

Settle for less...? Or for more! Tips on timing, confidentiality and strategy in (multijurisdictional) settlement arrangements

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National Report of Austria

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1. QUESTIONNAIRE FOR ANTITRUST PROCEDURES (MAÏTE OTTES)

1.1 General issues

1.1.1 Does your jurisdiction provide for settlement procedures with the competent competition authority?

The Austrian Cartel Act ('ACA') does not provide for a settlement procedure with the Austrian Federal Competition Authority ('FCA') that is comparable to the settlement procedure provided for under EU Law.

This fact must, however, be seen in the context of the Austrian antitrust law and antitrust proceedings:

In Austria, the FCA is only an investigating authority but has no competence to decide on antitrust cases. Only the Cartel Court ('CC') as court of first instance or the Higher Cartel Court ('HCC') as court of second instance are competent to do so. The FCA may thus only initiate proceedings before the CC.

The most important tasks of the FCA can be summarized as follows:

- (i) The FCA is party to any proceedings before the CC and the HCC, no matter who initiated the proceedings, i.e. if it was initiated by one of the Official Parties (i.e. the FCA or the Federal Cartel Prosecutor ('FCP')) or by any third party (such as regulators or any undertaking that has an interest on the decision of the CC);
- (ii) The FCA may conduct investigations of economic branches, if the FCA suspects that competition in the respective branches is restricted or distorted;
- (iii) The FCA cooperates with courts and authorities as well as the European Commission and other national competition authorities; and
- (iv) Any merger control notification must be submitted with the FCA. The Official Parties are then to decide whether the intended concentration can be cleared in Phase I or whether Phase II proceedings should be initiated. In such case, the notification will be submitted to the CC which will then decide in Phase II proceedings.

However, in Austria, the ACA and the Act for Non-Contentious Proceedings (*Außerstreitgesetz* – 'AußStrG'), which is applicable to proceedings before the CC and the HCC, provide for a legal basis for proceedings that come close to settlement procedures. Such proceedings are summarized in the following paragraphs:

Pursuant to Section 30 AußStrG there is the possibility that the parties to antitrust proceedings reach a settlement before the Cartel Court. (The ACA as such does only indirectly deal with settlements reached before the CC (*see* Section 34 ACA dealing with the enforcement of decisions and settlements)). Such settlement terminates antitrust proceedings and no substantive decision on whether or not the

party/parties has/have infringed cartel law will be rendered after the settlement has been reached. There is currently a discussion going on in Austria as to whether or not it would be possible at all that parties also settle pursuant to Section 30 AußStrG in the context of fines proceedings (*see e.g. Xeniadis/Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren*, ÖZK 2012, 83).

Moreover, the CC may render a decision without giving any reasoning pursuant to Section 39 (4) AußStrG if the decision is in conformity with the requests or intention of all parties and the parties waived their right to appeal. In practice, this is only feasible where all parties' requests are aligned and thus, where the parties have already agreed on some kind of settlement before initiating the proceedings before the CC.

Additionally, pursuant to Section 30 ACA, the FCA may take into consideration the cooperation of the party/parties when requesting the fine. This is due to the fact that the CC may not impose a higher fine on the undertaking concerned than the fine that was requested by the FCA.

In practice, the FCA approaches the party concerned even before cartel proceedings are initiated and reaches an informal agreement with the party, under the premise that the party admits the breach of competition law. Furthermore, the party and the FCA will put beyond dispute the relevant facts and the (maximum) fine. The FCA will then request the agreed upon (and in general lower) fine when referring the case to the CC. Moreover, the parties will submit aligned requests and agree to waive their right to appeal, in order to terminate the proceedings either with a settlement reached before the CC or to terminate the proceedings with the decision of the CC, thus the court of first instance, pursuant to Section 39 (4) AußStrG.

The following questions will be answered on the basis of those "settlement" possibilities under Austrian law outlined above.

1.1.2 If your jurisdiction does not provide for settlement procedures, does your jurisdiction provide for commitment decisions?

