

**Settle for less...? Or for more! Tips on timing,
confidentiality and strategy in
(multijurisdictional) settlement arrangements**

Antitrust, Commercial Fraud and Litigation Commissions

Prague 2014 – Working Session 5

General Report

General Reporters:

**Karin Graf, Wenger Plattner, Zürich, Switzerland
(Litigation)**

**Maïte Ottes, Van Doorne Advocaten, Amsterdam, The
Netherlands (Antitrust)**

**Alexander Saucken, Roxin Rechtsanwälte LLP, Düsseldorf,
Germany (Commercial Fraud)**

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1. INTRODUCTION

1.1 Overview over Working Session and General Report

It seems fair to assume that most countries have a settlement rate of more than 50% in **civil litigation** cases filed in court. Even though the legal systems differ substantially from one to another, we assume that the legal systems allowing for settlements and the tactics leading to settlements are comparable almost world-wide. Not every settlement negotiation is, however, as simple as an opening demand of hundred, a counteroffer of fifty and a “surprising” end game of settling at seventy-five. We want to look at various national provisions dealing with settlements including timing and confidentiality issues with a view to analyse and discuss whether there are uniform strategies and/or uniform boundaries in international settlement negotiations.

Also in **antitrust procedures**, settlement agreements seem to be applied ever more. Do the tactics to be used in these procedures differ from settlements in civil proceedings? Taking into account any possible follow-up civil proceedings, aspects of confidentiality, privilege and admitting guilt are of eminent importance in considering a settlement with a competition authority.

A different approach may be found in **criminal procedures**. As the criminal court is obliged to find the “truth” with regard to the accusations in place, settlement procedures aiming at a conviction agreed by the accused, the prosecutor and the court may contradict the criminal procedure’s very nature. We want to get an idea of how settlement procedures in criminal proceedings are dealt with in different jurisdictions and which restrictions may apply in order to guarantee proceedings in conformity with the constitution and maintaining the rights of the accused.

The ultimate aim of our project and our Working Session in Prague is to combine several competences. We want to create an opportunity for exchanging international best practices and lessons to be learned in the context of settlement arrangements.

1.2 National Reports

We have been able to collect the following national reports:

	Jurisdiction	Name	Email
Civil Litigation	Brazil	Ricardo Gama	ricardo.gama@veirano.com.br
		Leopoldo Pagotto	pagotto@zisplaw.com.br
	China	Yang Jun	jun.yang@jadefountain.com
	Finland	Janne Nyman	janne.nyman@susiluoto.com
	Germany	Michael Pauli	m.pauli@heuking.de
	Israel	Benjamin Leventhal	benjamin@fisher-lawfirm.com
	Spain	Montse Pujol	m.pujol@jpujoladvocats.com
	Switzerland	Jean-Rodolphe Fiechter	jean-rodolphe.fiechter@kellerhals.ch
		Joelle Berger	jberger@vischer.com
	UK	Fiona Gillett	fgillett@stewartslaw.com
US	Marcus Fruchter	fruchter@sw.com	
	Colin Delaney	crpdelaney@sgrlaw.com	
Poland	Jordan Zafirow	Jordan.Zafirow@wkb.com.pl	
Anti-Trust	Italy	Rossella Incardona	rosellaincardona@gmail.com
	Austria	Corinna Potocnik	c.potocnik@wmlaw.at
	Finland	Katriina Kuusniemi	Katriina.kuusniemi@roschier.com
	UK	Andrew Bullion	abullion@hausfeldllp.com
	Spain	Cristina Hernandez Marti	cristinahernandezmarti@gmail.com
	Japan	Takahiko Itoh	takahiko.itoh@bingham.com
	Poland	Aleksander Stawicki &	Aleksander.Stawicki@wkb.com.pl Bartosz.Turno@wkb.com.pl

		Bartosz Turno	
	France	Stephane de Navacelle Lina Mroueh Lefevre	sdenavacelle@navacellelaw.com lm@gutkes.com
Commercial Fraud	US	Marcus Fruchter Arnaldo B. Lacayo	fruchter@sw.com alacayo@astidavis.com
	UK	Jonathan Tickner	jtickner@petersandpeters.com
	Finland	Janne Nyman	Janne.nyman@susiluoto.com
	Italy	Roberto Viscomi	Roberto.viscomi@sudioviscomi.com
	Germany	Karl Sidhu	sidhu@roxin.de
	Switzerland	Grégoire Mangeat	gregoire.mangeat@eversheds.ch

We would like to thank all National Reporters who have provided the information necessary on each jurisdiction for their hard work.

2. CIVIL LITIGATION (KARIN GRAF)

2.1 General issues: Definitions, rules and guidelines, timing

2.1.1 Definitions of the term “settlement” in various jurisdictions

The starting point of our discussion was the questions as to whether or not there exists a uniform definition of the term settlement. Our review revealed that this is indeed the case. The question posed to the national reporters was the following: How do you define the term "settlement" in civil procedures?

According to the national reports, no jurisdiction actually uses a statutory definition of the term "settlement". However, despite the lack of a statutory definition, the term "settlement" is defined very similarly in most jurisdictions as an "amicable solution of a dispute reached through mutual concessions of the parties, achieved before or during lawsuit".

Several responses can be further highlighted in this context: In Finland, matters of civil procedure can generally be divided into discretionary cases (incl. all disputes stemming from contracts, business transactions and acts according to the Law of Contracts) and non-discretionary cases (mandatory, i.e. rights of an infant). Only the discretionary cases can be settled out of court. The Brazilian jurisdiction knows similar provisions, as settlements are only allowed with respect to private patrimonial rights. The Chinese report points out that there are two types of settlement which have to be distinguished, the out of court and in court settlement. Israel knows a very special form of "settlement" where the parties of a lawsuit explicitly authorize the court to determine a dispute in its free discretion, without need to justify and give reasons and in a manner non appealable.

The national report from the United States points to some characteristics of settlement agreements which are, presumably, accurate for most jurisdictions. Among these points is the observation that settlement agreements are typically contracts between the settling parties. Thus, settlement agreements are generally subject to the normal legal and statutory requirements for contracts. In the United States, strong judicial policy favors settlement because settlements simplify litigation and “conserve judicial resources” (meaning settlements save courts the work of deciding disputes that come before them). Accordingly, courts will usually uphold settlement agreements if they are entered in good faith and do not violate the law or public policy.

2.1.2 Statutory provisions dealing with settlements in the various jurisdictions

We were curious to understand the impact the written law has in various jurisdictions on the possibilities of the parties to conclude settlements in civil proceedings. The question posed to the national reporters was therefore whether there are statutory provisions dealing with settlements.

All jurisdictions from which national reports were received do have statutory provisions dealing with settlements in their Civil Codes and/or in their Civil Procedure Codes.

The main principle under Finnish law is that only discretionary cases can be settled out of court. Whether the case is discretionary or non-discretionary is determined by substantive law. The rules that apply to a settlement agreement are very similar to the ones that apply to any contract.

In the UK there are provisions which deal with and encourage settlement in the Civil Procedure Rules (CPR). Pre-action protocols provide for an early exchange of information between the parties to allow and encourage settlement before proceedings are commenced. The CPR sets out that the court should encourage and facilitate the use of alternative dispute resolution (ADR). The parties are required to file a "Directions Questionnaire" once they have filed their statements of case. They complete and exchange the questionnaires in order to provide the court with details of the claim prior to a case management conference hearing. The form also requires the parties to indicate whether they wish the court to order a one-month stay of proceedings or to assist in arranging ADR. If a party indicates in its questionnaire that it does not consider ADR to be appropriate or that is not willing to engage in ADR, it is required to provide an explanation for such refusal. Moreover, a party that without good reason fails to make meaningful attempts to settle may be sanctioned in relation to costs.

Article 842 of the Brazilian Civil Code determines the formalities the settlement must fulfill to be considered valid. A settlement agreement concluded before the filing of the lawsuit has to be in writing. Pending a lawsuit, an agreement must be concluded by public deed or must be ratified by the judge. Finally, the Brazilian Civil Code defines the instances in which the settlement can be declared null and void.

The judicial policy of the United States favors settlement because settlements simplify litigation and "conserve judicial resources" (see also 2.1.1 above). The

US courts do typically not review the terms of settlement agreements reached between parties to a dispute. For certain causes of action, including class actions and some bankruptcy proceedings, for example, settlements reached during litigation require court approval. In those instances, courts will review a proposed settlement to ensure that the parties entered it knowingly and voluntarily.

The Swiss Civil Procedure Code (CPC) knows four provisions dealing with settlements (Art. 208 CPC: course of action when a settlement is reached during the conciliation stage; Art. 241 CPC: settlements reached during the main stage of the proceedings; Art. 109 CPC: allocation of costs in the event of settlement; Art. 328 CPC: revision in case of an invalid settlement).

The German laws of procedure, on the other hand, do not explicitly deal with settlements. In court settlements are of dual nature, they terminate the pending judicial proceedings and determine the legal position of the parties at the same time. This concept is acknowledged in numerous provisions, e.g. §§ 98, 278 Paragraph 6, 794 Par. 1 Number 1 of the German Code on Procedural Law. § 779 of the German Federal Civil Code is the provision of substantive law dealing with settlements.

The Polish Civil Procedure Code (PCPC) contains several provisions dealing with settlements. Art. 917 PCPC defines the essential elements of settlement agreements and Art. 918 PCPC deals with erroneous settlements. Generally, Polish law defines two procedures for reaching a settlement: mediation and conciliation proceedings. Conciliation proceedings are short and low-cost (approximately EUR 10). There is only one court hearing and no evidence will be examined. In practice, these proceedings do not often lead to an agreement. They are mostly used to interrupt the prescription period. In Poland, mediation is understood as an ADR instrument which can be used before or during a lawsuit. A settlement agreement reached during mediation has to be validated by the court. Furthermore, the PCPC contains a number of provisions dealing with the inadmissibility of settlements.

