CHAPTER 11

Austria Q&A

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Effect of public proceedings

1 What is your country's primary competition authority?

The Federal Competition Authority (FCA) and the Federal Cartel Attorney (FCAtt) – together referred to as the 'official parties' – and the Cartel Court (a section of the Vienna Higher Regional Court) are responsible for the public enforcement of competition law in Austria. The Cartel Court is empowered to issue binding decisions in substantive matters including fining decisions. In general, the Cartel Court's decisions can be appealed to the Supreme Court (acting as Appellate Cartel Court).

The FCA is an independent authority empowered to investigate infringements of competition law. It may initiate proceedings before the Cartel Court but has no powers to issue binding decisions in substantive matters. The FCA is formally part of the Federal Ministry for Digital and Economic Affairs but is an independent body (i.e., not subject to instructions by the minister or the government).

The FCAtt, which is subject to instructions from the Federal Minister of Justice, can also initiate proceedings before the Cartel Court.

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2 Does your competition authority have investigatory power? Can it bring criminal proceedings based on competition violations?

The FCA may carry out all investigations necessary to meet its statutory tasks. In particular, it may request information from undertakings and associations of undertakings, inspect and make copies of business documents, and interrogate representatives of companies. The Cartel Court may, upon request of the FCA, order an inspection of business and private premises.

The FCA and the FCAtt cannot bring criminal proceedings based on competition law violations. Infringements of EU and Austrian competition law as such do not trigger criminal sanctions. However, certain cartel behaviour may qualify as bid rigging or fraud, which are stand-alone criminal offences. The prosecution of these criminal offences under criminal law falls within the competence of criminal prosecutors and the criminal courts.

3 Can private antitrust claims proceed parallel to investigations and proceedings brought by competition authorities and criminal prosecutors and appeals from them?

In principle, private antitrust claims can proceed parallel to investigations and proceedings of competition authorities, and criminal prosecutions.

4 Is there any mechanism for staying a stand-alone private claim while a related public investigation or proceeding (or an appeal) is pending?

Pursuant to Section 37(i)(1) of the Cartel Act, a civil court may stay a stand-alone action for damages until related proceedings by the European Commission, the Austrian competition authorities or a national competition authority of another EU Member State have been terminated.

5 Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have an evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers' decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

Section 37(i)(2) of the Cartel Act provides that a civil court dealing with a follow-on action for damages is bound by the establishment of an infringement of competition law found by a final decision of the European Commission, the Cartel Court or a national competition authority of another EU Member State or by a review court.

The findings of foreign competition authorities other than national competition authorities of EU Member States are not legally binding for Austrian civil courts. The courts may, however, take them into account as evidence. Decisions by sector-specific regulators are not binding for civil courts with regard to competition law infringements.

6 Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

By way of derogation from the general rule that undertakings that have infringed competition law through joint behaviour are jointly and severally liable for the entire harm caused by that infringement (see question 38), Section 37(e)(3) of the Cartel Act provides that an immunity recipient is only liable to its direct and indirect purchasers and suppliers unless other injured parties cannot obtain full compensation from the other undertakings involved in the same infringement of competition law. Section 37(e)(3) of the Cartel Act applies to the compensation of harm that occurred after 26 December 2016.

7 Can plaintiffs obtain access to competition authority or prosecutors' files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

In proceedings relating to an action for antitrust damages, the civil courts can, upon request of the claimant, order the defendant or a third party to disclose relevant evidence that is in their control (as regards the general requirements for such disclosure orders, see question 26). Such a disclosure order addressed to the defendant or a third party can, in principle, also be issued with regard to evidence included in the file of a competition authority and available to the defendant or third party.

The civil courts can only directly request the competition authority to disclose evidence included in its file if no party or third party is able (by applying reasonable efforts) to provide that evidence.

The civil courts may order the disclosure of the following categories of evidence included in the file of a competition authority only after the competition authority has closed its proceedings:

- information that was prepared specifically for the proceedings of a competition authority;

- information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
- settlement submissions that have been withdrawn.

