THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Eleventh Edition

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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This article was first published in March 2018
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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ISBN 978-1-912228-15-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed, using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government is undertaking a comprehensive review and is now considering the implementation of significant changes

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to its private enforcement law. The most significant developments, however, are in Europe as the EU Member States prepare legislative changes to implement the EU's directive on private enforcement into their national laws. The most significant areas to be standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period and privilege. Member States are likely to continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without this directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there have been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a 'preferred' jurisdiction for commencing private competition claims. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have taken steps to facilitate collective action or class-action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the 'public interest'.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia

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and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court. Of course, in the UK – an EU jurisdiction that has been one of the most active and private-enforcement friendly fora – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, e.g., Germany and Sweden). Some jurisdictions, such as Hungary, seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is, in essence, consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in a case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the

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overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of 'unjust enrichment' law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view

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it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries, and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
February 2018

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Chapter 5

AUSTRIA

Bernt Elsner, Dieter Zandler and Molly Kos[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Private antitrust litigation in Austria has substantially increased in recent years. To a large extent, such growth can be attributed to an increase of cartel court decisions imposing fines against cartel members based on intensified enforcement activity of the Austrian Federal Competition Authority (FCA) and the Austrian Federal Cartel Prosecutor (with the decision in the *Elevators and Escalators* cartel[2] being the show-starter). Based on such decisions finding violations of antitrust law, the Austrian Supreme Court (OGH) in several cases has affirmed the possibility of claims for damages for directly damaged parties[3] as well as for indirectly damaged parties,[4] including cases where damages were allegedly caused by cartel outsiders (umbrella pricing).[5]

In addition, Austrian private antitrust litigation has been the nucleus for landmark decisions of the Court of Justice of the European Union (CJEU), such as the *Kone* case[6] regarding antitrust damages claims based on umbrella pricing and the *Donau Chemie* case[7] concerning access to the file by possible private damages claimants. Although private antitrust litigation today plays a pivotal role in Austrian antitrust practice, and Austrian courts are actively shaping the law even on a European level (by referring such important questions to the CJEU), final decisions in major proceedings often experience substantial delay owing to numerous upfront disputes over procedural matters.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The Austrian Cartel and Competition Law Amendment Act 2017 (KaWeRÄG 2017) implementing the EU Damages Directive (Directive)[8] became effective on 1 May 2017.

1 Bernt Elsner and Dieter Zandler are partners and Molly Kos is an attorney at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH, Vienna.

2 OGH 8 October 2008, 16 Ok 5/08.

3 OGH 26 May 2014, 8 Ob 81/13i.

4 OGH 2 August 2012, 4 Ob 46/12m.

5 OGH 29 October 2014, 7 Ob 121/14s.

6 Judgment *Kone and Others v. ÖBB Infrastruktur AG*, C-557/12, ECLI:EU:C:2014:1317.

7 Judgment *Bundeswettbewerbsbehörde v. Donau Chemie and Others*, C-536/11, ECLI:EU:C:2013:366.

8 Directive 2014/104/EU 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 2014 L 349, p. 1.

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As the deadline for the implementation of the Directive expired on 26 December 2016, the provisions on the compensation of harm caused by infringements of antitrust law (Sections 37a to 37m Austrian Cartel Act (KartG)) entered into force retroactively as of 27 December 2016 (apart from the provision in Section 37m concerning the imposition of fines).

The new substantive provisions apply to harm incurred after 26 December 2016; for all damages arising before this date, the old regime has to be applied.

The KaWeRÄG 2017 amends the KartG, the Austrian Competition Act and the Austrian Act on Improvement of Local Supplies and Conditions of Competition. The provisions in Sections 37a et seqq KartG introduced new rules for actions for private antitrust damages claims (PADCs). The ordinary civil courts are the competent courts for PADCs.

