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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Germany --

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-- Germany --

1. Introduction

1. While the enforcement of competition law in Germany has predominantly been carried out by the Bundeskartellamt and the competition authorities of the sixteen German federal states (*Landeskartellbehörden*), private enforcement remained of great relevance during the past decade. Private enforcement proceedings complement the public enforcement of competition law: while proceedings of the Bundeskartellamt are mostly aimed at ending and punishing anticompetitive behavior (e.g. in cease-and-desist-proceedings or fining decisions), subsequent private enforcement proceedings allow the damaged parties, e.g. consumers or competitors, to receive compensation for harm caused by the defendant.

2. The increase in private damages actions is in particular due to the strengthening of private enforcement opportunities as introduced into German competition law by the 7th and 8th amendments of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter "GWB") in 2005 and 2013, respectively. Consequently, private damages claims have become more common in recent years, while private enforcement efforts previously focused on cease-and-desist proceedings.[1] Private and public enforcement efforts are not only complementary means for achieving the best possible deterrence, they are also closely intertwined: on the one hand, private proceedings often rely on final findings by the public enforcement bodies since their findings have a binding effect on civil courts. On the other hand, the Bundeskartellamt as the main public antitrust enforcement body has various possibilities to be involved in private proceedings, e.g. as amicus curiae or when exercising its right to give its opinion in proceedings before the Federal Court of Justice.

3. The EU directive on antitrust damages, which will be implemented into German competition law by the end of 2016, will entail some amendments to current GWB regulations. Since German competition law already corresponds to most specifications of the directive, the need for changes will be limited to only certain provisions.

4. This submission gives an overview on the basis of public and private enforcement as provided by the GWB, comments on potential consequences of the EU directive on antitrust damages for German competition law enforcement, sheds light on the relationship and interdependence between public and private enforcement in Germany and illustrates the importance of the Bundeskartellamt's leniency program for the success of the enforcement of the ban on cartels.

2. Substantive provisions of German competition law

2.1 Public enforcement

5. The Bundeskartellamt is competent for enforcing the ban on cartels (Section 1 and 2 GWB) and exercising abuse control (Section 19 and 20 GWB), if the anticompetitive effects of such practices go beyond the territory of one federal state.[2] Furthermore, the Bundeskartellamt has the exclusive competence for implementing merger control under the GWB in Germany (Section 35 to 43 GWB). Finally, if the anticompetitive agreements or abusive practices are likely to affect trade between the EU Member States, the Bundeskartellamt also applies the European competition law provisions (Articles 101 and 102 of the Treaty on the Functioning of the European Union – TFEU).

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1 This is true not only for abuse and discrimination cases but also for cases of anticompetitive behavior.

2 If effects of violations of the ban on cartels or abusive practices are limited to one federal state, the *Landeskartellbehörde* of that federal state is the competent competition authority.

6. Public enforcement comes primarily in the form of cease-and-desist or fining proceedings. In principle, the Bundeskartellamt can also skim off the monetary benefit which an infringing party has gained through the violation of competition law (Section 34 GWB, *Vorteilsabschöpfung durch die Kartellbehörde*). However, since injured parties can claim damage compensation themselves, the Bundeskartellamt rarely makes use of this right. Only in cases in which it is easy for the infringing party to identify its customers and for the Bundeskartellamt to monitor the imposed measure does the Bundeskartellamt order the infringing party to reimburse its customers. This largely refers to cases in which companies have permanent customers, e.g. excessive pricing proceedings against electric heating providers.[3]

2.2 Private enforcement

7. Private enforcement claims play an important role in Germany, especially in abuse and discrimination cases but also in cases involving anticompetitive agreements. They are dealt with by specialized civil courts (Section 87 and 89 GWB). In cases where a party claims damages after the Bundeskartellamt or another European competition authority has issued a final decision that an infringement has occurred, such finding is binding also on the civil courts (Section 33 (4) GWB).

8. The private enforcement of competition law has gained importance during the past decade, in particular through the legal provisions introduced into the GWB with its 7th amendment in 2005 and the subsequent 8th amendment in 2013.

