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Third Edition

Editor

Shaun Goodman

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EDITOR'S PREFACE

While 2010 largely represented a return to 'business as usual' for the US and EU authorities following the challenges of 2009 in responding to the financial crisis, the year also saw the arrival of a number of new players on the antitrust enforcement stage.

Foremost among this new breed is the Competition Commission of India ('CCI'), which took rein of its functions in March 2009, charged with investigating all trade-related competition disputes in India. In its first decision, adopted in December 2010, the CCI rejected a complaint that banks and home finance companies in India had acted anti-competitively by imposing prepayment penalties on borrowers switching lenders to obtain improved rates or facilities. The decision displays an admirable confidence for a new regulator, choosing to adopt as its first decision not only a finding of non-infringement, but also one that has apparently attracted the ire of the banking regulator, the Reserve Bank of India. With a compendium of ongoing cases across a diverse range of sectors including cement, glass, sugar, air transport and oil, the CCI looks set to assert its authority from the outset.

More established, but no less active, is Russia's Federal Antimonopoly Service ('FAS'). According to recent statistics published by the FAS, the authority initiated a staggering 5,437 competition cases during the first six months of 2010, including 1,289 cases related to abuse of a dominant market position, 277 cartel cases, 2,907 cases of anti-competitive actions by public authorities and 427 cases of unfair competition. Notable among the FAS's early successes was its decision of December 2010 finding that three companies engaged in the production and wholesaling of power-generating coal had infringed the Competition Act by participating in anti-competitive agreements aimed at fixing prices for power-generating coal and allocating the market among themselves. Criminal proceedings have also been initiated in the same case by the Ministry of the Interior. The case is notable as the first occasion on which the FAS has investigated

and proved a cartel existed in close cooperation with the Ministry, and on the basis of materials and information obtained through investigative activities, including court-sanctioned interception of telephone communications.

Not to be outdone, during the last week of 2010, two of China's antitrust enforcement agencies, namely the National Development and Reform Commission ('NDRC') and the State Administration for Industry and Commerce ('SAIC') respectively issued the long-awaited rules implementing the Anti-monopoly Law of the PRC ('AML'). These new rules clarify key areas of the agencies' antitrust enforcement practice, in particular, the constituent elements of monopoly agreements and abuse of dominance, and the defensive justifications potentially available to undertakings. The rules also provide practical guidance on investigative procedures, the leniency programme and delegation of investigation powers, and address certain key concerns. The new rules, which came into force on 1 February 2011, represent a significant milestone in the effective enforcement of the AML.

These developments confirm the increasingly global nature of public antitrust enforcement, and reinforce the importance of cooperation and convergence at all levels, both public and private.

As ever, I would like to thank all of the contributors for their support and cooperation in the preparation of this Review, and the publishing team at Law Business Research for their encouragement and enthusiasm.

Shaun Goodman
Kirkland & Ellis International LLP
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June 2011

Chapter 22

ITALY

Marco D'Ostuni and Kostandin Peçi[*]

I OVERVIEW

Articles 2 and 3 of the Italian Competition Act (Law No. 287/90) prohibit, respectively, restrictive agreements and abuses of dominant position. These provisions are analogous to Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU'). National competition rules apply in residual cases, when the infringements do not affect trade among Member States.

Both European and national competition rules are enforced in Italy by the Italian Competition Authority ('AGCM'). The AGCM is an independent institution that was established in 1990 by the Italian Competition Act. It consists of the Authority (i.e., a collegial body with decision-making powers, whose members are appointed jointly by the Presidents of the Italian Chamber of Deputies and Senate), and the Authority's staff (i.e., the officers conducing the investigations). The AGCM's enforcement powers include the power to: request information to undertakings; conduct dawn raids (exclusively) at the undertakings' premises, adopt interim measures; render binding the commitments proposed by undertakings under investigation; and impose fines up to ten per cent of the undertaking's turnover during the previous financial year. The final decisions of the AGCM may be appealed before the Italian Regional Administrative Court for Lazio ('TAR Lazio'). Finally, the AGCM adopts an annual report, normally by mid-June of each year, where it summarises its enforcement activities during the previous year.

