

## **Position Paper on Settlements (second edition)**

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## Preamble

- (1) This position paper explains the approach of the Austrian Federal Competition Authority (**AFCA**) towards a possible consensus-based termination of proceedings (known as a settlement) and the procedural steps in more detail. It is therefore aimed at undertakings seeking such an outcome.
- (2) From an enforcement perspective, the advantage of a settlement is above all the rapid establishment of compliance with antitrust law and the creation of legal certainty. The granting of a settlement discount (for more detailed modalities, see margin no. 11 ff and margin no. 18 ff) and resultant reduced fine constitutes a significant **advantage** for undertakings. Legal certainty is created insofar as the undertaking is informed of the specific, reduced amount of the fine even before it is pending before the court. The avoidance of time-consuming and cost-intensive cartel proceedings is a further advantage for both authorities/courts and undertakings. Both in Europe and around the world, the possibility of resolving antitrust proceedings by way of settlements has become established and proven best practice.<sup>1</sup>
- (3) In this respect, the AFCA ensures that the fines applied for as part of a settlement have a sufficient specific and general preventative effect. The aim is to increase the effectiveness of antitrust law enforcement by shortening the duration of proceedings and utilising official resources more effectively.
- (4) The possibility of a consensus-based termination of proceedings exists in Austria for all relevant **offences under the Austrian Cartel Act (KartG)**, in particular, §§ 1, 5 and 17, as well as offences under **Articles 101 and 102 TFEU**.
- (5) An acknowledgement made for the purpose of settlement proceedings is defined pursuant to § 37b subpara. 5 KartG in accordance with Art 2 subpara. 18 of Directive

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<sup>1</sup> See, for example, the German Federal Cartel Office's factsheet, [https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt-Settlement.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt-Settlement.pdf?__blob=publicationFile&v=3) and the European Commission's statement, [https://competition-policy.ec.europa.eu/cartels/settlement\\_en](https://competition-policy.ec.europa.eu/cartels/settlement_en).

(EU) 2014/104<sup>2</sup> and Art 2 para. 1 subpara. 18 of Directive (EU) 2019/1:<sup>3</sup> *"Settlement submissions: a voluntary presentation by an undertaking to a competition authority, describing the undertaking's acknowledgement of, or its renunciation to dispute its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure"*.

- (6) This is to be distinguished from the **leniency programme**<sup>4</sup> pursuant to § 11b para. 2 of the Austrian Competition Act (WettbG)<sup>5</sup>, the parallel application of which does not preclude the consensus-based termination of proceedings, so that a cumulative reduction of the fine to be imposed is generally possible.<sup>6</sup> Leniency applicants are undertakings or associations of undertakings that were involved in a cartel<sup>7</sup> but are now cooperating in the investigation of that cartel within the meaning of § 11b para. 1 or 2 WettbG and who, "in exchange for the freely volunteered disclosure of information on the cartel (...)" are offered "either full immunity or a significant reduction of the penalties (...)".<sup>8</sup>
- (7) It should be noted that cooperation by undertakings outside of this position and the leniency programme may also be taken into account in the exercise of the AFCA's due discretion when determining the amount of the fine to be applied for, taking into account statutory assessment criteria (cf. in particular § 30 para. 3 subpara. 3 KartG).
- (8) In cases where the imposition of a fine is not mandatory due to the nature of the infringement in question, there is the possibility of the Cartel Court accepting commitments pursuant to § 27 KartG as a form of accelerated termination of proceedings. This takes the form of an undertaking submitting commitments which

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<sup>2</sup> Directive (EU) 2014/104 of the European Parliament and the Council of 26th November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions applicable in the Member States and in the European Union, Official Journal (OJ) 2014 L 349/1.

<sup>3</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11th December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ 2019 L 11/3.

<sup>4</sup> See the [Leniency programme guidelines](#) available on the AFCA website and the Ordinance of the Federal Minister for Digital and Economic Affairs [on the Application of the Leniency Programme of the Austrian Competition Act, Federal Law Gazette \(BGBl\), II No 487/2021](#).

<sup>5</sup> WettbG, BGBl, I No. 62/2002 as last amended by BGBl. I No 176/2021.

<sup>6</sup> In this context, a settlement discount is deducted from a fine that is already to be applied for in a reduced amount on the basis of the provisions of the leniency programme.

<sup>7</sup> Within the meaning of § 11b para. 1 subpara. 1, the AFCA may also instruct the undertaking applying for leniency not to withdraw from the cartel for tactical investigative reasons.

<sup>8</sup> Commission Notice on cooperation within the network of competition authorities, OJ C 2004/101, footnote 14 to margin note 37.

the Cartel Court can declare binding if it can be expected that these commitments will prevent future infringements.

