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The International Comparative Legal Guide to:

Competition Litigation 2013

5th Edition

A practical cross-border insight into competition litigation work

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The International Comparative Legal Guide to: Competition Litigation 2013

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1 General

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

Competition litigation or private enforcement – provided the terms are not restricted to civil damage claims only – has a comparatively long tradition in Austria.

As early as 1993, the Cartel Act (*Kartellgesetz*) has afforded standing to private bodies to bring applications for cease (*Abstellung*) orders or for decisions of finding (*Feststellung*) before the Austrian Cartel Court (*Kartellgericht*). Damage claims could not and cannot be entertained before the Cartel Court.

Under certain circumstances, a breach of competition law can also constitute an infringement of Sec 1 of the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*). Similar to the Cartel Act, the Unfair Competition Act provides for desist (*Unterlassung*) orders. In addition, recovery (*Beseitigung*) and/or damages (*Schadenersatz*) may be awarded by the commercial courts (*Handelsgerichte*). Both the Cartel Act and the Unfair Competition Act foresee the possibility to have the final decision published.

Finding, desist, recovery and damage actions, as well as actions to have, for example, a contract nullified may be brought under general civil law. However, while there are several cases pending (in particular, following-on from the *Austrian Elevators and Escalators* cartel case), there are, to date, only a very few final decisions on private cartel law enforcement before the civil courts (*Zivilgerichte*). One concerns a follow-on private damage claim against a driving school where damages were awarded (District Court [*Bezirksgericht*] Graz 16-3-2007, 4 C 463/06 h as confirmed by Regional Court [*Landesgericht für ZRS*] Graz 17-8-2007, 17 R 91/07 p *Driving Schools*); another one concerns the payment card business where the claims were found to be time-barred (Commercial Court Vienna 3-9-2009, 22 Cg 138/07 y).

Besides, breaches of competition law can constitute criminal offences. In particular, the Austrian Criminal Act (*Strafgesetzbuch*) penalises bid-rigging. Cartel behaviour may also qualify as fraud. Anyone harmed is entitled to join the criminal proceedings in order to seek compensation for its civil law claims (*Privatbeteiligtenanschluss*). The rights of such parties have been strengthened by an amendment to the Criminal Procedure Act (*Strafprozessordnung*).

Finally, it shall be mentioned that breaches of competition law may also trigger labour law litigation. This can, for instance, be the case where the contract of an employee having engaged in anti-competitive behaviour is terminated and the employee challenges such termination. Litigation before the labour and social courts (*Arbeits- und Sozialgerichte*) is, as a rather collateral aspect, not further discussed here.

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

As mentioned under question 1.1, a private action may be based on the Cartel Act, the Unfair Competition Act and/or general civil law (in conjunction with competition law). However, not all potential plaintiffs can invoke every legal basis – see the answer to question 1.5. According to a proposed amendment of the Cartel Act, which is likely to enter into force on Jan 1, 2013, the Cartel Act will explicitly state in the future that anyone guilty of committing an infringement of competition law is also obliged to compensate the resulting damages.

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

In principle, the legal basis for private actions in Austria is national law (see also under questions 1.1 and 1.2). As Austria is a Member State of the EU, particularly Articles 101 and 102 TFEU are directly applicable and the case law of the ECJ on private enforcement is to be observed (most notably, ECJ 20-9-2001, C-453/99 *Courage/Crehan* and ECJ 13-7-2006, C-295 and 298/04 *Manfredi*).

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

The Cartel Court, a specialised division of the Court of Appeals of Vienna (*Oberlandesgericht Wien*), is exclusively competent to hear applications pursuant to the Cartel Act. Remedies against its decisions are heard by the Austrian Supreme Court *(Oberster Gerichtshof – OGH*) sitting as the Cartel Court of Appeals (*Kartellobergericht*).

Actions under the Unfair Competition Act are heard by commercial courts. However, save for Vienna (where there is a special commercial court both at district and regional level), the ordinary civil courts sit as commercial courts in such cases. Other actions in competition cases are not dealt with by specialist courts – see also under 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?

