

Rupprecht Podszun, Düsseldorf

SSNIPpets (49): Last minute [English Version]

Prof. Dr. Rupprecht Podszun is one of the directors of the Institute for Competition Law at Heinrich Heine University Düsseldorf.

Suggested Citation: *Podszun, DKartJ* 2024, 50-54

It's the summer sales: everything that has piled up has to go. So it's time again for SSNIPpets – small but significant news information and pleasantries – the pet project by Rupprecht Podszun. This issue is all about cartels – and a highlight in the calendar of Germany's competition law capital!

Düsseldorf Open

We're as happy as the Serbian mixed air pistol team when winning an Olympic gold medal.¹ And why? Because the 7th Open Düsseldorf Doctoral Seminar in Antitrust Law is coming up, the so-called Düsseldorf Open, on 2 and 3 September 2024! Now is the last chance to register – click here for all information and last-minute registration.²

For two days, you are pleasantly torn out of the lonely doctoral mill. Instead of procrastinating with ironing and podcasts, you can spend your time in Düsseldorf and take a break from your doctorate with other long-suffering writers of thick books. On the programme: plenty of talks, the best catering from the Düsseldorf law firms, a case study with Judge Gerhard Klumpe and the hot shots of the legal profession, the presentation of the Herbert Smith Freehills PhD Award – and two guests of honour: firstly, Carel Maske, who as

Senior Attorney for Microsoft looks after competition and digital regulation issues in the EMEA region.

Secondly, we have this institution at the Düsseldorf Open, the fireside chat without a fireplace. Illustrious personalities such as Martijn Snoep, Konrad Ost, Lindsey McCallum, Jörg Nothdurft and Andreas Schwab have already chatted away in front of the crackling YouTube fire. This year, one of the world's best-known economists and political advisors will be in the hot seat: Fiona Scott Morton. The professor from Yale (where my colleague Christian Kersting also studied, so he's really looking forward to it) will be answering questions from the participants. Experience shows that this will be intense. Well, if we were the Serbian mixed shooting team... but anyway. If you would like to join us, please send an email to [ikartr \(at\) hhu.de](mailto:ikartr@hhu.de) (young academics only – and most parts of the seminar will be in German, sorry!)

If you have finished your dissertation, you should be able to find the name and title of your work in our diss list.³ If this is not yet the case, please let us know!

Oh deer

Now I'm really getting into the marketing mood, so I'll throw something else out there! Come on, friends, here's something on top: when two rutting stags clash their antlers, what do you think of first? Exactly: the conflict between competition and sustainability. In any case, our latest book has this motif on the cover, so it looks very chic and is definitely worth buying. I edited it together with Justus Haucap, Anja Roesner and Tristan Rohner. It's called "Competition and

¹ Eurosport (only in German), Olympia 2024, https://www.eurosport.de/sportschiessen/olympia-paris-2024/2024/olympia-2024-vor-freude-uber-den-boden-gerollt-serbiens-mixed-team-holt-gold-mit-der-luftpistole_vid2196478/video.shtml (last accessed 23.8.2024).

² Düsseldorf Institute for Competition Law (only in German), Düsseldorf Doctoral Seminar in Antitrust Law,

<https://www.ikartr.hhu.de/offenes-doktorandenseminar/vorschau-7-doktorandenseminar-2024> (last accessed 23.8.2024).

³ DKart, The list of Ph.D.-Theses, <https://www.dkart.de/en/blog/2018/11/23/die-diss-list/>.

Sustainability” and was published by Edward Elgar.⁴ In the book, we cover virtually everything that could be of interest with regard to sustainability and competition.

A gentle breeze

Rumour has it that the topic of sustainability will feature prominently in the 12th amendment to the German Act against Restraints of Competition, ARC. The draft is not yet officially out, but many people seem to know it. Overall, the plans seem to fall short of exciting the outrage and fear that previous editions of the ARC triggered. Some people I have spoken to are irritated by the fact that the thresholds for German merger control may be raised.

Another mini-excitement: the Federal Cartel Office Bundeskartellamt is finally to be given (minimal!) powers to enforce consumer laws. As a reminder: Germany and Austria are the only countries in the EU that continue to rely on a largely private enforcement system in consumer matters. Even the UK and the USA have strong consumer protection authorities. The strengthening of the Federal Cartel Office has been criticised in the form of a “letter from associations”, which can be read (in German) here.⁵

In the letter, some business organisations warn that the gaps in protection should first be identified once again and then closed using civil law (in other words: please postpone the plans until the day after tomorrow). However, strong protection against imports from third countries is needed, of course, and a tough authority is welcome here.

One of the signatory associations is somewhat out of line: the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband). The fact that Germany’s number one consumer organisation is joining forces with business associations to oppose the Federal Ministry of Economics’ plan to strengthen consumer protection in Germany is... quite an astonishing

plot twist. It seems to me that someone is afraid of competition from the Bundeskartellamt.

Before you ask: I have no information on when the draft bill for the GWB amendment will be presented. If you have travelled with Deutsche Bahn lately, you may know that delays are a the new German cool. Maybe that’s true for the Deutsche Bahn owner, the government, too...