9. The 7th amendment to the GWB widened the categories of addressees of Section 33 (1) GWB to everyone who is affected by an infringement of antitrust law. Moreover, Section 33 (3) sentence 2 GWB now stipulates that a damage is not a priori excluded because the good or service was resold. This clarifies that a party can be affected and harmed by an infringement even if that party is not a final consumer. While a passing-on defense is possible for the infringing party, the burden of proof lies with the party itself. The 7th amendment additionally facilitated follow-on suits by binding courts to the (final) finding of an infringement by a competition authority or relevant court (Section 33 (4) GWB). It alleviates private plaintiffs from providing proof of the infringement, implying a substantial reinforcement of private claims for compensation. Finally, the introduction of Section 89a GWB allows each party to apply for a reduction of the dispute value, unilaterally favouring the applicant party/claimant [*Streitwertanpassung*]. If the beneficiary loses the lawsuit, all due fees (court fees, the attorneys' fees) are calculated based on the reduced dispute value. If he wins the case, the attorney can demand his fees based on the initial dispute value. This avoids the risk of high litigation costs and thereby further enhances incentives to take legal action when a party is harmed by an infringement of antitrust law.

10. The 8th amendment to the GWB brought about an extension of the right to institute proceedings (damage compensation claims) to associations of businesses and companies affected by the infringement (Section 33 (2) no. 1 GWB). While this right had until then been limited to competitors of the infringing party, it now encompasses demand-side companies as well. Furthermore, Section 33 (2) no. 2 GWB now also empowers consumer associations to seek an injunction, thereby significantly increasing the opportunity of consumers to take legal action against infringements of antitrustl law.

[3] See for example http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2010/29_09_2010_Heizstrom.html?nn=3591568).

3. Potential consequences of the EU directive on antitrust damages for German competition law

11. After the final adoption of the EU directive on antitrust damages actions by the European Council on 10 November 2014, it was signed into law on 26 November 2014. Member states now have to implement it into their national legal systems by 27 December 2016.[4]

12. The GWB already encompasses many of the central provisions of the EU directive on actions for antitrust damages. Article 1 of the directive clarifies that "everyone" affected by an infringement of competition law is entitled to claim compensation for damages. While the wording of the corresponding Section 33 of the GWB slightly differs, it is consistent with the content and meaning of the guideline since it equivalently addresses "competitors or any other market participants". Similarly, the specifications in Section 33 of the GWB with respect to the defendant [*Anspruchsgegner*] may be interpreted such that they are congruent with Article 1 (1) and Article 3 (1), (2) of the directive. However, a clarification seems advisable. The current legal situation in Germany concerning the content of compensation claims (Sections 33 (3) sentences 1, 4 and 5 GWB in combination with Sections 249 and 252 of the German Civil Code (*Bürgerliches Gesetzbuch*)) also already corresponds to the provisions of Article 3 (2) of the EU directive.

13. Finally, there is no need for an adjustment of German competition law with respect to the binding effect [*Tatbestandswirkung*] of final decisions of competition authorities on subsequent legal proceedings. The specifications of Section 33 (4) of the GWB even go beyond those of the EU directive: while the directive only establishes the binding effect of decisions by national competition authorities on courts of the same member state, the GWB grants a binding effect of the final decisions of both national competition authorities and competition authorities of other EU member states on subsequent proceedings in other (e.g. civil) legal proceedings.

14. Nevertheless, several specifications of the directive have given rise to questions regarding if and how German competition law needs to be adjusted in order to be brought in line with the EU directive. These questions are currently being discussed at government level. So far, it is unclear in which way the different specifications, e.g. regarding the proof/evidence of damages, will be incorporated into German competition law. Similarly, while the possibility of a passing-on defense was introduced into the GWB as part of the 7th amendment in 2005 and confirmed by German case law[5], German specifications on the disclosure of information slightly differ from the regulations of the EU directive: instead of giving the infringing party the right to demand disclosure (to an adequate/reasonable extent) from the plaintiff or third parties[6], the burden of proof lies solely with the infringing party according to current specifications in the GWB.

15. In particular, the German legislation regarding the disclosure of evidence from leniency applicants needs to be aligned with the requirements of the EU directive. So far, the provisions regarding the disclosure of evidence of the German Code of Civil Procedure (*Zivilprozessordnung*) stipulate that civil courts can order the submission of files [*Vorlage von Akten*] (Section 142 (1) and Sections 421 and 425 of the German Code of Civil Procedure). In order to implement the respective provisions of the directive, these regulations can be a starting point for the creation of a special right to disclosure in actions for cartel damages.

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4 http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html

5 The possibility of a passing-on defense was confirmed in 2011 by the Federal Court of Justice (BGH, Urt. v. 28.06.2011 – KZR 75/10, NJW 2012 – *ORWI*).

6 Exceptions can result from good faith (Section 242 German Civil Code).

16. The provisions of the EU directive on joint and several liability largely correspond to the respective German provisions, e.g. regarding the liability in settlements between cartel members [*Innenausgleich*]. However, the specifications in Article 11 (2) represent a novelty to German law: they specify that small and medium sized companies can be privileged (under certain conditions) when it comes to joint and several liability. Likewise, German law lacks a similar privileging of immunity recipients, as stipulated by the EU directive in Article 11 (4), (5) and (6).

17. A discrepancy between German law and the EU directive also exists with respect to the duration of the limitation period before entitlement to damage compensation claims lapses. According to the EU directive, the limitation period must be at least 5 years from the date of (potential) awareness of an infringement or the cessation of the infringement. German law requires the limitation period to be only 3 years from the date of (potential and reasonably expectable) awareness. Moreover, according to current German law, entitlement to claims can be barred 10 years after occurrence of the infringement or – if damage has not yet occurred – 30 years after the infringement, irrespective of whether the damaged party was aware of the infringement or not. The directive does not comprise a limitation period that expires irrespective of the damaged parties' awareness of the infringement. However, under certain conditions, it does allow the member states to implement absolute limitation periods.[7] Whether this also encompasses the German specification on the absolute limitation period remains to be determined.

4. The interplay between public and private enforcement in Germany

4.1 Involvement of the Bundeskartellamt in private enforcement proceedings

18. The Bundeskartellamt has the opportunity to be involved in private enforcement proceedings. It is to be informed of all private enforcement actions arising before the courts and upon request can be sent all briefs, records, orders and decisions. According to Section 90 GWB and Article 15 Council Regulation (EC) No. 1/2003, the courts are required to provide the Bundeskartellamt with this information. Moreover, the Bundeskartellamt can participate as amicus curiae in the civil proceedings resulting from private enforcement actions. This allows the Bundeskartellamt to help to ensure a coherent development in the public and private enforcement of competition law. Members of staff have a right to take an active part in the court proceedings by way of written or oral statements. While cases are appealed in points/reasons of fact and law in the first instance, the Federal Court of Justice only deals with appeals in points/reasons of law. The Bundeskartellamt participates in every proceeding before the Federal Court of Justice by way of oral statement and before the courts of lower instance by way of written statements in leading cases as well as in cases linked to ongoing proceedings of the Bundeskartellamt and upon request of the court.

[7] Recital 36: Member states should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.

4.2 Private follow-on proceedings

19. Courts are bound by the final decisions of the competition authorities (or equivalently by the decisions of courts dealing with public enforcement cases). Hence, private damages proceedings typically follow the final decisions of the competition authorities.[8] Courts dealing with the private enforcement proceedings then only have to assess the causality and the extent of the damage to the plaintiff or prosecuting party.[9]

