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Information exchanges between competitors: the Italian Competition Authority's recent practice

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Abstract

In 2004, two cases on exchanges of information between competitors were decided by the Italian competition authority ("AGCM" – the Autorità Garante per la Concorrenza ed il Mercato). This revived a lively debate on the conditions in which these practices should be prohibited and whether they are anticompetitive per se. Over the years, the AGCM has taken a firm stand against such practices, in some cases beyond that taken by the European Commission and the European Court. This article reviews the rules and outlines the innovative approach that the AGCM has recently adopted.

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Exchanging information

Information exchanges between competitors: the Italian Competition Authority's recent practice

By **Antonio Capobianco and Stefano Fratta**, *Wilmer Cutler Pickering Hale and Dorr LLP**

In 2004, two cases on exchanges of information between competitors were decided by the Italian competition authority ("AGCM" – the *Autorità Garante per la Concorrenza ed il Mercato*). This revived a lively debate on the conditions in which these practices should be prohibited and whether they are anticompetitive *per se*.

Over the years, the AGCM has taken a firm stand against such practices, in some cases beyond that taken by the European Commission and the European Court. This article reviews the rules and outlines the innovative approach that the AGCM has recently adopted.

AGCM's case law on information exchanges

In the early years of its enforcement practice, the AGCM largely followed EU rulings, relying mainly on two factors:

- (i) the type and quality of the information exchanged, and
- (ii) the structure of the market on which the participants to the exchange are active

More specifically, the AGCM has usually taken the following elements into account:

- *The subject matter of the exchange:* Confidential information on the essence of the business, such as prices, quantities and commercial strategies, cannot generally be disclosed to competitors. The AGCM carries out a case-by-case assessment of exchanges of information on other matters, such as product deliveries, deliveries to customers, capacity utilisation, output and sales figures, and market shares.
- *The level of detail:* This influences competitors' ability to coordinate their market strategies. The greater the detail, the greater the possibility of predicting another's future conduct and of adjusting conduct accordingly. In general, the AGCM does not object to the dissemination of aggregated data that does not allow individual companies' information to be identified, although it has not indicated a minimum level of aggregation needed to prevent an antitrust investigation. Case by case, the degree of aggregation should be sufficient to prevent identification.
- *Frequency of exchange:* Companies can adapt their commercial policy to their competitors' strategies better and in a more timely fashion if data exchanges are more frequent.
- *The nature of the products in question:* It is easier for companies to coordinate prices in homogeneous product markets. In differentiated product markets, access to detailed sensitive information about competitors may not be as useful in predicting their future behaviour.
- *The level of concentration in the market:* According to the traditional approach of the Commission and the European

Court, the more concentrated a market, the easier it is for competitors to find and enforce sustainable coordination. The AGCM is extremely careful in reviewing exchanges of information in oligopolistic markets, particularly if these are protected by high entry barriers.

While this approach is in line with the Commission's practice and the case law of the European Courts, in some recent cases the AGCM has departed from it and has adopted a different and innovative view.

"Philip Morris/Cigarette Retailers"

The facts

In February 2003, Philip Morris (PM) notified the AGCM of a standard agreement that PM intended to enter with a significant number of tobacco retailers. According to the agreement, retailers had to transmit to PM, on an exclusive basis, information on the sales volumes of their outlets, and notably information on

- (i) PM's daily sales volumes by brand,
 - (ii) the retailer's daily aggregated sale volumes, and
 - (iii) the daily sales of each cigarette brand sold by the retailer.
- PM was to receive such information monthly.

The AGCM decided to open an investigation on the ground that PM would gain a competitive advantage *vis-à-vis* its competitors by foreclosing access to the same or a comparable set of detailed and sensitive information on the sale of cigarettes in Italy. It considered that PM's initiative, which would give it detailed exclusive information on its competitors' sales on a daily basis, might go beyond what was necessary for PM to monitor its own business trends. Indeed, the investigation showed that the retailers selected by PM represented the best statistical group for such an exercise because of their number, size, location and type of business. The exclusivity clause clearly prevented competitors from replicating a similarly representative set of retailers.

In the course of the investigation, PM removed the exclusivity, thus eliminating the main vertical concern raised by the AGCM. At the same time, PM argued that the agreement had procompetitive effects, in particular that it would generate distribution efficiencies, such as avoidance of the stock disruption that is the main factor driving demand towards competing brands.

The decision

In June 2004, the AGCM concluded that PM's standard agreement did not infringe the Competition Act (*Bolletino 24 of 2004*). The AGCM was confronted by an unusual situation. There was no direct exchange of information between competitors (*i.e.* no

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direct horizontal effects) as the exchange took place between companies at different levels of trade. Nevertheless, the agreement could indirectly affect horizontal competition between cigarette suppliers since it concerned sensitive information relating to the market for the sale of cigarettes.

