

# Private Antitrust Litigation

in 27 jurisdictions worldwide

Contributing editor: Samantha Mobley

# 2010



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# Austria

**Bernhard Kofler-Senoner and Hasan Inetas**

CHSH Cerha Hempel Spiegelfeld Hlawati

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## Legislation and jurisdiction

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

Private antitrust enforcement and litigation in Austria is, to some extent, still somewhat undeveloped. In 1993, an amendment of the Austrian Cartel Act introduced provisions on the right of individual undertakings affected by anti-competitive practices to initiate proceedings before the Austrian Cartel Court. Subsequently, private antitrust enforcement has become increasingly important in Austria. However, to date, enforcement measures have been mainly restricted to requests for cease and desist orders based on the Cartel Act and have rarely included actions for damages. Claims for damages based on general principles of tort or on the Austrian Unfair Competition Act (UWG) have been, as yet, underutilised in Austria. Reasons are, inter alia, a lack of relevant case law and various undecided legal issues as well as other practical matters such as difficulties in accessing evidence and fear of retaliatory measures.

With this background, the outcome of the Austrian Verein für Konsumenteninformation's (VKI – a consumer organisation constituted under Austrian law) case against several Austrian banks, concerning interest adjustment clauses, was eagerly anticipated. The VKI, in connection with the European Commission's antitrust decision on the Austrian bank cartel, the *Lombard Club* (COMP/36.571/D-1), also based its claims (on behalf of consumers) on violation of Austrian and EC cartel law. An interesting aspect of these proceedings was whether the claimant could gain access to the European Commission's administrative file relating to the *Lombard Club* cartel decision (for the related judgment of the court of first instance on the issue of access to the administrative file in competition cases, see question 19). Unfortunately, the parties reached a settlement in 2006, so it remains unclear whether the action for damages based on violation of Austrian and EC cartel law would have been successful or not (especially because the action was also based on the use of illegal provisions in the terms and conditions of the relevant contracts).

In 2007, the regional court of Graz, as appellate court, confirmed a decision of the district court of Graz-Ost to award damages to customers of driving schools in Graz on the grounds of violations of cartel law. Prior to this the Cartel Court had, at the request of the Federal Competition Authority (FCA), imposed penalties on these driving schools for having conducted a price cartel. It was the first time that damages were awarded in Austria on the grounds of cartel law infringement. The decision confirmed the presumptions of various cartel law scholars and practitioners, such as the applicability of section 1311 of the Civil Code (see question 2). However, several other questions remain open, for example, the applicability of passing-on over charges. Furthermore, in 2007 the Cartel Court imposed penalties in the amount of €75 million on the companies participating in an elevators and escalators cartel. The proceedings were conducted in parallel to the European Commission's elevators and escalators case since the Commission did not deal with the situation

on the Austrian market. Several real estate businesses have applied for cease and desist orders and some have announced that they intend to file actions for damages. This case was subject to significant media attention in Austria and raised public awareness about the possibility of claiming damages for breaches of cartel law.

In the past two years, the European Commission and the European Parliament have published various papers and resolutions dealing with private antitrust litigation (eg, white paper on damages for breach of EC antitrust rules; resolution of the European Parliament on the said white paper). This might also encourage private antitrust litigation in Austria.

- 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 private antitrust enforcement before the Cartel Court based on the Cartel Act; civil law disputes about and in connection with the validity of agreements (agreements in violation of the Cartel Act are generally void); and actions for damages.

The Cartel Act empowers any undertaking affected by anti-competitive behaviour (see question 4) 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, the federal cartel prosecutor, the Austrian Economic Chamber or the Austrian Chamber of Labour may initiate proceedings at the Cartel Court.

