

**Questions for National Reporters of LIDC Torino 2014****Question A  
AUSTRIA**

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**Question A**

**The consistency and compatibility of transactional resolutions of antitrust proceedings (such as settlement processes, leniencies, transactions, commitments, and amicable agreements) with the due process and fundamental rights of the parties**

**1. Introduction**

In the following, the term „transactional resolutions“ covers settlement processes, leniency, transactions, commitments and other types of transactional resolution (cf., Question A).

As to *merger control law*, transactional resolutions are included in the Austrian Cartel Act (“Kartellgesetz 2005 in der gültigen Form”, “Austrian Cartel Act 2005 as amended”, “Cartel Act”). They are in use for many years in order to early terminate notification proceedings in phase II at the Cartel Court or (with commitments) in phase I.<sup>1</sup>

With regard to *antitrust law*, neither settlements as such, nor its procedures are explicitly included in the Cartel Act.

Settlements have been applied very rarely in Austria until 2012<sup>2</sup>. In 2012, the beer cartel proceedings concerning the boycott of supply to Cash&Carry by Austria’s leading breweries (Braunion, Stiegl, Ottakringer) were terminated by settlement. Since then, all (!) cartel proceedings in Austria, which lead to a fine, have been concluded by settlement. E.g., in 2013 and 2014 fines based on settlements were imposed on Rewe (EUR 20 mn), various beer producers (e.g., Rieder Beer, Schloss Eggenberg), but also dairy producers (e.g., Bergland Milch, Kärtnermilch, Emmi).

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1 BWB Z-1511, Berglandmilch eGen und Stainzer Milch, Steirische Molkerei eGen.

2 See, e.g., “Telekom”, BWB, M-222“ÖSV”, Decision of the Cartel Court, court reference 26 Kt 42/06; „OMV / Jet Fuel“, cf., press release BWB 04/2008.

Besides the focus on grocery, other sectors included the electronics sector (Philips got fined in the amount of EUR 2.9mn) and the construction industry (“insulating material”, undertakings’ identities undisclosed). All these settlements covered vertical restrictions / infringements of cartel law.

From the authorities’ side, arguments put forward in favor for settlements in cartel proceedings are as follows:

- (i) Faster termination of proceedings resulting in the authority’s conservation of its own resources,
- (ii) Reduction of proceedings (as recently confirmed by the European Commission<sup>3</sup>, concerning the number of its staff members, the Austrian Federal Competition Authority (“Bundeswettbewerbsbehörde”, “BWB”) is among the least equipped competition authorities in Europe) and
- (iii) Faster termination of the infringement itself resulting in a faster and direct benefit of the consumer (settlements usually substantially lessen the duration of the proceedings concerned). E.g., concerning the beer cartel, case handlers of the BWB explicitly refer to the advantage of the settlement to immediately cease the illegal supply boycott.<sup>4</sup>
- (iv) Occasionally, the settlement also results in a mandatory list of measures, which will be published and which is therefore capable to influence the respective industry sector as such. See, e.g., the (currently draft) guidelines with regard to vertical agreements, which have been elaborated by the BWB in connection with numerous settlements proceedings concerning vertical agreements.

From the authorities’ side, the reduction of fines based on a settlement can be *reasoned* by the parties’ cooperation with the authority. E.g., the authority may get some new facts / documents provided, which assist the authorities in investigating the undertaking’s, but also other parties’ misconduct.

These arguments of the BWB in favor for settlements partly overlap with the interests of the undertakings concerned. Such as the BWB, undertakings are interested to shorten up the proceedings in order to save time, money and resources. Furthermore, undertakings are – of course – highly interested in a settlement based reduction of the fine. Last but not least, settlement proceedings may result in less transparency (due to shortened or only summarized judgments), and less publicity.

From a practitioner’s perspective, settlements can be considered as a very useful instrument to avoid too long and expensive proceedings, especially if the infringement itself is hard core (e.g., horizontal agreements on prices) and if the facts are sufficiently proven.

However, the Cartel Court’s recent practice to base its judgments on settlements only, might not always be helpful in establishing and developing the cartel law practice in Austria. E.g., concerning vertical restrictions within the grocery sector, numerous cases have been settled. However, specific legal questions concerning vertical restraints are still open. Therefore, from a practitioner’s perspective, the decision of Spar (besides Rewe the second big grocery chain in Austria) not to settle but to challenge the allegations of the BWB at the Cartel Court, must be appreciated.

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<sup>3</sup> „Despite increases in the budget of the Austrian Federal Competition Authority, it remains significantly understaffed in comparison to the authorities of other Member States of a similar or smaller size.“ European Commission, Recommendation for a COUNCIL RECOMMENDATION on Austria’s 2014 national reform programme and delivering a Council opinion on Austria’s 2014 stability programme {2 June 2014, SWD(2014) 421 final}.

<sup>4</sup> Xeniadis / Harsdorf, Anmerkungen zum Bierkartell, OZK 2012/2, S 64 ff.

Concerning criminal law, there are binding decisions of the Austrian Supreme Court (see, e.g., 11 Os 77/04 und 13 Os 1/10m), following which settlements between defendant and prosecutor are infringing the main principles of criminal (procedure) law and are therefore prohibited.

## 2. Transactional resolution of agreements and the abuse of dominance

### 2.1. Overview of transactional procedures

In Austria, transactional agreements encompass negotiated settlements, commitments based on settlements and leniencies. Settlements are available for both, cartels and abuse of dominance cases. Transactional procedures may also cover a combination of different infringements.

#### 2.1.1. Settlements

##### 2.1.1.1. Legal background

In legal literature it is disputed whether the possibility of court settlements in cartel procedures is backed up by the provisions of the Cartel Act (“Kartellgesetz 2005 as amended”, “Cartel Act”). In the Cartel Act itself, Sect. 34 Sect. 1 lists “court settlements” as executory titles and Sect. 56 states that court settlements are not subject to court fees.<sup>5</sup> Beyond that, the Austrian Cartel Act provides no general or outreaching provision.

As a consequence, critics at least request guidelines published by the BWB (comparable to the guidelines published by the BWB concerning leniency procedures).

However, as outlined below, the flexibility concerning rules and details of a settlement also creates advantages for the undertakings’ side. E.g., the mentioned fact that settlement talks can be initiated at any time during but also before the proceedings at the Cartel Court, may be of course also in the interest of undertakings. Also the German Bundeskartellamt seems to be in favor for some flexibility in the settlement procedure in order to enable more successful negotiations on settlements.<sup>6</sup>

Based on this legal uncertainty, one main argument against settlements is that fines imposed by the Cartel Court reflect the exclusive power of the state to sanction infringements. Following this view, this legal power cannot be substituted by an agreement between the undertaking concerned and the BWB.<sup>7</sup> Other legal commendatory, which is in favour for settlements, refers to the general provisions of Sect. 30 Cartel Act (stating that cooperation of undertakings can be reflected in the amount of the fine) and Sect. 39 (4) Austrian Non-Contentious Proceedings Act (“Außerstreitgesetz”, “AußStrG”), following which a judgement can be without cause in case the parties concerned agree on the outcome (the Non-Contentious Proceedings Act being the general procedural law also for cartel proceedings).<sup>8</sup>

##### 2.1.1.2. Discretion

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<sup>5</sup> Solé, Das Verfahren vor dem Kartellgericht, Wien 2006, marginal no 271, Thyri, Kartellrechtvollzug in Österreich, Wien 2007, pt 439.

