damage, it will become increasingly difficult forsupposedly clean-cut cartelists to wash their hands of the matter at least with regard to damages claims.

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

Merit Olthoff/Thomas Lübbig, Brussels/Berlin

A lot to digest, and more to come!

Merit Olthoff is a lawyer and partner at Freshfields Bruckhaus Deringer in Brussels. **Prof. Dr. Thomas Lübbig** is a lawyer and Of counsel at Freshfields Bruckhaus Deringer in Berlin.

contact:merit.olthoff@freshfields.com; thomas.luebbig@freshfields.com
suggested citation: *Olthoff/Lübbig*, DKartJ 2023, 5

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

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

With the FSR, the European Commission seeks to control "foreign subsidies", which it broadly defines as a "direct or indirect financial contribution by a non-EU country, which is limited to one or more companies or industries and which confers a benefit on a company active in the Single Market" (quoted from the EU's dedicated FSR webpage). "Foreign subsidy" is an umbrella term which covers various financial instruments such as "interest-free loans, unlimited guarantees, capital injections, preferential tax treatment, tax credits, grants, etc.". Under the FSR, the Commission is empowered to review ex ante certain inbound investments in the event of (i) concentrations involving subsidies and (ii)

bids in public tenders for major projects in an EU Member State where a bidder may be "supported by the government of a non-EU country through direct subsidies". These cases are to be brought to the attention of the Commission through a mandatory and suspensory ex ante notification. At the same time the Regulation provides for the own-initiative investigation of matters where the "EU subsidiary of a non-EU country parent company has access to cheap, State-supported financing in the non-EU country of the parent company" (as all the preceding citations also quoted from the EU's dedicated FSR website).

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

When it comes to staffing, the Commission apparently needs 120 case officers to administer the new Regulation efficiently, and some of these resources may need to be drawn in from other units of DG COMP and elsewhere within the Commission. As to data, the Commission, in all cases which come to its attention by way of an ex-ante notification, will primarily rely on the notifying party(ies). To this end, on 6 February 2023, the Commission published for consultation a draft Implementing Regulation to the FSR, with two draft notification forms in annex. Annex 1, which deals with concentrations bears certain similarities to the Form CO known under the EUMR, and, to the credit of the Commission, it is not overly long. Yet, when you look at the individual sections, you will see that the Commission's appetite for information is not easy to satiate. A central element of the form is section 5 which asks for a list of "foreign financial contributions", a term that in its substantive remit may go beyond the definition of a State aid under Article 107 (1) TFEU, and which could require notifying parties to screen hundreds or thousands of agreements or other financial relationships they may have with non-EU State Governments or Government-controlled bodies. On the other hand the Commission does make a laudable attempt to alleviate this burden through the establishment of two de minimis thresholds, which are that foreign financial contributions (i) below an individual amount of 200,000 EUR, or (ii) in total, per third county and per year, below 4 million EUR, do not need to be listed, but still count towards the notification thresholds.

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

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

While it is understandable that the Commission may appreciate this kind of information, why does it require it to be provided by the notifying party? It is odd because, under the general competition rules, the notifying party is not even supposed to know what the other bidders are doing, or even to know whether there are other bidders at all and how many. Hence, section 6 requires the party to rely on (i) (a dearth of) information in the public domain (if any), or (ii) mere

conjecture. Alternatively, (iii) it may need to negotiate a clause in pre-SPA documents, such as NDAs or the like, for the seller to make this information available. But will the seller be prepared to agree to such a clause? Will the seller even be allowed to do that under Article 101 TFEU? In any event, this burdensome provision will put non-EU bidders which need to submit a filing under the FSR at an unfair disadvantage. Is that an intended consequence of section 6? Probably – and hopefully – not – but that does not solve the problem. If section 6 is not reduced in scope following the consultation, the Commission may still deal with this issue "pragmatically" as already indicated in recital 9(a) of the form, whereby waivers may be granted by the Commission in a situation where the notifying party(ies) "indicate where any of the requested information that is unavailable could be obtained by the Commission". This way of proceeding would not be unprecedented, and it is also used by the Commission under the EUMR in situations of a hostile takeover where certain information from the seller and the target can only be obtained through an RFI addressed to them directly.

with a kind of in-camera process where the Commission takes its decision on the basis of information that is not disclosed to the notifying party.

So, in conclusion, the application of the FSR, both in terms of the scope of the foreign financial contributions to be listed under section 5 and the bidding market information requested under section 6, will require a lot of pragmatism on the part of the Commission, which may well be forthcoming in most cases, but perhaps not in all. This would then raise an issue of fairness and, quite frankly, also the question why the EU legislator would enact a law which, in order for it to be reasonably applied, relies on the authority exercising a certain pragmatism (which inherently introduces an element of arbitrariness) from the start?

Justus Haucap, Düsseldorf

Conference Debriefing (35): FIW-Symposium Innsbruck

Prof. Dr. Justus Haucap ist Direktor des Düsseldorf Institute for Competition Economics (DICE) an der Heinrich-Heine-Universität Düsseldorf.

Kontakt: haucap@dice.hhu.de
Zitiervorschlag: *Haucap*, DKartJ 2023, 7

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

Nach zweijähriger Pause (genau, wegen Corona) trafen sich jetzt 120 Rechtswissenschaftler, Ökonomen, Anwälte, Enforcer und Industrievertreter, um im Hotel Grauer Bär über aktuelle Fragen des Kartellrechts zu diskutieren oder zu klagen, je nach Façon. Wer war denn da oder worum ging es genau? Wer eine