

ETHICAL CRITICISM OF COMPETITION LAW

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1. *Introductory remark*

Prior to assessing competition law from an ethical perspective, we must acknowledge the objectives as put forward in the competition law itself. I should like to focus on the German competition law first, will then point to comparative regulations of other countries and shall finally draw the line to the Community law, the Europeanization of competition law.

1.1 The law against unfair competition (UWG)

Without going into a detailed description of the development of the law, I would like to refer to the law against unfair competition of 7th June 1909 (UWG), »which has provided the legal basis for the German standards of fair competition for almost one hundred years«¹. It contained a blanket clause that made it possible »to conceive facts with the help of the unaltered wording of the law, which would have exceeded the power of imagination of a lawyer at the turn of the century by far.«² The 1909 blanket clause in § 1 reads as follows: »Any party performing commercial transactions who, for the purpose of competition, undertakes unfair practises *contra bonos mores* can be held liable for omission and compensation.« In the course of the adaptation to the Community law in the 1990s, a liberalisation followed. The amendment of the law against unfair competition of 2004 mentions the protection of other

1 Wettbewerbsrecht und Kartellrecht. Gesetz gegen den unlauteren Wettbewerb, Preisangabenverordnung, Markengesetz, Markenverordnung, Gemeinschaftsmarkenverordnung, Gesetz gegen Wettbewerbsbeschränkungen sowie die wichtigsten wettbewerbsrechtlichen internationalen Übereinkommen und Vorschriften der Europäischen Gemeinschaft. Textausgabe mit ausführlichem Sachverzeichnis und einer Einführung von Professor Dr. Helmut Köhler, 27., neu bearbeitete Auflage, Stand 1. März 2007, X.

2 Ackermann, Brunhilde, Wettbewerbsrecht. Unter Berücksichtigung europarechtlicher Bezüge, Berlin/Heidelberg 1997, 1.

competitors and the protection of consumers — according to the regulations 84/450/EWG — and also explicitly refers to »public interest« in § 1 S. 2 UWG; however, this is unfortunately restricted to »undiluted competition«. According to Köhler, »the protection of other public interests (such as environmental protection, health protection, protection of judiciary, employee protection) is not considered relevant to the competition law«³. Following Ackermann, however, we have to take into account »the social function of the competition law, having been emphasized by the jurisdiction for a long time, which has to an increasing degree provided the basis for legal inferences in the assessment of competitive transactions.«⁴ According to Rittner/Kulka the importance of the blanket clause § 1 UWG is that it permits the »unconfined inclusion of legal standards with regard to constitutional as well as European law into the terms of competition law. The third-party effect of constitutional rights in civil law (see also § 1 Rn. 49) can indeed be realised only within the frameworks of blanket clauses such as § 3 UWG (= amendment of 2004). Similarly, EU legal guidelines (see also above § 1 Rn. 10ff.) can be observed in the interpretation of the blanket clause without the need to change the law in case of conflicts between the German and the European law. Considering that the original law against unfair practise is increasingly superimposed by the Constitutional and the European law, this function of the blanket clause deserves special attention.«⁵

As to the conception of the consumer, the Community law draws on the »average consumer who possesses average information, thoughtfulness and sensibility«.⁶

In order to arrive at an adequate consideration of the competition law, we must point out the changes that have taken place in jurisdiction. Due to an increasing environmental awareness, competitors take the chance to advertise the environmental, social and cultural sustainability of their products and technologies. If this is not to be seen as misleading advertising due to its emotional appeal (according to § 3 UWG), the environment-friendly merchant has to prove that »the correctness of his specifications is beyond doubt.«⁷ In contrast, competitors using environmentally harmful production procedures or even put harmful products on the market, offering them at lower prices than other environment-friendly competitors, need not fear to be held liable for misleading advertising. According to Brunhilde Ackermann, supreme

3 Wettbewerbsrecht und Kartellrecht, *ibid.*, XII.

4 Ackermann, *ibid.*, 5

5 Rittner, Fritz/Kulka, Michael, Wettbewerbs- und Kartellrecht. Eine systematische Darstellung des deutschen und europäischen Rechts, 7., völlig neu bearbeitete Auflage, Heidelberg/München Landsberg, Berlin 2008, 46.

6 *ibid.* X.

7 Ackermann, *ibid.* 122

court decisions in this field have changed due to an increasing environmental awareness. So far, »environment–related advertising has principally qualified as influence on the consumer’s purchasing decision due to its emotional appeal, thereby contradicting the principles of competition«⁸; now, the perspective has changed, however: »If the correctness of the specifications is beyond doubt, they cannot simply be assessed as unobjective, anticompetitive influence on consumers.«⁹

We can certainly agree with this detailed consideration: If companies invest time, money and energy to a considerable degree with the aim to make their products or production technologies more environmental–friendly and sustainable, or they are involved in sponsoring environmental projects, companies should be allowed — within their rights to freedom of speech — to point out their commitments objectively in their advertisements. To deny a company this right would indeed do a disservice to our environment, which is rightly considered as a high value; in all probability, positive investments and innovations would remain undone. The impetus on the ‘regular merchant’ — as the benchmark of competition — would be abolished, if he was prohibited to talk about his good actions. Environment–related advertising, provided it is based on realities, should be deemed essentially positive. Besides actual information about efforts/attempts/successes in order to achieve higher environmental compatibility, there will have to be additional elements to account for anticompetitive action; e. g. a highly suggestive appeal causing high psychological attraction, or additional criteria inadmissible in any form of advertising (harassment or deception etc).«¹⁰

The concept of sustainability has also entered the European environmental law, the single European act as well as the EU agreement; the fifth EU action program (ABI C 138 of 17th May 1993) is even dedicated to a »Sustainable and environmentally compatible development«. This has also found its way into numerous guidelines and decisions of the European Court of Justice. The judgments of the European Court of Justice of 17. 9. 2002, case C–513/99 *Concordia Bus Finland OY AB* and of 4. 12. 2003, *EVN AG*, case C–448/01, *Wienstrom GmbH vs. the Republic of Austria* state that »ecologically oriented criteria are an admissible part of the award procedures and particularly the acceptance of tenders... Four conditions have to be fulfilled:

1. The criteria for acceptance of tenders must correlate with the subject of the order...

8 Ackermann, *ibid.*, 122.

9 *Ibid.*

10 Ackermann, *ibid.* 122f.

2. The criteria for acceptance of tenders have to be specific and objectively qualifiable and
3. the criteria for acceptance of tenders must observe the Community law.«¹¹

1.2 The law against restraints of competition, anti-trust law (GWB)

While the UWG aims at protecting the competitors against unconscientious dealings, the GWB has the task to prohibit practises that restrict free trading and competition. The GWB draws on the maxim of the Constitutional law of the Federal Republic of Germany based on the constitutional right to the freedom to develop one's own personality¹². Today, a reference to the aim of sustainable development should be included; consequently, not only »free competition«, but rather »free and sustainable« competition should be protected against restraints.

