

# In Memory of Professor Ernst-Joachim Mestmäcker

Xiaoye Wang<sup>1</sup>

On April 26, Dr. Dong Yiliang, who is living in Hamburg, Germany, told me that Professor Mestmäcker had passed away on April 22 at the age of 97. With deep grief, I couldn't help thinking of my experiences with him since 1988. Yes, I was very lucky to have had Mestmäcker as my academic mentor for more than 30 years. I have been very grateful, as his great thinking on competition law and policy has been the guiding light for my academic research and has left a deep imprint on my academic carrier.

## I. He guided me to the antitrust research path

I belong to the oldest of the "lao san jie".<sup>2</sup> In 1966, just as I was about to graduate from high school, China began its unprecedented Cultural Revolution, and one of its consequences was the nationwide closure of classes in order to achieve a revolution. As a result, naturally, I also lost the opportunity to continue my studies at university. During the Cultural Revolution, I worked in the countryside, in factories, and in government offices. In February 1978, when I was fortunate enough to enter the Department of Political Science and Education of Inner Mongolia Normal University – as one of the first batch of college students after the resumption of the national college entrance examination – I was already 30 years old and had two children.<sup>3</sup> On the eve of graduating from university and after four months of intensive study, I passed the examination for four professional level courses in legal theory, civil law, private international law, and public international law, thus allowing me to study in Beijing and reunite with my husband, who was admitted to the Graduated School of Chinese Academy of Social Sciences as a master in law student. In so doing, I became one of the 13 master's students admitted to the law department of Renmin University

of China in 1981. At that time, I majored in private international law, and Professor Liu Ding (刘丁) was my supervisor; the title of my master's thesis was "The applicable law of transnational contracts".<sup>4</sup> After receiving a master's degree from Renmin University in December 1984, I joined the Civil Law Department of the Institute of Law of the Chinese Academy of Social Sciences, where my research field was foreign-related economic law. From this experience, it can be seen that if I hadn't studied in Germany later, I would not have had the chance to have engaged in academic research on antitrust law.

In 1988, as I was about to turn 40 years old, I was, with the help of Professor Frank Münzel of the Max Planck Institute for Comparative and International Private Law in Hamburg, fortunate enough to receive a scholarship for three years from the association titled "Internationale Studentenfreunde e. V.". Thereby, I had the opportunity to study in Germany and pursue a doctorate. It was even more fortunate that, upon Professor Münzel's recommendation, Professor Mestmäcker agreed to be my doctoral supervisor. I can still remember Mestmäcker telling me that I was entering not only a very important but also a very interesting academic field. As a result of studying antitrust law and writing my dissertation on it, my academic career reached a turning point. Specifically, I shifted from the study of private international law to a field that was almost unknown to ordinary Chinese people at that time – antitrust law. As a result, my own interests had also reached a turning point, that is, I shifted from focusing on foreign-related factors in civil and commercial law to focusing on the market economy, market competition, and market competition order; correspondingly, I began to pay close attention to China's economic and political structural reforms.

Ernst-Joachim Mestmäcker was the leading authority on antitrust law in Germany and Europe,<sup>5</sup> and one of the main representatives of ordo-liberalism.<sup>6</sup> He was Director of the Max Planck Institute for Comparative and International Private Law from 1979 to

<sup>1</sup> Professor at Law Institute of Chinese Academy of Social Sciences. The author thanks Prof. Xiaomin Fang and Dr. Yiliang Dong for their help and encouragement in writing this paper.

<sup>2</sup> 'Lao san jie (老三届)' refers to the middle and high school students who graduated during the Cultural Revolution, in particular those of 1966, 1967 and 1968. A majority of these graduates were sent by the government to rural areas to undergo 're-education'.

<sup>3</sup> In December 1977, China held its first nationwide college entrance examination since the Cultural Revolution. 5.76 million people took this examination, and it changed the fate of 270,000 individuals across the country.

<sup>4</sup> Professor Liu Ding passed away in 1984.

<sup>5</sup> Stefan Grundmann/Karl Riesenhuber (eds.), *Deutschsprachige Zivilrechtslehre des 20. Jahrhunderts in Berichten ihrer Schüler*, 2007.

<sup>6</sup> See Thomas Biebricher/Peter Nedergaard/Werner Bonefeld (eds.), *The Oxford Handbook of Ordoliberalism*, 2022.

1994. He held many other positions, including Dean of the University of Bielefeld from 1967–1969, Chairman of the First German Monopolies Commission from 1973–1978, Vice-President of the Max Planck Society from 1984–1990, Advisor for Competition Policy and Economic Policy of the European Commission from 1960–1970, and Scientific Adviser for the Federal Ministry of Economic Affairs from 1960 to 2006.<sup>7</sup>

Mestmäcker intensively researched corporate law, copyright law, and international economic law. But since the publication of his doctoral thesis, his special interest had been antitrust law. And in this field, his work was reflected in numerous books and papers, particularly Immenga/Mestmäcker (eds), *Wettbewerbsrecht*, and also including *Kommentar zum Deutschen Kartellrecht*, *Kommentar zum Europäischen Kartellrecht* (7th edition 2024), and Mestmäcker/Schweitzer, *Europäisches Wettbewerbsrecht* (3rd edition 2014). These books have had great influence in Germany and Europe as authoritative references in the field of competition law and policy. Mestmäcker was awarded many important prizes, including the Ludwig Erhard Prize for Economic Policy (1980), the Orden Pour le Mérite of Science and Art (1994), the Hans Martin Schleyer Prize (1997), and the Friedrich August von Hayek-Medal (2009); moreover, he was twice awarded the Order of Merit of the Federal Republic of Germany, being bestowed the Grand Cross (1997) as well as the Cross of Merit 1st Class (1981). In addition, he was made an honorary Senator (1983) and was awarded the honorary degree of Doctor of Laws (2009) from Bielefeld University.<sup>8</sup>

