

## **Working Session**

**“Damage claims in competition matters: The dawn of a new era?”**

Antitrust Commission  
Litigation Commission

**Munich, 2016**

### **National Report of Austria**

**Corinna Potocnik**

Müller Partner Rechtsanwälte  
Rockhgasse 6, 1010 Vienna, Austria  
+43 1 535 8008  
[c.potocnik@mplaw.at](mailto:c.potocnik@mplaw.at)

and

**Armin Manzouri**

Fiebinger Polak Leon und Partner  
Am Getreidemarkt 1, 1060 Vienna, Austria  
[a.manzouri@fplp.at](mailto:a.manzouri@fplp.at)

General Reporters:

Sebastian Janka, Noerr LLP, Munich, Germany  
Simone Gambuto, Macchi di Cellere Gangemi, Rome, Italy  
Anouk Rosielle, Boekel N.V., Amsterdam, the Netherlands  
Dina El-Gazzar, Stewarts Law LLP, Leeds, United Kingdom

31 January 2016

# QUESTIONNAIRE

## CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

### 1. How would you summarize in few lines the status quo of private enforcement in your jurisdiction?

In 2013, the Austrian Legislator introduced an amendment of the Austrian Cartel Act ('ACA') and thereby introduced *inter alia* a Section on damages for antitrust violations. In more detail, this Section (Section 37a ACA) says that any culpable infringement of antitrust law – including infringements of EU and Austrian antitrust law – establishes liability for damages. Furthermore, Section 37a ACA determines a couple of procedural rules in connection with private enforcement (as will be explained in more detail below).

Section 37a ACA only applies to infringements of antitrust law that occurred after 28 February 2013 (for any infringements committed before this date, damages could be claimed on the basis of a general Section of Austrian Civil Law; Section 1311 Austrian Civil Law Act).

From a very general point of view, it can be considered that the Austrian Supreme Court tends to decide in favour of claimants in private enforcement cases and often takes recourse to the CJEU's relevant preliminary rulings.

#### a. Can individuals file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU (private enforcement Directive)?

Yes. Under Austrian law, it is possible to file an antitrust damage claim pursuant to Section 37a ACA regardless of the implementation of Directive 2014/104/EU ('the Directive').

#### If yes, are they able to submit both stand alone and follow-on actions?

Yes, Austrian Civil Courts (which are competent to decide on private enforcement actions – *see* Chapter II below) are competent to decide not only on follow-on actions, but also to decide on stand alone actions. Civil Courts thus also have the competence to decide on whether there has been an infringement of antitrust law as precondition to decide on the stand alone action.<sup>1</sup> However, in practice stand alone actions only have limited

---

<sup>1</sup> See e.g. decision of the Austrian Supreme Court of 08 October 2008 (16 Ok 8/08).

relevance. Reasonably, a claimant will await the antitrust decision before claiming damages with the Civil Courts that are bound by the Cartel Court's decision on the question whether there has been an antitrust infringement or not (*see* question 3 below).

As will be explained below in more details, in Austria there are no decisions by the Austrian Federal Competition Authority on antitrust infringements; only courts are competent to decide. The Federal Competition Authority is a mere investigating body when it comes to infringements of competition law.

**2. Has your country already implemented/started implementing the private enforcement Directive?**

- **Do you believe that your country will meet the deadline?**

Austria did not yet implement the Directive. To date, the concrete drafting of necessary amendments of Austrian laws is still under debate as well as the date on which the necessary amendments will come into force. With its Amendment of 2013, Austria did already proactively introduce some new aspects that are now determined in the Directive, but there are still extensive amendments to be made.<sup>2</sup>

Although the necessary amendments have not yet been decided in the Austrian Parliament, there are no reasons to doubt at this stage that the deadline cannot be met.

## **CHAPTER II: COURT AND PROCEDURE**

**3. What is (are) the court(s) in charge of antitrust private enforcement?**

- a) Is there a specialized court specifically for antitrust based claims?**  
If No: are there specific chambers for antitrust claims within the civil/commercial courts?  
If Yes: is the court composed only by judges, also economic experts and/or other persons?
- b) May the court impose interim measures?**
- c) May the trial proceed in parallel and independently of a National Competition Authority investigation?**  
If so, how likely it is that the court suspends the case up to the National Competition Authority decision?
- d) Is the decision subject to appeal?**

---

<sup>2</sup> For an overview of necessary amendments to be made *see* e.g. Krauskopf/Schicho, *Die Umsetzung der Schadenersatzrichtlinie*, VbR 2015/121.

