The Private Competition Enforcement Review

Ninth Edition

Editor
Ilene Knable Gotts

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EDITOR'S 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 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 has 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: Brazil 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 last 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. Also, 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 to its private enforcement law. The most significant developments, though, 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 calculation. 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 adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is 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 also taken steps to facilitate collective action or class-action legislation. 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 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.

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, for example, 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 jurisdictions 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 the 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 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 have not been available except to organisations formed to represent consumer members; a new class action law will come into effect by 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; limited recognition of privilege in Germany; 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 to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view 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 2016

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.[2] 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[3] 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

1 Bernt Elsner is partner, Dieter Zandler is an attorney and Molly Kos is an associate at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH, Vienna. The authors would like to thank Arno Scharf (also of CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH) for his assistance with preparation of this chapter.

2 Apart from private antitrust damages claims, private antitrust litigation in 2015 in Austria also led to Supreme Court decisions in various fields involving cases where private claimants were seeking (1) access to newspaper takeaway in Vienna's subway stations (OGH 11 June 2015, 16 Ok 8/14h), (2) admission to selective distribution networks in the automotive services industry (OGH 8 October 2015, 16 Ok 1/15f), (3) to challenge non-compete and radius clauses in lease agreements for tenants in shopping centres (OGH 8 October 2015, 16 Ok 6/15s), or (4) to contest predatory pricing and cross-subsidising in the waste collection sector (OGH 8 October 2015, 16 Ok 9/15g).

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

parties[4] as well as for indirectly damaged parties,[5] which now also includes cases where damages were allegedly caused by cartel outsiders raising their prices in the wake of a cartel (umbrella pricing).[6]

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[7] regarding antitrust damages claims based on umbrella pricing as well as the *Donau Chemie* case[8] concerning access to file by possible private damages claimants. Although private antitrust litigation nowadays 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

In Austria, Section 37a of the Cartel Act (KartG) is the cornerstone of private antitrust damages claims (PADCs).[9] The competent courts for PADCs are the ordinary civil courts.

Pursuant to Section 37a(1) KartG first sentence, claimants may seek damages from parties culpably violating the substantive provisions of Austrian or European antitrust law. Section 37a(3) KartG stipulates that decisions of the cartel court, the European Commission or the national competition authorities (NCAs) of other EU Member States[10] 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 damages incurred and a causal link between the infringement and such damages. Section 37a(4) KartG stipulates that the statute of limitations for PADCs is suspended for the period during which infringement proceedings are pending before the cartel court, the European Commission or before the NCAs of other EU Member States. The suspension ends six months after the decision has become legally binding or the

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

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

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

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

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

9 Other provisions that can be used as a basis for a claim for private antitrust law enforcement not (directly) aimed at seeking damages – such as Section 36(4) Nr 4 KartG (actions for seeking a prohibition decision pursuant to Section 26 or establishing infringements in the past pursuant to Section 28 KartG) – as well as cases where the nullity of an agreement violating competition law is sought are not covered in this chapter.

10 According to the prevailing opinion, the Austrian official parties are not covered by this provision although they also qualify as national competition authorities under Regulation 1/2003: see Reidlinger/Hartung, *Das Österreichische Kartellrecht*, 3rd edition (2014), p. 246.

proceedings have ended otherwise. According to Sec 37a(2) KartG, PADC proceedings can be suspended for the duration of parallel proceedings with the cartel court, the European Commission or an NCA of another EU Member State.

Section 37a KartG was introduced in the Cartel and Competition Amendment Act 2012 and entered into force on 1 March 2013. The provision was mainly inspired by Section 33 of the German Act against Restraints of Competition (GWB).[11] For all PADCs resulting from violations from Austrian and European antitrust law that have occurred until 28 February 2013, the general tort law rules apply.[12] While it is also established case law that antitrust laws are so-called protective provisions under general tort law that – in case of an infringement – may form the basis of PADCs if the damages have been caused culpably,[13] the reliefs offered by Section 37a KartG are not applicable to PADCs based on antitrust violations that occurred prior to 1 March 2013.

The general limitation period for PADCs is three years, commencing from the knowledge of the circumstances giving rise to the claim and the identity of the injuring party. The maximum period for PADCs is 30 years if the claimant has no knowledge of the damage and the identity of the tortfeaser (Section 1489 ABGB).

The above-mentioned provisions may be subject to considerable change following the implementation of the EU Damages Directive (the Directive) in Austria (see Section XV, *infra*).