- (9) In cases of a consensus-based termination of proceedings, as in all other cases, the AFCA works together with the **Federal Cartel Prosecutor**<sup>9</sup> in an established cooperation. The Federal Cartel Prosecutor is regularly involved by the AFCA in discussions regarding a possible settlement.
- (10) This position paper represents the AFCA's current legal opinion and practice. It is neither binding for the Austrian courts, in particular the Cartel Court and the Supreme Cartel Court, nor anticipates their decisions.

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<sup>9</sup> See <https://www.justiz.gv.at/justiz/justizbehoerden/bundeskartellanwalt.36c.de.html>.

## Basic considerations

- (11) The notion “settlement” for the purpose of this position is not to be confused with a settlement within the meaning of § 30 para. 1 of the Austrian Non-Contentious Proceedings Act (AußStrG) in conjunction with § 34 KartG. Rather, here a settlement requires an acknowledgement and a renunciation to dispute by the undertaking regarding the facts established by the AFCA to establish a case amenable to a consensus-based termination of the proceedings. Proceedings are terminated by a binding decision of the Cartel Court.<sup>10</sup> As a rule, Cartel Court proceedings are conducted without extensive taking of evidence, on the basis of facts established by the AFCA, which are expressly not disputed by the undertaking, alongside an assessment of the documents submitted to the Cartel Court. That said, the Cartel Court has the discretion of collecting further evidence in accordance with the principle of investigation prevailing in antitrust law.
- (12) The legal basis for Cartel Court settlement proceedings is provided in particular by §§ 17<sup>11</sup> and 33 para. 1<sup>12</sup> AußStrG. In summary, they provide the defendant / undertaking and official parties with the opportunity to shorten the evidence proceedings before the Cartel Court.

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<sup>10</sup> A (civil) court that decides on compensation for damages arising from an infringement of competition law is bound by the finding of such infringement as made in the final decision of the Cartel Court (cf. § 37i para. 2 KartG). The fact that the Cartel Court’s decision is based on a settlement does not change this. However, some of the documents drawn up with a view to settlement are subject to privilege and therefore to special protection against use in damages proceedings (see (16)).

<sup>11</sup> § 17 AußStrG: *“The court may request a party to comment on the application of another party or on the content of the enquiries, setting a reasonable deadline, or to summon the party to a hearing for this purpose. If the party allows the deadline to expire or does not comply with the summons, the court may assume that there are no objections to the information provided by the other party or to an intended decision based on the disclosed content of the enquiries. The request to comment and the summons must contain a reference to these legal consequences and must be served in the same way as an action. An appeal against such a deadline or summons is not admissible.”*

<sup>12</sup> § 33 para. 1 AußStrG: *“The court may abstain from enquiries if it is convinced on the basis of obvious facts or the undisputed and unobjectionable statements of one or more parties that an allegation may be regarded as true.”*

- (13) The prerequisite is that the undertaking explicitly does not dispute the content of the AFCA's application for a fine submitted to the Cartel Court. In addition to providing the undertaking's information (i.e. undertaking's name, address and company register number) and an explicit statement that the facts are not in dispute, the acknowledgement must accept the AFCA's legal assessment and proposed fine as appropriate.<sup>13</sup>
- (14) In particular, the following facts are not in dispute:
- a description of the alleged behaviour, including its temporal and geographical dimension and consequences
  - the form of the undertaking's involvement
  - the naming of other undertakings involved in the alleged behaviour
- (15) A **legal assessment** is the subsumption of the undisputed facts under the applicable antitrust law provisions in the sense of the AFCA's interpretation of the law. This must be explicitly accepted by the undertaking in the acknowledgement. For the sake of completeness, it should be added that this legal assessment is not binding for the Cartel Court and the Supreme Cartel Court.
- (16) Acknowledgements (settlement submissions within the meaning of § 37b para. 5 KartG) belong to the category of **privileged documents**<sup>14</sup> that are granted special protection against inspection, disclosure and use by third parties (in particular plaintiffs for damages) but also by parties to Cartel Court proceedings. The AFCA may use (parts of) acknowledgements as evidence in further cartel court proceedings relating to facts admitted in the acknowledgement (e.g. against another undertaking involved in the same infringement). As a result of the granting of the right to be heard within the meaning of § 13 para. 2 WettbG or in the context of cartel court proceedings, another undertaking subject to cartel prosecution may gain knowledge of this evidence, which is expressly labelled as "privileged" by the AFCA. However,

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<sup>13</sup> In the event of a settlement before the matter is pending before a court, the AFCA will inform the undertaking in a suitable manner of these elements of the application to be submitted by it.

