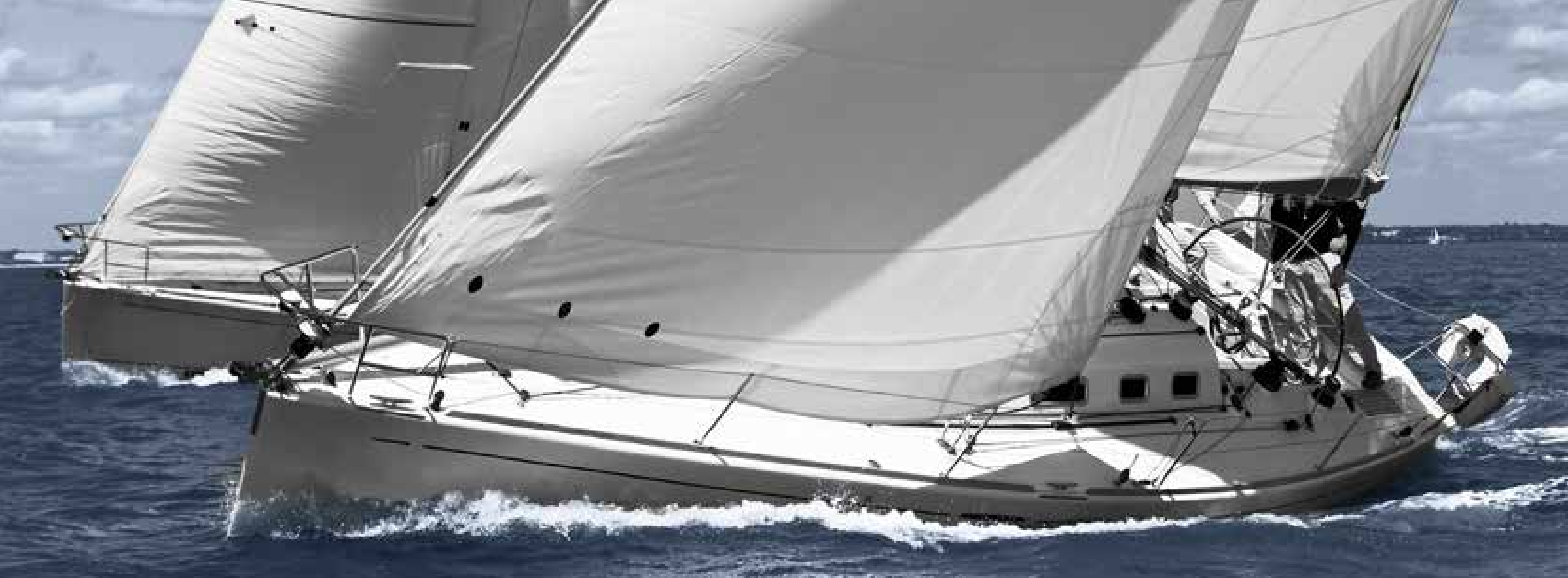

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The International Comparative Legal Guide to:

Competition Litigation 2016

8th Edition

A practical cross-border insight into competition litigation work

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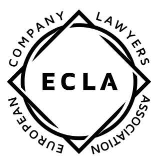

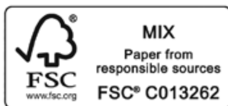

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EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Competition Litigation.*

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of competition litigation.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting competition litigation, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in competition litigation in 36 jurisdictions.

All chapters are written by leading competition litigation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Euan Burrows and Mark Clarke of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Chapter 6

Austria

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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.

Since 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*). Similarly 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 has 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). In addition, the ECJ has recently handed down a judgment following a request for a preliminary ruling regarding the question of compensation of damages asserted by customers of third parties (hence, of undertakings that did not participate in a cartel – so-called "umbrella plaintiffs" and "umbrella claims", respectively). While the Austrian Supreme Court had come to the conclusion that Austrian tort law does not provide for the possibility to assert such claims, the ECJ has ruled 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). According to the ECJ, a victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, 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 that cartel. The ECJ left it up to the referring court to determine whether those conditions are satisfied. It will be interesting to see the effect of this preliminary ruling on pending private enforcement proceedings in Austria.