20. A prime example of a successful follow-on damage compensation claim is a cartel case in the rail manufacturing industry.[10] The Bundeskartellamt had initiated investigations against various rail manufacturers and suppliers after receiving an application for leniency by the Austrian company Voestalpine AG. In early July 2012the Bundeskartellamt imposed fines totaling 124.5 million Euros on four rail manufacturers and suppliers for conducting anticompetitive agreements (quota and price agreements in public tenders) to the detriment of Deutsche Bahn AG, the biggest German railway company. Fining decisions were served on ThyssenKrupp GfT Gleistechnik GmbH, Essen (103 million Euros), Stahlberg Roensch GmbH, Seevetal, which since 2010 belongs to the Vossloh group (13 million Euros), TSTG Schienen Technik GmbH & Co.KG, Duisburg (4.5 million Euros) and Voestalpine group (4 million Euros). All aforementioned companies cooperated with the Bundeskartellamt in the course of the proceedings within the scope of its leniency program. In 2013, the Bundeskartellamt imposed a fine amounting to 10 million Euros on Moravia Steel Deutschland GmbH as part of a settlement agreement with that company. Proceedings against further companies concerning related product markets are still ongoing.

21. After the successful termination of the public proceedings in the rail manufacturer case, the Deutsche Bahn (being the injured party) filed a civil law suit against the members of the cartel at the District Court in Frankfurt. So far – according to media reports – it has received damage compensation amounting to 50 million Euros from Voestalpine and 150 million Euros from ThyssenKrupp, both of which were achieved as part of out-of-court settlements.[11]

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8 An example of a stand-alone civil law suit is a damage compensation claim from 2010, in which a dominant undertaking was successfully sued for excessive pricing (OLG [Higher Regional Court] Frankfurt a.M., decision of 21.12.2010, 11 U 37/09 (Kart) – *Arzneimittelpreise*), which shows that under certain conditions excessive pricing can also be successfully challenged by private parties in civil law suits, even without a prior public proceeding conducted by the Bundeskartellamt. It is important to note, however, that in civil proceedings the court has considerably larger discretion in assessing the amount of damages (in this case the part of the price that was deemed abusively excessive) than the Bundeskartellamt has in estimating the excess profit in its own proceedings concerning excessive pricing.

9 The number of follow-on proceedings varies: while the Bundeskartellamt registered five follow-on proceedings in 2012, the number of registered follow-on proceedings in 2015 amounts to at least 10 (as of 19 May 2015).

10 A case summary of the public proceedings conducted by the Bundeskartellamt can be found here: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2011/B12-11-11.pdf?__blob=publicationFile&v=2

11 See media reports, for example http://www.derenergieblog.de/alle-themen/verkehr/schadensersatz-gegen-schienenkartell-schnelles-handeln-ist-gefragt/ or http://www.spiegel.de/wirtschaft/unternehmen/thyssenkrupp-zahlt-wegen-schienenkartell-millionen-an-deutsche-bahn-a-934558.html or http://www.zeit.de/wirtschaft/2013-04/schienenkartell-bahn-schadenersatz.

4.3 Non-case related interaction between Bundeskartellamt and private enforcement parties

22. National and international conferences are a good opportunity for members of the Bundeskartellamt to participate in discussions with the judges of specialized competition chambers. One example of such an occasion is the Meeting of the Working Group on Competition Law. This group meets once a year to discuss fundamental issues of competition policy. Another example is the International Conference on Competition organized biennially by the Bundeskartellamt.[12] The most recent International Conference on Competition was held in March 2015. The conference attracted about 400 participants, among them representatives from competition authorities, companies and law firms and also consumer associations. The design of effective procedures and sanctions in cartel prosecution was the topic of one of the panel discussions, which also addressed the issue of private antitrust enforcement through damage compensation claims.

5. Enforcing the ban on cartels: the Bundeskartellamt's leniency program

5.1 The role of the leniency program in public enforcement

23. The Bundeskartellamt's leniency program – implemented in 2000 and fundamentally revised in 2006 – plays a key role in the successful public enforcement of the ban on cartels.[13] More than half of all cartel proceedings are triggered by information from leniency applicants.

24. In 2013 alone, 64 leniency applications in 41 cases were filed. In the same year, the Bundeskartellamt imposed fines amounting to 240 million Euros on 54 companies and 52 private citizens in cartel proceedings. The successful completion of the majority of these cases can be attributed to the Bundeskartellamt's leniency program, without which many of these cartels would not have been detected in the first place.