The Cartel Court is not entitled to award damages but only to issue cease and desist orders. Up until 31 December 2005, such cease and desist orders could be issued only as long as the infringement concerned was still in existence (and not after its termination). Under the new Cartel Act 2005 (which entered into force on 1 January 2006), the Cartel Court is also entitled to hold (by making a declaratory judgment) that certain behaviour was in violation of the Cartel Act even though this behaviour has been terminated in the meantime. As a precondition for any such judgment the plaintiff must prove that it has a 'legitimate interest' in such declaratory judgment. The Cartel Court recently rejected the initiation of proceedings to make such a declaratory judgment on the grounds that the plaintiff's interest in 'preparing a claim for damages at the civil courts' did not constitute a sufficient 'legitimate interest' pursuant to section 28 of the Cartel Act, since the Cartel Court was only entitled to rule on matters of public interest (and private damages were not a matter of public interest). The Austrian Supreme Cartel Court has confirmed such rule of law in a recent judgment.

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

- general principles of tort (especially sections 1295 and 1311 of the Austrian Civil Code). In such a case, the plaintiff has to prove that:

- the defendant has violated Austrian or EC cartel law;
  - the violation has caused damage to the plaintiff;
  - such damage comes under the protective scope of the violated law; and
  - the defendant has acted intentionally or negligently. (For more details on the burden and standard of proof, see question 15.); and
- section 1 of the UWG that states that, in principle, anyone using unfair commercial practices in the course of business may be requested to cease, to desist from such practices and, if such person acted culpably, may be held liable for damages. The Austrian courts have recognised that violations of cartel law may constitute violations of section 1 of the UWG and (in a different context) that consumers may also bring claims for damages based on section 1 of the UWG.

- 3** If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

For the relevant legislation, please see question 2.

The relevant courts are:

- the Cartel Court, regarding applications for cease and desist orders (also by way of injunctive relief) directly based on the Cartel Act;
- regarding actions for damages:
  - district courts, for claims of up to €10,000; or
  - regional courts, for claims of more than €10,000; and
- if the claim is brought against a registered entrepreneur or an undertaking and related to a commercial transaction on the side of the defendant:
  - district commercial courts, for claims of up to €10,000; or
  - regional commercial courts, for claims of more than €10,000 and UWG claims.

- 4** In what types of antitrust matters are private actions available?

Individuals or undertakings affected by one of the following types of anti-competitive behaviour may under certain circumstances file requests for cease and desist orders or declaratory judgments with the Cartel Court (sections 26 and 28 of the Cartel Act):

- illegal cartels;
- abuse of a dominant position;
- completion of a concentration without non-prohibition or without observing remedies; and
- prohibition of retaliatory measures.

Actions for damages on the basis of section 1295 in connection with section 1311 of the Austrian Civil Code or section 1 of the UWG may be filed with the competent courts in case of any violation of the Cartel Act or EC competition rules that causes damage to the plaintiff.

- 5** What nexus with the jurisdiction is required to found a private action?

From a procedural point of view, any natural or legal person having full legal capacity (regardless of nationality or location of registered seat) may, in principle, file an action for damages with the Austrian courts, provided that the defendant is an Austrian resident (natural person) or has its registered seat in Austria (legal person). Furthermore, defendants resident or with registered offices outside of Austria but within the European Union may be sued in Austria on the basis of Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Actions against non-EU residents may be brought before Austrian courts if the Lugano Convention applies or the defendant owns property in Austria, has a permanent representation in Austria or employs some kind of entity in Austria doing

business for it (section 99 of the Jurisdiktionsnorm – JN).

Claims for damages based on the Austrian Cartel Act mandatorily require that Austrian cartel law is applicable. Having incorporated the effects doctrine, the Cartel Act only applies if the facts of a case – regardless of whether realised in Austria or abroad – (potentially) affect the Austrian market.

- 6** Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes, private actions can generally be brought against both corporations and individuals including those from other jurisdictions in certain circumstances (see question 5).

- 7** If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

#### Private action procedure

- 8** May litigation be funded by third parties? Are contingency fees available?

