White Paper – Damages actions for breach of the EC antitrust rules
About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Herbert Tumpel
President

Werner Muhm
Director

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members’ gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labor.
Executive Summary

The AK, which besides the Consumer Information Association (VKI) represents the interests of consumers in Austria and also grants legal protection, considers the European Commission initiative to be an important impulse for improving and implementing enforcement by consumers or companies damaged by cartel agreements. Restrictive agreements that are not exempted in accordance with Art 81(3) harm the economy as well as individual consumers.

Public enforcement of competition law by the European Commission and the national competition authorities has clearly been strengthened in the past. This is evident in particular in the number of antitrust law infringements uncovered as well as in the size of the fines imposed. The more rigid punishment inherent in competition law and the greater public relations work involved have greatly helped shape the awareness of consumers and companies. They have therefore noted that on the one hand antitrust infringements do not constitute “trivial offences” and on the other that those affected are directly harmed by these because they – as the Commission aptly puts it – have to pay higher prices for lower quality and a limited choice.

The current debate on damages actions constitutes a logical development of competition law that reveals two aspects: individual compensation for the damage incurred and with it a further prevention instrument in efforts to maintain fair competition rules.

The AK welcomes the fact that a public discussion on more efficient enforcement of damages actions is also being held on the strength of the comments made on the preceding Green Paper within the scope of the White Paper on hand. The aim of the Commission initiative, namely to improve the conditions for actions for antitrust damages, is regarded as extremely important from a consumer policy viewpoint.

Within this framework, we also welcome the fact that the EU Commission continues to support an efficient, powerful public competition authority that is enforced at both national and European level.

It should be stressed at the outset that the White Paper addresses two key points. On the one hand, access to information for victims of restrictive trade practices as well as the possibility that indirect purchasers and consumers in particular can also bring damages actions. Without the possibilities for this proposed in the White Paper, the aim of the White Paper to encourage victims to claim the damages incurred cannot be achieved. Attention should therefore be directed to these two points.
The AK has gained profound experience and expert knowledge especially on issues related to competition law thanks to the integration of social partnerships in competition proceedings. In addition, the AK has an independent right of petition in the case of market power abuse proceedings and cartels. In the area of consumer protection, the AK is able to bring “collective actions” (in terms of combining a multitude of claims for proceedings) and can obtain recourse to legal process with the highest court of justice by assigning claims even if only small amounts are involved (§ 502 Para 5(3) of the Code of Civil Procedure / ZPO).

In addition, the AK has instituted the first proceedings for damages in Austria owing to a breach of the national Cartel Act in favour of affected consumers and won the case (driving school cartel in Graz). We have therefore also gained initial experience with preparing damages actions as part of a follow-on action.
The AK position in detail

1. Standing

The AK views the attempt to also make indirect purchasers in particular (purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered harm because an overcharge was passed on to them along the distribution chain) authorized to bring an action as an important impulse when taking action against anti-competitive practices.

We consider the standing of qualified entities such as consumer protection associations as well as the possibility to launch opt-in collective actions to be essential and indispensable.

This is because procedural hurdles can be overcome effectively with these instruments. As the Commission itself emphasises correctly, a number of circumstances prevent the individual victim (consumer) pursuing a claim, in particular the inefficiency of pursuing an individual claim in court that is for the most part relatively small. This results in the legal costs risk being much greater than the possible claim for damages. In Austria, consumer protection associations have therefore already switched to bundling the claims of consumer victims and enforcing them together. Even if this practice was considered to be permissible by the courts in the end, it only constitutes an emergency solution as it brings with it high administrative expenses and leads to a significant legal costs risk for the consumer protection associations that have handed over the individual claims and have enforced these themselves as claimants, a risk that they cannot bear when it comes to the limited budget resources at their disposal.

Opt-in collective actions are therefore very welcome. However, it is necessary to organise collective actions in such a way that access to the law is encouraged and not hindered. With regard to the claims of the individual, which are only small as a rule, it is to be feared that when accessing the law a low threshold would result in the individual giving up on enforcing his or her claim due to the time and expense involved. The necessary number of claimants should therefore not be set prohibitively high and specifying a minimum amount in dispute should be dispensed with. Given that procedural costs to be paid in advance also hinder access to the law, possible advances on costs should also be dispensed with.

2. Access to evidence: disclosure inter partes

As has already been pointed out in the introduction, the AK feels that, par-
ticularly for follow-on actions, drawing on information disclosed by the competition authorities is a prerequisite for also being able to enforce claims for damages. In addition, information on the time, duration and location of the antitrust infringement is needed, together with existing information on the market price under competitive conditions as well as those taking part in a restriction of competition. The public competition institutions in particular could make a significant contribution here in ensuring that consumers and companies that have suffered damage gain their rights as part of individual actions by preparing their decisions better and making them more transparent.

We deem the approach proposed by the Commission, whereby the court can, under specific circumstances, order the parties to proceedings or third parties to disclose precise categories of relevant evidence, which are needed for an appropriate prosecution, to be positive in principle.

However, the AK assumes that extremely controversial opinions will arrive on this subject, and that this approach will be categorically rejected particularly by companies – not least also with reference to “discovery proceedings”, which the European legal system is unfamiliar with.

On the other hand, if a court order on disclosure is rejected, the EU Commission must instead think more about improving access to files held by the competition authorities.

3. Binding effect of NCA decisions

It is to be welcomed in principle if decisions made by the national competition authorities based on competition law are binding and this is also established by law. This serves to shorten proceedings and lighten the victim’s burden.

