

Austria

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Legislation and jurisdiction

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

Private antitrust litigation in Austria has become more popular in the past few years. The first case decided by an Austrian court took place in 2007 and involved driving schools in Graz ('Grazer Fahrerschulkartell'), which were convicted of price fixing. The plaintiff, one of the driving students, was awarded €218,000. The case was not appealed to the High Court.

Companies taking part in an elevator and escalator cartel have been convicted by the Austrian Federal Competition Authority (FCA) and the Cartel Courts: based on these decisions, several claims for damages were filed at the beginning of 2010. There is great interest in the decisions that will be made in these cases, as many procedural and material questions have already been raised.

Since 2007 there has been discussion of a ministerial draft to amend the Austrian Code of Civil Procedure in order to enable class actions, but this has not yet been adopted. An 'Austrian form of the class action' has emerged (see question 20), but so far this has not been used in antitrust matters. With regard to damages claims, some hurdles identified by the European Commission's White Paper also exist in Austria, and there has been no discussion on the level of the legislature. Changes in this respect are, therefore, not expected soon.

Although in Austria it is clear that private antitrust litigation is positive for many reasons, it has only recently begun to develop. Therefore, there are still many questions to be answered by the legislature and by the courts.

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

There are four different types of private antitrust actions or motions. These are:

- Motions based on the Cartel Act, eg cease-and-desist orders;
- Claims for damages resulting from an infringement of competition law;
- Disputes about agreements violating the Cartel Act (which are generally void).
- Actions for injunctions based on the Act against Unfair Competition (UWG).

All these private antitrust actions are mandated by statute.

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

Motions such as those for cease-and-desist orders or declaration of infringement are based directly on the Cartel Act, and have to be brought before the Cartel Court (first instance). Appeals have to be

made to the High Court (OGH).

Disputes regarding void agreements because of infringement of the Cartel Act are based on civil law in conjunction with the Cartel Act. Such disputes have to be brought before the civil courts or, if the defendant is an undertaking and the disputes resolve from a commercial relationship, before the commercial courts. In general, the courts of first instance for such disputes are the regional courts (in cases where lower damages are claimed, the disputes must be heard at district courts). Appeals have to be made to the appellate courts. The High Court can be called as the third and final instance.

Claims for damages are based on civil law and have to be brought before civil courts.

Actions for injunctions based on the Act against Unfair Competition (UWG) also have to be filed with civil courts; the relevant courts are the same as those for disputes about void agreements (see above).

All the mentioned actions are only to be brought before courts, either civil (commercial) or cartel courts. The FCA itself is entitled to bring motions before the Cartel Court but not to rule on private antitrust actions, ie, on motions filed by enterprises. As well as filing motions to the Cartel Court, the FCA's other main tasks are investigations and assessment of concentrations.

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

Cease-and-desist orders (section 26 Cartel Act) and motions for declaration of infringement (section 28 Cartel Act) are available for certain antitrust matters (eg cartels, abuse of a dominant position, implementing a concentration without prior clearance by the FCA).

Claims for damages are available for all types of antitrust matters as long as there is a breach of the Cartel Act or European Competition Law which caused damage to the plaintiff.

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

There must be a nexus to the Austrian market; ie, the infringement of competition law must affect the Austrian market. Austrian jurisdiction only applies if the behaviour infringes the Austrian Cartel Act.

The international competence of Austrian courts derives from the Brussels I Regulation with respect to EU member states and from the Lugano Convention with respect to Switzerland, Norway and Iceland. According to both regulations, claims can generally be brought before an Austrian court if the defendant is domiciled in Austria (if a natural person). If the defendant is a legal person, it can be sued in Austria if its (i) statutory seat, (ii) central administration, or (iii) principal place of business is in Austria. Austrian jurisdiction also governs claims for damages if the harmful event occurred or may occur in Austria.

Otherwise, if the competent court has to be identified by Austrian procedural law – because the Brussels I Regulation or the Lugano Convention do not apply – the rules set out above apply, except the

special rule for claims for damages, as Austrian procedural law does not provide for such a rule.

