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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Paper by Dr. Tilman Makatsch --

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THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT - GERMANY

By Dr. Tilman Makatsch

Deutsche Bahn AG ("DB") is a transport, networks, and logistics company. DB operates the German rail network, provides public rail and bus transport, and with DB Schenker provides air-, land-, and water-freight services. With annual purchases of approx. EUR 25 billion concerning a broad range of products, most cartels affect DB, either directly or indirectly. German company law requires DB to assess and where necessary to enforce cartel damage claims against its suppliers. For this purpose DB established a special competition litigation unit in 2013 which I am heading. Currently, we have around 65 cartel proceedings on our watch-list. In eleven cases, where we could not obtain satisfactory out-of-court settlements, we are pursuing (follow-on) damage claims in different European jurisdictions and the United States (e.g. air-cargo, interchange-fees, and rail-tracks).

1. Comment – Can the conflict of public enforcement and private enforcement be resolved by incentivizing early settlements?

1. The competition law system in Germany is based on two pillars, public enforcement and private enforcement. The two are not (yet) equal. Public enforcement still has more weight.

2. The main public enforcement objectives are general and special deterrence in order to prevent cartels that are detrimental to economy. This is mainly attempted by imposing fines on individual cartel members high enough to not only deter the individual cartelist, but also to serve as a deterrent to the general public. In the past the overall amount of fines has increased significantly, as has cartel detection. However, cartel detection is closely related to the establishment of the leniency system in Germany. At the same time, private enforcement has gained in importance over the past fifteen years.[1] Its primary aim is to compensate for damages suffered due to cartel infringements.

3. In our experience the biggest challenges to successful private enforcement are - *inter alia* - information asymmetries, slow and cost intensive proceedings, and significant legal uncertainty.

4. By its very nature cartels are (generally) secret. But in order to establish the loss in a follow-on claim (let alone stand-alone claims), access to evidence held either by a competition authority or another party –especially the cartelists – is eminent. The quest to overcome the information asymmetries - and court proceedings in general - can be very lengthy and produce soaring legal costs. At the same time, with the limited information available bringing a claim implies significant legal uncertainty. The Commission

[1] In 2001 the Court of Justice of the European Union (CJEU) ruled in Courage (Case C-453/99, Courage vs Crehan [2001] ECR I-6297) that everybody has a right to claim compensation caused by competition law infringements.

wants to strengthen private enforcement across the EU. For this purpose it has recently passed legislation which has to be transformed into Member State law by 2016.[2]

5. The main **conflict** between public enforcement and private enforcement relates to the leniency system and follow-on damage claims. In the interest of incentivizing cartelists to apply for **leniency** competition authorities fear that cartelists are deterred from lodging a leniency application because the risk of **exposure to follow-on damage claims** is considered too high; e.g. if leniency material is not properly protected from the **document access** requests by private litigants.

6. In the United States, although the exemption for individuals from criminal sanctions for their participation in antitrust infringements is one major driver for leniency applications[3], generally the same conflict subsists. In order to resolve the conflict, the 2004 Antitrust Criminal Enhancement and Reform Act stipulated rules to make leniency even more attractive for firms. Leniency now lowers the damages from treble damages to single damages (detrebling), and limits the liability to liability for own infringements and for own customers. In relation to the EU (and Germany in particular) cartel enforcement in the United States appears to rely more heavily on private enforcement.

7. It has been already suggested to resolve the conflict between public and private enforcement in Germany by integrating the private compensation mechanisms into public enforcement[4], e.g. by creating a one stop shop procedure.[5] However, I do not suggest merging public and private enforcement. My idea is rather to create a **two-step procedure** at the Bundeskartellamt that splits the decision in two: first a **declaratory decision**, and second, after an **interim period designed to facilitate settlements** with potential claimants, a **final decision** that **takes into account** the **settled amounts**. Settlements are a fast and inexpensive way to reach a satisfactory result both for cartelists and damage claimants vis-à-vis long and costly court claims.

