DUE PROCESS IN ANTITRUST SETTLEMENTS

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1. Introduction

Transactional resolutions are becoming an increasingly important part of antitrust proceedings. Contributions from sixteen jurisdictions[1] 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]

A transactional resolution of antitrust proceedings brings many benefits to competition authorities and companies under investigation in public interest 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 with the investigation of sensitive points that can lead to an imbalanced result, this contribution aims to derive and propose recommendations on how transactional resolutions can achieve an optimal balance in terms of market intervention

[1] The following national groups submitted a contribution 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, report not published), **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.

while 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 resolutions pertaining to all fields of competition law: agreements, abuse of dominant positions or merger control. Although undertakings and competition authorities have always exchanged views 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 the 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-upon solutions outside the domain of horizontal cartels, that is, abuse of a dominant position and other potentially restrictive 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 kinds of agreements reached with competition authorities, thus avoiding 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 the comparison of mechanisms and transactional resolutions in various jurisdictions. The national contributions in this book provide excellent information and analysis 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 the abuse of dominant position and agreements (Section 3). We will briefly present the main findings in merger control (Section 4), before drawing conclusions regarding how over- and under-intervention can be dealt in transactional resolution mechanisms (Section 5). We will conclude with some recommendations in the final section.

[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.

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 the companies under investigation.[10] In the case of leniency programmes, the cooperation of the marketplace is a substitute for time-consuming and costly investigative mechanisms.[11] In certain jurisdictions, transactional resolutions have long been considered `a very effective means for social peace` and for facilitating adherence from the public.[12]

Beyond case resolutions, discussion with companies under investigation improves authorities' understanding about markets and industries; the positive externalities of this understanding will spill over into other cases and improve market intervention overall.[13] It is submitted that transactional resolutions reduce costs and delays that result from 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 with optimal competition law enforcement and therefore serve public interest by ensuring both restoration and correction of an anticompetitive situation,[15] as well as detection and prevention of infringements. The flexibility of transactional resolution mechanisms is superior in many aspects to bare

[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 % 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.

[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.

injunctions, since transactional resolution mechanisms enable the testing of more innovative remedies compared to injunctions and orders,[16] as well as 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 for better enforcement policies.

Companies under investigation benefit from lower fines,[18] less reputational damage,[19] and overall cost reductions. In cases of commitment decisions 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 in market intervention, accordingly establishing 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. An 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, which are often published in a form that does not describe all the facts and or include the complete reasoning, companies cannot rely on a clear decision-making practice. The transactional resolutions also run the risk that benign conduct is left unqualified through commitments; in certain circumstances, non-infringement decisions may provide more beneficial for the market in the long run.[22]

Not all contributors to this study share this criticism. Transactional resolutions have a great potential for guiding other market players[23] or 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 costs of a loss of legal certainty or lack of precedential strength.[25]

An argument linked to the unpredictability of transactional resolutions 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.

[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.
[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.

Reduction of punishment and of the deterrent effect of competition laws is another potential negative effect associated with the 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 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 from 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 Unites 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] 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' 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 effects 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 the anticompetitive effects of their proper conduct in the market. As such, transactional resolutions are a means to solve the unpredictable nature of competition law and the impossibility for the legislator to clearly define what anticompetitive conduct is. Inclusion

[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 for instance 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.
[35] See J. Auwerx, Belgium, p. 4.
[36] A. Keller, Hungary, p. 29.

of obligations to compensate victims of competition law infringements in transactional resolutions is another way of strengthening the restorative component of competition law.

Concern has been expressed in relation to the regulatory nature of remedies and transactional resolutions that cause competition authorities to 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 over long periods, instead of clear-cut prohibitions or non-intervention. Accordingly, it is submitted that regulatory remedies should not be considered suitable mechanisms to address market failure requiring long-term regulation.