III EXTRATERRITORIALITY

The application of the specific rules on PADCs in the KartG requires a domestic effect in Austria ('effects doctrine').[14] 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:

a against a defendant domiciled outside Austria if the harmful event caused by the cartel occurred or is expected to occur in Austria;[15]

b against a defendant that is domiciled in Austria (with the potential to include the other cartel members as additional defendants in the same lawsuit[16]); and

11 Gruber, *Österreichisches Kartellrecht*, 2nd edition Vienna 2013, Section 37a KartG 2005, p. 498.

12 Section 86(4) KartG last sentence.

13 OGH 14 February 2012, 5 Ob 39/11p; OGH 4 Ob 46/12m.

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

15 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.

16 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'.

c against defendants that are not domiciled in one of the Member States of the EEA if they hold assets in Austria.[17]

IV STANDING

Based on the decisions of the CJEU in *Courage v. Crehan*[18] and *Manfredi*,[19] anyone who has suffered damages from an infringement of Article 101 TFEU is entitled to recoup his or her losses from the cartelists. This case law also had a significant effect on PADCs solely based on an infringement of Austrian competition law. So far, only in cases of umbrella claims has the OGH held that under Austrian law (if EU law is not applicable), a claimant would not have standing against the cartelists due to lack of an adequate causal link between the cartelists' infringement and the losses alleged by the claimant.[20] Following the CJEU's decision in the *Kone* case,[21] 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

Austrian law currently 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).

In order to obtain such evidence, a potential claimant contemplating a PADC may request access to files of the cartel court pursuant to the provisions set out in Section 219(2) of the Code of Civil Procedural (ZPO).[22] Based on this provision a third party may be granted access to the file if it can credibly show a legitimate interest (which typically can be established by a possible PADC). If such legitimate interest can be shown, the cartel court has to decide whether to grant access to the file by balancing the conflicting interests of the party seeking access and the interests of the parties of the cartel court proceeding, in particular business secrets. Such balancing of interests has to be made for every single document for which access is requested.[23]

Based on the CJEU's decision in the *Donau Chemie* case (which was based on a request to the Austrian cartel court for access to the file concerning an infringement

17 Section 99 Law on Court Jurisdiction (JN).

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

19 Judgment *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.

20 OGH 17 October 2012, 7 Ob 48/12b (ruling).

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

22 Gitschthaler in Gitschthaler/Höllwerth, *AußStrG* Section 22 paragraph 28 et seq.

23 Ibid. paragraphs 43, 47, 48.

proceeding relating to printing chemicals), Section 39(2) KartG, which made such access to the file conditional upon the approval of all the parties to the cartel court proceedings (and thereby making access to the file virtually impossible for potential claimants) is no longer applicable if the potential claim for which access to the file is requested is based on an infringement of Article 101 TFEU. In a more recent ruling, the OGH declared that Section 39(2) KartG also will no longer be applicable in cases where the potential PADC for which access to the file is requested is based on an infringement of national antitrust law without any EU law implications.[24] According to this judgment, the courts should give parties that deny access to the file the opportunity to present their reasons for such denial in order to decide on the balancing of interests.[25]

The FCA – which often will be in possession of additional evidence (as not all evidence will necessarily be submitted to the cartel court proceedings by the FCA) – currently does not allow (third) parties access to its file.[26]

Furthermore, in PADC proceedings before civil courts, parties can claim that the opposing party is in possession of documents that are of significant importance for substantiating its claims and parties can request the court to order the opposing party to disclose such documents (Section 303 ZPO). Disclosure may not be denied only when (1) the opposing party has itself relied on the document, (2) the opposing party is obliged to disclose the document due to applicable law, or (3) the document is a joint document of the parties.[27] Owing to these limitations, the existing disclosure obligation currently does not play an important role in Austrian procedural practice.

Note that the imposition of Article 5-7 of the Directive[28] may drastically change the legal setting for potential discovery of evidence in Austria. Although no draft of the implementation statute has yet been published,[29] it is expected that Article 5 et seq. of the Directive will be implemented closely to the original wording of the Directive.

VI USE OF EXPERTS

According to Section 351(1) ZPO, courts can appoint experts to collect evidence. Such court-appointed experts can have an important role in private antitrust damage

24 OGH 28 November 2014, 16 Ok 10/14b and 16 Ok 9/14f; Ablasser-Neuhuber, *Zur Einsicht in Akten des Kartellverfahrens*, ÖBl 2015/37; Zandler, *Akteneinsicht in Kartellgerichtsakten*, 9 February 2015: http://blog.cms-rrh.com/post/2015/02/09/akteneinsicht-in-kartellgerichtsakten/ (last accessed on 9 December 2015).

