Austria

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Overview of the law and enforcement regime relating to cartels

While Austrian antitrust legislation dates back to 1951, modern enforcement standards were only introduced after Austria's accession to the European Union in 1995. In 2002, Austria switched from a system of criminal responsibility of individuals to a system of monetary fines levied on firms involved in infringements of the antitrust rules. In addition, the 2002 reform established the Federal Competition Authority ("FCA") as an investigatory body with the power to request information and conduct dawn raids. In 2006, a further reform strengthened enforcement, in particular by establishing a leniency programme. Since the mid- to late 2000s, the FCA has relied on the leniency programme and on dawn raids to uncover a number of secret cartels.

The main competition acts in Austria are the *Kartellgesetz* ("Cartel Act"), which contains the body of substantive antitrust law, as well as rules for proceedings in the Cartel Court, and the *Wettbewerbsgesetz* ("Competition Act"), which lays down the investigatory powers held by the FCA. The prohibition of anticompetitive agreements, including hardcore cartels, is contained in Sections 1 *et seq* Cartel Act, which mirrors Article 101 TFEU (with only minor exceptions). Violations of section 1 are subject to fines of up to 10% of consolidated group turnover. In addition, while Austria has moved away from a general criminalisation of cartels, some criminal law risks for individuals remain. In particular, bid rigging constitutes an offence carrying a prison sentence of up to three years. Furthermore, the Austrian criminal courts have considered that cartel behaviour may in certain circumstances be qualified as criminal law fraud.

While Austrian antitrust law is largely in line with the model adopted in most European jurisdictions, one key difference is that Austrian law provides for a strict separation of powers between investigatory and decision-making authorities. Austria's competition watchdog, the FCA, has broad investigatory powers. In particular, it can request information and the production of documents, hear witnesses, and conduct dawn raids (though for the latter it has to obtain a court warrant). Upon conclusion of its investigation, the FCA may bring proceedings in the Cartel Court, and request the imposition of a fine on the members of an alleged cartel. In addition, the Federal Cartel Prosecutor ("FCP"), who reports to the Minister of Justice, also has the power to request fines – though unlike the FCA, he does not have proper investigatory powers. The FCA and the FCP together are referred to as the "Official Parties".

All substantive decisions in competition matters, from cease-and-desists orders to the imposition of fines for infringements of the antitrust rules, are made by the Cartel Court. The Cartel Court is a specialised division of the Vienna Court of Appeal. Decisions are

rendered by chambers, each of which is composed of two judges and two lay judges. The lay judges are experts nominated by the Federal Chamber of Commerce and the Federal Chamber of Labour.

In proceedings for the imposition of a fine, evidence is heard by the Cartel Court in an oral hearing. In practice, this has led to witnesses playing a more important role than e.g. at the EU level. As regards the determination of the fine, the Cartel Court is not bound by the methodology adopted by the FCA and FCP in their requests, but may not impose a higher fine than the amount applied for.

Infringements of competition rules become time barred if neither the FCA nor the FCP applies for the imposition of a fine within five years after the infringement has ended, in line with the limitation period under EU Regulation 1/2003. Austrian competition law deviates from the EU model in that investigatory measures by the FCA do not give rise to an interruption or a staying of the five-year period. However, it is not unlikely that this "anomaly" will be removed in the course of the next reform of Austrian competition law (see below).

Overview of investigative powers in Austria

The Official Parties initiate all investigations in cases where a fine can be levied upon undertakings.

Concerning suspected illegal cartels or abuse of a dominant position, the FCA (also on request of the FCP) can conduct dawn raids (to be approved by the Cartel Court in advance). During the inspection, the FCA is entitled to interrogate representatives and employees with regard to necessary information and explanations to facts and documents. The FCA may also seal individual rooms of the premises during the inspection.

