

RECENT DEVELOPMENTS IN ITALIAN COMPETITION LAW (YEAR 2011)

di **Fabiana Di Porto** (*)

Abstract

The following notes critically summarise and assess the major trends registered in the application of EC and Italian antitrust rules by the national competition authority (i.e. the *Autorità Garante della concorrenza e del mercato*, hereafter: Agcm) in 2011.

In the period concerned, no particular innovations have been made by Agcm in the interpretation of the concepts of “enterprise”, “agreements” and “consistency” of the analysed practices. Similar evaluations can be made with regard to the identification of “relevant markets” and “dominant positions”, as well as for the application of the fines laid down in the Italian antitrust law. This statement holds true for all of the three main antitrust domains, namely: anticompetitive agreements, abuses of dominant position and mergers.

However, when looking at the general approach of Agcm’s enforcement strategy, some interesting trends can be recognised.

First, a counter-tendency in the use of commitment decisions can be observed with regard to both restrictive agreements, where Agcm made use of such tool in only one case out of seven (I730 — *Gestione dei rifiuti cartacei-Comieco*); and abuse of dominance cases, where only a minority of proceedings (three out of seven) were closed with the acceptance of commitments. In line with the EC case-law, Agcm repeatedly rejected commitments that were presented by the parties to hard core cartels and imposed severe fines (e.g. the A413 — *Tnt Post Italia/Poste italiane* case resulted in a fine of € 39.3 billion for the incumbent Poste Italiane). As in the previous years, no interim measures were adopted and in only one case Agcm made use of leniency programs in order to break a cartel in the road transport sector (I722 — *Logistica internazionale*).

Second, regarding mergers, Agcm put a great deal of attention in the definition of barriers to entry that impede market forces to counter-balance the dominant position of the post-merger entity. In particular, Agcm made use of both merger control and advocacy (opinion-giving) powers to help reduce normative barriers to entry (C11082 – *Compagnia Valdostana delle Acque/Deval-Vallenergie*). Another noteworthy trend can be observed with regard to remedies, where Agcm thoroughly conditioned the clearance of the concentrations at stake (three out of five) to the acceptance of (para-)regulatory

(*) Associate Professor of Economic Law, University of Salento, Lecce (fabiana.diporto@unisalento.it).

behavioural commitments. The latter consisted, for instance (C11205 — *Elettronica Italiana/Digital Media Technologies*), in the duty to grant access to the essential facilities owned by the post-merger entity on a transparent, non discriminatory and fair basis; in the obligation to adopt the unbundling of accounts; and to provide disaggregated offers to downstream competitors. Finally, Agcm once again intervened (C10910 — *Intesa San Paolo/Banca del Monte di Parma*) to ban interlocking directories that would result in the creation of a collective dominant position by terminating personal links between the directors of one of the merging entities and those of *Crédit Agricole* (external to the operation). Such approach is nonetheless likely to change due to the recent adoption of a new law (Art. 36 of Law-Decree no. 201/2011 — also named “Save-Italy” — converted by Law no. 214/2011) that expressly forbids cross-directorships in the insurance, bank and financial services markets.

Third, and more generally, an increasing importance is being given to information. Traditionally the exchange of information has received a negative assessment under antitrust laws. Especially, it has been seen as a practice facilitating collusion or eventually *per se* condemned as anti-competitive when detailed information was exchanged in highly concentrated markets. Although this holds still true with regard to agreements, it is worth noting that Agcm is increasingly condemning abuses related to the treatment of information by dominant firms (*rectius*: information monopolists). The Authority is also giving high consideration to information issues when accepting commitments and imposing remedies in abuses cases.

Fourth, with regard to Agcm’s opinions concerning the “in house provision” of local public services, an important modification of the law (Art. 4 of Law no. 148/2011, as lately amended by Art. 9 § 2 of Law no. 183/2011 — so called “2012 Stability Law” — replacing Art. 23-*bis* of Law no. 133 of 6 August 2008, and more recently modified by the Law Decree no. 1/2012 “*decreto cresci-Italia*”) resulted in a steep reduction in the number of opinions released (only five).

Finally, the antitrust law has been amended to strengthen the advocacy powers of Agcm. In particular, by means of Art. 35 of the “Save-Italy” Decree, a new art. 21-*bis* has been introduced in the antitrust law, entrusting Agcm with the power to challenge any anticompetitive measures adopted by public administrations before administrative courts. This new provision, strongly supported by the Agcm itself, is intended to lead to a considerable reduction in the number of administrative measures that directly or indirectly restrict competition.

