

C/M/S/

Law . Tax



Competition Law Newsletter
Settlement with the Competition
Authority
October 2013



The **main purpose of a settlement with the competition authority** is an efficient conclusion of the procedure with considerable time and cost savings for both the company and the authority.

Settlement with the Competition Authority

Main aspects

Concluding a Settlement

A settlement with the competition authority (Settlement) is negotiated and agreed between the Secretariat of the Competition Commission (Secretariat) and the relevant company and is then submitted to the Competition Commission (COMCO) for approval.

Subject matter of a Settlement

Appropriate measures for removing an unlawful restriction of competition for the future.

Advantages of a Settlement for the company

- possibility of negotiating future admissible conduct;
- reduction in any fine;
- time and cost savings;
- reduction in negative publicity.

Disadvantages of a Settlement for the company

- risk of an incorrect assessment as a result of a limited review of the facts;
- «waiver» of any legal remedy;
- possible admission of guilt in view of any potential claims for damages;
- increased risk of penalties for the future.

Key points in negotiations with the Secretariat

- limit any obligations to the business area under investigation;
- ensure that the obligations undertaken are specifically and tightly defined;
- make it clear that the COMCO's presentation of facts and legal assessment are not acknowledged by the company;
- link the «waiver» of legal remedy to compliance with the range of fine (and any other conditions) submitted to the COMCO.

A Settlement should be considered as early as possible in the proceedings in order to maximise the reduction in the fine and increase a company's influence on the investigation process and its results.



Initial position

If the Secretariat determines as part of an investigation that a company is involved in a prohibited restriction of competition, it may propose a Settlement to the company in order to put an end to the prohibited restriction (Art. 29 para. 1 of the Swiss Cartel Act). In practice, a Settlement may also be initiated by the company affected. The main purpose of a Settlement is an efficient conclusion of the procedure with considerable time and cost savings for both the company and the authority.

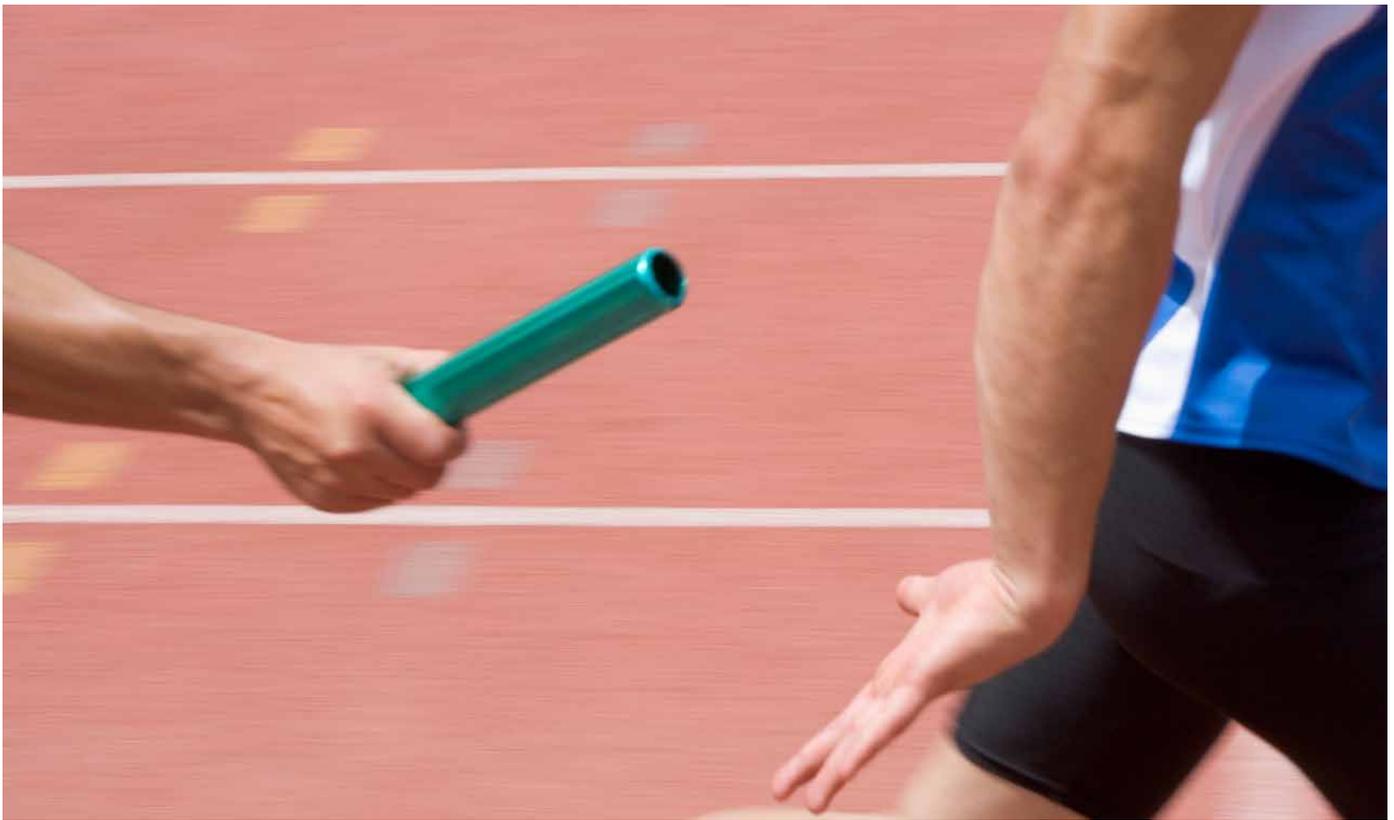
If a Settlement is agreed, it is drawn up in writing and submitted by the Secretariat

