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Collective Private Enforcement Clashes with German Laws on the Regulation of Legal Services: AG Szpunar's Opinion in C-253/23 – ASG 2

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Introduction

Last week, Advocate General Maciej Szpunar delivered his Opinion in case C-253/23, a preliminary reference that stems from a form of collective private enforcement of competition law in Germany called the 'assignment model'. This type of litigation is based on the fiduciary assignment of claims from a high number of persons or companies who bought cartelized products and are potentially entitled to claim damages. Through the assignment, these claims are bundled with the assignee. The assignee is often a legal entity which is founded solely to pursue these claims in subsequent damages proceedings. Therefore, it is often also referred to as 'action vehicle' (*Klagevehikel*). The assignors usually agree with the assignee on a certain contingency fee (*quota litis*) to be deducted in case of success of the claims. In his Opinion, AG Szpunar generally backed the assignment model. Relying on the referring court's analysis of the relevant national laws, he argues that the legality of such a form of bundled private enforcement is required to comply with the principle of effectiveness in conjunction with Art. 101 TFEU and the right to effective judicial protection.

The opinion was much awaited in Germany, as many similar proceedings are currently pending or under appeal. The legal issue at hand is relatively specific to Germany as it concerns the German law on the provision of legal services (*Rechtsdienstleistungsgesetz* – RDG, see English version here) limiting the assignment of claims to service providers. The RDG allows the provision of legal services by persons or entities other than lawyers or law firms only under certain conditions in order to protect the quality and trustworthiness of legal counselling generally. These conditions are generally less strict than for lawyers who are bound by more precise and comprehensive laws regarding the legal profession (e.g. in Germany *Bundesrechtsanwaltsordnung* and the *Berufsordnung für Rechtsanwälte*). One reason why alternative legal service providers are active in the market is that they can more easily obtain third-party funding, and their remuneration models are more flexible, i.a. allowing more easily for contingency fees. Many obligations under the law of the legal profession in Germany, which restrict lawyers and their firms from providing similar services do not apply to alternative legal service providers. In summary, the RDG thus allows the provision of legal services under a lower standard of duties but only in specific fields or for specific services like, for example, debt collection services. In the area of alternative legal service providers which use a licence for debt collection (section 10 RDG), it has been much debated

where the boundaries are and which cases can be pursued by these alternative legal service providers. It is disputed whether competition law claims can form part of ‘debt collection’. If not, such cases could not be pursued by the alternative legal service providers and the according assignment of claims would not be legally valid.

Factual Background of the Case

The Land of North Rhine-Westphalia (Germany) allegedly harmonized the prices of timber (roundwood) for itself and other woodland owners in the region from 2005 to 2019, in violation of Article 101 TFEU. In 2009, the Federal Cartel Office adopted a commitment decision regarding the Land of North Rhine-Westphalia and other German Länder involved in the marketing of roundwood. In 2012, the Federal Cartel Office (FCO) opened a new investigation into the relevant market conditions for the Land of Baden-Württemberg specifically. As a result of this second investigation, the FCO rendered a prohibitory injunction against the said practice in the Land of Baden-Wurttemberg and annulled the previous commitment decision of 2009 relating to that Land. However, that injunction was later annulled by the German Federal Court of Justice on procedural grounds. Basically, the reason was that the Federal Court of Justice on appeal held, it was not lawful under section 32b of the German Act against Restraints of Competition (ARC) to take up proceedings once again if these were already concluded with a commitment decision unless there was a relevant change in factual circumstances. Such relevant change in factual circumstances was denied by the Federal Court of Justice in its appeal decision. Since then, no further steps have been taken under public enforcement regimes.

However, this did not prevent potential claimants from engaging in private enforcement. 32 sawmills assigned their claims to ASG 2, a legal service provider licensed under the German RDG, which then brought the claims in its own name and at its own expense before the regional court of Dortmund. The Land of North Rhine-Westphalia challenged the action, arguing that the assignments were null and void under German law due to violations of the RDG (essentially arguing that the litigation went beyond the licenses of the alternative legal service provider).

Referral Questions

The Landgericht Dortmund, instead of deciding on the lawfulness of the assignment of claims right away, referred questions to the Court of Justice of the European Union regarding the compatibility of a potential prohibition of such assignments with EU law, especially with the principle of effectiveness. In essence, the Landgericht Dortmund asked the ECJ whether national laws prohibiting private enforcement through the assignment of claims such as in the given case contravene EU law, especially Art. 101 TFEU and Art. 47 of the Charter. It differentiates the questions between cases of follow-on litigation (1.) and stand-alone litigation (2.). The third question is merely declaratory in asking about whether such national laws should be left unapplied which would obviously be the consequence if these national laws were contrary to EU law and could not be interpreted in conformity.

