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International Report

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

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1. Introduction

Transactional resolutions are becoming an increasingly important part of antitrust proceedings. Contributions from sixteen jurisdictions¹ presented in the LIDC Congress in Turin confirm such a trend.

To embrace all jurisdictions represented in the LIDC, under this contribution, the transactional resolution of antitrust proceedings encompasses any resolution of competition law (i.e., antitrust) proceedings through bargaining or negotiation that results in a mutually agreed outcome between competition authorities or other governmental bodies and the companies, or else in an outcome influenced by these negotiations. We mention as examples settlements, plea bargains, commitments, undertakings, amicable agreements, leniencies, consent orders, decrees, judgments, remedies, and all other forms of negotiated solutions.²

Transactional resolution of antitrust investigations brings many benefits to competition authorities and companies under investigation in the interest of the public as well as private companies. Due process, as part of the rule of law, ensures that public interest is maximised in antitrust proceedings while safeguarding individual rights and freedoms at the basis of the market economy and our democracy. Starting from the investigation of sensitive points that can lead to an imbalanced result, this contribution aims at deriving and proposing recommendations on how the transactional resolutions can achieve an optimal balance in terms of market intervention and safeguarding public interest on the one hand and protecting individual rights and freedoms on the other. At the end, the success of transactional resolution mechanisms will depend on procedural fairness and on the extent to which the rights of the parties involved will be safeguarded.³

Our study encompasses transactional resolution pertaining to all fields of competition law: agreements, abuse of dominant positions or merger control. Although undertakings and competition authorities have always discussed issues while complying and applying competition laws in any field, the negotiation of remedies in merger control is one of the domains where both parties have benefited from the full potential of such discussions.⁴ We include, therefore, merger remedies to permit comparison with other fields.

Under the influence of competition law of the European Union, many European jurisdictions currently use the term “settlement” for agreement on a fine reduction in the field of cartels, and the term “commitments” for any agreed solution in the field other than horizontal cartels,

¹ The following national groups submitted a national report on this topic: **Australia** (B. Jedličková, J. Clarke and S. Bhojani), **Austria** (G. Fussenegger), **Belgium** (J. Auwerx), **Brazil** (J. C.M. Berardo), **Czech Republic** (J. Kindl and M. Petr), **France** (D. Bosco), **Germany** (E. Bueren), **Hungary** (A. Keller), **Italy** (A. Camusso), **Japan** (I. Hayashi), **Poland** (A. Stawicki, B. Turno, T. Feliszewski, K. Kanton and K. Karasiewicz), **Serbia** (D. Ognjenovic), Spain, **Switzerland** (D. Emch and D. Neuenschwander), **Sweden** (H. Andersson), the **United Kingdom** (M. Israel), and the **United States of America** (E. E. Varanini).

² Settlements of private actions are outside the scope of this study.

³ See M. Israel, United Kingdom, p. 2.

⁴ In some countries, negotiated merger remedies have preceded settlements in the field of agreements and abuse of dominant positions; see A. Camusso, Italy, p. 3.

that is, abuse of a dominant position and other agreements. In this contribution we will use the term “settle” or “settlement” as the resolution of an antitrust investigation in the framework of an antitrust proceeding before a competition authority with or without court involvement. In this sense, the term “transactional resolution” better encompasses all kind of agreements reached with competition authorities, avoiding therefore appeals or litigation in court.

The main focus of this study is on due process and fairness. Our objective will be to identify weaknesses and shortcomings and suggest measures or safeguards to improve fairness of the transactional resolution mechanism. Accordingly, this report is less about comparison of mechanisms and transactional resolutions in various jurisdictions. National reports provide in this regard excellent analysis for readers for further reflection on this subject.

After discussing the role and benefits of transactional resolution mechanisms (Section 2), we will review the informal and formal processes of transactional resolutions in abuse of dominant position and agreements (Section 3). We briefly present the main finding in merger control (Section 4), before concluding on how over- and under- intervention can be dealt in transactional resolution mechanisms (Section 5). Our recommendations that will serve as the basis of the draft LIDC resolution to be discussed during the congress in Turin will be included in the last Section 5.

2. Role and Benefits of Transactional Resolutions

Transactional resolution mechanisms have become central to antitrust proceedings.⁵ The success of transactional resolutions is driven by the fact that all parties benefit therefrom, in what can be explained by a balance of public and private interests.

Competition law enforcement benefits from quick termination of the infringement and damages to the economy,⁶ adequate allocation of resources,⁷ reduction of the length of antitrust proceedings,⁸ better cooperation of the companies under investigation,⁹ and higher acceptance of state intervention by companies under investigation.¹⁰ In case of leniency programs, the cooperation of the marketplace is a substitute for time-consuming and costly investigative mechanisms.¹¹ In certain jurisdictions, transactional resolutions have been

⁵ In some jurisdictions, the majority of proceedings are resolved following a transactional mechanism. In Germany, in the period between 2007 and 2011 around 80 percent of proceedings were resolved through settlements (E. Bueren, Germany, p. 9). In Austria, all cartel cases since 2012 have been concluded by settlements (G. Fussenegger, Austria p. 1). In France, around 30 % of all decisions are resolved through commitment (D. Bosco et al, France, Section 1.2). See however D. Ognjenovic, Serbia, p. 2, where transactional resolution are not used often.

⁶ See G. Fussenegger, Austria p. 2.

⁷ J. Auwerx, Belgium, p. 26; A. Keller, Hungary, p. 3; A. Stawicki et al., Poland, p. 1; D. Emch and D. Neuenschwander, Switzerland, p. 1.

⁸ See J. Kindl and M. Petr, Czech Republic, p. 3. Transactional resolution of antitrust proceedings has not however reduced the length of proceedings in Belgium (J. Auwerx, Belgium, p. 26). In other countries such as Brazil, transactional resolutions have considerably reduced the length of the proceedings (see José C. M. Berardo, Brazil, p. 3).

⁹ See for instance José C. M. Berardo, Brazil, p. 3; A. Keller, Hungary, p. 3; E. E. Varanini, United States, p. 3.

¹⁰ See D. Emch and D. Neuenschwander, Switzerland, p. 1.

¹¹ See J. Kindl and M. Petr, Czech Republic, p. 3.

considered since a long time as "a very effective means for social peace" and facilitating adherence from the public.¹²

Beyond resolutions of cases, discussion with companies under investigation improves authorities' understanding about markets and industries; the positive externalities of this understanding will spill over in other cases and improve market intervention overall.¹³ It is submitted that transactional resolutions reduce costs and delays resulting from the requirements related to the burden and standard of proof;¹⁴ however, it is precisely this shifting of the burden of proof to companies and the reduction of the level of proof resulting therefrom that weakens guarantees for companies, giving rise to issues of fairness.

National reports largely admit that transactional resolutions help in optimal competition law enforcement and therefore serve public interest by ensuring both restoration and correction of an anticompetitive situation¹⁵ as well as detection and prevention of infringements. The flexibility of transactional resolution mechanisms is superior in many aspects to bare injunctions, since they enable the testing of more innovative remedies compared to injunctions and orders¹⁶ and a fine balancing of pro- and anticompetitive effects,¹⁷ avoiding an all-or-nothing approach. Transactional resolution mechanisms as a balancing act may achieve more in the development of competition law and pave the way of better enforcement policies.

Companies under investigation benefit from lower fines,¹⁸ less reputational damage,¹⁹ and cost reductions. In case of commitment decision where no liability is found, companies avoid acknowledgment of infringement by reducing in this way the risk of follow-on actions for damages. Besides, negotiations allow companies to actively participate to the market intervention, establishing accordingly their own acceptable conduct in the market.²⁰

Transactional resolution mechanisms can have downsides as well. One of the criticisms is based on the decreased legal certainty for companies and the lack of precedential findings. Increased unpredictability of competition law may result from an unbalanced intervention through transactional resolutions compared to injunctions:²¹ if the majority of proceedings are resolved through transactional resolutions, often published in a form that does not describe all facts and complete reasoning, companies cannot rely in a decision-making practice that would clearly construe the law and policy of competition authorities. The transactional resolutions bear also the risk that benign conduct is left unqualified through commitments; in certain circumstances, non-infringement decisions may provide greater benefits for the market in the long run.²²

¹² See A. Camusso, Italy, p. 2.

¹³ See A. Camusso, Italy, p. 19.

¹⁴ See A. Camusso, Italy, p. 4.

¹⁵ B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 9 and 24; see also E. Bueren, Germany, p. 17 et seq.

¹⁶ B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 9; E. E. Varanini, United States of America, p. 7.

¹⁷ E. E. Varanini, United States of America, p. 7.

¹⁸ A. Keller, Hungary, p. 3; A. Stawicki et al., Poland, p. 1.

¹⁹ A. Camusso, Italy, p. 8; A. Keller, Hungary, p. 3.

²⁰ A. Camusso, Italy, p. 8.

²¹ See for instance M. Israel, United Kingdom, p. 25.

²² See M. Israel, United Kingdom, pp. 25-26.

This criticism is not shared by all contributors of this study. Transactional resolutions have a great potential in guiding other market players²³ or in serving as soft law, setting governmental expectations over time.²⁴ It is submitted that benefits related to the flexibility and innovative nature of remedies may well outweigh the loss of legal certainty or lack of precedential strength.²⁵

An argument linked to unpredictability of transactional resolution is that the procedure is not transparent, and its opacity affects the rule of law.²⁶ Increased transparency would be achieved not only by allowing third parties and the market to comment, but also by publishing full reasons for choosing a commitment or settlement procedure and the content and measures thereof.

Reduction of punishment and of deterrent effect of competition laws is also another negative potential effect associated with transactional resolution of antitrust proceedings.²⁷ The greater the proportion of transactional resolutions compared to injunctions, the greater the risk that the deterrent effect of competition law sanctions will be reduced. The weakening of the deterrent effect would in turn lessen the attractiveness of transactional resolutions.²⁸ However, it is our conclusion that such negative effects have not been observed, and, if any, they are outweighed by the overall positive benefits associated with transactional resolutions.²⁹

The view that agreements with respect to fines are also considered to contradict the exclusive power of the state to sanction infringements,³⁰ and that settlements constitute deviations from the “public interest” and the “rule of law” is becoming less common,³¹ demonstrating greater acceptance of transactional mechanisms.

Another debate is the undermining of restorative justice in that transactional resolutions make private damages actions more difficult or impossible. In the United States, the argument is even made that prosecution should be preferred to settlements where those settlements do not include admission of facts.³² Another view is that by facilitating admission of infringement to competition law, settlements could also contribute to facilitating civil claims.³³ In addition, the practice of the German Competition Authority to ensure indemnification of victims of competition law infringements is an innovative approach dealing with the drawbacks of transactional resolutions with regard to private actions for damages.³⁴ In other jurisdictions such as in Belgium, the new Code of Economic Law takes into account companies’

²³ See A. Keller, Hungary, p. 3; A. Camusso, Italy, p. 19.

