The Relationship between Railway Regulatory Law and Competition Law in the Legal Evaluation of Railway Infrastructure Charges

Expert Opinion

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A.
Overview of the questions and results of the expert opinion

(Pages 2-7)

This expert opinion concerns the relationship between railway regulatory law and competition law in the legal evaluation of railway infrastructure charges. In particular, it deals with the question of whether a civil court's award of competition law damages or a civil court's judgment ordering the repayment of infrastructure charges based on a violation of competition law presupposes a prior legally binding finding by the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (*Bundesnetzagentur*, "BNetzA") that the track access charges violate regulatory law.

This question arises against the backdrop of several lawsuits filed by railway undertakings (RUs) and public authorities (purchasers of local rail passenger services) that are pending before German civil courts. The defendant and some courts of lower instance have taken the position that the ECJ's reasoning in its judgment of 9.11.2017 in the *CTL Logistics* case can be transferred to the judicial assertion of competition law damage claims. In its judgement in the *CTL Logistics* case, the Court of Justice found the application of the German Civil Code (*Bürgerliches Gesetzbuch*, "BGB") regime of equity control under § 315 (3) BGB to regulated railway infrastructure charges to be unlawful if the competent regulatory authority had not previously determined that the track access charges were unlawful.

Subsequently, the Federal Court of Justice (*Bundesgerichtshof*, "BGH") has repeatedly ruled - in Judgements dated 29.10.2019 (Case No. KZR 39/19) and 1.9.2020 (Case No. KZR 12/15) - that this case law is not transferable to the assertion in civil courts of competition law damage claims. Such claims are not called into question by the judgement in *CTL Logistics* and cannot be precluded by railway regulatory law. The BGH did not consider a reference for a preliminary ruling to be appropriate, because there were no reasonable doubts within the meaning of the *CILFIT* case law of the ECJ as to the manner in which the question was to be resolved. Since some courts of lower instance nevertheless consider the transferability of the judgement in the *CTL Logistics* case to competition law damage claims to be in need of clarification, the existence of an *acte clair* as assumed by the BGH will be analysed.

This expert opinion comes to the following conclusion:

1. **A claim for damages or a claim for repayment of track access based on a violation of competition law does not depend on a prior legally binding finding by the BNetzA that the track access charges violate regulatory law.**

2. **This question can be answered unambiguously on the basis of EU law and therefore does not require clarification by the ECJ (*acte clair*). Moreover, the fact that such a decision by the BNetzA is not generally a prerequisite for claims for repayment has already been explicitly decided by the ECJ in its Judgement dated 9.11.2017 in the *CTL Logistics* case (*acte clair*).**

The considerations underlying this result are summarised as follows:

1. Railway regulatory law does not preclude the independent application of competition law to the same charges.

   - **Based on the primacy of primary law, Arts. 101, 102 TFEU take precedence over the secondary law, including over the regulatory regime of the Railway Directives.**

     Given the EU law hierarchiy of norms, the application of EU competition rules cannot be excluded by sector-specific regulatory law. Conflicts between the two legal regimes are to be decided based on the principle of *lex superior derogat legi inferiori* instead of the principle of *lex specialis derogat legi generali*. Given that the Railway Directives are to be interpreted in conformity with primary law on the one hand but shape the legal framework within which undistorted competition takes place on the other hand, the two legal regimes mutually influence each other. But if, in exceptional cases, conflicts cannot be resolved in this manner, EU competition law prevails.

   - **The ECJ has consistently held that regulated charges are simultaneously subject to an independent review under Art. 102 TFEU.**

     A finding of an infringement of EU competition law is conceivable both if regulated charges were levied or approved in conformity with the regulatory regime (*Deutsche Telekom* and *Telefónica* cases) and if the regulatory authority has already intervened on the basis of its own powers based on the same facts. There is no violation of the principle of *ne bis in idem* in the latter case, because the two legal regimes serve different interests (*Orange Polska SA* case).

   - **Even when national law is considered in isolation, railway regulation and competition law are applicable side-by-side.**

     While German competition law is hierarchically subordinate to European secondary law, the German legislator generally assumes that regulatory law and German competition law are complementary regimes. Only in exceptional cases do special rules - see § 12 (7) of the General Railways Act (*Allgemeines Eisenbahngesetz*, "AEG"), § 111 (1)(1) of the Energy Industry Act (*Energiewirtschaftsgesetz*) - exclude the application of certain provisions of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, "GWB"). In all other cases, the two legal regimes apply in parallel. According to § 33 (2)(3) and § 45 (2)(3) of the Railway Regulation Act (*Eisenbahnregulierungsgesetz*, "ERegG"), the regulatory approval of charges creates an irrebuttable presumption of fairness within the meaning of § 315 BGB while no similar presumption is provided for with regard to competition law.

2. At the institutional level, the BNetzA's competences under regulatory law do not limit the competence of the civil courts to independently assess the facts of a case under competition law. This applies without limitation insofar as the assertion of claims for competition law damages is concerned.

   - **Regulatory law does not lead to a concentration of proceedings at the BNetzA, such that the application of competition rules and the protection of competition would depend on its assessment.**

     Pursuant to Art. 56 (2)(1), (9)(3) Directive 2012/34/EU, the competence of the Federal Cartel Office to apply competition rules and to ensure competition in the rail transport markets is explictly unaffected by the competences of the regulatory body. The competences of the European Commission also remain unchanged. Unlike in other jurisdictions like the United Kingdom, the regulatory

authority in Germany has not been entrusted with the task of directly applying competition law in the respective sector. The BNetzA is merely required to interpret regulatory law in conformity with primary law (competition law).

- **According to consistent case law, the private and decentralised enforceability of European competition law before the civil courts follows from the direct applicability of Arts. 101, 102 TFEU which create individual legal rights.**

  Pursuant to Art. 6 Regulation (EC) No. 1/2003, national courts have jurisdiction for the application of Arts. 101, 102 TFEU. If a plaintiff objects to charges that are in violation of competition law and wants to bring this violation to an end, s/he may be referred to legal actions against the unlawful approval under the ERegG if the asserted violation of competition law corresponds in substance to a violation of regulatory law. In such a setting, administrative procedural law simultaneously becomes sector-specific *procedural* competition law. The old version of the AEG, on the other hand, did not guarantee effective legal protection by means of which individuals could obtain *ex tunc* cessation of a violation of competition law, however. Consequently, the old regulatory law could not be understood as sector-specific *procedural* competition law. In any case, the situation is different for the retrospective decision on claims for competition law damages. For these, the civil courts have retained unrestricted jurisdiction, even after the entry into force of the ERegG.

- **As the ECJ has decided in its *Courage* and *Manfredi* judgments, it follows from Arts. 101, 102 TFEU in conjunction with the principle of effectiveness that any person is entitled to claim damages or losses caused by a violation of competition law.**

  Given the primacy of EU primary law, such claims, which are to be decided by the courts in accordance with Art. 6 Regulation (EC) No. 1/2003, cannot be effectively excluded by the Railway Directives. Simultaneously, damage claims or claims for repayment which are meant to undo harms of the past do not have the same potential for conflict with regulatory law as requests to bring a violation to an end – which are directed to the future. Accordingly, conflicts between competition law damage claims and regulatory law have not arisen in legal practice to date; in the event of a conflict, primary law would take precedence.

3. Nor can the assertion of claims competition law damages in civil court be made dependent on the charges in question having first been referred to the BNetzA.

   - **Based on the independent applicability of EU competition law, the legal assessment of charges under regulatory law cannot predetermine a competition law assessment.**

     Arts. 101, 102 TFEU remain applicable alongside regulatory law. Under German law, the BNetzA- while required to consider competition law in its interpretation of regulatory law – is not competent to apply competition law as such. Consequently, its decision cannot pre-empt claims for damages based on competition law. In particular, an analogy to Art. 9 of the Antitrust Damages Directive 2014/104/EU, which governs the effects of decisions of national *competition authorities*, is thus excluded. The ECJ has repeatedly ruled that competition authorities remain competent to examine, under EU competition law, the charges that have previously been reviewed by a regulatory authority, and may both confirm the assessment of the regulatory authority or arrive at a different assessment on this legal basis.

- **A requirement that the BNetzA initially determine that charges are unlawful under regulatory law in a first step before claims for competition law damages can be brought before the civil courts in a second step would contradict the principle of effectiveness.**

  The determination of a violation of competition law cannot depend on a prior objection by the regulatory authority, neither with regard to concerns that are dealt with by competition law alone, nor in with regard to concerns that are addressed by both areas of law. Even in the latter case, an evaluation according to genuine competition law standards must remain possible and can lead to an outcome that deviates from that of the regulatory authority. Otherwise, an effective application of competition law, which the regulatory authority is not competent to apply, would not be ensured; claimants would be prevented from enforcing their individual rights under civil competition law.

- **According to the case law of the ECJ on Art. 102 TFEU and Art. 1 (3) Regulation (EC) No. 1/2003, the prohibition of abuse of dominance applies without the need for a prior decision by a competition authority. *A fortiori*, a decision by the regulatory authority cannot be a prerequisite.**

  From the direct applicability of Arts. 101, 102 TFEU, it follows by implication that courts may apply the prohibitions contained therein irrespective of whether competition authorities have previously found a violation and that individuals may also invoke the rights granted to them irrespective of such a determination (*BRT/SABAM* case). This case law is codified in Art. 1 (3), Art. 6 Regulation (EC) No. 1/2003 and is the starting point for the decentralised enforcement of competition law before the courts of the Member States. However, if a decision by the competition authority is not a prerequisite for legal assertion, this must apply *a fortiori* to decisions by the regulatory authority. The evaluation under regulatory law is instructive for the evaluation under competition law, but cannot be predeterminative.

- **In addition, the right to an effective remedy under Art. 47 of the Charter of Fundamental Rights precludes the requirement of prior referral to the regulatory authority for the repayment of charges levied under the formerly applicable regulatory regime of the AEG (old version).**

  Even assuming that, in other sets of circumstances, the judicial assertion of claims for competition law damages could be made dependent on a prior referral to the BNetzA, this could not apply to the repayment of such charges that were levied under the old version of the AEG. Such a prerequisite was not legally determined and recognisable for the plaintiffs, either at the point in time of the emergence of the claim or at the point in time of its assertion in court. This was pointed out by the BGH (case KZR 39/19). Moreover, under the old version of the AEG effective legal protection could not be achieved via the regulatory authority because, firstly, a complaint was only possible after the failure to conclude a contract, secondly, the group of injured parties was larger than the group of persons entitled to file a complaint and, thirdly, the applicants could not force the BNetzA to take a decision.

4. A requirement of a prior decision by the regulatory authority does not follow from the judgement of the ECJ in case C-489/15 of 09.11.2017 *(CTL Logistics*).

   - **According to the judgement, a review as to equity carried out by a civil court is excluded if it can lead to an adjustment of regulated charges on a case-by case basis and outside the procedure provided for by Art. 30 Directive 2001/14/EC.**

     In its *CTL Logistics* decision, the ECJ deals solely with the question set out in para. 34 of the judgement, as to "whether the provisions of Directive 2001/14, in particular Art. 4 (5) and Art. 30 (1), (3), (5) and (6) thereof, must be interpreted as meaning that they preclude the application of national

legislation, such as that at issue in the main proceedings, which provides for a review of the equity of charges for the use of railway infrastructure, on a case-by-case basis, by the ordinary courts and the possibility, if necessary, of amending the level of those charges, independently of the monitoring carried out by the regulatory body provided for in Art. 30 of that directive". In the operative part of its judgment, the Court answered referral questions 5) and 6) in the negative, both of which were directed precisely at the compatibility of an equity review of with Arts. 4 (5) and 30 Directive 2001/14/EC.

- **Over and above the exclusion of a civil law equity review, the judgement does not pronounce a prohibition on courts to decide on repayment claims without first referring the matter to the regulatory body.**

  In its referral questions 1) and 2), the Regional Court of Berlin had explicitly requested the ECJ - and abstracting from the standard of § 315 (3) BGB - to give a preliminary ruling on whether Directive 2001/14/EC (generally) precludes claims for repayment of infrastructure charges if the regulatory authority and, if applicable, the administrative courts have not previously decided on the question of the unlawfulness of the corresponding charges. Although the ECJ does not deal with these questions further in the grounds for its decision, it ultimately explicitly *answers them in the negative* (see para. 105 of the decision). Consequently, the Directive therefore does *not* generally preclude repayment claims without prior referral to the regulatory authority, but only precludes an equity review of the charges by a civil court, because this review - even if it is generally limited to claims for repayment – could possibly lead to an adjustment of regulated charges in individual cases *for the future* outside the procedure under Art. 30 Directive 2001/14/EC.

- **The ECJ's *CTL Logistics* decision regarding the exclusion of an equity review of regulated charges is not transferable to the review of such charges under competition law for the very reason that both the prohibition of abuse under competition law and the claims for competition law damages which contribute to its effective enforcement take precedence over the Railway Directives: primary law takes precedence over secondary law.**

  The *CTL Logistics* case concerns solely the applicability of national civil law alongside the regulation of charges under railway law. The unspoken starting point here is that the Railway Directives take precedence over the laws of the Member States. By contrast, the relationship of claims for damages under competition law to the regulation of charges is governed by a different conflict resolution rule - the primacy of primary law. The assessment of the charges under competition law is based on the standards of EU primary law, which also guarantees an effective regime for damages claims under civil competition law.

- **The lines of conflict between the equity review under civil law and regulatory law described by the ECJ in the *CTL Logistics* case do not extend to the relationship between competition law and regulatory law.**

  As the ECJ points out in para. 64 and paras. 73-74 of the *CTL Logistics* decision, the equity assessment under § 315 (3) BGB focuses on the bilateral contractual relationship and for this very reason comes into conflict with the prohibition of discrimination under regulatory law, which aims to ensure the equal treatment of different contractual partners. By contrast, competition law, just like regulatory law, looks at the market. Given that competition law, like regulatory law, focuses on the protection of competition and the protection of the market counterparty, it does not come into conflict with the prohibition of discrimination. The prohibitions of discrimination under competition law and law are aligned; in other respects, the two areas of law complement each other in the protection of competition.

- **The institutional conflict between the regulatory authority's supervisory competence and the civil court's authority to assess charges in the course of an equity review - a conflict which was central to the *CTL Logistics* decision - does not arise between a regulatory review and competition law damages, because the application of competition law does not require the review of the "correct" application of regulatory law.**

  Whereas the equity review under § 315 (3) BGB functioned as a gateway for a review of charges by a civil court on the basis of regulatory law standards, regulatory law and competition law remain independent legal regimes with independent standards, which merely influence each other, but do not blend into one. While civil courts must take into account the framework under regulatory law when applying competition law, this does not imply any encroachment with the exclusive powers of the regulatory authority any more than interpreting regulatory law in light of competition rules implies encroachment with the powers of the competition authorities.

- **Indeed, court decisions under civil competition law take effect only *inter* partes, but this lies in the logic of a decentralised application of competition rules and follows directly from their parallel applicability, which railway regulatory law cannot preclude.**

  Competition rules are directly applicable and grant individual rights, precisely in order to enable a decentralised enforcement. In this form, they enjoy priority over secondary EU legislation. Simultaneously, judgements of civil courts regarding claims to competition law damages have so far not triggered any need to adjust the regulatory structure of charges. As a rule, claims for damages are brought with a considerable time lag. Moreover, the prohibition of discrimination under railway regulatory law is not jeopardised if individual competitors are awarded damages. Such awards do not distort the competitive “level playing field”, which is determined not by past but by current charges. Furthermore, the prohibition of discrimination does not imply that equal rights have to be asserted equally by all market actors in court.

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I. Subject matter of the expert opinion

Various lawsuits brought by railway undertakings (RUs) and public authorities (purchasers of local rail passenger services) and asserting reimbursement or damages under civil competition law on the grounds of anti-competitive excessive track access charges or station charges are currently pending before German civil courts. For example, the DB Netz AG's practice of adding so-called "regional factors" to the track access charges in local rail passenger transport (SPNV) in the period from 1.1.2003 to 10.12.2011 is challenged: Percentage surcharges on the track access charge were levied on selected routes and exclusively RUs of local rail passenger transport (SPNV). Plaintiffs claim that this amounted to an abuse of dominance within the meaning of Art. 102 TFEU / § 19 GWB.

In these civil court proceedings, the relationship between general (German and European) competition law and railway regulatory law has become a relevant preliminary question. For example, the Regional Court of Frankfurt a.M. dismissed several lawsuits against DB Netz AG on the grounds that it was not authorised to rule on the asserted claims under civil competition law unless the unlawfulness had first been established by a final and binding decision of the BNetzA according to regulatory law standards.[1] The existence of an exploitative abuse, an exclusionary abuse or an anti-competitive discrimination under German or European competition law would need to be examined incidentally within the framework of regulatory law. Civil courts would not be authorised to undertake such an assessment. The same position has been taken by other courts of lower instance in proceedings in which track access or station charges were also disputed.[2]

The Regional Court of Frankfurt a.M. based its view on the ECJ's judgement of 9.11.2017 in the *CTL Logistics* case[3], according to which an equity review of track access charges in accordance with § 315 (3) BGB can only be undertaken in accordance with EU law if the incompatibility of the charge with the provisions of railway regulatory law has previously been established by the competent regulatory authority or by a court that has reviewed the regulatory authority's decision. Otherwise, an equity review pursuant to § 315 (3) BGB, which is based on the interests of the parties in the individual case, would be contrary to the principle of equal treatment under EU railway law and would jeopardise the uniformity of the regulatory regime. Moreover, civil courts would encroach on the jurisdiction of the regulatory authority provided for by EU law if they applied the provisions of railway regulatory law independently.

These principles - according to the Regional Court of Frankfurt a.M. as well as other German courts of lower instance - are transferable to the review of track access charges under competition law. On this view, the applicability of Art. 102 TFEU would be unaffected by such an interpretation. Only the enforcement of private claims arising from Art. 102 TFEU by national civil courts would be precluded. The EU law requirement of an effective enforcement of Art. 102 TFEU would not prevent such preclusion, because Directive 2001/14/EC (or Directive 2012/34/EU, which replaced it on 16.6.2015) would ensure, by means of a regulatory regime, that there is no abuse of dominance in the first place. The implementation of this regime would be monitored by the competent regulatory authority, which is itself subject to judicial review. *Torsten Körber* has corroborated this view in an expert opinion for DB Netz AG.[4]

The BGH ruled differently in its judgement dated 29.10.2019, issued in a parallel proceeding.[5] According to the BGH, the assertion in civil court of claims for damages or for the surrender of unjust enrichment resulting from the violation of Art. 102 TFEU by a railway infrastructure undertaking was not precluded either by Directive 2001/14/EC itself or by the old version of the AEG. Furthermore, the enforcement of competition law-based claims

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1 See Regional Court of Frankfurt a.M., Judgement dated 8.11.2018, 2-03 O 517/15; Judgement dated 9.5.2018, 2-06 O 38/17, ECLI:EN:LGFFM:2018:0509.2.06O38.17.0A.

2 Regional Court of Leipzig, Judgement dated 6.7.2018, 01 HK O 3365/14, ECLI:DE:LGLEIPZ:2018:0706.01HKO3365.14.0A, para. 32 *et seq.*; Regional Court of Berlin, Judgement dated 30.10.2018, 16 O 495/15 Kart, ECLI:DE:LGBE:2018:1030.16O495.15KART.00, para. 40 f.; Higher Regional Court of Dresden, Judgement dated 17.4.2019, Case U 4/18 Kart, ECLI:DE:OLGDRES:2019:0417.U4.18KART.0A, para. 43 *et seq.* - overruled by BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0 - *Trassenentgelte*

3 ECJ, Judgement dated 9.11.2017, Case C-489/15, ECLI:EU:C:2017:834 - *CTL Logistics*.

4 Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020.