The FCA's dawn raid practices have been the subject of several decisions of the Cartel Court and the Cartel Court of Appeals. *Inter alia*, the Cartel Court confirmed that a "strong" suspicion is not required for it to issue a search warrant. Moreover, there is no hierarchical order of the investigative powers attributed to the FCA, hence a search warrant may be issued right away (without any need to first resort to less intrusive tools, such as requests for information). Furthermore, "accidental findings", which are not covered by the search warrant, may in general be used by the FCA. Even if the alleged cartel participants are willing to cooperate, this fact does not render an inspection disproportionate.

Besides inspections, the FCA also has the right to question witnesses, use experts and send requests for information to undertakings. The FCA is entitled to enforce its own information request by imposing fines.

Overview of cartel enforcement activity during the last 12 months

Concerning statistics, in 2014, the FCA conducted 20 inspections. There were 10 leniency applications, while the fines based on the request of the FCA and imposed by the Cartel Court amounted to €21.9m. However, so far in 2015, this amount has been more than doubled. By the end of November, the Cartel Court had imposed fines of, in total, approx. €50m.

Besides the FCA's continuing focus on vertical agreements (resulting in a record fine against the grocery retailer Spar, see below), there were several cases based on horizontal cartel infringements, including a fine of in total €17m against more than 30 freight forwarding undertakings (termination of proceedings based on settlements, see below).

Cartel Court's case law in 2015

Again, concerning **vertical agreements**, various fine decisions of the Cartel Court in 2015 are related to grocery supply in the food sector. However, also two suppliers of electronics, a supplier of navigation devices, and a supplier of motor- and mountain bikes were fined for anticompetitive behaviour with regard to their respective dealer's retail sale prices.

"Highlight" of the year was a fine in the amount of €30m, which was imposed on Austria's second-largest grocery retailer, Spar, by the Supreme Court. The amount of fine is the highest fine ever imposed by an Austrian Cartel Court on a single undertaking. The proceedings against Spar were initiated by the FCA. In its request for fine to the Cartel Court, the FCA argued that Spar had fixed retail prices with its suppliers in 17 different product areas directly (by agreeing on retail prices), but also indirectly, e.g., by most-favoured price clauses, which obliged suppliers to ensure that the retail price of their products at the premises of competitors of Spar (e.g., Rewe) was not below the retail prices at Spar.

Also due to procedural reasons (Spar requested the seal of an explicitly high amount of documents), the proceedings at the Cartel Court and the Supreme Court focused on dairy products. Sixteen product categories, e.g. beer, are therefore still open and the respective proceedings pending at first instance.

In first instance, the Cartel Court fined Spar in the amount of €3m for vertical, but also horizontal collusion on resale prices with various suppliers of dairy products between July 2002 and March 2012.

Both sides, Spar and FCA/FCP, filed an appeal to the Supreme Court, which, in substance, confirmed the legal approach of the Cartel Court. Following the decision, resale price maintenance in general is to be considered an infringement "by object". The Supreme Court found that Spar had infringed Art 101 TFEU. Spar intended to harmonise, moderate or affect retail prices directly, but also indirectly, e.g., by requesting from its suppliers a certain retail margin. Moreover, Spar's suppliers were required also to increase prices (and retail prices) with Spar's competitors. Therefore, the infringements concerned were considered to be not only vertical but also horizontal.

Concerning the amount of fine, the Supreme Court multiplied the amount by 10 (!) and imposed a fine on Spar of €30m. The court justified this increase by the missing deterrent effect of the fine imposed by the Cartel Court. The Supreme Court hereby referred to Spar's global turnover and the assumed benefits of the infringement. With regard to the method of setting fines, the Supreme Court, contrary to the European Commission in its *Guidelines* on the method of setting *fines, stated that fines in Austria are not based on the turnover to which the infringement relates, but on the overall turnover in general.* In calculating the exact amount, the Supreme Court referred to the total turnover of Spar in the amount of €8.7bn, but also the annual turnover with dairies amounting to €400m. Following the Supreme Court, a fine of €3m would only have been justified if the potential benefits of the infringement concerned were in each year of the infringement below €300,000, and therefore in 10 years (duration of infringement) below €3m. The Supreme Court considered this to be "totally unrealistic", while the imposed fine of €30m was considered to be "appropriate".