**If Yes, does the 2<sup>nd</sup> (and/or 3<sup>rd</sup>) instance court assesses both the merit of the case and the law?**

To answer this question, it has to be borne in mind that the competence of Austrian courts is split in this regard: Firstly, there are specialized Cartel Courts that will decide on antitrust infringements (e.g. abuse of a dominant position, cartels, etc.). Secondly, there are Civil Courts that decide on damage claims. Simply put, a claimant seeking to obtain compensation may either (i) call the Cartel Court to seek a judgment stating that a violation of cartel law has been committed and then go to the Civil Courts to claim damages (the Civil Court will be bound by the Cartel Court's decision, as explained below) or (ii) directly go to the Civil Courts to claim damages; the Civil Court will then decide on whether there has been an antitrust violation as preliminary question and based on this, decide on the damage claim.<sup>3</sup>

As explained above, in Austria, there are specialized courts for antitrust claims, namely the Cartel Court (as first instance) and the Supreme Court as Higher Cartel Court (as second and last instance), which decide on antitrust claims. However, damage claims must be submitted with the Austrian Civil Courts (not the Cartel Courts), which are in charge of damage claims in general. For civil law claims, the Austrian legal system provides for three instances whereas the third instance is the Supreme Court. The second and third instance must not assess the merit of the case, but is limited to procedural deficiencies and legal inaccuracies.

The Cartel Court is composed of two judges (whereby one judge acts as the presiding judge) and two competent lay judges (*Fachkundige Laienrichter*) who must have expertise in the sector of law or economy (*see* Section 59 *et seq.* ACA). The Higher Cartel Court is either composed by three judges (whereby one judge acts as the presiding judge) and two competent lay judges (*Einfacher Senat*) or by seven judges and two competent lay judges (*Verstärkter Senat*).<sup>4</sup> Civil Courts in first instance are in general composed only by one judge. In second instance the court is composed by three judges. The Supreme Court as third instance is composed by five judges or eleven judges (*Verstärkter Senat*).<sup>5</sup> Except for legally provided exceptions (e.g. commercial matters or matters on employment law), Civil Courts are composed by judges only.

The Cartel Courts as well as the Civil Courts may impose interim measures. For instance interim measures to secure monetary claims in civil proceedings are only admissible in case the assets risk being destroyed or a decision would have to be enforced in a state that is not bound by international contracts.<sup>6</sup>

---

<sup>3</sup> See decision of the Austrian Supreme Court of 08 October 2008 (16 Ok 8/08).

<sup>4</sup> Such decisions by seven judges plus two lay judges are necessary if the case deals with fundamental principles of law, e.g. if the Supreme Court intends to decide against prevailing case-law.

<sup>5</sup> Again for legal questions of fundamental importance.

<sup>6</sup> For more details *see* Section 379 *et seq.* Austrian Enforcement Code.

The trial on private enforcement may proceed in parallel to an antitrust proceeding. However, Section 37a (2) ACA allows private enforcement proceedings to be suspended up to a decision of the Cartel Court, the European Commission or a national competition authority in the meaning of Regulation (EG) No 1/2003.<sup>7</sup> In practice, proceedings will most likely be suspended in order to avoid inconsistent decisions.

Moreover, pursuant to Section 37a (4) ACA, all Civil Courts are bound by a decision of the Cartel Court, the European Commission and a national competition authority (of any EU Member State) that found an antitrust infringement. This binding effect goes even further than what is required by the Directive.<sup>8</sup>

**4. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an “anchor defendant” sufficient (cf ECJ, C-352/13))?**

In order to bring a private action to a court in Austria, there must firstly have been an infringement of Austrian or EU antitrust law or an infringement of the antitrust laws of another member state of the EU.<sup>9</sup> Moreover, in principle, even infringements of the antitrust laws of any other country might allow Austrian courts to decide on a private enforcement action.

In Austria, in general, a damage claim has to be lodged at the domicile of the defendant. However, parties can, according to Section 104 of the Austrian Law on Jurisdiction agree on the applicability of Austrian Laws and the jurisdiction of Austrian Courts.

