GLG

Global Legal Group

# The International Comparative Legal Guide to:
# Competition Litigation 2011

## A practical cross-border insight into competition litigation work

Published by Global Legal Group, in association with CDR, with contributions from:

ACCURA Advokatpartnerselskab
Alston & Bird LLP
Arnold Bloch Leibler
ARNTZEN de BESCHE Advokatfirma AS
Ashurst LLP
Axinn, Veltrop & Harkrider LLP
Barnert Egermann Illigasch Rechtsanwälte GmbH
Borden Ladner Gervais LLP
Dittmar & Indrenius
Drew & Napier LLC
Egorov Puginsky Afanasiev & Partners
Elvinger, Hoss & Prussen
Eugene F. Collins, Solicitors
Eversheds Bitāns Law Office
Gernandt & Danielsson
Gianni, Origoni, Grippo & Partners
Hogan Lovells
Hoxha, Memi & Hoxha
J. Sagar Associates
Lellos P. Demetriades Law Office, LLC
Muscat Azzopardi and Associates
Oppenheim
Pachiu & Associates
Pels Rijcken & Droogleever Fortuijn N.V.
Sérvulo & Associados
Shin & Kim
SJ Berwin LLP
TGC Corporate Lawyers
Vasil Kisil & Partners
WalderWyss Ltd.
Webber Wentzel

CDR
Commercial Dispute Resolution

# Austria

Barnert Egermann Illigasch Rechtsanwälte GmbH

Isabella Hartung

## 1 General

### 1.1 Please identify the scope of claims that may be brought in Austria for breach of competition law.

Claims that may be brought in Austria for breach of competition law are manifold:

a. On the basis of the Austrian Cartel Act (*Kartellgesetz*), the Federal Competition Authority (*Bundeswettbewerbsbehörde*), the Federal Cartel Prosecutor (*Bundeskartellanwalt*) and also private entities may apply to the Cartel Court (*Kartellgericht*) for a cease and desist order (*Abstellung*) or a decision finding an infringement (*Feststellung*). The Federal Competition Authority and the Federal Cartel Prosecutor may, in addition, apply to the Cartel Court for the imposition of fines.

b. Private entities may also bring claims for breach of competition law before the commercial courts (*Handelsgerichte*) on the basis of the Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*). The latter provides a legal basis to apply for a cease and desist order and to claim damages.

c. In addition, private entities may bring damage claims for breaches of competition law before civil courts pursuant to the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). They may also argue that the competition law was breached in order to defend themselves against a plaintiff's claim.

d. If the competition law breach amounts to a criminal offence (in case of fraud or bid rigging) and criminal proceedings are initiated against the respective individuals, anyone who suffered damage due to such offence may join the criminal proceedings (*Privatbeteiligung*). The criminal court may determine the amount of damage suffered to the extent possible on the basis of the results of the criminal proceedings or simple further investigations, failing which the damage claim must be brought before civil courts.

### 1.2 What is the legal basis for bringing an action for breach of competition law?

The legal basis for such actions depends on the type of court where the action is brought: the Cartel Act, for instance, is the legal basis for actions before the Cartel Court, whereas the Act Against Unfair Competition is the legal basis for actions before commercial courts (see for more details above, question 1.1).

### 1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is derived from national law and, as concerns breaches of Arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), also EU law.

### 1.4 Are there specialist courts in Austria to which competition law cases are assigned?

Yes: the Cartel Court is a specialist division of the Vienna Court of Appeals (*Oberlandesgericht Wien als Kartellgericht*); it only rules on competition law cases brought on the basis of the Cartel Act and claims based on the Act on Improvement of Local Supply and Competition (*Nahversorgungsgesetz*).