In January 1993, I completed my doctoral defense at law faculty of Hamburg University,<sup>9</sup> and, in May, my dissertation “Monopoly and Competition in China’s Economy: A Comparative Study of Merger Control in the United States and Germany” was published by Mohr Siebeck and accepted as volume 35 in the book series “Research on foreign and international private law” of the Max Planck Institute in Hamburg.<sup>10</sup> In 1995, it was listed as one of principal works on Chinese competition law in Chapter 35 (“Restraint of Competition”) in the *International Encyclopaedia of Comparative Law*, Volume 3 (“international private law”).<sup>11</sup> I discovered that while the chapter included many principal works as references for competition law in developed countries, there were only two papers by Professor Münzel and my doctoral dissertation as principal works for Chinese competition law. This showed that there were indeed very few Chinese scho-

lars who raised their voice internationally in the field of competition law at that time.

In the 1980s, there were two reasons that I chose merger control as the topic of my thesis. Firstly, Professor Mestmäcker was supervisor of my thesis. The second reason was that at the end of 1987, the State Commission for Economic System Reform and the State Commission for Economy and Trade jointly issued “Several Opinions on the Establishment and Development of Enterprise Groups”,<sup>12</sup> in which it was stated that “[t]he establishment of enterprise groups must follow the principle of encouraging competition and preventing monopoly” and “[a]n industry generally does not engage in exclusive monopoly enterprise groups, in order to encourage competition between groups in the same industry, promote technological progress and improve economic efficiency.”<sup>13</sup> This meant that although China’s economic system reform at that time attached importance to expanding the scale of enterprises through enterprise alliances and the formation of enterprise groups, it also attached importance to the issue of antitrust. I consulted Mestmäcker on this topic because I had been informed that there were many doctoral dissertations in Germany addressing merger control, and I was therefore concerned that my thesis might overlap with someone else’s. Professor Mestmäcker told me that it did not matter if 30 people were writing on a same topic because everyone had his or her own perspective. He hoped that I would complete an excellent thesis based on the then current situation and the prospect of China’s economic reform, making reference to the competition laws and policies of other countries.

To this day, I have retained the comments made by Mestmäcker and Münzel as the first and second reviewers of my doctoral dissertation, and I am happy to relate that they both give it a high evaluation. In his five-page long commentary, Mestmäcker points out that “the author has provided a very accurate description and analysis of the legal and economic issues closely related to market competition and, on this basis, put forward a legislative proposal for China’s merger control. The proposal fully took into account the experience of the United States and Germany, as well as China’s special economic system, particularly the way that businesses merge and how the relevant markets are defined.” As a result, my thesis was graded “magna cum laude”.

In a discussion with Prof. Mestmäcker on my thesis, I knew he agreed with my opinion praising the theory on optimal competitive intensity as proposed by Professor Erhard Kantzenbach,<sup>14</sup> but he also pointed out a deficiency in my work in that I had not aptly examined the

<sup>7</sup> <<https://www.mpipriv.de/1075845/ernst-joachim-mestmacker>>.

<sup>8</sup> Ibid.

<sup>9</sup> The topic of my oral defense was “The EC Anti-dumping Law and Its Impact on China’s Export Trade”. According to the rules at the University of Hamburg, a doctoral defense should address a topic different than the doctoral thesis.

<sup>10</sup> Xiaoye Wang, *Monopole und Wettbewerb in der Chinesischen Wirtschaft, Studien zum ausländischen und internationalen Privatrecht*, 1993.

<sup>11</sup> See the list of major publications in Ivo Schwartz/Jürgen Basedow, *Restrictions on Competition*, Int. Encycl. Comp. L., 1995, p. 111–135.

<sup>12</sup> 国家体改委、国家经委印发《关于组建和发展企业集团的几点意见》的通知, issued on December 16, 1987, available at <[lawinfochina.com](http://lawinfochina.com)> (北大法律英文网)/<[pkulaw.cn](http://pkulaw.cn)> (北大法宝), Index number (法宝引证码) CLI4.3618.

<sup>13</sup> Available at <<http://www.reformdata.org/1987/1216/24147.shtml>>.

<sup>14</sup> The optimal competition intensity refers to such kind of market structure: there are multiple competitors, their products are relative different, and the market transparency is not very high. See Erhard

theory proposed by Professor Erich Hoppmann, who was an important economist in the Freiburg School. Based on Hayek's theory of instinct and the spontaneous order of market economy, Hoppmann made important contributions to economic theory in the area of competition policy, and he played an important role in the second revision of the German Competition Act (GWB) in 1973. In particular, Hoppmann published important works on merger control and even proposed views different from Kantzenbach.<sup>15</sup> Unfortunately, as I had perhaps focused almost entirely on the competition policy involved with M&A, I had not adequately studied the economic theories of ordo-liberalism. I asked Mestmäcker whether I should supplement or revise the thesis, and he replied that it was not necessary because in fact there were very few papers which achieved perfectness. However, my guess is that he wanted me to finish my thesis as soon as possible.