Systemic relevance

As I write these lines, the German government is rescuing the Meyer Werft shipyard in Papenburg. 3,300 employees, Chancellor Olaf Scholz was there, the shipyard is “systemically relevant” for the maritime economy, an “industrial crown jewel”. The order books are well filled. It is rumoured that the state is to take over 90 % of the shares in Meyer Werft. The German government is now somewhat used to nationalising companies. (Strangely enough, entrepreneurs sometimes like nationalisation, sometimes not, e.g. in the case of housing. It’s confusing). I am not in a position to judge why there are no banks that sense a good deal for this shipyard with full order books, but the federal government does. Incidentally, the shipyard has so far been owned by a family via certain foundations. In 2015, the holding company’s headquarters were moved from Germany to Luxembourg, which is not such a big maritime force, as far as I know. But there must have been good reasons for this move.

So now the family Meyer Werft has its ships in the bag (if the EU Commission agrees). One flaw in the German government’s new portfolio company: Meyer Werft mainly builds cruise ships. If the company is now run by the German Ministry for Economics and Climate Protection, there may be a greenwashing case looming...

⁴ *Haucap/Podszun/Rohner/Rösner*, Competition and Sustainability, <https://www.e-elgar.com/shop/gbp/competition-and-sustainability-9781035325382.html> (last accessed 23.8.2024).

⁵ Letter from associations (only in German), *Verändeschreiben zur erwogenen Einrichtung der behördlichen Rechtsdurchsetzung*, <https://www.lobbyregister.bundestag.de/media/45/80/320465/Stellungnahme-Gutachten-SG2406250185.pdf> (last accessed 23.8.2024).

God with you, land of BayWa

In SSNIPpets 37 (at the end) I had already reported on BayWa.⁶ That is a big agriculture giant in Bavaria, and it sometimes manages to get into the spotlight for diverse reasons, e.g. in the context of censorship of textbooks for school kids. If you have ever lived in Bavaria... it is this kind of dominant company that has always been there and you wonder why all this is possible for decades... I guess you know what I mean.

BayWa is now also well known to younger competition lawyers thanks to its involvement in the crop protection cartel. After the fine proceedings ended, BayWa filed an official liability suit against the Federal Cartel Office. The allegation: The office had called other participants in the cartel and invited them to submit leniency applications, so that BayWa had fallen into the slurry barrel trap of fines after leniency applications. Of course, that stank to high heaven. BayWa failed with its official liability claim. The Higher Regional Court of Cologne wrote:

“In addition, the risk which the plaintiff itself has created by the fact that it or its employees have violated the provisions of competition law in a relevant manner has primarily materialised in the event of damage. The plaintiff has therefore itself set the decisive cause of the damage and therefore cannot now hold the defendant liable.”

The fact that the Cologne Senate cited the so-called “pig panic case” (decided by the Federal Court of Justice in 1991, case VI ZR 6/91) as a precedent for this demonstrates a greater sense of context. (The facts of the pig panic case are not for the faint-hearted, but if you dare and can read German, you can read about it here).⁷

Why am I mentioning this now, even though the Federal Court of Justice finally dismissed the BayWa lawsuit in 2022?⁸ Because the company is now back in the headlines: It is in a deep crisis. The mess is going on.

Woodcutters.

The Land of Baden-Württemberg once cartelised the marketing of timber from its woods. This is an awfully long story, but the current turn of events is interesting. There is a group of sawmills that gave its damages claims to a professional company that is now suing the Land for a three-digit-million Euro sum. They lost in first instance, but now secured a win in the second round with the Stuttgart Higher Regional Court (case no. 2 U 30/22). The verdict is remarkable for three reasons:

- Unlike the lower court, the higher court approved of this construction where the claims were bundled by the professional company. The court did not see a violation of the German Legal Services Act.
- Secondly, it is formally a stand-alone action for damages – there was no binding decision by a competition authority on the matter.
- Thirdly, the judges thus cut a potentially hefty sum out of their employer’s budget. After all, the courts are a thing of the Länder in Germany.

However, it is now back to square 1: The lower court has to determine the amount of damages. After all, we are still in Germany, where cartel damages proceedings can take a few years before anything comes out of it...

I particularly like one sentence in the recent decision: “Furthermore, the fact that the round timber market continued to function after the defendant Land discontinued the bundled marketing of round timber shows that it is also possible for smaller forest owners to market round timber independently of the defendant Land. The defendant Land does not provide a comprehensible explanation as to why it should nevertheless be assumed that this would not have been possible in earlier times (...).”

Here you go: the market works!

In the shadow of this case, which itself has its roots in a mammoth case brought by the Federal Cartel Office, a gnarled little plant has grown at the Higher Administrative court of Baden-Württemberg (case no. DL 16 S

⁶ Podszun, SSNIPpets (37): Home office, <https://www.dkart.de/en/blog/2020/02/29/ssnippets-37-home-office/>.

⁷ BGHZ 115, 84 - 89 (only in German).

