

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2023 – Austria

Michael Mayr (MMRA) · Monday, April 29th, 2024

### Cartels and Restrictive Agreements

#### Policy and Procedure

##### *Revised Settlement Guidelines*

On 6 November 2023, the AFCA published revised [settlement guidelines](#). Based on these revised guidelines, the AFCA will apply a settlement discount of up to 15% (compared to 20% under the previous settlement guidelines of 2004). In addition, the revised settlement guidelines expressly recognise the possibility of hybrid settlements:

- **Availability of Settlements.** Under Austrian competition law, settlements are available for all potential infringements of competition law, including not only cartels but also vertical agreements, the abuse of a dominant position, or the violation of the merger standstill obligation.
- **Settlement Discount.** Based on the revised settlement guidelines, the AFCA will apply a settlement discount of up to 15% (instead of up to 20% as under the previous guidelines). The concrete discount will depend on factors such as whether the settlement negotiations actually facilitated and accelerated the procedure. According to the guidelines, if a settlement is reached only following the initiation by the AFCA of a procedure before the Cartel Court, the potential discount will normally be below 10%,

The revised settlement guidelines clarify that a leniency discount and a settlement discount can be applied cumulatively, although in case of such a cumulation, the settlement discount would necessarily be lower than 15% given that the leniency discount already reflects the undertaking's acknowledgment of the facts and the existence of an infringement.

- **Procedure.** Settlements are negotiated between the undertaking that is interested in entering into a settlement and the AFCA, although these negotiations will normally also involve the Austrian Federal Cartel Attorney.

An undertaking that is subject to an investigation by the AFCA may inform the AFCA at any time that it would be interested in entering into a settlement. Settlement negotiations will normally commence once the AFCA has sent its statement of objections to the undertaking concerned.

To reach a settlement, the undertaking concerned must acknowledge in writing the facts of the

conduct in question, the existence of a competition law infringement, and the amount of a fine (if any) that the AFCA will request the Cartel Court to impose on the undertaking.

The AFCA may terminate the settlement negotiations if the undertaking concerned appears not to sincerely cooperate or impedes the AFCA's investigations. The AFCA will in any case terminate the negotiations if the undertaking does not cease the infringement.

Once the undertaking and the AFCA have agreed the terms of the settlement and an appropriate amount of a fine (if any), the AFCA will request the Cartel Court to adopt a binding decision incorporating the terms of the settlement and imposing the agreed amount of the fine (if any).

- **Hybrid Settlements.** The revised settlement guidelines foresee the possibility of hybrid settlements in cases involving several undertakings where not all undertakings are willing to enter into a settlement. The AFCA will endeavour to obtain separate decisions from the Cartel Court in relation to those undertakings that agreed to enter into settlements ahead of the decisions that relate to undertakings that are not willing to enter into settlements. In practice, the Cartel Court will however have discretion whether it would adopt several separate decisions or whether it would adopt one single decision in relation to all undertakings concerned (i.e., including those that agreed to settle and those that did not agree to settle).

## Cases

### *Construction Cartel*

In 2023, the Cartel Court imposed several significant fines on additional construction companies for their participation in an overall, Austria-wide cartel arrangement in the construction sector. The overall construction cartel is considered to have had a duration of more than 15 years from at least July 2002 to October 2017 and covered the entire territory of Austria, although not every company necessarily participated in the overall cartel across Austria during the cartel's entire duration (i.e., some companies colluded specifically only on projects in certain regions of Austria at certain points in time).

As of December 2023, total fines imposed by the Cartel Court in the construction cartel amount to c. € 177 million. Procedures against several additional construction companies are pending before the Cartel Court and it is expected that fines will be imposed against several additional companies.

#### **Austria – Construction Cartel – Overview of Fines**

<b>Company</b>	<b>Fine</b>	<b>Cartel Court Decision Date</b>
Strabag	€ 45,370,000	October 2021 <sup>[1]</sup>
Porr	€ 62,350,000	February 2022
Habau	€ 26,330,000	November 2022
Swietelsky	€ 27,150,000	March 2023
Pittel + Brausewetter	€ 4,810,000	May 2023
Kostmann	Full immunity	June 2023
Granit	€ 9,800,000	November 2023
Hitthaller + Trixl	€ 1,360,000	November 2023

*Status: December 2023*

## *Industrial Sugar*

On 13 September 2023, the Cartel Court imposed a fine of € 4.2 million on Südzucker for having participated in a market partitioning agreement for industrial sugar with regard to the territory of Austria.