2.1.3 Ethical rules and guidelines to be considered

Are there ethical no-goes that need to be considered when thinking of or negotiating a settlement? How far can lawyers go when acting in their clients' interests and which are the boundaries to be considered?

It appears that Germany is the only jurisdiction in which neither ethical rules nor written guidelines affect negotiation strategies in practice.

A Finnish attorney is obliged to consider the possibility of an amicable settlement of a dispute before undertaking legal action. A different behavior would be considered a breach of the code of conduct of the Finnish Bar Association. Moreover, the ethical rules of the Finnish Bar Association prohibit attorneys from using any threats to reach a settlement. Furthermore, the ethical rules of the Finnish Bar Association prohibit to mention or refer to the other party's settlement offer in the trial of the matter.

Also Switzerland knows a duty to encourage settlements wherever possible. Art. 9 of the Swiss Lawyers' customs and practice rules provides that a lawyer shall encourage amicable settlements, if it is in the interest of its client.

The Israeli law provides for a strict confidentiality of formal mediation. Beyond formal mediation it is only a matter of common practice that materials and matters raised within settlement discussions should remain confidential. Pursuant to the Israeli national report, this common practice is many times not honored by opposing parties.

In the UK, the Solicitors' Code of Conduct obliges the attorneys to act with integrity and to act in the best interests of each client when considering settlement of a claim.

The Chinese jurisdiction states that the parties of the settlement must have full knowledge of the nature of the agreement, neither party shall intentionally misrepresent the facts and neither party should be forced to enter into the settlement.

Brazilian laws restrict the direct contact between a lawyer of one party and the opposing party, provided the latter is already represented by a lawyer. This principle is also known in Switzerland.

In the US there are no special ethical rules or guidelines that only apply to settlement negotiations. Generally, the lawyer shall promptly inform the client whenever a settlement offer is received. Furthermore, a lawyer may never threaten to pursue criminal prosecution of an adverse party in order to gain leverage in settlement negotiations.

The Polish report points out that the Polish Civil Code acknowledges the doctrine of culpa in contrahendo. A party, who negotiates in violation of good faith, in particular with no intention of concluding a contract, shall be obliged to compensate the damage the other party suffered as a result of his reliance on the conclusion of the contract. In addition, an attorney shall strive for solutions minimizing the client's costs and advise amicable termination of a dispute if it is in client's interests.

2.1.4 *Timing issues*

We wondered whether, in the view of our national reporters, there is a specific point in time that is particularly suitable for settlement discussions. Not surprisingly, the answers given turned out to be quite varied. The question posed to the national reporters was the following: Is there a specific point in time in the history of a case that is particularly suitable for settlement discussions?

The national reporters agree that there is usually more than one suitable point in time for settlement discussions. The Finish report mentions that settlement discussion before the filing of a claim or during written or oral preparation of the civil dispute at a relatively early stage of the trial, are particularly promising. In the UK, settlements are generally considered before or after disclosure. Similarly, there are two stages in a typical United States case where engaging in settlement discussions typically has a greater likelihood of success. The first of these stages is early in the case (soon after the filing of the claim) and the second one is after the parties have finished taking fact discovery. In practice, parties and lawyers from the United States are generally reluctant to entertain serious settlement discussions until at least some important discovery has been completed. Both the Chinese and the Brazilian report point out that the timing of settlement discussions is decided on a case by case basis. Because civil proceedings usually take long in Brazil, the plaintiff is often interested in settling at an early stage of the lawsuit.

The Israeli reporter interestingly and provocatively holds that he strongly favors judgments over settlements. He then defines ten key moments for settlement discussions such as *e.g.*, after a judge made initial comments on the case during pre-trial, when there is a need to stall time or before or after submission of sensitive documents.

In Switzerland, settlements can be reached pre-litigation, during conciliation proceedings which precede ordinary court litigation, during the so-called instructional hearing before the judge in charge of the case or even post-litigation.

The Polish reporter mentions that in the general course of a lawsuit a settlement can be reached until the end of the proceedings in second instance court, i.e. until the court issues the final judgment. However, settlements in the second instance are much more seldom. German law distinguishes between out of court settlements and in court settlements. There are usually two points in time which are suitable for reaching an in court settlement: During the hearing in court or between the hearing in court and the issuance of the judgment.

2.1.5 The role of judges in the context of settlement discussions

How comfortable are judges when taking an active role in settlement discussions? Is it true that there is a major gap between the various jurisdictions and that judges from common law countries prefer the parties to negotiate a settlement without the judge being present and taking an active role? The question posed to our national reporters was the following: We assume that all jurisdictions know the out of court settlement. Is it, however, frequent in your jurisdiction that the court or the judge facilitates settlement discussions between the parties? What enables (if yes) or prevents (if no) the court from doing so?

The national reports from all jurisdictions mention explicitly that judges typically encourage and facilitate settlement discussions between the parties. However, there are different ways of encouraging und facilitating settlements.

According to the Finnish report the intensity of facilitating settlement discussions depends on the personality of the judge. Active judges would not be reluctant to submit a draft settlement agreement to the parties.

In the UK, on the other hand, the judge would never actively participate in settlement discussion between the parties. It is interesting to note that the judge will not be told about or find out the details of settlement proposals and their outcome until either a settlement is reached or at the end of a trial when an award of costs is considered. All settlement discussions and any meetings are usually held on a "without prejudice" basis. The Civil Procedure Rules (CPR) contain several provisions which encourage settlement. There are pre-action protocols which provide for the early exchange of information between the parties to allow settlement before proceedings are issued. Furthermore, judges shall encourage and facilitate the use of alternative dispute resolution (ADR). In addition, the parties are required to file a "Directions Questionnaire" once they have filed their case statements. They complete and exchange the questionnaires in order to provide the court with details of the claim prior to a case management conference hearing.

The parties have to indicate in this questionnaire whether they wish the court to order a one-month stay of proceedings or to assist in arranging ADR.

In the United States, the Federal Rules of Civil Procedure and the procedural rules of many states allow judges to order litigants and attorneys to appear for pretrial conferences to facilitate settlement. Some courts order parties to participate in settlement conferences or non-binding mediation (with another judge or a third-party neutral) at different stages of the case. An active encouragement of settlement by the judge presiding over a case is only allowed in some jurisdictions.

In contrast, Poland does not use pre-defined instruments to facilitate the parties' negotiations. Usually, courts merely postpone the hearing of a case if parties request the court to do so. In Brazil, the judge has to arrange a preliminary hearing (conciliation hearing) to introduce settlement discussions (Article 331 of the Civil Procedure Code). The judge can schedule an additional hearing in the course of proceedings whenever the parties demonstrate their willingness to settle. Furthermore, some Appellate Courts arrange a conciliation hearing before an appeal judgment is handed down.

Swiss law gives the courts the opportunity to facilitate settlements discussions at any time (Art. 125(3) CPC). In commercial matters, it is very frequent that the court, on the first day of trial and after having reviewed the claim and the response and after having heard both parties' opening statements, makes active attempts to settle a case. The judge sometimes even submits a settlement proposal to the parties for their consideration under the caveat that evidence has not yet been considered in full pending the hearing of witnesses. German courts are allowed to facilitate settlement discussions based on the principle of expedition of proceedings ("Beschleunigungsgrundsatz") and § 278 German Procedural Code. Based on the latter provision the courts must not only focus on issuing a decision, but also on encouraging amicable solutions for disputes. To conclude a settlement means realization of judicial peace ("Rechtsfrieden") which is one of the main purposes of court proceedings.

2.2 Enforcement of settlement

2.2.1 *Differences between the in court and the out of court settlement, especially when enforcing a settlement*

Are there differences between the in court and the out of court settlement, for example with respect to their effect in enforcement proceedings? Are there other practically relevant differences?

Most jurisdictions distinguish between the enforcement of in court and out of court settlements. In court settlements are generally enforceable like judgments, but there are some nuances. In Finland, in court settlements can be enforced like a final and non-appealable verdict. A settlement reached completely out of court without the issue having been filed in court cannot be enforced like a verdict. In case of breach of such an out of court settlement agreement, the non-defaulting party needs to obtain a verdict first on the basis of the contractual settlement agreement.

Under UK laws, a settlement that is reached before legal proceedings are issued takes the form of a contract. If there is a breach by a party to the contract then the terms of the settlement contract can be enforced through a claim for breach of contract. A settlement agreement concluded after proceedings have commenced takes the form of a consent order or judgment. When a settlement is reached in court, there are different types of order/judgment. Either the parties set out their agreement in a court order/judgment that is then filed at court or a so-called Tomlin order is issued. The key characteristic of a Tomlin order is that the terms of the agreement are not set out in the order itself but are instead set out either in a schedule or a separate settlement agreement either annexed to the Tomlin order referred to in the Tomlin order as having been entered into between the parties. The Tomlin order therefore only refers to the fact that a settlement has been reached between the parties but no further details of the terms of the settlement are recorded in the Tomlin order. The purpose of a Tomlin order is to maintain the confidentiality of the settlement terms. Only the terms set out in a court order or judgment are directly enforceable. If there is a breach of settlement terms in case of a Tomlin order, the non-defaulting party will need to consider bringing new proceedings or to reinstate the original proceedings (if stayed before).