Austrian lawyers are prohibited from agreeing any form of contingency fee with their clients (section 879, subsection 2, number 2 of the Austrian Civil Code). However, since a ban on arranging contingency fees is exclusively applicable to lawyers, an increasing number of court proceedings are financed using legal expenses insurance. This trend can be observed in recent ‘class actions’ (for a closer definition of class action under Austrian law see question 19), where specialised companies offer process financing against participation in the profit.

- 9** Are jury trials available?

No, Austrian law does not provide for jury trials in actions for damages. However, *fachmännische Laienrichter* (lay judges recommended by the Chamber of Commerce, the Chamber of Labour and the Presidential Conference of the Austrian Chambers of Agriculture) may sit together with professional judges in proceedings at the Cartel Court and the commercial courts (for the various competent courts see questions 3 and 18).

- 10** What pre-trial discovery procedures are available?

The Austrian Code of Civil Procedure (ZPO) does not provide for pre-trial discovery procedures as such. In 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 may a party ask the court to request the submission of evidence (for example, documents) from the other party to the proceedings or from third parties. General requests for unknown evidence (‘fishing expeditions’) are generally not allowed in Austria. However, evidence produced in the course of pre-trial discovery proceedings outside of Austria may be admissible in Austrian proceedings. Further, if feasible under the Cartel Act (see question 2), one may first initiate proceedings for a declaratory judgment at the Cartel Court (which may ask the defendant ex officio to provide certain evidence and subsequently initiate a follow-on action for damages before Austrian civil courts).

- 11** What evidence is admissible?

Basically, everything that serves to assist with the assessment of facts can be used as evidence.

**12** What evidence is protected by legal privilege?

It is subject to academic discussion whether there is a legal privilege for counsel advice at all pursuant to Austrian competition law, since neither respective regulations nor jurisprudence exists on this subject. However, the FCA has announced on various occasions that it is of the opinion that there is no legal privilege for client-attorney communications or in-house counsel products in Austria.

**13** 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 the case of its violation. However, section 168b of the Austrian Criminal Code qualifies certain forms of anti-competitive agreements with regard to tender procedures as criminal offences (bid rigging). Private actions for damages are available even where there has been a criminal conviction within the meaning of section 168b of the Austrian Criminal Code.

**14** Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

There is no explicit statutory provision covering the issue of whether civil courts are bound to use the findings of criminal proceedings in the same matter. However, case law provides that civil courts are bound to use the findings of criminal courts in the same matter after there has been a verdict (there is no binding effect in the case of acquittals).

Evidence gathered in the course of criminal proceedings and for non-contentious litigation may be relied upon without hearing (taking) such evidence for a second time in the civil court proceedings if: all parties have been involved in both proceedings and none expressly vetoes its use; the evidence cannot be taken or heard for a second time; or a party to the civil proceedings, which has not been involved in the criminal proceedings, expressly agrees.

There is no specific statutory provision or explicit jurisprudence protecting leniency applicants from follow-on litigation. There is a possibility to provide an oral application for the leniency programme, which is recorded by the FCA, instead of filing an application form. Since there is no obligation for the FCA to disclose such protocols and third parties do not have access to the FCA's files, an oral application should prevent claimants from making use of such an application in a possible follow-on litigation scenario against the applicant (eg, by way of US civil discovery proceedings).

**15** What is the applicable standard of proof for claimants and defendants?

The court has to be fully convinced of the claimed facts of a case. According to the case law of the Supreme Court, there is a slightly lower standard of proof if an act with protective effect, such as the Cartel Act, has been infringed. If the plaintiff proves that it has suffered damage and the defendant violated an act with protective effect (for example, the Cartel Act), there is a legal presumption that the violation of cartel law caused the damage.

Where the plaintiff could not or could only with unreasonable difficulty prove the exact amount of damage in the course of the proceedings, the court may fix the damages at its own discretion provided that it has been proven that damage was caused by the defendant (section 273 of the ZPO).