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

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

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

Not applicable.

Private action procedure

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

Litigation may be funded by third parties, and this is increasingly the case with respect to class actions. Particular companies which specialise in financing proceedings have thus emerged in Austria. These companies are also allowed to offer their services against participation in profit as long as they do not get involved in strategic decisions regarding the trial.

However, lawyers are generally not allowed to work for contingency fees in Austria, in order to protect the client. Unlike in some other jurisdictions, the claimant cannot receive more than the actual loss it suffered.

- 9 Are jury trials available?

No, jury trials are not available in Austria.

However, the Appellate Court and the High Court decide by senate – a judge is accompanied by several side judges, two of whom are lay judges. One lay judge has to be sent to the senate by the Austrian Chamber of Commerce; the other has to be sent by the Austrian Chamber of Labour.

- 10 What pre-trial discovery procedures are available?

Austrian procedural law does not provide for specific pre-trial discovery. The plaintiff has to provide all the necessary evidence to prove that it has suffered a loss, that the defendant caused this damage and that it is the defendant's fault (see question 3). However, under certain circumstances the plaintiff can apply for the defendant to produce certain documents.

It is further possible to encourage the FCA to investigate a certain sector or certain companies, as the FCA has investigative powers such as the power to order the execution of house searches. However, the person making the request is not entitled to have the FCA investigate within a certain period, and indeed is not even entitled to have the FCA investigate at all.

Section 28 Cartel Act provides for the possibility to file a motion for declaration of an already terminated infringement if the plaintiff has a good reason (a special 'interest'). However, the High Court decided that having suffered a loss and therefore intending to claim damages is not sufficient to meet this prerequisite.

- 11 What evidence is admissible?

Generally under Austrian law every kind of evidence is admissible, especially documents, expert opinions and testimonies. However, there is an exception for evidence which a party gathered by violating criminal law.

- 12 What evidence is protected by legal privilege?

Austrian competition law and jurisdiction have not yet recognised that evidence gathered for a trial concerning antitrust matters can be protected by legal privilege.

There is a legal privilege mandated by statute for criminal law proceedings. This refers to attorneys but not in-house counsel. However, there is no clear opinion among various authors whether this privilege can be extended to competition law proceedings and – as already mentioned – legislation and jurisdiction have been silent on this question up to now.

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

Private actions are available whether or not there has been a criminal conviction. However, the Cartel Act does not any more provide for criminal sanctions. The only relevant criminal penalties are under section 168b of the Austrian Criminal Code for bid rigging.

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

If a party has been convicted by a criminal court, the ruling is binding for the civil proceedings but only with respect to the convicted person. Acquittals do not have such binding effect.

Leniency applicants are not protected from follow-on litigation. Rather, it has recently become very popular in Austria to sue former cartel members for damages (see question 1).

- 15 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

A party in a civil trial can always petition the court for a stay of proceedings. Under certain circumstances the court will have to suspend the trial, but this has to be expressly stated by law. However, if a preliminary question is to be answered by another court or authority, the court may suspend the trial until a final judgment is received from this other court or authority.

Furthermore, it is possible for the parties to a trial to agree on a stay of proceedings for a certain period, which has to be at least three months. Accordingly, the parties themselves can decide to stay proceedings for whatever reason. They do not need the consent of the court for this decision.

- 16 What is the applicable standard of proof for claimants and defendants?

With respect to claims for damages, the burden of proof varies according to the type of liability. In case of tortious liability, ie the plaintiff and the defendant not being in a contractual relationship prior to the trial, the plaintiff suing for damages has to prove that it has suffered a loss, that the defendant has caused this damage and that the defendant acted with intention or gross or slight negligence. The amount of the compensation depends on the degree of the defendant's guilt (see question 29 below).

If a 'protective law' is violated – the Cartel Act fulfils this definition – or the plaintiff and the defendant have or had a contractual relationship, it is the defendant who has to prove that the occurrence of the damage was not its fault (ie, shift the burden of proof in case of contractual liability). Also, the burden of proof is facilitated for the plaintiff if a protective law is violated: in this case, the violation of the protective law indicates that the defendant's behaviour caused the damage.

