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Gerhard Klumpe, Dortmund

Don't You (Forget About Me)

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Dr. Gerhard Klumpe, einer der bekanntesten Kartellrichter Deutschlands, hat in Brüssel über die private Kartellrechtsdurchsetzung in führenden Jurisdiktionen diskutiert. Für unseren Blog D'Kart schildert der Vorsitzende Richter am Landgericht Dortmund seine Eindrücke zu den internationalen Tendenzen im Private Enforcement.

Don't You (Forget About Me) – diese Hymne der Simple Minds kennt nicht nur jeder, der in den 1980ern aufgewachsen ist, sondern sie ist auch die prägendste Musik des Films The Breakfast Club, in dem sich fünf Personen des Morgens treffen, um über tiefgreifende Probleme zu sprechen und dabei eine Menge von sich oder doch ihren Erfahrungen preis zu geben.

Das Set-up beim Frühstück in Brüssel

Genau an diese Szene erinnerte das Zusammentreffen von 4 Richterinnen und Richtern mit ihrer Moderatorin zum Frühstück im Le Chatelain in Brüssel anlässlich der dort stattfindenden, von Informa Connect organisierten Veranstaltung CompLaw: Private Enforcement 2024. Sollte bei Kaffee, Tee und Brötchen eigentlich nur eine letzte Abstimmung über das folgende, mit Judges´ Roundtable überschrieben Panel stattfinden, so ging es stattdessen sofort mit der Diskussion der Sachthemen los, und das derartig angeregt, dass die Beteiligten beinahe den Beginn der Veranstaltung verpasst hätten. Doch waren es nur wenige Schritte, um in den eigentlichen Veranstaltungssaal umzuziehen und einfach das Gespräch dort vor dem interessierten Publikum fortzuführen.

Der hier am Judges Round Table zusammentreffende Frühstücksclub bestand aus Vertreterinnen und Vertretern der derzeit wohl wichtigsten Foren für Kartellschadensersatzklagen, nämlich aus den Niederlanden (Elske Boerwinkel, NCC District Court), aus Spanien (Gustavo Andrés Martín Martin, Commercial Court n.1 Alicante), aus Großbritannien (Ben Tidswell, Chairman Competition Appeal Tribunal) und aus Deutschland (der Autor dieser Zeilen hier), moderiert von niemand Geringerer als Dorothy Hansberry-Bieguńska (Hansberry Tomkiel, Polen).

Zunächst wurde ein kurzer Überblick über die durch die Rechtsprechung des EuGH sowie der nationalen (Höchst-)Gerichte zwischenzeitlich gelösten Rechtsfragen geboten, wobei auch jüngste Rechtssprechungsentwicklungen wie etwa die 15 Entscheidungen des Tribunale Supremo (TS) und die bekannte Entscheidung des CAT[1] erörtert wurden. Gustavo Martin kündigte zudem das Bevorstehen weiterer Entscheidungen des TS in den kommenden Wochen an, die weitere Klärungen insbesondere im Hinblick auf die Ermittlung der Schadenshöhe versprechen würden. Dies gab den Startschuss für die Erörterung der fortbestehenden Probleme von Kartellschadensersatzklagen.

In allen Jurisdiktionen stehen zwei Themen im Blickpunkt: Zum einen geht es um die Handhabung großvolumiger (Sammel-)Klagen. Zum anderen stellt sich die Frage, wie der Schadensumfang ermittelt wird. Diese Frage ist gepaart mit der Frage nach Art und Weise der Einführung ökonomischer bzw. ökonometrischer Expertise in den Rechtsstreit sowie die Behandlung und Bewertung solcher Gutachten (und möglicher Alternativen hierzu).

Der Umgang mit großvolumigen

[1] Royal Mail Group Ltd. v DAF Trucks Ltd., Urt. v. 07.02.2023, [2023] CAT 6.

(Sammel-)Klagen

Während im Hinblick auf den ersten Aspekt in Großbritannien sowie den Niederlanden Kartellschäden praktisch durchweg in Form gebündelter Klagen verfolgt werden, sind in Spanien kleine und kleinste Klagen vorherrschend. Zudem besteht dort – ähnlich wie in Deutschland, wo bekanntlich beide Vorgehensweisen zu verzeichnen sind – eine gewisse Skepsis in Bezug auf Sammelklagen.

Gleichwohl erschien es aus Sicht aller am Panel Beteiligten als wahrscheinlich, dass in Zukunft die Bündelung von Ansprüchen der maßgebliche Weg zur Anspruchsverfolgung sein wird, schon zur einfacheren und umfassenderen Generierung von Daten und natürlich aufgrund besserer Optionen der Prozessfinanzierung. In den Niederlanden besteht dabei neben den auch in Deutschland in der Diskussion stehenden Abtretungsmodellen die Option, Klagen durch die Gerichte selber zu bündeln. Zudem sieht auch das niederländische Prozessrecht seit 2020 die Möglichkeit von Anspruchsbündelungen vor.[2] Dennoch bleibt das – höchstrichterlich auch in den Niederlanden noch nicht bestätigte – Abtretungsmodell auch hier vorherrschend.

Dabei sind die Umfänge der Klagebündel schon bei den jetzt anhängigen Klagen enorm. In den Niederlanden umfasst im LKW-Kartell eines der Verfahren vor der Rechtbank Amsterdam mehr als 200.000 Erwerbsvorgänge. In Deutschland ist eine ähnliche Zahl von Umsatzgeschäften in Fällen des Rundholzkartells und des Pflanzenschutzmittelkartells zu verzeichnen. Dies stellt die Gerichte aller Länder vor erhebliche Herausforderungen, wobei die Grundvoraussetzungen und Werkzeuge zur Bewältigung solcher Prozessungetüme in den Jurisdiktionen durchaus unterschiedlich sind.

