

RESOLUTION QUESTION A

LIDC CONGRESS, TURIN 19 – 20 SEPTEMBER 2014

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

- A. Whereas transactional resolutions of antitrust proceedings have become an important mechanism of antitrust enforcement;
- B. Whereas transactional resolution mechanisms may contribute to preserving effective competition in the public interest while bringing benefits to both companies and competition authorities, and the public at large;
- C. Whereas transactional resolution mechanisms are a means of ensuring cooperation and adherence of market participants and ensuring an effective enforcement of competition laws;
- D. Whereas a balanced intervention through transactional resolution mechanisms maintains a sufficient degree of predictability and deterrent effect of competition laws;
- E. Whereas in certain market circumstances, transactional resolution mechanisms may be superior to bare injunctions and fines by enabling more innovative remedies and allowing a fine balancing of anti and pro-competitive effects;
- F. Whereas the frequent use of transactional resolution mechanisms may result in abandonment of charges or low sanctions for serious infringements, reducing deterrent effect and hindering compensation to victims of such infringements, meanwhile unduly incentivising, if not compelling, companies to renounce their fundamental rights;
- G. Whereas jurisdictions in which penalty settlements are approved by courts are generally perceived to show greater respect for impartiality and the right to a fair trial and set better incentives for authorities not to enter into inappropriate settlements provided that judicial review is exercised effectively;
- H. Whereas negotiation and approval by a single administrative authority simplify the process and offer greater certainty to companies willing to enter into transactional resolutions. This also applies to when the transaction resolution is subject to judicial approval, but to a lesser extent;
- I. Whereas the broad discretion of competition authorities in entering and concluding transactional resolution mechanisms should be balanced by procedural guarantees and communication of the essential steps of transactional mechanisms in guidelines and other soft law instruments;

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

- J. Whereas the potential for transactional resolution mechanisms to contribute to an optimal enforcement of competition law depends also on procedural fairness and on the extent to which due process and the rights of all parties involved, including third parties, are safeguarded;
- K. Whereas the interests of the public and the parties under investigation are considerably different in a settlement/commitment negotiation process when the enforcement agency's responsibility is essentially prospective, to avoid immediate and/or future losses of competition flowing from a proposed merger, acquisition, or joint venture that is under review by the agency;
- L. Whereas in merger-type investigations, the whole process is instituted by the parties making a submission seeking approval, and the agency does not (and should not) normally start off with a presumption of infringement. Rather any antitrust concerns tend to arise during the course of merger review, and hence the agency may not have a clear view of what causes it to want to consider enforcement action or settlement until very late in the review process;
- M. Whereas in a merger-type investigation and commitments and undertakings procedures, the principal purpose of competition policy is to protect the broad public interest in maintaining fair and efficient markets. Thus, it is important to provide some reasonable procedural opportunities for other potentially affected market participants (including especially customers and consumer representatives) to offer comments, evidence and objections;

The Ligue considers that it is important to participate in this debate and therefore recommends

In general

1. That given the reduced likelihood or limited possibility of appeal, along with the deference shown by the judicial branch to competition authorities in relation to transactional decisions, there is greater interest in ensuring fairness and due process from the beginning of the investigation until the conclusion of transactional resolutions;
2. That 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 and that benefits from transactional resolution mechanisms should not be withdrawn when companies invoke their rights. However, if the companies appeal on a basis that is inconsistent with the grounds on which they were given such benefits, then those benefits should be liable to be withdrawn;
3. That entering into and concluding transactional resolution mechanisms should remain voluntary and that the threat of sanctions in the case of commitment procedures, the increase of sanctions up-front or the decrease of fine reductions in the absence of active cooperation, should all be considered to be unfair conduct and contrary to due process;
4. That competition concerns should be raised only on the basis of sufficient evidence and only after a careful analysis and assessment of the likelihood of making an adverse finding;
5. That, upon request, companies should receive a written summary of the competition authority's concerns accompanied with essential evidence, or, that verbal discussions concerning those concerns or objections should be recorded and handed over to companies;
6. That companies entering into a transactional process should have sufficient access to essential

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

documents before concluding an agreement with competition authorities and that, in certain cases, access to the entire file may be necessary in order to counterbalance the reduced formality during the communication of objections and the streamlined procedure in general;

7. That companies should have a reasonable timeframe to consider key documents, evidence and objections and to prepare submissions;
8. That discussions in the framework of a transactional resolution of the case should be clearly distinguished as such and should be on a without prejudice basis, particularly in the case of admission of facts or liability;
9. That 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 inference;

In cases of penalty settlements

10. That, in transactional resolutions where admission of facts or liability for infringement of competition laws is a precondition, authorities should not make use of such submission or of the information and evidence contained in it against the company or draw any adverse inference if discussions are terminated. Where possible, competition authorities should additionally create sufficient safeguards such as the separation of teams and units dealing with the case if negotiations fail;
11. That in the case of settlements resulting in fine reduction, the basic amount of the sanction and the level of the discount should be communicated to the company up-front and, in any case, before settlement submissions acknowledging the infringement;

In cases of merger control

12. That when the competition agency receives a merger-type transaction for review, it should promptly issue a public notice and then allow third parties (including especially customers) to make responsive legal and factual submissions concerning the transaction;
13. That during an administrative review of a merger-type transaction, the competition agency should notify the parties under investigation as soon possible about its specific concerns that might cause it to reject the transaction as being inconsistent with competition law;
14. That, consistent with its needs to maintain confidentiality of the positions being taken during settlement negotiations, the agency should seek to provide potentially affected third parties with at least some notice of its competitive concerns as they develop during the course of a merger-type investigation;
15. That when the competition agency has not issued a notice in accordance with paragraph 12, it should not allow a proposed settlement to become final in a merger-type transaction, unless it has given other potentially affected market participants an effective opportunity to offer evidence or objections to the settlement;

When the transaction resolution is subject to judicial approval

The following considerations shall apply:

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

16. That entering into and concluding transactional resolution mechanisms should remain voluntary and that the threat of sanctions in the case of commitment procedures, and the increase of sanctions up-front, should all be considered to be unfair conduct and contrary to due process;
17. That, upon request, companies should receive a written summary of the competition authority's concerns or that verbal discussions concerning the competition concerns or objections should be recorded and handed over to companies;
18. That discussions in the framework of a transactional resolution of the case should be clearly distinguished as such and on a without prejudice basis, particularly in the case of admission of facts or liability. The competition authority should not infer liability if that it is not true;
19. That companies under investigation should have the option to withdraw their submissions and retract their willingness to settle or their undertakings;
20. That, in transactional resolutions where admission of facts or liability for infringement of competition laws is a precondition, authorities should not make use of such submissions or of the information and evidence contained in them against the company or draw any adverse inference if discussions are terminated.