<sup>6</sup> Cf., Polley/Heinz, Settlements bei der Europäischen Kommission und beim Bundeskartellamt, Ein Vergleich, WuW 2012, 14.

<sup>7</sup> Kodek, Vergleichsabschluss im Kartellverfahren durch die Amtsparteien in Bundeswettbewerbsbehörde, Jahrbuch Kartellrecht 2011, S 27 ff.

<sup>8</sup> Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012 / 3, p 83.

Concerning Austrian Cartel law practice, settlements cannot be considered as binding agreements in a strict legal sense, but can be summarized as a factual coordination in order to terminate cartel proceedings. Both, the authorities and the undertakings concerned have full discretion in their respective decision whether to start (but also to revoke) settlement talks. Therefore, both sides can take the initiative to propose settlements (while, of course, leniency applications (at least applicants for full immunity) are, by their nature, submitted by initiative of the undertaking only).

The same applies to the preparation of documents which are elaborated in the due course of the settlement, e.g. the acknowledgement (for details, see below). There are no rules settled, therefore, based on the circumstances on the case, it might be that the parties to the settlement negotiate on the wording of these briefs or that the authority submits the first or even final draft.

### 2.1.1.3. Procedure in a nutshell

Based on the authorities' practice, the main criteria for settlements can be summarized as follows:

The BWB is one of the two "official parties" (besides the Federal Cartel Prosecutor, "Bundeskartellanwalt", "FCP"), which can exclusively apply for the imposition of a fine. Therefore the settlements must be made between the undertakings concerned and the responsible official party (depending on the case, this can be either the BWB or the FCP, or both of them).

Due to its nature of settlements, there are, at least upfront, no limits concerning the issues which can be negotiated and settled. I.e., in theory, there might be also cases in which the official parties are ready to reduce or abandon some objections (e.g., based on (missing) evidence) in exchange of the acceptance of infringement or a change of behaviour in relation to another conduct. Following critics, such limitation is not covered by law, in their view, the BWB must base its request for fine (and therefore also settlement negotiations) always on the entire facts.<sup>9</sup>

In case several companies which participated in a cartel are willing to settle, the BWB usually (but not always) holds separate talks. The BWB hereby mostly follows requests by the undertakings concerned which are concerned about their business secrets (e.g., turnover, customers etc). Dealing with several undertakings in the same case, the BWB should base its settlements on comparable criteria, e.g., in relation to period of time of infringement, relevant products or similar percentage of reduction when calculating the starting amount of the fine.<sup>10</sup>

Besides discussing the legal assessment (e.g., concerning gravity and the duration of the infringement), one main issue of the settlement negotiation usually concerns the amount of fine to be imposed (as mentioned, in Austria the official parties are exclusively entitled to request for a fine; the Cartel Court must not impose a higher amount of fine as requested).<sup>11</sup>

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<sup>9</sup> Kodek, Absprachen im Kartellverfahren, ÖJZ 2014/443, 448.

<sup>10</sup> Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012, 83, page 92.

<sup>11</sup> In principle, settlements may take place without the official parties initiating proceedings at the Cartel Court. E.g., an undertaking could agree in commitments, while the official parties refrain from initiating proceedings at the Cartel Court. However, if the settlements include also a certain amount of fine or binding commitments, proceedings must be always initiated at the Cartel Court, as the latter is the only authority which is entitled to decide on a case (especially impose a fine).

Following articles also written by case handlers of the BWB, the reduction of fine should be essentially smaller than the reductions of fine offered to leniency applicants (irrespective of the fact that a accumulation of both, reductions based on leniency and settlement, should be possible<sup>12</sup>). Following this legal literature, the maximum percentage of reduction should be not more than 20%<sup>13</sup> compared to a regular calculation of the fine. However, again, as settlements must always be assessed on the facts on the case concerned, there might be and have been also situations, where the reduction of the fine agreed on might be above but – of course – also below this percentage. E.g., a reduction of more than 20% may be justified if the settlement negotiations focus on a certain specific infringement (amongst others) or a specific period of time only.<sup>14</sup>

It is not clear, whether the BWB is formally obliged to present any kind of statement of objections. However, in practice, the BWB usually presents their preliminary assessment and provides (at least limited) access to key documents (cf. 2.2.2. in detail).

Based on the negotiations (and, mostly, some kind of statement of objection), one main criterion is the *acknowledgement* of the undertaking, in which an infringement of competition law is confirmed. Depending on the circumstances of the case and the negotiations with the authority, the acknowledgment usually encompasses the undertaking's confirmation of the facts and its confession of an infringement (based on the case, liability might be additionally issued). In certain circumstances (especially, if it is unclear whether a behaviour can be classified as an infringement of cartel law<sup>15</sup>) it may be that the BWB and the undertakings agree in commitments only (i.e., without acknowledging an infringement).

After the official parties have reached a common understanding with the undertakings concerned on possible terms and conditions of the settlement (also with regard to a possible amount of fine to be requested), the authority then submits the facts, its evidence and legal assessment in a brief which it submits to the Cartel Court. The brief usually also includes an application for a certain (settled) amount of a fine. As part of the settlement, the undertakings do not challenge, but acknowledge this brief.

The Cartel Court, which cannot initiate proceedings on his own and which cannot impose fines which are higher than requested by the official parties, will examine in a next step whether the undertakings agreed on the settlement voluntarily and whether they were able to assess the chances and risks of a settlement. It is disputed, in which detail and in which amount of independence the Cartel Court must also assess the respective facts and legal assessment as presented in the settlement.<sup>16</sup> Following various commentaries, at least if the Cartel Court does not accept the settled facts as being complete or fully true, own investigations must be initiated.<sup>17</sup>

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12 Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012 / 3, p 92.

13 Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012 / 3, p 91.

14 Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012 / 3, p 92.

15 However, it is doubted, whether in this case settlements should be even possible; cf, Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012 / 3, p 92.

16 Krenn, Verpflichtungszusagen und Transparenz, Eine Replik auf ÖZI 2012, 206, ÖZK 2013/2, p 58, 60.

17 Kodek, Absprachen im Kartellverfahren, ÖJZ 2014/443, 449.

In the (mostly) following oral hearing, which in general is open for the public, the authority then refers to its request for fine and the party does not challenge this request; this may be also done in written form). Additionally, the right to appeal may be waived either from the undertaking concerned or from both sides. The Cartel Court then delivers the judgment.

#### 2.1.1.4. Publication of settlements

In the past, judgments based on a settlement accompanied by a waiver to appeal occasionally consisted of the verdict only, i.e. no reasons were included. This was based on Sect 39 (4) Austrian Non-Contentious Proceedings Act, following which a judgment does not have to be reasoned if it follows the requests / will of all parties concerned or if it is delivered orally and all parties concerned waive their right to appeal the decision.

