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## *Judicial perspectives on Competition Law*

-- Italy --

### 1. Introduction

1. The Italian Competition Authority (hereinafter also referred as the Authority or AGCM) welcomes this opportunity to share its experience regarding its interaction with national Courts and to discuss possible ways to address the challenges that judges face when applying Competition Law.

2. In Italy the enforcement of Competition Law is carried out by AGCM (public enforcement), which is an independent Administrative Authority, as well as by the Judges before which consumers and business can directly ask for damages and injunctive reliefs in case of anti-competitive conducts (private enforcement).

3. As for public enforcement, the Italian Code of Administrative Procedure (Legislative Decree 2 July 2010, no. 104) reserves exclusive jurisdiction on the decisions issued by the Italian Competition Authority to administrative courts, and concentrates all litigation at the first instance into the functional competence of the TAR Lazio (Articles 133 and 135 of the Code of Administrative Procedure). The judgements issued by the TAR Lazio can be further appealed before the Council of State, acting as a court of last instance. In particular, Article 33 of the Italian Competition Act (Law no. 287 of 10 October 1990) provides that “*judicial relief before the administrative courts is regulated by the Code of Administrative Procedure*”.

4. As for private enforcement, pursuant to Article 18 of Legislative Decree no. 3 of 19 January 2017 (“Legislative Decree no. 3/2017”), which transposed the Antitrust Damages Directive 2014/104/UE (“Antitrust Damages Directive”), competition law disputes fall under the jurisdiction of the judicial sections specialized in company law of Milan, Rome and Naples<sup>1</sup>. These specialized judicial sections have jurisdiction over actions for damages and requests for interim relief relating to infringements of the Italian Competition Act or of Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU). The mentioned provisions enable commencement of these actions both in instances where the AGCM has already ruled on the breach of law (follow-on actions) and as stand-alone claims. The decision of these specialized judicial sections might be appealed before the Court of Appeal (respectively of Milan, Rome and Naples). In turn the decisions of such Courts of Appeal could be further appealed before the Italian Supreme Court (Corte di Cassazione) but only on points of law (assessment of legitimacy and not on the merits of the case).

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<sup>1</sup> Pursuant to Article 140-bis of the Italian Consumer Code (Legislative Decree no. 206 of 6 September 2005), Italian “opt-in consumer class actions” fall within the jurisdiction of the courts of these main Italian judicial districts, based on the place of the defendant company’s registered office.

5. Both TAR Lazio and the said judicial specialized sections retain the possibility to have recourse to a reference for a preliminary ruling on validity under Article 267, paragraph 1, of the TFEU<sup>2</sup>. On the other hand the Council of State and the Italian Supreme Court (Corte di Cassazione), since they are both Courts of last instance, have - with some relevant exceptions<sup>3</sup> - the duty to make such a preliminary reference under Article 267, paragraph 3 of the TFEU.

## 2. The judicial review of the AGCM's decisions

### 2.1. The standard of judicial review

6. The grounds of judicial review over administrative acts in Italy are incompetence, breach of legal requirements and misuse of powers. Therefore, Italian administrative Courts will normally check the reasonableness and consistency of administrative decisions, without substituting their own assessment to that of the administration.

7. Accordingly, the Council of State clarified that the administrative Courts exercise a full review – in law and fact - of the reasoning underpinning the Authority's decision, yet they may not substitute their own evaluation to the one already made by the Authority, which remains the sole subject entitled to exercise antitrust powers<sup>4</sup>.

8. However, pursuant to Article 134 of the Italian Code of Administrative Procedure, in disputes concerning fines imposed by independent administrative authorities, Italian administrative Courts are empowered to carry out a review of the merits of the case with respect to fines. This means that administrative Courts may confirm, annul, reduce or increase the fines, imposed by the Authority.

9. As competition enforcement at national and EU levels departs from the traditional form-based approach to rely increasingly on more sophisticated economic reasoning, an imperfect knowledge of economic theories and methods underpinning competition policy may dent the quality of judicial decisions, distort the level playing field for market operators and ultimately jeopardise the consistent application of EU rules.