The rules prescribe a fault-based liability: thus, a claim for damages for antitrust infringements requires that an unlawful and culpable antitrust infringement caused the harm. Section 37i (2) KartG stipulates that decisions of the cartel court, the European Commission or the national competition authorities (NCAs) of other EU Member States establishing an infringement have a binding effect for the Austrian civil courts as regards illegality and culpability. Therefore, in a follow-on scenario, claimants 'only' have to establish the damage incurred and a causal link between the infringement and such damage. However, in the case of a cartel (between competitors), a presumption of harm applies. This presumption is rebuttable, with the burden of proof resting with the infringer. As proving the occurrence of antitrust damages has been a rather difficult task for claimants in the past, the newly introduced presumption of harm should facilitate the enforcement of claims by parties who have suffered harm from a cartel.

Section 37h KartG stipulates new rules on the limitation period for PADCs. PADCs are now time-barred five years after the injured party becomes aware of the damage and the identity of the infringer (the absolute period of limitation is 10 years after the occurrence of harm). The statute of limitation for PADC proceedings is suspended during pending proceedings before the cartel court, the European Commission or the NCAs of other EU Member States; investigations by the European Commission or NCAs into possible infringements of antitrust law; and settlement negotiations. In the case of proceedings before the Cartel Court, or proceedings or investigations by the European Commission or NCAs, the suspension of the statute of limitations ends one year after the decision on the proceedings has become legally binding or after the end of the investigation. Section 37g (4) KartG allows courts to suspend the proceedings for a maximum period of two years when it is likely that the parties will agree on a settlement. In the case of unsuccessful settlement negotiations, a claim has to be filed within a reasonable period of time (Section 37h (2) final sentence).

III EXTRATERRITORIALITY

The application of the specific rules on PADCs in the KartG requires a domestic effect in Austria (effects doctrine).[9] If no such domestic effect can be established, a claimant may only base its PADC on general tort law rules.

As regards jurisdiction, a PADC can, *inter alia*, be brought before Austrian courts against a defendant domiciled outside Austria if the harmful event caused by an antitrust

9 Section 24 (2) KartG; cf OGH 27 February 2006, 16 Ok 49/05; OGH 23 June 1997, 16 Ok 12/97.

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infringement occurred or is expected to occur in Austria;[10] against a defendant that is domiciled in Austria (with the potential to include the other cartel members as additional defendants in the same lawsuit;[11]) and against defendants that are not domiciled in one of the Member States of the EEA if they hold assets in Austria.[12]

IV STANDING

Based on the decisions of the CJEU in *Courage v. Crehan*[13] and *Manfredi*,[14] anyone who has suffered damage from an infringement of Article 101 TFEU is entitled to recoup his or her losses from the antitrust infringers. This case law also had a significant effect on PADCs solely based on an infringement of Austrian antitrust law.

To date, in cases of umbrella claims it has been held that under Austrian law (if EU law is not applicable), a claimant would not have standing against the antitrust infringers due to a lack of an adequate causal link between the infringement and the losses alleged by the claimant.[15] Following the CJEU's decision in *Kone*,[16] however, it remains to be seen whether the OGH will uphold this approach in 'domestic' cases that are not also based on an infringement of EU competition law.

V THE PROCESS OF DISCOVERY

Effective rules on the disclosure of evidence were only introduced into Austrian law with the KaWeRÄG 2017. These new (procedural) rules apply to all PADCs in which the action initiating the proceedings is filed after 26 December 2016. Therefore, these new rules on the disclosure of evidence also apply to disputes over harm incurred prior to 26 December 2016 as long as only the proceedings are initiated after this date.

Apart from these new rules on disclosure of evidence after a PADC has been filed, general Austrian civil procedural law does not allow for (pretrial) discovery as found in Anglo-American legal systems. Rather, each party has to substantiate the facts favourable to its legal position by putting forward evidence (e.g., witnesses, documents, court-appointed experts).

