PRIVATE ENFORCEMENT IN GERMAN COURTS: BETWEEN LAW AND ECONOMICS
LAW AND ECONOMICS: HOW DOES THE LAW FIND ITS WAY TO THE ECONOMY AND THE ECONOMY TO THE LAW?

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Dr. Ellen Braun formally opened the conference by presenting the topic and introducing the speakers. The legal perspective was presented by Prof. Dr. Peter Meier-Beck (Presiding Judge, Bundesgerichtshof); the economic perspective was explained by Prof. Dr. Kai-Uwe Kühn (Professor of Economics, University of East Anglia); and Dr. Lukas Rengier (Senior Associate, Allen & Overy, Hamburg) and Dr. Ellen Braun (Partner, Allen & Overy, Hamburg) then elaborated upon the legal perspective from the specific point of view of lawyers.

Ellen Braun started by outlining the history of private enforcement actions and claims in Germany. Back in 2003 and 2004, there were only a few cases. Private enforcement became more common after the 2005 legal reform, and has been on the rise since then; in 2018, there were already thirty-four court decisions. As a result of the 2005 amendment, which introduced plaintiff-friendly rules; the awarded damages have overtaken the fines imposed. She also mentioned the second plaintiff-friendly amendment in 2017 based on the EU Damages Directive and specified that it may take a few years before claimants can start taking action on the newly provided legal basis.

Ellen Braun then dealt with the ruling of the German Federal Court of Justice dated 11 December 2018, which was the focal point of the workshop: KZR 26/17 – Schienenkartell. According to Dr. Braun, this decision was a surprise to many as it rejected the prima facie presumption (Anscheinsbeweis) of damages in follow-on cases, which had been commonly accepted by German first and second instance courts prior to this decision.

This prima facie presumption relied on an earlier Supreme Court decision taken within the framework of an appeal against a cartel decision in which the FCO imposed fines which at the time were still calculated with reference to the additional turnover achieved as a consequence of the infringement (Mehrerlöse). In its decision KRB 2/05 – Berliner Transportbeton dated 28 June 2005, the Federal Court of Justice articulated the following reasoning: the main driver of cartel conduct is to increase revenue; therefore, if operators enter into a cartel agreement, they do so in order to increase their profits. Moreover, according to the Berliner Transportbeton I decision, the longer a cartel has operated, the more widespread it is, the higher the threshold will be for the judge to deny that an economic advantage has arisen from the cartel agreement. Based on this argument developed by the Supreme Court in a quasi-criminal case, the lower instance courts adopted a prima facie presumption of civil damages in follow-on cases.

Until the Schienenkartell decision in December 2018, seventeen follow-on damages cases had been tried before German courts. In twelve of these decisions, the prima facie presumption of damages had been accepted by the courts, and the decisions demonstrating a certain “automatism” of finding damage causation instead of looking at the details of the case: The consensus among German lower instance courts had been that the reference to an infringement decision was sufficient to prove damage causation which...
Reduced the debate to the question of quantum, i.e. size of damages to be paid to the plaintiff.

However, the Schienenkartell decision overruled this previously accepted rule. The Supreme Court considered that courts must study the details of the case in order to convince themselves of damages causation in an overall assessment (Gesamtwürdigung).

The Court expressly acknowledged the diversity and complexity of anti-competitive agreements and their implementation. Therefore, cartels cannot be restricted to a “typical set of facts”, rather each case must be assessed on its own merits. As a consequence, follow-on cases based on cartel decisions are not the type of cases for which the application of a prima facie presumption can be justified. Courts may resort to empirical judgments such as those provided by economic science on the likelihood of cartel profits, but these will only operate as a factual presumption (tatsächliche Vermutung), its role not stronger than any other piece of evidence. The overall assessment must take all the factors present into account in order to arrive at the conclusion regarding damage causation.

Dr. Braun then explained that the Roundtable had been designed to throw light on the consequences to be drawn from the Schienenkartell decision, taking a closer look at the decision from the Court’s perspective (Prof. Dr. Meier-Beck), reviewing what type of empirical judgments could be derived from economic science in order to assist courts (Prof. Dr. Kühn), and finally discussing what type of argument plaintiffs and defendants may in future consider when debating damage causation in follow-on cases before the courts (Dr. Rengier).

