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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Enforcement by private competition litigation in Austria is not restricted to damages claims. Private bodies have standing to file for cease and desist (*Abstellung*) orders or for decisions of finding (*Feststellung*) before the Cartel Court (*Kartellgericht*). Such actions for cease and desist or finding are attractive where no decisions for a fine by a competition authority is or is yet available. The Cartel Court has never had jurisdiction to hear claims for damages – this jurisdiction rests with the general civil courts.

An infringement of competition law may also infringe Sec. 1 of the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*). The Unfair Competition Act also provides a basis for cease and desist (*Unterlassung*) orders. In such cases, recovery (*Beseitigung*) and/or damages (*Schadenersatz*) may be awarded by the commercial courts (*Handelsgerichte*), hearing cases under the Unfair Competition Act. Under the Cartel Act as well as under the Unfair Competition Act, final decisions can be published.

The civil courts hear cases for finding, cease and desist, recovery and damage actions, as well as actions to have a contract avoided. However, while there are several follow-on cases pending after the Austrian Elevators cartel case, an Austrian banking case and the European Trucks case, there are, to date, only very few final decisions on private cartel law enforcement before the civil courts.

The European Court of Justice (ECJ) rendered a preliminary ruling judgment on the question of damages claimed by customers of third parties (so-called "umbrella claims"). Although the Austrian Supreme Court had ruled that Austrian law provides no basis to assert such claims, the ECJ found that "*Article 101 TFEU must be interpreted as meaning that it precludes the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions*" (ECJ 5.6.2014, C-557/12). Consequently, a victim of umbrella pricing, i.e. an indirect customer, may claim compensation for the loss caused by the members of a cartel, even if it had no contractual links with any of them, where it is established that the cartel at issue was, under the circumstances of the case and, in particular, considering the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of the cartel. It is up to the referring court to determine whether those conditions were met.

Upon a related request for a preliminary ruling sent to the ECJ in May 2018 (OGH 17.5.2018, 9 Ob 44/17m), the ECJ ruled (12.12.2019, C-435/18) that "*Article 101 TFEU must be interpreted as meaning that persons who are not active as suppliers or consumers on the market affected by a cartel, but who have granted subsidies in the form of promotional loans to purchasers of the products offered on that market, may demand that undertakings which participated in the cartel be ordered to make good the damage suffered by the persons concerned because the amount of the subsidies was higher than it would have been in the absence of the cartel, so that they could not use the difference for other more profitable purposes*". Thus, a general basis of claim was confirmed for a public entity who provided subsidies without being a supplier or customer on the relevant market.

No decisions on umbrella claims have been handed down so far by Austrian Courts.

Certain infringements of competition law can qualify as criminal offences. The Criminal Act (*Strafgesetzbuch*) explicitly penalises bid rigging in Sec. 168b. Cartel behaviour may also constitute fraud; however, in such cases the prosecution would need to prove the damage caused and intended. Anyone harmed by such offences (*Privatbeteiligter*) can join the criminal proceedings seeking compensation.

Finally, breaches of competition law may cause labour law litigation, e.g. where an employee, having engaged in anti-competitive behaviour, challenges his termination.

1.2 What is the legal basis for bringing an action for breach of competition law?

Actions could be based on the Cartel Act, the Unfair Competition Act and/or general civil law in conjunction with competition law. However, some actions are only available to certain plaintiffs – see the answer to question 1.5 below.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for private damage actions is national law (see the answers to questions 1.1 and 1.2 above). Following the case law by the ECJ on private enforcement (ECJ 20.9.2001, C-453/99 *Courage/Crehan* and ECJ 13.7.2006, C-295 and 298/04 *Manfredi*), Articles 101 and 102 Treaty on the Functioning of the European Union (TFEU) are directly applicable but do not contain explicit rules on damages. However, it is long-standing case law that the possibility for anybody to claim damages greatly enhances the

effectiveness of competition rules. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to establish the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, including those on the application of the concept of "causal relationship", provided that the principles of equivalence and effectiveness are observed (ECJ 13.7.2006, C-295 and 298/04; ECJ 5.6.2014, C-557/12).

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

The **Cartel Court** is a specialised division of the Vienna Court of Appeals (*Oberlandesgericht Wien*) and has exclusive jurisdiction to hear actions under the Cartel Act. Its decisions can be appealed to the Austrian Supreme Court sitting as the Cartel Court of Appeals (*Kartellobergericht*).

Civil courts hear actions under the Unfair Competition Act and under general civil law for damages. Except for Vienna, where special commercial courts exist both at district and regional level, the ordinary civil courts sit as commercial courts in such cases. See also the answer to question 1.6 below.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

Any undertaking or association of undertakings with a legal or economic interest may file an action before the **Cartel Court**. This criterion of interest is not applied strictly. However, an application for finding requires a special interest. The Cartel Act explicitly states that seeking compensation for damages creates a sufficient legal interest for an action for declaratory relief.

