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Alternatives to Leniency Programmes – Contribution from Italy

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Alternatives to Leniency Programmes

- Contribution from Italy –

1. Introduction

1. The Autorità Garante della Concorrenza e del Mercato (hereinafter also “the Authority” or “the AGCM”) has a strong record of cartel investigations. Its action relies on a reactive/proactive detection policy in order to strengthen cartel deterrence. This effort has led to significant results: since 2016, almost 90% of cartels have been detected upon *ex-officio* investigations¹.

2. Therefore, despite a slight decline in the number of leniency applications in the last few years, the effectiveness of the AGCM’s cartel enforcement has not been undermined.

3. The Authority’s practice has shown that a combination of reactive and proactive detection tools (such as whistleblower platform, intensive collaboration with other public entities including public prosecutors, whistleblower platform, intensive collaboration with other public entities including public prosecutors’ offices, finance and tax police, public procurement agencies, screening tests), is crucial to preserve and increase incentives for companies to self-report, as well as to discourage the creation and the maintenance of cartels, in the first place.

4. This contribution outlines the experience of the AGCM on reactive and proactive detection tools besides its leniency programme. Section 2 describes the recently introduced whistleblowing platform and some first promising results; section 3 illustrates some proactive initiatives put forward to foster *ex-officio* investigation, mainly through an intense cooperation with other national authorities/institutions, the use of screening test, particularly in bid-rigging cases, and an increased and effective international cooperation; section 4 concludes.

2. Reactive detection tools besides leniency: the recent introduction of the whistleblowing platform

5. Following a decline in leniency applications in the last few years (although overall in line with international trends), in 2023 the AGCM further strengthened its cartel detection tools, by introducing two relevant complementary measures:

- the creation of a dedicated directorate, named “Cartels, Leniency and Whistleblowing”, in the context of an internal reorganisation implemented in January 2023;

¹ In line with the 2019 OECD Report reviewing the implementation of and developments with regard to the Recommendation of the Council concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0294], *ex-officio* investigations covers a variety of sources, such as: complaints from third parties; publicly available information; screening of available data such as public procurement data; information from other investigations; information from other governmental agencies; whistle-blower programmes.

- the launch of a whistleblowing platform, following the best practices of the European Commission and a number of national competition authorities, in March 2023.

6. In the past, anonymous complaints had already played a significant role in ensuring the effectiveness of the AGCM ex officio investigation: between 2013 and 2022, twelve formal proceedings, initiated thanks to anonymous reports, were closed by the Authority, sometimes as the source triggering the AGCM's action, sometimes together with other non-anonymous reports. Of these, eight proceedings concerned secret cartels². However, in the absence of a specific tool to protect anonymous and safe interactions, only in rare cases anonymous complainants came forward again in the course of the proceedings, and even in those cases, the impossibility of communication with them greatly limited their potential contribution.

7. In the light of the above, the aim of the whistleblowing platform is that of incentivising anyone in possession of confidential information on alleged competition infringements to disclose it anonymously. More specifically, the platform is directed to individuals who have become aware of antitrust offences through their job or carrying out their duties (employees or former employees, clients/purchasers, suppliers, competitors) and do not want to reveal their identity.

8. The platform is managed by an external service provider (the same provider used by the European Commission) and it allows a two-way confidential communication between the whistleblower and the Authority, insofar as it allows to send and receive encrypted messages without tracing the IP address of the whistleblower. Moreover, the whistleblower has the possibility to submit a report, simply by filling a form requesting certain information: the description of the alleged anticompetitive conducts, the effects that have been produced and the parties involved. It is also possible to upload documents to better illustrate the alleged anticompetitive behaviour. In addition, the platform provides for the creation of an Inbox for subsequent anonymous interlocutions: this seems crucial for obtaining additional information or clarifications from the whistleblower while safeguarding his anonymity. The information received by the whistleblower is handled by a dedicated team in the newly instituted Cartel directorate, so as to ensure a more consistent approach.

9. Unlike some other European Competition Authorities, such as Hungary and Slovakia, the AGCM decided, at this stage, not to offer financial incentives/rewards to whistleblowers aimed at counterweighting possible retaliation costs. In any case, protection against retaliatory measures can be achieved by other means offered by the legal system, such as the prohibition of employment dismissal³.

10. The AGCM is confident that this tool will strengthen the fight against secret cartels and, more generally, against other anti-competitive practices. The first results in the past eight months are highly satisfactory and encouraging. From March to November 2023, the AGCM received more than one hundred reports, resulting in:

- several ongoing interactions with anonymous complainants via Inbox;
- the opening of three cartel proceedings.