Besides Spar, another grocery chain, Pfeiffer HandelsgmbH / Zielpunkt GmbH, was fined for retail price maintenance with regard to five different product categories, amongst them dairy products and beer. Based on a settlement proceeding, the Cartel Court imposed a fine of €5.62m. With regard to the amount of fine, the FCA (which was negotiating the settlements) announced that the fine was limited due to the small market share of

Pfeiffer / Zielpunkt (as compared to Rewe and Spar). Furthermore, the FCA also referred to Zieklpunkt's financial difficulties. In the meantime, Zielpunkt was indeed forced to file for insolvency (as of 1 December 2015).

On supplier's side, the Cartel Court (based on settlements between the respective company and the FCA) imposed fines on Vöslauer (€653,775), Brauerei Jos. Baumgartner GmbH (€56,000), and Pago (€152,460). All these fines were imposed because of vertical concerted practices with grocery chains, especially with regard to retail price maintenance.

Besides grocery, the FCA also investigated the electronics market. Nikon settled on an amount of €0.17m for coordination of its retail prices concerning single-lens-reflex and compact cameras. Also due to prohibited retail price maintenance, Samsung was fined in the amount of €1.05m. Additionally to the coordination, Samsung partly requested its dealers to increase the respective online-retail price on the website of Samsung's dealers. Besides cooperation, a compliance-programme of Samsung, which was initiated before the FCA began to investigate, was considered as a mitigation factor. Including this case, there have been so far seven undertakings fined for infringement concerning online trade (electronics). Fines of €6.2m in total have been imposed by the Cartel Court (all proceedings closed by settlement).

United Navigation, a producer of navigation devices, was fined for retail price maintenance and market allocation (by agreeing with its Austrian dealers not to export to Germany) in the amount of €0.1m. Lastly with regard to vertical infringements and very recently, the Cartel Court fined KTM Bike, a producer of high quality motor bikes and mountain bikes, in the amount of €0.1m based on KTM's price recommendations with the intention to restrict competition. The anti-competitive practices related to KTM's request towards its dealers to restrict rebates on both the amount and the period of time where such rebates were offered. Furthermore, it was requested that KTM bikes had to be excluded from general discount offers. The respective request was not explicitly indicated as being a "recommendation". KTM furthermore tried to enforce its request against the dealers, e.g., by threatening to terminate supply contracts and not to deliver any more if the dealers did not follow KTM's requests.

Concerning horizontal antitrust practices, very small, but also large undertakings have been fined for anticompetitive behaviour. E.g., with regard to smaller undertakings, the Cartel Court fined four small sports retailers in the Austrian skiing village St Anton in the total amount of €0.42m. The dealers had fixed their retail prices with regard to the sale and rental of sport equipment.

Furthermore, the Cartel Court fined four wholesalers for price collusion almost in the same total amount as the above-mentioned sports retailers (here €0.43m). The FCA's investigations were based on two leniency applications (whereby against the first leniency applicant, no fine was imposed). The undertakings concerned had exchanged information and agreed on terms on payment and minimum prices. The Cartel Court thereby accepted, *inter alia*, as mitigating factor that the collusions were only implemented in a very small amount. Additionally, the anticompetitive behaviour did not result or only to a very limited extent resulted in an enrichment.

Last, one of Austria's most discussed cartel proceedings concerning consolidated freight forwarding in Austria came to an end in 2015. The proceedings were initiated on a leniency application of Schenker in 2007. As a consequence, the FCA applied for a fine to the Cartel Court against initially more than 40 (!) freight forwarding undertakings which had been organised in a conference ("*Speditions-Sammelladungs-Konferenz*", "SSK").

The German Federal Office of Defence Technology and Procurement ("*Bundesamt für Wehrtechnik und Beschaffung*", "BWB") then alleged that the undertakings concerned had fixed prices and allocated customers within the SSK with regard to the national transport of component parts, resulting in an infringement of EU competition law (Art 101 TFEU). Further to BWB's allegation, there had been co-operation between the SSK and *Österreichische Bundesbahnen* (Austrian Federal Railway). Within this co-operation, the Austrian Federal Railway as the only addressee was accused of exchanging sensitive market information and adjusting their tariffs with the respective freight forwarding undertakings.