10. The Italian case law shows an increasing willingness of administrative Courts to access and discuss the facts of the case, as well as the economic analysis of those fact carried out by the Authority, with a view to ensuring the effectiveness of the judicial

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<sup>2</sup> As an example, recently, the Italian Council of State referred to the Court of Justice several questions for a preliminary ruling concerning the interpretation of Article 101 TFEU in the context of a decision adopted the AGCM against Roche and Novartis (AGCM, decision no. 24823 of 24 February 2014, I760 *Roche-Novartis/Farmaci Avastin e Lucentis*). The case is still pending. See Opinion of Advocate General Saugmandsgaard Øe, Case C179/16, delivered on 21 September 2017. [http://res.cloudinary.com/gcrusa/image/upload/v1506004611/C0179\\_2016\\_EN\\_AGO\\_rxjsa4.pdf](http://res.cloudinary.com/gcrusa/image/upload/v1506004611/C0179_2016_EN_AGO_rxjsa4.pdf).

<sup>3</sup> As it is well known the obligation of last instance EU national courts to make a preliminary reference may extinguish when (i) the questions are not relevant to solve the national proceeding; (ii) the issue arisen before the national court is materially identical to a question which has already been object of a preliminary ruling by the CJEU ('*acte éclairé*'), or (iii) when the interpretation of EU law is "so obvious that no reasonable doubt is left" ('*acte clair*').

<sup>4</sup> *Ex multis*: Council of State, VI, 12 February 2007, n° 550; Cons. St., VI, 10 March 2006, n° 1271; TAR Lazio Roma, I, 24 agosto 2010, n° 31278; TAR Lazio, Roma, I, 29 December 2007, n° 14157; TAR Lazio, Roma, I, 30 March 2007, n° 2798; TAR. Lazio, Roma, I, 13 March 2006, n° 1898.

review, as well as the fullest safeguard of the rights of defence of the undertakings concerned.

11. In fact, the Italian Council of State clarified that the judge is vested with the task of ascertaining whether the power conferred to the AGCM has been correctly exercised. As a consequence, the scrutiny of substantive findings is full and effective, and encompasses the technical criteria and methods employed by the AGCM in its economic assessment<sup>5</sup>.

12. Administrative Courts may establish whether the evidence relied upon is accurate, reliable and consistent, whether it contains all the information that should be taken into account, and whether it is suitable to substantiate the conclusions drawn.

13. This approach of the Council of State was confirmed by the European Court of Human Rights (ECHR) in its *Menarini* judgment<sup>6</sup>. The ECHR held that the Italian judicial review system is compliant with human rights insofar as the control exercised by the Council of State is a full jurisdiction control. In particular, the ECHR highlighted that the Italian administrative Courts are able both to ascertain the appropriateness and proportionality of the measures adopted by the AGCM and to exercise control over assessments of technical nature.

## 2.2. Evidentiary matters in competition cases before Courts in Italy

14. The review of the AGCM's decisions often requires sophisticated economic analysis. Several judgements show a remarkable economic sensitivity and a growing familiarity with economic issues by the administrative Courts.

15. A telling example is the development of the notion of “concerted practice”, which has been enriched over time to capture several forms of coordination between competitors falling short of a full-fledged agreement. The Italian judges acknowledged that “*in the field of prohibited agreements the acquisition of a ‘smoking gun’ is rare and an excessively rigorous standard of proof would risk undermining the purpose of antitrust law [therefore] it may be considered sufficient (and necessary) to identify clues of unlawful forms of collusion and coordination, provided such clues are serious, precise and consistent*”<sup>7</sup>. For the Authority to substantiate a concerted practice on the basis of circumstantial evidence alone, the key factor appreciated by the Courts is the so-called “*narrative consistency*”, meaning that the reconstruction proposed by the Authority, underpinned by several coherent clues, should be “*the only one able to explain the facts or in any case clearly preferable to any alternative hypothesis*”<sup>8</sup>.