**5. How long does a single (or collective) antitrust private enforcement action in first instance usually take?**

There is no official statistics on how many cases dealing with damage claims due to antitrust infringements are currently pending or have already been decided by the courts. Accordingly, there are also no statistics on how long antitrust private enforcement actions in first instance usually take. However, on a more general level, it can be said that civil law procedures in first instance usually take between 12 and 18 months in Austria.<sup>10</sup> In any case, there is no general rule on how long proceedings may take in Austria.

---

<sup>7</sup> Please note again in this regard that the Austrian Competition Authority has no competence to decide a case but is a mere investigating authority.

<sup>8</sup> For more details see e.g. Krauskopf/Schicho, *Die Umsetzung der Schadenersatzrichtlinie*, VbR 2015/121.

<sup>9</sup> Reidlinger/Hartung, *Das österreichische Kartellrecht*, 3d ed..

<sup>10</sup> For further references see e.g. [http://www.chg.at/wp-content/uploads/CHG-Justizstudie-2014\\_1.pdf](http://www.chg.at/wp-content/uploads/CHG-Justizstudie-2014_1.pdf) (accessed on 31 January 2016) and <https://www.justiz.gv.at/web2013/html/default/8ab4a8a422985de30122a93207ad63cc.de.html> (accessed on 31 January 2016).

**6. Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?**

Legal costs (i.e. court fees, representation costs for all parties according to the Lawyers' Tariff and court appointed experts) are to be borne by the losing party. The Court will state in its decision which costs are to be reimbursed and how the costs are allocated between the parties. Representation costs of the parties that go beyond the fees determined by the Lawyers' Tariff have to be borne by each respective party.

**7. In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in your jurisdiction that could allow third parties to buy claims from cartel victims?**

Alternative funding, such as third party funding is a rather unusual concept in Austria (which might be due to the limited number of third party funders operating in Austria). However, it is accepted as a lawful concept.

Alternative fee arrangements are only admissible in Austria under limited rules: Contingency fee arrangements as well as a *pactum de quota litis* are prohibited under Austrian Law (*see* Section 879 Austrian Civil Code and Section 16 Attorneys Code) in order to protect clients who can usually not evaluate their own chances of success. Furthermore, the attorney and the client may not agree on a commission for the attorney (Section 51 Code of Conduct) and an attorney is not allowed to agree on an unreasonably high remuneration. This must, however, be assessed on a case-to-case basis. As a guideline, the proportion between remuneration and necessary scope of work must be reasonable.<sup>11</sup>

It is accepted in Austria that claims may be assigned to a third party. It is therefore not necessary that the debtor is informed of such assignment. In practice, bundles of claims are mostly assigned to associations (*see* question 8 below). However, such associations are in general entrusted with the protection of consumers and not specialized on private enforcement.

**8. Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?**

- **If Yes, how it is applicable to antitrust private enforcement, (e.g. direct/indirect purchasers, consumers and/or clients)?**
- **Do collective redresses operate through an opt-in or an opt-out system? In case of an opt-out system, how is the class defined?**

---

<sup>11</sup> For more details *see* the National Report of Austria for the 52<sup>nd</sup> Annual Congress in Prague 2014, Potocnik, *Ethics and Role of Counsel in International Arbitration*.

- **How is it coordinated with the individual actions' framework?**

The Austrian Jurisdiction does not dispose of a collective redress system as such. However in front of Austrian courts, different systems are used in order to collectively lodge a claim. For instance, so called model proceedings are conducted by e.g. consumer associations in order to create jurisprudence. Another possibility is for the claimant to assign his damage claim to an association, which then lodges the claim for all claimants collectively and bears the litigation risk (against payment).