With regard to the SSK, the Cartel Court as court of first instance rejected the authority's allegations. This was mainly reasoned by the fact that in 1996 the SSK was exempted from the application of Austrian competition law by order of the Austrian Cartel Court, which applied the Austrian *de-minimis* exemption to the SSK. Contrary to EU competition law, the Austrian *de-minimis* regime also exempted hardcore infringements if the undertakings concerned were below 5% market share (this *de-minimis* regime was in force until 2013). Additionally, the SSK had always been legally advised by an established law firm which was (also) specialised in competition law.

The BWB contested the decision in an appeal to the Supreme Court. Also the European Commission submitted its opinion (as foreseen in Article 15(3) of Regulation 1/2003). In the following, the Cartel Supreme Court decided to ask the European Court of Justice ("ECJ") for clarification in a preliminary ruling concerning the undertakings' erring and their fault deriving therefrom.

The ECJ was strict and clear in its ruling (C-681/11 *Schenker and others*): "*An undertaking which has infringed that provision may not escape imposition of a fine where the infringement has resulted from that undertaking erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer or of the terms of a decision of a national competition authority*."

Given the binding preliminary ruling of the ECJ, the Supreme Court then consequently ruled that the defendants had systematically infringed Article 101 (formerly Article 81 EC) over several years. However, the Supreme Court went even further: when discussing mitigating factors, it excluded the possibility of a reduction of the fine due to an erroneous advice by a legal adviser experienced in matters of competition law or an erroneous national authority's decision. As the Supreme Court found the case was not yet ready for decision with regard to the individual calculation of the undertakings' fines, the case was sent back to the Cartel Court, which succeeded its initial proceedings. By judgment of 19 December 2014, it imposed fines of in total €17m on 30 freight forwarding undertakings. The fines were based on settlement proceedings between the FCA and the undertakings concerned (including the Austrian Federal Railway, concerning its exchange of information allegations).

Key issues in relation to enforcement policy

The FCA does not make its enforcement priorities public. Its record in horizontal cartel cases is rather balanced: the FCA has uncovered cartels for diverse products and services such as printing chemicals, elevators, freight forwarding services or among steel wholesalers, and even among local driving schools as well as among local sports retailers in a major skiing resort. It is currently acting against alleged cartels among suppliers of sugar, as well as in the wood processing industry.

In addition to horizontal cartels, one major focus in the FCA's recent enforcement work has been vertical agreements. Here, the authority has mainly targeted the retail sector, in

particular supermarkets, DIY markets, and electronics retailers, as well as their respective suppliers. In this area, the FCA's main focus has been on resale price maintenance, as well as (increasingly) on restrictions of online trade.

Key issues in relation to investigation and decision-making procedures

While Austrian law avoids bias by separating investigation (FCA) and decision-making (Cartel Court), it still suffers from a few shortcomings in terms of due process. The most significant issue is judicial scrutiny of dawn raids. While dawn raids require a warrant issued *ex ante* by the Cartel Court, the actual conduct of enforcers during the inspection is only subject to light judicial control exercised by the Federal Administrative Court, a different court than the one authorising the inspection. According to the Federal Administrative Court, the conduct of enforcers may only be challenged if it is excessive. This makes it difficult to challenge conduct by enforcers which does not obviously exceed the scope of the Cartel Court's warrant (i.e., taking copies of documents relating to products not covered by the warrant). While Austrian law in this regard appears difficult to reconcile with European Court of Human Rights ("ECtHR") case-law (in particular the recent *Vinci Construction* judgment), it is not yet clear whether the currently discussed reform will strengthen judicial oversight of dawn raids.

Another shortcoming is lack of access to the file: firms which are targeted by the FCA's investigation do not have a right to access to the authority's file. While the FCA evidently has to present the evidence which it intends to rely on once it applies to the Cartel Court, firms have no way of knowing what else is contained in the authority's file. This is an issue in particular as regards potentially exculpatory evidence.

