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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, nanananaaaa"[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/.

Giorgio Monti, Tilburg

Much more than a market?

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Europe is preparing for the next Parliament, the next Commission – and all the challenges coming up these days. So, what is the European Union supposed to do, once the successors of Margrethe Vestager & Co. are sworn in? To be prepared, the institutions asked two Italian bigwigs for reports – the Council turned to Enrico Letta, the Commission to Mario Draghi. The Letta Report is now out, and D'Kart turned to another great Italian, Giorgio Monti, Professor at the Tilburg Law and Economics Center, to dissect the Letta Report. Here is his report on the report.

I have no idea why Enrico Letta's report on the internal market issued in April 2024 is entitled Much More than a Market.[1] Perhaps, heeding Jacques Delors' quip that 'nobody can fall in love with the single market'[2] he considered that proposing more could help make this report politically salient. However, there is nothing in this report beyond enhancing the internal market as defined in the EU Treaties wherein it is an element of a social market economy. This blogpost is divided in three segments. First, I comment on the style of the report; second, I briefly review the contents of the six chapters of the report; third, I discuss aspects of the report that may be of particular interest to the competition law community.

Style

One cannot help but draw comparisons with Mario Monti's report, A New Strategy for the Single Market[3] released on 9 May 2010. The symbolism for one: 9 May is Europe Day, the date when in 1950 we saw the Schuman declaration[4] that launched the intergovernmental project which led to today's EU. This one comes out mid-April, no particular symbolism attached. It also comes at the tail end of the current Commission and just before elections so it is not clear how much will be remembered by anyone when the EU resumes business after the elections. Two other things stand out. The first is that Monti's report is much better composed: incisive analysis followed by precise recommendations. Letta's is repetitive, with a great number of recommendations scattered throughout the text. Three 'roadmaps' with timetables are provided for some policy fields which raises the question as to why some items discussed have these detailed timetables and the rest (the vast majority) do not – are these more important?

The second is that you'd expect this report to show some frustration. Large swathes of it cover issues that Mario Monti had highlighted in 2010 as being key for moving Europe further (e.g. opening the services market, liberalizing network industries, making enforcement more effective), and little has been accomplished. Already in 2010 Monti referred to the single market as unfinished business with national regulations hampering economic initiative and innovation.[5] And yet there is no anger at generations of politicians who have done little but react to pressing emergencies, frequently blaming the EU for unpopular choices.

[1] *Letta*, Much more than a market, 2024, https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf (last accessed 3.5.2024).

[2] *Delors*, Address to the European Parliament, 1989, https://www.cvce.eu/content/publication/2003/8/22/b9c06b95-db97-4774-a700-e8aea5172233/publishable_en.pdf (last accessed 3.5.2024).

[3] *Monti*, A new strategy for the single market, 2010, https://ec.europa.eu/docsroom/documents/15501?locale=nl.

[4] Fondation Robert Schuman, Declaration of 9 may, https://www.robert-schuman.eu/en/declaration-of-9-may-1950, (last accessed 3.5.2024).

[5] *Monti*, A new strategy for the single market, 2010, p. 37.

Substance

The report contains six (unnumbered) chapters, each vaguely titled, all essentially rebooting the internal market in ways Letta thinks are necessary. Here I take a quick look at these chapters, with a warning that it is hard to synthesise a document that waffles on.

1: A fifth freedom. The EU created space for four economic freedoms: free movement of goods, services, capital and persons. This is the heart of the internal market, and the legal and economic salience of these freedoms is clear: Member States may not keep legislation that hampers these freedoms and EU Law may legitimately harmonise divergent national laws to enhance these market freedoms. Letta wishes to add a fifth freedom. What is this freedom? It is impossible to find a definition in the report. Freedom to what? Freedom from what? The best we get is this:

"This fifth freedom should encompass several fields, among which research, innovation, data, competences, knowledge and education."[6]

The idea behind this can be one that one may agree on: Europe lacks a coherent technology policy, there is limited action to create skills, infrastructure and investment to achieve greater industrial leadership and the EU is lagging behind the US and China in ways that significantly hamper its capacity to lead on innovation in an epoch of major technological changes. But what this needs is not a freedom, but a coherent, EU-wide industrial policy. This is what the first chapter really recommends: "granting enhanced authority to a collective industrial policy at the European scale."[7] Perhaps then, it is a plea for giving the Commission the freedom to coordinate the EU's industrial policy further?

But rather than demanding Treaty reform (presently the EU has no industrial policy competence), the Letta report recommends stuff which is already going on (e.g. European Data Spaces), marginal tweaks such as supporting the mobility of researchers and innovators (free movement of people anyone?), and identifies fields where one should focus (computing power and AI) which are well known without proposing a concrete way to make the EU 'a leading hub for AI innovation.[8] Why not be more radical and call for added EU powers to actually get things done?

2: Financing Strategic goals. As I have discussed elsewhere, the EU has to pay for any industrial policy.[9] So far it has used creative ways to find public money to achieve this but it is clear that more needs to be spent and money has to be spent better. Letta is right in stating that the EU needs 'a strategic approach that leverages the Single Market's potential in obilizing both private and public resources more effectively.'[10] This entails making capital markets work better and fixing state aid rules. I look at state aid below.

For capital markets, the report identifies three areas to make them work: increasing the supply of capital (e.g. stimulating investments by pension funds, insurance firms, retail savers), stimulating the demand for capital (especially access for small firms where he thinks what is needed is 'fostering a culture of capital market utilization among SMEs'[11] and designing an institutional framework governing capital by better supervision of financial markets at EU level. The report recognizes that it may be difficult to negotiate a full transfer of supervisory powers to the EU and accompanies modest proposals in this regard with suggestions for improving the governance and decision making of the European Securities and Markets Authority. This is all sensible stuff, but it is not clear why the report does not also consider whether the EU should have a bigger budget as well. It isn't as if private funders have a monopoly in wise spending.

3: Scale needed. Gone are the days of globalization moderated by the WTO: EU companies need to be large to 'bolster the EU's strategic autonomy, economic power, and global policy influence.'[12] The report targets the followings sectors for regulatory intervention: finance (discussed in chapter 2) electronic communications, energy, transport, defence, outer space and health. The three network industries have been the targets of EU for decades. In telecom, the issues are well-

[6] *Letta,* Much more than a market, 2024, p. 19.
[7] *Letta,* Much more than a market, 2024, p. 20.
[8] *Letta,* Much more than a market, 2024, p. 23.
[9] Editorial Comments, 60 Common Market Law Review 2023, 617.
[10] *Letta,* Much more than a market, 2024, p. 26.
[11] *Letta,* Much more than a market, 2024, p. 32.
[12] *Letta,* Much more than a market, 2024, p. 50.

known: more investment is needed in infrastructure (e.g. 5G Networks) and markets remain national – the report suggests that EU-wide operators could achieve the scale necessary for investment, noting that a unified approach to spectrum allocation is key to allowing the creation of larger players.

In energy markets the EU revealed its capacity for adaptation by finding alternatives to Russian gas, leading Letta to conclude that its response 'has been more effective and united than in any other previous energy crisis'.[13] The proposal is to build on this momentum to stimulate the emergence of continent-wide markets to deploy clean energy. However, many initiatives already exist. The one new recommendation that emerges is to speed up the system of public funding by proposing a singe entity to manage clean EU energy funding. This is a direct response to concerns that the US IRA provides quicker funding because it is based on tax breaks. It has been over a year that the EU has considered policies to compete with IRA!

The new fields for intervention (defence, space and health) are probably the result of the two recent EU crises: Covid-19 and Russia's invasion of Ukraine. For defence and space the report raises concerns about underinvestment and fragmentation of national markets – perhaps the latter is not so surprising since defence and space remain areas where states have guarded their autonomy. To fix defence, the report recommends consolidation of procurement by buying from local suppliers as a means to stimulate this sector. This requires money that the EU does not have but as the report shows Member States have this on the agenda, the one new idea here is to use the European Stability Mechanism (created to save the economies of certain countries during the financial crisis, repurposed already form Covid-19). This third use of this funding mechanisms suggests a deeper reform of the EU budget might be preferable.

4: Distributive justice. Economic growth has not been for all: one third of EU citizens live in regions that have not seen much if any of the positive effects of the internal market in the past twenty years. Addressing this is vital, we can all agree with this. However, the EU has limited competences to distribute wealth, so there is little to recommend. Letta suggests a rather bizarre new freedom (if there is a fifth freedom, it is found here not in chapter 1): the freedom to stay. Letta's concern is that the only way many people use to improve their lot today is to leave impoverished regions which is a vicious circle as the brain drain leaves these regions even worse off, a 'development trap'.[14] (It was perhaps not wise for an Italian national to plead for the freedom to stay given that nearly 70% of young people aged 18 to 34 in Italy live with their parents,[15] a right to stay clearly existing there!).

How to execute this freedom to stay: by rethinking regional aid as cross-border measures so that adjacent impoverished regions can benefit. No data is provided about how this might better redistribute wealth. Another more realistic suggestion made in the report is to offer grants and support for businesses, but without as we saw, any reflection on how to increase the size of the EU budget. Appointing a Vice President responsible for the freedom to stay without a budget is unlikely to be useful.[16] More sensibly, the report suggests that Member States take more ownership of their national budgets to deal with this, since they are competent. The EU would oversee this via the European Semester. Of course this process will do little to legitimize the EU as governments will blame the EU for higher taxes. By those same parties who seek election as MEPs.

5: Better EU-level law-making. This is an interesting chapter not least in light of complaints that the EU is only good at regulating industry rather than promoting it. These proposals stood out to me as particularly useful:

• ensuring more inclusive participation with a recognition that some interested groups lack the lobbying know-how of more experienced players and suggesting ways to make the former more engaged;

[13] *Letta,* Much more than a market, 2024, p. 61.

[14] European Commission panorama, The development trap: a cause of Euroscepticism?, 2023, https://ec.europa.eu/regional_policy/whats-new/panorama/2023/09/09-06-2023-the-development-trap-a-cause-of-euroscepticism_en (last accessed 3.5.2024).

[15] Share of young adults living with their parents in Italy, 2022, https://www.statista.com/statistics/578476/young-adults-living-with-their-parents-italy-vs-europe (last accessed 3.5.2024).

[16] *Letta,* Much more than a market, 2024, p. 94.

• regulating smarter, building in sunset clauses and facilitating experimentation;
• a Dynamic Impact Assessment that recalculates the costs and benefits when the European Parliament or Council recommend redrafting proposed legislation;
• reducing regulatory burdens by identifying redundant laws first and then reflecting on the fundamentals of regulation. In the regulation of digital markets this is particularly necessary as there are far too many under-examined links among the various Acts that have recently come into force.

6: External relations. As may be expected, the tone of this segment of the report reflects today's ruptured times with an emphasis on security, competitiveness (a dangerous obsession),[17] strategic independence and strategic partnerships.[18] Since the EU has already moved to devise a policy in this direction, the report recommends building on this by adding to the list of technologies that must be de-risked (none identified though), and finding a framework of cooperation with 'rival partners' (no details here). It also suggests a Transatlantic Single Market (no detail) to improve relations with the US[19] which may be hard to weave together if you know who gets elected. Enlargements yes, but avoid more illiberal regimes a greater emphasis on ensuring candidates abide by the rule of law. Of all the chapters this is the most vague, perhaps necessarily so as this is the realm of geo-politics.

The Internal Market and Competition

Some will remember that when the current version of the EU treaties were being negotiated, the then French President asked "Competition as an ideology, as a dogma: what has it done for Europe?"[20] This led to the Treaty draftsman relegating the EU's aim of achieving undistorted competition to a protocol.[21] It did not stop the Court of Justice quickly resetting the importance of competition policy,[22] but certain elements of the Letta report show comparable signs that competition risks being sidelined. For example, he seems to accept the complaint that there has been 'excessive entry' of service operators in telecom.[23] Can there really be too much competition? Relatedly, there are several calls for greater collaboration among firms and remarks that scale matters for the long term survival of EU industry given geo-political tensions and the need for strategic autonomy.

While the report continuously reassures us that scale should not come at the expense of competition, there is a clear call for some relaxation of competition rules which may mean **more relaxed merger standards** and a **more lenient approach to exempting cooperation**. A hint of how this might be operationalized is by reference to a dynamic approach consumer welfare[24] which suggests consumers may have to tolerate short run price hikes for long term innovation. This is an approach permitted in the Treaties,[25] but is a major reorientation of competition policy that has so far been resisted, note for example the modest reformulation of the Guidelines on Horizontal Agreements.