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 the finding of an infringement and fine discounts, and commitments (undertakings) made binding through a decision declaring that there are no grounds for action (no infringement is found). The scope of transactional resolutions varies, however, from those resolutions in EU law, and the 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] France[39] and Czech Republic[40] 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]

In Australia, the difference regarding a 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 in cases of decisions involving a finding of liability.[43]

Leniency programmes are effective tools for 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

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

aiming at improving legal security for applicants has resulted in an increase in leniency applicants.[44] Consequently, the 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 the *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, the 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 (plea 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 investigation on transactional resolutions and abuse-of-dominance positions. The decision approving the agreement cannot leave open the question of the infringement of competition law; amicable agreements are therefore possible in cases of infringement. A leniency programme applies for horizontal and vertical agreements subject to fines.[48]

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 applicable not only during investigations, but also in the limited review conducted *de facto* or *de jure* by courts.[49]

Generally, the discretion of authorities is greater in cases of transactional resolutions outside leniency programmes. In order to offer sufficient incentives to potential leniency applicants,

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

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 to appeal and the waiver of the right to appeal that we will discuss below, the limited control of settlements by 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 bodies[51] is found in the separation, or balance, of executive, legislative and judicial powers. In the United States, 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 the 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 proceedings and the rights of the parties. Discretion also impacts the predictability of the process and the legal security of the parties. One mechanism for increasing predictability and reducing the negative impact of the authorities' discretion is the communication of the essential steps of the transactional mechanism in guidelines and other soft-law instruments bound to the authorities themselves. Several authors see the use of soft law as a necessary tool for increasing the 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 provide 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 the investigation settlement or submission of undertakings are possible, and what would be the maximum of reduction of fines in cases of cartels outside leniency.

In procedures involving admission of infringement, the discretion of authorities shall be reduced and confined to a minimum level aiming at ensuring flexibility. This is 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

[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.

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 for individuals and companies, and they are considered to represent a step forward in the good administration of antitrust enforcement.[55]

The national reports do not reveal any trend showing 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 the 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 does not exist.

Within the discretion of the law recognised by competition authorities, there are several ways for authorities to increase pressure on companies. These include the threat of higher fines,[57] a lower reduction of fines, and conduct requests that exceed what is necessary to cure anticompetitive effects. In merger control, where time is of essence, delays in authorisation or delays in evaluation of remedies submitted by parties increase the pressure on companies as well as their incentive to submit remedies that go beyond what is necessary to remedy the competitive concerns, or remedies 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. However, the 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.

[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.

Not all such principles can serve as grounds for appeal. Furthermore, the right to appeal plays a limited role in transactional resolutions. Principles of fairness and due process will not be effectively tested in appeals. Accordingly, the grounds for setting aside or reversing 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 is not suitable to offset the power of authorities.

Consequently, 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, the 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] Similarly, in Australia, the right against self-incrimination applies 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 regarding the right against self-incrimination and the right to be heard, essential in antitrust proceedings. Other rights will be discussed further while discussing the process of transactional resolutions.

The right against self-incrimination and the presumption of innocence are expressly provided for in the fundamental laws (constitutions) of several countries.[60] On that basis, these essential guarantees apply to administrative criminal proceedings[61] as well as cartel proceedings.[62] The right against self-incrimination and the presumption of innocence are based on Article 6 of the CEDH. In some jurisdictions, the right against self-incrimination applies to criminal antitrust offences only, and not to administrative proceedings.[63]

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

The obligation to provide information does not affect the right against self-incrimination as long as the request concerns only factual elements and the questions are not formulated in such a 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 genuinely `voluntary` when they are filed in response to a threat of sanctions or other constraints. The greater such threat, depending on the importance of the sanctions and the potential hindrance on business conduct, the less `voluntary` the cooperation of companies and infringement admissions thereof;[65] indeed, in certain circumstances the threat of sanctions, together with the risks related to time and investigation costs, make such cooperation *involuntary*. This also applies to leniency applications. In a system involving extremely high fines such as competition law, the risk in terms of enforcement lies not only in the admission of actual infringement, but also in the admission of infringement that never happened or in the filing of leniency as a precautionary measure, overloading the enforcement authorities 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 that would have continued to cause damage to the economy without such a procedure. Leniency and immunity programmes 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 the same 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 that 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 infringements are entered only in later stages of the investigation, i.e. after the authority has produced all evidence and parties have had the

[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.

right to review such evidence, the right against self-incrimination is not compromised since the parties accept the settlement after having reviewed the existing evidence.[66]

In order to preserve the right against self-incrimination and other rights of defence, authorities should not consider the lack of active cooperation of companies under investigation as an aggravating factor.[67] On the other hand, granting of benefits under 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, a 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 cases of commitments that do not result in acknowledgment of guilt, there is no pressure or incentive on companies to accept liability for infringing on 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 files 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 comments 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 were 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 to and see the main evidence, even access to the full file, and (iii) the opportunity to have a clear perspective on the essential components of the transaction and their amount.

