

FAQs on the AFCA's Construction Cartel Investigation

Vienna, July 2023

Imprint

Media owner, publisher and editor:

Austrian Federal Competition Authority, Radetzkystraße 2, 1030 Vienna, Austria

Design and production: Austrian Federal Competition Authority
Vienna, July 2023.

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FAQs on the AFCA's Construction Cartel Investigation

1. When did the AFCA begin this investigation?

As part of its investigations into possible agreements in the construction industry, the Austrian Federal Competition Authority (AFCA) carried out searches of business premises together with the Public Prosecutor's Office for Economic Affairs and Corruption (WKStA) in the spring of 2017, seizing large amounts of data. The cartel that was uncovered operated in the construction industry, having an impact on almost all market niches in the structural and civil engineering sector and concentrating in particular on road building.

A large number of construction projects were affected. The AFCA is still continuing its investigations into the majority of the companies involved.

During the searches, the AFCA seized more than 70,000 paper documents and 57 TB of IT data.

2. What exactly are the companies accused of?

Under the auspices of the construction cartel, agreements were concluded between the participating companies with the purpose of minimising or eliminating competition, thus allowing them to help each other win contracts and so, among other things, secure their shares of the market. In order to achieve this joint objective, prices were fixed, markets were divided up, competition-sensitive information was exchanged, for example about how future bids would be approached, and the companies formed service delivery and bidding consortiums that contravened cartel law. These constitute prohibited practices under Section 1 Cartel Act (KartG) and Article 101 Treaty on the Functioning of the European Union (TFEU).

3. How did the construction companies conclude their agreements?

The agreements dealt, among other things, with the prices to be quoted in bids and the submission of what are known as “cover bids”. When public procurement procedures are conducted under the cheapest-bidder principle, the members of a cartel will submit “cover bids” that are designed to be more expensive than the bid drawn up by the cartel member designated to win the contract. Competitors also agreed that particular rival companies should not submit a bid at all in certain tendering procedures or that a particular company should win a contract.

Such infringements of cartel law were coordinated both at meetings of rival companies and also by means of bilateral contacts. Some of the construction projects were divided up according to a fixed formula, which was based on the market shares the companies had gained in the course of their historical development and was reflected in the number of construction projects each company was to be awarded.

Depending on the nature of the specific infringement of cartel law, reciprocal favours were also demanded, which took the form of the bartering of services, subcontracts, the supply or purchase of services at preferential conditions etc. Instead of these reciprocal favours being stipulated, points were allocated as part of a scoring system, under which “credit” points could then be redeemed by calling in reciprocal favours or “debit” points paid off by performing such favours.

Furthermore, there were also occasions when rival companies revealed the basis for their calculations to each other before submitting their bids (“internal submission”) so it could be agreed which of them should win the contract in question.

4. Relevant legislation

Austrian Federal Cartel Act (KartG)

According to Section 1 KartG, practices are prohibited that prevent or distort competition. Such practices include fixing prices and dividing up markets, geographical areas or clients.

Treaty on the Functioning of the European Union (TFEU)

Pursuant to Article 101 TFEU, all practices are also prohibited that have as their object or effect the prevention or distortion of competition. Such practices include, for instance, fixing prices and dividing up clients or geographical areas. Article 101 TFEU may find application if the precondition is satisfied that these practices (potentially) affect trade between EU Member States.

Austrian Federal Criminal Code (StGB)

Agreements relating to public procurement procedures may also lead to prosecution under the Austrian Criminal Code.

Austrian Federal Public Procurement Act (BVerG)

Being a party to agreements that contravene cartel law may entail consequences under public procurement law as well.

5. Which provinces have been affected?

The offences committed have affected all parts of Austrian territory, although to varying degrees depending on the companies involved.

6. How many companies are being investigated?

It is not possible to state a precise number because the investigations are still ongoing. It is to be assumed several dozen companies will be investigated.

7. How much are the companies being fined?

Where it is found an offence has been committed, the Cartel Court may, at the application of the AFCA, impose fines not exceeding 10% of the company's total turnover in the preceding business year. The gravity and duration of the offence, the degree of the company's culpability, its economic capacity and the extent to which it has cooperated with the authorities are taken into account when such fines are set.

