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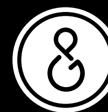

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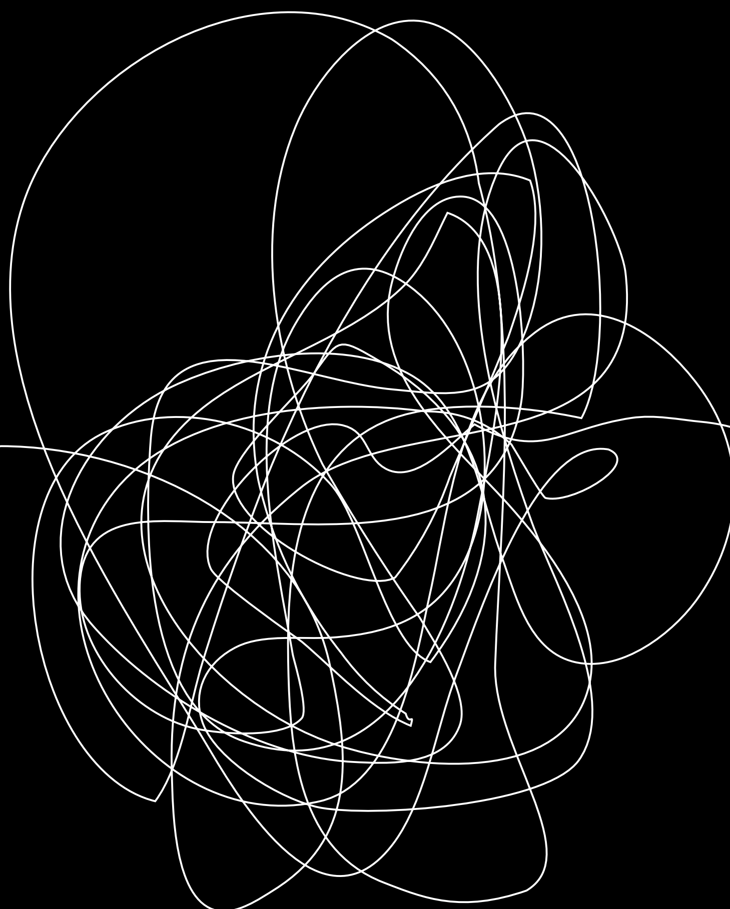

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Uphill struggle

Ferdinand Graf of Graf & Pitkowitz Rechtsanwälte discusses the private enforcement of antitrust law and the difficulties suing cartels

Cartels often bump up the price of goods causing buyers to overpay. The damage thereby generated can – in theory, at least – be claimed in a law suit. The enforcement of antitrust law through such private actions is strongly encouraged by the European Community. The European Commission has published several notices on this topic (e.g. the green paper on damages actions for breach of the EC antitrust rules and the white paper on damages actions for breach of the EC antitrust rules), thus encouraging member states to provide relevant legislation. The case law of the Court of Justice of the European Community requires national courts to give effective remedies "to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition".

Some member states have adapted their laws on damages in order to satisfy the prerequisites for effective enforcement of antitrust law on a national level. In Austria, however, there have been practically no damage actions based on the infringement of antitrust law. In fact, so far there has been only one case of a follow-on action based on a judgment of the Austrian Cartel Court in 2005 (on the *Fahrschulkartell*). In spite of several announcements of aggrieved parties and lobbies, which occurred particularly in connection with some of the big antitrust cases (e.g. *Lombard-Kartell*, A*ufzugskartell*), no other follow-on actions were filed.

The failure of private enforcement in Austria stems from the current legal situation. Several uncertainties with respect to material and procedural law seem to discourage potential plaintiffs enough to prevent them from taking legal action.

Access to evidence

One of the major obstacles for private enforcement is the limited access to relevant information, i.e. information about the undertakings involved in the antitrust violation, in particular information regarding the violation itself and regarding the basis of the cost calculation. Obviously, such information will often involve business secrets and will therefore be concealed by these undertakings. Gathering such information is, however, essential, in order to compute and specify the amount in dispute and to use as evidence.