Both laws, the UWG as well as the GWB, are private laws. Yet, private laws are not to be seen as absolutes, but are anchored within the Fundamental rights as objective value systems. »No regulation of a private law may contradict the Fundamental rights; any regulation has to be interpreted in their sense.« (BVerf. GE 42, 143, 148 »Deutschlandmagazin«)¹³. Consequently, both the UWG and the GWB should include the aim of sustainability in order to prevent the externalisation of social, ecological and cultural costs.

Conclusion: *The law against unfair competition* as well as *the law against restraints of competition* are able to guarantee the protection of the immediate competitors. To some extent, this may also fulfil the protection requirement of the consumers. Both laws are meant to guarantee that the constitutional right to the freedom to develop one's own personality is given sufficient frameworks in a market economy, in order to enhance the common good in the best possible manner. By relating the competition law back to the Constitutional law or — as the 1909 blanket clause puts it — to the *bonos mores* as well as to the European law, it is made clear that the competition law is not considered as an end in itself, but should act as an instrument to implement in the best possible manner the »bio-survival guarantee for human beings and their environment« in a market economy.¹⁴ Karl Homann and Michael Ungethüm

11 Lansky, Gabriel / Pestal, Caroline, Rechtliche Anforderungen aus dem Postulat der »nachhaltigen Entwicklung« an öffentliche Auftraggeber der Infrastruktur, in: Internationale Fachtagung 2005. Betondecken aus volkswirtschaftlicher Sicht, 39 — 43, here: 40 f.

12 Art. 1, 2 Basic Constitutional Law

13 Ackermann *ibid.*, 129

14 Johannes Hoffmann, Zur Bedeutung der Kulturverträglichkeit; in: Hoffmann, J. /Ott, K. /Scherhorn, G., Hrsg., *Ethische Kriterien für die Bewertungen von Unternehmen*. Frankfurt-Hohenheimer Leitfaden, Frankfurt 1997, 263–291, here: 291.

arrive at the same conclusion when they state: »Thus, competition has an instrumental value, not an original one. Competition can only fulfil this function if it is subjected to regulations that are equally binding for all competitors and their compliance is controlled by the antitrust agency. Therefore, the moral quality of competition depends on the frameworks that channel the competitive practises, which are dominated by self-interests, in such a way that they result in 'prosperity for all'«¹⁵.

This is exactly where we should put the ethical question: Are the frameworks of the competition law formed in such a way that the »bio-survival guarantee for human beings and their environment«¹⁶ is globally protected in our market economy, so that incarnation in community, at one with the Creation, may succeed throughout the world? So far, this has not been the case, as the aim of sustainability is not yet seen as inevitable requirement of the UWG and GWB, free, sustainable competition is not yet sufficiently protected, and consequently, social, ecological and cultural costs can be and are shifted on the public.

1.3 Survey of the competition laws in EU member states

Subsequently, I should like to compare the competition laws in EU member states and the guideline of 10. 9. 84 concerning misleading advertising in a brief survey.

15 Homann, Karl und Ungethüm, Michael, Ethik des Wettbewerbs, in: FAZ, 23. 6. 2007, Nr. 143, 11.

16 »The term«bio-survival guarantee« was coined while the Frankfurt-Hohenheimer guideline was developed. We especially considered the issue of what exactly denotes the dimension called cultural sustainability? With the criterion of »cultural sustainability« we mean to enforce developments expressing themselves in newer social movements such as the peace movement, the eco-movement the women's lib movement etc., in order to help establish a bio-cultural pattern penetrating all aspects of society and daily life. We hope that the cultural knowledge appearing in primary and secondary social mechanisms may be altered, combined and inter-related in the sense of bio-survival guarantee for human beings and their environment. See Hoffmann Johannes, Zur Bedeutung der Kulturverträglichkeit, in: Hoffmann, Johannes/ Ott, Konrad / Scherhorn, Gerhard, Hrsg., Ethische Kriterien für die Bewertung von Unternehmen — Frankfurt-Hohenheimer Leitfaden — Deutsch und Englisch, Frankfurt/Stuttgart 1997, 263–319, here: 273 f. or: basically, the criteria we developed in the guideline comprising the dimensions natural, social and cultural sustainability should be considered as a tool offering decision support in the various contexts, precisely aiming at the universal bio-survival guarantee for human beings and their environment, and realise these aims as best we might. Ibid. 292. Basically, the term bio-survival guarantee for human beings and their environment covers what we mean today when talking about extensive sustainability. Therefore, it is legitimate to use the term sustainability when we actually mean this universal aim.

Country	Laws	Aim
Sweden	1971 »law amended 1. 1. 96 against undue marketing	Consumer protection; 1. correct information 2. Principle of social responsibility e. g. as concerns advertising for children; 3. against misleading advertising
Finland	Law on unfair business conduct of 22. 12. 78 (UVG); Consumer protection law (VSG) of 20. 1. 78	
Great Britain	No general law, but case law, no blanket clause »To draw a line between fair and unfair, between what is reasonable and unreasonable passes the power of the courts«	Consumer protection; Protection of the public; Self-control without abolition of self-regulation; Assumption of EG guideline see High Court of Justice of 17. 11. 88
Ireland Same as GB	No codified law, but private self-control	"
Denmark	Law against unfair competition, both civil law and public law with sanctions, prohibitions and regulations on indemnities	Creation of —a healthy market — consumer protection — general societal interests
Netherlands	Part of Civil code since 1980 art. 1416a to 1416c	Against misleading advertising; reversal of the burden of proof: The advertiser has to prove the correctness and completeness; oriented towards qualified consumers.
Belgium	1. 2. 93 law on trade procedures, information and protection of consumers	Consumer protection; List of prohibited forms of misleading advertising; reversal of the burden of proof possible; explicitly mentions »effects« on the environment in art. 23f.
Luxembourg	Law of 27. 11. 86	Consumer protection
France	Blanket clause art. 1382 and. art. 1383 of Civil code; Unfair competition; Prohibited competition	Principle of freedom of trade — degrading the competitor — perturbing competitive companies — impediment to the market — the average consumer as benchmark

Italy	Applied EG guideline about misleading advertising as of 14th Feb. 1992. Self-control in »Codice di autodisciplina pubblicitaria«	— exclusively oriented to the individual right — only oriented towards competitors — to participating advertisers — consumer protection — advertising is public information — the less critically inclined addressee is the criterion
Spain	Law 34/1988 art. 8. sec. 3 Consumer and user protection law 19. 7. 1984 Law on unfair competition of 10. 1. 91	Concept of average consumer
Portugal	NCP= Novo Codico da publicidade of 23. 10. 90	Art. 6 NCP rules that any advertising must be geared to the principles of admissibility, visibility, truthfulness and respect for consumer rights
Greece	Founded on the German competition law of 1914. Independent rules by regulation of 9. 11. 1990. The law of 3. 9. 91 covers consumer protection	Consumer protection
Austria	öUWG corresponds largely to the German competition law	Consumer protection
EEC	European community: According to art. 189 of TEC, community law has priority over national law. Guideline of 10. 9. 84 about misleading advertising	Consumer protection; Also: protection of traders, manufacturers, craftsmen or freelancers as well as public interests against misleading advertising and their unfair effects.

