

Austria

Albert Birkner and Bernhard Kofler-Senoner

Cerha Hempel Spiegelfeld Hlawati

Legislation and jurisdiction

- 1 How would you summarise the development of private antitrust litigation in your jurisdiction?

The development of private antitrust enforcement and litigation in Austria may be characterised as being ambivalent. In 1993, an amendment of the Austrian cartel act (*Bundesgesetz vom 19. Oktober 1988 über Kartelle und andere Wettbewerbsbeschränkungen* - Cartel Act) has newly introduced provisions on the right of individual undertakings affected by anti-competitive practices to initiate proceedings before the Austrian Cartel Court (Kartellgericht - Cartel Court). Consequently, private antitrust enforcement has become more and more important in Austria. However, such enforcement measures playing an important role have been mainly restricted to requests for cease and desist orders on the basis of the Cartel Act and have hardly included actions for damages so far. The latter sector, ie actions for damages based on general principles of tort or on the Austrian Unfair Competition Act (*Bundesgesetz gegen den unlauteren Wettbewerb 1984* - UWG) - as set out in more detail under question 2 below - may be qualified as rather underdeveloped. Reasons for that might be, inter alia, lack of respective case law and other practical matters (eg fear of retaliation measures, etc).

In that context, it is worth being noted that in the course of its damage proceedings against several Austrian banks concerning interest adjustment clauses, the Austrian Verein für Konsumenteninformation (VKI), which is a consumer organisation constituted under Austrian law, has, in connection with the European Commission's antitrust decision on the Austrian bank cartel 'Lombard Club' (COMP/36.571/D-1), also based its claims (on behalf of consumers) on violation of Austrian/EC cartel law. The outcome of such proceedings will most likely have an important influence on the future development of private antitrust actions in Austria (for the related recent judgment of the Court of First Instance on the issue of access to the administrative file in competition cases, see question 17 below).

As of 1 January 2006, the amended Cartel Act 2005 bringing about a clarification and simplification of Austrian cartel law will enter into force. The amendment will, however, not lead to fundamental changes in respect of private antitrust enforcement (especially not regarding actions for damages).

- 2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

In terms of private antitrust enforcement, one has to distinguish between (i) private antitrust enforcement based on the Cartel Act before the Cartel Court, (ii) civil law disputes on and in connec-

tion with the validity of agreements (agreements in violation of the Cartel Act are generally void) and (iii) actions for damages.

The Cartel Act empowers any undertaking affected by an anti-competitive behaviour (for the exact provisions, see question 4 below) to file an application for a cease and desist order with the Cartel Court (also by way of injunctive relief). In such proceedings, the Cartel Court acts as a specialised court. Besides undertakings, certain other institutions, such as the Federal Competition Authority (Bundeswettbewerbsbehörde), the Federal Cartel Prosecutor (Bundeskartellanwalt) or the Austrian Chamber of Labour (Arbeiterkammer) may initiate proceedings at the Cartel Court.

The Cartel Court itself is not entitled to award damages but only to issue cease and desist orders. Until today, such cease and desist orders could be issued only as long as the infringement at issue was still in place (not after it had been terminated). Under the new Cartel Act 2005, the Cartel Court will also be entitled to hold that a certain behaviour has been in violation of the Cartel Act even though such behaviour at that time has already been terminated.

With respect to actions for damages, no explicit statutory basis for bringing Austrian or EC competition law-based damages actions exists. However, such claims might be based on:

- The general principles of tort (especially Sections 1295 and 1311 Austrian Civil Code). In such case, the plaintiff has to prove that: (i) the defendant has violated Austrian or EC cartel law; (ii) the violation has caused a damage to the plaintiff; (iii) such damage has been in the protective scope of the violated law (*Rechtswidrigkeitszusammenhang*); and (iv) the defendant has acted intentionally or negligently. For more details on burden and standard of proof, see question 13.
- Section 1 UWG stating that anyone acting *contra bonas mores* in the course of business and at the same time for the purpose of competition may be requested to cease and desist and may be held liable for damages. Austrian courts have recognised that violations of cartel law might constitute violations of Section 1 UWG and that also consumers may bring damage claims on the basis of Section 1 UWG.

- 3 If based on statute, what is the relevant legislation?

Please see question 2 above.

- 4 In what types of antitrust matters are private actions available (eg cartel cases)?