The AGCM's analysis of the relevant market is not very detailed. It concluded that:

- The Italian market for the sale of cigarettes is extremely concentrated – HHI 4,569 in 2000 and 4,480 in 2003 (*AGCM's findings in BAT/ETI, Bollettino 51 of 2003*).
- The market had been affected by anticompetitive practices for many years. In particular, the AGCM had previously found that PM and ETI (the former national monopoly, now privatised and acquired by BAT – British American Tobacco) had colluded to prevent competitors from growing in the Italian market (*AGCM's findings in tobacco prices investigation, Bollettino 11 of 2003*).
- For about a decade, PM had been the leading operator and, together with ETI, had held a collective dominant position with a combined market share in the range 90% (*AGCM's findings in BAT/ETI*).
- The market is characterised by a significant degree of transparency concerning prices, which are regularly published in the *Official Journal*. Transparency as to volume is less, since Etinera (ETI's subsidiary which distributes cigarettes nationwide on a *de facto* monopoly basis) only disseminates aggregated statistics to the market participants.
- After ETI's privatisation and sale to BAT, the conditions of competition improved considerably. PM has experienced a significant reduction in its market share, mainly to the benefit of BAT.

The withdrawal of the exclusivity clause had already eliminated most of the AGCM's concerns on foreclosure of the market for the acquisition of information from the tobacco retailers. The decision therefore focused on the effects of enforcement of PM's standard agreement on the market for the sale of cigarettes.

The AGCM took a positive view of the notified agreement. In particular, it noted that acquisition of information in such a detailed and systematic fashion could allow more efficient monitoring of demand trends on both a geographic and a point-of-sale basis. It concluded that the agreement could contribute to better product distribution and brand positioning.

In support of its non-infringement decision, the AGCM noted that market conditions had significantly changed during the investigation:

- the second and third largest suppliers after PM (BAT and ETI) had merged, creating the second largest operator. As a result, PM's market share had decreased by about 10%, while BAT's market share had risen.
- Through its merger with ETI, BAT had acquired access to sensitive and extremely detailed information on its competitors' sales through its distribution subsidiary, Etinera.
- The AGCM decided to clear BAT's acquisition of ETI subject to conditions during the course of its investigation of the PM standard agreement, which it had suspended. In particular, it concluded that the conditions imposed on BAT would eliminate the situation that had allowed the collective dominant position held by PM and ETI to be sustained.

In the light of all these factors, the AGCM concluded that the standard agreement would allow PM to respond more appropriately to the competitive threat represented by BAT's ability to operate on the basis of detailed market knowledge acquired through Etinera. In other words, the AGCM maintained that the agreement would allow the creation (or the re-creation, after BAT's acquisition of Etinera) of a "level playing field" between PM and BAT as far as the detailed knowledge of the Italian market for the sale of cigarettes was concerned.

Comment

The situation was unusual – a vertical agreement capable of having direct horizontal effects. Nevertheless, the decision is based on an unsupported assumption that PM would use the information acquired through the agreement to compete rather than to collude, despite the fact that the market is highly concentrated and involves a homogenous product.

An interesting feature of this decision is the analysis – or rather the lack of analysis – of the relationship between PM's market power and the artificial market transparency created by its system. In the contemporaneous investigation of the BAT/ETI merger, the AGCM concluded that PM was no longer collectively dominant with ETI. However, no discussion whatsoever can be found on whether PM might now hold a single dominant position.

This is an important factor in view of the European Court's ruling in the *AKZO* judgment ([1991] ECR I-3359) that it is abusive to require customers to supply sensitive details about competitors with the purpose of gaining a competitive advantage over them. According to the Court, such a practice is not a normal means of competition and may result in violation of the competition rules.

Another issue raised by the decision is whether the outcome of the case would have been the same had a similar set of information been exchanged directly between the cigarette manufacturers (*viz* between PM and BAT, which together control nearly all the Italian market) rather than through a vertical agreement with the retailers.

The reasoning followed by the AGCM to demonstrate that the standard agreement would generate procompetitive effects seems to plead in favour of a positive answer to this question. On the other hand, an extensive interpretation of this decision would lead to the conclusion that any, or most, information exchanges between competitors could be justified by the increased transparency that allows the parties to respond more appropriately to the competitive threat and to operate on the basis of a better and more detailed knowledge of the market.

Finally, there is no discussion in the AGCM's decision on whether the increased transparency created by the agreement to the sole advantage of PM may facilitate exclusionary anti-competitive practices in this market.

In particular, the decision makes it clear that only PM (through the notified system) and BAT (through its distribution subsidiary, Etinera) will have access to detailed information on competitors' sales, while their competitors – with only 10–20% of the market – will have access to the limited set of aggregated information disseminated by Etinera according to their distribution agreement. It was not discussed whether PM and BAT will have information that might allow them to anticipate, and so defeat, competitive moves from

fringe competitors, thereby chilling competition in the market.