**PROF. DR. PETER MEIER-BECK**

Following this introduction, Prof. Dr. Meier-Beck pursued with an in-depth presentation of the Federal Court of Justice’s position in regard to this decision. He started by explaining the important difference between prima facie evidence and factual presumption. Judge Meier-Beck then emphasised distinguishing these principles from the principle of statutory presumption. While the former have to be based on facts, it is not a requirement for the latter, although it is usually the case in practice. Evidential facts must provide with sufficient certainty to reach affirmative conclusions. Sufficient certainty thus needs to be defined.

Regarding prima facie evidence, it is sufficient to prove certain indicating factors (Indiztatsachen) that are commonly recognised as providing a basis for a given conclusion. In this case, proof of atypical circumstances must be brought to override the automatic conclusion. Therefore, following the principle of prima facie evidence, in order to avoid damages in a cartel case, proof must be brought that the cartel worked in an atypical way and there is light (almost none) weight put on the individual facts of whether the cartel actually resulted in anticompetitive effects and whether market partners suffered damages. This conclusion is simply derived from the proof of the existence of a «typical» cartel.

In the case of factual presumption, this conclusion cannot be reached as easily. Proof of indicating factors (e. g. The existence of a price, market allocation or quota cartel) may be sufficient, but it depends on the circumstances of the case whether they are sufficient in light of factors, which point in the other direction. Also, more emphasis is put on the fact of actual anticompetitive effects. It is not always sufficient to simply prove that a cartel exists.

According to Judge Meier-Beck, the Federal Court of Justice had never confirmed that the principle of prima facie evidence applies in cases based on cartel agreements. Prof. Dr. Meier-Beck pointed out that a certain standard can be traced back to the terms of a criminal decision rendered by the BGH on 8 January 1992, 2 StR 102/91 (BGHSt 38, 186). The existence of a cartel implies a high probability of market prices higher than those achievable in the absence of the cartel. Moreover, he referred to the Berliner Transportbeton I decision as well as the Grauzement I decision dated 26 February 2013 and the Grauzement II decision dated 12 June 2018: There is a high probability that a cartel is established and maintained because it actually generates higher market prices, not because it is supposed to generate higher market prices. Those are probability statements drawn from experience, but not experience that is strong enough to admit prima facie evidence.

Following the publication of the Schienenkartell decision, the BGH was criticised for denying prima facie evidence and supposed to bear the burden of proving the absence of such kind of evidence. However, Judge Meier-Beck dismissed this reproach to the Court and insisted that the «burden of proof» lies on the person that claims the existence of prima facie evidence; this person has to bring proof of the factual basis justifying application of the prima facie principle, starting by precisely determining which facts have to be established so that prima facie evidence can be used to accept evidence of the principal matter.

Even the principle of effectiveness (effet utile) established by European Union law does not provide a basis for applying the principle of prima facie evidence. Prof. Dr. Meier-Beck pointed out that national legislators might be obliged by EU law to create statutory presumption. However, the creation of more or less irrefutable factual presumptions might exceed judicial competences.

He emphasised that the only possibility to establish prima facie evidence other than by statutory presumption is by bringing sufficient empirical evidence. According to Judge Meier-Beck, the Schienenkartell decision does not exclude the possibility of ever establishing prima facie evidence; it only rules that strong empirical evidence must be brought to apply the principle of prima facie evidence in cartel cases. He mentioned that this decision could be even understood as a call for economic research to produce data and examine
whether or not, in the case of some types of cartels to be precisely defined, it can be established with sufficient certainty that effects in market prices are an almost unavoidable consequence of the infringement. If so, then the principle of prima facie evidence could be applied.

In any case, it remains unnecessary to prove damages resulting from cartel conduct with certain, scientific evidence. The court must compare actual observations regarding historic market results with a theoretical contra-factual scenario. The applying standard is always under certainty, and it is decisive what the court is convinced of. Damages are determined by judicial assessment what the market conductions would most probably be in the absence of cartel conduct.

Judge Meier-Beck stressed and deplored that, when ruling on the Schienenkartell case, the appeal court did not take into consideration all the elements presented as evidence as a whole, but took into account these elements separately to assess whether or not atypical circumstances justified the application of the prima facie evidence principle. He also pointed out that it is easily forgotten that the Federal Supreme Court does not establish or assess the facts of a specific case, but its only role is to assess on whether or not the application and interpretation of the law conducted by the lower courts was correct. In the end, it is the trial court judge that needs to make the decision on whether a cartel agreement is present in a specific case and whether or not this agreement caused damages to other market participants.