Apart from the above said, 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 should 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 an amendment to the Austrian competition rules, which entered into force on 1 March 2013, the Cartel Act now explicitly states in its Sec 37a para 1 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, Articles 101 and 102 TFEU, in particular, are directly

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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? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

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 the past, several applications were rejected for lack of such interest (*cf.* OGH 8-10-2008, 16 Ok 8/08). See further question 3.1 below. Since the amendment, the Cartel Act contains an explicit provision (Sec 28 para 1a) according to which the required legal interest is also given if a finding decision is requested in order to later on seek compensation for damages. Notably, this new rule applies to any application lodged on or after 1 March 2013, irrespective of when the infringement took place (thus, also if it was before the entry into force).

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. Hence, the persons concerned have to take action in assigning their claims. Therefore, such a "group action" is based on an "opt-in" basis. It should be noted that 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 20,000) 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. Otherwise, the general civil courts are competent. The district court will deal with claims having a subject-matter of up to EUR 20,000. The regional courts are competent for any higher amounts. 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 Does Austria have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction and if so, why?

Austria may be considered a preferable forum for claimants as the Austrian Supreme Court has explicitly held that, based on Article 6 para 1 of the Brussels I Regulation, now Article 8 para 1 of the Brussels Ia Regulation (concerning legal proceedings instituted, authentic instruments formally drawn up or registered and court settlements approved or concluded on or after 10 January 2015), Austrian civil courts are competent to hear private damage actions

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in all cases where at least one of the cartelists resides or has its corporate seat in Austria. Hence, this is a generous approach that contributes to the fact that actions may be easily brought before Austrian courts even if there is a link to various other countries.

With respect to standing, in the *Hobex* case, the Austrian Supreme Court confirmed that all market participants (including the indirectly damaged) are entitled to bring private damage claims and, hence, have standing.

Other helpful provisions are already contained in the Austrian Code of Civil Procedure. For further details, see the answer to question 4.4.

1.8 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 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 commercial courts 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 (still) is an actual infringement of competition law. In one case, the Cartel Court of Appeals 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. Since the amendment, the Cartel Act also provides for a decision of finding as preparation of actions for damages (which, before, was 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 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 (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).

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).

As already pointed out in the context of question 1.2, the special provision of Sec 37a para 1 of the Cartel Act was introduced with a view to further support the private enforcement of cartel damage claims.

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

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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, 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, 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). See also the answer to question 4.3.

Exemplary damages are not available under Austrian law. However, since the amendment to the Cartel Act (see, *inter alia*, the answer to question 1.2), 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.

As stated above (question 1.1), there are to date only a few final decisions dealing with private cartel law enforcement. At this moment, no decision, in which damages were awarded, is publicly available. The following should be noted in this context: as this is a comparatively new area, issues such as to which extent pleading needs to be detailed, whether also umbrella claims (i.e. claims regarding purchases from non-cartelists), etc. have mainly been addressed by the courts. There are several cases pending that may well see the award of damages once at this stage. Future damage claim cases benefit from the developments that have taken place so far and it is expected that they will take a much shorter time to be finally decided. There is also a case, namely the Grazer Driving School case, where damages have been awarded. However, the decision is not publicly available as, in Austria, only all judgments by the Supreme Court are generally publicised (the final decision in the Driving School case stems from the Appeal Court of Graz).

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?

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.

There is no such thing like a special redress scheme in Austria (apart from private damage claims).

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 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 the answer to 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 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in Austria?

The Austrian Code of Civil Procedure recognises an important provision regarding evidential presumptions; namely Sec 273 – see the answer to question 3.2.

It should be noted in this context that the EU Damages Directive, which will have to be implemented into Austrian law, foresees a presumption that a cartel causes harm. Hence, it may be argued that, unless the defendant cartelists prove that no damages were caused, the court could use Sec 273 para 1 of the Code of Civil Procedure to ascertain the amount of the damages to be awarded.