Verschiedene Instrumente

Die Gerichte in Großbritannien verfügen nicht nur über einen breiten Erfahrungsschatz, sondern auch über besondere Vorschriften im Hinblick auf Sammelklagen. Sie kennen auch das in den letzten Jahren entwickelte Konzept des blueprint to trial im Hinblick auf die ökonomischen Fragen und die anzuwendenden Methoden. Damit ist gemeint, dass das CAT einen „Proposed Class Representative" erwartet, der eine sachverständig informierte Methodik vorlegt, auf die die Klage gestützt wird – das ist der Blueprint, der vorab vorgelegt werden muss.

In Spanien und Deutschland mangelt es an solchen speziellen Regelungen für die derzeit anhängigen Klagen. Auch in den Niederlanden existieren keine gesonderten Regelungen für die dort durch die Gerichte selbst oder in Form von Abtretungsmodellen herbeigeführten Bündelungen.

In den letztgenannten Jurisdiktionen haben die Gerichte daher selbst begonnen, die Vorgaben der jeweiligen Prozessordnung den praktischen Erfordernissen anzupassen. Insoweit bestand auf dem Panel Konsens, dass die Verfahrensordnungen zwar den Anforderungen dieser umfangreichen Prozesse nicht genügen, aber notwendigen Anpassungen auch nicht entgegenstehen.[3] In allen Rechtsordnungen kristallisiert sich dabei die Anberaumung einer Case Management Conference als Mittel der Wahl zur frühzeitigen Strukturierung des Verfahrens und zur Herausarbeitung der wesentlichen ökonomischen Themen des Falles heraus.

Zu verzeichnen ist eine Akzeptanz dieser Vorgehensweisen durch die Prozessbeteiligten, wobei im Übrigen in der Diskussion durchaus Abweichungen im Prozessverhalten der Parteien in den einzelnen Jurisdiktionen festgestellt werden konnten. Für die Niederlande ließ sich die Bereitschaft der Beteiligten zu einer in gewisser Weise kooperativen Prozessführung feststellen, was Ausdruck findet in sog. joint submissions (gemeinsamen Stellungnahmen sämtlicher Beteiligter auf einer Prozessseite, also etwa aller Beklagten, zur Verringerung des Umfangs des Prozessstoffes) sowie auch der gemeinsamen Fokussierung auf die Kernprobleme (agree/disagree-statements). In Großbritannien ist zumindest Kooperationsbereitschaft zwischen den Parteigutachtern festzustellen, wenn diese im Rahmen von Case Management Conferences unmittelbar vom Gericht und somit ungefiltert durch Prozessvertreter der Parteien angehört werden. Für Spanien hingegen ist die Tendenz festzustellen, die Prozesse vollumfänglich streitig auszufechten.

[2] Vgl. zur Situation dort schon *Klumpe/Weber*, NZKart 2021, 492 ff.

[3] Vgl. insoweit für Deutschland etwa *Klumpe*, WuW 2022, 596 ff.

Die Feststellung der Schadenshöhe

Im Hinblick auf die Schadensfeststellung selber stellt sich eine große Bandbreite des Vorgehens in den Rechtsordnungen heraus. Ein erster großer Unterschied ist bereits, dass durch das Gericht bestellte Gutachter etwa in Großbritannien nicht vorgesehen sind, dafür indes die Richterbank des CAT auch mit Ökonomen besetzt ist. Letzteres ist in den drei anderen Jurisdiktionen nicht der Fall, wobei allerdings mit der Neufassung des § 144 Abs. 1 ZPO in Deutschland den Gerichten die Möglichkeit eröffnet wird, Sachverständige auch außerhalb der eigentlichen Beweisaufnahme zu Zwecken der Beratung des Gerichts in Sachfragen heranzuziehen.[4]

Diskutiert wurden zunächst die Anforderungen an die Darlegung und dann ggf. das Beweismaß im Hinblick auf die Erwerbsvorgänge als Grundlage jeder Schadensberechnung, insbesondere vor dem Hintergrund, ob insoweit Änderungen der Anforderungen bei großen Sammelklagen zu erwarten sind. Während für Deutschland aufgrund der bisherigen Rechtsprechung des BGH zum Merkmal der Kartellbetroffenheit unter allen Umständen § 286 ZPO zur Anwendung kommen dürfte, sind die Anforderungen in Großbritannien geringer. In den Niederlanden dürfte diese Frage in der jetzigen Phase des LKW-Kartell-Prozesses zur Entscheidung anstehen.

Zur eigentlichen Feststellung des overcharges kommen in Deutschland praktisch alle denkbaren Modelle (freie Schätzung im Schienenkartell vor dem LG Dortmund, Einholung eines Gerichtsgutachtens im Zuckerkartell vor dem LG Mannheim, Schätzung auf Grundlage von Parteigutachten ohne Bestellung eines Gerichtsgutachtes in diversen Kartellverfahren vor dem LG Berlin) zur Anwendung. In Spanien sind Schätzungen ohne Gerichtsgutachter, und oft genug auch ohne Berücksichtigung der vorgelegten Parteigutachter, zu verzeichnen.[5] Der CAT brachte in der oben näher bezeichneten Entscheidung Royal Mail Group die mittlerweile schon sprichwörtliche Broad Axe zum Einsatz[6]

Das Nullschadensparadox

Diskutiert wurden selbstverständlich auch diverse Ansätze zur Behandlung des Nullschadensparadox – oft verlangen die Gerichte nunmehr eine Art theory of no harm in Form einer Erläuterung, warum ein lang andauerndes Kartell trotz seiner vorgeblichen Wirkungslosigkeit aufrechterhalten wurde[7] – sowie die Frage nach der Anerkennung eines auf dem unionsrechtlichen Effektivitätsgrundsatz basierenden Mindestschadens von 5% und mehr aufgrund der Rechtsprechung des EuGH[8] und des BGH[9] in den bekannten „Dieselfällen"; ein Thema, das auch im weiteren Verlauf der Konferenz noch auf der Agenda stand.