Going to Germany to study in 1988 was a key step in my life because it gave me the opportunity to travel abroad, to observe the world, to understand the legal systems of developed market economies, and in particular to engage in the study of antitrust law at an early stage when the average Chinese citizen had little knowledge of it. But here, I would like add that going to Germany to study was a pivotal step in my life also because during this time I received great help from two German professors, Mestmäcker and Münzel. In particular, Mestmäcker, as my mentor, supported my research on antitrust for 30 years subsequent to receipt of my doctoral degree and influenced my academic career deeply.

## II. My special gratitude

When I was working on my thesis at Max Planck Institute in Hamburg, I didn't have much time to talk to Mestmäcker. This was not only because my German language was not good enough; rather, it was also because Mestmäcker was always very busy. As the director of the MPI, in addition to heavy load of academic research he was obliged to attend many social activities. Additionally, as a student I had to make an appointment to communicate with him, and the time window was very short because there were often other students waiting to meet outside his office. But even with the limited contact, I still felt very much that Prof. Mestmäcker was especially kind to me as a foreign student, and he almost never refused my requests for help. Indeed, without his support and assistance, my academic research on antitrust would not have been able to achieve the results it has known until today.

The biggest difficulty I faced during my study in Germany was the language, because the completed thesis had to be at the level of German as written by a German. Further, the thesis had to be at a high level as required by the publisher; otherwise I would not receive a doctoral degree. Compared with English, German is already more difficult for Chinese speakers, and it was obviously even more difficult for me, a student who did not begin to learn German until after the age of 40. I am very grateful to Prof. Mestmäcker for his great help to me in this regard, in particular due to his decent character, his readiness to help, and his friendly persuasion, which led to Prof. Münzel's agreement and hard work in helping me polish my German thesis in terms of language and content. Additionally, Prof. Mestmäcker suggested that his former student Dr. Christoph Engel should help me with the revision of my German paper (carrying the English title of "EC Anti-dumping Law and China's Export Trade to the EC"), so that it could be published in the *Rabels Zeitschrift*. As result of these research achievements, I had numerous opportunities to participate in international conferences, including the German International Cartel Conference (IKK) and the International Competition Network (ICN), and I travelled to more than 20 countries for academic exchanges.

As a scholar, I often encountered a lack of materials for my academic research. After returning from Germany in 1994, I still returned to Germany for a few months every few years, mainly to use the libraries of the Max Planck Institutes. Additionally, I was especially lucky that Mestmäcker had been very helpful in this regard and had sent me many books and papers. The first one I received was the *Festschrift* for him that had been edited by three of his former students in 1996.<sup>16</sup> In this work, in addition to academic papers written by his colleagues and students in the fields of economic law, competition law and policy, and EU law, Prof. Hans Zacher, as the President of the Max Planck Society, and Hans von der Groeben, the former Commissioner of the European Community, highly praised Mestmäcker for his contributions. The deepest impression this *Festschrift* left on me was the long list of Mestmäcker publications, beginning in 1952 when he published his doctoral thesis and proceeding on to 1996 when the *Festschrift* was published. His publications not only gave evidence of his outstanding contributions to competition law and policy in Germany and Europe but also strongly encouraged me and inspired my future academic career.

I also received the 4th<sup>17</sup> and 5th<sup>18</sup> editions of the *Commentary on Competition Law* edited by Immenga/Mestmäcker, which covers European and German competition law. I received the 2nd edition of Eu-

Kantzenbach, *Die Funktionsfähigkeit des Wettbewerbs*, 2nd edition, 1967, p. 138.

<sup>15</sup> As an economics representative of the second generation of the Freiburg School, Erich Hoppmann succeeded Hayek as the head of the department of economics of Freiburg University in 1968. See *Manfred E. Streit*, *Freiheit und Wettbewerb*, in *Memoir of Erich Hoppmann*, <<https://www.degruyter.com/document/doi/10.1515/ordo-2008-0122/html?lang=en>>.

<sup>16</sup> *Ulrich Immenga/Wernhard Möschel/Dieter Reuter* (eds.), *Festschrift für Ernst-Joachim Mestmäcker*, 1996.

<sup>17</sup> *Immenga/Mestmacker*, *Wettbewerbsrecht, Kommentar zum Deutschen Kartellrecht, und Kommentar zum Europäischen Kartellrecht*, 4th edition, 2007.