The survey proves that competition laws do not just »float in space«, but are to be seen in the context of market economical frameworks. Within these frameworks consumer protection may be taken into account, the question remains, however, to what extent — and if consumer protection is not systematically undermined by spreading »ignorance campaigns«¹⁷ more often than not. In any case, both the UWG and the GWB lack legal regulations concerning

17 Proctor, Robert N., Unwissen ist Macht. Deutsche Killermaschinen sind für den Tod von Millionen von Rauchern verantwortlich, in *Süddeutsche Zeitung*, 2. 1. 2008, Nr. 1, Seite 11; vgl auch: Proctor, Robert N. und Schiebinger, Londa, Ed., *Agnology: The Making and Unmaking of Ignorance*, Stanford (University Press) 2008.

environmental protection. Including environmental protection into law should not really pose a problem, considered that judgments on a national level as well as judgments of the European Court of Justice have taken it into account. The EU guideline explicitly mentions »public interests«. As the above-mentioned examples of the jurisdiction of the European Court of Justice make clear, environmental goals are clearly acknowledged. The Belgian commercial law, article 23f., emphasizes the 'consideration of the effects on the environment' and Denmark — just as the EU guideline — mentions public interest as criterion; the Netherlands as well as Belgium require the reversal of the burden of proof; i. e. that every competitor has to prove the correctness of their advertising messages. In Germany, the reference to the Constitution and previous rulings of the courts show a development that suggests adjustments of UWG and GWB to the judicial decisions. Indeed, a corresponding amendment seems to be overdue. In this regard, the social responsibility embodied in the Basic Constitutional Law (GG article 14, section 2) might be a relevant factor that should be considered in the competition law and antitrust law.¹⁸

In a second step, I shall briefly outline the capitalist¹⁹ market economy that provides the context the competition law is applied to.

2. *The capitalist version of market economy as context*

»The market economy with competition is the best system so far known to achieve the solidarity of mankind under modern conditions«²⁰, say Homann and Ungethüm. Theoretically, this may be correct, however, it does necessarily apply to our situation, as our market economy is dominated by capital — and therefore capitalistically shaped. Rather, financial capital is not committed to sustainability, but solely focuses on its own proliferation. Arising social and economical expenses can be shifted on the public.

»Capitalism«, as Fernand Braudel puts it, »is not market economy; capitalism simply floats on it«²¹. Capitalism instrumentalizes market economy and

18 See also the catholic social studies of the pope: »The right to private property is secondary to the collective right of usufruct, secondary to the provision of the commons for the benefit of all.«, Johannes Paul II., Enzyklika *Laborem exercens*, 14: AAS 73 (1981) 613.

19 This is about »capitalist« market economy, which means that in a capitalist market economy, capital or financial capital is considered the prior-ranking value. In a non-capitalist market economy the production resources nature, work and capital are treated as equals. This is e. g. intended in a social and ecological market economy or even a co-operative market economy.

20 Homann, K. /Ungethüm, M., *ibid.*

21 Fernand Braudel, *Die Dynamik des Kapitalismus*, Stuttgart 1986, 99.

exploits it in favour of capitalist privileges²². This has a rather long tradition. In his work *Nicomachean Ethics* Aristotle already envisions an idea of capitalism by his definition of money. He distinguishes between money as a means of exchange and money as capital and draws the conclusion that money in the role of capital results in a capitalist economic system, even if he uses a different terminology. He strongly condemns this system. As early as this, the dangers of a predominance of capital are pointed out. Georg Simmel's work *Philosophie des Geldes* makes the results of the predominance of money transparent. Those who consider money as their centre of reference practise a re-evaluation of all values. Consequently, relations between individuals become indirect, because in-between the individuals we now have the money and we will measure our fellow human beings according to their monetary value. Ultimately, money is transformed; instead of a means to an end, it becomes the whole purpose. Money takes on an almost religious character. Georg Simmel emphasizes in his work *Philosophie des Geldes* that »it may be the irony of the historic development that just when satisfying and completed missions become atrophic, the one value, which is nothing but a means, grows into this vacancy and fills it. In reality, money as the absolute means and therefore centre point of multitudinous missions correlates in its psychological dimension with the concept of God; of course, psychology can only uncover this, as it is its privilege not to be able to utter blasphemies. The idea of God shows its deeper nature in that pluralities and opposites may achieve unity in it; according to the beautiful words of Nicolas of Cusa, it is the *coincidentia oppositorum*. Doubtlessly, money evokes emotions, which show a psychological similarity to these 'unified opposites'. As money increasingly becomes an absolute and an equivalent of all values, it rises in abstract heights above the wide variety of all objects and becomes the centre where the very opposites, the most different and distant things find their common denominator and get in contact. Thus, money indeed allows an elevation above the individual, a belief in its omnipotence as if it was a higher principle; and it is providing for the individual and humble ones in every single moment, almost as if converting itself consistently.«²³

Money turns into tin gods. Or, to put it differently: If sacraments are signs of God's closeness, then someone having money in abundance will be in possession of all the graces of property-oriented, capitalist society. Then we deal with »religion market economy« as Walter Benjamin put it. Money is bestowed

22 See Scherhorn, Gerhard, Nachhaltige Entwicklung: Die besondere Verantwortung des Finanzkapitals, in: Geld & Ethik, Bd. 1, hrsgg. Für die Projektgruppe Ethisch-Ökologisches Rating von Johannes Hoffmann und Gerhard Scherhorn, Erkelenz 2008, 42 ff.

23 Simmel, Georg, Philosophie des Geldes. Gesamtausgabe 6, ed. by: Frisby, David P. und Köhnke, Klaus Christian, 1. edition. 1989, 305.

an almost sacramental character. Putting money as an absolute leads the way to putting economic capital as an absolute.

In capitalism, capital enjoys privileges with destructive effects. No one less than Johann Wolfgang Goethe pointed this out in his *Faust II* at the beginning of industrialization. In this work, he describes the attempt of alchemists to gain money from worthless substances; in Goethe's *Faust*, the attempt fails. According to Hans Christoph Binswanger's interpretation, Goethe indirectly attempted to apostrophize the concept of modern economy, an equation that succeeds in this case due to money being exempted from all ethical duties. Binswanger states: »Faust's enterprise has become an overall plan. It is modern economy. Based on this diagnosis, we may modify Clausewitz's phrase, 'politics were the continuation of war by different means', in Goethe's spirit to 'modern economy is the continuation of alchemy by different means'.²⁴

The privileges that capital enjoys in the capitalist market economy must be considered as protectionism that cannot be ethically justified. In a true market economy that deserves its name, the economic capital, the natural capital (the entire natural production goods) and the social capital (the entire production requirements and conditions of the respective society and culture) exist as equal production factors. The capitalist market economy is in comparison an economic system in which all assessments and actions of its economic objects — in our case the competitors in competition law — are determined by the laws of capital utilisation.

