

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

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1 General issues

1.1 Does your jurisdiction provide for settlement procedures with the competent competition authority?

1.1.1 Yes. The Office of Fair Trading (OFT) has a settlement procedure.

1.2 If your jurisdiction does not provide for settlement procedures, does your jurisdiction provide for commitment decisions?

1.2.1 The OFT also has a binding commitments procedure, this is separate and distinct from the settlement procedure. Where a case gives rise to competition concerns, instead of making an infringement decision, the OFT may be prepared to accept binding commitments from a business as to their future conduct.

2 If your jurisdiction does not provide for settlement procedures, please answer the following questions from the perspective of such commitment decision procedure.

2.1 What is the general stance towards settlement procedures in cartel matters? Are these generally considered to be a preferred route?

2.1.1 Settlement and binding commitments are increasingly commonly used by the OFT. Settlement allows for the use of a streamlined administrative procedure by the OFT but will only be available in cases which are deemed appropriate for settlement by the OFT.

3 Procedural issues

3.1 At what stage can a settlement be reached? E.g.: (i) only in the investigative procedure, (ii) before publishing a statement of objections, (iii) at any stage before an infringement decision has been taken, or (iv) at any time?

3.1.1 Settlement is only possible after the statement of objections has been issued.

- 3.2 Is it possible to settle with only one, or several parties involved in the alleged cartel, or do all accused parties need to be involved? Are there any constraints with whom a settlement can be reached (cartel leaders, recidivists, etc.)?
- 3.2.1 Settlement is possible with any of the addressees of the statement of objections. It is possible to settle with one or several addressees. Cartel leaders and recidivists may be invited by the OFT to discuss settlement. The OFT's Policy Committee must approve settlement discussions with any party.
- 3.3 Could you elaborate on the possible settlement arrangements. Are these only pecuniary measures or could these involve behavioral measures as well? How are the terms of a settlement being determined?
- 3.3.1 The settlement procedure is only available where a business under investigation is prepared to admit a breach of competition law and agree to a streamlined administrative procedure governing the remainder of the investigation. An infringement decision will still be published. Settlement may involve a reduced penalty but this is not guaranteed. Behavioural measures are generally only adopted in the binding commitments procedure. The OFT will determine the terms of the settlement and it will require an admission of liability on the part of the settling company.
- 3.4 Which party can take the initiative for a settlement: is this the administrative authority only, or the suspected parties as well?
- 3.4.1 Parties under investigation 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.
- 3.5 Are there any other institutions involved other than the competition authority? Does a settlement, e.g., require any court approval? Please elaborate on the relevant procedure.

3.5.1 No, the decision is made only by the OFT together with its Policy Committee.

3.6 Is it necessary for reaching a settlement to admit being guilty?

3.6.1 Yes.

4 Enforcement of settlement

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?

4.1.1 No. In a settlement, once the fine is paid there will be no further enforcement measures taken. Behavioural measures are not possible in settlements with the OFT. They are only possible in relation to binding commitments.

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

4.2.1 No, a settlement involves an admission of liability. It is not possible to appeal once such an admission has been made.

4.3 Would it e.g. be possible for a party reaching a settlement with a public authority to be prosecuted for the same behavior by a criminal prosecutor?

4.3.1 Where a company makes 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 does not make an immunity application, it is possible for an individual to be subject to a criminal prosecution in relation to that conduct. In the UK, companies cannot be subject to criminal prosecution only individuals. 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.

5 Confidentiality and privilege

- 5.1 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?
 - 5.1.1 Yes, 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.
- 5.2 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?
 - 5.2.1 No. But materials provided by one party during the course of an investigation can be used against other parties
- 5.3 Do parties who have settled their case get any protection from any possible follow-on damage claims in civil proceedings?
 - 5.3.1 No, but 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.