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Do Railway Law And Competition Law Clash? AG ?apeta Let's The Sparks Fly

Sebastian Reiter (bpv Hügel) · Wednesday, May 4th, 2022

In 2017 the ECJ decided in its CTL Logistics judgment (C?489/15, CTL Logistics, ECLI:EU:C:2017:834) that national civil courts must not examine railway charges if they fall under the competence of a railway regulator under Directive 2001/14/EC (now Directive 2012/34/EU) under equity (§ 315 German Civil Code, "BGB"). AG ?apeta recently suggested reconsidering this case law (Opinion of 7 April, 2022, C?721/20, DB Station & Services AG, ECLI:EU:C:2022:288, the "**Opinion**", paras. 61 et seq) and opening up the review of regulated infrastructure charges by civil courts under civil law rules.

The Higher Regional Court of Berlin referred the present case. ODEG Ostdeutsche Eisenbahn GmbH, a railway company, had sued DB Station & Service AG, a railway infrastructure company and a subsidiary of the German legacy incumbent Deutsche Bahn, for repayment of alleged excessive infrastructure charges. The case turns on two foundational questions on the relationship between regulatory law and competition law (for the exact wording of the questions by the court see here):

- If an agency regulates infrastructure charges, can civil courts review such infrastructure charges under Article 102 TFEU? (or does the ECJ's CTL Logistics judgment apply to the review of such charges under Article 102 TFEU as well)?
- In the case of a dispute between an infrastructure operator and their customer: Are civil courts under an obligation to wait for a (final) decision by the regulatory agency on the merits before reviewing such charges under Article 102 TFEU?

AG ?apeta suggested affirming both questions but qualified her reply:

- Civil courts can review regulated infrastructure fees under Article 102 TFEU if they are ruling on claims for reimbursement of excessive railway charges by a railway company.
- In such cases, EU law does not require civil courts to wait for a (final) decision by a regulator to undertake such a review (but they may if they wish as long as they provide effective judicial protection).

Both results have a firm grounding in the ECJ's case law and have also been taken up by the German Federal Court of Justice ("***Bundesgerichtshof***"). As AG ?apeta mentions, the German Bundesgerichtshof (KZR 39/19, *Trassenentgelte*) has decided that civil courts can apply Article 102 TFEU if railway infrastructure operators charge abusive prices irrespective of whether such

fees were allowed for by applicable regulatory law. In doing so, the BGH explicitly follows the ECJ's case law on the relation between competition law and telecom regulation (ECJ 14.10.2010, C?280/08 P – Deutsche Telekom). To the BGH this was an *acte clair*. From an EU law perspective, the review of regulated network tariffs is settled case-law across industries (cf. Schweitzer, https://ssrn.com/abstract=4006189); for the latest iteration by the Bundesgerichtshof see KZR 89/20, *Regionalfaktoren*, para. 19 and the case-law cited therein).

Nonetheless, AG ?apeta suggested in her reasoning that the ECJ's CTL case law is not only incompatible with the primacy of Article 102 TFEU, but should be discontinued altogether (Opinion, para. 62) because "there is no reason why Directive 2001/14 should be interpreted as granting the regulatory body exclusive competence to assess the validity of the charges" (Opinion, para. 63).

How did we end up here after everything had been settled by the ECJ and was *clair* to the Bundesgerichtshof?

The procedural history and the scepticism of the referring court may offer (parts of) an explanation:

In 2005(!) DB Station & Service AG introduced a new price list ("SPS 05") (Opinion, para. 6).

In 2009 the German railway regulator ("***Bundesnetzagentur***") declared SPS 05 invalid but effective until 1 May 2010 and invited railway companies to claim reimbursement of overcharges in court (Opinion, para. 7).

DB Station & Services AG appealed, and in 2010, the Higher Administrative Court, North Rhine-Westphalia, granted the action suspensory effects (Opinion, para. 8).

ODEG claimed reimbursement in several cases before the Regional Court Berlin for overcharges as compared to DB Station & Service AG's previous price list ("SPS 99") between 2006 and 2010, and the court admitted these claims on equity grounds (§ 315 BGB). DB Station & Service AG appealed before the Higher Regional Court of Berlin (the referring court), which joined the cases in 2015 (para. 9).

In the meantime, the ECJ had handed down its CTL Logistics judgment (Opinion, para. 10; see above; the CTL case law as later extended in *Koleje Mazowieckie* (C-120/20, ECLI:EU:C:2021:553)).