10 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012, L 351/1, p. 1, Article 7 (2); see also Judgment *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel and others*, C-352/13, ECLI:EU:C:2015:335.

11 Ibid. Article 8 (1): 'provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

12 Section 99 Law on Court Jurisdiction (JN).

13 Judgment *Courage Ltd v. Bernard Crehan* and *Bernard Crehan v. Courage Ltd and Others*, C-453/99, ECLI:EU:C:2001:465.

14 Judgments *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v. Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04), and *Pasqualina Murgolo* (C-298/04) *v. Assitalia SpA*, C-295/04, ECLI:EU:C:2006:461.

15 OGH 17 October 2012, 7 Ob 48/12b (Ruling).

16 The OGH in this decision asked the trial court to establish the necessary facts with regard to umbrella pricing: OGH 7 Ob 121/14s.

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Under the new provisions on disclosure of evidence (Section 37j (2) KartG), a party may submit a reasoned request for disclosure of evidence to the court together with, or after, having lodged an action for damages. Apart from requesting the disclosure of (certain) pieces of evidence, a request for disclosure may also cover categories of evidence.

However, to avoid a US–style 'discovery' and 'fishing expeditions', evidence and categories of evidence need to be defined by the party requesting the disclosure as precisely and as narrowly as possible, taking into account the facts and information reasonably available to it. The court then may order the disclosure of evidence by third parties or the opposing party. The court has to limit a disclosure order to a proportionate extent, taking into account the legitimate interests of all parties (including third parties) concerned. The interest of companies in avoiding actions for damages caused by infringements of antitrust law is not relevant for this assessment. The disclosure may also comprise evidence containing confidential information. The confidentiality of the information has to be taken into account by the court when assessing the proportionality of a disclosure request. If necessary, special arrangements to protect the confidentiality of such information have to be mandated (e.g., excluding the public from the proceeding, redacting confidential information from documents and restricting the right of access to evidence to a particular group of persons).

Moreover, the party being ordered to disclose evidence can request that certain pieces of evidence are only disclosed to the court by invoking a legal obligation of secrecy (e.g., legal professional privilege) or any other right to refuse to give evidence (Section 157 (1) Nos. 2 to 5 Austrian Criminal Procedure Act (StPO)). The court will then decide, without consulting with the parties, whether to require the disclosure of the evidence. A court decision ordering disclosure may be appealed immediately, but a decision denying the disclosure may only be appealed when linked to the remedy against the final judgment.

A party to the proceedings may also apply for the disclosure of documents entailed in the files of competition authorities (the European Commission, NCAs). However, certain documents – namely information prepared for the proceedings before the competition authority, information prepared during the proceedings by the authority and submitted to the parties, and settlement submissions that were withdrawn – may only be disclosed once the competition authority has completed its proceedings (Section 37k (3) KartG). Leniency statements and settlement submissions are not subject to disclosure (Section 37k (4) KartG).

It remains to be seen whether this provision (implementing Article 6 (6) of the Directive) will be subject to legal challenge, as it may conflict with the CJEU's decision in *Donau Chemie*, which determined that a general exclusion of the inspection of records without any balancing of interest is contrary to the principle of effectiveness. According to the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims of damages from infringements of Article 101 or Article 102 TFEU are designed and applied in such a way that they do not make it in practice impossible or excessively difficult to exercise the Union right to full compensation for harm caused by an infringement of Article 101 or Article 102 TFEU.

So far, there exists no published case law applying the new rules on disclosure of evidence. It can be expected that courts will face a number of exciting and difficult questions when dealing with such a new instrument, previously unknown to the Austrian legal system. In particular, the proportionality test, required for the assessment of every disclosure request, will be quite challenging, as the relevant evidence subject to the disclosure request will normally (with the exception of cases specified in Section 37j (7) KartG) not be inspected by the court, which will then have to base its assessment solely on the assertions of the parties.