<sup>18</sup> *Ibid.*, 5th edition, 2014.

ropean Competition Law prepared by Mestmäcker/Schweitzer.<sup>19</sup> Additionally, I received 14 papers from Mestmäcker by way of mail or in person, including “öffentliche Unternehmen und gemeinwirtschaftliche Dienste in der EU” (2004),<sup>20</sup> “Franz Böhm” (2007),<sup>21</sup> “Europäische Prüfsteine der Herrschaft und des Rechts – Beiträge zu Recht, Wirtschaft und Gesellschaft in der EU” (2007),<sup>22</sup> “Wettbewerbsfreiheit und unternehmerische Effizienz. Eine Erwiderung auf Schmidtchen” (2008),<sup>23</sup> “Recht und Politik in der EU” (2008),<sup>24</sup> “50 Jahre GWB: Die Erfolgsgeschichte eines unvollkommenen Gesetzes” (2008),<sup>25</sup> “Soziale Marktwirtschaft-Eine Theorie für den Finanzmarkt nach der Krise?” (2011),<sup>26</sup> “Private Macht-Grundsatzfragen in Recht, Wirtschaft und Gesellschaft” (2016),<sup>27</sup> and “Friedrich Schiller über Freiheit in der europäischen politischen Gesellschaft” (2016).<sup>28</sup> In my experience, every few years Mestmäcker would compile a collection of his papers from the preceding years into a book series titled “Wirtschaftsrecht und Wirtschaftspolitik”. I received two of these books. One is named “Wirtschaft und Verfassung in der Europäischen Union – Beiträge zu Recht, Theorie und Politik der europäischen Integration”, a 2003 publication which collected 28 papers; another is “Europäische Prüfsteine der Herrschaft und des Rechts – Beiträge zu Recht, Wirtschaft und Gesellschaft in der EU”, which in 2016 collected and published 31 papers. I received the second in September 2017 at the Max Planck Institute in Hamburg. When I thought to myself that this book was published at his age of 90, and that most of the collected papers were written and published when he was aged 80 to 90 – and that this book was the last token of memory for me – I was so moved that my eyes were full of tears, and my heart was full of emotion and thoughts!

In front of Prof. Mestmäcker, I may have perhaps complained about the lack of research materials on competition law in China. He wrote to me in 1995 and told me that if I found any interesting books in the series “Economic Law and Economic Policy”, edited by him, he could send them to me. In February 1998, he told me that, through his efforts, the Zeit-Stiftung had agreed to donate a batch of books on German and European economic law to the Institute of Law of the

Chinese Academy of Social Sciences, where I worked; the materials were to be funded with 15,000 marks in 1998 and 10,000 marks in 1999, and the books were to be purchased by the Max Planck Institute in Hamburg. In order to get the books soon, Prof. Mestmäcker asked me to finish a book list as soon as possible. He said that he regretted that 25,000 marks was too little to provide the necessary books to the library of my Institute. But he was happy that the fund should be enough to help me with my own academic research. In fact, 25,000 marks was not a small figure at that time, and after the books arrived, I set up a small library at the Study Center for German and European Law in my Institute, so that at least my colleagues who knew German could use them.

Prof. Mestmäcker was not only the supervisor of my doctoral thesis but also someone always willing make recommendation and open further doors. In 1997, when as part of an application for a China-EU Higher Education Cooperation Project titled “Research on Competition Law in the European Community” I needed to demonstrate that I had a European cooperative partner, I wrote to Mestmäcker for help on December 13, 1997. Considering that he was no longer the director of the Max Planck Institute in Hamburg, I wrote also to then-director Prof. Klaus Hopt on December 22. It was during the timeframe of Christmas and the coming new year, so I expected the mail and a response to be very slow. To my surprise, Mestmäcker wrote to me upon his receipt of my letter on January 5, 1998, and promised that he would serve as the European partner for my application. On January 12, I received a fax from Mestmäcker stating that Director Hopt had agreed with him and that the Max Planck Institute in Hamburg would be the European partner for my research project. Additionally, the Institute invited me to be a visiting scholar for a period of time during the project. As if I were his own child, Mestmäcker advised me that his letter and the fax from the Institute could be handed over to the European side to help me with the cooperative project.

I know that Prof. Mestmäcker accepted at least three Chinese as his doctoral students, which shows that he paid great attention to China during its transition from a planned economy to a market economy. As a result, he was very interested in the academic publications of these students. In 1996, when I published in China the book entitled “Antitrust Law Issues in Mergers and Acquisitions” (based on my doctoral thesis in German<sup>29</sup>), he was very happy and said that he hoped that this book would have an important influence on the rule of law in China in terms of the market competition order. When I was preparing to publish the book “Competition Law in the European Community”, after my project under a China-EU Higher Education Cooperative Project in 2000, I asked Mestmäcker to write a foreword for my book. He readily agreed, and he not only stated in

<sup>19</sup> Mestmäcker/Schweitzer, *Europäisches Wettbewerbsrecht*, 2nd edition, 2004.

<sup>20</sup> Mestmäcker, in: Helmut Schmidt Rechart von Weizsaecker (eds.), *Innenansichten aus Europa*, 2004

<sup>21</sup> Mestmäcker, in: *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler*, Volume 1, Stefan Grundmann & Karl Riesenhuber (eds.), 2007

<sup>22</sup> Mestmäcker, in: *Ordo – Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, Volume 58 (2007).

<sup>23</sup> Mestmäcker, in: *Ordo – Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, Volume 59 (2008).

<sup>24</sup> Mestmäcker, in: Ernst-Joachim Mestmäcker/Wernhard Moschel/Martin Nettesheim (eds.), *Verfassung und Politik im Prozess der europäischen Integration*, 2008.

<sup>25</sup> Mestmäcker, *WuW* 1/2008.

<sup>26</sup> Mestmäcker, in: *Ökonomie versus Recht im Finanzmarkt? Eberhard Kempf/Klaus Lüderssen/Klaus Volk* (eds.), 2011.

<sup>27</sup> Mestmäcker, in: *Private Macht*, Florian Möslin (eds.), 2016.