### 1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

a. Before the Cartel Court, a claim can be brought by the Federal Competition Authority or the Federal Cartel Prosecutor and, in principle, also by every undertaking or association of undertakings which has a legal or economic interest in the respective decision. In addition, the Federal Chamber of Commerce (*Wirtschaftskammer Österreich*), the Federal Chamber of Employees (*Bundesarbeitskammer*) and the Committee of Presidents of the Chambers of Agriculture (*Präsidentenkonferenz der Landwirtschaftskammern*) may bring claims before the Cartel Court (which happens rather rarely, though). However, standing to bring an action requires a more defined interest if the infringement has already ceased (see also below, question 3.1).

b. Before the commercial courts a competitor or the representative bodies mentioned above (in a.) may bring an action on the basis of the Act Against Unfair Competition. In addition, the Austrian Labour Union (*Österreichischer Gewerkschaftsbund*), the Austrian Competition Authority and, under certain circumstances, also certain representative bodies from other EU Member States may bring such action. Under the Act Against Unfair Competition, private individuals may only bring damage claims (but not an application for a cease and desist order).

c. Under the General Civil Code, damage claims can be brought by private individuals, companies or other entities who have suffered damage, regardless of whether they are competitors, customers or suppliers.

d. Any private individual, company or other legal entity may join criminal proceedings, provided that they suffered damage due to the alleged criminal offence.

Multiple claimants have to initiate separate proceedings which can, thereafter, be joined by the court. They may jointly initiate proceedings under the following conditions only: their claims must be directed against the same defendant; must be based on facts which are largely similar; and the court must have jurisdiction for each single claimant (see below, question 1.6). Another option for multiple claimants is to assign their respective claims to another entity which brings the proceedings in its own name. Class actions in the strict sense are not available in Austria; their introduction (not limited to competition law breaches) was the subject of public debate, but proposed amendments to the Code of Civil Procedure (*Zivilprozessordnung*) were aborted so far. However, EU legislation on this issue is in the pipeline and will likely necessitate amendments to the rules presently in force in Austria.

### 1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Bringing a claim under the Cartel Act is only possible if the incriminated practice has effects on the Austrian market. There is only one single Cartel Court in Austria hearing such claims; the respective application can be filed with the Cartel Court by everyone who has standing (see above, question 1.5).

Claims under the General Civil Code are heard by commercial courts if they concern a business-related affair and are brought against an entrepreneur for whom the affair was actually business-related. Otherwise they are heard by the general civil courts. The Jurisdictional Statue (*Jurisdiktionsnorm*) deals with the question which civil or commercial court is competent to take the case: if the value of the subject matter does not exceed EUR 10,000, the district courts (either the general civil or the commercial ones) are competent to hear the claim. Above this threshold the claim has to be brought before the regional courts (again, either the general or the commercial ones). Claims under the Act Against Unfair Competition are in any case dealt with by the regional commercial courts.

From a geographical point of view, the (commercial or civil) court where the defendant company has its seat is entitled to take on a claim. Alternatively, the claimant may sue at the place where the damage was inflicted (i.e., where the action causing the damage was taken). This corresponds to the system followed by EC Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which governs jurisdiction in cases having a relation to other EU Member States and is directly applicable in Austria.

Criminal proceedings can be joined by an aggrieved party at the criminal court where such proceedings are pending.

### 1.7 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial in proceedings before the commercial and civil courts, whereas it is, to a certain extent, inquisitorial in proceedings before the Cartel Court. However, claimants bringing an action before the Cartel Court will at least have to submit the facts on which they base their claim; if the relevant facts cannot be determined (*non liquet*), this will be to the detriment of the party bearing the burden of proof for the respective facts (see below, question 4.2).

## 2 Interim Remedies

### 2.1 Are interim remedies available in competition law cases?

Yes - see below, question 2.2.

### 2.2 What interim remedies are available and under what conditions will a court grant them?

The Cartel Court may grant an interim injunction if the applicant furnishes *prima facie* evidence for circumstances under which a cease and desist order may be granted. Before the Cartel Court decides on the application for interim relief, the defendant will be heard. Interim injunctions may also be granted regarding applications for cease and desist orders under the Act Against Unfair Competition. In both cases it is not necessary to demonstrate that granting of interim relief seems necessary to prevent imminent danger or imminent irrecoverable damage (whereas this is a prerogative for interim injunctions based on general civil law).

## 3 Final Remedies

### 3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

A cease and desist order will be granted by the Cartel Court if the respective breach of competition law is still ongoing at the time of the decision. The Supreme Cartel Court ruled in 2009 that a cease and desist order may also be available if an abusive behaviour of a dominant company has already ended, but if the effects of the infringement are still continuing due to the long-term character of the agreements concluded by the dominant company. Fault on the defendant's part is not required.