It must be noted in this regard that such “collective redress” systems in Austria are not comparable to class actions in the USA or the like. In Austria, individual claims of individual named claimants are assigned to an association for the purpose of filing a complaint in court. Thus it is possible not only to combine claims of several individuals in one action, but also to have the lawsuit financed by a litigation finance company.<sup>12</sup> This leads to the consequence that the court will not have to assess the claims of the “class” but all individual claims that have been assigned to the consumer association for instance. It is highly debated in Austrian literature whether a mere assignment of authority to conduct the claim (without assignment of the claim as such) is in conformity with the laws. Such litigation in one’s name on another’s behalf is strictly refused by the Austrian Supreme Court.<sup>13</sup>

Furthermore, the Austrian legal system provides for the possibility to combine multiple private enforcement proceedings if (i) multiple victims (ii) have been harmed by the same offender (iii) in the same way, i.e. on the same factual basis (*Streitgenossenschaft*).<sup>14</sup> This system is based on reasons of economy of procedure. However, this does not lead to a uniform proceeding; every claimant is still free to dispose of its case on its own discretion, e.g. one claimant may decide to settle the case without necessarily leading to a settlement with all claimants. Accordingly, there is also no necessity for a uniform judgment.

### **CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY**

#### **9. Are National Competition Authority decisions relevant for individual antitrust claims, in particular**

- **as presumption / proof of the infringement in the follow-on case? (f.i. does it matter for the division of the burden of proof between parties if the action is a follow on damages case or a stand-alone action? If so, please elaborate on any difference with regard to the burden of proof)**
- **in terms of the *quantum* of the compensation?**
- **for the limitation period?**

---

<sup>12</sup> Kodek, *Die “Sammelklage” nach österreichischem Recht*, ÖBA 2004, 615.

<sup>13</sup> Legal principle by the Austrian Supreme Court RS0110271.

<sup>14</sup> See e.g. decision of the Austrian Supreme Court of 20 November 2012 (5 Ob 123/12t).

- else?

As explained above, the Austrian Federal Competition Authority is an investigating authority and therefore not competent to decide on antitrust infringements. The Austrian Competition Authority is, however, entitled to bring actions before the Cartel Court, if it assumes that a breach of Austrian or EU antitrust law occurred. During proceedings before the Cartel Court, the Austrian competition Authority always has party status.

Decisions on antitrust infringements are – in general – made by the Cartel Court(s) and are relevant for follow-on actions: Pursuant to Section 37a (4) ACA, all Civil Courts are bound by a decision of the Cartel Court, the European Commission and a national competition authority (of any EU Member State) that established an infringement against competition law. However, Civil Courts deciding on stand alone actions are competent to decide on the alleged infringement of antitrust law as a preliminary question and do not require a decision by the Cartel Court. In this case the claimant in the civil court proceedings bears the burden of proof for the antitrust behaviour of the defendant and the damage occurred.

The quantum of the compensation will only be decided by the civil court in the private enforcement proceeding and is as such not dependent from the Cartel Court's decision.

For the duration of the limitation period *see* question 10 below.

#### **10. What are the relevant limitation periods (taking into account question 9 above)?**

In general, under Austrian liability law, the limitation period for damage claims is three years after discovery of damage and the party at fault. Pursuant to Section 37a (4) ACA, the general limitation period is suspended during proceedings in front of the Cartel Court. Once a decision, which is legally binding, is rendered in the antitrust proceedings, a limitation period of six month starts, during which a victim can lodge an action for damages in front of the Civil Court.

The foreseen limitation period of Section 37a (4) ACA will have to be extended when implementing the Directive – which is welcomed in Austrian literature taking into consideration the complexity of follow-on actions.

#### **11. What is the liability regime as regard parents for the infringement of their subsidiaries?**

The Austrian Supreme Court held in a decision of 2012<sup>15</sup> that parents may be considered accessories and are therefore jointly liable for the infringement of their

---

<sup>15</sup> Decision of the Austrian Supreme Court of 14 February 2012 (5 Ob 39/11p).



subsidiaries, but only in case the parent participated in the infringement by influencing the respective subsidiary; i.e. the parent must have exercised a decisive influence on its subsidiary. As far as can be seen, this has been only one recent decision where the Austrian Supreme Court dealt with the question of liability of parents for antitrust infringement of their subsidiaries.

**12. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartelists) in civil litigation. Does this differ from liability vis-à-vis the authorities?**

Austrian law provides for joint liability in civil litigation,<sup>16</sup> under the premises that the damage has been caused jointly whereas a joint understanding of committing a certain unlawful act, is deemed to be sufficient.<sup>17</sup> In practice, it is assumed that cartelists have such joint understanding.

This differs from the fine system provided for in cartel proceedings where the fine is calculated separately for every undertaking being part of a cartel based on its value of sales as well as aggravating and mitigating circumstances (*see* Section 30 ACA).