Was es zu lernen gilt

Als Fazit des Round Table lässt sich festhalten, dass Schadensersatzzahlungen und Vergleiche aufgrund im Rahmen des private enforcement eingebrachter Klagen Realität geworden sind, auch wenn diese eine umfängliche und noch längst nicht beendete Evolution durchmachen mussten. Oder mit den Worten des spanischen Kollegen: Europa musste einst lernen, dass Kartelle schlecht sind, vielleicht mussten wir jetzt erst lernen, dass private Durchsetzung des Kartellrechts gut ist.

Und nach einem solchen Panel voller Informationen und Ideen geht jeder Beteiligte sodann vom Podium wie weiland John Bender, der rebellische Freak des Breakfast Clubs, innerlich die Faust reckend und „naaaa, nanananaaaa"[10] summend.

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[4] Vgl. hierzu *Klumpe*, WuW 2024, 12, 16.

[5] Vgl. hierzu auch *Bornemann/Suderow*, NZKart 2023, 478, 479.

[6] Ausführlich dazu *Tolkmitt*, ZWeR 2023, 309 ff. und jetzt ganz aktuell auch High Court Case Cl-2016-000758, zuletzt abgerufen am 12.2.2024.

[7] Hierzu auch *Schweitzer/Woeste*, ZWeR 2022, 46 und LG Dortmund, 27.9.2021, Az. 8 O 4/18 Kart, WuW 2021, 727.

[8] EuGH, 21.3.2023, Rs. C-100/21, ECLI:EU:C:2023:229 – *Mercedes-Benz Group AG*.

[9] BGH, 26.6.2023, Az. VIa ZR 335/21, NJW 2023, 2259, 2269, Rn. 74.

[10] https://www.youtube.com/watch?v=4gLVqjIvokc.

Gerhard Klumpe, Dortmund

Don't You (Forget About Me) [English Version]

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Dr. Gerhard Klumpe, one of Germany's best-known antitrust judges, discussed private antitrust enforcement in leading jurisdictions in Brussels. For our blog D'Kart, the presiding judge at Dortmund Regional Court describes his impressions of international trends in private enforcement.

Don't You (Forget About Me) - not only is this Simple Minds anthem familiar to anyone who grew up in the 1980s, it is also the defining music of the film The Breakfast Club, in which five people meet in the morning to talk about profound problems and reveal a lot about themselves or their experiences.

The set-up at breakfast in Brussels

Reminiscent of precisely this scene was the meeting of four judges and their moderator for breakfast at Le Chatelain in Brussels on the occasion of the CompLaw: Private Enforcement 2024 event organized there by Informa Connect. While the coffee, tea and rolls were supposed to be just a final vote on the following panel, entitled Judges' Roundtable, the discussion of the substantive issues started immediately instead, and was so lively that the participants almost missed the start of the event. However, it only took a few steps to move to the actual event hall and simply continue the discussion there in front of the interested audience.

The breakfast club meeting here at the Judges Round Table consisted of representatives from the currently most important forums for antitrust damages actions, namely from the Netherlands (Elske Boerwinkel, NCC District Court), Spain (Gustavo Andrés Martín Martin, Commercial Court n.1 Alicante), the UK (Ben Tidswell, Chairman Competition Appeal Tribunal) and Germany (the author of these lines here), moderated by none other than Dorothy Hansberry-Bieguńska (Hansberry Tomkiel, Poland).

First, a brief overview of the legal issues that have since been resolved by the case law of the ECJ and the national (supreme) courts was provided, including a discussion of recent case law developments such as the 15 decisions of the Tribunale Supremo (TS) and the well-known CAT decision[1]. Gustavo Martin also announced the imminence of further decisions by the TS in the coming weeks, which would promise further clarification, particularly with regard to determining the amount of damages. This kicked off the discussion of the continuing problems of antitrust damages claims.

In all jurisdictions, the focus is on two issues: firstly, the handling of large-volume (class) actions. Secondly, there is the question of how the extent of damages is determined. This question is paired with the question of how to introduce economic or econometric expertise into the legal dispute as well as the treatment and evaluation of such expert opinions (and possible alternatives).

Dealing with large-volume (class) actions

With regard to the first aspect, while in the UK and the Netherlands cartel damages are almost always pursued in the form of bundled claims, in Spain small and very small claims are predominant. In addition, there is a certain skepticism with regard to class actions - similar to Germany, where both approaches are known to exist.

Nevertheless, from the perspective of all those involved in the panel, it seemed likely that the bundling of claims will be the main way of pursuing claims in the future, if only to generate data more easily and comprehensively and, of course, due to better litigation

[1] Royal Mail Group Ltd. v DAF Trucks Ltd., judgment of 07.02.2023, [2023] CAT 6.

funding options. In the Netherlands, in addition to the assignment models that are also being discussed in Germany, there is also the option of bundling claims by the courts themselves. In addition, Dutch procedural law has also provided for the possibility of bundling claims since 2020.[2] Nevertheless, the assignment model - which has not yet been confirmed by the highest court in the Netherlands either - remains predominant here too.

The scope of the claim bundles is already enormous in the lawsuits currently pending. In the Netherlands, one of the proceedings before the Rechtbank Amsterdam in the truck cartel involves more than 200,000 purchase transactions. In Germany, a similar number of sales transactions have been recorded in the roundwood cartel (Rundholzkartell) and the plant protection products cartel (Pflanzenschutzmittelkartell) cases. This poses considerable challenges for the courts in all countries, although the basic requirements and tools for dealing with such litigation monsters vary considerably from jurisdiction to jurisdiction.