Though, following sources close to the Cartel Court<sup>18</sup>, the latter will - although not obliged by law - in future refrain from adopting shortened judgements based on Sect 39 (4) Austrian Non-Contentious Proceedings Act (also based on essential critics, e.g., by the Austrian Chamber of Labour, that unreasoned judgements substantially restrict possible private follow on proceedings).<sup>19</sup>

Additionally, based on the reform of the cartel act in 2013, decisions on cartels, which have been initiated after 28 February 2013 must be summarized and published in the so called “Ediktsdatei” / Ediktsdatabase<sup>20</sup>. In the publication itself, the protection of business secrets must be respected. In practice, the Cartel Court sends its written judgement to the parties concerned, which then indicate which parts of the decision should be non-disclosed. If the Cartel Court does not follow the parties’ arguments in this regard, the parties may appeal to the Cartel Supreme Court.<sup>21</sup>

Though, judgments based on a settlement (and therefore on the request of fine of the official parties only) will not be that detailed as a judgment, which is based on several oral hearings and briefs, which must outweigh different arguments and which might be challenged on appeal at the Cartel Supreme Court as court of second instance (in Austria, there are only two court instances with regard to cartel law proceedings).

#### 2.1.1.5. Point in time of settlement?

With regard to the earliest point of time to settle, the authorities should be convinced “that there is an infringement of cartel law, based on which proceedings have to be initiated”. On the other side, undertakes should be “enabled to examine whether the official parties’ allegations are founded”, e.g., by receiving a statement of the authority or based on the documents of a dawn raid.<sup>22</sup>

In general, the official parties (which are, as mentioned, the exclusive parties, to request an imposition of a fine) can withdraw their request until the decision of the Cartel Court. In second and last instance, such a withdrawal of the request on fine is only possible if the other parties to the proceedings agree.

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18 Kodek, Absprachen im Kartellverfahren, ÖJZ 2014/443, 450.

19 Cf., 16Ok14/13, decision of the Cartel Supreme Court of 27 January 2014.

20 [www.edikte.justiz.gv.at](http://www.edikte.justiz.gv.at).

21 Cf., 16Ok14/13, decision of the Cartel Supreme Court of 27 January 2014.

22 Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012 / 3, p 90.

Therefore, in fact a settlement (which is based on the parties' agreement anyway), can be made until the Supreme Cartel Court rules (cf, Sect 36 (5) Cartel Act).

### 2.1.2. Commitments

Besides a factual coordination in order to terminate the cartel proceedings settlement negotiations can also encompass commitments.

This may, but does not have to be based on Sect 27 Cartel Act decisions. This latter statute stipulates that in case of a cease and desist order (cf, Sect 26 Cartel Act), the cartel court may declare commitments of undertakings concerned and associations of undertakings binding if it is expected that these commitments preclude future infringements. As a consequence, the proceeding will be closed. However a settlement might but is not necessary the basis for an application of Art 27 Cartel Act. The court can declare commitments binding also if the official parties (or the undertakings concerned) do not agree. I.e., the cartel court may decide on its own (often after consultation of experts) on commitments proposed by the undertakings concerned or the official parties.

It is disputed, whether the Cartel Court must ascertain an infringement before declaring commitments binding<sup>23</sup>

In general, commitments can contain behavioural measures as well as structural measures. Measures may involve, e.g., a limitation of information exchange necessary for the operation of a joint venture or a limitation on third party access,<sup>24</sup> the divesture of certain shares<sup>25</sup> or e.g., a re-launch of a non-discriminatory and transparent tender procedures for pay-tv rights, radio rights and rights for highlight reports on skiing events.<sup>26</sup>

So far, the BWB is also ambivalent with regard to its publication practice concerning commitments: While in some cases the commitments are published (see, e.g., the proceedings against the Austrian Skiing Federation), they are not disclosed in other, essential proceedings (cf., with regard to Constantin and its movie distribution<sup>27</sup>).

### 2.1.3. Leniency

#### 2.1.3.1. Leniency established by Law

Contrary to settlements, leniency is established in Austrian Competition law itself and established in Austrian practice.

Article 11 Sect. 3 of the Austrian Competition Act ("Wettbewerbsgesetz", "Competition Act") stipulates that the BWB can refrain from applying for a fine against companies which:

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23 Cf., e.g., Reidlinger, Hartung, Das österreichische Kartellrecht, p 219.

24 Cartel court, reference no 25 Kt 41/06, 15 July 2009.

25 See OMV's commitment concerning its share in FSH, a company in charge of aviation-refueling at the Vienna airport.

26 Cartel court, reference no 26 Kt 42/06, 18 February 2008.

27 Cartel Court 9.5.2011, 26 Kr 2/08, Constantin Film.

- (i) provide to the BWB information and evidence allowing the BWB to initiate a search warrant or – provided that the BWB already disposes of enough information to do so – submit information which is sufficient to initiate a request for fine procedure at the Cartel Court;
- (ii) ended its involvement in the alleged cartel (violations of Article 101 Sect. 1 TFEU or Article 1 Sect. 1 of the Austrian Cartel Act);
- (iii) cooperate with the BWB in order to fully clarify the facts of the case and supply all evidence available to them; and
- (iv) have not coerced other undertakings to join the cartel.

The BWB has elaborated recently updated<sup>28</sup> leniency guidelines where it provides details as regards the authority's approach and the procedure to qualify for leniency.

Leniency applicants have to cooperate fully, seriously, truthfully and promptly throughout the entire procedure. This obligation encompasses the presentation of all documents held by the company and information otherwise available. Moreover, the company has to issue detailed written information on other participants including purpose, functionality and activities up to description of individual anti-competitive meetings.

Since time is on the essence in case of leniency, companies may obtain a marker whereby the company has to submit supplementary information on the infringement within eight weeks. In the event of a network case where the European Commission is particularly well-placed to deal with the case<sup>29</sup> and where the company intends to apply or has already applied for leniency to the European Commission, the BWB may assign a summary application marker.<sup>30</sup>

Since the BWB only grants full immunity to the first leniency applicant, companies need to act quickly. Subsequent applicants may only obtain reductions if they provide information and evidence that have significant additional value. In this connection, the BWB provides for a fixed spectrum of possible reductions.<sup>31</sup> Once the BWB submitted a request for a fine at the Cartel Court, leniency applications are in general rejected,<sup>32</sup> however cooperation can be considered as a mitigating factor.

#### 2.1.4. Leniency vs / and Settlements

Leniency and settlements may be applied in parallel, as, e.g., also a leniency applicant may settle with the authority regarding the assessment of the facts and legal consequences in the proceedings at the

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28 Handbuch der Bundeswettbewerbsbehörde zur Anwendung des Sect. 11 Abs 3 bis 6 WettbG (Kronzeugenregelung), April 2014,

[www.bwb.gv.at/SiteCollectionDocuments/Leniency%20Handbuch%202014.pdf](http://www.bwb.gv.at/SiteCollectionDocuments/Leniency%20Handbuch%202014.pdf).

29 Commission notice on cooperation within the network of competition authorities, Official Journal C 2004/101, pt 14.

30 Handbuch der Bundeswettbewerbsbehörde zur Anwendung des Sect. 11 Abs 3 bis 6 WettbG, Kronzeugenregelung, April 2014, ("Leniency Handbook") pt 38.

31 Leniency Handbook, pt 25: 30-50% for the first company that fulfils the conditions of Sect. 11 para. 4 (iii) and (iv) of the Austrian Competition Act, 20-30% for the second company, up to 20% for every further company. Provided that the significant value of supplementary information is exceptionally strong the BWB may grant further reductions of the fine in individual cases.