Austrian law does not provide for the pre-trial discovery right of the claimant to demand information from the legal counterpart. Thus, the claimant depends on its investigations and the information provided by official authorities. In essence, the Austrian authorities involved in antitrust proceedings are

- the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP); they have an extensive power to investigate and they can bring antitrust cases before the Cartel Court;
- the Cartel Court (lower instance) and the Supreme Cartel Court (appellate court), which have the exclusive decision-making power with regards to the prosecution of antitrust violations.

Damages claims are handled independently in separate proceedings initiated by claimants before the Civil Court. They are not part of the antitrust proceedings. In addition to the national authorities, the European Commission may introduce cartel proceedings based on Articles 81 and 82 of the EC Treaty.

In general the full right to information is reserved exclusively to the parties of the proceedings. However, in most cases, claimants are not parties of the antitrust proceedings. The right to information of other persons is restricted in many ways. The FCA argues that it is exempt from its obligation to provide information if this could affect its investigation. If undertakings involved in antitrust cases

"There have been practically no damage actions based on the infringement of antitrust law"

fear that the FCA could pass on information to other persons, they might exert additional effort to hold back information from the FCA. Thus, passing on information can affect the FCA's power of investigation. Consequently, the right to receive information from the FCA is limited. In fact, the FCA's practice with respect to giving out information is extremely restrictive. The highest Administrative Court (*Verwaltungsgerichtshof*) is currently determining whether this is in line with the statutory rules.

The Cartel Court may deny access to information, if necessary, in order to protect legitimate business secrets. According to some provisions, the Cartel Court's power to provide access to information is even subject to the consent of the undertakings involved in the antitrust violation.

Notwithstanding the fact that the claimant has legal standing in damages claims before the Civil Court, the claimant's right to obtain information is restricted there as well. The defendant is not legally obliged to produce documents which contain business secrets. Another useful tool to obtain information during the damages proceedings is through the court's authority to consult files of other courts and public authorities. However, this tool requires the court to lay open the consulted file to all parties and thus disclose the entire content of the file which might contain business secrets. Therefore, some hold that this competence, too, is subject to the consent of the cartel participants. According to others, consent is not necessary, but the court has to base its decision on whether to consult the other court's file on a fair balance of all the interests involved.

> "The Cartel Court may deny access to information"

Plaintiff's right of action

In many cases the contractual partner of the cartel participant (direct purchaser) is not the final consumer of the goods, but rather resells the goods – sometimes after manufacturing them – to another person (indirect purchaser). Eventually, the damage, or part of the damage, is passed on to the last person in the chain (the end user). The distributor may or may not suffer damages. With respect to damages claims, such passing-on cases trigger three questions:

- Should the antitrust infringer be allowed to raise a so-called pass-on as a defence?
- Does the end user have a right of action against the cartel participant?
- How are the damages calculated in all of these cases?

In general, only the party who was originally harmed is granted the right to take action in order to avoid an overflow of damages claims. However, legal practice has established that in certain cases, a third party may file a claim against the person who committed the unlawful act. That is, if the commercial risk is borne by a third party, the damage is relocated from the originally harmed person onto the third party. Prerequisite for the third party's right to take action is, however, that the legal basis for the relocation of the damage existed in the first place and the originally harmed party never actually suffered any loss. Even though this prerequisite is not fulfilled in the case of passing-on damages based on an antitrust violation, most would grant the end users the right to take action. Nevertheless, in view of the divergent legal practice, there remains considerable uncertainty as to whether end users would actually be granted the right to take action by the court.

By the same token, it is not clear how the rights of the direct purchasers (and, for that matter, of the intermediaries) would be judged by the court. Presumably, the direct purchasers would lose their right of action if, and to the extent that, the end users are granted the right to take action.