Pursuant to Section 27 ACA, the CC may declare commitments of the parties concerned binding, if it can be expected that the commitments will prevent further infringements of competition law. Such decision by the CC terminates cartel proceedings.

A commitment decision may be applied for any infringement of the Austrian competition law outlined in the first part of the ACA, thus in brief cartels, abuses of a dominant position as well as mergers.

- **If your jurisdiction does not provide for settlement procedures, please answer the following questions from the perspective of such commitment decision procedure.**

1.1.3 What is the general stance towards settlement procedures in cartel matters? Are these generally considered to be a preferred route?

Settlements reached in Cartel Court proceedings are not (yet) very common in Austria. There are only a few cases that ended with a settlement and only a very low percentage of them dealt with the issue of fines to be imposed on an undertaking. To give an example, only in 2012 the first multi-party cartel proceeding has been terminated by settlement (BWB/FD-212 – *Bierbrauer*).

This might also be due to the fact that there is no settlement procedure in Austria comparable to the settlement procedures with the European Commission. However, there is a growing awareness of the benefits of settlement procedures, especially in the light of the FCA being a small competition authority with only approx. 20 case-handlers and the fact that cases can in general be terminated faster and more easily in settlement procedures.

1.2 Procedural issues

1.2.1 At what stage can a settlement be reached? E.g.: (i) only in the investigative procedure, (ii) before publishing a statement of objections, (iii) at any stage before an infringement decision has been taken, or (iv) at any time?

As outlined in question 1.1.1 above, the FCA will in practice already approach a party concerned in the investigating procedure. However, a settlement can be reached at any stage of the proceedings before the CC or the HCC – provided that the settlement is reached before the CC/HCC issues a decision, of course.

1.2.2 Is it possible to settle with only one, or several parties involved in the alleged cartel, or do all accused parties need to be involved? Are there any constraints with whom a settlement can be reached (cartel leaders, recidivists, etc.)?

Taking into consideration that the Official Parties are always parties to Cartel Law proceedings in Austria, first the question arises whether such settlement must in any case also be reached with the Official Parties even in cases where the proceedings were initiated by an individual applicant. Pursuant to the prevailing opinion in Austrian literature (as far as can be seen, there is no case-law as to this matter), the settlement must in such cases also be reached with the Official Parties or the Official Parties must at least not oppose against the settlement reached between the parties (*see Solé, Das Verfahren vor dem Kartellgericht*, para. 273).

As to the question whether all other parties involved in the alleged cartel must be involved in order to settle, there are, as far as can be seen, neither rules of law nor case-laws as to this question. According to Austrian literature, however, it is

possible to settle with only one or several parties involved in an alleged cartel, provided that the Official Parties agree to the settlement or at least do not oppose against it.

1.2.3 Could you elaborate on the possible settlement arrangements. Are these only pecuniary measures or could these involve behavioral measures as well? How are the terms of a settlement being determined?

As far as can be seen, there are no provisions that would limit settlement arrangements to pecuniary measures.

1.2.4 Which party can take the initiative for a settlement: is this the administrative authority only, or the suspected parties as well?

There are no rules that would prevent any party from taking the initiative for a settlement. It lies, however, in practice in the FCA's discretion if the FCA intends to reach a settlement with the party or not. Thus, in practice, succeeding to reach a settlement will fully depend on the FCA.

1.2.5 Are there any other institutions involved other than the competition authority? Does a settlement, e.g., require any court approval? Please elaborate on the relevant procedure.

As explained under question 1.1.1, the CC/HCC is always involved when reaching a settlement, as settlements will only be reached in proceedings before the CC/HCC. However, the settlement does not require any court approval.

1.2.6 Is it necessary for reaching a settlement to admit being guilty?

There is no specific rule under Austrian law as to this question, however, the FCA will in practice only agree to the settlement if the party admits having infringed competition law.

1.3 Enforcement of settlement

1.3.1 Are there any rules as to the enforcement of a settlement? E.g. in monitoring any possible behavioral measures? What are the consequences if a settlement agreement is breached?

In Austria, settlements are enforced pursuant to the rules of the Act on Enforcement (*Exekutionsordnung* – 'EO') just as any court decision of the CC/HCC. Settlements and court decisions constitute executory titles according to Section 1 EO.