Actions before the Cartel Court: Pursuant to Sec 36 para 4 of the Cartel Act, any (association of) undertaking(s) having a legal or economic interest may bring an application before the Cartel Court. In practice, the interest criterion is not applied very strictly. However, an application for finding requires a special interest. In several recent cases, the respective applications were rejected for lack of such interest (*cf.* OGH 8-10-2008, 16 Ok 8/08). See further question 3.1 below.

While private individuals do not have standing before the Cartel Court, applications may be brought by the Austrian Chamber of Commerce (*Wirtschaftskammer Österreich*), the Chamber of Employees (*Bundeskammer für Arbeiter und Angestellte*) and the Committee of Presidents of the Chambers of Farmers (*Präsidentenkonferenz der Landwirtschaftskammern Österreichs*). Further, the Federal Competition Agency (*Bundeswettbewerbsbehörde*), the Federal Anti-trust Prosecutor (*Bundeskartellanwalt*) and the sector-specific regulators have standing before the Cartel Court.

Actions based on the Unfair Competition Act: Competitors may (alternatively or additionally to an application before the Cartel Court) file a desist and/or recovery action according to Sec 1 para 1 in conjunction with Sec 14 para 1 and Sec 15 of the Unfair Competition Act with the commercial courts. In the case of an intended or negligent breach, damages can also be claimed by customers (*cf.* Sec 1 para 1 in conjunction with Sec 16 of the Unfair Competition Act and leading case OGH 24-2-1998, 4 Ob 53/98 t). As under the Cartel Act, actions based on the Unfair Competition Act may also be brought by the above-mentioned representative bodies.

Actions under general civil law: Both the Austrian and the EU prohibition of cartels and abuse of market dominance provisions are generally considered as protective rules (*Schutzgesetze*) within the meaning of Sec 1311 of the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). Moreover, most commentators agree that current competition law does not only protect free competition (and thereby competitors) but also customers. As a consequence, aggrieved competitors as well as harmed customers may bring a tort claim. Whether or not a claim can also be based on an existing agreement (provided the potential claimant is a party to that agreement) largely depends on the stipulations of such agreement. In some of the currently pending cases, plaintiffs argue that defendants would have infringed (pre-) contractual information or notification obligations by not advising that prices were (allegedly) cartel-inflated. Further, a claim may also seek to have an agreement nullified because of breach of competition law. In these scenarios, the one having standing is the contractual party. The indirectly harmed (e.g. the customer of someone who purchased from a cartelist) generally only have a valid claim under very limited circumstances (see also the answer to question 5.2).

Private enforcement before the criminal courts: Both individuals and companies having a civil law claim can seek compensation before the criminal courts provided criminal proceedings against the defendant(s) are pending.

As regards class-actions, a draft amendment to the Austrian Civil Procedure Code (*Zivilprozessordnung*), which would have introduced group trials and what could be referred to as "specimen proceedings" was heavily criticised and has not become law. There is, thus, only limited scope for collective claims. Under certain conditions, however, individual proceedings can be brought together or subsequently be joined by the competent court. In that regard, it can also be possible to sue several defendants in Austria even if only one of them is seated in Austria. Moreover, (potential) plaintiffs may assign their claims to one entity which then brings the assigned claims together in its own name. However, such assignment does not necessarily mean that the values of the various claims are to be added-up. Hence, the district (generally competent for claims of up to EUR 10,000) rather than the regional court may remain competent for such a "group action".

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

As mentioned under question 1.4, the Cartel Court is exclusively competent to hear applications pursuant to the Cartel Act and the commercial courts to hear claims based on the Unfair Competition Act. Should a claim against an entrepreneur (*Unternehmer*) registered in the commercial register (*Firmenbuch*) relate to a commercial agreement (*unternehmensbezogenes Geschäft*), the commercial courts also hear claims otherwise to be brought before the ordinary civil courts.

The rules on civil jurisdiction (*Jurisdiktionsnorm*) determine which local commercial or civil court, i.e. of what region, is competent (*örtliche Zuständigkeit*).

Private enforcement before criminal courts can only take place within the proceedings against the relevant defendant, i.e. only the criminal court trying the respective defendant has jurisdiction.