5 BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0 - *Trassenentgelte*.

does not require a final and binding determination by the BNetzA that the charges are unlawful. Since the BGH considered this to be obvious (*"acte clair*"), it refrained from referring the question to the ECJ for a preliminary ruling. The BGH has since confirmed this line in its judgement dated 1.9.2020, the reasons for which are not yet available.[6]

In contrast to the BGH, courts of lower instance with similar cases pending are considering a request for a preliminary ruling. The ECJ would have to clarify whether civil courts could find that track access charges were unlawful under competition law without the regulatory authority having first determined that the charges violated railway regulatory law.

In the following, we will therefore examine not only the relationship between competition law and railway regulatory law, but also whether the situation under EU law is indeed clear ("*acte clair*"), as the BGH believes, such that a reference for a preliminary ruling is unnecessary, or whether this is a question that requires a decision by the ECJ. As the ECJ ruled in its *CTL Logistics* judgement dated 9.11.2017 regarding the relationship between § 315 (3) BGB and Directive 2001/14/EC that a German civil court may engage in an equity review of track access charges under § 315 (3) BGB only if the regulatory authority has previously issued a final and binding decision that the charges are contrary to railway law, the question arises as to whether the decision also casts doubt on the previous understanding of the relationship between competition law and railway regulatory law. In substance, therefore, what is at issue here is the transferability of the ECJ's considerations regarding the relationship between § 315 (3) BGB and railway regulatory law to the relationship between competition law and railway regulatory law.

The answer to this question is relevant in those proceedings in which the anti-competitive nature of the so-called regional factors is in dispute. Their unlawfulness under regulatory law is widely recognised, but has not yet been established by the BNetzA with final and binding effect. In a decision dated 5.3.2010, the BNetzA had declared the regional factors invalid for the period starting on 12.12.2010, based on a violation of the prohibition of discrimination under railway regulatory law in § 14 (1)(1) AEG (old version). The BNetzA also considered the regional factor to be in violation of the charging principles of transparency and equal treatment pursuant to § 4 (2) of the Railway Infrastructure Usage Regulations (*Eisenbahninfrastrukturbenutzungsverordnung*, "EIBV") in conjunction with no. 2 of the Annex to the EIBV, § 21 (6)(1) EIBV. However, the BNetzA and DB Netz AG later settled the case to end the administrative proceedings. As part of this settlement, the DB Netz AG undertook not to levy the regional factors starting on 11.12.2011 and only to levy them at a reduced rate in the period from 12.11.2010 to 10.12.2011. This did not involve a final legal assessment of regional factors. As a result of this settlement, the decision by the BNetzA has not become final and binding. For procedural reasons, the BNetzA does not consider itself in a position to determine the incompatibility of track access charges with railway regulatory law with effect for the past, or to order the repayment of the charges.

In multiple decisions dated 11.10.2019 and 3.7.2020, which were essentially based on the same grounds, the BNetzA therefore rejected applications by railway undertakings and public authorities to declare regional factors or station charges unlawful retrospectively.[7] According to the BNetzA, there is no basis in the Railway Regulation Act (*Eisenbahnregulierungsgesetz*, "ERegG")[8], which has now come into force, for complaints against charges that have already expired. Pursuant to § 68 (3) ERegG, the BNetzA can only decide on charging schemes within the meaning of § 66 (4)(No. 5) or the "level or structure of infrastructure charges which an applicant is, or may be, required to pay" with effect for the future. In the view of the BNetzA, the same applies to its decisions pursuant to § 68 (2)(1) ERegG regarding the complaint of an applicant pursuant to § 66 (1) ERegG that believes that it has been discriminated against or otherwise aggrieved by decisions of a railway infrastructure undertaking, or regarding applications from applicants where an access agreement or a framework agreement with the infrastructure manager is not concluded (§ 66 (3) ERegG). Numerous lawsuits are pending before the Administrative Court of Cologne against these decisions of the BNetzA, which are essentially based on the same grounds.

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6 BGH, Judgement dated 1.9.2020, KZR 12/15 - *Stationspreissystem*.

7 For instance, BNetzA, Decision dated 11.10.2019, BK10-18-0094_E; Decision dated 3.7.2020, BK10-19-0167_E.

8 For the justification of the (undisputed) applicability of the ERegG, see BNetzA, Decision dated 11.10.2019, BK10- 18-0094_E

The procedural situation is therefore as follows: In the view of the BGH, RUs and public authorities can assert damage claims against DB on the basis of competition law. For charges levied under the old AEG, this was necessary already for reasons of effective legal protection. According to another view, the assertion of damage claims on the basis of competition law requires a prior final and binding decision of the regulatory authority. However, the BNetzA does not see itself in a position to take such a retroactive decision because, in its view, railway regulatory law does not permit such a "retroactive" decision.

Against this background, this legal opinion addresses the question of the relationship between competition law and railway regulatory law in the legal evaluation of railway infrastructure charges.

Answering the question in terms of substantive law also has an institutional dimension. Because of the division of responsibilities between civil courts, on the one hand, and the regulatory authority and administrative courts, on the other hand, any interpretation of substantive law comes with implications for both access to justice and the cooperation between the actors. If the enforcement of damage claims under competition law depends on the regulatory authority's prior determination that the charges are unlawful under railway law, the injured parties will, at best, be able to enforce their damage claims if the BNetzA does take a substantive decision. So far, the BNetzA has refused to take the relevant substantive decision, based on its interpretation of national law. Its position has been challenged in court but the proceedings are ongoing and will probably involve three court levels. In its judgment KZR 39/19, the BGH has held that, in such a setting, EU law cannot require a further standstill of the proceedings pending before civil courts.

In terms of substantive law, the setting of the charges by DB Netz AG between 1.1.2003 and 10.12.2011 - that is, in the period in which DB Netz AG levied the so-called regional factors - took place on the basis of the AEG (old version). Under this regime, the infrastructure manager was competent for setting the track access charges. They were not subject to an approval requirement. Rather, the infrastructure manager was obligated to notify the BNetzA of any intended revision or amendment of the network statement, including the intended charging principles and level of charges (§ 14d AEG, old version). The BNetzA could engage in an *ex-ante* and/or *ex-post* review - pursuant to § 14e (1)(No. 4) AEG (old version), it could subject the infrastructure manager's planned decisions to a summary *ex ante review* and, if necessary, lodge an objection within four weeks. However, if the network statement or the level or structure of track access charges did not comply with the provisions of railway regulatory law, the BNetzA could also declare them invalid at a later date *ex officio* with effect for the future (§ 14f AEG, old version).

In contrast, the ERegG now makes charges for the provision of the minimum access package subject to approval (§ 45 ERegG). However, as will be shown, this does not make any significant difference as to the question of whether civil courts are authorised to rule on consequential claims under civil law arising from a violation of competition rules by track access charges.

II. Main features of the regulation of railway infrastructure charges

1. The Railway Directives 2001/14/EC and 2012/34/EU

a) Objectives and principles in terms of substantive law of the regulation of charges

Railway *infrastructure* was and is a natural monopoly. However, beginning with Directive 91/440/EEC on the development of the Community's railways[9], the European Union set out to liberalising rail *transport*. The opening up of rail transport had a dual objective from the outset.[10] the Railway Directives are intended to contribute to the greater integration of freight and passenger transport in the internal market,[11] which is an important prerequisite for the development of the free movement of goods and workers.

[9] ABl. 1991 no. L 237/25.
[10] See Kühling/Weinbeck, in: Kühling (ed.), AEG/ERegG, Commentary, 2020, introd. para. 4.
[11] See Directive 2001/14/EC, recital 1; Directive 2012/34/EU, recital 2.

At the same time, however, railway services are also part of the internal market, the basic principle of which is a system of undistorted competition.[12] As such, the regime of access and charge regulation under railway law is intended to strengthen competition between railway undertakings[13] as well as between the different modes of transport.[14]

In view of the persisting infrastructure monopoly, opening up rail transport to competition requires that railway undertakings can gain access to the rail network on fair and non-discriminatory terms. The vertical integration of rail operations and the provision of rail transport services in one undertaking gives rise to possible risks of discrimination and obstruction.

Under competition law, a claim by railway undertakings to access to the rail network arises from the so-called *"essential facilities*" doctrine (Art. 102 TFEU / § 19 (2)(4) GWB). However, with the systematic and day-to-day monitoring of fair and non-discriminatory access, competition law alone would be overwhelmed.

The European legislator reacted to this by gradually creating a regulatory framework for capacity allocation and charging rules, which, repeatedly proved to be inadequate, however, and was adjusted and reinforced accordingly. The core of the railway directives was and still is a prohibition of discrimination under regulatory law: To ensure fair competition on the railroads, railway undertakings are to be treated equally in terms of both access to the infrastructure and usage charges. For infrastructure charges, the prohibition of discrimination is reflected in Art. 4 (4) and (5) Directive 2001/14/EC (correspondingly: Art. 29 (2) and (3) Directive 2012/34/EU): Infrastructure managers shall ensure "that the charging scheme is based on the same principles over the whole of their network" (Art. 4 (4) Directive 2001/14/EC; Art. 29 (2) Directive 2012/34/EU); and they shall ensure "that the application of the charging scheme results in equivalent and non-discriminatory charges for different railway undertakings that perform services of equivalent nature in a similar part of the market" (Art. 4 (5) Directive 2001/14/EC; Art. 29 (3) Directive 2012/34/EU). The basis for calculating the infrastructure charges is the network statement, which the infrastructure manager must develop and publish (Art. 3 (1) Directive 2001/14/EC in conjunction with Annex I; Art. 27 Directive 2012/34/EU). The charges actually applied must comply with the rules laid down in the network statement (Art. 4 (5) Directive 2001/14/EC; Art. 31 (2) Directive 2012/34/EU).[15] The prohibition of discrimination represents, as the ECJ has stated, "the central criterion for the determination and recovery of the charge for use of the infrastructure".[16] Structurally, it is secured by the requirement that an infrastructure manager that is vertically integrated and not independent of railway undertakings in its legal form, organisation or in its decision-making functions must outsource the collecting of charges to a charging body that is independent of railway undertakings in its legal form, organisation and decision-making functions (see Art. 4 (2) Directive 2001/14/EC; the requirements for separation between infrastructure management and the provision of transport services are reinforced by Art. 6 and 7 Directive 2012/34/EU).

The second pillar of the regulation of charges, established in Directive 2001/14/EC and further developed in Directive 2012/34/EU, is comprised of a few basic principles of cost relatedness and incentive regulation. The charging framework of the Member States shall be intended to provide incentives for infrastructure managers to reduce costs and manage infrastructure efficiently (Art. 6 (2) and recital 40 of Directive 2001/14/EC; Art. 30 Directive 2012/34/EU) and to make economically viable investments in railway infrastructure (Directive 2001/14/EC, recital 34; Directive 2012/34/EU, recital 66).[17] The setting of the rules for calculating the infrastructure charges and the calculation of the infrastructure charges themselves is the responsibility of the infrastructure manager, who is assured of "management independence" [18] and is granted a certain leeway in the

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12 See Protocol No. 27 on the Internal Market and Competition, OJ 2008 No. L 115/309.

13 See Directive 2001/14/EC, recital 16; Directive 2012/34/EU, recital 4.

14 See Directive 2012/34/EU, recital 5.

15 For the principle of equal treatment, see also ECJ, Judgement dated 28.2.2013, Case C-473/10, ECLI:EU:C:2013:113, para. 47 - *Commission v. Hungary*; ECJ, Judgement dated 18.4.2013, Case C-625/10, ECLI:EU:C:2013:243, para. 49 - *Commission v. France*; ECJ, Judgement dated 9.11.2017, Case C-489/15, ECLI:EU:C:2017:834, para. 36 - *CTL Logistics*.

16 ECJ dated 9.11.2017, Case C-489/15, ECLI:EU:C:2017:834, para. 47 - *CTL Logistics*.

17 See also ECJ, Judgement dated 28.2.2013, Case C-483/10, ECLI:EU:C.2013:114, para. 45 - *Commission v. Spain*.

18 For this concept, Directive 2001/14/EC refers to Art. 4 Directive 91/440/EEC, which provides that "as regards management, administration and internal

calculation and levying of the infrastructure charges (see Article 4 (1) (2) Directive 2001/14/EC and recital 20; Art. 29 (1) Directive 2012/34/EU).[19] This flexibility shall enable the infrastructure manager to ensure an efficient use of the rail network.[20]

However, the infrastructure manager is also subject to certain requirements in this regard, and since Directive 2012/34/EU has entered into force, the Member States have been empowered to subject the setting of charges to an *ex ante* approval requirement (Art. 30 (8) Directive 2012/34/EU). The infrastructure charges included in the network statement shall be "set at the cost that is directly incurred as a result of operating the train service" (Art. 7 (3) and recital 38 Directive 2001/14/EC; Art. 31 (3) Directive 2012/34/EU), and provide consistent signals to infrastructure users that lead them to make rational decisions (Directive 2001/14/EC, recital 35; Directive 2012/34/EU, recital 44). This may also include a charge component reflecting the scarcity of infrastructure capacity of the identifiable segment of the infrastructure during periods of congestion (Art. 7 (4) and recital 25 Directive 2001/14/EC; Art. 31 (4) Directive 2012/34/EU). In addition, the costs of environmental effects may be taken into account (Art. 7 (5) (1) Directive 2001/14/EC; Art. 31 (5) Directive 2012/34/EU).

The manner in which full recovery of the infrastructure manager's costs is achieved is left to the discretion of the Member States. Cost recovery may result from revenues of an infrastructure manager from infrastructure charges, surpluses from other commercial activities and State funding (see Art. 6 Directive 2001/14/EC).[21]

b) EU law requirements for the law enforcement regime

Finally, the European Railway Directives impose certain requirements on Member States with regard to enforcement of the law. Pursuant to Art. 30 (1) Directive 2001/14/EC (Art. 55 (1) in conjunction with Art. 56 (2) Directive 2012/34/EU), the Member States must establish a regulatory body that is independent of the infrastructure manager and that, among other things, must ensure that the infrastructure charges comply with the requirements of the Directive (Art. 30 (3)(1) Directive 2001/14/EC; Art. 56 (2) and (6) Directive 2012/34/EU).[22]

Art. 56 (2) Directive 2012/34/EU now states in this regard:

"Without prejudice to the powers of the national competition authorities for securing competition in the rail services markets, the regulatory body shall have the power to monitor the competitive situation in the rail services markets and shall, in particular, control points (a) to (g) of paragraph 1 (the network statement in its provisional and final versions; the criteria set out in it; the allocation process and its result; the charging scheme; the level or structure of infrastructure charges [....]; arrangements for access in accordance with Arts. 10 to 13; access to and

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review over administrative, economic and accounting matters railway undertakings have independent status in accordance with which they will hold, in particular, assets, budgets and accounts which are separate from those of the State". In Directive 2012/34/EU, the principle of independence is laid down in Art. 29 (1) (1) Directive 2012/34/EU: "Member States shall establish a charging framework, while respecting the management independence laid down in Art. 4". Art. 4 (1) Directive 2012/34/EU refers to the fact that railway undertakings owned directly or indirectly by Member States must have, among other things, an independent status in terms of management "in accordance with which they will hold, in particular, assets, budgets and accounts which are separate from those of the State". According to Art. 4 (2), the infrastructure manager "shall be responsible for its own management, administration and internal control" ... "While respecting the charging and allocation framework and the specific rules established by the Member States". Regarding the independence of management, see also: ECJ, Judgement dated 9.11.2017, Case C-489/15, ECLI:EU:C:2017:834, para. 38 - *CTL Logistics*; ECJ, Judgement dated 28.2.2013, Case C-483/10, ECLI:EU:C.2013:114, para. 44 - *Commission v. Spain*; ECJ, Judgement dated 28.2.2013, Case C-556/10, ECLI:EU:C:2013:116, para. 82 - *Commission v. Germany*.

19 ECJ, Judgement dated 28.2.2013, Case C-483/10, ECLI:EU:C.2013:114, para. 39, 41 - *Commission v. Spain*; ECJ, Judgement dated 3.10.2013, Case C-369/11, ECLI:EU:C:2013:636, para. 41 f. - *Commission v. Italy*.

20 See also recitals 12 and 20 of the Directive. See further ECJ, Judgement dated 28.2.2013, Case C-483/10, ECLI:EU:C.2013:114, para. 44 - *Commission v. Spain*; ECJ, Judgement dated 28.2.2013, Case C-556/10, ECLI:EU:C:2013:116, para. 82 - *Commission* v. *Germany*; ECJ, Judgement dated 9.11.2017, Case C-489/15, ECLI:EU:C:2017:834, para. 39 - *CTL Logistics*. Regarding the importance of ensuring the independence of the infrastructure manager, see also Kühling, in: Ronellenfitsch/Eschweiler/Hörster (eds.), Aktuelle Probleme des Eisenbahnrechts, 2015, p. 73, 90, who refers above all to safeguarding independence vis-à-vis the executive and legislative branches.

21 Regarding this, see also Art. 8 Directive 2001/14/EC - in order to achieve full recovery of the infrastructure manager's costs, a Member State may levy mark-ups on the basis of efficient, transparent and non-discriminatory principles (Art. 8 (1)). The infrastructure manager may set or continue to set higher charges on the basis of the long-term costs of such projects if they increase efficiency and/or cost-effectiveness and could not otherwise be or have been undertaken (Art. 8 (2)).

22 ECJ, Judgement dated 9.11.2017, Case C-489/15, ECLI:EU:C:2017:834, para. 57 - *CTL Logistics*.

charging for services in accordance with Art. 13) on its own initiative and with a view to preventing discrimination against applicants. It shall, in particular, check whether the network statement contains discriminatory clauses or creates discretionary powers for the infrastructure manager that may be used to discriminate against applicants".

Applicant railway undertakings that consider themselves to be discriminated against, unfairly treated or to be in any other way aggrieved - in particular by the network statement, the charging scheme and/or the level or structure of infrastructure charges - must be able to appeal to the regulatory body (Art. 30 (2) Directive 2001/14/EC; Art. 56 (1) Directive 2012/34/EU). According to Art. 30 (5) Directive 2001/14/EC, the regulatory body had to decide on any complaints and take action to remedy the situation within a maximum period of two months from receipt of all information. Pursuant to Art. 56 (9) Directive 2012/34/EU, the regulatory body must now consider complaints within one month of receipt. A decision must be made and remedial action must be taken, if necessary, within 6 weeks of receipt of all relevant information. Art. 56 (9) Directive 2012/34/EU further states:

"Without prejudice to the powers of the national competition authorities for securing competition in the rail service markets, the regulatory body shall, where appropriate, decide on its own initiative on appropriate measures to correct discrimination against applicants, market distortion and any other undesirable developments in these markets, in particular with reference to points (a) to (g) of paragraph 1 [of Art. 56]".

Decisions of the regulatory body are binding on all parties covered by that decision, thus have *erga omnes* effect and "shall not be subject to the control of another administrative instance" (Art. 56 (9) (2) Directive 2012/34/EU.

The regulatory body has exclusive jurisdiction over complaints based on the provisions of the directive. In this respect, its decisions are subject to judicial review (Art. 30 (6) Directive 2001/14/EC; Art. 56 (10) Directive 2012/34/EU). Exclusive jurisdiction is intended to ensure uniformity of review.[23] For the same reason, negotiations between applicants and infrastructure managers concerning the level of infrastructure charges may only take place under the supervision of the regulatory body, which monitors compliance with the provisions of the directive (Art. 30 (3)(2) and (3) Directive 2001/14/EC; Art. 56 (6) Directive 2012/34/EU).

2. Main features of the regulation of charges in national railway regulatory law

In implementing these EU law requirements, the German legislator has followed the development of EU secondary law - the General Railways Act (*Allgemeines Eisenbahngesetz*, "AEG"), which came into force as of 1.1.1994 and transposed Directive 91/440/EEC into national law, initially contained only a minimalist regulation of access to infrastructure and charging schemes. The Railway Infrastructure Usage Regulations (*Eisenbahninfrastrukturbenutzungsverordnung*, "EIBV") of 1997 supplemented the AEG with more detailed requirements for an access and charging regime, thus implementing Directive 95/19/EC.