<sup>28</sup> Mestmäcker, in: *Ordo – Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 2016.

<sup>29</sup> Xiaoye Wang, *Antitrust Law Issues in Mergers and Acquisitions (企业合并中的反垄断问题)*, 1996. This book was awarded second prize of the Qian Duan Sheng Outstanding Achievements in China in 2008.

the foreword the great significance of EC competition law as the cornerstone of the European Economic Community but also complimented the book's merit and its potential "to enable the largest country on earth to draw on European experience in its legislation and its relations with other countries to carry out a scientific comparative study in the field of antitrust law, and that it was very important for the people to understand the economic order in the non-centralized economy." Additionally, he stated also that it was his honor to have opportunity to write the foreword to congratulate me personally, and he hoped that the thoughts I expressed in the book would be further disseminated and have a long-term impact.<sup>30</sup>

In 2014, I published a collection of essays titled "The Evolution of China's Anti-Monopoly Law" (with Edward Elgar in the UK). In order to promote the book globally, Mr. Elgar, as the funder of this publishing house, encouraged me to ask a few international scholars to write brief reviews that could appear on the back cover of the book. I asked Prof. Mestmäcker and Prof. Eleanor Fox of New York University for help. The text Mestmäcker provided read: "The transformation of a planned economy to a more market-oriented economy is among the most challenging tasks of responsible political leadership. China's move towards a market economy left the outside world in unbelieving wonder. The adoption of an anti-monopoly law is a necessary and a particularly difficult part of such a project. An anti-monopoly law interferes with vested political and economic interest. The certainties of plans are gradually substituted by the uncertainties of markets and the vagaries of competition. Such decisions have a constitutional dimension. They would not be possible without profound legal and economic advice by scholars who are prepared to become identified with and argue for the new order. Such a scholar is Prof. Xiaoye Wang. The account of her life indicates the long way she had to travel to become one of the foremost competition law scholars in her own country and on a truly global level. This book highlights her scholarly accomplishments as well as her courage and independence in the service of an effective Chinese anti-monopoly law. It has been my good fortune that Prof. Wang at the beginning of her career accepted my advice in the preparation of her doctor's dissertation at the Hamburg Max-Planck Institute."<sup>31</sup> When I read this review, on the one side, I was glad that Mestmäcker was satisfied and even had a sense of pride with me, and on the other side, I was very touched as without Mestmäcker as my mentor, I would probably be in a different situation – at least in the field of competition law and policy, I would not have been

recognized by the international community, as is the case today.<sup>32</sup>

### III. Mestmäcker's huge academic legacy in China in China

His outstanding achievements led to Mestmäcker's becoming an indisputable academic authority and greatly influencing the generation and development of competition law in Germany and Europe. However, his academic influence in this area is by no means limited to Germany and Europe, because he has also had great influence in China.

Prof. Mestmäcker visited China twice in his lifetime. The first time was in 1986; the second time was in November 1997, when he participated in the Sino-German Symposium on Comparative Anti-monopoly Law held by the Institute of Law of the Chinese Academy of Social Sciences in Beijing. This symposium may have been the first international conference on competition law and policy in China, and it was also the first conference organized by myself. On the German side, in addition to Prof. Mestmäcker, Dr. Dieter Wolf, as the president of the Federal Cartel Office, and Prof. Peter Behrens of the University of Hamburg attended the conference. In consideration of China's national conditions, Mestmäcker brought and presented a paper entitled "Die staatlichen Unternehmen im Wirtschaftsrecht Deutschlands und der EWG".<sup>33</sup> Additionally, I translated his papers on "Wirtschaftsrecht"<sup>34</sup> and "Fusionskontrolle im Gemeinsamen Markt zwischen Wettbewerbspolitik und Industriepolitik",<sup>35</sup> Professor Fang Xiaomin translated the paper on "Europäisches Wettbewerbsrecht im Zeichen der Globalisierung",<sup>36</sup> and Dr. Dong Yiliang translated his English paper titled "The Development of German and European Competition Law with special Reference to the EU Commission's Article 82 Guidance of 2008".<sup>37</sup> Relative to Mestmäcker's overall academic achievements, these papers that were translated into Chinese should be deemed a drop in an ocean, but they reflect his important thoughts on the state, order, power, freedom, society, human nature, and many other aspects. What follows are some highlights of his thoughts as excerpted from several papers I've translated.

#### 1. Economic order is exactly the economic constitution

As the juristic representative of ordo-liberalism, Mestmäcker very often emphasized that the economic order

<sup>30</sup> Xiaoye Wang, *Competition Law in the European Community* (欧共体竞争法), 2001. This book was awarded second prize of the Outstanding Achievements of the Chinese Academy of Social Sciences in 2004.

<sup>31</sup> Xiaoye Wang, *The Evolution of China's Anti-Monopoly Law*, 2014. This book was awarded second Prize for Outstanding Achievements of the China's Law Society (2017) and second prize of the Outstanding Achievements of China's Ministry of Education (2019).

<sup>32</sup> Adrian Emch/Wendy Ng (eds.), Wang Xiaoye Liber Amicorum, *The Pioneer of Competition Law in China*, 2019.

<sup>33</sup> E. J. 麦斯特麦克: 《德国与欧共体经济法中的国有企业》, in: Wang Xiaoye (ed.), *Anti-Monopoly Law and Market Economy* (反垄断法与市场经济), 1998, pp. 108–122.