A decision finding an infringement may be issued by the Cartel Court even if the infringement has already come to an end. However, in such case a private plaintiff will have to show that there is a danger of resumption (*Wiederholungsgefahr*) and that, therefore, it is necessary to clarify the legal position. Again, there is no requirement of fault.

A cease and desist order will be issued under the Act Against Unfair Competition if an undertaking breaches competition rules in order to gain a competitive advantage *vis-à-vis* a competitor, unless the defendant acted on the basis of a justifiable interpretation of the law (*vertretbare Rechtsauffassung*). Fault is again not required, only the danger that the breach is committed (*Begehungsgefahr*) or resumed (*Wiederholungsgefahr*).

Damages for breach of competition law may be awarded either under general civil law or the Act Against Unfair Competition (to date the case law is still very scarce, though). In both cases, the court will apply the following test: (a) the incriminated practice must infringe either EU or national competition law; (b) a damage must have occurred; (c) the damage for which compensation is claimed must be within the protective scope (*Rechtswidrigkeitszusammenhang*) of the rule breached (i.e., the purpose of the rule breached has to encompass protection against exactly the sort of damage that occurred in the case at hand); (d) there must be a causal link between the infringement of the rule and the damage; and (e) the defendant must have acted intentionally or at least negligently.

### 3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

The award will in any case comprise the amount of the actual damage caused (*positiver Schaden*), i.e., any harm to existing assets. Loss of profit (*entgangener Gewinn*), i.e., loss of future opportunities, can, under general civil law, only be awarded if the damage was caused by grossly negligent or intentional behaviour. Irrespective of the degree of fault, loss of profit can be included in the award if is based on the Act Against Unfair Competition or if EU competition law was breached.

Sec 273 of the Code of Civil Procedure allows the court to determine the amount of the award at its own discretion if it is clear that the claimant is entitled to compensation, but the actual amount of damage cannot be proven at all or such proof would encounter disproportionate difficulties.

Exemplary damages are not available under Austrian law.

### 3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

No, they are not.

## 4 Evidence

### 4.1 What is the standard of proof?

Generally court judges have to be convinced that the presented facts are true with "high probability" (the requirement of "utmost probability" was abandoned in recent case law). Judges are free in their consideration of different pieces of evidence (*freie Beweiswürdigung*).

As set out above (question 2.2), a lower standard of proof (*prima facie* evidence) is generally sufficient for interim relief.

However, in the main proceedings, *prima facie* evidence will only suffice in certain special circumstances where the applicant faces major obstacles to proof of evidence (this has been applied in abusive pricing-cases, as the applicant is often not able to prove the defendant's costs).

### 4.2 Who bears the evidential burden of proof?

Generally each party bears the burden of proof for the facts that substantiate the respective party's own submissions (i.e., the plaintiff has to prove the existence of an infringement and any other requirements of the remedy sought, whereas the defendant has to prove any facts submitted to rebut the plaintiff's allegations).

However, statutory presumptions contained in the Cartel Act shift the burden of proof: if, for instance, the market share of an undertaking reaches or exceeds 30% on the relevant market, such undertaking is presumed to hold a dominant position and, therefore, bears the burden of proving that this is not the case.

Further, if EU or national competition law was breached, a claimant seeking damages does not have to prove the defendant's fault, but rather the latter has to rebut the statutory presumption of fault.

### 4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

There are no limitations under Austrian law on the forms of evidence that parties may put forward. Parties may also submit expert evidence (notwithstanding the fact that courts will often appoint an expert witness who is independent of the parties).

In proceedings before the Cartel Court, the court may hear evidence even against the will of the parties.

### 4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Discovery, i.e., a formal investigation that is conducted before trial and allows a (private) party to question other parties, and/or to force the other party to produce documents or other physical evidence, is not available under Austrian law. However, the Federal Competition Authority's powers of investigation comprise a right to request documents from undertakings and associations of undertakings.

After court proceedings have been initiated, a private party can obtain identified pieces of documentary evidence from the other party under certain circumstances ("fishing expeditions" for unknown evidence are not possible). If the respective requirements are fulfilled, the court may order the other party to produce the piece(s) of documentary evidence. The other party may only refuse the production of a piece of evidence in certain defined cases, e.g., if the production of a document would entail a risk of criminal prosecution for such other party or a third party. In any case the court cannot force the other party to produce a piece of evidence, but will take a refusal into account in its consideration of evidence.