[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; see E. Bueren, Germany, p. 8. See A. Camuso, Italy, p. 14, for whom the more companies benefit from the cooperation, the less relevant the right against self-incrimination becomes.
[69] J. Auwerx, Belgium, p. 14.

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 files for companies under investigation. While such a position is comprehensible, it is precisely the hurdles created for companies at this stage that may encroach on the right to be heard and may produce 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 effective competition.

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 all along the process of transactional resolution, since different issues arise at different stages of the process.

3.5. Fairness, Due Process and the Transactional Resolution Process

3.5.1. Informal Investigations That Do Not Result in Binding Decisions

Many antitrust investigations are resolved informally, following a discussion with competition authorities during an initial phase where procedural rights are not formally available or respected. Companies voluntarily undertake the adaptation of 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 the time and expense in connection with a formal investigation,[70] and the same applies for authorities. In principle, such quick resolution of cases should be used in relation to conducts having limited effect on competition.[71]

In this preliminary phase, companies in general do not have access to files and do not receive any written form of objections. Only discussions occur between parties and competition authorities. In contrast, authorities have large investigative powers, backed by sanctions in cases of non-cooperation to provide information.[72] The risk in this initial phase is 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, thus shifting 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.

The rights of defence may be more at stake at this stage than during a formal investigation.[74] However, companies under investigation may wait 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 of having access to key documents.

Such undertakings are not binding on the 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 Swiss Competition Commission.[76] Given the fact that companies agree to adapt their behaviour, that no binding decision is taken against them, that no infringement is found, and that such closure of procedures is not subject to publicity, such an informal procedure does not encroach on the fundamental rights of companies.

The main risk lies in over- or under-intervention and the lack of transparency of this kind of informal intervention. The risk of over-intervention may be solved by a regular review of undertakings. In the United Kingdom, for instance, the OFT released a company form of voluntary assurances one year after they were offered by the company, on the grounds that the evidence was insufficient to lead to a finding of infringement.[77] Under-intervention may also be adjusted by the possibility for 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 other companies adopt the same conduct, what exactly was offered to companies under investigation, or how can third parties benefit from or enforce such commitments? Given that no sanctions are adopted, such informal intervention is not suitable for conduct that has caused significant damage to the economy, or that has a 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 is usually provided 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.

[74] See A Camusso, Itlay, 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.

As explained above in this report, the main achievement of transactional resolutions is to free up resources of competition authorities 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 infringements, making burdensome 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. For instance, the preliminary assessment 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] In other words, the burden is shifted onto companies and, on the whole, this does not reduce society's cost related to the enforcement of competition law.

Not all jurisdictions have a information mechanism comparable to the statement of objections 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 investigative work.

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

In Belgium, the College of Competition Prosecutors (the 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 believes that a settlement is possible for fine reduction, it invites the companies to submit a settlement statement by a fixed deadline.[80] The communication of objections is therefore an essential element of the procedure since a 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 discussion 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.

[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.

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 drafts a settlement declaration and sets a deadline for companies to admit objections and facts included in the settlement declaration, as well as to admit the upper limit of the fine.[84]

Doubtful also is 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 in the United Kingdom, for instance, where settlement discounts are capped at 10% post-statement of objections, but may go up to 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 that 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 cases where companies are not found to have infringed on competition law, such as in cases of commitments, companies have the right to know the concerns of competition authorities. In EU jurisdictions, companies are informed of the competition concerns via a preliminary assessment, which is shorter and more superficial 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] a limitation that intends to clearly distinguish between commitment procedure and regular proceedings. In the United Kingdom the authority sends a summary of competition concerns after a company shares its readiness to offer commitments.[88] In Belgium, companies may submit undertakings once the Competition College (decision-making body) has made clear that it intends to take a prohibition decision, which implies that the Competition College has sufficient proof of an infringement;[89] however, parties may submit commitments even before this, 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.[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]

[83] E. Bueren, Germany, p. 18.
[84] See E. Bueren, Germany, p. 12.
[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.