The report confronts the **regulation of state aid** more directly The main concern is asymmetric spending by those who can afford this. The report suggests the introduction of a state aid contribution mechanism, by which Member States who grant aid are required to allocate a proportion of national funds to financing pan-European investments. It is not particularly clear to me how this can be achieved without an amendment to the Treaties. And absent any figures on how much this contribution might amount to, it is not even clear whether this is sufficient for anything. Moreover, the problem with state aid is that we don't know how to distinguish between good and bad aid. This is largely because the procedure for authorization is front-loaded with states having to make an economic case for state aid without anyone having sufficient legal standing or knowledge to push back and without any ex post

[17] *Krugman,* Competitiveness: A dangerous obsession, http://gesd.free.fr/krugman94.pdf (last accessed 3.5.2024).
[18] *Letta,* Much more than a market, 2024, p. 133.
[19] *Letta,* Much more than a market, 2024, p. 142.
[20] Financial Times, Competition has served Europe well; Mr Sarkozy has not, https://www.ft.com/content/85a2d268-2346-11dc-9e7e-000b5df10621 (last accessed 3.5.2024).
[21] Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol (No 27) on the internal market and competition, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008M%2FPRO%2F27 (last accessed 3.5.2024).
[22] ECJ, 17.2.2011, Case C-52/9, ECLI:EU:C:2011:83 – *TeliaSonera Sverige.*
[23] *Letta,* Much more than a market, 2024, p. 52.
[24] *Letta,* Much more than a market, 2024, p. 53.
[25] *Monti,* 11 (3-4) Journal of European Competition Law & Practice 2020, 124.

analysis of what state aid interventions have worked. These gaps need filling.

Conversely the report even suggests being quicker with disbursing cash especially for energy investments lest firms relocate to the US to take advantage of the IRA's tax breaks. Again there is a tension between pursuing an active industrial policy that keeps investments here and a smart economic policy that makes the grant of state aid subject to better checks. Letta proposes solving this by adjusting the recent state ad policy of granting aid to important projects of common European interest (IPCEIs) which already require the contribution of state aid by multiple Member States and reaching multiple beneficiaries to facilitate the subsidization of long term strategic projects. One wonders, however, why the report considers this to be preferable to making the case for a bigger EU budget.

The discussion on **public procurement** reveals similar tensions between on the one hand praising this instrument while on the other bemoaning that Member States buy from the cheapest provider and remarking that there has been less competition for public contracts. The proposed solution to stimulate buyers to use this to enter into contracts that 'foster the creation of high quality jobs, characterized by fair wages and conditions underpinned by collective agreements'[26] may reduce competition further. Suggesting a minimum quota for innovation procurement is also an odd way of stimulating SMEs who might have less scale to promise innovation and this just seems another way of using state coffers to achieve EU goals.

Generalizing from this, it is hard to disagree with Jean-Francois Bellis[27] that there is a risk, which this report just confirms, of the EU placing competition policy down one notch.

A report with rivals

While I have formed a generally negative impression of this report, perhaps the principal takeaways should be two. First, how hard it has been to build the EU market, how many complex issues must be addressed to make it work better, and how useless many national politicians have been. Second, one of the running themes of this report is how much more integration would be possible if Member States were more trustful of each other and pooled their resources. The report does well to identify all the complexities and junctures where greater cooperation may help.

But this is also its weakness: by covering so much and not pinning down a set of key priorities it reads like a report that has something pleasing for all, which in my view is not what we need now. Moreover, it is often hard to understand what the report proposes that is new when it often also explains existing policies. The text is also disorganized. For example: chapter 3 identifies some economic sectors, but other chapters identify additional sectors of focus (e.g. deep tech) so that there is no one place where a list of strategic industries is identified. Chapter 4 rightly looks at distributive justice but then pivots to consider the importance of consumer protection laws and new Code of Business Law to enhance competitiveness of SMEs who can use this to trade across the EU with lower costs, like the Uniform Commercial Code in the US. It's like looking at an over-decorated Christmas tree.

We'll see if the Mario Draghi report will bring greater focus and a sense of direction. In the meantime, the market for gaining the attention of new Commissioners and MEPs is filling up with rival recommendations, of which those by Jacques Pelkmans,[28] a wise analyst of Europe's internal market, is also worth a look.

[26] *Letta,* Much more than a market, 2024, p. 46.

[27] *Bellis* (only in French), 2024, https://www.iee-ulb.eu/content/uploads/2024/04/Carte-blanche_Jean-Francois-Bellis_1504_final.pdf (last accessed 3.5.2024).

[28] *Pelkmans,* Empowering the single market, 2024, https://cdn.ceps.eu/wp-content/uploads/2024/01/CEPS-In-DepthAnalysis-2024-03_Empowering-the-Single-Market.pdf (last accessed 3.5.2024).

Sebastian Steinert, Berlin

Conference Debriefing (41): 50 Jahre Monopolkommission

Sebastian Steinert, Maître en Droit, LL.M., schreibt derzeit eine Doktorarbeit zum Digital Markets Act. Die Arbeit wird von Prof. Dr. Rupprecht Podszun betreut.

Zitiervorschlag: *Steinert*, DKartJ 2024, 19-24

Die Monopolkommission hat Geburtstag! Schon seit 50 Jahren ist sie das unabhängige Beratungsgremium der Bundesregierung. In Berlin kam die deutsche Wettbewerbscommunity zusammen, um sie zu feiern. Und wie könnte man die "Verfechterin des Wettbewerbs" besser feiern als mit dem, was sie ausmacht: Intensive Debatten und "kritischer Diskurs". Als Geburtstagsgeschenke gab es leider keine Umsetzungsversprechen aus der Politik, aber dafür hochrangige Anerkennung und überraschenden Bekenntnisse. Sebastian Steinert berichtet.

Name der Veranstaltung: 50 Jahre Monopolkommission – Wettbewerb im Spannungsfeld von Industriepolitik und ökologischer Transformation

Ort & Zeit: Bundesministerium für Wirtschaft und Klimaschutz (BMWK), Berlin, 05.06.2024

Gastgeber: BMWK und Monopolkommission – in der sitzen derzeit die beiden Professoren Jürgen Kühling und Tomaso Duso sowie aus der Unternehmenspraxis Dagmar Kollmann, Pamela Knapp und Constanze Buchheim.

Publikum: Alle, die mit der Monopolkommission gelegentlich zu tun haben: Bundestagsabgeordnete wie Sandra Detzer, Kartellbeamte wie Eva-Maria Schulze (BKartA) und Thomas Deisenhofer (EU-KOM), Richter wie Jan Tolkmitt (BGH) und Ulrich Egger (OLG Düsseldorf), die Anwaltschaft (Düsseldorf natürlich wieder stark vertreten), Profs (z.B. Thomas Weck oder Gabriela von Wallenberg, die selbst mal für die MoKo gearbeitet haben) und natürlich VertreterInnen von Monopolisten (Thoralf Schwanitz von Google), solchen, die es gern blieben (Wolfgang Kopf von der Telekom), und solchen, die gegen eben diese kämpfen (Peter Westenberger vom Verband Die Güterbahnen).

Für die Jubiläumsfeier wurde ein straffes Programm vorbereitet: Eine Keynote, zwei Vorträge und sechs Diskussionen. Und das alles in unter fünf Stunden (Spoiler: Es hat länger gedauert). Dieses Conference Debriefing können Sie also entweder lesen, wenn Sie an der Zukunft des deutschen Wettbewerbsrechts interessiert sind oder aber wenn Sie noch Inspiration für die Feier Ihres nächsten runden Geburtstags suchen.

1. Der Unterschied zwischen Theorie und Praxis

Eine Testfrage zu Beginn: Was ist reizvoller, die Arbeit in der Monopolkommission oder die im Rat der „Wirtschaftsweisen"? Carl Christian von Weizsäcker, dem beide Mitgliedschaften angeboten wurden, gab per schriftlichem Grußwort eine klare Antwort: Er entschied sich für die MoKo, weil die Zusammenarbeit mit den Praktikern so reizvoll sei (Geburtstagskompliment Nr. 1 des Tages). Denn die MoKo zählt klassischerweise drei VertreterInnen aus der Wirtschaftspraxis zu ihren Mitgliedern. Das sind aktuell:

- Dagmar Kollmann (seit 2012), u.a. Aufsichtsrätin bei der Deutschen Telekom und beim Bankkonzern CitiGroup Global Markets Europe,
- Pamela Knapp (seit 2020), u.a. Aufsichtsrätin beim Lichttechnikhersteller Signify und beim Chemiekonzerm Lanxess, und
- Constanze Buchheim (seit 2022), u.a. Aufsichtsrätin beim Softwareunternehmen Valsight und Präsidentin der Entrepreneurs' Organisation Berlin.

Im ersten Panel, einem kurzweiligen Gespräch mit den beiden Wissenschaftlern Jürgen Kühling (Recht) und Tomaso Duso (Wirtschaft), durften die drei von ihren Highlights aus den vergangenen Jahren in der MoKo erzählen. Für Dagmar Kollmann war es die Zeit nach der Finanzkrise und die intensive Auseinandersetzung mit dem 3-Säulenmodell der deutschen Bankenlandschaft. Pamela Knapp war selber einmal Vorständin eines Unternehmens, dem eine Kartellgeldbuße auferlegt wurde (natürlich vor ihrer Zeit!). Sie hat sich deshalb besonders an der Diskussion zur Haftung von

Vorstandsmitgliedern beteiligt (ist Thema im nächsten Hauptgutachten, das am 1. Juli übergeben wird). Constanze Buchheim ist im Startup- und Digitalbereich zuhause, und deshalb standen für sie die Diskussionen zu agiler Unternehmensführung und zu Geschäftsmodellen mit Künstlicher Intelligenz im Vordergrund. Die Unternehmerinnen machten deutlich, dass es einen wichtigen Unterschied machen kann, wenn die Perspektive der Unternehmen eingebracht wird. Das ist dann wohl der berühmte Unterschied zwischen Theorie und Praxis, der für von Weizsäcker entscheidend war.

2. Die Betrachtung des Olymp

Wer noch nicht ganz weiß, wo die Monopolkommission im deutschen Institutionengefüge einzuordnen ist, dem sei erklärt: Die Monopolkommission ist der deutsche Olymp für Wettbewerbsfragen.

Ein besonders großes Geschenk

So sagte es zumindest Professorin Veronika Grimm, ihres Zeichens Mitglied bei der großen Schwester, den Wirtschaftsweisen, pardon dem „Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung“. Sie berichtete, wie sie sich als VWL-Studentin 1995 für Wettbewerbsthemen begeisterte und auf die Monopolkommission als den “Olymp” blickte. Ein größeres Geburtstagskompliment hätte sie zum Jubiläum wohl kaum mitbringen können. Sie setzte aber noch einen drauf und lobte die Gutachten der Monopolkommission als “hochrelevant” und “auf den Punkt”. Die EntscheiderInnen im Raum mahnte sie, die Empfehlungen der Monopolkommission zu befolgen, denn der Wettbewerb sei das Asset, das uns den entscheidenden Vorteil gegenüber Autokratien verschafft.

Für den Wettbewerb gibt es immer Luft nach oben

In ihrem Vortrag “Wettbewerb in der Klimapolitik: Zwischen politischen Zielen und wettbewerblichen Instrumenten“ hielt sie dann ein fundiertes Plädoyer für mehr Wettbewerb in der Klima- und Energiepolitik. Was es dafür braucht? Vor allem verlässliche Rahmenbedingungen, um Unternehmen Investitionssicherheit zu bieten (auch für die berüchtigten Brennstoffzellen, über die sich Grimm zuletzt mit den anderen Wirtschaftsweisen zerstritten hatte)[1]. Außerdem brauche es einen klaren Fokus auf den Emmissionshandel statt eines Blumenstraußes an verschiedenen Handlungsinstrumenten, die sich gegenseitig der Anreizwirkung berauben (das war wohl das einzige Mal an diesem Tag, dass in einer Sache weniger statt mehr Wettbewerb gefordert wurde). Aber auch vor der geopolitischen Dimension schreckte die Wirtschaftsweise nicht zurück: Europa müsse an der Einrichtung eines Weltmarktes für grüne Energie arbeiten und deshalb sollte für den zukünftigen Energiehandel „die werteorientierte Außenhandelspolitik nicht an erster Stelle stehen“. (Man sagt, das Echo des Raunens im Saal halle immer noch nach).

Legacy und Lanz

Nach dem Vortrag kam mit den Worten von Jürgen Kühling die “Legacy” der Monopolkommission zum Zuge, denn Justus Haucap, Kommissionsvorsitzender 2008-2012, ergriff das Wort. Er erinnerte sich, wie das Sektorgutachten Gas und Strom 2009 einen regelrechten „Shitstorm“ auslöste (hieß das damals schon so?), weil es die Idee aufbrachte, auch im Markt für erneuerbare Energien Wettbewerb einzuführen. Er lobte Grimm als Stimme im Sachverständigenrat – und bei Markus Lanz –, die den Wettbewerb hochhält. Jürgen Kühling animierte das zu einer Ermahnung aller Kollegen, es ebenso zu halten: “Erst forschen, dann twittern und dann ab zu Lanz. Und nicht erst zu Lanz und dann überlegen, ob man dazu etwas forschen kann.”

3. Der wertegebundene Wettbewerb

Der nächste Redner wurde mit Spannung erwartet, denn es hatte sich dank FAZ[2] schon herumgesprochen: Die Monopolkommission hat bald ein neues Mitglied. Professor Rupprecht Podszun (schon mal gehört?) wird ab 1. Juli die Nachfolge von Professor Jürgen Kühling als Rechtswissenschaftler in der Kommission antreten.