Finally, Prof. Dr. Meier-Beck added that the Schienenkartell decision strengthens the lower courts’ margin of discretion in deciding cases but also places greater responsibility on them with respect to the assessment of cartel effects, which cannot merely consist of drawing conclusions based on prima facie evidentiary rules.

**PROF. DR. KAI-UWE KÜHN**

Prof. Dr. Kai-Uwe Kühn started by approving the Schienenkartell decision to the extent that economic evidence was given special weight and explained that cartel behaviours are generally much more heterogeneous than it is commonly expected. However, he stressed that empirical data on cartels is very difficult to obtain. Until fifteen years ago or so, findings were mainly drawn from theory. Nowadays, empirical studies provide the second largest source of findings. Participants in the studies are asked to answer certain questions and conclusions are drawn from their replies, which reflect human behaviour. Empirical studies allow identifying patterns that could not be found otherwise, using theory.

However, Prof. Dr. Kühn warned that, as evidence-based conclusions are often misinterpreted, generalisations should only be made with caution. Customer protection agreements exemplify this, and Prof. Dr. Kühn mentioned the Kali und Salz case (which officially was dealt with as an information exchange case, although the facts reveal that it was rather a customer protection agreement). The type of cartel conduct consisting for competing companies to agree not to target each other’s customers but instead the customers of third parties with smaller market shares is very easily proven since market participants can immediately realise that they lost customers. However, it cannot be inferred from the fact that a market participant was targeted and hypothetically has a cause of action that it actually suffered from the cartel agreement. Also, this type of cartel agreement is sometimes beneficial to customers, especially those of the smaller third-party companies, to the extent that they will benefit from price reduction by the companies participating in the cartel.

However, Prof. Dr. Kühn is not opposed to use generalisation for the assessment of damages in the case of the typical price-fixing cartel, as these situations are very easily evaluated and atypical circumstances can be found just as fast. When competitors agree on specific market prices, (a) either it results in manifest price increases, and it is thus possible and easy to assess damages; (b) or, on the contrary, artificial price increases cannot be found, and it is thus possible to argue that atypical circumstances disprove the evidentiary assumptions. In the case of exchange of information, price variations are not that easily be detected and quantified and conclusions as to whether cartel agreements have been entered into cannot be drawn following the same reasoning.

Moreover, Prof. Dr. Kühn emphasised that damages can sometimes be disproven on the basis of factual evidence, for example in the case of exchanges of information and the definition of targeted prices that are not applied by the cartelists. The conduct is unlawful and justifies the penalty, although it does not have any impact on the market and price development. Another example of a case in which proving the existence of a cartel was a particularly uneasy task is the Flüssiggas case. In this case, no physical meeting between cartelists occurred for entering into a customer protection agreement. Nevertheless, it was common courtesy not to target the customers of the other market participants. Therefore, although it seemed, from the outside perspective, that a cartel had been established, the facts were at odds. The facts had to be dealt with differently than in the case where the conclusion of an agreement materialised. Higher standards of proof must be applied when assessing whether the conduct had an impact on price development and harmed the customers.

Finally, Prof. Dr. Kai-Uwe Kühn insisted on a recent trend already mentioned with respect to exchanges of information. In these cases, it is difficult to prove...
an actual negative impact on price development, to the extent that exchanges of information sometimes result in efficiencies and vary very much from one another.

**DR. LUKAS RENGIER**

Dr. Lukas Rengier agreed with Prof. Dr. Kühn that not all cartels are alike. He noted that economic studies provide results that may be different from those that lawyers may expect. To illustrate this, he picked up examples provided by Prof. Dr. Kühn. For instance, in cases of an information exchange, information obtained from a competitor can also be used to undercut the competitor’s prices so that it lowers the price. Information exchanges therefore are considered as antitrust as regards their effects on prices.

As a consequence, Dr. Rengier welcomed the Schienenkartell decision because it provides more flexibility for courts to take economic knowledge into account.

Dr. Rengier explained that not only the quantum of damages and the pass-on of damages, but also damage causation are essentially economic issues. When assessing damage causation following the Schienenkartell decision, economic research may be relevant in various ways. In practice, this may require courts to appoint an economic expert also when assessing damage causation.

Following these general remarks, Dr. Rengier explored in detail how economic research could become relevant when assessing damage causation. According to the Schienenkartell decision, empirical principles (Erfahrungssätze) of cartel-related overcharges may be used to prove damage causation. Dr. Rengier recalled that, as Prof. Dr. Kühn had explained, economic research has established different empirical principles. He suggested that, to the extent that economic knowledge is sound and well established, it should be introduced in the proceedings with the help of (the parties’ or court’s) economists. In contrast, the empirical principle in the BGH decision should not be overstretched and become relevant when assessing damage causation.

The Schienenkartell decision mentions various factors that are relevant for the assessment, but does not define conditions that must be met to conclude that damage was caused. Dr. Rengier mentioned that economic research has in fact defined such conditions, namely the so-called collusion criteria. They are used to assess whether a certain type of conduct has affected the market in such a way that prices are inflated (=effective collusion). Since this precisely corresponds to the question of damage causation, Dr. Rengier suggested that they should also be used as framework for the Gesamtwürdigung of damage causation.

**QUESTIONS AND REMARKS**

How does the Federal Supreme Court expect the lower courts to articulate the Schienenkartell decision with the constraints they face in terms of the limited amount of time that courts can allocate to each case? Time constraints do not always allow the courts to conduct a complex analysis of the specific facts of each individual case, which would be required if they cannot use general experience standards.

Judge Meier-Beck recognised the difficulties that courts always have to cope with in terms of time management. However, he emphasised the importance of providing an analysis of the peculiarities of the case at hand as a basis for the decision. It requires from the judge that he or she takes into account all the relevant factors in view of the specific circumstances and to justify his conclusion in a comprehensible manner.

Prof. Dr. Rüdiger Lahme then asked Judge Meier-Beck about the qualitative difference between challenging an evidentiary presumption and challenging a factual presumption. Would it not have been enough to rule in the Schienenkartell case that the existence of challenging factors was not sufficiently examined?

In response, Judge Meier-Beck explained that, following this reasoning, the Federal Court of Justice probably would have come to the same conclusion. He stood in favour of an overall assessment of case-specific circumstances over the separation of prima facie evidence from the possibility to challenge its existence. How could an economist better explain the complex mechanisms at play using a more simplified model in order to improve the experience standards that can be used for the purpose of assessing cartel conduct?

Doris Hildebrand explained that the Schienenkartell decision places the emphasis on empirical research, economic findings, and experience. Prior to the decision, Ms Hildebrand had to conduct many damage estimations. The Schienenkartell decision introduced a significant change. Since then, she is asked more frequently to prepare expert reports in the field of competition policy and economics such as market structure analyses. However, Ms Hildebrand worries that it may simply result in longer expert reports, which would not be very practicable.

Judge Meier-Beck added that it was never the intention of the BGH to cause judgments and expert reports to become denser. If a case is very simple, as it might be the case in a market allocation or quota cartel, the harm to the customers being highly plausible, the courts may conduct a simplified analysis to explain their reasoning. However, if the case is more complex, investigations may need to be conducted with appropriate care to take into account all relevant factors.

Dr. Rengier stated that complex cases might indeed require courts to appoint an economic expert. Not in all cases is it possible to rely on the empirical principle (Erfahrungssatz) mentioned in the Schienenkartell decision according to which price and customer protection agreements likely cause harm. However, economic expertise may not be required any more once the case law has established additional categories of empirical principles for different types of behaviour.

Would it be helpful, in order to gather empirical data for economic research, to focus on the expertise of experts who worked in the field such as attorneys or retired managers after expiry of confidentiality agreements? They may be sources of better data than economy students whose decisions may move them away from reality due to their lack of experience.

Prof. Dr. Kühn added that generalisation in regard to the assessment of cartel conduct is problematic since cases vary significantly one from one another. Also, cases have become more complex in recent times; agreements have become less explicit.

Judge Meier-Beck further stressed the importance of thorough fact-based, case-specific investigations that the Federal Supreme Court tried to perform. However, he acknowledges that the courts must find plausible explanations of market results rather than conduct scientific research. Judge Meier-Beck expresses confidence in the ability of courts to find a right and practicable balance.