16. By the same token, the Italian case law went far beyond a formalistic approach when it ruled that antitrust infringements may be committed through the distorted use of rights which are formally legitimate, but “*exercised in a reprehensible manner for a*

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<sup>5</sup> E.g., Council of State, judgment no. 515 *Consorzio Qualità Veneta Asfalti* of 8 February 2007 and judgment no. 597 *Jetfuel* of 20 February 2008.

<sup>6</sup> ECHR, *A. Menarini Diagnostic s.r.l. v. Italy*, 27 September 2011, no. 43509/08.

<sup>7</sup> Ex multis, Council of State, 13 June 2014, no. 3032, *Gare assicurative ASL e aziende ospedaliere campane* and Council of State, 18 May 2015, no. 2514, *Vendita al dettaglio di prodotti cosmetici*.

<sup>8</sup> Ex multis, Council of State, 24 October 2014, no. 5274, 5275, 5276, 5277, 5278, *Vendita al dettaglio di prodotti cosmetici*.

*purpose different from that meant by the laws conferring such rights*<sup>9</sup>. Such conclusions were drawn with regard to cases of abuse of a dominant position (*see box 1*) and bid rigging in public tender procedures. Particularly in the field of bid rigging, Courts were often called to address competition issues that require a thorough consideration of economic implications, e.g., with regard to joint bids (*see box 2*).

### **Box 1. The Aspen case: judicial review and economic analysis**

In June 2017, the TAR Lazio upheld an AGCM's decision concerning excessive prices of indispensable off-patent treatments. Aspen, a pharmaceutical multinational, had obtained sharp price increases that, according to the Authority's investigation, were unjustified. AGCM's final decision to fine Aspen relied upon a complex economic analysis that took into account the specific circumstances of the case.

In its judgement, the TAR Lazio thoroughly reviewed the Authority's assessment and concluded that it had been conducted in a "logic and consistent manner". The TAR Lazio stated that the analysis to prove the unfair nature of the prices – based on the United Brands test – was complete and correctly applied to the specific case.

The TAR Lazio also examined detailed Aspen's claims regarding the balance sheet items used for the calculation and held that AGCM's approach was motivated and sharable. Finally, the TAR Lazio dismissed the claimant's objection that other tests would have been more appropriate, by reiterating the well-established principle that the administrative Court may not directly intervene on the decisions referred to the technical discretion of the Authority, thus substituting a contestable evaluation adopted by the Authority with an equally contestable alternative evaluation proposed by the parties, unless the Authority's decision is patently wrong or based on misrepresentation and logic flaws (TAR Lazio, judgement no. 8945 Aspen of 26 July 2017).

<sup>9</sup> Council of State, 12 February 2014, no. 693, *Ratiopharm/Pfizer*.

### Box 2. Judicial review and joint bids in tender procedures

In several judgements regarding joint bidding agreements in tender procedures, the Council of State took into account the economic rationale of the agreement as assessed by the AGCM and ruled that joint bidding agreements are anti-competitive if they are merely intended to exclude competition between rivals.

In its judgment of 13 June 2014 no. 3032, *Gare assicurative ASL e Aziende ospedaliere campane*, the Council of State confirmed the AGCM's conclusion that the agreement (which took the form of a co-insurance agreement), despite being lawful under civil law, had been used in a distorted and anticompetitive manner, in order to share markets and limit the risk of losing the contract.

In its subsequent ruling of 4 November 2014 no. 5423, *Comune di Casalmaggiore*, the Council of State upheld the AGCM's reasoning that the joint bidding agreements, which was lawful according to other laws, was in contrast with antitrust law, taking into account the specific circumstances of the case.

In particular, the Council of State overruled the TAR Lazio, which had quashed the AGCM's decision, arguing that the Authority did not prove the existence of a *quid pluris* making unlawful an otherwise legal arrangement (judgment of TAR Lazio of 10 April 2013 no. 4478) and upheld the decision of the Authority. The Supreme Court ruled that the evidence collected by the Authority showed the parties' strategy not to compete with each other in the tender, with a view to confirming their respective positions in the relevant territories and share the markets between the two companies.