The AGCM also plays an important role in increasing antitrust advocacy in Italy. In particular, the AGCM may notify the Italian Parliament, the Prime Minister and/or other administrative governing bodies of distortions of competition caused by legislation or other administrative provisions.

In 2007, the AGCM has been entrusted with the task of enforcing the rules on the prohibition of unfair commercial practices.

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II CARTELS

i Enforcement of anti-cartel rules

In 2010, the the AGCM adopted eight decisions under Article 101 TFEU. In four cases, the infringements were considered very serious and fines were imposed; in three cases, the AGCM accepted the commitments proposed by the parties involved, while in only one case did it choose to adopt a non-infringement decision. The AGCM also issued one infringement decision pursuant to Article 2 of the Italian Competition Act.

In *Domestic LPG Cartel*, the AGCM found that, between 1995 and 2005, three leading Italian companies, active in the Italian retail market of liquefied petroleum gas ('LPG') for domestic use, had entered into an agreement contrary to Article 101 TFEU. In particular, according to the AGCM, the companies had agreed to align their price lists, so as to reduce the impact of fluctuations in the international price benchmarks for raw materials and to keep LPG prices higher. The investigation showed that the companies' top management had regularly met in order to determine concerted price adjustments and monitor the cartel enforcement. The AGCM's case heavily relied on a leniency application filed by a cartel participant, which was granted full immunity from fines. However, AGCM also carried out an analysis showing that the parallel variation of the price lists could only be explained by the existence of a cartel.

In *Cosmetic Products*, the AGCM found that, between 2000 and 2007, several cosmetic manufacturers and the national trade association for branded consumer products had entered into a single and complex agreement aimed at exchanging sensitive information and coordinating commercial strategies in relation to retailers. In particular, information concerning future price increases, rebates and contractual conditions applied to retailers was principally exchanged during trade association meetings and through distribution channels set up by the trade association. According to the AGCM, the exchange of information reduced each manufacturer's uncertainty as to the commercial strategies of its competitors, thus allowing for coordinated price increases. The AGCM held that the coordination had actually led to a price increase above the inflation rate. The proceedings were initiated after a leniency application was filed by one of the manufacturers.

In *MasterCard*, the AGCM fined MasterCard and eight banks (which were licensees and members of the MasterCard circuit) for stipulating:

a a horizontal agreement aimed at defining multilateral transactions' interchange fees applied to domestic card payments ('Domestic MIF'); and

b vertical agreements allowing the banks to pass on the Domestic MIF to merchants and, thus, to final consumers.

According to the AGCM, the MasterCard circuit qualified as an association of undertakings, because the member banks participated directly and indirectly in its governance bodies. Thus, the joint setting of the Domestic MIF amounted to a restrictive agreement under Article 101 TFEU, without any economic justification. The AGCM also held that the restriction of competition was further strengthened by the vertical agreements entered into individually by MasterCard and its licensee banks, because these agreements allowed banks to transfer uniformly the Domestic MIF to merchants, as well as to include clauses in the contracts with the latter encouraging the diffusion

of MasterCard cards. As a result, the AGCM concluded that the agreements distorted competition among acquiring banks, potentially increased merchants' costs when accepting payment cards and, ultimately, raised consumer prices. However, on appeal by several parties, TAR Lazio suspended this decision.

In *Geologist Fees*, AGCM found that the national association of geologists had infringed Article 101 TFEU, by adopting rules that induced its members to apply the minimum fees recommended by the association for their services. The case followed the AGCM 2009 market investigation on competition in the professional consultants sector and shows the AGCM's commitment to challenging those professional association rules which could hinder the liberalisation process started in 2006.