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The new provisions on disclosure will probably also lead to a prolongation of PADC proceedings due to the following grounds: several rounds for disclosure can be made during the same PADC proceeding (i.e., a party will often only be able to fulfil the requirement of precisely and narrowly defining the relevant pieces of evidence after other documents have been disclosed to it); and defendants will also file requests for disclosure (especially to try to prove that an overcharge was passed on to the next level of the supply chain).

VI USE OF EXPERTS

According to Section 351 (1) of the Austrian Civil Procedure Code (ZPO), courts can appoint experts to collect evidence. Such court-appointed experts can have an important role in private antitrust damages proceedings, in particular as regards establishing whether an alleged loss has occurred and as regards the calculation of the quantum of damages (see Section VIII for more detail).

Although courts have the capacity to estimate the quantum of damages (see Section VIII) themselves, they often are not willing to make such estimates but rather prefer to appoint court experts, such as economists, to calculate the quantum of damages.

To establish loss and to calculate the quantum of damages, as well as the causal link between an infringement and such damages, parties can also appoint private experts and use their findings as evidence in the proceeding. In addition, parties may also try to call their private expert as an expert witness to the proceeding. Note, however, that private experts appointed by the parties do not substitute court-appointed experts, and that courts may disregard the findings of a party-appointed expert simply by relying on the findings and opinion of a court-appointed expert. Private party experts' findings reports also do not have the full evidential value compared to reports of court-appointed experts (Section 292 ZPO).

VII CLASS ACTIONS

Austrian law does not provide for class actions as found in Anglo-American legal systems (neither on an opt-in nor an opt-out basis). However, the number of mass proceedings has increased recently (although still comprising a much lower proportion when compared with other countries such as the US).[17] Recently, Austrian-style 'class actions' have been brought before courts mainly by VKI, the association for consumer protection, through individual consumers assigning their claims to the VKI, which then tries to combine these claims into a single court proceeding.[18] However, as the ZPO does not contain any specific provisions for class actions, courts have differed in their treatment, either treating them as separate single proceedings, by joinder of claimants, or having one 'test proceeding' (while staying the other proceedings), which then serves similar to a 'precedent' for the other claims.[19]

Despite the growing number of such Austrian-style 'class actions', courts remain reluctant to accept the pooling of claimant actions for damages; Austrian civil procedural rules are rather based on an individual examination of each claim brought before the court, and actions for damages are tried in various separate court proceedings.

17 Kodek in Neumayer, *Beschleunigung von Zivil- und Strafverfahren*, 2014, p. 5.

18 Kodek, Haftung bei Kartellverstößen in WiR – Studiengesellschaft für Wirtschaft und Recht (eds), *Haftung im Wirtschaftsrecht* (2013), pp. 63, 77.

19 Kodek in Neumayer, p. 9.

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To our knowledge, there is no published case law in Austria that examines the potential of an Austrian-style class action in PADC proceedings. However, the models that have been used for combining individual consumer claims could theoretically also serve as a process for pooling PADCs, and such a model appears to have been successfully applied in 2007 by the Austrian Federal Chamber of Employees in a PADC against a driving school in Graz that had participated in a cartel with other local driving schools.[20]

VIII CALCULATING DAMAGES

Under Austrian law, antitrust damages are limited to the actual loss suffered, which also includes lost profit plus statutory default interest[21] calculated from the date when the harm occurred. Thus, Austrian law does not allow a claim for punitive or treble damages, and also does not take into account possible fines imposed by competition authorities.

