Agenda 2025 Nachhaltigkeit im Kartellrecht als Schlüsselthema benannt hat. Forschende der Heinrich-Heine-Universität Düsseldorf haben im Auftrag des Ministeriums jetzt ein umfassendes Gutachten vorgelegt: „Wettbewerb und Nachhaltigkeit in Deutschland und der EU".[4] ***Justus Haucap und Rupprecht Podszun** hatten die Federführung und haben das Gutachten in dieser Woche in Berlin vorgestellt. **Podszun** berichtet hier, wie der Ausflug auf die Berliner Bühne gelaufen ist.*

Im Büro des Staatssekretärs

Es sind noch fünfzehn Minuten bis zum Start der Gutachtenvorstellung, als der Staatssekretär ins Büro bitten lässt. Der Einlass hatte sich etwas verzögert, offenbar hatte er mit Kartellamtspräsident Andreas Mundt, der schon bei ihm ist, noch etwas unter vier Augen zu besprechen. Die neueste Volte im Koalitionspoker um die 11. GWB-Novelle?

Die Zahl der Stellen, die Mundt dringend braucht, um die Europäische Kommission bei der DMA-Durchsetzung zu unterstützen? Oder ging es doch nur ganz banal um den Umzug des Bundeskartellamts, der im Bonner Generalanzeiger immerhin für ein Stürmchen im Wasserglas sorgte?

Als wir hereindürfen, ist der Raum schnell voll und Sven Giegold begrüßt uns dann auch ganz trocken: „So viele Stühle hab ich gar nicht." Neben ihm und Mundt haben sich Thorsten Käseberg, Referatsleiter für Wettbewerbspolitik im Hause, und sein Team sowie unser Team versammelt: Justus Haucap, meine Mitarbeiter Tristan Rohner und Philipp Offergeld und ich. Wie bringt man nun die Zeit rum, während man in der Sitzgruppe etwas ungelenk steht? Man spricht über die Büroeinrichtung. An den Wänden hängen Bilder von Bernard Schultze, die hat Giegold vom Vorgänger übernommen. Schultze, mehrfacher Teilnehmer der documenta, malt abstrakt und gehört zu den Begründern des Informel. Passt irgendwie zu Giegold. „Nur die Schiffe habe ich abräumen lassen", erzählt er. Vorbewohner Ulrich Nußbaum, Staatssekretär unter Peter Altmaier, hat ein Faible für die Seefahrt. Die sind nun abgetakelt und im Fundus vor Anker gegangen. Für eine eigenständige Neugestaltung des Büros hatte Giegold offenbar keine Zeit. Wo der Minister schon Müsli mit Wasser essen muss, wie er einst im Spiegel-Film erzählte, kann nicht erwartet werden, dass der Staatssekretär sich erst einmal um die Inneneinrichtung kümmert.

Die Transformation

Für deutsche Verhältnisse ist es ja auch ohne Neudekoration ein erstaunlicher Wechsel: Erstmals zog mit Robert Habeck ein Grüner ins Bundeswirtschaftsministerium ein. Eine lange Reihe schwarz-weißer Portraits, an denen wir kurze Zeit später vorbeihetzen, um rechtzeitig zur eigenen Gutachtenvorstellung zu kommen, erinnert an die ordnungspolitischen Mahner: Ludwig Erhard! Karl Schiller! Otto Graf Lambsdorff! (An jene, die aus anderen Gründen in Erinnerung blieben, wie

[4] https://www.bmwk.de/Redaktion/DE/Artikel/Wirtschaft/transformation-zu-einer-sozial-oekologischen-marktwirtschaft.html.

etwa Karl-Theodor zu Guttenberg, Werner Müller oder Jürgen Möllemann wird ebenfalls erinnert).

Die Ordnungspolitik steht ja möglicherweise vor einer Neubestimmung, und darum sollte es auch an diesem sonnigen Nachmittag in Berlin gehen. Ich selbst bin jedenfalls überzeugt davon, dass der konzeptionelle Rahmen des Wirtschaftsrechts tiefgreifend verändert wird. (Ausländische Leserinnen und Leser mögen mir verzeihen, dass ich geradezu old school ordoliberal überhaupt von Ordnungspolitik, Rahmen etc. spreche, statt einfach ein paar mathematische Formeln zu notieren.)

Erst hat die digitale Revolution die Wirtschaft verändert, darauf reagierte die Wettbewerbspolitik mit neuen Instrumenten, von § 19a GWB bis zum Digital Markets Act. Jetzt rast der Planet auf seine Belastungsgrenzen zu, was zu einer noch härteren Transformation zwingt. Die Akteure dieser grünen Transformation (hier nicht parteipolitisch gemeint) sind in einer ungewohnten Gemengelage: Es müssen alle zusammen ran. Das Warten auf Vorgaben der Politik genügt nicht. Das bringt auch die marktordnenden Behörden in Zugzwang – sie werden Kartellrecht lockern und verschärft anwenden müssen.

Gute Unternehmen?

Und damit sind wir mitten in der Nachhaltigkeitsdebatte des Kartellrechts. Das erste Umdenken muss bereits darin liegen, dass Unternehmen Akteure der Transformation sind, auch wenn es auf den ersten Blick mit dem ihnen eigenen Gewinnstreben nicht vereinbar scheint. Charlotte Kreuter-Kirchhof, Professorin u.a. für Energie- und Völkerrecht und Mitautorin unserer Studie, hat das immer wieder gepredigt: Die United Nations Sustainable Development Goals (SDG) verpflichten auch die Unternehmen zum Handeln. Und immer mehr Unternehmen handeln – ob aus Altruismus, um besser bei Verbrauchern und Bewerbern anzukommen oder um einfacheren Zugang zu Kapital zu erhalten (Stichwort: Sustainable Finance) sei dahingestellt. Sven Giegold, der ein Faible für grundsätzliche Überlegungen hat, spricht von corporate citizenship und christlicher Soziallehre.

Das macht es für Kartellwächter, die lebenserfahrungsgesättigt bei Unternehmen nicht immer gleich das Gute unterstellen, zu einer schwierigen Gratwanderung: Was ist überzeugendes Nachhaltigkeitsmanagement, was ist Greenwashing? Auch für uns Gutachter ist diese Frage kaum klarer geworden. An Beispielen für Absprachen, die das Grüne wollen, aber am Kartellrecht scheitern, mangelt es, zumindest in der Realität.

Manchmal erinnern mich die Forderungen nach einer weitgehenden Freistellung solcher Kooperationen an das Drängen der Presseverbandsvertreter, die vor einigen Jahren unbedingt Erleichterungen einforderten. Als die Politik 2017 den begehrten § 30 Abs. 2b GWB schuf, blieben Umsetzungen jedoch weiterhin Mangelware. Aus meiner Sicht ist für Nachhaltigkeitsvereinbarungen aktuell die Schaffung eines Ausnahmebereichs, einer Tatbestandsreduktion, einer gesetzlichen Ausnahme nach österreichischem Vorbild oder gar einer Gruppenfreistellung verfrüht. Mehr Guidance, die Bildung von Fallgruppen, ja. Das Bundeskartellamt will das wohl leisten. Justus Haucap hat sich, so mein Eindruck, in die Idee der Sustainability Sandboxes verliebt: Ein zeitlich begrenzter Experimentierraum zum Ausprobieren unter Aufsicht. Dann lässt sich sagen, was sich an Wettbewerbsbeschränkungen und Nachhaltigkeitswirkungen gegenübersteht.

Engherzige Leitlinien

Gerade für die größeren Absprachen, die einen stärkeren Impact haben würden, kommt es allerdings auf die Europäische Kommission an. Der Entwurf der Horizontal-Leitlinien verfehlt das Ziel. Hier mangelt es an der eindeutigen Anerkennung von out of market-efficiencies, also solchen Vorteilen, die nicht unmittelbar den von einer Absprache negativ betroffenen Verbrauchern zugute kommen. Das ist mit Blick auf das international konsentierte Verständnis von Nachhaltigkeit erstaunlich: Die UN SDG wollen sowohl in zeitlicher Dimension (intergenerationell) als auch in geographischer Dimension (intragenerationell) das Wirtschaften auf Kosten anderer verhindern. Vor diesem Hintergrund wirkt es engherzig, wenn die Verbesserung der Luftqualität in Asien nicht gegen höhere Verbraucherpreise in Europa abgewogen werden darf.