Private individuals (in the sense of non-entrepreneurs) do not have standing before the Cartel Court. However, applications may be brought by the Austrian Chamber of Commerce (*Wirtschaftskammer Österreich*), the Chamber of Employees (*Bundeskammer für Arbeiter und Angestellte*) and the Presidents' Committee of the Austrian Agricultural Chambers (*Präsidentenkonferenz der Landwirtschaftskammern Österreichs*). Further, the Federal Competition Agency (*Bundeswettbewerbsbehörde*), the Federal Antitrust Prosecutor (*Bundeskartellanwalt*) and the sector-specific regulators have standing before the Cartel Court.

The above-mentioned representative bodies or competitors may (alternatively or additionally to an application before the Cartel Court) file a cease and desist and/or recovery action under the Unfair Competition Act with the **commercial courts**. Damages can also be claimed by customers (OGH 24.2.1998, 4 Ob 53/98t; 16.12.2021, 4 Ob 49/21s) in the civil courts.

Both the Austrian and the EU prohibition of cartels and abuse of market dominance provisions are generally considered protective laws (*Schutzgesetze*) according to the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). Moreover, literature mostly agrees that competition law not only protects free competition (and thereby competitors), but also customers. Therefore, competitors as well as customers may bring a *damage claim in civil or commercial courts* if they have suffered harm. The ECJ has extended this to non-market-participants (see also the answer to question 1.1 above – subsidies). Possibly, contracts also support claims depending on their contents; e.g. plaintiffs could argue that defendants infringed (pre-)contractual information or notification obligations by not disclosing (allegedly) cartel-inflated prices. Further, an agreement may be void because of a breach of competition law. The indirectly harmed (e.g. the customer of someone who purchased from a cartelist) have a valid claim under certain circumstances (see also the answer to question 5.2 below).

Both individuals and companies having a civil law claim can also seek compensation before the **criminal courts**, provided criminal proceedings were initiated. Such criminal proceedings, due to the stricter legal requirements and the level of proof, are not always initiated, and damages will only be adjudicated in very clear-cut cases. Often the criminal courts shun difficult procedures in evidence and refer damage cases to the civil courts.

For **collective claims**, no special rules have been enacted so far. Consequently, possibilities for collective claims are limited. Under certain conditions, proceedings initiated individually can be joined by the trial court. It is also possible to sue several defendants together, even if only one of them is domiciled in Austria. Claimants may assign their claims to one entity that then asserts the assigned claims in its own name. As persons seeking damages must act in assigning their claims, such a "group action" could be considered to be based on an "opt-in" basis. Such assignment does not necessarily result in the values of the individual claims being added up to establish jurisdiction. Consequently, the district court (generally hearing claims of up to EUR 15,000), rather than the regional court, may have jurisdiction to hear such a "group action".

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The **Cartel Court** has exclusive jurisdiction to hear applications pursuant to the Cartel Act, and the **commercial courts** to hear claims based on the Unfair Competition Act. All other (civil) matters are heard by the general civil courts. A district court will hear claims with a value of up to EUR 15,000, except for some special matters. The regional courts have jurisdictions for higher amounts. Claims against an entrepreneur (*Unternehmen*) registered in the commercial register (*Firmenbuch*) and relating to a commercial agreement (*unternehmensbezogenes Geschäft*) will be heard by the commercial courts.

The location of the court having jurisdiction (*örtliche Zuständigkeit*) is determined by the Act on Civil Jurisdiction (*Jurisdiktionsnorm*). Normally, the domicile or commercial seat of the defendant will be the decisive factor for the location of the court. This may be more complex in cases where claims resulting from different transactions possibly affected by a cartel against different defendants, possibly located outside Austria, are filed. Then, European rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation (EU) No 1215/2012) may also become relevant. In that respect, the ECJ (15.7.2021, C-30/20) clarified that "*within the market affected by collusive arrangements on the fixing and increase in the prices of goods, either the court within whose jurisdiction the undertaking claiming to be harmed purchased the goods affected by those arrangements or, in the case of purchases made by that undertaking in several places, the court within whose jurisdiction that undertaking's registered office is situated, has international and territorial jurisdiction, in terms of the place where the damage occurred*".

Criminal courts will only enforce private damages claims connected with criminal proceedings against the civil defendant; i.e. only the criminal court trying the respective defendant has jurisdiction. Normally, the criminal court will only give judgment if the claims are obviously well founded and/or uncontested; otherwise, the criminal court will refer the matter to the civil courts.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The Austrian Supreme Court has ruled that Austrian civil courts have jurisdiction to hear private damages claims in cases where at least one of the cartelists resides or has its corporate seat in Austria. Consequently, actions may be filed with Austrian courts even if there is a link to various other countries. In a case relating to a banking cartel case, the Austrian Supreme Court confirmed that all market participants (including the indirectly damaged) have standing to bring private damages claims. Referring to European rules on jurisdiction (see question 1.6 above), presently actions by several Austrian plaintiffs against defendants from various European countries are pending in Austria, claiming damages following the EU Commission's decision against the so-called Trucks Cartel.