8. Which companies have already been fined?

Company	Fine imposed
STRABAG AG, F. Lang u. K. Menhofer Baugesellschaft m.b.H. & Co. KG (<u>27 Kt 12/21y</u>) <u>News update, 21 October 2021</u>	€45.37m
PORR Group (<u>26 Kt 5/21m</u>) <u>News update, 4 April 2022</u>	€62.35m
HABAU Hoch- und Tiefbaugesellschaft m.b.H., Held & Francke Baugesellschaft m.b.H., ÖSTU-STETTIN Hoch- und Tiefbau GmbH and STRAKA Bau GmbH <u>News update, November 2020</u> <u>News update, August 2022</u> <u>News update, December 2022</u>	€26.33m
Pittel + Brausewetter GmbH <u>News update July 2023</u>	€4.81 Mio
TOTAL fines for construction cartel	€138..86m

The AFCA filed an application with the Cartel Court in July 2022 to review the final decision against STRABAG and, if necessary, to amend it (application for amendment pursuant to §§ 72 et seq. of the Non-Contentious Proceedings Act). The Public Prosecutor's Office for Economic Affairs and Corruption (WKStA) continued with its criminal investigations and subsequently informed the AFCA of new facts – through the channels of administrative assistance – which, in the AFCA's view, made a judicial review of the final decision necessary. The Cartel Court rejected AFCA's application on the grounds that there was no legal foundation for it. The AFCA and the Federal Cartel Prosecutor appealed against this decision. In the end, the Supreme Cartel Court upheld AFCA's appeal, deciding that the case should be referred back to the Cartel Court (press release of June 2023).

9. Against which companies are judicial proceedings currently pending before the Cartel Court?

Company	Progress of judicial proceedings
Gebrüder Haider Unternehmensgruppe	<ul style="list-style-type: none"> • Appropriate fine requested by AFCA • May 2023: infringement acknowledged • Fine set at €3.51m
Swietelsky AG	<ul style="list-style-type: none"> • Leniency granted; fine consequently reduced • Fine of €27.15m requested by AFCA
Pittel + Brausewetter Gesellschaft m.b.H.	<ul style="list-style-type: none"> • Infringement acknowledged • Fine of €4.81m requested by AFCA
Kostmann GesmbH	<ul style="list-style-type: none"> • Leniency granted • Finding of infringement requested by AFCA
Hitthaller + Trixl Baugesellschaft m.b.H., PHB GmbH	<ul style="list-style-type: none"> • Infringement acknowledged • Fine of €1.36m requested by AFCA

10. Have any companies been granted leniency?

Several companies have been granted leniency. The AFCA has requested that STRABAG and Swietelsky's fines be reduced under the Leniency Programme. An application was filed with the Cartel Court in February 2023 for a finding of an infringement of cartel law to be reached against the first party granted leniency, Kostmann GesmbH. Kostmann submitted a leniency application as early as the spring of 2017 and subsequently cooperated continuously and comprehensively with the AFCA, as a result of which the company has been granted complete immunity from fines.

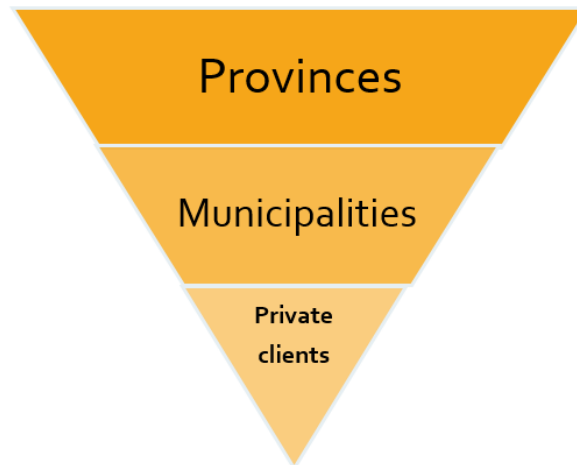
11. What kinds of construction project were affected and how much were the contracts worth?

Structural engineering	Civil engineering
<ul style="list-style-type: none">• office and residential buildings• cemeteries• barracks• power stations• prison buildings• car parks• parks• schools• etc.	<ul style="list-style-type: none">• road building• bridge building• earthworks• railway track construction and station installations• sewer construction• power line/pipeline construction• etc.

As things currently stand, the contracts for these construction projects were worth up to €61bn.

12. Who has potentially been harmed?

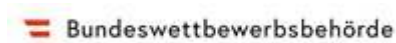
The offences committed have, in particular, affected numerous public clients, but also private clients as well. The individual parties affected can be taken from the decisions handed down by the Cartel Court (see the links in the table included in the answer to Question 8). The parties affected can be represented graphically as follows:



13. What is the value of the harm suffered?

The value of the concrete harm suffered is not quantified in proceedings before the Cartel Court. Clients have to claim compensation for the harm they have suffered by taking action through the civil courts.

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