

## QUESTION A

**The consistency and compatibility of transactional resolutions of antitrust proceedings (such as settlement processes, leniencies, transactions, commitments, and amicable agreements) with the due process and fundamental rights of the parties.**

### **1. Introduction**

#### *1.1 Transactional institutions – general framework*

Any analysis of the development of transactional institutions in the Italian legal system, as well as any investigation into the nature and functions of such institutions, inevitably depend on the assessment of the subjects and entities involved in any such transactions. Such exercise therefore requires to frame negotiations, and their manifold possible outcome<sup>1</sup>, in the wider picture of public administration.

In general, the Italian legal system expressly recognizes the legality of any settlement, or compromise agreement, between two or more parties with a view to prevent, or bring to an end, a legal dispute<sup>2</sup>.

In the context of civil law, however, the parties' right to enter into any such settlement or compromise is subject to the capacity to dispose of the rights which are the subject matter of the dispute, and therefore of the settlement itself<sup>3</sup>.

In an attempt to transfer the above general concept of Italian law to the domain of public entities, or administrative bodies, one may wonder whether the nature of a settlement – as provided in the above mentioned legal provisions – is *per se* compatible with the nature of the administrative entity or body.

The issue of the relationships between administrative law and settlement or transactions has long been debated, and can possibly reach its balance point: on the one hand, the exercise of the public power which administrative bodies are entitled, and due, to exert makes settlements and transactions doubtful as to their acceptability; on the other hand, however, one of the main principles of administrative law – that of efficiency<sup>4</sup> - clearly suggest that transactional remedies

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<sup>1</sup> A number of legal expressions can be used, such as compromise, settlement, agreement etc.. In the context of this work all such terms will be used regardless of any nuance or difference they may have, ie taking into account their common basis: that of an agreement between two or more parties, normally aimed at replacing a decision which would otherwise been taken by a competent Court or entity.

<sup>2</sup> Article 1965 of the Italian civil code "*a settlement is a contract whereby the parties, by mutual concessions, end pending litigation or prevent litigation that could arise between them. Mutual concessions can also create, modify, or extinguish relationships other than those which arise from the subject matter of the claim and the dispute between the parties*".

<sup>3</sup> Article 1966 of Italian civil code "*in order to compromise, the parties must have the capacity to dispose of the rights which are the subject matter of litigation. A compromise is void if such rights, either by their nature or by express provision of the law, cannot be disposed of by the parties*".

<sup>4</sup> Article 97 of the Italian Constitution "*Public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration*".

may offer very effective means for reducing public expenditure, making the whole administrative machine work more efficiently and help the state attain (at least some of) its objectives in a quicker and more certain way.

It has been underlined that transactional institutions constitute “*a very effective means for social peace*”, which public administration cannot ignore<sup>5</sup>. This old opinion from a scholar clearly demonstrates that the admissibility of the transaction for public bodies both in their relationships with other public bodies and with private entities have been argued since long.

In summary, it can be said that transactional institutions are normally admitted with reference to public bodies, also further to some decisive statements by the Corte dei Conti<sup>6</sup>.

The main limitation still derives from those areas where rights and powers are not disposable, i.e. all those measures and remedies adopted by public bodies which are the expression of the State power and therefore exclude the possibility to enter into any compromise – most typically, the imposition of sanctions such as fines.

The legal practice currently envisages, for instance, transactions which are admitted in the disputes between tax regulatory entities and individuals, or companies, although not in relation to the amount of the sanctions imposed, but rather on the modes of payment (for instance, the possibility to pay a certain amount by instalments).

Likewise, the Revenue Service normally resorts to the institute of mediation in its relationships with tax-payers, in order to prevent or settle ongoing tax-related litigation.

There are a number of other areas of administrative law, including that of competition law (see below) where the development of transactional remedies has been increasing in the last few decades, and can now be said to be perfectly admitted and generally acceptable.

Even in those areas where the State fully exercises its powers, including investigating, prosecuting and sanctioning powers, a certain degree of compromise has been gradually introduced.

When the code of criminal procedure has been first amended in the late ‘80s, a significant number of procedural changes have been brought in the code to foster the resolution of criminal proceedings by means of alternative procedures, all of which purported at reducing the workload of the Courts, while ensuring a higher degree of certainty of the criminal sanction, in exchange for a reduction of sentences. Among these alternative procedures, a plea-bargain<sup>7</sup> procedure has been introduced by means of which full trial is completely avoided and is rather replaced by a sort of “agreement” between the Public Prosecutor and the defendant, who mutually accept a pre-determined sentence.

The legal nature of plea-bargain is sensibly far from that of mediation or settlement in the realm of civil law, but the institution certainly demonstrates that public bodies are available to concede on

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<sup>5</sup> Enrico Guicciardi, “*La transazione degli enti pubblici*”, in *Arch.Dir.Pubbl.* 1936, pagg. 64 e ss. e 205 e ss.

<sup>6</sup> See Corte dei Conti, in Sezione Regionale di Controllo per la Lombardia, Lombardia/1116/2009/par

<sup>7</sup> The so called “*patteggiamento*”, or more technically “*applicazione della pena su richiesta*”; see articles 444 et foll. Code of Criminal Procedure.

their sanctioning and investigating powers in exchange for a more expeditious and less uncertain outcome of the case.

It can therefore be stated that transactional institutions, in their manifold varieties, are now certainly a significant part of the administration of justice in the broader sense of the word, therefore including both the judiciary and the administrative bodies with regulatory and investigating/sanctioning powers such as the Competition Authority<sup>8</sup>.

### *1.2 Transactional institutions in competition law*

In this scenario, the introduction into the Italian legal system of transactional institutions for competition law purposes is relatively recent, dating back to 2006<sup>9</sup>, when the possibility for companies to offer commitments to remedy an alleged violation of competition law was introduced in the Italian legal system<sup>10</sup>.