Schlagzeilen-Lieferanten

Giegold, der wohl eher ein weites Herz haben dürfte, bleibt in der Diskussion zurückhaltend. Er hat die Moderatorenrolle der Abteilungsleiterin Elga Bartsch überlassen, die Philipp Steinberg nachgefolgt ist, der

im Ministerium jetzt für „Wirtschaftsstabilisierung und Energiesicherheit“ zuständig ist. Giegold meint es ernst: erst zuhören, konsultieren, dann reden und entscheiden. Unsere Studie liegt vor, das Ministerium will jetzt zuhören. Zur Lektüre der 284 Seiten hat man den Interessierten immerhin bis zum 6. April Zeit gegeben. Bis dahin werden Rückmeldungen an nachhaltigkeit-ib1@bmwk.bund.de erwartet.

Für die Medien ist es natürlich etwas wenig, wenn das Ministerium verlautbaren lässt, es wolle zuhören. Was soll jetzt die Headline zu dieser Gutachtenvorstellung sein? Kann Giegold da nicht einen raushauen? Ich denke an Stephan Orti von Havranek, ihn habe ich unverhofft an Tor 1 des Ministeriums getroffen. Ich lernte ihn vor vielen Jahren kennen, als er im Bundeskartellamt noch das Referat leitete, das frühmorgens die relevanten Schlagzeilen des Tages zusammenstellte. Was würde das Team Pressedokumentation des Amtes von dieser Vorstellung abheften können? Orti von Havranek ist nicht mehr zuständig, er ist inzwischen Vorsitzender des Hauptpersonalrats des BMWK.

Aber Andreas Mundt, eloquent wie stets, hat zumindest noch einen Satz zu bieten, der wenigstens das kartellrechtliche Zentralmedium Lebensmittelzeitung interessiert: „Art. 210a GMO schafft eine weite Bereichsausnahme. Wir werden uns noch wundern, was dabei herauskommt“, so wird Mundt zitiert. *Initiative Tierwohl*, Vorzeigefall seines Amtes zur Nachhaltigkeitsdebatte, werde künftig in Brüssel geprüft.

Konkrete Optionen

Justus Haucap und ich, die wir uns ja für einen zitierfähigen Spruch eigentlich nie zu schade sind, können diesmal nicht viel Sensationelles beisteuern. Das liegt an unserem Gutachtenauftrag – und an der blauen Wand.

Der Gutachtenauftrag lautete, das Spannungsfeld von Wettbewerb und Nachhaltigkeit auszuleuchten und konkrete Optionen zur Weiterentwicklung des Kartellrechts vorzulegen. Wir sollten aber keine Empfehlungen aussprechen. Daran haben wir uns – im Verbund mit Charlotte Kreuter-Kirchhof, Sustainability-Management-Professor Rüdiger Hahn und den Wissenschaftlern Tristan Rohner, Anja Roesner, Philipp Offergeld und Alexandra May gehalten. Die Entscheidung über die von uns ausgebreiteten Optionen sollten wir nicht vorprägen. Das mindert bei der Vorstellung ein wenig unsere Schlagkraft. Gern hätte ich gesagt: Das Kartellamt muss jetzt mal einen Missbrauchsfall gegen ein marktbeherrschendes Unternehmen durchführen, das auf externen Effekten free-ridet! *Facebook reloaded*, aber diesmal mit Klimaschutz statt Datenschutz! Aber das wäre natürlich viel zu plakativ gewesen (zumal die Frage, was der *Facebook*-Fall eigentlich mit Datenschutz zu tun hat, ja durchaus diskutiert werden kann).

Nun ist allerdings in jeder Studie schon die erste Fußnote eine Setzung, die mit normativen Annahmen einhergeht. Beispielsweise halten wir die Marktwirtschaft als System weiterhin für unverzichtbar. Das brauchen wir den Leser*innen dieses Blogs nicht näher zu erläutern, aber außerhalb der überschaubar großen Fangemeinde des freien Wettbewerbs wird längst die Frage gestellt, ob eine auf Wachstum und Konsum angelegte Wirtschaft überhaupt noch zukunftsfähig ist. Marita Wiggerthale, einst beim Bündnis *Konzernmacht beschränken* aktiv, spielte in einer Frage bei der Gutachtenvorstellung darauf an. Haucap und Podszun meinen: Ohne den Ansporn im Wettbewerb werden die nötigen Innovationen und Anpassungen kaum zu leisten sein.

Sustainable Competition

Gleichwohl: Wo Unternehmen Kostenvorteile durch Raubbau haben, muss etwas grundlegend korrigiert werden. Das ist einerseits simple Marktversagenstheorie. Andererseits müsste das vielen Managern einen Schauer über den Rücken jagen. Das ist, finde ich, eine Stärke des Gutachtens: Wir bleiben nicht beim Thema der Nachhaltigkeitskooperationen stehen, sondern durchleuchten auch Fusionskontrolle, Missbrauchsrecht, Verfahren und Sanktionen systematisch auf ihre Sustainability-Effekte hin.

Wo Nachhaltigkeitsschädigungen einen Bezug zum Wettbewerb haben, kann das Kartellrecht relevant werden. Wer hier die Stirn runzelt, lese die Passagen zum sozial-ökologischen Wettbewerb im Gutachten – und sicherheitshalber auch den aktuellen IPCC-Bericht. Warum sollen wir einen Wettbewerb zulassen oder schützen, der dazu führen wird, dass die Marktwirtschaft in einiger Zeit kollabieren muss? *Sustainable competition* könnte als Benchmark den *consumer welfare*-Standard ablösen. Sicher ist: Die Berechnung wird nicht einfacher. Ideologischer als die

Chicago-School wäre eine solche Setzung aber auch wieder nicht, sie käme nur aus einer anderen Richtung.

Aber solche Provokationen habe ich vor der blauen Wand gar nicht „mit Schmackes“ (so sagt man im Rheinland) vorgetragen. Die blaue Wand, das ist die Stellage mit dem großen PVC-Banner in diesem bundesregierungsblauen Farbton, mit Adler, Ministeriumslogo und erheblicher Seriosität. Davor nahmen wir Platz, schauten in das Kameraauge, das uns in Millionen Haushalte (oder vielleicht 114 in der Spitze) projizierte. Die Ausstrahlung dieses amtlichen Arrangements aktivierte bei einem Anfänger wie mir doch eine außergewöhnliche Achtung vor der Aufgabe. Mich tröstete, dass sogar Justus Haucap – anders als in unserem Podcast zum Thema – auf Kalauer verzichtete. Immerhin waren wir jetzt für einen kurzen Moment Teil des bundesregierungsblauen Establishments.

Jetzt wird gelesen!

Nach der Gutachtenvorstellung ging alles ganz schnell. Die Zuhörerinnen und Zuhörer vor den Bildschirmen luden sich das Gutachten herunter und begannen zu lesen. Sven Giegold und Elga Bartsch drückten uns die Hand und murmelten etwas von „Minister“. Am nächsten Morgen würden wir in der Zeitung lesen, dass der Minister Krach in der Koalition geschlagen hat. Seine Mitarbeiter, Thorsten Käseberg, Markus Jankowski (ausgeliehen vom Kartellamt), Anna-Lena Beate, Sophie Gappa und Johannes Keim, waren gelöst; eine Minute Durchschnaufen, die Nachhaltigkeitsstudie war erstmal vom Tisch, auf dem sich ja derzeit noch anderes türmt. Wir machten noch ein Erinnerungsfoto vor der blauen Wand. Ich fragte mich, ob es wirklich des Farbausdrucks des Gutachtens bedurft hatte – das Nachhaltigkeitsthema hinterlässt Spuren. Eine hier nicht näher zu nennende Ministerialbeamtin verlief sich mit uns bei der Suche nach dem Ausgang, aber normalerweise erledigt sie ja auch ihr Tagewerk in Alt-Moabit und nicht in der Scharnhorststraße.