[1] WirtschaftsWoche, Warum die Wirtschaftsweisen jetzt über Batterien streiten, 2024, https://www.wiwo.de/politik/deutschland/wirtschaftsweisen-zoff-warum-die-wirtschaftsweisen-jetzt-ueber-batterien-streiten/29800598.html (zuletzt abgerufen am 14.6.2024).

[2] FAZ, Podszun wird Mitglied der Monopolkommission, 2024, https://zeitung.faz.net/faz/unternehmen/2024-05-27/ea8e7f2b76936800c64cf68ddb8f6416/?GEPC=s3 (zuletzt abgerufen am 14.6.2024).

Vorstellung sinnlos

Rupprecht Podszun ist hauptberuflich Blogger (D'Kart)[3] und Podcaster (Bei Anruf Wettbewerb)[4] und nebenberuflich ein "sehr, sehr renommierter Kartellrechtler" (Jürgen Kühling), was seine Vorstellung zu einer "sinnlosen Aufgabe" macht (Moderator Daniel Zimmer, Vorsitzender der Kommission 2012-2016). Zimmer erwähnte nach einigem Lob, das dem Redner sichtlich unangenehm war, dass Podszun in der Vergangenheit nicht nur als Kartellbeamter gearbeitet hatte, sondern auch als Theaterkritiker[5]. Podszun eröffnete seinen Vortrag dann mit den Worten "Wenn ich es jetzt richtig versemmel, kann ich vielleicht wieder als Theaterkritiker arbeiten."

Kartellrecht war nie unpolitisch

Dem Newbie in der Kommission hatten die Organisatoren ein sehr grundsätzliches Vortragsthema aufgetragen: "Wie politisch darf das Kartellrecht sein?". Die Themenformulierung gab damit vor, dass das Kartellrecht politisch ist. Und auch Podszun meint, der Glauben an ein unpolitisches Kartellrecht sei eine "groteske Selbsttäuschung". Politische Entscheidungen und "normative Wertungen" (so Podszuns Synonymvorschlag für alle, denen "politisch" ein zu schmutziger Begriff ist) haben das Kartellrecht immer geprägt. Das zeige sich insbesondere an der Ministererlaubnis, der Fallaufgreifpraxis der Kartellbehörden, der wettbewerblichen Schadenstheorie und den Ausnahmen vom Verbot der Wettbewerbsbeschränkungen. Für die Ministererlaubnis stellte Podszun klar, er hoffe, dass sie noch mit der kommenden GWB-Novelle abgeschafft werde (dieser Satz war die Einladung an alle kommenden Rednerinnen und Redner, ihre Auffassung zur Ministererlaubnis kundzutun).

Wertgebundener Wettbewerb

Wo es Spielräume für Wertungen im Kartellrecht gibt, erwartet Podszun, dass diese so ausgefüllt werden, dass die drängendsten Probleme in der Wirtschaft angegangen werden. Das Kartellamt forderte er ziemlich unverblümt auf, mal wieder so innovativ zu werden wie im Facebook-Fall – aber diesmal mit Umwelt-, statt Datenschutz. Um die Kartellrechtsanwendung nicht zum Allheilmittel zu machen, schlug er das „Leitbild des wertgebundenen Wettbewerbs" vor: Nach diesem Konzept muss das Kartellrecht wirtschaftliche Macht so einhegen, dass den Grundrechten und der verfassungsmäßigen Ordnung in der Marktwirtschaft zum Durchbruch verholfen wird. Podszun berief sich auf die Gesetzesbegründung, mit der vor 50 Jahren Fusionskontrolle und Monopolkommission eingeführt wurden. Darin steht: es gelte, die "Freiheit anderer" zu sichern. Das ist schon ein anderer Akzent als der Schutz der consumer welfare.

Und was waren die Reaktionen?

Nach Podszuns Vortrag meinte Achim Wambach (Vorsitzender der Monopolkommission 2016-2020), er würde bei den künftigen Diskussionen in der Kommission „ja gern mal Mäuschen spielen". Einige Redner warnten, man möge doch bitte den Aufgabenbereich des Kartellrechts nicht überspannen. Doch Podszun gab Entwarnung: Das entscheidende Kriterium sei immer der Wettbewerb. Nur hätten sich – siehe Facebook-Fall – die Wettbewerbsparameter geändert. Das war auf jeden Fall ordentlich food for thought – und daher war es gut, dass die Kaffeepause winkte.

4. Der kritische Diskurs

Wie politisch Fragen des Wettbewerbs tatsächlich sind, zeigte das nächste Panel mit dem Titel "Digitalisierung und industrieller Wandel: Wettbewerbspolitik im Rahmen der Transformation". Das Gespräch wurde zum Beispiel für das, was die MoKo immer anzustoßen versucht: Einen kritischen Diskurs. Moderiert wurde das Ganze von Tomaso Duso (er wird Jürgen Kühling als Vorsitzender folgen). Die Zusammenstellung der Diskutanten versprach von vornherein Stimmung:

- Sven Giegold (Staatssekretär im BMWK, ehem. MdEP für Bündnis 90/Die Grünen),
- Joe Kaeser (ehem. Siemens-Vorstandsvorsitzender und heute Aufsichtsratschef von Siemens Energy und Daimler Truck),

[3] D´Kart – Antitrust Blog, https://www.d-kart.de/.

[4] Podcast: Bei Anruf Wettbewerb, https://podcasters.spotify.com/pod/show/beianrufwettbewerb.

[5] *Podszun*, „Bitte nix mixen!", Streit ums Urheberrecht - Beobachtungen vom Prozess des Suhrkamp-Verlags gegen das Münchner Residenztheater wegen Frank Castorfs "Baal"-Inszenierung, 2014, https://nachtkritik.de/recherche-debatte/streit-ums-urheberrecht-beobachtungen-vom-prozess-des-suhrkamp-verlags-gegen-das-residenztheater-wegen-frank-castorfs-qbaalq-inszenierung (zuletzt abgerufen am 14.6.2024).

• Ulrike Herrmann (taz, Autorin von „Das Ende des Kapitalismus“) und
• Achim Wambach (ZEW – Leibniz-Zentrum für Europäische Wirtschaftsforschung).

Das EEG als Glaubensfrage

Joe Kaeser eröffnete mit der Fundamentalkritik, dass die Transformationen aktuell mit viel zu viel Staat und viel zu wenig Markt ausgestaltet werden. Sven Giegold entgegnete, er habe noch nie an die “plumpe Entgegensetzung” von Staat und Markt geglaubt. Er kenne kaum ein Land, in dem die Frage, wie viel der Staat in einer Situation des Wandels eingreifen darf, so “religiös diskutiert” werde wie in Deutschland. Als Erfolgsbeispiel für staatliche Gestaltung nannte er das Erneuerbare-Energien-Gesetz (EEG) und entflammte damit die Zündschnur der Diskussion. Kaeser und Wambach reagierten prompt: Der Erfolg des EEG sei ein Märchen, es habe Innovationen verhindert (Kaeser), die Industrie sei abgewandert (Wambach). Bei Giegolds Optimismus, dass das EEG grüne Technologien erfolgreich machen wird, verwechsele er BWL und VWL, so Herrmann, und für wirksamen Klimaschutz müsse man sich vom Kapitalismus ganz verabschieden. Das einzige was jetzt noch helfe, sei “grünes Schrumpfen”. Ganz im Gegenteil, meinte Wambach, denn “Schrumpfen ist kein Erfolgsmodell”, das andere Länder kopieren würden, um auf dem Weg der CO2-Einsparungen mitzugehen.

Fehlende Unterhaltung konnte man dieser Geburtstagsparty auf jeden Fall nicht vorwerfen. Vor lauter EEG-Diskussion kam die Digitalisierung (immerhin erstes Wort im Titel des Panels) dann allerdings etwas kurz (Giegold: “Ich werde keine weitere Frage akzeptieren, bis ich hierzu [der EEG-Kritik] Stellung genommen habe”). Aber immerhin konnten alle zum Schluss nochmal die Wichtigkeit der Digitalisierung in einem Satz betonen. Bis auf Ulrike Herrmann natürlich, denn für sie führt die energieintensive Digitalisierung nur “zu KI, die keiner braucht”.

Wünsche zum Geburtstag

Achim Wambach äußerte zum Geburtstag der Monopolkommission noch einen Wunsch: Die Monopolkommission sollte ein Gutachten mit Leitplanken für Beihilfen auf den Weg bringen. Und zwar unter besonderer Beachtung der Punkte Wettbewerb und Innovation. Und auch Sven Giegold adressierte noch einen wichtigen Wunsch an die anwesende “Kirche des Wettbewerbs”. Er sorge sich sehr um den Stellenwert des Wettbewerbs in der EU und warnte vor Erleichterungen in der Fusionskontrolle zur Schaffung von European Champions. Deshalb “müssen wir alle gemeinsam aufpassen, dass nicht zerschlagen wird, was wir über viele Jahre aufgebaut haben.” Denn die gewünschte verbesserte Wettbewerbsfähigkeit Europas werde jedenfalls nicht durch Einschränkungen des Wettbewers erreicht. Ob sein Sitznachbar Joe Kaeser, der Siemens-Chef gewesen war, als die EU-Kommission die Fusion von Siemens und Alstom untersagt hatte, das so unterschreiben würde?

5. Das Wort der Entscheider

Die Monopolkommission berät die Bundesregierung, “entscheiden kann sie aber nichts”, wie die Süddeutsche Zeitung unlängst feststellte.[6] Dafür holte Jürgen Kühling die echten Entscheider nun aufs Podium: Klaus Müller, Präsident der Bundesnetzagentur, und Konrad Ost, Vizepräsident des Bundeskartellamts, der für den kurzfristig verhinderten Andreas Mundt eingesprungen war.

Adams Apfel

Und was sagen die Entscheider zu den viel diskutieren Tendenzen zu einer stärkeren “Industriepolitik” (das ist das euphemistische Codewort für Einschränkungen des Wettbewerbs)? Klaus Müller verglich sie mit dem biblischen Apfel, der Adam verführte: Die Versuchung nach European Champions ist da, aber die Bundesregierung muss stark bleiben. Auch für Konrad Ost stand fest, dass das Bundeskartellamt die Forderung nach Großunternehmen unter Inkaufnahme der Verringerung wettbewerblicher Wirkungen nicht gut finden kann. Er gestand der Politik allerdings zu, dass Wettbewerb nur eines von mehreren Politikzielen ist.

Sneak-Peak

Jürgen Kühling gab im Gespräch eine Vorschau auf Aspekte, die im kommenden Hauptgutachten der Monopolkommission angesprochen werden. Namentlich die Versorgungssicherheit, der Fernwärmemarkt und die

[6] SZ, Brauchen wir diese Experten noch?, 2024, https://www.sueddeutsche.de/wirtschaft/wettbewerb-monopolkommission-konkurrenz-willy-brandt-1.7685486 (zuletzt abgerufen am 14.6.2024).

Eisenbahnregulierung. Der Machtmissbrauch von Fernwärmeversorgern ist auch Konrad Ost ein Dorn im Auge, und er berichtete, dass das Bundeskartellhamt hierzu mehrere Verfahren führt. Den Eisenbahnmarkt bezeichnete Kühling als den Sektor, bei dem "wir am wenigsten vorangekommen sind". Das provozierte bei Justus Haucap die Rückfrage, welche Fortschritte Jürgen Kühling denn im Postsektor sehe. Kühling blieb dabei, dass die Bahn den Wettstreit der Incumbents um den letzten Platz gewonnen habe – bei ihr sei die Kundenunzufriedenheit um ein Vielfaches höher als bei der Post. Klaus Müller wies darauf hin, dass es im Postbereich wenigstens zum ersten Mal die Ablehnung eines Portoerhöhungsantrags der Post AG gab.

Die Zukunft des Datenzugangs

Der Deutschen Bahn wurde letztes Jahr ja erst vom Bundeskartellamt verordnet, Wettbewerbern besseren Zugang zu ihren Verkehrsdaten zu gewähren.[7] Auf dieses Thema Datenzugang freuen sich Konrad Ost und Klaus Müller in Zukunft besonders: Die neue europäische Digitalgesetzgebung und das Kartellrecht böten hier reichlich Ansätze für verbesserte Bedingungen. Das Bundeskartellamt und die Bundesnetzagentur haben mit vier anderen Bundesbehörden bereits das "Digital Cluster Bonn"[8] gegründet, um im Bereich der Digitalregulierung stärker zusammenzuarbeiten. Das schließt § 19a GWB ein. Ost: Es habe sich bereits jetzt gezeigt, dass der DMA mit seinen spezifischen Verpflichtungen schnell an seine Grenzen stoßen kann und deshalb flexible Normen wie der § 19a GWB weiterhin entscheidend sein werden.