² See the most recent case no. I835 - MERCATO DEI CONTATORI D'ACQUA, infringement decision no. 29981 of 01/02/2022, published in the AGCM Bulletin no. 6/2022.

³ Legislative Decree No. 24 of 10 March 2023, transposing into Italian law the Directive (EU) 2019/1937 "on the protection of persons who report breaches of Union law".

11. The first formal investigation, opened in July 2023⁴ against the main oil operators (ENI, Esso, Saras, Kuwait, Tamoil, Repsol, IP and Iplom), concerns an alleged price coordination that led to simultaneous price increases in relation to a component of the retail price of automotive fuel (bio-component cost). According to the obligations set out in the legislation, at least 10% of motor fuel must consist of bio fuel. The value of this important price component has risen from €20/m³ in 2019 to around €60/m³ today and has an impact on pump prices of around €2 billion.

12. The second investigation was opened in September 2023⁵ against seven foundries for suspected coordination in list price increases of cast iron to their customers over the same period of time. According to the whistleblower, it is quite hard for customers to refuse price increases, given the significant costs associated with a potential change of supplier, also considering the higher utilization of the foundries' production capacity.

13. The third case, launched in November 2023⁶, relates to an alleged anticompetitive agreement/concerted practice between nine major producers of hollow glass operating in Italy. The proceedings is aimed at verifying whether simultaneous and similar increases of price lists of wine glass bottles are the result of a horizontal agreement and/or other form of coordination among the parties involved. In this case, ICA received also two non anonymous complaints.

14. This initial period of implementation of the whistleblowing platform appears to be very promising. In this respect, the Authority initial experience shows the importance of carefully selecting the whistleblower reports in order to follow up only with those that contain relevant and sufficiently reliable evidence. The possibility of interacting with the anonymous reporter is a key means that enables the Authority to verify quickly these two aspects of the whistleblower reports.

3. Proactive detection tools: some initiatives put forward to foster *ex-officio* investigation

15. The Authority is well aware of the importance of enhancing proactive detection with a view to supporting *ex-officio* investigation. Therefore, in this respect, the AGCM has sought to refine its proactive detection tools, launching *ex-officio* investigations on the basis of public information or through cooperation with other public authorities/institutions, including public prosecutors' offices, finance and tax police, public procurement agencies. Where possible, the AGCM has also used screening tests, particularly in bid-rigging cases, either to identify potential cases for investigation, or to provide additional supporting evidence to prove the infringement.

3.1. Cooperation with other national authorities/institutions

16. Several cartel investigations have been launched thanks to reporting by other public authorities: public prosecutors, finance and tax police, procurement agencies, government departments.

⁴ See AGCM case no. I864 - PREZZO DEL BIOCARBURANTE PER AUTOTRAZIONE, opening decision no. 30705 of 11/07/2023, published in the AGCM Bulletin no. 28/2023.

⁵ See AGCM case no. I866 - ACCORDI TRA FONDERIE, opening decision no. 30773 of 12/09/2023, published in the AGCM Bulletin no. 37/2023.

⁶ See AGCM case no. I867 - AUMENTI DEI PREZZI DEL VETRO CAVO, opening decision no. 30847 of 31/10/2023, published in the AGCM Bulletin no. 43/2023.

17. As for public prosecutors, in January 2018, in the context of the well-established and full collaboration already in place, the AGCM signed two Memorandum of Understanding with the Public Prosecutor's Offices of Rome and Milan⁷ in order to increase the effectiveness of the activities aimed at preventing and fighting corruption in the Public Administration, promoting the proper functioning of the market and repressing crimes against the Public Administration (especially bid-rigging), including by means of timely access to confidential information pertaining to criminal and administrative proceedings within their respective areas of responsibility.

18. Notably, according to these Memoranda of Understanding, the Prosecutor's Offices may send to the AGCM, also at the request of the latter, a copy of their requests for precautionary measures or their requests for indictments - accompanied by the consequent decision of the judge and the supporting investigative documents - regarding crimes that might significantly affect the proper functioning of the market (e.g., bid-rigging).

19. This type of interagency cooperation has shown to be particularly effective, to the point that it has allowed the Authority to obtain evidence, such as wiretaps, typically found in criminal investigations relating to other areas of law, like bribery, and therefore outside the scope of its investigative powers⁸.