Ja, lesen. Als ich zuletzt das Gutachten zufällig aufblätterte, stolperte ich über den Satz, dass im Verfahren der Ministererlaubnis „– im Fall *Miba/Zollern* – bereits Nachhaltigkeitsaspekte thematisiert“ worden seien. Schnell blätterte ich weiter, um nicht die Option einer Nachhaltigkeitsministererlaubnis zu finden (vgl. S. 174). Nächster Zufallsfund auf Seite 204:

„Zum anderen gibt es auch im Kartellrecht Probleme, die – unabhängig von der Nachhaltigkeitsdebatte – zu lösen sind: die noch immer mangelnde internationale Verzahnung über die EU hinaus, die zum Teil überkomplexen und langwierigen Verfahren, die gelegentlich überspannt erscheinenden Beweisanforderungen oder die ausbaufähige Einbindung der privaten Rechtsdurchsetzung seien hier beispielhaft genannt. Ein Kartellrecht, das weitergehende Aufgaben übernehmen soll, muss „fit for purpose“ sein – das sollte bei aller Begeisterung für die kartellrechtlichen Instrumente nicht übersehen werden.“

Ach, ein schöner Satz!

Rupprecht Podszun, Düsseldorf

The Blue Wall: Competition and Sustainability in Berlin (English Version)

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Are companies allowed to collude with other companies to jointly reduce CO_2 emissions? Hardly any other question has been discussed more often at antitrust conferences across the country in recent years. This is also due to the fact that the first green-led Federal Ministry of Economics and Climate Protection in Germany has named sustainability as a key topic in its Competition Law Agenda 2025. Researchers at the Heinrich Heine University in Düsseldorf have now presented a comprehensive report for the Ministry: "Competition and Sustainability in Germany and the EU".[5] Justus Haucap and Rupprecht Podszun were in charge and presented the report in Berlin this week. Podszun reports here on how the excursion to the Berlin stage went.

In the office of the State Secretary

There are still fifteen minutes to go before the presentation of the expert opinion is to start, when the State Secretary asks us into his office. There had been a slight delay in entering, apparently he had something to discuss in private with the President of the Cartel Office, Andreas Mundt, who is already with him. The latest in the German government's coalition poker over the 11th amendment to the competition act? The number of new posts Mundt urgently needs to support the European Commission in DMA enforcement? Or was it just quite banal about the relocation of the Federal Cartel Office, which at least caused a strom in a teacup in the Bonn daily *Generalanzeiger*?

When we are allowed in, the room is quickly full and State Secretary Sven Giegold, the second-highest ranking official in the Ministry, greets us dryly: "I don't have that many chairs." Apart of him and Mundt, Thorsten Käseberg, Head of Unit for Competition Policy in the house, and his team have gathered, as well as our team: Justus Haucap, Tristan Rohner and Philipp Offergeld from my team and me. So how do you pass the time while standing somewhat awkwardly in the seating area? We talk about the office furnishings. On the walls are pictures by Bernard Schultze, which Giegold took over from his predecessor. Schultze, an artist who participated in the documenta several times, paints abstractly and is one of the founders of *Informel*. Fits Giegold somehow. "I only had the ships cleared away," he says. Previous occupant Ulrich Nußbaum, State Secretary under Minister Peter Altmaier, has a soft spot for seafaring. The ship models have now been taken down and anchored in the archives. Giegold apparently had no time for an independent redesign of the office. Where the minister already has to eat his muesli in the morning with water, not milk, as he once told in a Spiegel film, the state secretary cannot be expected to take care of the interior design first.

The transformation

By German standards, it is an astonishing change even without new decorations: for the first time, a Green, Robert Habeck, moved into the Federal Ministry of Economics (which is now the Ministry of Economics and Climate Protection). A long row of black-and-white portraits, which we rush past a short time later in order to get to our own presentation of the report in time, reminds us of legendary predecessors: Ludwig Erhard! Karl Schiller! Otto Graf Lambsdorff!

Regulatory policy is possibly on the verge of being redefined, and that is what this sunny afternoon in Berlin

[5] https://www.bmwk.de/Redaktion/DE/Artikel/Wirtschaft/transformation-zu-einer-sozial-okologischen-marktwirtschaft.html.

should be about. In any case, I myself am convinced that the conceptual framework of economic law will be profoundly changed. (Foreign readers may forgive me for talking about regulatory policy, frameworks, etc. in an old-school *ordoliberal* way instead of simply noting down a few mathematical formulas).

First, the digital revolution changed the economy, to which competition policy responded with new instruments, from Section 19a GWB to the Digital Markets Act. Now the planet is racing towards its boundaries, forcing an even harder transformation. The actors of this *green* transformation (not meant here in a party-political sense) are in an unusual mixed situation: everyone has to pull together. Waiting for policy guidelines is not enough. Corporate actors need to act. This puts the market-regulating authorities, like the competition agencies, under pressure – they will have to loosen *and* tighten anti-trust laws.

Good companies?

And this brings us to the middle of the sustainability debate in competition policy. The first rethinking must already lie in the fact that companies are agents of transformation, even if at first glance it seems incompatible with their inherent profit motive. Charlotte Kreuter-Kirchhof, professor of energy and international law, among other things, and co-author of our study, has told us again and again: the United Nations Sustainable Development Goals (SDG) oblige companies to act. And more and more companies are taking action – whether out of altruism, to better appeal to consumers and on the job market, or to gain easier access to capital (sustainable finance) remains to be seen. Sven Giegold, who has a penchant for fundamental considerations, speaks of "corporate citizenship" and of traditions in the Christian social ethics.

This makes it a difficult tightrope walk for competition watchdogs, that, saturated with life experience, do not always immediately assume the good in companies: What is convincing sustainability management, what is greenwashing? For us as authors of the expert opinion, the criteria have hardly become clearer. There is a lack of examples of agreements where companies want to be green but fail because of competition law limits, at least in reality.

Sometimes the demands for a far-reaching exemption of such cooperations remind me of the whining of the representatives of the press associations who demanded relief at all costs a few years ago. When politicians created the coveted Section 30 (2b) GWB in 2017, practical examples remained scarce. With this in mind, I believe there is no room for the creation of a general exemption, a statutory exemption on the Austrian model or a block exemption regulation. More guidance, the definition of groups of cases, yes. The Bundeskartellamt promised to help here. My economist colleague Justus Haucap, it seems to me, has fallen in love with the idea of sustainability sandboxes: a temporary experimental space to try things out under supervision. The Hellenic competition agency has this on the agenda. If this works, there will be some material to balance the restrictions on competition and sustainability effects in a better way.

Narrow-minded guidelines

For those agreements with a lot of impact, it is the European Commission that matters – not the German government. The draft Horizontal Guidelines miss the mark. There is a lack of clear recognition of out-of-market efficiencies, i.e. advantages that do not directly benefit consumers negatively affected by an agreement. This is astonishing in view of the internationally agreed understanding of sustainability: the UN SDGs want to prevent economic activity at the expense of others, both in a temporal dimension (inter-generational) and in a geographical dimension (intra-generational). Against this background, it seems narrow-minded if the improvement of air quality in Asia may not be weighed against higher consumer prices in Europe.

Some headlines, please

Giegold, who is likely to have a rather wide, not narrow mind, remains reserved in the discussion. The State Secretary has left the role of moderator to the head of department, Elga Bartsch, who succeeded Philipp Steinberg, who is now responsible for "Economic Stabilisation and Energy Security" at the Ministry. Giegold means it that he wants to listen before pre-determining outcomes of the debate. Our study is available now. Interested parties have been given until 6 April 2023 to read the 284 pages. Until then, feedback is expected at nachhaltigkeit-ib1@bmwk.bund.de.

With the Deputy Minister not speaking out that's not a lot for the media. What is the message of this presentation supposed to be? Can't Giegold just knock one out of the park? I'm thinking of Stephan Orti von Havranek, I met him unexpectedly at Gate 1 of the Ministry. I got to know him many years ago when he was still head of the unit at the Federal Cartel Office that compiled the relevant headlines of the day early in the morning. What would the Office's press documentation team be able to file from our presentation? Orti von Havranek is no longer in charge, he is now the chairman of the main staff council of the Ministry.

So it is up to President Andreas Mundt, eloquent as ever, to offer a headline that is at least of some interest to the special interest magazine Lebensmittelzeitung: "Art. 210a of the CMO creates a broad exception. We will be surprised what comes out of this", Mundt is quoted as saying. *Initiative Tierwohl*, the Bundeskartellamt's key case on sustainability in competition, will be examined in Brussels in future.

Concrete options

Justus Haucap and me – we are never too shy for a quotable saying – cannot contribute much sensational this time. That's because of our mandate – and because of the blue wall.

