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I. Introduction

Ever since individual *locus standi* before the Cartel Court was introduced in 1993, private enforcement of competition rules has played an important role in Austria. To a considerable extent, actions by private parties, or by public institutions such as the Chamber of Labour, have compensated for the lack of a public prosecutor in competition matters.[1] However, in most cases these private enforcement measures do not consist in actions for damages but rather in requests for cease and desist orders. Although damages might be obtained under general principles of tort or on the basis of the Act against Unfair Competition before the civil or trade courts, no such awards have been reported yet. Recently, the possibility of civil actions for damages was intensively discussed in the context of the *Lombard Club*-case decided by the European Commission.

The lack of damages actions for breach of national and EC competition law in Austria is due to several reasons. Most of all, a private action will only be brought where plaintiff is sufficiently sure to be able to prove an infringement, and where he must not be afraid of retaliatory measures by defendants. Whereas the former criterion often renders private actions against secret cartels (i.e. Art 81 type of cases) difficult to pursue, the latter aspect is particularly important if the action would have to be directed against a dominant undertaking (i.e. Art 82 type of cases). The risk of bringing a private action for breach of national and/or European competition rules is enhanced by cost risks, i.e. the risk that plaintiff (if the actions fails) is requested not only to cover his own legal expenses but also to reimburse the opponents legal fees (and possibly to pay considerable court fees).

II. Actions for damages - status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

A. Law against Tort

There is no explicit statutory basis under Austrian law for action for damages arising from infringement of national and/or EC competition law. However, such actions may be based on the general principle of tort set forth in **Sec 1311 of the Austrian Civil Code** ("*Allgemeines Bürgerliches Gesetzbuch*" - ABGB) which provides that *anyone who intentionally or negligently infringes an act of law that is meant to prevent harm shall be liable to compensate the damage arising from his behaviour*.

While to date no cases have been reported where actually damages for anti-competitive behaviour have been awarded, there is unanimous consent in legal writing that the national competition rules codified in the Austrian Cartel Act as well

1 A public prosecutor in competition matters was only installed in Austria with the 2002 amendment to the Cartel Act. Today, two federal agencies – the Federal Competition Authority on the one hand and the Federal Cartel Attorney on the other – may bring actions before the Cartel Court.

as the EC competition rules qualify as "acts of law that are meant to prevent harm" (protective act; *Schutzgesetz*). Consequently their infringement may in principle give rise to damage claims before Austrian courts. This was confirmed (though just *obiter dicta*) by a number of courts of first instance when seized with damages actions by the *Verein für Konsumenteninformation* (VKI) against Austrian banks which, inter alia, where based on a violation of EC competition rules in the *Lombard Club*-case.[2] Also, in a recent decision on an application for a cease and desist order for an alleged abuse of a dominant position, the Austrian Supreme Court acting in his capacity as Supreme Cartel Court (*"Oberster Gerichtshof als Kartellobergericht"* – KOG) expressly referred the applicant to the possibility to claim damages.[3]

Whereas the legal basis for damage claims for anti-competitive behaviour as such is well established, there was considerable controversy on the question what particular harm the competition rules shall prevent and, consequently, how far civil liability for infringements of those rules should go. For instance, it was long argued that Austrian competition law protects workable competition as a matter of economic efficiency rather than in order to protect the interest of individual customers. Consequently, only competitors but not customers who are harmed by a cartel would have an action.[4] By the same token, in its early case law the Cartel Court explicitly stated that the aim of the provisions on abuses of dominant market positions is to protect the interests of the overall economy and not individuals.[5] Today, some authors still argue that only competitors should be deemed protected by competition rules[6]. Most of the legal writing, however, argues in favour of a wider interpretation, extending the scope of the protection afforded by competition rules to consumers, at least if they are direct customers of a cartel[7]. This is particularly true with regard to EU competition rules, notably in view of the ECJ's jurisprudence in cases T-88/92, *Groupement d'achat Edouard Leclerc;* 41, 43-48, 50, 111, 113, 114/73, *Société Anonyme Génerale Sucrière/Commission;* and C-453/99, *Courage-Crehan*.[8] For national law, it is worth noting that - for damage actions based on the UWG - the Supreme Court recently explicitly extended the scope of protection to consumers.[9]

The fact that, as legal discussions stand today, not only competitors but also customers of a cartelized industry are deemed protected by competition rules, does not mean that even very remote and indirect harm is actionable. It is a well established principle of Austrian tort law that, where the tort consists of an infringement of a protective act, the law breaker is only liable to cover damages which the act in question shall avoid, but not damages from mere side effects. This concept may be explained by the following example from outside competition law. Assume that a car driver speeds at 140 km/h in a zone where only 80 km/h are permitted. Some 20 km later (when he is driving again perfectly in line with traffic regulations), he is involved in a car accident where injury occurs. Without the speeding, the driver would not have been at this place at the critical time. The infringement was therefore causal for the injury. Nevertheless, the driver would not be liable for damages, as the purpose of speed restrictions is to avoid accidents in the restricted zone, but not to avoid that a particular person is at a specific spot at a specific time. Consequently, it would be inadequate to hold the driver liable for the later injury. This concept is usually referred to as the criterion of *Rechtswidrigkeitszusammenhang* (*adequacy*)*:* In Sec 1311 ABGB-cases, only damages are covered which are within the protective scope of the act in question.

In competition cases, the *Rechtswidrigkeitszusammenhang* may have importance when it comes to the obligation to reimburse consequential losses or losses incurred by third parties. For instance, if part of an industry establishes a price cartel and other industry members seize the opportunity to raise their prices as

2 See most recently LGZ Graz 02/04/2004, 30 Cg 145/02a.
3 OGH 16/12/2002, 16 Ok 10/02. See case summary in the appendix.
4 Koziol, *Haftpflichtrecht II* (1984) 105.
5 Kartellgericht 10/04/1973, Kt 151/73 = ÖBl 1974, 18.
6 Gehmacher/Hauck/Madl, *Schadenersatz bei Kartellverstoß – Zur Lombard-Club Entscheidung der Kommission* (2002), *ecolex* 564.
7 Hack, *Handlungsmöglichkeiten Einzelner bei Kartellrechtsverletzungen* (2003), ecolex 311.
8 Stillfried/Stockenhuber, Schadenersatz bei Verstoß gegen das Kartellverbot des Art 85 EG-V (1995), ecolex 301.
9 OGH 24/02/1998, 4 Ob 53/98. See case summary in the appendix.

well (without participating in the cartel as such), it is unlikely that the Austrian courts would oblige the cartel members to reimburse customers of their competitors for losses incurred as a consequence of the rise of the overall price level, as such indirect losses are not adequately covered by the protective aim of competition rules.