In *Transcoop Bus*, adopted pursuant to Article 2 of the Italian Competition Act, the AGCM found that several by-laws of Transcoop Bus, a consortium of undertakings specialised in transport services for physically-challenged persons in Reggio Emilia, restricted competition. According to the AGCM, the exclusivity and non-compete clauses, as well as the clause regulating withdrawal from the consortium, deprived its members of the possibility to exit the consortium and independently market their own transport services in competition with Transcoop Bus.

ii First cases on the application of the Italian leniency notice

In the *Domestic LPG Cartel* and *Cosmetic Products* decisions, the AGCM formally applied for the first time the 2007 Italian leniency notice. These cases confirm the effectiveness of leniency programmes in detecting and combating hard-core restrictions.

In *Domestic LPG Cartel*, the leniency application filed by one of the companies involved allowed the AGCM to extend the scope of its initial proceedings from infringements that allegedly took place in the regional market of Sardinia to hard-core restrictions taking place at the national level. Moreover, the oral statements provided by employees of the leniency applicant turned out to be crucial for the case, as the members of the cartel had been careful to eliminate any written record of their meetings and arrangements. Due to the absence of any 'smoking guns', the AGCM carried out its own analysis on parallelism of the conducts of the cartel members in order to prove the events alleged by the applicant. This purportedly reduced the benefits, in terms of time and resources spent for building the case by the AGCM, which normally derive from the leniency application. However, this reduced benefit was offset by the fact that it would have been extremely difficult for the AGCM to build a sound case without a leniency application.

Unlike the *Domestic LPG Cartel* decision, in *Cosmetic Products* the proceedings were initiated in the wake of a leniency application filed by one of the members of the cartel, which was granted full immunity and supported by applications filed by two other companies, which received fine reductions. Therefore, this case represents a clear example of the benefits that both the AGCM and the applicants could derive from the leniency mechanisms.

These cases shed light on a number of issues related to the application of the 2007 Italian leniency notice.

First, it is now clear that the AGCM may refuse, *ex officio*, access to a leniency applicant's oral statements. In particular, in *Cosmetic Products*, without a previous

confidentiality request from the leniency applicant, the AGCM refused to make accessible part of the latter's oral statements to the other parties to the proceedings, because the information contained therein either exceeded the scope of its investigation or was in any event irrelevant. The AGCM decision was upheld by Italian administrative judges, who recognised that, as a general principle, the AGCM may decide *ex officio* which documents in the case file are confidential.

The *Cosmetic Products* decision also reveals the AGCM's current willingness to grant more generous fine reductions than those envisaged by the 2007 leniency application notice, in order to reward full cooperation from the companies involved. In particular, the AGCM further reduced the fine levied on the third leniency applicant, who had already benefited from a 40 per cent reduction pursuant to the 2007 Italian leniency notice, because the company had reported aspects of the infringement in which it had not participated directly.

III ABUSE OF DOMINANT POSITION

i The enforcement of the provisions prohibiting abuse of dominant position

In 2010, the AGCM adopted 13 decisions under Article 102 TFEU. In only one case did the authority issue an infringement decision and impose a fine against the undertaking being investigated. In two cases, it closed proceedings initiated in compliance with a TAR Lazio decision, because in the meantime the latter had been reversed by the Italian Supreme Administrative Court. In the remaining 10 cases, the AGCM accepted the commitments proposed by the parties involved. The AGCM also closed by commitment decision one case of possible abuse under Article 3 of the Italian Competition Act.

The only case in which the AGCM issued a full decision (*Plasterboard market*) concerned the adoption by Saint-Gobain PPC Italia SpA ('Saint-Gobain') of a strategy aimed at hindering entrance of a new competitor (Fassa) in the market for plasterboard production in the centre/north of Italy. Specifically, AGCM held that Saint-Gobain had abused its dominant position in the plasterboard market by intentionally interfering in the negotiations between Fassa and the owners of land where Fassa planned to build its production plants. According to AGCM, Saint-Gobain had falsely showed interest in the same properties only to disrupt negotiations between Fassa and the landowners, had actually purchased one piece of land only to subtract it to Fassa and had induced several neighbouring farmers with preemption rights on the land to initiate legal actions aimed at impeding the acquisition of the same land by Fassa.

ii Increase of Italian administrative courts' scrutiny on AGCM commitment decisions

2010 statistics confirm the AGCM's tendency to close the great majority of its proceedings, especially Article 102 TFEU cases, by means of commitment decisions. This trend has captured the attention of Italian administrative courts, which after a period of deference, have recently started to scrutinise the AGCM's commitment decisions more in depth.