In the United States, the question whether an out of court settlement agreement is binding and enforceable is governed by the rules of contract law of the state where the parties executed the agreement or of the state designated in the settlement agreement's choice of law provision. A settlement agreement that has been

entered into as part of a consent judgment or consent decree is enforceable like a court order. The party seeking to enforce the agreement will generally not have to file a new lawsuit but may bring a motion (application) for enforcement before the court submitting the consent judgment or consent decree.

The Brazilian legislation allows enforcing in court settlements like ordinary decisions on the merits ("cumprimento de sentença"). In case of an out of court settlement the defendant will be personally summoned and may present a substantial defense ("embargos"). The obligation contained in the out of court settlement must meet certain requirements in order to be considered as an extrajudicial enforcement instrument. Thus, the agreement has to be certain, it has to designate an amount payable and provide for an outstanding amount and/or obligation at a precise time.

Also Israel distinguishes between settlement agreements obtained in court and granted status of a judgment. Out of court settlements are handled like any other written agreement unless the settlement was granted status of a judgment.

In court settlements are, according to Swiss law, binding decisions and directly enforceable. The out of court settlement is treated like any other contract. However, an out of court settlement can nonetheless be useful in enforcement proceedings, especially if it contains a formal acknowledgement of debt.

In Poland, settlements reached before court and during mediation constitute – if validated by the court – an enforcement order meaning that they authorize the creditor to pursue its dues with the help of a court bailiff. An out of court settlement is, under Polish laws as well as in most other jurisdictions, a contract between the parties without enforcement character. Similarly, the German laws provide that while an in court settlement constitutes an enforcement order, an out of court settlement merely has an impact on the substantive legal position of the parties. The parties to an out of court settlement can directly rely upon the rights which they have been granted pursuant to the settlement agreement. However, if they wish to take enforcement actions based on the out of court settlement, they must first refer to the courts to get an enforcement order.

China considers only in court settlements as enforceable per se. Out of court settlements do not have executory power and can only be used as evidentiary document in a new court action.

Apparently, only Spain does not distinguish between judicial and extrajudicial agreements in enforcement actions.

2.3 Confidentiality and privilege

2.3.1 Confidentiality of settlements and settlement discussions

The parties often have an interest in keeping the terms of their settlements confidential from third parties and/or the court. Does the law provide for or allow such confidentiality? In addition, the parties may want to be sure that what they concede in settlement discussions remains confidential. Some jurisdictions provide for settlement discussions to be confidential by law whereas other jurisdictions do not provide for a protection of the discussions leading to a settlement. The question posed to the national reporters was the following: Does your jurisdiction consider a civil settlement agreement and the discussions/correspondence leading to such a settlement confidential by law or other rules (e.g. ethical rules) or do the parties have to agree on confidentiality in the context of their settlement or settlement discussions?

A review of the national reports revealed that most jurisdictions consider civil proceedings as public. As a consequence of this publicity all legal briefs, written evidence and any potential in court settlements are considered part of the public domain. This has been explicitly mentioned in the reports of Brazil, China, Finland, Germany, Israel and the UK. There are several exceptions to this general rule which apply, for example to family matters (Brazil and Germany), if privilege can be successfully claimed (UK) or for trade secrets or private information that is considered protected by a stricter confidentiality standard (health, financial or criminal records; issues of national security). The Finnish law explicitly defines a standard which has to be fulfilled in order to rely on confidentiality which can be granted for a maximum period of 60 years.

Since settlement agreements are not per se confidential it is often suggested to reach agreement regarding confidentiality issues. Parties may, and quite often do, agree to keep settlement agreements confidential (explicitly: Brazil, China, Germany, Israel, UK, USA, Spain).

It is very interesting to note that the settlement *discussions* leading to a settlement enjoy very different protection in the various jurisdictions. The Swiss report points out that confidentiality is one of the most important aspects in settlement discussions and that in order to reach an agreement, the parties must feel totally

free to talk, to express opinions and to submit offers without having to fear that their words will be used against them in a future lawsuit or judgment. As a consequence, Swiss law explicitly provides that conciliation proceedings which precede an ordinary law suit are confidential and the statements of the parties may generally not be recorded or used subsequently in court proceedings. In addition, the Code of Ethics of the Swiss Bar Association provides that a lawyer may only inform the court of the parties' settlement offers with the previous consent of the counterparty. A similar approach is known in Brazil where article 25 of the Code of Ethics and Discipline of the Brazilian Bar Association provides that professional confidentiality is inherent to the profession, and must always be respected. Thus, all discussions/correspondence leading to a settlement are confidential by law, in order to protect the client's interest in the negotiation.

Similar approaches are followed by Finland, Israel (as a matter of common practice only) and Poland (exceptions). UK protects the settlement discussions by privilege (without prejudice privilege).

Germany does not regard settlement discussions as confidential per se and neither do Poland (in principle, with exceptions) or the USA if the parties have not reached an agreement regarding confidentiality issues.

2.3.2 Protection of confidentiality by other means

The question posed to the national reporters was the following: What means do you have to protect the confidentiality of your settlement and related discussions/correspondence for civil and other procedures?

Most jurisdictions explicitly distinguish between in court and out of court settlements. While settlement agreements that are concluded in the context of civil proceedings are generally regarded as public documents, settlement agreements reached before proceedings have been formally commenced are usually fully protectable by a confidentiality undertaking in the contract.

There appear to be several options to protect the confidentiality of a settlement. Brazil, Germany, Israel and the USA explicitly mention the possibility to file a restraining order and prevent the other party from breaching a confidentiality undertaking contained in a settlement agreement. It seems fair to assume that such an injunction would be available in most jurisdictions. Brazil, Germany and the USA additionally point out that a compensation for breach of contract could be claimed if improper disclosure was made by one party. It is suggested that

liquidated damages are agreed upon in the context of the confidentiality undertaking of the settlement in order to circumvent difficulties in the calculation of potential damages (Brazil, Germany, Poland).

In the UK, the parties can apply for a so-called Tomlin Order (see para. 2.2.1 above). The key characteristic of a Tomlin order is that the terms of the agreement are not set out in the order itself but are instead set out either in a schedule or a separate settlement agreement either annexed to the Tomlin order referred to in the Tomlin order as having been entered into between the parties. The Tomlin order therefore only refers to the fact that a settlement has been reached between the parties. No further details of the terms of the settlement are recorded in the Tomlin order. Therefore, even though any member of the public is entitled to apply to the court for copies of the pleadings and court orders in a claim, a Tomlin order will only record the fact that a settlement has been reached but not the terms of such settlement and will, therefore, protect the confidentiality of the agreement itself.

Discussions that are genuine attempts to settle a dispute are protected in different ways by various jurisdictions (Switzerland, Spain, UK, USA). In the UK, settlement discussions are covered by the without prejudice privilege. UK lawyers therefore suggest marking all correspondence and designating all discussions leading to settlement as "without prejudice". The Federal Rule of Evidence 408 of the USA provides that settlement offers and statements made during settlement negotiations are inadmissible evidence when offered to prove liability or the validity/invalidity of a claim. Switzerland protects the confidentiality of settlement discussions with the Code of Ethics of the Swiss Bar Association. Breach of the confidentiality of settlement discussions (confidential by law) may lead to administrative sanctions against the attorney-at-law (and not the party to the dispute) who is responsible for such breach of confidentiality.

2.3.3 Consequence of a breach of confidentiality

The question posed to the national reporters was the following:

What are possible consequences of a breach of confidentiality?

Numerous jurisdictions mention the possibility to claim a contractual penalty according to a potential non-disclosure agreement or according to the terms of a settlement agreement (Brazil, China, Finland, Germany, Israel, Switzerland, UK, USA). In addition, most jurisdictions will know a possibility to claim civil

damages arising from a breach of confidentiality according to general legal principles (explicitly: Brazil, Poland, Germany).

In some instances, a party who breached confidentiality may be exposed to criminal prosecution, primarily if documents are disclosed which the court has designated as being confidential (Finland, Brazil). In other jurisdictions, breach of confidentiality can lead to sanctions for contempt of court (USA).

In Poland, Spain and Switzerland, it is regarded a breach of professional ethics if confidentiality obligations are disregarded. Furthermore, the National reports of Israel, Poland and Switzerland mention that evidence which was used but should have been treated as confidential must be disregarded by the court.

2.3.4 Disclosure of settlement agreements in other proceedings

The question posed to the national reporters was the following: Are you allowed to disclose the settlement agreement in other proceedings (a) between the same parties or (b) between other parties?

The general answer given by most jurisdictions was that a settlement agreement can be disclosed in other proceedings between the same parties and between other parties. However, in most instances, a confidentiality clause or non-disclosure obligations will prevent the parties from disclosing the settlement agreement in an unrestricted manner. The use of the settlement will normally be governed by the terms of the agreement itself. Where civil proceedings are considered public proceedings, the unrestricted disclosure of a settlement agreement appears to be the norm. In the UK, the so-called Tomlin order (see above para. 2.2.1 and 2.3.2) is a tool to effectively protect the confidentiality of the terms of a settlement in the context of public proceedings.

Since Spain puts strong emphasis on protecting the confidentiality of the client's information, it is not possible to disclose a settlement between parties which are not parties to the settlement. A similar approach is followed in Finland where you would need the client's consent before disclosing a settlement in different proceedings.

3. ANTRITRUST PROCEDURES (MAÏTE OTTES)

3.1 General issues

3.1.1 Our first question relates to the availability of settlement procedures in competition law cases. We also asked whether procedures of commitment decisions are available, as an alternative to settlement arrangements.