The civil courts cannot at any time order the disclosure of leniency statements or settlement submissions. They are, however, not prevented from ordering the disclosure of pre-existing information that exists irrespective of the proceedings of a competition authority (even if such information has been submitted by a leniency applicant to the competition authority together with its leniency statement).

In addition to requesting a civil court to order the disclosure of evidence included in the file of a competition authority, a potential claimant may also request the Cartel Court (one of the competition authorities under the Austrian procedural framework) to obtain access to its file. When deciding on such a request, the Cartel Court is required to weigh all interests involved, including the interests of the claimant and the parties to the public proceedings, on a case-by-case basis. In cases concerning cartel behaviour that also qualifies as a criminal offence (e.g., bid rigging or fraud), the Cartel Court may forward (parts of) its file to the criminal prosecutor. This may enable potential claimants to indirectly get access to (parts of) the Cartel Court's file if they join the criminal proceedings as a private party and as such have access to the prosecutor's file.

The FCA does not grant access to its files nor provide information about its files' content to third parties (unless a civil court requests the disclosure of evidence directly from the FCA in proceedings relating to an action for damages as explained above).

Should a claimant obtain evidence the disclosure of which cannot be ordered by a civil court (see the relevant categories of evidence mentioned above) through access to the file of a competition authority (the Austrian competition authorities, the European Commission or a national competition authority of another EU Member State), the use of such evidence in proceedings relating to an action for antitrust damages would be inadmissible.

8 Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

The civil courts cannot at any time order the disclosure of leniency statements. In any case, the use of a leniency statement as evidence in proceedings relating to an action for antitrust damages would be inadmissible.

However, if a leniency applicant submits pre-existing information that exists irrespective of the proceedings of a competition authority, such information would not be shielded from subsequent disclosure to private claimants.

9 Is information submitted in a cartel settlement protected from disclosure?

The civil courts cannot at any time order the disclosure of settlement submissions (which have not been withdrawn). In any case, the use of a settlement submission as evidence in proceedings relating to an action for antitrust damages would be inadmissible.

However, if an undertaking that provides a competition authority with a settlement submission also submits pre-existing information that exists irrespective of the proceedings of a competition authority, such information would not be shielded from subsequent disclosure to private claimants.

10 How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

The fact that evidence has been submitted to a competition authority by a third party and that this evidence includes confidential information does not as such exclude disclosure of this evidence. When civil courts order the disclosure of evidence containing confidential information, they are, however, required to impose effective measures to protect such confidential information (see question 27).

Commencing a private antitrust action

11 On what grounds does a private antitrust cause of action arise?

Pursuant to Section 37(c)(1) of the Cartel Act, any entity that culpably (i.e., intentionally or negligently) infringes Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) or their Austrian equivalents (Sections 1 and 5 of the Cartel Act) is obliged to provide compensation for the harm arising from the infringement.

This provision confirms the case law of the Supreme Court according to which an action for damages for a competition law infringement can be based on general tort law provisions of the Civil Code (ABGB). In particular, the Supreme Court decided 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 from this behaviour. 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 of the Unfair Competition Act (UWG) in conjunction with Articles 101 or 102 TFEU or their Austrian equivalents (Sections 1 and 5 of the Cartel Act). According to Section 1 UWG and established case law, a breach of the law that is capable of conferring on the infringer an advantage over its law-abiding competitors qualifies as 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 judgment published.

Moreover, 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 due to an infringement of competition law.

12 What forms of monetary relief may private claimants seek?

The main monetary relief sought by private claimants is compensatory damages. Some legal scholars argue that in certain situations monetary relief could also be sought on grounds of unjust enrichment.

13 What forms of non-monetary relief may private claimants seek?

Under the unfair competition rules (see question 11), certain private claimants may bring an action for injunctions, including interim injunctions, and have the judgment published. Certain private claimants may also initiate proceedings before the Cartel Court and request a cease-and-desist order, including interim measures (see question 15).

14 Who has standing to bring claims?

As regards claims on the basis of Section 37(c)(1) of the Cartel Act and the general tort law provisions of the ABGB, there are no particular limitations with regard to the standing of natural and legal entities. In particular, also indirect purchasers (including final consumers) and competitors may bring actions for damages against entities that have infringed competition law and caused the claimant harm. Actions under the UWG can generally only be brought by competitors of the defendant.

