European Competition Agencies Meeting 2025

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Enforcement of Competition Law - In Search of a Balance

1. Introduction

Good evening. Thank you for the invitation. It is a great honour to be able to speak to so distinguished an audience. The title of my short talk today is "Enforcement of Competition Law - In Search of a Balance". My talk will have two parts. The first part gives you some glimpse into our local enforcement culture. In this part, I'll deal with sanctions for violations of competition law, and more specifically, with fines. You may have heard about the debate triggered by a recent decision of my Court of January this year. One word of caution: Obviously, I won't reveal anything confidential. Rather, I'll limit my observations to what was spelt out in published decisions. Thereby, perhaps I can highlight some developments which otherwise may be overlooked by a more casual observer. Unfortunately, many people only read summaries, and journalists sometimes not even those. This is hard to understand since most lawyers work for hourly fees and, thus, should have every incentive to study our decisions in detail.

The second part of my talk is of a more general nature. There, I'll pursue a more conceptual approach. I'll discuss some difficulties of finding a balance between public and private enforcement. In this part, I'll try to look at the matter not from a national perspective, but from a perspective of European union law.

2. Fines – An Austrian Perspective

Let me turn to the first part. In order to understand better what I am going to say, let me briefly give you a short summary of the development of Austrian competition law. Austria has a great history. However, unfortunately, the history of Austrian competition law is less than impressive. 125 years ago, there was a big debate going on in Austria and Germany how to deal with cartels (the so-called "*Kartellfrage*" – "cartel question"). This question was addressed, among others, by the German Congress of Jurists (Berlin 1902). There, Franz Klein, then Minister of Justice of Austria, spoke. He is the drafter of our Code of Civil Procedure and

[1] Check against delivery.

our Ltd Liability Company Act, a truly iconic figure, a “stylite” of Austrian law. He vehemently opposed the regulation of cartels, stating: “Effective, regular state monitoring of the cartel, preventive intervention by any authority in the management of the cartel and the cartelised companies seems to me to be completely out of the question at the moment.” He repeated this statement in the subsequent years on several occasions.

Fast forward some 80 years: For a long time, cartels were expressly permitted in Austria, the only requirement was that they had to be registered with the commercial court. There once was even a stock corporation whose purpose, expressly spelt out in the articles of association, was the “equalization of market surplus”. To be fair to the commercial court, registration of this stock corporation was refused and the refusal was upheld on appeal.

After Austria’s accession to the European Union in 1995, things changed. Yet, this was met with considerable resistance. Just one example: Apparently the Vienna guild of plumbers at one time held a meeting discussing possible counter-measures against the newly introduced practice of the city of Vienna to introduce public calls for tender.

Fast-forward another few years. We got a Competition Act which in many respects closely follows the rules in force at the European Union level. However, fines used to be very low. This changed when in 2012 a large cartel was discovered in the food retail sector which had operated at least from 2002 to 2012. Most proceedings were settled. There was one notable exception, one company refused to settle and was fined for price fixing of dairy products. This was an elaborate hub and spoke cartel. I recall that during a site inspection an email was found saying: “We still have to fix prices with X”. The sender of this email, when questioned as a witness, testified that he had written the email, but that he had not wanted to write this. Rather, he claimed, this sentence was the result of a typo. When asked what he actually wanted to write, he could not answer the question. Not surprisingly, his testimony was not considered credible by the Vienna Court of Appeals (which is the Cartel Court of first instance) and by the Austrian Supreme Court.

In 2014, the Cartel Court imposed a fine of 3 million EUR (which was less than most companies had settled for and led to some companies heavily criticizing their lawyers for having recommended a settlement). This decision was appealed by the Competition Authority and on appeal the Austrian Supreme Court increased the fine to 30 million EUR (16 Ok 2/15b). In its decision, the Supreme Court clarified a number of important principles for setting fines in competition cases. It pointed out that the system of fines in European Union law was not

identical to the domestic system. However, the European Commission's guidelines could be used as an orientation, provided that the domestic rules are followed and the court independently evaluates the case (see, already 16 Ok 4/07 - *Europay*; 6 Ok 5/08 – *lift cartel*). An important difference to European Union law is that under Austrian law the fine has to be set according to the total turnover of the previous year (16 Ok 4/09 - *Industriechemikalien*). Thus, the worldwide turnover of the entire group is the basis for determination of the fine. The maximum fine is 10 percent of the annual turnover. Contrary to Commission's guidelines, however, this amount is not just a „cap" which limits the fine which first is determined according to other factors (mostly, the volume of sales affected by the violation). Rather, according to the Austrian Supreme Court, the maximum amount determines the range of fines authorized and courts have to set the fine within this range. Analyzing the concrete criteria for the amount of the fine, the Court pointed out, among others, that the gravity (seriousness) of the violation, its duration, the degree of fault and the defendants' financial strength was clearly above average.

