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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 has some tradition in Austria, not restricting these concepts to damage claims. Starting with the Cartel Act 1993 (*Kartellgesetz*), standing was afforded to private bodies 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 – such jurisdiction rests with the general civil courts.

An infringement of competition law may also be an infringement of 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 voided. However, while there are several follow-on cases pending after the Austrian Elevators cartel case and an Austrian Banking case, there are, to date, only very few final decisions on private cartel law enforcement before the civil courts. These relatively small cases, relating to a driving school cartel, were not reviewed by the Supreme Court (*Oberster Gerichtshof – OGH*).

The European Court of Justice (ECJ) rendered in 2014 a preliminary ruling judgment on the question of damages claimed by customers of third parties (so-called "umbrella claims"). This resulted from the case of the Austrian National Railway claiming damages following the Elevators cartel. 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.

A related request for a preliminary ruling was sent to the ECJ in May 2018 (OGH 17.5.2018, 9 OB 44/17m), where the Austrian Supreme Court wanted to know whether European law (Art. 85 EC, 81 EU and Art 101 TFEU) is to be interpreted as meaning that, in order to maintain the full effectiveness of those provisions and the effectiveness of the prohibition resulting from those provisions, it is also necessary that persons can claim from cartelists compensation for damages which are not active as suppliers or customers on the market, but affected by the cartel, but under legal rules for subsidies grant loans to customers of the products offered on the market affected by the cartel. The damage done to these persons is that the loan amount granted is a percentage of the product costs and was higher than it would have been without the cartel agreement, which is why they could not invest these amounts profitably. The Supreme Court reasoned that, under national Austrian law, such damages would not be recoverable as the legal connection was not sufficient. However, the Court had doubts whether such result was compatible with European law.

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 case 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.

A 2017 amendment to Austrian competition law introduced a new chapter, Sec 37a to 37m, into the Cartel Act and transposed the EU Damages Directive into national law.

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). 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 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 Court of Appeals of Vienna (*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.

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. In the past, applications for findings were rejected for lack of interest (OGH 8.10.2008, 16 Ok 8/08), e.g. where the interest for a declaratory action was based on damages sought. See the answer to question 3.1. A 2013 amendment introduced an explicit provision into the Cartel Act, establishing that seeking compensation for damages creates a sufficient legal interest for an action for declaratory relief. This new rule applies to any application filed on or after 1 March 2013, irrespective of the time the infringement occurred.

Private individuals 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 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) in case of a culpable breach.

Both the Austrian and the EU prohibition of cartels and abuse of market dominance provisions are generally considered as protective rules (*Schutzgesetze*) according to the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). Moreover, literature mostly agrees that competition law does not only protect free competition (and thereby competitors), but also customers. Therefore, competitors as well as customers may bring a **tort claim in civil or commercial courts** if they suffered harm. Possibly, agreements in place can also support claims depending on their contents, e.g., plaintiffs could argue that defendants had 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).

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 are not always initiated, and damages will only be adjudicated in very clear-cut cases.

For **collective claims**, a draft amendment to the Austrian Civil Procedure Code (*Zivilprozessordnung*) was proposed some years ago, aiming to introduce group trials and exemplary legal proceedings, but did not become law. 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 which then asserts the assigned claims in its own name. As persons concerned 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 mean that the values of the individual claims are added up for reasons of establishing jurisdiction. Consequently, the district (generally competent for 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.

Criminal courts will only enforce private damage claims connected with criminal proceedings against the civil defendant, i.e. only the criminal court trying the respective defendant has jurisdiction. As experience teaches, 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 explicitly ruled that Austrian civil courts have jurisdiction to hear private damage 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 banking cartel case, the Austrian Supreme Court confirmed that all market participants (including the indirectly damaged) have standing to bring private damage claims.

When the EU Damages Directive was implemented into Austrian law in 2017, several provisions improving the procedural position of plaintiffs have been introduced – see below for more details.

1.8 Is the judicial process adversarial or inquisitorial?

Before the **Cartel Court**, 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, on the applicant – a private or public agency – rests the practical burden 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 damage 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.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes – see the answer to question 2.2.

