



Stephan Polster
DORDA BRUGGER JORDIS

Access to cartel evidence as a key to enhanced private enforcement: The Austrian example

In its recently published White Paper on damages actions for the breach of EC antitrust rules the European Commission identified access to cartel evidence as one of the key elements for enhancing private enforcement actions against anti-competitive practices. As the Commission notes, cartel victims might face considerable difficulties when proving alleged antitrust infringements and the actual loss suffered in 'follow-on' civil law damages actions, since important evidence is difficult to access and in most cases in the hands of the alleged infringer(s). The Commission therefore proposes in its White Paper enhanced possibilities for the claimant to apply for a disclosure of evidence in order to overcome the perceived structural information asymmetry.

Interestingly, the accompanying staff working paper also addresses the issue of balancing the right to effective compensation vis-à-vis the protection of confidential information, as evidence relevant to prove the case is likely to be in large part commercially sensitive. Whereas it is a general rule of Community law that confidential information and especially business secrets should in principle be protected, a rigid protection against disclosure based on confidentiality considerations would almost inevitably lead to the loss of the damages actions by the claimant, notes the Commission. It therefore takes the view that the exercise of the victim's right to compensation must remain effective in practice and that the two conflicting groups of interest are carefully balanced against each other.

Against this backdrop and considering that private enforcement actions of national and Community antitrust laws have recently gained increased attention also in Austria, the following provides a brief overview how the current Austrian legislation and case law handles this balancing act between the protection of legiti-

mate confidentiality interests, on the one hand, and the aim to enhance enforcement of antitrust laws through civil law litigation, on the other.

The Austrian Cartel Court only holds jurisdiction for public law cartel proceedings, but is not competent to decide also on civil law claims by victims of a cartel. Access to the files of the Cartel Court is therefore essential to enforce any civil law claims against the cartel members before the competent civil law courts. However, Section 39 (2) of the Austrian Cartel Act (ACA) provides that persons who are not a party to the respective cartel proceedings may only be granted access to file upon receiving the consent of all the parties to the proceedings, i.e., also of the cartel participants. According to the accompanying legislative materials, the provision aims to protect business secrets of parties to the cartel proceedings.

Thus, current Austrian law, when it comes to the question of access to file, does not provide for any balancing of different interests between potential civil law claimants and the cartel members. The respective reasoning contained in the legislative materials calls for criticism: the possibility that potential cartel members (anticipating the risk of access to file for cartel victims) would try to avoid their duty to provide information to the Austrian Federal Competition Authority investigating the matter does not seem to constitute a sufficient reason to deprive claimants of their right to access to file. The duty to provide information may be executed by means of a binding court order addressed to the companies. Companies not complying with such an order may incur cartel fines. Furthermore, Section 39 (2) ACA might also qualify as an infringement of the "equality in arms"-principle derived from Article 6 (1) of the European Convention of Human Rights,

implying that the legislator may not unilaterally worsen the position of a party enforcing or fending off civil law claims. A deterioration of a claimant's position is apparent, considering that the defendant is able to avoid the utilisation of evidence by invoking the consent requirement. Section 39 (2) ACA should therefore be brought into line with the request of the Commission White Paper, by leaving the ultimate decision on whether the legitimate interests of defendants in follow-on proceedings may be affected by a disclosure order with the competent judge.

A potential compromise between the interests of companies being accused of participating in a cartel and of the potential victims of such practices could further be a privileged treatment (in terms of protection of confidentiality) only of such cartel members who initiated the respective cartel proceedings by way of a leniency application before the competent authorities. In any event, an adequate resolution of this field of tension between confidentiality of cartel proceedings and enhancement of private enforcement is one of the current essential questions of Austrian and European competition laws. ■

By Stephan Polster,
DORDA BRUGGER JORDIS