to the COMCO for approval, together with the request for the final decision (Art. 29 para. 2 Cartel Act). If the COMCO approves the Settlement, the wording of the Settlement (not including the preliminary comments) is normally incorporated into the binding part of the decision (operative part).

From a dogmatic point of view, a Settlement represents an agreement under public law which is subject to approval by the COMCO. As an agreement under public law, the Settlement cannot be contested using ordinary legal remedies. On the other hand, the final decision of the COMCO by

which the Settlement is either approved or rejected, is subject to appeal to the Federal Administrative Court (see also the discussion of the disadvantages of a Settlement below).

Entering into a Settlement has different consequences for the further proceedings, the amount of any fine and the company's future conduct. A more detailed discussion of the subject matter and consequences of a Settlement is therefore provided below.



Subject matter and structure of a Settlement

A Settlement deals with appropriate measures for removing a prohibited restriction of competition for the future. This does not only involve regulating what a company is not allowed to do from a competition law point of view; rather, it also involves what it still can do without eliminating or significantly restricting competition.

However, neither a determination of the prevailing facts nor a legal qualification of these facts nor the legitimacy or inadmissibility of a certain conduct in the past can be the subject of a Settlement. The sanction to be applied cannot be negotiated either and therefore cannot be the subject of a Settlement. The Secretariat cannot engage in negotiations with a company on the issue of whether a fine must be imposed, nor is there any legal scope for negotiations regarding the amount of any fine (see also the advantages of a Settlement below).

In practice, a Settlement is structured into **two parts**:

The preliminary comments to the Settlement form the **first part**. They specify the range of fine within which the Secretariat intends to request the determination of the fine by the COMCO. However, the COMCO is not bound by this range of fine. The amount of the fine is fixed conclusively in the COMCO decision which brings the proceedings to an end. Also incorporated into the preliminary comments is the parties' waiver of the option of taking legal action against the COMCO's decision provided that the COMCO approves the Settlement. There is an emerging tendency in practice towards a mere declaration of intent, probably due to the fact that a formal waiver is problematic from a legal point of view. Companies also regularly link their declaration to the condition that the COMCO does not exceed the range of fine requested by the Secretariat. In the COMCO decision concerning the

distribution of music dated 16 July 2012, the waiver of legal remedies was made dependent on compliance with additional points in the preliminary comments.

The obligations to which the company is subject are set out in the **second part**. Only this second part of the Settlement is incorporated into the operative part of COMCO's decision and becomes legally binding. On some occasions in the past, including cases where only some of the affected companies agreed to a Settlement, the operative part of the decision merely stated that the Settlement was approved in the agreed form.

Advantages of a Settlement

Greater involvement in the decision

If a company merely waits for the COMCO to issue a decision, the Commission unilaterally dictates the company's future conduct. However, if the company, as part of a Settlement, negotiates a way of removing the restriction of competition with the competition authority, it is able to take an active part in the shaping of the decision. Through negotiations with the competition authority, the company can agree conduct which stays just within the law, and influence what is permitted and prohibited in the future. The company can also exert influence on additional points, including in particular those contained in the preliminary comments to a Settlement.

Reduction of fine

The competition authority recognises a company's willingness and readiness to enter into a Settlement as cooperative and thus mitigating behaviour when assessing the fine, resulting in a percentage reduction in the applicable fine. COMCO practice is that the size of reduction in the fine resulting from entering into a Settlement depends in particular on the point in time in the proceedings that a Settlement was entered into, and whether a reduction has already been granted based on voluntary cooperation in the proceedings as part of the leniency programme.