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 effects, accompanied with essential evidence. If authorities do not issue a statement of objections in general, verbal discussions with authorities in the early stages 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 enable them to choose between litigation or settlement. In our view, such a summary of concerns is an essential element to ensure due process.

3.5.2.2. Predictability and Clarity of Objections

Less formal safeguards regarding communication of objections decrease predictability for companies. The practice of increasing the amount of the potential sanctions[92] 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 also constitutes an undue pressure on companies. In other words, competition authorities may be tempted to extend their scope objections in order to improve their `negotiation position` regarding companies under investigation.

It is difficult to assess to what extent such negotiation techniques are used by competition authorities; however, concerns are raised about 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 for 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 the harm to the economy[94] 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 dominance.

As a matter of principle, the power lies with the competition 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 principles 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 a fine should not be used in order to obtain extensive commitments or undertakings by the companies under investigation without findings of any infringement;

[92] See E. Bueren, Germany, p. 14, reporting that cooperation allegedly 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.

- 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] and
- The companies under investigation 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 Documents and to Files

Access to files is crucial in transactional resolution mechanisms. Due to the streamlined procedure, with fewer written documents and more superficial objections, access to main documents is also a necessary safeguard and a way to overcome difficulties[97] deriving from the lack of 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 beginning the discussion of settlements but before the submission of settlement statements.[98] In Germany for instance, the guidelines state that the parties are able to access 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 that the parties waive their right to have access to the full file.[101] In certain jurisdictions, however, such as in Italy, access to the file, like 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 about 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 files at any time, and therefore waiver of such rights cannot be a precondition to entering a transactional resolution.[104] In Serbia, parties have access to files once a formal investigation

[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)
[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.

has started.[105] 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 has 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 under investigation.[106]

The main obstacle to accessing files of the procedure is confidentiality and business secrets—handling confidentiality and requests to keep a portion of the documents and submissions secret is what costs time and resources from the standpoint of authorities.[107]

It is our conclusion that companies entering 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 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. Reasons of cost and efficiency are not in our view sufficient justification for authorities to restrict such rights to access the entire file. Waiver to the right to have access to essential evidence or to files shall not be a prerequisite for entering a transactional resolution. A company subject to investigation and ready to start discussions in view of a transaction has sufficient interest in using this right efficiently, and not requesting documents with abusive intentions.

3.5.2.4. Form and Status of Parties' Submissions

A general trend has emerged regarding who submits 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, 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 always comes from companies under investigation, and these companies also submit the first draft undertakings or draft commitments.[108] Such a draft is further modified by companies following discussions with the competition authority.

[105] D. Ognjenovic, Serbia, p. 9.
[106] E. E. Varanini, United States, p. 27.
[107] See for instance, Italy, p. 13.
[108] J. Auwerx, Belgium, p. 6.

In other jurisdictions 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 case sanctions.[110]

In France, the company entering into a settlement for the reduction of a fine shall state clearly and unconditionally that it does not deny the facts or the qualification as an infringement on 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 the company's acknowledgment of its involvement and its responsibility for the infringement and its acceptance of the proposed range 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 procedures 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 a pre-condition to the granting of immunity.

In cases of undertakings or commitments, acknowledgment of infringement is not a precondition. The facts presented in decisions that make 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 officials. While this may protect companies under investigation against the improper use of their oral statements during discussions, a written procedure gives more legal certainty regarding the promises and requirements of competition authorities. In Germany, the institution of formal minutes about settlement agreement, the settlement proposal and its acceptance or rejection shall be mentioned in the file to enable control by judges and parties.[114]

[109] See G. Fussenegger, Austria, p. 4; D. Emch and D. Neuenschwander, Switzerland.
[110] See G. Fussenegger, Austria, p. 5.
[111] D. Bosco, France, p. 14.
[112] J. Auwerx, Belgium, p. 3.
[113] B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 18.
[114] E. Bueren, Belgium, p. 18.