6. Die Gratulation von ganz oben

Der Mächtigste zum Schluss: Nachdem er den Messerundgang bei der Internationalen Luft- und Raumfahrtausstellung und eine Rede beim Tag der Bauwirtschaft hinter sich gebracht hatte und bevor er ins Bundeskanzleramt weitermusste, durfte Vizekanzler Robert Habeck endlich sein eigentliches Tageshighlight absolvieren: Seinen Auftritt bei der Party der Monopolkommission. Er war gekommen, so eröffnete er, um ein Geburtstagsständchen zu singen, aus dem dann leider doch eine Keynote wurde. Die war allerdings eine Lobeshymne, also wenigstens ein gesprochenes Ständchen.

Für Robert Habeck ist die Monopolkommission der "Suchscheinwerfer" für wettbewerbliche Herausforderungen im wirtschaftlichen System. Sie sei ein politischer Akteur, aber könne sich auf die Fragen des Wettbwerbs fokussieren. Die Politik kümmere sich dann schon um die anderen politischen Erwägungen.

Der Minister und KI

Im Talk mit Kühling und Monopolkommissarin Constanze Buchheim schaltete Habeck souverän von Luftfahrt und Bauwirtschaft zu Wettbewerbsthemen um. Ganz im Sinne der Wettbewerbsfähigkeit machte er klar, dass er gerne führende KI-Unternehmen in Deutschland haben möchte, bevor er wettbewerbliche Bedenken hege. Er lasse sich auch gerne von der Monopolkommission für diese Haltung "dissen". Kann es sein, dass in fünf Jahren ein deutsches KI-Unternehmen zu viel Marktmacht hat? "Ich hoffe es", so Robert Habeck. Dafür müssten wir uns lösen von der Datensparsamkeit und bräuchten eine "Datennutzungsorgie" – es wäre interessant zu hören gewesen, wie Habecks engagiertes Plädoyer für Pragmatismus im Datenschutz bei seinen ParteifreundInnen ankommt. Bleibt zu hoffen, dass Sven Giegold nach der Geburtstagsparty seinem Chef nochmal seine Warnung in Erinnerung ruft: Wettbewerbsfähigkeit wird nicht durch die Einschränkung von Wettbewerb erreicht.

Hoffnungsvoller Dank

Und damit bildete der Austausch mit Robert Habeck den fulminanten Abschluss einer debattenfreudigen Geburtstagsfeier (Drinks gab's danach natürlich schon noch). Jürgen Kühling dankte den Gastgebern vom BMWK, in dem das Team von Referatsleiterin Dr. Karolina Lyczywek die MoKo betreut, und dem Team seiner Geschäftsstelle mit Generalsekretär Dr. Marc Bataille und Geschäftsführerin Dr. Juliane Scholl.

[7] Bundeskartellamt, Offene Märkte für digitale Mobilitätsdienstleistungen – Deutsche Bahn muss Wettbewerbsbeschränkungen abstellen, 2023, https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2023/28_06_2023_DB_Mobilitaet.html (zuletzt abgerufen am 14.6.2024).

[8] Bundesnetzagentur, Digital Cluster Bonn, https://www.digitalclusterbonn.de/DCB/start.html (zuletzt abgerufen am 14.6.2024).

Es bleibt die Hoffnung, dass die Monopolkommission auch in Zukunft der Suchscheinwerfer für denWettbewerb in Deutschland bleibt und ihre "kritische Expertise" (Habeck) in der Politik Gehör findet. Auch wenn das manchmal etwas dauern kann. Oder um es mit den Worten von Achim Wambach zur Fernbus-Liberalisierung zu sagen: "1988 gefordert und zack, schon 22 Jahre später ist es Realität."

Sebastian Steinert, Düsseldorf

Conference Debriefing (41): 50 years of the German Monopolies Commission [English Version]

Sebastian Steinert, Maître en Droit, LL.M., is currently working on a doctoral thesis on the Digital Markets Act. The thesis is being supervised by Prof. Dr. Rupprecht Podszun.

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Happy Birthday, Monopolies Commission! The "Monopolkommission" has been advising the German government on competition matters for 50 years now. The competition community came together in Berlin to party. And what better way to celebrate the "defender of competition" than with what makes it special: Intense debate and "critical discourse". Unfortunately, the birthday presents did not include political promises of implementation, but the party offered high-ranking recognition and surprising insights. Sebastian Steinert reports.

Event: 50 Years of the Monopolies Commission – Competition between Industrial Policy and Ecological Transformation

Place & Time: Federal Ministry of Economy and Climate Protection, Berlin, 05.06.2024

Hosts: The Ministry and the Monopolies Commission (or MoKo as it is sometimes called). The MoKo's current five members are professors Jürgen Kühling and Tomaso Duso and three representatives of the business community: Dagmar Kollmann, Pamela Knapp and Constanze Buchheim.

Audience: Everyone who occasionally deals with the Monopolies Commission: Members of Parliament such as Sandra Detzer, enforcers such as Eva-Maria Schulze (BKartA) and Thomas Deisenhofer (EU Commission), judges such as Jan Tolkmitt (BGH) and Ulrich Egger (OLG Düsseldorf), lawyers (the Düsseldorf bar strongly represented, of course), professors (e.g. Thomas Weck or Gabriela von Wallenberg, who once worked for the MoKo themselves) and of course representatives of those who are monopolists (Thoralf Schwanitz from Google), those who would like to remain monopolists (Wolfgang Kopf from Telekom), and those who are fighting against them (Peter Westenberger from railway association Die Güterbahnen).

A tight program had been prepared for the anniversary celebration: A keynote, two presentations and six discussions. And all in under five hours (spoiler: it took longer). So you can either read this conference debriefing if you are interested in the future of German competition law or if you are still looking for inspiration for your next birthday party.

1. The Difference between Theory and Practice

A test question to start with: Which is more appealing, working in the MoKo or in the national Council of Economic Experts? While the Council is more prominent in Germany, economist Carl Christian von Weizsäcker, who was offered both memberships, gave a clear answer in his written greetings: he chose the Monopolies Commission because its work is so exciting due to the collaboration with business practitioners. The MoKo traditionally has five members, two professors (law and econ) and three representatives from business. The business is currently represented by

- Dagmar Kollmann (since 2012), member of the supervisory board at Deutsche Telekom and the banking group CitiGroup Global Markets Europe,
- Pamela Knapp (since 2020), member of the supervisory board at lighting technology manufacturer Signify and chemicals group Lanxess, and
- Constanze Buchheim (since 2022), member of the supervisory board of software company Valsight and President of the Entrepreneurs' Organization Berlin.

In the first panel, an enjoyable discussion with the two academics Jürgen Kühling (law) and Tomaso Duso (economics), the three talked about their highlights from the past few years. For Dagmar Kollmann, it was the time after the financial crisis and the intense

examination of the 3-pillar model of the German banking landscape. Pamela Knapp herself was once a board member of a company that was fined for taking part in a cartel (before her time, of course!). She was therefore particularly interested in the discussion on the personal liability of board members for cartel fines (this is the subject of the next report of the MoKo, which will be presented on July 1). Constanze Buchheim comes from the start-up and digital sector, which is why she focused on the discussions on agile corporate management and business models with artificial intelligence. All three emphasized that it can make an important difference when the business perspective is brought to the discussion table. So this is probably the famous difference between theory and practice, which was decisive for von Weizsäcker.

2. Looking up to the Olympus

For those who are not quite sure where the Monopolies Commission fits into the German institutional structure, let me explain: the MoKo is the German Olympus for competition issues.

Tribute where tribute is due

At least that's what Professor Veronika Grimm, a member of the "big sister", the Council of Economic Experts, said. She recalled how, as an economics student in 1995, she was enthusiastic about competition issues and looked up to the MoKo as the "Olympus". She could have hardly paid greater tribute to the Commission for its anniversary. And she even topped it off by praising the MoKo's reports as "highly relevant" and "to the point". She urged the decision-makers in the room to follow the recommendations, because competition is the asset that gives us the decisive advantage over autocracies.

There is always room for more competition

In her presentation "Competition in climate policy: between political goals and competitive instruments", she then made a well-founded plea for more competition in climate and energy policy.

What is needed for this? Above all, a reliable framework that offers companies security to invest (including in the infamous fuel cells, over which Prof. Grimm had recently clashed with her fellow economic experts)[1]. In addition, a clear focus on the emissions trading system is needed instead of a bouquet of different instruments that deprive each other of their incentive effect (this was probably the only time that day that less rather than more competition was called for in a matter). And the economist also did not shy away from the geopolitical dimension either: Europe must work on establishing a world market for green energy and therefore "value-oriented foreign trade policy should not be the first priority" (some say you can still hear the rumbling in the room).

An ex, X and TV

After the presentation, the "legacy" of the Monopolies Commission, as Jürgen Kühling put it, made its appearance because Justus Haucap, ex-Chairman of the Commission (2008-2012), took the floor. He recalled how the 2009 gas and electricity sector report triggered a veritable „shitstorm" (was it already called like that back then?) because it had raised the idea of introducing competition into the market for renewable energies. He praised Grimm as a voice pro competition in the Council of Economic Experts – and in German TV shows. Jürgen Kühling used this as an encouragement to all colleagues to do as Veronika Grimm does: "First research, then tweet on X and then go to Markus Lanz [a German TV host]. And not first to Lanz and only thinking afterwards about what you could research on this."

3. Value-based competition

The next speaker was eagerly awaited, as word had already spread thanks to German daily FAZ that the MoKo will soon have a new member.[2] Professor Rupprecht Podszun (ever heard of him?) will succeed Jürgen Kühling as the law professor on the Commission from July 1 on.

[1] Aussiedlerbote, Hydrogen splits the opinion of economic specialists, 2024, https://aussiedlerbote.de/en/hydrogen-splits-the-opinion-of-economic-specialists/ (last accessed 14.6.2024).

[2] FAZ (only in German), Podszun wird Mitglied der Monopolkommission, 2024, https://zeitung.faz.net/faz/unternehmen/2024-05-27/ea8e7f2b76936800c64cf68ddb8f6416/?GEPC=s3 (last accessed 14.6.2024).

No introduction needed

Rupprecht Podszun is a full-time blogger (D'Kart)[3] and podcaster (Bei Anruf Wettbewerb)[4] and on the side he's a "very, very renowned competition law professor" (Jürgen Kühling), which makes his introduction a "pointless task" (moderator Daniel Zimmer, Chairman of the Commission 2012-2016). After some praise, which made the speaker visibly uncomfortable, Zimmer mentioned that Podszun had not only worked as an enforcer at the Bundeskartellamt in the past, but also as a theater critic. Podszun then opened his presentation with the words "If I mess up now, I might be able to work as a theater critic again."[5]

Competition law has never been unpolitical

The organizers had given the newbie on the Commission a very fundamental topic for his presentation: "How political is competition law supposed to be?". The phrasing of the topic thus indicated that competition law is political from the outset. And Podszun agreed that believing in a neutral, apolitical competition law is "grotesque self-deception". Political decisions and "normative considerations" (Podszun's suggested synonym for all those for whom "political" is too dubious a term) have always shaped competition law. This can be seen in particular in the ministerial approval mechanism, the practice of taking up cases, the theories of harm and the exceptions to the prohobition on restrictions of competition. With regard to the ministerial approval mechanism, Podszun made it clear that he wishes for its abolishment with the upcoming amendment to the German competition law code (this sentence was an invitation to all upcoming speakers to make their views known on the controversial ministerial approval mechanism).

Value-based competition

Where competition law allows normative considerations to come in, Podszun expects this to be done in such a way that the most pressing problems in the economy are tackled. He rather bluntly called on the Bundeskartellamt to be as innovative as they were in the Facebook case – but this time with environmental instead of data protection.

In order to prevent competition law from becoming a universal problem solver, he called for the model of "value-based competition" to be pursued: According to this concept, competition law must restrain economic power in such a way that fundamental rights and the constitutional order in the market economy prevail. Podszun referred to the legislative materials of the law that introduced merger control and the Monopolies Commission 50 years ago. It states that the aim of competition law is to safeguard the "freedom of others". That is quite a different take than the protection of consumer welfare.

And what were the reactions?

After Podszun's presentation, Achim Wambach (Chairman of the Monopolies Commission 2016-2020) said he would like to "be a fly on the wall" in future discussions in the Commission. Some participants warned that the scope of competition law should not be overstretched. But Podszun reassured them: the decisive criterion is always competition. It is just that the parameters of competition have changed – see the Facebook case. After all this food for thought it was definitely time for the coffee break.

4. The critical discourse

The next panel, entitled "Digitalization and industrial change: competition policy in the context of transformation", showed just how political competition issues really are. The discussion became an example of what the Commission always tries to initiate: a critical discourse. It was moderated by Tomaso Duso, member of the MoKo – he will succeed Jürgen Kühling as Chairman. The line-up of panellists promised a lively discussion from the beginning:

• Sven Giegold (State Secretary at the Ministry of Economy and Climate Protection, former green MEP),

[3] D´Kart – Antitrust Blog, https://www.d-kart.de/en/.

[4] Podcast: Bei Anruf Wettbewerb (only in German), https://podcasters.spotify.com/pod/show/beianrufwettbewerb.