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). 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 which may be available and describe in each case the tests which 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 (still) is 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 may adopt 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 damage 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 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 such 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 somewhat reduced by a Supreme Court decision, ruling that an antitrust law infringement only constitutes an infringement of Sec 1 of the Unfair Competition Act where the former infringement cannot be justified by any plausible interpretation of the law (*vertretbare Rechtsauffassung*) (OGH 14.7.2009, 4 Ob 60/09s *Anwaltssoftware*).

The (new) 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 interpretation play an important role.

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

(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).

The concepts of **adequate causation and protective scope** need further explanation: 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 chain of events. The protective scope concept means that the rule infringed aims at protecting from such harm as has occurred. The textbook example is the case of an underground cable being damaged during construction works. While the company owning the cable is clearly protected by the rules on property, its customers (e.g. being supplied with electricity or communications) are arguably not within the protective scope of these rules (protecting the property of the utility company), even if they suffer damages because of, e.g., the interruption of supply.

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 which 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*) and loss of profit (*entgangener Gewinn*) can be claimed. Actual harm has occurred if existing property or rights are affected. Loss of profit encompasses harm to future opportunities. While previously a claim for loss of profit was subject to the defendant having acted grossly negligent or intentional, under the new law on cartel damages the compensation generally includes loss of profit. Further, 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*). In this context, the 2017 amendment to the Cartel Act containing a (rebuttable) presumption that a cartel causes harm, 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 Authority may support the civil court in determining the amount of the damage.

To date, there are only few final decisions dealing with private cartel law damage claims. At this moment, no decision, in which damages were awarded, is publicly available, only one has been decided, i.e. the Grazer Driving School case, where damages have been 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). The reason why this case was not finally decided by the Supreme Court may be the relatively small amounts claimed.

There are cases pending were the future may see the award of damages. However, cases may be terminated by settlements before reaching 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 (like EC Rules) 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 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 damage 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 must, based on the evidence presented, 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 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 that the applicant established that sales by defendant were 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 estimation by the court, see the answer to question 3.2. On the closely 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 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.

Where a damage 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-facia* 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.

Since the 2017 amendment, Austrian law has contained 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 plaintiffs' positions. Further provisions support this effect, such as the binding effect of final decisions by European or national competition authorities: the final decisions of such competition authorities, by which a violation of antitrust law has been established, are binding (*Bindungswirkung*) on the Austrian civil courts. Defendant cartelists can no longer challenge the 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 which may be put forward by either side? Is expert evidence accepted by the courts?

Austrian law generally does not restrict the forms of permissible 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 heavily rely on expert witnesses they have appointed themselves. Such experts will work closely with and in support of the judge. The importance of their activities in collecting, analysing and interpreting data and the written opinions they eventually will deliver cannot be overestimated and shall receive the utmost attention.

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)?

Until the 2017 amendment, 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.

Under the 2017 amendment to the Austrian competition law, 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). 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 additionally consider the effectiveness of the public enforcement when judging the proportionality of the request. Documents, which were prepared specifically for the proceedings conducted by the competition authority, which the competition authority has 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 "**black list documents**" must not be ordered at any time, unless such documents or information is 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 to appear. 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; or if they are bound by professional secrecy 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 a 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 Article 101 or 102 of the TFEU, which would contradict a Commission decision on the same agreements or concerted practices.

The binding effect (*Bindungswirkung*) of final decisions by European or national competition authorities has been explicitly reiterated by the 2017 amendment. The binding effect encompasses the verdict and those facts necessarily supporting such verdict, but not each part 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, both under 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. The Austrian Supreme Court (28.11.2014, 16Ok10/14b and 16 Ok 9/14f) has further held that access to 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 2017 amendment implementing the EC Damages Directive may also include evidence containing confidential information. However, the court, prior to ordering disclosure, 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. Finally, the court can order an expert witness to prepare a summary not containing any confidential information.

In criminal proceedings, the public can be excluded from hearings where this is necessary for confidentiality reasons. While access to file 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. The Cartel Court shall give the parties the ample opportunity to specify those parts of the decision which they would like to exclude from the publication; subsequently, the judge must decide on the version to be published. Following the 2017 amendment, the final decision rejecting or dismissing an application and decisions on requests for an interim injunction must also be published.