<sup>34</sup> Mestmäcker, *RabelsZ*, 54 (1990), pp. 409–430.

<sup>35</sup> Mestmäcker, *Europarecht*, H.4/1988.

<sup>36</sup> Mestmäcker, in: Jürgen Schwarze (eds.), *Europäisches Wettbewerbsrecht im Zeichen der Globalisierung*, 2002.

<sup>37</sup> Mestmäcker, in: Lorenzo Federico Pace (ed.), *European Competition Law: The Impact of the Commission's Guidance on Article 102*, 2011.

of a state is exactly its economic constitution. He said, that economic law refers to the economic order and the latter refers to the rules that regulate the behaviour of economic agents who play an important role in economic operations. The basic principles of the economic order depend on the method of economic planning, which can be legally regulated in different ways and with varying degrees of a binding nature. If the constitution provides for it, these principles can be formally called the economic constitution. Regardless of its status in the constitution, the economic order can be regarded as the economic constitution, which illustrates the normative nature of its content and the broad significance of its principles.<sup>38</sup>

Mestmäcker also made clear that the legal rules protecting competition are exactly the economic constitution of a state with a market mechanism. He wrote: “The market economic order is characterized by autonomous (decentralized) planning of economic entities. The right to economic planning can be guaranteed by normal laws or constitution. It includes the freedom to choose and engage in an occupation, the freedom to contract, private ownership of the means of production, the freedom of association, and the freedom of collective bargaining between workers and employers. Private law holds that the right to plan the economy independently is self-evident. Together with private autonomy, the system of subjective rights, and the law of illegal practices, it regulates the legal framework of any market economic order. The coordination of decentralized economic plans is achieved through market prices, which are formed by competition under conditions of free access to the market. Competition forces companies to be cost-oriented and rewards those who discover new ideas. Therefore, we tend to maintain competition as a process of harmonizing and discovering the essential elements of a market economic order.”<sup>39</sup>

Referring to the relationship between economic order and social order, Mestmäcker points out that “in other theories of the state and society, the autonomy of economic power and universal egoism in a market economic system is considered so dangerous because democratically legitimate states should be given unlimited freedom of economic policy action. Our challenge, however, is to manage the economy without making the state its master or servant.”<sup>40</sup>

## 2. The market economy has its spontaneous and instinctive order

As the juristic representative of *ordo-liberalism*, Mestmäcker emphasized that “[t]he legal difference between a planned economy and a market economy can be described in terms of the contrast between organization and spontaneous order.”<sup>41</sup> “Wherever general

freedom of action is considered a principle, and the restrictions imposed on it by the state are an exception, spontaneous order emerges as a legal order. The general freedom of action is based on the fact that the individual in the society does not understand the needs of the society as a whole. In such a case, the reasonableness and legality of an individual’s actions cannot be judged without considering whether their actions are in the definite public interest. Similarly, it is unreasonable to impose legal obligations on these individuals, as they do not know in advance whether their actions will benefit the country’s economy as a whole. The common feature of law is that it does not take into account the often-contradictory expectations, motivations and purposes of individuals, but the system of free pricing and free competition, established through legislation and coordination, is the instinctive order of the market economy. The legislative task of the market economic system is to formulate norms that harmonize individual behavior with the instinctive order of the market.”<sup>42</sup>

Mestmäcker also pointed out that based on the spontaneous and instinctive order of the market economy, “the most important prerequisite for reconciling political freedom and economic freedom with the demands of economic efficiency is the separation of powers between the state and business. This separation is no less important than the separation of powers between the legislative, executive and judicial branches.”<sup>43</sup> He said also that the separation of powers between the state and business needs two prerequisites. On the one hand there is the economic independence of business from the state, and “in this regard the economic power of the state should be constrained first and foremost by making an organizational distinction between managing activities of the state and the activities of enterprises, and subjecting the activities of state-owned enterprises to the general rules of economic law, in particular competition law.”<sup>44</sup> On the other hand, “the power separation between the state and business also requires the political independence of the state from business. This is because in a market economy, the independence of the state is threatened by private power. In particular, private power is a means of acquiring economic power to realize economic plans. In this case, in order to safeguard economic order, the main task of the state is to resist the creation of economic power and its abuse, because competition is the greatest and most creative means of disempowerment in history.”<sup>45</sup>

Turning to the market order, Mestmäcker warns that private ownership of the means of production should not be deemed as a sign of market economic order. He said that “under the planned economy, the ownership of the means of production is the core element determining the economic order of the state. Since state ownership involves all sectors of the economy, the enterprises in these sectors are necessarily sub-

<sup>38</sup> Mestmäcker (Fn. 34), pp. 410.

<sup>39</sup> Ibid., p. 411.

<sup>40</sup> Ibid., p. 416.

<sup>41</sup> Ibid., p. 411.

<sup>42</sup> Ibid., p. 413.

<sup>43</sup> Ibid., pp. 416–417.

<sup>44</sup> Ibid., p. 417.

