

Slovenian Competition Day
The transposition of the Damages
Directive in Austria

Natalie Harsdorf
Federal Austrian Competition
Authority

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Jurisprudence and litigation in Austria I

2007

- Proceedings against driving schools in Graz: **Austrian Courts awarded for the first time damages to a customer**
- Appellate Court confirmed that the price differential between the cartel price and the competitive price may constitute the extent of loss and, accordingly, the amount of damages to be awarded
- When facing difficulties in assessing the amount of the loss, the court may rely on procedural provisions (§273 CPA) leaving it reasonable discretion in its evaluation
- First time **class action “Austrian style”** was applied successfully: Several plaintiffs can assign their individual claims to a collective plaintiff (eg consumer organization) which then opens proceedings against one and the same defendant.

Jurisprudence and litigation in Austria II

2012 – present (selection jurisprudence):

- Supreme Court 14.02.2012, 5 Ob 39/11p (culpability; liability)
- Supreme Court 15.05.2012, 3 Ob 1/12m (calculation of fine)
- Supreme Court 2.8.2012, 4 Ob 46/12m (passing on defence)
- Supreme Court 17.10.2012, 7 Ob 48/12b (umbrella pricing)
- Supreme Court 05.05.2014, 16 Ok 1/14 (publication)
- Supreme Court 29.10.2014, 7 Ob 121/14s (umbrella pricing)
- Supreme Court; 28.11.2014, 16 Ok 10/14b(f) (access to file)

Jurisprudence and litigation in Austria III

Bundswettbewerbsbehörde v **Donau Chemie** AG and Others, C-536/11

Concerned Austrian access to file rule in cartel cases:

“principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved”

Jurisprudence and litigation in Austria V

ECJ **Kone** AG et al. C-557/12:

- The ECJ strengthened the position of potential cartel damages claimants
- Principle of effectiveness *“precludes the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions”*
- However, does not implicate that will always be compensated
- ECJ did not comment on amount of fines

Amendment to Cartel Act/Competition Act: 1.3.2013 (§ 37 a KartG)

- A damage claim by a cartel victim shall not be dismissed merely because the cartel victim itself passed the cartel overcharge on to its customers (**passing on defence**)
- Clarified that in determining the amount of damages **any advantage** gained by the tortfeasor as a result of the infringement can be taken into account
- Damage claim proceedings based on competition law infringements **can be suspended** by civil courts for the duration of competition proceedings
- Civil courts shall be **explicitly bound** by the decisions of the CC, the EC, or other NCAs finding a competition law infringement
- **Three-year limitation period** shall, in cases investigated by a competition authority, be suspended for six months after a competition authority's decision establishing the violation has become final

Transposition of the Directive I

- **Competition Act Amendment** (regulates procedure before authority) amendment not yet in consultation!
- **Cartel Act Amendment** (regulates Court procedure + material law provisions) currently in public consultation since 26th August (comments can be submitted until 5th October):
http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Begut&Dokumentnummer=BEGUT_COO_2026_100_2_1269230
- **Scope of new damages rules:**
Changes shall encompass national cartel law
- **Definition of competition authority in Austria (§ 37 b new):**
Encompasses the Cartel Court, BWB and the Federal Cartel Prosecutor as well as the Commission + NCAs

Transposition of the Directive II

- **Definition** leniency applicant/declaration (§ 37b new):
horizontal cartel (relevant for disclosure)
- **Definition** immunity applicant (relevant for liability), § 37b new: secret + first to submit information
- ≠ scope of leniency Programme Austria (Competition Act): covers horizontal + vertical + non secret cartels
- **Liability** (§ 37c new): Whoever culpably commits infringement of Cartel Act is liable for damages

Damage to be awarded (Art 3/§ 37d new):

- Right to effectively claim full compensation covering not only actual losses, but also loss of profits, and the payment of interest
- Payment of interest from the moment of damage on (see existing § 37a)

Transposition of the Directive III

Joint liability (Art 11 / § 37e new):

- SME derogation
- immunity recipient derogation

Passing-on of overcharges (Art 13 / § 37f new):

- Burden of proof of proving passing-on lies with the cartel list when claim is made by direct purchaser
- Indirect purchaser needs to prove passing on (burden lies with him)

Consensual settlement (Art 19 / § 37g new):

- Claim of settling injured party is reduced by the settling's co-infringer's share of harm...
- § 37g (4) transposes Art 18 (2)

Transposition of the Directive III

Delimitation period (§ 37h new/Art 10)

- 5 years (≠ existing law: 3 years)
- Absolute delimitation period: 10 years (≠ general tort law: 30 years); alignment with public enforcement

New Delimitation period in public enforcement as well (§ 33 new):

- 5 year delimitation period (status quo); only final application to Court stopped the delimitation period
- New: the 5 year delimitation period shall be interrupted if any investigatory action is taken against and notified to at least one of the undertakings/association of undertakings involved; with each interruption the delimitation period starts running anew; absolute period = 10 years

Transposition of the Directive IV

Disclosure by parties/3rd parties (Art 5 / § 37j new):

- Reasoned submission
- Proportionality
- Courts may take measures to protect confidential information; some information may only be disclosed to the Court

Disclosure by competition authority (Art 6 / § 37k new):

- Proportionality
- Public enforcement effectiveness
- Black/grey list

Assistance in calculating the damage (Art 17 / § 37l new):

competition authorities may assist

Outlook

- Effectiveness of leniency programmes will have to be assessed; other investigation tools may gain importance
- Compatibility of Directive with *Donauchemie* line of reasoning unclear
- Administrative burden on competition authorities/courts (disclosure)
- Main remaining difficulty: how to assess the height of damages; litigation costs

Thank you for your attention!

Questions?

Natalie.harsdorf@bwb.gv.at