32 Leniency Handbook, para 30.

Cartel Court. So far, there seems to be at least one published case, where leniency and settlement has been combined.<sup>33</sup> As mentioned above, legal commentary supports this view.<sup>34</sup>

However, the preconditions for application are quite contrary. While the early time factor concerning leniency applications is quite essential, settlements should be best agreed only in case that the facts “have been investigated and clarified” and only after the undertakings concerned had the chance to assess “chances and risks” of the settlement.<sup>35</sup> In some cases, such assessment might be only possible after the BWB has initiated proceedings at the Cartel Court (by submitting a reasoned request for fine), while a leniency application must be submitted before this point of time. In practice, the BWB often initiates settlement talks before proceedings have been initiated before the Cartel Court.

Following critics, the BWB’s far-reaching practice in settlement might adversely affect leniency applications, which apply for a reduction (not immunity) of the fine.<sup>36</sup> However, based on the BWB’s experiences, it seems that in practice an increase in settlements also results in an increase of leniency applications applying for reductions of fine, especially with regard to SME-companies.

Still, some guidance / guidelines by the BWB with regard to details of settlement proceedings would be appreciated. Such guidance would enable undertakings to have more certainty to know whether and which transactional instrument (settlement / leniency application) can be applied at a certain stage of the proceedings and which range of benefits can be expected. Such guidelines should also refer to the fact that while in leniency proceedings the authorities’ interest also includes information of infringements of other undertakings, settlements should focus on the involvement of the undertaking concerned.

Therefore, in the author’s view, leniency and settlement do not compete, but do complete each other. The transactional instruments of settlement and leniency might be helpful for both, authorities and undertakings concerned. However, each instrument is based on different preconditions.

## 2.2. Fundamental and procedural rights of the parties

As outlined above, there are shared powers in Austrian cartel law enforcement: On the one side there are the official parties, which are exclusively entitled to initiate public enforcement procedures. On the other side, it is only the Cartel Court which can impose fines (however not higher as requested by the BWB and/or FCP).

Therefore the authorities’ position can be compared to the position of a prosecutor in criminal law proceedings. Concerning the official parties’ request for a fine, the newly introduced Sect 36a Cartel Act sets certain minimum criteria for such a request (e.g., identity of undertakings concerned, details and facts of the authorities’ allegations and examination, etc). However, these standards are very basic and undefined.

Furthermore, as mentioned, the proceedings in cartel law matters are subject to the Austrian Non-Contentious Proceedings Act. This act strictly follows the inquisitorial principle, following which the

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33 Brauunion was leniency applicant and party of the settlement in the Austrian Beer / Cash&Carry Cartel (see, e.g., <http://www.nachrichten.at/nachrichten/wirtschaft/Bierkartell-Kronzeuge-Brau-Union-kooperiert-mit-Wettbewerbshuetern;art15,657878>).

34 Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012 / 3.

35 Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012 / 3, p 91.

36 Kodek, Absprachen im Kartellverfahren, ÖJZ 2014/443, 450.

Court itself is obliged to investigate the essential facts of a case (cf, 13 and Sect 16 Austrian Non-Contentious Proceedings Act). Therefore, even an indefinite request without disclosing any evidence or conclusions must be accepted in general.<sup>37</sup> Last but not least, Sect 41 Cartel Act grants compensation of expenses only, if the authorities acted willfully. A strict approach by the Cartel Court in this regard excludes such compensation in practice.<sup>38</sup>

Concerning the level of fine requested the official parties mainly follow the Commission's guidelines of the method of setting fines (2006/C 210/02, "Commission's guidelines") also in cases which only affect Austrian Cartel law. This is accepted by the Cartel Supreme Court,<sup>39</sup> However, the latter repetitively argued that the fining system of the EU is not 100% congruent with the fining principles of national cartel law. Therefore, the Commission's guidelines and the decisions of the Commission which are based on these guidelines can be only applied in national proceedings to the extent that the respective legal norms and valuations can be compared (see, e.g., 16 Ok 5/10). Hence, the authorities may also follow their own approach<sup>40</sup>.

Concerning the undertaking's advantages in agreeing to settlements, reference is made to Sect 1 of this report. Companies which decide to continue are confronted with uncertainty regarding time, costs and outcome of the case. However, it might be of course also that the Cartel Court at the end entirely rejects the request of the authority.

#### 2.2.1. Right against self-incrimination and presumption of innocence

The so-called *nemo tenetur* principle or the right against self-incrimination is constitutionally enshrined in Article 90 Sect. 2 Federal Constitutional Law ("Bundesverfassungsgesetz", "B-VG") with regard to criminal procedures. It can be also derived from Article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Austrian jurisdiction has expanded this principle also for administrative penal proceedings<sup>41</sup>.

So far, the Cartel Supreme Court (see, e.g., 16 Ok 5/10) always avoided to clarify whether the abstract threatening of a fine according to Sect 29 Cartel Act results in a direct application of Art 6 ECMR, which (only) covers criminal fines. The Austrian Cartel Supreme Court follows the ECJ's approach that certain legal clauses of the ECMR do apply in cartel proceedings:<sup>42</sup>

The investigations rights of the BWB as stated in the Competition Act do not affect this right of self-incrimination. The Austrian Cartel Supreme Court, in referring to EU law, confirmed in this regard that undertakings are required to respond to such request for information as long as undertakings concerned would not be compelled to provide answers which might involve an admission on its part of the existence of an infringement.<sup>43</sup>

37 Cf Sole, Das Verfahren vor dem Kartellgericht, para 128 subseq.

38 Decision of the Cartel Supreme Court of 17 October 2005, 16 Ok 44/05.

39 Cf, Decision of the Cartel Supreme Court of 8 October 2008, 16 Ok 5/08.

40 Decision of the Cartel Supreme Court of 12 September 2007, 16 Ok 4/07.

41 Xeniadis / Kühnert, Ermittlungsverfahren vor der Bundeswettbewerbsbehörde – Vernehmung von Beteiligten und Zeugen durch die BWB, ÖZK 2011/5, page 174; VfSlg 15.600/1999.

42 See, e.g., Art 6 para 2 ECMR with regard to its principle of presumption of innocence (see 5 Ob 154/07v).

43 Decision of the Cartel Supreme Court of 11 October 2006, 16Ok7/06.

Also with regard to settlements, legal commentary's view is that settlement proceedings are in line with the standards of parties' rights as set by Art 6 ECMR, as long as settlements are based on a voluntary decision (also based on the fact, that undertakings in general are defended and advised by specialised lawyers).<sup>44</sup>

In case the settlement negotiations failed, the question, whether the authorities can make use of documents, statements, etc, which companies made or submitted during the settlement, has not been issued in decisions of the Cartel Court so far (at least to the author's knowledge). However, it is assumed that the statement of the company, the acknowledgement of the infringement and the later contradiction of the statement are subject to the free appraisal of the evidence by the Cartel Court<sup>45</sup>. Though, the undertakings will be most likely aware of this risk and therefore only provide documents in case they are sure to settle. Last, also in a succeeding proceeding, cooperation might be considered as a mitigating factor.

In settlements, there is no general obligation for parties in submitting all relevant documents or evidence which might be of interest for the authority. In contrary, a company applying for a leniency program has a formal obligation in submitting actively all kind of documents or evidence that could prove their participation in a competition law infringement as well as the participation of other companies.