#### **CHAPTER IV: DISCLOSURE OF EVIDENCE**

**13. What evidence is admissible in individuals' actions for antitrust infringements?**

- **Is there any pre-trial discovery procedure available?**
- **Is there any evidence protected by legal privilege?**

In general there is no limitation to the kind of evidence that can be brought before court (except for unlawfully obtained evidence, of course). The “typical” means of evidence that are covered in the Austrian Civil Procedure Act are (i) documents, (ii) witnesses, (iii) experts, (iv) inspection evidence and (v) hearing of the parties (*see* Section 292 *et seq.* Austrian Civil Procedure Act) which does not mean that evidence is limited to these means in Austrian proceedings. The opposing party has the possibility to invoke e.g. business secrets as opposition to the usage or discovery of certain evidence. It is the up to the decision of the judge, if such evidence can be disclosed or has to remain excluded due to business secrets.

There is no such thing as pre-trial discovery in Austrian Court procedures. However in cases where evidence might disappear, a pre-trial preservation of evidence can be ordered by the court.

---

<sup>16</sup> See e.g. decision of the Austrian Supreme Court of 02 August 2012 (4 Ob 46/12m).

<sup>17</sup> See e.g. decision of the Austrian Supreme Court of 02 August 2012 (4 Ob 46/12m).

In contrast to EU-Competition proceedings, the Austrian Antitrust Laws and jurisprudence does not provide for a legal privilege between the charged party and their counsel. However, in Austrian literature, a legal privilege similar to the one known in EU-competition proceedings is more and more often assumed and in practice applied.<sup>18</sup>

**14. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.**

The Cartel Court can order the discovery of evidence to defendants and/or third parties in cartel proceedings. However, there is no obligation for the respective party to comply with such order. In case of non-compliance, the judge has to take the non-compliance into account in its consideration of evidence. Other sanctions are not provided by Austrian Antitrust Law.

A Civil Court can also order the discovery of evidence. Like in antitrust proceedings, the defendant or third party cannot be forced to provide certain evidence. In case of non-compliance, the judge has to take the non-compliance into account when rendering the verdict (*see* Section 303 *et seq.* Austrian Civil Procedure Act).

**15. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.**

Based on the fact that the Austrian Competition Authority is a mere investigating authority, this question will be answered for the Austrian Federal Competition Authority and the Austrian Cartel Court(s).

Generally, the Austrian Competition Authority is bound by its official duty to confidentiality (Article 20 Austrian Federal Constitutional Law). Access to the Competition Authority's files is thus only granted if the interests of the person, i.e. the undertaking harmed by an antitrust infringement, outweigh the interest of the undertaking whose (business) secrets are to be kept confidential. In case the harmed undertaking can reasonably explain why it is reliant on the access to the Authority's file (e.g. because this will be its only possibility to prove the damage it suffered due to the violation of cartel law), access to the file will in general be granted.<sup>19</sup>

Section 39 (2) ACA originally provided that access to the competition court file is granted only if none of the parties to the proceedings object. This Section has been found to be incompatible with EU law by the CJEU because this provision would prevent the courts' opportunity to weigh up the interests protected by EU law. In

---

<sup>18</sup> Reidlinger/Hartung, *Das österreichische Kartellrecht*, 3d ed., p. 289 *et seq.*

<sup>19</sup> Pellech, *Zur Akteneinsicht im Lichte der EuGH-Entscheidung Pfeiderer C-360/09*, ÖZK 2011, 147.

particular, those courts, which are empowered only to take due note of the consent or refusal expressed by the parties to the proceedings concerning the disclosure of the evidence in the file, may not intervene in order to protect overriding public interests or the legitimate overriding interests of other parties, including that of allowing disclosure of the documents requested, if just one of those parties objects.<sup>20</sup> Section 39 (2) ACA has been found to be inapplicable in both, cases dealing with EU antitrust law and national antitrust law.