The content of such executory title may also include order for positive activity.

1.3.2 Is a settlement subject to appeal? Can the parties agree to waive the right of appeal?

In general, settlement agreements are not subject to appeal as such, but can be revoked by a party within time limits provided for in the settlement agreement itself.

As explained under question 1.1.1 above, in practice Section 39 (4) AußStrG serves also as the legal basis for “settlements” in Austria. Pursuant to this Section the parties waive their right of appeal in cases the decision is in conformity with the (aligned) requests and intention of all parties and does thus not require any further reasoning by the CC.

1.3.3 Would it e.g. be possible for a party reaching a settlement with a public authority to be prosecuted for the same behavioral by a criminal prosecutor?

In Austria there is in general no rule that would prevent that a party that reached a settlement be prosecuted for the same behavior by a criminal prosecutor. This is due to the fact that fines imposed on an undertaking in the course of cartel proceedings are considered as sanction under civil law and do thus not prevent the prosecution under Austrian criminal law (decision of the Austrian Supreme Court 16 Ok 52/05).

This must, however, be seen in the context of Austrian criminal law: The ACA does no longer provide for criminal sanctions and violation of cartel law as such is no criminal offence in Austria with one exception: Anti-competitive agreements in the course of public procurement proceedings are caught by Section 168b of the Austrian Criminal Code (*Strafgesetzbuch* – ‘StGB’). However, of course, crimes may be committed in connection with cartel law violations that are caught under the Austrian criminal law.

To the contrary, leniency applicants shall not be prosecuted under Austrian criminal law if the FCP submits a statement accordingly (*see* Section 209a and 209b of the Austrian Code of Criminal Procedure (*Strafprozessordnung* – ‘StPO’)).

1.4 Confidentiality and privilege

1.4.1 Is a settlement arrangement made public? What information is made public? Does this, e.g. include the settlement agreement itself, any documents and/or statements leading to such settlement?

In practice, mere settlement agreements reached between the parties in the proceedings before the CC are not made public.

To the contrary, decisions of the CC and the HCC have to be published. As regards the information that is made public Section 37 ACA is entirely based on the regulation 1/2003/EC, thus the names of the parties concerned and the “main content” of the decision including any penalties imposed are to be published.

1.4.2 If the parties do not reach a settlement, can statements and/or documents used in trying to reach a settlement, be used against the accused (or other) parties?

There are no rules that would specifically address statements and/or documents used trying to reach a settlement in Austria, however, those statements and/or documents that are part of the court's file may be assessed under certain conditions by third parties (this is the case where the parties concerned allow a third party to access the file or in cases dealing with EU competition law according to the ECJ's decision of 06.06.2013, C-536/11 – *BWB/Donauchemie et al.*). Further, the file may be referred to Criminal and Civil Courts as well as criminal prosecutors (decision of the Austrian Supreme Court 16 Ok 3/10).

Statements and/or documents that are part of the FCA's files can in general not be accessed. It is, however, currently debated in Austria in the light of the decision of the ECJ stated above whether such files should be accessible in cases dealing with EU competition law (*see* thereto Winner/Appl, *Wettbewerbsvollzug in Österreich im Vergleich zu ausgewählten Ländern*, Studie im Auftrag der Kammer für Arbeiter und Angestellte für Wien). Furthermore, the FCA is obliged to reveal certain information under certain conditions.

1.4.3 Do parties who have settled their case get any protection from any possible follow-on damage claims in civil proceedings?

Parties do indirectly get protection from possible follow-on damage claims in civil proceedings:

Settlements are in that way to the benefit of the parties, as follow-on damage claims in civil proceedings based on the settlement (or any decision pursuant to Section 39 (4) AußStrG) are more complex, as the settlement might not be published or only published in parts. Moreover, the settlement agreement is not binding for any follow-on damage claims. To the contrary, civil law courts are bound by formal decisions of the Cartel Court as to the infringement and liability of a party having infringed cartel law (Section 37a (3) ACA).