It is disastrous that capital is thereby allowed to exploit systematically human beings and nature in the interest of monetary proliferation. According to Gerhard Scherhorn, the »birth defect of capitalism« is that proprietors of capital who privately own production resources are also granted the sole right to the production profits²⁵. This is exactly why capital poses a threat to nature and human beings throughout the world. This is why the gap between rich and poor is getting wider in all countries of the world, the prosperity of so many people is being threatened, market economy and democracy are being washed out and endangered and the natural environmental is being ruined. Those who wish to save the market economy have to control the neo-liberal capitalism and withdraw its legally guaranteed privileges; e. g. law makers of all countries of the world, i. e. the parliaments, would have to abolish the capital's limited liability. Capital is to be made responsible for all damages that occur due to the externalized costs of ecological destruction and social

24 Binswanger, Hans Christoph, *Geld und Magie. Deutung und Kritik der modernen Wirtschaft anhand von Goethes Faust*, Stuttgart/Wien/Bern 1985, 55f.

25 Scherhorn, Gerhard, *Gleiche Chancen für das Kapital*, Vortrag beim Club of Vienna am 22. 1. 04, Manuskript, page 3 f.

dumping. Exempting capital from all ethical duties and any responsibilities for human beings, nature and the common good must come to an end. Capital must be held liable for causing environmental damage and poverty throughout the world. However, in order to achieve this, one should impose clearly defined duties on capital and companies as preconditions for being licensed, e. g. in the USA. In the year 1886, the US Supreme Court ruled that corporations have to be considered 'natural persons' and must therefore be protected by the Constitution. This decision of the Supreme Court — not even a decision of Parliament as representative of the citizens — led to the exploitation of the lower classes of societies, which we have been suffering from ever since. Therefore, critical observers in the USA require that corporations as artificial bodies should not enjoy the protection by »the Bill of Rights« and that proprietors and managers of these corporations will have to be made liable for the damages they cause.²⁶ Instead, the Supreme Court of the USA ruled in 1976: »A company's right to donate money in unlimited amounts to political parties and action committees is protected by the fundamental law of freedom of speech.«²⁷ Again, another fundamental law was expanded to include companies. »Ever since, political action committees (PACs) have been able to make sure that the interests of corporations, financial institutions and professional bodies dominate in both political parties in the USA. The number of PACs founded by corporations has increased from 89 in 1974 to 1467 in 1982.«²⁸ The catchy phrase by Josef Stieglitz, chair of the advisory committee for economic affairs during the presidency of President Clinton, highlights the result: »We managed to tighten the belts of the poor a few notches, and gave these to the rich to loosen their belts accordingly.«²⁹ The spirit emanating from these facts remains unbroken, regardless of the threat of climatic disaster, in spite of the financial catastrophe caused by top managers of major banks and the drastic increase of hunger and poverty throughout the world.

In a study called »Germany in the year 2020« the Deutsche Bank develops a scenario »expedition Germany«, humouring the so-called »project economy«, because it is supposed »to stand for mostly temporary, extremely co-operative and often global processes of value creation«³⁰. The study focuses on economic growth and the increase of capital value creation. Where this path leads us may be seen in a differentiated study by Dirk Solte of the *For-*

26 Grossmann, Richard L. and Adams, Frank T., Taking Care of Business: Citizenship and the Charter of Incorporation, in: *Earth Island Journal* Spring 1993, page 34f.

27 Harvey, David, *Kleine Geschichte des Neoliberalismus*, Zürich 2007, 64.

28 Ibid.

29 Henwood, D., *After the new economy*, New Press, New York 2003, 208; quoted from: Harvey, David, *ibid.*, 67.

30 *Deutschland im Jahr 2020. Neue Herausforderungen für ein Land auf Expedition*, Deutsche Bank Research 2007, preface, 1.

schungsinstitut für anwendungsorientierte Wissensverarbeitung (research institute for applied knowledge processing). He states: »The basic idea of the present text on the global financial system and especially the field of taxation laws is that — due to a global environment of incoherent laws and regulations — individual constraints and fields of interest of the responsible national regulatory bodies and other players (and their needs and aims respectively) resulted in conditions that are opposed to the idea of sustainability and its necessary pre-requisite, namely a social and cultural balance.³¹

Solte arrives at a well-founded but alarming result: All in all, the analysis shows a scenario, which leads to the insight that

- a) the for some parts extensively deregulated global financial markets,
- b) unlimited capital transactions and
- c) international competition over geographic locations, as well as tax dumping and inconsistent financial and fiscal systems, while there is no compensation such as e. g. a taxation of global transactions and activities, are continually increasing the imbalance between rich and poor. We are witness to a redistribution of wealth from the bottom up, from many people to few people, and to a shifting of entrepreneurial commitment: Make employees redundant in order to make profits from capital investments.

Without counter measures, a global collapse of financial structures within the next 10 or 20 years will be inevitable, not least because a simple »go ahead« would already lead to the situation that in a few »leading« countries, the national annual interest on debt would exceed the tax revenue.³²

Financial capital's needs of unhindered capital increase force everybody to surrender to the dictates of financial capital. We will have to throw off this yoke. Not only are states forced to reduce taxes and constantly increase the national debt; at the same time, they are burdened with the costs of the damages done to environment and climate as well as the social consequences of the increasing poverty of almost half of the world's population. On top of everything, lower taxes for financial capital notwithstanding, the rest of their profits bypasses the tax authorities anyway — thanks to tax dodges, quite legal, of course. Instead of sustainability, the result is the sell-out of natural, social and cultural capital.

In the NAFTA, the trade agreement between North and Middle American states, these privileges have been implemented without restraint in the so-

31 Solte, Dirk, *Weltfinanzsystem am Limit. Einblick in den »Heiligen Gral« der Globalisierung*, 1. Aufl., Berlin 2007, 25.

32 Solte, Dirk, *ibid.* 24.

called free trade zones. In El Salvador, I have been a witness to these practices myself. Bound by the agreed privileges, the respective national law is unable to prevent or prosecute the exploitation of human beings and environment. The OECD states and Germany, too, were supposed to grant financial capital the same privileges by codifying the MAI (Multilateral Agreement on Investment). »Thank God«, the watchfulness and commitment of social movements were able to prevent this from happening at the last moment.³³ These developments show that in our economic system, financial capital is made an absolute and ultimate point of reference. In the biblical sense, it has become the mammon. The Evangelium says: »You cannot serve God and the mammon.« The meaning is that for Christians, money will become the mammon, the tin god, if they make it their ultimate point of reference in life. The consequences of this attitude do not really come as a surprise: Sustainability as model and overall concept does not stand a chance, unless the frameworks change, for »partially, (e. g. by parts of the economy) sustainability is defined in such a way that the core of sustainability is turned upside down. Accordingly, the economy shall not develop within environmental confines, but environmental protection within the confines of the economically agreeable.«³⁴

Capitalist market economy includes the systematic privilege of capital or the super-rich respectively, while at the same time natural and social capital are exploited. This kind of cynicism is expressed in the statement of superrich New York hotelier Leona Helmsley, made in 1989: »We do not pay taxes, only the working class pays taxes.«³⁵ How can anyone develop a sense of responsibility anyway, if he or she has always lived according to the principle »disregard the rules and be amply rewarded — why should they obey the laws?³⁶

The same cynicism emanates from a bold statement by Michael Kramarsch of the management–consulting firm *Towers Perrin Deutschland* in an interview with the *Süddeutsche Zeitung*: »Still, I consider the discussion about allegedly excessive management salaries dangerous and negligent. It is presented in so incompetent a manner that elites are deliberately injured...«³⁷ However, this is not about »the subjective perception of what is fair or not«, but social compatibility and fairness, as in: why does Josef Ackermann pocket

33 Engels, Rainer/Martens, Jens/Wahl, Peter/Windfuhr, Michael, *Alles neu macht der MAI? Das multilaterale Investitionsabkommen, Informationen–Hintergründe–Kritik*, Edt., Weltwirtschaft, Ökologie & Entwicklung e. V. (WEED), Bonn 1998.