Access to court files is thus granted on the basis of Section 22 Non-Contentious Proceedings Act in conjunction with Section 38 ACA and Section 219 (2) Austrian Civil Procedure Act. Pursuant to this, access to file may be granted to a third party if this party can demonstrate that its interests are affected whereby a mere interest on information or economic interest is not sufficient. A sufficient interest may be that the access to the files has a concrete and direct importance for this party's civil law or public law conditions. The court has to assess whether this interest outweighs the interest of the parties to the proceedings which opposed to the discovery of the files. Access will generally be granted in case the third party needs to know something it can learn from the files and which is needed in order to pursue its rights. The party is, however, not required to explicitly mention which kind of information it expects to find in the accessed files.<sup>21</sup> Access to files is only granted by the courts after a respective request by the party requesting access. However, even if access to files is admitted by the courts, this means that the requesting party may only access them once. If the party wants to access the files again, it will have to file a corresponding request once again.<sup>22</sup>

## CHAPTER V: THE PASSING-ON OF OVERCHARGES

### 16. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

Yes, against the background of the CJEU's case-law, the Austrian Supreme Court held that indirect purchasers are entitled to compensation.<sup>23</sup>

The Austrian Supreme Court held that in general, only a direct purchaser would be entitled to claim compensation whereas the liable party would not be liable for so-called third-party damages.<sup>24</sup> This does, however, not apply in cases of mere "shift of damages" (*Schadensverlagerung*), i.e. in case the damage is a typical consequence that should have been prevented by the violated rule and has to be borne

---

<sup>20</sup> CJEU Case C-536/11 *Donau Chemie and Others*, ECLI:EU:C:2013:366.

<sup>21</sup> Kriechbaumer, *Schadenersatz wegen Kartellverstößen*, RdW 2015/315.

<sup>22</sup> Legal Principle of the Austrian Supreme Court RS0079198.

<sup>23</sup> See decisions of the Austrian Supreme Court of 2 August 2012 (4 Ob 46/12m), 17 October 2012 (/ Ob 48/12b) and 26 May 2014 (8 Ob 81/13i).

<sup>24</sup> Legal Principle of the Austrian Supreme Court RS0022638.

economically by a third party. Such mere shift of damages shall not release the liable party from its obligation to pay compensation.<sup>25</sup>

**17. Are victims of “umbrella damages” entitled to protection against antitrust infringements and to compensation in court?**

Yes, the Austrian Supreme court has only recently decided that victims of “umbrella damages” are also entitled to compensation.<sup>26</sup>

In order to claim compensation for “umbrella damages” it must be proven that the respective cartel, based on the concrete circumstances, could have triggered third parties to ask for excessive prices and that these circumstances could not have been hidden from the cartelists, i.e. the cartelists must have known that such damages may occur.<sup>27</sup>

**18. Is the passing-on defence allowed?**

In Austrian Antitrust Law, the passing-on defence is recognised.<sup>28</sup> Pursuant to Section 37a (1) ACA, the passing-on of a product or service with excessive prices does not deprive the possibility to claim damages. However, the damage may be reduced by the advantages the party that passed on the products or services had.

It is agreed upon in the Austrian literature that passing on defence is not only possible in a “direct line” (between seller, reseller and final client). The Austrian literature states, that even a third party, that occurred damage can demand restitution of the damage.

**CHAPTER VI: DAMAGES**

**19. What form of compensation can be granted by national courts for antitrust violations?**

**In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?**

Section 37a ACA provides that anyone having culpably committed an infringement as defined under Section 29 (1) ACA is liable to compensate damages resulting therefrom. However, the Cartel Court does not decide on the compensation for damage occurred due to an antitrust infringement. Proceedings concerning compensation claims take place in front of Civil Courts.

---

<sup>25</sup> Decision of the Austrian Supreme Court of 17 October 2012 (7 Ob 48/12b) with further references.

<sup>26</sup> Decision of the Austrian Supreme Court of 29 October 2014 (7 Ob 121/14s).

<sup>27</sup> Decision of the Austrian Supreme Court of 29 October 2014 (7 Ob 121/14s).

<sup>28</sup> Decision of the Austrian Supreme Court of 2 August 2012 (4 Ob 46/12m).

In general, Civil Courts may only accord compensatory damages (*Positiver Schaden*), i.e. the concrete loss suffered due to the infringement. Only in case the party held liable acted grossly negligently (in case both parties are companies also in case the party acted slightly negligently) or intentionally, the courts will also grant lost profits (*Entgangener Gewinn*). Furthermore, the court will grant interest starting with the occurrence of damage. Compensation for antitrust violations will only consist in monetary compensation.