From the eight countries from which we received reports, two countries do provide for such procedure: Brazil and the United Kingdom. In Austria there is the possibility that the parties to antitrust proceedings reach a settlement before the Cartel Court which has the competence to decide on antitrust cases (and not the competition authority). The other five countries do not provide for a settlement procedure (Japan, Finland, Italy, Poland, Spain).

A commitment procedure is indeed available in the United Kingdom, Italy, Poland, Brazil and Austria, although these procedures are generally not be used for hardcore infringements of competition law, such as price-fixing cartels.

Japan, Finland and Spain do not provide for settlement procedures nor commitment decisions. In Finland and Spain leniency is the main channel for companies to avoid or lessen the penalty payment for breach of competition law.

In Finland, a feature of the leniency procedure is that whistleblowers must, amongst others, immediately cease participation in the competition restraint. In essence, this means that a whistleblower has to make these commitments in order to be eligible for the immunity from fines due to the competition restraint.

3.1.2 We asked what is the general stance towards settlement procedures in cartel matters, and whether these are generally considered to be a preferred route. The stance the European Commission takes towards settlement procedures is that these could be viewed as beneficial to all parties. The competition authority on the one hand benefits from a shorter, quicker administrative process, allowing for more efficient use of staff in the cartel department and a reduced number of appeals to the court. For the companies on the other hand, involved in a cartel, the advantages are a shorter procedure and a reduced fine.

We noted that, even in countries where there is a settlement or commitment procedure, these are not regularly used yet, with the exception of the OFT in the

United Kingdom. In Austria there is a growing awareness of the benefits of settlement procedures, especially in the light of the competition authority being a small competition authority and the fact that cases can in general be terminated faster and more easily in settlement procedures. In Brazil the antitrust authorities claim that settling is the preferred route. Some critics do not share such an enthusiasm for settlement agreements though. The Brazilian reporter states that whilst the antitrust authority takes advantage of the instability inherent in cartels to execute leniency agreements, the manipulation of settlement is more complex. Win-win games, which are so clearly seen in the case of leniency agreements, become more obscure in the negotiation of settlement agreements with cartel members. What would a cartel member win by accepting a deal by means of which it agrees to pay a fine?

Also in Poland the commitment decision is not considered to be a preferred route in cartel cases. Currently a settlement procedure is proposed in a draft amendment of the Polish competition act. The procedure is planned to cover cases of both horizontal and vertical agreements as well as cases of abuse of dominant position. The Polish reporter believes that, in cartel cases, the competition authority should be far more willing to negotiate and finalize a settlement than to issue a commitment decision. The Japanese reporter stated that, because of the absence of the settlement or commitment decision in Japan, the procedure to complain against a cease and desist order and/or an administrative fine order are lacking flexibility and still take very long.

3.2 Procedural issues

3.2.1 We asked various procedural questions as to the stage in which a settlement can be reached, and by whom it has to be initiated.

In Austria the competition authority will already approach a party concerned in the investigating procedure. However, a settlement can be reached at any stage of the proceedings before the Cartel Court or the Higher Cartel Court. Also in Brazil a settlement can be reached at any time. The rule of thumb in Brazil is the sooner a settlement proposal is filed with the antitrust authorities, the greater the discount in the settlement will be. In the UK it is only possible to reach a settlement after the statement of objections has been issued. In Italy it is up to the parties to propose commitments within three months from the notification of the statement of objection. This stance is justified by the aim of expediting administrative procedures and costs savings. Commitments are admitted only when they are timely and able to remove effectively the alleged anticompetitive concerns. In Poland, in theory, commitments may be proposed by undertakings until the final

decision is issued and the infringement is finally proven. In practice, the opportunity for an effective filing of commitments by the undertaking exists only at the initial stage of antimonopoly proceedings.

3.2.2 In order for a settlement to be effective it might be necessary to settle with all parties involved in the alleged cartel. This does however does not seem to be the general stance.

Of the reports received, only in Poland it necessary that all parties to the forbidden agreement file an application for a commitment decision together. In the case of vertical restrictions, a commitment application should be filed by the supplier and the major distributors.

3.2.3 We asked questions on the type of possible settlement arrangements. As settlement arrangements relate to past behavior, one might expect only pecuniary measures to be taken. It seems logical on the other hand that commitment decisions provide for behavioral measures.

The reports we received show a mixed picture. This reasoning set out above indeed applies in the UK. A settlement agreement may involve a reduced penalty (even though such reduction is not guaranteed). Behavioral measures are generally adopted in commitment decisions.

In Italy and Poland, where there is no settlement procedure available, the commitment decisions do not lead to the payment of a fine, but behavioral measures are being adopted. As an example, in the Italian case *Order of Veterinary Surgeons of Turin*, the competition authority accepted a number of commitments, including the removal of restrictions on the advertising of veterinary services, the interruption of all disciplinary proceedings against veterinarians who had promoted their businesses or who had not applied the fees approved by the association, the abolition of minimum fees, and some other changes to the veterinarians' professional code of conduct to make it compliant with competition law.

In Austria however there are no provisions that would limit settlement arrangements to pecuniary measures. Also the Brazilian Antitrust Law rules that the authorities are empowered to take any measure required to bring the market back to its original condition (i.e. no collusion or dominance). This means that the pecuniary measures are not the only possible arrangements. In practice, there have

been few behavioural measures agreed in settlements and all of them referred to dominance case.

3.2.4 Which party can take the initiative for a settlement: is this the administrative authority only, or the suspected parties as well?

Each jurisdiction has its own perspective on this. In Austria there are no rules that would prevent any party from taking the initiative for a settlement. In Brazil the proposal can be made by the defendants and the administrative authority. In Poland it is always the suspected party, which has been served with a formal notification, that is the initiator of commitment negotiations. After an application for a commitment decision is filed, the competition authority may present its opinion on the proposed commitments and may also propose changes. In the UK parties will be invited to contact the OFT to discuss settlement once they have been sent the statement of objections. A party can discuss the possibility of settlement at an earlier stage in the proceedings with the OFT but no decision will be made as to whether the OFT will offer settlement until the statement of objections has been sent to the parties. The OFT will determine the terms of the settlement and it will require an admission of liability on the part of the settling company. The commitment procedure in Italy is not a negotiation between the competition authority and the parties involved. The competition authority enjoys broad discretion in accepting or rejecting the commitments. In many cases, the competition authority rejected commitments proposed by the parties even at a preliminary stage (i.e. before publishing them for the market test), on the grounds that they were unsuitable for removing the alleged antitrust concerns or related to hardcore antitrust infringements and/or the competition authority recognised a prevailing public interest in ascertaining the infringement.

3.2.5 One important aspect in determining whether entering into a settlement arrangement could be an interesting option is whether it is necessary for reaching a settlement to admit being guilty.

As to the jurisdictions that allow for true settlement arrangements, a confession is a mandatory requisite for a settlement (Brazil and the UK). In Austria there is no specific rule as to this question, however, in practice the competition authority will only agree to the settlement if the party admits having infringed competition law. In Poland an application for a commitment decision is not formally an admission of guilt, but in practice it is treated that way. In Italy the admission of being guilty is excluded by the nature of the procedural instrument itself.

3.3 Confidentiality and privilege

3.3.1 *Is a settlement arrangement made public? What information is made public? Does this, e.g. include the settlement agreement itself, any documents and/or statements leading to such settlement?*

In Austria, mere settlement agreements reached between the parties in the proceedings before the Cartel Court are not made public. In Brazil on the other hand the settlement must be made public. Practice has shown varying degrees of confidentiality, most of them related to the requests made by those proposing the settlement. In the UK the fact of the settlement is made public and an infringement decision will be published which will set out the amount of the fine. The settlement agreement itself and statements/documents leading to settlement are not published, but the infringement decision may make reference to admissions of the settling party. In Italy, in order to allow the market test in commitments proceedings, the decision concerning the opening of the procedure and the commitment proposal are published on the competition authorities' website. Once the commitments are accepted, also the commitment decision is published on the competition authorities' website.

The Polish competition authority publishes all its decisions, including commitment decisions, on its website, indicating the names of the undertakings involved. The commitments are fully set out in the dispositive part of the decision. Sometimes commitments may involve also an obligation for the undertaking to publish a notice about the decision (e.g. on its website or in a newspaper). The statement of reasons for the decision often contains recapitulation of all the proposals and applications filed in course of proceedings. However, the public version of the decision does not contain any business secrets or the personal data of any individuals other than parties to the proceedings.

3.3.2 *If the parties do not reach a settlement, can statements and/or documents used in trying to reach a settlement, be used against the accused (or other) parties?*

The Brazilian reporter states that - in theory - the statement and/or documents cannot be used against the accused (or other) parties. Also in the UK this is not possible, but materials provided by one party during the course of an investigation can be used against other parties. In Austria there are no rules that specifically address statements and/or documents used trying to reach a settlement. Statements and/or documents that are part of the competition authorities' files can in general not be accessed. It is, however, currently debated in Austria whether such files should be accessible in cases dealing with EU competition law.

In Italy any commitment proposals made (even if later rejected) constitute a part of the case files. In practice, the fact that a commitment proposal has been submitted and ultimately rejected is generally rather neutral for the final decision. However, the reporter is aware of cases where a rejected application for a commitment decision was used against the undertaking in a final decision. During the proceedings, third parties admitted to the proceedings can access any non-confidential documents in the authority's file; after the closing of the proceedings, third parties (not party to the proceedings) have the right to request access to the non confidential documents if they have a relevant interest to its access. The undertaking concerned has the right to oppose or limit such disclosure, and the competition authority, in deciding whether to allow access or not, must counterbalance the interest of the third party with the interest of the undertaking concerned. In the past, after the closing of a procedure, the Italian competition authority has not generally granted access to its filings to third parties claiming damages before civil courts.