B. Law against Unfair Competition

In addition to qualify as a tort under Sec 1311 ABGB, infringements of national or EC competition rules will frequently constitute an infringement of **Sec 1 of the Austrian Act against Unfair Competition** ("*Gesetz gegen den unlauteren Wettbewerb*" - UWG)[10]. Under Sec 1, 16 UWG, *anyone who in the course of business and for the purpose of competition acts contra bona mores may be enjoined from such acts and held liable for damages.* Under well established case law, any breach of law which is designed and able to give the injurer an advantage, as compared to his law-abiding competitors, simultaneously qualifies as a breach of *bona mores* and thus triggers the possibility to invoke the special actions provided for in the UWG (i.e. cease and desist, damages, recovery, publication).

Please note that the UWG contains specific rules on who may bring an action for cease and desist. Whereas pursuant to Sec 14 UWG claims for cease and desist may (only) be brought by competitors and certain privileged organisations, the Supreme Court held in the above referred case OGH 24/02/1998, 4 Ob 53/98 t that actions for damages under Sec 16 UWG may also be brought by individual customers who are injured as a consequence of unfair behaviour.

Generally speaking, the criteria of damage actions under Sec 1311 ABGB and Sec 16 UWG are identical. Where in the following text no specific differences are pointed out, the two types of damage actions follow the same rules.

B. Which courts are competent?

A. Civil Courts

In general, the competence to hear an action for damages lies with the Austrian **civil courts**, as opposed to (for instance) an administrative tribunal or the specialised Cartel Court. Which specific type of civil court will hear the action depends on the amount claimed and on the parties to the litigation. For claims for an amount of up to EUR 10,000 the district court ("*Bezirksgericht*") at the seat of the defendant is competent. For an amount exceeding EUR 10,000 a regional court ("*Landesgericht*") deals with the action. For claims arising from cartel agreements, Sec 122 of the Cartel Act provides that, irrespective of the amount in dispute, the case shall be heard by the regional court.

If (i) an action is filed against a company that qualifies as a "merchant" ("*Kaufmann*") pursuant to the Austrian Commercial Code ("*Handelgesetzbuch*", HGB), and (ii) the damage has arisen from a contractual commercial relation with the defendant, the **commercial courts** (which are specialised chambers of the civil courts) are competent to decide on the claim. Thus, for instance, if a customer claims damages because he was charged an excessive cartel price under a commercial supply agreement, the action will be decided either by the commercial district court ("*Bezirkgericht für Handelssachen*") or by a regional commercial court ("*Landesgericht als Handelsgericht*").

For damages claims based on the UWG as well the commercial courts have exclusive competence.

10 Cf. Supreme Court, („*Oberster Gerichtshof*", OGH) 15/10/2002, 4 Ob 201/02s, *Pro-Serve Sport GmbH u.a. gegen Österreichischer Tennisverband u.a. – ÖTV-Ballverträge*; WBl 1998, 318 – *Servicegutscheine*; ÖBl 1998, 36 – *Filmverleihgesellschaft*; ÖBl 1994, 66 – *Linzer Straßenbahnen*; WBl 1993, 264 – *Ursprungserzeugnisse*.

B. The Cartel Court

A special feature of Austrian competition law is the **Cartel Court** (technically: the *Oberlandesgericht Wien acting in its capacity as Cartel Court)*. The Cartel Court is established in the *Cartel Act*, the Austrian code against restrictive practices. It has a dual function in administering national competition rules. First, the Cartel Court decides upon applications for clearance of mergers (i.e. EMCR type of cases) and/or restrictive agreements (i.e. Art 81 Para 3 cases prior to Regulation 1/2003). Secondly, upon application by the Federal Competition Authority or the Federal Cartel Prosecutor, it issues cease and desist orders, or imposes fines for infringements of competition rules. With those two functions, the Cartel Court – in the European terminology – acts as a competition authority of first instance.

Simultaneously, however, private parties (and certain privileged institutions; see immediately below) may also seize the Cartel Court. In such cases, the Cartel Court acts as a specialized court for private party litigation in competition matters. More specifically, the Cartel Act empowers any undertaking affected by an uncompetitive behaviour (illegal cartel; see Sec 25 KartG; abuse of a dominant position; see Sec 37 KartG; illegal vertical restraints; see Sec 30c KartG) to file an application for a cease and desist order with the Cartel Court, also by way of injunctive relief (Sec 52 KartG). According to Sec 25, 30c and 37 KartG such applications may further be filed by:

- any business association representing economic interests if these interests are affected by the infringement
- the Chamber of Commerce
- the Chamber of Labour
- the Presidential Conference of the Austrian Chambers of Agriculture
- sector regulators such as *E-Control*

In particular the Federal Chamber of Labour, which has positioned itself as a consumer protection organisation, frequently makes use of this instrument. Other consumer organisations or individual consumer have no *locus standi* before the Cartel Court.

Please note that, as the law presently stands, the Cartel Court is not entitled to award damages but only to issue cease and desist orders, and even the latter only as long as the infringement in question is in place, i.e. not after it has been terminated.

From a procedural side, litigation in front of the Cartel Court is more beneficial to the plaintiff than litigation before the ordinary civil or commercial courts. For instance, before the Cartel Court each party has to bear its own costs. Even if plaintiff loses his case, he need not reimburse defendants costs (i.e. there is a reduced cost risk). Further, the Cartel Court has an ex officio obligation to establish the facts of the case, whereas before the civil courts plaintiff has to present all evidence himself. For those reasons – despite his restricted competences in private party actions – the Cartel Court is usually at the forefront of individual claims against anti-competitive behaviour. Private practice uses the Cartel Court and the ordinary courts as alternative means of dispute resolution, depending on the specifics of the case at hand.