The Supreme Court also emphasized that a fine can only have a deterrent effect if its amount and the likelihood that a fine is imposed are higher than the expected gains from the cartel. The Court referred to the Commission's Guidelines and to economic literature which stressed that theoretically the optimal fine would be the gain from the cartel plus a surcharge which guarantees that the violation is not the result of a rational calculation. One has to bear in mind that there may be unreported cases; so the violation may remain undetected. The Court also pointed out that the defendants had continued their cartel after the unlawfulness of this practice had been pointed out by an industry association.

The consolidated total turnover of the group in 2013 was 8.57 billion EUR of which 400 million EUR resulted from dairy products. The Supreme Court pointed out that the fine imposed by the Cartel Court was only 0.0346 % of the total turnover which, according to the Court, was completely unrealistic.

Subsequent decisions made clear that this decision was intended to send a message to all participants. However, unfortunately, this message was not received and, certainly, not understood by the intended recipients. Instead of a signal that higher fines should be imposed, the decision was interpreted as a new formula for setting fines at 0.35% of the annual turnover (3.5% of the statutory maximum) or 0.7% of the volume of sales of the products concerned. This formula was used as a basis in many settlement proceedings. For several years, the

Supreme Court did not have occasion to rectify this because there were no appeals. While appeals were relatively rare as a general matter (with most cases being settled), the few appeals that were brought were filed by defendants.

Only in 2022 the Supreme Court was invoked by the Cartel Authority in a case concerning the sugar cartel (16 Ok 2/22p). The Court reversed and remanded the decision of the first instance court. It expressly stated that the decision in which a fine of 3.5 % of the turnover was imposed was not intended to state a general rule. Rather, the purpose of this decision was to make it clear that in Austria, in order effectively to combat cartels, fines should be imposed in a way comparable to the what has already been practiced for a long time at the European Union level and at the level in many member states.

Another case decided last year (16 Ok 6/23b) concerned a small carpentry company. The firm only had an annual turnover of slightly more than 1 million EUR. It had engaged in a hard core cartel in a complex system of bogus offers in order to undermine public tender proceedings. The Cartel Court imposed a fine of 55,000 EUR. Both parties appealed. The Supreme Court increased the fine to 65,000 EUR. Rejecting defendant's argument, the Court held that a fine of only 3.5% of the statutory maximum (as in the decision 16 Ok 2/15b) was unwarranted. The Court reiterated that the decision 16 Ok 2/15b could not be generalized. Rather, the purpose of this decision, which had multiplied the fine imposed by the Cartel Court by 10, was to make it clear that in Austria, in order effectively to combat cartels, fines should be imposed in accordance with the practice at European Union level and in many member states.

The most recent case (16 Ok 5/24g) did not involve a hard core violation. Rather, defendant's subsidiary had acquired a store (by way of a lease agreement) without notifying the Cartel Authority. This was a concentration which was implemented without prior approval and, indeed, without prior notification of the Cartel Authority. Only four and a half years after the acquisition of the store the company finally notified the Cartel Authority.

The Cartel Court delined to impose a fine for what it regarded a mere technical violation with only a slight degree of fault. On 30 November 2023, the Supreme Court (16 Ok 4/23h) reversed the decision. Contrary to the view of the Cartel Court, the violation could not be regarded as involving only a light degree of fault which would justify not to impose a fine. The Supreme Court also stated that a merely „quasi symbolic fine" would not be sufficient.

On remand, the Cartel Court imposed a fine of 1.5 million EUR. This decision was appealed by the defendant, by the Cartel Authority and by the Federal Cartel Attorney. On 28 January 2025,

the Supreme Court increased the fine to 70 million EUR. Among other factors, it pointed out the duration of the violation (four and a half years), the high concentration in the food retail business, the financial strenght of the defendant and the fact that the company had already been fined for a violation of competition law in a previous proceeding.

This decision triggered a public debate. While it was received favourably by several media reports (and in several online forums), the German chamber of commerce stated that the decision was detrimental to the Austrian market. Two professors, interviewed by newspapers, endorsed the decision. Most recently, two Vienna lawyers criticized the decision in a newspaper article (conveniently omitting not only the magnitude of turnover and the maximum fine authorized, but also the duration of the offense and the prior conviction).