In Poland the Draft Amendment will introduce formal restrictions on access to statements and documents filed with the competition authority by the parties in course of settlement procedures. Those documents may not be copied or used by third parties in other proceedings. Moreover, if the competition authority or a party withdraws from a settlement procedure, no information and evidence obtained by the competition authority during the procedure can be used in the proceedings in question or in any other proceedings. In other words, without the undertaking's consent, such evidence will be inadmissible.

3.3.3 As follow-on damages claims are currently becoming a more popular tool in the enforcement of competition law, it might be to the benefit of accused parties if they would settle and thus get some protection from any possible follow-on damage claims in civil proceedings.

Although none of the reported jurisdictions provide for such direct protection, the position of the accused parties does seem to be a little better as compared to an infringement decision.

In the UK for example, the infringement decision may be less detailed than it would be in a case which is not settled. Follow-on damages claimants may then have less information on the infringement where a case has been settled.

Also the Austrian reporter claims that parties do indirectly get protection from possible follow-on damage claims in civil proceedings as the settlement might not be published or only published in parts. Moreover, the settlement agreement is not

binding for any follow-on damage claims, whereas civil law courts are bound by formal decisions of the Cartel Court as to the infringement and liability of a party having infringed cartel law. In Poland, the Draft Amendment providing for settlements, provides for certain safeguards for parties entering into settlement procedures. No evidence collected during such procedures may be used in civil proceedings without a written consent of the relevant party to the settlement procedure. However, the decision that concludes a settlement procedure will be of the same kind as a decision declaring a practice anticompetitive. As such, it may be used as a precedent for any follow-on damages claims that may be raised in civil proceedings.

In the jurisdictions where there is the possibility of taking a commitment decisions, reporters generally note that commitment decisions do not grant any special protection to undertakings whose commitments are accepted. There might however be an advantage in countries where a commitment decision does not entail an assessment of a breach committed by the undertakings concerned. In such case, the claimant in civil proceeding should still provide evidence of the anticompetitive infringement. However the Italian reporter noted that the risk to be subject to private enforcement claims is not completely eliminated: firstly, both the decision opening the proceeding and the commitment decision itself (as well as the information collected during the market test) may contain a sufficiently detailed description of the relevant markets and of the unlawful behaviour; secondly, the case-law, both at EU and national level, has proved to be quite in favour of an extension of the scope of follow-on actions, stating that commitment decisions introduce an “*effective doubt*” on the existence of an antitrust infringement, so that the burden of proof on the claimant might be reduced, though not eliminated. In Italy, the Tar Lazio, in the case Tim-Vodafone-Wind, expressly stated that the commitment decisions do not cause any immunity from a civil law stand point. In Poland it is noted that courts are not bound by the commitment decision (even if final and legally valid).

3.3.4 If reaching a settlement would create a relief from criminal prosecution this might be worth considering. However, in most jurisdictions a settlement does not prevent an individual from being criminally prosecuted as well. This might be a risk in bid-rigging type of offences which in many jurisdictions constitute both an administrative and a criminal offence.

The Polish reporter states that as a result of this 'double prosecutions' undertakings do not apply for commitment decisions in such cases. Also the Brazilian reporter states this is really a catch 22 for the widespread use of settlement in the administrative sphere in cartel cases. As there is a confession requirement and no restriction to its use by the public prosecutors, it is very risky for natural people to enter into a settlement in a collusion case. The administrative settlements reached so far mostly referred to legal entities with limited participation in Brazil, so that none of its directly involved officers were living in Brazil.

In some jurisdictions an exception to this is rule reported as to leniency applicant. In the UK, for companies that make an immunity application to the OFT, the individuals employed by that company who were involved in the illegal conduct will generally qualify for immunity from criminal prosecution in relation to that conduct. Where the company engaging in settlement with the OFT is not a leniency applicant, settlement by the company will not prevent the criminal prosecution of an individual involved in the illegal conduct. Also in Austria leniency applicants shall not be prosecuted under Austrian criminal law if the FCP submits a statement accordingly .

3.4 Enforcement of settlement

3.4.1 Are there any rules as to the enforcement of a settlement? E.g. in monitoring any possible behavioral measures? What are the consequences if a settlement agreement is breached?

In the UK, there will be no further enforcement measures taken once the fine is paid. In Austria, settlements are enforced just as any court decision of the Cartel Court/Higher Cartel Court. Settlements and court decisions constitute executory titles. The content of such executory title may also include order for positive activity.

In Brazil there is a branch of the antitrust authority specialized in checking whether the commitments have been implemented. Even though there is still a long way to have a very efficient enforcement, one must admit that there have been remarkable improvements since its early days.

In Italy the competition authority can re-open the proceeding closed with the acceptance of commitments. This has actually happened in May 2013. The competition authority re-opened a proceeding closed against two undertakings operating in the maritime transport for passengers in the gulf of Naples and

Salerno, on the basis of the breach of their commitments (accepted in 2009) and of further violations of antitrust rules. The Competition Authority can impose fines on the undertakings concerned. The fine can be equal to up to 10 percent of their individual turnover, which is the same turnover limit provided for cartels and abuses.

In Poland a commitment decision will always impose a reporting obligation on the undertaking. As a result, the undertaking is given a fixed deadline to send progress report(s) with evidence on how it complies with its commitments. For example, where the commitments include an obligation to amend any contract, the competition authority will often wish to be sent a certified copy of the amended contract. In the event of a failure to comply with any commitment (including a reporting obligation), the competition authority may fine the undertaking for up to the equivalent of EUR 10,000 per each day of the delay. Moreover, in the event of non-compliance, the competition authority may also ex officio revoke the commitment decision, restart the antimonopoly proceedings and issue a decision that declares the practice anticompetitive and sets a monetary fine of up to 10% of the overall annual turnover earned by the undertaking in the accounting year preceding the year in which the fine is imposed.

3.4.2 Is a settlement subject to appeal? Can the parties agree to waive the right of appeal?

In most countries settlement agreements are not subject to appeal (UK, Austria, Brazil). In Poland there is a right to appeal. However, such a decision is usually treated as a “win-win“ situation so an appeal is unlikely. In Austria it is noted that settlement agreements can be revoked by a party within time limits provided for in the settlement agreement itself. In Italy appeal is possible by third parties potentially damaged by the application of commitments (i.e. other parties to the same proceeding or any other subject concerned).

4. CRIMINAL PROCEDURES (ALEXANDER SAUCKEN)

This section brings together the similarities and differences in settlement arrangements provided by the criminal laws of 6 jurisdictions (USA, UK, France, Italy, Germany and Finland) and looks at any overlaps and whether any reforms of law are underway.

4.1 General Issues

4.1.1 *In the beginning of our discussion we wanted to learn if the national jurisdictions provided at all for settlement procedures with the prosecution authorities and/or the courts in their laws of criminal procedure.*

As a result it can be summarized that apart from the Finnish criminal law all jurisdictions provide for a certain form of settlement arrangements in their criminal procedures pursuant to which the accused undertakes to comply with conditions as agreed between the parties in exchange for the prosecutor discontinuing the prosecution, or in return for an agreed sanction. However, as will be discussed below, the details and conditions for such settlement procedures among those jurisdictions sometimes vary widely.

In Finland, no settlement procedures with the prosecutor and the courts in criminal procedure are currently available. The only way to reach an amicable solution is by settling the case with the damaged person by means of a special mediation process. As the plaintiff also holds a strong position in the criminal courts procedure, a damage compensation claim may be settled before the trial and the plaintiff may not demand punishment for the defendant anymore. However, this does not bind the prosecutor in any way, as the vast majority of crimes can be prosecuted without the cooperation of the plaintiff in the name of the public interest. Nevertheless, the settlement between the plaintiff and the defendant may have a strong impact on the sentencing of the defendant, as according to the Finnish criminal procedure law, the sentence may be decided by using a lenient punishment scale.

Interestingly, there is a legislation bill underway in Finland dealing with plea negotiation and waiving of the charges which is currently being processed in the Finnish Parliament. If such law came into force, the prosecutor and the defendant (with the consent of the plaintiff) would be able to negotiate and submit a verdict proposal to the court.

4.1.2 *In this context we wanted to know, if settlement procedures - if any - are a well-accepted part of criminal procedures with the prosecution within the different jurisdictions or if they are considered as being critical with regards to the function of the criminal procedure aiming at the “search for the truth”.*

Again, national reporters from all jurisdictions - apart from Finland - agree that settlement procedures are an important part of their respective criminal

procedures. However, in some jurisdictions the concept of settlements in criminal proceedings is regarded as critical.

The United States Supreme Court even has described settlements in criminal matters as “not only an essential part of the process but a highly desirable part for many reasons”. The court also held – according to the US respondent - that settlements are a constitutional means of resolving criminal matters.

The national reporter from France differentiates. In the public opinion, settlement procedures are not always well received, especially by the victims, who criticize those procedures. On the other hand, the French reporter also highlights the considerable advantages of such settlement procedures. They allow to close a criminal case within a reasonable time and to relieve the courts. Moreover, the practice shows that these settlement procedures also contribute to increase the proportion of cases which are closed without taking any further action, responding to a wish of the legislator and of the executive to always have a criminal response when an offence is committed.

The Swiss reporter emphasizes that within their settlement regime which also provides for conciliation proceedings similar to those in civil proceedings, the parties can consensually put an end to the proceeding and "therefore agree to cease the search for the truth". Regarding another settlement option, the so-called "accelerated proceedings", which allows the prosecutor, through a negotiation process between the parties involved in the dispute and based on a prior admission by the accused, to submit a pre-arranged indictment (bringing of charges) to the court for judgment, further concerns have been raised. This proceeding is considered to disregard the right of the accused to not self-incriminate. In addition, under such proceedings, when it comes to the establishment of the facts, instead of a search for the truth, the parties negotiate the facts and disregard the truth.