Recently, controversy has arisen whether *de lege lata* the Cartel Court is also competent to hear individual actions in Art 81 or Art 82-cases, or whether this function is restricted to the enforcement of national competition rules. It was argued that, when applying European competition law, the court may only assume the tasks of a competition *authority*, but not the tasks of a specialized competition *tribunal* for private party litigation. It is likely that this issue will be resolved in the course of an upcoming amendment to the Cartel Act which shall enter in force on 01/01/2005.

(i) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

No. In particular, the specialized Cartel Court (*Kartellgericht*) has no competence to award damages but only – in private party actions – to issue cease-and-desist orders (see above).

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

Any natural or legal person of full capacity (age, mental capacity etc) - irrespective of its nationality - has the right to file an action for damages under Sec 1311 ABGB. Capacity is defined by civil law and corresponds generally to the ability to take over liabilities. A legal person needs to be represented its managers.

Actions against a non-Austrian defendant having its registered office within the EC fall within the scope of Council Regulation 44/2001 of 22 December 2000 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[11]. For actions based on a contractual relation between the plaintiff and the defendant, in the absence of an explicit contractual arrangement, an action may be filed in Austria if the defendant has his registered office here, or if delivery under the contract took place in Austria. In cases of pure tort, the damage action can be filed in Austria if the damage occurred here or if the infringement leading to the damage took place in Austria (Art 5 no 3 Reg 44/2001). A special rule applies to consumers claiming damages based on a contractual relationship; If the defendant set commercial marketing activities in a Member State, a consumer of that Member State can file an action against this company based on the contractual relationship in his home country (Art 15 to 17 Reg 44/2001).

For actions against a foreign company from a country different from the EC Member States, the plaintiff can file an action relating to property or payments (*vermögensrechtliche Klagen*) in Austria if the foreign company owns property of any kind in Austria that is not substantially lower than the value of the damage claimed or if it has any representation or other body doing business for the company in Austria (Sec 99 JN).

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

There is no explicit statutory basis for *class actions* in Austrian civil procedure. It is, however, possible to *join the actions* of different plaintiffs in one proceeding if certain conditions are met (Sec 11 seq Austrian Code for Civil Procedure, *"Zivilprozessordnung"* - ZPO). To this effect, the claims must either result out of the same title (e.g. different persons were parties to the same contract which allegedly is anti-competitive), or if the various different plaintiffs have similar claims arising from the same actual reason (e.g. they were harmed by the same illegal behaviour), against the same defendant, and the same courts would be competent for their claims. Even if a number of actions are thus joined in a single procedure, they remain independent claims. The decision on the individual claims can differ within the same judgement, and each of the plaintiffs is still able to renounce, to accept a settlement etc for his individual claim.[12]

Further, it is not excluded that a number of complainants transfer their individual claims/titles to a collective plaintiff ("*Sammelkläger*") which then brings the joinder of claims as his own. Currently, for instance, there are claims pending from the "*Verein für Konsumenteninformationen" ("VKI*"), an Austrian consumer

11 OJ L 12 of 2001.

12 The second possible form of collective claims, the uniform party, will hardly apply to damage claims for competition infringements.

organisation, against banks concerning interest adjustment clauses allegedly overcharging consumers. The VKI also announced its intention to file an action against the Austrian banks that participated in the so-called "Lombard-Club" which received a fine for fixing prices (deposit, lending and other rates).[13] Currently the VKI filed an annulment action with the European Court of First Instance against the decision of the European Commission refusing access to its file (Case No T-2/03). Please note that specifics of this so-called assignation of collection ("*Inkassozession*") are disputed in Austrian legal writing and case law.

Under Sec 14 UWG, certain *representative bodies* (Chamber of Labour, Chamber of Commerce, Trade Unions, Associations of Undertakings) are entitled to bring actions for cease and desist orders. This does not encompass, however, a right of these institutions to claim damages in lieu of the "represented class".

Similarly, under the Cartel Act some form of "public interest litigation" is possible for cease-and-desist orders (but not for damages). Certain institutions and organisations such as notably the Austrian Chamber of Commerce, the Chamber of Labour, the Presidential Conference of the Austrian Chambers of Agriculture and sector regulators such as *E-Control* may seize the Cartel Court with claims for anti-competitive behaviour.

D. What are the procedural and substantive conditions to obtain damages?

Generally speaking, the following criteria must be established in order for a private party action for damages in competition cases to be successful:

a) Defendant(s) must have committed an *infringement* of national or European competition rules.
b) The infringement must have *caused* a *damage* to plaintiff.
c) The damage in question must have been within the protective scope of the competition rules (*Rechtswidrigkeitszusammenhang*; see A1 above).
d) Defendant must have acted either intentionally or negligently (*fault*).

(i) What forms of compensation are available?

The primary aim of Austrian tort law is to grant the injured party "natural restitution". This means that plaintiff should be put in the *status ante*, as if the damaging act had never occurred. Only if restitution in the original status is not possible, the damage should be compensated through pecuniary compensation. In case of anti-competitive behaviour, however, frequently only a pecuniary compensation will be feasible.

(ii) Other forms of civil liability (e.g. disqualification of directors)?

Austrian law does not provide for any other form of direct civil liability in anti-trust matter than the obligations to cease and desist and to pay damages. In particular, disqualification of directors is not addressed. However Directors are liable (under Sec 25 Act on private limited companies - *GmbH-Gesetz* and Sec 84 Act on public limited companies - *Aktiengesetz*) to compensate the company for damages occurred through infringements of competition law. In addition, an infringement for which the director was responsible can also be a ground for immediate dismissal of the director.

Further, bid-rigging is qualified in Sec 168b Criminal Code - *Strafgesetzbuch* as a criminal offence for which directors or other employees involved in the infringement may be held personally liable (imprisonment of up to three years).

Finally, severe administrative sanctions (such as a high fine levied upon an undertaking) is one of the factors to be taken into account when, under administrative law, the capability of a person to run a company is verified.

13 COMP/36.571 - *Österreichische Banken ("Lombard")*, Decision of 11/6/2002 OJ L 56/1 of 24/2/2004.

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

Damages may only be awarded where an infringement implied fault. Pursuant to Sec 1294 ABGB there are different degrees of fault: (i) intent ("*Vorsatz*"), (ii) major negligence ("*Grobe Fahrlässigkeit*") and (iii) minor negligence ("*Leichte Fahrlässigkeit*"). Intent is presumed if the author is aware of the illegality of his acts, if he foresees the damaging effect and if he accepts it. Negligence exists where defendant does not apply the required carefulness. It is major if the damage would not happen to a careful person under similar circumstances. It is minor if the damage results from an error that can occasionally even happen to a careful person. For all those tests, Austrian law provides for an objective standard (benchmark).