1.7 Is the judicial process adversarial or inquisitorial?

Before the Cartel Court, the judicial process is inquisitorial. However, even there, it is principally on the applicant to submit the facts necessary to establish an infringement. The proceedings before the commercial and ordinary civil courts are adversarial.

While criminal proceedings are to some extent inquisitorial, the criminal courts and public prosecution services focus on whether or not the defendant is guilty of a criminal offence. Unless all requirements needed in order to receive compensation are, or become during the proceedings, apparent (a party having joined criminal proceedings may also request further evidence to be heard) the compensation will not be granted but the persons harmed will be referred to civil litigation.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes – for further details, 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 expressly provide for interim injunctions (*einstweilige Verfügungen*). Pursuant to Sec 48 of the Cartel Act, the Cartel Court may grant interim relief where the requirements for issuing a cease order are shown (*bescheinigt*), which means a lower standard of proof than for an actual cease order (see also under question 4.1). According to Sec 24 of the Unfair Competition Act, the court can issue interim

measures to safeguard a later desist order. In proceedings based on the Unfair Competition Act, it is usual, in practice, to ask for interim relief.

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 would be put at (a significant) risk, interim relief under general civil law requires that (*cf.* Sec 379 *et seq.* of the Civil Enforcement Act [*Exekutionsordnung*]).

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.

As mentioned under question 1.1, the Cartel Act provides for cease orders and decisions of finding. A cease order will be issued where, at the point of time of the decision, there is (still) an actual infringement of competition law. In one case, the Cartel Court of Appeals has held that where the infringement has already ended but there are still consequences from the infringement, a cease order may still be issued (OGH 19-1-2009, 16 Ok 13/08); the case was referred back to the first instance and then settled. Otherwise, the Cartel Court may adopt a decision of finding (that there was an infringement) provided the applicant establishes a special interest in such finding. According to the proposed amendment to the Cartel Act, which will likely enter into force on Jan 1, 2013, the Cartel Act will in the future also provide for a decision of finding as preparation of actions for damages (which, currently, is seen as not constituting sufficient interest for an action for finding). A desist order pursuant to the Unfair Competition Act requires, first, that the infringement occurred in the course of business (*im geschäftlichen Verkehr*). In competition cases, this criterion is often met as competition law only addresses undertakings and their acts and omissions typically take place in the course of business. Moreover, the infringement must appreciably affect competition. Again, this criterion will typically be met in competition cases as the competition law also only prohibits appreciable behaviour. Finally, there must be a risk that the infringement will occur (*Begehungsgefahr*) or will be repeated (*Wiederholungsgefahr*). Once an infringement has occurred, the risk that it will be repeated is assumed. Thus, the defendant has to prove why this risk is practically excluded or extremely unlikely to materialise. When an infringement has occurred and an unlawful situation (*gesetzwidriger Zustand*) still exists, the competent commercial court may, upon request, also issue a recovering order. The defendant is then obliged to mend such unlawful situation to the extent this is within its discretion. Damages for infringing the Unfair Competition Act may be awarded under the same requirements as under general civil law. Generally, it is to be noted, however, that the relevance of the Unfair Competition Act for private anti-trust enforcement has recently been reduced by a Supreme Court decision making it clear that an anti-trust 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*).

In competition cases, the requirements for an award of damages under general civil law are the following:

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

(ii) such infringement has (adequately) caused:

a. (measurable) harm to the defendant;

b. the harm must be within the protective scope of the infringed competition provision (*Rechtswidrigkeitszusammenhang*); and

c. the defendant must have acted negligently or with intention (fault).

In particular, the concepts of adequate causation and protective scope warrant 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 in its nature apt to cause the harm, i.e. the harm has not only occurred because of an extraordinary chain of events. The protective scope concept means that the rule breached must aim at protecting from such harm as has occurred. A classic example is the case of a cable being cut during construction works. While the utility owning the cable is clearly protected by the rules on property, its customers are arguably not coming within the protective scope of these rules (protecting the property of the utility company).