The mandate the Ministry gave us for the expert opinion was to illuminate the area of tension between competition and sustainability and to present concrete options for the further development of competition law. We were not asked to give recommendations. That is what we did – together with Charlotte Kreuter-Kirchhof, Sustainability Management Professor Rüdiger Hahn and the researchers Tristan Rohner, Anja Roesner, Philipp Offergeld and Alexandra May.

I would have loved to say something like: Andreas Mundt, your agency must now conduct an abuse case against a dominant company that free-rides on external effects! *Facebook reloaded*, but this time with climate protection instead of data protection! But of course that would have been far too bold (especially since the question of what *Facebook* actually has to do with data protection is certainly open to debate).

Now, in every study, the very first footnote is a setting that comes with normative assumptions. For example, we still consider the market economy as a system to be indispensable. We don't need to explain this in detail to the readers of this blog, but outside of the relatively small fan community of free competition, the question has long been asked whether an economy based on growth and consumption is still sustainable at all. Marita Wiggerthale, once active in the Alliance to *Restrain Corporate Power,* alluded to this in a question at the presentation of the report. Haucap and Podszun think: Without the incentive of competition, the necessary innovations and adjustments will hardly be possible.

Sustainable Competition

Nevertheless, where companies have cost advantages due to predation, something needs to be fundamentally corrected. On the one hand, this is simple market failure theory. On the other hand, it should send a shiver down the spine of many managers. I think this is one of the strengths of the report: we do not stop at the issue of sustainability cooperations, but also systematically examine merger control, abuse of dominance law, procedures and sanctions for their sustainability effects.

Wherever damage to sustainability is related to competition, competition law can become relevant. Anyone who frowns here should read the passages on socio-ecological competition in our study – and, to be on the safe side, also the current IPCC report. Why should we allow or protect competition that will lead to the collapse of the market economy in some time? *Sustainable Competition* could replace the *consumer welfare standard* as a benchmark. One thing is certain: the calculation will not get any easier. But such a setting would not be more ideological than the Chicago School, it would just come from a different direction.

But I didn't deliver such provocations with verve in front of the blue wall. The blue wall, that is the stand with the large PVC banner in this federal government blue colour, with the eagle, ministry logo and considerable seriousness. We took our seats in front of it, looking into the camera eye that projected us into millions of households (or maybe 114 at the peak). The aura of this official arrangement did activate in a novice like me an extraordinary respect for the task. I was comforted by the fact that even Justus Haucap – unlike in our podcast on the subject – refrained from using corny jokes. After all, we were now part of the federal government's blue establishment for a brief moment.

Now it's time to read!

After the presentation of the report, everything happened very quickly. The audience in front of the screens downloaded the report and started reading. Sven Giegold and Elga Bartsch shook our hands and mumbled something about "we need to see the Minister". The next morning we would read in the papers that their boss made some noise in the coalition. His staff, Thorsten Käseberg, Markus Jankowski (on loan from the Bundeskartellamt), Anna-Lena Beate, Sophie Gappa and Johannes Keim, were loosened up, a minute to catch their breath, the sustainability study was off the table for now (they still have enough to do these days).

We took a souvenir photo in front of the blue wall. I wondered whether the colour printout of the report was really necessary – sustainability, you know. A ministerial official, who cannot be named here, got lost with us looking for the exit, but normally she does her day's work in Alt-Moabit and not in Scharnhorststraße.

Yes, read our report. (It's in German with an English executive summary). When I last opened the report by chance, I stumbled over the sentence that in the ministerial permit procedure "- in the case of *Miba/Zollern* – sustainability aspects had already been addressed". I quickly turned the page to avoid finding the option of a sustainability ministerial permit (cf. p. 174). So, I stopped elsewhere, and this happened to be page 204:

"On the other hand, there are also problems in competition law that need to be solved – irrespective of the sustainability debate: the still insufficient international integration beyond the EU, the sometimes overly complex and lengthy procedures, the requirements of proof that occasionally seem excessive or the integration of private enforcement that could be expanded are examples of this. If competition law is to take on more far-reaching tasks, it must be "fit for purpose" – this should not be overlooked despite all the enthusiasm for competition law instruments."

What a beautiful sentence!

Florian Wagner-von Papp, Hamburg

THE 11th AMENDMENT TO THE ARC AND GERMANY´S NEW COMPETITION TOOL

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On 5 April 2023, the German government, represented by Robert Habeck (Vice Chancellor and Minister for the Economy and Climate Protection, The Greens) and Marco Buschmann (Minister for Justice, Liberal Democrats (FDP)) unveiled the Government ***Bill*** *(RegE in German)*[6] *to reform the Act against Restraints of Competition (ARC) in a press conference [in German, but subtitles can be auto-translated]. In the press conference, Vice Chancellor Habeck called the reform the 'biggest reform in decades', 'perhaps the biggest reform since Ludwig Erhard'. Even if one does not want to go as far as that, it is clear that the planned reforms are not just tinkering around the edges.* ***Prof. Dr. Florian Wagner-von Papp*** *explains the planned reform here. As a*

[6] https://www.bmwk.de/Redaktion/DE/Downloads/Gesetz/aenderung-des-gesetzes-gegen-wettbewerbsbeschraenkungen.pdf?__blob=publicationFile&v=6.

service to our readers we also publish a consolidated rough English translation (no official translation) of the government draft that can be downloaded here: GWB11 engl[7]

The content of the Government Bill can be summarized under the following three headings.

1. Strengthening sector enquiries by introducing, in a Draft-§ 32f ARC (Act against Restraints of Competition = Gesetz gegen Wettbewerbsbeschränkungen, GWB),
    - the power for the Bundeskartellamt to order remedies including divestitures, or to accept commitments, where the sector enquiry finds a 'substantial and persisting malfunctioning[8] of competition' which may, but need not result from an infringement of competition law (similar to UK Market Investigation References in the case of adverse effects on competition or the EU plans for a New Competition Tool), and
    - the power for the Bundeskartellamt to impose on undertakings the obligation to notify all future concentrations where the sector enquiry finds that there are indications that such future concentrations may significantly impede effective competition, provided that the acquirer has a domestic turnover of more than €50m and the target has a domestic turnover of €500,000 in the last business year;[9]
2. strengthening the power to disgorge economic benefits by adding two presumptions to the current text of § 34 ARC: first, the presumption that an infringement of competition law results in a gain to the infringer, and, second, the presumption of a minimum gain in the amount of one per cent of the relevant turnover; and
3. providing for powers for the Bundeskartellamt to support the Commission in the enforcement of the DMA as well as introducing rules to enable and facilitate private enforcement of the DMA.

This blog post will first outline the Draft Bill of September 2022 (I.) before describing the fierce criticism the Draft Bill faced (II.) and the changes made in the Government Bill (III.). After giving my own two cents on the Government Bill (IV.), I briefly attempt a gaze into the crystal ball to assess the chances of the future fate of the Government Bill in Parliament (V.). A risky endeavour, no doubt: As everyone knows, predictions are difficult, especially about the future.

I. The Draft Bill of September 2022

Prior to the Government Bill, a Draft Bill for consultation [in German] had already been published in mid-September 2022 (below II.), and this, in turn, had been preceded by a ten-point competition policy agenda on 21 February 2022 [in German].

The Draft Bill that preceded the Government Bill already contained all the salient features that would later be included in the Government Bill.

1. The German-style New Competition Tool and sector enquiries

The central innovation in the Draft Bill was the new § 32f(3)–(7), introducing a German version of a New Competition Tool, inspired by the UK Part IV market investigation regime and the EU plans for a New Competition Tool (which, in turn, had been modelled on the UK regime).[10] The Explanatory Note argued that the current German regime of prohibiting anticompetitive horizontal or vertical agreements (§ 1 ARC), abuses of

[7] https://www.d-kart.de/wp-content/uploads/2023/05/GWB11-engl.pdf.

[8] I have used the phrase 'malfunctioning of competition' here because this is how officials from the Ministry for the Economy and Climate Protection translated the German phrase 'Störung des Wettbewerbs'. The phrase sounds a little clunky. I would be tempted to use 'distortion of competition' as a more elegant translation for 'Störung des Wettbewerbs'; but this sounds as if the new provision used the formulation contained in Article 101(1) TFEU, while the German phrase in Article 101(1) is a different one, namely 'Verzerrung des Wettbewerbs'.

[9] This part of the provision (Draft-§ 32f(2) ARC) is a slight modification of the current § 39a ARC, which had already been introduced in the last Amendment to the ARC.

