REPUBLIK ÖSTERREICH
JUSTIZ

OBERLANDESGERICHT WIEN
DER PRÄSIDENT

Jv 11168/08i-2

WIEN, am 03.09.2008

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Betrifft: Wettbewerbsreorganisationsgesetz 2008; Wettbewerbsgesetz 2008 (WettbG 2008) u.a.; Aussendung zur Begutachtung

Bezug: BMWA-56.141/0002-C1/4/2008

Zu dem oben bezeichneten Entwurf lege ich nachstehende

S t e l l u n g n a h m e

des Senates gemäß § 36 GOG des Oberlandesgerichtes Wien vor.

1. Erklärtes Ziel des vorliegenden Gesetzesentwurfes ist die Stärkung der Ermittlungskompetenzen der Amtspartei Bundeswettbewerbsbehörde, die Übertragung von Entscheidungsbefugnissen auf dieselbe und die Eingliederung der zweiten Amtspartei (Bundeskartellanwalt) in die Bundeswettbewerbsbehörde. Dieses Ziel zu erreichen sei notwendig, um Effizienzdefizite zu beseitigen. Alternativen gäbe es keine; aufgrund der neuen Aufgaben müsse der Personalstand der BWB entsprechend angepasst werden und würden (nicht quantifizierte) zusätzliche Personalkosten anfallen. Eine effektive Wettbewerbsbehörde diene der Sicherstellung des Wettbewerbs und wirke sich somit positiv auf den Wirtschaftsstandort Österreich aus. Für Unternehmen würden keine zu-

sätzlichen Verwaltungskosten entstehen, eine Stärkung der Bundeswettbewerbsbehörde würde die Effizienz der österreichischen Wettbewerbsrechtsvollziehung steigern.

2. Sowohl aus dem Übersendungsschreiben als auch aus dem übersandten Entwurf samt Vorblatt und Erläuterungen ist offensichtlich, dass das vom BMWA initiierte Vorhaben - obwohl dadurch eine tiefgreifende Änderung im österreichischen Kartellrecht erreicht würde - mit dem dafür zuständigen BMJ (als für das Kartellrecht zuständiges Ressort) nicht abgestimmt ist. Selbst aus dem übermittelten Entwurf (Artikel 1, 1. Abschnitt § 33 und § 41) ergibt sich zweifelsfrei, dass der Willensbildungsprozess im BMWA nicht einmal komplett abgeschlossen ist.

3. Jede Verbesserung einer gesetzlichen Materie, die Effizienzdefizite beseitigen soll, ist ein Ziel, dass es zu unterstützen gilt. Das Oberlandesgericht Wien und auch das Oberlandesgericht Wien als Kartellgericht verschließt sich einer derartigen Zielsetzung natürlich nicht. Die Frage, ob der Wettbewerbsrechtsvollzug in der Entscheidungsfunktion bei Gerichten oder bei einer Verwaltungsbehörde anzusiedeln ist, ist jedoch eine politische Entscheidung, die nicht vorschnell - ohne breite Diskussion - getroffen werden sollte.

4. Das Oberlandesgericht Wien als Kartellgericht, das in das (kurze und in die Ferienzeit im Sommer fallende) Begutachtungsverfahren miteinbezogen wurde, teilt die Auffassung des oder der Entwurfsverfasser, dass nur durch die vorgeschlagenen Änderungen eine Effizienzsteigerung zu erreichen wäre, nicht, da doch eine Reihe von Argumenten für die Beibehaltung der Kartellgerichtsbarkeit in erster Instanz sprechen. Die Abkehr vom Inquisitionsprinzip ist eine, wenn auch nicht neue, so doch Errungenschaft. Auch im amerikanischen Rechtsbereich ist die Trennung zwischen Ermittlungs- und Antragsbehörden einerseits und der Entscheidungsbehörde andererseits verbreitet zu finden. Auch auf europäischer Ebene gibt es zunehmend Befürworter für ein derartiges System.

So hat die OECD im Jahr 2006 eine Studie zu Wettbewerbsrecht und Wettbewerbspolitik in der Europäischen Union veröffentlicht, darin wird (S 62ff) als Schwäche angesehen, dass die Europäische Kommission Wettbewerbsfälle nicht nur untersucht, sondern auch entscheidet und eine gewisse Trennung der Verfolgung von der Entscheidung als unumgänglich bezeichnet. Ein separates Kartellgericht ist nach Ansicht der OECD langfristig gesehen wünschenswert (siehe Beilage ./1).

Im Juli 2006 hat die Europäische Kommission Prof. Damien Neven zum Chefökonomen in ihrer Generaldirektion Wettbewerb ernannt. Dieser hat in seiner im Oktober 2006 in der Zeitschrift Economics Policy (Vol 21, Nr. 48, S 741 bis 791) erschiene-

nen Studie „Competition Economic and Antitrust in Europe“, (Beilage ./2, S 771ff), dargelegt, dass das kontradiktorische Verfahren eher den wahren Sachverhalt zutage fördert als das inquisitorische Verfahren. Er zeigt auf, dass in einem inquisitorischen Verfahren eine Befangenheit bestehen kann, die dazu führt, dass nur mehr die Beweise und Argumente gesehen werden, die eine verfolgte Richtung unterstützen. Gerade eine ökonomische Beweisführung könne am besten in einem kontradiktorischen Verfahren überprüft werden. Er empfiehlt aus diesem Grund, dass die europäischen Entscheidungen in Wettbewerbsfällen durch ein Gericht erfolgen. Ein solches Gericht könnte in der Europäischen Kommission vom Case-Team getrennt angesiedelt werden, das Case-Team sollte bei diesem Gericht als Antragsteller auftreten. Eine solche Organisation hätte ein Vorbild bei der amerikanischen Wettbewerbsbehörde Federal Trade Commission. Alternativ könnte die Entscheidungsbefugnis aber auch an das europäische Gericht erster Instanz übertragen werden, bei dem dann die Europäische Kommission als Kläger auftritt.

In Österreich wies auch Wollmann in der Festschrift für Rainer Bechtold (Beilage ./3, S 674) darauf hin, dass die Europäische Kommission nach dem Inquisitionsprinzip als Ankläger und Richter fungiere und nicht alle Garantien einer objektiven Verfahrensführung gewährleiste. Auch er stellt die Frage, ob das europäische Vollzugssystem nicht in ein Gerichtssystem umgewandelt werden soll, bei dem die Dienststellen der Kommission nur als Ankläger, nicht aber als Entscheidungsorgan fungieren.
Auch der Aufhebung des nur kurz in Geltung gestandenen § 44a KartG 1988 - amtswegiges Einschreiten (des Kartellgerichts) durch das BGBl Teil I, Nr.62/2002 - lagen derartige Überlegungen zugrunde.