3.5.2.6. Deadlines and Timing for Submissions

Competition authorities usually fix a deadline for the parties to submit a settlement proposal, which is fixed in the regulations or at the discretion of authorities.[115] For commitments, it is also common to set deadlines. For settlements in cartel cases, the requirement for an early submission may encroach on the parties' right to know the case against them. The same issue comes up in cases of commitments or merger remedies, even though in this latter case deadlines are shorter due to the strict deadlines of 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 temporal pressure has been resolved by providing to companies in the law a minimum deadline of one month 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.[118] This three-month deadline is not considered mandatory, but rather a suggested deadline that can be prolonged—absolute deadlines are considered inappropriate in cases of negotiations, since they would put unnecessary pressure on both authorities and companies.[119]

The timing of submissions is also important, particularly when benefits for companies under investigation decrease with the lapse 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 of adversely affecting their right of defence.[120] Certain limitations are justified, such as the obligation to submit commitments after the reception of the preliminary assessment but before any drafting of a statement of objections[121] (which entails a greater workload for authorities)—the companies had the opportunity to assess the objections raised against them on the basis of the preliminary assessment, and therefore their rights are safeguarded.

Measures to mitigate the above-mentioned risks in cases of the submission of settlement statements involving acknowledgment of an infringement at an early stage of the investigation may include:

- Granting access to the key documents and key evidence within a reasonable deadline to companies under investigation;
- Describing the main objections in writing and identifying the main evidence supporting the alleged infringement that the authority intends to object to such companies;
- Setting a reasonable deadline for consulting key documents and evidence;

[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.
[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.

- Setting a reasonable deadline to allow parties to review and examine the objections of the authority and to prepare their settlement submissions; and
- 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 the authorities, it is not clear to what degree of proof the infringement should be evidenced before starting a transactional discussion with 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, neither do companies under investigation have a clear view on what the authorities have as evidence, or on whether their own conduct would infringe on competition law. An internal investigation is often necessary to discover evidence regarding anti-competitive conduct.

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

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

[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).

Moreover, even where companies admit having infringed on competition law, such admission shall be backed by sufficient evidence.[123] This is also a lesson to be learned 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 collect evidence around all facts relevant to the decision.[124] Even though in practice the courts 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 are supported by sufficient evidence.

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

Some authorities resolve this issue by setting high standards up-front. In the United Kingdom, the authority will consider settlement of a case provided the evidential standard for issuing a statement of objections is met.[125] Also, two-tier systems involving court approval result 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] which maintains the power to simply reject any intervention if the case is not backed by sufficient evidence.

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 cases of commitment procedures that do not involve a finding of infringement.[127]

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

[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 a perception that transactional resolutions do not alter the burden and standard of proof.
[127] See for instance J. Auwerx, Belgium, p. 6.

3.5.2.9. Withdrawal of Settlement Submissions and Admission of Guilt

The use of information and statements 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 on 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 discussion.[128] Such a 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 on competition law even 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 to the other units of competition authorities. In Brazil, for instance, the submissions are accessible to other units only from the moment 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 a different group of officials or a different composition of the decision-making body shall continue the case and make the final decision without being influenced by statements already made by the companies under investigations. This would also be sufficient, but necessary, to safeguard the right to an impartial judge.

We conclude that all discussion in the framework of a transactional resolution of the case should be clearly distinguished as such and should be done on a `without prejudice` basis, in particular in cases of admission of liability. In cases of a failure of transactional discussions, companies shall be allowed to withdraw their submissions without bearing any consequences, meaning that authorities shall not make use of such submissions, nor of the information contained therein, 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.

[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.

3.5.2.10. Withdrawal of Undertakings

In several jurisdictions, undertakings pertaining to the modification of future behaviour can be withdrawn without consequences for the companies that submitted them.[131] In 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 to authorities.[132]

Furthermore, even though statements may be protected by submission on a `without prejudice` 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 the fact that the undertakings submitted to the competition authorities are made binding by authorities, even if the companies did not agree to their amendments or wish 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 (the investigative body) and the company under investigation, and may impose sanctions even though the company submitted its undertakings on the condition that no fine would be imposed on it.[134] Such a decision was not considered to breach the principle of legitimate expectations; however, the insecurity resulting from it makes companies circumspect when discussing and submitting undertakings to the competition authority. In addition, according to a controversial decision of the Federal Administrative Court, the fact that a company enters into an agreement with the competition authority is considered as an implicit admission of infringement, even though companies state clearly that their submissions do not involve any admission of guilt.[135]