[5] *Podszun* (only in German), „Bitte nix mixen!", Streit ums Urheberrecht - Beobachtungen vom Prozess des Suhrkamp-Verlags gegen das Münchner Residenztheater wegen Frank Castorfs "Baal"-Inszenierung, 2014, https://nachtkritik.de/recherche-debatte/streit-ums-urheberrecht-beobachtungen-vom-prozess-des-suhrkamp-verlags-gegen-das-residenztheater-wegen-frank-castorfs-qbaalq-inszenierung (last accessed 14.6.2024).

• Joe Kaeser (former CEO of Siemens and now Chairman of the supervisory board of Siemens Energy and Daimler Truck),
• Ulrike Herrmann (from leftish newspaper taz, author of a book which translates to "The End of Capitalism") and
• Achim Wambach (ZEW – Leibniz Center for European Economic Research).

The Renewable Energy Act as a question of faith

Joe Kaeser opened with fundamental criticism stating that the ongoing transformation is currently being shaped with far too much state and far too little market. Sven Giegold replied that he had never believed in the "crude opposition" of state and market. He said he knew of hardly any other country where the question of how much the state should intervene in a situation of change was discussed as "religiously" as in Germany. He cited the German Renewable Energy Act as a successful example of state intervention, which ignited the fuse of the discussion. Kaeser and Wambach reacted promptly: the success of the Renewable Energy Act was a fairy tale, it had prevented innovation (Kaeser), the industry left the country (Wambach). With Giegold's optimism that the Renewable Energy Act will make green technologies successful, he is confusing business administration and economics, said Herrmann and stated that for effective climate protection you have to bid capitalism farewell altogether. The only thing that would help now would be "green shrinkage". Quite the opposite, said Wambach, because "shrinking is not a successful model" that other countries will copy in order to follow the path of reducing CO2 emissions. This birthday party definitely did not lack entertainment.

With all these faithful discussions of the Renewable Energy Act, the other part of the debate, digitalization (the first word in the title of the panel after all) came up a little short (Giegold: "I will not accept any further questions until I have taken a position on this [the criticism of the Renewable Energy Act]"). But at least everyone was able to emphasize in one sentence the importance of digitalization. Except for Ulrike Herrmann, of course, because for her, energy-intensive digitalization only "leads to AI that nobody needs".

Birthday wishes

Achim Wambach expressed another wish for the Monopolies Commission's birthday: the Commission should produce a report on state aid with a focus on competition and innovation. Sven Giegold also addressed an important wish to the "Church of Competition": He is very concerned about the status of competition in the EU and warned against easing merger control rules to create European champions. That is why "we must all work together to ensure that what we have built up over many years will not destroyed." After all, the desired improvement in Europe's competitiveness will not be achieved by restricting competition. Not so sure that Joe Kaeser, who was CEO of Siemens when the EU Commission prohibited the merger of Siemens and Alstom, agreed.

5. Let's hear the decision makers

The Monopolies Commission advises the German government, "but it can't decide anything", as the Süddeutsche Zeitung recently stated.[6] That's why, Jürgen Kühling brought the real decision-makers to the podium: Klaus Müller, President of the Bundesnetzagentur, and Konrad Ost, Vice President of the Bundeskartellamt, who jumped in for president Andreas Mundt, who was unable to attend at short notice.

Adam's apple

And what do the decision-makers have to say about the much-discussed tendencies towards a stronger "industrial policy" (the euphemistic code word for restrictions on competition)? Klaus Müller compared them to the biblical apple that tempted Adam: The temptation for European champions is there, but the government must remain strong. It was also clear to Konrad Ost that the Bundeskartellamt cannot approve of the demand for large companies at the cost of reducing competitive effects. However, he conceded to politicians that competition is only one of several policy objectives.

[6] SZ (only in German), Brauchen wir diese Experten noch?, 2024, https://www.sueddeutsche.de/wirtschaft/wettbewerb-monopolkommission-konkurrenz-willy-brandt-1.7685486?reduced=true (last accessed 14.6.2024).

Sneak peak

During the discussion, Jürgen Kühling also gave a sneak preview of aspects that will be addressed in the upcoming report of the MoKo. In particular, security of supply, the district heating market and railway regulation. The abuse of dominance by district heating suppliers also bothers Konrad Ost and he reported that the Bundeskartellamt opened several proceedings in this regard. Kühling described the railway market as the sector in which "we have made the least progress". This prompted Justus Haucap to ask what progress Jürgen Kühling had seen in the postal sector. Kühling maintained that the Deutsche Bahn had won the competition between incumbents for last place – customer dissatisfaction was much higher for Deutsche Bahn than for the postal service. In addition Klaus Müller pointed out that now for the first time an application for a postage increase had been rejected.

The future of data access

Last year, Deutsche Bahn was ordered by the Bundeskartellamt to grant competitors better access to its traffic data.[7] Konrad Ost and Klaus Müller are particularly looking forward to this issue of data access in the future: the new European digital legislation and competition law offer plenty of opportunities for improved conditions. The Bundeskartellamt and the Bundesnetzagentur have already founded the "Digital Cluster Bonn"[8] together with four other federal authorities in order to strengthen their cooperation in the area of digital regulation.

To conclude the discussion, Kühling asekd Ost whether there is any room at all for Section 19a ARC alongside the EU Digital Markets Act. Ost did not have to think long: It has already been shown that the DMA with its specific obligations can quickly reach its limits and that flexible standards such as Section 19a ARC will therefore continue to play a decisive role.

6. Congratulations from the very top

The most powerful man at the end: After completing his tour of the trade fair at the International Aerospace Exhibition and a speech at the Construction Industry Day, and before he had to move on to his boss, the Chancellor, Germany's Vice Chancellor Robert Habeck finally had his highlight of the day: His appearance at the MoKo's birthday party. He said he had come to sing a birthday tune, which unfortunately turned into a keynote speech. However, it was rather a hymn of praise, so it was kind of a spoken serenade afterall.

For Robert Habeck, the Monopolies Commission is the "searchlight" for competitive challenges in the economic system. It is a political player, but can focus on competition issues. Politicians would then take care of the other political considerations.

The minister and AI

In the discussion with Kühling and Monopolies Commissioner Constanze Buchheim, Habeck switched confidently from aviation and the construction industry to competition issues. In the spirit of competitiveness, he made it clear that he first would like to have leading AI companies in Germany and only worry about any competition concerns afterwards. He would also be okay to be "dissed" by the Monopolies Commission for this stance. Is it possible that a German AI company will have too much market power in five years' time? "I hope so," said Robert Habeck (who serves as the Minister for Economics and Climate Protection). To achieve this, we need to move away from data minimisation and need to opt for an "orgy of data use", he said. It would have been interesting to hear how Habeck's committed plea for pragmatism in data protection goes down with his fellow green party members. We can only hope that Sven Giegold will remind his boss of the warning he gave earlier at this birthday party: Competitiveness will not be not achieved by restricting competition.

Hopeful gratitude

And so the exchange with Robert Habeck was the spectecular end to a birthday party full of discussions and debate (there were drinks afterwards, of course).

[7] Bundeskartellamt, Open markets for digital mobility services – Deutsche Bahn must end restrictions of competition, 2023, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28_06_2023_DB_Mobilitaet.html (last accessed 14.6.2024).

[8] Bundesnetzagentur (only in German), Digital Cluster Bonn, https://www.digitalclusterbonn.de/DCB/start.html (last accessed 14.6.2024).

Jürgen Kühling thanked the hosts from the ministry, where the team led by Head of Division Dr. Karolina Lyczywek coordinates with the MoKo, and he thanked the MoKo team itself with Secretary General Dr. Marc Bataille and Managing Director Dr. Juliane Scholl.

It remains to be hoped that the Monopolies Commission will remain the searchlight for competition issues in Germany in the future and that its "critical expertise" (Habeck) will be heard in politics. Even if this can sometimes take some time. Or to put it with the words of Achim Wambach on the liberalisation of the long-distance bus sector: "Demanded in 1988 and bang, 22 years later it's already a reality."

Justus Haucap, Düsseldorf

Heike Schweitzer – in memoriam

Prof. Dr. Justus Haucap ist Direktor des DICE an der Heinrich-Heine-Universität Düsseldorf.

Zitiervorschlag: *Haucap*, DKartJ 2024, 31-32

In den Morgenstunden des 11. Juni 2024 ist Heike Schweitzer viel zu früh im Alter von nur 56 Jahren gestorben. Es ist ein Schock für die deutsche und europäische Kartellrechts-Community. Justus Haucap erinnert an eine bedeutende Kollegin und gute Freundin.

Heike Schweitzer war so etwas wie die deutsche Stimme im europäischen Kartellrecht. Mit ihrem Tod haben wir eine Denkerin von großem Intellekt und für viele eine Freundin verloren. Heike wird uns sehr fehlen. Werner Mussler schreibt heute in der FAZ, dass Heike wohl die führende Kartelljuristin ihrer Generation war und eine einflussreiche Politikberaterin.[1] Dem dürfte kaum jemand widersprechen, denn Heike hatte in der Tat enormen Einfluss auf die Weiterentwicklung des Kartellrechts in Deutschland und der EU und durch die Strahlkraft des europäischen Wettbewerbsrechts letztlich auch weltweit.

Heike kam aus der Schule des ebenfalls kürzlich verstorbenen Ernst-Joachim Mestmäcker, und sie sah sich stets auch in der Tradition von Franz Böhm. Dessen Bemerkung, dass der Wettbewerb das großartigste und genialste Entmachtungsinstrument sei, war eines ihrer Lieblingszitate. Wie Franz Böhm war Heike nicht nur gegenüber privaten Machtballungen kritisch, sondern ebenso gegenüber staatlicher Macht – eine Position, die mir selbst zutiefst sympathisch ist. In ihrer 2020 gehaltenen Franz-Böhm-Vorlesung etwa befasste sich Heike mit den Besonderheiten der privaten Macht im digitalen Zeitalter und verglich diese mit den bislang im Vordergrund stehenden Machtlagen.[2] Darauf aufbauend entwickelte sie die These, dass sich aufgrund dieser Besonderheiten der Mechanismus dezentraler Koordination selbst verändere. Dies habe wiederum zur Folge, dass sich eine Marktorganisation mit neuen Regeln entwickle. Gleichwohl war Heike auch gegenüber dem Digital Markets Act (DMA) kritisch, der ihr an einigen Stellen zu weit ging. Wie private Macht praktisch eingehegt werden kann, ohne staatliche Macht ausufern zu lassen, war ein fortwährendes Thema der vielen Diskussionen, die ich mit ihr führen durfte.

Heike hat in Freiburg Jura studiert (mit einem Stipendium der Studienstiftung des Deutschen Volkes). Nach dem ersten (1994) und zweiten (1996) Staatsexamen war sie bis 2006 zunächst als Doktorandin (Promotion 2001) und dann als Postdoktorandin in Hamburg am Max-Planck-Institut bei Ernst-Joachim Mestmäcker tätig, mit dem sie ja auch ab 2004 das Lehrbuch zum Europäischen Wettbewerbsrecht verfasste. 2006 wechselte sie als Professorin an das European University Institute in Florenz, von wo sie 2010 an die Universität Mannheim wechselte. Irgendwann in ihrer Mannheimer Zeit müssen wir uns auch persönlich kennengelernt haben. Als wir jedenfalls versuchten, Heike im Jahr 2013 an die Heinrich-Heine-Universität zu locken, waren wir bereits per Du. Leider zeichnete sich parallel ab, dass sie auch einen Ruf auf Nachfolge von Franz-Jürgen Säcker an der FU Berlin bekommen sollte – sie hat uns in Düsseldorf dann leider abgesagt, drückte aber zugleich ihr großes Bedauern aus, dass wir jetzt nicht intensiver zusammenarbeiten könnten.

[1] FAZ, Heike Schweitzer ist gestorben, 2024, https://www.faz.net/aktuell/wirtschaft/unternehmen/heike-schweitzer-gestorben-die-fuehrende-kartell-juristin-ihrer-generation-19786712.html (zuletzt abgerufen am 21.6.2024).

[2] Walter Eucken Institut, 3. Franz-Böhm-Vorlesung mit Verleihung der Walter-Eucken-Medaille, 2020, https://www.eucken.de/veranstaltung/3-franz-boehm-vorlesung-mit-verleihung-der-walter-eucken-medaille/ (zuletzt abgerufen am 21.6.2024).

Letzteres konnten wir dann zum Glück heilen, denn Anfang 2014 wurde Heike in den Kronberger Kreis, den wissenschaftlichen Beirat der Stiftung Marktwirtschaft, aufgenommen, 2019 beriefen wir sie in den Beirat unseres DICE (Düsseldorf Institute for Competition Economics). Im Kronberger Kreis haben wir sofort sehr intensiv gemeinsam an der Studie „Neustart in der Energiepolitik jetzt!" gearbeitet, für welche ich die federführende Verantwortung hatte. Weitere Studien, bei denen ich intensiv mit Heike zusammenarbeiten durften betrafen die Bankenunion, Diskriminierungsverbote in der digitalen Welt – Heike hatte sich zwischenzeitlich intensiv mit dem Thema Netzneutralität beschäftigt –, Green Deal und Wettbewerb, die Krankenhausversorgung sowie zuletzt die Zukunft des öffentlich-rechtlichen Rundfunks. Auf der März-Sitzung des Kronberger Kreises haben wir noch auf ihre 10-jährige Mitgliedschaft angestoßen und überlegt, ob nicht das Thema Landwirtschaft interessant für eine zukünftige Studie sein könnte. Ich bin untröstlich, dass wir diese nun ohne Heikes scharfsinnigen Intellekt erstellen müssen.