34 Rogall, Holger, *Akteure der nachhaltigen Entwicklung. Der ökologische Reformstau und seine Gründe*, 2. ed. Munich 2003, 295.

35 Kreye, Andrian, *Die Entfremdeten. Superreiche sind nicht von dieser Welt*, in: *Süddeutsche Zeitung*, 19. 2. 08, Nr. 42, 13.

36 *Ibid.*

37 »Unsachliche Diskussion«, Michael Karamarsch of Towers Perrin about manager salaries, Interview: Julia Bönisch, in: *Süddeutsche Zeitung*, 4. 4. 08, Nr. 79, 30.

a three hundredfold of what the bank pays to a bank clerk. Despite the fact that the *Deutsche Bank* had to face a loss of almost five billion Euros. Or: Director Herbert Hainer earns the 5500-fold of what »a seamstress earns at a supplier firm in Vietnam«³⁸. This is shameless, violates moral law and is unlawful according to Constitutional law.³⁹ Thank God, there are companies that behave differently and successfully attest to the fact that even in the context of capitalist market economy, economic capital, natural, social and cultural capital may be given equal value. The value creation account of the Weleda Group, as put forward in their annual review of 2006 states: »The total of the achievements of the Weleda Group increased by 39.1 million CHF in 2006. After deducting the advancements by other companies, the result is a value creation of 155.4 million Euro (137.6 Million CHF in the previous year).

»83.5 % of the attained value creation fell to the incomes of our staff members. In this context we should like to point out that we consciously talk about 'incomes' and 'staff members' and not 'personnel costs' and 'human resources'. We see our staff members as participants in our achievements, as 'co-enterprisers' and not 'production factors'. Thereby, we would like to support and advance the personal responsibilities and self-conception of our staff members. The account of the value creation is consequently an important instrument not only in economical, but also in social and business cultural respect.

9.7% of the value creation remained in the company. This part is the most important fundament for the financing of investments and protection of our financial independence. 4.1 million CHF or 2.6% of the value creation respectively are taxes. As in the previous year, we distributed dividends to shareholders and participants amounting to 625.000 CHF. The debt service increased by 2.1 million CHF.«⁴⁰

This example shows that companies or corporations can consciously refrain from profit maximizing by ecological and social dumping; they can be well aware of their responsibilities towards natural, social and cultural capital and manage to implement their responsibilities within the capitalist context.

Finally, I should like to point out the increasing cases of corruption that became public knowledge. Corruption undermines competition and eventually threatens democracy. The Munich-based Human Resources Consulting Agency CGC conducted a survey »among executives and personnel consultants«. 44% of all interviewees stated that »law-abiding companies experience drawbacks in competition«⁴¹; 56% were more concerned about the damage

38 Südd. Zeitung, 4. 4. 08, Nr. 79, 31.

39 See Prantl, Heribert, Moral and Gier, in: Südd. Zeitung, 11. 12. 07, Nr. 285, 4.

40 Transparenz. Jahresbericht der Weleda Gruppe AG 2006, page 55.

41 Business Keeper AG. Mit System gegen Korruption, Newsletter I/2008, Nr. 2, 2.

done to the reputation because of the media coverage than about the corruption per se. The increase of corruption and also the increasing exposure of corruption caused the federal cabinet — following regulations of the European Union, the Council of Europe and the United Nations — to decide upon a change of the criminal code in May 2007, in order to fight corruption on an international level⁴².

It is rather bizarre that in view of the tax fraud committed by numerous Germans with the help of the LGT-Bank Liechtenstein, a German lawyer was primarily busy wondering if and to what extent copies of the account data violate German criminal law. He concludes: »The copy of the immaterial data primarily constitutes a punishable use of trade secrets according to 17 section 2 number 2 of the law against unfair competition (UWG).«⁴³

These are but a few ideas of the contexts the competition law is presently applied to.

3. *Facts seen from the perspective of ethical criteria*

3.1 About the historic roots of the UWG and GWB

On the occasion of the 50th anniversary of the law against restraints of competition and the 50-year existence of the Federal Cartel Office, the issue of ethical criteria asks for a reference to the historic conditions that initiated and shaped the competition law. Only then will we understand the difficulties, changes, successes and failures of this institution.⁴⁴ In view of this anniversary, we might easily assume that the concept of social market economy by Ludwig Erhard and Alfred Müller-Armack were the basis of the competition law. In spite of some evidence as to the truth of that assumption, the origin — according to Christoph Buchheim — may be seen in the liberal thinking of the economist Walter Eucken from Freiburg, Germany, who argued as early as 1941 that »all politico-economic measures should be directed towards one goal, as a coordinated system is inevitable for a well-working economy.«⁴⁵

A co-founder of this school, Franz Böhm, contributed that »competition was a public-law performance, used by government with the purpose of sys-

42 Business Keeper AG, Newsletter IV / 2007, 2.

43 Sieber, Ulrich, Der Fall Liechtenstein. The German tax authorities' purchase of the stolen account data of a Liechtenstein bank may well prove to have been a lucrative investment. About the legality of the state's detecting methods the jury is still out, in: FAZ, 31. 3. 08, Nr. 75, 8.

44 Hennemann, Gerhard, Im Namen des Wettbewerbs, in: Süddeutsche Zeitung, 14. 1. 08, Nr. 11, 17.

45 Buchheim, Christoph, Soziale Marktwirtschaft, in: FAZ, 21. 6. 07, Nr. 141, 9

temizing the markets.«⁴⁶ One was of the opinion that »true competition in performance would only be given, if a strong and impartial state controlled it...« If this was the case, both requirements would be fulfilled, that is the protection against a weakening of competition by the state and a social orientation of the economy; then »a market economy characterized by competition would be a truly social one.«⁴⁷

Without going into the development after World War II, it is worth mentioning that the law against restraints of competition, which parliament passed in 1957, was built on this foundation. Yet, this law was solely geared to the conception of »free« competition and failed to include the protection of »free and sustainable« competition; sustainable aims must function within the framework of UWG and GWB as paramount guideline.