Various instruments

The courts in the UK not only have a wealth of experience, but also special regulations with regard to class actions. They are also familiar with the concept of the blueprint to trial developed in recent years with regard to economic issues and the methods to be used. This means that the CAT expects a "proposed class representative" to submit an expertly informed methodology on which to base the claim - this is the blueprint that must be submitted in advance.

In Spain and Germany, there are no such special regulations for the currently pending lawsuits. In the Netherlands, too, there are no separate regulations for the bundling brought about there by the courts themselves or in the form of assignment models.

In the latter jurisdictions, the courts themselves have therefore begun to adapt the provisions of the respective procedural rules to practical requirements. In this respect, there was consensus on the panel that although the procedural rules do not meet the requirements of these extensive processes, they do not stand in the way of necessary adjustments.[3] In all legal systems, the scheduling of a case management conference is emerging as the method of choice for structuring the proceedings at an early stage and for working out the key economic issues of the case.

These procedures are accepted by the parties involved in the proceedings, although the discussion also revealed differences in the procedural behavior of the parties in the individual jurisdictions. In the Netherlands, the willingness of the parties involved to engage in a certain degree of cooperative litigation was observed, which is expressed in so-called joint submissions (joint statements by all parties on one side of the proceedings, for example all defendants, to reduce the scope of the proceedings) as well as the joint focus on the core issues (agree/disagree-statements). In the UK, there is at least a willingness to cooperate between the party experts if they are heard directly by the court and thus unfiltered by the parties' legal representatives in the context of case management conferences. In Spain, on the other hand, there is a tendency for lawsuits to be fully litigated.

Determining the amount of damages

With regard to the assessment of damages itself, there is a wide range of procedures in the legal systems. The first major difference is that there is no provision for court-appointed experts in the UK, for example, but the bench of the CAT is also made up of economists. The latter is not the case in the three other jurisdictions, although the new version of Section 144 (1) ZPO in Germany allows the courts to call in experts outside of the actual taking of evidence for the purpose of advising the court on factual matters.[4]

Firstly, the requirements for the presentation and then, if applicable, the standard of proof with regard to the acquisition processes as the basis for any calculation of damages were discussed, in particular against the background of whether changes to the requirements for large class actions are to be expected in this respect. While Section 286 of the German Code of Civil Procedure (ZPO) is likely to apply in Germany under all circumstances due to the previous case law of the Federal Court of Justice on the characteristic of being affected

[2] See *Klumpe/Weber,* NZKart 2021, 492 et seq. on the situation there.

[3] Cf. in this respect for Germany, for example, *Klumpe* WuW 2022, 596 et seq.

[4] See *Klumpe*, WuW 2024, 12, 16.

by a cartel, the requirements in the UK are less stringent. In the Netherlands, this question is likely to be decided in the current phase of the truck cartel proceedings.

In Germany, practically all conceivable models (free estimation in the rail cartel (Schienenkartell) before the Regional Court of Dortmund, obtaining a court expert opinion in the sugar cartel (Zuckerkartell) before the Regional Court of Mannheim, estimation on the basis of party expert opinions without the appointment of a court expert in various cartel proceedings before the Regional Court of Berlin) are used to actually determine the overcharge. In Spain, estimates are made without a court expert, and often enough without taking into account the party experts submitted.[5] In the Royal Mail Group decision mentioned in more detail above, the CAT used the now proverbial broad axe.[6]

The zero-damage paradox

Of course, various approaches to dealing with the zero harm paradox have also been discussed - the courts now often require a kind of theory of no harm in the form of an explanation as to why a long-running cartel was maintained despite its alleged ineffectiveness[7] - as well as the question of the recognition of a minimum damage of 5% and more based on the principle of effectiveness under EU law due to the case law of the ECJ[8] and the BGH[9] in the well-known "diesel cases"; a topic that was also on the agenda for the rest of the conference.

What needs to be learned

The conclusion of the round table was that compensation payments and settlements based on actions brought in the context of private enforcement have become a reality, even if they have undergone an extensive and far from complete evolution. Or in the words of the Spanish colleague: "Europe once had to learn that cartels are bad, perhaps now we have to learn that private enforcement of antitrust law is good.

And after such a panel full of information and ideas, each participant then leaves the podium like John Bender, the rebellious freak of the Breakfast Club, inwardly shaking his fist and humming "naaaa, nanana-naaaa"[10]...

[5] See also *Bornemann/Suderow*, NZKart 2023, 478, 479.
[6] See *Tolkmitt*, ZWeR 2023, 309 et seq. and now also the very recent High Court Case Cl-2016-000758.
[7] See also *Schweitzer/Woeste*, ZWeR 2022, 46 and LG Dortmund, 27.9.2021, Case 8 O 4/18 Kart, WuW 2021, 727.
[8] EuGH, 21.3.2023, Case C-100/21, ECLI:EU:C:2023:229 – Mercedes-Benz Group AG.
[9] BGH, 26.6.2023, Case VIa ZR 335/21, NJW 2023, 2259, 2269, para. 74.
[10] https://www.youtube.com/watch?v=4gLVqjIvokc.

Rupprecht Podszun, Düsseldorf

DMA AI IKK

Rupprecht Podszun is a professor for civil law and competition law at Heinrich Heine University Düsseldorf and the editor of the new DMA Commentary.

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The Digital Markets Act shows its teeth: The European Commission opened the first investigations for non-compliance against Apple, Alphabet and Meta. Rupprecht Podszun reports on the first 20 days of DMA razzle-dazzle. He also looks back at the Bundeskartellamt's Berlin IKK conference and he has some news from his Chair that he wishes to share.

Breathtaking

If DMA enforcement keeps up its March-marching pace I voluntarily switch my interest to a more relaxed field, energy law or so.