1.8 Is the judicial process adversarial or inquisitorial?

Before the **Cartel Court**, in theory judicial proceedings are inquisitorial, following a special procedural law also applicable to other matters where the public state takes care of certain matters pertaining to its subjects. However, the practical burden rests on the applicant – a private or public agency – to submit the facts necessary for establishing an infringement.

Criminal proceedings are basically inquisitorial, and the criminal courts and public prosecution services focus on whether the defendant is guilty of a criminal offence. However, criminal courts will only rule on damages claims if those are obviously clearly founded and/or uncontested. A private party, having joined criminal proceedings claiming damages, may also present further evidence to be heard and question witnesses. Otherwise, the persons harmed will be referred to civil litigation.

Proceedings before the **commercial and general civil courts** are adversarial. However, the court has considerable discretion to act *ex officio* and has massive influence over the procedure in evidence.

1.9 Please describe the approach of the courts in your jurisdictions to hearing stand-alone infringement cases, including in respect of secret cartels, competition restrictions contained in contractual arrangements or allegations of abuse of market power.

The Courts will take on – as obliged by law – any sufficiently argued damage action. However, absent a final decision by a competition or other administrative authority, any plaintiff will have to submit, argue, and prove facts and law as to the infringement that is argued to have caused the damage. As private plaintiffs do not have the investigative powers and resources at their hands like authorities, such as information requests, dawn-raids, rights to interview witnesses, etc., the standalone plaintiff is usually in a much less favourable position than the plaintiff who can produce a competition decision; even the latter will have to argue and prove causation and the amount of damages, while he can rely on the authorities decision for the infringement. While the EC damage directive and its implementation into national law has sought to improve plaintiffs' positions here, the civil and commercial courts are still reluctant to deviate from the traditional principles that the parties must produce the evidence to support their respective positions.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes – see the answer to question 2.2 below.

2.2 What interim remedies are available and under what conditions will a court grant them?

Both the **Cartel Act** and the **Unfair Competition Act** provide for interim injunctions (*einstweilige Verfügungen*). The Cartel Court may grant interim relief where the requirements for issuing a cease-and-desist order are attested to a certain degree (*bescheinigt*), which means a lower standard of proof than for an actual cease and desist order (see also under question 4.1 below). The commercial courts can also impose interim measures to safeguard a later cease and desist order.

While under the Cartel Act and the Unfair Competition Act it is not necessary to show that without the interim injunction, the effectiveness of the principal application, if finally granted, would be put at (significant) risk, interim relief under general civil law is subject to such requirement.

The **criminal courts** cannot grant interim relief to a party seeking compensation in criminal proceedings.

3 Final Remedies

3.1 Please identify the final remedies that may be available and describe in each case the tests that a court will apply in deciding whether to grant such a remedy.

The **Cartel Act** provides for cease-and-desist orders and decisions of finding upon application by enterprises. Only certain official parties may move for fine decisions. A cease-and-desist order will be issued if there is (still) an actual infringement of competition law at the point of time of the decision. In one case, the Cartel Court of Appeals held that where the infringement has already ended but there are still consequences from the infringement, an order may still be issued (OGH 19.1.2009, 16 Ok 13/08); the case was referred to the first instance and then settled. If the infringement has ended, the Cartel Court still may render a decision of finding (that there was an infringement), subject to the applicant establishing a special interest in such finding. The Cartel Act explicitly also allows for a decision of finding in preparation of actions for damages. However, the Cartel Court has no jurisdiction to hear damages claims.

A cease-and-desist order pursuant to the **Unfair Competition Act** requires that the infringement occurred in the conduct of business (*im geschäftlichen Verkehr*), a criterion normally met in competition cases. Moreover, the effect on competition by the infringement must be appreciable. Finally, it must be likely that the infringement will occur or will be repeated. After an infringement has occurred, its repetition will be assumed. It falls to the defendant to prove that such risk can be excluded or is extremely unlikely to materialise. When an infringement has occurred, and an unlawful situation still exists, the court may, upon request, also issue a recovering order. The defendant is then obliged to remedy the unlawful situation to the extent within his abilities.

Damages for infringing the Unfair Competition Act may be awarded under the general requirements. However, the relevance of the Unfair Competition Act for private antitrust

enforcement has been limited by the Supreme Court ruling that an antitrust law infringement only infringes Sec. 1 of the Unfair Competition Act where the infringement cannot be justified by any plausible interpretation of the law (*vertretbare Rechtsauffassung*) (OGH 14.7.2009, 4 Ob 60/09s *Anwaltssoftware*; 4 Ob 101/09w *Preselection*). However, in 16.12.2021, 4 Ob 49/21s, the Supreme Court confirms, very generally, a right to damages, even for consumers following an unfair competition infringement.

Sec. 37c para. 1 of the Cartel Act confirms the earlier state of the general civil law that anyone who has infringed competition law is obliged to reimburse the damages caused. Further, the same provision contains a rebuttable assumption that a cartel among competitors, i.e. a horizontal infringement, causes (some) damage. However, the causation and the amount of such damage still needs to be proven by the plaintiff.

Where a plaintiff (also) relies on a contract, the provisions thereof and their construction may affect the claim.