Before the Cartel Court, standing is granted to undertakings that have a legal or economic interest in the decision requested. As regards the type of claims that can be brought before the Cartel Court, see question 15.

15 In what forums can private antitrust claims be brought in your country?

Private antitrust claims on the basis of Section 37(c)(1) of the Cartel Act, the general tort law provisions of the ABGB and the UWG can be brought before the civil courts.

In addition, certain private claims, in particular applications for a declaratory judgment that an undertaking has infringed EU or Austrian competition law and 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. The Cartel Court is, however, not competent to award damages.

16 What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

As regards claims brought before the civil courts, the jurisdictional rules are laid down in the Court Jurisdiction Act (JN) and EU Regulation No. 1215/2012. If the value in dispute does not exceed €15,000, the district courts have jurisdiction ratione materiae. On the other hand, the regional courts have jurisdiction ratione materiae if the value in dispute exceeds €15,000.

The JN and EU Regulation No. 1215/2012 provide for various competent courts ratione loci. In general, a person can be sued in the court of the place where the person is domiciled or has its registered seat but additional forums may be available (e.g., in matters relating to tort, the court for the place where the harmful event or the harm occurred). If more than one court has jurisdiction, the prospective claimant can choose the court where it wants its claim to be heard.

Applications for a declaratory judgment that an undertaking has infringed EU or Austrian competition law and for cease-and-desist orders regarding an ongoing infringement of EU or Austrian competition law can be brought before the specialist Cartel Court in Vienna.

17 Can claims be brought based on foreign law? If so how does the court determine what law applies to the claim?

Claims before the civil courts can be brought based on foreign law. The Austrian civil courts determine the applicable law on the basis of EC Regulation No. 593/2008 (if contractual obligations are concerned (Rome I)), EC Regulation No. 864/2007 (if non-contractual obligations are concerned (Rome II)) and domestic private international law.

As regards private antitrust damages claims, the applicable law is usually determined on the basis of Article 6(3) of EC Regulation No. 864/2007 (which applies in relation to events giving rise to harm that occurred after 11 January 2009). According to this Article, the applicable law shall be the law of the country where the market is, or is likely to be, affected. If the market is, or is likely to be, affected in more than one country, a claimant suing in the court of the domicile of the defendant may also choose to base his or her claim on the law of the court seized, provided that the market in that EU Member State is among those directly and substantially affected by the restriction of competition.

18 Give details of any preliminary requirement for starting a claim. Must plaintiffs post security or pay a filing fee? How is service of claim affected?

As regards proceedings before the civil courts, claimants have to pay a court fee upfront when bringing a claim. The level of the court fee is determined separately for each instance of the proceedings and depends on the value in dispute. However, ultimately the court fee will be borne by the unsuccessful party in accordance with the loser-pays principle (see question 40). In proceedings brought before the Cartel Court, the claimant is not required to pay a court fee upfront.

The Code of Civil Procedure (ZPO) provides that foreign nationals who are claimants in proceedings before the civil courts must, upon request by the defendant, make a deposit as security for the costs of the proceedings, except where provided otherwise by international treaty or convention. However, this provision generally does not apply to claimants who are nationals of or incorporated in an EU Member State. The level of the deposit is determined by the court in accordance with the expected costs of the proceedings.

19 What is the limitation period for private antitrust claims?

Pursuant to Section 37(h)(1) of the Cartel Act, the limitation period for private antitrust damages claims is five years. It starts to run when the claimant knows, or can reasonably be expected to know, of the behaviour and the fact that it constitutes an infringement of competition law; of the fact that the infringement of competition law caused harm to it; and the identity of the infringer. The limitation period does not begin to run before the infringement of competition law has ceased.

In addition to this subjective five-year limitation period, the Cartel Act provides for an objective limitation period of 10 years for antitrust damages claims that, in principle, starts to run when the harm occurs (irrespective of the claimant's knowledge of the infringement, the harm caused to it and the identity of the infringer) but does not begin to run before the infringement has ceased.