Along the same lines, although by way of a very different mechanism, a leniency program was also introduced in 2010<sup>11</sup>, to encourage “whistle blowing” for those undertakings which were ready to exit cartels and provide useful information for the prosecution thereof, in exchange for a substantial reduction, or even immunity, in the fines imposed by the Authority.

While the introduction of such legislative changes in Italian competition law system is certainly derived from the EU experience and legislation, it can also be – at least partially – attributed to the more general trend which has been evolving in the field of administrative law, where a number of similar mechanisms have been implemented so as to make the administration system more efficient, workable, less expensive and – last but not least – closer to those subjects (be them individuals or companies) in the interest of which the administration itself should operate.

In general terms, it can be said that the introduction of such transactional remedies or procedures have been welcome by the business community. It is true, of course, that even before such legislative changes the practice of the competition authority did include a certain degree of informal negotiations with the parties; this was specifically the case in the field of merger control, as well as in the – much less frequent – area of potentially restrictive agreements, while most serious offenses such as abuse of dominance seemed incompatible with a transactional approach.

The major change brought about by the 2006 reform, however, is that the negotiation process is now expressly recognized by the law, and plays a well-respected role in the overall mechanism of administration of antitrust justice. While contacts and informal negotiations are still possible at an

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<sup>8</sup> “*Autorità Garante della Concorrenza e del Mercato*”, hereinafter translated as Competition Authority. It is a public body, having administrative powers, which is established and operates pursuant to articles 10 et foll. Law. N. 287 of 10 October 1990.

<sup>9</sup> Decree 4 July 2006, no. 223 and subsequent law 4 August 2006, no. 248 which introduced Articles 14 *bis* and 14 *ter* of Law 287/1990.

<sup>10</sup> Article 14 *ter* of law 287/1990: “*Within three months from notification of the launch of an investigation into the possible violation of Articles 2 or 3 of this law or Articles 81 or 82 of the EC Treaty, companies may offer commitments that would correct the anti-competitive conduct which is the subject of the investigation. The Authority may, after having assessed the suitability of such commitments and within the limits of EU law, make them binding on for those companies and terminate the proceeding without ascertaining the contravention*”.

<sup>11</sup> See “*Notice on the non-imposition and reduction of fines under Article 15 of law no. 287 of 10 October 1990*”, as modified by resolution no. 21092 of 6 May 2010, published on bulletin no. 18 of 24 May 2010.

early stage (again, mostly in the field of merger control and, much less frequently, in the field of agreements), the law now provides for transactional mechanisms which are operated once a formal investigation has been started, i.e. when proceedings have commenced and are due to reach a decision – by either finding a breach of competition rules or acquitting the investigated company/ies.

Therefore, it can certainly be said that the major advantage for companies facing such opportunity is not only to be able to mitigate, or even remedy, the potential consequences of allegedly infringing behaviors, but also to be able to predict the magnitude of such consequences – something which was, and still is in the lack of transactional remedies, far more difficult to do given the wide discretionary power of the Authority.

Another clear advantage – favoring the Authority and therefore public administration itself as well as any involved undertakings – is that transactional procedures are clearly purported at reducing the workload, and therefore the duration and costs, of any investigating procedure. While a finding of infringement requires a heavy burden of proof, as well as certain amount of investigative efforts (which of course match with the defensive efforts of the investigated parties), the possibility of transactional remedies clearly, and drastically, reduces all such efforts, costs and delays.

### *1.3 Common features and rationale of transactional procedures in competition law*

As better explained below, there are various types of transactional institutions which are currently adopted and used in competition law.

The common basis of all such institutions is that they are expressly provided in the law, and are aimed at reducing uncertainty, workload, costs and delays. Also, in a more general framework, such transactional institutions are an expression of the State's willingness to make the administrative system more “workable” towards individuals and companies, while allowing all parties a right to intervene and express their position.

In this respect, transactional institutions certainly represent a step forward in the good administration of antitrust justice. Of course, there are still a number of legal issues which such remedies may pose, some of them strictly related to the parallel track of private enforcement of antitrust rules, namely civil actions and related claims for damages; these issues will be better dealt with below.

## **2. Transactional resolution of agreements and the abuse of dominance**

There are currently three main types of transactional institutions which are applicable to competition law, two of which referred to infringements and a third one to merger control<sup>12</sup>. As they differ sensibly from one another, they will be dealt with separately as follows.

### ***2.1 Decisions with commitments***

#### ***2.1.1 General legal framework and procedure***

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<sup>12</sup> While remedies for restrictive agreements or abuse of dominance share the same ratio and procedures, commitments within the framework of merger control have a slightly different nature; these latter will be dealt with separately at para. 3 below.

The first category is that of the so called “decisions with commitments”, which has been introduced into the Italian legal system in 2006.

This type of transactional resolution applies to both agreements and abuse of dominant position, as provided under articles 2 and 3 of Italian antitrust law.

Such a resolution is possible only once a formal procedure of investigation on an alleged breach of competition rules has been commenced, through a statement of objections issued by the Competition Authority and properly addressed to the defendant(s) as well as any interested third parties, such as complainants. In these circumstances, the statement of objections resumes the initial findings of the Authority, defines the potential framework for investigating the violation and provides a *prima facie* assessment of such violation, which is of course subject to further investigations and analysis by the Authority and in relation to which all parties are invited to make their submissions.

Within three months of the commencement of such procedure, the parties which are alleged to breach competition law may submit their proposal for measures and commitments purported at remedying, reducing or eliminating the alleged restrictions or distortions of competition as pointed to by the Competition Authority in its statement of objections. The range of such proposed measures is very wide, including for instance contractual arrangements, modifications of trading or contractual conditions, demergers or dismissal of business branches or assets, as well as any other kind of contractual, commercial or structural arrangements.

It is important to underline that any such proposition does not imply any acknowledgement or admission of guilt with respect to the statement of objections, but it rather constitutes a proposal to avoid further investigations and to specifically address any competition law concerns which is reflected in the statement of objections – be it well founded or not.

Whenever the parties decide to enter into a “negotiation stage” with the Authority, this normally happens through initial, informal contacts which can even be cultivated on a no-name basis – typically by the parties’s lawyers. This is very important to verify to what extent the Authority is willing to further negotiate, and in which direction.

If a proposal with commitments is therefore filed, a further, more formal, negotiation process takes place within the Authority until a consensus is reached about the commitments; if not such consent is reached, however, the parties are free to withdraw their proposed commitments and the Authority will proceed with its case, thus by exercising its investigative powers.

Once the proposal containing commitments is received by the Authority<sup>13</sup>, this latter may summon the submitting entity and, although the law does not expressly provide for any proper negotiation process, a discussion to possibly adopt the commitments takes place.

Once the commitments have been proposed in their final form<sup>14</sup>, the Authority issues a decision which makes such commitments become an integral part of the decision; therefore, by means of this

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<sup>13</sup> See resolution no. 16015 of 12 October 2006 as to the detailed layout of the procedural rules, specifically on the submission of draft commitments to be further discussed by/with the Authority.

procedure unilateral commitments by the submitting company are actually transferred into a full administrative decision, which is thoroughly binding on the submitting party.

A decision with commitments does not include any finding of liability, nor does it assess the potential breach of competition rules, whereas it establishes that the proposed commitments appear to be proportionate and appropriate to address and resolve the Authority's concerns as to a possible restriction or distortion of competition.

More specifically, the criteria adopted by the Authority in assessing commitments are those of *proportionality* and *necessity* with respect to the alleged infringement, as established by EU law, although the wording of the law refers simply to the "suitability" of the proposed commitments<sup>15</sup>.

The above described procedure is applicable to any cases of agreements and concerted practices, with the exclusion of typical "hard core" restrictions, such as horizontal agreements and cartels, or other most serious infringements. Likewise, the procedure is also applicable to those cases where an abuse of dominant position is at stake, but again the authority would be reluctant to enter into a decision with commitments in any case where substantial sanctions are likely to be imposed.

Therefore, as a general rule of thumb it can be said that decision with commitments are typically applied, and regulate cases, where the possible decision by the authority would not go beyond an injunction or, possibly, other measures to restore proper conditions of competition (such as an order to supply, an order to demerge etc.), whereas they would be excluded in all cases where substantial fines can be imposed.

Of course, third parties are allowed to intervene in such procedure.

When a statement of objection is issued by the Authority, it is published on the Authority's bulletin as well as the official website, thus allowing any interested third party to intervene in the proceedings. The right to intervene is extended to any individual, company, associations of consumers which may claim to have an interest (normally assessed in a rather wide manner) to express its position on the ongoing case.

The right to intervene include the right to access the Authority's file, including all non-confidential versions of the defendants' submissions as well as related documentation – please see below.

Within the framework of the above mentioned procedure, as soon as a proposal for commitments is submitted, same is made available again through its publication on the bulletin as well as the Authority's website, so as to allow any interested third parties to file submissions and to comment, mainly on the proportionality and/or appropriateness of the proposed commitments.

Once a decision with commitments is entered, any party may appeal such decision – as it would be with any other decision taken by the authority – before the Regional Administrative Tribunal (RAT) of Lazio, which has been attributed exclusive jurisdiction over the Authority's administrative decisions. RAT's decisions can be further appealed before the Council of State.

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<sup>14</sup> Another important step is the publication of the proposed commitments, triggering a 30-day deadline for third parties to make their submissions and comments (the so called "market test"), further to which commitments can still be modified before the Authority decides.

<sup>15</sup> Article 14 *ter* of Law no. 287 of 10 October 1990.

One of the main drawbacks for third parties, which may or may not be effected by a decision with commitments, is that such decisions always lack a finding of infringement, and therefore fail to provide a strong basis for private enforcement measures, typically civil actions including damages claims – please see below.

### *2.1.2 Decisions with commitments – pros and cons*

It is interesting to note that the recent and present practice of the Italian Competition Authority encompasses a large number of cases where investigated undertakings have submitted their proposed commitments, so that this procedure has now become a fundamental stage of virtually any procedure for the infringement of competition rules. Even in those cases where a finding of infringement and subsequent sanctions have been decided, prior to such decision the investigated undertakings have attempted at reaching a compromise solution by submitting their proposed commitments.

As it has been noted<sup>16</sup>, the undoubted success of decision with commitments is based on the fact that, albeit within a framework where the Competition Authority and the undertakings are on opposite fronts, such a procedure allow both parties to find common grounds and pursue mutual advantages.

From the authority standpoint, the main interest in adopting a decision with commitments resides in the opportunity of a quick and certain restore of the proper competition balance, therefore aiming at establishing fair conditions for competition on the market without having to invest time and resources in a finding of infringement and subsequent sanctions. Also, a decision with commitments has far lesser chances of being appealed before the Administrative Tribunal - even if this is still possible, the main interest to appeal would be missing.

Another clear advantage which is pursued by the Authority is to simplify complex cases, where the burden of proof an investigation would imply significant delays and efforts.

Last but not least, a decision with commitments and the negotiation process which advances such decision certainly allow the Authority to be more flexible in its approach to find a solution, as a “negotiated” solution can certainly be more articulated than a finding of infringement and a sentence would be.

As to the business community, the advantages in adopting a compromise solution are likewise numerous.

First, a decision with commitments avoids a finding of infringement and any further sanction. This also turns into avoiding further consequences which a finding by the authority could bring about, in terms of private enforcement measures, since there would be no precedent on which competitors or other third parties could commence Court proceedings and claim damages.

Another important issue, which is always crucial in competition law cases, is the reputational risk.

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<sup>16</sup> Please see Siragusa, “*Le decisioni con impegni*”, in “*Venti anni di Antitrust*”, Giappichelli, Torino, 2010, pp. 391 et foll..

While a finding of infringement can be disruptive for the reputation of the business, and imply severe financial consequences (for instance, but not only, for publicly traded companies), a decision with commitments avoid that risk area, and in some cases this is by itself a sufficient reason for the interested undertaking to engage in this process.

Also, the negotiation stage allows the undertaking to actively participate to the Authority's regulatory approach to market and competition, therefore establishing acceptable patterns and setting limits which are clearly legal, in light of the market test carried out by the Authority.

However, the increasingly frequent recourse to decisions with commitments has been frowned at by some commentators, as it would allegedly imply potentially adverse consequences.

First, there is a risk that the Authority would be less accurate and proactive in the pre-investigation stage, therefore being more readily available to open proceedings on the basis of a complaint filed by third parties, without properly investigating the case, as the opening of the formal case would provoke a reaction in investigated companies and shift on to them the burden of revising their competition policies and possibly providing solutions, just to avoid the complexity, costs and timeframes of a full-scale case.

Second, the frequent use of such procedures has significantly increased the fully regulatory approach of the Authority, which would now work more on the side of preemptively regulating market conditions, rather than pursuing distortions and infringements. Such criticisms are reasonable, in that decisions with commitments should not be considered as the mainstream route to addressing any kind of cases, but rather the preferred option to deal with those cases were, either because of the complexity or because of the limited seriousness of the infringement, full sanctions are unlikely to be imposed. In those cases, the balance between the need for a quicker and more certain outcome, and the need for "full justice", could be favorably resolved in favor of a compromise solution.

On the other hand, such a solution should be avoided in all those cases where the infringement is clearly willful, and the Authority's role should be that of fully and vigorously pursue the case, regardless of how difficult, burdensome and costly it is. This applies not only to the "hard core" restrictions, which are clearly excluded from the application of negotiated procedures, but also to other cases where – regardless to the nature of the infringement - the other elements surrounding the case are such as to point towards a prevailing public interest for the Authority to intervene and fully carry out the duty which the law assigns to it.

Another issue worth considering is the fact that negotiated procedures clearly represent, for most undertakings, a very attractive way to avoid unpleasant consequences, which are however in no case certain. This may over-encourage companies to offer commitments which are wider, and go beyond the necessary, than would be appropriate for resolving specific competition law concerns; on the other hand, the Authority could leverage the threat of a full scale case, involving fines, to persuade the interested parties to offer commitments of a wider spectrum, therefore beyond the proportionality criterion.

## ***2.2 Leniency programmes***



### *2.2.1 Legal and procedural framework*

The second type of transactional resolution is that of the so called “leniency programs” operating in the field of cartels, which were introduced into the Italian legal system by means of change in the law in 2006, and a further resolution by the Competition Authority in 2010.

As it is well known, cartels represent since the origins of antitrust law the most serious and harmful form of agreements, aimed at eliminating or restricting competition through horizontal collusion. Hence a particularly severe legal treatment of cartels, notably the possibility for antitrust authorities to impose severe sanctions (including fines up to 10% of the overall aggregate turnover of the undertakings concerned).

On the other hand, it is also well known that cartels are normally secret, and the burden of proof is inevitably challenging for any competition authority to investigate, prosecute and sanction these forms of agreements, or concerted practices.

The search for a balance between these two issues, i.e. the seriousness of the infringement and the difficulty to prosecute it efficiently, has prompted the legislator and the Competition Authority to adopt measures and rules to encourage the so called “whistle blowing”, i.e. incentives for those parties which decide to leave the cartel, discontinue its operation and provide authorities with relevant information which are helpful in the prosecution of the cartel itself.

On this background, the Competition Authority has issued a notice on the non imposition and reduction of fines under Section 15 of law no. 287 of 10 October 1990<sup>17</sup>, which applies to secret cartels, including those concluded in the context of public tender procedures, with particular reference to the fixing of purchase and selling prices, the limitation of production or sales and the sharing of markets (traditionally, the so called “hard core” restrictions).

The notice provides for the non imposition of fines (which would be otherwise fully applicable) to the undertaking who is first to submit voluntarily to the authority information or evidence as to the existence of a cartel, provided that such evidence is decisive in the finding of an infringement, is not already in possession of the Authority and the undertaking seeking the benefit of leniency immediately discontinues its participation to the cartel, while fully cooperating with the Competition Authority<sup>18</sup>.

Any other undertakings which are second in providing to the Authority similar evidence to prosecute the cartel may benefit from a reduction of fines up to 50% of the amount which would be otherwise imposed.

Again, a “quality test” is applied to such evidence, whereby these needs add a significant contribution to the knowledge and evidence already in possession of the Authority, therefore significantly supporting the finding of an infringement and prosecution thereof.

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<sup>17</sup> As modified by resolution no. 21092 of 6 May 2010.

<sup>18</sup> The immediate stop of an infringing activity may be subject to exceptions, whereby it is appropriate for the ongoing investigation that the undertaking goes on participating in the cartel.

The procedure set out in the notice provides for a formal application for leniency, which invariably is advanced by an informal approach<sup>19</sup>.

The above described procedure sensibly differs, both in its nature, purposes and process, from the procedure for decisions with commitments. While this latter is carried out openly, with full publicity (apart from confidentiality reasons concerning some specific information disclosed to the Authority) is guaranteed, so as to safeguard third parties' rights, leniency is applied in a completely different environment, where the same application for leniency is to be kept secret by the same applicant<sup>20</sup>.

Also, leniency procedures do not avoid a finding of infringement – rather, they are exactly purported at helping such a finding, albeit against parties which are not benefitting from the leniency procedure.

The significant degree of limitations to the parties's rights finds its main reasons in one of the prerequisite of leniency, which is to seek disruption of cartels, by making it less convenient, or more risky, for undertakings to participate where, at any time, a “whistle blower” can step out of the cartel, denounce it and seek indemnity whereas the other members would be severely sanctioned.

The issue has been debated for many years, also in light of the legal questions which it poses in relation to the potential harm to procedural fairness.

It is worth noting that whenever any of the above mentioned requirements for an undertaking to benefit the leniency fails, the Authority would regain its full sanctioning power also against the applicant. This, also, works as a further encouragement to clearly choose between unlawful activity, and the cooperation with the Authority.

Of course, from a business perspective, leniency procedures represent not only a risk factor in relation to the possibility of engaging in cartel activity, but may be also seen as a jeopardy to the right of defense, which is expressly acknowledged by the Italian Constitution. This is why legal scholars have been discussing the compatibility of leniency programs with Italian basic principles, highlighting that evidence provided by one party to a cartel should not be treated in the same way as evidence gathered *ex officio* by the authority while exerting its public powers.

In spite of the debate, however, leniency programs have been relatively successful in the last few years, although it is difficult to exactly weigh their importance given the very nature of cartels – that of being secret.

### 2.2.2 Leniency programmes – pros and cons

A long and lively debate on leniency programmes has been going on in Europe, and not only, in the last thirty years.

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<sup>19</sup> Even the notice provides that “before filing a leniency application, an undertaking may approach the authority even on an anonymous basis in order to seek guidance on this notice”, see paragraph 9

<sup>20</sup> Paragraph 7 c) “when contemplating the filing of a leniency application, the undertaking must not inform anyone of such intention, except other competition authorities”

The introduction of such procedures is much more recent in the Italian system, which makes it unavoidable to refer to the wider European and international experience.

One of the main, and still largely unanswered, question about leniency programmes is whether they actually represent a discouraging factor for cartels, or not.

Although it is certainly true that “whistle blowing” is by itself disruptive for cartels, and has caused many cartels to be discovered, collateral questions may as well arise – a paradoxical one being whether the existence of leniency in itself does not even encourage cartels, whereby participating undertakings can always seek safe harbor when things turn wrong, or where they lose interest in pursuing the cartel. In some other cases, strategic reasons for whistle blowers can play a very significant role, and there is even the risk that only unsuccessful cartels are denounced (which, in turn, means that successful cartels, certainly the most dangerous ones, remain secret).

One of the key points of leniency programs, as well as one of the decisive factor in determining their success, is the question of immunity from sanctions.

As above explained, the undertaking which first provides the authority with evidence which are helpful to find an infringement benefits from a total immunity from fines, where any further undertaking doing the same would simply benefit from a reduction of such fines.

It is crucial, however, to determine *when* an application for leniency is filed, as this may happen either before an investigation is launched by the Authority, or before any formal proceedings are commenced. The choice between when to file an application for leniency largely depends on how much sure the case is, in the knowledge of the Authority. Therefore, even if the law does not provide for any deadline, it is clear that the further the Authority progresses in its investigation, the lesser it would need support from any whistle blower – although this is not a general rule, since more complex cases may be in need of evidence originating from undertakings which participate to the cartel, regardless of any other investigation efforts made by the Authority.

Other, possibly even ethical, reasons are suggested by the very same concept of leniency; does the Authority meet the expectations of justice of those suffering from a restriction of competition, whenever it negotiates with wrongdoers? Is immunity too high a price to pay in exchange for information, albeit necessary to prosecute the infringement?

On a more legal side, further issues are implied in the special treatment of information and documents disclosed by applicants for leniency – they will be addressed in the following paragraphs.

## ***2.3 Fundamental and procedural rights of the parties***

### ***2.3.1 General procedural issues***

The administrative procedure which is applicable to competition law cases clearly provides for an obligation on the Authority to notify a formal decision to open an investigation, both for agreements and abuse of dominant position.

Such decision, however, is always the final outcome of a pre-investigation stage, which may last for a long time, where the Authority may act either *ex officio* or, more frequently, upon third party complaints and carries out a preliminary assessment of the grounds of such complaint; also, and more importantly, in such stage the Authority gathers useful information and initial evidence, by using its widespread investigation powers both in relation to the potential defendant(s), and to third parties, which may be targeted with specific requests for information.

In this pre-investigation stage, which is hardly regulated by the law, the Authority is actually free to determine the scope of its enquiries, and this normally impacts on the scope of the decision to open a formal investigation.

In such pre-investigation stage, the Authority may impose sanctions for those parties, both potential Defendants and any other third party, which refuse to cooperate in providing the requested information and documentation, or where such information and documentation are incomplete.

The proper balance between investigative powers and rights of defense is possibly more at stake at this stage, rather than after a formal decision to open an investigation is issued by the Authority – in this latter case, in fact, all proper safeguards will be formally in place, and the investigated parties will know what the case is about, at least in the Authority's approach.

With respect to transactional procedures, more often than not the initial interest for companies to submit possible commitments arises in the pre-investigation stage, when they are made aware of a possible complaint by a third party and may also understand what the Authority's initial view of the case is; nonetheless, it is premature to propose any formal commitment at this stage, since a formal statement of objection is still to be formulated.

While all parties maintain their rights of defense in both the pre-investigation and the investigation stage, and such rights can never be waived<sup>21</sup>, the actual exercise of such rights can suffer from limitations since elements gathered in the pre-investigation stage, when the potential defendant(s) is still uncertain as to what objections will be raised by the Authority, may be further used in a full-scale case, *i.e.* after a statement of objection has been issued.

As to third parties, it is to be noted that since the pre-investigation stage a non-confidential version of any submission or response filed by the potential Defendant(s) is envisaged, and that the Authority has the discretionary power as to whether all such submissions should be made available to the other parties (*e.g.* a Complainant), possibly to obtain some further feedback but also with a view to limit the exchange of allegations and charges at this early stage of the proceedings.

### 2.3.2 Statement of objections

As soon as the Authority believes that the pre-investigation stage can be concluded, and that sufficient evidence to support the allegations are available, it issues a statement of objections which must be notified to all interested parties – not only potential defendant(s), but also any possible complainant as well as other interested parties which possibly made submissions in the pre-investigation stage.

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<sup>21</sup> Article 24 of the Italian Constitution.

The statement of objections must include a description of the case, a summary of the available information and potential allegations, both factual and legal, as well as the indication of the officer in charge of the investigation and the initial deadline assigned to such officer to investigate the case.

At such point, the statement of objections would not reflect any potential preliminary contact or negotiation with the Authority, but rather serves as a pre-requisite to allow the parties to engage into further negotiations as well as to submit the proposed commitments (as above seen, within the three-months time limit).

### *2.3.3 Right to be heard and access to file*

Upon receipt of a statement of objections, all parties have a right to be heard by the Authority – either personally, or through an appointed representative.

Such rights, as well as any defense rights, cannot be waived and do not need be waived, whenever the parties decide to engage into a negotiated or transactional procedure.

The right to access the file is, however, limited mainly because of confidentiality reasons.

Since all submissions made by the parties can be filed in a non-confidential and a confidential version, the parties' right to access the file is limited to the non-confidential version of documents and submissions. In some cases, this may result into a significant limitation; the proper balance between the right to access the file and the right to preserve confidentiality, however, is to be found in the prior decision, by the Authority, to accept the confidentiality reasons put forward by the submitting parties and/or by discussing with the parties a strict approach – as it normally happens with the European Commission<sup>22</sup>.

### *2.3.4 Right against self-incrimination*

In general, right against self-incrimination is a general principle which, albeit not expressly provided for in competition law, is to be derived by the recognition by the Italian legal system of general, international law principles<sup>23</sup>. This means that no one can be forced by the Authority to provide information or documents which directly result into an admission of unlawful behavior or infringement.

In practice, however, and as it happens in criminal law, investigative powers – as well as the power to question parties, and to sanction them for lack of adequate and timely response – result into a sensible decrease of this fundamental safeguard. As a matter of fact, it is always very difficult to envisage, especially in a pre-investigation stage where a precise framework of objections is still to be designed, which information and documents could then help the Authority, at a further stage, to

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<sup>2222</sup> Trade secrets, as well as sensitive commercial information, are normally regarded as deserving confidentiality.

<sup>23</sup> Specifically, privilege against self-incrimination is provided by the European Convention for Human Rights and Fundamental Freedoms and has been confirmed on the *Okrem* case by the ECJ.

find an infringement. At the same time, a refusal to provide documents or information can be sanctioned.

On top of the above, it is also to be reminded that cooperation by potential defendant(s), even outside and before any application of a leniency program, would clearly result into a mitigating factor for the imposition of fines.

As a consequence, the practical impact of the right against self-incrimination is very limited.

This limitation, coupled with the introduction of transactional procedures into the Italian legal system, clearly encourage the parties to take as much advantage as possible from cooperation with the Authority, which is already favored in a normal case and becomes most favored if applied to a negotiated procedure.

A very important question is whether the Authority would be free to use whatever information and documents contained in the proposed commitments, when such commitments are later on withdrawn by the Applicant – in other words, can they be used for enforcement purposes?

The answer is yes – there is no automatic protection for Applicants on their own submissions, when such submissions have been made freely and on a voluntary basis.

This means, in practice, that as soon as the parties formally file their proposed commitments, it will be in the mutual interest of the Applicant and the Authority to reach a shared decision embodying such commitments; this also means, however, that the Authority will then have a further leverage to make the Applicant accept whatever change it proposes to the Applicant's submissions.

#### *2.3.5 Leniency programmes and rights of the parties*

A fundamental issue in relation to leniency programmes pertains to third party's rights, as well as to rights of defense of the same applicant for leniency.

The main question refers to the possibility for third parties to fully access the Authority's file and, therefore, any information and document received from the leniency applicants; it further implies whether full use, including use in Court proceedings, can be made of such information and documents.

A number of issues arise in relation to the right of protection against self-incrimination, as a full and unconditional access to the file would theoretically put the applicant for leniency in an even worst position, for example by allowing third parties to use self-incriminating documents or statements against the applicant in the framework of other proceedings.

In 2010, the Authority clarified the scope and limits of access to the file, by establishing that:

- access to confessional statements or documents is permitted only to those subjects which are the addressees of a statement of objection for alleged infringement of section 2 or section 101 of EU Treaty;
- no such access is therefore allowed to third parties (such as competitors, consumers, or the like);

- permitted access is conditional upon an undertaking not to copy any information or document, and to use such information only for the purpose of judiciary or administrative proceedings for the application of competition rules on which the same procedure is based.

Therefore, applicants for leniency are protected from the use of their own statements or documents by third parties, which cannot use such information to possibly strengthen their evidentiary apparatus in the framework of private enforcement measures (typically, claim for damages deriving from cartel behavior).

As a consequence, the above mentioned safeguard, which clearly protects applicants for leniency and is therefore purported at encouraging leniency as a tool for prosecuting cartels, puts third parties at a disadvantage by depriving them of potentially decisive evidence for private enforcement purposes<sup>24</sup>.

### 2.3.6 *Legal effects of decisions further to transactional procedures*

A decision by the Authority is binding on the addressees, as well as on the Authority itself.

If the decision was based on incorrect, misleading or false information provided by the parties, or if the commitments reflected in the decision are not complied with, the Authority retains the power to re-open investigations and to sanction the parties – please see below.

Apart from this, the parties which are the subject of a decision cannot be prosecuted for the same facts which were assumed as a basis for the same decision – *ne bis in idem*, or double jeopardy.

As a principle, all decisions by the Authority are made public through their publication on both the Authority's bulletin and the related website.

Such publicity, which is the expression of a generally accepted principle of transparency in administrative law, is also aimed at triggering deadlines and allowing any interested parties to intervene, make submissions and comments and possibly appeal.

Decisions do not normally analyze in great detail the path which has been followed to reach a certain commitment, but rather set out the commitments so that they are clear and specific enough for all parties to comply with.

In the procedure before a decision is made, proposed commitments are made public by means of a publication, so as to allow third parties to express their views about the suitability of such commitments to restore fair competition conditions.

Any decision, including decisions with commitments, taken by the Competition Authority is not binding for any Court, given the clear-cut separation between administrative bodies and the judiciary<sup>25</sup>.

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<sup>24</sup> It is to be recalled here that civil law systems still allow a limited degree of discovery, and therefore the burden of proof on the plaintiff can even play a significant role in discouraging private enforcement options. As to how the system works, also in combination with public enforcement mechanism, see Gabriella Muscolo, *Public e private enforcement*, in *Venti anni di antitrust*, Giappichelli, Torino 2010, p. 1015.

<sup>25</sup> This means, for instance, that no civil Court addressed for the potential violation of competition rules is due to stay the proceedings if a parallel action is handled by the Authority.

The most recent case law, however, has shown an increasing degree of reliance on the Authority's decisions and now considers that findings of the Authority constitute a "favoured" source of evidence to be used in civil proceedings<sup>26</sup> (typically, the so called "follow on" actions for damages) and are such as to create a presumption of infringement, which can be overturned by the defendant on which the burden of proof is shifted<sup>27</sup>.

When applied to decisions which result from a transactional procedure, however, these principles highlight one of the major pitfalls of such procedures for third parties – that of avoiding a finding of infringement, thus leaving competitors or consumers with the very significant burden of proving the violation, the causal link and the damages.

### 2.3.7 Judicial review

Any decision taken by the Competition Authority, including decisions with commitments, can be appealed by any interested party before the RAT of Lazio, which has exclusive jurisdiction on the Authority's decisions.

The case law has been able to touch on various issues deriving from decisions with commitments, namely: (i) the three months deadline for the undertakings to submit their commitments; (ii) the Authority's decisions rejecting the proposed commitments, as well as the application of the proportionality test in assessing such commitment, and (iii) the appropriateness of the commitments to positively resolve the competition law concerns expressed by the Authority.

On the first issue, the case law has clarified that the three months deadline for submitting proposed commitments should not be considered as final and , but rather as suggested rather than mandatory. In practice, most undertakings submit their preliminary commitments within such deadline, but it is very important that the deadline is not to be considered as absolute since, depending on the specific circumstances of the case, undertakings may actually need a longer time to properly assess which commitments, if any, should be proposed; and, of course, the authority may also need a longer time to properly assess, especially when the case is a complex one.

On the second issue, it has been clarified by the case law that any decision by the Authority rejecting proposed commitments may be appealed by the applicant. Any such rejection should be based on an assessment by the Authority of the seriousness of the infringement, and the case law has clarified that judicial review should not go into the merits of such assessment but rather evaluate whether the reasoning leading to the rejection of the commitments properly reflects the above criteria.

On the third issue, it is interesting to know that more recent case law has accepted the principle according to which the administrative Tribunal may review the decision with commitments in light of the proportionality tests, i.e. assessing on the merits whether the accepted commitments are suitable, and necessary to, eliminating the alleged restrictions of competition.

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<sup>26</sup> See *inter alia* Court of Cassation no. 2305 of 2 February 2005.

<sup>27</sup> See Court of Cassation no. 3640, of 13 February 2009; see also Marina Tavassi, *Il ruolo dei giudici nazionali nel private enforcement, competenze concorrenti*, in *Venti anni di antitrust*, Giappichelli, Torino 2010, pp. 1012.



This type of judicial review is particularly delicate, as it involves a substantial re-assessment of the market analysis, although it should be taken into account that administrative judicial review is always more focussed on evaluating the consistency of the reasoning, and its compliance with the legal *regime*, rather than any fact-related assessment.

In summary, the case law has helped identify some drawbacks of the system of decisions with commitments, namely the fact that respect of proportionality and necessity criteria is indeed fundamental to make such procedures what they are meant to be, instead of becoming an overall prevailing and “mainstream” remedy for a quicker resolution of antitrust disputes.

### *2.3.8 Non-compliance with a decision*

In case the Authority finds that commitments assumed in a decision are not complied with, or that the decision is based on false, incomplete or misleading information given by the company, or when the factual situation has changed, it can resume its powers and is entitled to prosecute the infringement.

This can be seen as a clear indication of the contractual nature<sup>28</sup> of antitrust transactional procedure, whereby the restoration of the Authority’s power to investigate and prosecute is a consequence of the “termination”, or resolution, of the agreement underlying the decision.

In other words, the decision is binding for both sides, the Authority and the company/ies; yet, the Authority is released from its obligations (which are of a negative nature, ie not to prosecute) whenever the other side fails to respect its own obligations<sup>29</sup>.

## 3. *Merger control*

In the area of merger control, the main difference between European and Italian law is that the latter does not make the legality of any concentration subject to a specific authorization by the Authority, but rather just imposes on interested parties a duty to notify the merger before it becomes effective; no automatic suspension is provided whenever such obligation has been properly respected.

If the concentration raises doubts as to its compatibility with competition law, the Authority commences an investigation the outcome of which can be *i)* a green light to the concentration, *ii)* a ban on the concentration, or *iii)* an authorization to the concentration, subject to remedies and commitments.

In this latter case, a negotiation process takes place within the Authority, albeit with less stringent and formal rules than it happens in relation to commitments for agreements and abuse of dominance.

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<sup>28</sup> See Gregorio Gitti, *Gli accordi con le Autorità indipendenti*, in *Venti anni di antitrust*, Guappichelli, Torino 2010, pp. 1111 et foll., who underlines the transactional dynamics of procedures involving commitments, and highlights the contractual nature of such remedies.

<sup>29</sup> By furthering the analogy with civil law mechanism, one could think of the ancient principle of Roman law, *inadimplenti non est adimplendum*, now reflected in article 1460 of Italian Civil Code.

Normally, the prospected concentration can be modified or adopted so as to include pro-competitive, or less anticompetitive, measures so as to make it acceptable for the Authority. Again, as the procedure for this kind of commitments is far less regulated than that for the above described commitments for agreements and abuse of dominants, there is no automatic and pre-established pattern.

What normally happens, however, is that any significant or potentially restrictive concentration is discussed between the interested parties and the Authority well in advance of any filing, so as to avoid that the Authority commences investigation. The good practice should advise parties to seek a shared view of the compatibility of the proposed concentration with the Authority before filing, or at least to submit a first draft project of concentration which is not too far away from the desirable one, in the Authority's eyes.

Third parties' rights, to access the file as well as to intervene in the discussion, is subject to a publication of a decision by the Authority. Therefore, whenever the concentration appears *prima facie* to avoid competition law issues, such rights would be virtually non-existent.

Only in those cases where the concentration requires further scrutiny, and therefore a formal investigation is started by a decision, then the parties may intervene, make submissions and comments.

As it happens with other decisions with commitments, the Authority retains the power to investigate, prosecute and sanction any interested parties whenever the commitments reflected in the decision are not complied with<sup>30</sup>.

#### **4. Impact on transactional outcome and on market intervention**

It is also arguable whether transactional procedures increase, or decrease, the predictability of competition law, ie of its application.

Any solution to which the defendant(s) contribute clearly introduces an element of unpredictability, which in turn can result into a lesser drive for third parties to denounce, to file complaints etc..

On the other hand, it has been said that the possibility of decisions with commitments, for instance, encourages competition authorities to commence proceedings even in circumstances where the case is less promising, in the hope that some good result would be ultimately achieved through commitments.

#### **5. Conclusions**

In conclusion, recourse to transactional mechanisms has become of central importance in the handling of antitrust cases.

In spite of the differences in legal nature and procedure of decisions with commitments, leniency programs and authorizations to mergers subject to commitments, all of these remedies share and are

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<sup>30</sup> In 2013, out of 80 concentration filings with the Italian Authority, only one has been investigated as possibly implying non-compliance.

based on the availability – or, one might rather say, the necessity – of Competition Authority to negotiate with interested parties.

While the settlement nature of the above remedies is still debatable, and a number of arguments rather point to the authoritative nature of any administrative decision, there is little doubt that any such decision is indeed built on a certain degree of compromise, and must include negotiation – ie the typical attitude of private parties which try to resolve their disputes, be them actual or potential.

Still, no business feels completely at ease in negotiating with a public administration body, which at the same time prosecutor, negotiator, and market regulator, and where the balance of negotiations is inevitably shifted towards the Authority.

It is difficult to assess whether such transactional procedures have actually reduced the number and/or the seriousness of competition law infringements, or whether effective deterrence has been achieved.

Any attempt at assessing the real impact on restrictive covenants and behaviours would fail simply because the drivers of anticompetitive behaviour are so numerous, and fact-specific, that it would be pretentious to calculate or predict what could, or could not, have happened of those remedies had not been in place.

Nevertheless, it is fair to say that the introduction of transactional remedies – even more, the introduction of a transactional culture in antitrust enforcement – has sensibly helped the business community to develop an increased sense for compliance with antitrust law, as well as facing market tests and competitors' challenges.

Also, Competition authority has derived benefits from the application of transactional procedures, not only with reference to a quicker and more certain attainment of its objectives, but also and more importantly has gained a deeper and more sophisticated understanding of business and economic mechanisms, which in turn has increased the degree of sophistication of the same Authority's approach to other cases.

The main criticism is still related to the increasing role of the Authority as a regulator, rather than a prosecutor; and the peculiarity of the systems herein described is that transactional procedures combine both roles within the same entity, which might create the risk that the regulatory part prevails, and that the impositive nature of the Authority prevails over the negotiation attitude.

Thus, the issue worth considering for the future of antitrust enforcement in relation to transactional remedies is possibly that of a separation between the two roles, whereby an independent entity should be responsible for assessing the proportionality and necessity of commitments, and for adopting a final decision embodying such commitments; while a different entity should maintain its investigative powers, without intervening in the negotiation process.

In this respect, the long-standing example provided by criminal law<sup>31</sup> could possibly shed some light on a workable system, where the roles are clearly distinguished at the investigation stage and

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<sup>31</sup> One should not forget that competition law, albeit unaltered by criminal law in the Italian legal system, is the closest legal environment and a natural one to look at when devising enforcement options.

until the defendant is indicted, but still allowing other mechanisms to play a role, with the involvement of several parties<sup>32</sup>.

A possible solution could then be reached by singling out – even if in the frame work of public bodies – separate entities, whereby the prosecuting side should act as a “party” in the context of an adversarial procedure, while any possible agreement should be assessed by a neutral third party entity<sup>33</sup>.

Of course, given the very recent changes in the law which introduced transactional procedures in the framework of competition law, several issues are still to be explored – among them, the impact of these procedures on private enforcement options, both in terms of possible undermining such options, and in terms of limiting access to decisive evidence. In this area, it will be clearer whether the system encourages and favours a workable system as such, thus limiting the protection for each competitor in possible enforcement options in exchange for a greater degree fo legal certainty and a safer – possibly, a more regulated – competitive environment.

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<sup>3232</sup> Again, the criminal system clearly show its weak points when it comes to defending third parties’ rights in the framework of plea bargain procedures, as these latter normally compress the expectation to “full justice”, eg. for parties damaged by the crime which will miss the advantages of a full trial, for instance in the lack of evidence and In the difficulty to obtain damages.

<sup>33</sup> This is, *mutatis mutandis*, the pattern in criminal law, where the roles of prosecuting and judging magistrates is clearly distinguished, the former being identified as a party to the proceeding, albeit endowed with stronger powers than the defendant.