

Position on Settlements



Federal Competition Authority

DISCLAIMER: Please note, that in case of deviations between the German and English version the German version prevails.

Position

I. General considerations

The aim of the present document is to inform undertakings interested in settling cartel cases about the position of the Federal Competition Authority (hereinafter referred to as “BWB”) regarding the following aspects of a settlement to terminate proceedings by mutual consent: requirements and criteria for exclusion, procedure, content of a settlement submission and the possible range of reductions of the requested fines.

Settlements are an appropriate and legally available means to bring antitrust infringements quickly and effectively to an end. In this context, not a settlement according to Section 30 para. 1 of the Austrian Non-Contentious Proceedings Act (AußStrG) in conjunction with Section 34 of the Cartel Act (KartG)¹ is meant, but rather a decision of the Cartel Court which is taken based on facts investigated by the BWB and not contested by the undertaking without the necessity of conducting full investigation proceedings. When fixing the fines, the BWB takes into account the speeding up of procedures as well as the contribution to the investigation of the matter² which undertakings make by introducing a settlement submission (“acknowledgement“), granting the undertaking a reduction of fines.

This procedure is legally covered by several provisions, with Section 33 para. 1 AußStrG and Section 17 to be mentioned as particularly relevant, which allow the defendant (in this case the accused undertaking) to speed up the investigation proceedings before the Cartel Court by either not contesting the objections raised in the BWB’s application or by explicitly stating that these objections are not in dispute.

Pursuant to Section 36 para. 2 KartG, the Cartel Court cannot impose a higher fine or a higher penalty than has been requested by the official parties³. When requesting a specific amount for the fines to be imposed, the official parties have to state the reasons for requesting this particular amount.

There is clearly room for settlements quite apart from the well-established leniency programme, which has to be clearly distinguished from the settlement and has a totally different aim from that of settlement, namely rewarding the detection of illegal agreements and behaviours infringing cartel law due to the

¹ KartG, Federal Law Gazette I 61/2005, as amended in Federal Law Gazette I No. 13/2013.

² Pursuant to Section 30 para. 1 KartG, the severity and duration of the infringement, the enrichment generated by the infringement, the degree of guilt and the economic performance have to be particularly taken into account when fixing fines. The mitigating circumstances laid down in Section 30 para. 3 KartG are not exhaustive. They therefore (in analogy to general criminal law) do not exclude mitigation as the accused party has contributed to speeding up proceedings before the Cartel Court by not contesting (in case these mitigating circumstances are not subsumed anyway under Section 30 para. 3 subpara 3 KartG).

³ i.e. BWB and Federal Cartel Prosecutor (Section 40 KartG).

cooperation of undertakings (formerly) involved in the infringement, which are at least partly unknown to the BWB.

A settlement is beneficial both for undertakings and the Authority as time-consuming and costly antitrust proceedings can be avoided, legal security can quickly be established and lawful behaviour respecting cartel law can be restored.

For the sake of good order, the BWB also wants to point out that the present position does not exclude that it will adequately consider the cooperation of undertakings with the Authority and the Cartel Court in their requests to impose fines, even in case the instruments of settlements and the leniency programme are not applicable.

The following position is not binding for Austrian courts, in particular the Cartel Court and the Supreme Cartel Court, but it represents the BWB's legal position and its current practises.

II. Requirements

A settlement to terminate proceedings can be taken into consideration for **all proceedings** concerning infringements of cartel law or European competition law. Unlike the leniency programme, this does not just concern illegal agreements etc. pursuant to Section 1 KartG 4 or Article 101 TFEU, but also **unilateral conduct**, such as abuse of market power or forbidden mergers.

As a matter of principle, every **undertaking involved** in such infringements may contact the BWB with the aim to terminate proceedings through settlement. However, it is not a basic prerequisite for a settlement that all parties to the proceedings agree to terminate proceedings by means of a settlement.

III. Procedure

There is no fixed timeframe for initiating a **settlement procedure**. Once the BWB has examined the evidence available to obtain an adequate amount of information, settlement discussions may be proposed by any of the parties at any time. If there is a general willingness of the Authority to terminate the proceedings by settlement, the BWB informs the undertaking of the main elements of the infringement, i.e. the facts of the infringement the undertaking is accused of, the legal assessment of the facts as well as the underlying evidence and – insofar or as soon as all facts relevant for fixing the requested fine are known –

proposes an amount of fine which based on the state of the investigations is not to be exceeded if a settlement is reached.⁴

Consequently, the settlement requires the undertaking to introduce a **settlement submission** in which the undertaking acknowledges the facts it is accused of as appropriate and it accepts the legal assessment made by the BWB as well as the maximum amount of the fine suggested by the BWB.⁵

Such a settlement submission is considered a mitigating circumstance which may result in a reduction of the requested fine by up to 20% (a so-called **Settlement Reduction**). In cases in which the Authority requests a reduced fine pursuant to Section 11 para. 4 WettbG⁶, the settlement reduction is deducted from the amount of fine which has already been reduced in accordance with the mentioned legal provisions.

IV. Proceedings before the Cartel Court

The BWB will subsequently request the Cartel Court to impose a fine based on the settlement submission and the available evidence. The Authority expects that the facts on which the application is based as well as their legal assessment as an infringement and the requested fine will not be disputed by the undertaking so that the proceedings before the court can quickly be concluded.⁷

Concerning the content of the decision taken by the Cartel Court as well as its publication pursuant to Section 37 KartG, the BWB will do everything in its power as an official party to the settlement to reach a conclusive decision regarding nature, scope and duration as well as other relevant circumstances of the infringement on the one hand, and to make its publication as comprehensive as possible on the other hand.

V. Federal Cartel Prosecutor

The BWB cooperates closely and continuously with the Federal Cartel Prosecutor in all settlement cases in accordance with this document as well as in all other cases.

VI. Conclusion

The Authority reserves the right to deviate, under certain circumstances, from the procedures described in the present document.

⁴ This statement replaces the "Statement of Objections" pursuant to Section 13 para. 1 of the Competition Act (WettbG), which in the procedure to fix fines is not obligatory anyway.

⁵ This also includes the method of fixing fines.

⁶ Also refer to the details in the BWB's Leniency Handbook, recital 22 ff.

⁷ Even in the case that an undertaking approaches the Authority wishing to seek a settlement only during already ongoing proceedings before the Cartel Court, the above mentioned details on the settlement submission and the settlement reduction will apply.