In several jurisdictions the law provides for the confidentiality of correspondence and documents exchanged between the companies under investigation and competition authorities in the framework of settlement 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 in this regard; in some jurisdictions, courts have responded differently to requests to grant access to documents pertaining to transaction resolutions.[138]

Accordingly, parties shall be granted the right to withdraw their undertakings or commitments, and such withdrawal must preclude authorities from using the company's submissions. Submission of undertakings by companies in the framework of a transactional

[131] See for instance France.
[132] See A. Camusso, Italy, p. 14.
[133] See G. Fussenegger, Austria, p. 7.
[134] ATF 139 I 72, *Publigroupe*.
[135] D. Emch and D. Neuenschwander, Switzerland, Section 2.4.3.
[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.

resolution mechanism shall not imply admission of any wrongdoing. Such submission shall be kept confidential to the greatest extent possible, except for essential information necessary to market-test commitments or undertakings.

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 benefits (such as a fine reduction) on the one hand, and the fact that *de facto* parties have no interest in lodging appeals after having reached a transactional resolution on the other. A waiver of the right to appeal or limited access to justice not only unduly limit parties' right to a fair trial, but also could offer negative incentive to officials to not behave in good faith, or to not 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 a leniency application have no right to appeal the settlement decision.[139] Such absolute exclusion is excessive and inadequate, since parties may have an interest in lodging an appeal on procedural grounds,[140] or on other grounds such as disagreement about the correct interpretation of the commitments, additional injunctions that 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 cases where companies have the right to review the draft decision before the decision is made and agree in all respects with it, this position encroaches on the right to trial if the companies under investigation do not have the opportunity to review and assent to the draft final decision.

In some jurisdictions, parties maintain to a certain extent their right to appeal. In France, for instance, a 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, including the importance of the damage to the economy, the assessment of its individual situation, its ability to pay, and recidivism.[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 cases of commitments is disputed.[145]

Other drawbacks may limit companies' right to appeal. In the United Kingdom, for instance, if settlement discussions fail the authority cannot make use of settlement submissions;[146]

[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.
[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.

whereas in cases of appeal of settlement decisions 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] The review, however, focuses on the consistency of the reasoning, which highlights that commitments are primarily there to properly resolve competition concerns and not to quickly terminate investigations.[150]

The waiver of the right to appeal is a precondition in a number of jurisdictions, particularly in cases of commitments mechanisms not involving neither any admission of guilt nor any finding of an infringement. In France and Hungary, for instance, the waiver of the right to appeal is a precondition to enter into a settlement agreement regarding the reduction of fines.[151] The waiver of the right to appeal was considered admissible in Hungary on the grounds 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 jurisdictions such as Brazil,[154] Italy,[155] or Poland,[156] the waiver of the right to trial is not valid. The same applies in Switzerland; however, the legitimate interest of the party having concluded an amicable agreement with authorities remains controversial.[157]

We conclude that the 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 in cases of a company appealing 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 the grounds and the reasoning behind the conclusion of transactional resolutions bear the risk of reducing the predictability of

[147] M. Israel, United Kigdom, p. 16.
[148] A. Camusso, Italy, p. 17.
[149] A. Camuso, 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.
[157] D. Emch and D. Neuenschwander, Switzerland, Section 2.4.7.

competition law enforcement. In some jurisdictions, there is no constant practice regarding publication of commitment decisions, and some commitment decisions are not published at all.[158] No information is given to the public on why the procedure was closed, on what grounds commitments were accepted, or 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, nor can other companies draw any conclusions or benefit from any indications based on how they could modify their behaviour to comply with competition law.

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

Some jurisdictions 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.

The United States has a two-tier system in which 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.[159] The investigation and enforcement of competition law in the United States is accomplished by the Federal Trade Commission (the FTC) and the Department of Justice (the DoJ); however, most of the cases resolved through settlements must be submitted for approval by the courts.[160] In general, the courts provide great deference to the executive branch 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.[161] For instance, the review of civil antitrust settlements entered into by the DoJ under the Tuney Act is conducted under the narrow test of public interest: the judge will check whether the terms of the order are clear or ambiguous, if the method used to enforce the terms is inadequate, and if third parties will be positively injured.[162] The court may reject a 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.[163] Civil antitrust settlements brought by federal states are assessed under a fairness and reasonableness standard, similar to that of 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 any evidence of

