AUSTRIA

Court proceedings in key jurisdictions
Introduction

This chapter is part of the ICC Compendium of Antitrust Damages Actions (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
Glossary

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identic cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
Directive 2014/104/EU: European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

Follow-on: A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

Immunity: Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

Infringer: Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

Joint-and-several liability: liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

Leniency: A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform the competition authority of an infringement that it did not previously have knowledge of.

Limitation period: a statutory period after which a lawsuit or prosecution cannot be brought in court.

Passing-on defence: a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

SME (Small—and Medium-sized Enterprise): categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

Stand-alone action: A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

Standard of proof: In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

Tort: A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
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Private antitrust litigation has a long tradition in Austria, specifically since 1993 when individual *locus standi* before the Cartel Court was introduced. It is not limited to damages claims. The recent implementation of the EU Directive 2014/104/EU on Antitrust Damages Actions (the “Directive”) into national law will further facilitate private antitrust damages litigation in Austria.
1. Jurisdiction

Private antitrust damages actions can be brought before Austrian civil courts on the basis of Section 37c (1) of the Austrian Cartel Act ("KartG"), the general tort law provisions of the Austrian Civil Code ("ABGB") and of the Unfair Competition Act ("UWG").

In addition, certain private claims, in particular (i) applications for a declaratory decision that an undertaking has infringed EU or Austrian competition law, and (ii) applications for cease-and-desist orders regarding an infringement of EU or Austrian competition law, may be brought before the Cartel Court by all undertakings that have a legal or economic interest in the decision. However, the Cartel Court does not have jurisdiction to award damages.

2. Relevant legislation and legal grounds

Sections 37a to 37m KartG implement the Directive into national law. Pursuant to Section 37c (1) KartG, any entity that culpably—i.e. intentionally or negligently—infringes Articles 101 or 102 TFEU or their Austrian equivalents (Sections 1 and 5 KartG) or equivalent provisions of the national law of a Member State of the European Union or of a Contracting State to the Agreement on the European Economic Area, is obliged to provide compensation for the harm caused by the infringement.

An action for damages resulting from a competition law infringement can also be based on the general tort law provisions of the ABGB. The Austrian Supreme Court confirmed that such an action may be based on Section 1311 ABGB, according to which anyone who intentionally or negligently infringes an act of law that aims to protect somebody or something from harm shall be liable to provide compensation for the harm arising out of this behaviour (Case 4 Ob 46/12m). The Supreme Court found that the prohibitions of restrictive agreements and abuse of dominance under EU and Austrian law qualify as such protective rules within the meaning of Section 1311 ABGB.

In addition, a private antitrust cause of action may also arise on the basis of Section 1 UWG in conjunction with articles 101 or 102 TFEU or their Austrian equivalents (Sections 1 and 5 KartG). According to Section 1 UWG and established case law, a breach of the law which is capable of conferring on the infringer an advantage over its law-abiding competitors constitutes an infringement of Section 1 UWG unless the breach can be justified by a reasonable interpretation of the law. Under the rules of the UWG, claimants may bring actions for injunctions and actions for damages and may have the decision published.

Finally, private antitrust litigation in a broader sense may also arise where one party to an agreement argues that the agreement or part of it is null and void because it infringes competition law.

**Ratione temporis application of the Austrian rules implementing the Directive**

The provisions of Austrian law which implement the substantive provisions of the Directive apply to the compensation of damages which occurred after 26 December 2016. Some of the rules provided for in the Directive were however already part of Austrian law prior to the implementation of the Directive (e.g. the binding effect of decisions of the competition authority or joint and several liability of joint infringers).
As regards the new rules on limitation periods, which implement the corresponding provisions of the Directive, a specific transitional provision provides that the new rules on limitation apply to claims for antitrust damages which had not yet become time-barred under the old rules on limitation on 26 December 2016 (unless the old rules on limitation are more favourable to the claimant than the new rules).

The provisions of Austrian law which implement the procedural provisions of the Directive, in particular the rules on disclosure of evidence, apply in proceedings on actions for antitrust damages which were initiated after 26 December 2016.