Main Findings of the AG and Analysis of the Opinion

Stand-alone vs. Follow-on Actions and the Issue of Admissibility

As outlined, litigation was based on the 2009 commitment decisions which, after the intervention of the Federal Court of Justice, are the only NCA decisions which are still in place. The referring court seemed to imply that it regarded this form of actions as follow-on litigation (see first referral question). The AG does not agree. He emphasizes that commitment decisions under Art. 9 of Regulation 1/2003 do not contain a final finding of infringements of Art. 101 TFEU (para 56). Despite the fact that commitment decisions (at least those by the EC) should be regarded as indicative or *prima facie* evidence in subsequent private damages proceedings (see the judgment in C-547/16 – *Gasorba*, para 29 and para 57 of the opinion in *ASG 2*), this does not mean that violations of competition law were bindingly asserted. Therefore, the AG qualifies the national damages proceedings as stand-alone actions (see para 57). This leads to the consequence that the first referral question on the scenario of follow-on litigation is hypothetical and therefore inadmissible (see para 61). By contrast, the second question – which deals in essence with the same issue but under the premise of stand-alone private enforcement – is held to be admissible (paras 62-71).

General Reflections on Claimants' Rights and EU Competence

On substance, the AG starts with relatively abstract reflections on whether the legal notion of 'claimant' in private enforcement of EU competition law is directly (though not explicitly) regulated by EU law as part of Art. 101 TFEU or whether it is subject to national procedural autonomy, only limited by the principles of effectiveness and equivalence (in detail on this: paras 83-94). He ultimately seems to regard this matter as regulated by EU law as part of the "constitutive conditions" of liability (paras 92f.). This is followed by reflections on whether the transferability of the claimants' rights is also governed by EU law (paras 95-99) which the AG denies. Nonetheless, and even if the conditions of transfer and assignment of rights are subject to national law (see para 98), this does not rule out that EU law may guide the interpretation of these national laws. In fact, it is established jurisprudence of the Court that the principles of effectiveness (and equivalence) limit national procedural autonomy. Specific conditions in national law for the assignment of claims must therefore not make the enforcement of such rights guaranteed by EU law impossible or excessively difficult.

It remains unclear why the Advocate General devotes substantial parts of his opinion to the described rather theoretical and abstract questions of competence given that it is all the way clear that the principle of effectiveness applies (he arrives at this conclusion, too, see para 108) and this suffices to resolve the questions at hand. It would be surprising to me if the Court in its judgment takes up any of these parts of the opinion as they do not seem to relate to the answer to the question at hand. Furthermore, one needs to recall that the general transferability of claims was not questioned in the national proceedings. More precisely, the focus of the national proceedings was whether the (generally possible) assignment of claims to an entity which acts as an alternative legal service provider is contrary to the national laws on the provision of legal services (here *Rechtsdienstleistungsgesetz*). Nobody would seriously question that the laws on the legal profession are a matter of national competence and so-called national procedural autonomy and can solely be checked against the principles of effectiveness and equivalence with regard to the compatibility of their application with Art. 101 TFEU.

Relevance of Art. 47 of the Charter

The AG proposes to examine the case, as suggested by the referring court, under both the principle of effectiveness in relation to Art. 101 TFEU and under Art. 47 of the Charter (see para 117). He seems to attribute specific relevance to Art. 47 of the Charter in this case although it remains unclear in which points the application of Art. 47 of the Charter goes beyond a mere application of the principle of effectiveness in conjunction with Art. 101 TFEU. The findings of violations in para 126 are based on the standard formula used for the principle of effectiveness, which arguably is the relevant legal test applicable in this case. Therefore, conflating both legal bases in his reasoning is not very convincing. Instead, it risks to diminish the clarity of the applicable legal test as I will further explore in my reflections on justifications (see below).

Relevance of the Directive 2014/104/EU

Whereas the referring court based its arguments also on Art. 2 Nr. 4, Art. 3 (1) and Art. 4 of the Damages Directive, the AG does not focus on these norms. He submits that Art. 3 (1) and 4 of the Directive do merely codify the jurisprudence of the Court on Art. 101 and the principle of effectiveness (see paras 79, 81, 142).

Art. 2 Nr. 4 being part of the section on definitions does not impose certain types of assignment on member states. It only foresees the possibility for member states to establish assignments and clarifies that such assigned claims would be covered by the directive (see paras 100-104). Therefore, an interpretation of Art. 2 Nr. 4 of the Directive does not contribute to resolving the legal questions at issue.