The limitation period for an action for injunctive relief on the basis of the UWG is six months from the time a potential claimant has positive knowledge of the infringement and the infringer or three years from the time the infringement was committed.

20 Are those time limits procedural or part of the substantive law? What is the effect of their expiry?

The limitation periods described in question 19 are part of the substantive law. The effect of their expiry is that the defendant can successfully raise the objection of limitation and that the claim will be dismissed by the court. The court may not take account of the expiry of the time limit on its own motion.

21 When does the limitation period start to run?

See question 19.

22 What, if anything, can suspend the running of the limitation period?

Pursuant to Section 37(h)(2) of the Cartel Act, the limitation periods for private antitrust damages claims are suspended for the duration of proceedings or an investigative measure of the European Commission, the Austrian competition authorities or a national competition authority of another EU Member State in respect of the infringement of competition law to which the antitrust damages claim relates. The suspension ends one year after the infringement decision has become final, the proceedings have otherwise been terminated or the investigative measure has been terminated.

The limitation period is also suspended for the duration of any consensual dispute resolution process.

23 What pleading standards must the plaintiff meet to start a stand-alone or follow-on claim?

In proceedings relating to an action for antitrust damages, the initial written pleading of the claimant must contain reasonably available facts and evidence sufficient to support the plausibility of its claim for damages. If the initial written

pleading meets this pleading standard, the claimant may request the court to order the defendant or a third party to disclose further evidence that lies in their control (see question 26).

24 Is interim relief available? What must plaintiffs show for the court to grant interim relief?

In proceedings before the Cartel Court, the claimant needs to show that there is a prima facie case that the defendant is infringing EU or Austrian competition law for the Cartel Court to grant an interim cease-and-desist order. The claimant usually does not have to show a risk of irreparable damage (Section 48 of the Cartel Act).

As regards actions for interim injunctions based on the UWG before the civil courts, the claimant is generally also not required to show a risk of irreparable damage but only that the defendant is likely to commit an infringement (Section 24 UWG).

25 What options does the defendant have in responding to the claims and seeking early resolution of the case?

The defendant may respond to the claims in a written pleading in which it may ask the court to dismiss the claims and, in particular, raise substantive and procedural objections to the claims. In the pleading, the defendant shall state the facts on which these objections are based and offer evidence. Furthermore, the defendant may request the court to order the claimant or a third party to disclose further evidence that lies in their control (see question 26).

Disclosure or discovery

26 What types of disclosure or discovery are available? Describe any limitations and the courts' usual practice in ordering disclosure or discovery.

The Law on Amendments to the Cartel Act and the Competition Act 2017, which has implemented 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 (EU Damages Directive) into Austrian law, has introduced a novel disclosure regime for proceedings relating to an action for antitrust damages. Under this regime, a civil court may, upon request of one of the parties, order the other party or a third party to disclose evidence that lies in their control once the action for antitrust damages has been filed (i.e., Austrian law does not provide for a pretrial disclosure regime).

A party needs to circumscribe items of evidence or relevant categories of evidence the disclosure of which is sought as precisely and as narrowly as possible on the basis of reasonably available facts. The disclosure of evidence shall be limited to what is proportionate. In determining whether any disclosure requested by a party is proportionate, the courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider: the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence; the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information that is unlikely to be of relevance for the parties in the procedure; and whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information. It still remains to be seen how the civil courts' practice in applying this novel regime develops.

A disclosure order can, in principle, also be issued with regard to evidence included in the file of a competition authority. Leniency statements and settlement submissions may, however, not be disclosed at any time and certain items of evidence may not be disclosed before the competition authority has closed its proceedings.

27 How do the courts treat confidential information that might be required to be disclosed or that is responsive to a discovery proceeding? Is such information treated differently for trial?

The courts can also order the disclosure of evidence containing confidential information. They are, however, required to impose effective measures to protect confidential information. Those measures can, in particular, include the possibility of redacting confidential information in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form.

28 What protection, if any, do your courts grant attorney–client communications or attorney materials? Are any other forms of privilege recognised?