Where a plaintiff relies on a contract, the provisions thereof and their interpretation obviously play an important role.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

Under Austrian law, the concepts of actual harm (*positiver Schaden*) and loss of profit (*entgangener Gewinn*) are to be distinguished. Actual harm means the harm occurred to existing property or rights. Loss of profit means the harm occurred to future opportunities. Generally, loss of profit is only to be compensated where the defendant has acted with gross negligence or intention. Sec 16 para 1 of the Unfair Competition Act foresees that irrespective of the level of fault, loss of profit is also awarded. Similarly, the ECJ has stated in its *Manfredi* judgment that, in any case involving a breach of Article 101 TFEU, loss of profit has to be compensated.

In principle, there are two methods for calculating the damages. According to the specific calculation method (*konkrete Schadensberechnung*), a comparison between the plaintiff's property after and (hypothetically) without the harmful event is made. Pursuant to the abstract calculation method (*objektive Schadensberechnung*), specific circumstances (of the person harmed, etc.) are not taken into account. Rather the "objective value" of the harmed items (typically their market price) is to be determined. While the specific calculation quasi automatically takes into account, for instance, also any passing on (resulting in lower or no damages), the abstract calculation does not. For this reason, most commentators favour the specific calculation. However, there are dissenting opinions and cases (not concerning competition infringements) where the abstract calculation has been applied.

Moreover, where it is certain that a party is entitled to damages but the exact amount is impossible or unreasonably difficult to establish, Sec 273 para 1 of the Civil Procedure Code entitles the court to assess the amount in its discretion (*nach freier Überzeugung*). Where some claims raised within the same action are comparatively 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 exact amount that should be awarded according to its discretion (*cf.* Sec 273 para 2).

Exemplary damages are not available under Austrian law. The planned amendment of the Cartel Act (see, *inter alia*, the answer to question 1.2), however, foresees that the court, when ascertaining the damage pursuant to Sec 273 of the Civil Procedure Code, may take into account the advantage gained by the defendant(s) as a result of the infringement.

3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

In principle, damages are assessed on the basis of the harm suffered by the plaintiff (see, however, also question 3.2 above). Whether or not fines have been imposed by the Cartel Court (the relevant authority in Austria inflicting fines) on the defendant is not a relevant criterion.

4 Evidence

4.1 What is the standard of proof?

In principle, the court must be convinced by the relevant evidence.

Regarding damages under the Unfair Competition Act, the Supreme Court has lowered the standard of proof by holding that the plaintiff only has to establish that (some) harm has occurred with a high probability (*cf.* OGH 15-9-2005, 4 Ob 74/05v).

Under certain circumstances (in particular, where the plaintiff has for objective reasons considerable difficulties to prove something), courts are also willing to accept some *prima facie* evidence. For example, in predatory pricing cases, it was held sufficient that the applicant established that sales were below costs by data of comparable undertakings (*cf.* OGH 9-10-2000, 16 Ok 6/00 and 16-12-2002, 16 Ok 11/02).

On the rules set forth in Sec 273 of the Civil Procedure Code, see already the answer to question 3.2. On the closely related question of the burden of proof, see the answer to question 4.2.

4.2 Who bears the evidential burden of proof?

In principle, the plaintiff must prove all requirements for granting the sought remedy (see on these requirements under question 3.1).

Where a damage claim is based on the infringement of a protective rule or an agreement, the defendant must prove that it bears no fault. Moreover, according to court practice, the plaintiff only has to prove the infringement and that harm has occurred to it but not causality (*cf.*, for example, OGH 16-9-1999, 6 Ob 147/99g).

4.3 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 does not restrict the forms of permissible evidence. Expert evidence is accepted. However, in practice, often the courts only rely on expert witnesses they have appointed rather than on the opinions of expert witnesses instructed by one of the parties.

4.4 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)?

Austrian law does not have discovery rules in the narrow sense.

During proceedings, a party can, pursuant to Sec 303 *et seq*. of the Civil Procedure Code, request the court to order the other party to produce certain documents. To this end, the requesting party needs to specify the documents in detail. The law sets out grounds on which a 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 taken into account when the court evaluates the evidence.

Further, Sec 184 of the Civil Procedure Code allows the parties to a trial to ask each other questions in particular with a view to establish the facts of a case and the relevant documents.