## CHAPTER VI: QUANTIFICATION OF HARM

### 20. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

The burden of proof is borne by the claimant. When claiming damages, it has to be proven that there has been a damage and the damage has to be quantified.<sup>29</sup> The claimant will, however, not have to prove that the cartelist acted culpably – there is a reversal of the burden of proof under Austrian law for antitrust violations under the ACA which leads to the consequence that the respondent will have to prove that it did not act culpably.

In case the claimant is only able to prove that there has been a damage but cannot quantify it, Austrian law allows for the damages to be estimated by the competent court (*see* also question 22 below). This possibility takes into account the difficulties often arising with regards to the quantification of harm.

### 21. Is there a difference between stand alone and follow-on actions?

The Austrian Law in general makes no distinctions between stand alone and follow-on actions. However, as explained above under question 10, in case of a stand alone action, the Civil Court may suspend its own proceedings for the duration of the antitrust proceeding and will then be bound by the findings of the Cartel Court. In terms of quantification of harm, there is, however, no difference between stand alone and follow-on actions.

### 22. How is damage quantified?

As stated under question 20 above, the claimant bears the burden of proving the damage and has to quantify the latter in its claim. Under Austrian law, compensation for antitrust violations will only consist in monetary compensation. In general, the damage will consist in the difference between the price actually paid and the hypothetical price under competitive conditions.

Practically, this will lead to major difficulties for the claimant, taking into consideration that it will most likely not be evident what the hypothetical price

---

<sup>29</sup> Reidlinger/Hartung, *Das österreichische Kartellrecht*, 3d ed..

under competitive conditions would have been or how prices of harmed competitors would have evolved without the antitrust infringement. Given those difficulties arising with regard to the quantification of harm, it is possible under Austrian law for the Court to estimate damages. This is only possible in cases, where the liability of the responsible party is proven and the amount of damage can only be quantified with unreasonable effort by the party. In any case the court may consider the advantages the undertaking had due to the infringement (but is not held to do so).<sup>30</sup>

In practice, a party will seek expert advice in order to quantify the damage.

**23. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?**

Under Austrian law, a defendant is free to prove that it did not act culpably when infringing antitrust law. If the defendant succeeds in doing so, the Civil Court will not be able to order the defendant to pay damages since a necessary element is missing (damage claims under Austrian law necessarily require a culpable act). Despite this possibility, it is rather unlikely that a defendant that is found to have violated antitrust law will succeed proving that it did not act culpably.<sup>31</sup>

**24. What is the role of economic experts, if any?**

In practice, parties as well as the court may appoint economic experts that will quantify damages. Whereas reports of party appointed experts are only considered part of the party's submission (and thus are subject to the free assessment of evidence by the judge(s)), reports of court appointed experts will in general be considered in the court's decision.<sup>32</sup> In practice, in the majority of cartel proceedings economic experts are appointed at some stage of the proceedings.

Judges may deliberately decide which expert they intend to engage – a mechanism that has been criticised for lacking objectivity in Austrian literature. Furthermore, the judge may deliberately decide which questions shall be answered by the expert without prior coordination with the parties.

**25. What other types of experts are typically engaged in your jurisdiction?**

Experts typically used in proceedings in front of the Austrian Cartel Court are in general economic experts. Depending on the case at hand, experts with additional knowledge of the specific economic sector are used (e.g. technical experts). It is however not common to use e.g. legal experts.

---

<sup>30</sup> Krauskopf/Schicho, *Die Umsetzung der Schadenersatzrichtlinie*, VbR 2015/121.

<sup>31</sup> In this regard, see e.g. the Austrian Supreme Court decision of 2 December 2013 (16 Ok 4/13 – *Speditionskartell*), based on the CJEU's decision C-681/11, *Schenker & Co u.a.*

<sup>32</sup> Böheim/Reidlinger, *Der kartellgerichtliche Sachverständige: Reformüberlegungen auf der Grundlage einer kritischen Bestandsaufnahme*, wbl 2013, 493.

**26. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?**

As said before, the Austrian Competition Authority does not have the competence to impose fines. In Austria, fines for actions against antitrust law are imposed by the Cartel Court.