The FCA takes the view in its administrative practice that no legal professional privilege is applicable under Austrian competition law.

With regard to the disclosure of evidence that can be ordered by a civil court, Section 37(j)(7) of the Cartel Act provides that the person who has been ordered to disclose evidence can request that certain specifically circumscribed items of

evidence, owing to a confidentiality obligation recognised by law or to that person's right to refuse to give evidence in accordance with the Criminal Procedural Code, only be disclosed to the court. The court will then review these items of evidence and decide whether they are also to be disclosed to the party that has requested their disclosure.

It remains to be seen how the civil courts will interpret Section 37(j)(7) of the Cartel Act (which entered into force in May 2017) with respect to attorney–client communications and attorney materials. This provision could be interpreted as meaning that only an attorney who is the addressee of a disclosure order can rely on his or her personal right to refuse to give evidence but that a party who is the addressee of a disclosure order cannot rely on his or her attorney's right to refuse to give evidence. However, there are also arguments against such an interpretation.

Trial

29 Describe the trial process.

The trial process usually starts with a preparatory hearing. At the preparatory hearing the court shall take decisions on procedural objections raised, the parties shall submit oral pleadings, and the court and parties shall discuss the main factual and legal arguments and, in particular, the further plan of the trial process. Further hearings generally involve taking of evidence and the discussion of its results. The hearings before the civil courts are usually oral and public.

It is noted that proceedings before the Cartel Court are, in principle, also public but the Cartel Court is required to close a trial to the public upon a party's request if necessary for the protection of commercially sensitive information.

30 How is evidence given or admitted at trial?

The general means of evidence provided in the ZPO are the hearing of the parties, the examination of witnesses, documentary evidence, opinions by court-appointed experts and judicial inspection. Witnesses will first be interrogated by the judge whereas the parties and their lawyers have the opportunity to ask further questions. Requests to present evidence are rejected by the court if the court considers the evidence concerned to be irrelevant.

31 Are experts used in private antitrust litigation in your country? If so, what types of experts, how are they used, and by whom are they chosen or appointed?

Experts regularly play an important role in proceedings before the Cartel Court and in private antitrust damages litigation before the civil courts. They are appointed by the court and are usually chosen from the official list of sworn and certified court experts. The most frequently used experts in antitrust cases are economists, accountants and industry specialists.

The parties may also engage private experts to provide a report on a particular topic. However, these reports only qualify as documentary evidence.

32 What must private claimants prove to obtain a final judgment in their favour?

Private claimants must usually prove the following elements to obtain a final judgment in their favour in an antitrust damages case:

- that the defendant has, intentionally or negligently, committed an infringement of EU or Austrian competition law; and
- that the infringement has caused a certain amount of harm to the claimant.

If the Cartel Court, the European Commission or a national competition authority of another EU Member State have established an infringement of EU or Austrian competition law in a final decision (see question 5), the civil courts are bound by that finding and the claimant does not have to prove the infringement again.

Furthermore, Section 37(c)(2) of the Cartel Act provides for a rebuttable presumption that a cartel between competitors causes harm.

33 Are there any defences unique to private antitrust litigation? If so, which party bears the burden of proving these defences?

Pursuant to Section 37(f)(1) of the Cartel Act (which applies to the compensation of harm that occurred after 26 December 2016), the defendant can invoke as a defence against a claim for antitrust damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law (passing-on defence). The burden of proving that the overcharge was passed on is on the defendant.

If the defendant successfully invokes the passing-on defence, this is without prejudice to the claimant's right to obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.

34 How long do private antitrust cases usually last (not counting appeals)?

The duration of private antitrust cases in first instance may vary significantly depending on the complexity of the case. In general, the duration of private antitrust cases is approximately one to two years but they can also last significantly longer.

35 Who is the decision-maker at trial?

In proceedings before the civil courts, the judgment in first instance is normally rendered by a single judge. Where the value in dispute exceeds €100,000, the case may, upon request by one of the parties to the proceedings, be heard and decided by a senate of three judges.