The UK respondent notes that in recent years policymakers in the UK have reacted to the perceived difficulties of prosecuting both individual and corporate accused of having committed serious fraud and other complex economic crime, and as a consequence have developed specific schemes to encourage settlements between prosecutors and such defendants. However, regarding the possibility of out of court disposals, which are mainly designed for minor offences like road traffic offences, public order offences or low value theft, the UK respondent also points out that this settlement scheme is relatively uncommon as a consequence of criticism by politicians and victims' groups.

In Germany, settlement procedures are widely used in criminal procedures, although they are also highly criticized for violating the principle of legality and the legal duty of the courts to investigate the truth. In 2013 the German Federal Constitution Court decided, however, that there is no violation of the principals of the German criminal process as long as the legal formalities are fulfilled and there is no place for “informal deals”.

Italy, to the contrary, seems to be highly convinced of its settlement options within its criminal procedure. The Italian reporter even points out that the Italian law of criminal procedure does not have the function to guarantee the “search for the truth”.

The opposite “extreme view” is represented by Finland. The current Finnish law of criminal procedure emphasizes the “search for the truth” and thus settlement procedures have traditionally not been part of the Finnish criminal procedure. Against this background, the proposed legislation dealing with plea negotiations would introduce a completely new element to the Finnish criminal procedure. Finland therefore serves as an interesting example that also very basic principles of the (criminal) law of a jurisdiction may be overruled and turned completely into another direction from time to time.

3.1.3 The aforementioned answers lead to the following question: Are settlements commonly used in criminal procedures in your jurisdiction?

The answers to that question seem to reveal a certain trend among all jurisdictions (except Finland): Settlement arrangements in criminal procedures are a comfortable way for courts and prosecution authorities to close criminal cases with low effort and to avoid lengthy courts proceedings. The critical aspects of this practice - a quick closure of criminal cases without having completely investigated and reviewed the backgrounds and circumstances of the accused offences - are therefore valid for most jurisdictions.

The French reporter points out that settlement arrangements in criminal procedures have been increasingly used over the last years. According to the French Ministry of Justice about half of the criminal responses have been closed by means of settlement procedures in 2012. By way of comparison, in 2006 only 1/3 of criminal cases had been closed by means of settlement arrangements.

In Germany, it could be observed that in the past many settlement arrangements even with the courts approval have been agreed upon without proper

consideration of the strict and obligatory conditions for settlement arrangements as provided by the German law of criminal procedures. Courts, prosecutors and defense lawyers alike tended to agree on – formally invalid – “informal deals” with the risk that these decisions could be revised and finally contested by higher courts. In order to bring this practice to an end, the German Federal Constitution Court in its highly recognized decision in 2013 emphasized that the legal formalities of the German law criminal procedures have to be strictly met.

In the US, 86 % of the 86.000 federal criminal defendants whose criminal cases were resolved pleaded guilty or “nolo contendere” were convicted on the basis of a settlement arrangement in the fiscal year 2005. The rates are similarly high in State criminal cases. The US reporter emphasizes that not all guilty pleas (or pleas of “nolo contendere”) are necessarily a result of plea agreements. However, criminal defendants would generally have little incentive to plead in such a manner without some type of agreements or accommodation from the prosecutors.

The Swiss reporter advises that with regard to the settlement option of conciliation proceedings it was the explicit intention of the Swiss legislator that prosecution authorities may only omit to proceed with settlement proceedings if the possibility of such proceeding was considered to be impossible beforehand.

Under the current Finnish legislation the possibility and the parties’ willingness for mediation between the plaintiff and the defendant is always examined during the pre-investigation. The mediation requires mutual consent. The usage of the mediation is somewhat hindered by the fact that the settlement does not bind the prosecutor and a trial and punishment may still result.

4.2. Procedural Issues

4.2.1 We furthermore wanted to learn what conditions there are for settlement arrangements in the respective criminal procedures.

The concepts of settlement arrangements in the different jurisdictions vary significantly to some extent and therefore influence the relevant conditions.

In Germany and the UK, in principle all crimes can be subject of a settlement arrangement. Whereas in the pre-trial stage (e.g. during investigations of the prosecution authority) only minor and middle sized criminal offenses may be settled by the parties in those jurisdictions, the settlement procedure during trial is possible with all sorts of crime. However, as will be discussed at a later stage, the

conditions for settlement arrangements before trial are highly formal in Germany. To the contrary, the process of “plea bargaining” in the UK, which allows to plead guilty either to a lesser offence or agree a ‘basis of plea’ with prosecutors setting out an agreed statement of facts for the court to conduct the sentencing exercise, is largely informal and has yet to be codified by statute according to the UK respondent.

In Italy, settlement arrangements cannot be requested for all sorts of crimes. For example, settlement procedures are not allowed in criminal cases with a Mafia or sexual context. The “Patteggiamento”, as the Italian provision for settlement procedures is called, provides that the charge for a crime is reduced to 1/3 of the maximum punishment foreseen by law. This procedure can be applied when for the crime committed the charge, reduced as said above, is equal to 2 years of the detention or combined with monetary punishment. In certain cases the “Patteggiamento allargato” allows the parties to agree on a punishment that, reduced by 1/3, does not exceed a term of imprisonment, along or in combination with monetary punishment, of 5 years.

In France, the conditions for a valid settlement arrangement depend on whether the settlement procedure aims at an “ending of the case under conditions (“classement sous conditions”)”, a “conditional suspension of the prosecution (“composition pénal”)” or a “guilty plea (“CRPC”)”. The “classement sous conditions” was created to respond to the development of petty crimes. There is no legal restriction on the offenses and on the maximum penalties to apply those measures, which can concern both national persons and legal entities. The “composition pénal” can only be proposed to a person who admits having committed any offense for which the main penalty is a monetary fine or prison sentence not exceeding 5 years. The “composition pénal” is not applicable in cases of press offenses, in voluntary homicide offenses or political offenses. Finally, the guilty plea (“CRPC”) can be agreed upon for all offenses with certain exceptions like voluntary and involuntary offenses against the physical integrity of a person and sexual offenses punished by the prison sentence exceeding 5 years. The guilty plea may play a role for both natural persons and legal entities. The guilty plea solution requires that the accused has admitted having committed the offense.

Pursuant to rule 11 of the US Federal Rules of Criminal Procedure a plea agreement may be discussed and reached between an attorney for the Government and the defendant’s attorney (or the defendant himself). The court must not participate in these discussions. As a result of these discussions the defendant may plead guilty or “nolo contendere” (which means that the defendant does not contest the conviction without admitting to be guilty) to either a charged offense

or a lesser or related offense, the plea agreement may specify what an attorney for the Government will perform under the agreement (e.g. not to bring or dismiss other charges; recommend or agree not to oppose the defendant's request that a particular sentence or sentencing range is appropriate etc.). The parties then must disclose the plea agreement in open court (unless the court allows to disclose in camera). This disclosure is followed by a judicial consideration of the plea agreement, finally accepting or rejecting the plea agreement.

According to the proposed legislation in Finland settlement proceedings will be possible only in cases where the maximum penalty of the suspected crime does not exceed 6 years of imprisonment (therefore excluding rape and other lesser sexual offenses, infanticide, battery and aggravated in forms of involuntary manslaughter, just to name a few). Before entering into settlement negotiations the prosecutor takes into consideration the nature of the case, the costs, the duration of the trial and other factors. Finally, the offender must admit having committed an offense and all parties (the defendant, the prosecutor and the plaintiff) must agree on the settlement. As a result of such settlement, a written verdict proposal is then submitted to the court. The court will eventually follow the verdict proposal or leave the matter in "status quo". It cannot, however, reject or in any way amend the verdict proposal.

In Switzerland, the only condition required for a non-compulsory conciliation is that the offence subject to the proceedings should be prosecuted only on complaint. As for the compulsory conciliation, it applies if there are considerations given to an exemption from punishment due to reparation being made in accordance with Article 53 SCC (Article 316 II CPC). The conditions of application of Article 53 SCC are that (1) the requirements for a suspended sentence, in accordance with the Article 42 SCC, are fulfilled, and (2) the interests of the general public and of the persons harmed in prosecution are negligible. Accelerated proceedings may apply if prior to the indictment (bringing of charges) the accused makes a request to the public prosecutor to conduct accelerated proceedings; the accused admits the matters essential to the legal appraisal of the case and recognizes, at least in principle, the civil claims and the public prosecutor does not request a custodial sentence of more than five years. However, it is important to mention that the accused does not have a right to be treated under accelerated proceedings. The prosecutor decides whether to conduct such proceedings; if he decides to disregard the accused request for accelerated proceedings, he does not need to provide a statement of reasons and his decision is considered as final. Where the CPC provides that a decision is final, there is no appellate remedy in respect of that decision, and therefore the accused has no right of appeal against such decisions.

4.2.2 *Can a settlement be reached at any time of the procedure (investigation and court proceeding) or is this option restricted to a certain stage (e.g. only in the investigation procedure)?*

With the exception of France all jurisdictions provide for the possibility to start settlement negotiations at any stage of the criminal procedure; as early as the investigation proceeding or as late as during the trial itself. Depending on the different settlement options within the given jurisdictions, some settlement proceedings are designed to close a criminal case even during the investigation proceedings, mostly subject to approval by the competent judge, whereas others are only relevant after the court proceeding has been opened.