20. Also the cooperation with the finance and tax police (Guardia di Finanza) has been extremely fruitful in terms of information obtained in order to initiate *ex-officio* proceedings. Already in 2004 Guardia di Finanza created a Special Antitrust Unit to assist the AGCM in its enforcement activities, which specialises in carrying out economic and financial analysis aimed at facilitating the Authority's investigation and inspections. The synergies produced by the cooperation with Guardia di Finanza allowed the Authority to make use of evidentiary information and supporting documentation in order to initiate and fruitfully conclude investigative cartel proceedings⁹.

21. Cooperation with public procurement entities/agencies is well established and effective, too. Fighting bid rigging in public procurement has always been one of the main priorities of the AGCM. In Italy, public procurement is fragmented in a large number of national, regional and local agencies. Therefore, in October 2013, the AGCM launched an initiative to assist procurement agencies in identifying and reporting to the AGCM behavioural anomalies which might be indicative of the presence of bid rigging. In particular, the AGCM addressed to all procurement agencies a handbook (so-called "Vademecum"), based on the OECD Guidelines for fighting bid rigging in public

⁷ The Memorandum of Understanding with the Public Prosecutor's Offices of Rome and Milan are currently being renewed.

⁸ See AGCM case no. I847 - GARE D'APPALTO BANDITE DALL'ARSENALE MARINA MILITARE DI TARANTO, opening decision no. 29759 of 13/07/2021, published in the AGCM Bulletin no. 31/2021.

⁹ See the AGCM recent cases no. I846 - GARE PER LA FORNITURA DI VESTIARIO PROFESSIONALE E ACCESSORI TECNICI, infringement decision no. 30053 of 1/03/2022, published in the AGCM Bulletin no. 10/2022; no. I847 - GARE D'APPALTO BANDITE DALL'ARSENALE MARINA MILITARE DI TARANTO, infringement decision no. 30740 of 18/07/2023, published in the AGCM Bulletin no. 31/2023; no. I858 - COMUNE DI LIVIGNO/PREZZO DEI CARBURANTI PER AUTOTRAZIONE, infringement decision no. 30675 of 19/06/2023, published in the AGCM Bulletin no. 27/2023.

procurement of February 2009, with tips and hints for identifying signals of potential bid rigging¹⁰.

22. In the handbook, the AGCM suggests considering the economic context first and then possible signals of anomalous conducts. The economics factors usually associated with collusion are the presence of few competitors or competitors characterized by similar size, homogeneous products, a continued participation in the tender of the same companies, the tender subdivided into several lots of similar economic value. Practices typically related to anti-competitive behaviour are: i) boycott of the tender; ii) cover-pricing (including bids made by non-awarded companies characterized by amounts far too high or at least higher than the same companies have offered in similar procedures, or bids containing special conditions which are notoriously unacceptable to the contracting authority, so as to determine their exclusion, or the submission of bids higher than the list prices); iii) subcontracting or use of groups of economic operators, including temporary associations, for market sharing purpose (e.g. in case of undertakings individually able to participate in a tender or performing the same main activity, or in case of withdrawal of the offer by an undertaking, which then benefits from a subcontract relating to the same tendering procedure); iv) rotation of bids; v) “suspicious” conducts in participating to the tender (e.g. same handwriting, similar estimates or calculation errors, simultaneous delivery or done by same subject, etc.).

3.2. Screening test

23. In 2014, the AGCM launched a “pilot” project using screening tests to detect collusive behaviour in public procurement tenders, which relies on a database of all tenders managed by the National AntiCorruption Authority (“ANAC”) and implemented with information provided by public procurement agencies. The aim was to assess the utility and the performance of some statistical tests in detecting bid rigging on a sample of tenders. However, the pilot project was discontinued in 2017 due to issues related to the quality and the range of information provided by the then existing dataset of public tenders. In this respect, two issues were identified:

- i) the database was incomplete (e.g., data on tenders which were not eventually awarded were missing) and presented clerical errors, also justified by the extreme fragmentation of the procurement system (for instance, in 2020 there were 25,700 tendering authorities involved in 4.95 million tendering procedures);
- ii) the database did not include information on the bids of not-winning participants. This information, even if clearly known by procurement agencies, was not collected by ANAC because the main statutory purpose for the collection of data from procurement agencies was to fight corruption, not collusion.

24. More recently, the AGCM has experimented the use of screening tools both *ex-ante* and *ex-post* the opening of formal proceedings: *ex-ante*, to identify suspicious bidding patterns, although such an activity is not undertaken in a systematic manner due to the difficulties in building a reliable dataset of public bids; *ex- post*, after the opening of an investigation, as a means to identify the scope of the anti-competitive agreement or to provide additional supporting evidence to prove the infringement¹¹.