Cases before the Cartel Court are heard and decided by a senate composed of two professional judges and two expert lay judges. The expert lay judges in the Cartel Court's senates are normally nominated by the Federal Chamber of Labour and the Chamber of Commerce.

Damages, costs and funding

36 What is the evidentiary burden on plaintiffs to quantify the damages?

The regular standard of proof provided in the ZPO is high probability. In principle, this standard of proof also applies to the quantification of damages. Section 273 ZPO, however, enables the court to estimate the amount of harm if proof of the precise amount of harm is impossible or excessively difficult.

37 How are damages calculated?

Damages are generally calculated on the basis of the harm suffered by the claimant as a result of the infringement. In practice, expert opinions play an important role in the calculation of damages. The most suitable method in a case depends, inter alia, on the type of competition law infringement and the data available.

The court may estimate the amount of harm if proof of the precise amount of harm is impossible or excessively difficult. In addition, the Cartel Court, the FCA and the FCAtt may, at the request of a civil court, assist the court with respect to the determination of the quantum of damages.

38 Does your country recognise joint and several liabilities for private antitrust claims?

Pursuant to Section 37(e)(1) of the Cartel Act, undertakings that have infringed competition law through joint behaviour are jointly and severally liable for the entire harm caused by the infringement. The Cartel Act provides for exceptions from that principle with respect to immunity recipients and small or medium-sized enterprises.

An immunity recipient 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.

A small or medium-sized enterprise is only liable to its direct and indirect purchasers and suppliers if its market share in the relevant market was below 5 per cent at any time during the infringement of competition law; its unlimited liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value; it has not been the leader of the infringement of competition law and has not coerced other undertakings to participate therein; and it has not previously been found to have infringed competition law.

39 Can a defendant seek contribution or indemnity from other defendants, including leniency applicants, or third parties? Does the law make a clear distinction between contribution and indemnity in antitrust cases?

Pursuant to Section 37(e)(4) of the Cartel Act (which applies to the compensation of harm that occurred after 26 December 2016), if undertakings are jointly and severally liable for the harm caused by an infringement of competition law, a defendant may recover a contribution from any other infringer. The amount of that contribution is determined based on the infringers' relative responsibility for the harm caused by the infringement of competition law. The relative responsibility of each infringer depends on the specific circumstances of the case, in particular on the infringers' turnover, market shares and respective roles in the cartel.

With regard to harm suffered by direct and indirect purchasers and suppliers of the infringers, the amount of contribution of an infringer that has been granted immunity from fines under a leniency programme shall not exceed the amount of harm that it caused to its own direct and indirect purchasers and suppliers. To the extent that the infringement of competition law caused harm to injured parties other than the direct and indirect purchasers and suppliers of the infringers, the amount of contribution from an immunity recipient shall be determined in the light of its relative responsibility for that harm.

40 Can prevailing parties recover attorneys' and court fees and other costs? How are costs calculated?

In proceedings before the civil courts, prevailing parties can recover attorneys' fees and court-related costs. Court-related costs include, in particular, the court fees that depend on the value in dispute and fees for experts and interpreters. As regards attorneys' fees, these costs can be recovered in accordance with the rules provided in the Lawyers' Tariff Act. If a party prevails in part, it can recover court costs and attorneys' fees according to the extent it prevails.

In proceedings before the Cartel Court, the prevailing party can – with limited exceptions – not recover its legal costs. The court fees are determined by the Cartel Court at the end of the proceedings. Depending on the type of proceedings, the fees can amount to up to €34,000. The Cartel Court determines the actual amount of the fee, depending, inter alia, on the economic importance and the complexity of the case, and decides which parties have to bear the fee, taking account of the parties' respective success.

41 Are there circumstances where a party's liability to pay costs or ability to recover costs may be limited?

Where the claimant has unnecessarily filed a lawsuit, notwithstanding the defendant's willingness to pay, the prevailing claimant may not recover any costs and is liable to pay the losing defendant's costs if the defendant immediately recognises the claim at the beginning of the proceedings.

If a party causes costs through pleading certain facts or offering evidence belatedly, this party is liable to pay these costs irrespective of whether it prevails.