Leniency/amnesty regime

Austrian law provides for a corporate leniency programme, under which firms which cooperate with the FCA may be entitled to full immunity, or to a reduced fine. Further details on the conditions for leniency and the procedure are set out in the FCA's "Leniency Handbook", which is available on its website (www.bwb.gv.at).

Under the Austrian leniency rules, full immunity is available to the first applicant allowing the FCA to apply for judicial authorisation of a dawn raid. If the FCA already has sufficient information to apply for a dawn raid, the first applicant may still receive full immunity, if it provides additional evidence allowing the authority to submit a reasoned application for imposition of a fine with the Cartel Court.

Firms which fail to meet the conditions for full immunity may qualify for a reduction in the fine of up to 50%. To benefit from a reduction, the applicant must provide the FCA with evidence which represents significant added value relative to the information already available to the authority. The amount of the reduction depends in particular on the applicant's rank in the "leniency queue", which in turn is determined by the time at which it met the significant added value criterion.

In addition to meeting these evidentiary standards, leniency applicants are required to cease the infringement, and to fully cooperate with the FCA throughout the investigation. Leniency is not available to firms which have coerced other participants to take part in the infringement.

The FCA grants markers to potential immunity applicants who provide it with basic information on the cartel – in particular, information on the firms involved, as well as on the

affected products, its geographic region and duration. Markers may be placed orally or in writing. The FCA accepts markers in English, but may request a translation into German later in the proceedings. Upon receipt of the marker, the FCA will set a deadline of up to eight weeks, within which the applicant will have to provide sufficient evidence to qualify for immunity. No marker is available for reductions of the fine: the applicant's rank in the queue depends on when it provided the FCA with evidence representing significant added value. Upon request, the FCA will issue a non-binding confirmation that the applicant is eligible for leniency, after analysing the evidence received. For firms which may benefit from a reduction of the fine, this confirmation also includes the intended level of the reduction (within certain bandwidths).

While the general features of the Austrian leniency programme are thus in line with the EU model, two features distinguish it from many other EU States. First, leniency in Austria is not limited to secret horizontal cartels, but is available for all anticompetitive agreements (e.g., also in vertical cases). Secondly, employees of leniency applicants may also be shielded from personal criminal liability for their cartel behaviour, if the FCP considers that prosecution would be inappropriate with a view to the applicant's contribution to the uncovering of the infringement.

Administrative settlement of cases

Besides the above-mentioned *Spar* – decision, since 2012, almost all cartel proceedings in Austria which have led to a fine, have been concluded by settlement.

From the FCA's side, arguments put forward in favour of settlements in cartel proceedings refer to, e.g., a faster termination of proceedings, reduction of proceedings concerning the number of its staff members, and a faster termination of the infringement itself, resulting in direct benefit to the consumer (settlements usually substantially lessen the duration of the proceedings concerned).

These arguments of the FCA in favour of settlements partly overlap with the interests of the undertakings concerned. In common with the FCA, undertakings are interested in shortening the proceedings in order to save time, money and resources. Furthermore, undertakings are – of course – highly interested in a settlement-based reduction of the fine. Last, settlement proceedings may result in less transparency (due to shortened or only summarised judgments), and less publicity.

Following its increased importance in practice, the FCA in 2014 also published this year its point of view on settlements in order to provide some guidance in practice with regard to, *inter alia*, conditions, content of a settlement statement, and the extent of the reductions of the fines applied.

Based on the *Spar* decision, which increased the fine of first instance substantially, it may be that undertakings feel forced to settle alleged infringements with the FCA more than in the past. With regard to the required development and adjustment of case law, it may be doubted whether Austria's antitrust practice will benefit from such an approach.

Third party complaints

Third parties may inform the FCA and/or the FCP of cartel behaviour. However, they do not thereby become a party to any investigation / prosecution proceedings. Nor do they have a right to have their complaint treated in a certain manner or to be informed about any steps taken by the Official Parties.