²⁴ See E. E. Varanini, United States of America, p. 8.

²⁵ See E. E. Varanini, United States of America, p. 7.

²⁶ See E. Bueren, Germany, p. 17.

²⁷ See M. Israel, United Kingdom, p. 25; E. Bueren, Germany, p. 17; B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 4.

²⁸ See J. Auwerx, Belgium, p. 26.

²⁹ See B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 24.

³⁰ See for instance G. Fussenegger, Austria, p. 3, A. Camusso, Italy, p. 3 et seq.

³¹ See J. C.M. Berardo, Brazil, p. 2.

³² See E. E. Varanini, United States, p. 10.

³³ See J. C.M. Berardo, Brazil, p. 3.

³⁴ See E. Bueren, Germany, p. 24.

commitment to compensate victims of infringements when determining the amount of the fine.³⁵ On the other hand, in jurisdictions where private actions are rare, transaction resolutions would not hinder private actions regarding damages claims.³⁶

Transactional resolutions outside horizontal cartels do not have punishment as the principal aim. Restorative justice is achieved through measures that correct anticompetitive effect while ensuring more cooperation from companies and better prevention of future infringements. Transactional resolutions play a significant role in involving undertakings in the resolution of anticompetitive effects of their proper conduct in the market. As such, transactional resolutions are a means to cure the unpredictable nature of competition law and the impossibility of the legislator to clearly define what anticompetitive conduct is. Inclusion of obligations to compensate victims of competition law infringements in transactional resolutions is another way of strengthening the restorative component of competition law.

Concern is expressed in relation to the regulatory nature of remedies and transactional resolutions, which make competition authorities act beyond the scope of their remit.³⁷ Competition law intervention is by its nature case specific and limited in time, and transactional resolutions act as a means of enforcing conduct obligations during long periods instead of clear-cut prohibitions or non-intervention. Accordingly, it is submitted that commitments and regulatory remedies should not be considered as mechanism suitable to address any kind of cases.

3. Transactional Resolution of Agreements and Abuse of Dominance

3.1. Overview of Transactional Mechanisms

In the EU, national competition laws are heavily influenced by EU competition law. Generally, besides leniency programmes, two types of procedures exist: settlements of infringements involving finding an infringement and fine discounts, and commitments (undertakings) made binding through a decision declaring that there is no ground for action (no infringement is found). The scope of transactional resolutions varies, however, from those in EU law, and procedural rights of the parties comply with national legislation. While settlements in EU competition law are possible only in cartel proceedings, settlement procedures in Belgium,³⁸ France³⁹ and Czech Republic⁴⁰ are possible in other cases of restrictive agreements as well as in abuse-of-dominance cases. In Sweden, settlements do not aim at a fine reduction, since the legislator did not want a system that would compel companies to admit guilt.⁴¹ Similar mechanisms exist in other jurisdiction influenced by EU competition law, where commitments and leniency are part of the competition law enforcement.⁴²

³⁵ See J. Auwerx, Belgium, p. 4.

³⁶ A. Keller, Hungary, p. 29.

³⁷ See A. Camusso, Italy, p. 19.

³⁸ See J. Auwerx, Belgium, p. 2.

³⁹ See D. Bosco, France, Section 1.2.

⁴⁰ J. Kindl and M. Petr, Czech Republic, p. 6 et seq.

⁴¹ See H. Andersson, Sweden, Section 2.1.3.

⁴² D. Ognjenovic, Serbia, p. 4.

In Australia, the difference regarding finding of liability is determined by the prerogative of the judiciary to make an infringement finding: the competition authority has competence in negotiating undertakings not resulting in a finding of liability, and the court has competence in approving fine reduction accompanying a finding of liability.⁴³

Leniency programs are effective tools in discovering cartels and are increasingly used by companies. A factor and precondition of their success is the transparency and legal certainty of the regulatory framework for prospective applicants. In Germany, the recent legal reform aiming at improving legal security for applicants has resulted in an increase of leniency applicants.⁴⁴ Consequently, enhancement of companies' collaboration depends significantly on the legal certainty and transparency of the regulatory framework and its application in practice. This lesson applies to all other transactional resolutions; accordingly increasing *legal certainty* and *transparency* of the transactional process will enhance the benefits of such mechanisms for all parties involved.

Outside Europe, leniency programmes exist in Australia, Brazil, and the United States. In Brazil, leniency applications are applicable to horizontal cartels and require admission of infringement of competition law, whereas settlements in unilateral conduct cases may or may not include acknowledgment of liability.⁴⁵ Instead of a fine, the companies applying for leniency may be required to pay a contribution. In unilateral conduct cases, conclusion of a settlement does not require any settlement payment.⁴⁶ Fine discounts are also available for companies that do not benefit from immunity or leniency. In the United States for instance, settlement with defendants not benefiting from immunity/leniency (pleas bargains) result in reduced fines or dismissal of some of the charges.⁴⁷

In Switzerland, the same procedure on amicable settlements is open to cartel participants, or companies subject to investigations on transactional resolutions and abuse of dominant positions. The decision approving the agreement cannot leave open the question of the infringement of competition law; amicable agreements are therefore possible in case of infringement. A leniency program applies for horizontal and vertical agreements subject to fines.⁴⁸

⁴³ B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 9: when submitting undertakings, companies acknowledge simply the *potential* risk of breaching competition law.

⁴⁴ See E. Bueren, Germany, p. 5.

⁴⁵ J. C.M. Berardo, Brazil, p. 4.

⁴⁶ J. C.M. Berardo, Brazil, p. 7.

⁴⁷ E.E. Varanini, United States, p. 15: "plea bargains are "negotiated agreement[s] between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, [usually] a more lenient sentence or a dismissal of other charges."

⁴⁸ See D. Emch and D. Neuenschwander, Switzerland, p. 4 et seq. Only hardcore horizontal and vertical cartels and abuse of dominant positions are subject to fines in Switzerland; agreements restricting competition by their effect are subject to sanctions in case of non-compliance with an existing prohibition decision.

3.2. Discretion of Competition Authorities and/or Judges During Proceedings

Competition authorities enjoy broad discretionary powers in conducting antitrust proceedings, including the possibility to conclude an amicable agreement with the parties under investigation. The discretion of competition authorities is present not only during investigations, but also in the limited review conducted *de facto* or *de jure* by courts.⁴⁹

Generally, discretion of authorities is greater in cases of transactional resolutions outside leniency programmes. In order to offer sufficient incentives to potential leniency applicants, leniency programmes include clear criteria that circumscribe the discretion of authorities; accordingly, competition authorities have less discretion to reject leniency applications than settlement or commitment submissions.⁵⁰

Apart from the discussion of the right of appeal and the waiver of the right of appeal that we will discuss below, the limited control of settlements by the judicial branches shows a certain deference of the judicial branch to the government's power to settle. The very existence of discretionary powers of government bodies⁵¹ is to be found in the separation, or balance, of executive, legislative and judicial powers. In the United States, the judges cannot dictate policy to federal agencies.⁵² Also, courts are reluctant to discuss and circumvent the use (or misuse) of powers by competition authorities. Such deference may put undue pressure on companies under investigation resulting from use of discretionary power, incompatible with fairness and due process.

Given the waiver of the right to appeal, the limited possibility to appeal, and the deference shown by the judicial branch to the executive branch of government in the case of transactional resolutions, there is a greater interest in ensuring fairness and due process from the start of investigation until the conclusion of transactional resolutions.

Discretion has an impact on the conduct of the proceedings and the rights of the parties. Discretion also impacts the predictability of the process and the legal security for the parties. One mechanism for increasing predictability and reducing the negative impact of the authorities' discretion on the parties is the communication of the essential steps of the transactional mechanism in guidelines and other soft law instruments binding to the authorities themselves. Several authors see the use of soft law as a necessary tool in increasing fairness of the transactional resolution process and a way to reduce the drawbacks of the discretion of authorities in this matter.⁵³ If the prerequisites for entering into discussion and for concluding transactional resolutions are made transparent and set out clearly in guidelines, parties engaging in discussions with authorities will be fully aware of consequences. Also, guidelines may give crucial information on how the different procedures apply: for instance, whether settlements in cases of hardcore cartels are used in conjunction with leniency application, at what stage of investigations are settlement or submission of

⁴⁹ See for instance D. Emch and D. Neuenschwander, Switzerland, Section 2.2.

⁵⁰ See J. Kindl and M. Petr, Czech Republic, p. 8 et seq.

⁵¹ In Europe, known as independent administrative authorities.

⁵² E. Varanini, US Report, p. 4.

⁵³ See for instance G. Fussenegger, Austria, p. 3 and 9.

undertakings possible, and what would be the maximum of reduction of fine in cases of cartels outside leniency applications.

It is submitted that in procedures involving admission of infringement, the discretion of authorities shall be reduced and confined to a minimum level aiming at ensuring flexibility, this to grant companies greater legal certainty on whether and under what conditions they can successfully apply for leniency or a fine reduction (settlement). In general, the more the transactional resolutions encroach on the procedural rights and individual freedoms of the parties, the less discretion the authority shall have and the more transparent the process should be.

3.3. Fairness, Good Faith, Legitimate Expectations and Good Administration

The principles of fairness, good faith, legitimate expectations and good administration are central to many jurisdictions and are attached to the principle of procedural justice.

Good administration is a principle applicable in several jurisdictions.⁵⁴ Transactional resolutions as such contribute to good administration of the state, by making the system more workable towards individuals and companies, and are considered to represent a step forward in the good administration of antitrust enforcement.⁵⁵

The national reports do not reveal any trend that these principles are not respected by authorities. In particular, it appears that legal measures in this sense would be ineffective and risk increasing bureaucracy,⁵⁶ and would not affect the incentive of authorities and parties to respect these principles. On the other hand, conduct benchmarks are difficult to incorporate in regulations, hence the existence of abovementioned principles and the use of two other principles to guide or control authorities, companies and judges: proportionality and equal treatment.

However, the extraordinary set of sanctions as well as the risk of prohibition of merger transactions, coupled with the necessary discretion authorities enjoy, grant significant leverage to authorities, which can be misused by particular officials. Misbehaviour is difficult to report, particularly in niche markets such as legal services on competition law, and therefore the fact that the national reports do not mention misbehaviour does not mean that it doesn't exist.