1.1 Two-Step procedure

8. As a **first step** in the two-step procedure the Bundeskartellamt should render a declaratory decision finding a competition law infringement. For this purpose, the authority should focus on the infringement of competition law and possible justifications. The setting of a fine should be reserved for the second-step. The Bundeskartellamt should be required to publish a meaningful non-confidential version of the declaratory (first-step) decision in a timely manner, even in case of a settlement between the authority and cartelists.

9. The declaratory decision should be followed by an **interim phase** of e.g. one year prior to the commencement of the procedure and the setting of a fine. In this phase cartelists should be incentivized to conclude settlement agreements with third party claimants. Potential claimants should be awarded time to (further) evaluate their claim to enter into meaningful settlement talks with the cartelists. To facilitate

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2 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1 – 19.

3 In Germany criminal sanctions for individuals exist for bid-rigging, but the leniency system does not award relief from criminal prosecution.

4 Canenbly/Steinvorth, in: FS 50 Jahre FIW, 143, 157; Sir Jeremy Lever, Opinion: Whether and if so how, the EC Commission's Guidelines on setting fines for infringements of Art. 81 and 82 of the EC Treaty are fairly subject to serious criticism, 2007, paras. 33 et seq.; Milutinovic in Amato/Ehlermann, EC Competition Law, 2007, 725, 754; Niemeier, WuW 2008, 927.

5 Canenbly/Steinvorth, in: FS 50 Jahre FIW, 143, 156 et seqq.

settlements also from a cartelists' perspective, subsequent fines could be reduced if and to the extent settlements were agreed upon.

10. After the interim period has lapsed, the competition authority should, in a **second step**, render a final decision in which the amount of the fine is determined. As mentioned above, in this respect the competition authority should be required to take into account the total amount negotiated in settlement agreements with and paid out to third party claimants in the interim phase. To properly merit interim period settlements the overall fine amount should be reduced accordingly, as a part of the profits are skimmed of via the settlements. However, in order to give cartelists a real incentive to settle, a "bonus"-amount should be deducted from the fine on top of the deduction of the settled amounts. A deduction of 15% appears appropriate.

1.2 In line with current legislation

11. The two-step approach is broadly in line with current legislation concerning the setting of the amount of the fine in cartel-infringement proceedings.

12. Prior to the amendment of the Act on Restraints of Competition ("ARC") in 2005[6] the excess profits that resulted from the cartel infringement formed the base for the calculation of the fine (Section 17 (4) Act on Regulatory Offences); any further amount had a sanctioning character.[7] Hence compensatory payments, i.e. settlements should have decreased the base-fine amount.

13. Although the Bundeskartellamt is no longer required to take the economic benefits into account for setting the fine, it may still do so according to Section 81 (5) ARC and Section 17 (4) of the Act on Regulatory Offences. The opportunity principle governs (cartel) administrative offence proceedings under German law. Accordingly, it is within the discretion of the Bundeskartellamt to close the administrative offence proceedings in view of compensatory measures.[8] Moreover, Section 34 (1) ARC stipulates that the cartel authority may order the skimming off of the economic benefit and require the undertaking to pay a corresponding amount of money. This shall not apply if the economic benefit has been skimmed off by the payment of damages, or the imposition of a fine.[9]

14. The EU damages directive[10] provides that "a competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor" (Art. 18 (3) of the Directive).

6 See. BGBl. 2005 I p. 1954.

7 Although in practice the Bundeskartellamt did not effectively differentiate between the two in its decisions.

8 Section 47 (3) of the Act on Regulatory Offences does not oppose to this. It is specifically applicable in situations where the payment to non-profit-organizations is ordered as a compensatory measure.

9 However, the Bundeskartellamt states in its guidelines for the setting of fines in cartel administrative offence proceedings that it " (…) no longer focuses on the excess profit generated by the cartel and where the upper limit can even be lower than the excess profit".

10 Directive of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

1.3 Benefits

15. From the perspective of both the cartelists and the third party claimants, such an integrative approach to streamline the public enforcement procedure would solve many of today's public and private competition law enforcement issues.

16. Both cartelists and private litigants are **spared from high costs** which normally occur in court proceedings; such costs typically include legal expenses for the representation in court, (further) expert reports/economic studies, and expenses (including opportunity costs) for own manpower to supervise external counsel and undertake internal data collection.

