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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Austria --

15 June 2015

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More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>

Please contact Ms. Naoko Teranishi if you have any questions regarding this document [phone number: +33 1 45 24 83 52 -- E-mail address: naoko.teranishi@oecd.org].

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-- Austria --

In November 2014 the EU-Directive on antitrust damage actions was adopted after several years of intensive discussion. It has to be transposed into national law within two years. While future provisions in Austria will therefore reflect the EU Directive, the contribution gives an overview of the current Austrian situation.

1. Overview of private enforcement in your jurisdiction

1.1 What is the status of private enforcement in your jurisdiction? Are there recent developments in this area?

1. Contrary to other European jurisdictions in Austria a legal framework exists to bring private damage actions. The class action "Austrian style" having been successfully applied for the first time following the driving school cartel case in 2007, private antitrust litigation in Austria has increased significantly over the past few years. Stepping up enforcement by the Austrian NCA with sometimes heavy fines has led to an increase in damage claims. In a couple of landmark rulings the Austrian Supreme Court has ruled on vital questions regarding liability, access to file, causality and the prescription period. In two cases preliminary references were made to the ECJ, both leading to results further strengthening the position of claimants. The amendment of the Cartel Act which came into force 1st March 2013 has further facilitated private enforcement. Further amendments will be made when implementing the new EU-Directive on Private Enforcement.

1.2 What are the overall objectives of public and private enforcement in your jurisdiction?

2. Public Enforcement secures competition in general. The aim of private enforcement is to reimburse damages suffered by victims of competition infringements which is in line with the general aims pursued by Austrian tort law.

2. Instruments to foster private enforcement

2.1 Is there a right for private litigants to claim damages in your jurisdiction? Is there a right to full compensation? Is this a general right or is it specific to antitrust claims?

3. Art 3 of the EU-Directive enshrines the right to effectively claim full compensation covering not only actual losses, but also loss of profits, and the payment of interest. This corresponds with Austrian tort law: Full compensation including loss of profits is due in all cases, in which § 349 of the Austrian Commercial Code is applicable, that is to say in business relationships. According to the general rules of the Austrian Civil Code this is also the case in situations of gross negligence or intent.

4. Further, in 2013 a specific paragraph on private damages claims was introduced to the Cartel Act: Article 37a para 1 Cartel Act (Kartellgesetz 2005) regulates in addition to the general tort law, that who culpably commits an infringement under Art 29 No. 1 (i.e. fines in particular due to cartels, abuse of market dominant position), is obliged to compensate the resulting damage. If a product or service has been acquired at an excessive price, the claim for damages is not excluded because the product or service has been resold (i.e. explicit exclusion of passing-on defence).

5. Art 37a specifies the requirements for compensation of antitrust violations and entails certain alleviations for damage claims similar to Art 33 German Cartel Act (dGWB):

- 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

- in determining the amount of damages, any advantage can be taken into account
- proceedings based on competition law infringements can be suspended by civil courts as long as the competition proceedings last
- decisions by competition authorities/courts have binding effect
- the three year prescription period is suspended as long as proceedings before the Cartel Court, Commission of the European Union or of a competition authority within the meaning of Regulation (EC) No. 1/2003 are pending. The suspension continues until six months after the termination of those proceedings (by a final decision or otherwise)

6. More regulations will be adopted to implement the new EU directive into Austrian law.

2.2 *Who has standing to file an action for damages and in what circumstances?*

7. Everyone suffering damage because of an infringement of competition law is entitled to bring in an action against the infringer under general tort law.

2.3 *What are the main features of your private enforcement system? For example: are there special discovery rules for antitrust cases? Or rules on the burden and standard of proof on causation and the quantification of damages? Does your jurisdiction provide for punitive damages? Does your jurisdiction permit the aggregation of claims and collective redress?*

8. Under the current legal situation the general tort law and civil procedure rules apply to the enforcement of antitrust damages. § 303 of the Austrian Civil Procedure Code provides a duty of the defendant to present certain documents, which are essential evidence for the claimant. If a party violates this duty, the Austrian courts may draw negative conclusions from that (principle of free consideration of evidence). The only special rule regarding damage claims in connection with infringements of antitrust rules is § 37a KartG, as cited above (see point 2.a).

9. There is no legal basis for punitive damages under our jurisdiction.

10. Even though the Austrian legal system does not contain any specific provisions on collective redress in a narrow sense, a form of class action "Austrian style" has been developed in practice: claimants may assign their claims to an association (e.g. consumer association) which then files a complaint on their behalf. There are also possibilities of joinder of claims under general tort law.

11. § 273 of the Austrian Code of Civil Procedure allows judges to estimate the harm caused. The rebuttable presumption "that cartel infringements cause harm" in Art 17 of the damages Directive corresponds broadly with the general rules of the burden proof in Austrian tort law.

12. In the preliminary ruling *Kone AG et al. C-557/12* the ECJ stated that the 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".