The reason for the different approach between settlements and leniency can be summarized as follows (quote referring to the Commission's approach; however the same applies to Austrian competition law practice):

*“Under the leniency notice, companies involved in cartels are rewarded for disclosing the existence of the cartel to the Commission and for providing evidence to it. Under the settlement notice, companies are rewarded for procedural efficiencies in the administrative stage.”*<sup>46</sup>

#### 2.2.2. Right of the parties to know the case against them (statement of objections)

In general, if the authorities intend to initiate proceedings at the Cartel Court (including requests for fine<sup>47</sup>.) and if their investigations are based on tools of investigations as stated in Sect 11, 11a and 12 Competition Act (i.e., e.g., request for information, dawn raids<sup>48</sup>, but also leniency), the undertakings concerned do have the right to be informed and to be heard (Sect 13 Competition Act).

Besides this rather general approach, no specific rule defining the right of an undertaking to get informed about investigations exists. Especially a concept comparable to a formal statement of objection is missing.

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44 Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012 / 3, p 89.

45 Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, page 93.

46 Flavio Laina, and Elina Laurinen, The EU Cartel Settlement Procedure: Current Status and Challenges, Journal of European Competition Law & Practice Advance Access published July 5, 2013, p 9.

47 Brugger, Kein rechtliches Gehör vor einem Geldbußenantrag der BWB?, eolex 2008, 648.

48 Concerning dawn raids, the company will get knowledge of the case against them based on the search warrant and after examination of the documents.

Concerning settlements, it is disputed whether the BWB is obliged to give the concerned company in a settlement procedure an overview with regard to allegations, evidence and legal conclusions. Legal commentary suggests that the BWB should provide such an overview / summary of allegations.<sup>49</sup> However, in practice, the BWB is mostly willing to provide or present their preliminary assessment and (at least limited) access to key documents.

Concerning *predictability*:

With regard to leniency applications there is always the risk that the applicant is not the first submitting information and evidence or that the information provided has not the additional value for a reduction of the fine.

Concerning settlements, the benefits of this proceeding are not predictable up-front. However, it can be doubted, whether such predictability in settlement proceedings is necessary as the parties to the settlement negotiations can step back from the settlements anytime. As mentioned, flexibility of the concept can be also an advantage for the undertakings.

Therefore, also the *level of fine* is difficult to predict upfront. Concerning leniency, the general rules and levels of reductions (based on the “first come” but also “additional value” concept) are known upfront.

With regard to settlements, such guidance / legal framework is missing. However, since the settlement procedure depends on the consent of the parties, the parties will generally insist on that the amount of the fine is covered by the settlement agreement.

### 2.2.3. Right to be heard and access to file

Concerning rights to be heard, reference is made to 2.2.2. above. During the proceedings before the BWB (i.e., before proceedings at the Cartel Court are initiated), the company does not have access to the file. This is due to the fact that the authorities are considered as parties in the (later) proceeding at the Cartel Court and as there is no access to the files of another party<sup>50</sup>.

### 2.2.4. Right to an equal treatment

Mostly based on requests of undertakings involved (which are concerned regarding their business secrets), the BWB usually (but not always) negotiates separately. However the BWB has to make sure that the same reduction of the fine is granted in the case of a comparable conduct to provide a fair and transparent administrative behaviour by the BWB<sup>51</sup>.

Concerning its leniency program, the BWB has established its Leniency Handbook in order to ensure transparency with regard to the proceedings and the amount of the fine applied.

### 2.2.5. Right to an impartial judge

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49 Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, page 90.

50 Raschauer, Die Bundeswettbewerbsbehörde und Art 6 EMRK, ÖZW 2008, 30.

51 Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, page 92.

In the settlement / leniency proceeding, the respective official party conducts the negotiation with the undertaking concerned, whereas the Cartel Court is the exclusive authority to decide on the application of the BWB (i.e., requests for fine, but also requests concerning cease and desists orders or declaratory judgements).

#### 2.2.6. Right to trial

Depending on the respective proceedings, it might be that both, BWB (with or without the FCP) and undertakings concerned submit a waiver to appeal. However, this is not a precondition for a settlement. Therefore, appeals against decision of the Cartel Court based on settlements can be admissible. In practice, special reasons should be included to increase chances of a successful appeal, e.g., a company may appeal against its own settlement agreement if other companies have received a higher reward<sup>52</sup>.

#### 2.2.7. Ne bis in idem

The principle of ne bis in idem is a fundamental right recognized in Article 50 of the EU Charter of Fundamental Rights (“EUCFR”) as well as in Article 4, Protocol 7 to the European Convention on Human Rights and Fundamental Freedoms (“ECHR”).

According to EU law, the principle of ne bis in idem only applies, if the facts of the case, the person infringing the cartel law and the legal interest to be protected are identical and if such facts have been the subject-to a final decision, penalising or declaring the non-liability of the concerned company.<sup>53</sup> Also the Cartel Supreme Court follows this approach.<sup>54</sup>

Therefore if the settlement results in a legally binding decision of the Cartel Court, the principles of ne bis in idem can be applied on the settled decision.<sup>55</sup>

Concerning leniency, the principle of ne bis in idem does not protect a leniency applicant in front of other authorities<sup>56</sup> except cases within the ECN leniency programme. Furthermore, the leniency applicant is not protected from private damage claims.

Since 2011, natural persons acting for the (now) leniency applicant in the cartel can under certain circumstances be protected from sanctions based on the Austrian Criminal Code (“Strafgesetzbuch”, “StGB”). The same applies to the respective undertaking applying (successfully) for leniency. If

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52 See with regard to the European settlement: Scordamaglia, The new Commission settlement procedure for cartels: A critical assessment.

53 Ia Joined Cases ECJ C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P und C-219/00 P Aalborg Portland A/S, Irish Cement Ltd, Ciments français SA, Italcementi – Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA, Cementir – Cementerie del Tirreno SpA v European Commission, pt 338 .

54 Decision of the Cartel Supreme Court of 12 September 2007, 16Ok4/07.

55 See with regard to the European level: van Bockel, The ne bis in idem principle in EU law, page 109.

56 Carmeliet, How lenient is the European leniency system? An overview of current (dis)incentives to blow the whistle, page 502; Eilmansberger/Reidlinger in Thanner/Soyer/Hölzel [Hrsg], Kronzeugenprogramme [2009], page 80.

certain conditions are fulfilled, the undertaking cannot be held liable pursuant to the Austrian Act on Corporate Criminal Liability (“Verbandsverantwortlichkeitsgesetz”).<sup>57</sup>

### 2.3. Rights of third parties

In general, the question whether the BWB should concentrate on reaching legally binding judgments by the Cartel Court in order to facilitate follow-on claims for damages or should focus on their resources and therefore also accept settlements, is quite complex (also due to economic theories) and heavily discussed in Austrian legal commentary.<sup>58</sup> The main question is whether the interest of the public in reaching transactional agreements outweighs the individual interests of private parties in receiving information in relation to the infringement.<sup>59</sup>

#### 2.3.1. Right to be heard and access to file

In general, there is no right of third parties to be heard in cartel proceedings.

The main provision with regard to third party access to cartel files is regulated in Sect. 39 para 2 Cartel Act. This clause precludes third party access to court files of competition law proceedings as long as the parties to the proceedings do not agree. The Sect. intends to protect in particular leniency applicants. However, the Sect. clearly results in a conflict of interest between the parties to the cartel proceedings and third parties’ interest in effective enforcement of civil claims (stemming from competition law infringements).

In 2011, the Sect. was challenged in front of the EU Court by reference for preliminary ruling. The national proceeding which led to the reference was a follow-on proceeding of a decision of the Austrian Cartel Court imposing fines on members of a cartel in the printing chemical business.<sup>60</sup> An association representing the interests of undertakings in the printing sector, requested access to file.