Further, according to Sec 37a para 3 of the Cartel Act, the final decisions of competition authorities like, in Austria, the Cartel Court but also the European Commission or other European competition

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authority, by which a violation of antitrust law has been established, are of a binding effect (*Bindungswirkung*) to the Austrian civil courts. That is to say that the existence of a cartel is not only established by *prima facie* evidence but the defendant cartelists cannot challenge such existence if it has been finally found by a competition authority.

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 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.

4.5 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)?

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).

4.6 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 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.

4.7 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?

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 was even more unclear. In order to alleviate this uncertainty, the amendment (see, *inter alia*, questions 1.2 and 4.3 above) has introduced a provision, according to which civil courts are explicitly bound by final decisions of competition authorities holding that an undertaking committed an infringement of anti-trust law. In practice, before that, it was regularly helpful for plaintiffs to have any decision establishing an infringement of competition rules by the defendant.

4.8 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. This provision has been subject to a recent preliminary ruling by the ECJ (C-536/11 *Bundeswettbewerbsbehörde vs Donau Chemie*) holding that it is incompatible with EU law. Further, the Austrian Supreme Court (28-11-2014, 16 Ok 10/14b and 16 Ok 9/14f) has 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 file must not impose an excessive burden on the ones who are claiming damages.

To what extent all this applies where a civil court 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). The (extent of) protection of business secrets is not yet resolved topic under Austrian law. The implementation of the EU Damages Directive will likely bring further clarity and, *inter alia*, an explicit protection of leniency applications/statements.

It may further be mentioned that, in criminal proceedings, there is 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 files 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.

With regard to commercial confidentiality, it should further be noted that, as a general rule, decisions by the Cartel Court are now generally published. Before the last amendment to the Cartel Act, this was only the case for decisions by the Cartel Court of Appeals.

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Now, the Cartel Court shall give the parties the opportunity to specify those parts of the decision which they would like to exclude from the publication; subsequently, the preceding judge has to decide on the version that shall be published. Against such a decision, the amendment foresees a possibility to lodge an appeal with the Cartel Court of Appeals within fourteen days.

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.

4.9 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 has standing before civil courts pursuant to national law.

However, Art 15 para 3 of EC Regulation No 1/2003 stipulates that the European Commission and national competition authorities can submit upon their own initiative written statements to Member State courts, provided that 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. 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 the answers to 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, a limitation of the passing-on defence has been introduced by the amendment. Pursuant to the new provision (Sec 37a para 1 of the Cartel Act), a private damage claim by the direct purchaser is not excluded by the fact that the goods or services have been sold on. If read literally, it seems as if cartelists can no longer invoke the aforesaid defence, but the *travaux preparatoires* explain that the corresponding provision in the German Act against Restraints of Competition served as a sample for the amendment. Against the background of that provision, the German Federal Supreme Court has handed down its important *ORWI* decision, which leaves room for the passing-on defence. In addition, the Austrian Supreme Court has in the recent *Hobex* case also relied heavily on the said *ORWI* decision, although in the context of whether or not indirect purchasers have standing; while answering this question in the affirmative, it stated that cartelists should only be held liable once (i.e. either by the direct contractor or, where the circumstances allow it, by a downstream plaintiff). Hence, it can be assumed that the passing-on defence is still available.

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.

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.

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?

According to Sec 17 para 1 of the Civil Procedure Code, third parties with a legal interest in the outcome of a general civil law proceeding 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. Whether or not they join, is the notified parties' decision. However, once notified, a party can no longer (in later right to contribution proceedings, for instance) argue as a defence that the case was not properly handled by the notifying party.

This holds true for private enforcement proceedings. In (public) cartel fine proceedings, the Cartel Court of Appeals has held in previous cases (18-9-2009, 16 Ok 9/09 and 14-07-2011, 16 Ok 3/11) that there is no legal basis for accessory interventions in proceedings before the Cartel Court under Austrian law.

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 ongoing. As regards decisions of finding, the required special interest will be more difficult to show the longer it has been since the infringement has 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.

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Since the entry into force of the amendment (see, *inter alia*, question 1.2 above), the Cartel Act explicitly stipulates that the limitation period for claims for damages is 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 varies 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.