The 2005 amendment to the AEG, combined with the adaptation of the EIBV, then transposed the requirements of Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure[24] into national law. Pursuant to § 4 of the EIBV, it was still incumbent on the infrastructure manager to define in its network statement the conditions of network access and the charging principles, on the basis of which the contracts of usage of infrastructure are concluded with the rail transport undertakings. DB Netz AG then set the charges for its services in track access price lists within the meaning of § 4 (2) (2), § 21 (7) EIBV. According to § 14 (4) AEG, the charges for the usage of the railway infrastructure were to be based on a cost recovery principle - they were to be set in such a manner that there was compensation for the total costs incurred by the railway infrastructure undertaking for the provision of the obligatory services according to § 14 (1) AEG plus a return on investment in line with market conditions.

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[23] See ECJ v. 9.11.2017, Case C-489/15, ECLI:EU:C:2017:834, para. 87 - *CTL Logistics* - decentralised enforcement in civil courts could lead to different judgements in different individual cases and to the parallel running of two non-coordinated routes to decisions.

[24] Directive 2001/14/EC of 26.2.2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, OJ 2001 No. L 75/29.

Pursuant to § 21 (1) EIBV, charges had to be create incentives for the reduction of disruptions and an increase of the efficiency of the railway network. According to § 21 (2), (3) EIBV, the infrastructure charge could include a component that took into account the costs of environmental-related impacts of train operation and the scarcity of rail capacity. According to § 21 (6) EIBV, the charges had to be non-discriminatory.

With these requirements, infrastructure managers were given a broad scope for setting charges.[25] According to § 1 (1)(1), § 14 (1)(1) AEG, the central maxim of the charging scheme under railway law remained the prohibition of discrimination: Railway undertakings were to be granted non-discriminatory access to the railway infrastructure, such as to guarantee a reliable, attractive and competitive transport service by rail transport service.

The ERegG has revised the entire German railway regulatory law and replaced the regulatory regime of the AEG (old version) and the EIBV as of 2.9.2016. Among other things, it implements the requirements of Directive 2012/34/EU, which, however, does not affect the essential basic elements of Directive 2001/14/EC.

The ERegG reinforces the system of incentive regulation in German law. The infrastructure manager's setting of charges for the minimum access package is subject to approval (see § 45 ERegG).

III. The relationship between railway regulatory law and competition law at the level of substantive law

1. Parallels and differences in objectives and assessment standards

As the brief outline has shown, European railway regulatory law aims to open up rail transport to the internal market and competition. It strives to achieve this objective primarily by strictly prohibiting discrimination in the allocation of infrastructure capacity and in the structuring and levying of charges. The prohibition of discrimination is supplemented by a requirement of cost orientation and basic principles of incentive regulation.

Such principles are compatible with the obligations of a monopolistic infrastructure manager as they follow from Art. 102 TFEU and from§ 19 GWB. According to Art. 102 (2)(c) TFEU, an abuse of a dominant position may consist, among other things, in the application of dissimilar conditions to trading parties if this places them at a competitive disadvantage. Pursuant to Art. 102 (2)(a) TFEU, it may also consist in the enforcement of unreasonable prices - including unreasonably high prices.[26]

Nevertheless, railway regulatory law and competition law are not congruent. The prohibition of discrimination under regulatory law is - at least in its interpretation by the ECJ - much more formalised than the prohibition of discrimination under competition law. A violation of Art. 102 (2)(c) TFEU, which is intended to prevent the dominant undertaking from distorting competition on upstream or downstream markets, requires that the conduct of the dominant undertaking, when viewed objectively with regard to the whole circumstances of the case, intends to distort competition. Mere discrimination against economic operators who pay higher prices than their competitors for equivalent services is not sufficient.[27] The comparatively stricter formulation of the prohibition of discrimination under railway regulatory law with regard to access to tracks and with regard to infrastructure charges is justified by the indispensability of access to infrastructure for market entry and the fact that track access charges account for a considerable share of the total costs of RUs. Unequal treatment can thus have a significant impact on the competitive position in the downstream market.

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25 See Kühling, in: Ronellenfitsch/Eschweiler/Hörster (eds.), Aktuelle Probleme des Eisenbahnrechts, 2015, p. 73, 80.

26 The review of price levels under competition law has its most important area of application in the review of price setting by holders of a statutory or natural monopoly, since a correction by market entry is precluded in this case - see, most recently, GA Pitruzzella, Opinion dated 16.07.2020, Case C-372/19, ECLI:EU:C:2020:598, para. 23-24 - *SABAM*.

27 ECJ, Judgement dated 19.4.2018, Case C-525/16, ECLI:EU:C:2018:270, para. 25-27 - *Meo*; ECJ, Judgement dated 15.3.2007, Case C-95/04 P, EU:C:2007:166, para. 144 - *British Airways*.

An effective regime of incentive regulation can contribute significantly to reducing the risk of abusive pricing by the infrastructure manager. However, the requirements under EU secondary law on the setting of charges deliberately leave leeway to the infrastructure manager in the calculation and levying of infrastructure charges (see Art. 4 (1) (2) Directive 2001/14/EC and recital 20; Art. 29 (1) (5) in conjunction with Art. 4 Directive 2012/34/EU),[28] in order to enable the latter to develop its own charging policy in line with the objectives of the directive. When making use of such discretion, the infrastructure manager must take into account the prohibition of abusive practices under competition law, to which it is always bound where it has leeway for autonomous entrepreneurial conduct. The requirements of the Railway Directives and Art. 102 TFEU are complementary in this respect. The concept of costs "directly incurred as a result of operating the train service" as a standard for the charging scheme (Art. 7 (3) Directive 2001/14/EC) is compatible with competition law standards for an abusive pricing if it is interpreted in light of the prohibition of abusive practices. At the same time, the prohibition of abusive practices can remain an important review standard in this respect.

The various forms of possible price-related or non-price-related exclusionary abuses that cannot be attributed to the prohibition of discrimination are outside the scope of the Railway Directives. This is also true for the prohibition of margin squeezes.

Moreover, the standards of railway regulatory law are not identical with those of competition law, because regulatory law pursues a much broader set of objectives than competition law.[29] Competition law has the objective of protecting undistorted competition in the internal market. Railway regulatory law aims to promote the performance of the rail network (recital 50 of Directive 2012/34/EU) and an attractive transport offer in addition, striving for a better balance of traffic between the different modes of transport (recital 35 of Directive 2012/34/EU), such that rail transport contributes to the reduction of transport costs for society as a whole. Furthermore, it shall promote investment in rail infrastructure (recital 66 of Directive 2012/34/EU); reduce noise emissions (recital 45 of Directive 2012/34/EU), and ensure safe operation of the railways (for the catalogue of objectives of German railway regulatory law, see § 1 (1)(1) AEG and § 3 ERegG). Such objectives are also incorporated into the system of setting infrastructure charges.

If the requirement to interpretate secondary law in conformity with primary law is observed, and if the secondary law framework is given due consideration in the interpretation of primary law,[30] no conflicts will follow from the differences between regulatory and competition law. Nonetheless, both bodies of law retain their respective perspectives and functions.

2. Relationship between sector-specific regulation and European competition law in the case law of the EU courts

In all jurisdictions that have decided to open up the network sectors, the partial convergence in objectives and the overlap in terms of the subject matter have raised the question of the relationship between competition law and sector-specific regulatory law, the purpose of which is to open markets.[31]

U.S. law answers this question differently for each sector. In certain contexts, the legislature expressly excludes the parallel application of antitrust law and treats regulatory law as *lex specialis*. In other contexts, the legislature explicitly prescribes parallel application. Where such a provision is lacking, the courts determine the relationship depending on the specific regulatory program and its functions, taking into account the mandate of the competent

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28 Kühling, in: Ronellenfitsch/Eschweiler/Hörster (eds.), Aktuelle Probleme des Eisenbahnrechts, 2015, p. 73, 80.

29 See already in the context of telecommunications law: CFI, Judgement dated 10.4.2008, Case T-271/03, ECLI:EU:T:2008:101, para. 113 - *Deutsche Telekom*; confirmed by ECJ, Judgement dated 14.10.2010, Case C-280/08 P, ECLI:EU:C:2010:603 - *Deutsche Telekom*. The lack of congruence between standards under regulatory law and those under competition law is also pointed out in Higher Regional Court of Dresden, Judgement dated 17.4.2019, U 4/18 Kart, para. 45; Hauf/Baumgartner, EuZW 2018, 1028, 1030.

30 See Nettesheim, EuR 2006, 737, 754. For more details, see III.4.

31 For the relationship between competition law and telecommunications law, see, for example, Topel, ZWeR 2006, 27 *et seq*.

supervisory authorities, and with a view to whether a parallel application may lead to contradictory conduct obligations for the norm addressees and whether the functioning of the markets would be impaired or strengthened by a parallel application.[32]

In its famous *Trinko* ruling,[33] the Supreme Court recognised that the parallel applicability of the Sherman Act was expressly mandated by the Telecommunications Act of 1996. Nonetheless, the question of whether a telecommunications network operator's violation of its network access obligations under the Telecommunications Act vis-à-vis another telecommunications provider also constituted a violation of Sec. 2 Sherman Act - that is, of the "*essential facilities doctrine*" - was answered in the negative: If a duty to guarantee network access already arose from sector-specific regulatory law, the access petitioner was found not to depend on a claim for access under competition law.[34] The Supreme Court simultaneously based this interpretation of the Sherman Act on general cost-benefit considerations: To the extent that certain types of competitive harm are already covered by sector-specific regulation, the additional benefit of competition law was thought to be small (p. 12). Simultaneously, its application causes considerable costs. This is particularly true when the facts to be adjudicated are highly technical and difficult for the competent courts to handle (p. 14). Moreover, the the task of monitoring whether network access is provided under conditions that are in line with antitrust law would overburden the antitrust courts (p. 15).[35] Finally, the Supreme Court pointed to the different functions of regulatory law and competition law. Regulatory law is meant to reduce historical monopolies. The task of Sec. 2 Sherman Act, on the other hand, is merely to prevent unlawful monopolisation. These two objectives should not be conflated (p. 16).

The *Trinko* ruling has often been referred to in European discussions.[36] Nevertheless, in the European context, the question of the relationship between European competition law and sector-specific regulatory law arises in a fundamentally different normative light. Whereas, in U.S. law, a decision has to be made on the relationship between two bodies of law that, as federal law, have equal normative rank in principle, a displacement of European competition rules by sector-specific regulatory law is excluded by the hierarchy of norms - Art. 101 and Art. 102 TFEU are and remain directly applicable primary law. Directives and their national implementation, as well as the market conduct of undertakings, must always be measured against these standards, insofar as they remain free to engage in autonomous conduct. The principle of *lex specialis derogat legi generali* cannot be applied to the relationship between European competition rules and sector-specific regulatory law from the outset. Instead, the principle of the primacy of the Treaties over secondary law applies.[37] Unlike in U.S. law, there can be no *"implied competition law immunity*" in EU law.

The case law of the EU courts leaves no doubt in this respect.[38] In the *Deutsche* Telekom[39] judgement, the ECJ confirmed that a pricing strategy of Deutsche Telekom (DT) infringed Art. 102 TFEU, although the charges in question - wholesale charges for local loop access services to competitors as well as, under a price cap system, retail charges for access services to end-users - had been approved by the regulatory authority (at that time, RegTP). A negative spread between the wholesale charges for access services that competitors had to pay to DT and the access charges that DT itself billed to end-customers led to abusive margin squeezing. This was attributable to DT, because it retained the option of requesting a change in retail charges from RegTB and thereby to stop the margin squeeze (paras. 84-86). The review of charges under regulatory law, which in this case - as in the context of railway regulatory law - was primarily aimed at opening up the previously monopolised markets to competition, therefore

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32 See Credit Suisse v. Billing, 551 U.S. 264 (2007), p. 4 *et seq.*

33 Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, (02-682) 540 U.S. 398 (2004).

34 Network access is then not "unavailable" as the "essential facilities" doctrine requires; "where access exists, the doctrine serves no purpose".

35 See Areeda, 58 Antitrust L.J. (1989), pp. 841-853, at p. 853: Approvingly, the Supreme Court cited Areeda against this backdrop: "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency".

36 Spain, for example, had invoked this case law before the CFI - see CFI, Judgement dated 29.03.2012, Case T-398/07, ECLI:EU:T:2012:173, para. 55 - *Spain v. Commission.*

37 BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 22 - *Trassenentgelte*. See also Nettesheim, EuR 2006, 737, 747. Furthermore, Bremer/Scheffczyk, NZKart 2018, 121, 122 *et seq.* This is not questioned by Körber: Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 43.

38 Likewise: BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 24 f. - *Trassenentgelte.*

39 See ECJ, Judgement dated 14.10.2010, Case C-280/07 P, ECLI:EU:C:2010:603, para. 80 *et seq.* - *Deutsche Telekom*.

did not preclude the parallel application of Art. 102 TFEU. Similarly, in the Telefónica[40] case, compliance with the Spanish telecommunications regulatory regime, which was based on the 2002[41] Community legal framework, could not immunise Telefónica from the intervention of the Commission on the basis of Art. 102 TFEU.[42] The applicants' argument that neither the Commission nor the national competition authorities may examine conduct subject to a regulatory framework with pro-competition goals under competition law was rejected by the CFI.[43] In terms of substantive law, the CFI referred to the "principles governing the hierarchical relationship of legal rules", according to which sector-specific secondary law may not derogate from Art. 102 TFEU.[44] At the same time, however, the possibility of parallel proceedings before the national regulatory authorities and the competition authorities is not excluded institutionally by the directives governing telecommunications. Even an obligation on the part of the Spanish regulatory authority to examine the compatibility of Telefónica's pricing strategies with Art. 102 TFEU does not prevent the Commission from finding an infringement of Art. 102 TFEU on its part, because it is not bound by decisions of national authorities (para. 301). Nor would it have to justify its intervention under competition law by proving exceptional circumstances. The decision was confirmed by the ECJ.

This case law was ultimately reaffirmed in *Orange Polska* SA[45]. In its proceedings, the EU Commission had found that Orange had abused its dominant position on the wholesale market for broadband access and on the wholesale market for unbundled access to local loops to protect its position on the retail market by developing a strategy aimed at restricting competitors' network access at all procedural stages - for example, by offering unreasonable access conditions, delaying the access negotiation process and refusing to provide necessary information. The Polish regulatory authority had acted several times to put an end to Orange's violations of rules under regulatory law and had also imposed fines on Orange. Only under the threat of functional unbundling did Orange finally undertake to comply with its access obligations under regulatory law. Notwithstanding the interventions of the regulatory authorities and although the violations had already been terminated when the proceedings were initiated, the Commission felt compelled to intervene in accordance with Art. 102 TFEU and to impose a fine. Once again, it assumed the applicability of the European competition rules not only to conduct that endangers competition in a manner not covered by sector-specific regulatory law; competition rules remain equally applicable to conduct that creates dangers that are also covered by regulatory law. The principle of *ne bis in idem* is not violated as the the protected interests are not identical.[46] The protection of undistorted competition sought by competition law is supplemented in regulatory law by a large number of protective objectives, which the regulatory authority must balance.[47] Again, the Commission's decision was upheld by the CFI[48] and the ECJ.

The parallel application of European competition law alongside sector-specific regulatory law based on European directives has not remained limited to the telecommunications sector. In the energy sector as well, the EU Commission applies Art. 102 TFEU alongside regulatory law.[49] The same applies in the postal sector.[50]

Nothing else can hold true for the railway sector. Art. 90 *et seq.* TFEU contain no exemption from competition law for the transport sector.[51] Competition rules do apply in the transport sector - and thus also in the railway sector.[52] In the same way as the regulatory framework in the telecommunications and energy sectors, the Railway

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40 ECJ, Judgement dated 10.7.2014, Case C-295/12 P, ECLI:EU:C:2014:2062, para. 135 - *Telefónica*.

41 See, in particular, Framework Directive 2002/21/EC, Art. 15 (1).

42 This case also concerned margin squeezing.

43 CFI, Judgement dated 29.03.2012, Case T-336/07, ECLI:EU:T:2012:172, para. 299-300 - *Telefónica*.

44 CFI, Judgement dated 29.03.2012, Case T-398/07, ECLI:EU:T:2012:173, para. 55 - *Spain v. Commission.*

45 ECJ, Judgement dated 25.7.2018, Case C-123/16 P, ECLI:EU:C:2018:590 - *Orange Polska SA v Commission*.

46 Regarding this, ECJ, Judgement dated 7.1.2004, Verb. Case C-204/00 P *et al.*, ECLI:EU:C:2004:6, para. 338- *Aalborg Portland A/S*.

47 European Commission, 22.6.2011, COMP/39.525, para. 137-138 - *Telekomunikacja Polska*.

48 CFI, Judgement dated 17.12.2015, Case T-486/11, ECLI:EU:T:2015:1002 - *Orange Polska*.

49 For an overview, see Karova/Botta, Sanctioning excessive energy prices as abuse of dominance, in: Parcu/Monti/Botta (eds.), Abuse of dominance in EU competition law: emerging trends, 2017, p. 169, 184 with further references.

50 See Notice from the Commission on the application of competition rules to the postal sector and on the evaluation of certain State measures relating to postal services, OJ C 39, 6.2.1998, pp. 2-18. For an overview of the relevant case practice, see Geradin/Malamataris, Postal services and competition law: An overview of EU and national case law, 6 March 2012, e-Competitions Bulletin Postal services, N. 43769.

51 See also Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 45 *et seq*.

52 See ECJ, Judgement dated 30.4.1986, Case C-209/84, ECLI:EU:C:1986:188, para. 42 - *Asjes* (for the transport sector in general). See further with respect

Directives, albeit opening up the market, are regulatory law characterised by diversity of objectives - not a mere sector-specific specification of competition rules (see above). Compared with telecommunications and energy law, the density of regulation under secondary law is actually significantly lower, leaving considerably greater scope for abusive conduct under competition law. As such, there is no doubt that the case law on the parallel application of competition law and regulatory law also applies in the railway sector.

A prerequisite for the application of competition rules in a specific case is that the relevant provisions leave a competitively relevant leeway for autonomous conduct to undertakings subjected to it;[53] for only then is there entrepreneurial conduct attributable to that entity. This condition is fulfilled insofar as it concerns the setting of charges by the infrastructure manager. It is true that, pursuant to Art. 29 (2) and (3) Directive 2012/34/EU and § 11 (1) ERegG (formerly Art. 4 (5) Directive 2001/14/EC and § 14 (1)(1) AEG, old version), the latter is bound by a prohibition of discrimination and is subject to review by the regulatory body pursuant to Art. 56 Directive 2012/34/EU and § 45 ERegG (formerly Art. 30 Directive 2001/14/EC and § 14f AEG, old version). Under the old law, the BNetzA was authorised to carry out *ex-ante* and *ex-post* reviews. Under the ERegG, infrastructure charges are now subject to approval (§ 45 ERegG). However, under both the old and the new law, the infrastructure manager has (had) some leeway in setting the charges (see Art. 4 (1) Directive 2001/14/EC; Art. 29 (1) (5) in conjunction with Art. 4 Directive 2012/34/EU), which must also be respected in the approval procedure. Under Art. 102 TFEU, it is part of the "special responsibility" of the infrastructure manager, which is always dominant on the relevant infrastructure market, to observe the prohibition of abusive practices under competition law when formulating the charging scheme and to apply for approval of infrastructure charges that comply with competition law. The fact that, pursuant to § 33 (2) and § 45 (2) ERegG, infrastructure managers are prohibited after approval from demanding charges different from the approved charges (the same applied under the old law when charges the BNetzA had not objected to had to be calculated and levied in the same way vis-à-vis all applicant railway undertakings within a network timetable period pursuant to § 21 (6) and (7) EiBV) is irrelevant for the application of Art. 102 TFEU; if necessary, approval for an adjustment of the charges must be obtained.