Consequently, claims were submitted to the Bundesnetzagentur, which rejected them in October 2019 as time-barred (an appeal was pending at the time of the request for a preliminary ruling; Opinion, para. 11).

In referring the present case to the ECJ, the Higher Regional Court of Berlin noted that several German civil courts have diverged from the Bundesgerichtshof's case law and decided that the CTL case law applies to the review of regulated charges based on Art 102 TFEU (Opinion, para. 14) and that there were (inter alia the following) good reasons to do so (para. 15): Under a review of infrastructure charges based on Art 102 TFEU some railway companies could end up paying lower charges than others which would undermine the non-discriminatory access to infrastructure, which Directive 2001/14/EC guaranteed (Opinion, para. 16) and thereby give rise to distortions of competition (Opinion, para. 19). For these reasons, the Higher Regional Court considers

Bundesgerichtshof's case law to prioritise the enforcement of Art 102 TFEU (KZR 12/15 – *Stationspreissystem II*) flawed (Opinion, para. 19).

Altogether, 17 years after the introduction of the disputed tariffs and 13 years after the Bundesnetzagentur had invalidated them(!), the plaintiffs have still not received a verdict. It's a cliché and yet, justice delayed is justice denied. Against this background, the moral gravitas pulling AG ?apeta toward her proposal to empower civil courts to review regulated railway charges even if an agency regulates them becomes palpable.

She argues that the facts of the CTL Logistics and the Koleje Mazowieckie case cannot be distinguished from the present case. Therefore, if "the interpretation resulting from [the CTL Logistics case] is transposed to the case where Article 102 TFEU is invoked" (para. 27), she sees a clash between the CTL Logistics jurisprudence and the principle of primacy of Article 102 TFEU. Therefore, she recommends abandoning the CTL Logistics jurisprudence.

However, from a bird's eye perspective, why transpose the CTL Logistics rationale to a private enforcement case in which a civil court is asked to apply Article 102 TFEU?

There are (at least) three primary reasons supporting the current state of the law as expressed in the ECJ's and the Bundesgerichtshof's case law:

From a hierarchy of norms perspective, it is perfectly consistent to accord Article 102 TFEU primacy over regulatory norms transposing EU directives and the latter primacy over national civil law such as § 315 BGB.

From a doctrinal perspective, Article 102 TFEU and review in equity (§ 315 BGB) are two different legal tests, and even if the facts cannot be distinguished, the law can be. To paint with a broad brush: Article 102 TFEU targets excesses of market power – anything under the threshold of an abuse is permitted. Its private enforcement branch allows *inter alia* the recuperation of excessive profits by customers so harmed. § 315 BGB seeks fine-tuned, granular justice in the exchange between two parties in an individual case under equity. Entrusting civil courts to review regulated tariffs under Article 102 TFEU does not necessarily entail scraping a jurisprudence, which blocks civil courts from reviewing regulated tariffs in equity. There is nothing inconsistent about facilitating private enforcement of competition law by giving Article 102 TFEU priority over national transpositions of regulatory directives while prioritising such transposition over dispositive rules of a civil code.

From an institutional design perspective, all of this is sensible. Civil courts are not equipped and do not have the technical know-how to review rate-setting exercises in infrastructure sectors. Therefore, EU regulatory law provides specialised and independent regulatory agencies with the staffing and resources to undertake such exercises (cf. Art 55 (3) Directive 2012/34/EU). Indeed, technical expertise and competence is the primary (non-doctrinal) reason why Directive 2001/14 (now Directive 2012/34/EU) should be interpreted as granting the regulatory body exclusive competence to assess the validity of the charges. And yet, while nobody controls independent regulatory agencies, opening up a review pursuant to Art 102 TFEU guarantees that the agencies are under control. In private enforcement actions, undertakings are free to provide evidence to the courts if they think that regulated charges amount to an abuse of market power.

While it may be unlikely that a civil court will be better at fine-tuning an infrastructure rate than a regulatory agency (CTL Logistics), civil courts are and can be trusted to review if a regulated rate

amounts to such an excess that it qualifies as abusive (Deutsche Telekom, Trassententgelte).

After AG ?apeta let regulatory law and competition law clash, I am curious to see if the ECJ will simply let the dust settle.

TLDR: AG ?apeta suggests that the ECJ's CTL Logistics case law, which blocks civil courts from reviewing regulated infrastructure charges under national civil law, should be discontinued. Doctrinally, such a departure is not necessary. Some non-doctrinal arguments support the current state of the law.

For those interested in further reading on the topic, Professor Schweitzer's piece is excellent.

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