The Cartel Court referred the case to the ECJ for preliminary ruling on compatibility of Sect. 39 para 2 of the Cartel Act (“full blockage”) with the “Pfleiderer”<sup>61</sup> and, therefore, EU law. In its ruling, the EU Court did not accept the strict protection of Sect 39 para 2 Cartel Act and concluded that the general provision of Sect. 39 para 2 Cartel Act jeopardises the effectiveness of the private enforcement of competition damage claims, the ECJ

The Court highlighted that a: “weighing-up is necessary because [...], any rule that is rigid, [...] providing for absolute refusal to grant [access], is liable to undermine the effective application [of] Article 101 TFEU [...]”. The Cartel Court therefore has to weigh up the public interest not to impede the effectiveness of anti-infringement (with regard to, e.g. leniency programmes) and the interest of the requesting party in obtaining access to documents in order to prepare its action for damages.

<sup>57</sup> Provided that leniency applications are successfully, Sect 209b Code of Criminal Procedure obliges the FCP to inform the prosecutor that leniency undertakings itself and their natural persons cannot be held liable on basis of criminal law.

<sup>58</sup> Kühnert, Xeniadis, Verpflichtungszusagen im System der Instrumente zur Verfahrensbeendigung —Eine Izeplik auf ÖZK 2013, 92, 93.

<sup>59</sup> Xeniadis / Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012 / 3, p 87.

<sup>60</sup> ECJ, C-536/11, Donau Chemie AG, Donauchem GmbH, DC Druck-Chemie Süd GmbH & Co KG, Brenntag Austria Holding GmbH, Brenntag CEE GmbH, ASK Chemicals GmbH, formerly Ashland-Südchemie-Kernfest GmbH, ASK Chemicals Austria GmbH, formerly Ashland Südchemie Hantos GmbH v Bundeswettbewerbsbehörde.

<sup>61</sup> ECJ C-360/09, Pfeleiderer AG v Bundeskartellamt.

Following the EU Court, non-disclosure may only be justified if there is a risk that a given document may actually undermine the public interest of the effectiveness of leniency programmes.<sup>62</sup>

However, in practice, access to the files of Austrian competition law proceedings was already granted before based on the constitutional principle of administrative assistance (Art 20 Austrian Constitution, “Bundes-Verfassungsgesetz”). Following this principle, the Cartel Supreme Court ruled that the Cartel Court is obliged to transfer the files - regardless of Sect. 39 para 2 Cartel Act<sup>63</sup> - to other administrative bodies like courts and prosecutors if requested.

E.g., in criminal law investigations, the request for access to file was made by a responsible prosecutor (the proceedings were held on employees of undertakings which participated in the elevator cartel<sup>64</sup>). After receiving the files, the prosecutor then granted access to file to all accused ones, private parties and victims of the cartel. On appeal, access was limited by not granting access to certain (very) confidential parts of the file.<sup>65</sup>

Similarly, the Cartel Court transmitted the file to a civil court where the file of the Cartel Court, after it had been included in the civil proceedings, became accessible to the parties of the civil proceeding. Again, in appeal, it was ruled that the Cartel Court, before forwarding the files to the civil court, has to examine whether business or trade secrets have to be respected.<sup>66</sup>

### 2.3.2. Right to trial

According to Article 2 Sect. 1 para 3 of the relevant Non-Contentious Proceedings Act companies only have the status of a party as far as the final decision directly affects their legally protected position. However, since cartel proceedings initiated by the official parties pursue the public interest of effective competition protection and do not serve individual interests, such a direct impact will regularly be dismissed. Therefore third parties cannot challenge transactional agreements, respectively the final decision of the Cartel Court thereon.

However, third companies in general also have the right to initiate regular cartel proceedings (with the exception of requests to impose fines), provided that they have a legal or economic interest in a final decision.

### 2.3.3. Right of equal treatment

As explained in Sect. 2.3.2 above, third parties do not obtain the status of a party in regular Cartel Court proceedings including the ones which are based on transactional resolutions. Therefore the denial of the right to trial does not constitute unequal treatment of third parties.

One interesting aspect in this regard is, that following Sect 37a (3) Cartel Act the civil court in follow on proceedings is bound to the final decision of the cartel court with regard to unlawfulness and culpability. Since third companies do not have party status in Cartel Court proceedings they might argue that this impairs their legal position in the event of follow-on damage claims.

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62 Cf. ECJ C 536/11, Bundeswettbewerbsbehörde v Donau Chemie AG and Others., [ECR = not yet published] pt 34, 48; ECJ C 360/09, Pfleiderer AG v Bundeskartellamt., ECR 2011 I-05161, pt 31

63 Decision of the Cartel Supreme Court of 22 June 2010, 16 Ok 3/10.

64 Decision of the Cartel Supreme Court of 8 October 2008, 16Ok 5/08.

65 Decision of the Higher Regional Court of Vienna, 20 Bs 381/11t.

66 Decision of the Higher Regional Court of Vienna of 10 June 2009, 8 Ra 38/09 f.

#### 2.3.4. Other issues and rights

Transactional procedures will result in legally-binding decisions of the Cartel Court. According to Sect 37a (4) Cartel Act, the expiration of the limitation period is suspended for 6 months after the decision of the Cartel Court has become final.

#### 2.3.5. Principle of legitimate expectation and of good faith

The Austrian legal order principally recognizes the principle of good faith and legitimate expectation. It is not clear how far this principle will reach in settlement proceedings. In the author's view, due to the informal character of transactional settlements it would be also counterproductive to record meetings.

It is difficult to generalize or to regulate any rules how far the authority should be limited in exerting pressure in any kind within obvious boundaries (e.g., bad faith, exchange of wrong information etc). Additionally, as in Austria it is not the authority but the Cartel Court which imposes a fine, the undertakings are free in stepping back from negotiations without fearing that the authority would impose an exaggerated fine. As mentioned, the Court is only limited in not increasing the amount of fine as requested by the authorities, however, the court may well refuse to impose a fine or reduce a fine.

#### 2.3.6. Confidentiality and publicity of the transactional solutions

The official parties do not grant any access to file in cartel infringement proceedings to third parties. Therefore all documents of settlements are confidential, at least until the proceedings at the Cartel Court are not initiated (concerning third parties' rights to access to file during the proceedings of the Cartel Court, see above, 2.3.1.).

Article 10b Sect. 2 of the Austrian Competition Act stipulates that the BWB has to announce on its website that it has filed an application to the cartel court. However, business secrets have to be considered and the BWB is free in its amount of information published. Following the law, the BWB only may publish the names of the companies concerned, a brief presentation of the nature of the alleged infringement and the relevant business sector. (concerning the BWB's duty to publish legally binding decisions of the Cartel Court based on Sect 37 Cartel Act reference is made to 2.1.1.4).

### 3. Merger Control

In Austria, mergers have to be notified to the Official Parties. If the official party do not request an in-depth examination at the Cartel Court within a waiting period of 4 weeks (on request of the notifying party, this waiting period may be extended up to 6 weeks), the notification is legally deemed to be cleared.

In phase 2, the Cartel Court must decide within 5 (or on request of the notifying party 6) months. If there is an appeal, the Cartel Supreme Court has two more months to decide on the notification. If the courts in phase II (first or second instance) do not decide within these respective periods of time, the respective court has to close the proceedings (by order) resulting in clearance of the notification.