<sup>14</sup> An acknowledgement is a privileged document pursuant to Part II, Chapter 5 and § 39 para. 2 KartG. Essentially, this means that any further (ordering of) disclosure or use of acknowledgements pursuant to §§ 13a para. 3 WettbG and § 37k para. 4 and 5 or inspection of files by third parties pursuant to § 39 para. 2 KartG is generally not possible. This privilege only covers the declaration of acknowledgement as such, i.e. the statement that was drawn up specifically for the purpose of enabling the application of a simplified or expedited procedure. However, the prohibition of disclosure does not extend to information that exists irrespective of the proceedings before the AFCA, even though such information is included in the files of a competition authority (§ 37k para. 4 KartG).



that (other) undertaking can only use this information for the purpose of exercising its rights of defence in the proceedings concerned (§ 39 para. 2 KartG).<sup>15</sup>

- (17) Considering the aim of achieving legal certainty and autonomous legal assessment of the facts by the Cartel Court (see point 15), the AFCA regards cases with key unresolved legal issues that have not yet been (sufficiently) clarified in case law to be less suitable for ending proceedings by means of settlement. In the course of its dutiful exercise of discretion in individual cases, the AFCA will generally not consider such cases for settlement.<sup>16</sup>

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<sup>15</sup> Other than in proceedings before the Cartel Court or the Supreme Cartel Court, privileged documents may only be used in accordance with this provision in proceedings concerning the splitting of a fine imposed jointly and severally on the parties involved in a cartel.

<sup>16</sup> This does not preclude the consideration of any other significant contribution by the undertaking to the clarification of the facts as a reason for mitigation in the assessment of a fine (§ 30 para. 3 subpara. 3 KartG).

## Procedural steps

- (18) In principle, there is no time limit for the initiation of settlement proceedings, which is why the undertaking concerned can initiate settlement talks with the official parties (AFCA and Federal Cartel Prosecutor) **at any time** if it is prepared to do so - in exceptional cases even after cartel court proceedings have been initiated, provided that this is still expected to facilitate the proceedings. Once the investigation has been completed, the AFCA informs the undertakings concerned of the main elements of the alleged infringement. This is done by means of a **statement of objections** (§ 13 para. 2 WettbG) that presents the facts of the case, essential evidence and the associated legal assessment to the undertaking concerned for comment.
- (19) In the interests of maximum procedural efficiency, settlement discussions are usually initiated by undertakings by means of an informal written request to the AFCA after the investigation procedure has been concluded and the AFCA's statement of objections submitted.
- (20) In general, the AFCA has discretion both as to whether it enters into settlement discussions or continues with them. This depends primarily on the stage of proceedings, the degree to which an undertaking is genuinely willing to cooperate and the extent to which it is endeavouring to end proceedings as efficiently as possible. If specific legal issues remain in dispute, judicial clarification is the appropriate way to create legal certainty.
- (21) The undertaking must disclose to the AFCA **all relevant facts** necessary for an assessment of the fine (turnover figures, mitigating factors worthy of consideration,<sup>17</sup> integrated preventive measures, etc.). Additional factual elements that become known in the further course of proceedings can be included in the assessment.
- (22) If an acknowledgement conforming to this position paper exists, a **settlement discount** of up to 15% will be applied.<sup>18</sup> The specific amount of the applicable settlement discount depends on various factors, in particular the simplification and shortening of proceedings actually achieved. The point in time in the proceedings when an acknowledgement is made also plays a role here. While a full reduction is often available if the acknowledgement is submitted shortly after the point in time

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<sup>17</sup> Pursuant to § 30 para. 1 KartG, when assessing the fine, "*particular attention shall be paid to the gravity and duration of the infringement, the enrichment due to such infringement, the degree of responsibility and the economic capacity.*" The grounds for aggravation and mitigation listed in § 30 para. 2 and 3 KartG are purely demonstrative.

<sup>18</sup> The settlement discount does not exclude an additional fine reduction as a result of cooperation outside the leniency programme.

mentioned in paragraph 19, the discount will usually fall well below 10% after cartel court proceedings have commenced.