In general, it is the plaintiff who bears the burden of proof (has to prove anti-competitive behaviour, damage, causation, fault, etc). The burden of proof is reversed with respect to fault in a case where the defendant has violated contractual obligations or an act with protective effect.

There is no jurisprudence concerning the passing-on defence in litigation for cartel damages. As a general rule, a set-off regarding compensation of damages by benefits received is possible if such a set-off does not exonerate the injuring party inequitably. The injuring party should not merely be discharged on the grounds that the claimant could pass on the damage to his customer.

**16** What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

There is no specific timetable for class or non-class proceedings. In particular, there is no absolute maximum time limit for proceedings. There are no specific measures to accelerate proceedings. Only if a court fails to perform specific procedural steps within a reasonable time (for example, hearings, the decision) can the parties apply to a higher court for a time limit to be set.

**17** 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 quantified or additional damage may occur at a later stage, it is recommended that an action for a declaratory judgment be filed within a three-year period to prevent claims from becoming time-barred.

**18** What appeals are available? Is appeal available on the facts or on the law?

Decisions of the Cartel Court (for example, cease and desist orders) are subject to appeals, which are heard by the Supreme Court as the Appellate Cartel Court. The appeal has to be filed within four weeks after service of the decision. The Appellate Cartel Court serves as a court of last resort. As a general rule (with certain exemptions), an appeal against a decision of the Cartel Court is only available on the law.

Judgments on actions for damages are to be appealed – on the facts and on the law – to the following courts:

- in general:
  - judgments of district courts go on appeal to the regional courts; and
  - judgments of regional courts go on appeal to the higher regional courts; or
- if the claim is brought against a registered enterprise and is related to a commercial transaction on the side of the defendant:
  - judgments of district commercial courts go on appeal to the regional commercial courts; and
  - judgments of regional commercial courts go on appeal to the higher regional courts.

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

**Collective actions****19** Are collective 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 (for example, the plaintiffs have been

parties to the same contract with the defendant) or result from the same fact pattern (for example, 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. The court may hold that some of these claims are justified and some are not and each plaintiff may freely dispose over its claims (for example, settle the dispute regardless of the will of the other plaintiffs).

- The Austrian Code for Civil Procedure further provides for a second option, which has also been used in the past. Several plaintiffs can 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 to proving anti-competitive behaviour and the respective damages related to this lies in the difficulties one may face in obtaining access to files from previous administrative competition proceedings. In this context, VKI applied to the European Commission for access to the administrative file relating to the *Lombard Club* decision. When the European Commission rejected this request in its entirety, VKI brought an action for annulment of the 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 to determine whether any exceptions applied or whether partial access was possible. The European Commission has not appealed this decision.

Due to the increasing number of cases where many plaintiffs combine their actions or assign their claims to one plaintiff against one and the same defendant, the Ministry of Justice has proposed a draft statute on class actions amending the Civil Procedure Code. The draft statute is currently being discussed. However, the proposed Austrian class action will still not be comparable to US class actions.

**20** Are collective proceedings mandated by legislation?

Not yet; see question 19.

**21** If collective proceedings are allowed, is there a certification process? What is the test?

There is no certification process.

**22** Have courts certified collective proceedings in antitrust matters?

As indicated in question 21, there is no certification process. However, Austrian class actions have been initiated in several cases.

**23** Are 'indirect claims' permissible in collective and single party proceedings?

Austrian class actions and single claims for damages are treated equally 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 the case of indirect representation (*mittelbare Stellvertretung*) or if damage is contractually passed on from the directly affected party to a third party). According to the case law of the European Court of Justice (C-295-298/04, *Manfredi*, rec 61), any individual who has suffered harm caused by an antitrust infringement (article 81 or 82 EC) must be allowed to claim damages before national courts; this also applies to indirect purchasers. Austrian courts would have to follow this

principle in the application of article 81 and 82 EC. Furthermore, there is the argument that the protective effect of the Austrian Cartel Act also aims to protect indirect purchasers. However, this issue has yet to be clarified by respective case law or statutory provisions.