Keywords:

Italian competition authority, mergers, abuses of dominant position, anticompetitive agreements, local public services, in house provision, commitments, leniency, sanctions.

JEL Classification:

K21 — Antitrust Law, K23 — Regulated Industries and Administrative Law

SUMMARY: 1. Agreements. — 1.1. Enforcement strategy: commitment *vs* infringement decisions. Inaugurating a counter-tendency? — 1.2. Relevance of information in agreement cases: the traditional view. — 2. Abuses of dominant position. — 2.1 Enforcement strategy and commitment decisions: limited scope for a counter-tendency (compared to agreements). — 2.2. Relevance of information in abuse of dominant position cases: a new entry. — 3. Mergers. — 3.1 Reducing normative barriers to entry: the combined use of antitrust enforcement and

advocacy powers. — 3.2 (Para)regulatory commitments in merger cases. — 4. Opinions on in house provision of local public services. — 5. Recent developments in the Italian antitrust law: the strengthening of Agcm's advocacy powers

1. Agreements

Compared to 2010 Agcm scrutinised a smaller number of agreements in 2011 (seven instead of eleven) ⁽¹⁾. Only in one case (I732 — *Aumento prezzi bitume* ⁽²⁾) no violation of the law was established, while in five cases Agcm ascertained the violation of Arts. 2 of Law no. 287/1990 (I735 — *Manutenzione Impianti Termici Comune di Potenza* and I734 — *Guida remunerazioni e tariffe 2009/2010 per operatori pubblicitari* ⁽³⁾ and 101 Tfeu (I722 — *Logistica internazionale*, I729 — *Gara d'appalto per la sanità per le apparecchiature per la risonanza magnetica*, and I731 — *Gare assicurative ASL e aziende ospedaliere campane* ⁽⁴⁾). In one case (I730 — *Gestione dei rifiuti cartacei* — *Comieco* ⁽⁵⁾) Agcm accepted commitments proposed by the parties without ascertaining any violation.

Most of the conducts scrutinised (four out of seven: I732, I722, I729 and I731) regarded possible concerted practices, three of which effectively amounted and were condemned as such, while in one case (I732) not enough evidence was provided to characterise the firms' parallel behaviour as unlawful.

1.1. Enforcement strategy: commitment vs infringement decisions. Inaugurating a counter-tendency?

In terms of public enforcement strategy, 2011 was characterised by a constant rejection of commitments presented by the parties of alleged anticompetitive agreements (see Table 1 below). In five out of seven cases commitments were presented, but Agcm accepted them in only one case.

Table 1. 2011 agreement cases: commitments presented and final decisions

Anticompetitive agreements — 2011	Commitments presented	Final decision
I730 — <i>Gestione dei rifiuti cartacei-Comieco</i>	yes	Commitment decision
I732 — <i>Aumento prezzi bitume</i>	yes	No violation
I722 — <i>Logistica internazionale</i>	yes	Infringement decision/Fine
I729 — <i>Gara d'appalto per la sanità per le apparecchiature per la risonanza magnetica</i>	yes	Infringement decision/Fine
I731 — <i>Gare assicurative Asl e aziende ospedaliere campane</i>	no	Infringement decision/Fine

⁽¹⁾ Data are taken from the following contributions: M. PANUCCI, A. DELL'ATTI, F. DI CRISTINA, M. ZUPPETTA, *Anticompetitive agreements (year 2011)* and F. DI CRISTINA, *Commitment decisions, interim measures and leniency programs (year 2011)*, in this issue of *Concorrenza e mercato*.

⁽²⁾ Agcm, I732 — *Aumento prezzi bitume*, 20 April 2011, in *Boll.* n. 16, 2011.

⁽³⁾ Agcm, I735 — *Manutenzione Impianti Termici Comune di Potenza*, 22 September 2011, in *Boll.* n. 38, 2011; Agcm, I734 — *Guida remunerazioni e tariffe 2009/2010 per operatori pubblicitari*, 22 June 2011, in *Boll.* n. 25, 2011.

⁽⁴⁾ Agcm, I722 — *Logistica internazionale*, 15 June 2011, in *Boll.* n. 24, 2011; Agcm, I729 — *Gara d'appalto per la sanità per le apparecchiature per la risonanza magnetica*, 4 August 2011, in *Boll.* nn. 33-34, 2011; Agcm, I731 — *Gare assicurative ASL e aziende ospedaliere campane*, 28 September 2011, in *Boll.* n. 39, 2011.

⁽⁵⁾ Agcm, I730 — *Gestione dei rifiuti cartacei* — *Comieco*, 16 March 2011, in *Boll.* n. 11, 2011.