42 May attorneys act for claimants on a contingency or conditional fee basis? How are such fees calculated?

Attorneys' fees may not be calculated as a percentage share of the amount awarded to a party. It is, however, lawful to agree on a fixed bonus conditional upon the outcome of the case.

43 Is litigation funding lawful in your country? May plaintiffs sell their claims to third parties?

Litigation funding is generally lawful in Austria. Certain issues regarding litigation funding have, however, not yet been clarified by the Supreme Court.

Claimants may, in principle, sell their claims to third parties. Attorneys may, however, not acquire claims from their clients.

44 May defendants insure themselves against the risk of private antitrust claims? Is after-the-event insurance available for antitrust claims?

Liability insurance against private antitrust claims is generally possible but is often excluded from coverage in standard insurance contracts. We are not aware of after-the-event insurance being provided for antitrust claims.

Appeal

45 Is there a right to appeal or is permission required?

A judgment rendered by a first-instance civil court can be appealed without permission being required. However, permission is required in most cases of further appeal to the Supreme Court against second instance judgments (see question 46).

46 Who hears appeals? Is further appeal possible?

In proceedings before the civil courts, the competent appellate court depends on which type of court has jurisdiction in first instance (see question 16). If the first instance judgment was rendered by a district court, the appeal is heard by the locally competent regional court. Where the first instance judgment was issued by a regional court, the appeal is heard by the locally competent higher regional court.

Further appeal against second instance judgments to the Supreme Court is usually only permissible if the outcome of the case depends on a question of law of considerable importance and, in addition, the value in dispute to which the second instance judgment relates exceeds €5,000. The appellate court decides on whether further appeal against the second instance judgment is permissible or not. Where the value in dispute to which the second instance judgment relates exceeds €30,000, the parties may file an extraordinary further appeal to the Supreme Court even if the appellate court decided that further appeal was not permissible. However, the Supreme Court will reject the further appeal if the outcome of the case does not depend on a question of law of considerable importance.

In cases for which the Cartel Court is competent at first instance (see question 16), appeals against the decision of the Cartel Court are heard by the Supreme Court (acting as Appellate Cartel Court) without permission being required. No further appeal is possible.

47 What are the grounds for appeal against a decision of a private enforcement action?

A first-instance judgment rendered by a civil court can generally be appealed on the following grounds: procedural errors, errors of law and errors of fact. A further appeal against a second instance judgment can only be brought (if at all) on the basis of procedural errors and errors of law.

A first-instance decision of the Cartel Court can be appealed for procedural errors, errors of law and, to a very limited extent, errors of fact.

Collective, representative and class actions

48 Does your country have a collective, representative or class action process in private antitrust cases? How common are they?

Austrian civil procedure law does not provide for class actions as such. However, the ZPO, together with the Supreme Court's case law, provides for certain legal tools that enable injured parties to seek collective redress by bundling a number of related claims or proceedings against a single defendant.

The ZPO provides for the joinder of proceedings and the joinder of parties. These tools enable the parties to jointly seek direct monetary compensation for harm suffered provided that the facts and the legal grounds for their respective claims are related to a certain extent. The joinder of proceedings (Section 187 ZPO) can be ordered by a civil court, at its own discretion, if there are two or more related civil proceedings pending before that court. The joinder of parties (Section 11 ZPO) allows two or more holders of a claim or claims to initiate civil proceedings as collective claimants against a single opponent. There are two legal grounds for the joinder of parties, namely substantive joinder of parties in cases in which each claim is based on the same factual cause; and formal joinder of parties where the claims are of the same type and based on an essentially similar factual cause and fall within the jurisdiction of the same court.

The commonly referred to 'Austrian style collective action' is based, inter alia, on the formal joinder of parties remedy set out above. On the basis of this concept, one party may file a single action containing several claims against a particular defendant based on individual assignment agreements. For an Austrian-style collective action to be initiated, the holders of the claims initially assign their claims to another legal entity that may subsequently act as a sole claimant. The main principle is that such an action can only be pursued for claims that rely on essentially the same or a similar legal and factual basis. Collective actions have so far not been common in antitrust damage cases in Austria.