- On March 1, it was announced that Booking.com, X and ByteDance (with its ad service) may qualify as new gatekeepers.[1] The Commission has 45 working days to assess.
- On March 6, the Commission published its first DMA Annual Report.[2]
- On March 7, the current gatekeepers (Alphabet, Amazon, Apple, ByteDance (for TikTok, Meta and Microsoft) had to hand in their compliance reports and the profiling reports. Summaries were published.[3] The obligations kicked in. Ever since, I try to keep track of the pirouettes Apple & others perform to escape their new duties.

- On March 11, Margrethe Vestager was inducted in the Hall of Fame of Technology Festival SXSW in the United States (congrats!), stating "we have not cared enough about risks with digital services".[4]
- On March 18, the Commission started DMA workshops. In these workshops, stakeholders were able to ask questions to gatekeeper staff after their presentations on compliance. Just to give you the flavour – Albrecht von Sonntag, Managing Director of Idealo, a comparison shopping portal, asked Google's Oliver Bethell:[5]

"My honest question now to you, Oli: What are you aiming at? The opening of a non-compliance decision by the Commission? Or would you rather have each and any of us take you to our national courts? After record-breaking antitrust fines and billion-Euro-damage claims – are you looking for a new record: the monopolist being sued by the most companies?"

("Oli", charming as ever, did not directly provide an answer.)

[1] European Commission, Booking, ByteDance and X notify their potential gatekeeper status to the Commission under the Digital Markets Act, 2024, https://digital-markets-act.ec.europa.eu/booking-bytedance-and-x-notify-their-potential-gatekeeper-status-commission-under-digital-markets-2024-03-01_en (last accessed 3.4.2024).

[2] European Commission, Annual report on Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52024DC0106 (last accessed 3.4.2024).

[3] European Commission, Compliance reports, 2024, https://digital-markets-act-cases.ec.europa.eu/reports/compliance-reports (last accessed 3.4.2024).

[4] German Embassy Washington, 2024, https://twitter.com/GermanyinUSA/status/1767633654010749333 (last accessed 3.4.2024).

[5] European Commission, Compliance with the DMA: Google, 2024, https://webcast.ec.europa.eu/compliance-with-the-dma-google-2024-03-21 (last accessed 3.4.2024).

Tell me why (I do like Mondays)

When we got the timetable for the DMA workshops we noticed that there was a break on 25 March 2024. There were five workshops in a row where Apple, Meta, Amazon, Alphabet and ByteDance ~~were grilled~~ were able to unfold their compliance activities. Then there was a weekend, and a Monday off and then came Microsoft. So, why was there this pre-Microsoft mundane Monday minibreak?

People who went through the German state exams can tell from experience that the day off in between is not helpful. It looks nice at the outset (you can sleep in and revise municipal law for the next day), but when it is there, you just want to have things over, cannot sleep anyway, and it turns out that they do not examine you on municipal law but on principles of administrative enforcement.

When that Monday arrived, the Commission's DMA team did not sleep in. Instead the Commission announced that it had started the first non-compliance investigations against Alphabet, Apple and Meta plus some further investigations.[6] Whoever thought that the DMA would be about a cosy "regulatory dialogue" was mistaken: The Commission plays hardball – and rightly so. This is the spirit of the DMA: Determined action, speedy & effective. The original "regulatory dialogue"-wording had been deliberately deleted during the legislative procedure.

The Commission now has 12 months to investigate and decide. If they find non-compliance, this is strike 1 out of 3 for establishing a presumption of systematic non-compliance (Article 18(3)). This may lead to severe consequences.

The courts will have a say, of course. But the General Court proved sympathetic to the Commission's Google cases, and its President has sided with the Commission in the first ever court proceedings on the DMA (concerning ByteDance's gatekeeper status).[7] This ruling has some heartening observations for the Commission. Marc van der Woude (the General Court's president) is merciless with the TikTok-owner regarding its burden of necessary substantiation. Yet, he also acknowledges a "lack of precision" regarding Article 5(2) DMA – yet it is not clear to me whether he thinks that the law is unclear or the ByteDance submission, or both.

Back to Law

This leads me to an interesting point (and to my first of two exciting news from my Chair). Can you imagine a court saying "there is a lack of precision in Article 102 TFEU"? Of course not! Article 102 is the textbook example for lack of precision – no need to highlight that.

The DMA is different: It is a very concrete, detailed and specific piece of legislation. Regarding the legislative technique the DMA is more like a block exemption regulation (BER). (The notable difference is that companies falling under the BER love it. Those falling under the DMA claim that "the potential resulting harm [from observing the rules of the DMA] (...) is significant and potentially 'existential'" (ByteDance[8])).

Now, this legislative difference means back to law: The DMA must be interpreted just as we learned to interpret the law in ~~Law101~~ the very first classes on contract law. For competition lawyers that is somewhat strange since we have become so used to economic arguments.

There is some help around the corner **(Big News #1/2)**: We have just published an article-by-article commentary on the DMA, guiding everyone through the application. I unboxed my volume on that Monday, March 25, mentioned above. Everyone who sees the book with its burgundy cover and the majestic inscription „Digital Markets Act" emblazoned in gold lettering against a dark blue background is thrilled. And the quality of the paper – I didn't even realise such a thing still existed! For bibliophile reasons alone, you should put this on your shelf. (Kudos to Beck Nomos Hart, our publishers!) If you read it occasionally, you will

[6] European Commission, Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act, 2024, https://digital-markets-act.ec.europa.eu/commission-opens-non-compliance-investigations-against-alphabet-apple-and-meta-under-digital-markets-2024-03-25_en (last accessed 3.4.2024).

[7] GC (President), 9.2.2024, Case T-1077/23 R, ECLI:EU:T:2024:94 – *Bytedance/Commission.*

[8] GC (President), 9.2.2024, Case T-1077/23 R, ECLI:EU:T:2024:94, para 39 – *Bytedance/Commission.*

probably also find that the authors have put a lot of effort into understanding and decoding the DMA.