3.2 Consequences of the globalization of the capitalist market economy

As long as state socialism in the form of state capitalism still existed, the market–economical capitalism had to face a powerful competitor on the world stage. Against the background of these global competitors both claiming universal validity, the political classes and economical interests among the respective political systems could communicate in a quite profitable way without running the risk of losing their political legitimation in their respective countries. The so–called Third–World countries were practically overwhelmed — »for their own good« — by the capitalist system’s claim of validity, helped along by agreements of the political classes and economic interests; these countries’ social fabrics and traditions were shattered or even destroyed; as a result, the economically expanding industrial nations, insisting on their validity, declared them as underdeveloped. Enrique Dussel made these practises transparent, just as Felix Wilfred, Bénézet Bujo, Obiora Ike, Sulak Siwaraksa, John May and many others did.⁴⁸ In his lecture in Liverpool on 20th March 1988, Bishop Peter Kwasi Sarpong from Ghana talked about this context. I should like to quote a section from his prophetic speech that should give us all ’food for thought’: »What is this so–called fairness we talk about so much?... It is pretty clear, there is no justice for Africa. How can there be

46 Ibid.

47 Ibid.

48 See Hoffmann, J., *Praxis der Entwicklungszusammenarbeit und die Frage nach Alternativen*, in: Hoffmann, *das eine Menschenrecht und die vielen Lebensformen*, ed. Vol. 3, 71–92; in the same volume the contributions of John Mary Waliggo, 107–129; Obiora Ike, 131–176; 97–245; Francis X. D’Sa 247–265; Rao Narahari, 267–283; Hans Josef Wüst, 299–305, Enrique Dussel, 307–318.

development, then? What is development, by the way? Normally, we tend to see underdevelopment as preliminary stage to development: People are underdeveloped and then they will develop or they will be developed. May I point out that in the beginning, all people were developed... In the past, Africans managed to cope satisfactorily with the vicissitudes of life. They coped with complex politics. They had developed their own economic systems, where one individual could not accumulate wealth at the expense of another. Africa's present sufferings mostly come from the haphazard adoption of political and economic systems it is not used to. In the 90s of this century, we should consider development not only as economic progress, but also as gain of knowledge, culture and the needs of life.⁴⁹

Many voices from non-western cultures could be heard about this issue. The response from different cultural contexts to our economic system's claim of universal validity, for the last twenty years until today, has been unmistakably consistent.⁵⁰ Francis X. D'Sa's comment proves correct; before we obtain the ability to think in alternatives and visions, we have to tackle the deconstruction of the prevailing validity claims of our economic system and unmask its limits and destructive potentials.

3.3 About the neo-classical claim to universal validity in national economies

To begin with, we have to consider the neo-classical claim to universal validity in national economies. Since Milton Friedmann, the neo-classical theory has provided the foundation of the unlimited freedom of capital. Giving this economic preference an absolute standing is highly dangerous for the economy as well as the well-being of human beings and their environment. According to Bertram Schefold, »the neo-classical economics that came into existence about 100 years ago and has been dominant for about 50 years — albeit not unchallenged—«⁵¹ rules the field of economy. Basically, it represents »a calculated optimization of economic and societal relations.«⁵² Experience has shown, however, that this definition is too vague, as »no school of national economics can do without concepts of optimization«⁵³. That is why Schefold

49 Peter Kwasi Sarpong (Bishop of Kumasi), *Gerechtigkeit und Entwicklung in Afrika: Die Herausforderung der 90er Jahre*, in: *Weltkirche* 5 (1988), 139–147; here: 143.

50 See e. g. Felix Wilfred (Ed) *Globalization or Peripheralization*, in: *jeevadhara, A Journal of Christian Interpretation*; Vol. XXV, No 145, Kottam/India, 1995, 1–92

51 Bertram Schefold, *Wirtschaftsstile, Band 1: Studium zum Verhältnis von Ökonomie und Kultur*, Frankfurt 1994, 29.

52 Ibid.

53 Ibid. 30.

argues in favour of the following definition of neo-classical economics: »Unlike classical economics, the neo-classical economics focuses on the determination of prices in goods and factor markets through supply and demand, which are based on subjective preferences. Consequently, neo-classical economics are essentially a theory of full employment, as the price balance is defined in such a way that there is special demand for goods and factors from those suppliers that match the factor prices.«⁵⁴ That is not true. On the one hand, the consequences that derive from the participation of all individuals in »several different systems of preference« are disregarded, so that »these individually different systems of preference could not aggregate into a higher preferential system — just as it would be impossible that the preferences of many individuals merge into a social welfare function.«⁵⁵ If, according to the neo-classical theory, we arrived at a general balance, we would need no further social-ethical or political regulations. However, the reverse is true. Could we eliminate the contradictions of our system by adequate further expansion?

The social market economy is a highly valued factor in order to safeguard a decent existence. According to their founding fathers,⁵⁶ its safeguarding is advanced by (continuously) working on the developing disparities and non-conformances as well as the safeguarding of distributive justice and ecological compatibility of the economy. This would, however, require us to reveal and analyse breakaway points and eliminate their causes. To my mind, such breakaway points are found in the monetary structures of the competition law, in the stock corporation law and in the trade law, which are in urgent need of new regulations. Just as Schefold turns on the neo-classical economists, arguing that »capital accumulation« must be comprehended »as autonomous process« that follows »its own rules« and »does not automatically adjust to external factors such as increase in population or natural resources«⁵⁷. And: »Unemployment or overemployment in the sense of the classical theory is based on capital accumulation as autonomous process; any adjustments are a matter of the population to deal with by migrating, changing participation rates etc.«⁵⁸ Finally, even »the assumption that interest rates control the rates of capital gains is not all that strange.«⁵⁹ This already reveals the

54 Ibid., 31.

55 Ibid., 34.

56 Alfred Müller-Armack, *Genealogie der Sozialen Marktwirtschaft, Frühschriften und weiterführende Konzepte*, zweite, erweiterte Auflage, Bern und Stuttgart 1981.

57 Schefold, *Wirtschaftsstile* 45 (Anm. 24).

58 See Hoffmann, *Praxis der Entwicklungszusammenarbeit und die Frage nach Alternativen*, in: Ders., Hrsg., Bd. 3, 71–92; ferner in demselben Band die Beiträge von John Mary Waliggo, 107–129; Obiora Ike, 131–176; 97–245; Francis X. D'Sa, 247–265; Rao Narahari, 267–283; Hans Josef Wüst, 299–305, Enrique Dussel, 307–318.

59 Ibid. 48.

fundamental role that the accumulations of capital and financial assets play in a market-regulated economy; politics will be forced to play a minor role, if we fail to regulate monetary processes and if ethical principles are no longer capable of controlling financial assets.

3.4 Money as social institution

The public takes increasing notice of these inequalities and perceives them as unjust, being faced with unemployment, debt, homelessness and growing poverty. Money is a good guaranteed by the state. It is a national institution, a social institution. Nobody would profit, if the value of »money« per se and as a means of exchange were not guaranteed by the economic performance of many people on the one hand and the state on the other. Preposterous as it sounds, but obviously, managers of major banks are also quite aware of this fact, when they, faced with losses of billions of dollars through their careless purchases of subprime real estate funds, keep calling for governmental support. In fact, currently the profit of money goes almost exclusively to the proprietors of liquid financial resources, which is due to the non-conformance of our monetary system with present day economic changes. Neither an adequate taxation, nor an adjustment of the frameworks will take care of an equitable balance. We are in the midst of a crisis, and maybe this will release the necessary creativity to find solutions. My thesis: The safety we provide for everybody in our state, all of us will also receive. That is what we have to take care of and in order to do so, we have to initiate the necessary adjustments at the crucial points.