Within the discretion of the law recognised to competition authorities, there are several ways for authorities to increase pressure on companies. These include threat of a higher amount of fine,⁵⁷ lower reduction of fine, and conduct requests that exceed what is necessary to cure anticompetitive effects. In merger control where time is of essence, delays of authorisation or delays in evaluation of remedies submitted by parties increase the pressure to companies and their incentive to submit remedies that go beyond what is necessary to remedy the competitive risk or that are unnecessary because the risk identified is remote or insignificant. As explained, benchmarks in this matter are the principles of proportionality and equal treatment;

⁵⁴ See Article 41 of the EU Charter of Fundamental Rights, right to good administration.

⁵⁵ See A. Camusso, Italy, p. 4.

⁵⁶ See J. C. M. Berardo, Brazil, p. 29.

⁵⁷ See discussion of E. Bueren, Germany, p. 24.

however, subjective assessments inherent in such an exercise are not apt to identify and clearly define threat or pressure that would exceed the level the legislator intended to grant to authorities and would be qualify as admissible.

Not all such principles can serve as grounds for appeal. Furthermore, the right to appeal plays a limited role in transactional resolutions. Fairness and due process principles will not be tested in appeals. Accordingly, the grounds for setting aside or reverse a decision are irrelevant. In addition, due to the deference of judges and the difficulty of the task in this matter, the right to appeal, even if extant, is not suitable to offset the power of authorities.

As submitted above, it is crucial to respect such principles with respect to transactional resolution at the investigation level, as conformity with such principles fosters acceptance of competition law by the business community and contributes to achieving optimal enforcement in the public interest.

3.4. Fundamental and Procedural Rights of the Parties

In general, fundamental and procedural rights of the parties are specifically provided in a text of law, and their scope is generally construed and defined by judiciary. Fundamental rights are of crucial importance in competition proceedings, due to the threat of fines. The proceedings are considered to be of a criminal nature, and therefore similar safeguards and guarantees to criminal procedures are provided to companies under antitrust investigations. In merger control, the fines play a minor role, and therefore the parties rights are guaranteed by procedural guarantees only.

Another distinction is relevant, that between legal entities and individuals. In Germany for instance, the rights closely linked to the human personality such as the right to remain silent were denied to legal entities.⁵⁸ In Australia, the right against self-incrimination apply to individuals, not to corporations.⁵⁹ Other jurisdictions have not adopted such a distinction; consequently, companies enjoy the same rights as individuals.

We will present below a few considerations on the right against self-incrimination and the right to be heard, essential in antitrust proceedings (Section 3.4.1). Other rights will be discussed further while discussing the process of transactional resolutions (see below Section 3.4.2 below).

The right against self-incrimination and presumption of innocence are expressly provided for in fundamental laws (constitutions) of several countries.⁶⁰ On that basis, these essential guarantees apply to administrative criminal proceeding⁶¹ as well as cartel proceedings.⁶² The right against self-incrimination and the presumption of innocence are based on Article 6

⁵⁸ See E. Bueren, Germany, p. 7.

⁵⁹ B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 17.

⁶⁰ Art. 90(2) of the Austrian Constitutional Law.

⁶¹ Austria, p. 10.

⁶² With regard to principle of the presumption of innocence: Austria (5 Ob 154/07v).

CEDH. In some jurisdictions, the right against self-incrimination applies to criminal antitrust offences only, and not to administrative proceedings.⁶³

The obligation to provide information does not affect the right against self-incrimination as long as the request concern only factual elements and the questions are not formulated in that way as to trigger a response resulting in an admission of guilt.⁶⁴ In general, there is no duty to actively provide documents or facts proving infringement of competition laws by parties submitting a settlement request.

The right against self-incrimination is particularly relevant for submissions entailing admission of infringement. In transactional resolution mechanisms such submissions are considered to be voluntary, implying therefore a waiver of such right. However, submissions of companies are not "voluntary" when they are filed in a response to a threat of sanctions or other constraints. The greater such threat, depending on the importance of sanctions and constraints on business conduct, the less "voluntary" is the cooperation of companies and infringement admissions thereof:⁶⁵ indeed, in certain circumstances the threat of sanctions, together with the risk related to time and costs of investigations, make such cooperation involuntary. And this applies also to leniency applications. In a system involving extremely high fines such as competition law, the risk in terms of enforcement lies not only in admission of actual infringement, but also in admission of infringements that never happened or in filing of leniency as precautionary measure, overloading the administration and increasing enforcement costs.

A distinction should be drawn however between immunity or leniency applications on the one hand, and settlement submissions regarding a fine reduction on the other. Immunity and leniency applications aim at the denunciation and discovery of cartels which would have continued to cause damage to the economy without such procedure. Leniency and immunity programs apply in general before any procedure is opened against the applicants, the likelihood of fines and therefore the threat thereof is somehow more abstract than in actual cartel investigations. As such, leniency is a detection and information mechanism which implies the waiver of the right against self-incrimination. As a result of such voluntary disclosure and incrimination, other rights such as the right to know the case against them or the presumption of innocence would have the same relevance for applicants of immunity and leniency programmes; in practice such rights are waived by leniency applicants. The same applies to subsequent settlement submissions by leniency applicants.

By contrast, settlements regarding fine discounts reward further cooperation of companies being investigated. The right against self-incrimination, presumption of innocence and the right to know the case against them are relevant for companies which have not applied previously for leniency or immunity programmes. Companies are not compelled to actively submit documents or information evidencing their own acts or actions of other companies. In cases where settlements involving admission of infringement are entered only in later stages

⁶³ D. Ognjenovic, *Sebia*, p. 8. In Serbia, abuse of dominant position is a criminal offence provided for in the criminal code.

⁶⁴ See decision of the Austrian Cartel Supreme Court of 11 October 2006, 16Ok7/06, G. Fussenegger, Austria, p. 10. J. Kindl and M. Petr, Czech Republic, p. 13 et seq.

⁶⁵ See the discussion in Germany concerning leniency applicants, E. Bueren, p. 7 et seq.

of the investigation, i.e. after the authority has produced all evidence and parties have had the right to review such evidence, the right against self-incrimination is not compromised since the parties accept settlement after having reviewed the existing evidence.⁶⁶

In order to preserve the right against self-incrimination and other right of defence, it is submitted that authorities should not consider the lack of active cooperation of companies under investigation as an aggravating factor,⁶⁷ which argument is valid also for abuse of dominance cases and transactional mechanisms involving admission of other infringements. On the other hand, granting of benefits within the discretion of authorities, such as a fine reduction, against companies cooperation, would be permissible.⁶⁸

Other procedural circumstances affect the right against self-incrimination. In Belgium, the company's settlement statement shall contain "acceptance of infringement identified" in the communication of objections sent by the competition authority, which may affect the right against self-incrimination to a greater extent, since the company is not free to draft its statement according to its own understanding of the facts and of the infringement.⁶⁹

In case of commitments which do not result in acknowledgment of guilt, there is no pressure or incentive on companies to accept liability for infringing competition law. Consequently, the presumption of innocence and the right against self-incrimination are safeguarded. Yet, this is true provided the voluntary undertakings are not considered to imply any (implicit) recognition of wrongdoing.

The right to be heard comprises several components, such as the right of parties to know the case against them, the right to have access to file and the right to comment on objections raised against them and/or the opportunity to be heard in person.

In transactional resolution mechanisms, the right to be heard in person is generally respected since discussions give sufficient opportunity to the parties to present and defend their case in front of competition authorities. In order to increase efficiency, the right to be heard in person is replaced by the opportunity to give comments at several stages of the procedure, in particular to the quasi-final draft decision that would record and make binding the agreement and undertakings of the parties. The right to be heard would be impaired if the parties are incentivised to submit undertakings or commitments, to admit facts or any infringement of the law before having had a reasonable opportunity, and within a reasonable deadline, to study the theory and objections of the authority, as well as to have access and review the main evidence used by authorities against them.

At early stages of the transactional discussions, the most important aspects of the right to be heard are (i) the right to know the case against the companies; (ii) the right to have access and

⁶⁶ See J. Kindl and M. Petr, Czech Republic, p. 13.

⁶⁷ See the discussion in Germany regarding leniency applications, E. Bueren, Germany, p. 7.

⁶⁸ See also in Germany, this is not covered by the prohibition of granting advantages not envisaged by statute, E. Bueren, Germany, p. 8. See A. Camuso, Italy, p. 14, for whom the more companies benefit from the cooperation, less relevant becomes the right against self-incrimination.

⁶⁹ J. Auwerx, Belgium, p. 14.

see the main evidence, even access to the full file; and (iii) the opportunity to have a clear view on the essential components of the transactions and their amount.

Transactional resolutions are conceived from the competition authorities' standpoint as a means to reduce costs and speed up the procedure, by drafting shorter statements of objections and using fewer resources to arrange access to file for companies under investigation. While such a position is comprehensible, it is precisely the hurdles created to companies at this stage that may encroach to the rights to be heard of the parties and may put unnecessary pressure to accept objections based on insufficient evidence or unclear effects on the market, and to submit commitments that go beyond what is necessary to restore efficient competition.

On the other hand, as a matter of principle cost efficiencies should not be achieved on the back of parties' rights of defence. Only when the parties rights are considered to be sufficiently fulfilled in an actual case should the cost efficiencies take priority over the rights of defence. Accordingly, total or partial waiver of defence rights should not be made a prerequisite to the benefits granted to companies in the framework of transactional resolution mechanisms.

The section below will discuss fairness in relations with the process of transactional resolution, since different issues arise at different levels of the process.

3.5. Fairness, Due Process and Transactional Resolution Process

3.5.1. Informal Investigation Which do not Result in Binding Decisions

Many antitrust investigations are resolved informally, following a discussion with competition authority during an initial phase where procedural rights are not formally available or respected. Companies voluntarily undertake to adapt their conduct against closure of investigation without any adoption of a formal decision or a finding of infringement. The main advantage for companies is that they avoid time and expenses in connection with a formal investigation;⁷⁰ the same applies for authorities. In principle, such quick resolution of cases should be used in conduct having a limited effect on competition.⁷¹

In this preliminary phase, companies in general do not have access to file and do not receive any written form of objections. Only discussions occur between parties and competition authorities. Authorities have large investigative powers on the other hand, backed by sanctions in case of non-cooperation to provide information.⁷² The risk in this initial phase lies in that authorities may be willing to open investigations on the basis of complaints filed by competitors or customers without investigating further the reality of the anti-competitive effects, shifting therefore the burden on companies under investigation and increasing the later incentives to offer something in order to stop investigations.⁷³

⁷⁰ See M. Israel, United Kingdom, p. 4.