If documents are in the possession of a third party, the cases in which such third party is obliged to produce them before court are even more narrowly defined. Documents which are in the possession of the Federal Competition Authority can generally not be obtained for the purpose of other proceedings (there is no right of access to the authority's file).

In proceedings before the Cartel Court, third parties may access the Cartel Court's file only if the parties to the proceedings have consented thereto; a recent decision of the Supreme Cartel Court clarified, however, that such consent by the parties is not required if a criminal court or the public prosecutor request access to the Cartel Court's file on the basis of the rules on administrative assistance (*Amtshilfe*).

### 4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Witnesses can be forced by the court to appear; to this effect the court can impose fines each time a witness who was duly summoned does not appear before court. However, there are certain grounds on which a witness may refuse to testify (once he/she has appeared before court).

Cross-examination of witnesses as known from Anglo-Saxon legal systems is not possible as such in Austria. It is rather the judge who leads the interrogation of the witness and the parties may thereafter ask additional questions.

### 4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

As regards an infringement decision by the Cartel Court, legal literature almost unanimously argues that they should have binding effect in follow-on proceedings for damages as to the fact that a breach of competition law has been committed. However, this has not been finally tested in court yet. The binding effect of infringement decisions issued by the European Commission stems from Art 16 of EC Regulation No 1/2003, according to which national courts cannot, when ruling on agreements, decisions or practices under Arts 101 or 102 TFEU which are already the subject of a Commission decision, take decisions running counter to the decision adopted by the Commission.

How decisions by authorities from other countries would be treated by Austrian courts regarding their probative value as to liability still remains to be seen.

### 4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

There is no protection of commercial secrets as between the parties of proceedings before the Cartel Court or the civil and commercial courts.

As regards proceedings before the Cartel Court, third parties may only have access to the Cartel Court's file if the parties to the proceedings have given their prior consent (in contrast to proceedings before civil and commercial courts, where third parties could gain access even without such consent if they demonstrate a legal interest). Proceedings initiated at the Cartel Court by the Federal Competition Authority or the Federal Cartel Prosecutor may only be joined with proceedings initiated by a private entity with the consent of the parties to the former proceedings. Furthermore, upon request of either party to the proceedings, the Cartel Court may exclude the public from oral hearings in order to protect business secrets. Such exclusion of the public from oral hearings is also possible in proceedings brought under the Act Against Unfair Competition.

Finally, witnesses may refuse a testimony regarding questions that the witness could not answer without disclosing a business secret (this rule applies to proceedings before the Cartel Court as well as commercial and civil courts).

## 5 Justification / Defences

### 5.1 Is a defence of justification/public interest available?

Similar to Art 101 TFEU, the prohibition of agreements restricting competition pursuant to the Cartel Act exempts agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In certain cases of abuse of a dominant position the defendant may argue that his behaviour, which would otherwise qualify as abusive, was objectively justified.

### 5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The "passing on defence" is, as such, not explicitly laid down in Austrian civil law, but the same results might be achieved by relying on the so-called "compensation for advantages" (*Vorteilsausgleich*), meaning that any advantage on the claimant's side will be set-off against the damage incurred. In this regard, the defendant would bear the burden of proving that the applicant has passed on the damage to his own customers (i.e., had an advantage). Other details of whether and how the "passing on defence" may be applied are disputed in legal literature, and there is no Austrian case law on whether a passing on-defence can validly be made against damage claims for breach of Austrian competition law. Under EU case law, anyone who suffered damage due to a breach of EU competition law should be allowed to bring a claim. It still remains to be seen how Austrian courts will deal with the passing on defence in connection with damages for breach of (Austrian and EU) competition law.

## 6 Timing

### 6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

There is no limitation period for bringing claims under the Cartel Act. However, cease and desist orders may, in principle, only be issued while the infringement is still ongoing (see question 3.1).

Applications for a cease and desist order under the Act Against Unfair Competition may be brought within six months from the date when the claimant learned of the breach and its author, but in any case no later than three years after the breach (unless an illegal result of the breach still persists).