As is explained in more detail under F(a)(i) below, there are different legal consequences attached to the different degrees of fault. Austrian tort law is based on the principle of "graduated compensation", i.e. the scope of damages due depends on the defendant's degree of fault. However, even minor negligence can give rise to damage claims.

Where damage arises from the infringement of a protective law, only defendant's fault while infringing the protective law, but not his fault with regard to the possible damages caused thereof, is relevant. Consequently, if a firm participates in a cartel without intent (or negligence) to harm the customers (e.g. because the firm believes that his actions have no actual bearing on the market conditions), damage may be obtained if plaintiff can show that the firm knew (or should have known) that his behaviour contradicts competition rules, irrespective of whether defendant knew (or should have known) that any particular damage might result thereof.

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party etc.)

Pursuant to Sec 1296 AGBG the burden of proof rests on the plaintiff who needs to convince the court that the substantive criteria for his damage claim are satisfied.

However, pursuant to Sec 1298, Sec 1311 AGBG and the pertinent case law, in case of an infringement of a protective law the burden of proof is reversed with regard to the question of *fault*. Thus, in a competition case, the plaintiff would not be required to prove that the defendant acted with fault, but rather the defendant would have to show that he acted neither intentionally nor negligently. This does not apply to cases brought under the UWG. Here, plaintiff needs to show that defendant infringed the competition rules with the intent to gain a competitive advantage over his law-abiding competitors.

A further alleviation of the burden of proof is brought about by the concept of *prima facie*-evidence, which is well established in Austrian civil procedure. Under this concept, it is sufficient for plaintiff to show that a certain fact within the sphere of defendant is likely. It is the defendant's obligation to rebut the presumption established by the prima facie-evidence. This concept was applied, for instance, in a recent predatory pricing case where the Cartel Court held that it is difficult for plaintiff to establish that defendant sells below (variable) costs. Therefore, the court ruled that cost data of comparable undertakings, competitors etc suffice to show the probability of sales below costs. The defendant then had to prove that his own costs differed from the complaints allegations (see OGH 9/10/2000, 16 Ok 6/00, and OGH 16/12/2002, 16 Ok 11/02).

(ii) Standard of proof

In principle the court must be *fully convinced* of the evidence on which it bases its judgement (subjective standard of proof). However, this subjective approach is complemented by an objective standard of proof: A piece of evidence is deemed to be true if there is such a high degree of probability that it is close to certainty, so that no reasonable and down-to-earth person would have doubts. Recent jurisdiction stated that, in case of infringements of a protective act, a lower degree of certainty should suffice to establish causality, i.e. the fact that the damage was caused by the infringement of the defendant (OGH 16/9/1999, 6 Ob 147/99g).

For the compensation of loss of profit, Sec 1293 ABGB sets forth that it suffices if the profit was probable, i.e. the profit could have been expected under the circumstances.

Damages occurred through competition law infringements are often very difficult to quantify. In cases where proof of the loss occurred is impossible or unreasonably difficult to establish for the plaintiff, Sec 273 of the Austrian Code on Civil Procedure gives the judge the possibility to fix the exact amount of damages that should be compensated. This will be dealt with in more detail below.

(iii) Limitations concerning form of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses are called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/ summoned?)

There are no limitations to the form of evidence which may be used in Austrian civil proceedings. Consequently any form of evidence can be admissible, even tapes, films, floppy discs etc. The main forms of evidence are:

- deeds and private documentary (Sec 292 – 319 ZPO);
- witnesses (Sec 320-350 ZPO);
- experts (Sec 351-367 ZPO);
- inspections (Sec 368-370 ZPO);
- interrogation of the parties (Sec 371 – 383 ZPO).

Even evidence improperly obtained by the parties is admissible. The only exception to admissibility concerns evidence improperly obtained by the court itself (i.e. the method of obtaining evidence used by the court is infringing constitutionally guaranteed rights). Such evidence is excluded, meaning that usage of such evidence results in the nullity of the proceeding.[14]

Witnesses may refuse to testify if their testimony implies a risk of criminal investigations or a direct financial disadvantage to themselves, to their partner or any other member of the family, if they are bound by professional secrecy, or if they would divulgate business secrets (Sec 321 ZPO). The same applies to the parties to the proceeding (Sec 380 ZPO).

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis:

- **Defendants**
- **Third parties**
- **Competition authorities (national, foreign, Commission)**

Discovery as such does not exist in Austrian civil procedure. A party may only request the judge to order the opponent to produce certain documents that are relevant evidence for his argumentation if he either provides a copy of this document, or if he is able to describe the content of the requested document in sufficient detail to clearly identify it (Sec 303 ZPO). The production of the documents can be refused if e.g. it would cause harm to the party or falls under professional secrecy or if it would lead to a disclosure of business secrets[15] (Sec

14 Rechberger in Rechberger, Kommentar zur ZPO, 2nd ed, Vor Sec 266, Rz 23, 24.

15 The Supreme Court defined a business secret as a fact in the non-disclosure of which a business has a cognizable interest resulting from its quality as a business; OGH 14/10/1969, 4 Ob 346/69.

305 ZPO). The judge has no power to force the opponent to produce these documents, however, the refusal will be taken into account when the judge evaluates the evidence. Under the above rules, also third parties can be requested to produce relevant documents (Sec 308 ZPO). Please note that those rules only govern the production of evidence of which it is positively known that it exists, but does not support "fishing expeditions" for unknown pieces of evidence.

In proceedings which are governed by an ex officio principle, the court is requested and entitled to establish the facts relevant for the case on its own initiative. Most notably for competition matters, this applies to proceedings before the Cartel Court. Here, the judge may – in his discretion - order parties or witnesses to appear before the bench, he may ask the parties to answer certain questions and to produce certain (specific) documents.

According to legal doctrine, evidence gathered through discovery in another country, where this is a legal means of collecting evidence, is admissible in Austrian proceedings.[16]

(b) Proving the infringement

(i) Is expert evidence admissible?