As proof of damage, and in particular its exact amount, is quite difficult when suing for cartel damages, Austrian procedural law provides for the possibility that the exact amount of the damage should be estimated by the court (section 273 Code of Civil Procedure). But this also requires that the plaintiff proves it has a claim against the defendant, ie, that the defendant has harmed the plaintiff. If evidence of the amount cannot be produced by the plaintiff, or can only be produced after disproportionate difficulty, the court may estimate the exact amount of the damage.

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

There is no typical timetable for proceedings and no statute providing for a maximum duration of proceedings. Generally it is not possible for a party to accelerate proceedings; however, if the court fails to act, a party can file a motion for the superior court to set a time limit within which the competent court has to act.

18 What are the relevant limitation periods?

The limitation period for damages claims is generally three years from the date on which the plaintiff becomes aware of the damage and the person responsible for the damage. It is not necessary to know the exact amount of damage that has occurred in order for the limitation period to start running. There is an absolute limitation period of thirty years after the behaviour leading to the damage has been conducted.

With respect to motions for declaration of an already terminated infringement of competition law (section 28 Cartel Act), the applicant has to bear in mind that when filing such a motion to the court it has to have a good reason and that the High Court decided that having suffered a loss and therefore intending to claim damages is not sufficient to meet this prerequisite.

Obviously, cease-and-desist orders can only be applied for if the behaviour infringing the Cartel Act has not already been terminated.

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

Generally, appeals are available. From the Cartel Court (see question 3) an appeal can be made to the High Court.

From the civil court, cases may be appealed to:

- the competent regional court as appellate court, if a district court is the competent court of first instance;
- the competent regional commercial court, if a district commercial court is the competent court of first instance;
- the competent appellate court, if a regional court or regional commercial court is the competent court of first instance.

In civil law proceedings, even the decision of the second instance can, under certain circumstances, be appealed to the High Court.

Generally, only the court of first instance may collect evidence, and an appeal can only undermine the consideration of evidence by the court of first instance. However, appeals to the High Court are only possible if the ruling on a question of law is appealed against.

Collective actions

20 Are collective proceedings available in respect of antitrust claims?

Collective proceedings are generally available in civil proceedings. There are two possible types of collective proceedings in Austrian procedural law. First, several plaintiffs may litigate a case together if the claim is based on the same actual facts and the same court is competent for all grounds. Second, an 'Austrian form of the class

action' has emerged over the past years. As the class action generally does not exist in Austria now, the plaintiff – which is often the Austrian consumer advocacy group – can be assigned the claims of many people who were damaged by the same defendant in order to start one proceeding for all of them. This kind of class action has been recognised by the courts.

Since 2007 there has been discussion of a ministerial draft to amend the Austrian Code of Civil Procedure in order to enable class actions, but this has not been adopted yet.

21 Are collective proceedings mandated by legislation?

Collective proceedings are not yet mandated by legislation (see question 20).

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

Not applicable.

23 Have courts certified collective proceedings in antitrust matters?

See question 20. The 'Austrian form of the class action' has not yet been initiated with respect to antitrust matters.

24 Are 'indirect purchaser claims' permissible in collective and single party proceedings?

Generally, Austrian tort law only provides for the plaintiff who has been directly injured to sue for damages. Indirectly injured persons may sue only in specific circumstances.

However, the ECJ's judgment in *Manfredi* strengthens the position of the indirect purchaser: it ruled that any individual may claim damages for breach of Art 81 (now 101) EC under national jurisdiction. It is therefore clear that indirect purchasers may also claim damages for breach of European competition law. However, in relation to breaches of Austrian competition law, there has not yet been any clarification as to whether Austrian courts would apply the *Manfredi* judgment in a totally national case.

25 Can plaintiffs opt out or opt in?

Not applicable.

26 Do collective settlements require judicial authorisation?

Collective settlements are not available under Austrian law.

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

Not applicable.

28 Has a plaintiffs' collective-proceeding bar developed?

A plaintiffs' collective-proceeding bar has not developed in Austria.