In *Lega Calcio*, the AGCM had accepted the commitments proposed by the Italian league of football clubs with respect to certain features of the centralised marketing of the Serie A and Serie B championship TV broadcasting rights, which had raised competitive

concerns. However, on appeal by a consumer association, TAR Lazio annulled the AGCM decision both on procedural and substantive grounds. In particular, TAR Lazio held that, by not publishing on its website the final amendments made by Lega Calcio in response to the market test results on its initial set of commitments, the AGCM had violated the notice on commitments procedure adopted by the AGCM itself pursuant to Article 14-ter of Law No. 287/90. The TAR Lazio's reasoning distinguished between ancillary post-market test amendments, which allegedly do not need to undergo a new market test, and material post-market test amendments, in relation to which the AGCM is obliged to run a new market test. On substantive grounds, TAR Lazio held that the commitments proposed by Lega Calcio were manifestly not able to satisfy the competitive concerns raised in the AGCM decision to initiate proceedings against Lega Calcio. As a matter of general principle, TAR Lazio maintained that the commitments proposed by the parties should always address the initial competitive concerns raised by the AGCM, in compliance with the principle of proportionality. Indeed, in its 2009 *Motorway Assistance Services* decisions, TAR Lazio had already observed that commitments should not go beyond what is necessary to remedy such concerns, in order to neutralise any risk that the AGCM, through its commitment decisions, exceeds its powers and acts like a market regulator.

In *MasterCard*, the Italian administrative judges annulled for the first time a decision by the AGCM rejecting commitments. The AGCM had refused a set of commitments whereby MasterCard would adopt certain actions (basically a reduction in domestic interchange fees) only until the General Court issued a decision in the *MasterCard v. European Commission* case. According to the AGCM, these commitments were not acceptable because they were merely temporary, not supported by any serious economic analysis (particularly as to the level of proposed fees) and subject to MasterCard's unilateral right of withdrawal under certain conditions. Shortly thereafter, TAR Lazio partially annulled the AGCM's decision. In particular, the court found that the temporary nature of the commitments was objectively justified, because the outcome of the *MasterCard v. Commission* case would likely have an impact on the matter. Furthermore, TAR Lazio held that the AGCM had been wrong in rejecting MasterCard's proposal without even requesting MasterCard to explain the economic rationale of the commitments. On the other hand, the administrative judges upheld the AGCM's argument that MasterCard's right of withdrawal would run counter to the very nature of the commitment mechanism, because it allowed the committed party to unilaterally avoid its obligations.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Market investigations

In 2010, the AGCM initiated a market investigation on the audio-visual sector aimed at identifying any obstacles that might hamper the development of competition. In particular, the AGCM stated that the audio-visual sector currently faces important technological progress with a 'rich pro-competitive potential' (for example, the introduction of digital terrestrial broadcasting and the convergence between the television and telecommunication industries). Therefore, the market investigation will focus on

competitive obstacles – connected for example to the property nature of platforms, the usage of closed decoders, as well as on possible exclusionary effects related to software applications or to search engines – particularly in pay-for-content services.

The AGCM had raised concerns on the development of competition in the audio-visual sector in two recent proceedings initiated under Article 102 TFEU, namely *Sky/Conto TV* and *Google*. In *Sky/Conto TV*, the AGCM intended to verify whether the technical and economic conditions offered by Sky to Conto TV (a pay-TV broadcaster) for access to Sky's satellite platform were defined in a non-transparent and non-discriminatory manner. In its final decision, the AGCM accepted commitments offered by Sky Italia Srl ('Sky'), held that its concerns were fully addressed and closed the case without any findings of infringement.