The general requirements for an award of damages in competition cases are:

(i) the defendant has infringed national or EU competition law; and

(ii) such infringement has (adequately) caused (measurable) harm to the defendant; said harm must be within the protective scope of the infringed competition provision (*Rechtswidrigkeitszusammenhang*); and the defendant must have acted negligently or with intention (fault).

Adequate causation and protective scope: under Austrian law, the infringement in question not only has to be a *conditio sine qua non* for the harm, but the behaviour of the defendant also needs to be, by its general nature, capable of causing the harm; i.e. the harm has not occurred only because of an extraordinary and unforeseeable chain of events. The protective scope concept means that the rule infringed has as its objective the protection from such harm as has occurred. However, if the claims are based on Article 101 TFEU, this must not limit rights available under this provision (see above the answer to question 1.1 and the ECJ cases referred to there).

Where a **prior final decision by a competition authority** is available, which is the normal case in follow-on actions, the courts deciding on damages are bound to such decision to the extent it states the infringement and its unlawfulness.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases that are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Under Austrian law, as in most European countries, exemplary (punitive) damages are not available, but only actual harm (*positiver Schaden*), loss of profit (*entgangener Gewinn*) and interest can be claimed. Actual harm has occurred if existing property or rights are affected. Loss of profit means harm to future income opportunities. While previously a claim for loss of profit was subject to the defendant having acted grossly negligent or intentionally, under the new law on cartel damages the compensation generally includes loss of profit. Further, the plaintiff is entitled to interest from the day on which the damage occurred. This is consistent with ECJ case law, as the *Manfredi* judgment ruled that, in any case involving a breach of Article 101 TFEU, loss of profit must be compensated.

Where it is established that a party is entitled to damages, but the exact amount is impossible or unreasonably difficult to establish, the court is entitled by law to assess the amount in its discretion (*nach freier Überzeugung*). This is also widely accepted in European law (ECJ 16.2.2023, C-312/21). In this context, the (rebuttable) presumption that a cartel between competitors causes harm (Sec. 37c para. 2 Cartel Act) has a special effect: unless defendant cartelists can prove the opposite, it is established that damage has occurred, and the exact amount thereof should be ascertained by estimation. If some claims raised within the same action are insignificant or where single claims do not exceed EUR 1,000, the court may even assess both: (i) whether damages should be granted at all; and (ii) the amount that should be awarded. Further, upon request by a trial court, the Cartel Court, the Federal Antitrust Prosecutor and the Federal Competition Agency may support the civil court in determining the amount of the damage. We are not aware of this having occurred so far.

To date, there are only a few final decisions dealing with private cartel law damages claims. No decision in which damages were awarded is publicly available; only one has been decided, i.e. the *Grazer Driving School* case, where damages were awarded. However, the decision is not publicly available as only judgments by the Supreme Court are published (the final decision in the *Driving School* case came from the Appeal Court of Graz). This case was not finally decided by the Supreme Court because the amounts claimed were relatively small.

There are cases pending that may see the award of damages in the future. However, settlements may occur before these cases reach the final stages with the courts.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Upon motion by the Federal Cartel Agency or the Federal Cartel Prosecutor, the Cartel Court may impose fines of up to 10% of the global group turnover (similar to rules under EC cartel law) for breach of national or European competition rules, and the Court has done so several times in the past. Damages are assessed by the civil or commercial courts based on the harm suffered by the plaintiff (see, however, question 3.2 above). Whether or not fines have been imposed on the defendant by the Cartel Court generally has no impact on the amount of damages, except that it was argued that the fine imposed indicates actual damages suffered.

In Austria, there is no special redress scheme (apart from private damages claims) available for persons harmed by a competition infringement.

4 Evidence

4.1 What is the standard of proof?

Generally, for damages to be awarded, the court, based on the evidence presented, must be fully convinced that the asserted facts are true. The courts are free in their evaluation of the evidence (*freie Beweiswürdigung*) and, generally, may consider any evidence that is brought to their attention.

The Supreme Court has lowered the standard of proof for damages claimed under the Unfair Competition Act where the plaintiff must only establish that (some) harm has occurred with a high probability (OGH 15.9.2005, 4 Ob 74/05v), and the defendant may prove the opposite, otherwise the amount of damage may be estimated by the Court. The case dealt with an illegal rebate scheme and the damages claimed by a customer who was discriminatorily not granted such rebate.

Where a plaintiff for objective reasons has considerable difficulties in proving something, courts may accept *prima facie* evidence. For example, in predatory pricing cases, it was held sufficient for the applicant to establish sales by the defendant to be below costs by presenting data of comparable undertakings (OGH 9.10.2000, 16 Ok 6/00; 16.12.2002, 16 Ok 11/02; 29.5.2018, 4 Ob 232/17x).

On the rules for an estimation by the court, see the answer to question 3.2 above. On the related question of the burden of proof, see question 4.2 below.