Concerning remedies, the Austrian merger control procedure provides different ways to make them effective.

On the one hand, the Cartel Court is entitled, also without the parties' participation, to impose them on the notifying party. The Cartel Court hereby has the power to clear a merger under conditions and obligations if the initial notification would have led to a denying decision without those remedies.<sup>67</sup> However, the notifying party or the official parties can also actively propose these remedies unilaterally, i.e. without the consent of the other party.<sup>68</sup>

In the second alternative, the conditions and obligations are the outcome of negotiations between the notifying party and the official parties.<sup>69</sup> Such settlement may be "confirmed" by order of the Cartel Court (i.e., the order of the court includes the remedies as agreed on) or simply by a bilateral settlement resulting in withdrawal of the authority's request for fine (and termination of the proceedings by simple order of the court, which does not refer to the settlement / remedies as such).

Whether the Cartel Court or the official parties accept remedies, does not cause different legal effects.<sup>70</sup> Pursuant to Sect. 17 Cartel Act mergers that were cleared under conditions and obligations may be realised only accordingly. A violation leads to prohibition of the transaction in both cases, as sanctions for both violations are identical (see below).

The following chapter focuses on the second option, i.e. negotiated remedies. For this purpose it will in a first part looked on how negotiations are set up before examining the enforcement of the agreed remedies.

### 3.1. Negotiation of remedies

#### 3.1.1. Remedies submitted in the first or second phase of the procedure

##### 3.1.1.1. Phase I

If the notifying party commits itself to comply with the negotiated conditions or obligations already in phase I, the official parties refrain from a request for a phase-II examination at court.<sup>71</sup> (Only) in this case the minimum waiting period of 4 weeks (calculated from the day of submission) will not be extended.

Due to the limited 4-weeks period, remedies within phase I are more likely if the parties contact the official parties already before notification. Also in the BWB's view, such so called pre-notification talks "avoid complex and costly procedures before the Cartel Court."<sup>72</sup> If the undertakings and the official parties agree, the latter refrain from the request for phase II and the transaction gets automatically clearance after expiry of the 4 weeks waiting period.

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67 Sect. 12(3) Cartel Act.

68 Cf. Reildinger, Hartung, Das neue österreichische Kartellrecht, 2005, p. 179

69 Sect. 17(2) Cartel Act.

70 Cf. BWB, Tätigkeitsbericht 2010,

[http://www.bwb.gv.at/Fachinformationen/Taetigkeitsberichte/Documents/1530\\_BWB\\_TB\\_2010\\_HO\\_MEPAGE.pdf](http://www.bwb.gv.at/Fachinformationen/Taetigkeitsberichte/Documents/1530_BWB_TB_2010_HO_MEPAGE.pdf), viewed on 27.03.2014; cf. as well Reildinger, Hartung, Das neue österreichische Kartellrecht, 2005, p. 196.

71 See, e.g., BWB Z-1511, Berglandmilch eGen und Stainzer Milch, Steirische Molkerei eGen.

72 <http://www.en.bwb.gv.at/MERGERCONTROL/Seiten/default.aspx>, viewed on 27.03.2014.

### 3.1.1.2. Phase II

If an agreement is achieved in phase II (i.e., in the proceedings in front of the Cartel Court), the official parties withdraw their request of a phase II examination. The Cartel Court then closes the proceedings by order.

### 3.1.2. The authorities' discretion in negotiations

Given that the *pre-notification talks* as well as later discussions with the official parties do not follow formal rules, the question how to negotiate or whether to engage into negotiations at all depends to a large extent on the official parties' discretion.

With regards to the Cartel Court's empowerment to grant clearance under conditions and obligations, the provision states that the Cartel Court can take such conditional decision. Therefore a large margin of discretion remains. The court generally must observe the parties' proposals, but it may refrain from accepting them. Under certain circumstances, even an examination may be omitted, e.g., when the proposals are submitted at a very late stage of the procedure not allowing the court to examine the proposal within the period of time left.<sup>73</sup> The Cartel Supreme Court held that the Cartel Court may not impose obligations and conditions if the merger were to be cleared also without them.<sup>74</sup>

### 3.1.3. The rights of the notifying party and time constraints

Within phase I, the notifying party might contact the authority at any time (however, the official parties are not obliged to react in a certain way). The right to be heard in cartel procedures as laid down in the Competition Act Sect. 13 does not cover proceedings concerning merger control. Furthermore, the notifying party does not have a right of access to the file (as intended by the legislator<sup>75</sup>).

Within phase II, the notifying party as formal party of the procedure has the right to be heard and the right to access to the file at any stage of the proceedings in front of the court.<sup>76</sup> Entering into negotiations with the official parties or the Cartel Court itself does not affect those rights, nor does the agreement on and acceptance of remedies.

Concerning time constraints, the law itself establishes maximum periods for the authorities to act: (see above, four weeks in phase I, five months in phase II and two additional months for the Cartel Supreme Court to decide on the appeal<sup>77</sup>). The Cartel Supreme Court deduces from these provisions a general duty for efficient proceedings.<sup>78</sup>

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<sup>73</sup> Decision of the Cartel Supreme Court of 17 December 2001, 16Ok9/01.

<sup>74</sup> Decision of the Cartel Supreme Court of 15 December 1998, 16Ok15/98.

<sup>75</sup> Cf. Thyri, *Kartellrechtvollzug in Österreich*, 2007, p. 165: Sect. 11(2) WettbG that indicates applicable provisions of the general procedural law for administrative procedures ("AVG"). According to the author, the missing reference to the pertinent provision covering right of access to the file, can only be interpreted as the will of the legislator not to provide for such right in the merger control procedure.

<sup>76</sup> Sect. 38 Cartel Act. read jointly with Sect. Sect. 15 and 22AußStrG

<sup>77</sup> Sect. 14 Cartel Act.

<sup>78</sup> Decision of the Cartel Supreme Court of 23 June 1997, 16Ok12/97.

However, in practice, the official parties can well put pressure on the notifying party to agree on remedies. While the waiting period of phase I is quite limited (with the result that official parties sometimes request for a phase II proceeding for the simple fact that they were not able to examine the effects of the notification), phase II can be extended up to 9 months (including possibility to extend and deadline for appealing to second instance). Therefore parties in fact will often accept remedies, even if they are excessive (or at least above the necessary level), in order to avoid waiting too long from an economic perspective.

#### 3.1.4. The role of third parties in defining the remedies

In general, undertakings, which are legally or economically affected by the transaction notified, may submit a written brief to the official parties within the first two weeks after notification (cf., Sect. 10 para 4 Cartel Act). However, the undertaking has no right that the complaint will be considered in any way.

Also in phase II proceedings third parties may submit a written brief to the Cartel Court.<sup>79</sup> Though, the complainant does not become party of the proceedings.<sup>80</sup>

In both, phase-I and phase-II, third parties do not have access to file.

Third parties therefore cannot significantly influence the negotiations for remedies at least on basis of a legal standing.

However, pursuant to the Cartel Act, the FCA has the obligation to publish certain acts: the notification,<sup>81</sup> the request for examination<sup>82</sup> and the award of a decision clearing with conditions and obligations.<sup>83</sup>

These obligations are obviously meant to inform the public, especially interested third parties. Though, according to the Cartel Supreme Court, the Cartel Act intentionally grants only limited rights to third parties because their interests as competitors are already protected in procedures concerning the abuse of a dominant position.<sup>84</sup>

Other than affected entrepreneurs, the Austrian Chambers<sup>85</sup> and regulators of concerned economic branches may submit their written observations to the Cartel Court on legal basis.<sup>86</sup>

## 3.2. Enforcement of remedies

For enforcing remedies, the Austrian legal order stipulates private as well as public enforcement.