Individuals or undertakings affected by one of the following anti-competitive behaviours may file requests for cease and desist orders with the Cartel Court: (i) illegal cartels (Section 25 Cartel

Act); (ii) abuse of a dominant position (Section 37 Cartel Act); or (iii) illegal vertical restraints (Section 30c Cartel Act).

Actions for damages on the basis of Section 1295 in connection with 1311 Austrian Civil Code or Section 1 UWG might be filed with the competent courts in case of any violation of the Cartel Act or EC competition rules (eg illegal cartels, abuse of dominant position or illegal vertical restraints) causing damage to the plaintiff.

5 What nexus with the jurisdiction (ie in terms of the parties and/or subject matter) is required to found a private action?

From a procedural point of view, any natural or legal person having full capacity (regardless of its nationality or location of seat) may in principle file an action for damages with Austrian courts provided that the defendant is an Austrian resident (natural person) or has its seat in Austria (legal person). Further, defendants having their residence or registered office not in Austria but within the European Union might be sued in Austria on the basis of Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. Actions against non-EU residents might only be brought before Austrian courts in case the defendant owns property in Austria, has a permanent representation in Austria or employs some kind of body in Austria doing business for it (Section 99 JN - *Jurisdiktionsnorm*).

Further, damage claims based on the Cartel Act necessarily require the applicability of Austrian cartel law. Having incorporated the effects-doctrine, the Cartel Act only applies if the facts of a case—regardless whether realised in Austria or abroad—(potentially) affect the Austrian market.

6 Can private actions be brought against both corporations and individuals?

Yes, private actions can generally be brought against both corporations and individuals.

7 If the country is divided into multiple jurisdictions (eg states or provinces), can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Private action procedure

8 Are contingency fees available?

Austrian lawyers are prohibited from agreeing with their clients on any form of contingency fee (Section 879 par 2 (2) Austrian Civil Code). However, since such a ban on contingency fees is exclusively applied to lawyers, an increased number of court proceedings are getting financed by legal expense insurances. Such financing could be observed, for instance, in recent 'class actions' (for the exact meaning of such notion under Austrian laws see question 17 below).

9 Are jury trials available?

No, the Austrian law does not provide for jury trials in actions for damages. However, so-called *fachmännische Laienrichter* (layman judges recommended by the Chamber of Commerce, the Chamber of Labour and the Presidential Conference of the Austrian Chambers of Agriculture) may sit with professional judges

in proceedings at the Cartel Court and the Commercial Courts (for the various competent courts, see question 16).

10 What pre-trial discovery procedures are available?

The Austrian Code for Civil Procedure (*Zivilprozessordnung* - ZPO) does not provide for pre-trial discovery procedures as such. In case of actions for damages, the parties have to produce evidence on their own (in contrast to ex officio proceedings before the Cartel Court). Only in specific cases, a party may ask the court to request from the other party to the proceedings or from a third party to submit evidence (eg documents) in the possession of such other party. General requests for unknown sorts of evidence (fishing expeditions) are generally not allowed in Austria. However, evidence produced in the course of pre-trial discovery proceedings outside of Austria might be admissible in Austrian proceedings.

11 Are private actions available where there has been a criminal conviction in respect of the same matter?

The Cartel Act does not provide for criminal sanctions in case of its violation. However, Section 168b of the Austrian Criminal Code (*Strafgesetzbuch*) qualifies certain forms of anti-competitive agreements with regard to tender procedures as criminal offence ('bid-rigging' - up to three years imprisonment). Private actions on damages are available even though there has been a criminal conviction within the meaning of Section 168b Austrian Criminal Code.

12 Can the evidence or findings in criminal proceedings be relied upon by plaintiffs in parallel private actions?

There is no explicit statutory provision covering the issue of whether civil courts are bound to the findings of criminal proceedings in the same matter. However, case law provides that civil courts are bound to findings of criminal courts in the same matter after there has been a verdict (no binding effect in the case of acquittals). Pieces of evidence gathered in the course of criminal proceedings may be relied upon without hearing (taking) such evidence for a second time in the civil court proceedings if: (i) all parties have been involved in both proceedings and no one expressly vetoes or the evidence cannot be taken/heard for a second time; or (ii) the party of the civil proceedings, which has not been involved in the criminal proceedings, expressly agrees.