25 See Gitschthaler, *AußStrG* Section 22 paragraph 43.

26 Polster/Zellhofer, *Aktenzugang im Kartellverfahren im Spannungsfeld zwischen Geheimnisschutz und Private Enforcement*, OZK 2008/3, p. 103.

27 According to Section 304(2) ZPO, if it was put up in the interest or entails a mutual legal transaction of the parties involved.

28 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.

29 As of the cut-off date for this publication.

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, *infra*, for more detail). Although Section 37a(1) KartG[30] also gives courts the capacity to estimate the quantum of damages (see Section VIII) themselves, courts often are not willing to make such estimates but rather prefer to appoint court experts, such as economists, to calculate the quantum of damages suffered.

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).[31] Recently, Austrian-style 'class actions' have been brought before courts mainly by the association for consumer protection (VKI) through individual consumers assigning their claims to the VKI, which then tries to combine these claims in a single court proceeding.[32] However, as the ZPO does not contain any specific provisions for class actions, courts have differed in their treatment, by either treating them as separate single proceedings, by joinder of claimants, or by having one 'test proceeding' (while staying the other proceedings), which then serves similar to a 'precedent' for the other claims.[33]

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

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

30 By way of reference to Section 273 ZPO.

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

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

33 Kodek in Neumayer, p. 9.

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.[34]

VIII CALCULATING DAMAGES

Under Austrian law, antitrust damages are limited to the actual loss suffered plus statutory default interest[35] calculated from the date when the loss 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. If a PADC is based on an infringement of Article 101 TFEU, such actual losses also include lost profits based on the CJEU's *Manfredi* judgment. For PADCs that are only based on an infringement of national antitrust laws, lost profits may be awarded in cases where the commitment of the infringement was grossly negligent or intentional[36] or if the claim is based on a contractual relationship between businesses[37] (these strict requirements will likely need to be amended with the implementation of Article 3(2) of the Directive).

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.[38] Often, injured parties have difficulty establishing the counterfactual hypothetical scenario that establishes proof of their damages.[39]

Section 37a(1) KartG, therefore, also 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 damages due to an antitrust infringement (i.e., the injured party has to prove the 'first euro' of its damages).[40] In one example, the allegedly injured party was not able to establish that it had suffered damages in follow-on litigation

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

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

36 Section 1331 ABGB; see Csoklich, *Schadenersatz nach Kartellverstoß*, VbR 2014/112, p. 185.

37 Section 349 UGB; see Kramer/Rauter in Straube/Ratka/Rauter (eds), UGB I, 4th edition (2011), Section 349 paragraph 8.

38 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.

39 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), p. 63, 74.

40 OGH 8 Ob 81/13i; see Kodek, ibid.

from the *Escalator* cartel when the claimant (due to lack of contractual documentation) was only able to provide estimates of the prices paid to the cartel members rather than expressly to determine the prices paid.[41]

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 attorneys' fees for larger disputes (typically above a double digit million euro amount) often exceed the actual attorneys' fees incurred. The award of costs also includes court fees, including a party's expenses for court-appointed experts.

IX PASS-ON DEFENCES

Section 37a(1) second sentence KartG clarifies that the passing on of excess fees in products or services as such is not sufficient grounds to preclude PADC of the initial buyer based on increased prices. An indirectly damaged party is also allowed to claim damages from the members of a cartel when the damages are 'automatically' passed on from the contractual counterparty of the cartelists to the claimant by means of a contractual obligation.[42] In its decision, the OGH adopted the position expressed by the German Federal Court in 2011[43] that the passing-on defence is to be recognised under the legal concept of 'benefit sharing' to reduce the damages suffered by the direct purchaser. However, as the decision involved a situation where the damage was 'automatically' passed on by means of a contractual obligation, it was not necessary for the OGH to deal generally with the question of an admissibility of the passing-on defence in cases where the direct purchaser was able to pass on some or all of its cartel losses to the next market level by way of a price increase.[44] In another decision, the OGH held a claim from an indirect purchaser of escalators admissible based on the contention that the loss was economically passed on to the indirect purchaser by the direct purchaser.[45] Therefore, if a party can establish that it has suffered damages that were caused by an antitrust infringement, there is generally no limitation for claims from indirect purchasers.

As regards the claims of the direct purchaser, based on the above precedents and although no case law exists on the question whether the passing-on defence is admissible where losses are passed on to the next market level by way of a price increase, Austrian legal literature predominantly takes the view that the concept of 'benefit sharing' should

41 OGH 3 Ob 1/12m.

42 OGH 4 Ob 46/12m.

43 BGH 28 June 2011, KZR 75/10.

44 Polster/Steiner, *Zur Passing-on defense im österreichischen Kartellschadenersatzrecht*, ÖZK 2014, p. 43, 46.

45 OGH 7 Ob 48/12b (judgment), p. 19.

be applied (which would generally make the passing-on defence permissible unless there is no causal link between the infringement and the benefit (i.e., passing on) and the defence would cause an unfair relief to the infringing party);[46] the burden of proof for the passing-on defence generally rests on the cartelists.