According to the practice of the competition authority, if a company is already

benefiting from a reduction based on the leniency programme, the amount of any additional reduction for agreeing to a Settlement lies between 10% and 20%, depending on when the Settlement was agreed. As the main purpose of a Settlement from the COMCO's point of view is to simplify and shorten the proceedings, the COMCO has also in the past limited the reduction resulting from agreeing to a Settlement to a single-digit percentage when the Settlement was only agreed after the draft of the Secretariat's request for a decision had been submitted to the parties for comments. In the same decision, the COMCO also indicated that it will no longer approve a Settlement if it is concluded at such a late stage in the proceedings.

On the other hand, the COMCO indicated in a recent decision that in cases where the leniency programme does not apply a reduction for concluding a Settlement of up to 40% is possible.

Time and cost savings

Proceedings can be simplified and shortened depending on the stage at which a Settlement is agreed. The competition authority still has to clarify the facts by way of evidence, in particular when the matter is directly sanctionable, even in cases where a Settlement has been agreed, and must also provide a legal assessment and decide on the admissibility of the restric-

tion of competition and on the fine to be imposed. Nevertheless, a Settlement simplifies the proceedings in practice. If a company admits a breach of competition law, or disputes a breach but nonetheless amends its conduct in mutual accord with the authority, the authority tends not to investigate the facts with the same level of precision and to state the reasons for its decision in less detail than in cases without a Settlement. This results in a reduction in procedural effort and costs, both for the competition authority and for the company.

Less negative publicity

The public simply becoming aware of a cartel investigation generally involves reputational damage for the company concerned. Reports of a breach of cartel law being established by the COMCO or a court are usually particularly damaging. In this context, the benefit of concluding the proceedings by way of a Settlement is that the competition authority tends to word its press releases in a more restrained way in such cases.

Disadvantages of a Settlement

Possibility of an incorrect assessment

As already mentioned, the competition authority often does not fully assess the facts when a Settlement is agreed. As such, the question remains as to whether the inadmissibility of the conduct could have been proven in full proceedings. The company is thus forced to accept a decision

and possibly a fine which are not based on facts that have been judged conclusively.

Waiver of legal remedy

As part of previous Settlements, an agreement was often reached to the effect that the company waived any review of the COMCO decision by the courts, provided

that the COMCO did not exceed the range of fine requested by the Secretariat. Such waiver is likely to be unlawful. Accordingly, in its more recent practice the Secretariat has started to require that companies provide a simple declaration of intent not to seek legal remedy. Irrespective of the legal admissibility, however, a company

will mostly *de facto* waive any review of the decision by the courts, provided that the Settlement is approved by the COMCO as agreed. The legal situation is unclear in cases where the COMCO approves the Settlement but exceeds the range of fine requested by the Secretariat. There is still a risk that no appeal can be made against the decision since the legitimate interest required for such appeal is lacking. In order to prevent this situation, one recommendation is to link the declaration to compliance with the range of fine requested; the other is to set out in the preliminary comments

to the Settlement that the facts as presented by the COMCO and its legal assessment are not recognised by the company.

tion authority's factual and legal assessment. However, there is currently a lack of practical experience in this area.

Potential disadvantages in compensation proceedings

Agreeing a Settlement could potentially be viewed as an admission of guilt in any proceedings regarding claims for damages against the company. The only way to counter this risk is with the proviso in the preliminary comments to a Settlement referred to above, stating that the signatory company does not share the competi-



Risks associated with new developments

The wording of a Settlement proposed by the Secretariat plays a major role in deciding whether it is advisable for a company to sign the Settlement or not. Recent developments in COMCO practice related to the scope and wording of obligations in Settlements may lead to increased risks for affected companies:

Expansion of the prohibited conduct

An analysis of the Settlements agreed in recent years shows that increasingly not only the conduct investigated in a particular case is prohibited, but that more extensive obligations are being imposed, such as not exchanging information related to price increases, not giving recommendations or not taking part in discussions related to a

passing on of cost factors, all irrespective of the effect such conduct has on competition.

Expansion of the affected business area

The Secretariat is also showing a tendency to extend the obligations imposed on a company in a Settlement to other business areas which were not part of the investigation.

The content of a Settlement is of major importance since, according to Art. 50 of the Cartel Act, a company is – without any further investigation – liable to a fine of up to 10% of the turnover generated in Switzerland in the last three years if it breaches the terms of a Settlement.

The consequence of the developments described here is that the risk of a fine due to breaching the terms of a Settlement increases substantially.

When negotiating a Settlement, it is therefore important to ensure that the obligations imposed on a company are defined as specifically and narrowly as possible and are based on the scope of the investigation. Otherwise there is a risk of the competition authority creating obligations for a company in a Settlement which go beyond the conduct prohibited under the Swiss Cartel Act.



Conclusion

As Settlements are a legal institution of considerable significance in proceedings before the Swiss competition authority, it is important that the opportunities and risks

associated with agreeing a Settlement are properly assessed and weighed up against each other. It is therefore worth monitoring developments in practice in general

and in any negotiations with the Secretariat, and carefully assessing whether coming to a Settlement is advisable for the relevant company in a specific case.