A comparative reading of this decision and the decision in the BAT/ETI merger case clearly shows that the AGCM used these proceedings to “remedy” the failure to impose the divestiture of Etinera on BAT as a condition for clearing the acquisition of ETI, a remedy that PM formally asked for in the proceedings (*BAT/ETI, Bollettino 51 of 2003, para 34*).

Imposition of such a condition on BAT could have jeopardised the successful privatisation of ETI, depriving BAT of one of ETI’s crown jewels. It can be concluded that the AGCM’s rationale was dictated by industrial policy goals, *i.e.* to level the playing field between the two giants of the tobacco industry, allowing them to compete on the basis of the same detailed market information.

“Iama Consulting”

The facts

Following separate notifications by two Italian insurance companies of their agreements with Iama Consulting for the acquisition of Aequos, a database containing detailed information on life assurance and pension insurance products, the AGCM opened an investigation. This was quickly extended to all insurance companies that had acquired the database.

The Aequos database offered the buyer access to sensitive information on all insurance and pension products available on the Italian market. That information was disaggregated (*i.e.* available for each product separately) and was released to the buyer on a quarterly basis. According to the initial notifications, the information contained in Aequos was publicly available and was taken from documents provided by insurance companies to customers.

In October 2003, the AGCM decided to open an investigation on the ground that the information contained in Aequos and the products offered by Iama Consulting were current, detailed and sensitive information on individual competing products, the dissemination of which could alter the conditions of competition in the market and could facilitate forms of horizontal coordination between insurance companies.

The decision opening the investigation (*Bollettino 41 of 2003*) makes a straightforward statement on the potential anti-competitive effects of an exchange of publicly available information when the individual costs for each market participant to collect such information are high. According to the AGCM, reduction of the cost of collecting the information in such situations will not generate efficiency gains to the benefit of consumers but will increase incentives to collude on the basis of the common information.

The decision

In September 2004, after an in-depth investigation, the AGCM prohibited the acquisition of Aequos by the insurance companies as it was a concerted practice for the horizontal exchange of sensitive information between insurance companies, contrary to the Italian Competition Act (*Bollettino 40 of 2004*).

The structure of the relevant market was moderately concentrated (CR4 56%, HHI 1000) but characterised at the same time by a certain instability in market shares. This could indicate the existence of competition. The nine insurance companies that had acquired the Aequos database held a combined

market share of 75% in the market for life insurance products. Contrary to what the parties had asserted in their notifications, the investigation revealed that:

- The information contained in the Aequos database was supplied to Iama Consulting by the insurance companies themselves, and was not independently collected from the market by Iama Consulting. This firm simply processed the information received, adding little to it before selling it to the insurance companies. The AGCM concluded that the exchange of information could qualify as a restriction of competition in the form of a concerted practice between competitors.
- The information contained in Aequos had an added value in comparison with the information that individual insurance companies could collect directly from the market and from public sources. While some had a public nature (prices and conditions of the policies), the data were not in the public domain in as far as they were not immediately and easily accessible to the insurance companies at little or no cost.
- Consumers could not buy the Aequos database. It was a product reserved to insurance companies. This circumstance restricted the advantages of the increased transparency to suppliers alone. The AGCM found this to be evidence of the anticompetitive purpose of the exchange.

The AGCM concluded that the parallel acquisition of the Aequos database by a large number of insurance companies amounted to an anticompetitive exchange of information on the ground that it was likely to encourage collusion between the parties.

Comment

Three aspects of the decision are of a particular interest:

1. The irrelevance of the public nature of the information exchanged when the cost of collecting such information is high: The European Courts have held that the exchange of publicly available information should not be considered an infringement of EC competition rules. In its recent judgment on the *TACA* case (*Atlantic Container Line v Commission*), the CFI was asked to review the Commission’s conclusion that an exchange of public information was an infringement of article 81 EC. The Court noted that, if the information is in the public domain as a result of a compulsory publication or if it can be easily deduced from publicly available information, its disclosure between competitors cannot be considered an infringement.

In the *Iama Consulting* decision, the AGCM considered that the fact that the information was obtained by Iama Consulting directly from the different insurance companies indicated that the information itself was not in the public domain. If the information was readily available, there would be no reason to set up a costly exchange system.

It is also interesting to note that, in the decision to open the investigation, the AGCM introduced the idea that the collection of publicly available information by an independent third party for sale to competing companies could in itself amount to an infringement of competition rules. Although the investigation disclosed that the information set used to build the Aequos database was not all publicly available, the *obiter dictum* remains and puts the AGCM at the forefront of enforcement in this area.

2. Transparency on the supply side versus transparency on the demand side: The AGCM found that the exchange of information was beneficial only to the insurance companies (supply side) and had no efficiency effect on the demand side since consumers and/or their associations had no access to the Aequos database.