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. However, 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. 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 has exercised this right.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

There is no defence of justification by public interest available.

There is a general exemption from the cartel prohibition (Article 101 para 3 of the TFEU and Sec 2 of the Cartel Act) stating that cartels which 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 which do not a) impose on the undertakings concerned restrictions which 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. This contains some "public" elements and therefore should be mentioned here.

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

The 2017 amendment to the Cartel Act introduced an explicit provision governing passing on situations, 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 derived from general principles of damage law. While the case law in Austria is not very far developed on passing on, German courts, while generally accepting the defence, recently discussed concepts to restrict this defence.

Further, the 2017 amendment confirmed that 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 possibilities of orders by the court for the presentation of evidence by the opposing party are 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*). 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 after the 2017 amendment, 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 of 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 has terminated.

Under the **Unfair Competition Act**, the limitation period for cease and desist orders is six months as of the point in time when the (potential) plaintiff has 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 damage 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.

Again, the 2017 amendment, brought significant changes about the statute of limitation. The Cartel Act now explicitly stipulates that damage claims based on an infringement of competition law become time-barred after five years from the point of time at which the harmed person becomes aware (or should have reasonably become aware) of the infringer, the damage and that the behavior which caused the damage constitutes a competition law infringement. This is supplemented by an objective limitation period, according to which the claim for compensation becomes time-barred in 10 years after the occurrence of the damage. None of these limitation periods starts unless the infringement was terminated. This new law applies to older claims which have not been time-barred on December 26, 2016, unless old rules effective on that date are more beneficial for the harmed party.

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 has become 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 reasonable time.

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 need to 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.

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, 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.

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. If success is only partial, the costs will be awarded *pro rata*. The amount of recoverable costs 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. While we are not aware of antitrust cases where this has been used, in other areas of law such third-party litigation financing occurs frequently.

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, though this was improved by the 2017 amendment. A decision may now 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 cases showing fundamentally new questions of law.

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 one applicant and/or a reduction of fines for any others. However, no general immunity from civil claims is granted. Since the 2017 amendment, 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, though harmed plaintiffs cannot receive payment from other defendants.

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 a large discretion in determining fines and may well (negatively) consider when evidence is withheld. The leniency applicant has no general right of refusal, and just a few categories of documents are protected against disclosure. For more details, see the answer to question 4.5.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The amendment to Austrian competition law implementation of the EU Damages Directive entered into force on May 1, 2017, which led to a further strengthening of private enforcement. The Cartel Act now contains a rebuttable presumption that cartel infringements cause harm.

Under certain circumstances, small- or medium-sized undertakings and the leniency applicant receiving full immunity from fines are privileged in that they will be held liable only *vis-à-vis* their direct and indirect purchasers and providers.

Quite new to Austrian civil procedure is the introduction of disclosure provisions. Even third parties can be ordered to disclose evidence, subject to a balance of interests. Furthermore, evidence as contained in the files of courts and authorities may be subject to disclosure. For such evidence, the balance of interest also must consider the effectiveness of public enforcement. Documents which include, among others, information which was prepared specifically for these proceedings may only be disclosed after the competition authority has terminated the proceedings. Leniency statements and settlement submissions must not be disclosed at any time.

In the past experience has shown that plaintiffs may have trouble when conclusively stating the facts to support their claim. This is mitigated under the new law, as "*the action has to be at least substantiated to the extent that it contains those facts and evidence which are reasonably available to the plaintiff and which sufficiently support the plausibility of a claim for compensation*" (see also the answer to question 4.2 above).

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The Damages Directive has been implemented.

11.3 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.

The (new) Sec 37a to 37m of the Cartel Act implement the EU Damages Directive. Sec 37a to Sec 37g are applicable to damages claims, concerning harm which occurred after December 26, 2016 only. Therefore, *inter alia*:

- 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,

are only applicable to damages which occurred after December 26, 2016.

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 which have not been time-barred on December 26, 2016. 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 competition authorities instead of one year) apply in case they are more beneficial for the damaged party (see also the answer to question 6.1).

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

There are no other proposed reforms relating to competition litigation.

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