Contact



Amr Abdelaziz, LL.M.
E amr.abdelaziz@cms-veh.com



Stefan Brunnschweiler, LL.M.
E stefan.brunnschweiler@cms-veh.com



Marquard Christen, LL.M., MAS
E marquard.christen@cms-veh.com



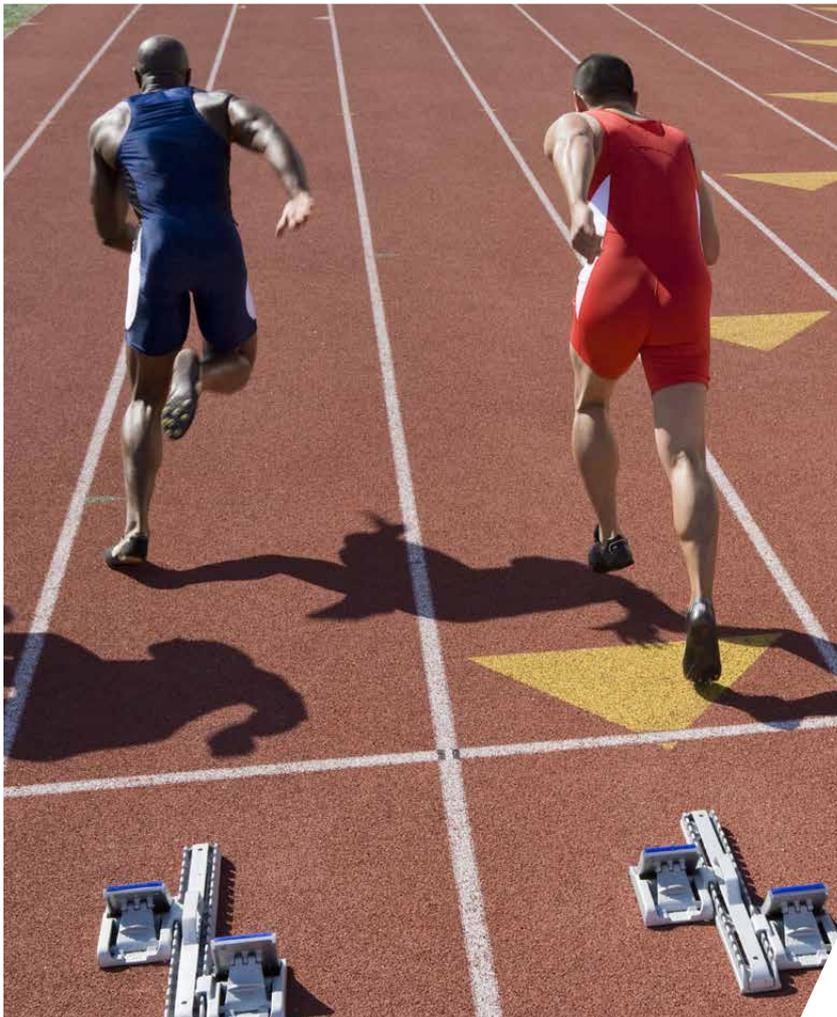
Mauro Nicoli
E mauro.nicoli@cms-veh.com



Alain Raemy, LL.M.
E alain.raemy@cms-veh.com



Dr Patrick Sommer, H.E.E.
E patrick.sommer@cms-veh.com



CMS von Erlach Henrici AG

Dreikönigstrasse 7
P.O. Box 2991
8022 Zürich

T +41 44 285 11 11
F +41 44 285 11 22
E office@cms-veh.com
www.cms-veh.com

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS member firms are:

CMS Adonnino Ascoli & Cavasola Scamoni, Associazione Professionale (Italy);
CMS Albiñana & Suárez de Lezo S.L.P. (Spain);
CMS Bureau Francis Lefebvre S.E.L.A.F.A. (France);
CMS Cameron McKenna LLP (UK);
CMS DeBacker SCRL/CVBA (Belgium);
CMS Derks Star Busmann N.V. (The Netherlands);
CMS von Erlach Henrici Ltd (Switzerland);
CMS Hasche Sjögle, Partnerschaft von Rechtsanwälten und Steuerberatern (Germany);
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH (Austria) and
CMS Rui Pena, Arnaut & Associados RL (Portugal).

CMS locations:

Aberdeen, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Berlin, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dresden, Dubai, Duesseldorf, Edinburgh, Frankfurt, Hamburg, Istanbul, Kyiv, Leipzig, Lisbon, Ljubljana, London, Luxembourg, Lyon, Madrid, Mexico City, Milan, Moscow, Munich, Paris, Prague, Rio de Janeiro, Rome, Sarajevo, Seville, Shanghai, Sofia, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

www.cmslegal.com