Whereas Art. 3 (1) and Art. 4 of the Directive do cover relevant legal questions for the present case, their scope does not go beyond what is laid down in Art. 101 TFEU itself and the subsequent jurisprudence of the Court based on Art. 101 and the principle of effectiveness. Therefore, it is reasonable for the AG not to focus his legal reasoning on the Directive which does not have direct effect between individuals (see para 142) but directly on Art. 101 and the principle of effectiveness. That furthermore allows him to avoid taking a position on the temporal applicability of the Directive as clearly Art. 101 does apply *ratione temporis* (see paras 73-81 of the Opinion; see further on these distinctions in my previous paper on the *Volvo* case here and a shorter blog post on the *Paccar* case here).

Violation of the Principle of Effectiveness

On the actual question of whether the national laws on the legal profession, interpreted in the way laid forward by the referring court, infringe the principle of effectiveness, the argumentation by the AG is relatively slim. This is because the most interesting questions, i.e. whether there are alternative viable options to pursue a claim without assigning it to an alternative legal service provider or ‘lawsuit vehicles’, are subject to national law and cannot be answered by the AG or the Court (see to that regard para 122). The AG raises these important questions and asks the referring court to examine carefully whether indeed the assignment model at hand is the only possible way

to effectively pursue the claims. One might think of either different types of assignment (e.g. non-fiduciary) or individual actions (see paras 122, 124) which may allow actions which are not in conflict with the national procedural laws. If such alternatives existed and their pursuance did not render the private enforcement excessively difficult, the principle of effectiveness of Art. 101 TFEU would not be infringed. However, the AG interprets the order for reference by the LG Dortmund in a way that the referring court implies that such viable alternative options do not exist. Such findings on national law by the referring first instance court will, as the AG underlines, not be checked by the ECJ but they might be subject to judicial review by appellate courts in the national proceedings (see para 122). Nonetheless, based on the premise that there are no alternative effective means to pursue the claim, the prohibition of the so-called assignment model as presumably the only viable option to effectively engage in private enforcement is contrary to the principle of effectiveness in conjunction with Art. 101 TFEU (see para 126).

Justification of Violations of the Principle of Effectiveness?

Surprisingly, the AG then moves on to enquire whether violations of the principle of effectiveness might be "justified with a view of protecting a fundamental principle" (para 128) in the legal order of the respective Member State. This might be a consequence of the conflation of the principle of effectiveness and Art. 47 CFR which the AG proposed before. However, it is not convincing. A two-step test, such as it is foreseen for limitations of fundamental rights under the charter (see Art. 52 CFR) is not normally applied to violations of the principle of effectiveness. Besides, the assessment of violations of the principle of effectiveness does already include a balancing of objectives and the consideration of "all aspects of the national regime in question" (see to that effect also para 121 of the opinion). In cases of legal conflict between the effectiveness of substantive EU law and autonomous national procedural law, the legal test of the principle itself does already contain a balancing of objectives as it establishes that only in cases where the pursuance of rights protected under EU law is rendered practically impossible or excessively difficult, the national legal norms must be interpreted in line with EU law or be left unapplied. In other words, the effectiveness principle in conjunction with a substantive norm of EU law only takes precedence where this is necessary to safeguard the effectiveness and supremacy of EU law.

There is, in principle, no room for justification after finding such a violation. The only reason for considering other general principles of law as limiting the principle of effectiveness in a concrete case would be that such general principles are regulated in EU law itself. Thus, for example, the effectiveness of Art. 101 TFEU must be balanced against the effectiveness of other treaty provisions or general principles of EU law. However, such balancing cannot take place against legal principles of member states' judicial systems as Art. 101 TFEU interpreted in conjunction with the principle of effectiveness takes precedence over such national laws and (constitutional) principles. Therefore, the balancing which the AG proposes in para. 128 is contrary to the supremacy of EU law and should therefore not be followed by the Court. It is clear from the wording and the context that the AG relates his reasoning to national legal principles because these are precisely those which were brought forward by the defendants who argued based on the national laws prohibiting the assignment of claims. Whereas the AG makes reference to the jurisprudence of the Court supporting his reasoning (see footnotes 65-67), it is questionable whether these cases concern a comparable situation. Two quoted judgments concern the principle of legal certainty (see here at para 74 and here at para 28) which is a general principle protected by EU law. As outlined before, a balancing of general principles of EU law with the principle of

effectiveness might be easier conceivable than a balancing with national legal principles. However, the jurisprudence of the Court in the quoted case law does not clearly distinguish these cases.

Besides, the quoted case law does not imply that national legal principles could be used as means of justification for violations of a principle of EU law. They merely establish that the "question whether a national procedural provision renders the exercise of an individual's rights under the European Union legal order impossible in practice or excessively difficult must be assessed taking into consideration, as appropriate, the principles which lie at the basis of the national legal system concerned" (see here at para 48 as quoted by the AG). The fact that such legal principles should be taken into consideration could (and should) be interpreted in a way that these considerations only serve the determination of whether indeed the national legal procedure is rendering the pursuance of the EU-law-protected right excessively difficult or not. In fact, in the quoted case, the ECJ asks the referring national court to examine its own national procedure (possibly in light of principles which lie at the basis of the national legal system), see paras 49-56 of the aforementioned judgment. Understood in this way and given that context, the jurisprudence quoted by the AG does not support a general possibility to justify violations of the principle of effectiveness with principles which lie at the basis of the national legal system.