3. Balancing public and private enforcement

3.1 *Have evidentiary issues arisen in your jurisdiction involving concurrent private and public enforcement cases, and how have agencies and courts resolved them? For example, what can the agency do if a private plaintiff is jeopardizing its case by seeking discovery from the parties under investigation or from essential witnesses?*

13. So far damages claims have mainly been brought as follow on claims.

14. The issue of getting access to information of the public enforcement case, including information provided by the leniency applicants, have been at stake in case EJC C-536/11 *Donauchemie*¹. This was a follow-on claim, however. The ECJ concluded that there has to be scope for a case by case analysis on granting access involving a balance of interests. This corresponds to § 219 Civil Procedure Act which currently applies.

15. In the judgment 16 Ok 10/14b(f) from 28 November 2014 the Austrian Supreme Court concluded that the documents at hand were not protected and could be handed out dismissing the claim that business secrets were concerned.

16. The relevant provisions in the EU directive are aimed at protecting leniency information as well as settlement declarations to safeguard the effectiveness of these instruments. This is very important as there is the impression that immunity applicants tend to be more cautious when cooperating with the authority following this judgement. This might have a chilling effect on public enforcement.

3.2 *Can plaintiffs access evidence in the competition authority's file, including leniency information? How is disclosure of evidence in the agency's file regulated in your national courts? How is appropriate protection of confidential information ensured? Do the rules change once the public investigation is completed?*

17. Until the private enforcement directive is implemented into the Austrian legal system, there is no guaranteed protection of the file of the Cartel Court (not even for leniency information or settlement declarations), see above on the judgment EJC C-536/11 *Donauchemie*.

18. There are no specific provisions on access to file of the Federal Competition Authority since the Cartel Court is the decision making body in Austrian cartel proceedings.

¹ On 6 June 2013 the Court of Justice of the European Union (CJEU) held that EU Member States cannot adopt legislation that deprives plaintiffs of all rights to access evidence in a cartel file of an antitrust authority. The issue was referred to the CJEU in the context of a cartel damage claim filed before an Austrian court by a third party. The plaintiff had requested access to the file from the proceedings between the cartel participants and the Austrian Competition Authority, which also contained materials received as part of leniency applications.

The CJEU ruled that European Union law, in particular the 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.

3.3 *What is the relationship between private enforcement and public enforcement remedies such as disgorgement and restitution?*

19. As mentioned above the prerequisite for private enforcement is that public enforcement is working. The Austrian Cartel Act (§ 30) provides for that in the provisions for the calculation of fines. When calculating the fine the Cartel Court may take into account the fact that a benefit has been gained by the infringer as an aggravating circumstance.

3.4 *Do you think that the development of private enforcement might affect the development of substantive standards applicable in public enforcement? Do you find this problematic?*

20. As described above there are interlinking topics. This interlinking is also described in the EU Directive.

4. *How can public enforcement help to promote private enforcement?*

4.1 *Does your competition authority play any role in private enforcement cases? Can it/does it act as an amicus curiae before a court in private cases?*

21. In Austria the Federal Competition Authority has investigative competences only while the Cartel Court is the decision-making body. Claims for damages because of infringements of competition law however are dealt with by regular civil courts.

22. Article 15 para 3 Regulation 1/2003 provides for possibilities for national competition authorities to act as amicus curiae before national courts in relation to the application of Articles 101 and 102 EU Treaty. These possibilities are scarcely used in practice. One of the reasons is that the Federal Competition Authority is rarely informed about antitrust cases pending before general civil courts.

4.2 *To what extent should administrative/judicial decisions or settlements be detailed (e.g. on the facts involved in the violation, or the quantification of the harm from the anti-competitive conduct) in order to help potential plaintiffs?*

23. Article 37 of the Cartel Act (Kartellgesetz 2005) specifies that the Cartel Court has to publish final decisions on the termination of an infringement, the finding of an infringement and the imposition of a fine.

24. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. The publication must take into account the legitimate interest of companies in the protection of their business secrets. If the decision of the Cartel Court is amended by a decision of the Supreme Cartel Court, the decision of the Supreme Cartel Court shall be published.

25. However this provision does not cover interim measures or dismissing decisions (Supreme Court judgment from 05.05.2014, 16 Ok 1/14).

26. Regarding settlements it has been discussed to what extent the facts of the underlying case and relating to the infringement should be published. In order to meet any criticism, the Federal Competition Authority made clear in its guidelines on settlements that it will do its utmost as official party to have a decision by the Cartel Court which contains meaningful information on type and extent of infringement, duration and any other relevant circumstance of the infringement and which is published to its fullest extent possible.

4.3 *Are the findings (of the authority or courts) in a public enforcement case binding in private cases? What about decisions of authorities/courts in foreign jurisdictions? Has the timing of publication of public decisions been a problem for private litigants?*

27. According to Article 37a para 3 Cartel Act (Kartellgesetz 2005), a civil court is bound by a final decision of the Cartel Court, the Commission of the European Union or of a competition authority within the meaning of Regulation (EC) No. 1/2003, finding that a company has committed an infringement unlawfully and culpably.