17. Early settlements would also **speed up the process**, as it may take a decade to obtain a final and binding decision on damages. Moreover settlements award parties a reliable basis for long-term planning. **Court procedures are a liability**, especially for the defendants. The total amount of the damages often remains unclear. At the same time companies are generally faced with the need to establish adequate provisions in the budget.

18. Moreover, third party claimants benefit since the **information asymmetries** vis-á-vis the cartelists are **mitigated** where settlements in the interim period are reached. Especially the burden of proof in relation to the damages suffered from the cartel weighs less heavy on the claimant in the settlement environment.

19. Another factor to take into account is that **leniency information becomes less valuable** in a situation where early settlements are common. In ongoing proceedings, competition authorities are normally not required to provide access to the file. Especially access to leniency material would not be necessary, once the competition authority is required to publish a non-confidential version of the decision meaningful enough to enable private litigants to evaluate their claims. In consequence leniency material would become less relevant for private litigants.

20. Last, a two-step procedure resulting in increased settlements would **ease the workload** of the courts and enable them to better concentrate on the problematic cases.

2. Questions (Appendix 1)

2.1 Overview of private enforcement in your jurisdiction

2.1.1 What is the status of private enforcement in your jurisdiction? Are there recent developments in this area?

21. There is a long tradition of private antitrust litigation in Germany.[11] Private enforcement has seen a rise in the last ten years especially concerning damage claims based on competition law infringements. Such claims have been significantly strengthened by the 7.th amendment of the Act on Restraints on Competition ("ARC"). However, court proceedings tend to be slow in comparison to certain other jurisdictions. Without Discovery/Disclosure private litigants tend to be particularly disadvantaged when it comes to obtaining information.

2.1.2 What are the overall objectives of public and private enforcement in your jurisdiction?

22. As other competition law systems, German competition law is based on two pillars, public enforcement and private enforcement.

23. The main public enforcement objectives in Germany are general and special deterrence. The objective is to prevent cartel infringements that are detrimental to economy and harms competition. Cartel agreements are viewed to generally result in excessive prices coupled with lower product quality and/or choice. At the same time the elimination of competition reduces the innovative potential of the companies. Cartels thus hurt the economy as a whole and the consumer in particular. Fines are set in a range to (ideally) deter companies and individuals from pursuing cartel activities.

24. In Germany private enforcement has always been a part of competition law. The main aim is to award compensation to those who have suffered loss due to the competition law infringement. However, the deterring nature of private enforcement is also acknowledged.

2.2 Instruments to foster private enforcement

2.2.1 Is there a right for private litigants to claim damages in your jurisdiction? Is there a right to full compensation? Is this a general right or is it specific to antitrust claims?

25. Private litigants have the right to claim damages in Germany in accordance with Section 33 (3-5) ARC. Section 33 (3) ARC provides that whoever intentionally or negligently commits an infringement of competition law shall be liable for the damages arising therefrom. A claimant is entitled to the compensation for the loss suffered from the infringement of the competition rules. The financial and commercial situation of the claimant (at the time of the judgment) is compared to a hypothetical scenario without such an infringement of the completion rules ("but-for" test). The difference of the two situations accounts for the amount of the damages. Thus it grants the right to full compensation of damages that the claimant actually did suffer due to the infringement. This right to full compensation is a general civil law right in Germany.

[11] Although the Ashurst Study concluded that there were only very few cases in Germany based on Art. 81 EC (now Art 101 TFEU), see Waelbroeck/Slater/Even-Shoshan, Study on the conditions of claims for damages in case of infringement of EC competition rules, 2004 (Ashurst Study), there are much more cases relating to abuse of dominance and vertical restrictions.

2.2.2 Who has standing to file an action for damages and in what circumstances?

26. Any "affected person" has standing to file an action for damages (Section 33 (1) ARC). Affected persons are competitors or other market participants impaired by the infringement. It is established case-law that the ARC does not differentiate between directly or indirectly affected persons (This is a result to the *Courage vs. Crehan* jurisprudence of the Court of Justice of the European Union ("CJEU"), where the CJEU stated that anybody who has suffered damages due to anti-competitive behavior should have the right to claim damages; The German courts interpret the term "person affected" widely. The OLG Düsseldorf in *ORWI* explicitly included parties that were indirectly affected by the cartel infringement.