Remedies

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

In general, Austrian tort law requires the defendant to compensate the plaintiff through specific performance. However, as this is often inappropriate or inadequate, eg, if competition law is infringed, the plaintiff is then entitled to pecuniary compensation.

Under Austrian law the plaintiff shall be compensated for actual

damage. Punitive damages are not available under Austrian law. However, the amount of the compensation depends on whether the defendant violated the law intentionally or negligently. In case of slight negligence the defendant has to compensate the plaintiff only for its actual damages. In case of gross negligence or intention the defendant has to compensate for the plaintiff's actual damages plus its damages for lost expectations. If an action is filed on the ground of section 1 UWG the plaintiff can claim actual damages and damages for lost expectations.

30 What other forms of remedy are available?

Injunctions are available under Austrian law. The plaintiff can apply for an injunction with respect to claims for damages, as well as in connection with an application for a cease-and-desist order. Under certain circumstances it is possible for execution to be carried out before a final judgment becomes available.

31 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available in Austria.

32 Is there provision for interest on damages awards?

Generally, interest of 4 per cent can be claimed. With respect to commercial claims, ie if the parties of the trial are enterprises, the plaintiff can claim 8 per cent over the European Central Bank's base interest rate.

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

The fines imposed by competition authorities are not taken into account when settling damages. Although the FCA and the Cartel Court shall consider the enrichment of the accused while fixing fines, this does not influence the amount of damages awarded to a plaintiff in antitrust litigation.

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

During a trial concerning damages each party must pay their own expenses, including court fees and lawyers' charges. However, as soon as a legally binding decision is reached, the winning party's costs are compensated by the losing party. If a party only wins to a

Update and trends

At the moment there is no discussion on changing the law with respect to antitrust litigation in Austria. Although the White Paper on damages by the European Commission suggests how to improve the situation in member states, Austria is still only beginning to experience the advantages and disadvantages of suing for damages after an infringement of the Austrian Cartel Act. At present numerous trials regarding the elevator and escalator cartel are being heard in Austrian courts, and there are many open questions with regard to this. Therefore, further, significant development of private antitrust legislature in Austria might start in a few years' time.

certain degree, cost compensation will beat the same ration as that of the party's success. If each party wins 50 per cent of the trial, each party will pay its own costs.

With regard to proceedings on the basis of the Cartel Act, the losing party is only obliged to compensate the winning one according to the principles set out above if proceedings were instigated frivolously.

35 Is liability imposed on a joint and several basis?

Liability is imposed on a joint and several basis if the defendants acted intentionally and jointly – eg, in the way that members of a cartel obviously act. Even if the defendants have only acted negligently, they can still be held jointly and severally liable if it is not possible to determine what part of the damage has been caused by which defendant.

36 Is there a possibility for contribution and indemnity among defendants?

Yes: if only one defendant has compensated the plaintiff, it can claim contribution and indemnity from those who are jointly and severally liable with it. The other wrongdoers are obliged to contribute according to the harm done by them. If the liability cannot be identified, all wrongdoers must compensate the defendant proportionately.

This contribution and indemnity among defendants does not include costs incurred before the start of the trial, nor interest for default.



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37 Is the 'passing on' defence allowed?

The 'passing on' defence is not mandated by statute. Although the European Commission recommends in its White Paper on damages that defendants should be entitled to invoke the 'passing on' defence against a claim for compensation of the overcharge, it is not currently supported by Austrian case law. There is a rule under Austrian law that specific benefits granted to the plaintiff have to be taken into account if damages are awarded to it. However, these exemptions will not be relevant in private antitrust matters.

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

There is no comparable defence available under Austrian law.

39 Is alternative dispute resolution available?

Alternative dispute resolution is generally available in Austria if agreed by the parties. Generally, three arbitrators decide on a case after a private trial. However, the parties may agree on numerous elements, such as the number of arbitrators, the code of procedure or whether oral proceedings shall take place. With respect to private damages claims, alternative dispute resolution would be a possibility, though generally it is not used.