In France, however, settlements cannot be reached at any time of the procedure, but only after the police investigation, when the prosecutor decides whether to initiate prosecution or to implement alternative proceedings to a prosecution or to close the case without taking any further action. Once the case is brought before the court, a settlement can no longer be proposed according to the French respondent.

4.2.3 *Which parties of the criminal procedure have to be involved in the settlement discussions?*

All jurisdictions provide that every party (court, prosecutor, defendant, victim) to the criminal proceeding participate to some extent in the settlement arrangement. However, the jurisdictions have different ideas of who must finally consent to the settlement arrangement.

In Germany every party of the criminal proceedings is involved in the settlement discussions, whereas only the court, the defendant and the prosecutor have finally to consent. To the other parties (e.g. the victim) only audience is granted and they do not have binding votes, but their statement may have influence on the prosecutor opinion.

Traditionally having a strong position within the criminal procedure, the plaintiff must agree to the settlement arrangement according to the proposed legislation in Finland. The other parties to consent are the prosecutor and the defendant.

Also the Swiss regulations are granting a strong position to the victim who plays a decisive role in the conciliation proceedings as well as in the accelerated proceedings.

In France the defendant and the prosecutor are the relevant parties for a settlement solution whereas the victim has to be heard, but does not have any rights to intervene on the public prosecution.

The US rules provide that an attorney for the Government and the defendant's attorney or the defendant himself are the only parties of a plea bargain, whereas the judge finally has to review and approve the agreements in open court, after the plea bargain has been agreed upon.

Similarly, in Italy and UK the defendant and the prosecutor have to agree on the settlement conditions whereas the court will finally review the settlement results.

43.2.4 We furthermore wanted to know more about the beginning of a settlement procedure. Which party to the criminal proceeding can take the initiative for a settlement: The court, the prosecutor, the defendant or all of them?

In Italy, the UK and the US settlement procedures are initiated either by the defendant or the prosecutor (US: attorney for the Government).

In Germany the relevant provision reads that “the court may find a settlement with the parties regarding the further proceeding and the results of the criminal procedure in appropriate cases”. However, it can be observed that settlement procedures in Germany are mostly initiated by the defendant or the prosecutor.

In France, it belongs to the public prosecutor to decide whether the case can be subject to a conditional suspension of the prosecution (“composition penal”) and to an ending of the case under conditions (“classement sous conditions”). Concerning the guilty plea (“CRPC”) the public prosecutor may decide for this procedure, either on his own initiative or upon the request of the offender or his lawyer.

The law proposal in Finland provides that the prosecutor decides whether to begin negotiations for a verdict proposal. The initiative for the settlement procedure itself may, however, come from the prosecutor, the defendant, the plaintiff or even from the court or the police.

In Switzerland, finally, it also depends on the relevant settlement option: Conciliation proceedings are regularly initiated by the prosecutor, whereas also the judge may propose to proceed with such settlement negotiations. The initiative

to request for accelerated proceedings, to the contrary, is only recognized for the accused (whereas in practice, however, the prosecutor often proposes to the accused to proceed with such request).

Interestingly, all jurisdictions require in principle that settlements in criminal proceedings have finally to be approved by the court. In this regard, it is emphasized by the UK respondent that as a constitutional principle nothing agreed between the prosecution and the defence can (or, at least, should) fetter the discretion of the court in relation to sentence. This issue arose in the famous case *R v Innospec Limited*. In that case the defendant, along with its US parent company, had been subject to a multi-jurisdictional investigation into alleged bribery and corruption. In a deal agreed with the Serious Fraud Office and US Department of Justice, both the UK and US entities agreed to plead guilty to certain matters. As part of that deal, a “global settlement” figure was agreed of \$40m, of which the defendant, Innospec Limited, agreed to pay some \$12.7 m. The sentencing judge, Thomas LJ, “reluctantly” agreed to impose the level of fine agreed between the defendant and the SFO. He was, however, highly critical of this approach, noting that:

“Principles of transparent and open justice require a court sitting in public itself first to determine by a hearing in open court the extent of the criminal conduct on which the offender has entered the plea and then, on the basis of its determination as to the conduct, the appropriate sentence. It is in the public interest, particularly in relation to the crime of corruption, that although, in accordance with the Practice Direction, there may be discussion and agreement as to the basis of plea, a court must rigorously scrutinise in open court in the interests of transparency and good governance the basis of that plea and to see whether it reflects the public interest”.

4.2.5 A core issue about settlement arrangements in criminal procedures concerns their formal requirements. We asked the national respondents to explain the formalities that have to be met for a valid settlement in their jurisdictions. Moreover, what are the consequences of a formally invalid settlement?

In the US, per the Federal Rules of Criminal Procedure, a criminal defendant must plead either guilty or “nolo contendere” (not contesting the sentence, but without admitting to be guilty) to either a charged offense or a lesser or related offense in order to benefit from a plea bargain agreement. Additionally, there are two types of bargains that may be struck, charge and sentence. Aside from the formalities of the negotiation itself, the plea agreement must be approved by the judge, who is under no obligation to accept the agreement. However, many jurisdictions require

the rejection of the plea agreement to be accompanied by an articulation of sound reason by the judge rejecting it.

In France, the ending of the case under conditions (“classement sous conditions”) requires the intervention of the prosecutor alone. For the conditional suspension of the prosecution (“composition pénale”) and the guilty plea (“CRPC”), the initiative belongs to the prosecutor, but the decision must be confirmed by the President of the Court, who decides whether or not to valid the proposal of the prosecutor. When he decides to approve the measure, the President of the Court issues an order.

According to the current Finnish legislation, the outcome of the official mediation process is a standard written form that describes the mediation process and the outcome of the negotiations and indicates, if the plaintiff has any claims left against the defendant after the mediation. However, the defendant and the plaintiff may also reach an unofficial settlement that has no formalities to be met – it may be even be a verbal agreement (although it usually is in writing). As the current settlement – by official mediation or by unofficial negotiations – does not have direct binding consequences on the charges, there is no actual invalidity.

In the proposed new settlement process the prosecutor drafts the verdict proposal, where the prosecutor agrees to demand punishment applying the lenient scale and may also agree to waive some of the charges in exchange for the confession (of the more serious charge/charges) by the defendant. Both aforementioned parties must agree on the rubrics of the confessed crimes. The verdict proposal must be in written form and both parties must undersign it. The verdict proposal must confirm the plaintiff’s consent. The verdict proposal must meet the basic formalities of a charge document. As the Finnish Criminal Procedure Law include provisions of correcting a simple error in writing, the chances that the verdict proposal would be deemed invalid due to error in formality are small.

In Germany, the formalities for a valid settlement agreement before trial are strict. The court announces the content of the settlement and decides about the content in form of a court order. The parties to the proceeding then have the opportunity to make representations, whereas only the defendant, the prosecutor and the court have to consent. The process, content and result of a settlement must be recorded. Furthermore the defendant must be instructed about the conditions according to which the court may deviate from the settlement and about the consequences, if the court does so. This instruction must also be recorded.

In Italy, the settlement has always to be validated by the judge which can be the “GIP” (Giudice Indagini Preliminari), the “GUP” (Giudice per Udienza preliminare) or the Judge of the Court if there is not preliminary hearing provided by the Italian Criminal Code of Conduct. Besides, this proceeding reveals an interesting aspect: Unlike in Germany, Italy strictly separates the competences in the preliminary and the final court proceeding (trial): Each proceeding is conducted by a separate judge. In Germany, to the contrary, the judge who decides about the opening of the trial (preliminary proceeding) is the same who will conduct the final court proceeding. For that reason, the German judge often seems to be “biased” to the disadvantage of the defendant during trial (otherwise he would not have opened the court proceeding). This aspect is highly criticized in Germany.

As to the accelerated proceedings before the prosecutor under the Swiss law of criminal procedure, the latter should prepare a negotiated indictment (bringing of charges), and communicate it to the parties; the parties must declare within ten days whether they consent (irrevocable consent) to the indictment (bringing of charges) or not. If any party rejects the indictment (bringing of charges), the prosecutor must conduct an ordinary preliminary proceeding. If the prosecutor has the consent of the parties, it shall submit the negotiated indictment (bringing of charges) with the proceeding files to the court of first instance. The indictment must contain – inter alia - the sentence and any further measures, instructions related to the imposition of a suspended sentence, the ruling on the civil claims made by the private claimant and the ruling on costs and damages, finally a notice to the parties that by consenting to the indictment, they waive their rights to ordinary proceedings and their right of appeal. Once the indictment (bringing of charges) is submitted to the court, the latter shall summon the parties for a hearing. At the hearing, the court shall inquire and establish whether the accused admits the matters on which the charges are based and whether this admission corresponds to the circumstances set out in the files. If the requirements for a judgment in the accelerated proceedings are fulfilled, the court shall issue a judgment that sets out the offences, sanctions and civil claims contained in the indictment, together with a brief statement of reasons for the fulfillment of the requirements for the accelerated proceedings.

3.2.6 In this context: What about the formal nature of a successful settlement arrangement? Will the settlement be executed itself or will the settlement results only become part of the final court judgment?

In Germany, Italy, the United States and Switzerland (re. the accelerated proceeding) the settlement agreements are not self-executing. Instead, the settlement results will become part of a final court judgment and therefore require

the judge's approval. In Italy, as described above, the judge who has participated in the settlement procedure cannot be the same judge of the final court judgment.

In France (re. the guilty plea) and – as proposed – in Finland the settlement will, after the courts' approval, have the effect of a final court judgment and therefore will be executed itself.