Sorry, I was carried away a bit by my marketing zeal. But it is a good book (really). It is not a translation of our German commentary (that some of you may already have noticed), but it is a completely updated and revised version.[9]

Send in the Economists

If the lawyers take the helm, what is left for the economists? I have discussed the DMA with some of the most wonderful economists around (and some awesome law colleagues). When we embarked on this, I had feared this would end up as a self-help therapy group for competition economists turned jobless. But no. First, they are academics, so they are not in it for the money. Secondly, we found a lot of good use for economic insights to the DMA enforcement without corrupting its speedy application (you can read our paper open access here[10]).

Probably, the first two sentences of Article 8(1) DMA are the most intriguing part:

"The gatekeeper shall ensure and demonstrate compliance with the obligations laid down in Articles 5, 6 and 7 of this Regulation. The measures implemented by the gatekeeper to ensure compliance with those Articles shall be effective in achieving the objectives of this Regulation and of the relevant obligation."

The gatekeepers need to demonstrate compliance. And compliance means "effective in achieving the objectives" of the DMA. Wow! Send in the economists: What does "effective" mean in this regard? We need indicators, benchmarks, concrete results for this. In the compliance reports, we have not yet seen any indication how gatekeepers define "effective in achieving the objectives". That means: We must work on these issues, and we will watch what is coming.

New Kids on the Blog

To do this, we have a second exciting information to report from our team **(Big News #2/2)**: We have set up a brand-new project on competition and digitisation! We cover the DMA, section 19a of the German competition act, and the UK Digital Markets, Competition and Consumers Bill. It is a project run by Oles Andriychuk from Newcastle University and me. Oles is of course known as a stunning philosopher of digital regulation – and an equally stunning YouTube practitioner![11] The Deutsche Forschungsgemeinschaft (DFG) and the UK Arts and Humanities Research Council (AHRC) gave us generous funding for this.
These days, research projects need a bizarre acronym, otherwise they can't be considered serious research. Oles and I came up with SCiDA – Shaping Competition in the Digital Age. We have a team (still growing), including Jasper van den Boom and Sarah Hinck, and we have – drumroll, please – a new, glossy, fancy blog! (Philipp Offergeld, who did a lot of work on this, calls it "clean". Okay.)

The blog is here: www.scidaproject.com.[12] You can sign up for the newsletter so as not to miss any of our blog posts. The first three blog posts are online (together with some other material), but of course it is work in progress and we are happy to get your comments and contributions. I recommend reading Jasper's and Sarah's report from the DMA workshops,[13] as well as their categorization of compliance risks.[14] There is much more to discover on the website – check it out! (There is even an explanation why SCiDA is not such a bizarre acronym after all, but makes perfect sense.)

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[9] *Podszun*, Digital Markets Act – Article by Article Commentary, 2024.

[10] *Podszun/Fletcher* et al., Journal of Competition Law & Economics 2024, The Effective Use of Economics in the EU Digital Markets Act, https://academic.oup.com/jcle/advance-article/doi/10.1093/joclec/nhad018/7513584?searchresult=1&login=true (last accessed 3.4.2024).

[11] https://www.youtube.com/@digital.markets (last accessed 3.4.2024).

[12] SCiDA – Shaping Competition in the Digital Age, https://scidaproject.com/.

[13] *Hinck/van den Boom*, SCiDA, A Week of Workshops: Observations from the DMA Compliance Workshops, 2024, https://scidaproject.com/2024/03/27/a-week-of-workshops-observations-from-the-dma-compliance-workshops/.

[14] *Hinck/van den Boom*, Compliance time! Categorizing Risks of Compliance Failures in the DMA, 2024, https://scidaproject.com/2024/03/27/compliance-time-categorizing-risks-of-compliance-failures-in-the-dma/.

I will remind you at the end of this blog post that you better (a) buy the new commentary and (b) sign up for the SCiDA blog. You can do that now, of course, too. I'll take a short break and listen to a really good Monday song.[15]

Okay, welcome back!

The DMA gets surprising criticism from two sides if I take soundbites on gatekeeper candidate X (formerly known as Twitter) as a yardstick. Kayvan Jebelli, a consultant in Brussels with some sympathy for the ~~devil~~ Silicon Valley, finds it stunning that "after months of efforts and regulatory dialogue, the companies targeted by this legislation still don't have a clear sense of their obligations". This, in his view, "calls into question the very logic of the DMA. It was supposed to be a clear list of dos and donts". Interestingly, Tommaso Valletti, former Chief Economist, and not a suspect of close ties with Big Tech, goes into a similar direction, commenting with sarcasm on the new DMA investigations: "Was the #DMA not supposed to be 'self-executing'?"

I do not share their wondering. The prohibition of murder has been in the books for ages. I thought that was 'self-executing' (no pun intended), too, but still there are people out there who seemingly do not have a clear sense of their obligations.

No AI in the DMA?

Sorry, for not having mentioned AI so far. Here we go. The next paragraph was ~~written~~ patched together by Microsoft's Copilot:

"While the DMA does not explicitly focus on Artificial Intelligence (AI), the rapid advancement of AI technology and its integration into digital services means that AI could indirectly fall under the scope of the DMA. The Act seeks to address the risks associated with "bigness" in digital markets, which could include large AI-powered platforms that act as gatekeepers. There is a growing concern that the current framework may not adequately cover generative AI systems, which could become gateways for AI-based services. As such, while AI is not the primary focus of the DMA, its implications on AI systems, particularly those that could dominate market access, are indeed significant and warrant careful consideration within the Act's regulations."