Ich hatte auch das intellektuelle und persönliche Vergnügen an vielen kleinen Projekten mit Heike zusammenzuarbeiten, sei es im Hinblick auf Überlegungen zur Reform des Kartellschadensersatzes, die wir auf der inoffiziellen Verabschiedung von Peter Meier-Beck beim Bundesgerichtshof präsentieren durften (unsere beiden darauf resultierenden Aufsätze wurden später in der ZWeR abgedruckt)[3] oder bei kleinen Aufsatzprojekten. Einen gewissen Einfluss hat sicher unsere Studie im Vorfeld der 10. GWB-Novelle gehabt, als wir uns im Auftrag des Bundeswirtschaftsministeriums gemeinsam mit Wolfgang Kerber (Marburg) und Heikes damaligem Doktoranden Robert Welker Gedanken zur Einhegung der Macht von digitalen Plattformen machen durften.[4]

Ganz allgemein hat Heike immer sehr gern mit Ökonomen in der wirtschaftspolitischen Beratung zusammengearbeitet. Sehr einflussreich war ihre Rolle als Sonderberaterin (1. April 2018 – 31. März 2019) der EU-Kommissarin Vestager für Digitalisierung und Wettbewerbspolitik (siehe "Competition policy for the digital era")[5] sowie als Co-Vorsitzende (mit Martin Schallbruch und Achim Wambach) der vom Wirtschaftsministerium eingesetzten Expertenkommission „Wettbewerbsrecht 4.0"[6] (Sept. 2018 – Sept. 2019). Auch mit anderen Ökonomen wie Wolfgang Kerber, Knut Blind und Martin Peitz hat Heike immer wieder eng zusammengearbeitet – dieses Ausmaß an Interdisziplinarität und der Austausch der Disziplinen ist viel zu selten zu finden. Auch deswegen wird Heike fehlen.

Was sie für die Entwicklung des europäischen Kartellrechts bedeutete, kann ich als Ökonom kaum angemessen würdigen, aber Pablo Ibáñez Colomo hat dies für Chillin Competition schön zusammengefasst.[7] Was Heike für den wissenschaftlichen Nachwuchs bedeutete, hat wiederum ihre ehemaliger Doktorand Kai Woeste in einem LinkedIn-Beitrag in bewegenden Worten niedergeschrieben.[8] Für die deutsche und europäische Kartellrechts-Community wie auch für uns Wettbewerbsökonomen ist Heikes Tod schwer zu verkraften, sie war im Grunde unersetzlich. Persönlich habe ich eine gute Freundin verloren. Du fehlst. RIP, liebe Heike.

[3] Die beiden Aufsätze: *Schweitzer/Woeste*, ZWeR 2022, 46; *Haucap/Heimeshoff*, ZWeR 2022, 80.

[4] *Schweitzer/Haucap/Kerber/Welker*, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie, 2018, https://www.bmwk.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.pdf (zuletzt abgerufen am 21.6.2024).

[5] *Crémer/de Montjoye/Schweitzer*, Competition policy for the digital era, 2019, https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en (zuletzt abgerufen am 21.6.2024).

[6] Bundesministerium für Wirtschaft und Klimaschutz, Kommission Wettbewerbsrecht 4.0, https://www.bmwk.de/Redaktion/DE/Artikel/Wirtschaft/kommission-wettbewerbsrecht-4-0.html (zuletzt abgerufen am 21.6.2024).

[7] *Ibáñez Colomo*, https://chillingcompetition.com/2024/06/12/heike-schweitzer-1968-2024/ (zuletzt abgerufen am 21.6.2024).

[8] *Woeste*, https://www.linkedin.com/feed/update/urn:li:activity:7206998829936652290/ (zuletzt abgerufen am 21.6.2024).

Justus Haucap, Düsseldorf

Heike Schweitzer – in memoriam [English Version]

Prof. Dr. Justus Haucap is Director of the DICE at Heinrich Heine University Düsseldorf.

Suggested Citation: *Haucap*, DKartJ 2024, 33-34

In the early hours of June 11, 2024, Heike Schweitzer died far too early at the age of just 56. It is a shock for the German and European antitrust community. Justus Haucap remembers an important colleague and good friend.

Heike Schweitzer was something like the German voice in European competition law. With her death, we have lost a thinker of great intellect and, for many, a friend. Heike will be greatly missed. Werner Mussler writes today in the German daily FAZ that Heike was probably the leading competition lawyer of her generation and an influential political advisor.[1] Hardly anyone would disagree with this, as Heike did indeed have an enormous influence on the further development of competition law in Germany and the EU, and ultimately also worldwide thanks to the influence of European competition law.

Heike came from the school of Ernst-Joachim Mestmäcker, who also died recently, and she always saw herself in the tradition of ordoliberal founding father Franz Böhm. His remark that competition is the greatest and most ingenious instrument of disempowerment was one of her favorite quotes. Like Franz Böhm, Heike was not only critical of private accumulations of power, but also of state power – a position that I myself deeply sympathize with. In her 2020 Franz Böhm Lecture, for example, Heike looked at the particularities of private power in the digital age and compared these with the power positions that have been in the foreground up to now.[2] Building on this, she developed the thesis that the mechanism of decentralized coordination itself is changing due to these peculiarities. This, in turn, led to the development of a market organization with new rules. Nevertheless, Heike was also critical of the Digital Markets Act (DMA), which she felt went too far in some areas. How private power can be contained in practice without allowing state power to get out of hand was a recurring theme in the many discussions I had with her.

Heike studied law in Freiburg (with a prestigious scholarship). After her first (1994) and second (1996) state examinations, she worked until 2006, first as a doctoral student (doctorate in 2001) and then as a post-doc at the Max Planck Institute in Hamburg under Ernst-Joachim Mestmäcker, with whom she also wrote an influential book on European competition law as of 2004. In 2006, she moved to the European University Institute in Florence as a professor, from where she moved to the University of Mannheim in 2010. We must have met in person at some point during her time in Mannheim. In any case, when we tried to lure Heike to Heinrich Heine University in 2013, we were already on a first-name basis (which is a thing in German). Unfortunately, it became apparent at the same time that she would also be offered a position as the successor of Franz-Jürgen Säcker at the FU Berlin (from where she moved to the Humboldt University Berlin in 2018). She turned down the offer from Düsseldorf, but at the same time expressed her great regret that we could not now work together more intensively.

Fortunately, we were able to cure the latter, as Heike was accepted into the Kronberger Kreis, the scientific

[1] FAZ (only in German), Heike Schweitzer ist gestorben, 2024, https://www.faz.net/aktuell/wirtschaft/unternehmen/heike-schweitzer-gestorben-die-fuehrende-kartell-juristin-ihrer-generation-19786712.html (last accessed 21.6.2024).

[2] Walter Eucken Institut (only in German), 3. Franz-Böhm-Vorlesung mit Verleihung der Walter-Eucken-Medaille, 2020, https://www.eucken.de/veranstaltung/3-franz-boehm-vorlesung-mit-verleihung-der-walter-eucken-medaille/ (last accessed 21.6.2024).

advisory board of the Stiftung Marktwirtschaft, a market economy-oriented foundation, at the beginning of 2014, and in 2019 we appointed her to the advisory board of our DICE (Düsseldorf Institute for Competition Economics).[3] In the Kronberger Kreis, we immediately worked very intensively together on a study on energy policies for which I was the lead author. Other studies on which I was able to cooperate closely with Heike concerned the banking union, bans on discrimination in the digital world – Heike had in the meantime worked on the topic of net neutrality -, the Green Deal and competition, hospitals and, most recently, the future of public broadcasting. At the March meeting of the Kronberger Kreis, we toasted her 10-year membership and considered whether the topic of agriculture might be interesting for a future study. I am heartbroken that we now have to do this without Heike's keen intellect.

I also had the intellectual and personal pleasure of collaborating with Heike on many small projects, be it with regard to considerations on the reform of antitrust damages, which we were able to present at the unofficial farewell of Chief Justice Peter Meier-Beck at the Federal Court of Justice (our two resulting essays were later published in the ZWeR)[4] or on small essay projects. The Federal Ministry of Economics had commissioned a study in the run-up to the 10th amendment of the German competition act. Heike and I worked with Wolfgang Kerber, the economist from Marburg, and Robert Welker, a PhD student of hers at the time.[5]

In general, Heike has always enjoyed working with economists, also for policy consulting. Her role as special advisor (1 April 2018 – 31 March 2019) to EU Commissioner Margrethe Vestager on digitalization and competition policy (see "Competition policy for the digital era")[6] and as co-chair (with Martin Schallbruch and Achim Wambach) of the expert commission "Competition Law 4.0" (Sept. 2018 – Sept. 2019) set up by the German Ministry of Economics was very influential.[7] Heike has also repeatedly worked closely with other economists such as Wolfgang Kerber, Knut Blind and Martin Peitz – this level of interdisciplinarity and exchange between disciplines is far too rare. This is another reason why Heike will be missed.

As an economist, I can hardly adequately appreciate what she meant for the development of European competition law, but Pablo Ibáñez Colomo summarized this beautifully for Chillin Competition.[8] Her former doctoral student Kai Woeste has written down in moving words what Heike meant for young academics in a LinkedIn post.[9] For the German and European competition law community as well as for us competition economists, Heike's death is difficult to cope with, she was basically irreplaceable. Personally, I have lost a good friend. You are missed. RIP, dear Heike.

[3] Kronberger Kreis - Scientific Council, https://www.stiftung-marktwirtschaft.de/en/inhalte/kronberger-kreis/ (last accessed 21.6.2024).

[4] The two articles (only in German): *Schweitzer/Woeste*, ZWeR 2022, 46; *Haucap/Heimeshoff*, ZWeR 2022, 80.

[5] *Schweitzer/Haucap/Kerber/Welker* (only in German), Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie, 2018, https://www.bmwk.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.pdf (last accessed 21.6.2024).

[6] *Crémer/de Montjoye/Schweitzer*, Competition policy for the digital era, 2019, https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en (last accessed 21.6.2024).

[7] Bundesministerium für Wirtschaft und Klimaschutz (only in German), Kommission Wettbewerbsrecht 4.0, https://www.bmwk.de/Redaktion/DE/Artikel/Wirtschaft/kommission-wettbewerbsrecht-4-0.html (last accessed 21.6.2024).

[8] *Ibáñez Colomo*, https://chillingcompetition.com/2024/06/12/heike-schweitzer-1968-2024/ (last accessed 21.6.2024).

[9] *Woeste*, (only in German), https://www.linkedin.com/feed/update/urn:li:activity:7206998829936652290/ (last accessed 21.6.2024).

Philipp Eckel, Bonn

Does Competition law disappoint football fans? 22nd annual meeting of the Association of European Competition Law Judges (AECLJ) – 30.05. – 01.06.2024

Dr. Philipp Eckel, LL.M (London), is a Referendaire at the Cartel Chamber of Germany's Federal Court of Justice.

Suggested Citation: *Eckel*, DKartJ 2024, 35-37

The Association of European Competition Law Judges (AECLJ) met in Berlin just two weeks before the kickoff of the UEFA European Championships. The topic: "Sports, Arbitration and Competition Law". Wolfgang Kirchhoff, the President of the AECLJ and also the president of the Cartel Chamber of Germany's Federal Court of Justice (BGH), raised a key question: „Does Competition Law disappoint football fans?" Philipp Eckel reports from the 22nd Annual Meeting of the AECLJ.

The participants and the venue

More than 120 judges and practitioners working at the EU Commission, NCAs and in private practice from all over Europe and the UK exchanged their views and experiences in respect of competition law and arbitration in sports. The conference, co-organised by the EU Commission and Adam Scott´s team from the CAT and supported by the German Federal Ministry of Justice, the *Studienvereinigung Kartellrecht*, *GRUR* and *FIW,* took place at the plenary hall („Großer Plenarsaal") of the Kammergericht in Berlin – a place of great historical importance where the *Volksgerichtshof* supported the Nazi terror by imposing countless death sentences from 1934 on. Nowadays, only the Constitutional Court of the State of Berlin is allowed to hold its hearings at the plenary hall.

Part 1: Sports and Competition Law

After a cozy evening reception at the Kammergericht (KG) at 30 May 2024, the academic programme started the next morning with a warm welcome by Angelika Schlunck (Secretary of State in the Federal Ministry of Justice), Svenja Schröder-Lomb (Vice President of the KG) and Wolfgang Kirchhoff.