4.2.7 An essential question regarding settlement procedures in criminal law concerns potential restrictions in the scope of possible settlement arrangements. We asked the national respondents if it is possible to settle any relevant question or if there are any restrictions with regard to the content and scope of settlement results.

It turned out that nearly all jurisdictions are limiting the scope of possible settlement contents.

In Germany, for example, a settlement may concern the legal consequences of the judgment, whereas it is not possible to determine a certain sentence. Thus, the court can only offer a lower and upper limit of a sentence. Since questions of guilt cannot be part of a settlement, the court will in any event still be able to – even in case of a settlement – decide a final sentence at its own discretion (which of course will not exceed an agreed upper limit). Of course it is also possible to settle the procedural behavior of the parties to the criminal procedure.

In Italy and – as proposed – in Finland as well as in France there are certain types of criminal offenses such as sexual violence and voluntary offenses against the physical integrity of the victim which are not suitable for settlement procedures. In Italy, also crimes with a Mafia context cannot be settled. Apart from that it seems to be possible to settle any relevant question in these jurisdictions. This also includes the question of guilt and the final sentence in all its details.

Under the Swiss law, conciliation proceedings are limited to offences that are prosecuted on complaint (non-compulsory conciliation) or to cases where considerations are given to an exemption from punishment due to reparations being made by the accused to the victim (compulsory settlement). The settlement option of accelerated proceedings is especially limited by the quantum of the expected penalty. Accelerated proceedings are excluded whenever the prosecutor is willing to request for imprisonment of more than 5 years. According to the Swiss respondent, apart from those restrictions there are no further limits for the application of such proceedings.

In the US law the criminal defendant is limited in what he or she might plea in order to benefit from the plea agreement. There are two types of pleas that can be negotiated: The charge or the sentence. The charge agreement allows for a dismissal a lowering of charge, whereas a sentence agreement provides that specific sentence or sentencing range is appropriate.

4.2.8 Does the settlement proceeding require that the defendant admits to be guilty? If so, will the confession remain valid in case the settlement eventually fails?

Interestingly, the Italian reporter advised that in Italy it is not necessary to admit to be guilty for a valid settlement arrangement.

To the contrary in France and – as proposed – Finland the admission of guilt will constitute a condition of a valid settlement. In case the settlement fails, the confession will not remain valid in both jurisdictions.

According the US law the defendant may plead guilty or nolo contendere. A plea of nolo contendere does not contain the admittance of guilt, even if the defendant implicitly accepts the (agreed) sentence at the end. If, for whatever reason, a plea of “nolo contendere” is unavailable in the given case, the defendant must plead guilty to benefit from a plea agreement). In case the plea agreement is violated by the court the defendant will be given the opportunity to withdraw his or her plea.

In Germany the relevant provision holds that the defendant shall plead guilty, but does not have any obligation to do so. However, in the legal practice a judge will regularly only accept a settlement agreement in case of an admittance of guilt. In case the settlement eventually fails it is also not possible to use this confession anymore.

The Swiss accelerated proceeding requires - unlike the conciliation proceedings - a "sufficiently understandable and precise admission of the accused; a conditional admission by the accused is not acceptable". However, when the court refuses to proceed under accelerated proceedings, statements made by the parties for the purpose of accelerated proceedings may not be used in any subsequent ordinary proceedings; all declarations and admissions made by the accused in this regard and until the decision of the judge refusing accelerated proceedings cannot not be used in ordinary proceedings.

4.3 Enforcement of the settlement

4.3.1 *We wanted to know if the settlement is binding for the criminal court or if it is possible - and under which conditions - to deviate from the settlement in the final judgment.*

According to the US System, where the defendant is pleading guilty or nolo contendere, the agreement between the prosecutor and the defendant must still be finalized by the court. If the agreement is rejected by the court and a final judgment based on the settlement is not entered, the settlement cannot come into effect. However, after the court imposes a sentence, neither side may repudiate the agreement. In this case, the defendant therefore may not withdraw a plea of guilty or nolo contendere (required for a plea-bargain agreement) and the Government must undertake the actions it agreed to perform under the agreement.

In Italy, France and – as proposed – in Finland it is in principle not possible for the court to deviate from the settlement in its final judgment.

The German law differentiates: The settlement agreement is usually binding for the criminal court which took part in the settlement procedure. However, it will not become binding if the court ignored facts or new facts came up with the results that the (agreed) sentence range is not adequate any more. Moreover, the court may deviate from the settlement if the defendant's procedural behavior does not correspond to the courts proposal for the settlement (e.g. the confession is not as detailed as the court would have expected).

According to the Swiss regulations, the settlement reached between the parties under accelerated proceedings is not binding for the court and in order for the outcome to be effective, the court should approve it. The court has the authority to deviate from the settlement, if it considers the conduct of accelerated proceedings was not lawful and reasonable or the requested sanctions are inequitable, considering that the charge does not correspond to what should have been deducted from the main hearing and the files of the case.

4.3.2 *What if the defendant and / or the prosecutor were not happy anymore with the settlement arrangement after the case has been closed? Is a settlement / court decision based on a settlement still subject to appeal or can the parties agree to waive the right of appeal?*

In Germany, a court decision based on a settlement is always subject to appeal, the parties are not allowed to waive the right of appeal as part of the settlement.

According to the US rules pleas are always subject to direct appeal and collateral attack. However, courts of appeal have generally held that an appeal waiver maybe negotiated and included in the plea agreement.

In France an appeal is only possible for a settlement arrangement in form of the guilty plea. In this case parties are no allowed to waive the right of the appeal within the arrangement.

This seems to be also valid for the proposed Finnish legislation: In case of a settlement agreement an appeal will be possible without any option to waive the right of appeal in the settlement agreement. If the court decides to leave the matter in “status quo”, this decision is non-appealable.

The Swiss respondent advises that in case of accelerated proceedings, once the court has approved the settlement, it becomes a judgment. The only grounds available for an appeal against this judgment are that a party did not consent to the indictment (bringing of charges) or that the judgment does not correspond to the indictment (bringing of charges). This approach considers that the objective in accelerated proceedings is not to establish the real facts, but to limit oneself to negotiated facts. However, accelerated proceedings may sometimes lead to an error on the facts, for example, when someone admits guilt to protect somebody else; whenever the untrue facts are related to the innocence or guilt of the person who has been condemned by the verdict, the judgment may be revised.

3.4 Confidentiality and privilege

3.4.1 What about the rights of the victim of a criminal offense? Does the individual / company being damaged by criminal behavior have a right of access to the criminal files in order to gather evidence for potential damage claims?

In principle all jurisdictions provide for the right of the victim to get access to the criminal files in order to gather evidence for any potential damage claims. In Finland and Switzerland, this right is guaranteed by the strong position the victim has (as plaintiff) within the criminal proceeding.

In the US, the access to the files may however be subject to certain statutory or other restrictions, especially with regard to antitrust and securities matters as well as tax cases.

Finally, the Italian respondent emphasized that in Italy there is “no cross examination and therefore no evidence in the (criminal) settlement procedure with the result that the settlement arrangement cannot be used as evidence for the civil procedure”. It remains unclear, though, if this is also valid for other documents and protocols.

3.4.2 Our final question concerns the relation between civil courts’ and criminal courts’ proceedings on the same matter. What impact does the criminal courts’ decisions that the defendant is guilty have on potential damage claims? Will a civil court be bound by the criminal courts’ decisions and vice versa?

This question has been answered quite differently in the relevant jurisdictions and most interestingly in Finland:

In the Finnish jurisdiction there are no separate criminal and civil courts, only different procedures for criminal and civil matters. As the damage claims are normally handled in connection with the criminal case (applying criminal procedure rules), the court will hand down one verdict that decides both the criminal and damage claims presented in the case. If the court finds the defendant not guilty, the damage claims are normally rejected. Vice versa, if the court finds the defendant guilty, the court is naturally bound by this outcome with regards to the damage claims and normally the defendant is obligated to pay damage compensation as well. In this case the court still has to decide if the amount of the damage claims is acceptable, if the damage claims have proper cause-and-effect relation to the crime, if the claimed damages are compensable by the law and so on. As the criminal and connected civil matters are normally handled on the same trial, the verdicts in both matters have a direct connection. If, however, the damage claim is handled in a separate trial, usually the court in that trial will accept the other court’s verdict in the guilt issue, especially if said verdict is final and non-appealable. The verdict given in the criminal case is most likely submitted as evidence in the damage claim trial.

Similarly, in the US, a criminal defendant facing civil litigation cannot challenge the facts supporting a criminal conviction. Thus, if a criminal defendant pleads guilty, even as a result of a plea agreement, that plea will constitute an admission of the elements of the criminal charge. To the extent the elements in the criminal charges and the civil claims are the same, the defendant cannot dispute those

elements. However, a civil court will only be bound by the criminal court's decision to the same extent—if a vital element to the civil claim is not met, then the defendant may be found guilty in the criminal case, and not liable in the civil matter.

The Italian respondent is skeptical again with regard to the effect of a criminal settlement on civil proceedings: As the settlement is not equal to a sentence of guilt, it will not have a binding effect on the judgment in civil procedures.

In Germany, obviously to the contrary of the Finnish and US legislation, the civil court is not bound by the criminal court's decision. The civil court is free in the consideration of evidence. It is however also possible to assert a damage claim in the criminal action. In this case the criminal court has the right to decide about the damage claim, too.

Similarly, the Swiss code of obligation ("SCO") has established the principle of independence of the civil court from the criminal court, according to which the civil court is not bound by the verdict of the criminal court regarding the establishment of fault or the quantification of damages. This shall also be valid for other sections of the verdict (e.g. the facts of the case). Therefore, a civil judge is not bound by an earlier criminal court verdict in the same case.