According to Austrian case law, antitrust damages are calculated by comparing the actual financial situation of the injured party after the infringement with the counterfactual hypothetical scenario without the damaging infringement.[22] Often, injured parties have difficulties establishing the counterfactual hypothetical scenario that establishes proof of their damage.[23]

Austrian law allows the courts to estimate the quantum of the damages if the liability has already been established and the injured party was able to establish that it has suffered damage due to an antitrust infringement (i.e., the injured party has to prove the 'first euro' of its damages).[24] However, for cartels between competitors, Section 37c (2) KartG contains a presumption that the cartel caused damage, thus already allowing an estimate if such presumption cannot be rebutted.[25]

While Austrian civil procedural rules regarding the reimbursement of procedural costs generally are based on the 'loser pays principle', attorneys' fees are only reimbursed on the basis of the (fixed) statutory fees for attorneys, which are largely dependent on the amount in dispute and not the actual amount of attorneys' fees incurred by a party (e.g., on the basis of hourly rates). As a rule of thumb, the statutory attorneys' fees are usually significantly lower than the actual attorney's fees (if an attorney does not charge his or her client on the basis of statutory fees) for smaller matters (as regards the amount in dispute), whereas the statutory

20 See Ginner, *Erstes österreichisches Urteil zum Private Enforcement – Fahrschulkartell Graz*, ÖZK 2008, p. 110 et seq.

21 The applicable statutory default interest is 4 per cent (Section 1000 (1) General Civil Code (ABGB)), except for claims from contractual relationships between businesses, which is 9.2 per cent +/- base interest (Section 456 Austrian Business Code).

22 OGH 15 May 2012, 3 Ob 1/12m; see Csoklich, 185; Reischauer in Rummel (ed), ABGB 3rd edition (2007), Section 1293 ABGB Paragraph 2a; Karner in Koziol/P Bydlinksi/Bollenberger (eds), ABGB, 4th edition (2014), Section 1293, Paragraph 9.

23 For possible calculation methods see Csoklich, Ibid.; Abele/Kodek/Schäfer, *Zur Ermittlung der Schadenshöhe bei Kartellverstößen – Eine Integration juristischer und ökonomischer Überlegungen*, ÖZK 2008, p. 216; Kodek, *Haftung im Wirtschaftsrecht* (2013), pp. 63, 74.

24 In one case, the allegedly injured party was not able to establish that it had suffered damage in follow-on litigation from the *Escalator* cartel as the claimant (due to lack of contractual documentation), and was only able to make estimates of the prices paid to the cartel members rather than the actual prices paid (cf OGH 3 Ob 1/12m).

25 OGH 8 Ob 81/13i; see Kodek, footnote 23.

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attorneys' fees for larger disputes (typically for an amount above €1 million) often exceed the actual attorneys' fees incurred based on applicable market rates. The award of costs also includes court fees, including parties' expenses for court-appointed experts.

IX PASS-ON DEFENCES

Section 37f KartG provides that generally the defendant has the burden of proof for passing-on. However, there is a presumption of passing-on of the damage to an indirect purchaser (in the case of a PADC by an indirect purchaser) if it has been established that the infringer has conducted an antitrust infringement causing a price increase for the direct purchaser and the products or services sold to the indirect purchaser were subject to this antitrust infringement. The antitrust infringer can rebut this presumption by way of *prima facie* evidence. Even if a passing-on can be established, a claimant can still claim lost profits from the antitrust infringers.

To prevent overcompensation, the defendant in a proceeding involving passing-on is allowed to summon the respective third party (e.g., the direct or indirect purchaser) to join the proceedings. In such case, the findings concerning passing-on will be legally binding for the third party irrespective of whether it joins the proceedings (Section 37f (4) KartG).

X FOLLOW-ON LITIGATION

Owing to the binding effect of final decisions of the cartel court establishing an antitrust law infringement (see Section II) in Austria, PADCs are in almost all cases pursued in follow-on actions. However, other areas of private antitrust litigation (e.g., contractual disputes or disputes involving access to essential facilities or distribution systems) often are commenced on stand-alone claims.