The first panel with Anne-Marie Witters as chair (President of the Market Court Brussels) tackled the topic „Sports and competition law before the EUCJ". Dr. Gero Meeßen (Legal Service of the Commission), Ben Van Rompuy (Assistant Professor of EU Competition Law at Leiden University) and Jean-François Bellis (advocate for the ISU before the EUCJ) discussed the ECJ´s latest decisions in European Super League[1], International Skating Union (ISU)[2] and Royal Antwerp Football Club[3]. The panel stressed the significance of the conceptual change since the ECJ modified the Wouters/Meca-Medina[4]-Doctrine by also applying it to Art. 102 TFEU and at the same time limiting it to infringements by effect. As a result, infringements by object could only be justified by Art. 101(3) TFEU which requires i. a. quantifiable efficiency gains. As regards the practical impact, a lot would depend on how the „by object" and „by effect"-dichotomy is applied and on how wide Art. 101(3) TFEU can be construed.

The second panel with Mads Bundgaard Larsen (President of the Maritime and Commercial High Court, Copenhagen) as chair shared the point of view of the European Commission and the NCAs as regards the public enforcement of competition law in the sports sector. Inge Bernaerts (Director for strategy and policy at DG

[1] ECJ, 21.12.2023, Case C-333/21, ECLI:EU:C:2023:1011 - Superleague.

[2] ECJ, 21.12.2023, Case C-124/21 P, ECLI:EU:C:2023:1012 – International Skating Union.

[3] ECJ, 21.12.2023, Case C-680/21, ECLI:EU:C:2023:1010, Royal Antwerp Football Club.

[4] ECJ, 18.7.2006, Case C-519/04 P, ECLI:EU:C:2006:492, Meca-Medina.

COMP) spot-lighted the policy background and i. a. the Commission´s Decisions regarding the joint selling of media rights (on FA Premiere League[5] and UEFA Champions League[6]). Fabienne Siredey-Garnier (Vice-Présidente de l' Autorité de la concurrence) gave an overview of the French Competition Agency´s activity in the sports sector and its 30 decisions between 1995 and 2023 (about 50 % dealing with distribution of sport equipment and about 40 % with the allocation of audiovisual rights). Gunnar Kallfaß (Head of the sports cases-division at the Bundeskartellamt) presented the perspective of the German Competition Agency and the consequences of the ECJ´s Super League Judgement for the BKartA's cases concerning the joint selling media rights and the „50+1 ownership clause" questioning whether the ECJ´s assessment of restriction by object was the right categorisation under national law.

Part 2: Arbitration and Competition Law

Andreas Mundt (President of the Bundeskartellamt) welcomed the participants for the second part of the day, which focused on the relationship between Arbitration and Competition Law. Mundt explained the particular role of sports for the BKartA's policy („no-winner-topic") and stressed individual liberty as one of the important objectives of Competition Law besides price and volume.

The first panel („Arbitration, sport and competition law") – chaired by Mercedes Pedraz Calvo (La Audencia Nacional, Madrid) – started with a statement by Christopher Vajda (former UK judge on the CJEU, now arbitrator in competition cases) who gave an overview over the jurisdiction in the UK and the influence of EU Competition Law. Since Christopher was part of the FA Tribunal London which objected last year against the FIFA Cap on football agents, he gave insights in the challenges for the tribunal and the plans in the UK about creating an independent football regulator. Florian Bien (Professor of Global Business Law, International Arbitration Law and Private Law at the Julius Maximilians University of Würzburg) explained the special factual features of sports & arbitration (need of speedy decisions, international dimension, one single federation per sport) and pointed out that – due to the very narrow scope of judicial control by the Swiss State Courts – awards by CAS were de facto excluded from state recognition procedures. Laura Melusine Baudenbacher (President of the Swiss Competition Commission) and Romano Subiotto (chairman at CAS) explained the (non-) legal reasons for the attractiveness of swiss substantive law, the history and advantages of CAS and its legal legitimacy.

The second panel of the afternoon – chaired by Wolfgang Kirchhoff – focused on competition law and arbitration in general. Daniel Zimmer (Director of the Institute of Commercial and Economic Law and of the Centre for Advanced Studies in Law and Economics at the University of Bonn) explained the legal framework how arbitration agreements are controlled by competition law („ordre public") and hereby discussed a recent BGH decision dealing with quarries.[7] The panel closed with statements by Daniel Barlow (President of the International Chamber of the Cour d'Appel de Paris) delineate the French competition law-arbitration-approach and Yves Herinckx (arbitrator and deputy judge at the Market Court in Brussels) explaining the role of an arbitrator and its challenges.

The day finished with a culinary dinner highlight at „The Käfer Roof Garden Restaurant" at the top of the Reichstag. The wide roof-top terrace of the restaurant was the perfect place to reflect the day and to enjoy a

[5] European Commission, Summary of Commission Decision of 22 March 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/38.173 — Joint selling of the media rights to the FA Premier League), 2008, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0112%2803%29 (last accessed 21.6.2024).

[6] European Commission, 2003/778/EC: Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League), 2003, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A32003D0778 (last accessed 21.6.2024).

[7] BGH, 27.9.2022, Az. KZB 75/21, WuW 2023, 108.

glass of wine with colleagues and old friends in a relaxed atmosphere.

The final day / Conclusion

The conference finished on 1 June 2024 with Mira Raycheva´s (Supreme Court of Bulgaria, Sofia) and Max Barret´s (High Court of Ireland, Dublin) panels giving national case law updates.

The Annual Meeting was – once again – a great opportunity to exchange the different experiences and national approaches to Competition Law and Arbitration in sports. As regards the opening question, whether Competition Law disappoints football fans, in my opinion, the conference showed that – especially after the recent ECJ´s judgements – consumer welfare plays a major role while applying competition law in the sports sector. It will be one of the major tasks and challenges for competition authorities and courts to safeguard the interests of sport fans in the long term by applying these principles. However, one could doubt whether the recent practice of joint selling of media rights in Germany – at least in the short run – really benefits the interests of football fans who have to purchase several subscriptions at a significant higher overall price than before in order to be able to watch the matches of their teams

Rupprecht Podszun, Düsseldorf

Conference Debriefing (42): 19th Annual Conference of ASCOLA

Rupprecht Podszun is a law professor at the University of Düsseldorf and the editor of this blog. Since 2023 he has been the president of ASCOLA. He wishes to thank his fellow members on the Executive Committee for the fantastic team work: Thomas Cheng, Magali Eben, Giorgio Monti, Wendy Ng and Peter Picht.

Suggested Citation: *Podszun*, DKartJ 2024, 38-44

More than 150 competition law scholars from around the world gathered in Würzburg to celebrate their job choice – could it be any better than being an academic dealing with the hottest topic on earth? This was the Annual Conference of the Academic Society for Competition Law (ASCOLA). D'Kart interviewed Rupprecht Podszun, the chairman of ASCOLA, to get a conference debriefing. Here are his insights on trends in antitrust research, German embarrassment, the winner of the best paper award, new stars on stage and a very short panel appearance by an antitrust high-flyer!

Name of the event: 19th Annual Conference of the Academic Society for Competition Law (ASCOLA)

Place & time: University of Würzburg, Germany, 4-7 July 2024. Key events took place in the Neubaukirche, a baroque church-turned-lecture hall. Awe-inspiring.

Hosts: The conference is an ASCOLA event, but of course the work lies with the local hosts – they are the ones running the show (and a show it was!): Professor Dr. Florian Bien and Dr. Björn Becker, pictured above, and their team directed the event. They did an awesome job!

Participants: Competition law scholars from around the world from A (as Oles Andryichuk, the philosopher of antitrust – just changed to Exeter University) to Z (as Bernadette Zelger who won an Antitrust Writing Award this year for a paper on ne bis in idem). There were well-known ASCOLA big names such as Alexandre de Streel or former president Michal Gal, but – as usual – also many first-timers. A young delegation from Berlin was greeted with particular affection: Simon de Ridder, Lennart Enwaldt, Philipp Hornung and Maximilian Wolters are PhD students who started their PhDs with the late Heike Schweitzer who was dearly missed.[1] Her team of young scholars at least offered a glimmer of hope that her legacy lives on.

Food & drinks: An awesome barbecue, a wine-tasting in an ancient cellar – couldn't have been better!

Question: Sorry, but these days are a bit busy with football, elections in the UK and France, Joe Biden, raging wars, and Taylor Swift on tour – I wanted to ignore the ASCOLA conference to be frank. A mistake?

Answer: Unwise! It would be so much more efficient to do competition law, since all the topics you mentioned are of course topics for the community. The issues can be analysed through the lens of power and nearly everything can be better with competition... I am exaggerating of course, but I was also surprised that the debates you mentioned did not play such a big role at ASCOLA. Judging from the titles, there was not a single paper on football, and none on war!

Q: You're losing me.

A: Shake it off, shake it off. The reaction of antitrust researchers to the global crises is a different one: Papers turn fundamental! The young ones go to the very bottom of competition law concepts and deconstrue

[1] *Haucap*, DKartJ 2024, 33.

them. Take Andrew McLean for instance. He said that the "innovation defence" (you cannot stop our merger because we are so innovative) is just a rebranding of the Chicago School's ideological "techno-conservatism". Imagine: Innovation has no longer a positive connotation!

Q: Wait, the Schumpeter/Arrow controversy on the effects of competition on innovation ended with an inverted U curve – U as in undecided, right? Schumpeter wants monopolies, Arrow wants competition, and now McLean wants a U-turn?

A: According to McLean, there is evidence that the inverted U nowadays looks more like a lazy L. Of course, he cited Mariana Mazzucato ("The entrepreneurial state") who is the well-hyped defender of state intervention in innovation.

Q: Adam Smith must rotate in his Canongate Kirkyard in Edinburgh when hearing an Edinburgh scholar promote such stuff...

A: Not so fast! Stavros Makris who works at Glasgow re-read Adam Smith, only to find out that the mainstream belief into what Smith had allegedly said is pretty flawed. Smith, so Makris argues, has not only identified the invisible hand of the market, but also a very visible hand of the public authorities who need to guarantee many functions.

Q: Adam Smith was the first ordoliberal?

A: Or so it seems. Ordoliberals are definitely back. Tristan Rohner and Helena Drewes, currently both working at my chair, argued in favour of "competition on the merits" as a benchmark for abuse cases. They say the concept could effectively remedy problems with the "more economic approach". Did you know that "competition on the merits" was invented as a concept for a predatory pricing case with petrol stations in Benrath, close to Düsseldorf, in 1930? As Tristan and Helena showed some of the confusion with the concept lies in the fact that the term was lost in translation in EU jurisprudence.

Q: Wait. You say, they are "currently" working at your chair. Any job market gossip?

A: Tristan Rohner will leave us, he was appointed a Junior Professor with tenure track at Bucerius Law School in Hamburg.

Q: Wow, congrats! I mean, sorry for you! Hamburg could be the next Düsseldorf, the competition law capital of Germany! Or at least a good competitor to your Rhine dominion!

A: Nanana. Don't want to hear that, but I concede that with Florian Wagner-von Papp at the University of the Armed Forces, Wolfgang Wurmnest at Hamburg University and Tristan at Bucerius it is a place to watch...

Q: And there is the Hamburg Max Planck Institute!

A: They do only little competition law there, nowadays, but the books that the late Ernst-Joachim Mestmäcker held in his hands are still there. Oh, by the way, over dinner I overheard a great scholar saying she would love to be able to read German. Asked why, she replied: to read Mestmäcker in the original. A colleague whispered to me: Would Kafka or Goethe be an option, maybe, too?

Q: Amazing academics!

A: You said Amazon?

Q: No, amazing. But speaking of Amazon... I assume Big Tech was Big Topic?

A: The only time I heard the term "Amazon" during this conference was when Francisco Beneke from the Munich Max Planck talked about sustainability in Latin America – and Amazon here did not refer to a gatekeeper, but a CO2-keeper. Of course, there were several panels on digital and data, but it was not as dominant as I would have expected it to be. In a final wrap-up panel of the conference, Masako Wakui, a thought leader from Japan, characterised the conference as not having "hot topics" – which she meant in a

positive way. In times of global warming "hot" has lost its appeal anyway. Scholars turn to a variety of topics and ideas, these days. The digital frenzy seems over.

Q: Still, there must have been some trends in digital competition law?

A: The spectre was pretty well given in a breakout session Digital I that I attended: Richard Li-dar Wang (National Chengchi University Taiwan) gave a very interesting account of how to measure efficacy of the new rules that we have in place. Jasper van den Boom from Düsseldorf (heyho!) – who had another very memorable moment at this conference – discussed Bytedance's role as a gatekeeper in the DMA from a conceptual ecosystem perspective. And Marco Botta of EUI went into the legal clash of privacy rules and DMA. All three were no longer in this "we have to do something"-mode, but much more down to earth, dissecting the rules. In the wrap-up panel, Wolfgang Kerber, the economist, said he noticed as a trend throughout the conference that lawyers do legal reasoning again.

Q: Hear, hear.

A: Really! And he is right. In antitrust, we did a lot of economics effects analysis. Now, more and more lawyers look into standards of proof, the exact meaning of words in legal texts or the reconciliation of rules from different fields.