All aforementioned questions relate to the issue of damages calculation. In case the end user is not granted the right of action, it is questionable as to what extent the direct purchaser would have to appropriate the damages, which he passed on to the end user. On the other hand, if the end user is granted the right of action, major difficulties arise from the fact that the damage suffered by the direct purchaser, differs from the sum of the damages incurred by the end users. In fact, the damage changes each time it is passed on through the chain. Thus, the question arises over whether the damages calculation should be based on the conditions valid for the direct purchaser or the end users. Moreover, if the calculation is based on the damage incurred by each end user, then the total sum of damages may be capped at the level of the damage originally incurred by the direct purchaser. If so, we are faced with the question of the key to distribution.

In addition to the legal issues, there are several economic questions. Apart from the general questions regarding the mode of calculation (see below), passed-on damages trigger difficulties due to the need for calculations for each level of the chain. Needless to say, all of these legal and economic problems are connected to major factual difficulties when it comes to collecting the relevant data.

About the author

Dr Ferdinand Graf is a founder of Graf & Pitkowitz, a leading Austrian law firm. Graf & Pitkowitz is a full-service commercial law firm, focusing on international business transactions and advising Austrian and international clients on all aspects of business law.

Graf & Pitkowitz was founded 15 years ago and is well know as an expert team for complex cases. Dr Ferdinand Graf is head of the firm's competition department. His work focuses on corporate, commercial and competition law. He has represented Austrian and international clients before both domestic and EC competition authorities. An integral part of his practice is assisting clients in merger clearance proceedings.

He has handled competition matters for Fortune 500 clients in Austria, the European Union and Eastern Europe. Dr Graf's corporate and M&A practice comprises seller and buyer representation, as well as the structuring of complex corporate reorganisations.

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A further theory – though not tested in court – is claiming partial nullity of the original purchase contract, i.e. to the degree that its terms are affected by the antitrust violation. If successful that argument would entitle the direct purchaser to reclaim what he was overcharged as a result of the cartel.

Uncertainties calculating damages

The burden of proof regarding the extent of damage lies with the plaintiff. He will therefore have to provide a comprehensive calculation of his damages. Antitrust violations can cause different kinds of damages. The damages may consist of being overcharged for goods or services. They can also consist of lost profits. Or if, due to a price agreement, prices increase and boost the costs of an undertaking which, in turn, is forced to raise its prices, thereby losing customers. Numerous difficulties and obstacles in connection with damage calculations have yielded several very complex and sophisticated economic models which try to encompass all damages along the retail chain.

In essence, all of the economic models are based on the "but-for" approach: the measure of harm in an antitrust damages case is taken to be the difference between the plaintiff's actual economic situation and the plaintiff's hypothetical situation, which would have been realised if no antitrust violation had occurred. Based on this approach, the damage constituted by overcharging is measured by the difference between the prices actually paid and the hypothetical prices, which should have been charged had there not been an anti-competitive behavior. The practical implementation of the but-for approach is, however, complicated. The calculation of the hypothetical price is complex, and the estimate of the impact on demand is subject to many uncertainties.

For certain cases, the Austrian Civil Procedures Act provides simplified rules on estimating loss. If the merits of the claims are established and the amount of the damages cannot (or only with disproportionate effort) be proven, then the damage amount is within the discretion of the court. Furthermore, if the claims do not exceed the amount of €1000 each, then the merits – as well as the extent of the damages – are at the court's discretion. Nevertheless, the court has to decide on the circumstances through due process. Relevant factors for the assessment are:

- the law,
- the principles derived from experience; and
- the facts established by the court.

The court's discretionary power does not eliminate the duty to establish relevant facts. The court is therefore required to establish facts which are relevant to the assessment. As much as possible, the court should collect information and seek enquiries, in order to meet the requirements to conclude with a reviewable decision. Consequently, in spite of the simplified rules on estimating the loss, the plaintiff will have to provide a minimum amount of information which the court can use as a basis for its judgement.

Insufficient tools for class actions

By passing on damages, those damages are dispersed along the entire trade chain, thus affecting more and more purchasers. At the same time, the amount of damages is divided among the number of purchasers in the chain, thereby yielding a diffusion of numerous, relatively small amounts of damages. In view of the minor harm suffered and the considerable risk of litigation, the affected persons are often discouraged from taking legal action to claim compensation. This problem would be solved if there were adequate tools for mass actions available. However, to date, Austrian law does not provide for the institution of class actions.