XI PRIVILEGES

The professional secrecy obligation of attorneys plays an important role in Austria when it comes to (defence) attorneys being used to provide evidence. According to Section 9 (2) of the Austrian Code of Lawyers (RAO), attorneys admitted to the Austrian Bar are obliged to keep confidential information that is entrusted to them by the client or is obtained in their professional capacity if the confidential treatment of such information is in the interest of the client. The obligation applies before courts as well as in administrative proceedings. Moreover, Section 9 (3) RAO stipulates that the obligation may not be circumvented by actions of the courts or administrative authorities (e.g., by questioning assistants of the attorney or ordering the disclosure or seizure of the attorney's documents, image, sound or data carriers). The obligation does not apply with respect to information or documents that are not attorney–client communication, but are rather just deposited with the attorney. Furthermore, the privilege does not apply to in-house counsel (as they are not admitted to the Austrian Bar).

In PADC proceedings, a person being ordered to disclose evidence can request that certain pieces of evidence are only disclosed to the court by invoking a legal obligation of secrecy (e.g., legal professional privilege) or any other right to refuse to give evidence

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(Section 157 (1) Nos. 2 to 5 StPO; see Section VIII for more detail). Additionally, an attorney may also refuse to give evidence as a witness if it violates confidentiality (Section 321 (1) No. 3 ZPO). However, clients have the right to release their attorneys from the obligation.

In FCA investigations, in particular as regards the seizure of documents during a dawn raid, attorney–client communications previously were not privileged if they were not in the hands of the attorney.[26] This has been heavily criticised in legal writing, as it deviates from the standard applicable in investigations of the European Commission and circumvents the obligation.[27] Based on a recent change to Section 157 (2) StPO, documents and information prepared for the legal advice or defence may not be seized even if they are in the domain of a defendant or co-defendant in criminal proceedings. It remains to be seen whether this general criminal law provision will also be held to be applicable in the case of dawn raids by the FCA.

XII SETTLEMENT PROCEDURES

Austrian law permits parties to settle private antitrust damages litigation both prior to starting legal proceedings and during an ongoing court proceeding. As one of the main advantages of a settlement (often) is its lack of publicity, there is limited public information available on how frequently settlements concerning PADCs occur (although there are a number of prominent cases where it is publicly known that they were settled out of court). As out-of-court settlements may be subject to stamp duty in Austria, it is important to structure them in a tax-efficient manner while at the same time providing the parties with the necessary legal protection.

In addition to private antitrust settlements, settlements of governmental antitrust proceedings[28] currently play a very important role in Austria. This makes it more difficult for private claimants to pursue PADCs against antitrust infringers, as only limited information about the details of an infringement becomes public in the fine decisions that are published by the cartel court on the basis of Section 37 (1) KartG.[29]

XIII ARBITRATION

As PADCs generally fall under the jurisdiction of the civil courts, they may alternatively be adjudicated in arbitration proceedings[30] provided that the parties mutually agree to such proceedings (Section 582 (1) ZPO). An arbitration agreement may be concluded for both contractual and non-contractual disputes (Section 581 (1) ZPO). Depending on the content of the arbitration agreement, the arbitration proceedings may be subject to national civil procedural rules or *ad hoc* rules, or administered under commonly used arbitration rules such

26 Metzler, 'The Tension Between Document Disclosure and Legal Privilege in International Commercial Arbitration – An Austrian Perspective' in Klausegger et al. (eds), *Austrian Yearbook on International Arbitration 2015*, pp. 231, 254.

27 Metzler, Ibid., 254 et seq. with further references.

28 For details see the FCA's Guidelines of Settlements: www.bwb.gv.at/Documents/BWB%20Standpunkt%20zu%20Settlements%20September%202014.pdf (last accessed on 29 January 2018).

29 This aspect has been criticised in legal writing: see Kodek, *Absprachen im Kartellverfahren*, ÖJZ 2014, 443, 450.

30 For further details, see Wilheim, *Die Vorteile der Abhandlung von Follow-on Ansprüchen in kollektiven Schiedsverfahren*, ÖZK 2014, p. 49.