4.2 Who bears the evidential burden of proof?

In principle, plaintiffs must submit conclusively and prove all facts supporting the claim. Normally in a follow-on action, where the existence of the cartel and its illegality are established by the decision of a competition authority, this is the causation of damage and the amount thereof. For competition claims, conclusive submissions are sufficient, to the extent they are based on the reasonably available evidence. Recently, the court took a fairly strict stand on inconclusive submissions that became so by way of later modifications and evidence filed by the plaintiff (OGH 21.12.2022, 5 OB 193/22a).

Where a damages claim is based on the infringement of a protective rule or an agreement, the defendant must, if this is established, prove the lack of fault. Moreover, according to court practice, the plaintiff only needs to prove the infringement and that harm has occurred; with respect to causality, a rebuttable *prima facie* proof will be assumed (OGH 16.9.1999, 6 Ob 147/99g). Also, in this case, the plaintiff must submit and prove the occurrence of damages and their amount (OGH 15.5.2012, 3 Ob 1/12m).

If a defendant raises the defence that the plaintiff has passed on any price surcharge resulting from the infringement of competition law, the defendant bears the burden of submission and proof in that respect.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

The Austrian Code of Civil Procedure recognises the possibility for the courts to estimate damages – see the answer to question 3.2 above.

Austrian law contains a rebuttable presumption that a cartel (among competitors) causes harm. In combination, rules allowing the judge to estimate the amount of damages by discretion strengthened the plaintiffs' positions. Further provisions support this effect, such as the binding effect of final decisions by European or national competition authorities: these final decisions establishing a violation of antitrust law are binding (*Bindungswirkung*) on the Austrian civil courts. Defendant cartelists can no longer challenge the very existence and illegality of a cartel once it has been finally established by a competition authority.

Where a damage claim is based on the infringement of a protective rule or an agreement, the plaintiff only needs to prove the infringement and that harm has occurred; with respect to causality, rebuttable *prima facie* proof will be assumed (OGH 16.9.1999, 6 Ob 147/99g).

4.4 Are there limitations on the forms of evidence that may be put forward by either side? Is expert evidence accepted by the courts?

Austrian law generally does not restrict the form or contents of admissible evidence. Only very rarely is evidence inadmissible by its very nature or the way it was obtained.

Expert evidence is accepted and widely used. While opinions by expert witnesses instructed by one of the parties may be useful for the parties, especially for the preparation of the action or the defence, and may be presented as documents into evidence, they carry relatively little weight with the court. For the judgment, normally the courts rely heavily on special sworn-in expert witnesses they have appointed in the courts of the procedure. Such experts will work closely with and in support of the judge. The importance of their selection and following activities in collecting, analysing and interpreting data and the written opinions they eventually will deliver cannot be overestimated and shall receive the utmost attention. Normally, the court will follow the opinion presented by the sworn-in expert witnesses. While the court cannot overrule the sworn-in expert witnesses on questions of fact, only in very extreme and rare cases will such sworn-in expert witnesses be replaced.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Originally, Austrian law did not contain discovery rules in the strict sense, which changed as required by the EU Damages Directive. Under general civil procedure law, upon motion by a party the court can, during proceedings, order the other party to produce certain documents. For this objective, the requesting party needs to specify the documents in detail. The law sets out grounds on which the production of a document can or cannot be refused. However, even if a refusal is unjustified, the court cannot enforce production orders, but the refusal will be considered in the court's judgment. Consequently, these rules on document production have carried little practical importance so far.

Upon reasoned motion by a party, the court can, during proceedings – after having balanced the mutual interests – order the opposing party or even a third party to disclose specific pieces of evidence. The evidence plaintiffs seek will likely concern the effects of a competition law infringement, whereas defendants will likely request the disclosure of documents proving passing on of overcharges. In case of confidential information, the court must order effective measures for the protection of such confidential information (see also the answer to question 4.8 below). For confidential information, the defendant of the application can demand that the evidence is only disclosed *vis-à-vis* the court, which then decides on the disclosure to the other party or takes the information into account when rendering its decision.

Also, the disclosure of evidence contained in the files of competition authorities can be requested by parties. Upon such motion, the court must also consider the effectiveness of the public enforcement when judging the proportionality of the request. Documents that were prepared specifically for the proceedings conducted by the competition authority, and which the competition authority created and sent to the parties during its proceedings and settlement submissions, which have been withdrawn, are sometimes called "**grey list documents**". The disclosure of such grey list documents must not be ordered before the proceedings before the competition authority have been closed.

Even stricter restrictions apply to leniency and (non-withdrawn) settlement submissions in cartel cases (i.e. proceedings concerning cartel behaviour between competitors, not including vertical agreements). The disclosure of these so-called "**blacklist documents**" must not be ordered at any time unless such documents or information are available independently from the competition procedure.

Further, under general procedural rules, the parties to a trial may ask each other questions in court with a view to establish the facts of a case and the relevant documents.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Summoned witnesses are obliged by law to appear before the court. If they do not appear, they may be fined by the court and must bear any costs that their non-appearance may cause. As this may include lawyers' fees, the costs could be substantial. Further, though rather unusual, the court could impose compulsory attendance on a witness. Finally, witnesses not appearing before the court may be liable for damages to the parties.