2.2.3 What are the main features of your private enforcement system? For example: are there special discovery rules for antitrust cases? Or rules on the burden and standard of proof on causation and the quantification of damages? Does your jurisdiction provide for punitive damages? Does your jurisdiction permit the aggregation of claims and collective redress?

27. German law does not provide for special discovery rules equivalent to the U.S. or disclosure procedures in the U.K. Thus there is no general right requiring the (potential) defendant to produce and provide documents and other relevant information. Rather, under German civil procedure, in general, the plaintiff is responsible for presenting the facts and all relevant evidence in court to substantiate the claim.

28. Moreover, no specific rules concerning the burden and standard of proof on causation and the quantification of damages exist which would go beyond the general civil law rules. German law also does not provide for punitive damages.

29. Collective redress in principle does not exist in Germany. Consumer associations may, however, act for their members to reach a remediation of the cartel infringement provided that provided they have a significant number of member undertakings selling goods or services of a similar or related type of product on the same market, provided they are able, in particular with regard to their human, material and financial resources, to actually exercise their statutory functions of pursuing commercial or independent professional interests, and provided the infringement affects the interests of their members (Section 33 (2)(1) ARC). Moreover, Section 34a ARC provides for the disgorgement of benefits, which must be surrendered to the federal State budget.

30. However, the aggregation of claims is possible in Germany. Although German civil procedure has its basis in individual filings, the transfer of damages claims to a third party who may enforce them collectively is allowed. In a recent case the Higher Regional Court Düsseldorf ruled that for such purposes the third party must be able to cover the expenses of the defendant(s) should the case be lost. Such costs include the costs of court proceedings as well as the legal fees calculated on the basis of statutory fees. This implies that the full amount spent on the representation by an external legal counsel may not be recoverable.

2.3 Balancing public and private enforcement

2.3.1 Have evidentiary issues arisen in your jurisdiction involving concurrent private and public enforcement cases, and how have agencies and courts resolved them? For example, what can the agency do if a private plaintiff is jeopardizing its case by seeking discovery from the parties under investigation or from essential witnesses?

31. Solving evidentiary issues is paramount to private plaintiffs. Plaintiffs have several options to gain access to relevant documents.

32. In accordance with Section 406 (e) of the German Code of Criminal procedure the potential plaintiff can request access to the file of the Bundeskartellamt. The request will normally be granted a non-confidential copy of the infringement decision and a list of evidence available to the Bundeskartellamt. The Bundeskartellamt does not give access to leniency documents. However, access to documents including leniency documents cannot be barred per se, but a case by case assessment is required, as has been established by the CJEU in *Pfleiderer* (Case C-360/09), *Donau Chemie* (Case C-536/11) and *ENBW* (Case C-365/12). The Amtsgericht Bonn is responsible for ruling on access to file requests to the Bundeskartellamt concerning access to the file in cartel proceedings. Recent case-law in Germany also speaks in favour of an individual assessment, including leniency documents (see e.g. OLG Hamm, 26.11.2013, 1 VAs 116/13 – 120/13 u. 122/13, WuW/E DE-R 4101; OLG Frankfurt, 4.9.2014, W3/14 (Kart) = WuW 2015, 171).

33. Furthermore the Code of civil procedure offers ways to retain Court orders concerning the production of certain specific documents during the proceedings from the defendant and third parties. If the plaintiff can prove that he has a damages claim but is unable to prove the amount of loss suffered, while the defendant can easily provide such information, a disclosure claim can be brought as a first procedural step and in connection with the action for damages. Another option to obtain relevant documents exists in case of (parallel) criminal proceedings. The Higher Regional Court of Hamm granted access to the files of the public prosecutor in the pending elevators and escalators damages actions before the Regional Court of Berlin (Case 1 Vas 116/13,-120/13 and 122/13). The files contained amongst others the leniency applications. Whether this may lead to the plaintiffs in this case obtaining direct access to the leniency material remains to be seen.