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 elaborated under question 1.5, there are no collective claims in the narrow sense in Austria. If a "group action" is constituted by assignments, for instance, of course a settlement is possible and binds 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 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 generally does 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 the answer to question 4.4.

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.

It may be concluded from the above that in some areas, amendments will not be necessary because of the changes introduced in 2013. For example, Sec 37a of the Cartel Act stipulates that anybody can seek compensation for damages and that interest is to be paid for such damages from the occurrence of the damage onwards.

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Some amendments will be required for the rules on the disclosure of evidence, which are foreseen in Article 5 *et seq*. of the Directive. Currently, Austrian civil procedure law does not contain disclosure rules in the narrow sense (see already the answer to question 4.4). It will be interesting to see in which way the legislator will suggest new provisions meeting the standards that are required pursuant to the Directive. In particular, it is questionable how to measure the "*reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of* [the plaintiff's] *claim*" which constitutes, according to the Directive, the precondition for such a disclosure order by national courts in antitrust damages actions proceedings.

As far as Article 9 of the Directive is concerned, the Austrian legislator has already introduced corresponding rules. Sec 37a para 3 of the Cartel Act foresees that civil courts shall be bound by any decisions of competition authorities finding an infringement of antitrust law.

However, some changes will be required with regard to Article 10 of the Directive, which deals with limitation periods. According to its para 2, Member States shall ensure that the limitation period shall not begin to run before the infringement has ceased and the claimant knows, or can reasonably be expected to know (a) the behaviour and the fact that it constitutes an infringement of competition law, (b) the fact that the infringement of competition law caused harm to him, and (c) the identity of the infringing undertaking. This corresponds to the general requirements for the statute of limitation of Austrian tort claims, namely (a) knowledge of the damage, (b) knowledge of the damaging party, and (c) knowledge of the damaging event.

According to Article 9 para 3, Member States shall ensure that the limitation period for bringing an action for damages is at least five years. In this respect, an amendment will become necessary, because currently, Austrian law generally only provides for a three-year limitation period.

Already since the last amendment, the limitation period is suspended during proceedings before the competition authorities and such suspension ends six months after a legally valid decision or other termination of the proceedings (Sec 37a para 4 of the Cartel Act). According to Article 9 para 4 of the Directive, the suspension shall end at the earliest one year after the infringement decision has become final. Hence, also in this regard, a change is warranted.

While according to Austrian tort law, infringing undertakings are already now jointly and severally liable to compensate damages, changes will be required in order to implement the Directive with regard to the exception concerning small or medium-sized enterprises and the respective counter-exception (Article 11 para 2 and 3). Moreover, amendments will also be required regarding the immunity recipients' restrictions of liability (Article 11 para 4). Currently, immunity recipients are liable as any other cartel member.

Furthermore, changes will likely be introduced as a result of the rules on passing-on laid down in Article 12 *et seq* of the directive. Currently, this issue is highly disputed and there are no clear rules, except for just one Supreme Court decision (see the answer to question 5.2).

As far as the quantification of harm (Article 17 of the Directive) is concerned, already now, Austrian courts have the possibility to apply Sec 273 of the Civil Procedure Code (see the answer to question 3.2). An amendment will be required because of Article 17 para 2 of the Directive which foresees a rebuttable presumption that cartel infringements cause harm. Currently, no such presumption exists in Austria.

Further changes will be required regarding the rules on consensual dispute resolution stipulated in chapter VI of the Directive. Currently, no such rules with regard to antitrust damages proceedings are foreseen.

11.2 Have any steps been taken yet to implement the EU Directive on Antitrust Damages Actions in Austria?

Works to implement the EU Damages Directive have commenced. A first draft piece of (amendment) legislation should become available during the second half of 2015.

For further details on the expected changes, see the answer to question 11.1.

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

Given that an amendment entered into force in 2013, which also brought about changes with regard to competition litigation (in particular the specific provision of Sec 37a of the Cartel Act that exclusively deals with antitrust damages claims), there are currently no proposed reforms in Austria. It remains to be seen to what extent changes will be proposed as a result of the EU Directive on Antitrust Damages Actions.

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