5. Der in den Erläuterungen erklärten Absicht, dem Muster des deutschen Bundeskartellamtes zu folgen, kann der Entwurf nicht gerecht werden. Trotz Zuweisung der Entscheidungsbefugnisse an die Bundeswettbewerbsbehörde ist keine Änderung deren Organisationsstruktur vorgesehen. Die Entscheidungskompetenz erster Instanz in Kartellrechtssachen soll künftig in Österreich ausschließlich beim monokratischen Behördenleiter der Bundeswettbewerbsbehörde liegen. Demgegenüber werden beim deutschen Bundeskartellamt Entscheidungen über Kartelle, Zusammenschlüsse und missbräuchliche Verhaltensweisen von eigenen Beschlussabteilungen getroffen. Jeder Fall wird von einem Kollegialgremium, bestehend aus dem Vorsitzenden der jeweiligen Beschlussabteilung und zwei Beisitzern, entschieden. Es handelt sich um eine Mehrheitsentscheidung. Die Beschlussabteilung entscheidet unabhängig (Das Bundeskartellamt in Bonn, Organisation, Aufgaben und Tätigkeit, 17).

Abgesehen von der Frage der organisatorischen Zuordnung dieser Entscheidungsgremien entspricht somit das in Deutschland geltende System der Entscheidungsfindung inhaltlich eher der derzeitigen österreichischen Rechtslage als den Vorgaben des Entwurfes.

6. Der nach Art 94 B-VG normierte Verfassungsgrundsatz der Trennung von Justiz und Verwaltung würde durch den vom Entwurf vorgesehenen Instanzenzug durchbrochen werden. Hinreichend nachvollziehbare Gründe, weshalb dies notwendig wäre, zeigt der Entwurf nicht auf, sondern beschränkt sich darauf, die vorgeschlagene Norm (Art 1, 1. Abschnitt, § 35 Abs 1) durch eine Verfassungsbestimmung zu immunisieren. Neben dieser verfassungsrechtlich bedenklichen Vorgangsweise zeigt der Entwurf auch keine Lösungen auf, in welcher Form das Oberlandesgericht Wien als Kartellgericht mit den Mitteln des Außerstreitverfahrens ein von der BWB nach AVG geführtes und entschiedenes Verfahren überprüfen soll.

7. Da der Entwurf die finanziellen Auswirkungen nicht annähernd quantifiziert, kann zu diesen auch nicht Stellung genommen werden, wiewohl doch das BMWA oder die BWB Überlegungen zur Aufstockung des Personalstandes der BWB angestellt haben sollten.

8. Der Entwurf versucht zu suggerieren, dass es mit dem Wettbewerb in Österreich im Argen läge. Wenn dem so wäre, so läge es wohl nicht nur an den derzeitigen Entscheidungsorganen, sondern wohl auch an potentiellen Antragstellern, zu denen auch die Bundeswettbewerbsbehörde zählt, durch entsprechende Antragstellungen Abhilfe zu schaffen. Der vermittelten aber unbegründeten Meinung in der „Begründung“ des Entwurfes, dass es mit dem Wettbewerb in Österreich im Argen läge, kann sich das Oberlandesgericht Wien als Kartellgericht nicht anschließen.

9. Wenn nun der Entwurf damit argumentiert, dass von keinen zusätzlichen Verwaltungslasten für Unternehmen auszugehen sei, begründet er die Steigerung von zwei auf drei Instanzen nicht.

10. Was nun die Eingliederung des BKA in die BWB (bzw die Abschaffung dessen Funktion und der seines Stellvertreters) anlangt, darf zur Vermeidung von Wiederholungen auf die seinerzeitige Stellungnahme des Oberlandesgerichtes Wien an das Bundesministerium für Wirtschaft und Arbeit zum Entwurf einer Wettbewerbsnovelle 2007 vom 1.3.2007, Jv 2044-2/07, do Zl BMWA-56.141/0005-C1/4/2007, verwiesen werden.

11. Angesichts der obigen Ausführungen, die sich bewusst nicht mit Detailproblemen des Entwurfs beschäftigten und aufgrund der Kürze der Begutachtungsfrist nicht

vollständig sein konnten, verwundert die Angabe im Vorblatt der Erläuterungen des Entwurfes, dass es keine Alternativen gäbe, doch sehr. Im Hinblick auf diese Stellungnahme kann das BMWA entsprechend der Übersendungsnote nicht davon ausgehen, dass gegen den Entwurf keine Einwendungen erhoben werden.

Mag.Dr. Sumerauer

(elektronisch gefertigt)

Beilage 11

COMPETITION LAW AND POLICY

IN THE EUROPEAN UNION

-- 2005 --

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

- to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

- to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

- to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The original Member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became Members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996), Korea (12th December 1996) and Slovak Republic (14th December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

Sharing responsibilities will add perspectives as well as resources. Substantive harmonisation across Europe makes it less critical in most cases to identify an effect on trade sufficient to support Community law jurisdiction. The same principles will be applied, especially concerning restrictive agreements and mergers, whether a matter is handled by DG Comp or by a national agency and whether it is assessed under Community law or national law. The regulation anticipates some variation in how national laws treat unilateral practices by dominant firms, and some differences remain in procedures and resources. There may also be differences among agencies in their capacity and willingness to act, particularly concerning sensitive sectors. The liberalisation projects have demonstrated the importance of a "federal"-level enforcer that can confront entrenched national monopolies. The opposite scenario is also conceivable. Policy disputes among the Commissioners might prevent them from reaching a clear decision whether to take enforcement action about a matter or a sector. An interested national agency might then step up, applying Community law. The Commission could take over the matter in order to preserve its prerogatives, but at least the national agency's initiative will have overcome the decision deadlock.[39]

The Commission's integrated enforcement process, though efficient, has inherent weaknesses. Combining the functions of investigation and decision in a single institution can save costs but can also dampen internal critique. Risk of unchecked discretion may make courts sceptical of the Commission's decisions. The reversals at the CFI in 2002 made it obvious that changes were needed, and the Commission has taken many steps to address long-recognised concerns about its internal quality controls. More "state of play" meetings and opportunities to expose the staff's thinking to the parties and to critical peer review are sound. The expectation of close CFI oversight represents a culture change at DG Comp. The net result of the reactions to the setbacks, as well as to the creation of the Chief Economist position and the expansion of the role of the hearing officers, is that case teams understand that they need to put together more and better evidence.

These changes had just been put in place at the time of the OECD's 2003 *Annual Survey*, which included a special chapter on product market competition. (OECD, 2003) That survey noted the concern about the absence of checks and balances where the powers of initiation and decision are combined, and it called for an assessment of whether the review panels and other measures made the decision process more effective. The most relevant measure of increased effectiveness will be whether the Commission's decisions are better able to survive judicial scepticism. Few cases reviewed with the new internal processes have completed their way through the courts, so it may be too early to tell. But some cases that have gone through the internal process were dropped or revised as a result, and thus they never

got to court. To that extent, the internal checks are doing what they are designed to do.