The AFCA had requested the Cartel Court to impose a fine on Südzucker already in 2010. The Cartel Court however declined to impose a fine on Südzucker in 2019, after the German *Bundeskartellamt* had imposed fines on Südzucker and two other German sugar producers, Nordzucker and Pfeifer & Langen) in 2014. The Cartel Court considered that pursuant to the *ne bis in idem* principle it would not have been justified to impose another fine on Südzucker. The AFCA appealed the Cartel Court's decision not to impose a fine on Südzucker before the Cartel Appeals Court. During the appeals proceedings, the Cartel Appeals Court requested the European Court of Justice to issue a preliminary ruling on the applicability of the *ne bis in idem* principle in this case. The European Court of Justice ruled that the *ne bis in idem* principle was not applicable in the circumstances of the case because the infringement that had been the subject of the German *Bundeskartellamt's* decision related only to the territory of Germany (and not also to the territory of Austria). The infringement that was the subject of the German *Bundeskartellamt's* decision therefore was not identical to the infringement that was the subject of the proceedings before the Cartel Court (see Case C-151/20 *Bundeswettbewerbsbehörde v. Nordzucker*).

Following the preliminary ruling of the European Court of the Justice, the Cartels Appeal Court referred the case back to the Cartel Court. In the subsequent proceedings before the Cartel Court, Südzucker acknowledged that it had participated in a market sharing arrangement with regard to the territory of Austria and the Cartel Court imposed a fine of € 4.2 million on Südzucker.

## *Wood Pellets*

In November 2023, the AFCA closed its investigation of alleged collusive behaviour in the [wood pellets sector](#). The AFCA suspected that the suppliers of wood pellets had engaged in price coordination and in restriction of supply of wood pellets through warehousing. Following the receipt of submissions from several whistleblowers, the AFCA conducted dawn-raids at the premises of several suppliers of wood pellets and a wood pellets industry association in October 2022. The AFCA was however not able to substantiate the alleged anticompetitive behaviour to a degree that would have enabled the AFCA to take the matter to the Cartel Court to seek the imposition of fines or other measures on the undertakings and the industry association. The AFCA therefore closed its investigation, subject however to it requiring the wood pellets industry association to implement certain compliance measures, including the adoption of competition compliance guidelines and the appointment of a person responsible for competition compliance.

## **Abuse of Dominance**

### **Cases**

#### *Peugeot*

In June 2023, the AFCA requested the Cartel Court to impose a fine on the Austrian distribution

subsidiary of Peugeot for the abuse of a dominant position following a decision by the Cartel Appeals Court confirming that Peugeot had abused its dominant position *vis-à-vis* an independent distributor of Peugeot vehicles (Case 16 Ok 4/20d – *Peugeot / Büchl*). The AFCA asked the Court to impose an “appropriate” fine, i.e., it will be for the Cartel Court’s to set the fine amount based on criteria such as the gravity and duration of the infringement, Peugeot’s revenues on the affected market, Peugeot’s financial gains, if any, resulting from the abusive behaviour.

## Merger Control

### Policy and Procedure

#### *Guidance on Pre-Notification Contacts*

In February 2023, the AFCA published [guidance on pre-notification contacts](#) in merger control cases. While the guidance in essence summarises the AFCA’s existing practice, it provides some additional clarity notably on the circumstances when the AFCA considers pre-notification contacts advisable.

The AFCA considers pre-notification contacts to be advisable in the following circumstances:

- The transaction is likely to lead to the creation or strengthening of a dominant position or meets one of the statutory presumptions for a dominant position (e.g., an undertaking has a market share of ≥30% or an undertaking is one of the four largest competitors with a combined share of ≥80%);
- The transaction results in “affected” markets as defined in the Austrian merger notification form (combined market share of ≥15% on horizontal overlap markets or individual or combined market shares of ≥25% on vertically related markets);
- The transaction is likely to attract complaints from competitors or customers;
- The transaction is likely to require an in-depth review for other reasons, e.g., in circumstances where there is no decisional practice on the relevant market or the parties intend to deviate from Austrian or EU precedents on market definition;
- The transaction is likely to raise competitive concern in sectors that are subject to sector inquiries or are otherwise an enforcement priority for the authority.

Parties may engage in pre-notification contacts as soon as they have a concrete intention to enter into the transaction (i.e., parties may not engage in pre-notification contacts with respect to hypothetical transaction scenarios).