<sup>45</sup> Ibid.

ject to the economic plan of the state. In this case, the economic law of the whole country is the legal system covering state-owned enterprises. But under the market economy, even though private ownership is a basic principle, it is not sufficient to establish a market economic system, because private ownership has completely different characteristics and changes constantly its functions along with market changes, in particular with the effectiveness of market competition."<sup>46</sup> He cites Walter Eucken and observes that "[j]ust as private ownership of the means of production is a prerequisite for the competitive order, the competitive order is equally a prerequisite for ensuring that private ownership of the means of production does not lead to economic and social grievances."<sup>47</sup>

### 3. The purpose of anti-monopoly law and the evaluation standard for its enforcement

As an authority in the field of competition law and policy, Prof. Mestmäcker often spoke of the freedom of competition as a spontaneous and instinctive order of the market economy, and of the protection of freedom of competition as an essential part of the market economic order. He stated that "[t]he purpose of anti-competitive restriction rules is to combat monopolistic tendencies related to competition. They are a necessary part of market order. The restrictions on the freedom of action of enterprises imposed by such laws are not intended to replace competition, but to maintain or restore its functioning as far as possible. The appropriate criteria must be determined according to the nature of the competition, as a process of coordination and discovery. In fact, one of the characteristics of the competitive process is that it does not know in advance the specific results it is supposed to produce."<sup>48</sup>

He said "the rules against restricting competition should be the rules of the game. They must oppose individual acts that restrict competition without specifying the desired outcome. Moreover, they must be general and abstract, in accordance with the requirements of the rule of law and the nature of spontaneous order. Consistent with these principles, contracts and acts designed to restrict individuals' freedom of competition are prohibited. In particular, therefore, we can prohibit cartels that restrict investment, production, or price competition, or that impede competitors' access to markets. Merger and acquisition and abuse of a dominant position should not be determined on these criteria. Because here it is necessary to consider the legality of a transaction or conduct based on the balance between legitimate individual economic interests and the public interests."<sup>49</sup>

Mestmäcker spoke also on the rationality of the extraterritorial application of antitrust law. He said that "the competition laws in most countries apply also to the

restriction of competition that occurs abroad but has domestic implications, and in this case, conflicts in the application of law may arise. In order to avoid such conflicts, some states restrict a wide range of extraterritorial applications by requiring international, substantive or conflict-of-law rules through prohibitive norms. However, only competition laws, which insist on the opening of markets and prevent cross-border restrictions on competition, will have extraterritorial effect. Such effect does not depend on what the legislator expects or does not expect, prescribe or not, and therefore there is no waiver of the extraterritorial application of cartel law. If a country renounces the extraterritorial application of its cartel law, it is unlikely that it will be able to establish an effective rule on the market behaviors of its domestic firms."<sup>50</sup>

### 4. State-owned enterprises under the market economy

As a representative of ordo-liberalism, Mestmäcker paid great attention to competition law in the context of a planned economy and a market economy, and many publications addressed the state-owned enterprises in Germany and the EC.

In 1997, at a conference on competition law in Beijing, he gave a speech on state-owned enterprises in which he said that "the purpose of the state's participation in enterprise activities and the operation of state-owned enterprises varies from country to country and even within a country. One of the more general and more important distinction is whether state-owned enterprises act as instruments of the state's economic policy, or whether they are obliged to behave in the same way as private enterprises. In the latter case, the policy function of state-owned enterprises is reduced to 'zero'. This approach is consistent with the basic principle of market economy, which is a clear distinction between the functions of the state and those of enterprises. In this case, the basic principle of economic law, namely the legal rules applicable to private enterprises, in particular cartel law and the law against unfair competition, also apply to state-owned enterprises. If state-owned enterprises are to be used as instruments of state economic policy, the state should not expect them to be as successful in competition and as profitable in the market as private enterprises. If the state subsidizes the business activities of these enterprises through taxation, breaks even through tax incentives in case of losses, or prevents or restricts competitors from entering the market through sovereign acts, that is, where there is an organizational link between the sovereign functions of the state and the functions of the enterprise, as in the case of enterprises with managerial functions, the competitive environment of such a market will be distorted."<sup>51</sup>

Mestmäcker noted also that the German GWB and EU competition laws guarantee the same competition conditions for state-owned enterprises and private

<sup>46</sup> Mestmäcker (Fn. 33), p. 111.

<sup>47</sup> Ibid. Mestmäcker quoted Walter Eucken, *Grundsätze der Wirtschaftspolitik*, 6th edition, 1990, p. 275.

<sup>48</sup> Mestmäcker (Fn. 34), p. 420.

<sup>49</sup> Ibid., p. 420.

<sup>50</sup> Ibid., p. 421.

<sup>51</sup> Mestmäcker (Fn. 33), p. 109.

enterprises. He cited the *Höfner* case in Germany as an example, thus stressing the important difference between the abuse of state power and the abuse of a dominant position by private enterprises, i.e. “it is possible for private enterprises to exclude competitors through strategic behavior which generally requires a comparison of costs and benefits. That is to say, in order to protect themselves from potential competition with the aim to achieve highest profits, private monopolists generally consider the elasticity of consumer demand when they artificially reduce market supply. But when the state grants special protection to privileged enterprises through its sovereign power, it generally thinks neither of the possibility of these enterprise’s business and their own interests, nor of the interests of consumers.”<sup>52</sup> He concluded that state monopolies operate at the expense of consumers, as they obviously restrict production, marketing and technological development.

