panel considered that there is no ongoing need for this requirement and that the removal of the requirement would reduce the costs of private enforcement.

3. Removing the requirement that overseas conduct will only be subject to Australian competition law if the relevant foreign corporation carries on business in Australia. The review panel recommended that Australian competition laws should apply to overseas conduct to the extent that the conduct relates to trade or commerce within Australia or between Australia and places outside of Australia.

The Australian Government has sought submissions on the final report by May 26, 2015, and expects to publish its response to the final report early in the second half of 2015.

Ross Zaurrini

Mona Mbogua

Austria

DONAU CHEMIE AND THE FOLLOWING BREAKTHROUGH IN AUSTRIA

Austria; Cartels; Disclosure; EU law; Investigations; Private enforcement

[1]For the first time, the *Oberster Gerichtshof*, Austrian Supreme Court (OGH), as the Court of Appeals in cartel (anti-trust) disputes, has granted a party pursuing private enforcement access to cartel files in two parallel decisions.[2] Applying a careful balancing test, the Supreme Court ruled that the Lower Court (Oberlandesgericht Wien as court of first instance in cartel matters) was right to ask the cartel member to provide legitimate reasons as to why the court should deny the injured party access to cartel files.[3] The Supreme Court closely followed the Plaintiff's (the injured party) line of reasoning that what mattered were not abstract considerations but whether the cartel member had demonstrated that there were legal interests preventing the court from giving access to the injured party.

Legal background

In Austria, the matter of access to cartel files was unregulated until the big reform of the Cartel Code in 2005.[4] The reform made access to the files by a third party, i.e. somebody potentially harmed by the cartel, dependent on the consent of the cartel member[5] and thus virtually impossible.[6] The curious reasoning behind it was that if companies would have to live in fear that victims of the cartel would eventually gain access to the files and thus discover trade secrets related to the cartel, they would not fulfil their legal duties to provide information to the authorities under art.11 of the Wettbewerbsgesetz (Austrian Competition Act).[7] However, from the very start, it was hard to imagine a scenario where the cartel member would ever grant their victims access to the files.[8] Until now, no successful private

[1] *Bundeswettbewerbsbehörde v Donau Chemie AG* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19.
[2] OGH November 28, 2014, 16 Ok 1O/14b; OGH November 28, 2014 16 Ok 9/14f. Since both Appeals Court Decisions follow the same reasoning, we will simply refer to the decision 16 Ok 9/14f.
[3] 16 Ok 9/14f re. 7.13.
[4] Kartellrechtsänderungsgesetz BGBl I Nr. 61/2005.
[5] KartG 2005 art.39 para 2.
[6] OGH August 2, 2012, 4 Ob 46/12m and in particular re. 10.6.
[7] 926 der Beilagen XXII. GP—Regierungsvorlagep.9.
[8] *Early criticism* by Karin Wesely in MR 2006, 404.

enforcement by an individual (victim of a cartel) has taken place in Austria.[9] However this is about to change since the European Court of Justice (ECJ) (first Chamber) on June 6, 2013 passed the following ruling:

> "European Union law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency program, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved."[10]

Hence, it was clear from an Austrian perspective that art.39 of the Kartellgesetz (KartG) 2005 could no longer be applied when the case involves European competition aspects.

The case

In 2007, Europay Austria Zahlungsverkehrssysteme GmbH was found guilty of being a member in a cartel and of the abuse of a dominant market position in Austria. [11] Once the decision was final, one company affected by the cartel filed a follow on, private enforcement suite with the Commercial Court Vienna in November 2008 (in the following "the Plaintiff"[12]). The lower courts dismissed the case, claiming that the Plaintiff had not proven reasonable grounds by referring to the cartel decision to substantiate his case. The decision and the subsequent appeal decision were later overturned by the Supreme Court in a groundbreaking decision dated August 2, 2012, 4 Ob 46/12m, which ruled that the Plaintiff had laid out the facts of the case that a cartel had indeed taken place and that the evidence in the continuing trial would show whether the facts were true and referred the case back to the Commercial Court Vienna to assess the actual financial damage the Plaintiff suffered because of the cartel.[13] During the procedure, the Commercial Court Vienna had ignored the Plaintiff's request to ask for the cartel files from the Oberlandesgericht Wien as cartel court of first instance, hereinafter also Lower Court, as evidence and also the *Bundeswettbewerbsbehörde* (Austrian Competition Authority) had refused access to its files.

However, meanwhile the ECJ had passed the *Donau Chemie* decision and the Plaintiff decided to file a direct request to the Cartel Court (Oberlandesgericht Wien) on December 2, 2013 to gain access to the cartel file. The Lower Court in turn waited two months and then asked the Plaintiff to name the required documents in the file and substantiate his interest in them (February 7, 2014). The Plaintiff refused, requested access to the entire file and reminded the Lower Court that he was legally entitled to gain access to the files under European law, in particular according to the findings in *Pfleiderer*[14] and *Donau Chemie*[15]. Furthermore, the Plaintiff argued that he had already spent considerable time and money in this proceedings and could thus not be accused of staging a "fishing expedition", and last but not least the cartel member's claim that trade and business secrets were involved

[9] There is the exception of the Grazer Driving Schools (LGZ Graz 17. 8. 2007, 17 R 91/07p) where the plaintiff was awarded €174, 40 plus 4% interest. The case is purposefully excluded since the cartel victim had ceded its potential claim to the Federal Chamber of Labor (*Arbeiterkammer*) which had spent considerable resources to evaluate the different price levels of driving tests, could therefore easily substantiate damages and the amount was so small that the judge had discretionary power to set damages.
[10] *Donau Chemie* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19 at [29].
[11] OGH September 12, 2007, 16 Ok 4/07.
[12] BMA Brandstätter Rechtsanwälte GmbH acted on Plaintiff's behalf.
[13] OGH August 2, 2012, 4 Ob 46/12m.
[14] *Pfleiderer AG v Bundeskartellamt* (C-360/09) [2011] 5 C.M.L.R. 7; [2011] All E.R. (EC) 979; [2012] C.E.C. 50.
[15] *Donau Chemie AG* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19.