⁸ Bundeskartellamt (only in German), Amtshaftungsklage der BayWa gegen das Bundeskartellamt rechtskräftig

abgewiesen, https://www.bundeskartellamt.de/Shared-Docs/Meldung/DE/Pressemitteilungen/2022/11_07_2022_BayWa.html (last accessed 23.8.2024).

2046/22). The 16th Senate had to decide whether a district forester could be removed from the civil service. He had been running a timber trade on the side – in competition with the official timber marketing of his local authority. He defended himself, not unwisely, by pointing out that there was no real competition – after all, the state timber marketing was in breach of competition law. It didn't help him, he lost his job.

Defrauded consumers

Fritz!Box is the name of a very popular rickety router in Germany. In my head, this router still makes a ping-krrrr-oink sound and then opens the gateway to the Internet. It has a 1990s look-and-feel to it. And yet the first Fritz!Box came onto the market in 2004, only. The digital world has obviously anachronised my sense of time.

A settlement between the Federal Cartel Office and the manufacturer AVM shows that there is apparently still good business for the Berlin-based company with the Fritz!Box. AVM may not be Big Tech, but, hey, a German IT company! The AVM guys made sure that everything remained adequate: using special software – we are IT-savvy after all – they took good care that the prices for end consumers did not slip too far below certain “target prices”. This resale price maintenance cost 16 million euros in fines for violating competition law.⁹

Perhaps the Berlin company had orientated themselves a little too much on Old Fritz, i.e. Frederick II of Prussia, after whom the Fritz! box is apparently named. According to a nice SPIEGEL article from 2006, the founders were looking for a name that could symbolise German workmanship abroad with a wink.¹⁰ Up to you to judge whether “Fritz” does the deal... (Of course, it could also be that it is not Frederick II, but Fritz Walter as the point of reference, that football hero. But football is – who would know better than us competition lawyers? – far too serious a matter to be used in a tongue-in-cheek manner...). In any case, Frederick the Great

once initiated a prize question that was announced in a scientific competition (!) organised by the “Académie Royale des Sciences et des Belles-Lettres de Berlin” (oui! That was the official name – in French!):

“Is it useful for the people to be cheated?” Old Fritz is said to have wanted an affirmative answer. Obviously, he was not a consumer welfare advocate. A mathematician provided the desired result. However, he had to share the prize with Rudolph Zacharias Becker, who was of the opposite opinion. Becker published the most widely distributed secular book in German of the 18th century in 1788, according to Wikipedia. It was a 447-pages book for farmers. No idea whether this earned him a PhD, but helpers for farmers seems to be a very timely topic.

Off!

Some time ago, Ariel Ezrachi, my colleague from Oxford, asked me to contribute a text on digital regulation to a special issue of the Journal of Antitrust Enforcement. When I asked what exactly I should write about, Ariel said: what ever is important to you. No sooner said than done.

I was on the train to Düsseldorf airport and sitting next to me was a young man who... but read for yourself, open access here.¹¹ It's not long. There are only 12 footnotes. (Now academics are already advertising the fact that their texts have few footnotes, sacra!) And it's a text for which I have – rarely enough – received a lot of feedback. It was mainly parents who got in touch and said: Yes, please, just that and plenty of it! They were concerned with this demand to politicians:

“(...) I urge you to restrict the use of the Internet, or at least social media platforms, by children and young people. According to reports from 2018, Big Tech parents in Silicon Valley are at the forefront of limiting screen time. Today, initiatives are underway in several countries to reduce screen time or to ban TikTok. Studies show the harmful effects for adolescents and for

⁹ Bundeskartellamt (only in German), Bundeskartellamt verhängt Bußgeld gegen den Hersteller von Fritz!-Produkten AVM, <https://www.d-kart.de/blog/2024/08/23/ssnippets-49-last-minute/> (last accessed 23.8.2024).

¹⁰ SPIEGEL (only in German), Die drei erfolgreichen Vier, [https://www.spiegel.de/wirtschaft/hardware-hersteller-avm-](https://www.spiegel.de/wirtschaft/hardware-hersteller-avm-die-drei-erfolgreichen-vier-a-451640.html)

[die-drei-erfolgreichen-vier-a-451640.html](https://www.spiegel.de/wirtschaft/hardware-hersteller-avm-die-drei-erfolgreichen-vier-a-451640.html) (last accessed 23.8.2024).

¹¹ Podszun, News ecosystems: tackling unfinished business, <https://academic.oup.com/antitrust/article/12/2/314/7642978> (last accessed 23.8.2024).

democracy. We cannot rely on parents or users themselves or on the ‘promotion of digital literacy’. The battle is not to be won by individuals. They fight against huge profit-making advertising ecosystems with well-paid professionals who design platforms so as to trigger addictive impulses for young brains. It is asking too much of children, and indeed adults, to control their use of these devices. Our societies, our democracies, cannot afford the brain damage of young people watching WarTok in endless loops.”

If you are also in favour of limiting screen time, then do the following now:

- Register for the Düsseldorf Open if you are writing or planning to write a doctoral thesis in competition law or economics.
- Write an email to your MPs in Parliament, and to be on the safe side also to Emanuel Macron, and demand a screen time limit for children and young people.
- Then switch off this device, close the screen and enjoy the Summer!

See you soon!