AGCM Annual Report Summary for OECD

Executive Summary

This report covers the enforcement and advocacy activities performed in the past calendar year (1 January 2019 to 31 December 2019) by the Italian Competition Authority (hereinafter 'the Authority' or 'the AGCM'), which is the agency responsible for enforcing competition law in Italy. Where appropriate, it also highlights significant developments up to February 2020.

In 2019, the AGCM registered a significant competition enforcement activity, leading to the imposing of sanctions totalling €693.93 million, the second-highest total ever, almost all of which were for the sanctioning of cartels. In particular, 33 cases were concluded, of which 9 concerned anti-competitive agreements, 5 abuses, 6 in-depth investigations of mergers and 8 regarding the application of legislation on trade relationships, especially the agri-food sector.

The fight against **cartels in public procurement tenders** was confirmed as the Authority's top priority in 2019, with no fewer than 5 out of the 9 investigations corresponding to around half of the overall amount of sanctions imposed. There was vital cooperation with other institutions such as Public Prosecutor's offices and contracting authorities whose reports contributed to the Authority's investigations. One of these tender procedures, entitled "FM4" for facility management services, published by Consip, the main procurement agency for the public administration, deserves particular mention as it was rigged by a sharing lot agreement between five undertakings, against which the Authority imposed sanctions of around €235 million. Outside public procurement, the AGCM uncovered a cartel in the markets for cardboard sheets and packaging, imposing an overall sanction of €287 million. Another noteworthy element is the growing use of leniency programmes, a crucial tool in detecting cartels. Three of the cartel proceedings concluded in 2019 were also conducted thanks to the fundamental cooperation with undertakings admitted to the programme.

The AGCM's efforts to tackle **abuses** focused on tender procedures in the local public transport sector: one case, an abuse based on withholding essential information from the contracting authority was not only sanctioned but its impact was also mitigated through the adoption of interim measures, while in another case, the abuse was facilitated by the vertically integrated nature of the dominant undertaking. Moreover, the AGCM closed with commitments an investigation in the financial post-trading sector and, in another case, did not hesitate to sanction a breach of the commitments accepted in previous proceedings involving an abuse of a dominant position on the market of organising amateur equestrian competitions.

The Authority has also used other **competences**, **complementary** to its main mission, by intervening to eliminate contractual imbalances deriving from an excessive market power from the demand side, in particular in the agri-food sector. The Authority deemed that in the medium and long term, the effects of these imbalances may also have a negative impact on competition if capable of damaging supply in terms of innovation and variety. In addition, for the first time, the Authority concluded an investigation

into abuse of economic dependence, pursuant to art. 9 of Italian Law no. 192/98, with respect to two undertakings operating on the newspaper and magazine distribution market in the Genoa and Tigullio area.

As regards **mergers**, the AGCM examined 65 transactions, five of which were authorised after conducting an in-depth investigation. In particular, in one case regarding pay-TV, the AGCM imposed conditions to restore the competitive process, compromised as the effects of the merger had already been realised in the course of the investigation. In another case, the AGCM laid down measures aimed at eliminating the distorting effects caused by the merger of two banking groups on a series of markets in Sardinia.

The Authority continued its intense **advocacy** activities, issuing 82 opinions to governmental and central and local administrative authorities and conducting hearings before the competent parliamentary committees. Some of these opinions concerned the improper use of public holdings in economic sectors where the State's presence would unjustifiably distort competition.

One important result was the conclusion of the **market study into Big Data**, in conjunction with the communications regulator and the privacy authority, accompanied by guidelines and recommendations for the government. The report defines a common framework of reference for analysing issues arising from the use of data by undertakings, with no prejudice to the specific competences of the three institutions.

In order to improve the **effectiveness of its actions**, the Authority has continued to monitor its advocacy activities and conducted an ex-post analysis, for the first time, of the remedies imposed as part of the assessment of mergers during the period 2007-2017. This analysis provided useful insights for improving the AGCM practice, which will also benefit undertakings.

1. REGULATORY AND POLICY DEVELOPMENTS

Two government measures adopted in late 2019 introduced important new features of relevance for competition purposes, which concern certain sectors.

In the electricity and gas sectors, Italian Decree Law no. 162 of 30 December 2019 (the so-called "Milleproroghe" Law) introduced a further extension of eighteen months, postponing until 1 January 2022 the deadline envisaged for abolition of the price regulation regime on the gas and electricity retail market. In a law on competition measures for the Italian economy (Law no. 124/2017), the Italian legislator had laid down the time frames and procedures for the final removal of the regulated regime, establishing the deadline of July 2019, which was then extended until July 2020. Moreover, the Milleproroghe Law states that the Ministry of Economic Development, having consulted the sector regulator and the AGCM, should define the procedures and criteria aimed at facilitating the informed entry of end customers onto the liberalised market, while also taking into consideration the need for competition and multiple suppliers and offers on the liberalised market.

The Milleproroghe Law also introduced important modifications in the motorway concessions sector, by changing the conditions that are applicable in the event of revocation due to non-compliance (valid also for the existing concessions). The procedure has now been made easier and less costly for the State. In particular, in the event of revocation of a concession due to non-compliance, by way of derogation from the Public Procurement Code of 2016, the concessionaire will only be able to receive from the State sums equal to the value of the works actually carried out and no longer a compensation for loss of earnings during the remaining years of the concession until its expiry.

In addition, in the case of revocation, forfeiture or termination of motorway concessions, the state-owned enterprise Anas may replace the concessionaire for the period necessary for selecting the new concessionaire through a public tender. More specifically (by way of derogation to the Public Procurement Code), it is stipulated that Anas may assume the management of roads/motorways and carry out ordinary and extraordinary maintenance, as well as make investments for their renovation and upgrading.

In the 2020 Budget Law (Italian Law no. 160 of 27 December 2019), certain provisions to restrict competition were introduced in sectors such as pharmaceuticals and tobacco retail, which have benefited from measures which, directly or indirectly, facilitate the expansion of their respective exclusive rights. In particular, the law extends to all Italian Regions the possibility that certain health-care services (e.g. booking doctor appointments or specialist examinations or conducting initial laboratory analyses) should be provided by pharmacies with the costs borne by the Italian National Health Service (SSN), albeit with the exclusion of the para-pharmacy channel. As regards tobacco, the law introduces a new consumption tax on smoking accessory products, such as "papers, rolled papers without tobacco and filters used for rolled cigarettes". It also requires the products subject to this new tax to be sold exclusively through the tobacco shops.

2. ENFORCEMENT OF COMPETITION LAWS AND POLICIES

2.1 Action against anti-competitive practices, including agreements and abuse of dominant position

2.1.1 Summary of activities

During 2019, 33 investigations were concluded, nine of which concerned restrictive agreements, five abuses of dominant position and six mergers subject to in-depth assessment, five of which were authorised subject to conditions (see tables 1 and 2).

Table 1 - Activity of the Authority	**2018**	**2019**
Anti-competitive agreements (incl. cartels)	8	**9**
Abuse of dominant position	7	**5**

Merger transactions examined	6	**6**
Separation obligations	1	**-**
Non-compliance with prior notification obligations	1	**2**
Recalculation of sanctions	4	**1**
Failure to respect commitments	-	**1**
Abuse of economic dependence	-	**1**
Commercial relations regarding the sale of agricultural and agri-food products	-	**8**
TOTAL	27	**33**

Table 2 - Proceedings concluded in 2019, divided by type and outcome

	Non-infringement of the law	**Infringement of the law, acceptance of commitments, revision of commitments**	**No jurisdiction or inapplicability of the law**	**Total**
Anti-competitive agreements (incl. cartels)	1	8	-	**9**
Abuse of dominant position	-	5	-	**5**
	Clearance	**Prohibition, authorisation subject to remedies, revision of remedies**	**No jurisdiction or inapplicability of the law**	**Total**
Mergers of independent enterprises	**57**	**5**	**3**	**65**

In 2019, seven decisions out of ten were upheld as regards all or part of the merits of the case by the Regional Administrative Court of Lazio, while, during the same period, ten decisions out of thirteen were fully or partly upheld by the Council of State.

Anti-competitive agreements

In 2019, eight anti-competitive agreements were uncovered, seven of which concerned secret cartels in violation of art. 101 of the TFEU and one a decision of an association of undertakings that was deemed restrictive in accordance with national legislation (art. 2 of Italian Law no. 287/90), with an overall sanction of €691 million. In another case, the investigation did not result in an infringement decision due to lack of sufficient evidence. The eight agreements investigated by the AGCM concerned various economic sectors.

Five out of the seven cartels ascertained by the Authority concerned the area of public procurement tenders, which is confirmed as the Authority's top priority for 2019. One of these tender procedures, entitled "FM4" for facility management services, published by Consip, the main procurement agency for the public administration, deserves particular mention as it was rigged by a sharing lot agreement between five undertakings, against which the Authority imposed sanctions of around €235 million. Outside public

procurement, the Authority uncovered a cartel in the markets for cardboard sheets and packaging, imposing an overall sanction of €287 million.
Another noteworthy element is the growing use of leniency programmes, a crucial tool in detecting cartels. Three of the cartel proceedings concluded in 2019 were also conducted thanks to the fundamental cooperation with undertakings admitted to the programme.

Abuse of dominant position

As regards abuses, five investigations were concluded, three of which ascertained a violation of art. 102 of the TFEU, one closed with an acceptance of commitments proposed by the parties while, in one case, the investigation was carried out to review the commitments imposed in a previous antitrust proceeding. The three investigations led to an overall sanction of €1.5 million. The AGCM's efforts to tackle abuses focused on tender procedures in the local public transport sector: one case, an abuse based on withholding essential information from the contracting authority was not only sanctioned but its impacts were also mitigated through the adoption of interim measures, while in another case, the ascertained abuse was facilitated by the incentives deriving from the vertical integrated nature of the dominant undertaking.
Moreover, the AGCM closed with commitments an investigation in the financial post-trading sector and, in another case, did not hesitate to sanction a breach of the commitments accepted in a previous proceeding involving an abuse of a dominant position.
During 2019, for the first time, the Authority concluded an investigation for abuse of economic dependence, pursuant to art. 9 of Italian Law no. 192/1998. Lastly, the Authority implemented the legislation concerning the regulations on trade relations as regards the sale of agricultural and agri-food products (art. 62 of Italian Decree Law 1/2012, converted, with amendments, into Law 27/2012), in accordance with which eight investigations were concluded.

2.1.2 Description of significant cases regarding anticompetitive agreements and concerted practices

I805 – Agreements in the sector of corrugated cardboard sheets and corrugated cardboard packaging[1]

In July 2019, the Authority established the existence of two anti-competitive agreements, in violation of art. 101 of the TFEU, involving the main manufacturers of corrugated cardboard sheets and packaging, as well as the relevant trade association Gruppo Italiano Fabbricanti Cartone Ondulato (GIFCO), imposing a total sanction of €287 million.
The first cartel involved the main players on the market of producing and marketing corrugated cardboard sheets (with an overall market share of around 90%) and entailed a single overall agreement aimed at fixing the sales prices of corrugated cardboard and defining production volumes in periodic meetings. An overall sanction of approximately €110 million was imposed against the undertakings

[1] Case no. *I805 - PREZZI DEL CARTONE ONDULATO*, Decision no. 27849 published in AGCM Bulletin no. 32/2019 of 12/08/2019, available at https://www.agcm.it/dotcmsdoc/bollettini/2019/32-19.pdf

involved. In accordance with the leniency programme, the benefit of full immunity from sanctions was granted to DS Smith group companies which, as the first leniency applicants, avoided the imposition of sanctions in excess of €70 million. The subsequent leniency applicants - Ondulati Nordest S.p.A. and the companies in the Pro-Gest group - were granted a 50% and 40% reduction in the sanction, respectively.
The second cartel involved undertakings active in the production and marketing of corrugated cardboard packaging (with an overall market share of around 50%), and the trade association GIFCO, parties to a single overall agreement aimed at fixing sales prices, allocating customers and sharing markets, especially with respect to large clients. An overall sanction of approximately €178 million was imposed against these undertakings. Full immunity from the sanction was granted to DS Smith group companies which, once again as the first leniency applicants, avoided the imposition of a sanction in excess of €70 million. The subsequent leniency applicants - Scatolificio Idealkart S.r.l. and the companies in the Pro-Gest group - were granted a 50% and 40% reduction in the sanction, respectively.

I808 – Awarding of a facility management services contract for PA buildings[2]

In April 2019, the Authority concluded an investigation, ascertaining an anti-competitive agreement, in violation of art. 101 of the TFEU, among the main operators in the sector of building cleaning and maintenance services, the so-called facility management services.
The aim of the agreement was to influence the outcome of the public tender procedure entitled FM4, run by the contracting authority Consip S.p.a. (the central procurement agency for goods and services acquired by the public administration) for the provision of facility management services for buildings used by the public administration. The contract in question – divided into 18 geographic lots of an overall value of some €2.7 billion – specifically concerned the provision of cleaning and maintenance services in public offices located all over Italy.
The acquisition of evidence was facilitated by the information provided by one of the parties to the proceedings (C.N.S. - Consorzio Nazionale Servizi Società Cooperativa), which filed a leniency application in accordance with art. 15 of Italian Law 287/1990.
The main thrust of the agreement was the allocation of eighteen lots of the tender. The investigation showed that the use of subcontracting and the establishment of a temporary grouping of companies were a form of distortion, aimed at reinforcing the agreements between the parties and, essentially, designed to implement the allocation plan.
The Authority deemed the infringement to be extremely serious and imposed overall sanctions of approximately €235 million. In addition, the Authority granted C.N.S., as a leniency applicant, a 50% reduction in the sanction.

I806 - Award of contracts for forest fire fighting activities[3]

[2] Case no. *I808 - GARA CONSIP FM4/ACCORDI TRA I PRINCIPALI OPERATORI DEL FACILITY MANAGEMENT*, Decision no. 27646 published in AGCM Bulletin no. 19/2019 of 13/05/2019, available at https://www.agcm.it/dotcmsdoc/bollettini/2019/19-19.pdf
[3] Case no. *I806 - AFFIDAMENTO APPALTI PER ATTIVITÀ ANTINCENDIO BOSCHIVO*, Decision no. 27563 published in AGCM Bulletin no. 9/2019 of 04/03/2019, available at: https://www.agcm.it/dotcmsdoc/bollettini/2019/9-19.pdf

In February 2019, the Authority concluded an investigation, determining the existence of two different anti-competitive agreements, in violation of art. 101 of the TFEU, concerning, respectively, the rigging of tenders for helicopter forest fire prevention services by the main market operators and the price fixing, within the framework of the Associazione Elicotteristica Italiana (Italian Helicopter Association - AEI), for the provision of helicopter services. The Authority issued sanctions amounting to over €67 million to the undertakings concerned.

The objective of the first cartel was the allocation of public tenders issued in Italy between 2005 and 2018 concerning helicopter forest fire prevention services, including through the use, for anti-competitive purposes, of a temporary grouping of companies, as well as the setting of an artificially high contract price.

The second cartel concerned, in addition to helicopter forest fire prevention services, cargo and passenger transport services via helicopters, for both public and private clients. AEI and its members took part in this cartel, which began in 2001 and ended in August 2017. The cartel entailed an anti-competitive horizontal agreement which had fixed, within the framework of the AEI, the list prices for cargo and passenger transport services, differentiated according to the type of helicopter, with respect to the reference time period.

2.1.3 Description of significant cases regarding the abuses of dominant position and defending the weaker party to a contract

A516 - Tender for the awarding of local public transport services in Bolzano[4]

In April 2019, the Authority concluded an investigation into SAD - Trasporto Locale S.p.A. ("SAD"), ascertaining an abuse of dominant position, in violation of art. 102 of the TFEU, consisting in the refusal to supply and delay in providing information necessary for conducting tender procedures for the awarding of suburban local transport services in the Province of Bolzano. The investigation was launched in January 2018 following a complaint from the Autonomous Province of Bolzano, the body that manages local transport in the area.

The Authority established the dominant position of SAD, the exclusive concessionaire, as the holder of a legal monopoly over the lines subject to investigation.

The investigation ascertained that SAD had acted knowingly to prevent the Province of Bolzano from being able to promptly launch the administrative procedures in preparation for organising a public procurement procedure for the awarding of such services on the expiry of the concessions (i.e. November 2018). Specifically, from March 2017 until the start of the investigation, but also subsequently (i.e. until the interim measures decision from the Authority), SAD had refused to provide the essential information for the drafting of the tender documents by the Province and then delayed sending such information or supplied it in an incomplete form. SAD was the only party in possession of these details by virtue of its

[4] Case no. *A516 GARA AFFIDAMENTO SERVIZI TPL BOLZANO*, Decision no. 27775, published in AGCM Bulletin no. 21/2019 of 27/05/2019, available at: https://www.agcm.it/dotcmsdoc/bollettini/2019/21-19.pdf

position as the legal monopoly holder with an exclusive right to operate the transport lines included in the concession.

The Authority also determined that SAD's conduct had generated actual anti-competitive effects, by delaying the publication of the call for tenders and forcing the Autonomous Province of Bolzano to extend the licences in force, resulting in a delay in opening the market to competition, which also caused prejudice to end user consumers.

In conclusion, the Authority, in view of the duration and seriousness of the infringement, imposed a sanction of around €1.15 million on the undertaking.

A525 – Abuse of economic dependence in the distribution of newspapers and magazines in the Province of Genoa[5]

For the first time, the Authority concluded an investigation into abuse of economic dependence, pursuant to art. 9 of Italian Law no. 192/1998, with respect to two undertakings operating on the newspaper and magazine distribution market. By establishing abuse of economic dependence, the legislator sought to grant particular protection to the weaker contractual party, as might be the case of an undertaking which finds itself in a position of economic dependence to a supplier, with abuse of such a situation causing a significant imbalance (to the detriment of the former) in terms of contractual rights and obligations.

The ascertained abuse consisted in the arbitrary interruption of supplies of newspapers and magazines by M-Dis and To-Dis to a sole proprietorship operating as a distributor of daily newspapers and magazines in Genoa and the surrounding areas. This sole proprietorship had entered into a preliminary agreement to sell its business to a local distributor (purchaser) operating in Tuscany.

The investigation shed light on a situation of economic dependence of the sole proprietorship concerned with respect to M-Dis and its subsidiary To-Dis, due to the fact that the latter are exclusive national distributors of a range of newspapers and magazines and, therefore, unavoidable trading partners for any local distributor operating in Genoa and its province.

The Authority ruled that the abuse of economic dependence by M-Dis and its subsidiary To-Dis had a significant impact on competition on the newspaper and magazine local distribution market, since it entailed the exclusion of an operator (and the company purchasing it), while obstructing competitive pressure on the market. Having determined this violation, the Authority imposed on the companies concerned, jointly and severally, a sanction of approximately €321,597.

Application of regulations on commercial relations in the agri-food sector to bakers[6]

In June 2019, the Authority concluded six investigations into undertakings associated with the main national distribution chains in the Large-Scale Retail sector, revealing unfair practices to the detriment of their bread-making suppliers, in violation of art. 62, paragraph 2 of Italian Decree Law 1/2012[7].

---

[5] Case no. *A525 MERCATO DISTRIBUZIONE QUOTIDIANI E PERIODICI NELL'AREA DI GENOVA E TIGULLIO*, Decision no. 28043 published in AGCM Bulletin no. 3/2020 of 20/01/2020 available at: https://www.agcm.it/dotcmsdoc/bollettini/2020/3-20.pdf

[6] Cases no. AL15A, AL15B, AL15C, AL15D, AL15E, published in AGCM Bulletin no. 28/2019 of 15/07/2019 available at: https://www.agcm.it/dotcmsdoc/bollettini/2019/28-19.pdf

[7] Art. 62, paragraph 2 of Italian Decree Law no. 1 of 24 January 2012 lays down rules on commercial relations in terms of the sale of agricultural and agri-food products, by intervening in "*economic relations between operators in the sector marked by a significant*

The investigations showed that the sector of fresh bakery products is extremely fragmented as regards supply, with some 20,000 family-run bakeries, mostly managed by natural persons or partnerships, which sell both directly (43%) and through traders and third-party distributors (with Large-Scale Retail representing 46% of the latter channel). The investigations concerned, in particular, the distribution of fresh bread, which, by its very nature and based on the regulations in the industry, is normally consumed within twenty-four hours of production.

The obligation of return (bearing the cost of the unsold produce) is common practice and widespread in the industry. This obligation was concretely applied by Large-Scale Retail operators, generating significant return percentages (up to 20% and in some cases 30-40% of the delivered product) and bakers were required to accept the return clause against their commercial interests, or face the genuine risk of losing the opportunity of supplying the distribution chain again.

During the proceedings, the Authority framed the practice of return within the context of a significant contractual imbalance between the distribution chains under investigation and their respective fresh bread suppliers, most of which are small businesses with few employees.

The Large-Scale Retail undertakings involved in the six investigations relied on this contractual imbalance to impose, without any individual negotiations, on all or part of their bread suppliers, the return clause, even when they found this condition inconvenient, thus causing an excessive and unjustified transfer of a risk typical of distribution activities to the suppliers.

This conduct, consisting in the imposition of unjustifiably unfair commercial conditions, was considered a violation of art. 62, paragraph 2, letters a) and e) of Italian Decree Law 1/2012 and resulted in the issuing of sanctions totalling €680,000.

2.2 Mergers and acquisitions

2.2.1 Statistics

As regards mergers, the Authority examined 65 transactions, 57 of which were authorised in Phase I and six of which required an in-depth investigation, at the end of which, in five cases the transaction was authorised subject to remedies, while in the remaining case, the Authority asked the parties to notify again the transaction which had changed during the review[8]. In two other cases, the Phase I review ended with no grounds for action due to the inapplicability of the merger law.

2.2.2 Summary of significant merger cases

imbalance between their respective positions of commercial strength" and qualifies as unlawful a series of conducts, with the Authority responsible for imposing the relevant sanctions. In particular, paragraph 2 of art. 62 states that, in commercial relations between economic operators regarding the sale of agricultural and agri-food products, it is forbidden to "*impose, directly or indirectly, conditions on purchase or sale or any other unjustifiably unfair contractual conditions*" (letter a) or to "*adopt any further unfair commercial practices that prove so even in consideration of the set of commercial relations that characterise the procurement conditions*" (letter e).

[8] Case no. *C12247 - BDC ITALIA-CONAD/AUCHAN*, Decision no. 28039, published in AGCM Bulletin no. 52/2019 of 30/12/2019, available at: https://www.agcm.it/dotcmsdoc/bollettini/2019/52-19.pdf

C12207 SKY ITALIA/R2 (merger in the pay-TV market)[9]

In May 2019, the Authority authorised subject to conditions the acquisition by Sky Italian Holding S.p.A. (Sky Group) of certain pay-television assets of the digital terrestrial television business of Mediaset Premium S.p.A. (Mediaset Group), in particular the R2 technological platform. The transaction concerned various relevant markets, all with national geographical scope, especially the pay-TV market.

According to the Authority, the merger was likely to lead to a strengthening of the dominant position of the Sky Group on the pay-TV market, resulting in the elimination or substantial lessening of competition on this market and those connected with it, such as the wholesale supply of pre-packaged television channels for pay-TV and possible sub-segments (basic and premium) and the licensing market for the rights to broadcast audiovisual content and its sub-segments.

Following the issuing of the statement of objections s by the Authority, Sky stated that it wished to return R2 and other assets to Mediaset. However, in view of the fact that the return of R2 was partial – since certain R2 assets remained the property of the Sky Group – and that the merger had already caused effects on the markets, the Authority decided to complete the review of the transaction in any case.

In particular, the Authority decided that the transaction had generated particularly anti-competitive effects, resulting in the removal of the existing and future competitive pressure previously exercised by Mediaset Premium on the pay-TV of the Sky Group. For this reason, it decided to impose, for a three-year period, measures considered appropriate for restoring competition on the pay-TV market, consisting in a prohibition, for the Sky Group, to impose exclusive rights for its audiovisual content and linear channels on the internet platforms in Italy, authorising the merger subject to the full and effective implementation of the prescribed measures.

C12231 BPER BANCA/UNIPOL BANCA (merger in the banking sector)[10]

In July 2019, the Authority authorised subject to conditions the acquisition of control of Unipol Banca S.p.A. (Unipol) by BPER Banca S.p.A. (BPER). With regard to the Sardinia Region, the investigation covered a number of local markets: private and commercial banking as well as investment and asset management services to consumer households and small & medium enterprises. The investigation also covered, again in the Sardinia Region, the market for loans to public bodies and that for loans to medium/large-sized enterprises.

During the in-depth investigation, the Authority analysed the post-merger increases in market share held on the various markets by BPER and Unipol, concluding that a joint share of at least equal to or greater than 40% would cause significant obstacles to competition.

Following the findings of the investigation, the Authority considered that the merger was likely to result in the creation and/or strengthening of the dominant position of BPER in certain markets of Sardinia.

The Authority decided to authorise the merger subject to measures aimed at eliminating the anti-competitive effects the merger: in particular, the measures envisage, in geographical markets where the

[9] Case no. *C12207 SKY ITALIA/R2*, Decision no. 27784, published in AGCM Bulletin no. 21/2019 of 27/05/2019, available at: https://www.agcm.it/dotcmsdoc/bollettini/2019/21-19.pdf

[10] Case no. *C12231 - BPER BANCA/UNIPOL BANCA*, Decision no. 27842, published in AGCM Bulletin no. 29/2019 of 22/07/2019 available at: https://www.agcm.it/dotcmsdoc/bollettini/2019/29-19.pdf

effects of the merger would affect competition, the sale of certain branches owned by Unipol to an independent party capable of being an actual or potential competitor in the market.

C12246 - FRATELLI ARENA/SMA - DISTRIBUZIONE CAMBRIA - ROBERTO ABATE (merger in retail groceries distribution)[11]

In December 2019, the Authority authorised subject to conditions the acquisition by Fratelli Arena s.r.l. of exclusive control over three groups of business branches, respectively comprising: i) 33 supermarkets from the Simply network, ii) 8 supermarkets from Distribuzione Cambria and iii) 11 supermarkets from the Roberto Abate Group.

In order to better understand the habits of consumers and the dynamics of demand in the retail groceries sector, the Authority commissioned a market research, conducted on a national representative sample, to collect evidence to be used for the definition of the relevant markets and, more generally, the competitive assessment of the merger.

In the case under review, following a quantitative analysis of the Parties' position on the relevant markets and the competitive constraints exercised by the stores subject to purchase on those of the acquirer and qualitative examination of the specific characteristics of each of the relevant markets, the Authority identified competition concerns on 8 local markets (2 hypermarket markets and 5 supermarket markets in the Province of Catania and 1 supermarket market in the Province of Messina).

In order to prevent any reduction on competition, the Authority authorised the merger, laying down behavioural and structural remedies for the Parties, including the divestiture of various stores and the signing of a lease agreement for a business branch.

2.2.3 Ex-post assessment of the structural measures

In 2019, the AGCM conducted an ex-post assessment of its practice in defining and implementing merger remedies with the goal of improving their effectiveness. The ex-post review focused in particular on structural remedies, i.e. the divestiture of assets, imposed by the Authority during the period 2007-2017. In order to adequately assess their effectiveness, the Authority contacted the purchasers of the divested assets, via questionnaires, which enjoyed a relatively high response rate. The information requested by the AGCM through the questionnaire concerned: a) the characteristics of the assets acquisition process; b) the performance of the purchased assets; c) the degree of profitability of the assets; d) the level of completeness of the imposed remedies; e) the time frames and process for integrating the purchased assets.

The results of the ex-post review will be used to draft an operating manual for internal use that also takes account of the best international practices.

[11] Case no. *C12246 - FRATELLI ARENA/RAMI DI AZIENDA DI SMA -DISTRIBUZIONE CAMBRIA-ROBERTO ABATE*, Decision no. 28038 published in AGCM Bulletin no. 52/2019 of 30/12/2019 available at: https://www.agcm.it/dotcmsdoc/bollettini/2019/52-19.pdf

3. THE ROLE OF THE COMPETITION AUTHORITY IN THE FORMULATION AND IMPLEMENTATION OF OTHER POLICIES

3.1 Opinions and recommendations

In 2019, the Authority issued 82 advocacy interventions, using the regulatory tools available and intervening in a number of sectors to urge the legislator to remove the unjustified obstacles to the competitive process and its dynamics. The AGCM also held 8 hearings before the competent parliamentary committees.

In particular, the Authority issued 69 opinions pursuant to articles 21 and 22 of Italian Law no. 287/90 and 12 reasoned opinions in accordance with art. 21-bis of Italian Law no. 287/1990, one of which was to the Communication Authority, and three in accordance with the regulations on public-shareholder companies, which require the public administrations to inform the AGCM when it intends to establish state-owned enterprises and purchase shares in those already existing.

During 2019, the Authority monitored advocacy interventions for the two-year period 2017-2018, noting that the outcome of the assessment was positive in 54% of the opinions issued in 2017 and 2018 (a percentage which rises to 85% in the case of opinions on draft laws), especially in sectors such as services, transport, waste management, healthcare and tourism.

One important result was the conclusion of the market study into Big Data, in conjunction with the communications regulator and the privacy authority, accompanied by guidelines and recommendations for the government. The final report defines a common framework of reference for analysing issues arising from the use of data by undertakings, with no prejudice to the specific competences of the three institutions.

3.2 Description of significant advocacy interventions

3.2.1 Big Data Market Study

The AGCM, together with the Authority for Communications and the Authority for the Protection of Personal Data, have published the final report of the joint Market Study on Big Data (hereafter the "Study"), accompanied by "Guidelines and policy recommendations" to the government and parliament[12].

From three different yet complementary perspectives, the Study examined how Big Data is driving change: from the users who provide the data, to the companies that use Big Data and, thus, the markets.

[12] Market Study no. *IC53 - BIG DATA*, Decision no. 28051 published in AGCM Bulletin no. 9/2020 of 02/03/2020 and available at: https://www.agcm.it/dotcmsdoc/bollettini/2020/9-20_all.pdf. An English translation of the Guidelines and Recommendations can be viewed at the following link: https://eng.agcm.it/dotcmsdoc/pressrelease/Big%20Data_Guidelines%20and%20policy%20recommendations.pdf

The Study looked at ways to exploit potential synergies between the three authorities and to identify the most appropriate tools for any interventions[13].

In the course of the Study, the relevant legal and economic literature has been reviewed and included in the analysis to provide an accurate theoretical framework. The Authority conducted hearings with academic experts and collected contributions of numerous market operators active in sectors such as telecommunications, media, digital platforms, information technology, insurance and banking. The hearings were supplemented with several requests of information. Finally, the Authority conducted an online survey on a sample of more than two thousand Italian users, to investigate the nonmonetary relationship between the users who provide personal data and the companies that provide digital services.

After more than two years of working closely together, the three authorities reached a common position whereby, inter alia, (i) protecting privacy as a fundamental right should not hinder dynamic competition nor innovation; (ii) appropriate regulatory measures to mitigate the market power of major digital platforms should not overshadow the risks of ex-ante intervention on innovative markets; (iii) competition in "zero price markets" can only be examined using traditional criteria based on prices and quantities.

First of all, the Study highlights how reducing information asymmetry between users and digital operators during the data collection phase is a fundamental policy aim, and several tools can and should contribute to it, such as the application of data protection and consumer protection legislations. During the Study, it emerged that data are often processed for purposes that are defined in general terms only: indeed, the mass acquisition of data can make it difficult to specifically identify ex ante the purposes for such processing. Innovative solutions have been proposed to encourage individuals to participate in the processing of their data that uses Big Data techniques, such as dynamic consent (whereby individuals initially give their broad consent to a general notice regarding the possible purposes for processing their data, to subsequently receive more detailed information with a request to give additional and more specific consent).

From a purely competition perspective, however, the practice of many online service providers to acquire information about their users beyond what is strictly required for the implementation of the contract, and beyond the consent provided by users on the purposes for which their data are being processed, must be carefully assessed.

Where the acquisition of data may be relevant for companies since it enables them to extract information enabling the more competitive provision of goods/performance of a service, compliance with the privacy rules may make it more difficult for operators who do not benefit from a direct relationship with the user to access their data. In fact, the protection of personal data may be at odds with the need to encourage the circulation of data and, with it, free competition between companies.

[13] In the course of the Study, the relevant legal and economic literature has been reviewed and included in the analysis to provide an accurate theoretical framework. The AGCM conducted hearings with academic experts and collected contributions of numerous market operators active in sectors such as telecommunications, media, digital platforms, information technology, insurance and banking. The hearings were supplemented with several requests of information. Finally, the Authority conducted an online survey on a sample of more than two thousand Italian users, to investigate the non-monetary relationship between the users who provide personal data and the companies that provide digital services.

The right to data portability should help avoid technological lock-in and increase competition between players providing digital services. However, there are a number of obstacles to the effective development of data portability, linked in particular to a general lack of awareness amongst users of the existence of this right, the constraints on their mobility (also due to the presence of network effects) and the still uncertain boundaries of data portability, which might include only part of the data collected and processed by businesses. Developing common data transfer standards could be key to avoiding a situation in which users only make use of their right to data portability in certain, limited circumstances. In any case, according to the three authorities, any regulatory interventions regarding access to data must be necessary and proportionate, and they must take into account the specific nature of the service/market, as well as the social aims connected to them and which are subject to regulatory supervision.

As part of the Study, some operators highlighted how, in order to promote the free movement of data and the development of the digital economy, a model could be developed with decentralised and alternative systems, in which users have control over the data generated through their various activities and can decide independently whether and how to pool these data for a purpose to which they attach value.

As regards the relationship between the application of consumer protection and competition laws, the Study underlines the effectiveness of consumer protection tools – some of which have already been implemented by the Authority – against messaging service providers (guilty of forcing the user to accept new terms of service) and social media networks (accused of not providing clear and accurate information on the commercial purposes for which data are collected). Consumer protection can, in fact, be enforced across a multitude of aspects of the relationship between operators and users during the data acquisition phase. The effect of this is not just to provide direct protection for consumers, but also to assume a pro-competition role to the extent that users are put in a position to (more) consciously and actively exercise their consumer choices.

The Study also focuses on the issue of personalising services and prices, analysing the risks involved as regards consumer protection and pluralism of information. The fact that operators, given the amount of information they hold, can direct the profiled user towards personalised content, highlights a critical aspect, not only as regards competition (by enabling possible abuses likely to reduce the contestability of the ecosystems of the main platforms or facilitating the stability of cartels or collusive equilibria) but also in terms of consumer protection (who may not know the extent to which the search service used by the consumer filters or adjusts the results based on the user's individual characteristics) and in relation to protecting pluralism (a high degree of personalisation in the distribution of journalistic content can reduce the level of information pluralism significantly and, as a result, the consumer's ability to access a plurality and variety of information sources).

From a purely competitive perspective, the Study focuses on assessing market power in digital ecosystems characterised by the exploitation of Big Data.

An important element in assessing market power is the vertical and conglomerate integration of digital operators. This amplifies the ability to capture, process and exploit data in providing services to consumers and businesses, and allows for incredibly accurate profiling. From this perspective, the

competitive constraints that can be developed on the supply side, which have traditionally been used to identify potential competitive pressure, should be given much more space in the definition of the relevant market.

One significant element in assessing market power on data-driven markets is also represented by external growth, such as acquisitions by dominant players of potentially disruptive start-ups (so-called killer acquisitions). These transactions could also avoid merger control rules: in this respect, a reform at domestic and international levels is desirable in order to allow competition authorities to fully assess merger transactions that fall below the current notification thresholds, but which could potentially restrict competition from the outset.

In the Study's final report, the AGCM analyses the main conducts which may result from the exploitation of Big Data and which may constitute possible abuses of a dominant position (refusal to deal, other exclusionary conducts, discrimination and exploitation) or anti-competitive agreements that use pricing algorithms.

Lastly, another important recommendation emerging from the Study concerns the need to strengthen the powers of the AGCM in order to obtain information outside of investigations and increase the maximum sanctions to ensure an effective deterrent against breaching consumer protection rules.

3.2.2 Advocacy in the postal services sector

During 2019, the Authority carried out significant advocacy in the postal services sector, aimed at ensuring the full opening of postal markets to competition, as established by the legislator in a 2017 market opening reform, which liberalised the final postal services for which there was still in place a legal monopoly in favour of Poste Italiane S.p.A. (in particular, the notification of judicial acts and infringements of the Highway Code by post).

The Authority intervened in consideration of the fact that, two years after the entry into force of the aforementioned regulatory provision, the liberalisation process was (and is still) ineffective. In particular, the AGCM found there were gaps in the sectoral regulatory framework which do not enable operators to organise the necessary training activities for their employees and therefore to offer the liberalised services. As a consequence, the Authority sent an opinion to parliament, the government and the sector regulator (AGCOM), seeking the introduction of changes to overcome the shortcomings in the legislative/regulatory system[14].

As regards postal services, the Authority also highlighted the anti-competitive restrictions contained in the draft contract for the 2020-2024 programme, concluded between the Ministry of Economic Development and Poste Italiane S.p.A., which will define, inter alia, the modalities for providing the universal postal service during the five-year period 2020-2024 and the associated obligations of the

[14] Opinion no. *AS1610 – REGOLAMENTAZIONE SERVIZI DI NOTIFICAZIONE DI ATTI GIUDIZIARI E DI VIOLAZIONI DEL CODICE DELLA STRADA*, published in AGCM Bulletin no. 35/2019 of 02/09/2019, available at: https://www.agcm.it/dotcmsdoc/bollettini/2019/35-19.pdf

concessionaire. In particular, the Authority underlined, in another opinion[15], how the provisions contained in the programme contract also entrust to Poste Italiane S.p.A. the offer of services outside the universal postal service (and, in certain cases, also outside the postal sector), based on agreements which bypass public procurement procedures, thus distorting competition and generating greater costs for the public finances. The AGCM ruled that, in order to facilitate the full development of competitive dynamics in the postal sector, now fully liberalised, and in the other sectors affected by the draft programme contract, the latter must be restored to its original purpose, i.e. solely to define the procedures for providing the universal postal service. At the same time, the scope of universal service must be confined solely to the services deemed to be essential to public service duty, and those which are basically associated with the operation of the ordinary mail service between private individuals.

3.2.3 Advocacy in the concessions sector

In 2019, the Authority issued various reports in the concessions sector as regards the extension and duration of concessions. As regards the former, in an opinion concerning the awarding of concessions for ski lifts and slopes[16], the Authority observed that, in general, the duration of the concessions (which should usually be justified on a technical, economic and financial analysis) does not have to be necessarily be linked to the recovery period of the investments necessary for carrying out the activity since, for the issuing of the new concession, the administration should have already accounted for the value of the investments made by the outgoing concessionaire.

Similarly, the Authority considered excessive the ten-year duration of the parking concessions for running a business in public areas, as ruled by the Lazio Region (Regional Law no. 22/2019), also in consideration of the nature of the activities to be carried out by successful bidder, as they do not require particular investments[17]. The Authority found this provision likely to prejudice the proper unfolding of the competitive dynamics, by favouring outgoing operators and hindering the entry of new competitors, which clearly conflicts with the principles expressed in the Services Directive and Italian Legislative Decree no. 59 of 26 March 2010 (*Implementation of Directive 2006/123/EC on services in the internal market*).

As regards the extension mechanisms, the Authority intervened in one particular case[18], informing the Minister for Infrastructure and Transport that the extension granted to the new entity resulting from the merger between Moby and CIN, with the latter holding a concession for maritime transport between Italy and the major islands, compared with its natural expiry (July 2020), could not be justified by the

---

[15] Opinion no. *AS1627 - SCHEMA DI CONTRATTO DI PROGRAMMA 2020-2024 TRA IL MINISTERO DELLO SVILUPPO ECONOMICO E POSTE ITALIANE*, published in AGCM Bulletin no. 50/2019 of 16/12/2019 available at: https://www.agcm.it/dotcmsdoc/bollettini/2019/50-19.pdf

[16] Opinion no. *AS1584 – COMUNE DI SUBIACO (RM) - AFFIDAMENTO E PROROGA DEL SERVIZIO DI GESTIONE DEGLI IMPIANTI DI RISALITA SCIISTICI A FAVORE DELLA SOCIETÀ LIVATA 2001*, published in AGCM Bulletin no. 20/2019 of 20/05/2019, available at: https://www.agcm.it/dotcmsdoc/bollettini/2019/20-19.pdf

[17] Opinion no. *AS1638 - REGIONE LAZIO - TESTO UNICO DEL COMMERCIO-DURATA DELLE CONCESSIONI DEI POSTEGGI,* available at: https://www.agcm.it/dotcmsdoc/bollettini/2020/2-20.pdf

[18] Opinion no. *AS1568 - SERVIZIO DI TRASPORTO MARITTIMO TRA L'ITALIA CONTINENTALE E LE ISOLE MAGGIORI E MINORI*, published in AGCM Bulletin no. 11/2019 of 18/03/2019 and available at: https://www.agcm.it/dotcmsdoc/bollettini/2019/11-19.pdf

objective of guaranteeing business continuity of CIN being merged in a newly created entity. According to the Authority, it is necessary to first carry out an assessment of the services subject to public service obligations; once such services have been identified, it would be preferable to award them through transparent and non-discriminatory competitive procedures, while also taking account of the possibility that they might be provided in non-exclusive form.

4. RESOURCES OF THE COMPETITION AUTHORITY

4.1 Annual Budget

The annual expenses incurred by the Authority in 2019 totalled €58.9 million (€55.3 million in 2018). This figure also includes the costs for other competences assigned to the Authority such as consumer protection, conflicts of interest and the legality rating.

In accordance with Italian Legislative Decree no. 1/2012, the financing system of the Authority is based on a mandatory contribution from companies established in Italy whose turnover exceeds the threshold of €50 million. The contribution, which was originally set as 0.06 per thousand, was gradually reduced by the AGCM to the current level of 0.055 per thousand, set in January 2018 and confirmed in March 2020. The income derived from these contributions replaces all previous forms of financing (merger fees and funds from the public budget).

4.2 Number of employees

The total number staff of the AGCM at the end of 2019 was 280. This includes all human resources tasked with performing other non-competition competences for the AGCM (e.g. consumer protection). In December 2019, 136 employees worked in competition area, 35 of whom were support staff and 101 non-administrative staff. The latter group comprised 49 lawyers, 43 economists and 9 other professionals (e.g. IT).