[10] The draft explanatory note gives full credit to both these role models.

dominant positions (§ 19 ARC), abuses of relative or superior market power (§ 20 ARC), and abusive conduct of undertakings of paramount significance for competition across markets (§ 19a), as well as ex ante merger control (§§ 35 et seq. ARC) was insufficient to protect competition comprehensively. The Explanatory Note identified gaps, for example, for cases of tacit collusion (algorithmic or otherwise), possibly common or cross ownership, or cases of unilateral market power in the absence of discrete abuses. While merger control was meant to protect against market structures arising in which such coordinated or unilateral practices could impede competition, merger control cannot protect against internal growth, against the accumulation of market power in the hands of the remaining undertaking when competitors exit a market, against concentrations that preceded the introduction of merger control, against concentrations that should not have been cleared in the past, or against concentrations that were permitted by ministerial exemption.

On the other hand, the Explanatory Note to the Draft Bill also emphasized that internal growth in particular was generally to be seen in a more positive light, and that the new tool was not meant to stifle the incentive to succeed in competition. The sentiment of the 1945 *Alcoa* judgment that '[t]he successful competitor, having been urged to compete, must not be turned upon when he wins'[11] comes to mind, even if it is not quoted in the Explanatory Note.

In order to fill the gaps identified above, § 32f(3) of the Draft Bill was to enable the Bundeskartellamt to impose all necessary behavioural or structural remedies where, following a sector enquiry, it is established that a 'substantial, continuing or repeated malfunctioning of competition exists on at least one market or across markets'. § 32f(4) of the Draft Bill gave the Bundeskartellamt the power to order undertakings to divest shares or assets, provided that it is to be expected that the divestment substantially reduces or eliminates the malfunctioning of competition, and further provided that no milder yet equally effective remedies are available.

In contrast to the subsequent Government Bill, the Draft Bill contained much less detail and fewer safeguards (see below III.). With a grain of salt, the operative part of § 32f(3) of the Draft Bill version could be reduced to the sentence: 'Where a substantial, continuing or repeated malfunctioning of competition exists on at least one market or across markets, the Bundeskartellamt may impose all necessary remedies of a behavioural or structural nature on undertakings.' The draft provision mentioned a non-exhaustive list of possible remedies. It did not, however, define the new term 'malfunctioning of competition', and did not even include a systematic list of examples or theories of harm. Instead, it listed (in § 32f(5) of the Draft Bill) a non-exhaustive number of factors which were to be 'considered' when determining a malfunctioning of competition. These included, but were not limited to, the number, size, financial power, and turnover of the undertakings on the relevant market or markets, the market shares and market concentration, cross-shareholdings, market entry or exit barriers, and market outcomes.

In terms of procedural safeguards, § 32f(3) of the Draft Bill contained none, except for the principle of proportionality. § 32f(4) of the Draft Bill allowed for the remedy of divestments only as a last resort and gave the Monopolies Commission and the competition authority in the Land where the undertaking had its seat the opportunity to comment on the Bundeskartellamt's draft order before it was issued. Where the assets to be divested had been acquired based on a final decision of the Bundeskartellamt or the European Commission or a ministerial exemption, divestiture could not be ordered before five years had lapsed since the decision (or, in the absence of Phase II-referral in Germany, the lapse of the time period for referrals).[12]

In lieu of a remedies order, the Bundeskartellamt could make commitments offered by the undertaking binding on them (§ 32f(6) of the Draft Bill).

In addition to the introduction of the 'German NCT', the Draft Bill made a few minor changes in the context of sector enquiries. First, the trigger for sector enquiries is currently that 'rigid prices or other circumstances' raise the suspicion that competition could be restricted or distorted. The Draft Bill deletes the words 'rigid prices or'. Second, the Draft Bill introduces obligations that the sector enquiry should generally be concluded within 18 months, and that any subsequent

[11] United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

[12] In the Government Bill, this has been extended to 10 years since the decision had become final.

remedies orders under § 32f(3), divestment orders under § 32f(4), or orders to notify future concentrations under § 32f(2) should be issued within 18 months after publication of the final sector enquiry report. However, the 18-month deadlines are not strictly binding, and there are no consequences attached to non-compliance with these deadlines. Third, the Draft Bill empowers the Monopolies Commission to make recommendations for starting a sector enquiry. While this recommendation is non-binding for the Bundeskartellamt, the Draft Bill requires the Bundeskartellamt to explain its reasons for not starting a sector enquiry if it has not done so within six[13] months of the publication of the recommendation.

2. Disgorgement of benefits

An additional, but more incremental, aim of the Draft Bill was to render more effective the remedy of disgorging the economic benefits of an undertaking that had infringed competition law.

For more than four decades, the ARC has empowered German competition authorities to disgorge economic benefits from undertakings that have intentionally or negligently infringed competition law. The provision was originally introduced in 1980, then as § 37b ARC 1980, and renumbered as § 34 in 1998, where it is still found today. The provision has achieved hardly any practical significance.

Alternatively to § 34, the competition authority may disgorge the benefits by increasing the fine by the amount of the economic benefit where the competition authority issues a fining decision.[14] Competition authorities, however, avoid splitting the fine into a punishing and a disgorging part because it would require them to quantify the economic benefits caused by the infringement. There is a suspicion that competition authorities instead implicitly calculate the fine such that economic benefits of the infringement are disgorged, even when they profess the fine to contain purely punishing elements.[15]

The background to the renewed interest in this provision on disgorgement of benefits is that the Russian war of aggression against the Ukraine and the energy crisis led to a sharp rise of oil and petrol prices, and to a sharp rise of profits of some undertakings in the energy sector. As always when petrol prices rise, the public and politicians call for competition law interventions – a call that ultimately tends to remain unheard because it is usually misplaced where a shock to demand or – as here – a shock to supply leads to higher prices. Be that as it may, 'disgorging benefits' sounded just like the instrument to help, and so the attention turned to § 34 ARC. However, the provision did not apply to this scenario for several reasons; and – spoiler alert! – even after the now proposed changes, it still would not have applied to the scenario of rising prices in the energy sector to the extent they were caused by a shock to supply without an underlying infringement of competition law.

The Draft Bill sought to make § 34 ARC more effective by proposing three changes: first, deleting the reference to 'intentional or negligent' infringements;[16] secondly, adding a presumption that the infringement of competition law leads to economic benefits; and thirdly, adding a second presumption that such an

[13] In the Government Bill, this has been extended to 12 months.

[14] §§ 81 et seq. ARC provides for administrative fines for infringements, and § 81d(3) ARC provides that § 17(4) of the Act on Administrative Offences applies. The latter provision makes disgorging the benefits of an offence mandatory. However, § 81d(3) ARC modifies this and gives the competition authority the choice either to include a disgorging element to the fine (in which case disgorgement under § 34 ARC can no longer be ordered to the extent the fine disgorges the benefits, § 34(2)1 no. 2 ARC), or to impose a fine purely for purposes of punishment (In which case the economic benefit may be disgorged by way of § 34 ARC).

[15] Wouter P.J. Wils has shown that the European Fining Guidelines are an approximation for disgorging the economic benefits. Wils, Wouter P. J., The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis. World Competition: Law and Economics Review, Vol. 30, No. 2, June 2007, Available at SSRN: https://ssrn.com/abstract=962654. While the German Fining Guidelines differ from the European ones, the logic would appear to be similar. Kersting, in: Kirk, Offergeld &Rohner (eds), Kartellrecht in der Zeitenwende, Nomos 2023, 79, 80f., argues that this implicit disgorgement would be illegal, inter alia, because it would deprive the infringer of the possibility to deduct the disgorging part of the fine for tax purposes.

[16] This proposal is no longer included in the Government Bill.

economic benefit amounts to at least one per cent of the relevant turnover.

3. Public and private enforcement of the DMA

The third set of changes concerned the public and private enforcement of the DMA.

1. Public enforcement of the provisions of the DMA is concentrated with the European Commission. However, the DMA leaves some space for support by national competition authorities. The Draft makes use of this space by introducing a new § 32g, extending the Bundeskartellamt's investigative powers to cases where non-compliance with Articles 5, 6, or 7 of the DMA is suspected, and by extending the jurisdiction of the Bundeskartellamt (§ 50) and the rules on cooperation with other authorities (§ 50f ARC) accordingly.
2. In addition, the Draft Bill creates a private cause of action for damages where Articles 5, 6, or 7 of the DMA are infringed, and extends the procedural provisions on private competition law enforcement (including those on the binding effect of infringement decisions, limitation periods, and the substantive and procedural rules on disclosure) to actions for non-compliance with Articles 5, 6, or 7 of the DMA.