Q: That sounds dull.

A: And it is not! Because there is a world to discover! And there is a lot of inspiration from other fields: If you do not reduce competition law to a reductionist economic concept, you can do really interesting stuff. Todd Davies from UCL, for instance, gave a talk on "niche theory" from ecology as a way to understand competition law. And in the same panel, Gregory Day (University of Georgia, USA), gave a historical account of US antitrust law – explaining the Sherman Act with a view to the Reconstruction era that preceded it. It was fascinating to hear Greg relate the anti-slavery fight of John Sherman with later discrimination cases. Antitrust's promises are still unfulfilled, he says. But what I want to say is: There is a huge diversity and variety of approaches. That is probably the characteristic thing of academic research in 2024.

Q: Let's talk about the stars of the conference.

A: You mean David Bosco, Liang Li and the Bien Brothers?

Q: Oh, I thought Andreas Mundt and his peers on the Enforcers Panel were the stars of this conference?

A: Right, yes, they were of course, but this conference also made new stars, too. Let's discuss the enforcers first: There was Andreas Mundt from Germany – who is the boss of our sister organisation, the International Competition Network (ICN). Every time I see him on stage I am impressed how straight-forward he is in his messages, how witty he is in his answers and how well he plays the audiences. He shared the panel with Benoît Coeuré from France, Ryan J. Danks from the US Department of Justice and Juliana Oliveira Domingues, a long-time ASCOLA member who had served as the Attorney General of CADE, the Brazilian enforcer. Coeuré became an asset for the community ever since he joined the club as an outsider, coming from Finance. The show was stolen though by Doris Tshepe.

Q: She is the South African commissioner for competition, right?

A: Exactly. She flew in from an UNCTAD meeting in Geneva, landing in Frankfurt, jumping on a car, flying over the Autobahn, joining the panel 20 minutes before it closed, taking off the next morning to Greece. In between, she rocked the thing. A bit Hollywood style, this fly-in-fly-out, but then they are the stars. Or, as Andreas Mundt put it: What would you academics chew on if not for us?

Q: Haha, there you go, theorists! Nothing worth without practice!

A: Luckily, Mundt also said, it is a two-way street. To give an example of the impact of academic literature on the Bundeskartellamt's practice he cited work by

Richard Schmalensee and David Evans on platforms. They were heavily influential, he said, for the design of section 19a, that competition law gatekeeper rule in Germany.

Q: Ouch. Not the luckiest pick of references, right?

A: Mundt had participated in an Oxford workshop at Ariel Ezrachi's a week before where – under Chatham House rules – it had been a big topic, as we understand, that academics can no longer be trusted since so many of them are paid for by big corporations. Evans and Schmalensee are certainly renowned economists, but both of them have been on the Big Tech payroll. But then they are not ASCOLA members. ASCOLA has an Ethics Declaration[2] in place, requiring its members to disclose all funding properly. More to be done, as Ioannis Lianos (back in academia after his time as the boss of the Hellenic competition agency) does not get tired to assert. But, to do justice to Andreas Mundt: When I asked all those people to stand up who are in favour of a break up of Alphabet, Mundt jumped to his feet – as did maybe a third of participants.

Conference Innovations:
The conference had 72 papers with speakers from all continents. They had been selected from roughly 150 submissions in a double blind peer review process. Among the innovations in the conference format this year:
- *There was a conference stream for PhD students ("Young Scholars Workshop") where experienced experts discussed intensely chapters from PhD projects.*
- *Scholars were invited to submit pitches for work-in-progress so that ideas could be floated and discussed.*
- *In a panel with heads of the ASCOLA Regional Chapters different regions were represented, presenting their regions' developments for digital competition.*
- *In a final wrap-up panel five scholars were invited to give their impressions from the 25 breakout sessions that took place in 5 parallel sessions.*
- *In line with the new Guiding Principles on Diversity, Inclusion and Social Safety at ASCOLA Events the programme had the numbers of contact persons for cases of discrimination, harassment, emergencies, etc.*

Q: I learned you have a soft spot for declarations nowadays!

A: We proudly presented the Guiding Principles on Diversity, Inclusion and Social Safety at ASCOLA events![3] After the JECLAP editorial[4] where female members of the antitrust community spoke out we decided to raise awareness and get some very basic procedures in place. The idea is that people can only exchange arguments if they respect each other and do not bully, discriminate or harass others. People want to feel safe nowadays when going to a conference. And of course, diversity on panels is an issue. With the rules, ASCOLA is trying to send a signal. And many scholars signalled back that this was a heartening, encouraging move. It was time to put these issues into the spotlight.

Q: Speaking of spotlight: Who won the Best Junior Paper Award?

A: Liang Li is the name! She is a young professor from the Chinese University of Social Sciences in Beijing, and her paper reconceptualises the idea of "power" in competition law – broadening the term beyond mere market power. She made a lasting impression, definitely well-deserved! Seems that our jury with Fabiana Di Porto, Thomas Cheng and David Gerber had a sharp eye again. And Liang excelled in another field, too, and you will hear about this in a minute.

Q: I remember that the *Economist* ran a cover story the other day on the rise of Chinese science...

A: You see? ASCOLA is always in tune with the times.

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[2] ASCOLA, Transparency and Disclosure Declaration, https://ascola.org/wp-content/uploads/2020/11/ascola_ethics_declaration.pdf (last accessed 26.7.2024).

[3] ASCOLA, Guiding Principles on Diversity, Inclusion and Social Safety at ASCOLA Events, 2024, https://ascola.org/resources-2/guiding-principles-on-on-diversity-inclusion-and-social-safety-at-ascola-events/ (last accessed 26.7.2024).

[4] *Akman/Banda/Bania* et al., 14 Journal of European Competition Law & Practice 2023, 379.

Q: For curiosity only: How did the Germans fare?

A: Those presenting at ASCOLA really do a good job, and people like Thomas Weck, Eckart Bueren or Oliver Budzinski are known for asking really good questions in discussions. Someone who had not been to ASCOLA conferences for a while was heavily impressed by the big questions put forward by scholars, and said: The normal German research is a bit narrow, isn't it? But at Würzburg, it was not our research that was embarrassing.

Q: What then?

A: Deutsche Bahn. It became the running gag of the conference. Or not even running, to be exact. "My train was 18 minutes late", complained one Asian participant, and I could only congratulate him that he was such a lucky person! I got so used to delays, non-working Wifi, nerve-wrecking announcements and the ignorance towards all this that I am completely numb already. But when foreigners who had pictures in their head of an efficient, high tech Germany tell you of their miserable train rides from Frankfurt to Würzburg – only to find out that the taxi driver only accepts cash... it is all there again. It is a bit of a consolation for competition teachers that Deutsche Bahn serves as the textbook example of a complacent monopoly. And you know what people simply did not want to believe?

Q: Tell me!

A: When we told them that the Bundeskartellamt is battling in court with Deutsche Bahn for real-time data access – the mobility platform case.[5] "But that's a state-owned enterprise, how can they withhold data?!", someone asked me. Because they can! That's why we like competition. Regensburg law professor Jürgen Kühling was at the conference, too. Just days before he had presented his final expert opinion as head of the German Monopolies Commission. Whoever wants to know what can go wrong with a state monopolist (and how to cure it) – the Monopolies Commission's "Hauptgutachten Wettbewerb 2024"[6] is a treasure trove.

Q: I remember you love to go to this conference to learn about things happening in far away places.

A: Developments are converging everywhere – when you hear Xingyu Yan (Xiamen University) talk about competition problems in Chinese energy markets that is absolutely relatable. My favourite story came from Liana Japaridze who works at Sussex but is originally from Georgia. The Georgian competition agency did a fuel cartel case – and they did basically the same case three times within a few years. A perfect experiment: Re-running the same case. Liana told it as an evolutionary story how the young competition agency improved from case to case. Great.

Q: We have not yet spoken about private enforcement.

A: And not yet about the highlight of the conference! Private enforcement is a mess everywhere. In the US, so Filippo Lancieri (just moved from Zurich to Georgetown University) reported, private damages claims seem to have broken down. Much needed amendments are not passed. Zeyu Zhao (Renmin University) estimated that 10% of Chinese private litigation cases are successful. I was not able to hear the talk by Francisco Marcos from Spain, but he told me that the Spanish trucks damages avalanche is about to end. The enforcers, in their panel, all agreed that their authorities – sorry, but no, sorry – can do nothing in favour of private parties.

[5] Bundeskartellamt, Düsseldorf Higher Regional Court largely confirms enforceability of the Bundeskartellamt's ruling on abusive practices against Deutsche Bahn, 2024, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2024/11_03_2024_OLG_DB.html (last accessed 26.7.2024).

[6] Monopolkommission, Biennial Report XXV: Competition 2024, https://monopolkommission.de/en/reports/biennial-reports/451-biennial-report-xxv-competition-2024.html (last accessed 26.7.2024).

Q: No hope whatsoever?

A: Björn Lundqvist from Stockholm explained that the Nordics are picking up in the field – not least due to high interest rates which makes it attractive to litigate. He said that on an interesting panel: Hosted by Peter Picht and Thomas Cheng, some heads of ASCOLA Regional Chapters reported how their jurisdictions grappled with digital issues. I learned from Maciej Bernatt, for instance, that Poland still has a very strong local competitor to Amazon, and from Zeynep Ayata that (a) Turkey is now officially Türkiye and (b) it introduces some really harsh anti-Big Tech regulation.

Q: There we are, another mentioning of Amazon! I knew it!

A: True, but Maciej also said, and this is a general feeling, that we must not forget other egregious competition law violations over our appetite for Big Tech. Björn chimed in that we still have an "oligopoly gap". Maciej mentioned state-owned enterprises in particular, and this brings me back to...

Q: ...the German railway system, okay, okay. Now, before we have another "Verzögerung im Betriebsablauf": What was this highlight of the conference that you have been mentioning over and over again?

A: "All of me, why not take all of me, lalala..." That was so good! You know Florian Bien and Björn Becker? Our hosts are the kind of people who schedule a musical concert for Friday at six o'clock. That was exactly the same time when the German national football team hit the pitch to meet Spain. When the audience shuffled into beautiful Toscanasaal in the Würzburg residence many were looking at their mobiles to follow the match. I sat close to two well-known German law professors who know as much about football tactics as about merger control. But a couple of minutes later – all this was gone! People were immersed in the first ASCOLA concert which certainly will remain one of the most memorable conference events ever. (And the Germany match can easily be forgotten anyway).

Q: So what did Florian and Björn do?

A: Florian opened the concert with two études by Chopin, played beautifully on the piano. This was followed by Helena Drewes playing a Poulenc sonata on flute. Liang Li (at this time still unaware of her later honours) played a self-composed fantasia on a Chinese flute, taking us to her village. That was so emotionally moving! After that, Björn Becker took over at the piano and opened the jazzy part of the concert. Björn is a postdoc with Florian, and the co-organiser of the conference, but when you saw Florian turning the sheets for him you noticed that the two are far more than brothers in competition.

Q: You mentioned the Bien brothers, earlier.

A: Yes, Florian's children are highly talented top-musicians. They had already performed at the conference start with a young chamber orchestra which was wonderful in that former church. Now, they were the supporting act for ASCOLA members playing music, together with economics professor Toker Doganoglu.

Q: Who else took the stage?

A: There were two further memorable moments: Jasper van den Boom (formerly Tilburg, now Düsseldorf) was sitting in the first row, getting more and more uncomfortable when seeing Bien, Becker, Drewes and the likes performing like pros. "I thought this was easy-going and fun", he said when it was his turn. He was visibly shaken – and not the Shakin' Stevens style of shaking. I felt him so much! I would have died in my shoes if I had had to perform a song in this concert. But Jasper didn't bow out and had our hearts when he said "Remember me for being brave" – and then he started to sing a decent version of "Holiday in Spain", a song by the Counting Crows in a Dutch-Anglo version. A professor from the Netherlands, sitting close to me, sighed, touched. And Jasper deserves to be remembered for his ecosystem paper anyway!

Q: And the other memorable moment?

A: David Bosco! We know him as a French competition law expert, and also as the organiser of the hottest

ASCOLA conference ever, 2019 in Aix-en-Provence.[7] But now, we got to know him as a guitarist and a singer with the air of a rockstar! He sang the jazz standard "All of me" and – as an encore – "Fly me to Würzburg" (a re-written funny version of that big standard). It was simply fabulous to hear him and that goes for the whole ASCOLA band! The music added to this perfectly organised event, giving it a very personal Bien/Becker-special flavour. We loved it! David Bosco, by the way, has a band at home and plays big concerts in the Marseille area! I still have "All of me" in my ears today.

Q: "Fly me to Würzburg" would have been better than taking the A-train to Würzburg, right?

A: Don't get me started again...!

Q: And next year?

A: The ASCOLA family will meet in Chicago upon invitation by Spencer Waller! So excited!

[7] *Podszun*, Conference Debriefing (11): ASCOLA Conference, Aix-en-Provence, June 2019, https://www.d-kart.de/blog/2019/07/02/ascola-conference-aix-en-provence-2019/.