[158] See G. Fussenegger, Austria, p. 7.
[159] See E. E. Varanini, United States of Amercia, p. 15.
[160] Not all settlements are subject to court review. The 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).
[161] E. E. Varanini, United States of America, p. 6 et seq.
[162] E. E. Varanini, United States of America, p. 16 et seq.
[163] E. E. Varanini, United States of America, p. 17.

collusion or corruption surrounding the settlement.[164] Concerns of due process are resolved through the conduct of public hearings. In certain states, courts do not conduct any hearing of the interested party, and the proposed order may enter the same day, meaning that there is no scrutiny of the proposed orders. According to the national reports, such abbreviated settlement processes may create a problem hindering justification of how the settlement fits with the authority that government enforcers have to enter into such settlements.[165] The lack of hearing raises concerns about due process since it is the public hearing and the opportunity of the public to comment that forces the executive branch to set clear goals and clearly justify its actions.[166]

In Austria, decisions about fines are made by the Cartel Court. The Cartel Court is bound by the highest level of fine requested by the Competition Authority. Companies under investigation merely acknowledge the request filed by the Competition Authority. Companies are therefore confronted with uncertainty regarding the time, cost and outcome of the case.[167] It is unclear, however, to what extent the Cartel Court reviews the facts and the qualification of facts investigated by the Competition Authority.[168] In addition, only the Cartel Court can impose a fine, making it impossible for the investigative bodies to threaten an exaggerated fine in case the parties withdraw from negotiations,[169] although the risk of requesting a higher fine threshold from the Cartel Court still subsists.

In Australia, only courts can make a finding of infringement and impose penalties of a punitive nature. The punitive character of infringement and penalties results in the obligation to subject such procedures to a fair trial, thus the necessity for the courts to determine and approve such transactions.[170] 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.[171] 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.[172] Sufficient discretion is therefore provided to the transaction agreement between competition authorities and companies. In contrast, undertakings/commitments are not of a punitive character, and therefore can be made by the administrative authority alone. The competition authority may accept undertakings from companies and then enforce them in courts if such undertakings are not followed by the

[164] E. E. Varanini, United States of America, p. 21.
[165] E. E. Varanini, United States of America, p. 22.
[166] See in general, E. E. Varanini, United States of America, p. 6.
[167] See G. Fussenegger, Austria, p. 10. 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, which results in uncertainty for companies under investigation.
[168] G. Fussenegger, Austria, p. 5.
[169] G. Fussenegger, Austria, p. 16.
[170] B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 14.
[171] B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 3.
[172] B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 4.

companies having offered them.[173] The two-tier system in Australia is considered to respect the right to an impartial judge, since decisions on the reduction of penalty are decided by a judge who has not been involved in the case.[174]

Sweden has a similar system to that of Australia, in that the competition authority has competence to order a company to terminate an infringement or accept commitments, but only courts can impose fines.[175] 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.[176]

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 the commitments submitted and the discussions taking place between the officials and the company under investigation, and may make comments.[177] The involvement of the decision-making body in the investigative phase was not found to be contrary to the right to an impartial judge under Article 6 (1) of ECHR. After the market test, the parties are inviting to a hearing before the decision-making body of the authority, which can request amendments to commitments. In France, commitments submitted to the investigative and decision-making body may be withdrawn and the authority excludes these documents from the file.[178] However, the two-tier system in France may result in a lack of predictability regarding the fine reductions; indeed, the fine reduction is discussed between the company and the investigative body, but the agreed reduction of the fine is not binding to the decision-making body.[179]

A similar system exists in Switzerland, where amicable settlements are negotiated by the investigative body, but are approved and made binding by decision of the competition commission.[180] The agreement covers the level of the fine for past conduct and lays out future conduct that companies are obliged to follow, but the legal qualification is not negotiable. The Swiss 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 the approval of commitments for the future.[181] This raises the issue of the respect of the principle of legitimate expectations and that of good faith in negotiations.

[173] B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 5 and 7.
[174] B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 16.
[175] H. Andersson, Sweden, p. 1.
[176] H. Andersson, Sweden, Section 2.2.
[177] D. Bosco, France, p. 8.
[178] D. Bosco, France.
[179] D. Bosco, France, Section 1.3.
[180] D. Emch and D. Neuenschwander, Switzerland, p. 33 et seq.
[181] ATF 139 I 72, *Publigroupe*.