Let me add a few observations of my own. I realize that I am treading difficult territory here. The author Ernst Jünger once aptly stated that anyone commenting his own work would go below his level. Clearly, the range of sanctions authorized in competition law is very broad. A large part of this range is still uncharted territory with most decisions imposing fines so far being on the lower end of the range. This range of fines has to fit, on one end of the spectrum, rather technical violations, and, on the other end, hard core cartels involving large parts of the country and going on for many years. The relatively small nature of the violation in question was the reason why the Supreme Court imposed a fine of less than one percent of the maximum authorized (9 billion EUR). If we use the annual turnover of the entire group as a criterion to determine the economic power of the defendant company, the result, while clearly a staggering amount in absolute terms, can hardly be surprising. Let me illustrate this by a fictitious example: Let us assume the defendant is a medium sized company with an annual turnover of 10 million. This would result in a maximum fine of 1 million. If in this case the Court had imposed less than 1% of the maximum amount, let's say 7,000 EUR, the decision would not only not have received similar public attention, but would have been largely ignored. Yet, in relative terms, this fictitious case is not different from the case decided. In my opinion, there should not be a discount for big companies.

3. Public v Private Enforcement – Some Comments from a Systemic Perspective

This brings me to the second part of my talk. Here I want to talk briefly about the relationship between public and private enforcement. Ideally, private enforcement should contribute to enforcement of competition law, thereby increasing compliance. However, unfortunately, this

does not work to the extent expected (or at least hoped for). Private enforcement in plain English means damages. Companies have to pay damages if someone suffered a harm from a violation of competition law. This principle was developed, and affirmed, in a long line of decisions of the ECJ (as it then was called), based on EU primary law and the principle of effectiveness. I mention the decision C 453/99 *Courage Crehan* of 2001 and C-295/04 *Manfredi* of 2006. In 2014 the Damages Directive (Directive 2014/104) was enacted.

Ideally, private enforcement should increase deterrence: Companies now face fines and damages. Ideally, public and private enforcement should supplement and strengthen one another. However, it seems that this does not work well. In theory, cartel authorities could compel cartel members to pay damages by threatening huge fines for failure to do so. However, this is not done in practice. Competition authorities have different priorities. I am not blaming or criticizing this practice; it reflects the statutory tasks and the mission of competition authorities. Competition authorities focus on putting an end to cartels, rather than to achieving full compensation of victims for past behavior. The result is that the victims have to file a separate lawsuit for damages.

This situation is now called “private enforcement”. Unfortunately, private enforcement is not very efficient. I have identified three factors why the role of private enforcement in the fight against cartels seems to by very limited:

First, private enforcement is not really attractive for injured parties (and, therefore, not a very effective tool to fight cartels). Victims face huge difficulties in obtaining information; proceedings take a long time which is due, in part, to the complexity of cases but also to the fact that in many countries these cases are heard not by specialized tribunals, but by ordinary courts. There is, however, on reason why bringing civil actions is not attractive for victims which can be blamed directly on the Damages Regulation, namely the passing-on defense. I’ll come back to this in a few moments.

The second and third factors I would like to discuss directly concern the relationship between public and private enforcement. There seems to be a conflict of goals: In the interest of public enforcement, we limit access to information for victims, thereby hampering private enforcement. (This is the second aspect I am going to explore in few moments). Finally, there is also a possible correlation the other way round: The very existence of private enforcement may deter cartel members from coming forward and cooperating with the authorities, thereby hampering public enforcement.

Let me turn to the first aspect I mentioned. One reason private enforcement is not attractive for victims is the passing-on defense. According to Article 13 of the Damages Directive, the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. This, of course, is a departure from general principles in civil law. Assume someone sets fire to a factory. If he is then sued for damages, he clearly could not defend himself by asserting that the owner of the factory had passed on the harm to his purchasers.

One of the reasons for this departure from traditional well-established principles of the law of damages, in my opinion, (at least historically) is procedural law. The purpose of the passing-on defense, developed in the US, is not to protect the defendant, but to shift the harm to consumers at the end of the supply chain in order to enable them to bring class actions.

In the US, under federal law indirect purchasers do not have standing to sue for damages under federal antitrust law – a rule that was first announced by the Supreme Court in *Illinois Brick v. State of Illinois*, 431 U.S. 720 (1977). The upshot of the decision is that indirect purchasers are barred from pursuing money damages under the Sherman Act. Granted, that rule is still evolving and in *Apple v. Pepper*, 139 S. Ct. 1514 (2019), a narrowly divided Court held that iPhone users who bought apps on Apple's App Store constitute direct purchasers vis-à-vis Apple. This, of course, significantly expands the notion of "direct purchasers".