13 What is the applicable standard of proof and who bears the burden?

Standard of proof: the court has to be fully convinced of claimed facts of a case. According to case law of the Supreme Court (Oberster Gerichtshof), there is a slightly lower standard of proof if an act with protective effect (*Schutzgesetz*), such as the Cartel Act, has been infringed.

In case the plaintiff cannot prove the exact amount of damages in the course of the proceedings, the court may fix the damages at its own discretion provided that it actually has been proved that damages in fact have been caused by the defendant (Section 273 ZPO).

Burden of proof: in general, it is the plaintiff who bears the burden of proof (has to prove anti-competitive behaviour, damage, causation, fault, etc). According to case law, such burden of proof is reversed with respect to fault in case the defendant has violated an act with protective effect (such as the Cartel Act). This principle does, however, not apply, if the plaintiff bases its claim

on Section 1 UWG. Here, the plaintiff has to prove that the defendant has breached the law with the intention to be in a better position than his competitor (to gain a competitive advantage).

14 What is the typical timetable for class and non-class proceedings?

There is no specific timetable for class or non-class proceedings. In particular, there is no absolute maximum time limit for proceedings.

15 What are the relevant limitation periods?

Claims for damages generally become time-barred after three years from the time the damage and the author of the damage are known to the plaintiff. If damage has occurred and the author of the damage is known to the potential plaintiff, but the precise amount of the damage cannot be assessed or additional damage might occur at a later stage, it is recommended that an action for a declaratory judgment be filed within a three year period in order to prevent claims from becoming time-barred.

16 What appeals, if any, are available?

Decisions of the Cartel Court (eg cease and desist orders) are subject to appeals which are heard by the Supreme Court as Appellate Cartel Court (Kartellobergericht). The appeal has to be filed within four weeks after service of the decision. The Appellate Cartel Court serves as court of last resort.

Actions for damages are to be filed at and appealed to the following courts:

(i) In general:

- ◆ District courts (*Bezirksgerichte* - claims of up to €10,000.00), appeal goes to the regional courts;
- ◆ Regional courts (*Landesgerichte* - claims above €10,000.00), appeal goes to the higher regional courts (*Oberlandesgerichte*).

(ii) If the claim is brought against a merchant (*Kaufmann*) and based on a commercial relationship:

- ◆ District commercial courts (*Bezirksgerichte in Handelssachen*, in Vienna: *Bezirksgericht für Handelssachen* - claims of up to €10,000.00), appeal goes to the regional commercial courts.
- ◆ Regional commercial courts (*Landesgerichte als Handelsgerichte*, in Vienna: *Handelsgericht* - claims above €10,000.00 and UWG-claims), appeals go to the higher regional courts.

A further appeal to the Supreme Court as court of third (and last) instance is only available in extraordinary cases (and primarily on questions of law).

Class proceedings

17 Are class proceedings available in respect of antitrust claims?

The Austrian Code for Civil Procedure does not provide for class actions comparable, for instance, to US class proceedings. However, one may distinguish between two cases where several plaintiffs may combine their actions against one and the same defendant:

- Several plaintiffs may join their claims for damages provided that, inter alia, their claims: are directed against the same

defendant; are based on the same title (eg the plaintiffs have been parties to the same contract with the defendant); or result from the same fact pattern (eg the plaintiffs have all been affected by the same unlawful behaviour of the defendant). It has to be noted, however, that in all such cases, even though only one proceeding takes place, the claims of the plaintiffs remain separate, ie the court may hold that some of those claims are justified and some are not or each plaintiff may freely dispose over its claims (eg settle the dispute regardless of the will of other plaintiffs).

- The Austrian Code for Civil Procedure further provides for a second option which has also been used in the past. Several plaintiffs might assign their individual claims to a collective plaintiff which then opens proceedings against one and the same defendant. This has been the case, for instance, in the proceedings of VKI against several Austrian banks concerning interest adjustment clauses.

It has to be considered, that in all such cases one main obstacle for the proof of anti-competitive behaviour and of the respective damages lies in the difficulties one may face in obtaining access to files of preceding administrative competition proceedings. In that context, VKI applied to the European Commission for access to the administrative file relating to the 'Lombard Club' decision. When the European Commission rejected that request in its entirety, VKI brought an action for annulment of that rejection before the Court of First Instance of the European Communities. On 13 April 2005, the European Court of First Instance annulled the European Commission's decision and, inter alia, held that the European Commission was bound, in principle, to carry out a concrete, individual examination of each of the documents referred to in the request in order to determine whether any exceptions applied or whether partial access was possible. To our knowledge, the European Commission has not appealed this decision but is currently considering VKI's updated request for file access.