As the AG does not find sufficient grounds for a justification (see paras 133-136), this dogmatical argument has no impact on the outcome of the case. However, given the high relevance of the principle of effectiveness for nearly every private enforcement case and for EU law generally, the Court should be careful to create a precedent for easily made justifications for violations of that important principle.

Consequences for the National Proceedings and Beyond

As a complete prohibition of the assignment of claims to alternative legal service providers infringed the principle of effectiveness of Art. 101 TFEU, according to the AG, the referring national court needs to either interpret its national laws in accordance with EU law in order to avoid this situation (see para 141), or it needs to leave the relevant national laws (here the laws possibly prohibiting the assignment to alternative legal service providers) unapplied (see para 143). It seems that the national court only considered the latter of these two options. That perception is shared by the AG (see para 141). However, interpretation in accordance with EU law might be the more viable option to solve this case. Actually, when looking beyond the one case which is subject to this referral, there were multiple diverging approaches taken by German courts dealing with similar cases either in the same or other private enforcement cartel cases. Some had indeed interpreted the law of the legal profession restrictively and denied the possibility of assigning claims to alternative legal service providers (see for example LG Mainz, judgment of 7.10.2022 – 9 O 125/20; LG Stuttgart, judgment of 28.4.2022 – 30 O 17/18 and judgment of 20.1.2022 ? 30 O 176/19; LG Hannover, judgment of 1.2.2021 ? 18 O 34/17). Most recently, in one of the first appeal decisions on this matter in Germany, the Oberlandesgericht Stuttgart held that the assignment of claims to an alternative legal service provider did not infringe the German laws on the legal profession and was therefore valid. Notably, this judgment by the appellate court in Stuttgart was rendered without prior reference to the ECJ. As the full judgment has not been published yet, it remains to be seen whether the line of argumentation is based solely on German law or also encompasses references to an interpretation of the German RDG in accordance with EU law. In any event, the appeal on grounds of law to the German Supreme Court (BGH) is

admissible so one can expect that the last word on this matter has not been spoken yet.

For the present case, this judgment by the Stuttgart higher regional court is already relevant as it shows that an interpretation of national law in conformity with EU law is – opposed to the AG's reading of the LG Dortmund's referral – possible. This option should be further explored by the Dortmund regional court when it needs to decide on the matter after the procedure before the ECJ is concluded. Additionally, an interpretation of the national procedural laws, especially the RDG, in conformity with EU law might benefit from more convincing legal reasoning. As the AG outlined, for leaving the national laws unapplied due to the principle of effectiveness of Art. 101 TFEU, the LG Dortmund would need to argue that there were no other ways to effectively bring the claims. Despite the fact that the currently used assignment model is arguably the easiest and most favourable model for mass litigation, mere advantageousness does not suffice. It is uncertain whether appellate courts would concur with the LG Dortmund that bringing individual claims or bundled claims purchased by one legal entity would not be effective ways for private enforcement in these particular cases. Especially with regard to the specifics of the market for timber which is characterized by B2B trade of assumingly substantial amounts of goods, it is not inconceivable that individual claims would be worthy of being pursued such as it was the case in the trucks cartel litigation where we saw both individual as well as bundled litigation (i.a. through the same assignment model), too.

One may recall that the German Bundesgerichtshof has, in its jurisprudence in other areas of law, favoured a more open interpretation of the law of the legal profession and allowed the assignment of rights to alternative legal service providers for the bundling of claims in a number of areas (see for example BGH of 13.6.2022, VIa ZR 418/21 – *financialright*; and 13.7.2021, II ZR 84/20 – *AirDeal*). I and others have argued in favour of the application of these arguments to cases of collective private enforcement through the assignment and bundling of claims (see for example here and here). The principle of effectiveness of Art. 101 TFEU has always been one argument in favour of such an interpretation. If the ECJ follows the AG in the case of *ASG 2*, it will be an argument which German courts will not be able to disregard anymore. Therefore, the decision will have an influence far beyond the referred case and concerns private enforcement more generally. The so-called 'assignment model' will likely stay the most important tool for private enforcement. The directive on collective redress, although being transposed in Germany in a broad way, applying i.a. to cartel damages claims, cannot be expected to fully resolve the existing issues and will likely not replace the assignment model (on the general development of collective redress see also *Hornkohl*, here in German and in English; see on practical implications also *Imgarten* (2024)).

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