49 Who can bring these claims? Can consumer associations bring claims on behalf of consumers? Can trade or professional associations bring claims on behalf of their members?

In practice, Austrian-style collective actions (as set forth in question 48) are brought by representative bodies such as the Federal Chamber of Labour and the Austrian Consumer Information Association, after injured parties have assigned their individual claims to these bodies.

50 What is the standard for establishing a class or group?

Austrian civil procedure law does not provide for class actions as such. As explained in question 48, Austrian-style collective actions may, however, be brought for claims that rely on essentially the same or a similar legal and factual basis.

51 Are there any other threshold criteria that have to be met?

Austrian civil procedure law does not provide for class actions as such.

52 How are damages assessed in these types of actions?

The Austrian-style collective action is based on individual assignment agreements between the holders of an individual claim and another legal entity. Damages are thus only distributed to those entities that have initially assigned their claims to the claimant.

53 Describe the process for settling these claims, including how damages or settlement amounts are apportioned and distributed.

See question 52.

54 Does your country recognise any form of collective settlement in the absence of such claims being made? If so, how are such settlements given force and can such arrangements cover parties from outside the jurisdiction?

Austrian law does not currently provide for a collective settlement mechanism in the absence of an Austrian-style collective action being brought.

55 Can a competition authority impose mandatory redress schemes or allow voluntary redress schemes?

The Austrian competition authorities have no powers to impose mandatory redress schemes or to allow voluntary redress schemes.

Arbitration and ADR

56 Are private antitrust disputes arbitrable under the laws of your country?

Private antitrust disputes are arbitrable under Austrian law.

57 Will courts generally enforce an agreement to arbitrate an antitrust dispute? What are the exceptions?

Where the parties to an antitrust dispute have concluded an arbitration agreement, the civil courts do not have jurisdiction to hear the dispute. However, a civil court may become competent despite an arbitration agreement if the defendant does not raise the defence of lack of jurisdiction before arguments on the substance of the case are advanced.

An action for annulment against an arbitral award can be brought before the Supreme Court only on grounds of violation of fundamental procedural principles and of public policy.

58 Will courts compel or recommend mediation or other forms of alternative dispute resolution before proceeding with a trial? What role do courts have in ADR procedures?

The civil courts may not compel mediation or other forms of alternative dispute resolution before proceeding with a trial in private antitrust cases. If a consensual dispute resolution concerning the claim covered by an action for antitrust damages is expected between the parties, the court may suspend the proceedings for up to two years.

Advocacy

59 Describe any notable attempts by policy-makers to increase knowledge of private competition law and to facilitate the pursuit of private antitrust claims?

The latest amendment to the Cartel Act (the Law on Amendments to the Cartel Act and the Competition Act 2017) implemented 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 (EU Damages Directive) into Austrian law. The previous amendment to the Cartel Act (the Law on Amendments to the Cartel Act and the Competition Act 2012) had also been driven by the objective of facilitating private antitrust damages claims and had already anticipated some of the amendments required by the EU Damages Directive.

The Cartel Court is obliged to publish its final decisions including the names of the parties. The FCA must also immediately publish the operative part of final decisions of the Cartel Court on its website. These measures are intended to increase transparency for potential damages claimants.

Other

60 Give details of any notable features of your country's private antitrust enforcement regime not covered above.

The answers to the questions above reflect the status of Austrian law at the time of writing including the amendments brought about by the Law on Amendments to the Cartel Act and the Competition Act 2017, which implemented the EU Damages Directive into Austrian law. Some of the rules set forth above are only applicable to the compensation of harm that occurred after 26 December 2016 (i.e., as they have no retroactive effect, different rules may apply to the compensation of harm that occurred earlier). The rules on disclosure of evidence only apply to actions for damages of which a court was seized after 26 December 2016.

In June 2021, a draft bill amending the Cartel Act was published (the Law on Amendments to the Cartel Act and the Competition Act 2021). Although the focus of these upcoming amendments (which are likely to enter into force on 1 January 2022) is on public enforcement of competition law, the draft bill also proposes a few minor amendments to the rules on access to file that are relevant for the private enforcement of competition law.