¹⁰ <http://www.agcm.it/stampa/news/6647-varato-il-vademecum-sugli-appalti.html>

¹¹ See Italy’s Note on Data Screening Tools for Competition Investigations, submitted in WP3 meeting in November 2022.

25. As for *ex-ante* data screening analysis, the AGCM opened two proceedings based on the scrutiny of bids: the first one concerned a tender procedure for the procurement of cleaning services and other maintenance services in schools¹² and the second one addressed a tender for consultancy services on the use of European structural funds¹³. In both cases, the anomalies observed in the bidding behaviour led to the launch of a full-fledged investigation which confirmed the bid-rigging conduct, in violation of Art. 101 TFEU. In particular, the bidding pattern and other evidence collected during the dawn raids (contacts and exchange of information, meetings in preparation for the tender, simulations before the submission of bids leading to outcomes very similar to the actual ones) were considered to prove the infringement. Both the infringement decisions were upheld by the administrative Courts.

26. Data screening methods have also been used *ex-post* in other proceedings, either to better assess the scope of the infringement (i.e. to extend the scope of the investigation so as to include tenders for which there was no specific documentary evidence but similar bidding patterns, as in a cartel concerning tenders for the supply of water meters, in 2022¹⁴) or to provide valuable additional evidence to prove the anticompetitive agreement (as in the proceedings relating tenders for forest aerial firefighting services and helicopter rescue services, closed in 2019¹⁵).

27. Specific digital skills can be highly beneficial to improve the effectiveness of screening methods. To this end, in November 2023 the AGCM decided to launch a recruiting process for two experts in Data Engineering and Data Science on the basis of qualifications and exams.

3.3. International cooperation

28. In the face of increasing sophistication of cartels, which entails higher standards of proof and hence additional efforts in the investigation, the AGCM is well aware of the importance of enhanced and effective international cooperation. In this respect, the AGCM actively participated in the elaboration of the ICN “*Guidance on Enhancing Cross-Border Leniency Cooperation*”¹⁶, as cooperation in cross-border leniency applications can help the agencies involved to better delineate the scope of the parallel proceedings, better target and coordinate investigative steps (such as dawn raids), reduce duplication of effort and streamline the information-gathering process. Moreover, international cooperation is

¹² See the AGCM case no. 785 - GARA CONSIP SERVIZI DI PULIZIA NELLE SCUOLE, infringement decision no. 25802 of 22/12/2015, published in the AGCM Bulletin no. 50/2015.

¹³ See the AGCM case no. I796 - SERVIZI DI SUPPORTO E ASSISTENZA TECNICA ALLA PA NEI PROGRAMMI COFINANZIATI DALL’UE, infringement decision no. 26815 of 18/10/2017, published in the AGCM Bulletin no. 43/2017.

¹⁴ See AGCM case no. I835 - MERCATO DEI CONTATORI D’ACQUA, infringement decision no. 29981 of 01/02/2022, published in the AGCM Bulletin no. 6/2022.

¹⁵ See AGCM case no. I806 - AFFIDAMENTO APPALTI PER ATTIVITÀ ANTINCENDIO BOSCHIVO, infringement decision no. 27563 of 13/02/2019, published in the AGCM Bulletin no. 9/2019.

¹⁶ See ICN, *Guidance on Enhancing Cross-Border Leniency Cooperation*, 2020. This guidance is intended to provide practical advice for competition agencies to assist them in engaging with other jurisdictions on matters involving multi-jurisdictional leniency applicants, with the two parallel aims of first, making international enforcement efforts more effective and second, helping to reduce disincentives for prospective leniency applicants.

beneficial at the later stage, when determining the case outcome and sanctions, with a view to fostering consistency and avoiding double counting.

29. In this perspective, in February 2023, the AGCM signed a Memorandum of Understanding with the Australian Competition Authority (ACCC), which provides for additional opportunities to discuss and exchange views on cases of common interest and/or cross-border issues, also in order to facilitate the search for convergent solutions. Key areas of interest identified for collaboration between the AGCM and the ACCC include cartels, digital platforms and market studies. Similar agreements are in place with the other European (including France and Spain) and non-European (e.g. Brazil) competition authorities; others are foreseen shortly.

4. Conclusions

30. The Italian Competition Authority is aware that modern and effective investigative techniques require a full range of proactive and reactive detection tools (including whistleblowing and cartel screening), that are complementary to traditional leniency programmes, in order to credibly increase the threat of detection and result in effective deterrence. Indeed, to reach its full potential, leniency policy needs effective ex officio detection of anti-competitive conducts and significant fines, once serious violations as cartel have been ascertained.