The Court can call upon officially registered independent experts ("*Sachverständiger*") who cover a wide range of expertise. Recourse may be taken, for instance, to expert accountants who may provide an opinion on an eventual loss of income. The expert is appointed by the court ex officio, although the parties may apply to consult an expert. The expert can gather his own evidence for his report (e.g. interrogate the parties or third parties).

It is also possible that the parties engage "private experts" to provide a report on a topic. However, these reports are only treated as private documentation and prove nothing but the opinion of the author.

No expert evidence on questions of law is permissible, as the court is supposed to be cogniscent of the law (national and EC law) itself (*iura novit curia*).

(ii) To what extent, if any, is cross-examination permissible?

The witnesses presented by either party may be examined by the other party as well. As a rule, the judge will start the interrogation, with lawyers of each side having the opportunity to ask additional questions.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

Under this heading, two topics need to be distinguished. The first issue concerns the question to what extent evidence established in previous proceedings may be "reused" in subsequent litigation. The second issue relates to the question to what extent an Austrian judge is bound by a previous decision of a national court or authority, or of a foreign court or authority (*Bindungswirkung*).

A. Evidential Value

Under Austrian procedural rules, the judge is expected to gain a personal impression of the evidence on which he bases his decision *(Unmittelbarkeitsgrundsatz)*. Thus, the judge should not only read transcripts of interrogations of certain persons before an administrative authority but should interrogate the respective witnesses himself. Even more so, the judge should take personal note of documentary evidence instead of only citing from other decisions.

16 Dietmar Czernich, *Österreichisch-Amerikanisches Zivilprozessrecht* , JBl 2002, 613; Rechberger in Rechberger, Kommentar zur ZPO, 2. Auflage, Vor Sec 292 Rz 1, Fasching, ZPO, 2. Auflage, Rz 925.

According to Sec 281a ZPO there are exceptions to this principle for transcripts of evidence or written expert opinions from previous proceedings, if:

- The parties involved[17] are identical and (i) none of them opposes or (ii) the evidence is no longer available; and/or
- The parties not involved in the earlier proceedings give their approval.

From Sec 281a ZPO and Sec 190 ZPO (which specifies under which circumstances a court is requested to interrupt his proceedings to await the decision of an administrative authority on a preliminary question), it is, however, deduced that in spite of the *Unmittelbarkeitsgrundsatz*, the results of administrative proceedings may (but need not) be used by the courts as indirect evidence.

B. *Bindungswirkung*

If another court or authority already decided upon a preliminary question for a damages claim pending at a civil court (e.g. the existence of an infringement of competition law), the civil court is bound upon:

- final judgements of other Austrian civil courts (in the same context or on an incidental question, i.e. a legal relationship which is of essence for the proceedings on hand), and/or judgments of civil courts from other EU Member State whose recognition is based on Article 33 par 1 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, always provided the parties to the procedure are identical and the judgement has no authority to the detriment of third parties; these restrictions flow from the right to be heard under Article 6 ECHR;

- final decisions of administrative authorities, except the decision is void due to (i) lack of jurisdiction, (ii) excess of authority's scope of action or (iii) absolute inadmissibility of the administrative act[18]. As the jurisdiction of national competition authorities from other EU Member States is restricted to their respective territory, even when applying Art 81 et seq of the EC-Treaty, it seems to us that no binding effect for Austrian courts exists in this context. The binding effect of Commission decisions is governed by Sec 16 of Regulation 1/2003.

- final verdicts of national criminal courts (with the exception of acquittals)[19].

Please note that the binding effect, in all these cases, only concerns the operative part of the relevant decision, i.e. neither its reasoning nor its legal assessment.

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

No. Any evidence proving the damage (i.e. a detriment caused to plaintiffs property or rights or to his person as such) is admissible, such as (for instance) accounts showing a decrease in income. With reference to damage claims under the UWG, the Supreme Court stated that the loss must be substantiated. A mere reference to the fact that the plaintiff suffered a loss of turnover (OGH 11/07/1931, 3 R 527), or that he lost customers (OGH 14/09/1929, GRUR 1321), or that his business is in decline in general (OGH 23/01/1934, 4 Ob 9) does not suffice.

However, if the proof of the exact amount of damage is impossible or unreasonably difficult to establish for the plaintiff, the judge may assess the damage (Sec 273 ZPO). This assessment is not a discretionary decision, but rather a ratio decidendi: The judge has to assess the damage on the basis of his "free conviction" ("*freier Überzeugung*"), meaning that the judge has to estimate the amount to the best of

17 Involvement comprises any party or intervener in civil proceedings including the procedure at the Cartel Court, or party or intervener in criminal proceedings; Rechberger in Rechberger, *Kommentar zur ZPO*, 2nd ed, § 281a, Rn 3.
18 OGH SZ 57/23; SZ 64/98.
19 Since the "decriminalisation" of Austrian competition law only big-rigging is still a criminal act.

his knowledge and belief, taking into consideration his experience of life, his insight into human nature and (most important) the results of the entire proceeding.[20]

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

The Austrian Supreme Court sets very stringent standards for causation. The defendant is only liable for directly causal damages. A behaviour which only resulted in a damage because the voluntary behaviour of another party intervened does not raise liability.

F. Grounds of justification

(i) Are there grounds of justification?

Yes, Austrian tort law accepts certain grounds of justification (e.g. self-defence, state of emergency). One of the very few situations where an infringement of competition law might conceivably be justified is an infringement a company needed to commit in order to avoid financial ruin.

Furthermore, there are certain situations where defendant may show that he lacked fault. The defendant might prove lack of negligence for instance by demonstrating that it was not reasonable to expect to honour competition rules under the particular circumstances of a given situation, or that he was not aware to infringe the law. However, the latter defence will be restricted to situations where there is no clear guidance in the case law on the illegality of a certain behaviour, as according to Sec 2 ABGB everybody is obliged to inform himself about legal provisions applying to him.

(ii) Are the 'passing on' defence and 'indirect purchaser' issues taken into account?

If the damage is passed on to another undertaking up-or downstream or to a final customer, the firstly injured party incurred no damage through the infringement. Due to the method of "calculating the difference", this first party will not be awarded damages. Instead, the indirect purchaser, who cannot pass the excessive price further on, has an action.[21]

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

The injured party has a duty to minimise his loss pursuant to Sec 1304 ABGB. The plaintiff has to do everything possible to keep the damage as limited as possible, or to prevent that the damage is increased through his own behaviour. This might include, for instance, an obligation to look for alternative suppliers in case he is faced with a price fixing cartel. However, defendant bears the burden of proof if the plaintiff has allegedly not complied with this duty.