Checks improve quality but can increase costs. The Commission is still experimenting, to find the appropriate balance between the time and resources needed to put a case together and the time and resources devoted to explaining and defending it internally. Such flexibility can be an inherent advantage of an integrated system. Aspects of the quality control system remain *ad hoc*. Not every case is subject to a peer review panel or the attention of the Chief Competition Economist. For now, it is appropriate to make those decisions case by case, in part because there are not nearly enough resources available to give that attention to everything. But as the allocation of cases among agencies evolves, most of the docket at DG Comp may be the more complex and controversial matters for which in-depth analysis and critical scrutiny are most necessary. If so, then *de facto* these internal steps may become expected rather than extraordinary.

Some explicit separation between the investigative and decision-making functions may be inevitable, to secure judicial confidence in the quality of the Commission's decisions. One option for more transparent separation within the Commission process could be creating a more formal evaluative role for the hearing officers. These officials now deal primarily with ensuring process fairness, more than with assessing the substantive merits. Nonetheless, if they have views about the merits, the process already provides some opportunity to convey them. It would a challenge, though, to create such a role that stops short of a full internal administrative trial and initial decision, a process that could just add a layer of delay.

The Commission-level decision process is another quality check, but it is not without problems. The Commission has a key independent role in the Community governing structure, as an institution that is charged with acting in the interests of the Community as a whole. By contrast, the Council and the Parliament are political bodies that must be responsive to national and other interests. The Commission's historic strength has been its appearance of impartiality with respect to national rivalries. Even so, observers in the mid-1990s noted concerns that Commissioners might tend to favour their policies and interests, subliminally if not overtly. (Wilks & McGowan, 1996) No other jurisdiction in the OECD assigns decision-making responsibility in competition enforcement to a body like the Commission. With 25 members, the Commission is too large to effectively deliberate and decide fact-intensive matters.[40] Realistically, the Commission defers increasingly to the Competition Commissioner, providing some high-level policy control over the Competition Commissioner's initiatives. The Competition Commissioner may have consulted with the Legal Service, Hearing Officer, peer review panel and Chief Economist, and the Commission may have before it opinions from the Advisory

Committee or other Commission services. But when the Commission decides a matter, it has typically not heard directly the case against the proposed decision. No Commissioner, including even the Competition Commissioner, will have attended the hearing. All depend on briefings from staff, and there is no *ex parte* rule or other control on contacts between investigating staff and the Commissioners who decide the matter. There is no initial adjudicator that is fully independent of the investigative function.

It is thus not surprising that courts are moving into what looks like a first-instance role. At least, since the CFI was created the courts have not given the Commission much leeway about evidentiary matters. The potential for judicial review and annulment shores up deficiencies of the Commission decision process under principles of European human rights law about impartiality and independence. But the current court system would be taxed to the limit by a true first-instance decision responsibility. To be sure, the courts have risen to the occasion when called: in the 1975 *Sugar Cartel* case, the ECJ produced a 200 page judgment (nearly 500 pages, in CMLR) to examine claims about individual markets and the interaction of competition and agricultural policies, and the full judgment of the CFI in the 2000 *Cement Cartel* cases runs to nearly 1 200 pages. And the CFI was created to increase the judiciary's capacity to handle fact-intensive review. The "fast track" procedure there has made this a realistic possibility even for time-sensitive cases such as mergers.[41] The scope of review and thus the role of the courts are evolving. Recurring issues in competition cases, such as market definition and assessing net effects of agreements and transactions, show that it is not always clear where to draw the line between matters of fact and evidence that are subject to judicial review and matters of complex economic analysis that in principle should be entrusted to the Commission's expertise.

If a separate court took on more responsibility for making records and deciding cases, it would likely play a larger role in determining policy too. As Community competition policy moves beyond law-driven market integration toward a more economic approach, courts may need to articulate a more coherent conception of competition and policy goals. (Gerber, 1998) Perhaps a specialist competition court could fill that role. Changes to the CFI's status due to the Treaty of Nice prepared the way by giving the CFI its own basis for jurisdiction and authorising it to annex panels to hear matters in the first instance, with an appeal to the CFI. Though this was conceived as an outlet for staff cases, it might foreshadow the creation of a separate competition court as a first-instance decision-maker.[42] (Goyder, 2003) But creation of a new "cartel court" at this time would be premature. It would undermine the role of the Commission and the Council in setting policy direction, and it would encourage DG Comp to act more like a prosecutor than a decision-maker. Short of changing the courts' basic function in the process, they might be given more

comprehensive powers to consider Commission decisions on the basis of appeal rather than judicial review. The European courts now review Commission decisions for legal and procedural deficiencies, exercising full control only over the sanctions imposed. If the court rejects the Commission's finding of infringement, it can only annul the decision and send it back to the Commission for further proceedings. An alternative would be to authorise a full appeal, leading to entry of final judgment by the court.

Resources appear sufficient for DG Comp to deal with Community-wide cases and policy development and co-ordination. Inadequacies noted in the 1990s have evidently been overcome. (Wilks & McGowan, 1996) Indeed, now that the national competition agencies apply Community law, public resources committed to competition enforcement in the EEA are substantially greater than in the United States. To be sure, Europe does not yet have such a large contingent of non-government lawyers and economists engaged in supporting and defending private antitrust enforcement.

The 2003 *Annual Survey* called on the Commission to consider economy-wide welfare losses in setting priorities. The Commission has long set its overall priorities based on an understanding of the likely net economic effects of enforcement intervention. For example, a judgment about the net economic impact motivated the shift of resources and attention over the last ten years from vertical restraints to horizontal cartels. At the smaller scale of choosing individual cases, though, it is not often feasible to rely on suppositions about large-scale welfare losses. The high priority given to hard-core cases is based on considerations of general deterrence rather predicting the effect of stopping any individual cartel. For non-hard core cases, the net effect might not be very clear at the outset. Nevertheless, DG Comp is trying to improve is methods for setting enforcement priorities DG Comp's 2004 annual report calls for enhancing the pro-active nature of policy-making, to remedy market failures in support of the competitiveness agenda, while providing for enforcement action at the most appropriate level in the enlarged EU. (EC DG Comp, 2004) The comparative advantage of the 26 different authorities is now highly relevant. The Commission obviously ought to take the lead on matters with international or Community dimension, or where the key factor is a Community based regulatory program, such as network infrastructure. Allocation of resources is shifting already in response to these priorities. DG Comp has doubled its resources for cartel enforcement over the last year, resulting in a doubling of enforcement activity too (measured by statements of objections issued).