Last but not least, courts may, on their own initiative or upon request, ask other courts or authorities to provide their files. In principle, courts and authorities are obliged to comply with such requests unless there are other overriding considerations (such as, in particular, secrecy obligations – see also the answer to question 4.7).

4.5 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 have to bear any additional costs that their non-appearance may cause.

Witnesses may, however, refuse to testify if they would otherwise risk criminal prosecution or a direct financial disadvantage; or if they are bound by professional secrecy or would otherwise divulgate business secrets.

Any witness may be interrogated by either party. In practice, the (preceding) judge starts the interrogation and either party is afforded the possibility to ask (additional) questions. A party not calling the witness is not restricted to the facts revealed in direct examination.

4.6 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?

Pursuant to Article 16 of the Regulation No 1/2003 (EC), 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. As regards the probative value of Austrian competition decisions, commentators argue that they have binding effect (*Bindungswirkung*) on the parties to the proceedings (leading to the decision in question). However, this has, as far as can be seen, not yet been finally tested in follow-on private enforcement cases (in the mentioned *Driving School* case, the defendant did not contest its involvement in a cartel). Whether other national competition decisions have binding effect is even more unclear. In order to alleviate this uncertainty, the proposed amendment (see, *inter alia*, question 1.2 above) foresees that the Cartel Act will explicitly provide in the future that the civil courts are bound by final decisions of competition authorities holding that an undertaking committed an infringement of anti-trust law. In practice, already now, it regularly is helpful for plaintiffs to have any decision establishing an infringement of competition rules by the defendant (irrespective of whether or not such decision is formally of binding effect).

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

Both under the Cartel Act and the Unfair Competition Act, the general public may, upon request, be excluded from oral hearings if this is necessary for the protection of business secrets. While the Civil Procedure Code does not expressly foresee this possibility, it can be argued that also in general civil law proceedings the public should be excludable for commercial confidentiality reasons.

Moreover, according to Sec 39 para 1 of the Cartel Act, a joinder of proceedings instigated by the Federal Competition Agency or the Federal Cartel Prosecutor with proceedings instigated by another party may only take place with the consent of the parties. Sec 39 para 2 of the Cartel Act provides that, in principle, third persons may only access the files with the consent of the parties to the proceedings concerned. Whether this also applies where a court or authority requests the files of the Cartel Court is disputed. The Supreme Court has, however, made it clear that the Cartel Court's file is to be given to the criminal prosecutor (*Staatsanwalt*) upon request (OGH 22-6-2010, 16 Ok 3/10). This provision is currently tested in a request for preliminary ruling before the ECJ (C-536/11 *Bundeswettbewerbsbehörde vs Donau Chemie*).

Sec 219 para 2 of the Civil Procedure Code is similar to Sec 39 para 2 of the Cartel Act. However, under the Civil Procedure Code, even without consent, third parties may access the files where they can show a legal interest in doing so.

In criminal proceedings, there is also a possibility to have the general public excluded 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 file and a right to be present at the hearings, which can only in exceptional cases (in particular, where the investigation would be obstructed) be restricted.

Finally, it should be mentioned that Austrian procedural law does not have express rules on the protection of business secrets amongst (a multitude of) parties to specific proceedings.

4.8 Is there provision for the national competition authority in Austria (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 a matter of law (see the answer to question 1.1). It is also very common for them to actually 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, Art 15 para 3 of the of EC Regulation No 1/2003 stipulates that the European Commission and national competition authorities can submit upon own initiative written statements to Member State courts, provided that this is required for a coherent application of Art 101 or 102 TFEU. In Austria, the respective national competition authority is the Federal Competition Agency. However, as far as can be seen, there is no Austrian private enforcement case yet where the European Commission or the Federal Competition Agency would have made use of this right.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Apart from state compulsion (which may exclude a competition law infringement in the first place), it is hardly conceivable that a defendant successfully argues that it infringed competition law in the public interest. However, it may well be argued that the behaviour coming within the ambit of competition law is justified (*cf.* Article 101 para 3 of the TFEU and Sec 2 of the Cartel Act) and that, therefore, in fact no competition law infringement has occurred.

