

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

Antitrust, Commercial Fraud and Litigation Commissions

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1. QUESTIONNAIRE FOR ANTRITRUST PROCEDURES (MAÏTE OTTES)

1.1 General issues

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

The Finnish Competition and Consumer Authority (FCCA) does not offer settlement procedures to parties in breach of antitrust rules. In Finland, leniency is the main channel for companies to avoid or lessen the penalty payment for breach of competition law. The absence of settlement procedures at the FCCA follows already from the fact that the FCCA can only propose to the Market Court that a penalty payment should be imposed on a company. It is the Market Court that makes the final decision, whether or not the fine will be imposed. As the FCCA lacks the power to impose penalty payments for breaches of the antitrust legislation, it also lacks the power to offer settlement procedures.

The trend within the EU regarding settlement procedures in antitrust matters has however been discussed in Finland in connection with drafting the new Competition Act (Kilpailulaki, 948/2011), which came into force on 1.11.2011. Namely, the trend was discussed by the working group consisting of amongst others the Chief Director for the FCCA, Chief Justice of the Market Court, representatives from the government, the Ministry of Trade and Industry, the Confederation of Finnish Industries and Federation of Finnish Enterprises. The working group was assigned to prepare a consultation process and a report on material issues in view of the new legislation. In its report (“Kilpailulaki 2010 työryhmän keskeiset ehdotukset”), the working group concludes, that there is a need to give the FCCA more effective tools to investigate and charge companies in breach of competition law. However, as regards settlements, the working group states that although settlement procedures do offer a faster system to handle breaches of competition law, it would not noticeably hasten the handling of such cases nor would it lessen the resources used by the FCCA in its investigations. This is due to the broad investigation that must none the less be carried out when there is a suspicion that competition law has been breached.

The working group report also discusses the possibility of settlements during the proceedings in the Market Court. However, it concludes that this kind of “plea bargaining” is a foreign concept to the Finish legal system and would thus be difficult to incorporate into the administrative judicial procedure in Finland. Further, as the possibility of a settlement probably could be used only in marginal cases, the working group concludes that it would not have the desired effects.¹

¹ Kilpailulaki 2010 työryhmän keskeiset ehdotukset, pages 24-25

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

Commitment decisions are not as such used in Finland. However, a feature of the leniency procedure is that whistleblowers must immediately cease participation in the competition restraint, cooperate with the FCCA during the entire investigation, not destroy evidence and keep the procedure confidential from other parties. 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. There is however no independent commitment procedure whereby an investigation may be laid down due to commitments made to the FCCA by the companies in breach of competition law.

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

N/A

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

N/A

1.2 Procedural issues

1.2.1 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?

N/A

1.2.2 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.)?

N/A

1.2.3 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?

N/A

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

N/A

1.2.5 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.

N/A

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

N/A

1.3 Enforcement of settlement

1.3.1 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?

N/A

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

N/A

1.3.3 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?

N/A

1.4 Confidentiality and privilege

1.4.1 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?

N/A

1.4.2 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?

N/A

1.4.3 Do parties who have settled their case get any protection from any possible follow-on damage claims in civil proceedings?

N/A