Creation of a special cartel directorate was announced as an innovation; however, in 1998 and again in 2002, DG Comp had previously announced the creation of special new cartel units. Whether or not the directorate is particularly

Beilage 12

Competition economics and antitrust in Europe

SUMMARY

This paper aims to assess the influence that economic analysis has had on competition policy in the European Union over the last twenty years. Economists are increasingly used in antitrust cases; the annual turnover of the main economic consultancy firms has increased by a factor of 20 since the early 1990s and currently exceeds £20 million. This is about 15% of the aggregate fees earned on antitrust cases, a proportion close to that in the US. The economic resources mobilized by the EU Commission are, however, an order of magnitude smaller and this imbalance is a source of concern. The legal framework and the case decisions have also been influenced by economic analysis in important ways. For instance, the analysis of agreements between firms has increasingly focused on effects; the analysis of the factors that determine effective competition has become more sophisticated; the concept of collective dominance has been progressively developed in terms of the theory of collusion in repeated interactions, and quantitative methods have become more important. However, enforcement has sometimes appealed to economic reasoning in flawed or speculative ways; the paper discusses procedural reasons why this may have occurred. This paper assesses the system of evidence gathering implemented by the Commission in the light of the law and economics literature. It is concluded that while the reforms recently implemented by the Commission do address the main weaknesses of this system, they may still not allow for the most effective development of economic theory and evidence in actual cases.

— *Damien J. Neven*

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are not modified when an efficiency defence is considered. Even if it is often argued informally that the parties should bear the burden of proof with respect to efficiencies (see for instance, Röller *et al.*, 2006), there is no explicit shift in the burden of proof in the Merger Regulation.[68]

This feature is important and may be a factor which helps explaining why the efficiency defence has not been overextended in the same way in merger control as in Article 81(3). As discussed above, there is no perception that unconvincing efficiency claims have been accepted under the merger regulation (on the contrary, the Commission may have neglected important efficiency benefits). The fact that the burden of proof is not explicitly shifted to the parties under the merger regulation, so that the procedure remains consistent and balanced may help to explain this difference. Of course, the fact that the status of the efficiency defence was not entirely clear until 2004 has probably also played a role.

Given the unusual features of the system of evidence gathering in the EU and its importance for the processing of economic evidence, the following section will discuss it more fully in light of the existing literature.

6. THE SYSTEM OF EVIDENCE GATHERING

As discussed above the EU procedure can be seen as inquisitorial, with a prosecutorial bias and some degree of political control. The relative merits of the adversarial and inquisitorial systems have long been considered in the law and economics literature and we will discuss the main insights from this literature. The significance of a prosecutorial bias has also been discussed. I take both issues in turn and start with the latter.

6.1. Prosecutorial bias

The fact that the Commission is a decision maker which takes responsibility for uncovering the evidence that would normally be brought forward by plaintiffs may introduce some biases, which are discussed in Wils (2004). He observes that officials may be the victim of 'hindsight' bias, namely the 'tendency for people with the benefit of hindsight to falsely believe that they could have predicted the outcome of an event'. For instance, if it is found in the course of a Phase II investigation that there is no competition concern, officials will tend to believe that they should have known this at the time when they wrote the statement of objection which led to a Phase II. This hindsight will lead to a problem of cognitive dissonance, which might

[68] In the recent (21 September 2005) judgment on *EDP/Gaz Natural* (Case T-87/05), the CFI further discussed the allocation of the burden proof with respect to remedies. Despite the fact that the notice on remedies stipulates that it is for the parties to show that the proposed commitment meet the competition concern, the court held that the burden of proof rests with the Commission.

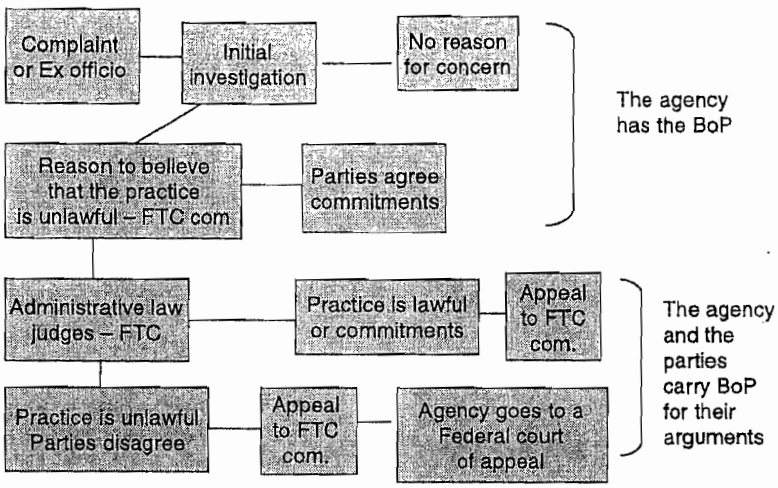

Figure 2. FTC procedure

call into question the confidence that officials have in their judgment, and they will naturally try to avoid this dissonance. The consequence would be that officials would tend to concentrate on evidence that confirms their own judgment.[69] The symptom is a 'self-confirming bias' which some commentators claim to observe in fact (see Kühn, 2002). Burnside (2001) for instance observes: 'The frequent opinion of industry is that a view, once entrenched in the Commission's thinking, cannot be dislodged: "I have made up my mind. Do not try to confuse me with the facts"'.

Some empirical evidence on the significance of such a bias can be obtained from the FTC procedures in the US. The FTC procedure is complex but its essential features are presented in Figure 2. The FTC Commission actually plays a mixed role to the extent that it acts both as a prosecutor and a judge on appeal: the FTC Commission acts as a prosecutor in the initial phase and brings the case to an administrative law court. However, if the administrative law court finds against the parties (or imposes commitments that the parties do not accept), the parties can appeal its decision to the FTC Commission, which therefore acts as judge on appeal.

This particular feature of the FTC procedure has been exploited by Coate and Kleit (1998). They test whether the result of the appeal is affected, other things being equal, by the composition of the FTC Commission and in particular the proportion of members which rule on appeal while having also taken the decision to initiate proceedings. They find that the effect is both statistically and economically significant; an overlap of three Commissioners (out of seven) easily doubles the probability

[69] According to Wils (2004), the significance of this hindsight bias is well documented in the psychology literature.

that the Commission will confirm the decision of the administrative law court (relative to the probability when there is no overlap).

By contrast, there is some experimental evidence suggesting that pre-mature judgment (which gets reinforced) is less likely to occur in adversarial systems (see Parisi, 2002 and references therein).

Overall, it would thus appear that the self-confirming biases that may be induced by the prosecutorial role that the Commission assumes cannot be dismissed as insignificant.

6.2. Adversarial versus inquisitorial

The analysis of adversarial versus inquisitorial procedures has a long tradition in the law and economics literature. In the context of an early debate, Posner (1988) argued that competition between parties in the adversarial system would ensure that every relevant piece of information would be produced. The adversarial model was also defended as it allows for a dialectics of assertion and refutation, which may be instrumental in revealing the true state of world. Tullock (1988), by contrast, emphasized the fact that parties would attempt to mislead the decision maker.

Various formal models have explored the merits of these arguments. One strand of the literature assumes that the underlying facts of the case strike a balance between the interests of the parties involved. In other words, the evidence is never inconclusive.