However, as the AK understands it decisions made by NCAs can only be effective within the respective territory. If the price increases were however passed on, one cannot rule out the possibility of them affecting other Member States in principle – in this case, the decisions of NCAs from other Member States should therefore also exhibit a binding effect.

The binding effect established would have not least a cost-saving effect that should also be in the interests of companies as these must also bear the costs of the proceedings if they lose possible damages proceedings.

However, it is also important in this context that the decision is announced in all Member States that could possibly be affected by an antitrust infringement.

4. Fault requirement

The Austrian Schadenersatzrecht (law on damages/compensation) provides a fault requirement. The infringement of both European and national
antitrust law is considered to be an infringement of protective law, with a shift in the proof of burden vis-à-vis the fault. The defendant must therefore prove that he is not at fault. In the AK’s opinion, the reason to relieve infringers from liability, namely an “excusable error” proposed in the White Paper, should however be construed very narrowly. Salespersons in particular who are expected to apply a higher standard of care can be required to be acquainted with the conditions of competition law and also observe them.

5. Damages

The AK welcomes it if victims are provided with a framework with non-binding guidance for the quantification of damages in antitrust cases. It is extremely difficult to calculate the specific harm suffered if there is a lack of knowledge of the price level under market conditions.

6. Passing-on overcharges

The AK welcomes this provision as it makes it clear that damages on the basis of antitrust infringements in which overcharges were passed on to the next point in the distribution chain are possible even for consumers who are at the end of a possibly longer distribution chain. If one – as the ECJ also purports – decides on this step, a shift in the burden of proof proposed by the EU Commission is also necessary. Damages proceedings are only possible based on the rebuttable presumption that the illegal overcharge was passed on to indirect purchasers in its entirety as evidence of overcharges on products or services cannot be given by someone else.

7. Limitation periods

As regards the commencement of limitation periods, the AK believes that a distinction should be made in principle between “stand-alone actions” and “follow-on actions”.

For “stand-alone actions”, the AK welcomes the Commission proposal in which the limitation period should not start to run if continuous infringements are involved. However, to this end a specific explanation is required on what is meant by a continuous infringement. Does a continuous infringement also exist for instance if there is a longer period of time between the specific agreements? In addition, we still need to clarify the content of the agreement. The companies fix for example the price of products A, B and C in an agreement. Consumers suffering damage have only obtained product C. The companies only continue to fix prices for products A and B. Is this also regarded as a repeated infringement?

For “follow-on actions”, the AK believes that the limitation period – as the

The AK approves the Commission proposal in which the limitation period for “stand-alone actions” should not start to run if continuous infringements are involved but argues for a limitation period of at least three years for “follow-on actions”.

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Commission proposes – should start once a decision made by a competition authority has become final due to reasons of legal certainty. However, the AK is of the opinion that the limitation period should be at least three years. The approach in the White Paper of at least two years does not go far enough. Consumers should be able to still bring a stand-alone action even after possible test cases for damages. This is still possible within three years as a rule.

In addition, the limitation period should also be abandoned in any case in the event of an interruption in civil law proceedings for damages owing to the institution of public competition proceedings.

8. Costs of damages actions

The early resolution of cases proposed by way of a settlement is a solution which we should strive for particularly due to the fact that damages actions are complicated by antitrust infringements. The AK also estimates – in so far as considerable amounts of damages are involved – that they are associated with extremely high expert’s fees, lawyer fees and court fees.

However, in its opinion on the Green Paper the AK has already pointed out that if the risk of action for the claimant is completely removed, there is the not inconsiderable danger that blackmailing and querulous practices will occur more often, which is not in keeping with fair economic outline conditions. For this reason, lightening the costs should be permissible exclusively for the claimant only in exceptional cases.

The AK believes preference should be given to fixing the costs of proceedings at a low level for both parties, including expert’s fees.

To reduce rising litigation costs and therefore make mass actions (collective actions) capable of being financed, a maximum value in dispute of EUR 1 million should be set irrespective of the quantum of damages – this would be the basis for calculating the court fees, lawyer’s fees and expert’s fees. In addition, the claimant in collective actions should have the opportunity to assess the value in dispute himself, which would also take into account the uncertainty involved in assessing the damage. In case the defendant finds fault with the value in dispute, the court should decide on the value in dispute.

9. Interaction between leniency programmes and actions for damages

The fact is that more and more cartels – often particularly serious ones – are detected by way of leniency programmes. So as not to jeopardise this programme, it should be accepted that victims should not be able to inspect the corporate statements. On the other hand, the EU Commission has...
made several concessions with regard to assessing the amount of damages since the proposals in the Green Paper and has dropped the system of “double damages”. In the AK’s opinion, only a balanced system of incentives also offers the attractiveness of leniency programmes vis-à-vis the law on damages.

This system of incentives, which consists of exempting immunity recipients from joint and several liability in all cases (the immunity recipient is only liable for claims by his direct or indirect contractual partners), is not balanced.

We should not rule out the possibility that those companies in particular that do not enjoy leniency status and therefore receive no reduction in fines become insolvent and the consumers affected do not receive any compensation particularly because significant fines have been imposed and subsequent proceedings for damages.

In case another cartel member becomes insolvent, exoneration of the immunity recipient from joint and several liability would only be justified if the fines paid by the latter could be used for compensation payments.

In conclusion, the AK would again like to reiterate the importance of this project and declares itself in favour of adopting the results arising from the discussion on the White Paper in the form of a legal instrument.
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