If defendant is able to prove that there is joint fault due to the plaintiff's behaviour, plaintiff and defendant will be held jointly liable. Damage will then be awarded in accordance with the degree of contributory negligence of the plaintiff (e.g. plaintiff bears 75% of fault, defendant 25%. Plaintiff will only be awarded 25% of his losses.).

G. Damages

(a) Calculation of damages

20 Rechberger in Rechberger, Kommentar zur ZPO, 2nd ed, Sec 273, Rz 5.

21 Cf. Thomas Eilmansberger in: Hans-Georg Koppensteiner (Hrsg), "Österreichisches und europäisches Wirtschaftsprivatrecht, Teil 6/1: Wettbewerbsrecht – Kartellrecht, Verlag der Österreichischen Akademie der Wissenschaften, Wien (1998)., p 168; referring to Wilburg, Drittschadensfälle, JherJB 82, 95ff; Koziol, Haftpflichtrecht I, 288.

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

Damages will be assessed on the basis of injury suffered by the plaintiff, as they aim to compensate his loss.

There are two different forms of compensation for damages: indemnity ("*Eigentliche Schadloshaltung*") and full restitution ("*volle Genugtuung*"). Whereas indemnity covers the actual loss of property (e.g. financial loss because plaintiff was overcharged due to price fixing practices), full restitution also covers loss of profits (e.g. lost business opportunities if a company was boycotted).

If the defendant can only be blamed for minor negligence, he needs to compensate the actual loss occurred through the damaging act. The actual loss is in principle calculated on an objective basis, (Sec 1332 ABGB), based either on the "common value" or by way of "calculating the difference" ("*Differenzmethode"*). Under this test, the court will assess what the value of plaintiffs damaged property was before and after the infringement. However, in case of a pecuniary loss the damage can often only be calculated on a subjective, concrete basis. Here, actual damage also includes business opportunities that would have certainly materialised had the infringement not taken place.

If the defendant is to be blamed for major negligence or intent, he is required to compensate not only the value of the damaged object but also lost profit. In cases of major negligence/intent the damage is calculated by comparison of the plaintiff's property in total before and after the infringement (subjective basis).

In cases of infringements of the Unfair Competition Act, the damaged party can always (even in cases of minor negligence) claim full restitution including lost profit.

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

The damages awarded will refer to the injury suffered by the plaintiff in total, whether incurred in Austria or elsewhere.

(iii) What economic or other models are used by courts to calculate damage?

As indicated before, there is no case law in Austria on damages actions in competition cases. It therefore remains to be seen whether the courts will develop a specific method to calculate such damage. In principle, the courts have wide discretion in doing so. According to legal writing, damages for competition infringements might be calculated, for instance and alternatively, on the following basis:[22]

- For the calculation of damages caused by overcharging through a cartel, the difference between the actual price charged as opposed to the hypothetical market price will be the loss occurred by plaintiff.
- In cases of suppression and hindering of competitors (such as predatory pricing, or refusal to deal), a suitable method might be a review of the development of profits and turnover prior and past the abuse.
- If an undertaking in a dominant position prevents market entry, the damage would be the loss of profit the new entrant could have generated if he had been able to enter the market. The likelihood of the profit generated could be proved by market surveys, by comparison with successful business activities of the undertaking in other (geographic or product) markets, etc.

22 Eilmansberger in: Koppensteiner (Hrsg), "Österreichisches und europäisches Wirtschaftsprivatrecht, Teil 6/1: Wettbewerbsrecht – Kartellrecht, Verlag der Österreichischen Akademie der Wissenschaften, Wien (1998), p. 162 seq.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

The courts will use the best factual basis available to assess the damage, i.e. (as the case may be) either data from the time the injury occurred or later data. There is no rule in Austrian law that evidence which points to the amount of damage but which came into existence only ex post might not be used.

(v) Are there maximum limits to damages?

No.

(vi) Are punitive or exemplary damages available?

No. As the aim is to put the victim into the position he would be without the injurious act, only actual damages occurred will be compensated.

(vii) Are fines imposed by competition authorities taken into account when settling damages?

No. Fines have a different (public) aim than compensation for damages.

(b) Interest

(i) Is interest awarded from the date
- **the infringement occurred; or**
- **of the judgment?; or**
- **the date of a decision by a competition authority?**

According to case law interest for damages can be claimed as from the day the claim is specified, i.e. as of the day the defendant is informed of the existence of the claim and the amount of compensation claimed (by a demand note sent, an action filed etc).[23] Legal writing occasionally draws a distinction between full restitution (interest as from the day the claim is quantified) and indemnity calculated on a objective-abstract (from the day the damage occurred).[24]

(ii) What are the criteria to determine the levels of interest?

The general statutory interest rate is 4% (Sec 1000 ABGB). However, Austria extended the scope of higher interest rates required by Directive 2000/35/EC on combating late payment in commercial transactions late payments to *all* claims arising ex contractu, including damages for breach of a commercial contract.[25] Therefore, a party to a contract which falls foul of competition rules (e.g. a pub who claims that his beer purchase agreement infringes Art 81 of the EC-Treaty, and that he was overcharged by the supplier) might invoke the higher interest rate. The higher statutory interest rate amounts to the sum of the base interest rate (currently 1.47%) plus 8% (Sec 1333 ABGB).

(iii) Is compound interest included?

Pursuant to Sec 1000 ABGB the plaintiff can claim compound interest after pendency, i.e. after he has filed his action with the court. In general compound interest amounts to 4%.

H. Timing

(i) What is the time limit in which to institute proceedings?

Actions for damages must be brought within three years from the day the damage and the author of the damage is known to the plaintiff (Sec 1489 AGBG). This

23 Cf. OGH 21/10/2002, 2 Ob 175/00 z; OGH 10/09/1981, 8 Ob 138/81.
24 Koziol, *Haftpflichtrecht* I (1997) 482 seq.
25 See Explanatory Notes EB RV 1167 GP XXI, p. 10.

three year period applies both to general damages claims and claims based on the UWG[26]. A long stop period for damages claims runs 30 years if the author or the damage are not known to the plaintiff, or if the damage resulted from certain types of criminal actions. The starting point for the 30 year period is disputed (infringement vs. damage), with prevailing legal writing referring to the time the damage occurred. If a damage has occurred and the author but not the precise amount is known, the damaged party needs to request a declaratory judgment within the three year period in order to avoid prescription for future consequential damages.[27]

(ii) On average, how long do proceedings take?