34. However, it should be noted that for all damages action brought after 26 December 2014 the procedural rules, including disclosure of evidence, are governed by the European Commission's Directive on Antitrust Damages (Art. 21 of the Directive) even prior to its transposition into German law, which contains specific provisions for the disclosure of documents in damages actions.

2.3.2 Can plaintiffs access evidence in the competition authority's file, including leniency information? How is disclosure of evidence in the agency's file regulated in your national courts? How is appropriate protection of confidential information ensured? Do the rules change once the public investigation is completed?

35. As elaborated above (see question 3a) the plaintiff may be granted access to the Bundeskartellamt file, but is generally limited to certain evidence. Access may be refused when the proceedings are still ongoing and could potentially be jeopardised by disclosure of evidence. Confidential information can be withheld by the Bundeskartellamt and the Courts.

2.3.3 What is the relationship between private enforcement and public enforcement remedies such as disgorgement and restitution?

36. Public and private enforcement are generally both equally applicable. This may even be the case in the situation where disgorgement or restitution is ordered by the Bundeskartellamt. Disgorgement is a natural part of the fine and has no impact on the private damages action.

2.3.4 Do you think that the development of private enforcement might affect the development of substantive standards applicable in public enforcement? Do you find this problematic?

37. Private enforcement in Germany does not negatively impact the development of public enforcement. Private enforcement is as relevant to the German competition law system as is public enforcement.

2.4 How can public enforcement help to promote private enforcement?

2.4.1 Does your competition authority play any role in private enforcement cases? Can it/does it act as an amicus curiae before a court in private cases?

38. The Bundeskartellamt does not play a direct role in private enforcement cases. It is uncommon for the Bundeskartellamt to act as amicus curiae before a court in private enforcement cases.

2.4.2 To what extent should administrative/judicial decisions or settlements be detailed (e.g. on the facts involved in the violation, or the quantification of the harm from the anti-competitive conduct) in order to help potential plaintiffs?

39. The Bundeskartellamt is one of the very few European competition authorities that do not generally publish its decisions. Only some decisions are published in the form of case notes. Very rarely are non-confidential versions of a decision are published. The content of the press releases that are published, however, is most often too scarce to enable claimants to substantiate a private damages claim. Moreover, this has posed a serious threat concerning limitation periods, especially with respect to the current absolute limitation period of ten years [Section 199 (3)(1) CC], which cannot be maintained in this form in the face of the Cartel Damages Directive (see recital 36). Another factor to consider is the start of the limitation period. Recent case-law proposed that the limitation period should begin to run from the moment of the press-release.[12] Due to the specificities of the case, this should remain a singular decision.

40. In contrast, the European Commission is bound by Art. 21(3) Reg. 1/2003 to publish meaningful (as has been lately reinforced by the General Court of the European Union in the *Evonik Degussa* judgement (Case T‑341/12 and T‑345/12) non-confidential versions of its decisions. Never the less, it sometimes takes a long time before a non-confidential version is published, due to confidentiality issues raised by the cartelists. To facilitate the private claimants' ability to substantiate their claims the competition authorities' decisions need to be published in a timely manner and as complete as possible. At the moment, (potential) claimants spend a lot of time (and resources) with access to file requests to the Bundeskartellamt and ensuing court proceedings just to get access to a non-confidential version of the decision of the Bundeskartellamt. Hence, the Bundeskartellamt should be required by law to publish non-confidential (and yet informative) decisions.

2.4.3 Are the findings (of the authority or courts) in a public enforcement case binding in private cases? What about decisions of authorities/courts in foreign jurisdictions? Has the timing of publication of public decisions been a problem for private litigants?

41. Section 33 ARC stipulates that where damages are claimed for an infringement of competition law provisions in the ARC the Treaty of the Functioning of the European Union, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Union, or the competition authority or court acting as such in another Member State of the European Union; the same applies to findings in final judgments resulting from appeals against such decisions.

42. The timing of the publication is a major problem for cartel claimants, as has been explained above.

12 OLG Düsseldorf, Judgement of 18.02.2015 - VI- U (Kart) 3/14 = NZKart 2015, 201.