## 3. Private enforcement in Italy

### 3.1. Balance between private and public enforcement

17. The Antitrust Damages Directive is based on a two-pillar system, where public and private enforcement work as complementary tools to ensure the overall effectiveness of competition rules. At the same time, the Antitrust Damages Directive is meant to avoid possible abuses of litigation.

### 3.2. Evidentiary issues

18. In stand-alone private enforcement actions, significant information asymmetry between the parties is likely to occur. Conversely, in follow-on actions the investigation carried on by the Authority may be an important source of information, and access to documentary evidence held by the Authority can become a key step on the way towards a well substantiated claim.

19. In order to facilitate these antitrust damages action, the Antitrust Damages Directive considered crucial to intervene in the access to evidence phase. Thus, as envisaged by the Antitrust Damages Directive, Legislative Decree no. 3/2017 introduced the possibility for the said specialized Italian Courts to issue disclosure orders. These Courts can now order to disclose also relevant "categories of evidences"<sup>10</sup>, provided that

<sup>10</sup> See Article 3 paragraph 2 of Legislative Decree no. 3/2017.

the principle of proportionality is satisfied (balancing the conflicting interests related to the disclosure of evidence – right of full and direct compensation, on the one side, and right to confidentiality, on the other side) and that all the conditions laid down by Legislative Decree no. 3/2017 are met<sup>11</sup>.

20. In particular, Legislative Decree no. 3/2017 establish special norms in relation to the disclosure of evidence included in the file of the Authority. In this specific regard it states a criterion of residuality by providing that the Courts can request the disclosure from the Authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence<sup>12</sup>. Moreover, in order to protect the effectiveness of public enforcement, it allows the disclosure of evidence that do not fall within the so called *black-list*<sup>13</sup> and it permits to obtain a list of information<sup>14</sup> (so-called *grey list*) only after the closure of the proceeding by the Authority (thus indirectly and *a contrario* establishing a so-called *white list* of documents that could always be ordered to discover).

### 3.3. Cooperation between competition authorities and Courts in private enforcement

21. As envisaged by the Antitrust Damages Directive, the adoption of Legislative Decree no. 3/2017 introduced new opportunities for cooperation between the AGCM and Courts in the context of private enforcement. Two out of the three means of cooperation specifically relate to the access to evidences phase.

22. Firstly, the specialized Courts may request assistance from AGCM to ensure that a specific evidence refers to a leniency program or commitments and is thus included in the said “black list”<sup>15</sup>.

23. Secondly, AGCM may submit observations to a specialized Court before which a discovery order is sought, with a view to stating its view on the proportionality of the disclosure request<sup>16</sup>.

24. As for the third tool of cooperation, this relates to the quantification of damages phase. Indeed, Legislative Decree no. 3/2017 provides that AGCM may assist the specialized Courts with regard to the determination of the *quantum* of damages. Such

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<sup>11</sup> In particular see Article 3 paragraph 1 of Legislative Decree no. 3/2017 which has laid down four conditions for the disclosure of evidence: i) *semiplena probatio* of the alleged facts, ii) actual relevance of the facts and evidences to be collected; iii) proof that the relevant evidence lies in the control of the counterparty or of a third party and iv) reasonable nature of the required information.

<sup>12</sup> See Article 4 paragraph 1 of Legislative Decree no. 3/2017.

<sup>13</sup> These are leniency statements and settlement submissions. See Article 4, paragraph 5 of the Legislative Decree no. 3/2017.

<sup>14</sup> See Article 4 paragraph 4 of Legislative Decree no. 3/2017. Information that was prepared by a natural or legal person for the proceedings of the competition authority; information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and settlement submissions that have been withdrawn.

<sup>15</sup> See Chapter III of the Directive, “Disclosure of Evidence”, Article 6, para. 7 (Article 4, paragraph 5 of the Legislative Decree no. 3/2017).

<sup>16</sup> See Article 6 para. 11, of the Directive (article 4, paragraph 7 of the Legislative Decree no. 3/2017).

assistance is subject to a request by the specialized Court and is left to the discretion of the AGCM<sup>17</sup>.