To initiate the pre-notification contacts, the AFCA expects that parties to submit a largely complete draft of the merger notification form to enable the authority to engage in a meaningful pre-notification review of the transaction. The parties may also submit draft proposals for potential commitments, although the AFCA will normally conduct a market test of commitments only during the formal review of the transaction.

The AFCA may terminate its pre-notification review if it concludes that the pre-notification review would not result in further procedural efficiencies compared to the formal review or if the parties fail to adequately cooperate (e.g., if they do not respond to information requests).

## Cases

### *Saubermacher / Pötlzleitner*

On 8 March 2023, the AFCA and the Federal Cartel Attorney cleared the formation of a 50/50 joint venture between Saubermacher and Pötlzleitner, two Austrian waste disposal companies, in Phase II subject to commitments (BWB/Z-6107 – *Saubermacher / Pötlzleitner*). The joint venture concerned the collection of waste wood.

While the AFCA did not identify concerns, the Federal Cartel Attorney concluded that concerns could not be ruled out in light of combined shares in excess of 30% and negative feedback received during the market investigation.

The Federal Cartel Attorney ultimately cleared the transaction subject to certain behavioural commitments, including an obligation to provide storage capacity for waste wood at the parties' and the joint venture's sites at non-discriminatory conditions, an obligation not to share competitively sensitive information between the joint venture and an existing waste wood collection joint venture of one of the parties, and an obligation not to acquire further undertakings with activities in waste wood collection or recycling until the end of 2029.

### *Wienerberger / Terreal*

On 13 June 2023, the Cartel Court cleared the acquisition by Wienerberger of Terral in Phase II subject to commitments (BWB/Z-8156 – *Wienerberger / Terreal*). The transaction concerned roofing tiles.

The AFCA and the Federal Cartel Attorney concluded that the transaction would lead to horizontal concerns in light of the parties' combined share of nearly 90% on the Austrian market for roofing tiles in a highly concentrated market.

The Cartel Court cleared the transaction subject to a commitment by Wienerberger to divest the Austrian and Eastern European tiles business of the target to an independent acquirer and a commitment to install new tiles production capacity in a divested production plant in Hungary to enable that plant to supply roofing tiles also to the Austrian market. The divestiture commitment was combined with an obligation to continue supplying the divestment business with roofing tiles for a transitory period of 3 years (extendable twice by 1 year).

### *Dr. Oetker / Galileo Lebensmittel*

On 17 July 2023, the acquisition by Dr. Oetker of Galileo Lebensmittel was cleared in Phase I subject to remedies (BWB/Z-6288 – *Dr. August Oetker Nahrungsmittel / Galileo Lebensmittel*). Dr. Oetker and Galileo are two German producers of frozen food products including frozen pizzas. While Dr. Oetker produces frozen pizzas of all sizes, Galileo produces primarily mini pizzas and other frozen snack products.

Based on an in-depth market investigation in Phase I, the AFCA concluded that the acquisition would not reduce competitive pressure on Dr. Oetker and that Austrian customers would continue to have sufficient alternatives to the type of frozen snacks produced by the target. The Federal Cartel Attorney, in contrast, identified competitive concerns in relation to the supply of white-label frozen food products by the target to supermarkets.

To address these concerns, Dr. Oetker agreed to continue the target's white-label supply of frozen food products in Austria for a period of 4 years subject to a gradual decrease of the annual supply volumes.

### *Rewe and Billa*

On 30 November 2023, the Cartel Appeals Court confirmed that the conclusion of a long-term lease agreement for retail surface in a shopping mall can constitute a notifiable concentration in circumstances where another company had until recently operated a supermarket on essentially the same retail surface and the new lessor would continue to operate a supermarket on the same retail surface (Case 16 Ok 4/23h – *Rewe and Billa*).

Rewe, the operator of one of Austria's largest supermarket chains, entered into a 15-year lease agreement for retail surface in an existing shopping mall. That same retail space had been used until several months prior to the conclusion of this lease agreement by the company that previously owned the shopping mall. This company sold the property to a real estate development company, which closed the mall for several months to renovate it. Following the renovation works, the real estate development company entered into the long-term lease agreement with Rewe.

Rewe did not notify the conclusion of the lease agreement as a concentration under Austrian merger control rules to the AFCA, despite having consulted with the AFCA whether a similar transaction structure could potentially constitute a notifiable concentration (which the AFCA had confirmed). Following the conclusion of the lease agreement, the AFCA initiated infringement proceedings against Rewe and requested the Cartel Court to impose a fine on Rewe for having violated the Austrian standstill obligation.