A bit dull, but well summarised, OpenAI! I can only hope that the paragraph does not infringe copyright, in particular that of Ayse Gizem Yasar and her co-authors of this paper.[16] German competition law influencer Hanno Bender had a great screenshot of a document from the New York Times' lawsuit against Microsoft, OpenAI and others where the Table of Contents sets the record straight.[17]

Regulatory diaAIlogue

The German Ministry of Justice organised a "high level summit" on GenAI and copyright. Philipp Justus, a Google Vice President, was at this summit. The Ministry posted a photo of his talk and stated on X:

"Artificial intelligence for the benefit of mankind – this is what @phjustus, Vice President of @GoogleDE, makes a case for during our GenerativeAISummit. Dialogue and partnership-based solutions are needed to address copyright issues relating to AI-generated content." (Bundesministerium der Justiz, @bmj_bund, X, 5 March 2024, my translation)

Is this statement a bit... awkward? Sure, I do not doubt that Google is only in it "for the benefit of mankind". But I had not been aware, so far, that we go for "dialogue and partnership" when "copyright issues" come up. In my experience, German jurisprudence on copyright is full of harsh rulings against violations of copyright that some may deem as "petty". I'm looking forward to the German initiative to change the rules and to liberalise copyright by introducing a "benefit of mankind"-defence.

Wish list

Let's quickly turn to competition law (but I will revert to AI later). The Bundeskartellamt's 22nd International Conference on Competition took place in Berlin at the end of February 2024. For Germany, this *IKK* is arguably the most interesting venue for competition law.

[15] https://www.youtube.com/watch?v=-Kobdb37Cwc (last accessed 3.4.2024).

[16] *Yasar/Chong* et al., AI and the EU Digital Markets Act: Addressing the Risks of Bigness in Generative AI, https://arxiv.org/pdf/2308.02033.pdf (last accessed 3.4.2024).

[17] See for a picture of the table of contents: *Podszun*, DMA AI IKK, 2024, https://www.d-kart.de/blog/2024/03/31/dma-ai-ikk/.

This year, the team of Andreas Mundt had a particularly good touch in choosing speakers.[18]

The first highlight was of course that night at Nolle, a peculiar Berlin restaurant. At the door (waiting for Andreas Mundt's handshake) you get to know Salome Kavtaradze from the competition agency in Georgia. As you make your way to the cloakroom you pass Siemens' Georg Böttcher, Irene Sewczyk from the Bundeskartellamt, Jürgen Kühling from the Monopolies Commission and Mario Strebel who heads the Swiss branch of the famous Studienvereinigung. His German counterpart Ingo Brinker mingles with the Düsseldorf crowd – better so since he soon joins Tilmann Kuhn at White & Case there, coming from Munich. (Brinker's move is probably job market news of the year for JUVE.) You spot Martijn Snoep, Ioannis Lianos, Thibault Schrepel. Someone points out that Margrethe Vestager wears pretty cool sneakers. Top judges like Ulrike Pastohr are there – shortly after the conference we learn that she moves from the Düsseldorf bench to the German Supreme Court.
Next morning, those who were still a bit sleepy after a night in Berlin are woken up by the second highlight – the opening address by Sven Giegold. Giegold, a State Secretary for Economics, takes great interest in competition law and in competition law reform. He reiterated that we will see another reform of the German competition act in this legislative period. (For our non-German readers: As a member of the German government, it takes a certain amount of confidence to claim that a law will be passed in this legislative period that is part of economic regulation.) Topics may include merger thresholds, sustainability, damages and, most controversially, but also most needed (in my humble opinion) powers for the Bundeskartellamt in questions of violations of unfair competition rules. This was not the remarkable part of this stimulating speech though.[19]

Giegold quickly turned to European competition law. A former member of the European Parliament, he is well aware that national competition policies only go this far. Unexpectedly (at least for me) he presented the *Sven Giegold EU Competition Law Wish List*:

- Introduce a New Competition Tool;
- Follow the Dutch example for sustainability exemptions;
- Revise the Damages Directive so as to have more leniency applications;
- Drop the more economic approach in Article 102 TFEU-cases;
- Finance DMA enforcement with fees (as in the DSA);
- Raise EU merger thresholds and devise rules against killer acquisitions.

No lack of ambition or confidence detected here.

Comp stands for...

My impression is that this wish list was presented for a reason. Germany wishes to take the stand when it is decided what COMP stands for in Brussels.

Let me briefly explain: The European Commission will be rebuilt after the EU elections in June. Talk of the town in Brussels is on "competitiveness". Please note that this sounds like a nice word for people who love "competition". But in practice, it is pretty much the opposite – it is a euphemism for "industrial policy". Advocates of "competitiveness" would have allowed Siemens and Alstom to merge and they would shower European companies with taxpayer money in the vague hope for putting them in a better position in markets abroad.

So, competitiveness policies lead to a weakening of state aid-rules, competition rules, merger control. In 2019, economists have convincingly rejected this idea.[20]

The test case for the comp vs comp camps is the merger of Siemens/Alstom. Remember, the Commission had prohibited this merger and had angered French and German politicians at the time. Executive Vice

[18] Bundeskartellamt, Conference programme, 2024, https://www.bundeskartellamt.de/IKK/EN/Agenda/agenda_node.html (last accessed 3.4.2024).
[19] BMWK, Rede Staatssekretär Sven Giegold auf der Internationalen Kartellkonferenz (only in German), 2024, https://www.bmwk.de/Navigation/EN/Home/home.html (last accessed 3.4.2024).
[20] *Motta/Peitz* et al., More, not less competition, is needed in Europe, 2019, https://www.d-kart.de/en/blog/2019/02/15/europa-braucht-mehr-nicht-weniger-wettbewerb/.

President Vestager stands with the decision unwaveringly, and she made the point at IKK that CRRC, the Chinese alleged strongman, has not come anywhere in the past five years. The time period nicely coincides with what you look at in a merger case. This assessment is probably not what economist Tomaso Duso envisages as a real ex post evaluation of a merger,[21] but at first glance[22], Vestager seems right.