⁷¹ See J. Kindl and M. Petr, Czech Republic, p. 8.

⁷² See in Italy, A. Camusso, p. 12.

⁷³ See A. Camusso, Italy, p. 8.

It is submitted that potentially, the rights of defence are more at stake at this stage than during a formal investigation.⁷⁴ Companies under investigation may wait however for the formal opening of the procedure, where they will have more rights than during the initial and informal investigation phase, should they not be comfortable with the lack of information about the case or the impossibility to have access to key documents.

Such voluntary undertakings are not binding on companies submitting them, accordingly there is no sanction for non-compliance outside the opening of a formal investigation. In the United Kingdom these are called "voluntary assurances".⁷⁵ In Switzerland, such undertakings create an obligation on the companies to act in good faith, however they are not approved, nor made binding, by a decision of the Competition Commission.⁷⁶ Given the fact that companies accept to adapt their behaviour, that no binding decision is taken against them, that no infringement is found, and that such closure of procedures are not subject to publicity, such an informal procedure does not encroach on fundamental rights of companies.

The main risk lies on over- or under-intervention and the lack of transparency of such kind of informal intervention. The risk of over-intervention may be cured by a regular review of undertakings. In the United Kingdom for instance, the OFT released a company from voluntary assurances one year after they were offered by the company, on the ground that the evidence was insufficient to lead to a finding of infringement.⁷⁷ Under-intervention may be also adjusted by the possibility for the authorities to open a formal investigation at any time if the assurances given by companies prove to be inadequate or insufficient. Ultimately, the main drawback of such intervention is insufficient transparency and publicity around the case, which sends mixed messages to market participants: was there a potential infringement, should the other companies adopt the same conduct, what exactly offered companies under investigation, or how can third parties benefit and enforce such commitments? Given that no sanctions are adopted, such informal intervention is not suitable for conduct having caused significant damage to the economy, or having clear detrimental effect on competition.

3.5.2. Formal Investigations

3.5.2.1. Communication of the Case Against the Company

In general, the parties have the right to be informed about the investigation. Such information usually is done at an early stage of the procedure and does not include sufficient information on all allegations that the competition authority may wish to raise. This communication is not a sufficient base on which the companies may submit commitments or simply show readiness to enter into a settlement with authorities.

As explained above in this report, the main achievement of transactional resolutions is to free up resources of competition authorities also by downsizing formal exchanges such as written procedures and the preparation of written documents, which in turn is believed to increase efficiency. Yet, less written procedure entails ill-defined concerns related to competition

⁷⁴ See A Camusso, *Ilay*, p. 12.

⁷⁵ M. Israel, *United Kingdom*, p. 4; D. Emch and D. Neuenschwander, *Switzerland*, p. 2.

⁷⁶ D. Emch and D. Neuenschwander, *Switzerland*, p. 2.

⁷⁷ See M. Israel, *United Kingdom*, p. 6.

infringements, making burdensome and demanding the defence of companies, and arduous their task of finding remedies to cure vague competition concerns or their decision to acknowledge or not infringement of competition law in the framework of settlements. The preliminary assessment for instance in the case of commitments may well be very superficial, and companies may offer commitments for an alleged infringement that does not exist or is not proven.⁷⁸ Put in other words, the burden is shifted on companies and, on the whole, this does not reduce society's cost related to enforcement of competition law.

Not all jurisdictions know a comparable information mechanism to the statement of objections as known in EU competition law, i.e. a written communication where the Commission states in detail the objections raised against the company under investigation, and where such objections are the result of thorough investigation work.

In some jurisdictions, the form and the content of such communication is not clearly set.⁷⁹ In Switzerland, the objections of the Secretariat of the Competition Authority are presented in a draft decision which is sent to the parties for comments, however such draft decision is usually drafted after the parties have negotiated an agreement with the authority.

In Belgium, the College of Competition Prosecutors (investigative body of the competition authority) communicates its intention to proceed to a settlement (fine discount) in writing. After such discussions, if the competition authority considers that a settlement is possible for fine reduction, it invites the companies to submit a settlement statement within a deadline.⁸⁰ The communication of objections is therefore an essential element of the procedure since the company's settlement statement shall contain "acceptance of infringement identified" in the communication of objections. Even though prior communication safeguards the right of the company to know the case against it, the fact that the company should accept the facts and infringement as described in the communication is believed to affect the right against self-incrimination.⁸¹ The level of the fine (minimum and maximum), will be set in draft decision by the investigative body only after discussions and after the issuance of the settlement statement by the company.⁸² Therefore, neither the level of the fine, nor the fine reduction is predictable for companies. Moreover, the College of Competition Prosecutors is free to modify the proposed minimum and maximum until the submission of the draft decision to the president of the authority.

In Germany, the competition authority should disclose orally or in writing the essential elements of the infringement and the upper limit of the fine. Objections do not have to be set in writing before the discussions start.⁸³ The competition authority will draft a settlement declaration and set to companies a deadline to admit objections and facts included in the settlement declaration, as well as admit the upper limit of the fine.⁸⁴

⁷⁸ See D. Bosco, France.

⁷⁹ See for example Austria, p. 11; A. Stawicki et al., Poland, p. 12.

⁸⁰ J. Auwerx, Belgium, p. 3.

⁸¹ J. Auwerx, Belgium, p. 14.

⁸² J. Auwerx, Belgium, p. 15.

⁸³ E. Bueren, Germany, p. 18.

⁸⁴ See E. Bueren, Germany, p. 12.

Questionable is also the practice of granting greater benefits if companies settle before receiving any statement of objections compared to the situation where parties receive one. This is the case for instance in United Kingdom, where settlement discounts are capped at 10% post statement of objections, but may be 20% before the issuance of a statement of objections.⁸⁵ While this is linked to a certain degree to time and cost savings, as well as the stage of reaching a settlement, the fact that the fine reduction depends simply on the issuance of a document which is essential to safeguard fundamental rights of companies is questionable. This rewards waiver of the rights, and not only time and cost savings.

Even in the case where companies are not found to have infringed competition law, such as in case of commitments, companies have the right to know the concerns of competition authority in a clear way. In EU jurisdictions, companies are informed of the competition concerns via a preliminary assessment, which is a much shorter and less detailed than the statement of objections,⁸⁶ upon which companies may submit commitments that remove these concerns. In France for instance, companies may submit commitments after the reception of the preliminary assessment but before any statement of objection is issued,⁸⁷ which limitation intends to clearly distinguish between commitment procedure and regular proceedings. In United Kingdom the authority will send a summary of competition concerns after a company inform of its readiness to offer commitments.⁸⁸ In Belgium, companies may submit undertakings once the Competition College (decision-making body) has made it clear that it intends to take a prohibition decision, which implies that the Competition College has sufficient proof of an infringement and that was made known to the companies.⁸⁹ However, parties may submit commitments even before, once they have sufficient information on the objections raised against them. In Italy, a resolution of the case through commitments is possible after the issuance of a statement of objections issued to companies and third parties.⁹⁰ The statement of objections summarises the main findings and a prima facie assessment of infringement. After informal discussion on the willingness to resolve the case by undertakings, the competition authority and the company under investigation start formal commitment discussions. In Serbia, commitments must be offered before the drafting of the statement of objections.⁹¹

It is our conclusion that parties should always receive a summary of the concerns and objections in writing, with sufficient details on the facts and alleged infringement and a description of anticompetitive effect, accompanied with essential evidence. If authorities do not issue statement of objections in general, verbal discussions with authorities at the early stage of investigation or transactional discussions shall be at least recorded and handed over to companies and their counsels, so that they have sufficient information to take a decision to litigate or settle. In our view, such a summary of concerns is an essential element to ensure due process.

⁸⁵ M. Israel, United Kingdom, p. 14.

⁸⁶ See D. Bosco et al., France.

⁸⁷ See D. Bosco et al., France.

⁸⁸ M. Israel, United Kingdom, p. 7.

⁸⁹ J. Auwerx, Belgium, p. 6.

⁹⁰ A. Camusso, Italy, p. 5.

⁹¹ D. Ognjenovic, Serbia, p. 9.

3.5.2.2. Predictability and Clarity of Objections and Benefits of a Transactional Resolution

Less formal safeguards regarding communication of objections decreases predictability for companies. The practice of increasing the amount of the potential sanction⁹² or extending the scope of initial objections to infringements without sufficient evidence increases the pressure on companies under investigation to accept a settlement with authorities. The threat of a high fine to obtain modification of the conduct of the company under investigation constitutes also an undue pressure to companies. In other words, competition authorities may be tempted to extent the scope objections in order to improve their "negotiation position" towards companies under investigations.

It is difficult to assess to what extent such negotiation techniques are used by competition authorities; however concerns are raised towards the use of such actions in antitrust transactional resolutions.⁹³ In this regard, the policy followed by the competition authority should be clear and predictable up-front to companies under investigation. In particular, the choice between sanctions and commitment decisions should be made at the beginning of the investigation, as soon as the authority has sufficient evidence and elements to determine harm to economy⁹⁴ and the need to sanction the company: the authority should not use the threat of high sanctions to induce companies to submit excessive undertakings. This is particularly the case for abuses of dominant position.

As a matter of principle, it is submitted that the power lies on the authorities and therefore there is no need for them to act as private actors during negotiations; every use of such negotiation techniques is contrary to the principle of fairness and due process.

Safeguards in this respect include the following:

- The authority shall decide as soon as possible whether to enter into discussion with companies. Outside cartel cases, if a fine is envisaged, the threat of such fine should not be used in order to obtain extensive commitments or undertakings by the companies under investigation without finding of any infringement;
- The basic amount of the sanction shall be set up front, not after the expression of willingness of the companies under investigation to settle;⁹⁵
- The basic amount of the fine as well as the level of the reduction shall be communicated to companies before their settlement statement containing acknowledgment of the infringement;
- Objections shall be raised only on the basis of sufficient evidence and only after a careful analysis and assessment of the likelihood of finding an infringement;⁹⁶

⁹² See E. Bueren, Germany, p. 14, reporting that allegedly cooperation has influenced the trend by increasing the basic amount of the fine, and not by reducing the actual level of fine paid by companies.

⁹³ See G. Fussenegger, Austria, p. 4.

⁹⁴ See for instance D. Bosco, France, Section 1.2.

⁹⁵ See E. Bueren, Germany, p. 24.

⁹⁶ See G. Fussenegger, Austria, p. 4; see also Article 29 of the Swiss Competition Act: "If the Secretariat considers that a restraint of competition is unlawful, it may propose an amicable settlement to the undertakings involved concerning ways to eliminate the restraint." (emphasis added)

- The companies under investigations shall have the option to withdraw their submission and their willingness to settle or submit undertakings without having to bear any negative consequence.