It corresponds to this legal situation that the Railway Directives do not provide for an exclusion of competition rules.[54] On the contrary, the continued applicability of competition law is consistently presumed in the railway directives. In some provisions, the directives explicitly state that they apply "without prejudice to Arts. 81, 82 [...] of the Treaty" (now Arts. 101, 102 TFEU).[55] Moreover, the coexistence of the two legal regimes is stressed in Art 56 (2) Directive 2012/34/EU, according to which "the powers of the national competition authorities for securing competition in the rail services markets" remain unaffected.[56]

In German law, corresponding references can be found in § 68 (1)(3) ERegG[57] and in § 9 (3) of the Act on the Federal Administration of Railway Traffic (*Gesetz über die Eisenbahnverkehrsverwaltung des Bundes*, "BEVVG"), according to which the tasks and competences of the competition authorities under the GWB remain unaffected. Furthermore, § 9 (3)(2) BEVVG (formerly § 14b (2) AEG in the version applicable prior to 2.9.2016) states:[58]

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to railway regulatory law: BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 21 - *Trassenentgelte*. See also Bremer/Scheffczyk, NZKart 2018, 121, 123; Hauf/Baumgartner, EuZW 2018, 1028, 1030 *et seq.*

53 See ECJ, Judgement dated 14.10.2010, Case C-280/08 P, ECLI:EU:C:2010:603, para. 80-96 - *Deutsche Telekom*.

54 BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 22 - *Trassenentgelte*.

55 Art. 9 (1) (discounts on charges), Art. 17 (1) (framework agreements) and Art. 24 (2) (special routes) Directive 2001/14/EC. Accordingly, in the current law: Art. 33 (1), Art. 42 (1) and Art. 49 (2) Directive 2012/34/EU.

56 The provision states: "Without prejudice to the powers of the national competition authorities for securing competition in the rail services markets, the regulatory body shall have the power to monitor the competitive situation in the rail services markets". See, however, Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, pp. 44 *et seq.* and 82: The regulation only contains an institutional delimitation of the authority's competence and does not allow any conclusions to be drawn as to the applicability of competition law. In conclusion, however, Körber also assumes the continuing applicability of Art. 101 and Art. 102 TFEU as directly applicable primary law (see Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 65 *et seq*.).

57 § 68 (1)(3) ERegG states: "Irrespective of the competences of the cartel authorities, [the regulatory authority] shall decide *ex officio* on suitable measures to prevent discrimination and market distortion".

58 Körber's theory that this "primarily" concerns keeping up-to-date on activities that have points of contact with the activities of the other authorities, "such as the leasing of commercial space in station buildings" (Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 42), is absurd in light of the cited ECJ case law.

"The regulatory authority and the railway supervisory authorities, as well as the competition authorities and the regulatory authorities competent under the Telecommunications Act and the Energy Act, shall share with each other information that may be relevant to the performance of their respective duties. In particular, they shall inform each other of intended decisions to prohibit abusive or discriminatory conduct by railway infrastructure undertakings. They shall give each other the opportunity to comment before the procedure is closed by the competent authority".

The fact that the EU has implemented sector-specific regulatory law with Directive 2001/14/EC, replaced by Directive 2012/34/EU, therefore neither replaces EU competition rules with "sector-specific antitrust law",[59] nor does it restrict their application.[60] It is a prerequisite for the applicability of Art. 102 TFEU that the conduct in question may affect trade between Member States.[61] It can, however, be assumed that the setting of railroad access conditions and of infrastructure charges meet this condition, as the liberalisation of the railway sector is intended to make access attractive for foreign transport providers in particular.[62]

At the same time, the case law discussed above illustrates the function that can be assigned to a parallel application of competition law alongside regulatory law. As a result of its independent applicability, Art. 102 TFEU remains a standard of review against which national regulatory law and its application must be measured. National regulatory authorities have repeatedly disregarded the standard of Art. 102 TFEU in the interpretation of regulatory law.[63] In other cases - such as *Orange Polska* - competition law has been applied because regulatory law alone did not have sufficient clout.

3. Parallel applicability of German competition law and railway regulatory law

With regard to German competition law, the situation is different in terms of the hierarchy of norms. In principle, EU directives take precedence over national competition law.[64] However, the principle of the primacy of application of EU law over national law only applies if there is a conflict between legal rules. Railway regulatory law and competition law - as just explained - must in principle be regarded as complementary legal regimes, at least in their substantive legal content. In any case, this is true for EU competition law. But in view of the far-reaching synchronisation of German and European competition law, this principle extends to German competition law.

This does not preclude that individual provisions of the GWB may be declared inapplicable within the framework of railway regulation. For example, § 12 (7) AEG states: "§ 1 GWB shall not apply to agreements between railway undertakings or to agreements between railway undertakings and other undertakings engaged in the carriage of passengers, or to decisions or recommendations of associations of such undertakings, insofar as they are made in the interest of providing the population with sufficient local public passenger transport services [...]". On the other hand, § 12 (7)(3) AEG stipulates that § 19 (1) in conjunction with § 19 (2) (No. 1 GWB shall apply "*mutatis mutandis*" in these cases as well. Orders of the competition authority are to be issued "in consultation with the competent approval authority".

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59 Differing view, Otte/Kirchhartz, in: Kühling/Otte (eds.), AEG/RegG, Commentary, 2020, § 45 ERegG para. 47, who, however, overlook the above-mentioned case law of the ECJ.

60 See also BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 22 - *Trassenentgelte*, referring to the primacy of primary law over secondary law and ECJ, Judgement dated 11.4.1989, Case 66/86, ECLI:EU:C:1989:140, para. 45 - *Ahmed Saeed Air Travel*. However, this is also the conclusion of those who reject the enforcement under civil law of claims for competition law damages - see, for example, Staebe, EuZW 2018, 118, 121.

61 Regarding this, see BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 53 - *Trassenentgelte*: In view of DB Netz AG's train access pricing systems, which are applicable throughout the country, it is not far-fetched that DB Netz AG's pricing conduct is likely to make it more difficult for competitors from other Member States to gain access.

62 Kühling, in: Ronellenfitsch/Eschweiler/Hörster (eds.), Aktuelle Probleme des Eisenbahnrechts, 2015, p. 73, 105.

63 Thus, in the case of ECJ, Judgement dated 14.10.2010, Case C-280/08 P, ECLI:EU:C:2010:603 - *Deutsche Telekom*; CFI, Judgement dated 29.03.2012, Case T-336/07, ECLI:EU:T:2012:172, para. 303 - *Telefónica:* The cost model used by the Spanish regulator to examine margin squeezes was found to be unsuitable here for the purposes of Art. 102 TFEU.

64 Weitner, EnZW 2018, 73, 78, among others, refers to this.

These special provisions suggest that the GWB - subject to a special provision in regulatory law - is to remain applicable in principle. They also contradict the theory that the applicability of the GWB was restricted by the ERegG (formerly AEG, old version), at least to the extent that railway regulatory law establishes its own requirements for the setting of charges, because railway regulatory law is *lex specialis* in this respect.[65]

The initial decision in favour of a parallel application of regulatory law and national competition law corresponds to the arrangement made by the German legislature for the telecommunications sector.[66] For the energy industry, on the other hand, a different rule was established: Pursuant to § 111 (1)(1) of the Energy Industry Act (*Energiewirtschaftsgesetz*, "EnWG"), § 19, § 20 and § 29 GWB are not applicable within the scope of the EnWG, insofar as the EnWG "expressly provides for conclusive regulations".[67] There is no corresponding provision in the ERegG, however.

Finally, *Körber*'s argument that the interpretation of § 33 (2) and § 45 (2) ERegG precludes the monitoring of charges approved under the ERegG is also unconvincing. Since, according to these provisions, a charge approved by the BNetzA is to be regarded as a “fair” charge within the meaning of § 315 BGB and the fairness standard is milder than the standard for abusive practices under competition law, which involves a special condemnation that goes beyond mere unfairness, an approved charge, according to *Körber*, can *a fortiori* not be abusive within the meaning of § 19 GWB. Any other view would allegedly be in conflict with the principle of the unity of the legal order and would be contradictory in terms of evaluation.[68]

However, a different conflict looms if approved charges are deemed "not abusive" under the broader interpretation of § 33 (2) and § 45 (2) ERegG proposed by *Körber*: Pursuant to Art. 3 (2) Regulation 1/2003, Member State law may provide for rules on unilateral conduct of undertakings that are stricter than Art. 102 TFEU. Yet, it may not apply less stringent standards. The fiction of fairness of § 33 (2) and § 45 (2) ERegG thus cannot exclude the abusiveness under Art. 102 TFEU, which remains applicable in parallel (see above). If approved charges were deemed to be fair under § 19 GWB as well, German competition law could possibly come into conflict with a contrary interpretation under Art. 102 TFEU. It is no coincidence or oversight, therefore, that § 33 (2) and § 45 (2) ERegG provide for a legal fiction of fairness "only" with regard to § 315 BGB and not also with regard to § 19 GWB.

The German legislator’s intention that the GWB will remain applicable in parallel with EU competition law and railway regulatory law can therefore be safely assumed - subject to expressly standardised exceptions. This is not contradicted by the judgement of the ECJ in the *CTL Logistics* case (for more details, see V. below).

4. The mutual influence between regulatory law and competition law

The parallel applicability of competition rules and railway regulatory law may lead to conflicts. As the case law of the EU courts cited above shows, neither the failure of a regulatory authority to intervene nor an approval by a regulatory authority precludes a violation of Art. 102 TFEU. Where directives come into conflict with competition rules in a way that cannot be resolved differently, the principle of the primacy of the Treaties over secondary law applies.[69] If the conflict does not result from the provisions of secondary law themselves, but from the implementation by the Member States, EU law takes precedence over national law.

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65 See Otte, in: Kühling/Otte, AEG/ERegG, Commentary, 2020, § 45 ERegG para. 47; Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 83 - in particular with regard to discrimination review under railway law and price level review. According to Kühling, the discrimination test pursuant to § 19 (2)(No. 1) var. 2 and (2)(No. 3) GWB is displaced by the sector-specific prohibition of discrimination - see Kühling, in: Ronellenfitsch/Eschweiler/Hörster (eds.), Aktuelle Probleme des Eisenbahnrechts, 2015, p. 73, 103.

66 See § 2 (4) of the Telecommunications Act (*Telekommunikationsgesetz*), according to which the provisions of the GWB remain applicable "insofar as no conclusive provisions are expressly made by this Act".

67 The primacy of the EnWG over the GWB is confirmed in § 185 (3) GWB. § 185 (3) GWB states: "The provisions of the Energy Industry Act shall not preclude the application of § 19, § 20 and § 29 GWB, unless otherwise provided in § 111 of the Energy Industry Act".

68 Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 83.

69 Regarding this principle and its legal derivation, see Nettesheim, EuR 2006, 737, 747.

However, a fundamental conflict between the substantive provisions of the Railway Directives or the ERegG (and the AEG, old version) and EU competition rules cannot be assumed with regard to the provisions relevant in the current court proceedings.[70] Rather, they comprise complementary regulatory regimes that shall develop their full effectiveness in their interaction. The prohibition of discrimination under regulatory law formalises and supplements the prohibition of discrimination under competition law. The linking of infrastructure charges back to costs and the mechanisms of incentive regulation are compatible with price level review under competition law. It follows from the principle of parallel applicability of competition law and regulatory law that the regulatory body and the administrative courts entrusted with reviewing its decisions must take into account the requirements of competition law when interpreting regulatory law. They are obligated to interpret regulatory law in accordance with primary law and therefore in accordance with competition law.

Simultaneously, regulatory law that is designed and applied in accordance with competition law also defines the regulatory framework within which undistorted competition takes place. The application of competition rules, which must always take into account the economic and legal conditions, must therefore consider the regulatory framework.[71] Thus, secondary law influences the interpretation of primary law. In this respect, *Nettesheim* speaks of "interpretative Rückwirkung" of secondary law on primary law.[72] Competition rules and regulatory law are interrelated.

Thus, in determining whether the infrastructure charge of an infrastructure manager constitutes a price abuse, for example, the concept of costs under regulatory law must be interpreted in light of competition law, while competition law must take into account the incentive regulation under railway law. The infrastructure manager must exercise the scope of action left to it by setting charges in accordance with the requirements of the prohibition of abusive practices under competition law. The review under competition *law* compensates for the fact that the entrepreneurial decisions are not controlled by competition.[73] However, the review of price levels under competition *law* respects entrepreneurial freedom of action as long as they serve legitimate objectives - above all, objectives specified by regulatory law.[74]

The duty to mutually take into account the normative framework of the neighbouring field of law does not mean that regulatory law and competition law must always reach identical results. In some respects, regulatory law imposes stricter obligations on infrastructure managers. In other cases, other and more far-reaching duties may follow from competition law. This was pointed out by the ECJ in *Telefónica*, among others.[75]

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70 See also Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 52: Both competition law and regulatory law pursued the objective of protecting competition and applied a prohibition of discrimination in this regard. Conflicts are "more likely to arise from misapplication of one matter or another, or from regulatory law pursuing extra-competitive objectives beyond competition law".

71 See ECJ, Judgement dated 11.4.1986, Case C-66/86, ECLI:EU:C:1989:140, para. 43 - *Ahmed Saeed Flugreisen*: "Certain interpretative criteria for assessing whether the rate employed is excessive may be inferred from Directive 87/601/EEC, which lays down the criteria to be followed by the aeronautical authorities for approving tariffs"; BGH, Decision of 29.1.2019, KZR 12/15, ECLI:DE:BGH:2019:290119BKZR12.15.0, para. 31- *Stationspreissystem*: "[A]n examination of infrastructure charges under railway law for violations of the prohibition of discrimination can provide valuable insights into non-discriminatory charging principles, which are also conducive to any necessary evaluation under competition law".; BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 36 - *Trassenentgelte*; Mestmäcker/Schweitzer, Europäisches Wettbewerbsrecht, 3. 2014 ed., § 1 para. 67; Immenga/Mestmäcker, in: Immenga/Mestmäcker (eds.), Wettbewerbsrecht, vol. 1: EU, 6th ed. 2019, EinlEU A para. 71: "Here, it is indisputable that regulatory measures must at the same time take into account the requirements of competition possible in the markets concerned. However, the same applies to the application of competition rules in regulated areas. [...] The purposes and effects of regulation are to be considered in the application of competition rules". Likewise Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 76 *et seq.*

72 Nettesheim, EuR 2006, 737, 753.

73 BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 42 - *Trassenentgelte*.

74 Fundamental regarding the methods of determining an abuse of pricing power within the meaning of Art. 102 TFEU: ECJ, Judgement dated 14.2.1978, Case C-27/76, ECLI:EU:C:1978:22, para. 252 - *United Brands and United Brands Continental v. Commission*. For a recent overview of the methods used to determine excessive prices: GA Wahl, Opinion of 14.9.2017, Case C-177/16, ECLI:EU:C:2017:286 - *Autoritiesibu*.

75 ECJ, Judgement dated 10.7.2014, Case C-295/12 P, ECLI:EU:C:2014:2062, para. 133 - *Telefónica*.

IV. The institutional law enforcement structure - competences for enforcement of competition rules in cases of their application in parallel with regulatory law

In the judgement of the ECJ in the *CTL Logistics* case, the applicability of § 315 BGB, or alternatively its enforcement regime, was at issue - the ECJ stated that Directive 2001/14/EC "precludes the application of national legislation" such as § 315 BGB, "which provides for a review of the equity of charges for the use of railway infrastructure, on a case-by-case basis, by the ordinary courts and the possibility, if necessary, of amending the amount of those charges, independently of the monitoring carried out by the regulatory body provided for in Art. 30 of Directive 2001/14 [...]".

As shown, railway regulatory law does not take precedence over EU competition law. However, the question is whether the enforcement of competition law by the civil courts can depend on a prior determination by the BNetzA that the infrastructure charges are unlawful.

Before addressing this issue in Section V, this section will outline the system for the enforcement of competition rules and its interaction with the enforcement of regulatory law more generally. The principles shaping this interaction predetermine the answer to the question raised in this expert opinion.

In competition law, a distinction is regularly made between "public enforcement" of competition rules by competition authorities - combined with the possibility of imposing fines - and "private enforcement" before national courts, which can both order the rectification or cessation of competition violations and award damages or order reimbursement. Thereby, competition law relies on a complementary and decentralised enforcement regime. The competition authorities have discretion in taking up a case. Effective legal protection for private individuals is nevertheless guaranteed, as they can independently pursue violations of competition rules before civil courts.

If competition rules are applied in parallel and overlapping with sector-specific regulatory law, the regulatory regime may modify the enforcement structure under competition law. This is to be assumed in particular when regulatory law subjects certain decisions of an undertaking - such as the conditions for network access and charging schemes - to an approval requirement. In such a case, the authority must take action and also take into account the requirements of EU competition law when interpreting regulatory law (Art. 4 (3) TEU). Complainants who assert that an approval violates competition rules are referred to the legal recourse provided for this purpose in regulatory law.[76]

Whether the path to the civil courts for the purpose of establishing the unlawfulness under competition law of the charge set by the infrastructure manager and to assert a charge adjustment is also blocked if the charge setting was not subject to an approval requirement but could be reviewed *ex ante* or *ex post* by the competent authority, is to be discussed.

However, if damage claims or claims for reimbursement of charges are asserted based on an alleged violation of competition law, civil courts retain jurisdiction, unless otherwise provided for in EU or national law.

1. Public enforcement of competition rules - the continuing competence of the European Commission and the national competition authorities

The regime of public enforcement of competition law in cases of its parallel application to regulatory law is not at issue here. It is nonetheless helpful to summarize the fundamental principles which are clearly regulated in EU law.

[76] Under competition law, such an approval could only be challenged with the argument that the authority had violated its obligation under Art. 102 TFEU in conjunction with Art. 4 (3) TEU. It must be assumed, however, that a violation of Art. 102 TFEU in the approval process must be asserted before administrative courts and that civil law proceedings are not available for this purpose.

According to Art. 4 and Art. 5 Regulation 1/2003, both the EU Commission and the Member State competition authorities are competent to apply Articles 101 and 102 TFEU.

The competence of the EU Commission to apply competition rules also remains unaffected within the scope of application of sector-specific regulatory law, as the proceedings and decisions of the EU courts discussed above have shown.[77] This already follows from the principle that the EU Commission is not bound by the decisions of Member State authorities.[78]

According to Art. 56 (2) Directive 2012/34/EU, the competence of the national competition authorities to apply competition rules and to ensure competition in the rail services markets likewise remains unaffected.[79]

The European legislator has recognised that this may result in tensions and, in Art. 55 (2) Directive 2012/34/EU, has provided the possibility for the Member States to opt for an organisational merger of the sector-specific regulatory authority with the national competition authority. Accordingly, some Member States have delegated the enforcement of market-opening regulatory law to the competition authority.[80] Conversely, the United Kingdom has conferred to the authorities entrusted with sector regulation the application of competition rules in the respective sector.[81] The German legislator, on the other hand, has retained separate authority competences - the BNetzA is competent for enforcing railway regulatory law, and the Federal Cartel Office (*Bundeskartellamt*) is competent for enforcing competition rules. Thus, in implementation of Art. 56 (2) Directive 2012/34/EU, § 9 (3)(1) of the Act on the Federal Administration of Railway Traffic (*Gesetz über die Eisenbahnverkehrsverwaltung des Bundes*, "BEVVG") states: "The duties and competences of the cartel authorities under the Act against Restraints of Competition shall remain unaffected".[82] Under the old law, a corresponding provision was contained in § 14b (2)(1) AEG (old version).