X FOLLOW-ON LITIGATION

Due to the binding effect of final decisions of the cartel court establishing an antitrust law infringement (see Section II, *supra*) 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 (obligation) 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 information confidential which (1) is entrusted to them by the client or (2) 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.

In PADC proceedings, an attorney may refuse to provide documents if the disclosure violates such confidentiality obligation (Section 305 number 4 ZPO). Additionally, an attorney may also refuse to give evidence as a witness if it violates confidentiality (Section 321(1) number 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 are not privileged if they are not in the hands of the attorney.[47] However, 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.[48]

46 Polster/Steiner, ibid.

47 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*, 231, 254.

48 Metzler, ibid, 254 et seq. with further references.

XII SETTLEMENT PROCEDURES

Austrian law permits parties to settle private antitrust damages litigation both prior to starting legal proceedings as well as 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 PADC 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 cartel settlements, settlements of governmental antitrust proceedings[49] currently play a very important role in Austria, which makes it more difficult for private claimants to pursue PADCs against cartelists 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 Article 37 KartG.[50]

XIII ARBITRATION

As PADCs are claims generally falling under the jurisdiction of the civil courts, they may alternatively be adjudicated in arbitration proceedings,[51] 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, *ad hoc* rules or administered under commonly used arbitration rules such as those of the ICC or the Vienna International Arbitral Centre (VIAC). 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 of 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 already is subject to arbitration proceedings is subsequently initiated before civil courts such claim in general will also be rejected (Section 584(3) ZPO).

Article 18 of the Directive on the suspension and other effects of consensual dispute resolution may provide new incentives for the Austrian legislator to establish specific rules for arbitration proceedings on PADC.

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49 For details see the FCA's Guidelines of Settlements: www.bwb.gv.at/Documents/BWB%20Standpunkt%20zu%20Settlements%20September%202014.pdf (last accessed on 16 December 2015).

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

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

XIV INDEMNIFICATION AND CONTRIBUTION

Under Austrian law, cartel members are jointly and severally liable co-debtors for the losses of injured parties[52] if the infringement was committed intentionally or if the individual portion of the damages sustained cannot be determined. In such case, an injured party may claim from one cartel member the loss caused to it by the entire cartel; such joint and several liability is based on general tort law (Section 1302 ABGB).[53] For such joint and several liability, an individual cartel member's intent must not necessarily cover the losses caused by the entire cartel.[54]

Where a cartel member is held liable as a co-debtor, it may seek redress for the damage payments from the other co-debtors.[55] Austrian law does not provide for any specific rules on how to determine the respective contribution of each cartel member for private antitrust damages and we are not aware of any specific case law in Austria on this issue.

Currently, there are no specific provisions that provide for special protection from joint and several liability as co-debtors applicable to immunity recipients or SMEs. However, this should change following the implementation of Article 11 of the Directive.

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 will again lead to a substantial transformation of the legal framework for cartel damages claims in Austria.[56]

The most important legislative change from the Directive's implementation will be caused by Articles 5 and 6 of the Directive introducing extensive rules on disclosure of evidence and access to file.

Furthermore, the limitation period's extension from three to five years under the suspension provisions of the Directive once a competition authority initiates investigations or proceedings (Article 10) will push the legislator to clarify issues that have been at the top of its agenda for some time.[57]

Therefore, it is expected that the implementation of the Directive will further stimulate private antitrust damage litigation in Austria.

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52 OGH 5 Ob 39/11p; Wilhelm, *Kartellverstoß macht alle Kartellanten schadenersatzpflichtig*, ecolex 2012/170.

53 OGH 4 Ob 46/12m; OGH 5 Ob 39/11p.

54 Ibid.

55 Section 1302 ABGB.

56 For further details see, Krauskopf/Schicho, *Die Umsetzung der Schadenersatzrichtlinie – eine Herausforderung für alle Beteiligten*, VbR 2015/121.

57 See Arbeitsprogramm der österreichischen Bundesregierung 2013–2018, 9: 'Verjährungsbestimmungen anpassen: Verstöße sollen nicht während laufender Ermittlungshandlungen verjähren', www.bka.gv.at/DocView.axd?CobId=53264 (accessed on 9 December 2015).

Appendix 1

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