could not be relevant since enough time had passed[16] for the data contained in these files to be irrelevant for business purposes.[17] On March 12, 2014, the Lower Court granted access to some parts of the file where the court could not detect information worthy to protect and requested from the cartel member to substantiate, i.e. highlight, which parts of the file should not be given access to, due to considerations of business and/or trade secrets. The cartel member did not comply, citing amongst other things cost considerations and the Lower Court therefore granted the Plaintiff access to the remaining documents in June 2014. This was appealed by the cartel member, who finally lost when the appeal was denied on the merits by the Supreme Court in November 2014 of which the parties were notified in January 2015.[18]

The (Appeals Court) Decision

The Supreme Court as appeal court in cartel matters stated that the right to access the files, if contested by any of the parties involved in the case, would have to be seen as any other request for access to files according to art.219 para.2 of the Zivilprozessordnung (Austrian Code of Civil Procedure). Therefore, the third party making the request had to provide the court with legal interest justifying such access. Referring to well established precedence, the Supreme Court underlined the fact that a general desire to gather information is not sufficient.[19] However, according to the Supreme Court, the desire to gather evidence to strengthen one's case is a legitimate reason.

Having established that the Plaintiff had a legitimate interest to access the files, the Supreme Court considered whether the parties concerned could claim legal protection against the disclosure of the file. According to the Supreme Court, the cartel members would technically be able to claim secrets were business and trade secrets are involved. [20] The Supreme Court made it crystal clear that the general argument that the request for access is a "fishing expedition" is not to be considered since the request to access files is in itself based on the interest to gather information. Only by gaining access to the file will the Plaintiff know what is in the file.[21]

The Supreme Court then considered the impact of European case law and in particular the *Donau Chemie* decision. Applying the case, the Supreme Court summarised the opinion, pointing out that a national court needed to weigh the evidence in each individual case,[22] and decide for each individual document whether access could be granted.[23] The Supreme Court confirmed the view that the court, before granting access to the files, had to consider other possibilities the Plaintiff in private enforcement might have to gather evidence.[24]

Furthermore, the Supreme Court considered the impact of the *EnBW*[25] decision but stated that it deals with the EU transparency directive[26] with regard to the cartel-specific regulations of 1/2003/EC and had therefore no bearing on national cases. The Supreme Court proceeded with discussing the different academic views before reviewing the law in Germany and the procedure regarding access to files according to arts 29–30 of the

[16] The original cartel prosecution which had led to the decision 16 Ok 4/07 was based on cartel files from 2003 and earlier.
[17] In the decision *Deutsche Telekom AG v Commission of the European Communities* (T-271/03) [2008] E.C.R. II-477; [2008] 5 C.M.L.R. 9, the European Court of Justice, First Instance argued that since the data in the file at hand was more than five years old, the party objecting to others having access to the file would have to prove a real interest.
[18] OGH November 28, 2014, 16 Ok 9/14f and 16 Ok 10/14b.
[19] RS-Justiz RS0079198.
[20] Re.3.4.
[21] Re.3.5.
[22] *Donau Chemie* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19 at [29] and [34].
[23] *Donau Chemie* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19 at [43], [47] and [48].
[24] *Donau Chemie* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19 at [32] and [47].
[25] *EnBW Energie Baden-Wurttemberg AG v European Commission* (T-344/08) EU:T:2012:242; [2012] 5 C.M.L.R. 4.
[26] Regulation (EC) No 1049/2001.

Verwaltungsverfahrensgesetz (German Administrative Procedure Act). The Supreme Court further points out that the legislature intends to strengthen private enforcement with the new cartel code.

Keeping the above said in mind, the Supreme Court found that the Lower Court had not erred when it balanced the different interests in favor of the Plaintiff. According the Supreme Court the Respondent had failed to point out which documents actually contained business and/or trade secrets.[27] It again emphasised that antitrust violations could never be considered to deserve protection as trade secrets.[28] The cartel member's claim that leniency programs would be affected was dismissed since none of the cartel members had qualified.[29] In addition, the time lapse since the cartel was officially terminated meant that the cartel member could have not claimed trade/business secrets.

Eventually, the Supreme Court pointed out that the request for access to files need not be overly specific since it were in the nature of such requests that they are made to gather information.[30] The Supreme Court elaborates that the jurisdiction by the ECJ could be taken as a guideline that private enforcement should not be made virtually impossible by national procedural provisions. The Supreme Court concurred with the Lower Court's view that it would have been up to the cartel member to provide reasons why the Court should exempt parts of the file from access.[31] Since the cartel member had failed to do so but claimed that the screening of the cartel files was an unreasonable request, the Lower Court had been right to decide in favor of the Plaintiff.

Conclusion

As the time line shows, while private enforcement has been discussed extensively, it has not taken full hold in Austria until recently. However, progress has been made, in particular since the groundbreaking Supreme Court decision of August 2, 2012, 4 Ob 46/12m, about private enforcement and now the Supreme Court's equally important decisions about access to files of the cartel court of November 28, 2014, 16 Ok 9/14f and 16 Ok 10/14b. The bottom line is that Austrian courts will have to consider decisions by the ECJ much more carefully when it comes to private enforcement.

Victoria Rosengren

[27] Re.7.8.
[28] Referring to the decision OGH 27.01.2014, 16 Ok 14/13.
[29] Re.7.10.
[30] Re.7.12.
[31] Re.7.13.