3.5 The reasons why our economic system is oriented to financial assets

Schefold offers the crucial reason following Adam Smith: »I will therefore adopt the thesis that a market — regulated economy in the sense of Smith can only survive, because the political and social life is dominated by ethical principles. As is generally known, Smith was not only a political economist, but also a moral philosopher. In his theory about *moral feelings*, he formulates the principle of *sympathy*, which means a kind of emotional interest in the fate of others; every individual judges other people's actions by more or less putting himself in their position and trying to empathize with their motives, in short becomes a spectator of their behaviour... Obviously, Smith sees social conduct controlled by ethical principles, independent of economical restraints and market mechanisms, which have the character of a legality organising the political and social life... »It is this 'socialization of the individual' (Heilbronner) that provides the background against which the role of selfish

actions within the *Wealth of Nations* must be put into perspective.«⁶⁰ Economics need to be controlled by the moral powers of a culture. These had rather not be left to their own devices. Ernst Wolfgang Böckenförde, specialised in constitutional law, puts it aptly: »The liberal, secularized state lives on preconditions it cannot guarantee itself.«⁶¹ Still, these ethical preconditions, values that have grown in a society — and the ones a society has not yet come to terms with respectively — e. g. values of Christian tradition must not be jeopardized. Factually, the substance of the societally internalized moral system is perpetually threatened, if not consumed, by the capitalist market economy — at least according to Max Weber; e. g. by controversial economic practices or releasing financial capital from all ethical responsibilities and also due to the fact that financial capital refuses to take on responsibility for the protection of these values. Therefore, we need frameworks that impose responsibilities for preserving natural, social and cultural capital to a reasonable degree on financial capital.

It is a dangerous, if not lethal, error to see economic growth as a law of nature we have no means to escape. If we survive and wish to arrive at shaping our reality in a manner that observes natural, social and cultural sustainability, we will have to set guidelines for the economy to match. If not, it may well be possible that humankind and the world will be threatened by extinction. We must not twiddle our thumbs. Even the question whether human rights can be applied universally, which in our Western thinking describes the universal as generalization of the specific, evokes resistance in other cultures.⁶² According to Felix Wilfred, this conception only represents the least common denominator, but »not true togetherness«.⁶³ In other words: Human rights that deserve their name have to respond to »the vital human questions of survival, which the people of the Third World are concerned with.«⁶⁴

60 Ibid.

61 Böckenförde, Ernst Wolfgang, *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht*, Frankfurt a. M., 1976, S. 60.

62 Hoffmann, Johannes, Edt., *Das eine Menschenrecht und die vielen Lebensformen. Die Begründung der Menschenrechte in der Kritik der Kulturen*, Frankfurt 1992.

63 Wilfred, Felix, *Die Sprache der Menschenrechte — ein ethisches Esperanto? Reflexionen über universale Menschenrechte aus einem indischen/dritte Welt Kontext*, in: Hoffmann, Johannes, Edt., *Universale Menschenrechte im Widerspruch der Kulturen*, Frankfurt 1991, 155–177, here: p. 158.

64 Ibid., p. 165

4. *Conclusions*

4.1 Irrationality in the competition law

Where did the presentation of the context of »capitalist market economy« lead us? Major hindrances on the way to sustained development throughout the world are the monetary frameworks and structures, which were produced by a neo-liberal economic system, influenced by the superrich, in the most deceiving manner.⁶⁵ They are the results of social processes in the societies of the rich industrial nations and they can and have to be changed, if they are perceived as destructive and if they threaten the natural, social and cultural means of existence. We become increasingly aware of the situation that present-day capitalist market economy no longer serves people's welfare and the preservation of their natural environment, but has become an end in itself; its only purpose is the proliferation of financial assets, which indeed decreases rather than increases prosperity.⁶⁶ The question is, how the monetary structures — the breakaway points — can be altered and in what way ethics may contribute to these changes.

First of all, we will have to say goodbye to certain myths such as: »In a free market economy, the invisible hand will look after the common good.«⁶⁷ The invisible hand can only regulate in the sense of a sustained development, if it operates on the basis of societal values and sustainable ethical qualities and social culture.

Another myth we have to identify and eliminate is people's faith in technology and science, namely that damages occurring in a market economy can be repaired by new technological or scientific solutions.⁶⁸ I do not intend to belittle scientific and technological achievements, nor do I wish to propagate a pessimistic view on research; again, the crucial issue is to keep the perspectives in balance and refrain from seeing them as absolutes.

65 Klein, Naomi, *Die Schockstrategie. Der Aufstieg des Katastrophenkapitalismus*, Frankfurt a. M. 2007

66 Scherhorn, Gerhard et al., *Wohlstandskosten und verantwortliches Handeln. Ergebnisbericht über eine experimentelle Studie im Forschungsschwerpunkt »Mensch und globale Umweltveränderungen« der Deutschen Forschungsgemeinschaft. Arbeitspapier 68. Stuttgart (1997), Universität Hohenheim, Lehrstuhl für Konsumtheorie und Verbraucherpolitik.*

67 Schütz, Mathias/Wirth, Stephan und Bode Eiko, *Lügen in der Chefetage. Gesammelte Unwahrheiten aus dem Management*, 1. Aufl., Weinheim 2007, 261–265.

68 Hoffmann, Johannes, Hrsg., *Irrationale Technikadaptation als Herausforderung an Ethik, Recht und Kultur. Interdisziplinäre Studien*, Frankfurt 1997

At this point, it seems to be advisable to check capital's privileges in a capitalist market economy for rationality.⁶⁹ The project team »ethics of technology«, part of the interdisciplinary team »technological research« at Frankfurt University, developed a scale ranging from »rationality« to »irrationality«, with e. g. »irrationality« being also divided into »strong« and »weak« irrationality. We will encounter a case of »strong irrationality«, if in a certain context one perspective is put as absolute. We have to take this into account, when we apply the laws UWG and GWB. As UWG and GWB are never ends in themselves, but tools for the functioning of a social and ecological market economy, we will have to test to what extent the ultimate purpose or universal value remains intact, namely the preservation of a sustainability-oriented market economy, meant to guarantee the bio-survival for human beings and their environment. As I tried to show, the regulations of UWG and GWB only implement this in some parts, e. g. in the field of consumer protection. Thanks to the current capitalist context to which UWG and GWB are applied, the implementation of these laws is restricted to that effect that the encouragement and facilitation of a social and ecological market economy are systematically ignored. Putting economic capital in an absolute position results in damaging, even destroying the substance of the common good, environment and nature as well as the substance of cultural values. From an ethical point of view, these are highly irrational practices for guaranteeing the bio-survival of human beings and their environment.

Just practicing UWG and GWB already results in irrationality in so far as controversial economic practices in the course of competition, such as corruption, ecological and social dumping, are usually justified by claiming that otherwise, economic growth might not be achieved in the context of global economy. A context of rationality such as 'economic growth' is de facto used in order to justify actions in quite a different context of (ir)rationality. From a rational viewpoint, we cannot accept this, as it is indeed a highly irrational argument.