(1) Milgrom and Roberts (1986) examine the intuition of Posner according to which competition between interested parties will ensure that 'true' facts will be uncovered. They do not consider the cost of gathering information but allow agents to have different information. Information is verifiable but may be concealed. The decision maker is naive but knows whether the agents are well informed. They show that if there is always an interested party who is well informed, has an opportunity to report and prefers the full information decision, the full information outcome is the only equilibrium. This result suggests that a naive decision maker faced with evidence that is strategically reported will enforce the full information decision as long as the interests of the parties are sufficiently opposed.[70]

(2) Froeb and Kobayashi (1996) extend this line of work by assuming that the decision maker may be biased and evidence is costly to produce. In their model, the parties produce evidence by making random draws from the same distribution and only report favourable evidence (so that the parties know the true state and have the same technology in producing evidence). This distribution is however biased in favour of one party (the true facts are thus conclusive and favour one party). They show that

[70] They also show that agents' limited ability to communicate the information that they have may not matter if the decision maker is sophisticated; here again, as long as there is an agent that prefers the full information outcome over any alternative, the decision maker can enforce the full information outcome.

the decision maker will again take the full information decision. This arises because the party favoured by the underlying distribution will produce more evidence (because it is less costly to do so). In addition, parties take advantage of the bias of the jury to produce less (costly) evidence in the direction of the bias. These results, while sensitive to a number of assumptions including the modelling of the decisions maker's bias and the functional form of the underlying distribution, still suggest that the importance of the decision maker's lack of sophistication in the adversarial system should not be exaggerated.

(3) Froeb and Kobayashi (2001) compare the outcome of the inquisitorial and adversarial system in a similar model. Again, they assume that parties have the same technology in producing evidence and focus on the incentive to reveal information. In the adversarial system, evidence on either side is provided by making random draws from the same distribution, each litigant reports only the most favourable information, and uses an optimal stopping rule to determine the number of draws. The judge simply splits the outcome, whereas an arbitrator uses the average of his observations. The authors focus on the variance of the estimator for a given number of draws across all parties (i.e. a given total cost). They find that that the adversarial system may lead to a lower variance if the underlying distribution itself exhibits a large variance (for instance with a uniform distribution). This suggests that the average of strategic (extreme) reporting is not necessarily more variable than the average of truthful reports. In other words, the adversarial system is not necessarily worse even when it is assumed that the inquisitor has the same technology as the parties to uncover evidence.

(4) The assumption that the decision maker knows about the information that is available to the parties is considered by Shin (1998). He shows that competition between agents with sufficiently opposed interests will no longer suffice to ensure the full information outcome. The decision maker is then faced with a pooling between agents that are genuinely ignorant and agents that conceal information. He assumes that there is a signal that is observed with different probabilities by the two parties and observed with some probability by an inquisitor. One can then compare the outcome reached by the inquisitor with that of an arbitrator who knows the probabilities that the agent will have received the signal. He shows that the adversarial procedure still fares well in this set-up because the arbitrator can adjust the standard of proof across agents as a function of the probability that they have received the signal. In essence, the judge reasons that if one party who is thought to be better informed does not come up with evidence, he 'must' be wrong.

Hence, it appears that two pieces of biased information processed by a naïve judge may be at least as good as one (possibly two) piece(s) of unbiased information processed by an inquisitor, when the judge knows what the agents know and the interest of agents are opposed, when the agents have the same technology of producing evidence, and when differences in the quality of information that the agents have access to can be observed.

(5) Dewatripont and Tirole (1999)[71] consider an alternative set-up, in which there are three possible states of the world (and associated decisions); one party wins, the other party wins, and the status quo. This structure differs from that adopted in the models reviewed so far in which one party always wins. If there is information in favour of both parties, the status quo should prevail (from a social point of view). Agents invest in getting information and may obtain it with some probability. If there is no information in its favour, the agent will not get any. If there is favourable information the agent will get it with some probability. Hence, in this set up, there are some situations of genuine inconclusiveness as there may be no fact in favour of either party.

An inquisitor can look for reasons to support either side of the argument and incurs a fixed cost of searching for each side. He obtains evidence with some probability and he can make a finding in favour of either side or choose the status quo. His payoff is lowest in the case of the status quo (it is equal to the payoff that he gets if he does not search). In an adversarial system, both parties can incur a cost of searching.

Assuming that evidence cannot be manipulated, the adversarial system dominates. This arises because the inquisitor may not actually look for both sides of the argument. When the probability of finding evidence is high enough, he actually focuses on one side of the argument; indeed, he is afraid that by looking for evidence on both sides, his evidence will not be conclusive and that he will have to choose the status quo. By contrast, in the adversarial system, the parties will always search and there is full information collection.

In order to consider the manipulation of evidence, the authors assume that a party can either get a positive signal or conflicting evidence. He can suppress evidence, either by not reporting information that he has or suppressing information which is not helpful to his case, if he has conflicting information. The authors show that an inquisitor will choose not to reveal information, which would lead to the status quo. Errors in decision making take the form of 'extremism', such that one side of the argument is endorsed when the status quo would be appropriate. By contrast, in the adversarial system, an advocate might suppress conflicting evidence: if the opposite party has positive evidence, this will lead to the status quo when decisions in favour of the opposite case would be favourable. The error takes the form of inertia. However, when the opposite party has no evidence, it will lead to a decision in favour of the party suppressing evidence. The error takes the form of extremism.

Hence, an adversarial system generates inertia in addition to extremism and accordingly it will tend to dominate the inquisitorial system when the cost of inertia

[71] See also Palumbo (2001) who extends the work of Dewatripont and Tirole by assuming that the effort is continuous. She shows that an excessive amount of proof taking can take place (as agents invest in information partly because of the scope for additional manipulation that it allows for). She also shows that the adversarial system fares relatively less well than the inquisitorial system in this environment.

is 'much' less than the cost of extremism. The authors also show that the adversarial system is more attractive when the parties have a high probability of finding evidence in favour of their case, if it exists.

(6) Some experimental evidence on the relative performance of inquisitorial and adversarial systems is available. Block *et al.* (2000) consider an experimental design in which one party is right and the other is wrong (so that evidence, if it is available, is conclusive).[72] They consider two scenarios; one in which Mr Wrong has private information to the effect that he is wrong and one in which, in addition, Mr Right also has a hint that he is right. In the adversarial set up, the parties are free to debate whereas in the inquisitorial set up, the inquisitor controls the debate.

The results are striking: when Mr Wrong has private information, the inquisitorial system performs better. The private information is revealed in 28% of cases and only in 7% with an adversarial system. By contrast, when the information is correlated, the reverse obtains but the difference is more dramatic. The information is revealed in 71% of cases with the adversarial system and in 14% of cases with the inquisitorial system.

Block and Parker (2004) further exploit this experiment by characterizing the settlement imposed by the judge when the information was not revealed. They find that, relative to an adversarial regime, the inquisitorial regime will produce more extreme settlements, in favour of one party over the other. This finding is consistent with the predictions of Dewatripont and Tirole.

To sum up, the literature seems to provide the following insights:

- There is some validation of Posner's intuition that competition between interested parties leads to the revelation of information particularly in circumstances which may resemble those of antitrust proceedings (in which it is likely that the decision maker has reliable prior knowledge on the information available to the parties).
- The inquisitorial regime can be expected to produce more extreme decisions than the adversarial regime. This result may however be highly dependent on the assumption that it is made with respect to the objective of the inquisitor. The inquisitor's aversion to the status quo which is built into the model of Dewatripont – Tirole is not, however, obviously ill-founded, and seems to accord with intuition in light of inquisitors' career objectives.
- Experimental evidence provides some validation of this assumption and confirms that the adversarial regime fares better when information is not totally skewed. This would seem to fit with the circumstances of antitrust proceedings in which plaintiffs (or their proxies) can be expected to have some information regarding the merits of the case.
- Existing theoretical models do not consider explicitly what is potentially one of the main advantages of the adversarial regime, namely the dialectics of assertion and refutation in the evaluation of evidence produced by the parties.

[72] See also Block and Parker (2004).

6.3. EU procedures and reform

The prosecutorial bias and the intrinsic features of an inquisitorial procedure would appear to reinforce each other; in particular the conclusion that an inquisitor might not invest in seeking evidence towards both sides of the argument (when evidence is hard to manipulate) or might suppress conflicting evidence will be reinforced in the presence of a hindsight bias. The tendency towards extremism in the EU is also probably reinforced by the inconsistency between the standard of proof and the scope of the decisions mentioned above, at least with respect to the implementation of the merger regulation. Indeed, when evidence is not very conclusive, the Commission cannot meet the required standard of proof with either decision. In those circumstances, it will have a further incentive to shift towards extreme outcomes (by suppressing evidence or failing to fully consider some alternatives).

The tendency to focus on one side of the evidence would also appear to be consistent with the way in which the Commission has been found by the court to mishandle economic theories and evidence. The court decisions on *Airtours/First Choice*, *Tetra Laval/Sidel* and *Schneider/Legrand* illustrate this vividly. In those decisions, the court explicitly criticized the Commission for not pursuing arguments and for suppressing (or misinterpreting) evidence.

This interpretation is congruent with some of the criticism that has been formulated towards merger control in the EU from direct observations of the procedures. For instance, Kühn (2002) describes what he refers to as a 'self-confirming' bias in the Commission's analysis, namely that the Commission takes a view on cases early on and subsequently focuses on findings which support that view.

It is tempting to associate extreme decisions with high fines and clearance and the status quo with moderate fines (with respect to collusion under Article 81). From this perspective, it is interesting to note (as discussed above) that the court almost invariably reduces the fines imposed by the Commission. This is consistent with the view that the Commission suffers from the extremism that can be expected in inquisitorial procedures.

The absence of a proper validation of economic evidence in some procedures can also be observed; this is easy to illustrate with the proceedings of the *Volvo/Scania* case. Marc Ivaldi and Frank Verboven undertook a merger simulation for the EU. The parties and their econometrician (J. Hausman) criticized their analysis at the hearing. These authors, however, felt that some of the criticisms was misplaced, but had no way to defend themselves[73] as the procedure does not allow for a second round of discussion. One cannot help thinking that an adversarial regime, which allows for cross-examination and direct confrontation, would have been more effective in

[73] A non-confidential version of the study, as well as the criticism of Hausman, and a proper reply by the authors have now been published (see Ivaldi and Verboven, 2005a and 2005b; and Hausman and Leonard, 2005).

validating the evidence in this instance and more generally in other procedures.[74] Evidence that is not subject to rigorous scrutiny can be easily abused; key assumptions in theoretical reasoning can be disguised as innocuous and an empirical result that is not robust can be disguised as such.[75] Even if the presentation of evidence is not distorted, investigating its robustness is more effectively undertaken by several parties with different perspectives.

Of course, the EU procedure would also appear particularly weak in validating economic evidence in light of the current imbalance in resources observed above. Inquisitorial procedures may not be best suited to distil and improve economic evidence, but such a procedure without adequate resources for the inquisitor would seem particular prone to abuse.

Following the court decisions mentioned above, the EU has implemented a couple of significant reforms: the office of the Chief Competition Economist has been created (with a staff of about 10 professional economists). A review of the analysis of the case team at a late stage of the procedure by a set of different Commission officials has been introduced. This institution commonly referred to as the 'fresh pair of eyes' is arguably well targeted at the main weakness of an inquisitorial procedure with a procedural bias, namely its tendency to suppress information or to fail to look for it. Whether it intervenes at a sufficiently early stage in the procedure and whether the fresh pairs of eyes have the right incentives with respect to their colleagues (who may turn out to be the fresh pair of eyes on other cases) is unclear.[76]

7. REMEDIES?

From this discussion of procedures, the following conclusions emerge:

- The allocation of the burden of proof with respect to Article 81(3) is a bit odd and possible overextensions of the efficiency defence may be related to this feature. As a corollary, shifting the burden of proof towards the parties with respect to efficiencies in merger control, and with respect to Article 82 (as proposed by the discussion paper on Article 82) may be misplaced.
- The observations that the Commission may decide early on cases and search for selective evidence or that theories are neglected are consistent with the incentives

[74] In recent cases, however, the Commission has introduced some element of cross-examination within the existing procedure (by allowing the economic advisers to the parties to access data and evaluate the analysis performed by the Commission (or plaintiffs) on its premises).

[75] In the words of Posner (1999), referring to economic expert witnesses 'the expert witness can mislead judges and juries more readily than lay witnesses can because they are more difficult to pick apart in cross-examination, they can hide behind an impenetrable wall of esoteric knowledge'.

[76] The merger between EDP and Gaz Natural which presumably was subject to a fresh pair of eyes (and benefited from the input of the chief economist) was prohibited and challenged in court, partly on the basis that the Commission made an error of assessment. The Commission prevailed (Case T-87/05).

generated by the inquisitorial regime with a prosecutorial bias implemented by the EU.

- There is some inconsistency between the scope of the decisions enforced under the Merger Regulation and the standard of proof that the Commission is supposed to meet. This inconsistency reinforces the biases of the inquisitorial systems towards extremes.
- The nature of economic evidence, which needs to be validated, may be such that it is best handled by a process of assertion and refutation, which is typical of an adversarial system of proof taking.
- As the US experience suggests, validation of economic evidence is helped by a clear set of rules which forces the economic experts to state 'fully and in a timely manner' the economic reasoning and the facts on which they rely. This is enforced in a code of conduct (the Reference Manual on scientific evidence used by federal courts), which incorporates the standards set by the Supreme Court in the *Daubert* decision.[77] The EU could adopt a similar standard. Whatever the system of evidence gathering, a set of rules on handling of economic evidence would prove useful.
- The imbalance in resources between the Commission and the parties is an impediment to a proper validation of economic evidence.
- Both the standard of proof and the standard of review have remained surprisingly vague until recent cases. The Commission probably did not fully appreciate the standard of proof that it would be expected to meet and the standard of review that would be applied to its decisions. Recent decisions by the court should significantly reduce the scope for mismanagement of economic evidence.
- A strengthening of the standard of review cannot, by itself, fully correct the incentives provided by an inquisitorial procedure. The Commission can hardly be made accountable for the effort that it does not exert in pursuing some argument.