Mestmäcker pointed out that the scope and extent of state-owned enterprises in a market economy should not exceed the boundary from quantitative change to qualitative change. He said that “[s]tate involvement in business activities does not necessarily lead to conflict with the market economy system if it is in harmony with the market economy when there is effective competition in the market and the state does not grant privileged status to state-owned enterprises. However, the higher the proportion of the state-owned economy in the overall economy, the bigger the possibility that the market economy suddenly changes into a state-controlled economic system. Therefore, the scope and extent of the state-owned economy under the market economy, in any case, should not go beyond this boundary. If the function of the private economy is to a large extent expressed in the operation of a state-owned economy, there may be a quantitative change to a qualitative change. In a situation where state ownership of the means of production accounts for the majority of the whole means of production, on the one hand, the state will not tolerate private enterprises harming the economic interests of state-owned enterprises, and on the other hand, private enterprises cannot engage in their own business activities without taking into account the operation of state-owned enterprises.”<sup>53</sup> This shows that even if private ownership of the means of production cannot be regarded as a sign of the market economic order, it is difficult to identify an economic system as a market economy if the state-owned economy accounts for a large proportion of the overall economy, because in such a situation, the enterprises with ownership in the hands of the state cannot compete effectively with each other.

#### IV. A few last words

From the point that Mestmäcker, as a student, entered the economic law class of his mentor Franz Böhm 70

years ago, “competition as a steering and control device and its legal protection”<sup>54</sup> had become a research topic that he never gave up in his life, and his achievements in this area have been immortalized forever.

From Mestmäcker’s monograph published at the age of 90, titled “A Touchstone of European Power and Law – Contributions to Law, Economy and Society in the EU”, we know that even though his lifelong academic work revolved around the grand topic of competition law and policy, the scope of his work was extremely broad. That means that, in addition to legal systems, he also researched philosophy of law, economic analysis of law, the history of legal thought, jurisprudence, and sociology, such that we encounter Hobbes, Locke, Montesquieu, Adam Smith, Hume, Kant, Hegel, Marx, Max Weber, Nietzsche, and Schiller very often in his works; especially Kant’s philosophy of law had a significant influence on his academic research.<sup>55</sup> The English paper he presented in this monograph titled “A Legal Theory without Law – Posner v. Hayek on Economic Analysis of Law”<sup>56</sup> has left a deep impression on me. Here, he compared Posner and Hayek, two great men who have made significant contributions to law and economics, but he pointed out firmly that law is not the handmaiden of economics, because it has its own meaning. These works not only show that he is erudite and knowledgeable; they also leave us valuable spiritual wealth. For example, from the perspective of legal methodology, “A Legal Theory without Law” tells us at least that in the study of law, including the economic analysis of law, we should consider legal philosophy, legal history, and legal comparison; further, different countries should consider different national conditions.

Finally, it should be noted that Mestmäcker became an undisputed academic authority in the field of competition law and policy in Germany, Europe, and even globally, and that in addition to the significant influences of his own academic achievements and social activities, a larger number of his students and their students have also played and have been playing an important role in carrying on his academic legacy.<sup>57</sup> Here, I would like to say that Professor Mestmäcker also has students – and their students – in China. These people have played, are playing, and will continue to play their due role in China’s rule of law. As China “adheres to the principles of marketization and rule of law,

<sup>54</sup> See Werner Mussler, Ernst-Joachim Mestmäcker, *Frankfurter Allgemeine Zeitung*, April 26, 2024, p. 26.

<sup>55</sup> See Jens Petersen, Rezension: Ernst-Joachim Mestmäcker: *Europäische Prüfsteine der Herrschaft und des Rechts-Beiträge zu Recht, Wirtschaft und Gesellschaft in der EU*, *Archiv für Rechts- und Sozialphilosophie* 103 (4), 2017, pp. 553–554.

<sup>56</sup> Mestmäcker, *A Legal Theory without Law – Posner v. Hayek on Economic Analysis of Law*, in: Walter Eucken Institut (eds.), *Beiträge zur Ordnungstheorie und Ordnungspolitik*, Volume 174, 2007.

<sup>57</sup> E.g. Ulrich Immenga, Volker Emmerich, Wernhard Möschel, Daniel Zimmer, Heike Schweitzer et al., referred to by Werner Mussler, in Ernst-Joachim Mestmäcker, *Frankfurter Allgemeine Zeitung*, April 26, 2024, p. 26. I would also like to extend my deep condolences to the colleagues, friends and family of Prof. Dr. Heike Schweitzer, who passed away in June 2024 at the young age of 56.

<sup>52</sup> *Ibid.*, pp. 117–118.

<sup>53</sup> *Ibid.*, pp. 111–112.



and strengthens the fundamental position of competition policy”,<sup>58</sup> it is of course still necessary to learn from the experience of developed market economies, especially from Germany and the EU, in the improvement and implementation of China’s competition law. There is no doubt that Mestmacker’s great works on competition law and policy, which are related to law, economy, and society, will continue to be an important source for us, allowing us to absorb ideas, theories, experience, and to acquire various spiritual wealth.

Professor Ernst-Joachim Mestmäcker will live in my heart forever!

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<sup>58</sup> See Art. 4 of China’s Anti-Monopoly Law (中华人民共和国反垄断法), promulgated on August 30, 2007, revised in June 2022; Chinese-English available at <lawinfochina.com> (北大法律英文网)/<pkulaw.cn> (北大法宝), Index number (法宝引证码) CLI. 1.5128034; Chinese-German in: ZChinR 2023, pp. 48–64.