Depending on the complexity of the case, between one and two years in first instance. An appeal against the decision takes approximately 9 to 12 months. Under certain conditions, in particular if a legal question of general interest is concerned and the claim exceeds a certain value threshold, a further appeal to the Supreme Court is admissible, which takes approximately a further 9 to 12 months.

(iii) Is it possible to accelerate proceedings?

No.

(iv) How many judges sit in actions for damages cases?

Depending on the court deciding in first instance, either one judge (in district courts and in general also regional courts) or three judges (in regional courts if the claim exceeds EUR 50,000 and one of the parties requests decision by a senate). In general a senate of three judges decides at courts of second instance. Depending on the court deciding in first instance the appeal goes either to the regional court or to the higher regional court. Under certain conditions an appeal against a judgement in second instance to the Supreme Court is admissible. The Supreme Court decides in senates of five judges.

(v) How transparent is the procedure?

The parties to the proceedings have full access to all documents. Any document submitted by a party to the court will also be provided in copy to the opponent. Third parties are not granted access to the file. However, oral hearings are public and therefore open to anybody interested in the case.

I. Costs

(i) Are Court fees paid up front?

The plaintiff has to pay court fees up front upon filing his action. These fees are calculated on the basis of the amount claimed and the court in charge.

Actions for a cease-and-desist order before the Cartel Court are privileged insofar as no up front court fees have to be paid. However, there may be high ex-post fees, whose precise amount is determined by the judge.

(ii) Who bears the legal costs?

Ultimately, legal costs are to be borne according to success. If, for instance, defendant fully prevails, plaintiff not only has to bear his own legal costs (lawyers' fees) but also costs of the opponent (and vice versa). If plaintiff succeeds in part, costs will be shared in relation to the claim's success. There exists a statutory tariff system on the amount of lawyers fees to be reimbursed.

26 For cease and desist orders the deadline pursuant to Sec 20 is 6 months from the day the infringement and the author are known to the complainant.

27 Koziol/Welser, Bürgerliches Recht I (2002) 205.

Again actions for a cease-and-desist order before the Cartel Court are privileged as there is (i) no obligation to reimburse the opponents legal costs if the action fails, and (ii) no obligation to reimburse the opponent for damage incurred as a consequence of interim relief which, in the subsequent main proceedings, is not supported.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

Pursuant to Sec 879 ABGB it would be *contra bona mores* if a lawyer charged a contingency fee *("quota litis")*. However, as this prohibition is limited to lawyers, legal expense insurance may provide for such contingency fees. For instance, in recent cases collective claims were financed through a German legal expense insurance that bears all costs if the claim is not successful and receives a contingency fee of 30% if damages are obtained.[28]

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

All costs (lawyers' fees, court fees, fees for experts, etc) can be recovered depending on the success of the action. See ii above.

(v) What are the different types of litigation costs?

Court fees, lawyers costs, costs for external experts or translators, costs for witnesses.

(vi) Are there national rules for taxation of costs?

There are no specific national rules on the taxation of costs.

(vii) Is any form of legal aid insurance available?

Private legal expense insurance is available in Austria.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

The average costs can not be estimated as their calculation depends on various factors such as the amount claimed, the court in charge, the length of procedure, number of witnesses called upon, nomination of experts etc.

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

There is no difference.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

No.

(iii) Are there any differences according to whether defendant is a public authority or a natural or legal person?

No.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

28 E.g. the VKI proceeding against banks regarding interest adjustment clauses; See above II.C.2.

The notion "leniency programme" usually refers to promises by the competition authorities (or by public prosecutors) to reduce the level of fines if the defendant collaborates in an administrative (or criminal) proceeding. The question is whether such collaboration is also able to reduce the potential level of damages which defendant has to pay. Under Austrian law, the answer is clearly no. Whereas public prosecution of competition infringements serves to prevent (generally and specifically) that the "invisible hand" of competition is hindered to perform its function in a free market economy, tort law is in place to restitute a private party that incurred injury from the hands of another party. In principle, these are different legal objectives. Therefore, under Austrian thinking, public leniency has no bearing on private actions.

(v) Are there differences from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?

No. There are no substantial or procedural differences for damage actions within Austria.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

As already mentioned above, other forms of private enforcement of national (and also European) competition rules than claims for damages play an important role in Austria. In particular, private actions for **cease and desist orders** are frequently brought both before the specialized Cartel Court and the regular Commercial Courts (in the latter case frequently as claims under the UWG). For further details on proceedings before the Cartel Court, see C(ii) above.

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon

There are no incidences of such cases available from public sources.

<u>III. Facilitating private enforcement of Articles 81 and 82 EC</u>

(i) Which of the above elements of claims for damages (under sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

As explained above, Austria has a history of quite successful private enforcement of competition rules, though not by way of damages actions but by way of cease and desist orders. This success was made possible by the following specific features of litigation in competition matters:

- The Cartel Court provides a specialized tribunal which is able to deliver decisions in competition matters in high quality.
- The Cartel Court establishes the facts of the case brought before it *ex officio*, thus alleviating to some extent the difficulties for private plaintiffs to prove their case.
- The Federal Competition Authority (FCA) and the Federal Cartel Prosecutor are, by law, party to any proceeding before the Cartel Court. This *amicus curiae* system often serves to provide plaintiffs with additional support. Not infrequently, cases before the Cartel Court which were initially brought as private actions end as semi private/public litigation (with the FCA adding his factual knowledge to the file and supporting plaintiff's claim by an application for fines).
- Applications to the Cartel Court are privileged in terms of cost and damage risk for interim measures.
- *Locus standi* before the Cartel Court is vested in a considerable number of institutions which pursue public interest litigation, most noticeably the Chamber of Labour and the sector regulators. Often, these institutions take the place of private parties who would not dare to bring an action in their own name.