This does not result in "dual jurisdiction", notwithstanding the parallel application of competition law and regulatory law.[83] It is true that the BNetzA must observe competition rules in its decisions under regulatory law (see above). However, its (exclusive) competence is limited to the enforcement of railway regulatory law.[84] It has no power to enforce competition rules as such - that is, in a manner detached from their significance for an interpretation of regulatory law that conforms to primary law.[85] As already shown, competition rules and regulatory law are not congruent in their application to the conduct of the infrastructure manager, despite overlapping objectives.[86] To ensure effective enforcement of competition rules with their independent substantive standards, the competence of the Federal Cartel Office must therefore be maintained.

To avoid any conflicts that may arise from the parallel application of competition law and regulatory law by different authorities, § 9 (3)(2) BEVVG provides for an exchange of information between the authorities.

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77 See, in particular, ECJ, Judgement dated 14.10.2010, Case C-280/08 P, ECLI:EU:C:2010:603, para. 80-96. - *Deutsche Telekom*; ECJ, Judgement dated 10.7.2014, Case C-295/12 P, ECLI:EU:C:2014:2062 - *Telefónica*; ECJ, Judgement dated 25.7.2018, Case C123/16 P, ECLI:EU:C:2018:590 - *Orange Polska SA v. Commission*; confirms CFI, Judgement dated 17.12.2015, Case T486/11, ECLI:EU:T:2015:1002, para. 13 *et seq.* - *Orange Polska SA v. Commission* (for the presentation of the proceedings).

78 See also ECJ, Judgement dated 10.7.2014, Case C-295/12 P, ECLI:EU:C:2014:2062, para. 132-135 - *Telefónica*.

79 The provision states: "Without prejudice to the powers of the national competition authorities for securing competition in the rail services markets, the regulatory body shall have the power to monitor the competitive situation in the rail services markets and shall, in particular, control points (a) to (g) of paragraph 1 on its own initiative and with a view to preventing discrimination against applicants. [...]"

80 For example, the Netherlands and Spain.

81 See Competition and Markets Authority, Regulated Industries: Guidance on concurrent application of competition law to regulated industries (CMA10, 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892735/Guidance_on_concurrent_application_of_competition_law_to_regulated_industries.pdf.

82 § 9 (3)(1) BEVVG states: "The duties and competences of the cartel authorities under the Act against Restraints of Competition shall remain unaffected".

83 Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 81.

84 BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 41 - *Trassenentgelte*: However, the exclusive competence of the BNetzA to review infrastructure charges "[...] does not extend to the application of Art. 102 TFEU, as follows from the case law of the Court of Justice regarding Art. 102 TFEU and as Art. 6 Regulation 1/2003 [...] states".

85 See also BGH, Decision dated 7.6.2016, KZR 12/15, ECLI:DE:BGH:2016:070616BKZR12.15.0, para. 46 *et seq.*

86 See also Kühling, in: Ronellenfitsch/Eschweiler/Hörster (eds.), Aktuelle Probleme des Eisenbahnrechts, 2015, p. 73, 93: "Since sector-specific competition law already does not displace general competition law in view of its merely rough control function in railway law, there can also be no displacement effect in institutional terms".

In particular, they are to "inform each other of intended decisions to prohibit abusive or discriminatory conduct by railway infrastructure undertakings" and "give each other the opportunity to comment before the procedure is closed by the competent authority". They are thus obliged to cooperate. As far as is known, this has not resulted in any serious conflicts in the railway sector so far.

Körber's counterproposal to restrict the Federal Cartel Office from the outset to such conduct and risks to competition that are not the subject of regulatory law,[87] would not be feasible on normative grounds. Since the German legislator has not established any competence of the BNetzA to apply competition rules independently, it would lead to a restriction of the scope of application of Art. 102 TFEU, in violation of primary law.[88]

2. "Private enforcement" - the enforcement of claims for remedy/injunctive relief and damages by undertakings whose rights are infringed by violations of competition law

One of the fundamental structural principles of EU competition law is the direct effect of competition rules. According to established case law, the EU competition rules create individual rights that the courts of the Member States must safeguard.[89] Notwithstanding the great practical importance of public enforcement of competition rules, their direct effect together with their primacy of application over conflicting national law[90] is one of the fundamental conditions of their practical effectiveness *(effet utile*). Compared to the Member States, the EU disposes of a significantly smaller administrative apparatus with direct enforcement powers. Simultaneously, it cannot consistently rely on an effective enforcement of EU law by Member State authorities as EU law is directed precisely against the various restrictions on freedom of movement imposed by national law and Member State policies. For an effective enforcement of EU law, the EU has therefore been dependent on the assistance of EU citizens, who are empowered to take action against violations of fundamental freedoms or competition rules on their own initiative.[91] *Masing* has aptly described this as the "mobilisation of the citizen for the enforcement of law".[92]

The direct effect of competition rules means that anyone adversely affected by a violation of competition law has the possibility of taking action against this violation without the need for a prior administrative order to establish the violation.[93] The individual rights conferred by competition rules includes both a right to put a violation to an end (a) and a right to compensation for the damage caused by the violation (b).

a) Right to put a violation to an end

Applicants within the meaning of railway regulatory law, whose rights are impaired by an anti-competitive access or charging scheme, must be able to defend themselves effectively against such a violation of competition law.

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87 Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 85.

88 According to the case law of the ECJ, Art. 102 TFEU also remains applicable to conduct and situations of risk that are simultaneously covered by regulatory law - see ECJ, Judgement dated 25.7.2018, Case C-123/16 P, ECLI:EU:C:2018:590 - *Orange Polska SA v Commission*. More specifically: see above.

89 ECJ, Judgement dated 30.1.1974, Case C-127/73, ECLI:EU:C:1974:6, para. 15/17- BRT/SABAM; ECJ, Judgement dated 24.10.2018, Case C-595/17, ECLI:EU:C:2018:854, para. 35 - *Apple Sales International* - established case law. See also BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 19 - *Trassenentgelte*: Competition rules serve not only to protect the market structure and competition, but also to protect individual interests and establish individual rights.

90 ECJ, Judgement dated 15.7.1964, Case C-6/64, ECLI:EU:C:1964:66 - *Costa/E.N.E.L.*

91 Masing, Die Mobilisierung des Bürgers für die Durchsetzung des Rechts (1997), p. 19; Poelzig, Normdurchsetzung durch Privatrecht (2012), pp. 262 *et seq.*; Hellgardt, Regulierung und Privatrecht (2016), p. 184 *et seq.* See also Ruffert, DVBl. 1998, 69, 71: "The renunciation of individual legal elements in the preconditions of direct effect is also more in line with the structural principles of Community law, which tends to involve the market citizen in its decentralised enforcement review and in this respect shows a tendency toward functional subjectification. The direct effect can also and especially be activated for the protection of general interests and thus stands in fundamental contrast to the German Protective Norm Doctrine".

92 Masing, Die Mobilisierung des Bürgers für die Durchsetzung des Rechts (1997), pp. 42 *et seq.*; Hellgardt, Regulierung und Privatrecht (2016), pp. 184 *et seq.*

93 See also BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 37 - *Trassenentgelte*.

If the infringement results from a conduct covered by competition rules but not by railway regulatory law - for example, from a margin squeeze or from an otherwise exclusionary strategy - the BNetzA is not competent for putting such an infringement to an end. Effective legal protection is only guaranteed if legal recourse to the civil courts is available – as elsewise. Obviously, in such cases, no prior determination of the unlawfulness of the access conditions or charging scheme can be demanded under regulatory law; this is because it is a violation of competition rules, which does not overlap with a violation of regulatory law, that is asserted.

It is unclear, however, whether the legal recourse to the civil courts is also available to those affected by a violation of competition rules if the violation of competition rules corresponds in substance to a violation of railway regulatory law, that is, if the violation of competition law coincides with a violation of the prohibition of discrimination under regulatory law or if the deviation from the principle of setting the infrastructure charges at the costs directly incurred as a result of operating the train service also results in abusive pricing. In such cases, the undertaking whose rights are affected has the option of filing a complaint with the BNetzA, which can establish a violation of regulatory requirements by way of an interpretation that draws on competition law principles. The BNetzA's decision would be subject to review by the administrative courts – which would also verify the compatibility of the regulatory decision with EU competition law. The question then is whether a person affected in his or her rights should nonetheless have recourse to the civil courts in addition.

In this respect, a distinction must be made between the old and the new legal situations. Pursuant to § 45 (1) ERegG, the charges of the infrastructure manager for the provision of the minimum access package, including the charging principles, now require approval by the regulatory authority. Pursuant to § 45 (2) ERegG, the infrastructure manager may not agree on any charges for the minimum access package other than those approved. The applicant railway undertaking has recourse to the administrative courts against an approval.[94] It is conceivable that the approval violates Art. 102 TFEU in conjunction with Art. 4 (3) TEU because the BNetzA did not give sufficient or accurate consideration to competition law in its interpretation of regulatory law. A possible violation of competition law must then be asserted within the framework of administrative court review, however. The power of the administrative courts to review decisions of the BNetzA extends to the parallel application of competition rules. Art. 6 Regulation 1/2003, according to which national courts have the power to apply competition rules, is not violated thereby. Railway regulatory law merely assigns these disputes to administrative courts, not civil courts, by way of exception. Only administrative courts are competent to decide on the lawfulness of the charge – which is what the applicant desires. A civil court could find a violation of Art. 102 TFEU. Its decision could not, however, substitute the approval of the charge required by regulatory law.

It is unclear whether corresponding principles also applied under the old legal situation. Under the AEG (old version), track access charges were not subject to any approval regime. Instead, the infrastructure manager was obligated to notify the BNetzA of any intended change in the charging principles and levels (§ 14d (1)(No. 6) AEG (old version)). Pursuant to § 14e AEG (old version), the BNetzA could object to this decision of the infrastructure manager within four weeks (§ 14e (1)(No. 4) AEG, old version). If no objection was lodged, the BNetzA was nevertheless authorised, pursuant to § 14f (1)(2) AEG (old version), to review the regulations regarding the level and structure of the infrastructure charges *ex officio* and, if necessary, to adjust them with effect for the future. Under the AEG (old version), an applicant who wanted to object to the level and structure of the infrastructure charges had only very limited options. An objection by the BNetzA pursuant to § 14e AEG (old version) in the *ex ante* review procedure could not be requested by applicant railway undertakings. A right of applicants to appeal to the regulatory body was only standardised in § 14f (2) AEG (old version) and thus limited to a retrospective review of the infrastructure charges by the BNetzA, which could then only order an adjustment of the charges pursuant to § 14f (1) AEG (old version) with effect for the future. The right to file a complaint pursuant to § 14f (2) AEG (old version) also required that an agreement regarding access to the rail network pursuant to § 14 (6) AEG (old version) or a framework agreement pursuant to § 14a AEG (old version) had not been concluded. Furthermore, only "the applicants, whose right of access to the railway infrastructure may be impaired" were eligible to file a complaint (§ 14 (2)(2) AEG, old version).

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[94] See Otte/Kirchhartz, in: Kühling/Otte, AEG/ERegG, Commentary, 2020, § 45 ERegG para. 51.

The question of whether these regulations in the AEG (old version) complied with the requirements of the Charter of Fundamental Rights and the German Basic Law (Grundgesetz) is currently the subject of a legal dispute pending before the Administrative Court of Cologne. It is not included in subject matter of this legal opinion.

The well-known deficiencies of the previous legal protection regime[95] under railway regulation law have led the BGH to affirm the civil courts' powers to subject the charges in question to an equity review pursuant to § 315 (3) BGB.[96] This equity review was prohibited – at least in its previous form – by the ECJ in *CTL Logistics,* however.

This expert opinion strives to clarify whether this "old" system of legal protection met the requirements of effective legal protection for those injured by a violation of competition law - with the possible consequence that railway regulatory law could be understood as sector-specific *procedural* competition law.

The practical effectiveness of EU competition rules, in conjunction with the right to an effective remedy guaranteed by Art. 47 of the Charter of Fundamental Rights, requires that anyone who has been injured by a possible violation of competition law be able to demand its immediate cessation. The wording of § 14f (2) AEG (old version) merely provided that the decisions of the infrastructure manager "[*may*] be reviewed by the regulatory authority upon request [...]". This wording left open the possibility of an intervention being at the BNetzA's discretion. Furthermore, the right to file a complaint under Art. 14f (2) AEG (old version) was only present if an access agreement or a framework agreement was not concluded. A person injured by a violation of Art. 102 TFEU must be able to seek cessation independently of such a prerequisite. Furthermore, the "*effet utile*" of competition rules dictates that *any* injured party is allowed to assert its damages - even if the injured party, such as a public authority, was not itself a party to the contract or would not have been a party to a failed contract.

Measured against the requirements of Art. 102 TFEU in conjunction with Art. 47 Charter of Fundamental Rights, the legal protection system under regulatory law clearly did not provide an effective remedy. Thus, it cannot be interpreted as sector-specific *procedural* competition law. Such a regime would have to include, at a minimum, a *right* to intervention by the authority with effect *ex tunc* for *all* potentially injured parties.

If, under the AEG (old version), there was a lack of sector-specific procedural competition law meeting the requirements of EU law, the continued applicability of the general rules must be assumed. Accordingly, those whose rights under competition rules were infringed by the infrastructure manager's charging scheme or setting of charges could, in principle, bring an action for a violation of competition law before the civil courts; this also applied if the violation of competition law overlapped with a violation under regulatory law. Since the infrastructure managers had considerable leeway in setting charges, an abusively excessive charge or an otherwise abusive structure of charges was readily attributable to them.

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95 See also Kühling, in: Ronellenfitsch/Eschweiler/Hörster (eds.), Aktuelle Probleme des Eisenbahnrechts, 2015, p. 73, 83, who speaks of a procedural insufficiency of sector-specific review of charges. Kühling identifies three deficiencies: (1) It is (was) unclear whether the review of charges of § 14f (2) AEG (old version) also applied if the contracting parties were only unable to reach agreement on part of the charge; (2) it is (was) disputed to what extent the BNetzA had discretion in the decision-making process in the review of charges; (3) the legal consequence of the determination of any violations of the sector-specific regulation of charges is (was) disputed with regard to the effect *ex nunc* or *ex tunc*.

96 See BGH, Judgement dated 18.10.2011, KZR 18/10 para. 20: "In contrast, the rail transport undertaking's options under the General Railways Act to defend itself against a price demand that is perceived to be too high are much weaker. The undertaking has no legal possibility of causing the regulatory authority to conduct a preliminary review of the charge levels pursuant to § 14e (1)(No. 4), (3)(No. 2) AEG. According to the wording of § 14f (2) (1), (2) AEG, it can only file an application for a review of the charges if an individual usage contract was not concluded due to the disagreement on the reasonable price. Even if this provision were to be applicable by analogy to the case that the contract was otherwise validly concluded despite the absence of agreement regarding part of the charging scheme - as is the case here with the cancellation charge - the regulatory authority still has discretion as to whether to review the charges subject to objection. With regard to the extent of this discretion, there is a dispute in the literature (for discretion in the decision-making process, *Kramer*, in: *Kunz*, EisenbahnR, version: 2009, AEG § 14 f. marginal no. 6; a. A. *Schmitt*, in: *Schmitt/Staebe*, Einf. in das EisenbahnregulierungsR, marginal no. 641). In any case, the regulatory authority is not obligated to enter into a review procedure in response to every application without exception. The legal consequence of an application that has merit is also unclear. It is true that § 14f (3) AEG states that the regulatory authority can oblige the railway infrastructure undertaking to change its decision or determine the terms of the contract itself and declare conflicting contracts invalid. However, it is not clear from the wording of the law whether this can only be done with effect for the future or also retroactively, as is expressly stipulated in § 14f (1) (2) AEG. In any case, it seems doubtful whether the regulatory authority's decision can also cover contracts for track access use that have already been concluded at the time of the decision by the authority - as may occur in the case of occasional traffic applied for at short notice".

Indeed, legal recourse to the civil courts could theoretically lead to conflicts with the railway regulatory regime. The potential points of friction were explained by the ECJ in its *CTL Logistics* decision in a different legal context - specifically with regard to the equity review of infrastructure charges by a civil court in accordance with § 315 (3) BGB.[97] In particular, divergent judgements by courts of lower instance could have jeopardised the practical effectiveness of the prohibition of discrimination under railway law, triggering the need for repeated adjustments of the charging schemes. This could have put pressure on a coherent structure of charges with regard to the regulatory objectives.

No such conflicts have occurred. On the one hand, before *CTL Logistics*, undertakings that felt that their rights had been impaired by the charge structure overwhelmingly opted for an equity review by civil courts under § 315 (3) BGB, rather than competition law. On the other hand, they have consistently limited themselves to liquidating their losses *ex post*, such that the risk of ongoing adjustments to the charge structure invoked by the ECJ has not materialised.

However, if the risk had materialised, the solution to the conflict of laws - in contrast to what the ECJ decided in *CTL Logistics* for the equity review pursuant to § 315 (3) BGB - would not have been the primacy of EU secondary law over national law. Rather, the *"effet utile*" of competition rules would have taken precedence over the coherence of railway regulatory law. It would have been necessary to adapt the legal protection system in railway regulatory law in such a manner that it would have met the requirements of effective sector-specific *procedural* competition law. As shown above, this has now happened with the ERegG.

b) Claims for a compensation of damages caused by a competition law violations

In the court proceedings that are currently pending there is no dispute as to the manner in which those injured by competition law violations may assert an injunction that may, under certain circumstances, interfere with an infrastructure manager's current charging scheme. Instead, claims for damages or reimbursement are asserted. Such claims for reimbursement or damages are not expressly provided for in railway regulatory law.

Since the entry into force of the ERegG, which now provides for a charge approval regime, an approval that is unlawful due to excessive charges must be revoked in accordance with § 48 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*). The contractual partners of the infrastructure manager may then have claims for repayment under § 812 (1) BGB. Under the old law, on the other hand, there was no approving administrative act. The unlawfulness of the charges could result directly from a violation of railway regulatory law or competition rules in setting the charges.

In a first step, clarification is needed whether the assertion of damage claims under competition law was or is possibly precluded by railway regulatory law (1). It seems to be consented that this is not the case. In the absence of a sector-specific exception, the civil courts have jurisdiction for actions for competition law damages (2).

(1) Claims for competition law damages by injured parties are not excluded in the event of a concurrence of competition law violations with regulatory law violations

(a) The importance of competition law damages for the *effet utile* of EU competition rules

Art. 101 and Art. 102 TFEU do not provide for any legal consequences under civil law beyond the nullity of agreements in violation of competition law enshrined in Art. 101 (2) TFEU. However, according to an established

[97] Regarding these, see also Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, pp. 57 *et seq.*, who apparently assumes in his expert opinion that not only claims for damages and reimbursement can be asserted in civil court, but that in such proceedings an adjustment of the infrastructure charges with effect for the future can also be applied for and ordered.

case law of the ECJ since the landmark decisions of *Courage*[98] and *Manfredi*[99], the Member States are obligated to guarantee a right of all those injured by a competition law infringement to compensation for the damage they have suffered as a result of the violation and to provide for a procedure for asserting such claims that complies with the principles of equivalence and effectiveness.[100] This duty of the Member States follows from the obligation to ensure the practical effectiveness (*effet utile*) of EU competition law and the individual rights associated with Arts. 101 and 102 TFEU. Private claims for damages, according to the ECJ, are likely to strengthen the working of the EU competition rules[101] and thereby to contribute to the maintenance of effective competition in the Union.[102] In later decisions, the ECJ has also referred to the compensatory function of the claims for damages prescribed by EU law.[103]

The basic features of the compensation regime for competition law damages to be guaranteed under national law are now governed by the Cartel Damages Directive 2014/104/EU.[104] Where the case law of the ECJ regarding Art. 101 and Art. 102 TFEU and the Cartel Damages Directive 2014/104/EU leave room for maneuvre, it is for national law to regulate the details of the procedure.[105] Similarly, it is the responsibility of the Member States to designate the courts having jurisdiction.[106] However, the procedural arrangements must not be designed in such a manner that they make it "practically impossible or excessively difficult" to assert damages claims that result from violations of competition law.[107]

Private claims for competition law damages have become a central part of the EU competition law system as a result of this case law and the Cartel Damages Directive.[108] This is true even where their enforcement is likely to make public enforcement of competition law more difficult - for example, because they reduce the incentives for voluntary disclosure of a violation by principal witnesses. The assertion of private claims for competition law damages is not excluded in such cases. Only the rights to inspect files, which are intended to facilitate private enforcement in other respects, are restricted.[109]

(b) No exclusion of private damage claims or claims for reimbursement based on competition law violations by railway regulatory law

Damage claims or claims for reimbursement based on competition law infringements are not excluded by railway regulatory law - even where the violation under competition law results from conduct that is also subject to railway regulatory law.

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98 ECJ, Judgement dated 20.9.2001, Case C-453/99, ECLI:EU:C:2001:465, para. 23-25 - *Courage*.

99 ECJ, Judgement dated 13.7.2006, Case C-295/04, ECLI:EU:C:2006:461, para. 58-60 - *Manfredi*. See also: ECJ, Judgement dated 5.6.2014, Case C-557/12, ECLI:EU:C:2014:1317, para. 20 *et seq.* - *Kone*.

100 ECJ, Judgement dated 20.9.2001, Case C-453/99, ECLI:EU:C:2001:465, para. 26 - *Courage*; ECJ, Judgement dated 13.7.2006, Case C-295/04, ECLI:EU:C:2006:461, para. 60 - *Manfredi*. See from recent case law, concurring: ECJ, Judgement dated 28.3.2019, Case C-637/17, ECLI:EU:C:2019:263, para. 39 - *Cogeco Communications Inc. v. Sport TV Portugal SA (et al.)*.

101 ECJ, Judgement dated 20.9.2001, Case C-453/99, ECLI:EU:C:2001:465, para. 27 - *Courage*.

102 ECJ, Judgement dated 20.9.2001, Case C-453/99, ECLI:EU:C:2001:465, para. 27 - *Courage*; ECJ, Judgement dated 6.11.2012, Case C-199/11, ECLI:EU:C:2012:684, para. 42 - *Otis*; ECJ, Judgement dated 28.3.2019, Case C-637/17, ECLI:EU:C:2019:263, para. 41 - *Cogeco Communications Inc. v. Sport TV Portugal SA (et al.)*.

103 ECJ, Judgement dated 6.6.2013, Case C-536/11, ECLI:EU:C:2013:366, para. 24 - *Donau Chemie*; ECJ, Judgement dated 12.12.2019, Case C-435/18, ECLI:EU:C:2019:1069, para. 31-32 - *Otis*.

104 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, pp. 1-19.

105 See also ECJ, Judgement dated 13.7.2006, Case C-295/04, ECLI:EU:C:2006:461, para. 25 - *Manfredi*.

106 ECJ, Judgement dated 20.9.2001, Case C-453/99, ECLI:EU:C:2001:465, para. 29 - *Courage*.

107 ECJ, Judgement dated 20.9.2001, Case C-453/99, ECLI:EU:C:2001:465, para. 29 - *Courage*; ECJ, Judgment dated 13.7.2006, Case C295/04, ECLI:EU:C:2006:461, para. 72 - *Manfredi*; ECJ, Judgement dated 5.6.2014, Case C-557/12, ECLI:EU:C:2014:1317, para. 25 - *Kone*; ECJ, Judgement dated 28.3.2019, Case C-637/17, ECLI:EU:C:2019:263, para. 43 - *Cogeco Communications Inc. v. Sport TV Portugal SA (et al.)*. See also BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 30 with further references - *Trassenentgelte*.

108 Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 97, fails to recognise the significance of the claim for competition law damages for the EU competition law system.

109 ECJ, Judgement dated 6.6.2013, Case C-536/11, ECLI:EU:C:2013:366, para. 29 *et seq.* - *Donau Chemie*; see also recital 6 of Directive 2014/104/EU: "To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid the divergence of applicable rules, which could jeopardise the proper functioning of the internal market."

As shown above, the application of competition law is not restricted by railway regulatory law. The two regulatory regimes remain applicable side by side.

In German law, the claim for damages in the event of a culpable violation of competition rules is standardised in § 33a GWB (formerly: § 33 (3) GWB, old version). In addition, in the case of contracts that violate competition law and are therefore void (Art. 101 (2) TFEU / § 134 BGB), a claim for repayment under § 812 (1) BGB comes into consideration.[110] Neither § 812 (1) BGB nor § 33a GWB nor railway regulatory law contain any indications of an exclusion or restriction of damages or reimbursement claims where competition law and sector-specific regulatory law are applicable in parallel.[111]

What is more, an exclusion of competition law-based damage claims in regulated sectors in general and in the railway sector in particular would be contrary to primary law. According to the case law of the ECJ since *Courage* and *Manfredi*, damage claims are a central component and prerequisite for the practical effectiveness of competition law. They help to effectively deter anti-competitive conduct; they help to compensate for gaps in public enforcement; and they can help to subsequently eliminate or mitigate the consequences of a distortion that has occurred in the market or competitive process.[112] Such functions of private competition law-based damages are not rendered obsolete in regulated sectors. On the contrary, especially in sectors already characterised by structurally entrenched market power, it must be ensured that the additional preventive effect resulting from damage claims is maintained.

Accordingly, in its decision in *CTL Logistics*, the ECJ expressly answered in the negative - albeit without further reasoning - the question posed by the Regional Court of Berlin as to whether Directive 2001/14/EC precludes the assertion of claims for the reimbursement of infrastructure charges to the extent that these are not asserted via the procedures provided for before the national regulatory body and the corresponding judicial procedures provided for the review of the decision of the authority.[113]

(2) Jurisdiction of civil courts over actions for repayment or damages based on competition law

If the continued existence of the claims for repayment or damages based on competition law is not in question, the question of legal recourse remains to be clarified.

According to Art. 6 Regulation 1/2003, "National courts shall have the power to apply Arts. 81 and 82 of the Treaty [today: Arts. 101, 102 TFEU]".

Under German railway regulatory law, the BNetzA has no jurisdiction to decide on claims for reimbursement or damages under competition law. Similarly, German railway regulatory law does not assign such actions to the administrative courts by way of exception. Therefore, the general jurisdiction of the regional courts in civil actions under competition law (§ 87 GWB) remains unaffected.

V. Can civil courts award damage claims only after the unlawfulness of infrastructure charges was previously determined by the regulatory body?

In the proceedings currently pending before civil courts, the question arises as to whether damage or reimbursement claims based on an infringement of competition law can only be decided following a legally

110 See BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 28 – *Trassenentgelte* with references to the literature.

111 See also BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 32 - *Trassenentgelte*.

112 See Schweitzer/Woeste, The Private Attorney General: Ein Modell für die private Rechtsdurchsetzung des Marktordnungsrechts?, in: Rechtsvergleichung im Vergleich der Zeiten, Rechtsordnungen und Theorien, 36th Conference on Comparative Law [forthcoming], available at http://ssrn.com/abstract=3695965.

113 ECJ, Judgement dated 9.11.2017, Case C-489/15, ECLI:EU:C:2017:834, para. 105 in conjunction with para. 33 - *CTL Logistics*.

binding determination of the unlawfulness of the track access charges under regulatory law by the regulatory body or the courts reviewing its decisions, and whether the civil courts are bound by such a determination when taking their decision.

There is disagreement about the relevance of the ECJ judgement in the *CTL Logistics* case for answering these questions. In this preliminary ruling, the ECJ determined that it was incompatible with Directive 2001/14/EC for civil courts to review railway infrastructure charges on a case-by-case basis as part of an equity assessment pursuant to § 315 (3) BGB and, if necessary, to amend them independently of the monitoring by the regulatory body provided for in Art. 30 Directive 2001/14/EC.[114] However, the ECJ answered in the negative the further question referred by the Regional Court of Berlin, which was unrelated to § 315 BGB, as to whether Directive 2001/14/EC precludes claims for repayment of infrastructure charges "if the disputed charges have not previously been submitted to the national regulatory body for review".[115]

Following the *CTL Logistics* judgment, the question has come to the fore as to whether excessive track access charges can give rise to damages or reimbursement under competition law. DB Netz AG is of the opinion that the assertion of claims for reimbursement or damages under competition law is precluded or is dependent on a prior determination, which is then binding on the civil courts, of the unlawfulness of the infrastructure charges for the same reasons, which preclude an equity review pursuant to § 315 (3) BGB.

In contrast, the BGH stated in its *Trassenentgelte* decision[116] that the ECJ's reasoning in the *CTL Logistics* decision cannot be transferred to the assertion of damages or reimbursement claims based on a violation of competition rules. The direct effect of Art. 102 TFEU precludes "a restriction according to which claims under civil competition law can only be asserted if the regulatory authority has previously found a violation"; from the principle of direct effect it follows not only that national courts have jurisdiction to apply competition rules, but also that no prior administrative decision is required for their application.[117]

Körber has countered this theory in a commissioned expert opinion. He argues that the principle that no prior administrative decision is required to apply competition rules applies only to the interaction of private and public enforcement within the enforcement regime under competition law. In this respect, the ECJ and the EU legislator took a decision in favour of parallel enforcement by authorities and courts and accepted the associated risk of the inconsistent application of competition law. However, according to *Körber*, this cannot be easily transferred to the relationship between competition law and regulatory law or between civil courts and regulatory authorities. The lines of conflict would be fundamentally different here: On the one hand, conflicts between competition law review by civil courts and substantive regulatory law could arise, in particular with regard to the prohibition of discrimination under regulatory law and the goal to create incentives to optimise the use of infrastructure, to reduce costs and trigger investments. On the other hand, the institutional and procedural safeguarding of these objectives through the competence of the regulatory body would be put into question.[118]

In the following, it will first be shown that and why no conclusions can be drawn from the *CTL Logistics* judgement as to whether the assertion of competition law damage claims is compatible with the Railway Directives (1.). In a second step, it is to be shown that EU law does not require a "preliminary procedure" before the regulatory body with binding effect for the competition law damages proceedings. To the contrary, such a requirement would violate fundamental principles of EU law (2.). Finally, the principles must be clarified according to which possible tensions between the evaluation of infrastructure charges under competition law and under regulatory law are to be resolved (3).

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114 ECJ, Judgement dated 9.11.2017, Case C-489/15, ECLI:EU:C:2017:834, operative part - *CTL Logistics*.

115 See ECJ, Judgement dated 9.11.2017, Case C-489/15, ECLI:EU:C:2017:834, para. 105 in conjunction with para. 33 - *CTL Logistics*.

116 BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0 - *Trassenentgelte*.

117 BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 37 - *Trassenentgelte*. In this respect, the BGH refers to ECJ, Judgement dated 30.1.1974, Case C-127/73, ECLI:EU:C:1974:6, para. 15-17 - BRT/SABAM. More recently, for example, CFI, Judgement dated 22.3.2000, Case T-125/97, ECLI:EU:T:2000:84, para. 80 - *Coca Cola*. See also Art. 1 (3) Regulation (EC) No 1/2003: "The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required".

118 Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, pp. 67 *et seq*.

1. The relevance of *CTL Logistics* for competition law damage claims

a) The preliminary ruling of the ECJ in CTL Logistics[119]

In the *CTL Logistics* case, the Regional Court of Berlin had referred various questions to the ECJ for a preliminary ruling. The questions concerned the compatibility of a civil law claim for the repayment of allegedly excessive infrastructure charges with the requirements of Directive 2001/14/EC. In its response, the ECJ focused on the question of whether Directive 2001/14/EC precludes a judicial equity review of infrastructure charges in accordance with § 315 (3) BGB. The ECJ answered in the affirmative: The possibility of a civil court adjusting rail infrastructure charges in individual cases, irrespective of their evaluation by the regulatory authority and in view of the respective bilateral interests of the contracting parties were found to be incompatible with the objectives, substantive principles and procedural principles of Directive 2001/14/EC.

(1) Incompatibility of the evaluation criteria in terms of substantive law

Firstly, an equity review of track access charges that - as provided for in § 315 (3) BGB - is based on the bilateral interests and the economic reasonableness of the individual contract in a given case cannot be reconciled with the prohibition of discrimination laid down in Directive 2001/14/EC or the principle of equal treatment (paras. 70-76).

Secondly, such a review is likely to close off the leeway that Art. 4 (1) Directive 2001/14/EC deliberately leaves to the management of the infrastructure manager when calculating infrastructure charges – a leeway that is meant to allow for a charge structure that optimises the use of the infrastructure and creates incentives for investment (para. 77-83).

Thirdly, the evaluation criteria relevant for the equity review under § 315 (3) BGB are incompatible with the assessment criteria[120] under regulatory law. If, on the other hand, the courts were to interpret § 315 (3) BGB in light of the assessment criteria under railway regulatory law, they would be encroaching on the exclusive powers of the regulatory body under Art. 30 Directive 2001/14/EC (para. 84-87).[121]

(2) Incompatibility of the judicial equity review pursuant to § 315 (3) BGB with the procedure for setting charges under railway regulatory law

Fourthly, the regulatory body would face practically insurmountable difficulties if it had to quickly integrate the various individual decisions of the civil courts based on § 315 BGB into a non-discriminatory system (para. 88). Pending a decision by the highest court, there would then always be unequal treatment between the railway undertakings that had brought an action before a court and those that had not. The regulatory body would then have to respond to final decisions of civil courts by adjusting the charges for all railway undertakings (para. 89-90). This would again imply an impermissible encroachment on the scope of action of infrastructure managers and an encroachment on the exclusive competence of regulatory body (para. 92-93).

Fifthly, the application of § 315 BGB by civil courts would undermine the *erga omnes* effect of the decisions of the regulatory body[122] - that is, the binding nature of such decisions for all parties affected in the railway sector, whether transport undertakings or infrastructure managers. The effect of a civil court judgement ordering the

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119 ECJ, Judgement dated 9.11.2017, Rs. C-489/15, ECLI:EU:C:2017:834 - *CTL Logistics.*

120 Here, the ECJ cites Arts. 4, 7, 8 Directive 2001/14/EC.

121 The ECJ assumes a further conflict between § 315 (3) BGB and railway regulatory law insofar as Directive 2001/14/EC allows the infrastructure manager to levy charges for infrastructure capacity that is requested but not used. However, this is not a relevant evaluation criterion under § 315 (3) BGB (para. 100-101).

122 See Art. 30 (5) (2) Directive 2001/14/EC.

repayment of unfair portions of charges - possibly based on the provisions of the AEG (old version) and the EIBV - is necessarily limited to the parties to the dispute (para. 94). This would give the prevailing party a competitive advantage over other infrastructure users (para. 95-96).

Sixthly, in proceedings based on § 315 (3) BGB, an amicable settlement of the dispute between the parties without the involvement of the regulatory body is not precluded, whereas Directive 2001/14/EC allows negotiations between infrastructure managers and applicants concerning the level of infrastructure charges only if carried out under the supervision of the regulatory body[123] (para. 98-99).

b) No transferability of the decision on the incompatibility of an equity review under § 315 (3) BGB to claims under competition law

According to various courts of lower instance,[124] the decision in *CTL Logistics* is based on a generalisable idea: According to this line of reasoning, the EU railway regulatory regime, as enshrined in Directive 2001/14/EC and continued in Directive 2012/34/EU, generally precludes claims for repayment or damages under civil law by individual railway undertakings unless the unlawfulness of the setting of charges has been established in a final and binding decision of the regulatory authority, because otherwise the prohibition of discrimination under regulatory law and the exclusive competence of the regulatory authority to review infrastructure charges would be undermined. This generalisation is surprising if only because the ECJ expressly answered in the negative[125] the question referred by the Regional Court of Berlin as to whether Directive 2001/14/EC precludes claims for repayment of infrastructure charges (in general, that is, not only on the basis of § 315 BGB or a comparable provision) if the disputed infrastructure charges have not previously been submitted to the national regulatory body (referral question 2), and thus distinguished between an equity review pursuant to § 315 (3) BGB and other possible claims for damages or reimbursement. With this differentiation, which has been widely overlooked in the discussion, the ECJ has excluded any inference from its judgment on the admissibility of an equity review under § 315 (3) BGB to other claims, in particular claims under competition law.

On the merits, the theory that the evaluation under EU law of an equity review under § 315 (3) BGB can be extended to claims under competition law overlooks the special features of an equity review and the differences between it and claims based on competition law.

(1) Different conflict resolution rules

In *CTL Logistics*, a decision had to be made on a conflict between the objectives of substantive regulatory law and the enforcement mechanisms of Directive 2001/14/EC on the one hand and a norm of German contract law on the other hand - that is, a conflict between EU law and national law. With regard to this conflict, the rule of the primacy of EU law over national law applies. In order to avoid a conflict, national courts must, as far as legally possible, procedurally arrange the actions before them such as to contribute to the objective of effectively protecting the rights deriving from EU law.[126]

If claims for reimbursement or damages based on competition law are asserted, the conflict resolution rule is different. Such claims for reimbursement or damages are stipulated by primary law and must be effectively implemented by the Member States (see above, IV.2.). Accordingly, the principle of the primacy of EU secondary

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123 Art. 30 (3)(2) and (3) Directive 2001/14/EC.

124 Regional Court of Frankfurt a.M., Judgement dated 9.5.2018, 2-06 O 38/17, ECLI:DE:LGFFM:2018:0509.2.06038.17.00, para. 71 *et seq.*; Regional Court of Leipzig, Judgement dated 6.7.2018, 01 HK O 3365/14, ECLI:DE:LGLEIPZ:2018:0706.01HKO3365.14.0A, para. 32 *et seq.*; Regional Court of Berlin, Judgement dated 30.10.2018, 16 O 495/15 Kart, ECLI:DE:LGBE:2018:1030.16O495.15KART.00, para. 22 *et seq.*; Higher Regional Court of Dresden, Judgement dated 17.4.2019, U 4/18 Kart, ECLI:DE:OLGDRES:2019:0417.U4.18KART.0A, para. 43 *et seq.* By contrast, see the Judgement of the BGH dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 36 - *Trassenentgelte*.

125 See ECJ, Judgement dated 9.11.2017, Case C-489/15, ECLI:EU:C:2017:834, para. 105 in conjunction with para. 33 - *CTL Logistics*.

126 ECJ, Judgement dated 28.11.2019, Case C-379/18, ECLI:EU:C:2019:1000, para. 63 - *Deutsche Lufthansa v. Land of Berlin*.

law (in the form of the Railway Directives) over national law does not apply. If the tension cannot be resolved in any other manner, the principle of the primacy of primary law over secondary law applies.[127] However, in a first step, a solution must be sought that takes into account both the EU objectives pursued with the guarantee of claims for competition law damages *and* the objectives of the directive. Unlike in the case of a conflict between EU law and national law, such a solution must ensure the practical effectiveness of EU competition rules, that is, it must not make it excessively difficult to enforce claims based on competition law.

(2) Differences between the judicial equity review under contract law and damage claims based on competition law infringements

It must also be taken into account that the objectives and evaluation criteria of an equity review under contract law differ from those of a competition law review - even if, from the plaintiffs' point of view, the latter has functionally taken the place of the equity review after *CTL Logistics*. As such, the relationship between railway regulatory law and competition law (see III. above) is different from the outset from the relationship between railway regulatory law and contract law.

In *CTL Logistics*, the ECJ considered the equity review under contract law according to § 315 (3) BGB to be incompatible with the review of charges under railway regulatory law, mainly because the civil court's fairness ruling was focussed primarily on the bilateral contractual relationship (para. 64). Accordingly, the infrastructure managers would be obligated to make use of the leeway left to them by railway regulatory law, taking into account the respective interests of their contractual partner (para. 71).[128] However, in the correct view of the ECJ, the prohibition of discrimination, which is central to the regulation of charges under railway law, would then be in jeopardy (paras. 73-74): A non-discriminatory charging policy in relation to all railway undertakings requires that charges are set on the basis of uniform criteria that do not take into account the specifics of individual bilateral contractual relationships.

No comparable conflict exists between railway regulatory law and competition law. The norms of competition law - like those of regulatory law - aim to regulate and safeguard the market structure and competition. The specifics of each individual contractual relationship are not relevant for abuse control. The decisive factor is the protection of competition and the protection of the opposite market side from exploitation.[129] Accordingly, the criteria under regulatory and competition law for evaluating the lawfulness of infrastructure charges are partly aligned (for example, with regard to the prohibition of discrimination) and complementary in all other respects (see III. above).[130] The decision-making scope left to the infrastructure manager under regulatory law when structuring charges is indeed limited by competition law. However, this limitation already follows from the parallel applicability of competition rules, which is undisputed in substance (see III.2. above). The leeway is not eliminated by competition law (see above).

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127 Likewise: BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 33 *et seq.*, 36 - *Trassenentgelte*: "The relationship between prohibition of abusive practices and sector-specific regulation is determined by the primacy of primary over secondary law, unlike the relationship between the sector-specific review of charges and the assessment of fairness under civil law". See further ECJ, Judgement dated 11.4.1989, Case C-66/86, ECLI:EU:C:1989:140, para. 45 - *Ahmed Saeed Air Travel*.

128 128 Likewise with regard to airport charges: ECJ, Judgement dated 21.11.2019, Case C-379/18, ECLI:EU:C:2019:1000, para. 67 and 70 - *Deutsche Lufthansa v. Land of Berlin*: It was legally impossible on the basis of § 315 (3) BGB to "obtain judicial review on the basis of objective criteria" that would be suitable for ensuring compliance with a prohibition of discrimination under regulatory law.

129 See also Hauf/Baumgartner, EuZW 2018, 1028, 1030.

130 This is also recognised by Körber - see Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 52: "Conflicts between competition law and regulatory law should also tend to occur to a lesser extent than those between regulatory law and § 315 BGB, because competition law leaves less leeway to the national civil judge than does the fairness standard of § 315 BGB, and because uniform standards do indeed exist to a greater extent (and especially at the EU level) for competition law". However, Körber then nonetheless assumes that competition law in civil litigation is "more open to the consideration of individual concerns of the parties to the dispute" than regulatory law, because private enforcement under competition law is "primarily (if not solely) in pursuit of individual interests". However, this individual motivation does not change the fact that the standards under substantive law are precisely not individual ones.

The institutional conflict identified by the ECJ in *CTL Logistics* between the equity review under contract law and the regulation of railway charges - the encroachment on the exclusive supervisory competence of the regulatory body, which serves to safeguard the prohibition of discrimination under regulatory law - also presents itself in a different light for the relationship of the assessments under competition law and regulatory law: According to the Railway Directives, the exclusive competence of the regulatory authority relates to the formulation of the contractual relationship between the infrastructure manager and the railway undertaking by means of the network statement, including the charging rules. To the extent that the equity review under contract law becomes a gateway for a review by a civil court of the "correct" application of regulatory law, this may in fact lead to a duplication of review jurisdiction that is not envisaged by the directives. However, as shown, for the independent application of competition rules, the regulatory authority has not only no exclusive competence, but no competence at all. Civil courts, as shown above, will consider the framework under regulatory law when interpreting competition law. However, this does not involve any encroachment on the exclusive competence of the regulatory authority to apply regulatory law - just as the interpretation of regulatory law in the light of competition rules does not involve any encroachment on the competence of the competition authorities.

However, decisions of civil courts regarding the unlawfulness of the charge structure under competition law could also lead to the need to adjust the charging schemes and/or the setting of charges. This follows directly from the parallel applicability of competition rules though. That the need for adjustment may follow from judgements that operate only *inter partes* is inherent in the logic of the decentralised application of competition rules. However, railway regulatory law cannot exclude either of these, if only because it is not congruent, even though it runs parallel to Art. 102 TFEU in some respects (see above, III.2.). A system in which the assertion in civil court of damages or reimbursement claims based on competition law infringements would *generally* be made dependent on the unlawfulness of the charges under regulatory law would be contrary to primary law, if only because it would disable the protection of competition conveyed by primary competition rules in many respects - for example with regard to exclusionary strategies not covered by regulatory law.[131]

All of this does not mean that no potential tension whatsoever remains between the decision on damages and reimbursement claims by a civil court and the regulation of railway charges:

In certain sets of circumstances, violations of regulatory law and violations of competition law may largely overlap - for example, in the case of violations of the prohibitions of discrimination under regulatory law and competition law. If a civil court is not bound to an assessment of regulatory law in its assessment of competition law, contradictions of assessment may arise.[132]

If settlement negotiations are conducted within the framework of civil actions under competition law, this may indirectly involve negotiations regarding the "correct" level of infrastructure charges, which, according to the provisions of the Railway Directives, should only take place under the supervision of the regulatory body, which monitors compliance with the provisions of the directives (Art. 30 (3)(2) and (3) Directive 2001/14/EC; Art. 56 (6) Directive 2012/34/EU).

In practice, however, the risk that diverging civil court judgements on actions for competition law damages will require constant adjustments to the charging schemes is low. Civil court actions directly aimed at adjusting the charge structure are excluded under the ERegG, as shown above (see above, IV.2.a)). Claims for damages or reimbursement based on competition law are typically asserted with such a considerable time lag that they relate - at least at the time of the judgement - to charging schemes and settings that are no longer in force.

[131] For the unrestricted parallel applicability of competition rules alongside sector-specific regulatory law, see above at III.2.

[132] See also Gerstner, EuZW 2018, 74, 80: If the regulatory authority did not have exclusive competence for the review of charges, there would be a risk of contradictions of assessment between competition law and railway regulatory law. See also Freise, TranspR 2018, 425, 431.

Nor do civil court actions for damages jeopardise the prohibition of discrimination under railway regulatory law.[133] This is quite obviously true when it comes to private actions for damages brought by public authorities that are not themselves involved in competition on the railways. However, it also applies to private actions for damages brought by railway undertakings. As *Kühling* has rightly observed, the prohibition of discrimination under regulatory law "does not require that all parties be placed on an equal footing with *ex tunc* effect, irrespective of whether or not they have taken legal action against certain conduct on the part of the railway infrastructure undertaking".[134] The *"level playing field*" in the competition between railway undertakings would be impaired if infrastructure charges *for the future* were calculated according to different standards. The fact that an undertaking is awarded damages for past infringements, on the other hand, will not fundamentally change the position of railway undertakings in competition, because it does not become the basis for calculation in competitive tendering procedures.

Finally, the fact that damage payments may jeopardise the coverage of the infrastructure manager's costs for the past cannot stand in the way of claims under civil law.[135] The costs of an infrastructure manager are certainly considered within the framework of a price level review under competition law. However, the need to cover costs cannot justify abuses of a dominant position, nor in any other respect can it lead to the exclusion of the resulting claims for damages.

2. No requirement under EU law for a "preliminary procedure" by the regulatory authority with binding effect for civil courts

a) The theory of the predetermining effect of railway regulatory law for the assessment under competition law within the framework of private actions for damages

Notwithstanding these far-reaching differences between § 315 (3) BGB and claims for damages and reimbursement resulting from a competition law infringement, some courts of lower instance assume that such damages and reimbursement claims can (also) only be considered if the incompatibility of the infrastructure charges with the requirements of railway regulatory law has previously been established with legally binding effect by the regulatory authority or a court with jurisdiction for its review.[136]

Without a prior final and binding decision regarding the unlawfulness of the track access charges under regulatory law, a civil court would only be permitted to examine claims under competition law on the basis of legal aspects unrelated to railway regulatory law. However, since the law of the Railway Directives specifically substantiates and elaborates the principles of the prohibition of discrimination and the prohibition of the exploitation of a dominant position, which are also relevant under competition law, an independent application of competition law by civil courts in these respects, detached from the assessment under regulatory law, would be excluded. Competition law-based damage claims could only be awareded if the competent regulatory authority had established a violation in advance.[137] This coincides with the line of arguments presented by *Körber* in his commissioned expert opinion: According to him, a review by a civil court on the basis of competition law - with

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[133] For a different view see Weitner, EnWZ 2018, 73, 78; Staebe, EuZW 2018, 118, 121; Karalus, EuR 2018, 477, 480 *et seq.*: The principle of equal treatment is infringed because the undertaking successfully bringing the action is favoured. In contrast, Hauf/Baumgartner, EuZW 2018, 1028, 1031 and 1034: The unequal treatment resulting from the fact that individual RUs are awarded reimbursement claims in proceedings under competition law is irrelevant - there is no "equal treatment in injustice".

[134] Kühling, in: Ronellenfitsch/Eschweiler/Hörster (eds.), Aktuelle Probleme des Eisenbahnrechts, 2015, p. 73, 99.

[135] Unclear in this respect: Regional Court of Berlin, Judgement dated 30.10.2018, 16 O 495/15 Kart, ECLI:DE:LGBE:2018:1030.16O495.15KART.00, para. 39: In civil proceedings under competition law, the aspect that the infrastructure manager must ultimately obtain a certain total revenue in order to cover costs is not taken into account.

[136] For example, Regional Court of Leipzig, Judgement dated 6.7.2018, 01 HK O 3365/14, ECLI:DE:LGLEIPZ:2018:0706.01HKO3365.14.0A, para. 32 *et seq.*, para. 47; Regional Court of Berlin, Judgement dated 30.10.2018, 16 O 495/15 Kart, ECLI:DE:LGBE:2018:1030.16O495.15KART.00, para. 31 *et seq.* See also Higher Regional Court of Dresden, Judgement dated 17.4.2019, U 4/18 Kart, ECLI:DE:OLGDRES:2019:0417.U4.18KART.0A, para. 44 *et seq.*, 46.

[137] Higher Regional Court of Dresden, Judgement dated 17.4.2019, U 4/18 Kart, ECLI:DE:OLGDRES:2019:0417.U4.18KART.0A, para. 47; Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, pp. 59 *et seq.*

the exception of follow-on actions in front of a civil court that follow a final and binding decision by the BNetzA or a legally binding judgement by an administrative court - would be contrary to the directives and thus contrary to EU law.[138]

b) The incompatibility of this theory with the independent applicability of competition law

A rule that would make claims for competition law damages contingent on a prior final and binding determination of regulatory unlawfulness would avoid contradictions between regulatory law and civil courts' findings in damages actions. However, this result would come at the cost of a radical break with the independent applicability of competition law alongside market-opening regulatory law, as confirmed by the ECJ in a long line of cases. In the context of the enforcement of private damages claims, secondary law would be given primacy of application over primary law (1). This would also fail to recognise that the principle of the practical effectiveness of competition rules mandates private law damage claims in case of competition law infringements and their effective elaboration in national law (see above, IV.2.b)(1)(a)) (2).

(1) Independent applicability of competition rules alongside regulatory law

The theory that a predetermining effect of regulatory law in the sense just described is justified by its legal nature as "sector-specific competition law",[139] which merely substantiates the requirements of Arts. 101/102 TFEU, is untenable in view of the established case law of the ECJ, according to which there is no congruence between general competition rules and market-opening regulatory law. Primary law must not be displaced by sector-specific secondary law. Competition rules remain independently applicable (see above, III.2.). The assessment under regulatory law is to be taken into account in the application of Art. 102 TFEU according to the principles of an interrelated interpretation of regulatory and competition law. However, it does not decide the competition law issues, nor does it predetermine the ultimate decision. An infrastructure charging scheme or the setting of charges may violate competition law even if it is lawful under regulatory law.[140] This is overlooked by those who want to attribute a binding effect to a regulatory body's decision on the lawfulness (under regulatory law) of infrastructure charges with regard to the assessment under competition law in accordance with the binding effect of Art. 9 of the Antitrust Damages Directive 2014/104/EU.[141] Yet, the regulatory body is not competent for an assessment under competition law.

The German legislator, on the other hand, has correctly recognised the independence of the competition law assessment in relation to the assessment under regulatory law and has, therefore, not extended the fiction in § 33 (2)(3) and § 45 (2) ERegG, according to which approved charges are deemed to be "fair charges" within the meaning of § 315 BGB, to the assessment under competition law.

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138 See Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, pp. 64 *et seq*., 73, 86 *et seq*.: "Under *CTL Logistics*, civil courts may not apply rules of regulatory law and thereby anticipate the decision of the regulatory body with sole competence. The assertion of claims for reimbursement or damages in civil court on the basis of claims under private law, including competition law, [...], to the extent that it is aimed at correcting the level of the charges, can only be considered after a final and binding determination by the BNetzA that the charges are unlawful. Until such a situation exists, the proceeding has to be stayed under § 148 of the Code of Civil Procedure (*Zivilprozessordnung*)".

139 Otte/Kirchhartz, in: Kühling/Otte (eds.), AEG/ERegG, Commentary, 2020, § 45 ERegG para. 47.

140 At the same time, this means that competition law damages claims remain feasible even alongside the approval regime introduced by the ERegG. The approval does force infrastructure managers not to agree to charges other than the approved charges for providing the minimum access package. However, it is up to the infrastructure managers themselves to apply for infrastructure charges that comply with competition law, and in this respect they remain subject to the prohibition of abusive practices under competition law. Differing view apparently, Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 86: "The national civil court may not itself review the decision of the regulatory authority [...] against the standard of regulatory law [...] nor may it, by applying other standards (for example, those under competition law), invalidate for the individual case a charging approval granted on the basis of railway regulatory law" without contradicting on the regulatory regime set out in the directives. Otherwise, the sole competence of the BNetzA would be encroached upon.

141 See Körber, Regulierte Eisenbahnentgelte und Kartellrecht, 2020, p. 73 and p. 86.

(2) The practical effectiveness of private competition law damages claims

A predetermining effect of the evaluation under regulatory law for the assessment under competition law can also not be justified by the fact that it would apply only in private competition law damages proceedings.

As shown (see above, IV.2.b), anyone who has suffered damage as a result of the violation of the EU competition rules must be able to claim compensation for such damage. All provisions relating to the assertion of such claim, including all procedural arrangements, must comply with the principle of effectiveness.[142] Consequently, they must not make the assertion of the damage claims - and thus the effective application of competition rules - excessively difficult or even practically impossible.[143]

This principle of effectiveness would be violated if the enforcement of claims for reimbursement and damages under competition law were made dependent on a prior binding determination of unlawfulness under railway regulatory law by the regulatory authority. The independent and parallel application of competition rules alongside regulatory law also means that the assessment under competition law may differ from the assessment under railway regulatory law. This applies not only with respect to those types of conduct that are only covered by competition law, but not by regulatory law - for example, with regard to certain exclusionary strategies. Notwithstanding the influence of secondary law on the interpretation of primary law, this also applies where competition law and regulatory law overlap, because it is conceivable that a regulatory authority does not give sufficient consideration to the effects of a give type of conduct on competition when interpreting regulatory law (see above, III.2. and 4.). Competition law-based claims for reimbursement or damages may therefore be awarded even if the regulatory authority has deemed the setting of charges to be lawful. The requirement of a preliminary determination by an authority of the unlawfulness under railway law would prevent the assertion of claims under civil law in such cases and thus violate the obligation to ensure the practical effectiveness of competition rules. Individual rights would not only be restricted, but abolished.

This is also made clear by the fact that the principle of direct effect of competition rules would be undermined by the requirement of a preliminary procedure before an authority whose decision would be binding for the competition law assessment. Pursuant to Art. 1 (3) Regulation 1/2003, an abuse of dominance within the meaning of Art. 102 TFEU is prohibited without a prior decision being required. This codifies the established case law, which is fundamental to EU competition law, that the prohibitions contained in Arts. 101 and 102 TFEU produce direct effect in relationships between individuals and confer rights to individuals that the national courts must safeguard. If the assertion of such rights were made dependent on a prior decision by the competition authority, this "would mean depriving individuals of rights which they hold under the Treaty itself".[144] The ECJ has repeatedly reaffirmed this finding, including in its recent case law.[145] The same must apply *a fortiori* with regard to a decision by a regulatory authority - if, as shown, the assessment under regulatory law is instructive for the assessment under competition law, but does not predetermine the decision legally, the private enforcement of competition rules

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142 ECJ, Judgement dated 21.11.2019, Case C-379/18, ECLI:EU:C:2019:1000, para. 62 - *Deutsche Lufthansa/Land Berlin*, with reference to ECJ, Judgement dated 13.3.2007, Case C-432/05, EU:C:2007:163, para. 39 and 43 - *Unibet*.

143 See more recently: ECJ, Judgement dated 28.3.2019, Case C-637/17, ECLI:EU:C:2019:263, para. 43-44 - *Cogeco Communications Inc. v. Sport TV Portugal SA.*

144 See ECJ, Judgement dated 30.1.1974, Case C-127/73, ECLI:EU:C:1974:6, para. 15-17 - *BRT/SABAM*: "The competence [of national courts] to apply the provisions of Community law [...] derives from the direct effect of those provisions. As the prohibitions of Articles 85 (1) and 86 [Arts. 101 and 102 TFEU] tend by their very nature to produce effects in relations between individuals these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard. To deny, by virtue of the aforementioned Article 9 [Regulation 17/62], the national courts' jurisdiction to afford this safeguard, would mean depriving individuals of rights which they hold under the Treaty itself." See also: ECJ 10.7.1980, Case 37/79 para. 13 - *Anne Marty v. Estée Lauder*. See also BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 36 - *Trassenentgelte*.

145 ECJ, Judgement dated 24.10.2018, Case C-595/17, ECLI:EU:C:2018:854, para. 35 - *Apple Sales International*. It followed in these proceedings that the application of a jurisdiction clause within the framework of an action for damages by a distributor against its supplier based on Art. 102 TFEU could not be dependent on a prior determination of a violation of competition law by the competition authority - the right of a person injured by a violation of competition rules to claim compensation for the damage he or she has suffered is independent of the prior determination of such a violation by the competition authority; ECJ, Judgement dated 28.3.2019, Case C-637/17, ECLI:EU:C:2019:263, para. 38 *et seq.* - *Cogeco Communications Inc. v. Sport TV Portugal SA (et al.)*. See also CFI, Judgement dated 22.3.2000, Case T-125/97, ECLI:EU:T:2000:84, para. 80 - *TCCC v. Commission*.

would be de facto precluded by a requirement of a prior decision by a regulatory authority.[146] Competition rules would be deprived of their direct effect and the injured parties would be deprived of the individual rights conferred on them by the competition rules. In fact, they would only be able to assert claims for damages and refunds on the grounds that the charges were unlawful under regulatory law, and not on the grounds of a violation of competition law.

The courts with jurisdiction for the application of Arts. 101 and 102 TFEU would be deprived of the "essential task" assigned to them by Art. 6 Regulation 1/2003 of protecting the individual rights arising from competition rules in legal disputes between private parties.[147]

(3) Interference with the guarantee of effective legal protection, Art. 47 of the Charter of Fundamental Rights

Insofar as violations of competition rules are asserted with regard to the infrastructure charges levied under the application of the AEG (old version), a requirement for a prior determination by an authority of unlawfulness under regulatory law would also violate the right to an effective remedy under Art. 47 of the Charter of Fundamental Rights.

Under this provision, any person whose rights or freedoms guaranteed by EU law have been violated has the right to an effective remedy before a court. Anyone who is injured by a violation of competition law must have the option of claiming damages (see above, IV.2.b)).

The BGH correctly rejected the requirement for a prior determination of the unlawfulness of the infrastructure charges, for the reason that the railway undertakings would then have to comply with requirements of procedural law when enforcing their claims, which were not determined by law either at the time the claim arose or at the time it was asserted in court, and were therefore not recognisable to the entitled parties.[148]

There are some indications that, at the time the claim arose, it was not even possible for the injured parties to force the BNetzA to take a decision under the AEG (old version) (see above, IV.2.a)). The possibilities for railway undertakings to apply to the BNetzA for an *ex post* review were limited in various respects - in terms of subject matter and personal scope - by § 14f (2) AEG (old version). It was unclear whether a public authority would have been entitled to file a complaint at all, since § 14f (2) AEG (old version) limited the right to file a complaint to "applicants whose right to access the railway infrastructure may be impaired". Moreover, at least according to the wording of the provision, the BNetzA retained discretion in the decision-making process. If the assertion of private competition law damages claims was made conditional on a prior determination by the regulatory authority that the charges were unlawful, such a system of legal protection would not only violate the requirement that the procedural arrangements be designed in such a manner that they do not make the assertion of the claim excessively difficult.[149] It would also violate the requirement of effective legal protection under Art. 47 of the Charter of Fundamental Rights.

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[146] This follows from the fact that the assessment under competition law within the framework of public enforcement can indisputably differ from the assessment under regulatory law, see above, III.2.

[147] See recital 7 of the Antitrust Damages Directive 2014/104/EU. See further BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 37 - *Trassenentgelte*. Also Hauf/Baumgartner, EuZW 2018, 1028, 1035: Art. 6 Regulation 1/2003 makes it clear that the decision of a civil court does not require a prior decision of an authority.

[148] BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 39 - *Trassenentgelte*.

[149] ECJ, Judgement dated 20.9.2001, Case C-453/99, ECLI:EU:C:2001:465, para. 29 - *Courage*; ECJ 13.7.2006, Case C295/04, ECLI:EU:C:2006:461, para. 72 - *Manfredi*; ECJ, Judgement dated 5.6.2014, Case C-557/12, ECLI:EU:C:2014:1317, para. 25 - *Kone*; ECJ, Judgement dated 28.3.2019, Case C-637/17, ECLI:EU:C:2019:263, para. 43 - *Cogeco Communications Inc. v. Sport TV Portugal SA (et al.)*. See also BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 30 with further references - *Trassenentgelte*.

If the Administrative Court of Cologne were to confirm the BNetzA's legal opinion that it lacked the authority to retrospectively review infrastructure charges that had already expired at the time the application was filed,[150] it would also be impossible for the injured parties to establish the prerequisites for a decision by a civil court regarding their claim for damages at the time their claims are asserted.[151] The legal opinion of the BNetzA makes it clear that the legal protection regime under railway regulatory law, as it has been applied to date, is not geared to protecting individual rights to competition law damages. In its recent *Cogeco Communications*[152] judgement, the ECJ ruled that the duration of the period of limitations for competition law-based damage claims must not be so short "that, combined with the other rules on limitation, it renders the exercise of the right to claim compensation practically impossible or excessively difficult" (para. 48). A short period of limitations that cannot be suspended or interrupted during the duration of proceedings ending with a final and binding decision of the national competition authority or an appellate body makes it practically impossible or excessively difficult to assert a claim for damages (para. 51). Member States would have to take into account the objectives and particular features of competition law when setting periods of limitation, in order not to undermine the full effectiveness of Art. 102 TFEU (para. 47). To be sure, the question to be answered here does not concern periods of limitations. However, if a determination by an authority of the unlawfulness of the infrastructure charges were a prerequisite for the assertion of private claims for competition law-based damages, the application deadlines for the determination of such unlawfulness would also have to take into account the requirements of the *"effet utile*" of competition law-based damages claims. The impossibility of a retrospective determination by the BNetzA of the unlawfulness of regulation would be incompatible with this principle. Civil courts would be in violation of their obligation to ensure the practical effectiveness of private damages claims if, notwithstanding these deficiencies in the legal protection regime under regulatory law, they were to require a prior determination of an authority that the infrastructure charges were contrary to regulatory law.

3. Principles of EU law for dealing with the tension between regulatory law and actions for competition law-based damages

a) Cooperation relationship between competition law and regulatory law

In essence, the theory that regulatory law predetermines the competition law assessment in the course of private actions for competition law-based damages postulates the displacement of primary law by secondary law. The hierarchy of norms under EU law suggests precisely the opposite: In the case of a conflict that cannot be resolved otherwise, primary law would take precedence over secondary law.[153]

However, this conflict resolution rule only applies when the tension between the regulation of charges under railway law and actions for competition law-based damages cannot be resolved in any other manner. The principle of loyalty of Art. 4 (3) TEU applies to all EU law - both primary and secondary law. Pursuant to Art. 4 (3)(2) TEU, Member States "shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union".

The *"effet utile*" principle of interpretation is a special manifestation of the principle of loyalty. Provisions of EU law are to be interpreted by national courts in a manner that ensures their "practical effectiveness". This principle applies equally to EU primary law and to secondary law. Subject to a conflict that cannot be resolved in any other manner and must therefore be decided in accordance with the primacy of the Treaties, the national courts are thus obligated to give full effect to both competition law-based private damages claims and the Railway Directives.

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150 BNetzA, Decision dated 11.10.1019. An action against this decision is pending before the Administrative Court of Cologne. Regarding the relevant case law of administrative courts, see, *inter alia*: Linsmeier/Röckrath, EuZW 2019, 412, 413 f.

151 See also BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 45 *et seq.* - *Trassenentgelte*.

152 ECJ, Judgement dated 28.3.2019, Case C-637/17, ECLI:EU:C:2019:263 - *Cogeco Communications Inc. v. Sport TV Portugal SA.*

153 Likewise BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 33 *et seq.*, 36 - *Trassenentgelte*: "The relationship between prohibition of abuse and sector-specific regulation is determined by the primacy of primary over secondary law, unlike the relationship between the sector-specific review of charges and the assessment of fairness under civil law". See further ECJ, Judgement dated 11.4.1989, Case C-66/86, ECLI:EU:C:1989:140, para. 45 - *Ahmed Saeed Air Travel*.

As shown, competition law and regulatory law are to be understood as complementary. They are to be placed in a cooperative relationship in light of their respective objectives, substantive legal principles and institutional design.[154] Together, they shall ensure undistorted competition in the railway market and between different modes of transport. Private competition law enforcement must not destroy the functioning and coherence of the regulatory regime. Conversely, railway regulatory law cannot preclude private claims for competition law damages, which retain their function in the regulated area (see above, IV.2.b)(1)(a)). They are not only an important manifestation of the system of individual rights from which competition arises. They also strengthen the incentives for the infrastructure manager to observe competition law when setting charges and help to ensure that excessive infrastructure charges do not lead to a further consolidation of the power of a vertically integrated infrastructure manager in the long term. Consequently, the relationship between regulatory authorities and civil courts must be designed such as to ensure that the assertion of competition law-based damages or reimbursement claims is not made excessively difficult.

b) The cooperation relationship under German law

These requirements under EU law are already taken into account in the current legislation. If interpreted in conformity with EU law, § 76 ERegG provides an institutional framework for the cooperative relationship between civil courts and the regulatory authority. The provision states:

"For civil disputes arising from this Act, § 90 (1) and (2) of the Act against Restraints of Competition shall apply *mutatis mutandis*, with the proviso that the Federal Cartel Office and its president shall be replaced by the regulatory authority and its president."

Accordingly, German courts must notify the regulatory body of all legal disputes, the decision of which depends in whole or in part on the application of the provisions of the ERegG or on a decision to be made in accordance with these provisions. At that point, the president of the regulatory authority may, if he or she deems it appropriate for the protection of the public interest, appoint a representative from his or her office who shall be authorised to make written statements to the court, to refer to facts and evidence, to attend the hearings, to make submissions and to put questions to parties, witnesses and experts.

According to the explanatory memorandum to the ERegG, § 76 ERegG was intended to refer only to disputes "arising from the ERegG", however. The mechanism was not to be applied to disputes under civil law, which are based on non-ERegG provisions but in which the interpretation of the ERegG may be a preliminary issue.[155] The Member States and all Member State authorities have a duty to take account of EU law in the application and interpretation of national law, however. As shown, this is especially true when it comes to the relationship between competition law and regulatory law. With this in mind, § 76 ERegG must be interpreted as meaning that "civil disputes arising from [the ERegG]" may also include private actions for competition law-based damages brought on the basis of the setting of regulated access conditions or charges.

In the case of civil damages action based on a competition law infringement, for which a regulatory authority's assessment of the (un)lawfulness of an infrastructure charging scheme or charge setting is a relevant aspect, that regulatory authority can therefore act as *amicus curiae*. Civil courts are required by virtue of the principle of loyalty (Art. 4 (3) TEU) to take into account the overlaps with railway regulatory law in their competition law assessment and to respect the functioning of the system of railway regulation. If regulatory proceedings are still pending, the principle of loyalty of Art. 4 (3) TEU may obligate civil courts to await their outcome, in order to take account of the purposes and effects of sector-specific regulation when applying Art. 102 TFEU.[156]

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[154] Regarding the cooperation relationship between private and public enforcement of competition rules, which also is not always tension-free, see Schweitzer/Woeste, Der "Private Attorney General": Ein Modell für die private Rechtsdurchsetzung des Marktordnungsrechts?, in: Rechtsvergleichung im Vergleich der Zeiten, Rechtsordnungen und Theorien, 36th Conference on Comparative Law [forthcoming], available at http://ssrn.com/abstract=3695965.

[155] See Bundestag Printed Paper (Drucksache) 18/8334, p. 260.

[156] See also BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 43 *et seq.* - *Trassenentgelte*. This

Although the competition law assessment ultimately remains a self-standing task the outcome of which is not predetermined by regulatory law, conflicts can thereby normally be avoided.

VI. Conclusion

The investigation has shown that the assertion of claims for reimbursement or damages under competition law in civil courts is not dependent, and cannot be made dependent, on a prior determination of a regulatory authority or administrative court that the infrastructure charges are unlawful under regulatory law.

The ECJ's *CTL Logistics* decision, according to which a judicial equity review of track access charges pursuant to § 315 (3) BGB is incompatible with Directive 2001/14/EC, or compatible only if the equity review is based on a regulatory authority's final and binding determination of the unlawfulness of the charge under regulatory law, cannot be transferred to a civil court's judicial assessment of claims based on EU competition law. The relationship between EU competition law and railway regulatory law is governed by a different conflict resolution rule: While EU directives take precedence over national law, EU primary law takes precedence over secondary law where the conflict is otherwise irresolvable. Prior to the application of this conflict resolution rule, an interpretation of the relevant norms must be sought that ensures the practical effectiveness of both primary and secondary law. On the institutional side, this obligation to search for substantive concordance is backed up by a duty to establish a cooperative relationship between the bodies competent for the application of the respective rules.

Moreover, the lines of conflict identified by the ECJ between the Railway Directive 2001/14/EC and the judicial equity review pursuant to § 315 (3) BGB are not to be expected to the same extend in the interaction between the Railway Directives and EU and national competition law. Thus, the tension emphasised by the ECJ between railway regulatory law oriented to a strict requirement of equal treatment and an equity review oriented to the interests of the contracting parties in the individual case does not arise in the relationship between regulatory law and competition law as the lawfulness of the charges does not depend on bilateral interests, but on objective market conditions under both legal regimes. Both comprise a prohibition of discrimination. Moreover, it is in line with general principles of interpretation under EU law that both railway regulatory law and competition law must consistently take into account their interrelatedness. In view of the common objective of ensuring undistorted competition in rail transport, it cannot be assumed that there are irresolvable contradictions. Art. 4 (3) TEU obliges all institutions entrusted with the application and enforcement of the rules to avoid such contradictions and to ensure that practical effectiveness is given to both regulatory regimes simultaneously.

Nevertheless, tensions between railway regulatory law and competition law cannot be ruled out - especially where competition law and regulatory law establish largely parallel or at least overlapping rules of conduct, like the prohibition of discrimination. Overlaps also arise between an incentive-based regulation of infrastructure charges and the prohibition of pricing abuses. If, in an assessment under competition law, a civil court is not bound to the assessment under regulatory law, divergent interpretations remain feasible. However, such tensions in the relationship between competition law and regulatory law are not to be regarded as a system failure in EU law. Rather, they follow directly from the principle, firmly anchored in EU law, that competition rules remain fully and independently applicable alongside sector-specific regulatory law. Thus, the tension cannot and should not be eliminated by giving priority to sector-specific regulatory law, as the theory of a predeterminative effect of a regulatory authority's decision would.

Practicable solutions must, however, be found to ensure that different judgements by civil courts on actions for competition law-based civil damages awards do not require constant adjustments to the charging schemes under regulatory law.

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corresponds to what follows from Art. 16 (2) Regulation 1/2003 within the framework of the cooperation relationship between public enforcement of competition rules by the EU Commission and their private enforcement by civil courts - according to this provision, national courts must avoid issuing decisions that conflict with a decision that the Commission intends to issue in proceedings that it has initiated, and must therefore consider a stay of pending proceedings, where necessary.

Yet, the risk of civil court judgements directly interfering with applicable charging schemes or setting of charges is small - civil court actions directly aimed at adjusting the charge structure are excluded under the ERegG (see above, IV.2.a)). Under the AEG (old version), they would probably have been possible, but here as well, this did not correspond to legal practice. Rather, the civil courts have been concerned exclusively with *ex post* damage claims. Competition law-based damages or reimbursement claims are typically asserted with such a considerable time lag that they relate - at least at the time of the judgement - to charging schemes and charges that are no longer in force. The civil courts remain obligated under Art. 4 (3) TEU (principle of loyalty) to contribute to the full effectiveness of the Railway Directives in the interpretation and application of competition rules, insofar as this is compatible with the competition rules. If § 76 ERegG is interpreted in conformity with EU law, the BNetzA may participate in the civil proceedings as *amicus curiae* (§ 76 ERegG in conjunction with § 90 (1) and (2) GWB). There is a need to adjust the infrastructure charges to the case law of the civil courts only if competition law imposes more far-reaching restrictions on the structure of infrastructure charges than does regulatory law. The duty to adjust charges then follows from the binding nature of competition rules. This does not impair the functionality of the regulation of infrastructure charges.

The same applies to settlement negotiations in civil competition law-based proceedings. The requirement under railway law that negotiations regarding the "correct" level of infrastructure charges should only take place under the supervision of the regulatory body, which monitors compliance with the provisions of the directive (Art. 30 (3)(2) and (3) Directive 2001/14/EC; Art. 56 (6) Directive 2012/34/EU), is intended to prevent infringements of the principle of non-discrimination in the case of infrastructure charges levied on an ongoing basis. For negotiations regarding damages or reimbursement claims, a supervision of the regulatory authority is not required in the same manner. If an applicant is awarded damages or if reimbursement is ordered on the basis of competition law, this does not violate the prohibition of discrimination under regulatory law. The payment of damages *ex post* does not impair the *"level playing field*" during ongoing operations.[157] The BNetzA's own view that it has no competence at all with regard to retrospective claims for reimbursement or damages is additional evidence of the fact that the functioning of the regulatory regime does not require supervision by the regulatory authority in settlement negotiations. The *amicus curiae* status of the BNetzA in civil proceedings provided for in German law (see § 76 ERegG in conjunction with § 90 (1) and (2) GWB) nevertheless enables it to introduce its own view under regulatory law. This is sufficient to ensure a cooperative interaction between competition law and regulatory law, also in institutional terms.

The obligation under EU law to take into account the interrelatedness of regulatory law and competition law in their interpretation and to ensure a functional cooperative relationship at the institutional level is already fully taken into account in German law. If private actions for competition law-based damages were to be made dependent on a prior final and binding determination that the infrastructure charges were unlawful under regulatory law, this would violate the "*effet utile*" of the EU competition rules - specifically, the obligation of the Member States to award damages to those injured by competition violations and to provide for a procedure that does not make it excessively difficult or impossible to assert such a claim. A requirement of a determination of the unlawfulness of infrastructure charges under regulatory law that would predetermine the competition law assessment would make it impossible to enforce private competition law-based damage claims in cases where infrastructure charges violate competition law even though they are lawful under regulatory law. Yet, as competition law remains independently applicable alongside regulatory law, private damage claims must remain feasible in such a setting. This does not only apply where competition law prohibits conduct - such as exclusionary strategies - that is not covered by regulatory law. It also applies where competition law and regulatory law largely overlap. In such cases, it follows from the general principles of EU law that a conflict-free interpretation of both legal regimes is to be achieved not by excluding the application of competition rules, but by ensuring a cooperative interaction of the institutions competent for their application and interpretation - with the proviso that competition rules take precedence in the event of an irresolvable conflict.

[157] See further BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 40 - *Trassenentgelte*: "If one wanted to subordinate the individuals rights granted by Art. 102 TFEU to the collective of applicant railway undertakings, this would be in irresolvable contradiction to the individual power of market participants to enforce competition rules under civil law, which is founded in primary law".

Moreover, the requirement of a preliminary procedure before an authority whose decision would be binding for the application of competition law by civil courts would undermine the principle of direct effect of competition rules. This principle, which initially mandated the applicability of competition rules by courts irrespective of a prior decision by a competition authority, must apply *a fortiori* to decisions by regulatory authorities. The requirement of a prior decision by a regulatory authority and its binding nature for the assessment under competition law would turn on its head the principle that an evaluation under regulatory law is instructive but not predeterminative for the assessment under competition law. Private competition law-based claims would otherwise be reduced to a follow-on tool in case of pre-established violations of regulatory law.

Since the requirement of a prior administrative determination of the unlawfulness under regulatory law would clearly violate the principle of the independent and parallel application of competition rules alongside sector-specific regulatory law and the "*effet utile*" of competition rules, there is in fact no need to invoke an infringement of the right to an effective remedy in Art. 47 of the Charter of Fundamental Rights. However, Art. 47 of the Charter would also be infringed if the assertion of competition law-based damages or reimbursement claims were made dependent on a "preliminary procedure" before a regulatory authority (see above, V.2.b)(3)).

VII. Acte Clair

In some proceedings pending before the courts of lower instance, the question arises as to whether the determination that the assertion of competition law-based reimbursement or damages claims before a civil court does not require a prior final and binding decision regarding the unlawfulness of the infrastructure charges under regulatory law constitutes an "*acte clair*", or whether this question should be referred to the ECJ for a preliminary ruling. In light of the above, there can be no doubt about the answer.

In its judgement dated 29.10.2019, the BGH also stated that "with regard to the plaintiff's individual rights derived from primary law (Art. 102 TFEU) there is no reasonable doubt that Art. 102 TFEU along with the provisions under national law that are necessary to realise the rights derived from the prohibition of abuse of dominance apply irrespective of whether Directive 2001/14/EC and, in its implementation, § 14 (1)(1) AEG (old version) oblige the defendant to levy non-discriminatory infrastructure usage charges and subject the charges demanded by the defendant to review by the Federal Network Agency".[158]

The BGH got it right. If civil courts were to rule on competition law-based damages or reimbursement claims only on the basis of a decision of an authority that legally establishes the unlawfulness under regulatory law, this would be in flagrant violation of fundamental principles of EU primary law:

First, the parallel and independent application of competition law alongside sector-specific regulatory law, as consistently confirmed in the case law of the ECJ, would be disregarded. The fact that "only" private claims would be made dependent on the assessment under regulatory law cannot change the assessment. According to consistent and clear case law, competition law-based damages claims fully participate in the requirement to ensure the "*effet utile*" of competition rules.

Second, a predetermining effect of a decision under regulatory law for the subsequent competition law assessment would severely impair the practical effectiveness of competition law-based damages claims and thus of the competition rules more generally because - notwithstanding a far-reaching compatibility and complementarity - there is no necessary synchronisation between the assessments under regulatory law and competition law. An infrastructure charge may violate competition law even if it is lawful under regulatory law. In the event of a conflict between primary law and secondary law, primary law prevails.

[158] BGH, Judgement dated 29.10.2019, KZR 39/19, ECLI:DE:BGH:2019:291019UKZR39.19.0, para. 48 - *Trassenentgelte*.

However, the parallel application of primary and secondary law in the manner outlined in this expert opinion does not at all jeopardise the functioning of the regulatory regime under railway law for setting infrastructure charges, which is enshrined in Directive 2001/14/EC and today in Directive 2012/34/EU. With the *amicus curiae* status of the regulatory authority, the German legislator has already provided an appropriate instrument for resolving the tensions.