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as those of the ICC or the Vienna International Arbitral Centre. As Austrian law requires an arbitration agreement in writing, arbitration is rarely used for the typical follow-on PADC, but is rather confined to private antitrust disputes where the contract between the parties to the proceedings already contains a (sufficiently broad) arbitration clause.

In cases where an effective arbitration agreement exists, Austrian courts have to reject a claim if the defendant does not engage in the court proceedings without contesting the court's jurisdiction (Section 584 (1) ZPO). If a dispute that is already subject to arbitration proceedings is subsequently initiated before civil courts such claim in general will also be rejected (Section 584 (3) ZPO).

XIV INDEMNIFICATION AND CONTRIBUTION

According to Section 37e (1) KartG, the participants in an antitrust infringement are jointly and severally liable co-debtors for the losses culpably caused to injured parties (therefore, not requiring an intentional infringement and irrespective of whether the individual portion of the damages can be determined). The amount of contribution depends on the relative responsibility of the participant (e.g., market share, role in the infringement).

Section 37e (2) and (3) KartG contain specific provisions granting special protection from joint and several liability for immunity and leniency recipients (and redress for damage payments from immunity recipients) and small and medium-sized enterprises (SMEs), as well as for redress in the case of settlements (Section 37g).

In principle, immunity and leniency recipients are only liable for the damage caused towards their direct or indirect purchasers. Only in cases where other damaged parties are not entirely compensated by the other parties to the infringement will the immunity recipient also have to step in and compensate those damaged parties that are not the immunity recipient's direct or indirect purchasers.

SMEs having a market share of less than 5 per cent during the antitrust infringement period, and which would be in danger of losing their commercial viability and having their assets devaluated entirely, are also only liable for the damage caused towards their direct or indirect purchasers. This special protection of SMEs does not, however, apply to SMEs that organise an infringement or force other companies to participate in the infringement, or that are antitrust infringement reoffenders.

Where settlements between an injured party and one of the infringers are made, this infringer is in principle no longer liable for any claims of this injured party against any of the other parties to the infringement. Only in cases where the remaining claim of the injured party is not compensated by the other cartelists will the infringer who has concluded the settlement have to step in (such liability, however, can be contractually excluded, for example in a settlement agreement).

Redress for damage payments from other antitrust infringers is subject to the relative responsibility of the participant (see above). Redress from an immunity or leniency recipient is limited to the damage the immunity or leniency recipient caused to his or her direct and indirect purchasers.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Although the specific Austrian provisions on the enforcement of PADCs only came into force approximately three years ago, the implementation of the Directive again substantially

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transformed the legal framework for cartel damages claims in Austria.[31] As the wording of the amendments closely follows the text of the Directive, it is highly likely that Austrian courts will submit requests to the ECJ for preliminary rulings regarding the interpretation of individual provisions of the Directive.

However, in general the new rules create the impression that there is little interest in establishing Austria as an attractive forum for (private) antitrust damages proceedings. The federal government's impact assessment even assumed that the amendment will not change the workload of the Austrian judiciary, as the positive and negative effects on the workload balance each other out. It remains to be seen whether this assessment applies in practice, as the new provisions include some far-reaching changes as regards both substantive and procedural matters (e.g., regarding the new provisions governing the disclosure of evidence by the opposing party or by a third party).

31 For further details, see Krauskopf/Schicho, *Die Umsetzung der Schadenersatzrichtlinie – eine Herausforderung für alle Beteiligten*, VbR 2015/121; Ablasser-Neuhuber/Stenitzer, 'Das KaWeRÄG 2017 – Die wichtigsten Neuerungen', *ÖBl* 2017/32; 'Potocnik-Manzouri, Das KaWeRÄG 2017 – Wesentliche Änderungen im Bereich der Kartellgesetzes', *ecolex* 2017, 380; Dokalik, 'Schadenerstaz wegen Wettbewerbsverletzungen nach dem KaWeRÄG 2017', *RdW* 2017/178.

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Appendix 1

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ISBN 978-1-912228-15-7

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