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Cartel Court Offers No Simple Way of Obtaining Damages

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December 18 2008

Following two Higher Regional Court of Vienna (as Cartel Court) decisions relating to a high-profile cartel case,⁽¹⁾ the Supreme Court has rendered a judgment on the necessary preconditions for receiving a declaratory decision on past infringements of antitrust law (for further details please see "[Declaratory Decision on Past Infringement of Antitrust Law](#)").⁽²⁾ The Supreme Court confirmed the lower court's decisions, rejecting the plaintiff's motions and providing additional clarifications.

The plaintiff sought a decision to establish infringement and gain access to evidence in preparation for seeking damages from the alleged cartel members. The plaintiff hoped that the Cartel Court's investigatory powers and plaintiff-friendly rules of procedure would enable it to collect information and evidence to support and calculate its damages claim. Thus, it expected to increase its chances of success in a strict civil procedure where plaintiffs seeking damages must substantiate and prove not only the illegality of an action, but also causality and the amount of damages.

Under the Code of Civil Procedure, the court will consider only evidence that is produced by the parties. The possibilities to force a defendant to present documents in court are limited. Normally, the burden of proof for causality and damages rests primarily with the plaintiff. As is the case with European fine decisions, the courts' fine decisions may indicate illegality, but they normally do not support causality and the calculation of damages.

Initially, the Supreme Court clarified that even under the special rules of procedure in cartel cases, parties must sufficiently substantiate the facts upon which they base their motions. Any *ex officio* investigations conducted by the Cartel Court will not extend beyond the parties' motions that cannot be substituted by referring to a fine procedure and the related court files. Thus, even before the Cartel Court, general civil procedure rules relating to the burden of proof and substantiation of a claim apply. Consequently, the court saw no reason to reverse the burden of proof and make the defendants prove the termination of infringements. It further clarified that any contracts concluded by the alleged cartel members with third parties that may have been related to the cartel itself were not considered ongoing infringements and would not be regarded as void.

To support its decision that the preparation of a damages claim is no sufficient basis for a declaratory decision of the Cartel Court, the Supreme Court reasoned that:

- in general, declaratory decisions are subsidiary to other possible actions (eg, an action for damages);
- such a declaratory decision may be of little use if the civil court needs to consider a complete set of facts (eg, a large number of contract relations) in order to calculate damages;
- there are restrictions on using the files of a cartel procedure in other cartel or civil procedures, unless the parties give their consent. Although it gave no final opinion, the court clearly supported the extensive scope of this rule; and
- in the Cartel Court there is normally no possibility for parties to recover their legal costs.

In conclusion, the Supreme Court confirmed that the Cartel Court has jurisdiction in cartel matters;

however, this cannot be extended to purely civil claims of damages and related declaratory decisions on past infringements. Consequently, damages claims following a fine decision in cartel matters must be filed in the civil courts under the strict rules of civil procedure, without additional assistance from the cartel authorities and the Cartel Court.

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Endnotes

⁽¹⁾ Higher Regional Court of Vienna as Cartel Court, February 19 2008, 25 Kt 24, 25/07; November 25 2008, 25 Kt 19, 20/08.

⁽²⁾ Supreme Court as Higher Cartel Court, October 8 2008, 16 Ok 8/08.

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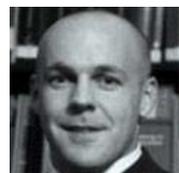
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