The AGCM suggested that, if the market transparency achieved extends also to the benefit of consumers, this may generate positive effects on competition capable of counterbalancing any collusive effects created by the increased transparency on the supply side, basing this on a twofold argument:

- The fact that consumers benefit from greater market transparency renders the demand more elastic, which generally leads to a lower price equilibrium.
- The increased elasticity of demand perceived by competitors may, in a dynamic context, undermine any potential collusive practice. In particular, transparency on the demand side facilitates the comparison between the different offers and thus increases the number of consumers who will acquire the more suitable product. At the same time, the increased elasticity creates an incentive for companies to abandon the collusive behaviour and autonomously lower their prices. This incentive effect is considerable, and generally overrides the negative effect that may be generated by greater elasticity of demand – a more elastic demand makes it easier to punish deviating companies through a lowering of prices.

The AGCM's reasoning seems to be generally applicable to any exchange of information that increases transparency on the demand side. Even if it is formulated in cautious language, the AGCM has probably generalised a defence for companies involved in information exchanges. If the information collected is made available to the general public, there is now a presumption that such an exchange is not anticompetitive. This expands on what the European Courts have already said – the communication of the exchanged information between the suppliers to the buyers may counterbalance the anticompetitive effects of the exchange and thus render the practice compatible with competition rules.

3. The exchange of information may have anticompetitive effects in non-concentrated markets also: In this respect, the AGCM referred to its previous *RC Auto* decision where it decided that the exchange of information between competing insurance companies in a non-concentrated market could be a restriction of competition. In its decision (*Bollettino 30 of 2000*), the AGCM argued that even in non-oligopolistic markets an exchange of information may be restrictive of competition if it concerns prices and if consumers do not benefit from the greater transparency.

The *Iama Consulting* decision confirms that, according to the AGCM, the fact that an exchange of information takes place in a relatively non-concentrated market cannot be used to argue that the exchange of information has no anticompetitive effects. In addition, the AGCM explicitly confirmed that exchanges of information are more necessary to ensure the stability of a collusive agreement in a non-concentrated market, where the costs of collecting information and monitoring the strategies of competitors are higher than in concentrated oligopolistic markets.

This position has no precedent in Commission or European Court practice. On the contrary, this has established a

presumption of legality when the exchange of information concerns products in competitive markets (e.g. Commission's decision in *UK Agricultural Tractor Exchange*, OJ 1992 L68/19, para 37, and CFI judgment in *J Deere v Commission* [1994] ECR II-957, para 49).

The AGCM's practice therefore shifts the burden of proof for the companies involved. According to EU case law, the investigating authority has the burden of demonstrating that, notwithstanding the existence of a non-concentrated market, the exchange may nevertheless have a restrictive effect on competition. By contrast, according to the AGCM's *Iama Consulting* decision, the existence of a coordinated exchange of information on a non-concentrated market is an additional presumption that goes towards proof of the anticompetitiveness of the practice in question.

Conclusions

The two decisions are symptomatic of an innovative approach adopted by the AGCM on the exchange of information between competitors. The new element that distinguishes the AGCM's recent analysis from existing case law on the subject is the assessment of the reaction of demand to a potential collusive equilibrium on the supply side. However, the AGCM's position remains consistent with the general understanding that exchanges of information should be prohibited as such only when they are likely to contribute to a tacitly collusive agreement. If demand is sufficiently elastic to react to a concerted price increase, it will undermine the stability of any tacit coordination.

Economic analysis can also explain the apparently divergent approaches that the AGCM has taken in the two decisions described in this article. In the *PM* decision, it considered that the agreement had procompetitive effects even if it affected a highly concentrated market. On the other hand, in the *Iama Consulting* decision, it considered that the increased transparency of the market created by the concerted practice could have anticompetitive effects even if the market was characterised by low concentration and relative competition.

If the two decisions are reviewed in the light of the potential reaction of consumers, however, it is apparent how the analysis of the demand was indeed the driving factor in both cases. In the *PM* case, the existence of complete price transparency allowed customers to compare brands easily and to switch producers in case of price rises. Accordingly, the AGCM could clear the agreement even if it gave rise to significant artificial transparency in a highly concentrated market.

By contrast, in the *Iama Consulting* decision, the demand was not elastic and customers were unable to undermine the stability of a potential collusive equilibrium transparency. Transparency, therefore, was considered to be an additional tool for the creation of collusion in the market. As a result, the AGCM prohibited the exchange.

This may prove to be a hot topic for discussion also among the European Commission and other competition authorities in the EU, since it anchors economic analysis in the still rather formalistic approach to competition assessment taken by the Commission and Court. The AGCM has thus contributed to one of the main aims of the modernisation of competition enforcement in Europe.