II. Criticism against the Draft Bill of September 2022

The critics against the Draft Bill fell into two camps: those who fundamentally opposed the proposals (especially the German NCT) and those who supported the German NCT in principle but took issue with the details.

1. Fundamental opposition to the proposals

The consultation process revealed general hostility towards the proposals in the Draft Bill on the part of many industry associations. The harshest criticism is directed at the German NCT and the possibility of divestments in § 32f of the Draft Bill. The idea that any undertaking could come into the crosshairs of the Bundeskartellamt without infringing competition law and that the Bundeskartellamt could impose any remedy, including the break-up of undertakings, in case of an ill-defined malfunctioning of competition is labelled as a paradigm shift, a move to an arbitrary market design by the state, and – in the more extreme comments – a move to a planned economy. Some members of the academic community voice similarly fundamental, though generally not quite as drastically worded, criticism. At a minimum, the introduction of a market investigation reference regime moves away from the current paradigm of only addressing *restraints* of competition, and many commentators consider this to be an objectionable fundamental change of paradigm.

2. Qualified support with constructive criticism

Other critics were less fundamentally opposed to the proposal or welcomed the proposals with open arms. Yet even those who support the introduction of the German NCT in principle (full disclosure: Yours truly included) criticized the Draft Bill for its lack of guidance it gave to the addressees on what was to be understood under the new concept of a 'malfunctioning of competition'. The criticism conceded that a crisp and comprehensive definition of a general clause that is meant to act as a gap filler is not possible and that the exact contours of the concept will necessarily remain blurry. However, this should not have prevented mentioning case categories or sample theories of harm. In the UK, where the 'definition' of the 'adverse effect on competition' (AEC) is similarly elusive as the German Draft Bill's 'malfunctioning of competition', the Competition Commission's guidance (adopted by the CMA) points out structural and conduct features, and identifies as potential sources of competitive harm: 1. unilateral market power; 2. barriers to entry and expansion; 3. coordinated conduct by firms, 4. vertical relationships, and 5. weak customer response.[17]

Well-meaning critics of the German Draft Bill suggested that a similar catalogue of theories of harm and a corresponding non-exhaustive list of examples would go a long way towards attenuating the industry's concern about legal certainty. Further suggestions for improving the Draft Bill's approach based on the UK experience included a call for clarification that the NCT should only be used where enforcement of the conduct rules was not considered sufficiently promising, and a two-stage, 'fresh-pair-of-eyes' investigation and

[17] Competition Commission, Guidelines for market investigations: Their role, procedures, assessment and remedies (April 2013) CC3 (revised). These were adopted by the CMA.

decision-making process similar to the UK regime (either of the institutional variety, as was the case before the ERRA2013, or of the internal variety, as has been the case within the CMA since the ERRA2013). If these measures should be insufficient to alleviate the industry's concerns, it was proposed that safe harbours could be considered, eg, to exclude markets where a malfunctioning of competition is unlikely or where the effects would only be *de minimis*.

III. The Government Bill of 5 April 2023

As mentioned in the introduction, the Government Bill was published and presented on 5 April 2023. The Government Bill is in large part and in its main thrust identical to the Draft Bill but puts some flesh on the bare bones of the concept of the 'malfunctioning of competition'. It also introduces a number of procedural safeguards and makes some minor changes to the Draft Bill and its Explanatory Note.

1. Changes to the German NCT in § 32f

- The Draft Bill's wording of the central condition for intervention, the 'substantial, continuing or repeated malfunctioning' (*erhebliche, andauernde oder wiederholte Störung*), had been criticised: Even if the intended meaning was relatively clear, it seemed to put the three adjectives in an alternative relationship. For example, under a literal interpretation of the Draft Bill's wording, an insubstantial but repeated malfunction would have been caught. The Government Bill now substitutes the unambiguous formulation 'substantial and persisting malfunction' (*erhebliche und fortwährende Störung*) for the Draft Bill's ambiguous wording.
- At the same time, the Government Bill now clarifies in a legal definition that a malfunctioning is 'persisting' if it has existed for at least the past three years and there are no indications that it will disappear, on the balance of probability, within the next two years (§ 32f(5)3 in the version of the Government Bill).
- There is no definition for 'substantial' in the operative part of the Government Bill. The Explanatory Note to the Government Bill (at p. 31) explains that a malfunctioning is 'substantial' if it 'has more than merely de minimis effects'. This is a surprisingly low bar for intervention, and not necessarily a bar one would associate with 'substantial'. It is true that in some contexts, for example when it comes to the qualified effects test in international competition law, 'substantial' is used for what is essentially a mere de minimis threshold. And yet, even though I am fairly trigger-happy when it comes to the enforcement of competition law, in this context, where intervention is not based on an infringement of a discrete prohibition but only on the objective malfunctioning of competition, I would have expected a higher bar for intervention, and 'substantial' usually does denote a higher bar than a de minimis standard.
- The Government Bill introduces the qualification that the substantial and persisting malfunctioning must affect competition on one at least nation-wide market, several markets, or across markets. Given that these are alternatives, and the size of the market volume or the size of several sub-national markets remains undefined, this does not seem to be a high hurdle to overcome.
- Paying heed to the criticism mentioned above (II.), the Government Bill now includes not only the (slightly modified) list of factors to be considered in finding a malfunctioning, but also a non-exhaustive list of examples of categories of theories of harm where a malfunctioning is 'in particular' to be found. Similar to the list in the Competition Commission's guidance (CC3 revised), these categories of theories of harm are: 1. unilateral market power in supply or demand; 2. barriers to entry, barriers to exit, restrictions of capacities or barriers for consumers to switch suppliers; 3. parallel or coordinated conduct; 4. input or customer foreclosure through vertical relationships.[18] The additional list of factors to be considered in finding a malfunctioning now also includes transparency and homogeneity of the goods on the relevant markets, but also 'mitigating' factors such as the degree of innovation on the

[18] § 32f(5)1 of the Government Bill.

markets and efficiencies (provided consumers receive an appropriate share).[19]

- The Government Bill now includes a condition that, on the basis of the facts as understood at the time of decision-making, enforcement of the conduct prohibitions against anticompetitive agreements (§ 1 ARC) or abuses of market power (§§ 18 et seq. ARC) must likely be insufficient to counter the malfunctioning appropriately, thus introducing a 'soft subsidiarity' of the application of the German NCT vis-à-vis the existing conduct prohibitions.
- The Government Bill now excludes remedies orders on the basis of sector enquiries based on repeated infringements of consumer law.[20] It is not entirely clear what this would mean where such a sector enquiry finds that these infringements result in, for example, a barrier for consumers to switch suppliers, and therefore a malfunctioning of competition.
- With regard to procedure, the Government Bill has made major changes. The process is now divided into three steps.
    - First, there is the sector enquiry, which must precede any finding of a malfunctioning.
    - Second, if the Bundeskartellamt intends to make a finding that there is a substantial and persisting malfunctioning of competition, it is required to issue a corresponding decision and to address this decision to one or more undertakings which, by their conduct, substantially contribute to the malfunctioning of competition.
    - Third, the Bundeskartellamt may, following an oral hearing in which the parties and the Monopolies Commission have a right to be heard,[21] order remedies or make commitments made by the undertakings binding on them.

The second step, newly introduced in the Government Bill, could delay the process by more than it may at first appear. It allows the addressees to appeal the decision containing the finding of a malfunctioning. While such an appeal does not have suspensive effect, the President of the Bundeskartellamt Andreas Mundt has already indicated[22] that it seems very unlikely that the Bundeskartellamt would proceed to the third step before the decision about the finding of a malfunctioning has become final.