3. **What types of anti-competitive conduct are damages actions available for?**

In accordance with Section 37a (1) KartG, damages actions are available for infringements of competition law as defined in Section 37b (1) KartG.

These include violations of the prohibition of restrictive agreements (Article 101 TFEU), the prohibition of abuse of a dominant market position (Article 102 TFEU), as well as their Austrian equivalents in Sections 1 and 5 KartG respectively and the prohibition of retaliatory measures (Section 6 KartG). Violations of provisions of the national law of a Member State of the European Union or of a Contracting State to the Agreement on the European Economic Area, which are pursuing the same objectives as Articles 101 and 102 TFEU, are covered as well.

4. **What forms of relief may a private claimant seek?**

The primary objective of damages actions is compensation for harm caused by an infringement of competition law.

The undertaking that culpably commits a breach of competition law may be required to pay compensation for any harm caused thereby. Section 37c KartG contains the rebuttable presumption that a (horizontal) cartel between competitors causes harm. This standardized reversal of the burden of proof makes it easier for the injured party to assert its claims. As a result, the claimant does not have to demonstrate that it has suffered harm in the first place; it however still has to prove the quantum of harm.

Private claimants can request that the damage caused by an infringement of competition law is compensated; this damage includes positive damage, loss of profits as well as interest (Section 37d (1) KartG). The KartG does not contain rules on the calculation of damages. A civil court deciding on an antitrust damages claim can ask the Cartel Court, the Federal Cartel Attorney and the Federal Competition Authority for assistance in determining the amount of damages.

If several undertakings have infringed competition law through joint behaviour (e.g. in the case of a cartel), they are jointly and severally liable for the resulting damage (see Section 37e KartG). It is not required that they have a joint intention to cause damage.

Special provisions apply to “crown witnesses” (leniency applicants granted immunity from fines) and SMEs in Section 37e KartG. A “crown witness” is only liable to its direct and indirect purchasers and suppliers unless the other injured parties cannot obtain
full compensation from the other undertakings involved in the same infringement of competition law. An SME is only liable to its direct and indirect purchasers and suppliers if (i) its market share in the relevant market was below 5% at any time during the infringement of competition law, (ii) its unlimited liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value, (iii) it has not been the leader of the infringement of competition law and has not coerced other undertakings to participate therein, and (iv) it has not previously been found to have infringed competition law.

### 5. Passing-on defence

Section 37f KartG provides that the defendant in an action for antitrust damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or parts of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on is on the defendant. Even if the defendant can show that the overcharge was passed on, the claimant may still claim compensation for loss of profits due to the passing-on of the overcharge (e.g. if the claimant’s sales to its customers were reduced as a result of the passing-on of the overcharge).

In the case of an action for antitrust damages brought by an indirect purchaser, the law provides for a presumption of passing-on of the overcharge to that indirect purchaser if it has been established that (i) the defendant has committed an infringement of competition law resulting in a price increase for the direct purchaser of the defendant and (ii) the indirect purchaser has purchased the goods and services that were the object of this infringement of competition law. The infringer (defendant) can rebut this presumption by way of *prima facie* evidence.

To prevent overcompensation, the defendant in proceedings involving passing-on can 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).

### 6. Pre-trial discovery and disclosure, treatment of confidential information

Effective rules on the disclosure of evidence in antitrust damages proceedings were only introduced into Austrian law with the provisions implementing the Directive in 2017: Section 37j (2) KartG provides that 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 disclosure of certain pieces of evidence, a request for disclosure may also cover categories of evidence. The evidence and the categories of evidence need to be defined by the party requesting disclosure as precisely and as narrowly as possible, taking into account the facts and information reasonably available to it.

The court may then order the disclosure of evidence by third parties or the opponent party. The court has to limit a disclosure order to take account of the principle of proportionality, considering the legitimate interests of all parties concerned. An interest to avoid actions for damages caused by an infringement 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, specific measures to protect confidentiality of such information have to be mandated (e.g. excluding the public from the proceedings).

Moreover, the party being ordered to disclose evidence may 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) no. 2-5 Austrian Criminal Procedure Act).

Documents which are part of files of competition authorities may also be disclosed upon application. However, certain documents can 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).