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79 At least following the BWB's recommended practice,  
[www.bwb.gv.at/Zusammenschlusse/Seiten/default.aspx#RechteDritter](http://www.bwb.gv.at/Zusammenschlusse/Seiten/default.aspx#RechteDritter)

80 Cf. Sect.Sect. 10(4) and 11(3) KartG, Gruber, Österreichisches Kartellrecht, 2008, p. 264 and  
<http://www.en.bwb.gv.at/MERGERCONTROL/Seiten/default.aspx>, viewed on 27.03.2014

81 Sect. 10(4) Cartel Act.

82 Sect. 11(2) Cartel Act.

83 Sect. 15 Cartel Act.

84 Decision of the Cartel Supreme Court of 1 July 2002, 16Ok2/02.

85 Labour and management representations in the form of non-territorial self-governing bodies.

86 Sect.Sect. 45 and 46 Cartel Act.

As for private enforcement, options are given in theory, practical effects remain however rather remote. As can be seen in the following, the means of public enforcement do not depend on whether the remedies had been negotiated with and accepted by the Cartel Court or the official parties.

### 3.2.1. Public enforcement

Non-compliance with remedies to transactions is put under various sanctions according to the Cartel Act. A general prohibition to put measures into effect that do not respect remedies is stated in Sect. 17(2) KartG. The same paragraph underlines expressis verbis that this principle is equally valid for remedies imposed by the court and for those agreed on with the official parties.

The Cartel Court may order the termination of the prohibition's violation.<sup>87</sup> This order can contain behavioural or structural measures, whereas preference has to be given to the behavioural ones according to the principle of proportionality.<sup>88</sup> This order can be issued on application not only by the official parties but also by regulators, the Chambers or even third parties.<sup>89</sup> Non-compliance with the order can be sanctioned with a periodic penalty payment (on application of the official parties).<sup>90</sup>

Additionally, in order to sanction a – deliberate or negligent – violation of the prohibition to put measures into effect other than according to the remedies, the Cartel Court may impose fines on the non-complying party.<sup>91</sup> It may do so only on application for a fine by the official parties.<sup>92</sup> As with regard to cartel infringement, the fine may not exceed 10% of the undertaking's total turnover in the preceding business year.

It might as well occur that a transaction is put into effect lawfully, i.e. according to all conditions and obligations, but nevertheless, need may arise for additional ex post measures in order to weaken or abolish the negative effects of the merger.<sup>93</sup> The Cartel Court may order such measures pursuant to Sect. 16 Cartel Act, exclusively on request by the official parties.<sup>94</sup> By imposing measures pursuant to Sect. 16 Cartel Act, the Cartel Court shall neutralise negative effects on competition but at the same time, it shall respect the principle of proportionality. According to the doctrine, this provision does therefore not apply in case of minor, one-time infringements.<sup>95</sup> Also the non-compliance with ex post measures can be subject to fines and periodic penalty payments.<sup>96</sup>

Interestingly, despite the fact that the provision on ex post measures aimed to substantially imitate the corresponding EU provisions,<sup>97</sup> it does not allow for the same sanctions:<sup>98</sup> Whereas on the European level non-compliance with obligations in the clearing decision can lead to withdrawal of the decision, potentially followed by a new procedure, the Cartel Court may only impose additional measures to the initial decision which remains valid.

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87 Sect. 26 Cartel Act.

88 Cf. Thyri, *Kartellrechtsvollzug in Österreich*, 2007, p. 121.

89 Sect. 36 (4) Cartel Act.

90 Sect. 35 (1) lit. a und Sect. 36 (2) Cartel Act.

91 Sect. 29 clause 1 lit. a Cartel Act.

92 Sect. 36 (2) Cartel Act.

93 Sect. 16 Cartel Act.

94 Sect. 36 (2) Cartel Act.

95 Cf. Gruber, *Österreichisches Kartellrecht*, 2008, p.294.

96 Sect. Sect. 29 para 1 lit b and 35(1) lit a Cartel Act.

97 Article 8(6) and (7) of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29/01/2004, p. 1 (EC Merger Regulation)

98 Cf. Petsche, *Urlesberger, Vartian, Kartellgesetz 2005*, 2007, p. 334.

### 3.2.2. Private enforcement

Third parties do not have the right to apply to the Cartel Court for fines or periodic penalty payments. Nevertheless, they are given two tools for private enforcement of negotiated remedies.

On the one hand, the Austrian Cartel Act explicitly obliges undertakings to compensate damage that occurred on the basis of an infringement of the prohibition of putting measures into effect contrary to conditions or obligations.<sup>99</sup> However, major practical effects of this possibility have not come up so far.<sup>100</sup>

On the other hand, the Cartel Acts declares contracts void that infringe the afore-mentioned prohibition. Also “interested” third parties may request cease and desist orders with regard to infringements of these prohibitions at the Cartel Court<sup>101</sup>. Again, the results in practice are negligible.<sup>102</sup>

Therefore, efficient enforcement of negotiated remedies remains mainly public, i.e. under the responsibility of the official parties, which request fines, periodic penalty payments and additional obligations, and the Cartel Courts, which may impose fines and order such measures.

#### ***EXECUTIVE SUMMARY ON SETTLEMENTS IN CARTEL PROCEEDINGS***

*From a practitioner’s perspective, settlements are considered to be a very useful instrument to stop infringements and to avoid too long and expensive proceedings, especially if the facts of the infringement are sufficiently proven.*

*In the author’s view, flexibility is a key request in order to guarantee a successful application of settlements. Only based on flexible criteria, the circumstances of the individual case can be adequately considered in the respective settlement.*

*However, also flexible criteria should have some framework and limits in law and practice.*

*Therefore, on the one side, it would be highly appreciated from the author’s side, if the instrument of a settlement in cartel proceedings as such would be included and confirmed in the Austrian Cartel Act itself (so far, settlements are only mentioned in the Cartel Act with regard to court fees and executory titles). An analogy to EU and German cartel law is limited as the BWB – contrary to the Commission and the German Bundeskartellamt – cannot decide on its own (but only request a fine).*

*On the other side, it would be also appreciated if the BWB publishes some soft law, e.g., guidelines. In such guidelines, guidance could be given with regard to essential questions such as the right point of time, the scope of settlements (limitation of allegations? duration?) or the possible reduction of a fine. However, again, guidance provided should acknowledge flexibility in order to reflect the special character of the respective case.*

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<sup>99</sup> Sect. 37a (1) read jointly with Sect. 29 clause 1 lit a Cartel Act.

<sup>100</sup> Cf. Reidlinger, Hartung, Das neue österreichische Kartellrecht, 2005, p. 216 f.

<sup>101</sup> Sect 26 Cartel Act in connection with 36 para 4 (4) Cartel Act.

<sup>102</sup> Cf. Reidlinger, Hartung, Das neue österreichische Kartellrecht, 2005, p. 198.

*Within the proceedings itself, it is essential – also with regard to rights of defense – that the authority presents results of its examination and allegations (following the concept of a „statement of objections“). The BWB in practice follows this approach; again, there should be flexibility with regard to the scope and details provided*