**24** Can plaintiffs opt out or opt in?

Not applicable.

**25** Do collective settlements require judicial authorisation?

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

**26** If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

Not applicable.

**27** Has a plaintiffs' collective-proceeding bar developed?

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

## Remedies

**28** What forms of compensation are available and on what basis are they allowed?

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

**29** What other forms of remedy are available?

Injunctions are available in the course of proceedings before general civil courts and in cease and desist proceedings before the Cartel Court (section 48 of the Cartel Act).

Austrian civil procedure principles further provide for the possibility of an 'execution for security', which requires a valid judgment that does not need to be enforceable.

**30** Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Austrian law.

**31** Is there provision for interest on damages awards?

According to section 1,000 of the Austrian Civil Code, interest of 4 per cent per annum can be claimed from the date of the claim's specification towards the author of the damage. A higher interest rate, amounting to 8 per cent above the base rate in force at the end of the respective elapsed mid-year as published by the Austrian National Bank, may be claimed if the claim constitutes a claim between enterprises outside of a commercial contract.

**32** Are the fines imposed by competition authorities taken into account when settling damages?

Under Austrian law, proceedings for damages do not have any punitive character, the aim is only to indemnify the aggrieved party.

Therefore, fines are not taken into account when settling damages; this would impair the plaintiff's position and contradict Austrian tort principles.

**33** Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

With reference to actions for damages, the Austrian Code of Civil Procedure is applicable, which follows the principle that the legal costs of the party that wins the case shall be compensated by the losing party. If one party is only partially successful such party's legal costs will only be reimbursed by the other party in proportion to its success. The amount of legal fees to be compensated is fixed by statute.

With regard to private antitrust enforcement based on the Cartel Act (cease and desist orders, declaratory judgments) the losing party is obligated to compensate the winning party only if the proceedings were unreasonably provoked by the losing party (section 41 of the Cartel Act).

**34** Is liability imposed on a joint and several basis?

If several individuals or legal persons have caused damage by way of joint and intentional action (which is normally the case with infringements of cartel law), such individuals or legal persons are generally jointly liable for the entire amount of damages claimed. If the authors of the damage did not act jointly or intentionally (minor or major negligence) and specific parts of the damage can be allocated to each of the authors of the damage, these authors may only be held liable for the part of the damage caused by them.

**35** Is there a possibility for contribution and indemnity 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 respective proportions of the damages from the other authors of the damage (section 896 of the Austrian Civil Code). In the case that specific shares of the damages cannot be allocated to these authors, each author has to bear an equal share.

**36** Is the 'passing-on' defence allowed?

There is no statutory 'passing-on' defence under Austrian law. Even though an 'adjustment (or compensation) of damages by benefits received' needs to be taken into account under Austrian tort law principles, it is doubtful that a defendant would fully succeed in applying the 'passing-on' defence before Austrian courts considering current case law. However, the European Commission in its white paper suggests that defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge, while indirect purchasers should have the passing-on sword as a rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

**37** Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Not applicable.

**38** Is alternative dispute resolution available?

Arbitration proceedings are possible under Austrian law but only when arbitration has been agreed to between the parties to the proceedings. Private antitrust enforcement is, however, generally not conducted through alternative means of dispute resolution.

# CHSH

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Banking Regulation	Oil Regulation
Cartel Regulation	Patents
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Equity
Dispute Resolution	Product Liability
Dominance	Product Recall
e-Commerce	Project Finance
Electricity Regulation	Public Procurement
Environment	Real Estate
Franchise	Restructuring & Insolvency
Gas Regulation	Securities Finance
Insurance & Reinsurance	Shipping
Intellectual Property & Antitrust	Tax on Inbound Investment
Labour & Employment	Telecoms and Media
Licensing	Trademarks
	Vertical Agreements

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