- The non-exhaustive list of possible remedies now contains the prohibition of unilateral information disclosures where such disclosure could facilitate collusion, which had been conspicuously absent in the Draft Bill.
- The provision on divestment orders (§ 32f(4)) has also been significantly reformed. First, where the Draft Bill allowed divestment orders to be issued against *any* undertaking (provided this contributed to the elimination or substantial improvement of the malfunction), the Government Bill restricts such orders to undertakings in a dominant position or undertakings of paramount significance for competition across markets. Second, procedurally an oral hearing in which the Monopolies Commission has a right to be heard is required before the order. Third, the Government Bill now assigns suspensive effect to appeals against the divestment order. Fourth, the shares or assets only need to be divested if the price offered by the purchaser amounts to at least 50 per cent of the value as assessed by an accountant appointed by the Bundeskartellamt. Fifth, the Government Bill now takes up a suggestion made by the Monopolies Commission and provides for state compensation in some circumstances: where the purchase price offered is lower than the value as assessed by the accountant (but 50 per cent or more than this value), the state will pay 50 per cent of the difference between the value and the purchase price. This means that the addressee of the divestment order will at a minimum receive 75% of the assessed value of the shares or assets.
- Where the shares or assets to be divested had been acquired by way of a concentration reviewed by a competition authority and the concentration had been cleared in a final decision

[19] § 32f(5)2 of the Government Bill.
[20] § 32f(1)2 in the Government Bill's verssion.
[21] § 56(7) in the Government Bill's version.
[22] Presentation on 25 April 2023 at the 4th Competition Day of the Markenverband e.V.

by the European or German institutions (or where the Bundeskartellamt decided not to enter Phase II, or where there was a ministerial exemption for the concentration), a divestment order cannot be issued for at least 10 years since the date of the decision (or, mutatis mutandis, the date in which the period for the decision to enter Phase II expired).

- The Government Bill now provides in § 32f(8) that in the case of regulated sectors (railways, postal services, telecommunications) or regulated electricity or gas networks, the Bundeskartellamt may order remedies under § 32f(3) or order divestments under § 32f(4) only where the Federal Network Authority (*Bundesnetzagentur*) gives its assent. Implicitly, this clarifies that the rules are applicable to these regulated sectors and networks as well.

2. Changes to the disgorgement of benefits

Compared to the significant changes to the NCT in § 32f, the changes to the Draft Bill's rules on disgorging benefits are minor. The Government Bill no longer proposes to delete the requirement that disgorgement is only possible for 'intentional or negligent' infringements. Considering that the disgorgement of benefit is not a rule on damages, but more akin to unjustified enrichment, where we do not require fault for liability, one could quibble with this change. However, given the very low threshold for negligence where competition law infringements are concerned, this is not likely to make any practical difference. The only other change of the Government Bill's wording compared to the Draft Bill is the introduction of a legal definition for the 'period of disgorgement' of five years in § 34(5), and the corresponding rephrasing in § 34(4).

3. DMA enforcement

The only (minor) changes between the Draft Bill and the Government Bill with regard to the changes to the public and private enforcement are the amendments

- that where an infringement of Article 7 DMA is considered possible, the Bundeskartellamt will give the Federal Network Authority an opportunity for comment;
- that the binding effect on courts is extended to the European Commission's designations under Article 3 DMA; and
- of the full citation to the title of the DMA.

IV. My own two cents: Comments on the Government Bill

From the outset, I considered the proposals in the Draft Bill, in particular the introduction of the NCT in § 32f, to be welcome additions in the armoury of the Bundeskartellamt.

1. Fundamental criticism against the NCT unjustified...

Some of the commentary on the German NCT clearly is over the top. Invoking a 'planned economy', when the NCT does no more than essentially copy the UK's regime of market investigation references in Part IV of the Enterprise Act 2002, is hyperbole far removed from serious discourse. There are quite a few things I would call David Cameron, Theresa May, Rishi Sunak or, in particular, Boris Johnson and Liz Truss with her 'Britannia Unchanined' co-author Kwasi Kwarteng as Chancellor, but 'socialist' is not necessarily the word that comes spontaneously to mind.

I also did not, and still do not, share the fundamental criticism that the NCT is incompatible with the ordoliberal approach. The original ordoliberal approach, as proposed in the *Josten Draft* of 1949 (co-authored by Franz Böhm), would have eliminated any economic market power not achieved by pioneering initiatives. It would have done so by breaking up entities with market power if the 'position of power could not be otherwise eliminated on a permanent basis' (§ 15 of the *Josten Draft*) – in other words, the *Josten Draft* did include the possibility of divestments (or other remedies) even in the absence of infringing conduct. This approach was suggested not because the drafters did not know any better: they deliberately chose to address the issue of market power at its roots rather than address market power only once it was abused.[23] Market interventions

[23] Walter Bauer, Franz Böhm, Durt Fischer, Paul Josten, Wilhelm Köppel, Wilhelm Kromphard & Berhard Pfister, *Entwurf zu einem Gesetz zur Sicherung des Leistungswettbewerbs und zu einerm Gesetz über das Monopolamt mit Stellungnahme des Sachverständigen-Ausschusses und Minderheitsgutachten*, presented to the Director of the Administration of the Economy Ludwig Erhard on 5 July 1949, pp. 119-120.

would have been even more radical under Walter Eucken's proposals for as-if-competition.[24]

Following intense lobbying by the German Industry Association BDI, the *Josten Draft* never became law. Instead, under the ARC as eventually passed, existing positions of market power were left unaffected, and the decision not to include merger control in the original ARC led to further unchecked concentration. Starting from a skewed playing field, simply invoking von Hayek's competition as a discovery process does not guarantee that efficient competitors face contestable markets. Intervening where markets are not contestable in order to open up markets to competition, even in the absence of restrictive agreements or discrete abusive conduct, hardly goes against the teachings of Eucken and Böhm.

It is true that the introduction of the German NCT means that we are moving from a system characterized by deficient coverage – leaving gaps such as tacit collusion with or without facilitating practices – to a system including a general clause that could potentially be stretched to cover too much or to allow remedies that go beyond that which would be necessary. Reasonable minds can differ on which side to err. However, there have always been regrettable gaps in the enforcement armour, in particular when it comes to oligopolies. Newer developments mean that these gaps are widening: Algorithmic collusion and the parallel use of the same algorithm will exacerbate the problem of tacit collusion. Digital conglomerates with their ecosystems foreclose large parts of the economy to dynamic newcomers because of network effects and advantageous access of data. Developments in the financial world mean that new gap cases may come into existence, such as potential problems with common ownership, or old ones may become more frequent, such as minority shareholdings in competitors or interlocking directorates. Given these developments, I consider it preferable to err on the side of a competition law instrument that allows for intervention.

2. ... but calls for more detail than in the Draft Bill were justified – and have been heard

That is not to say that one need not be careful when intervening on the basis of an instrument like the German NCT. Where there are competition law *infringements*, the trigger for intervention is (moderately) well defined, and remedies can be surgically tailored to removing the infringement. In contrast, interventions without infringements, based on a general malfunctioning of competition, do not put similarly defined boundaries on remedies. This must not result in the competition authority designing markets by doing more than removing the obstacle identified. This danger needs to be borne in mind, but this is also true under the already existing law in the many cases in which commitment decisions are issued.

The German NCT as it was designed in the original Draft Bill of September 2022 gave very little contextual information, and instead provided for a general clause with ill-defined contours. Based on the Draft Bill, it would have been difficult for undertakings to foresee in which circumstances they might face interventions, and difficult for courts to assess whether remedies imposed were substantively legal because there was no yardstick against which to measure legality; appeals would arguably only have been restricted to a proportionality review. The Draft Bill also lacked procedural safeguards. In essence, one had to trust the Bundeskartellamt to practice self-restraint. While such trust would arguably be justified,[25] it has to be conceded that it is best not to build on trust alone when an institutional set-up is designed.

The Government Bill has paid heed to the criticism levied against the Draft Bill and taken great pains to address the deficiencies of the Draft Bill (above III.). Of course, not all uncertainty has been removed from the German NCT. Some uncertainty is inevitable where a general clause is meant to fill the enforcement gaps in a dynamic environment. However, § 32f(5) with its list of examples and factors to be considered, while non-exhaustive, gives a clear idea what circumstances may

[24] Eg, Walter Eucken, ORDO 2 (1949) 68.