As discussed above, it is hard to tell whether the reforms implemented by the Commission will prove effective in redressing the biases induced by the inquisitorial procedure. In view of the intrinsic advantages of an adversarial procedure discussed above, it is still worth considering what the implementation of such a procedure would entail. There are at least two possible institutional arrangements. First, the case team could become a public prosecutor (as in the US system). The office of a 'judge' would have to be created. Presumably, the 'judge' and his office could belong to the Commission but it should be separated in a credible way from the institution to which the case team belongs. Such a separation between prosecutors and judge is enforced in many judicial (and administrative) systems and seems therefore feasible. This institutional arrangement would effectively involve the establishment of an administrative tribunal within the Commission (like that of the FTC).

[77] See Posner (1999), Werden (2005) and Breyer (2004).

Alternatively, the decisions could be taken by the CFI, with the 'Commission' acting a plaintiff. This would involve a broadening of the tasks entrusted to the court by the Council which according to Wils (2004) is feasible within the current EC treaty.[78]

Whether decision making is entrusted to an administrative law judge or the CFI, it will also be necessary to provide them with support in particular regarding economic analysis. As emphasized by Posner (1999), the ability to appoint experts is essential for the functioning of US courts. This option would seem to be open at least in the case of the CFI.[79]

Those changes would imply in any event that the College of Commissioners would no longer take the final decision. This may be attractive in itself. As mentioned above, the scope for capture by corporate interests and member states at the level of the College of Commissioners has been a concern in the past. Clearly, Commissioner Monti has established very high standards of independence towards corporate interests[80] and member states and the focus has sifted away from that sort of capture. However, since there is no clear benefit from granting decision-making power to the College of Commissioners and no guarantee that this form of capture may not surface again[81] in the future, a delegation of decision making would seem attractive.

8. CONCLUSION

According to Richard Posner (1999), 'there is a remarkable isomorphism between legal doctrine and economic theory. The isomorphism becomes an identity when, as in antitrust (but not only there), the law adopts an explicitly economic criterion of legality'. The isomorphism and possible identity is constructed as economics influences the interpretation of the law. The evidence reviewed in this paper confirms that important progress has been made in this respect in Europe in the last twenty years. Furthermore, the wording of the law itself has occasionally been changed to allow for more economics-friendly implementation. Some conditions are also in place to deepen the process. A number of national antitrust agencies are headed by economists and have accumulated economic expertise (including sometimes the creation of an office of chief economist). The proportion of antitrust lawyers with a sound understanding of economics and the proportion of competition economists with a good understanding of the law has increased. The CFI in recent judgments has not shied away from the review of economic analysis.

[78] There is, however, no consensus among lawyers on this issue. See Wils (2004) for a discussion.

[79] See Botteman (2006).

[80] The biography of J. Welch provides an amusing illustration of this (Welch and Byrne, 2001).

[81] See for instance Vives (2005) who highlights renewed risks of capture by member states.

Recht und Wettbewerb

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7. GWB-Novelle und KartG 2005 – ein Benchmarking im Wettbewerb der Gesetzgeber

I. Einleitung

1. Die Verabschiedung der VO 1/2003[1] hat viele Mitgliedstaaten der Europäischen Union zu einer Überarbeitung ihrer nationalen Kartellgesetze veranlasst. Art. 3 VO 1/2003 hat den Vorrang des europäischen Rechts bei der Beurteilung wettbewerbsbeschränkender Absprachen erheblich erweitert. Dies führt dazu, dass den nationalen Kartellrechtsordnungen nur noch in jenen Fällen eigenständige Bedeutung zukommt, die rein lokale oder regionale Auswirkungen haben und keine zwischenstaatliche Relevanz aufweisen. Angesichts der zunehmenden Verflechtung der Volkswirtschaften innerhalb der Europäischen Union betrifft dies immer weniger Sachverhalte. Es entspricht deswegen einem Gebot der legistischen Vernunft, auch ohne explizite Harmonisierungspflicht das nationale Recht zumindest soweit an das gemeinschaftliche Kartellrecht anzupassen, dass grundlegende Wertungswidersprüche vermieden werden.

2. Auch der deutsche und der österreichische Gesetzgeber haben sich dieser Erkenntnis nicht verschlossen. In Deutschland hat das Bundesministerium für Wirtschaft und Arbeit Anfang 2003 den Konsultationsprozess für eine Überarbeitung des GWB in Angriff genommen. Er hat letztlich zum In-Kraft-Treten der umfangreichen 7. GWB-Novelle am 1.7.2005 geführt. In Österreich ging die Initiative für die „Modernisierung" des Kartellrechts vor allem von der Wirtschaftskammer Österreich (WKÖ) aus, die Anfang 2004 (in Abstimmung mit zahlreichen weiteren interessierten Institutionen, wie der Bundesarbeitskammer, der Bundeswettbewerbsbehörde oder dem Bundeskartellanwalt) einen Gesetzesvorschlag vorgelegt hat. Diese Initiative mündete in die Verabschiedung eines neuen Kartellgesetztes (KartG 2005)[2] welches am 1.1.2006 in Kraft trat. Inhaltlich handelt es sich beim KartG 2005 um eine umfassend novellierte Wiederverlautbarung des davor bestehenden KartG 1988, also um eine harmonische Weiterentwicklung des vorhandenen Rechtsbestandes mit dem Ziel einer weitgehenden Angleichung an das materielle europäische Kartellrecht.

3. Sowohl Deutschland, dessen GWB in der Urfassung am 1.1.1958 in Kraft trat, als auch Österreich, dessen erstes Kartellrecht nach dem 2. Weltkrieg im

[1] Verordnung (EG) Nr. 1/2003 des Rates v. 16.12.2002 zur Durchführung der in den Art. 81 und 82 des Vertrages niedergelegten Wettbewerbsregeln, ABl. 2003 L 1/1.

[2] Bundesgesetz gegen Kartelle oder andere Wettbewerbsbeschränkungen, BGBl. I Nr. 61/2005.