Witnesses may, however, refuse testimony to avoid criminal prosecution or a direct financial disadvantage for themselves or close family, or if they are bound by professional secrecy (lawyers, medical doctors, priests, etc.) or would otherwise disclose business secrets.

Any witness may be interrogated by either party. In practice, the judge starts the interrogation and either party may ask (additional) questions. All parties could ask all questions relevant to the case, though the judge has wide discretion as to topics and decisions on objections to questions.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Yes. National courts must not issue decisions concerning agreements or concerted practices within the meaning of Articles 101 or 102 TFEU, which would contradict a European Community Commission decision on the same agreements or concerted practices.

The binding effect (*Bindungswirkung*) of final decisions by European or national competition authorities is explicitly reiterated by the law. The binding effect encompasses the verdict and those facts stated and necessarily supporting such verdict, but no other details of the reasoning.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Generally, Austrian procedural law does not have express rules on the protection of business secrets amongst (a multitude of) parties to specific proceedings. However, under both the Cartel Act and the Unfair Competition Act, the public may, upon request, be excluded from oral hearings if this is necessary for the protection of business secrets or confidential information.

A joinder of proceedings initiated by the Federal Competition Agency or the Federal Cartel Prosecutor to proceedings instigated by another party must not take place absent the consent of the parties because of the investigative powers vested in the public entities. The relevant provision of the Cartel Act provides that, in principle, third persons may only access the respective court files with the consent of the parties to the proceedings concerned. The ECJ (C-536/11 *Donau Chemie*) ruled that this is incompatible with EU law. However, the Austrian Supreme Court ruled (12.5.2022, 16 Ok 1/22s; 2.5.2023, 16 Ok 1/23t) that following the rules introduced by the EC Damages Directive, including the publication of the decisions of the Cartel Court, outside pending damage proceedings access to Cartel Court files will (again) only be granted with the (unlikely) consent of the parties to those proceedings.

The Cartel Court (28.11.2014, 16 Ok 10/14b and 16 Ok 9/14f) has further held that access to a file must also not be generally denied in cases not containing "a foreign element". The Austrian Supreme Court further stated that the criteria for being granted access to a file must not impose an excessive burden on those claiming damages. Finally, it was clarified that the Cartel Court's file must be forwarded to the criminal prosecutor (*Staatsanwalt*) upon request (OGH 22.6.2010, 16 Ok 3/10).

The disclosure of evidence as established by the amendment implementing the EC Damages Directive may also include evidence containing confidential information. However, prior to ordering disclosure, the court must hear the affected parties and balance the legitimate interests of all parties and third parties concerned. The court shall order appropriate and effective protection measures, such as the presentation of a non-confidential excerpt, the exclusion of the public from the hearings or the imposition of a limit on the group of people that can acquire knowledge of the evidence. Obviously, the parties and their counsel cannot be excluded. Moreover, the parties' rights (to be heard) must not be unduly restricted. By Decision of 10.11.2022, C-163/21, the ECJ ruled that the EC damage directive has to be construed to the effect that "*the relevant evidence referred to therein which is in the power of disposal of the defendant or a third party, also refers to evidence that the party against whom the request for disclosure of evidence is directed, must recreate by means of Information, knowledge or data that is within his control, compiling or classifying, subject to strict compliance with Art. 5, paras. 2 and 3 of this Directive, which obliges the national courts seized to ensure that the disclosure of evidence they ordered is relevant, proportionate, and necessary, taking into account the legitimate interests and fundamental rights of the defendant*". This extends the powers of courts to order disclosure of evidence to defendants or third parties.

Finally, the court can order an expert witness to prepare a summary not containing any confidential information.

In criminal proceedings, the public can also be excluded from hearings where this is necessary for confidentiality reasons. While access to files for third parties is limited (they need to have a reasoned legal interest [*begründetes rechtliches Interesse*]), parties seeking compensation in criminal proceedings have access to files and a right to be present at the hearings, which can be restricted only in exceptional cases (to avoid obstruction of the investigation).

Decisions by the Cartel Court, including the full names of the parties, are published on a special website. The Cartel Court shall give the parties ample opportunity to specify those parts of the decision that they would like to exclude from the publication; subsequently, the judge must decide on the version to be published. The final decision rejecting or dismissing an application and decisions on requests for an interim injunction must also be published. The declared reason for the publication is to facilitate private enforcement of damage claims. When a decision by the Cartel Court is partly confirmed, partly amended by the Supreme Court, only the decision by the Supreme Court, and not the one by the Cartel Court, shall be published (8.11.2021, 16 Ok 2/21m). The Cartel Court has a wide discretion as to the content of the published version (26.9.2022, 16 Ok 5/22d).

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

In proceedings before the Cartel Court, the Austrian Federal Competition Agency and the Federal Cartel Prosecutor both

have standing. As they normally initiate such proceedings, it is necessary for them to participate in such proceedings. On the other hand, neither the Federal Competition Agency nor the Federal Cartel Prosecutor have standing before civil courts, pursuant to national law. The civil court can request assistance from the Cartel Court, the Federal Competition Agency and the Federal Cartel Prosecutor when determining the amount of the damage. However, this has rarely occurred so far.

Under European law, the European Commission and national competition authorities can, on their own initiative, submit written statements (*amicus curiae* briefs) to Member State courts, if this is required for a coherent application of Articles 101 or 102 TFEU. In Austria, the respective national competition authority is the Federal Competition Agency. So far, we are not aware of any case where the European Commission or the Federal Competition Agency have exercised this right.

4.10 Please describe whether the courts in your jurisdiction have a track record of taking findings produced by EU or domestic *ex-ante* sectoral regulators into account when determining competition law allegations and whether evidential weight (non-binding or otherwise) is likely to be given to such findings.

There is no such clear track record; documents will be judged on a case-by-case basis and the judges are free to draw conclusions.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Technically, there is no defence of justification by public interest available for the individual defendant. However, there is a general exemption from the cartel prohibition (Article 101 para. 3 TFEU and Sec. 2 of the Cartel Act) stating that cartels that contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and that do not a) impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives, or b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question, shall be exempt. Proving the existence of such circumstances may be quite complex, and the undertaking invoking the exemption bears the risk of error.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The Cartel Act contains an explicit provision governing passing on situations, explicitly stating that the passing on defence is admissible. The burden of proof for passing on rests on the defendant. However, this seems to be not much different to the law pre-amendment as rooted in general principles of damage law. While the case law on passing on in Austria is not far developed, German courts, while generally accepting this defence, recently discussed various concepts to restrict it.

Indirect purchasers have standing if they can establish that damages were passed on to them. For this, the indirect purchaser can invoke a rebuttable presumption that damages have been passed on. The presumption requires that the indirectly harmed customer establishes an infringement, a cartel mark-up on the level of the direct purchaser and that he obtained goods or services subject to the cartel behaviour.

Both for the passing on defence and for the argument of standing of the indirect customer, the possibility of orders by the court for the presentation of evidence by the opposing party is available, subject to a balance of interest.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

In private civil law proceedings, as opposed to public fine proceedings, third parties with a legal interest in the outcome can support the position of the original party by accessory intervention (*Nebenintervention*). A defendant can notify other cartel participants, arguing that they have such legal interest to join (*Streitverkündung*). Recently, this has been occurring frequently. Whether or not they join is the notified parties' decision. However, once notified, a party can no longer (e.g. in procedures on recourse claims) argue as a defence that the case was not handled properly by the notifying party.

As stated explicitly in the law, in passing on situations, the defendant can notify either the indirect purchaser or its direct customers (depending on who is suing) with a request to join the proceedings.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

With respect to the claims possible, it is necessary to distinguish between **claims for cease and desist** or **for findings** to be heard by the Cartel Court or the civil courts on the one hand and **claims for damages** to be heard by the civil courts only on the other hand.

The **Cartel Act** does not establish limitation periods for applications for cease-and-desist orders or decisions of findings. However, cease and desist orders can only be issued if the infringement is still ongoing. For decisions of finding, the required special interest will be more difficult to argue the more time has passed since the infringement was terminated.

Under the **Unfair Competition Act**, the limitation period for cease-and-desist orders is six months from the time when the (potential) plaintiff learned about the infringement and the identity of the (potential) defendant. Moreover, cease and desist claims are limited to three years after the end of the infringement. However, this is not the case where an illegal situation continues to the present. If this is the case, desist and/or recovery claims may be still brought.

Under **general civil law**, the limitation period for damages claims is three years from knowledge of the harm and the identity of the (potential) defendant. Under certain circumstances (where also a criminal offence is committed by a natural person), it could be argued that a 30-year period is relevant. Further, if undue enrichment can be argued and proven, a 30-year period could also be argued.

The Cartel Act explicitly stipulates that damages claims based on an infringement of competition law become time barred after five years from the point of time at which the harmed person became aware (or should have reasonably become aware) of the infringer, the damage and that the behaviour that caused the damage constituted a competition law infringement. This is supplemented by an objective limitation period, according to which the claim for compensation becomes time-barred 10 years after the occurrence of the damage. Neither of these limitation

periods starts unless the infringement was terminated. This new law applies to older claims that were not time barred by December 26, 2016, unless old rules effective on that date are more beneficial to the harmed party. It was discussed whether this provides for a retroactive effect and whether such effect is permissible under EU law, which was confirmed (ECJ 22.6.2022, C267/20). Under certain circumstances, the limitation of the claim for compensation is suspended (e.g. for the duration of the proceedings before, or investigations by competition authorities and for settlement negotiations). The suspension ends one year after the decision of the competition authority became final or one year after the proceedings were terminated otherwise. In case of settlement negotiations, after their abortion, an action must be filed or continued within a reasonable period.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The duration of proceedings varies considerably and could take several years. Durations of proceedings with the Cartel Court (or another European or national competition authority) for fines, cease and desist or findings on the one hand, and with civil courts for damages on the other hand, must be regarded separately. With the Cartel Court and criminal courts, one level of appeal must be considered; with the civil courts, two appeals are possible if the case goes up to the Supreme Court.