- (23) If submission of the acknowledgement is preceded by lengthy and repeated negotiations that run counter to the objectives of accelerating the proceedings and reducing the costs, this also leads to a decrease in the possible reduction.
- (24) Regarding the potentially **cumulative effect of cooperation under the leniency programme**, which leads to an application for a reduced fine pursuant to § 11b WettbG, and a **consensus-based termination of proceedings** (see point 6), it should be noted that any additional settlement discount in particular reflects acceptance of the legal assessment carried out by the AFCA, while the establishment of facts and an undertaking's admission of involvement in an infringement are already inherent to leniency cooperation. In this respect, double consideration is out of the question, meaning that the full settlement discount cannot be granted in such cases.
- (25) In the interests of conducting efficient proceedings, undertakings must adhere to the **deadlines** set by the AFCA in the context of settlements.
- (26) Settlement discussions are **usually terminated** by the AFCA if an undertaking's behaviour thwarts the purpose of the settlement, namely to reduce the costs of the proceedings, or obstructs or jeopardises the investigations (including those concerning other undertakings). This is the case, for example, if evidence is suppressed or disclosed to third parties,<sup>19</sup> deadlines are disregarded or other acts of delay or obfuscation are committed. A continuation of the offence will in any case result in the termination of talks.

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<sup>19</sup> Unless disclosure is made in agreement with the AFCA or due to a legal obligation. If there is a statutory duty of disclosure, the AFCA must be informed of this in good time.

## Cartel Court proceedings

- (27) If a settlement is reached before court proceedings are pending, the AFCA submits a corresponding **application** to the Cartel Court. Such an application essentially sets out the alleged infringement and the AFCA's legal assessment. The application is accompanied by the acknowledgement signed by the undertaking and evidence proving the infringement.
- (28) The above also applies in the exceptional case that an undertaking only approaches the AFCA or the official parties with a request for settlement during ongoing cartel court proceedings. On the basis of this and the available evidence, the AFCA then **applies to the Cartel Court for the imposition of a fine / specifies the amount of the fine.**
- (29) Pursuant to § 36 para. 2, 2nd sentence KartG, the Cartel Court cannot impose a higher fine than applied for by the AFCA. This means that if the fine is specified in its application or at a later stage during the cartel court proceedings, the Cartel Court is bound by the amount of the fine.
- (30) Both in the case of a settlement prior to pending court proceedings and during the cartel court proceedings, it is advisable to bring the statement on the AFCA's application (initiating the proceedings), usually ordered by the Cartel Court, to the AFCA's attention in advance.
- (31) The court is free either to conduct further investigations, e.g. to hear witnesses, or to base its decision on the AFCA's submission and the undertaking's concurring acknowledgement without taking any further steps.
- (32) In proceedings against several defendants, individual undertakings may decide in favour of a consensus-based termination of proceedings, while others opt for "contentious" proceedings ("**hybrid proceedings**"). The AFCA will endeavour to the extent possible under procedural law (§ 36 para. 2 of the Austrian Non-Contentious Proceedings Act (AußStrG)) and in view of the circumstances of the individual case to bring parts of the proceedings affecting the applicants for settlement to a swift conclusion by way of a partial decision. However, the Cartel Court is ultimately responsible for deciding on this.

## Publication

- (33) The AFCA **may** inform the public about proceedings if they are of public importance, while protecting business and trade secrets. § 35b of the Public Prosecution Act on informing the media applies mutatis mutandis.<sup>20</sup> In addition, the AFCA **is obliged** to announce on its website that it or the Federal Cartel Prosecutor has filed an application with the Cartel Court pursuant to §§ 26, 27, 28, 28a and 29 KartG 2005, while maintaining business and trade secrets. The announcement may contain the names of the affected undertaking or undertakings and, in brief, the nature of the suspected infringement and business sector affected.<sup>21</sup> The AFCA is also obliged immediately to publish on its website the judgement of final decisions pursuant to §§ 26 to 29 KartG 2005, quoting the case number. This publication may contain the names of the affected undertaking or undertakings and the business affected. If an infringement of Art 101 TFEU or § 1 KartG 2005 is found in a decision but no fine is imposed due to proceedings by the AFCA pursuant to § 11b para. 1 subpara. 1 lit. a, the publication, in the case of a leniency pursuant to § 37e para. 3 KartG 2005, shall in any case contain the name of the undertaking and a reference to the leniency status.<sup>22</sup> **Apart from this**, following proceedings pursuant to § 37 KartG and after hearing the parties, the Cartel Court publishes its decision in the **Edicts Archive of the Judiciary**.

## Concluding remarks

- (34) This position paper is not exhaustive. The AFCA reserves the right to deviate from the procedure described in this position paper in the event of special circumstances in individual cases. The AFCA is happy to provide further clarification and answer any queries. If you have any questions about these guidelines, please contact [wettbewerb@bwb.gv.at](mailto:wettbewerb@bwb.gv.at).

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<sup>20</sup> § 2 para. 2 subpara. 4 WettbG.

<sup>21</sup> § 10b para. 2 WettbG.

<sup>22</sup> § 10b para. 3 WettbG.

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