Instead, the so-called class action lawsuit with Austrian imprint (or simply, Austrian class action) has been established through practice over the past years as a means to legally assert mass damages. An organisation or association (class action plaintiff) is assigned multiple claims from consumers for their collective enforcement in court. The Austrian class action is usually, but not necessarily, initiated and carried out by the Consumer Protection Committee (CPC) and the Federal Chamber of Labour (FCL) as the class action plaintiff. In fact, any person having legal capacity may act as a class action plaintiff, unless the law specifically establishes otherwise.

Austrian class actions serve the purpose of merging many small claims, thus reducing the litigation risk for each claimant. Nevertheless, the Austrian class action is but a makeshift with several deficiencies and has repeatedly been criticised. Nobody is obliged to organise an Austrian class action and it is very uncommon for anyone else but the CPC or the FCL to do so. Thus, if these organisations do not initiate an Austrian class action, it might be difficult to find a person who is willing to organise the Austrian class action and to serve as class action plaintiff.

Binding judgments?

A convicting judgement by the Cartel Court could be used to prove the illegal behaviour of the cartel participant. However, such judgement will have full evidentiary value only if it is binding upon the Civil Court.

A judgement is binding within the scope of the substantial *res judicata* effect which has temporal, objective and subjective limits. The temporal limits refer to the fact, that only incidents which existed by the end of the trial will be accounted for by the *res judicata*.

The objective limits define the binding content of the judgment. According to the Civil Procedures Act, the *res judicata* covers the asserted claims, the legal rights or the legal relations in dispute only. The Cartel Court does, however, not review private claims, legal rights or legal relations. In view of the Cartel Court's competence, the *res judicata* covers, depending on the judgement, the dictum regarding the unlawfulness of the examined behaviour and sometimes also regarding fault.

According to legal practice, the subjective limits of the *res judicata* limit the binding effect of civil judgments to the parties engaged in the proceedings. All other persons are not bound by a previous judgement. Consequently, since claimants who suffer damages from an anti-competitive behaviour are usually not engaged in the proceedings before the Cartel Court, the judgement of the Cartel Court (even though it may be used as evidence) will not have a binding effect upon the Civil Court. That means that claimants who bring their damages claims before the Civil Court will have to prove the illegal behavior of the cartel participants themselves. Considering the enormous time and effort put into uncovering such behaviour by official authorities like the FCA, the Cartel Court and the European Commission, this outlook must be highly discouraging for potential plaintiffs. A discerning minority hold that, similar to the legal practice with respect to sentences of criminal courts, a judgement which confirms illegal behaviour should be binding in cases in which the cartel participant is a party to the proceedings. Nonetheless, it is very doubtful that the Civil Courts would follow the dissenting opinion and deliver a judgement differing from the prevailing case law.

The statute of limitations for damages claims is three years, starting from the time at which the identity of the infringer and the amount of damages are known or should be known, but no longer than 30 years. This regulation leaves open a number of questions. In some cases it may be very doubtful at what point the identity of the infringer is (supposed to be) known. It is not determined whether and until what stage it is permissible to await the outcome of running cartel proceedings. Likewise, it is not specified, at which point a person knows the amount of damage. There are lots of possible interpretations of this regulation and there is plenty of case law regarding other cases of damages claims. However, due to a lack of case law with regards to damages caused by antitrust violations, there remains a considerable uncertainty.

All of the deficiencies pointed out above cause people to refrain from taking legal actions for compensation. Yet, legislation removing these obstacles is progressing slowly. The crux of the matter is the fact that some important tools which would support private enforcement (predominantly those tools which would grant claimants access to relevant information) are at the same time apt to deter public enforcement. Above all, public authorities fear to compromise the leniency programme which is the main source for discoveries of antitrust violations. As a result, the breakthrough of private antitrust enforcement is still impending.