3.5.2.3. Access to Evidentiary Document and to File

Access to file is crucial in transactional resolution mechanisms. Due to the streamlined procedure, fewer written documents and more superficial objections, access to main documents is also a necessary safeguard and a way to overcome difficulties⁹⁷ deriving from less clarity due to the form and stage of the transmission of objections.

In several jurisdictions, companies under investigation have access to evidence used to support objections after the starting of the discussions for settlements, but before the submission of settlement statements.⁹⁸ In Germany for instance, the guidelines state that the parties are able to have access to the *main evidence* at an earlier stage of the procedure compared to the standard one.⁹⁹

Access to the full file is not granted to companies before they submit settlement statements,¹⁰⁰ or it is expected from the parties to waive their right to have access to the full file.¹⁰¹ In certain jurisdictions, however, such as in Italy, access to file likewise any other right of defence cannot be validly waived.¹⁰² In Switzerland, parties have access to the full file once a formal investigation is initiated. The investigative body of the competition authority informs companies under investigation on the documents included on the file, so that they can review them and possibly comment on their content.¹⁰³ In Sweden, parties have broad access to file, at any time, and therefore waiver of such rights cannot be preconditions to entering a transactional resolution.¹⁰⁴ In Serbia, parties have access to file once a formal investigation has started.¹⁰⁵

The main obstacle to access to file of the procedure is confidentiality and business secrets; handling confidentiality and request to maintain a part of the documents and submissions secret is what cost time and resources from the standpoint of authorities.¹⁰⁶

In the United States, companies do not have access to documents before the filing of the case to courts; due process is safeguarded by ensuring access to documents and public hearings once the civil or criminal litigation before the courts have commenced. It is submitted by the national reporter that in American-style systems, defendants and third parties should not have a formal right to access investigative files while the case is still in investigation.¹⁰⁷

⁹⁷ See D. Bosco, France.

⁹⁸ This is the case for instance in Belgium (p. 16) and in Germany (p. 11).

⁹⁹ E. Bueren, Germany, p. 12 regarding settlements.

¹⁰⁰ In Belgium, it is not clear whether the parties will have access to full file.

¹⁰¹ E. Bueren, Germany, p. 11 regarding settlements.

¹⁰² A. Camusso, p. 12 ff, article 24 of the Italian Constitution.

¹⁰³ D. Emch and D. Neuenschwander, Switzerland, Section 2.4.5.

¹⁰⁴ H. Andersson, Sweden, Section 2.2.3.

¹⁰⁵ D. Ognjenovic, Serbia, p. 9.

¹⁰⁶ See for instance, Italy, p. 13.

¹⁰⁷ E. E. Varanini, United States, p. 27.

It is our conclusion that companies entering in a transactional process shall have sufficient access to essential evidence used by competition authorities. Access to the entire file may be used in transactional resolutions to counterbalance the reduced form of formality during the communication of objections, the lack of formal oral hearings on the case and the streamlined procedure in general. At an initial stage, companies may be granted access to essential evidentiary documents, and if necessary access to the entire file, in order to assess exculpatory and disculpatory evidence. The cost and efficiency reasons are not in our view a sufficient justification for authorities to restrict such right to access the entire file. Waiver to the right to have access to essential evidence or to file shall not be a prerequisite for entering a transactional resolution of to other benefits such as fine reduction. A company subject to investigation and ready to start discussions in view of a transaction has sufficient interest in using this right in an efficient way and in not abusing with request of documents.

3.5.2.4. Form and Status of Parties' Submissions

A general trend emerges on who submit the first draft: in the majority of jurisdictions, the parties take the initiative to request a transactional resolution of the investigation and submit the first draft. This possibility for parties to take the initiative and submit the draft settlement respects to a greater extent their rights, by ensuring that they are not forced to commit, to conduct, or admit facts or infringements beyond what is necessary and beyond what can be expected from them to mitigate anticompetitive effects.

This is particularly the case for commitments or undertakings: in Belgium, the initiative to submit undertakings comes always from companies under investigation, which also submit the first draft undertakings or draft commitments.¹⁰⁸ Such draft is further modified by companies following discussions with the competition authority.

In other jurisdiction there is no specific rule, the companies or the authority may take the initiative and even draft the text of settlements.¹⁰⁹

3.5.2.5. Form and Status of Admission of Facts and Infringement

In substance, admission of facts and/or infringement is a precondition in cases of settlements of infringement procedures accompanied with sanctions.¹¹⁰

In France, the company entering in a settlement for reduction of a fine shall state clearly and unconditionally that it does not deny the facts and the qualification as an infringement of competition law given to them by investigative body of the authority, neither the liability nor other elements such as the duration of infringement or the anticompetitive effects.¹¹¹ In Belgium, the settlement statement must contain company's acknowledgment of its involvement and its responsibility for the infringement and acceptance of the proposed range

¹⁰⁸ J. Auwerx, Belgium, p. 6.

¹⁰⁹ See G. Fussenegger, Austria, p. 4.

¹¹⁰ See G. Fussenegger, Austria, p. 5.

¹¹¹ D. Bosco, France, p. 14.

of sanctions proposed by the investigative body to the decision making body (the Competition College).¹¹²

In Australia, parties are generally required to admit that they have engaged in an infringement of the competition law, however only the courts can make a finding of infringement and therefore transactional procedure are not perceived as requiring waiver of the right against self-incrimination.¹¹³ Leniency applications are an exception to this, in that the admission of guilt is pre-condition to granting of immunity.

In case of undertakings or commitments, acknowledgment of infringement is not a precondition. The facts presented in decisions making binding undertakings or commitments are however acknowledged or confirmed by undertakings, either expressly or implicitly, by not challenging them.

In certain jurisdictions, there are no formal minutes about the content of the discussions with the officials. While this may protect companies under investigations against the improper use of their oral statements during discussions, a written procedure give more legal certainty regarding the promises and requirements of competition authorities. In Germany, the institution of formal minutes about settlements agreement, the settlement proposal and its acceptable or rejection shall be mentioned in the file to allow a certain control by judges and parties.¹¹⁴

3.5.2.6. Deadlines and Timing for Submissions

Competition authorities usually fix a deadline to the parties to submit a settlement proposal, which deadline is fixed in the regulations or at the discretion of authorities.¹¹⁵ For commitments, it is usual also to set deadlines. For settlements in cartel case, the requirement for an early submission may encroach to the parties' right to know the case against them. The same issue raises in case of commitments or merger remedies, even though in this later case deadlines are shorter due to the strict deadlines for merger control.

In the Czech Republic, parties must submit commitments within fifteen days from the reception of the statement of objections.¹¹⁶ In France, the issue of the time pressure has been resolved by providing in the law a minimum deadline of one month to companies for submitting commitments; obviously companies may submit their undertakings earlier.¹¹⁷ In Italy, parties can offer commitments within three months from the reception of the statement of objections notified to them.¹¹⁸ Such deadline of three months is not considered as mandatory, but a suggested deadline that can be prolonged: absolute deadlines have been considered as inappropriate in case of negotiations, since they would put unnecessary pressure on both authorities and companies.¹¹⁹

¹¹² J. Auwerx, Belgium, p. 3.

¹¹³ B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 18.

¹¹⁴ E. Bueren, Belgium, p. 18.

¹¹⁵ See J. Auwerx, Belgium, p. 3.

¹¹⁶ J. Kindl and M. Petr, Czech Republic.

¹¹⁷ D. Bosco, France, Section 1.2.

¹¹⁸ A. Camusso, Italy, p. 5. P. 7

¹¹⁹ A. Camuso, Italy, p. 16.

The timing of submissions is also important, in particular when the benefits for companies under investigation decrease with the laps of time. The fact that the companies shall submit commitments or apply for settlements at a very early stage of the antitrust investigation runs the risk affecting their right of defence.¹²⁰ Certain limitations are justified, such as the obligation to submit commitments after the reception of preliminary assessment but before any drafting of a statement of objections¹²¹ (which entails more workload for authorities): the companies have had the possibility to assess the objections raised against them on the basis of the preliminary assessment, and therefore their rights are safeguarded.

Measures to mitigate the submission of settlement statement involving acknowledgment of an infringement at an early stage of the investigation may include:

- Granting of access to the key documents and key evidence within a reasonable deadline to companies under investigation;
- Describing the main objections in writing and identify the main evidence supporting the alleged infringement that the authority intends to object to such companies;
- Setting a reasonable deadline to consult key documents and evidence;
- Setting of a reasonable deadline to allow parties to review and examine the objections of the authority and to prepare their settlements objections;
- Setting clear procedural rules in guidelines or regulations, including a minimum deadline to allow companies to examine the evidence held by authorities, draft their settlement statement and make an informed decision regarding the admission of the infringement and of the charges raised against them.

3.5.2.7. Burden and Standard of Proof

In general, while according to the law it is clear that the burden of proof lies always on authorities, it is not clear at what level of proof the infringement should be evidenced before starting a transactional discussion with the companies under investigation. This is also a consequence of the pragmatic function of settlements; as stated by an American court: "Trials are primarily about the truth. Consent decrees [settlements with court orders] are primarily about pragmatism."¹²²

At the investigation stage, the more advanced the investigation, the more evidence is gathered from the authority, either by proving an infringement or disqualifying the conduct. Accordingly, at an early stage of the conduct, the authority does not have sufficient evidence proving an infringement and, in most cases, nor companies under investigation have a clear view on what the authorities have as evidence, or on whether their own conduct would infringe competition law. An internal investigation is often necessary to find out evidence regarding anti-competitive conduct.

¹²⁰ A. Stawicki et al., Poland, p. 1 et seq.

¹²¹ See the case of France. By contrast, in the EU companies are allowed to offer commitments at any stage of the procedure, even after having received a statement of objections.

¹²² See E. E. Varanini, p. 10, citing a court judgment in *U.S. (SEC) v. Citigroup Global Markets (Citigroup Global Markets II)*, 752 F.3d 285, 295 (2nd Cir. 2014).

The issue of the level of evidence becomes delicate, particularly in transactional resolutions involving an admission of facts or infringements at the early stages of the investigation and those other resolutions that will be published. There is a conflict between time and resources that authorities and companies aim to save and situations where there is not sufficient evidence of an infringement or it is controversial whether the conduct in question infringes competition law. The information asymmetry in favour of authorities is cured by granting access to file to companies under investigations, and by forcing authorities to describe the case against companies. Similarly to leniency, transactional resolutions provide an opportunity for authorities to use their discretion in order to incentivise companies to disclose valuable information and adopt a collaborative behaviour.