In *Google*, the AGCM also accepted the commitments offered by Google and closed the case without any finding of infringement. In its final decision, the AGCM held that its concerns (relating to various aspects of the relationships between Google and Italian publishers) were fully addressed by the commitments.

ii Significant cases

Energy

In 2010, the AGCM closed, by commitment decision, two proceedings initiated in the wake of a market survey by the Italian energy regulator, which indicated an anomalous fluctuation of electricity prices in the Sicilian macro-area of the electricity wholesale market. In *Enel*, an Article 102 TFEU case, the AGCM alleged that Enel (the Italian electricity incumbent owning 50 per cent of the power generation capacity installed in Sicily) withheld the capacity of its Sicilian power plants with the aim of creating supply shortages so that it could set higher prices to the detriment of consumers. Similar concerns were raised in *Edipower tolling agreement*, an Article 101 TFEU case against four electricity producers that co-owned a pivotal Sicilian power plant managed by their jointly-controlled company Edipower. In particular, the AGCM alleged that the producers had colluded to implement a contract for the supply of fuel to Edipower in exchange for the energy produced (i.e., 'tolling agreement' approved by the AGCM in a previous decision) with the aim of withholding the plant's capacity in order to raise electricity prices. In both cases, the parties offered commitments that addressed the concerns raised by the AGCM, which, in turn, closed both proceedings without any finding of infringement.

In the *Sorgenia v. Hera*, *Sorgenia v. Acea*, *Sorgenia v. Italgas*, *Sorgenia v. A2A* and *Sorgenia v. Iride* cases, the AGCM accepted the commitments submitted by several Italian gas and electricity distributors in order to remedy concerns regarding a possible abuse of their respective dominant positions in the local markets for the distribution of gas and electricity. The proceedings were prompted by several complaints filed by Sorgenia, a newcomer in the retail commercialisation of gas and electricity to residential clients and small businesses. In its decisions to initiate proceedings, the AGCM noticed that, according to Sorgenia, the distribution companies obstructed the completion of the procedures necessary for the switch of final clients from their historical retail companies to Sorgenia. The AGCM alleged that this conduct was put in place to hinder

the entrance of Sorgenia in the retail markets and, thus, weaken its ability to compete with the subsidiaries of the distribution companies active in the retail markets.

Telecommunications

On 13 May 2010, the AGCM, following a complaint filed by Fastweb, launched an investigation to determine whether Telecom Italia SpA ('Telecom') has abused its dominant position by refusing to provide its competitors with certain information and wholesale services possibly necessary to formulate competitive technical and economic offers for non-residential customers.

On 23 June 2010, the AGCM, following complaints filed by Fastweb and WIND, initiated an investigation pursuant to Article 102 TFEU, in order to investigate whether Telecom had:

a deliberately hindered or delayed activation of wholesale services requested by its competitors; and

b pursued a discriminatory discount policy in relation to customers located in areas where competitors can access the network's local loop through wholesale unbundling services, by offering retail prices so low that they could not be matched by competitors.

Both proceedings are still pending.

Railways

On 15 December 2010, AGCM, following a complaint filed by Arenaways SpA (a non state-owned company active in the national railway passenger transport, 'Arenaways'), launched an investigation on the railway company Ferrovie dello Stato SpA ('FS') and its controlled company Rete Ferroviaria Italiana SpA (i.e., the Italian railway network manager, 'RFI') to determine whether they abused market dominance by obstructing the entry of Arenaways in the Italian passenger transport sector.

The proceedings are still pending.

V STATE AID

i Preferential tariffs for the supply of electricity to energy-intensive consumers

On 1 July 2010, the General Court rejected an appeal brought by ThyssenKrupp Acciai Speciali Terni SpA ('Acciai Terni') against a 2007 EU Commission decision which found that the extension of the preferential tariffs for the supply of electricity to Acciai Terni, granted in 2005 until 2010 by Italy to the appellant, amounted to unlawful aid incompatible with the common market. Accordingly, the Commission ordered the recovery of the aid.