Damage claims can only be brought within three years from the date when the plaintiff learned of the damage and its author, but in any case no later than 30 years after the breach.

### 6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The duration of proceedings in the first instance is hard to estimate, but they will generally take at least one year. Applications for interim relief are dealt with more rapidly.

## 7 Settlement

### 7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

In proceedings before civil and commercial courts, the parties do not require any permission to discontinue breach of competition law claims.

In proceedings before the Cartel Court, the respective claim may be withdrawn until the decision in the first instance is issued; the proceedings, however, only terminate if neither the Federal Competition Authority nor the Federal Cartel Prosecutor declares, within 14 days from service of the withdrawal, its intention to continue the proceedings. In appeal proceedings, the claim may only be withdrawn until the decision of the Supreme Cartel Court is

issued and if the defendant as well as the Federal Competition Authority and the Federal Cartel Prosecutor consent thereto.

## 8 Costs

### 8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Yes, in proceedings before civil and commercial courts the unsuccessful party has to pay the other party's costs. In proceedings before the Cartel Court, however, this rule only applies if the unsuccessful party's submissions were wilful (*mutwillig*), i.e., not *bona fide*.

### 8.2 Are lawyers permitted to act on a contingency fee basis?

Pursuant to Sec 879 of the General Civil Code, agreements on the basis of which clients owe their attorney a percentage of the amount awarded to them are illegal and, therefore, void. However, it is possible to agree on a success fee in the form of a specific amount to be paid in case the proceedings are won.

### 8.3 Is third party funding of competition law claims permitted?

Generally yes, with the exception of the prohibition set out above (question 8.2).

## 9 Appeal

### 9.1 Can decisions of the court be appealed?

Yes: decisions of the Cartel Court as well as of the civil, commercial and criminal courts can be appealed.

## 10 Leniency

### 10.1 Is leniency offered by a national competition authority in Austria? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The Federal Competition Authority may grant immunity from fines under the Austrian leniency rules. However, neither successful nor unsuccessful leniency applicants are given immunity from civil claims.

### 10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Please note that in Austria leniency can only be granted by the Federal Competition Authority (who will in such cases refrain from applying to the Cartel Court for the imposition of fines); leniency cannot be obtained in Austrian court proceedings.

The mere fact that a company tried to obtain leniency from the Federal Competition Authority (be it successfully or not) does not as such entail a right of that company to withhold, in subsequent court proceedings, evidence which was disclosed for purposes of the leniency application. See also question 4.4 regarding refusals to produce pieces of evidence.

**Isabella Hartung**

Barnert Egermann Illigasch Rechtsanwälte GmbH
Rosenbursenstrasse 2
A-1010 Vienna
Austria

*Tel:* *+43 1 513 80 080*
*Fax:* *+43 1 513 80 0840*
*Email:* *hartung@beira.at*
*URL:* *www.beira.at*

Isabella Hartung is a partner at Barnert Egermann Illigasch, specialising in competition law and regulatory/energy law. She has extensive experience in all areas of Austrian and EU competition and merger control law, and advises Austrian as well as international clients.
Isabella Hartung graduated from the University of Vienna in 1997. After having completed her postgraduate studies in European law at the College of Europe (Bruges), she received her doctor juris from the University of Vienna in 2000. During her studies Isabella Hartung worked as a trainee in the European Parliament and the European Commission. From 2000 to 2006, she worked as an associate in the antitrust, competition and trade department of a magic circle law firm in Vienna and London. She was admitted to the Vienna bar in 2003.
Isabella Hartung gives lectures and is author of several articles on competition law topics as well as co-author of a text book on Austrian competition law ("*Das österreichische Kartellrecht - Ein Handbuch für Praktiker*", 2nd edition, Linde Verlag 2008).

# Other titles in the ICLG series include:

- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment Law
- Enforcement of Competition Law
- Environment Law
- Gas Regulation
- International Arbitration
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Product Liability
- Public Procurement
- Real Estate
- Securitisation
- Telecommunication Laws and Regulations

# To order a copy of a publication, please contact:

Global Legal Group
59 Tanner Street
London SE1 3PL
United Kingdom
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk