

# Access to File for Damage Claimants in Competition Law Cases (Austria)

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## I. Introduction

The European Court of Justice ('ECJ') has ruled in the *Donau Chemie* case<sup>1</sup> that Section 39 (2) of the Austrian Cartel Act ('Cartel Act'), the main Austrian competition law statute, violates the principle of effectiveness due to making the access to file for third parties dependent on the consent of the cartelists.<sup>2</sup> Recently, the Austrian Supreme Court ('Supreme Court'), in its function as Cartel Court of Appeals, was confronted with a similar situation as the ECJ against the background of competition law infringements in the payment card industry. This article further analyses the decisions by the Supreme Court<sup>3</sup> following what could be called *Donau Chemie* principles.<sup>4</sup>

## II. Access to file pursuant to recent Supreme Court jurisprudence

### A. Background: set of facts and proceedings

Upon the motion of a competitor, proceedings were initiated several years ago for finding that the Respondent had engaged in anti-competitive practices or restrictive agreements<sup>5</sup> and that it had abused its dominant position.<sup>6</sup>

In particular, it was argued that the Respondent levied inappropriate high domestic interchange fees for cashless transactions using point-of-sale (POS) payment systems. The relationship between the Respondent and its contracting parties was regulated by a contract, commonly known as cash dispenser contract (*Bankomatvertrag*) in Austria.

On 17 December 2003, the Higher Regional Court of Vienna, sitting as Austrian Cartel Court of first instance (hereinafter, the 'Cartel Court'), reached a decision

## Key Points

- Under European competition law, claiming for damages after an infringement of competition rules must not be made practically impossible or be unnecessarily hampered.
- In that regard, the Austrian Supreme Court has made it clear that third parties must have the possibility to access the file relating to (fine) proceedings on competition law infringements.
- To access the file, the criteria to fulfil cannot impose an excessive burden on those seeking redress.
- If they refuse their consent to access, the parties involved in the fine proceedings are to give substantiated reasons.

wherein it declared a cartel to have been in place between the Respondent and its contracting parties with reference to a specific point of the cash dispenser contract, on the one hand, and an abuse of the Respondent's dominant position, on the other hand.<sup>7</sup>

During the appeal proceedings, the Respondent changed the terms concerned of the cash dispenser contract and the applicant competitor withdrew its motions. Pursuant to Section 40 Cartel Act, the Austrian Federal Competition Agency ('BWB') is an 'official party' (*Amtspartei*)<sup>8</sup> in competition proceedings. As such, it participates in the proceedings and can also continue them in cases where the original applicant withdraws its motions.

Not only did the BWB continue the mentioned proceedings, but, in separate proceedings, also filed an application for the imposition of fines against the Respondent.

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1 ECJ 6-6-2013, C-536/11 *Donau Chemie*.

2 Cf., with further details, Stephan Polster and Iris Hammerschmid, 'Aktenzugang im österreichischen Kartellverfahren nach der Entscheidung *Donau-Chemie*' (2013) 4 *Österreichische Zeitschrift für Kartellrecht*, 140; Florian Neumayr, Heinrich Kühnert and Valentina Schaumburger, 'The Gordian Knot of Access to File: Legislation will have to resolve it' (2014) 7(4) *Global Competition Litigation Review* 185 (189).

3 Supreme Court 28 November 2014, 16 Ok 10/14b and 16 Ok 9/14f.

4 See further on the *Donau Chemie* case as well as other relevant recent European jurisprudence and principles developed therein below.

5 Violating Austrian statutory provisions corresponding to Article 101 (1) Treaty on the Functioning of the European Union ('TFEU').

6 Violating Austrian statutory provisions corresponding to Article 102 TFEU.

7 Cartel Court 17 December 2003, 27 Kt 243, 244/02.

8 Also the Federal Cartel Prosecutor is an official party.

In those proceedings, the Cartel Court determined the amount of the fine to be 5 million euros.<sup>9</sup> The Respondent appealed, but the Supreme Court, for the first time in the history of Austrian cartel enforcement, increased the imposed fine from 5 million to 7 million euros.<sup>10</sup>

Hereafter, a newly founded association (in the following, referred to as 'First Claimant') that had alleged damage claims assigned to it and a company (in the following, referred to as 'Second Claimant') seeking compensation for alleged damages resulting from Respondent's behaviour applied for inspection of the files of the Cartel Court. Claimants argued that they needed access to further determine their actions (for about 8.4 million euros in the case of the First Claimant and approximately 8.5 million euros for the Second Claimant) pending before the Commercial Court Vienna.<sup>11</sup>

Section 39 (2) Cartel Act foresees that the access to file is dependent on the consent by the parties to the respective proceedings. Both the Respondent and the official parties approved the inspection of particular documents in the file, namely the decisions by the Cartel Court and by the Supreme Court as well as certain expert opinions. However, the Respondent did not give its approval to a further inspection of the file.

In the light of the *Donau Chemie* decision by the ECJ, which held that outright denial of access to file based on the mentioned statutory provision is not compatible with fundamental legal principles, the Cartel Court requested the Respondent to highlight every passage that, according to its opinion, contained business secrets and should, therefore, be excluded from the inspection of files. The Cartel Court requested reasons for such exclusion to be given.

The Respondent did not follow this order arguing that screening the whole file would constitute a disproportionate and unilateral burden. Instead of it performing such task, it reasoned that the Claimants should further specify to what they want to have access. It also considered that some expert, bound by professional secrecy, could evaluate the documents needed by the Claimants.

The First Claimant limited its motion for inspection of the files to specific documents (specified by the document numbers).<sup>12</sup> The Second Claimant continued to seek full access to the Cartel Court's files.

## B. Decision by the Cartel Court

The Cartel Court found for the Claimants and granted access to the files in their entirety.<sup>13</sup>

The Cartel Court reasoned that, absent other opportunities to get access to that information, the inspection of files was necessary for bringing actions for damages and that there was no public interest in withholding the access to the files in question. Further, it was up to the Respondent to claim and substantiate any business secrets by means of founded assertions, which the Respondent had not done.

Further, the Cartel Court noted the long time span between the proceedings and the granted access to file, which, in the opinion of the Cartel Court, made it unlikely in the first place that any true business secrets were disclosed.

## C. Appeal and the Supreme Court's ruling

### 1. The appeal

The Respondent appealed the decision by the Cartel Court.

In particular, the Respondent argued that Section 39 (2) Cartel Act had to be applied because Austrian competition law and not European law was at issue. Besides, the access would have to be denied because the required legal interest regarding each single document was not established.

The reasoning of the appeal basically rests on two grounds. First, Section 39 (2) Cartel Act was by the ECJ declared incompatible with European law, but the ECJ did, as a matter of course, not rule on the application of European legal principles to sets of facts that are subject to national competition laws only. Second, if, for some reason, one left Section 39 (2) Cartel Act aside, still the general Austrian Code on Civil Procedure ('Civil Procedure Code') foresees that, absent consent, access to file is only to be granted if (sufficient) legal interest is established.

### 2. Further on the relevant European jurisprudence

In the *Pfleiderer* case,<sup>14</sup> the ECJ had held that national courts or authorities should decide requests for access to file on a case-by-case basis. This meant a difficult balancing of interests (including the balancing of promoting private enforcement versus the protection of leniency programmes).<sup>15</sup>

In the *Donau Chemie* case, the Cartel Court had asked the ECJ whether the 'up-front weighing of interests' as enshrined

9 Cartel Court 22 December 2006, 27 Kt 20, 24, 27/06.

10 Supreme Court 12 September 2007, 16 Ok 4/07.

11 Commercial Court Vienna, pending cases 19 Cg 223/10f and 11 Cg 168/08f.

12 In Austria, each document forming part of a court file receives a particular document number (*Ordnungsnummer*).

13 Cartel Court 25 June 2014, 27 Kt 20, 24, 27/06-67 and 9 July 2014, 27 Kt 243, 244/02-143; those documents in the file that had already been agreed by the parties to be accessible and been provided were technically 'excluded' from the ordered access to the file.

14 ECJ, 14 June 2011, C-360/09, *Pfleiderer*, 2011 I-05161.

15 Cf. Neumayr et al. (n 2) 185, 188, and 194.

in Section 39 (2) Cartel Act is in accordance with the principle of effectiveness and equivalence. The ECJ emphasised that no national provision must be constructed in a way that deprived the national courts of their possibility to weigh the different interests against each other on a case-by-case basis.<sup>16</sup> A provision like Section 39 (2) Cartel Act can be qualified to hamper the enforcement of damage claims in a way incompatible with European legal principles.<sup>17</sup>

In the *EnBW* case, the ECJ clearly recognised that there is an interest not to simply disclose everything. Rather, the interest in the inspection of (parts of) files must be established on a case-by-case basis.<sup>18</sup> One could argue that applicants had to establish that the disclosure of single documents is necessary for bringing an action for compensation; in consequence, general applications would not be sufficient but justified, and specific requests would be required.<sup>19</sup>

### 3. Further on the relevant Austrian statutory provisions

Pursuant to Section 38 Cartel Act, the Cartel Court and the Supreme Court are, in principle, to follow the procedural rules set forth in the Code on Non-Litigious Matters (*Außerstreitgesetz*). The Cartel Act itself contains some specific provisions. Amongst these rules is Section 39 (2) Cartel Act.

The Code on Non-Litigious Matter largely refers to the Civil Procedure Code. With Section 219 (2), the Civil Procedure Code has a provision on the access of file by third parties, which is similar but not identical to Section 39 (2) Cartel Act. In particular, Section 219 (2) Civil Procedure Code foresees that a third party may access the file either if the parties to the proceedings in question consent (insofar Section 39 (2) Cartel Act is no different) or, which goes beyond Section 39 (2) Cartel Act, if a legal interest for gaining the access is established.

Mere economic interests as well as general public interests are not sufficient.<sup>20</sup> For being granted access to file, the inspection must have a positive effect on the legal sphere of the third party seeking access. It does not matter whether such legal sphere is of a private law or a public law nature.

The enforcement of claims or an improvement of the body of evidence available to a (potential) claimant can be regarded as sufficient legal interest.<sup>21</sup> It is also generally acknowledged that (detailed) knowledge of the relevant circumstance one may obtain through the access cannot be required prior to such access since acquiring information is the very purpose of a request for access to files.<sup>22</sup>

Further, a weighing of interests takes place. The legal interest of the third party seeking access is balanced against the interests of the parties to the case in question in having (parts of) the files protected.<sup>23</sup>

### 4. The reasoning of the Supreme Court in the present case

On the issue whether or not (and to what extent) Section 39 (2) Cartel Act applies, the Cartel Court noted some connection to European law and held Section 39 (2) Cartel Act inapplicable for this reason.<sup>24</sup>

Remarkably, the Supreme Court reasoned in essence without such reference to European law that the *Donau Chemie* principles should apply. Thereby also absent a consent as required by Section 39 (2) Cartel Act allowing access to file where, like under Section 219 (2) Civil Procedure Code, there is an (overriding) interest on the side of the one seeking access.

To set, in effect, Section 39 (2) Cartel Act aside also in purely domestic circumstances, the Supreme Court referred to the recent amendment of the Cartel Act and emphasised that the legislator wanted to promote private enforcement.<sup>25</sup> The amendment had, in particular, introduced Section 37 Cartel Act with a view to facilitate so-called ‘follow-on-claims’. Pursuant to this provision, final decisions by the Cartel Court are to be published.<sup>26</sup>

If a judgment is not published (in an adequate way), a provision such as Section 39 (2) Cartel Act, which makes the inspection of files depended on the involved parties’ consent, would constitute a disproportionate infringement of Article 6 of the Human Rights Convention and Article 47 of the Charter of Fundamental Rights of the European Union; both the provisions guarantee a fair trial and the access to the courts.<sup>27</sup>

16 ECJ 6-6-2013, C-536/11 *Donau Chemie*.

17 Cf. Opinion of AG Niilo Jääskinen in C-536/11, *Donau Chemie*, para. 51.

18 ECJ 27-2-2014, C-365/12 *EnBW*.

19 Cf. Ondrejka, ‘EuGH zum Zugang zu Kartellakten, neue Chance für Kronzeugenprogramme’ (2014) 32(7) *Recht der Wirtschaft* 387 (390).

20 Cf., for example, Supreme Court 30 May 2007, 9 Ob 15/07g.

21 Cf. *Klauser/Kodek*, JN—ZPO, § 219 ZPO E 9; *Glitschthaler* in Rechberger, Civil Procedure Code, § 219 recital 3; Higher Regional Civil Court Vienna (*LGZ Wien*) 9 June 1999, EFSlg 90.917.

22 Cf. Jürgen C.T. Rassi, ‘Geheimnisschutz bei der Akteneinsicht und Aktenübersendung im Zivilprozess’ (2014) 16 *Zivilrecht aktuell* 303 (304).

23 Cf. *Schragel in Fasching/Konecny*, *Zivilprozeßgesetze*, § 219 ZPO recital 3; Daphne-Ariane Simotta, ‘Einige Probleme des Datenschutzes im Zivilverfahrensrecht I’ (1993) *Österreichische Juristenzeitung* 793 (800).

24 Cartel Court 25 June 2014, 27 Kt 20, 24, 27/06-67 and 9 July 2014, 27 Kt 243, 244/02-143.

25 By way of a side note, it may be mentioned that constitutional law questions could be raised in this context (but were not expressly addressed by the Supreme Court)—cf. Zandler, ‘Kartellrechtsblog’ <<http://blog.cms-rrh.com/post/2015/02/09/akteneinsicht-in-kartellgerichtsakten/?L=0&cHash=ce232895b038743a446ca8fb3fb9a20c>>, last accessed on 9 June 2015.

26 Cf. Hanno Wollmann and Franz Urlesberger, ‘Das Kartell- und Wettbewerbsrechts-Änderungsgesetz 2012’ (2013) *Ecolex* 252 (253).

27 Cf. also Opinion of Jääskinen (n 17) para. 65.

The Supreme Court 'imported' the doctrine established in the ECJ jurisprudence that statutory (national) provisions must not make the claiming for damages caused by competition law infringements practically impossible or unnecessarily hamper private enforcement also to cases not containing a 'foreign element'.

In consequence, not only did the Supreme Court leave Section 39 (2) Cartel Act without application but also emphasised that the criteria regarding the formulation of requests for inspection of files should not impose too great a burden on the party seeking access. This also in view of the fact that it is the very nature of such applications that details on what may be obtained through the access are not yet known, but further information is investigated.

Further, the Supreme Court noted that there should be a balancing of interests. However, in the present case, the Respondent had not used its chance to declare and support claims that the file contains business secrets that could need protection by denying access to (parts of) the file. Rather, the Supreme Court noted that the Respondent remained inactive by only stating that a required screening would constitute a disproportionate effort.

Moreover, in an earlier case, the Supreme Court had already decided that the anti-competitive behaviour or other violation of competition rules as such could never be regarded a business secret.<sup>28</sup>

### 5. Excursus: leniency programmes

Leniency programmes constitute an important support for the effective enforcement of both national laws and Article 101 TFEU by means of granting the one who 'blows the whistle' immunity from fines (under certain circumstances). Therefore, leniency programmes including their effectiveness are attributable to the public interest, which is weighed against the interest of inspecting files in competition law proceedings.<sup>29</sup>

Knowing that access to files may be granted to third parties can contribute to make it less likely that an undertaking applies for leniency. However, this consideration can hardly justify the exclusion of inspection of files in general, meaning that the whole file is not subjected to inspection of files.

The exact role leniency shall play in the balancing of interest remains an interesting question. In the case discussed here, the Supreme Court did not have to address

the issue of leniency programmes because none of the involved parties had applied for leniency (which was only introduced later in Austria).

The Supreme Court in very general terms stated that the proceedings had been initiated a long time ago, and, therefore, the information gained through the inspection of files was not up to date and that no further claims for damages could be lodged due to the limitation period. It also noted that the Cartel Court must not attach much importance to the last fact.

## III. Conclusion

In the discussed case, the Supreme Court 'imported' most of the considerations on access to file by third parties, which the ECJ has developed over the last years, also to sets of fact that do not contain 'a foreign element', ie are not necessarily subject to European competition law.

Section 39 (2) Cartel Act, which by its wording makes access to file by third parties dependant on the consent of the cartelists, is seen as significantly hampering private enforcement and has, in effect, been set aside by the Supreme Court. It is noted, however, that the Supreme Court's reasoning is not very elaborate on the 'import' to domestic cases and rests not least on the final decision by the Cartel Court not having been published.

Following the Supreme Court's decisions, absent consent by the parties to the proceedings in question, the principles of Section 219 (2) Civil Procedure Code are to be applied also to purely domestic cases. It appears advisable for affected parties to elaborate on why no access should be granted to which parts of the files with a view to achieve a more detailed balancing of interests than was found necessary by the Cartel Court and the Supreme Court in the present case.

It will also be interesting to see how the implementation of the Directive on Antitrust Damages Actions ('Damages Directive'),<sup>30</sup> which has to be completed by 27 December 2016, will shape the access to information in Austria. Particularly, the Cartel Court had noted that there was no other option to obtain information. This may already be questioned under current Austrian law,<sup>31</sup> and the Damages Directive will further foster access to information.<sup>32</sup>

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28 OGH 27-1-2014, 16 Ok 14/13.

29 Cf. Polster and Hammerschmid (n 2) 140, 142, and 143.

30 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1.

31 Cf., for instance, Jürgen C. T. Rassi, 'Die Aufklärungs- und Mitwirkungspflichten der nicht beweiselasteten Partei im Zivilprozess aus österreichischer Sicht' (2008) 121 Zeitschrift für Zivilprozess 165.

32 Cf. European Commission 'Antitrust action for damages – damages directive' <[http://ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html)>, last accessed on 9 June 2015 and for an 'Austrian perspective' on the Damages Directive *Ummenberger-Zierler*, EU-Richtlinie über Schadenersatz bei Kartellverstößen, ÖBl 2014/53.