25. The described set of cooperation tools has created a very promising framework for joint work and exchange between the AGCM and the specialized Courts. However, since the transposition of the Directive in the Italian legislation is very recent, it is still early to provide an assessment of the application of these cooperation mechanisms.

26. Noteworthy, means of cooperation had already been provided in Regulation 1/2003 EC on the modernization of EC competition rules, namely by Articles 15 and 16, respectively titled “Cooperation with national courts” and “Uniform application of Community competition law”. In particular, the possibility for national competition authorities or the European Commission to act as *Amici curiae* in private antitrust litigation (upon request by judges or *ex officio*) was expressly provided by Article 15.1 and 15.3 of Regulation 1/2003<sup>18</sup>.

### 3.4. Effects of AGCM’s decisions on litigations

27. Article 16 of Regulation 1/2003 provided that, when national courts rule on agreements, decisions or practices under Article 101 or 102 TFEU that are already the subject of a European Commission decision, they cannot issue decisions that run counter to the decision adopted or contemplated by the Commission.

28. In this respect, as an additional important means of coordination among public and private enforcers, Legislative Decree no. 3/2017 transposed the Antitrust Damages Directive providing that also a finding of an infringement by AGCM is binding on the specialized Courts and that a finding of an infringement by a Competition Authority of another Member State of the European Union constitutes at least *prima facie* evidence before the Italian Courts<sup>19</sup>.

29. However, this could occur only when these findings become *res judicata*, meaning that they are no longer subject to appeal.

30. This binding effect/evidentiary value refers to the existence of the unlawful conduct, of the offender and of how the unlawful conduct was performed<sup>20</sup>. Thus, in follow-on actions, the said specialized Courts will still have to: (i) ascertain the existence of a causal link between the damages claimed by the plaintiffs and the findings of the public enforcer; (ii) deal with the quantification of damages<sup>21</sup>.

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<sup>17</sup> See Article 17 para. 3 the Directive (article 14, paragraph 3 of the Legislative Decree no. 3/2017).

<sup>18</sup> Recently the AGCM acted as *Amicus curiae* against a decision of the Tribunal of Rome, which on 6 April 2017 granted interim measures aimed at blocking UberBlack services in Italy following a suit by an association of taxi-drivers. The Judges of Appeal reversed the Tribunal’s decision on 26 May 2017.

<sup>19</sup> See Article 9 of the Directive (Article 7 of the Legislative Decree no. 3/2017).

<sup>20</sup> See Article 7 paragraph 1 of Legislative Decree no. 3/2017.

<sup>21</sup> Even before the transposition of the Antitrust Damages Directive, in Italy the binding effect of administrative decisions was already recognized *de facto*. In particular, according to the Supreme Courts case law, it has been constantly affirmed, since ruling no. 2305 of 2 February 2007, that AGCM’s decisions shall be considered as “privileged evidences”. A relevant number of these judgement by the Supreme Court regard the follow-on actions for damages relief following the

#### 4. Interaction between the Italian Competition Authority and the Italian Courts

31. The AGCM believes that active engagement with national Courts is crucial to ensure mutual understanding and further improve the techniques of judicial scrutiny.

32. From 2014 to 2016, the AGCM carried out a training project for Italian and French judges on competition rules in the European Union, co-financed by the European Commission. The project was led by the Italian Competition Authority and co-organised by two major Italian judicial bodies, namely the Council of State and the Scuola Superiore della Magistratura (National School of the Judiciary), which is the public body enjoying exclusive competence for the training of the Italian civil and criminal judges. Pursuant to Italian law, the Scuola Superiore organizes both induction courses for new judges and advanced training for all judges.

33. The main objective pursued by the project was to provide bespoke advanced training to selected national judges who were already familiar – at least to a certain extent – with the fundamental tenets of economics concepts and methodologies relevant to competition enforcement. Accordingly, the project was intended to familiarise national judges with the theoretical and practical instruments to deal with competition cases entailing complex economic assessments, thus contributing to increase legal certainty, promote efficiency and foster consistency across the EU.

