

Disclosure in Antitrust Damages Actions: Experiences in Austria

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State of Play

- B2B-litigation vs B2C-litigation
- To date: no relevant private enforcement in the realm of consumer claims
- Why?
 - Procedural law
 - Substantive law



Key Issue Access to Justice

- Individual enforcement: no option for consumers
- Collective enforcement ?
 - not included in the EU Damages-Directive
 - not included in the Representative Actions-Directive

Key Issue Access to Justice

- „**Austrian Style Class Action**“ = claim bundling based on assignment model
 - (1) **Issue:** non-Austrian based defendants
 - Art 7 Nr 2 of Brussels I bis operates on local jurisdiction = no uniform jurisdiction (see VW: 16 class actions all over Austria)
 - de lege ferenda: provisions on exclusive individual jurisdiction for mass claims-cases (eg HG Vienna)
 - legislative measures concerning matters of court organization permitted under Brussels I bis (ECJ re Volvo)

Key Issue Access to Justice

(2) Issue: Minor Damages

- no incentives to opt in for consumers (rational disregard vs ideological consumers), low numbers of participation (max 4-5 % of all affected consumers, eg re VW 2,77 %)
- no incentives to launch an action: scarce resources, exposure v no compensation, expert opinion-proceedings = expensive litigation
- Third Party Funding: might not be feasible in relation to individual damages

Key Issue Access to Justice

- **Game Changer RAD 2020/1828 as of 25.6.2023 ?**
 - Not applicable to antitrust violations (Annex I) → national extension highly advisable!
 - No solution for minor damages-scenarios
 - → opt out-implementation (distribution issues vs cypres-models) ?
 - → (effective) disgorgement through qualified entities / authorities ? (see Art 10 German UWG idF VRUG, Art 34, 34a GWB idF RefE 11. GWB-Nov)



Key Issue Access to Information

- Public disclosure of court decisions in Ediktsdatei: Art 37 KartG, Art 89j GOG (see 16 Ok 1/22s) – includes naming of defendants
- → successively extended to repudiating decisions, preliminary injunctions, settlement decisions
- Public disclosure RIS Art 48a f GOG, Art 14 f OGHG
- Public disclosure BWB Art 10b/3 WettbG

- Art 219 ZPO v Art 39/2 KartG: right of access to files requires consent of the parties

Key Issue Access to Information

- Art 37j, 37k KartG – implementation of Art 5 Damages Directive
 - see Art 18 RAD; broad interpretation re C-163/21
 - no „pretrial discovery“, no substantive rights to disclosure/access to evidence (unlike in Germany: Art 89b ff dGWB)
 - inner-procedural disclosure only
 - → quantification of damages prior to disclosure required (228 ZPO), no „Stufenklage“ (Art 42 EGZPO [per analogiam?])
 - → 43/2 ZPO: prevents negative cost effects for plaintiffs in case of over-valued claims

Key Issue Quantification of damages

- „conclusiveness“-requirement (principle of equivalence!, evidence of original purchase + original purchase price) v quantification + determination of damages (226 ZPO)
- presumption of harm + causation („1. Euro“) → estimation under 273/1 ZPO post Art 5-disclosure requests (C-312/21)
- confidentiality- and proportionality-issues: 37j/6/4 KartG (expert summary: OLG Vienna 4 R 122/22y)
- low(er)-threshold application of 273/1 ZPO: no doctrinal issues
- see re Dieselgate: prevailing public interests, allocation of risks to a mala fide perpetrator, effet utile-construction of damages law → OGH + BGH imposing minimum range of damages between 5 - 15 %
- application of effet utile-case law re UCTD on ex officio-obligations?

Conclusio

- private enforcement seeking consumer redress: typically follow-on-actions only
- to date: no precedents / cases in Austria under the Directive's regime
- binding effect of final decisions concerning infringements (37/2 KartG)
- presumptions of harm and causation (passing on overcharge, 37f/3, 37c)
- → disclosure-rules: mostly relevant for quantification of damages
- ex officio-obligation by the courts?
- low(er)-threshold application of 273/1 ZPO (estimation)
- lack of effective collective instruments



Thank you !

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