The reports

Those who love competitiveness better than competition hope for two reports that are due soon, the Letta Report and the Draghi Report. Both reports are expected to pave the way for EU policies in the coming years. They were commissioned by the European Council on the Internal Market (Letta Report) and the European Commission on Competitiveness (Draghi Report). The authors are heavyweights Enrico Letta and Mario Draghi. The former currently serves as President of the Jacques-Delors-Institute, an influential think tank. The latter (haha) is of course the former central banker. Both briefly served as Italian prime ministers, but then, who didn't? More importantly, they seem to be sharp thinkers with a strategic mind.

The Giegold Wish List is to be understood in this context. The German government wants to see more competition on the agenda of the next EU Commission. The list feeds into the reports. Let's hope for success, otherwise we will get "whatever it takes" (Draghi) for EU industry, even at the expense of competition.

CEO typology

The IKK offered a fascinating case study on types of German CEOs. I do not often see such men (and they are mostly male) in action. I was able to identify three types in Berlin. (Videos from all IKK talks are available here)[23]

Type 1: Tobias Meyer of DHL, the postal services incumbent, a global player. Meyer is a former McKinsey consultant with a certain air of ice. He does not flicker when Andreas Mundt asks a tough question. Meyer was in Dubai. He saw a lot of Chinese cars on the streets there. Meyer has a certain liking for China. Not good for European industry. Meyer probably loves competitiveness more than competition. He sounds very determined.

After the Meyer-talk a shrewd observer said to me in the break: "What a cry for help for Europe!"

Type 2: Arndt G. Kirchhoff of Kirchhoff Automotive, a family business turned global player with headquarters in the Sauerland. This is traditional German industry at its best. It is hard to imagine Kirchhoff at McKinsey's. I rather see him organise a football tournament for his staff where he takes pride in handing out the Cup to the winners and where they also hand out an award for best Fair Play, and, oh, this is actually what he does![24] Kirchhoff is a regular in German competition circles, he engages in associations and advocates the social market economy model. I do not see him begging for state aid.

Type 3 was the show stealer: Johannes Reck, CEO of GetYourGuide, an online travel company that is a Unicorn. Reck (who looks like a twenty-something, but is closer to 40) has a degree from ETH Zurich and founded the company. Smart guy, clear message, right to the point, knowing his audience.

The panel discussed AI and competition.[25] It was a strong line-up: Reck had Tobias Haar (General Counsel of Aleph Alpha, the German AI hopeful), Cristina Caffarra (no introduction needed) and Microsoft's Rima Alaily with him, Ariel Ezrachi (Oxford) moderating. Two things stuck with me: One, there is far too little venture capital available in Europe for start-ups (if compared with the US). Two, the "AI Tech Stack" is highly concentrated in the hands of BigTech with disastrous potential for foreclosure. Rima Alaily kept a remarkably calm composure, but maybe she knows how

[21] See also *Argentesi/Buccirossi* et al., 17 Journal of Competition Law Economics 2021, 95.

[22] Euractiv, Chinese train maker withdraws from Bulgaria tender after EU probe, 2024, https://www.euractiv.com/section/railways/news/chinese-train-maker-withdraws-from-bulgaria-tender-after-eu-probe/ (last accessed 3.4.2024).

[23] https://www.youtube.com/channel/UCEPnKP7WMADulYZO_Ybqnvg/videos (last accessed 3.4.2024).

[24] SauerlandKurier, WM-Feeling bei Kirchhoff (only in German), https://www.sauerlandkurier.de/kreis-olpe/attendorn/wm-feeling-kirchhoff-5795822.html (last accessed 3.4.2024).

[25] D'Kart Antitrust Advent Calendar 2023, https://www.d-kart.de/blog/2023/12/01/antitrust-advent-calendar-2023/.

difficult it is for competition agencies to capture AI activities (cf. the efforts here[26] or here[27]).

Ads

News broke during the IKK conference that Google faces a EUR 2,1 billion damages claim due to ad-tech practices in the Amsterdam Rechtbank. Publishing houses sue the company based on a 2021 decision by the French Autorité de la Concurrence.[28] (This is not to be mixed up with the recent fine against Google, handed down by the French, for not honouring an agreement with publishers.)

When I think about it, I am still struck that 3 out of 6 gatekeepers basically make their money from advertising. Advertising, as we know, is another word for biased information.

It is strange, isn't it, that the transformation we go through is fuelled financially by advertising. Advertising tries to make people turn to something (Latin: advertere), i.e. turn away from the thing they are doing... This thought gives even more meaning to the final plea of DHL CEO Tobias Meyer at IKK: "Focus on what matters! Focus on what matters!" Put differently: Do not let yourself be turned away from what is important, e.g. by some targeted advertising that exploits your all-too-human flaws (with a bow to the late Daniel Kahneman).

By the way: Have I alerted you to our new DMA Commentary and the SCiDA-Project on digital regulation with a new blog?[29]

Happy holidays!

[26] Competition in Virtual Worlds and Generative AI, https://competition-policy.ec.europa.eu/document/download/e727c66a-af77-4014-962a-7c9a36800e2f_en?filename=20240109_call-for-contributions_virtual-worlds_and_generative-AI.pdf (last accessed 3.4.2024).

[27] Bundeskartellamt, Cooperation between Microsoft and OpenAI currently not subject to merger control, 2023, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/15_11_2023_Microsoft_OpenAI.html (last accessed 3.4.2024).

[28] Autorité de la Concurrence, Decision 21-D-11 of June 07, 2021 regarding practices implemented in the online advertising sector, https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-online-advertising-sector (last accessed 3.4.2024).

[29] SCiDA – Shaping Competition in the Digital Age, https://scidaproject.com/.