

Competition & Antitrust - Austria

New settlement policy

Contributed by [Preslmayr Attorneys at Law](#)

February 19 2015

[Introduction](#)
[Requirements](#)
[Procedure](#)
[Fines](#)
[Comment](#)

Introduction

In 2012 the Federal Competition Authority (FCA) began offering companies a quick way to resolve infringements in the form of settlements. Due to the particularities of Austrian antitrust proceedings (ie, the Cartel Court imposes fines, while the FCA acts as a prosecuting body only), settlement procedures are structured differently from those in other European countries and at the European Commission. For example, in order to settle a fine in Austria, undertakings must formally acknowledge infringements as investigated by the FCA, after which the Cartel Court will issue a decision in line with the FCA's fine application without conducting an evidentiary proceeding. The Cartel Court is bound by law to impose a fine not exceeding the amount applied for by the FCA (which is typically agreed on beforehand by the FCA and the respective undertaking).

Looking at the Cartel Court's published decisions since January 2013, the settlement policy seems to have been successful, as the vast majority of cases (18 out of 22) have been resolved through settlement. However, settlement has not only become a popular option, but also has been heavily criticised due to an apparent lack of information and transparency surrounding decisions. Following these criticisms, the FCA issued guidelines on its settlement policy in September 2014. Although this policy is non-binding, it elaborates on the FCA's legal position and practice when it comes to settlements.

Requirements

Settlements can be sought for all Austrian or European competition law infringements, not just infringements of the cartel ban,⁽¹⁾ as is the case with the leniency programme. Consequently, settlements can be sought in cases of alleged abuses of dominant market positions and even prohibited implementation of mergers. Any undertaking involved in a possible infringement can request a settlement with the FCA. Further, not all parties to a proceeding need to agree to the settlement.

Procedure

There is no strict period for the initiation of settlement proceedings. After the FCA reviews evidence, both parties can offer to initiate settlement discussions. The FCA will explain:

- the investigated facts;
- the evidence found; and
- its legal assessment of the case.

Further – and most importantly for undertakings – the FCA will announce the fine that it intends to submit to the Cartel Court.

If an undertaking is ready to settle, it must formally acknowledge the infringement as investigated by the FCA and accept a fine up to the maximum amount submitted by the FCA. The FCA requests that undertakings acknowledge not only the investigated facts, but also the legal assessment of the case – a policy which has been criticised by competition law practitioners.

Subsequently, the FCA will file a motion to fine the undertaking based on the formal acknowledgement of the infringement. As the undertaking has already acknowledged its infringement, the Cartel Court can render its fine decision quickly, evaluating only the conclusiveness of the FCA's motion to impose a fine, not the infringement as such. In accordance with Section 37 of the Cartel Act, the FCA promises to do everything in its power to ensure that Cartel Court decisions

Authors

[Dieter Hauck](#)



[Esther Sowka-Hold](#)



are published in as much detail as possible, in relation to the nature, scope and duration of the infringement.

Fines

The FCA will reduce fines by 20% where infringements are resolved through settlement. In comparison, the European Commission reduces fines by only a maximum of 10%. In line with the commission's practice, an undertaking can pursue a settlement under the settlement procedure and the leniency programme; the 20% settlement discount further reduces fines in such cases.

Comment

It is clear that settlements provide some legal certainty for charged undertakings, which is advantageous. Further, they enable undertakings to learn the possible maximum fine that will be imposed quickly, without having to endure long and costly proceedings. However, the incentive to acknowledge falsehoods or facts which the undertaking does not qualify as antitrust infringements in order to shorten proceedings and reduce costs is a clear disadvantage. These easily made acknowledgements must be treated with caution, as Cartel Court settlement decisions include a binding sentence of guilt, which may be used as the basis for further damages claims.

Although settlements have become an integral part of the FCA's practice, their pros and cons must be carefully assessed on a case-by-case basis, considering the risk of follow-on actions for damages.

For further information on this topic please contact [Dieter Hauck](#) or [Esther Sowka-Hold](#) at Preslmayr Attorneys at Law by telephone (+431 533 16 95), fax (+431 535 56 86) or email (hauck@preslmayr.at or sowka-hold@preslmayr.at). The Preslmayr Attorneys at Law website can be accessed at www.preslmayr.at.

Endnotes

(1) Section 1 of the Cartel Act or Article 101 of the Treaty on the Functioning of the European Union.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners



© Copyright 1997-2015
Globe Business Publishing Ltd