As background information, the disputed aid represented the extension of an initial measure granting a preferential tariff for 30 years to three companies (part of the formerly state-owned Terni Group) in order to compensate for the nationalisation of the group's power plant in 1962. The initial measure was first extended in the early 1990s simultaneously with the renewal of the power plant concessions to electricity self-producers. At that time, the measure, which extended the preferential tariffs to Terni

until 2001 and foresaw a phaseout in 2007, was notified to the Commission with the latter raising no objections. However, the disputed 2005 extension was not notified to the EU Commission.

The main substantive plea brought by the appellant was that the disputed measure did not constitute state aid due to its compensatory nature. In particular, Acciai Terni based its arguments on a dynamic interpretation of the Italian legislation that, according to the appellant, directly connected the grant of the preferential tariffs to the renewal of the power plant concessions to the other self-producers (in 1999, the Italian legislature postponed the expiry of concessions until 31 December 2010, and, shortly after the adoption of the disputed measure, until 2020). Thus, according to the appellant, it did not derive any advantage from the measure.

However, the General Court rejected this argument, *inter alia*, on the following grounds:

a It was clear from the initial measure that the 1960s legislature did not intend to connect the grant of the preferential tariff to the renewal of the power plant concessions.

b The fact that the first extension of the preferential tariffs was notified to the EU Commission showed the inexistence of the alleged automatic relationship between the preferential tariffs and the renewal of the concessions.

c The non-existence of such a relationship was also evidenced by the fact that the extension of the preferential tariffs was adopted six years after the 1999 renewal of the concessions and was not extended to the actual duration foreseen until 2020 by the second renewal introduced immediately after the disputed measure.

d As admitted by the Italian authorities during the proceedings, the aim of the extension of the preferential tariffs was that of increasing the competitiveness of Acciai Terni in order to avoid the delocalisation of its production.

Accai Terni appealed the decision and the appeal is pending before the Court of Justice.

V CONCLUSIONS

In light of the facts *supra*, the following trends are discernible in public competition enforcement in Italy:

a The increasing use of the 2007 Italian Leniency Notice in the AGCM's fight against hard-core cartels, expected to continue in the future, also in light of the willingness of the AGCM to grant further fine reductions to applicants in addition to those envisaged in the notice.

b The statistics *supra* confirm the tendency of the AGCM towards closing cases by commitment decisions; even though commitment decisions are undeniably important for both undertakings and the AGCM, an excessive reliance on such decisions might give rise to the following shortcomings:

- poor development of law and less detection of infringements; both necessary factors for enhancing deterrence effects of private competition litigation;

- excessive reliance on the complainant's allegations and, thus, lack of pre-investigation activities aimed at ascertaining the basis of the complaints filed; and
- the risk that the AGCM, by rendering binding the commitments proposed by the companies under investigation without a thorough evaluation of how they are connected to the competitive concerns raised by the authority, exceeds its powers and acts like a market regulator.

c Administrative courts have increased their scrutiny in relation to the AGCM's commitment decisions within their power to review. Basically judges have called for a more sound identification of competitive concerns, thus for an in-depth analysis of the case, necessary for evaluating the suitability and proportionality of the commitments proposed by the companies under investigation; such concerns raised by administrative courts may induce the AGCM to modify its current approach to commitment decisions.

Appendix 1

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Marco D'Ostuni is a partner at Cleary Gottlieb Steen & Hamilton LLP, resident in the Rome office. His practice focuses on antitrust, telecommunications, media and energy law. He has represented clients before the EU Commission and the Italian Antitrust Authority in antitrust investigations and merger filings; in proceedings before the Italian Communication Authority and the Italian Energy Authority; and in arbitration and litigation before civil and administrative courts involving complex antitrust or sector regulation issues. Mr D'Ostuni is distinguished as a leading lawyer in *Competition/ European Law* and in *TMT: Telecommunications* by Chambers Europe. He co-authored several publications on antitrust matters. He graduated with honours from Naples University Law School and holds LLMs both from the Collège d'Europe (Bruges) and from the Columbia University School of Law, as well as a PhD in competition law from the University of Perugia, Italy. Mr D'Ostuni has been a member of the Naples Bar since 2001, and of the New York Bar since 2003.

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