5.1. The leniency program, private damage compensation claims and the Pfleiderer-Case

25. The success of the Bundeskartellamt's leniency program can largely be attributed to the possibility of a fine reduction or full immunity for a leniency applicant. If immunity recipients faced an enhanced risk of private damages law suits due to their statements in their leniency applications, this would significantly dampen their incentive to cooperate with the Bundeskartellamt and thereby jeopardize the success of the leniency program itself.

26. In a private proceeding a third party had requested access to the Bundeskartellamt's files in an administrative fine proceeding in order to prepare its private damages claim.[14] Pfleiderer, a customer of a décor paper cartel, who sued the cartelists for damages, requested information from the Bundeskartellamt's proceedings against the cartel, including leniency documents. The case was referred to the Local Court of Bonn, which referred the case to the ECJ. The ECJ ruled that it is for the national courts, on the basis of

12 http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/25_03_2015_IKK.html

13 The most recent notice of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases as part of its leniency program can be found here: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Notice%20-%20Leniency%20Guidelines.pdf?__blob=publicationFile&v=5

14 See Germany's contribution to the June 2010 Roundtable on "Procedural Fairness issues in civil and administrative enforcement", OECD Doc. DAF/COMP/WP3/WD(2010)35 and Germany's contribution to the October 2011 Roundtable on "Institutional and procedural aspects of the relationship between competition authorities and courts, and update on developments in procedural fairness and transparency", OECD Doc. DAF/COMP/WP3/WD(2011)77.

their national laws, to determine the conditions under which such access must be permitted or refused by weighing both interests protected under EU law (right to claim damages vs. effectiveness of enforcement of competition law). In applying the ECJ decision the Local Court of Bonn refused disclosure for that particular case. Pfleiderer was not granted access to the leniency applications of the cartel participants.[15]

27. The EU directive contains clear-cut provisions regarding the disclosure of documents. Courts must be able to order the defendant or a third party to disclose relevant evidence in cartel damage actions [Article 5 (1)]. Only if this disclosure has been unsuccessful can requests for access to the file of a competition authority be ordered [Article 6 (10)]. However, leniency statements and settlement submissions must not be made accessible in any way to claimants [Article 6 (6)]. Moreover, these documents must be deemed to be inadmissible in actions for damages or otherwise protected under the national rules applicable [Article 7 (1)].[16]

28. This affirms the view of the German government and of the Bundeskartellamt that leniency applications should be subject to particularly strict confidentiality, since an effective enforcement of the ban on cartels requires an effective leniency program. While private enforcement – at first sight – seems to be weakened by the provisions of the EU directive on the strict confidentiality of leniency documents, a closer consideration leads to the opposite conclusion: since private enforcement largely depends on the successful detection of cartel infringements, the protection of leniency programs also ensures the possibility to take private legal action against damages from cartel infringements and receive compensation. At the end of the day a successful leniency program is therefore crucial for effective public and private enforcement alike.

6. Conclusion

29. Competition law in Germany is enforced both by public and private legal action. Public enforcement through the Bundeskartellamt plays a key role in detecting and prohibiting infringements, e.g. through the successful operation of its leniency program. Private enforcement proceedings complement public enforcement efforts by providing injured parties with an opportunity to receive damage compensation. Currently, the German legislator is elaborating on the implementation of the EU directive on antitrust damages into German competition law. Even though German regulations already largely correspond to the specifications of the directive, certain adjustments have to be made, most of which will further fine-tune the relation between public and private enforcement opportunities.

15 See ECJ, the decision of 14 June 2011 and Bundeskartellamt's press release regarding the Local Court of Bonn's decision of 18 January 2012, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/30_01_2012_Pfleiderer.html?nn=3591568

16 In that aspect, the directive goes beyond the decision in the Pfleiderer case, in which the Local Court of Bonn – following the ECJ decision – ruled that the question on whether to disclose leniency documents or not should be a case-by-case decision.