Whereas the decision of the Cartel Court is relevant for the Civil Court's finding whether there has been an antitrust violation at all, the fines do not have an influence on the quantification of damages as such. However, the shares to be paid by each respective undertaking (in their internal relationship) are equal to the share of damage caused by the respective undertaking. Furthermore – unlike the directive – leniency applications do not have an influence on evaluating the quantification of damages.<sup>33</sup>

#### **CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION**

**27. Is there any form of alternative dispute resolution available in your jurisdiction?**

**If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?**

There is no specific form of alternative dispute resolution available in Austria for private enforcement. However, it is undisputedly accepted in Austria that arbitral tribunals are competent to decide on private enforcement.<sup>34</sup>

#### **CHAPTER VIII: SETTLEMENTS**

**28. Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:**

- settlements requiring court approval;
- settlements outside of proceedings;
- timing of settlement;
- etc.

Although there is no legal basis for settlements in Austrian cartel proceedings, settlements are accepted in Austria in practice. It is, however, unclear whether or to which extent settlement procedures also have a positive effect on imposed fines.

---

<sup>33</sup> Kriechbaumer, *Schadenersatz wegen Kartellverstößen*, RdW 2015/315.

<sup>34</sup> Willheim, *Die Vorteile der Abhandlung von Follow-on Ansprüchen in kollektiven Schiedsverfahren*, ÖZK 2014, 49.

The Austrian Cartel Act does not provide for a settlement procedure with the Austrian Federal Competition Authority which is comparable to the settlement procedure provided for under EU Law. However, in Austria, the ACA and the Act for Non-Contentious Proceedings (*Außerstreitgesetz*) provide for a legal basis for proceedings that come close to settlement procedures. Such proceedings can be summarized as follows: Pursuant to Section 30 Act for Non-Contentious Proceedings there is the possibility that the parties to antitrust proceedings reach a settlement before the Cartel Court. Such settlement terminates antitrust proceedings and no substantive decision on whether or not the party/parties has/have infringed cartel law will be rendered after the settlement has been reached. In practice, the Federal Competition Authority approaches the party concerned even before cartel proceedings are initiated and reaches an informal agreement with the party, under the premise that the party admits the breach of competition law. Furthermore, the party and the Federal Competition Authority will put beyond dispute the relevant facts and the (maximum) fine. The Federal Competition Authority will then request the agreed upon (and in general lower) fine when referring the case to the Cartel Court. Moreover, the parties will submit aligned requests and agree to waive their right to appeal, in order to terminate the proceedings either with a settlement reached before the Cartel Court or to terminate the proceedings with the decision of the Cartel Court, thus the court of first instance, pursuant to Section 39 (4) Act for Non-Contentious Proceedings.<sup>35</sup>

In civil law proceedings, it is also possible to reach a settlement between the parties. The competent judge will then only issue a decision repeating the wording of the settlement reached between the parties. Such decision is final and binding between the parties.

In practice, it can be observed that Austrian judges encourage the parties to reach a settlement and will pro-actively work towards a settlement between the parties.

## CHAPTER IX: RECENT CASE LAW

### **29. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.**

There are only a few (publicly available) cases in Austria that deal with private enforcement (and which have not yet been covered in the answers to the questions above). The majority of relevant case-law with regards to damage claims due to antitrust infringements arose in connection with the *Aufzugskartell* (decision of the Austrian Supreme Court 16 Ok 5/08) only in 2008.

---

<sup>35</sup> For more details see the National Report of Austria for the 52<sup>nd</sup> Annual Congress in Prague 2014, Potocnik, *Settle for less...? Or for more! Tips on timing, confidentiality and strategy in (multijurisdictional) settlement arrangements.*



In a recent noteworthy decision by the Austrian Supreme Court,<sup>36</sup> it highlighted the importance of Section 37 ACA which provides that any decision by the Cartel Court (or the Higher Cartel Court in case of an appeal) on an antitrust infringement must be published including the names of the parties and the substantial content of the decision as well as the sanctions imposed, whereby business secrets of the respective parties must be protected accordingly. The Supreme Court emphasised the importance of this publication in order to allow and ease private enforcement. Therefore, it is necessary to publish the facts underlying the case – including turnover if deemed necessary – as well as the name of the parties in order to allow everyone to assess whether it should consider a follow-on action.

---

<sup>36</sup> Decision of the Austrian Supreme Court of 21 January 2015 (16 Ok 6/14i).

**Disclaimer**

*General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter : "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2015.*

*AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.*

*The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.*