Except waiving/skipping appeals, there are limited possibilities to speed up proceedings. Obviously, the better the preparation for bringing an action, the sooner the appointment of a court expert (for causation and amount of damages) and a judgment can be expected. Much depends on the quality of the factual argument and evidence that can be presented by the plaintiff.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example, if a settlement is reached)?

Parties do not require court permission to discontinue proceedings for damages in civil courts. The situation is different with proceedings before the Cartel Court. While parties can terminate proceedings, the Federal Competition Agency and/or the Federal Cartel Prosecutor can, within a period of 14 days as of service of the declaration that applications by private parties (e.g. for cease and desist or for findings) are revoked, continue proceedings against the defendant in their own name as official parties.

Moreover, in appeal proceedings before the Cartel Court of Appeals, the application initiating the proceedings can only be revoked with the consent of the defendant and the Federal Competition Agency, as well as the Federal Cartel Prosecutor.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As described in the answer to question 1.5 above, there are no collective claims in the narrow sense in Austria. If a "group action" based on assigned claims is settled, which is possible, the settlement is binding on all assigned claims. If several plaintiffs have brought a joint action, quite complex issues could arise upon settlement.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In proceedings pursuant to the **Cartel Act**, there is only a reimbursement of costs if the application or defence was wanton (*mutwillig*), which is rarely awarded.

Under general **civil law**, the unsuccessful party must reimburse the winning party for (quite substantial) court fees, lawyers' fees, and expenses (e.g. for court-appointed experts, which play a major role in damages claims). If success is only partial, the costs will be awarded *pro rata*. The amount of recoverable costs for lawyers is determined by law in a system depending on the amount in dispute and the various activities (e.g. action, statement of defence, other briefs, hearings by the hour).

A party joining **criminal proceedings** is entitled to have its costs reimbursed if it succeeds in receiving compensation.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers under Austrian law are not permitted to act on a pure contingency fee basis, i.e. the fee is a part of the recovered amount in case of success. Other fee arrangements like hourly rates, even with a success bonus, are possible.

8.3 Is third-party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Funding by third-party litigation financing is permitted.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions by the Cartel Court can be appealed to the Cartel Court of Appeals, which is a special senate of the Supreme Court. However, the Cartel Court of Appeals does, beside the review of questions of law, review the facts established by the trial court only to a very limited extent. However, a decision may also be appealed to the Cartel Court of Appeals claiming that, according to the case files, there are substantial doubts about the correctness of the facts supporting the Cartel Court's decision.

Decisions by the civil district, regional or commercial courts can be appealed on two levels; the final appeal is heard by the Supreme Court. Generally, however, the Supreme Court will only hear questions of law in cases showing fundamentally new questions.

Decisions by the criminal courts can be appealed as well.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency is available under Austrian law. Leniency applications must be filed with the Federal Competition Agency and may result in full immunity from fines for the first applicant and/or a reduction of fines for any others. However, no general

immunity from civil claims is granted. The law grants a small benefit to the successful leniency applicant in that he is liable for damages only *vis-à-vis* his own direct or indirect customers, unless harmed plaintiffs cannot receive payment from other defendants. The Federal Competition Agency has published guidelines for leniency.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

In Austria, leniency is exclusively administered by the Federal Competition Agency; there is no leniency in court proceedings. However, the Cartel Court has large discretion in determining fines and may well (negatively) consider when evidence is withheld. The leniency applicant has no general right of refusal, and only a few categories of documents are protected against disclosure. For more details, see the answer to question 4.5 above.

11 Anticipated Reforms

11.1 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction? How has the Directive been applied by the courts in your jurisdiction?

The Damages Directive has been implemented very closely following the Directive's wording. Application of the new rules by courts may be seen in newer cases when they evolve.

11.2 Please identify, with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation; or, if some other arrangement applies, please describe it.

Sec. 37a to 37m of the Cartel Act implement the EU Damages Directive. Sec. 37a to 37g are applicable to damages claims, concerning harm that occurred after December 26, 2016 only:

- the rebuttable presumption that cartel infringements caused harm;
- the exception concerning small- or medium-sized enterprises and the respective counter-exception;
- the restriction of the liability of immunity recipients; and
- the provision expressly governing passing on.

The new rules on disclosure apply to all proceedings in which the brief initiating the proceedings is (or has been) submitted after December 26, 2016.

Concerning limitation, the new limitation provision of the Cartel Act applies to claims that have not been time-barred on December 26, 2016. It was discussed whether this provides for a retroactive effect and whether such effect is permissible under EU law, which was confirmed (ECJ 22.6.2022, C267/20). However, in case the infringements happened prior to and were not time-barred by that date, the old rules (e.g. limitation period of three years, or suspension of only six months after a final decision or other termination of the proceedings before the competition authorities, instead of one year) apply in case they are more beneficial to the damaged party (see also the answer to question 6.1 above).

11.3 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

No reforms are currently being proposed.

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