

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

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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 prohibition 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://nacht kritik.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 leftist 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 be 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](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 asked 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 after all.

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 “disseminated” 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 achieved by restricting competition.

Hopeful gratitude

And so the exchange with Robert Habeck was the spectacular 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.”