34. Speakers at the events included the President and the Vice-President of the Council of State, Commissioners of the Italian Competition Authority, senior judges, as well as academics in both EU and antitrust law. Seminars focused on case studies and encouraged a lively interaction between the organizing institutions and the judges. Furthermore, participants had the opportunity to expand their knowledge thanks to a dedicated Internet site that provided didactic material as well as a forum that enabled an open discussion with the trainers and the other participants.

35. A second project, under the heading “Antitrust economics for judges”, focused on the role of economics in the competition assessment, with the aim to provide judges with a technical expertise in the face of increasingly complex antitrust analysis. The final session of the project, held in 2016 on the premises of the Council of State, consisted of a mock trial, in which participants were encouraged to confront themselves with several aspects of a complex antitrust case.

36. The results achieved by the projects were twofold. On the one hand, the projects enabled national judges to properly assess economic evidence and arguments when reviewing the legality of decisions issued by the national competition agency, as well as when adjudicating private claims involving competition-related issues. On the other hand, they provided national judges with advanced training on selected competition issues, notably market definition and market power, the economics of unilateral conduct, the judicial review of complex economic assessments in merger cases and antitrust damages actions.

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AGCM’s decision on a cartel in the car insurance market. See *ex multis* Corte di Cassazione, judgement of 28 May 2014 no. 11904; Civil Section I, judgement of 30 May 2014 no. 12186; Civil Section III, judgement of 23 July 2014 no. 16786.

## 5. Conclusions

37. The development of the competition case law in Italy seems to confirm that the Italian administrative Courts, while not being specialised in the competition realm, are fully aware that antitrust disputes typically imply a thorough economic analysis, and take it in due account.

38. The organizational choice to concentrate antitrust disputes on specific chambers has clearly contributed to form a pronounced sensitivity for sophisticated economic reasoning, economic theories and methods underpinning competition policy.

39. The recent transposition of the Antitrust Damages Directive into the national legislation will certainly contribute to the development of private enforcement in Italy and provide further opportunities for fruitful interaction between the AGCM and the specialized Courts.

40. Moreover, the fruitful training experience coordinated by the Italian Competition Authority proved that Italian judges are eager to participate in capacity building initiatives, particularly when they follow a case-based approach, whereby judges have the opportunity to discuss the practical aspects of real-life scenarios and to address typical challenges faced in competition review.

41. Providing also specialized courts with similar training programs on specific aspects of competition law and policy could facilitate an harmonious development of private antitrust enforcement.

42. In the past, the Italian Competition Authority had been reluctant to engage in training projects for judges, in light of the role that the Council of State and TAR Lazio play vis-à-vis its decisions. However, the involvement of the National School of the Judiciary enabled to overcome the hesitancy, insofar as the AGCM could cooperate with the public body responsible for the training of the Italian judges.

43. For its part, the AGCM engaged in an effort to simplify the drafting of its decisions, whereby it endeavours to present the logical process followed in the most clear and effective way. It is far from easy to reflect the outcome of an extensive and complex investigation through a clear, synthetic illustration, but it is crucial to avoid unnecessary sophistication and ensure that the AGCM's reasoning is fully understood by all stakeholders, including the judiciary.

44. It remains to be seen how the case law will further develop to factor in the new issues and challenges raised by technical innovation, particularly in the digital realm. The availability of huge amounts of data and advanced data processing systems is affecting business models and competitive dynamics. Indeed, detection and substantiation of cartels might become increasingly hard, since algorithms may facilitate interaction and mutual monitoring, thus rendering collusion easier and swifter. By the same token, the assessment of market power may be more difficult in the fast-changing digital realm; likewise, big data may raise novel competition concerns in mergers and complicate the distinction between pro- and anti-competitive effects of online vertical relationships.

45. All these new topics are deemed to represent an additional area of interaction between competition authorities and Courts, who will both need to gain a sound understanding of the implications of impetuous technical advancements on competition.