2. Die wesentliche Neuerung durch die 7. GWB-Novelle im Bereich der *Unterlassungsansprüche* besteht soweit ersichtlich darin, dass die Klagebefugnis auf bestimmte bevorrechtigte Institutionen ausgedehnt wurde. In Österreich war dies nicht erforderlich. Schon seit 1993 gibt das österreichische Kartellrecht sowohl Privaten als auch Unternehmensvereinigungen sowie anderen öffentlichen Institutionen sehr weitreichende Möglichkeiten zur Verfolgung von Wettbewerbsverstößen. Nach § 36 Abs. 4 KartG 2005, der im Grunde den früheren Rechtsbestand übernahm, ist nicht bloß jeder Unternehmer, der von einem wettbewerbswidrigen Verhalten betroffen ist, zu individuellen Verfolgung des Verstoßes vor dem Kartellgericht berechtigt. Die gleiche Befugnis kommt betroffenen Unternehmervereinigungen, der WKÖ, der Bundesarbeitskammer und der Präsidentenkonferenz der Landwirtschaftskammern Österreichs zu. Namentlich die Bundesarbeitskammer, die sich im Bereich der Wettbewerbspolitik insbesondere Angelegenheiten des Verbraucherschutzes annimmt, hat in der Vergangenheit von der Antragsbefugnis beim Kartellgericht durchaus intensiv Gebrauch gemacht. Ein gewisses Manko der österreichischen Rechtslage besteht darin, dass vorbeugende Unterlassungsansprüche (bei Wiederholungsgefahr), wie sie nunmehr § 33 Abs. 1 GWB vorsieht, dem österreichischen Kartellrecht fremd sind. Derartige Ansprüche können aber über § 1 UWG[18] (Fallgruppe des sittenwidrigen Normverstoßes) geltend gemacht werden, und zwar auch von den dort legitimierten Verbandsklägern. Das österreichische Kartellrecht war also immer schon im Sinne eines Private Enforcement verfolgungsfreundlicher, als es der früheren deutschen Rechtslage entsprach.

3. Die Sonderregelungen des § 33 GWB für *Schadenersatzansprüche* haben nach meinem Verständnis vor allem den Grund, dass der BGH in seiner Rechtsprechung das Erfordernis der Schutzgesetzverletzung restriktiv gehandhabt hat und Schadenersatzansprüche nur von Personen zuließ, gegen die sich die wettbewerbswidrige Handlung gezielt richtete. Im Lichte der Entscheidung des EuGH im Fall *Courage*[19] bedurfte dies einer Korrektur. In Österreich hat es eine vergleichbar restriktive Judikatur nicht gegeben. Höchstgerichtliche Rechtsprechung zu Schadenersatzansprüchen bei Kartellverstößen fehlt nahezu vollständig. Eine Korrektur durch den Gesetzgeber war daher nicht erforderlich. Anzumerken ist, dass der OGH unlängst im Bereich des UWG auch Verbrauchern Schadenersatzansprüche zuerkannt hat.[20] Insoweit ist (trotz fehlender Sonderbestimmungen für die Geltendmachung von kartellrechtlich begründeten Schadenersatzansprüchen) auch zukünftig nicht unbedingt ein Auseinanderklaffen der Judikatur in Deutschland und Österreich zu erwarten.

4. Aus österreichischer Sicht interessant sind die Bestimmungen im neu gefassten § 33 Abs. 4 GWB über die *Bindungswirkung von Entscheidungen der Wettbewerbsbehörden*. Weder das KartG noch die allgemeine österreichische Zivilprozessordnung enthalten Vorschriften, welche die Gerichte an Vorfrage-

[18] Entspricht § 1 des deutschen UWG.
[19] EuGH 20. 9. 2001 C-453/99.
[20] OGH 24. 2. 1998 ÖBl 1998, 193.

entscheidungen der Verwaltungsbehörden binden würden. In der Judikatur wird die Bindung dennoch überwiegend bejaht. Die Gerichte gehen von einem einheitlichen Staatswillen aus, der es erforderlich mache, dass jedes Staatsorgan die Entscheidung anderer Staatsorgane respektieren und sich daran gebunden erachten müsse. Der OGH und die ordentlichen Gerichte lehnen eine Bindung nur dort ab, wo die Vorfrage durch einen absolut nichtigen Verwaltungsakt entschieden wurde, sich die Behörde also etwa bei ihrer Entscheidung nicht innerhalb der Grenzen ihrer Amtsbefugnisse gehalten hat. In der Lehre wird die Bindung der Gerichte an verwaltungsbehördliche Entscheidungen aber zum Teil vehement abgelehnt. In dem führenden Lehr- und Handbuch von *Fasching*[21] heißt es:

Die verfassungsrechtlich garantierte richterliche Unabhängigkeit verleiht den Gerichtsverfahren eine besondere Rechtsschutzqualität, die mit der anders gearteten Rechtsschutzform der weisungsgebundenen Verwaltung nicht in Einklang gebracht werden kann. Der Zusammenfall der Aufgaben der Verwaltungsbehörden als Entscheidungsorgan einerseits und als Partei zur Wahrung der öffentlichen Interessen andererseits schließt eine gleichwertige Objektivität ebenso aus wie das Fehlen einer echten reformatorischen Gerichtskontrolle der Verwaltung. Die Annahme einer Bindung an Verwaltungsbescheide stellt eine nicht vertretbare Einschränkung der richterlichen Unabhängigkeit dar, die durch die Weisungsbefugnis der Verwaltungsbehörde im Vorfragebereich entscheidend gefährdet wäre, womit der individuelle Rechtschutz des einzelnen Rechtssuchenden schwer beeinträchtigt würde.

Diese Ausführungen sind deswegen bemerkenswert, weil das Wettbewerbsverfahren vor der Europäischen Kommission die von *Fasching* eingemahnten Garantien einer objektiven Verfahrensführung nicht gewährleistet. In Verfahren nach der VO 1/2003 gilt ein „Inquisitionsprinzip", bei dem die Kommission als Ankläger und Richter in einem fungiert. Gegen Entscheidungen der Kommission kann zwar das EuG angerufen werden. Dessen Entscheidungen sind jedoch rein kassatorisch, d.h. das Gericht ist nicht berechtigt, seine eigene Auffassung an die Stelle der Entscheidung der Verwaltungsbehörde zu setzen. Folgt man der Auffassung von *Fasching*, wäre demnach eine Bindung der (österreichischen) Zivilgerichte an Entscheidung der Kommission in Wettbewerbssachen abzulehnen. Ganz allgemein betrachtet wirft dies die Frage auf, ob das europäische Vollzugssystem des Kartellrechts nicht doch in ein Gerichtssystem umgewandelt werden sollte, bei dem die Dienststellen der Kommission nur als Ankläger, nicht aber als Entscheidungsbehörde fungieren. Der deutsche Gesetzgeber hat mit der Verabschiedung von § 33 Abs. 4 GWB jedenfalls ein bemerkenswertes Vertrauen in die Richtigkeitsgewähr von Entscheidungen der Wettbewerbsbehörden, auch außerhalb Deutschlands, erkennen lassen.

[21] Zivilprozess, 2. Aufl., Rdnr. 96.

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