There is no clear opinion of the Austrian Supreme Court so far on the legitimacy of the Austrian forms of class actions described above. Due to the increasing number of such cases, the Austrian legislator is currently discussing an amendment of the ZPO in order to provide an explicit statutory basis for class actions.

18 Are class proceedings mandated by legislation?

See question 17 above.

19 If class proceedings are allowed, is there a certification process?

What is the test?

There is no certification process.

20 Have courts actually certified class proceedings in antitrust matters?

As indicated under question 19 above, there is no certification process. However, 'Austrian class actions' have been initiated in several cases.

21 Are class proceedings permissible in respect of indirect claims?

'Austrian class actions' and single claims for damages are equally treated in this respect. In general, Austrian tort law only awards damages in respect of direct damage. Austrian case law recognises indirect damage claims only in exceptional cases (eg in case

of indirect representation (*mittelbare Stellvertretung*) or if damage is contractually passed on from the directly affected party to a third party).

22 Can plaintiffs opt out?

Not applicable.

23 Do class settlements require judicial authorisation?

Austrian law on civil procedure does not provide for class settlements.

24 If the country is divided into multiple jurisdictions (eg states or provinces), is a national class proceeding possible?

Not applicable.

25 Has a plaintiffs' class-proceeding bar developed? Give details.

No plaintiffs' class-proceeding bar has developed in Austria so far.

Remedies

26 On what basis are damages allowed (eg limited to actual loss or a multiple thereof)?

Austrian tort law follows the principle that the person or undertaking suffering losses shall primarily be granted natural restitution (*Naturalrestitution*). Since natural restitution is not feasible in most cases (eg damage through anti-competitive behaviour), plaintiffs are generally granted pecuniary compensation. The compensation amounts to the actual losses in case the damage has been caused by the defendant through minor negligence (*leichte Fahrlässigkeit*). A plaintiff may additionally claim loss of profits provided that the damage has been caused by the defendant intentionally (*vorsätzlich*) or through major negligence (*grobe Fahrlässigkeit*). In case a claim is based on Section 1 UWG, loss of profits can always be claimed (even in case of only minor negligence).

27 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Austrian law.

28 Is there provision for interest on damages awards?

Interest in the amount of 4 per cent can be claimed from the time of the claim's specification towards the author of the damage (Section 1000 Austrian Civil Code). A higher interest rate, amounting to 8 per cent above the interest base rate in force at the end of the respective elapsed mid-year as published by the Austrian National Bank, might be claimed in case the claim constitutes a claim between enterprisers out of a commercial contract.

29 Can legal costs be recovered? If so, on what basis?

The Austrian Code for Civil Procedure follows the principle that legal costs of the party winning the case shall be compensated by the losing party. If one party succeeds only partially such party's legal costs will only be reimbursed by the other party in proportion to such partial success. The amount of legal fees to be compensated is fixed by statute.

30 Is liability imposed on a joint and/or several basis?

In case several individuals or legal persons have caused damage by way of joint and intentional action, such individuals or legal persons are generally jointly liable for the whole damage amount claimed. If the authors of the damage did not act jointly or intentionally (minor/major negligence) and specific parts of the damage can be allocated to each of the authors of the damage, those authors may only be held liable for the part of the damage caused by each of them.

31 Is there a possibility for contribution and indemnity as between or among defendants?

If only one out of several individuals or legal persons jointly liable for damages is sued and held liable to pay the whole damages, such defendant may recover the respective proportions of the damages from the other authors of the damage (Section 896 Austrian Civil Code). In case specific shares of the damages can not be allocated to those authors, each author has to bear an equal share of the damages.

CHSH

Cerha Hempel Spiegelfeld Hlawati

Contacts: Albert Birkner
Bernhard Kofler-Senoner

e-mail: albert.birkner@chsh.at
e-mail: bernhard.kofler-senoner@chsh.at

Partnerschaft von Rechtsanwälten
A-1010 Vienna
Parkring 2

Tel: +43 1 514 35 431
Fax: +43 1 514 35 38
website: www.chsh.at