However, some 30 states have enacted so-called *Illinois Brick* repealer statutes, thereby authorizing indirect purchasers to sue for damages. This only works if there is a powerful class action mechanism available. For this, one would need an "entrepreneurial" attorney organizing such class actions (which he will only do if he can expect a high fee), and an opt-out mechanism under which, by default, everybody would be part of the plaintiff class if they do not actively choose not to participate. This leads to a strong "bundling effect" of class actions, large amounts of damages (and, therefore, possible awards) and high fees.

In the EU, we have none of these. Interestingly, on a European level, debate about collective redress started with competition proceedings. Later the debate shifted to consumer law and now, ironically, cartel damages are not listed in the Annex of the Representative Action Directive (although under domestic Austrian law it would be possible to bring a group proceeding for cartel damages). What happens now is that we assume the harm somehow trickles down the supply chain to consumers. Consequently, losses are widely spread so that

the individual loss is infinitesimally small. There are “atomized” losses and, as a result, there is no incentive to pursue them, neither collectively nor individually. Indeed, it makes sense if consumers remain passive in such a situation (a phenomenon described as “rational apathy”). Let me now turn to the second and third factors I have identified. These directly relate to the relationship between public and private enforcement, and, indeed, the relationship between claimants and competition authorities.

We need informers to reveal cartels. This is the same in cartel cases and in criminal cases. Whether it is morally justified to cooperate with criminals has been the subject of a long debate. Napoleon comes to mind who once allegedly said: “J’aime la trahison, mais je déteste un traître” (other sources attribute this quote to Julius Caesar). As a practical matter, we need informers. We need cooperating parties and, therefore, we have leniency agreements. Because they need informers, competition authorities try to protect informers. The result is that access to information on informers is limited, thereby hampering private enforcement in order to assist public enforcement.

There is a true conflict of aims. Because informers have to be protected, leniency statements and settlement submissions are protected under Art 6 of the Damages Directive. Also, the content of the published decision is often negotiated and reveals very little about the defendant company’s actual conduct and the losses caused by it. Thus in essence, the need to get evidence for public enforcement may cause difficulties for private enforcement. This may not be true in all cases, of course, because injured parties may benefit from a conviction in the public enforcement proceeding. Yet, if they do not have sufficient information, the victims will be unable to pursue their claims.

This takes me to the third factor I have identified: The possible civil law consequences are far worse than the fine. This may deter a cartel member from cooperating with the authorities because by coming forward he could face damages which by far exceed the amount of the fine he could expect if he remains silent.

The reason for this is that civil law has very little to offer to informers in this respect. You all know the rule in Article 11 of the Damages Regulation about joint and several liability. The bottom line is that an informer is only liable for harm caused to its own purchasers or providers. This can still be a lot of money and may deter cartel members from cooperation with competition authorities. There are examples in the US where a fine of a few millions was imposed and the company then faced 600 million of damages. There is very little we can do

about this in civil law. After all, we are talking about *intentional* tort-feasors. (I know, of course, that in theory negligence may lead to a cartel, but I yet have to see such a case). It is very difficult and, perhaps, impossible to justify that they should have to pay less.

US law is different: There, the law provides for treble damages which can be de-trebled for informers. Thus, the informer can avoid criminal penalties and limit its civil liability to actual damages. The purpose of this is, of course, to increase incentives to abandon and reveal antitrust conspiracies.

Obviously, there is no simple solution for this. In order to influence the choice to be made by possible informers, we could either dramatically increase the sanctions (including, perhaps, like in the US, criminal sanctions) or reduce (or, perhaps even eliminate) the liability for damages of cooperative parties. Certainly, there is a complex interplay of several factors. I have illustrated some of them, but no doubt there may be others. This complex interplay has to be kept in mind not just when applying the existing law, but also when thinking about future reforms.

4. Conclusion

I realize that I am the only person standing between you and your main course. Therefore, I would like to stop at this point. I do not want to "eat" into your dinner time (pun intended). I spoke, no doubt, too long, and perhaps irrelevant. As a mitigating factor I would like to point out that my other area of expertise is insolvency law. There, you normally only receive a tiny quote. If tonight I managed to fulfil a tiny quota of your expectations, this is more than I could hope for. Thank you for your attention and enjoy your dinner.