So far, there is no published case law applying the new rules on disclosure of evidence.

Apart from these new rules on disclosure of evidence after proceedings in antitrust damages claims have been filed, general Austrian civil procedural law does not allow for (pre-trial) 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, including private expert opinions. The court can, and in most cases will, also appoint an expert to produce a report on questions which require specific economic knowledge (e.g. on the quantification of harm).

7. Limitation periods

The limitation period in Austria is five years, starting from the date on which the injured party becomes aware, or can reasonably be expected to know (i) the identity of the infringer, (ii) the damage it suffered and (iii) the behaviour concerned as well as the fact that it constitutes an infringement of competition law (Section 37h KartG).

In any case, the claim for compensation becomes time barred ten years after the date of the occurrence of the damage.

However, the limitation periods referred to above shall not begin to run before the infringement of competition law has ceased.

Also, the limitation periods are suspended for the duration of proceedings before the European Commission or any national competition authority in the EU related to an infringement of competition law. The suspension ends one year after the closure of the competition authority’s investigation or the final decision of the respective competition authority. On-going settlement negotiations also suspend the limitation period.

8. Appeal

District courts are the courts of first instance for cases with a maximum amount in dispute of EUR 15,000. Regional courts have jurisdiction for first instance rulings on all legal matters not assigned to district courts. The respective regional courts as court of second instance decide appeals against decisions of the district courts.
Appeal decisions may be challenged before the Austrian Supreme Court if the case at hand involves a significant legal issue. “Significance” refers to one of the following scenarios:

- the respective decision deviates from earlier Supreme Court case law;
- the legal question at hand is novel; or
- there are diverging decisions from the Supreme Court regarding the matter under consideration.

Also, usually an appeal to the Supreme Court requires that the dispute value in the respective case exceeds EUR 30,000, or the dispute value exceeds EUR 5,000 and the first appellate court grants a right to an appeal (i.e. if the appellate court agrees that the question at hand is significant, as per the above).

9. Class actions and collective representation

Austrian law does not provide for collective actions or class actions in the strict sense of the term. The Austrian Code of Civil Procedure provides for the possibility for proceedings to be joined if (i) these proceedings have been brought individually by several claimants, (ii) against the same defendant, (iii) are pending before the same court and (iv) the joinder of proceedings is likely to lead to an acceleration of the proceedings or a reduction of procedural costs (joinder of proceedings under section 187 of the ZPO).

Due to the absence of a genuine collective action, or class action in the strict sense, the Austrian legal practice has developed a mechanism that has been (unofficially) labelled as ‘class action Austrian style’. In these cases, the injured parties (mostly consumers) assign their claims to a legal entity that is willing to act as a claimant, typically a trade or consumer association or a special purpose vehicle in the form of a limited liability company or an association (Verein), which then brings an ordinary (two party) lawsuit over the assigned claims (theoretically also a natural person could act as the claimant to which the claims of the other potential claimants are assigned). The monetary benefits are redistributed among the class. The Austrian Supreme Court confirmed the legal admissibility of these lawsuits under the condition that all claims are essentially based on the same grounds (see for example OGH, 27 February 2013, Case 6 Ob 224/12b, where the Supreme Court also confirmed the legality of third party funding of such Austrian-style class actions).

10. Key issues

The focus of the Austrian Supreme Court’s case law in the area of antitrust damages so far was on the issues of jurisdiction, limitation, the requirements of a sufficiently substantiated claim, burden of proof, passing-on and the standing of indirect purchasers (decisions of lower courts in civil matters are usually not publicly available). As regards limitation, the Supreme Court took a very claimant-friendly position already before the implementation of the Directive.

The Austrian Supreme Court also dealt with the question of umbrella pricing effects and asked for a preliminary ruling of the CJEU on this point which has become relevant for antitrust damage claims across the European Union (CJEU, Case C-557/12, Kone et al.).
There is yet no case law of the Supreme Court on the new rules on disclosure of evidence which implement the Directive. As disclosure of evidence is a novelty to the Austrian system of civil procedure, guidance by the Supreme Court and appellate courts will be needed in order to establish a uniform practice in the application of these rules by the courts of first instance.
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