The Cartel Court agreed that the lease agreement should have been notified as a concentration because Rewe, in effect, took over the market position of the supermarket that had previously been operated on the same surface. According to the Cartel Court, both the shopping mall and the previous supermarket had an established market presence. This market presence had not vanished during the time the mall was closed due to the renovation works, given that the period during which the mall was closed was less than a year. The Cartel Court considered it reasonable to expect that the previous supermarket's customer base would not have disappeared during this relatively short period during which the mall was closed. The Cartel Court however declined to impose a fine on Rewe for the violation of the standstill obligation because it considered Rewe to have acted with a low degree of negligence in light of the absence of Austrian case law involving comparable facts.

The AFCA appealed the Cartel Court's decision not to impose a fine. The Cartel Appeals Court confirmed the Cartel Court's ruling that the lease agreement constituted a notifiable concentration and agreed with the AFCA that a fine should have been imposed on Rewe. According to the Cartel Appeals Court, following the consultation on jurisdiction with the AFCA, Rewe should have known that the lease agreement likely was a notifiable concentration as the AFCA had confirmed

to Rewe that a similar transaction structure would have been a notifiable concentration. The Cartel Appeals Court however did not itself impose a fine on Rewe but referred the case back to the Cartel Court requesting it to impose an appropriate fine on Rewe.

## Sector Inquiries

### Grocery Retail Sector Inquiry

On 3 November 2023, the AFCA published its [report](#) on its [sector inquiry into the grocery / food retail sector](#). The AFCA had initiated this inquiry in October 2022 with a view to assessing the competitiveness of the grocery / food retail sector across a broad range of grocery products against the backdrop of increasing price levels and high levels of inflation in 2022 and 2023.

While the sector inquiry confirmed that the Austrian grocery / food retail is highly concentrated, it did not find evidence that this high degree of market concentration was the cause for the rise of grocery / food price levels in the recent past. The inquiry however did find evidence that the large supermarket chains likely engaged in unfair trading practices *vis-à-vis* certain suppliers:

- The Austrian grocery / food retail is highly concentrated, i.e., the four largest supermarket chains together account for more than 90% of the total grocery / food retail segment.
- This high level of market concentration was however not the reason for the rise of food / grocery products prices in the past 2-3 years: The supermarket chains were not able to increase their overall profit margins between 2021 and 2023, although profit margins in individual product categories fluctuated significantly in this period.
- The large supermarket chains have significant bargaining power *vis-à-vis* to their suppliers, except large international manufacturers of branded packaged food products. According to the report, prices of non-fresh food products supplied by international manufacturers tend to be higher in Austria than in neighbouring countries (notably Germany) and international manufacturers' earnings margins are around 2x as high as the earnings margins of national manufacturers of non-fresh food products.
- Several suppliers of the large supermarket chains had been subject to potentially unfair trading practices by the supermarket chains, including unilateral amendments of supply contracts or requests for financial contributions unrelated to their supply of agricultural and food products. The AFCA intends to investigate and prosecute such unfair trading practices as an enforcement priority under the Austrian Fair Trading Practices Act, which implements [Directive \(EU\) 2019/633](#) on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

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[1] Following a request for amendment by the Federal Competition Authority to the Cartel Appeals Court based on the suspicion that Strabag had not fully disclosed all relevant facts during the initial proceedings before the Federal Competition Authority and the Cartel Court, the Cartel Appeals Court referred the case back to the Cartel Court for the Cartel Court to reimpose an appropriate fine; see Case 16 Ok 8/22w, decision of 25 May 2023. These referral proceedings are

pending (as of December 2023).

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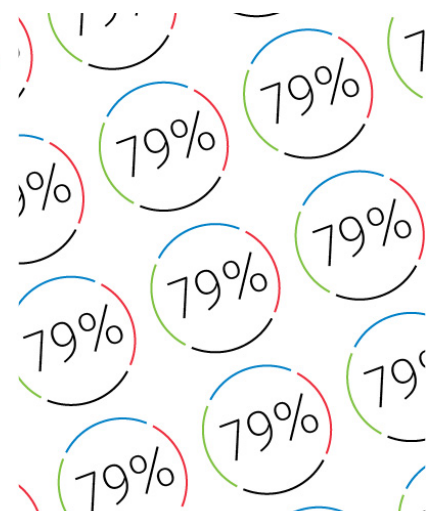
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