However, saving of time and resources is the very reason why a transactional discussion shall not commence at first place if there is little or no evidence on an infringement or if the conduct under investigation is not likely to restrict competition. The investigation principle (*maxime inquisitoire*) shall compel authorities in investigating both incriminating and exonerating facts concerning a conduct of a company.

Moreover, even where companies admit having infringed competition law, such admission shall be backed by sufficient evidence.¹²³ This is also the lesson derived from criminal law on bid rigging proceedings, where the agreement with the prosecutor, which involves a confession, does not exempt the court from the duty to take evidence to all facts relevant to the decision.¹²⁴ Even though the courts in practice seem to reduce their control to the level of plausibility of confessions compared to the main evidence submitted to them, it is important that the investigation authorities as well as judges verify whether the admission of facts, infringement and if necessary guilt is supported by sufficient evidence.

Obviously, the rule above and the measures do not apply to leniency applications, since the leniency application should submit full evidence to infringement of competition law even before opening of any investigation.

Some authorities resolve this issue by setting high standard up-front. In United Kingdom, the authority will consider settlement of a case provided the evidential standard for issuing a statement of objections is met.¹²⁵ Also, the two-tier systems involving courts approval results in better safeguards with respect to the burden and standard of proof, since authorities should defend their case and the necessity of undertakings or settlements before the court,¹²⁶ who maintains the power to simply reject any intervention if the case is not backed by sufficient evidence.

¹²³ See for instance the requirement regarding settlements in Germany, where admission should be backed by sufficient other evidence, inspired by criminal procedural principal (E. Bueren, Germany, p. 9).

¹²⁴ E. Bueren, Germany, p. 20.

¹²⁵ M. Israel, United Kingdom, p. 14.

¹²⁶ See for instance Australia, p. 20, where there is the perception that transactional resolutions do not alter the burden and standard of proof.

3.5.2.8. Discretion of Authorities in Pursuing Discussions Concerning Undertakings and Settlements

Competition authorities have broad discretion to start, continue or cease the settlement procedure. This is a direct consequence of the fact that companies under investigation do not have a right to a negotiated outcome. Besides, parties do not have a right to appeal the decision of the authority to continue or cease the settlement procedure. The same discretion is present in case of commitments procedures which does not involve a finding of an infringement.¹²⁷

Such discretion is necessary, however the lack of efficient control by appeals gives leverage to authorities that should be counterbalance by other mechanism, such as clear rules on the prerequisite in starting a transactional resolution process or on the use of documents after a discussion fails.

3.5.2.9. Withdrawal of Settlement Submissions and Admission of Guilt

The use of information and statement of companies submitted in the settlement procedure after such procedure is unsuccessful, be it because the companies have withdrawn their statement or the authority decides not to pursue with a transactional resolution mechanism, runs the risk of encroaching to the presumption of innocence and the right of parties to a partial and objective authority.

Generally, competition authorities do not make use of settlement submissions or undertakings in the event the authority itself decides to discontinue or the company withdraws from the discussions.¹²⁸ Such principle is set out in guidelines or is simply followed in practice.

In certain countries, authorities can use settlement statements where the parties have acknowledged infringement of competition law if the settlement procedure is not successful.¹²⁹

In leniency and settlement cases, where the companies include in their submission an admission of the facts or of the infringement, the prohibition of the use of statements, correspondence and documents is crucial for companies. In addition to clear rules, some authorities have put in place firewalls within the authorities to impede the flow of information from the unit receiving and handling leniency applications, and the other units of competition authorities. In Brazil, for instance, the submissions are accessible to other units only when the authority decides to accept the leniency application or a settlement agreement.¹³⁰ Such structural separation is advisable with regard to all transactional mechanisms that are abandoned while companies have made submissions or oral statements before officials; in such cases different group of officials or a different composition of the decision making body

¹²⁷ See for instance J. Auwerx, Belgium, p. 6.

¹²⁸ See for instance Brazil, p. 18; France, p. 5; United Kingdom, p. 15.

¹²⁹ See Belgium, p. 13, Serbia, p. 8, A. Keller, Hungary, p. 10. This was the case in Germany, however it seems that currently it is considered that admission of infringement may not be used (eg as evidence) if such statement are withdrawn, this for both criminal and administrative procedures (E. Bueren, p. 10, footnote 54).

¹³⁰ See J. C.M. Berardo, Brazil, p. 18. Other measures are taken on a case by case basis.

shall continue the case and take the final decision without being influenced by statements already made by companies under investigations. This would be sufficient, but necessary, to safeguard also the right to an impartial judge.

It is our conclusions that all discussion in the framework of a transactional resolution of the case should be clearly distinguished as such and shall be done in a "without prejudice privilege" basis, in particular in case of admission of liability. In case of failure of transactional discussions, companies shall be allowed to withdraw their submissions without consequences, meaning that authorities shall not make use such submission nor of the information contained thereof against the company. In addition, competition authorities shall create sufficient safeguards such as separation of teams and units dealing with the case if negotiations fail.

3.5.2.10. Withdrawal of Undertakings

In several jurisdictions, undertakings pertaining to the modification of their future behaviour can be withdrawn without consequences for companies having submitted them.¹³¹ In other countries such as Italy, there is no automatic protection of parties' submissions in case of withdrawal or failure to reach an agreement, which gives significant leverage on authorities to push companies accept changes to companies submissions.¹³²

Furthermore, even though statements may be protected by submission on a "without privilege" basis, publicity and publication of undertakings or commitments in order to allow the market to provide comments is an obstacle to the withdrawal of commitments. Some aspects of undertakings can however remain confidential.

Another risk lies in that the undertakings submitted to the competition authorities are made binding by authorities, even though the companies did not agree to their amendments or wishes to withdraw them. This is the case in Austria.¹³³ In Switzerland, the competition commission may also issue a decision approving and therefore making binding an amicable agreement concluded between its Secretariat (investigative body) and the company under investigation, and impose sanctions, even though the company submitted its undertakings on the condition that no fine would be imposed to it.¹³⁴ Such decision was not considered to breach the principle of legitimate expectations, however the insecurity resulting by it make companies circumspect when discussing and submitting undertakings to the competition authority. In addition, according to controversial decision of the Federal Administrative Court, the fact that a company enters in an agreement with the competition authority is considered as an implicit admission of infringement, even though companies state clearly that they submissions do not involve any admission of guilt.¹³⁵

Put it differently, companies may contribute to defining a set of rules impacting their future behaviour, which may be declared binding against their will. Compared to a situation without

¹³¹ See for instance France.

¹³² See A. Camusso, Italy, p. 14.

¹³³ See G. Fussenegger, Austria, p. 7.

¹³⁴ ATF, Publigroupe.

¹³⁵ D. Emch and D. Neuenschwander, Switzerland, Section 2.4.3.

commitments, the companies' position would be worst. Although companies may be ordered to adopt conduct in compliance with competition law, as is the case in EU competition law, the binding effect of detailed rules of conduct may be more burdensome than a simple injunction to respect a prohibition.

In several jurisdictions the law provides for the confidentiality of correspondence and documents exchange between the companies under investigation and competition authorities in the framework of settlements procedures.¹³⁶ Confidentiality protects companies under investigation against disclosure to third parties and the use of such documents in follow-on private litigation.¹³⁷ There is no uniform solution on this principle. In some jurisdictions, courts have responded differently to request to grant access to documents pertaining to transactions resolutions.¹³⁸

Accordingly, parties shall be granted the right to withdraw their undertakings or commitments, and such withdrawal shall impede authorities using such submissions. Submission of undertakings by companies in the framework of a transactional resolution mechanism shall not imply any admission of any wrongdoing by competition authorities or courts. Such submission shall be kept confidential to the greatest extents, except for essential information necessary to market test such commitments.

3.5.2.11. Right to Appeal

A distinction should be drawn between the waiver of the appeal as a precondition for discussion and concluding a settlement and/or granting of benefits (such as a fine reduction), and the fact that *de facto* parties have no interest in lodging appeals after having reached a transactional resolution. A waiver of the right of appeal or a limited access to justice not only limit unduly parties right to a fair trial, but would also give negative incentive to officials not to conduct in good faith or not to respect due process during transactional discussions, or to request remedies beyond what is necessary to remove competition concerns.

In several jurisdictions, companies submitting a settlement statement, commitments, or leniency application, have no right to appeal against the settlement decision.¹³⁹ Such absolute exclusion is nevertheless excessive and inadequate, since parties may have an interest to lodge an appeal on procedural grounds,¹⁴⁰ or on other grounds such as disagreement about the correct interpretation of the commitments, additional injunction which did not form part of the agreement, or the fact that the company was induced to propose commitments by force or deceit.¹⁴¹ In addition, while such a solution may be acceptable in the cases where companies have the right to review the draft decision before the decision is taken and agree in all respects with it, this position encroaches to the right to trial if the company under investigation does not have the possibility to review the draft final decision and agree to it.

¹³⁶ On the importance of confidentiality, see E. E. Varanini, United States of America, p. 12 et seq.

¹³⁷ See J. Auwerx, Belgium, p. 3, 13 and 20; D. Bosco et al., France, p. 7.

¹³⁸ José C. M. Berardo, Brazil, p. 31.

¹³⁹ For instance, in Belgium (p. 19 et seq. of the national report) or USA (p. 15 of the national report).

¹⁴⁰ See J. Auwerx, Belgium, p. 18.

¹⁴¹ E. Buerne, Germany, p. 23.

In other jurisdictions parties maintain to a certain extent their right of appeal. In France for instance, the company cannot challenge the parts of the settlement agreement that it has not denied, however the company maintains its right to challenge the criteria for the calculation of the fine, that is the importance of the damage to the economy, the assessment of its individual situation, its ability to pay of the group as well as recidivity.¹⁴² In Australia, undertakings are also subject to judicial review.¹⁴³ In Serbia, both leniency decisions and commitments are subject to judicial review.¹⁴⁴ In other jurisdictions, the scope of the right to appeal in case of commitments is disputed.¹⁴⁵

Other drawbacks may limit the right to appeal of companies having reached a settlement or having offered commitments. In United Kingdom for instance, if settlement discussion fail the authority cannot make use of settlement submissions,¹⁴⁶ whereas in case of appeal of settlement decision it is possible to use admission of infringement in the appeal and any other document, information or whiteness evidence provided by it.¹⁴⁷

Interestingly, in Italy not only the commitment decisions are subject to appeal, but also the decision of the authority to reject commitments offered by parties.¹⁴⁸ In Italy, commitments decisions are reviewed under the proportionality test, which allows the court to assess the merits of the case and evaluate whether the suggested commitments were suitable to resolve competition concerns.¹⁴⁹ Although such review involves the merits of the case, it focuses rather on the consistency of the reasoning, which highlights that commitments are primarily there to properly resolve competition concerns and not the prevailing mechanism aiming primarily to terminate quickly investigations.¹⁵⁰

The waiver of the right to appeal is precondition in a number of jurisdictions, in particular in case of either commitments mechanisms not involving any admission of guilt, nor a finding of an infringement. In France and Hungary for instance, the waiver of the right of appeal is a precondition to enter in a settlement agreement regarding the reduction of fines.¹⁵¹ The waiver of the right to appeal was considered admissible in Hungary on the ground that it was balanced by the right of the party to access the file prior to making the settlement submission and the right to withdraw the settlement submission.¹⁵²

In some jurisdictions, the waiver of the right to appeal cannot be part of the settlement.¹⁵³ Under some jurisdictions such as Brazil,¹⁵⁴ Italy,¹⁵⁵ or Poland,¹⁵⁶ the waiver of the right to

¹⁴² D. Bosco, France, Section 1.3.

¹⁴³ Australia, p. 15.

¹⁴⁴ D. Ognjenovic, Serbia, p. 10.

¹⁴⁵ See in Germany, E. Bueren, p. 23.

¹⁴⁶ M. Israel, United Kingdom, p. 15.

¹⁴⁷ M. Israel, United Kingdom, p. 16.

¹⁴⁸ A. Camusso, Italy, p. 17.

¹⁴⁹ A. Camusso, Italy, p. 17.

¹⁵⁰ Ibidem.

¹⁵¹ D. Bosco et al., France, Section 1.3, A. Keller, Hungary, p. 11.

¹⁵² A. Keller, Hungary, p. 11.

¹⁵³ See Germany regarding settlement procedures, E. Bueren, p. 9.

¹⁵⁴ See José C. M. Berardo, Brazil, p. 25.

¹⁵⁵ See A. Macusso, Italy.

¹⁵⁶ A. Stawicki et al., Poland, p. 14.

trial is not valid. The same apply in Switzerland; however the legitimate interest of the party having concluded an amicable agreement with authorities remains controversial.¹⁵⁷

We conclude that waiver of the right to appeal shall not be a precondition of any kind of transactional resolution of antitrust investigations, and that the benefits of the transactional resolutions shall not be withdrawn should a company appeal against the decision making binding the transactional mechanism discussed with the competition authority.

3.5.2.12. Transparency and Publicity of Transactional Resolutions

Decisions or judgments that do not include grounds and the reasoning behind the conclusion of transactional resolutions bear the risk of reducing the predictability of competition law enforcement. In some jurisdiction, there is no constant practice regarding publication of commitment decisions, and some commitment decisions are not published at all without criteria.¹⁵⁸ No information is given to the public on why the procedure was closed, on what grounds where accepted commitments and why they were considered to resolve competition law concerns. Such lack of publicity creates an area of opaque and ambiguous intervention; the public cannot assess whether its interest in efficient competition is preserved, not other companies can draw any conclusion or benefit from any indication based on how it could modify its behaviour to comply with competition law. In addition, such decisions make unnecessarily arduous follow-on private actions.¹⁵⁹

3.5.3. Two-tier Systems - Approval of Transactional Resolutions by a Body not Involved in Negotiations

Some jurisdiction function in a two-tier system where investigation and negotiation of settlements are separate from the decision making process. In the United States, Australia, Austria and Sweden the process involves the executive as well as the judiciary power. France, Belgium and Switzerland have somehow separated investigation from decision making, however these functions remain within the same administrative authority.

United States knows a two tier system where settlements and plea bargainings are negotiated by government authorities but approved by Courts. Courts are not bound to follow the recommendations of the government and can also reject the case entirely.¹⁶⁰ Investigations and enforcement of competition law in the United States is made by FTC and DoJ, however most of the cases resolved through settlements has to be submitted for approval to the Courts.¹⁶¹ In general, Courts provide great of deference to the executive for legal and practical reasons, meaning that the Court will not second-guess the remedies and solutions found by the government within its discretionary powers.¹⁶² For instance, the review of civil antitrust settlements entered by the DoJ under the Tuney Act is reviewed under the narrow test of

¹⁵⁷ D. Emch and D. Neuenschwander, Switzerland, Section 2.4.7.

¹⁵⁸ See G. Fussenegger, Austria, p. 7.

¹⁵⁹ See G. Fussenegger, Austria, p. 6.

¹⁶⁰ See E. E. Varanini, United States of America, p. 15.

¹⁶¹ Not all settlements are subject to court review. FTC may conduct civil antitrust settlements (consent decrees) which do not require an approval from the Court (see E. E. Varanini, United States of America, p. 18).

¹⁶² E. E. Varanini, United States of America, p. 6 et seq.

public interest: the judge will check whether the terms of the order are clear or ambiguous, if the method to enforce the terms is inadequate, and if third parties will be positively injured.¹⁶³ The Court may reject proposed settlement only if it will result in adverse antitrust consequences. Due process concerns are resolved by requiring from the government a submission of justifications for the settlement, by conducting hearings, and by granting third parties the opportunity to comment and intervene in the procedure.¹⁶⁴ Civil antitrust settlements brought by federal states are assessed under a fairness and reasonableness standard similar to settlements outside of the antitrust context: the courts examine the basic legality of the settlement, the clarity of the court order (settlement), the ability of the settlement to resolve allegations in the complaint and whether there is a collusion or corruption evidence surrounding the settlement.¹⁶⁵ Concerns of due process are resolved through the conduct of public hearings. In certain state courts reviews, courts do not conduct any hearing of interested party and the entry of the proposed order may enter the same day, meaning that there is no scrutiny of the proposed orders. In the view of the national reporter, such abbreviated settlement processes may create a problem in hindering a justification of how the settlement fit with the authority that government enforcers have to enter in such settlements.¹⁶⁶ The lack of hearing raises concerns on due process since it is the public hearing and the opportunity of the public to comment that forces the executive to set clear goals and clearly justify its actions.¹⁶⁷

In Austria, the decision on fines is taken by the Cartel Court. The Cartel Court is bound by the highest level of fine requested by the Competition Authority. Companies under investigation only acknowledge the request filed by the Competition Authority. Companies are therefore confronted with uncertainty regarding time, costs and outcome of the case.¹⁶⁸ It is unclear however to what extent the Cartel Court reviews the facts and the qualification of facts investigated by the Competition Authority.¹⁶⁹ In addition, only the Cartel Court can impose a fine making it impossible for the investigative bodies to threaten with an exaggerated fine in case the parties withdraw from negotiations,¹⁷⁰ although the risk of requesting a higher fine threshold to the Cartel Court still subsist.

The Cartel Court may freely reject the request of the authority for a settlement. Under general procedural rules, statements of the company on facts and the acknowledgment of the infringement are subject to the free appraisal of the evidence by the Cartel Court,¹⁷¹ which results in uncertainty for companies under investigation.

In Australia, only courts can make a finding of infringement and impose penalties of a punitive nature. Punitive character of infringement and penalties results in the obligation to make subject such procedure to a fair trial, and therefore the necessity the courts to determine

¹⁶³ E. E. Varanini, United States of America, p. 16 et seq.

¹⁶⁴ E. E. Varanini, United States of America, p. 17.

¹⁶⁵ E. E. Varanini, United States of America, p. 21.

¹⁶⁶ E. E. Varanini, United States of America, p. 22.

¹⁶⁷ See in general, E. E. Varanini, United States of America, p. 6.

¹⁶⁸ See G. Fussenegger, Austria, p. 10.

¹⁶⁹ G. Fussenegger, Austria, p. 5.

¹⁷⁰ G. Fussenegger, Austria, p. 16.

¹⁷¹ G. Fussenegger, Austria, p. 11.

and approve such transactions.¹⁷² Reduction of penalties is negotiated by the competition authority, which prepares with the parties a joint submission to the court. The court is not bound by the joint submission, but generally follows the agreement.¹⁷³ The test the court applies is whether the penalty falls within a range that the court itself would fix, even though the court would not substitute its assessment of the penalty with the figure submitted by competition authority.¹⁷⁴ Sufficient discretion is therefore provided to the transaction agreement between competition authorities and companies. By contrast, undertakings are not of a punitive character, and therefore can be taken by administrative authority alone. The competition authority may accept undertakings from companies, and then enforce them in courts if such undertakings are not followed by companies having offered them.¹⁷⁵ The two-tier system in Australia is considered to respect the right to an impartial judge, since decisions on reduction of penalty are decided by a judge who has not been involved in the case.¹⁷⁶

Sweden knows a similar system to Australia, in that the competition authority has competence to order a company to terminate an infringement or accept commitments, but fines can be imposed only by courts, and therefore competition authority has to file a case in court.¹⁷⁷ Accordingly, settlements are adopted only when the circumstances of the case are clear, and the fact that only a judge may impose a sanction regarding voluntary undertakings or leniency cases makes the system less vulnerable with respect to due process.¹⁷⁸

In France, in the case of commitments, the preliminary assessment is issued by the investigative body of the authority, and the commitments are discussed by this authority and the companies. The decision making body is however aware of commitment submitted and the discussions involved between the officials and the company under investigation and may make comments.¹⁷⁹ The involvement of the decision making body into the investigative phase was not found to be contrary to the right to an impartial judge under Article 6 (1) ECHR. After the market test, the parties are invited to a hearing before the decision-making body of the authority, which can request amendments to commitment to respond to comments of market participants. In France, commitments submitted to the investigative and decision making body may be withdrawn and the authority excludes these documents from the file.¹⁸⁰ However, the two-tier system in France may result in a lack of unpredictability regarding the fine reductions; indeed, the fine reduction is discussed between the company and the investigative body, however the negotiated reduction of the fine is not binding to the decision making body.¹⁸¹

A similar system exists in Switzerland, where the amicable settlements are negotiated by the investigative body, but are approved and made binding by decision of the competition

¹⁷² B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 14.

¹⁷³ B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 3.

¹⁷⁴ B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 4.

¹⁷⁵ B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 5 and 7.

¹⁷⁶ B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 16.

¹⁷⁷ H. Andersson, Sweden, p. 1.

¹⁷⁸ H. Andersson, Sweden, Section 2.2.

¹⁷⁹ D. Bosco, France, p. 8.

¹⁸⁰ D. Bosco, France.

¹⁸¹ D. Bosco, France, Section 1.3.

commission.¹⁸² The agreement covers the level of the fine for past conduct as well as future conduct that companies are obliged to follow; the legal qualification is however not negotiable. Competition commission can either reject or accept the agreement or suggest necessary changes. Although the competition commission usually follows the agreement concluded between its Secretariat and the company under investigation, in at least one case the competition commission went beyond what was agreed by the company, imposing a fine in addition to approval of commitments for the future.¹⁸³ This raises the issue of the respect of the principle of legitimate expectations and that of good faith in negotiations.

3.5.4. Right of Third Parties

Right of third parties are largely defined by procedural rules. Such rights are much more limited for various reasons.

A difference is to be drawn between the rights of complainants or other market participants affected by the conduct subject to investigation (such as competitors or customers), the rights of other companies subject to investigation and the possibility of other market participants to comment.

At early phases of investigations, third parties do not have formal rights to intervene or access the files, and certainly not more rights than defendants. Such restrictions are admissible to preserve confidentiality of investigations. In case of leniency or immunity applications, the rights of third parties are even more limited and justified by the secrecy of the investigations, which applies also to leniency applicant themselves.¹⁸⁴ In other jurisdictions, third parties are granted broad access to file,¹⁸⁵ with the exception of confidential information.

Restrictions to the rights of other companies subject to the same investigations are more delicate. Transactional resolutions may create incentives for companies to accept facts that charge other companies at the same time, or even risk creating the opportunity in case of leniencies to exaggerate the liability of other competitors in cartels while minimizing their own. Such risk can be minimised by granting conditional access to other defendants in the file and granting them the opportunity to comment and provide discharging evidence. For leniency applications, specific restrictions apply to the right of third parties to view documents.¹⁸⁶ Scholars in countries like Italy with a long standing practice in whistleblowing suggest that evidence provided by one party to a cartel should not be treated in the same way as evidence gathered *ex officio* by authorities,¹⁸⁷ in order to circumvent such risks.

In Italy, the statement of objections preceding commitments are published, and third parties having an interest may comment on it.¹⁸⁸ Such third parties may be individuals, companies or consumer associations. In Australia, all submissions are published and made public subject to

¹⁸² D. Emch and D. Neuenschwander, Switzerland, p. 33 et seq.

¹⁸³ Case Publigruppe, ATF 139 I 72.

¹⁸⁴ See A. Camusso, Italy, p. 10.

¹⁸⁵ H. Andersson, Sweden, Section 2.3.1.

¹⁸⁶ See for instance, Italy, p. 15 et seq.

¹⁸⁷ See A. Camusso, Italy, p. 11.

¹⁸⁸ A. Camusso, Italy, p. 6.

confidentiality and business secret, and third parties have the opportunity to comment. Public hearings are also conducted.¹⁸⁹

In a number of jurisdictions, third parties do not have a right to appeal the decision making binding the undertakings submitted by companies or settlements.¹⁹⁰ Compelling public interests such as the discovery of harmful cartels supersedes the interests of third parties to intervene or appeal. In the USA for instance, amnesty processes are not reviewed by courts, granting to the government discretion to grant immunity without control by third parties.¹⁹¹

In other jurisdiction, such as Italy,¹⁹² third parties may appeal against commitment decisions.

Interests of third parties may be taken into account by conducting market tests in case of undertakings and commitments.

4. Merger Control

The vast majority of remedies raising competition concerns are cleared subject to conditions or obligations attached to the decision authorising the transaction. The most used type of merger remedies are divestments or sale of an on-going business, sales of shareholdings, IP licensing, account, structural or legal separation. In jurisdiction where no suspension period is imposed, such remedies are negotiated in a less formal procedure.¹⁹³

The initiative for proposing remedies is up to the companies. Given the strict deadlines on the authorities, the submission of remedies is also subject to strict deadlines, which is in the interest of companies having filed a notification.

In certain jurisdictions, third parties have a right to comment during the formal investigation of mergers and after publication of the decision opening a formal procedure.¹⁹⁴

Officials tend to be more open and constructive in negotiation of merger remedies compared to transactional resolutions on other fields, although the procedural principles and rules are similar. It seems that the open process and the lack of threat of fines reduces the risk on fairness and due process compared to transactional resolution of antitrust proceedings.

5. Impact on Transactional Outcome and on Market Intervention

Transactional resolutions involve a certain negotiation or bargaining with competition authorities, limiting to a certain extent the role and the right to appeal of companies under investigation and of third parties, accordingly bearing the risk of over¹⁹⁵ and under-intervention.

¹⁸⁹ B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 9.

¹⁹⁰ See for instance Austria, p. 15; USA, p. 15; Sweden, Section 2.3.2; Switzerland; Serbia, p. 12.

¹⁹¹ E. E. Varanini, United States of America, p. 22.

¹⁹² A. Camusso, Italy, p. 7.

¹⁹³ A. Camusso, Italy, p. 18.

¹⁹⁴ A. Camusso, Italy, p. 18.

¹⁹⁵ See A. Stawicki et al., Poland, p. 22, for examples of over-intervention.

The principles of proportionality and necessity are used in European jurisdictions to define appropriate remedies able to resolve competition concerns while not going beyond what is necessary. In the case of commitments for instance, their scope should be as close as possible to injunctions.¹⁹⁶ The risk of over-intervention is being taken into account in France, by stating that the authority does not make binding commitments that go beyond what is necessary to resolve competition concerns identified in the preliminary assessment.¹⁹⁷ Similarly, in United Kingdom the competition authority will accept commitments only in cases where competition concerns are readily identifiable.¹⁹⁸ In Australia, the competition authority will accept undertakings only if it has sufficient evidence to prove an infringement of competition law.¹⁹⁹ In case of remedies that go beyond what is necessary to remove competitive concerns, but that are however useful to implement the core commitments, authorities may simply acknowledge such measures without making them binding. Such approach has the advantage to give clear indications to the market on what measures are strictly necessary in order to comply with the law, which avoids dissemination of negative effects of overreaching undertakings or commitments.

Another means to limit over- or under-intervention of competition laws, is transparency of the draft transactional resolutions and the opportunity of third parties to comment. Transparency gives the right incentive to authorities to be guided only by the public interest.

6. Conclusions

Transactional resolution mechanisms have become central to optimal antitrust enforcement. When public and private interests are balanced, all parties and the society can thereby benefit.

The principles of fairness and due process are vital to transactional resolution mechanisms. Conformity with such principles fosters the business community's acceptance of competition law and contributes to realising optimal enforcement in the public interest.

Given the limited possibility of appeal, along with the deference shown by the judicial branch to the executive branch of government in the case of transactional resolutions, there is greater interest in ensuring fairness and due process from the beginning of the investigation until the conclusion of transactional resolutions.

Competition authorities enjoy broad discretion in the enforcement of competition law. Though such discretion is necessary, the lack of efficient control by appeal gives authorities leverage that should be counterbalanced by other mechanisms, such as clear rules regarding prerequisites for starting a transactional resolution process or concerning the use of documents after discussion fails.

Discretion impacts both the predictability of the process and the legal security of the parties. However, companies' collaboration depends significantly on the legal certainty and transparency of the regulatory framework and its practical application. One mechanism for

¹⁹⁶ A. Camusso, Italy, p. 6.

¹⁹⁷ D. Bosco, France.

¹⁹⁸ M. Israel, United Kingdom, p. 6.

¹⁹⁹ B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 9.

increasing predictability while preserving authorities' discretion is the communication of the essential steps of the transactional mechanisms in guidelines and other soft law instruments.

In order to safeguard due process and fairness, waiving the company's rights (e.g., the right to access documents and the right to appeal) should not be a precondition for entering into or concluding transactional solutions. At the same time, benefits from transaction resolution mechanisms should not be withdrawn in the case that companies enforce such rights.

Competition authorities should not increase pressure on companies during either investigations or transactional discussions as a means to compel them to enter into such transactional resolution mechanisms. Entering into and concluding such mechanisms should remain voluntary. In that respect, the threat of sanctions in the case of commitments, the increase of sanctions up-front or the decrease of fine reductions in the absence of active cooperation, and delays in granting merge clearance should all be considered to be unfair conduct and contrary to due process.

However, transactional resolutions should not result in the abandonment of charges or in very low sanctions for serious infringements, since either would consequently reduce the deterrent effect of competition law, preclude compensation to victims of such infringements, and unduly incentivise, if not pressure, companies to renounce their fundamental rights.

Specific safeguards and rules may be adopted to ensure fairness and due process for companies under investigation:

- Authorities should decide as soon as possible whether to enter into discussion with companies or follow through with the prosecution of the case;
- Objections should be raised only on the basis of sufficient evidence and only after a careful analysis and assessment of the likelihood of discovering infringement;
- Companies should always receive a written summary of the concerns and objections, with sufficient details about the facts and alleged infringement, as well as a description of the anticompetitive effect, accompanied with essential evidence. Verbal discussions concerning the objections should be recorded and handed over to companies and their counsels;
- Companies entering into a transactional process should have sufficient access to essential evidence used by competition authorities. Access to the entire file may be necessary in transactional resolutions in order to counterbalance the reduced formality during the communication of objections, the lack of formal oral hearings on the case, and the streamlined procedure in general;
- Authorities should set a reasonable deadline by which key documents and evidence should be consulted;

Authorities should set a reasonable deadline by which parties are allowed to review and examine the objections of authorities and prepare their settlements submissions;

- In the case of fines, the basic amount of the sanction should be set up-front and, in any case, before settlement submissions;

- The basic amount of the fine and the level of the reduction should be communicated to companies before the submission of any settlement statement that contains an acknowledgment of the infringement;
- Discussions in the framework of a transactional resolution of the case should be clearly distinguished as such and on a non-prejudicial basis, particularly in the case of admission of liability;
- Companies under investigation should have the option to withdraw their submissions and retract their willingness to settle or their undertakings without having to bear any negative consequence;
- Authorities should not make use of such submission or of the information contained therein against the company. Competition authorities should additionally create sufficient safeguards such as the separation of teams and units dealing with the case if negotiations fail.

Two-tier systems in which transactional resolutions are approved by courts show greater respect for impartiality and set better incentives for authorities not to enter into disproportionate settlements.

While transactional resolutions to a certain extent shift the burden of proof to companies, the standard of proof for interventions should not be reduced unnecessarily. Some authorities resolve this issue by setting a high standard up-front. Two-tier systems involving court approval additionally result in better safeguards regarding the burden and standard of proof, since authorities should defend their case and the necessity of undertaking such or seeking settlement before the court, which retains the power to reject any intervention if the case is not supported by sufficient evidence.

Transactional resolutions may have more issues regarding over- and under-intervention of competition law. However, such risks can be reduced by increasing both the transparency of drafted transactional resolutions and the opportunity for third parties to comment. Transparency gives appropriate incentives to authorities to be guided only by the public interest, which ensures a certain control by the public.