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

Under Austrian law, only the directly harmed are generally entitled to damages (see already under questions 1.5 and 3.1). Where those have passed-on damages, the indirectly harmed can, under certain limited circumstances, have a claim. In such scenarios, defendants may also advance the passing-on defence if sued by say their direct customer. However, as far as can be seen, there is no final decision dealing with these issues against the background of a private anti-trust law enforcement case. According to the proposed amendment of the Cartel Act (see, *inter alia*, the answer to question 1.2), the Cartel Act will encompass a rule stipulating that a claim for damages is not excluded because the good or the service initially purchased at an (allegedly cartel-inflated) excessive price has been sold to somebody else.

Also, as elaborated under question 3.2, passing-on is, in principle, taken into account in calculating any damages where the specific calculation method is used. However, should the abstract calculation method be employed, passing-on would be excluded.

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?

The Cartel Act does not lay down limitation periods for applications for cease orders or decisions of finding. However, as elaborated under question 3.1, cease orders are generally only issued if the infringement is still on-going. As regards decisions of finding, the required special interest will be more difficult to show, the longer the infringement has already ended.

Pursuant to Sec 20 para 1 of the Unfair Competition Act, the limitation period for 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, desist claims are limited to three years after the end of the infringement. However, this is, according to Sec 20 para 2 of the Unfair Competition Act, not the case where an illegal situation remains to be present. As long as this is the case, desist and/or recovery claims may be brought.

Under general civil law, the limitation period for damage claims is three years as of knowing the harm and the identity of the (potential) defendant. Under certain circumstances (in particular, where also a criminal offence is committed), it could be argued that a 30-year period is relevant.

According to the proposed amendment of the Cartel Act (see, *inter alia*, question 1.2 above), the limitation period for claims for damages will be interrupted in the case of fine proceedings and expires six months after a decision has become final or any other (final) termination of initiated fine proceedings.

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 competition proceedings vary considerably. On average, proceedings do not last less than a year (in each instance). There are hardly any possibilities to expedite proceedings (save for not appealing the first instance decision).

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)?

In general, parties do not require any permission to discontinue competition proceedings. However, Sec 36 para 5 of the Cartel Act foresees that the Federal Competition Agency and/or the Federal Cartel Prosecutor can, within a period of fourteen days as of service of the declaration that applications are revoked, continue proceedings against the defendant on their own account. 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.

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 wilful (*mutwillig*).

Under general civil law, the unsuccessful party has to bear the costs of the court and the successful party.

A party joining criminal proceedings is entitled to have its costs reimbursed if it receives compensation. If it successfully pursues a follow-on civil action, it can claim the costs of joining the criminal proceedings as necessary for preparation of the civil law suit.

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

Generally, lawyers are not permitted to act on a contingency fee basis.

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

Yes, third party funding is, in principle, permitted. As far as it can be seen, there are no anti-trust cases yet, where this option has actually been used. However, in other areas of law, third party funding has already been employed in Austria.

9 Appeal

9.1 Can decisions of the court be appealed?

As elaborated under question 1.4, decisions by the Cartel Court can be appealed to the Cartel Court of Appeals. However, the Cartel Court of Appeals does generally not review the facts found by the first instance decision but only the application of the law.

Decisions by the district, regional civil or commercial courts can also be challenged. Under certain circumstances, there is a further remedy available against the appeal decisions.

The same holds true of decisions by the criminal courts.

10 Leniency

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

Since January 2006, leniency has been available under Austrian law. Leniency applications must be filed with the Federal Competition Agency and may result in full immunity from fines but do not afford immunity from civil claims.

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) take into account when evidence is withheld. On the question of refusal to produce certain documents in civil litigation, see already the answer to question 4.4.

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- competition litigation;
- joint ventures, cooperation agreements and vertical relationships such as distribution systems;
- advice with regard to all aspects of market dominance and abuse issues;
- representation of undertakings subject to antitrust proceedings before national and European authorities and courts;
- leniency applications; and
- Austrian and EU merger control as well as co-ordination of multi-jurisdictional filings.

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