Apart from raising complaints with the Official Parties, third parties can also bring proper motions before the Cartel Court. As early as 1993, the Cartel Act has afforded standing to private bodies to bring applications for cease (*Abstellung*) orders and for decisions of finding (*Feststellung*). Notably, the "loser pays" principle (the losing party has to reimburse statutory legal costs) is not applicable in proceedings before the Cartel Court. Hence, the risk of bringing private motions is limited (only if the motion is found to be fraudulent may the reimbursement of costs be ordered).

Under certain circumstances, a breach of antitrust law can also constitute an infringement 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 may be awarded by the commercial courts (*Handelsgerichte*). The Unfair Competition Act foresees the possibility to have the final decision published (in the press) at the expense of the losing party.

Further, third parties may in the context of antitrust infringements also bring desist, recovery and damage actions, as well as actions to have, for example, a contract nullified, under general civil law before the ordinary civil courts (*Zivilgerichte*). See on this, private enforcement (in the narrow sense) below.

Civil penalties and sanctions

As mentioned, the Austrian enforcement system has moved away from general criminalisation of cartel behaviour.

The main sanctions imposed are fines handed down by the Cartel Court upon application by the FCA and/or the FCP against the undertakings involved in antitrust infringements. The maximum amount of fine is 10% of the (worldwide) annual group turnover.

While there are no fining guidelines like those of the European Commission (the Cartel Act only sets out some general principles), the FCA closely follows the EU framework when determining the amount it asks to be imposed. In this context, it may be noted that the Cartel Court must not impose a fine higher than what the Official Parties have requested.

Certain obstructive behaviour (e.g., not answering formal information requests) may also trigger fines. Such fines must not exceed 1% of turnover.

Treble damages or the like are alien to Austrian law.

Right of appeal against civil liability and penalties

A decision by the Cartel Court can be appealed to the Austrian Supreme Court sitting as the Cartel Court of Appeals (*Kartellobergericht*).

The Supreme Court does not review the establishment of facts executed by the Cartel Court (save the most severe errors, such as a blunt contradiction between what has been established in the Cartel Court's decision and what the file records as outcome of the taking of evidence). Rather, the Supreme Court focuses on the right application of the law.

Where the FCA has exceptionally imposed a penalty (for obstructive behaviour), its decisions may be appealed to the Federal Administrative Court (*Bundesverwaltungsgericht*).

Criminal sanctions

The Cartel Act does not contain any criminal sanctions for a breach of competition law. Therefore, the Cartel Act does not foresee imprisonment as a sanction.

However, following Section 168b of the Austrian Criminal Code, bid rigging constitutes a criminal offence (*Submissionskartelle*). Moreover, certain cartel behaviour may also qualify as, in particular, fraud (Section 146 *et seq.* of the Criminal Code). While bid rigging allows for a custodial sentence of up to three years, fraud may be sanctioned with imprisonment of up to 10 years.

The relevant provisions of bid rigging or fraud are not enforced by the Cartel Court but by the (ordinary) criminal courts. The proceedings before the criminal courts are governed by the Code of Criminal Procedure.

Cross-border issues

There are only a few rules on cooperation between the Austrian competition authorities and those of other jurisdictions in Austrian legislation.

The Competition Act provides that the FCA shall be the competent authority in Austria for implementing EU competition rules. The Competition Act expressly refers to the authority's duty to support and cooperate with the Commission in investigating violations of EU law.

This duty is specified in Section 12(2) of the Cartel Act. Pursuant to Articles 20 and 21 of Regulation 1/2003, the Commission has the right to inspect and review business records, and companies are obliged to grant access to their business premises. However, to allow enforcement of a Commission's investigation order, the FCA has to apply to the Cartel Court for a corresponding search warrant. When finally conducted, the FCA also assists the European Commission in inspections of undertakings' premises.

Moreover, the Cartel Act allows the transfer of information – conditional on the confidentiality interests of the parties – to, amongst others, the Commission and NCAs of other Member States. Likewise, the FCA may ask for information from the latter authorities as well.

In practice, the FCA cooperates closely with the Commission and other competition authorities within the so-called European Competition Network. For example, when the concentration *Rail Cargo Austria/MAV Cargo* was notified to the Austrian authority in 2009, it worked together with the European Commission and the Hungarian competition authority in order to conclude that the transaction had a community dimension and therefore had to be notified to the European Commission. In 2009 and 2010, the FCA carried out two inspections at the Austrian premises of a manufacturer of firefighting equipment on behalf of the German *Bundeskartellamt*.

Developments in private enforcement of antitrust laws

Austria has recently seen many private enforcement actions. Most cases are still pending (in particular, following on from the Austrian *Elevators and Escalators* cartel case).

A landmark case concerned a follow-on private damage claim against a driving school where damages were awarded. In that case, the Federal Chamber of Labourers (*Bundesarbeiterkammer*) had claims of consumers taking driving lessons at cartelised prices assigned to it, and pursued them against one of the cartelist driving schools. The District Court (*Bezirksgericht*) Graz, confirmed by the Regional Court (*Landesgericht für ZRS*) Graz, held that antitrust laws are protective provisions that can also be enforced by consumers (or the Federal Chamber of Labourers on their behalf); cartelists were found to be jointly and severally liable.

In another case (concerning the payment card industry), the Austrian Supreme Court confirmed that all market participants (including the indirectly damaged) are entitled to

bring private damage claims, and hence have standing. Further, the Supreme Court found that the (three-year) limitation period started with the publication of the fine decision at the earliest.

It may also be noted that, in yet another case, the Supreme Court has explicitly held that, based on Article 6 of the Brussels-I Regulation, Austrian civil courts are competent to hear private damage actions in all cases where one of the cartelists resides or has its corporate seat in Austria.

The pending follow-on actions in the elevator industry will further flesh out under what circumstances damages claims can successfully be brought in Austria. One development may well have impact also beyond Austria, which is the so-called umbrella question. Against the background of an Austrian set of facts, the ECJ has handed down a preliminary ruling that actions asserted by customers of third parties (hence, of undertakings that did not participate in a cartel) must not be excluded *per se* (as the Austrian Supreme Court had held with regard to Austrian tort law). The Austrian Supreme Court has transposed this judgment, and the trial court is looking into the question of whether the cartel at issue, in the circumstances of the case, included the contracts in question and, in particular, whether specific aspects of the relevant market were liable to have the effect of umbrella pricing by third parties, and if those circumstances and specific aspects could not be ignored by the cartelists.

Reform proposals

In September 2014, the Federal Chamber of Labour and the Federal Chamber of Commerce published a joint report on competition policy in Austria. The two Chambers are important stakeholders in the Austrian legislative process, and enjoy a particularly prominent role in competition law matters for historical reasons. While concrete legislative proposals may still be some time in the making, the report published by the Chambers is likely to have a significant influence on the debate leading up to a potential draft bill.

The report does not propose a major overhaul of Austrian competition law, but proposes a number of smaller adjustments. One major focus of the report is transparency, both for the addressees of the competition rules, and for potential damages claimants. In order to increase legal certainty for the former, the report proposes a greater reliance on administrative guidelines to be published by the FCA, e.g. as regards the determination of the fine. In order to facilitate damages actions, the report suggests that third parties should be granted access to the FCA's file (as set out above, even firms targeted by the FCA's investigation currently do not have access to its file). Another significant change proposed by the two Chambers is that investigatory measures adopted by the FCA should give rise to an interruption of the five-year limitation period.

Whereas the report by the Chambers thus focuses on limited, but potentially significant adjustments, the Director General of the FCA made it clear in his reaction that the authority is aiming for a change from the current separation of powers between FCA and Cartel Court, to a system of administrative law enforcement as seen in most European jurisdictions. While no details of such a system are yet available, it is clear that it would involve investigation and decision-making being concentrated in the FCA. The coming months will show whether there is sufficient support in favour of such an overhaul.

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