The same must be said about the argument concerning the »invisible hand«. Here especially, a context of rationality entirely unknown to the UWG and GWB is used as legitimation to disregard social and ecological aims as well as the preserving of the substance of social and cultural capital, because surely, the »invisible hand« would sort things out on its own? Those, who still argue along these lines, will have to put up with the question, whether or not they consciously tell the untruth, guided by their own interests.

69 Hoffmann, Johannes, Edt., *Ethische Vernunft und technische Rationalität*, Frankfurt 1992.

4.2 Considering side effects

Finally, we will have to test the practice of UWG and GWB on the basis of the ethical principle of double-effects of any action. According to Peter Knauer »the principle of double-effects of any action can be seen as fundamental principle of the entire ethics.«⁷⁰

The original version of this principle can be traced back to Thomas v. Aquin, who in turn goes as far back as Aristotle, dealing with his work and developing it further.⁷¹

The principle of double-effects assumes that there is no act without double-effects and other effects and side effects respectively, which occur unnoticed and unintended, or are consciously taken into account or even created. This also applies to decisions assessed and made in the context of UWG and GWB. If we prioritize economic growth and put it as absolute value, we will accept side effects, which are to some extent irrevocable, namely environmental damage through displacement and externalisation of costs.

On the basis of Peter Knauer's new, hermeneutic version of this principle, we are able to envision this issue in a differentiated manner. Peter Knauer states:

»1) An action is intrinsically 'bad', if damages are allowed for or created without appropriate reasons.

The reason or cause of an action is not an 'appropriate one'.⁷²

**If a desired value or set of values — in a universal sense — is permanently and entirely undermined.*

Exactly this is the case with the current construction of the UWG and GWB. Higher-ranking values such as climate protection, social acceptability, fair distribution of goods and granting all people access to the goods of the earth for a humane life, in short, the value called »bio-survival guarantee for human beings and their environment« as well as a market economy oriented towards sustainable aims, are constantly undermined by the practice of UWG and GWB. For these laws operate within the context of a primarily capital-oriented economy and are gradually destroying the substance of the aforementioned values. There may be good intentions behind the UWG and GWB as concerns the structuring of relations between competitors as well as com-

70 Knauer, Peter, *Handlungsverflechtungen. Neue Fundamentelethik aus dem Prinzip der Doppelwirkung*, Frankfurt, ohne Jahrgang, zitiert nach Internetmanuskript, 7. See also: Habersack, Michael, *Audiatur et altera pars. Vom Prinzip der Doppelwirkung einer Handlung am Beispiel der aktuellen Klimapolitik*. Seminararbeit im Seminar: Was heißt ethisch argumentieren?, Frankfurter Sommersemester 200.

71 See Aristoteles *Physik* III, 5, 196b und *Metaphysik* XI, 8, 1065a

72 The expression 'appropriate reason' is not exactly commonly used; it means what we usually call a »sufficient reason«.

petitors and consumers under private law; as both laws neglect to take into account the privileges of capital, they work counterproductively with the effect that they prevent sustainable development. The hierarchy of values is therefore turned upside down. Last-resource measures are passed off as top priority aims regardless of the development of a sustained economy. Another well-known system growing without limits is cancer, and as we all know, this illness is normally lethal. The same applies to capital, for systems with exponential growth will eventually collapse.

**.. or if the attempt to prevent damage or a set of damages (in a universal sense) results in the very opposite, thus increasing instead of decreasing damage.«*

This is certainly correct, if we argue that the privileges of financial capital will have to persist in order to make economic growth possible. The same may be said, if, from a regional or national perspective, one argues that without capital privilege, we will have to face capital flight, resulting in locational disadvantages. From an ethical perspective, none of these reasons is justified, as the damages done to the safeguarding of the bio-survival guarantee for human beings and their environment and a sustainability-oriented market economy respectively, are disregarded. There will be alternatives⁷³, however, if we change the frameworks of global competition by imposing responsibilities for the preservation of the environment and the care for humankind on capital, by emphasizing the social and environmental duties of capital and by requiring capital to operate in favour of a sustainable, substance-preserving economy. In order to guarantee this, we also need to redefine that private property and especially private property of production resources, as well as the fact that proprietors' have all the profits at their disposal, is not a law of nature. Just as private property is not the result of an individual's achievement, but is made possible by the achievements of many within the frameworks of their respective societies — in the interest of the resource »environment«. From this, we can also deduce the importance of private property⁷⁴ operating with the aim of securing common welfare, public goods, and the bio-survival guarantee for human beings and their environment.

».. or in case another value will unnecessarily become affected in any way«.

This is absolutely and undeniably true, as basically all other societal values are impaired for the benefit of the privileges of financial capital, in spite of sufficient alternatives being available to enable all parties concerned — in the truest sense of competition law — to enjoy equal opportunities due to a free, sustainable competition law, to advance economic development and guarantee bio-survival for human beings and their environment.

73 See Prahalad, C. K., *Der Reichtum der Dritten Welt. Armut bekämpfen. Weltweiten Wohlstand fördern. Würde bewahren*, 1. Auflage München 2006.

74 See also endnote 18

»2) *In case several actions are linked, one action alone is already 'bad' if*

a) The acting persons use this action in order to make an intrinsically 'bad' action possible;

b) if the acting persons intend to make it possible by using another, intrinsically 'bad' action.⁷⁵

In our context, we will have to take these cases, with several actions linked up, into due consideration. Just think of corruption or bribery, actions that are surely intrinsically 'bad'; if they were justified, however, by the argument that else, the project or production order would go to someone else, this would be inconsistent with the UWG and GWB. Again, there are alternatives; e. g. the frameworks of competition may be designed in such a way that decisions about offers or contracts have to be based solely on a contractor's or bidder's performance. This seems to be inevitable in the context of globalization. The formation of these frameworks is an essential responsibility of national and international legislative institutions.

Consequently, –considering condition b) — we cannot morally justify the optimization of profits by pursuing social and ecological dumping, which is definitely a 'bad' action.

In summary, it is fair to say that from an ethical perspective, the UWG and GWB need to be embedded in adequate frameworks, on a national and international level, so that competition — as principle and in all contexts — corresponds to the aim of sustainable development and economical, ecological, social and cultural sustainability will be implemented in global economy in the interest of a sustained market economy. If we want this to become true, we must mobilize all ethical powers in societies and cultures in order to generate the necessary cultural pressure for gradual changes.

From an ethical viewpoint, the universal value or ultimate purpose we have to pursue in the context of competition law is the biological basis to guarantee the survival of all human beings. The social and ecological market economy is considered the means to achieve this aim, whereas the competition law is seen as a means to secure this aim. We can only achieve our aim, if the frameworks of the competition law (UWG and GWB) are based on criteria of ecological, social and cultural sustainability. From this perspective, both the national and international competition law will have to be designed or re-designed on the basis of sustainable aims. Governments that wish for a sustainable development for human beings and their environment will need to actively advocate the formation of a free competition law oriented towards sustainable aims and define its frameworks from a perspective of ecological, social and cultural sustainability.

75 See Knauer, Peter, *ibid.* 69.