In order to further promote private enforcement of competition rules, the following might be provided for:

- *Locus standi* before the Cartel Court might be extended to other consumer organisations than the Chamber of Labour, e.g. the *Verein für Konsumenteninformation*.
- The Cartel Court might be empowered to award damages, in addition to cease and desist orders.
- As under the UWG, damages for infringement of competition rules should always (even in case of minor negligence) include reimbursement of lost profits.
- The representative organisations might be empowered to claim damages on behalf of the class which they represent.

Please note that introduction of the above elements into Austrian law would have severe implications on both the funding of the Cartel Court and its staffing. The Cartel Court enjoys a high reputation because it consists of senior judges who normally sit in appellate senates. These judges (four professional judges and practically two laymen) would be clearly not in a position (both with regard to their number and their career path) to entertain proceedings which involve complex questions on the calculation of damages. In fact, if such additional tasks should be created for the Cartel Court, the court's entire organisation would need to be restructured (without compromising quality and consistency).

Taking these practical considerations into account, another possibility to facilitate private enforcement could be the introduction of a national *reference procedure* in competition matters.[29] The basic concept of such a procedure would be an exclusive competence of the Cartel Court to decide on the legality or illegality of behaviour under anti-trust laws in Austria in private litigation. If (e.g.) a regional court were seized with a claim for damages for alleged anti-competitive behaviour, it would have the opportunity (and obligation) to refer the preliminary question of whether an infringement occurred to the Cartel Court who would solve this questions according to its regular procedure (with all features listed above). Once this decision is taken, it would rest with the applicant court to determine the precise amount of damages.

As opposed to the above listed "institutional" aspects, we believe that the more "technical" aspects of claims for damages (such as whether causation is too difficult to establish, whether significant limitations follow from the concept of *Rechtswidrigkeitszusammenhang* etc) do not provide real scope for facilitating the private enforcement of Art 81 and 82 EC. All those issues might well and adequately be solved on the basis of the general tort doctrine under Austrian law.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

An alternative means of dispute resolution available in Austria (as elsewhere) is arbitration. Actually, Austria has long experience with arbitration in competition matters. The Austrian government (at that time, still of the *Donaumonarchie*) was the first ever European government ever to propose an anti-trust code (in 1896). These attempts, and the subsequent case law, were spurred by the experience with the large and important industry cartels which existed in Austria and other European countries at the turn to the 20th century. At that time, the Austrian legislator gained the experience that arbitration is not a suitable method of dispute resolution in competition cases, as arbitration has a tendency to insufficiently take public policy considerations into account. On that account, the Austrian Cartel Act discourages arbitration in competition matters till to date. Sec 124 Cartel Act provides that, even if the parties to an anti-competitive agreement have provided for dispute resolution by arbitration, the claimant may also seize the ordinary courts.

29 A similar procedure already exists with regard to claims from insider trading.

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V. National case law summaries

OGH 16/12/2002, 16 Ok 10/02
(Supreme Court deciding in its authority as Supreme Cartel Court)

Facts and legal issues

The plaintiffs and the defendant offer telephone services via self-operated telecommunication networks. The defendant is the former public telecom monopoly. The defendant offered a promotional offer to end customers for a limited time period of 2 months. The plaintiffs complained that the defendant abused its dominant position on the market for the provision of public telephony via a fixed telecommunication network through price squeezing. It allegedly charged the plaintiffs higher switching fees in its local net as the difference between the promotional offer the defendant charged to end customers and its own costs. The other competitors which depended on the defendant's services to offer their own services were unable to offer the same prices without selling below their costs. The plaintiffs requested a cease-and-desist order (as well as in parallel an injunction) and to hold that the defendant is abusing a dominant position and to prohibit the defendant to market such abusing promotional offers in the future.

Held
That the Cartel Court has no authority to state on an alleged abuse of a dominant position if the **incriminated behaviour is terminated**. The Cartel Court cannot order an undertaking not to abuse its dominant position in the future. **Whether an abuse of a dominant position could lead to claims for damages, elimination or cease-and-desist orders by the affected competitors needs to assessed according to civil law.** These questions are not covered by Sec 35 para 1 KartG.

OGH 24/02/1998, 4 Ob 53/98 t
(Supreme Court)

Facts and legal issues

A consumer (who transferred his right to sue to the Chamber of Labour according to Sec 55 para 4 JN, the plaintiff) received a catalogue and a bulletin of participation for a raffle organised by the defendant, a mail order company. The letter sent to the plaintiff gave the impression that he had already won the first price (a convertible or ATS 420,000 in cash). The plaintiff argued he had suffered a pecuniary damage (lawyers fees for advice and sending a reminder to the defendant) because of the defendant's misleading advertising.

The Supreme Court dealt for the first time whether a consumer can bring an action for damages under the Unfair Competition Act.

Held

The Court referred to legal writing and followed their line of arguments that consumers which are victims of a behaviour infringing unfair competition rules should be able to claim damages on the basis of the UWG. The amendments to the UWG in 1971 were based on the lead principles of a better protection of competitors in cases of unfair competition and a better market transparency, which should also serve consumer protection. Also the fact that Sec 14 UWG gives certain consumer organisations the right to request cease-and-desist orders is an indication that not only the interests of the competitors but also of consumers should be taken into account. Furthermore, the UWG does not define the standing to sue (with the exception of cease-and-desist orders) for individual claims.

OGH 16/12/2002, 16 Ok 11/02
(Supreme Court as Supreme Cartel Court)
(See also OGH 9/10/2000, 16 Ok 6/00)

Facts and legal issues

Two supermarkets requested an injunction against another competing, allegedly dominant, supermarket which predatory pricing practices. The defendant held a market share of approx. 35% on the Austrian market for food retailing, the plaintiffs approx. 4-5%.

Held

In general the plaintiffs have to prove the facts on which they base their claim or to bring prima facie proof in the case of interim measures. However, in view of the proximity of the defendant to the facts and the distance of the plaintiff from the facts, that need to be proved, the Supreme Court allows an **alleviation of proof** if it is otherwise impossible to provide evidence for the plaintiffs. If the plaintiff is not in a position to find out the defendant's costs for proving the predatory pricing practice, it suffices that he brings indirect prima facie proof of e.g. conditions of purchasing of comparable undertakings. If plaintiff brings such prima facie proof, it is the defendant's task to bring prima facie proof that his total costs are covered. For that purpose he is not required to disclose his exact total costs.