[25] Critics hastened to add that they trusted Andreas Mundt, but often added that one did not know who would follow him as the next President of the Bundeskartellamt. This reveals a misunderstanding of the President's role within the Bundeskartellamt. The Bundeskartellamt's decisions are handed down by independent Decision Panels, without influence by the President.

result in interventions based on what theories of harm. The close modelling of the German NCT on the British Part IV regime allows drawing parallels to the corresponding case law for orientation. The level of detail of § 32f in the Government Bill's version is sufficient for a court to assess whether the Bundeskartellamt has made a credible case that a malfunctioning exists, and to assess whether the remedies are proportionate to the aim of eliminating that malfunction. The restriction that the Bundeskartellamt may choose as addressees only those undertakings that contribute substantially is a sensible focusing of enforcement energy, and at the same time removes the anxiety of smaller players that they could be caught in the net.

3. Yet more room for improvement? The case for a fresh pair of eyes

There is one additional procedural safeguard I would have liked to see that is not (yet?) to be found in the legislative proposal: the requirement for a 'fresh-pair-of-eyes' approach such as the one in the institutional set-up in the UK before the ERRA2013 or the one that is now replicated within the CMA. The necessarily vaguer concept of a malfunctioning of competition compared to a competition law infringement leaves greater leeway for differences of opinion whether a competitive situation amounts to a malfunctioning and whether intervention is justified (and if so, what the appropriate remedies are). There is a danger of commitment bias and confirmation bias on part of even a well-meaning enforcer where that enforcer has spent substantial time and effort in investigating a market or markets.

It is true that there is the possibility of appealing the Bundeskartellamt's decision to the courts, so that there is a 'fresh pair of eyes' at that stage. The Government Bill has strengthened this possibility by allowing appeals against the finding of a malfunctioning at the second stage even before remedies are ordered at the third stage. Yet, the softer boundaries of the concept of a malfunctioning mean that the courts will arguably pay greater deference to the competition authority's institutional advantages. Courts are institutionally not well-suited to replicate the broad investigation into an entire sector. While there is no formal limitation to the judicial-review standard (as is the case in the UK), de facto the yardstick under the German regime will not be very different. At the same time, the softer boundaries of the concept of malfunctioning of competition also mean that court supervision of remedies will not be as strict as in the case of infringements of competition law (although supervision will still be stricter than in the case of commitment decisions, because there the argument is that the parties agreed to the remedies).[26]

For these reasons, I would have preferred a fresh-pair-of-eyes approach *before* the administrative decision is issued. The *Josten Draft* of 5 July 1949 provides an interesting three-stage blueprint. It suggested that before a divestment order, at the first stage the undertaking should be given three months to propose a plan. If this plan was not forthcoming, or if it was not satisfactory, the competition authority should then propose its own plan to the Minister for Economic Affairs. If the Minister agreed with the plan, it would be implemented. If the Minister did not agree, the competition authority's plan would be put to a select committee of the German Bundestag; if it agreed, the plan would be implemented.

The first stage of the *Josten Draft* is already part of § 32f, because the rules on commitment decisions (§ 32b ARC) are included by reference. It seems very likely that in practice many, if not most, § 32f investigations will end in commitment decisions, if only because the breadth of potential remedies in a remedies order gives the competition authority a powerful threat point.

The introduction of the second and third stages of the *Josten Draft* could, first, address the problem of commitment and confirmation bias mentioned above; they would provide a 'fresh pair of eyes'. This was the reason why the *Josten Draft* proposed them. Additionally, the requirement of consent of political actors (either the Minister or the select committee) would acknowledge the fact that the new instrument is one that straddles the line between competition law enforcement and regulation.

The proposal faces three potential objections: procedural ineffiency; reduced incentives for the

[26] Whether that argument is persuasive is a separate question. For my views see Florian Wagner-von Papp, 'Best and Even Better Practices in Commitment Decisions after Alrosa: The Dangers of Abandoning the Struggle for Competition Law' (2012) 49 CMLRev 929.

competition authority to expend resources on investigations; and politicization of competition law.

First, any 'fresh-pair-of-eyes' approach necessarily brings with it costs in the form of delays, effort, and money. This is why in the UK the institutional duplication of the investigations by the OFT and the Competition Commission was abandoned in the ERRA2013, and why the intra-institutional duplication within the CMA was softened by allowing individuals from the Phase I team into the Phase II team. Ideally, the second stage should not try to replicate the entire decision-making process but should restrict itself to a plausibility and appropriateness analysis with tight time-limits. The additional delay should not be such as to deprive the NCT of its practical effectiveness.

Second, a review of the decision by another actor may reduce the Bundeskartellamt's willingness to expend substantial resources on an investigation if there is a danger that these resources will be wasted where assent by the second-stage decision maker is not forthcoming. However, the *Josten Draft's* proposal alleviates this concern by giving the competition authority three bites at the apple by requiring *alternatively* the assent by the undertaking, the Minister, *or* the select committee.

The third potential objection is not a general one against a fresh-pair-of-eyes approach but specifically one against participation of the Minister or the select committee in the decision-making process. Such participation of political actors may lead to a politicization of competition law. The German experience with ministerial exemptions in merger cases has indeed not been a happy one. The problem is arguably less problematic when it comes to the German NCT, because this instrument straddles the lines between competition law enforcement and regulation anyway. The Bundeskartellamt would retain the power of initiative and would be the only player able to design the content of the remedies order. In other words, it would remain primus inter pares among the decision makers; the Minister or the select committee should only be able to give assent to the draft order (*vel non*), but not to influence its content.

V. Likelihood of the Government Bill passing into law

Despite the not insubstantial blowback against the Draft Bill and to a lesser extent the Government Bill, it seems likely that the NCT proposal will pass into law. Two of the three coalition partners have nailed their flags to the mast. The initial bill was drafted by the Ministry for the Economy and Climate Protection under leadership of a Minister from the Greens. It seems unlikely that the Greens in Parliament will be impressed by the criticism against the bill. For those on the left wing of the Greens, state intervention is not a problem to begin with, and for those on the moderate wing of the Greens, the intervention to strengthen competition in non-functioning markets is a way to raise consumer welfare while respecting the logic of a competitive market economy.

The liberal party (FDP) has, in principle, also been a supporter of the proposal. They had, while in a different coalition with the Christian Democrats and under a different Minister for the Economy (Rainer Brüderle, FDP), introduced a proposal for the introduction of a power to order divestitures even in the absence of a competition law infringement back in the year 2010. This proposal had failed, among other things because their then-coalition partner CDU/CSU did not sufficiently support the proposal and because the proposal did not provide for any milder means; given that divestitures are a last resort only and very unlikely to be ordered, the 2010 bill had been considered largely a symbolic one.

This background is likely to strengthen the FDP's resolve to make the current Government Bill succeed in Parliament. Both Robert Habeck (Greens) and Marco Buschmann (FDP) emphasized the 'origin story' of the new competition tool being the direct descendant of the Brüderle Draft of 2010 in the press conference presenting the Government Bill on 5 April 2023. The FDP in Government has therefore committed to the bill, not by grudging support for a proposal by the Greens, but by taking (co-) ownership. Invoking the Brüderle-Draft also means that a renewed failure to pass the Bill would result in a political embarrassment to the FDP. Nevertheless, it is possible that the FDP in Parliament may be in two minds about the Government Bill. The FDP has always been torn between a liberal instinct to protect free and undistorted competition on the one hand and a certain proximity to industry associations on the other. It seems likely that FDP support for the Government Bill in Parliament will not be undivided, and it is

quite possible that the FDP will seek to make amendments to the Government Bill (possibly by introducing a fresh-pair-of-eyes approach?).

The SPD has not made any similar public precommitment to the Bill, except for not stopping the Government Bill from passing Cabinet scrutiny. The coalition agreement between the SPD, Greens, and FDP had provided for support for a power to order divestitures independently of a finding of an infringement of competition law, but only on the *European* level.[27] While the SPD is therefore not equally invested in the project as the Greens or the FDP, it seems likely that they will support the project.

Of course, it is difficult to predict whether modifications will be made along the legislative process, and if so, of what kind. It is to be hoped that the German NCT will become law and that any amendments to the bill will not deprive the instrument of its practical effectiveness.

[27] Additionally, the coalition agreement had envisioned empowering the Bundeskartellamt to investigate and impose remedies where 'substantial, persistent or repeated infringements of consumer protection law' occurred (a formulation that closely resembles the wording of the Draft Bill of August 2022, where it was the 'substantial, persistent or repeated distortion of competition' that allowed intervention). Curiously, the Government Bill, which allows the imposition of remedies where a 'substantial continuing or repeated distortion of competition' is found, excludes sector enquiries that are based on repeated infringements of consumer protection laws.