3.5.4. Rights of Third Parties

The rights 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 for other market participants to comment.

At early phases of investigations, third parties do not have formal rights to intervene or access files, and certainly do not have more rights than defendants. Such restrictions are admissible to preserve the confidentiality of investigations. In cases 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 the leniency applicants themselves.[182] In other jurisdictions, third parties are granted broad access to files,[183] with the exception of confidential information.

Restrictions on 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 in cases of leniencies even risk creating the opportunity to exaggerate the liability of other competitors in cartels while minimizing their own. Such risks 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 rights of third parties to view documents.[184] Scholars in countries like Italy with a long-standing practice of 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,[185] in order to circumvent such risks.

In Italy, the statement of objections preceding commitments is published, and third parties with interest may comment on it.[186] Such third parties may be individuals, companies or consumer associations. In Australia, all submissions are published and made public subject to confidentiality and business secrets, and third parties have the opportunity to comment. Public hearings are also conducted.[187]

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.[188] Compelling public interests such as the discovery of harmful cartels, supersede the interests of third parties to

[182] See A. Camusso, Italy, p. 10.
[183] H. Andersson, Sweden, Section 2.3.1.
[184] See for instance, Italy, p. 15 et seq.
[185] See A. Camusso, Italy, p. 11.
[186] A. Camusso, Itlay, p. 6.
[187] B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 9.
[188] See for instance Austria, p. 15; USA, p. 15; Sweden, Section 2.3.2; Switzerland; Serbia, p. 12.

intervene or appeal. In the United States, for instance, amnesty processes are not reviewed by courts, granting to the government discretion to grant immunity without control by third parties.[189] In other jurisdictions, such as Italy,[190] third parties may appeal against commitment decisions.

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 commonly used types of merger remedies are divestments or sale of an on-going business, sales of shareholdings, IP licensing, or account, structural or legal separation. In jurisdiction where no suspension period is imposed, such remedies are negotiated in a less formal procedure.[191]

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 the companies that have 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.[192]

Officials tend to be more open and constructive in negotiations of merger remedies compared to transactional resolutions in 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 threats to fairness and due process compared to transactional resolutions 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 over-[193] and under-intervention.

The principles of proportionality and necessity are used in European jurisdictions to define appropriate solutions for resolving 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 the injunctions.[194] The risk of over-intervention is 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.[195] Similarly, in the

[189] E. E. Varanini, United States of America, p. 22.
[190] A. Camusso, Italy, p. 7.
[191] A. Camusso, Italy, p. 18.
[192] A. Camusso, Italy, p. 18.
[193] See A. Stawicki et al., Poland, p. 22, for examples of over-intervention.
[194] A. Camusso, Italy, p. 6.
[195] D. Bosco, France.

United Kingdom the competition authority will accept commitments only in cases where competition concerns are readily identifiable.[196] In Australia, the competition authority will accept undertakings only if it has sufficient evidence to prove an infringement of competition law.[197] In case of remedies that go beyond what is necessary to remove competitive concerns, but that are nevertheless useful to implement the core commitments, authorities may simply acknowledges such measures without making them binding. This approach has the advantage of giving clear indications to the market regarding what measures are strictly necessary in order to comply with the law, avoiding the dissemination of the 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 society can 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 the realisation of 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 implementation. One mechanism for increasing predictability while preserving authorities' discretion is the communication of the essential steps of 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

[196] M. Israel, United Kingdom, p. 6.
[197] B. Jedličková, J. Clarke and S. Bhojani, Australia, p. 9.

concluding transactional solutions. At the same time, benefits from transaction resolution mechanisms should not be withdrawn if companies enforce such rights.

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

Yet, transactional resolutions should not result in the abandonment of charges or in very low sanctions for serious infringements, since either would reduce the deterrent effect of competition law, preclude compensation to victims, 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. As an alternative, 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;

- In the case of fines, the basic amount of the sanction should be set up-front and/or, 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; and

- Authorities should not make use of such submission or of the information contained therein against the company. Competition authorities may, whenever possible, additionally create sufficient safeguards such as the separation of teams and units dealing with the case if negotiations fail.

Transactional resolutions may raise 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 degree of control by the public.