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Ex-Post Assessment of Merger Remedies – Contribution from Italy

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Ex-Post Assessment of Merger Remedies

- Contribution from Italy -

1. Introduction

1. In 2019, the Autorità Garante della Concorrenza e del Mercato (hereafter the Authority or the AGCM) conducted an *ex-post* assessment of its practice in defining and implementing merger remedies.[1] The study analysed the characteristics and implementation of both structural and behavioural remedies imposed by the Authority in merger decisions adopted in the 2007-2017 period, focusing in particular on the effectiveness of structural remedies.

2. The assessment allowed the AGCM to identify some relevant differences between structural and behavioural remedies in terms of the effectiveness and timeliness of the measures, as well as the compliance processes. In addition, the study led to a number of proposals to strengthen the effectiveness of the remedies adopted by the Authority to restore an adequate level of competition in the relevant markets, bringing to changes in the Authority's practice of the last few years. In particular, the ex-post study highlighted the importance of clearly identifying the assets to be divested in the final decision rather than during the compliance phase, despite the strict deadline for Phase II merger investigations (with the current rules, in force since 1990, only 45 calendar days). Moreover, the study suggested that a shorter timeframe would make the divestiture of assets more effective, together with the imposition of fire sale provisions and a more regular use of divestiture trustees.

3. This contribution outlines the objectives of the *ex-post* assessment and the reasoning that led the Authority to select the methodology (Section 2), describes the Authority's findings related to structural and to behavioural remedies (section 3), and finally presents some high-level recommendations that emerged from the *ex-post* analysis.

2. Assessing the effectiveness of structural remedies: objectives and methodology of the AGCM *ex-post* study on merger remedies

4. As highlighted by the OECD Reference guide published in April 2016,[2] *ex-post* reviews of competition decisions may have multiple objectives, including improving the

[1] A brief outline of the results of the *ex-post* study was published in the Authority's 2019 annual report, and a broader overview of the main findings was presented in an *ad-hoc* event organised with the Italian Antitrust Association. See link to the presentation (in Italian only): https://www.associazioneantitrustitaliana.it/wp-content/uploads/2020/09/slide-Butt%C3%A0.pdf.

[2] OECD, Reference guide on ex- post evaluation of competition agencies' enforcement decisions, April 2016.

decision-making process. In particular, in the merger control area, they can enhance the design and implementation of merger remedies and commitments.[3]

5. In the Authority's case, the primary goal of the *ex-post* review was to increase its understanding of the extent to which remedies have been effective and to improve their design and implementation process. In particular, based on the findings of the *ex-post* study and international best practice, the AGCM intended to provide internal guidance to assist its case teams in designing and assessing structural remedies.

6. The need for a more comprehensive and consistent approach in this area was deemed necessary in an organizational structure in which the merger enforcement activity is not centralised into a merger division but shared across sectoral investigative units. Moreover, as a result of the considerable time constraints posed by the Italian merger review framework, which currently envisages only 45 calendar days for in-depth review (or Phase II), a significantly short period compared to international standards, in the AGCM practice, the discussion of several aspects of the design and implementation process often takes place after the conditional clearance. It was hence considered important to explore how the definition of remedies could be improved, also in order to avoid possible implementation problems after the merger decision.

7. The identification of the methodology for the research was informed by the *ex-post* reviews of other competition authorities,[4] and aimed to provide a fact-based, neutral review of the overall activity carried of the AGCM over a decade, rather than focusing on individual decisions, which would have required the involvement of external consultants and raised questions about the sample selection, with the risk of singling out some specific stakeholders.

3. Structure and main findings of the AGCM's *ex-post* review of merger decisions: focus on structural remedies

8. The AGCM *ex-post* study, carried out by the Chief Economist Team, consists of two parts. The first part involved the compilation of a comprehensive dataset of all merger remedies imposed by the Authority during the 2007-2017 period. This desk-based research allowed a detailed description of the Authority's practice to be obtained through a variety of summary statistics, including a classification of remedies, an analysis of their content and requirements based on international best practices, an analysis of the duration of remedies and their implementation (see section 3.1 below).

9. The second part of the study provided an in-depth analysis of structural remedies: since asset divestitures occur with the same modalities across industries and are generally used to fix similar competition concerns (unilateral effects), it was thought that they were more suitable for a general *ex-post* assessment compared to behavioural remedies, which may address different competition concerns.

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[3] In this contribution we will use the term "remedies" to indicate both remedies and commitments for simplicity's sake. In the Italian legal framework, "commitments" are measures proposed voluntarily by the merging parties while "remedies" are measures which can be imposed by the Authority. Indeed, under the Italian framework, the AGCM can impose remedies even in absence of a commitment proposal from the merging parties.

[4] In particular the following studies: *FTC's Merger Remedies 2006 – 2012, A Report of Bureaus of Competition and Economics*, Federal Trade Commission, January 2017; *Merger Remedies Study*, DG Comp, European Commission, October 2005.

10. Following the practices of other competition authorities, the AGCM conducted a survey of market participants/stakeholders: questionnaires were sent to all the purchasers of the divested assets using a dedicated online platform, with a response rate of 70%. Survey responses were complemented by interviews in the most complex cases.

11. Since the *ex-post* analysis focused on the buyers of the assets (and not the merging parties), securing their cooperation was key to the success of the AGCM initiative. Hence, it was important to underline that the AGCM analysis was going to be carried out and presented in aggregate terms only, without singling out a specific purchaser or merger transaction and that a wide set of mergers decisions was going to be included in the sample.

3.1. Merger remedies 2007-2017: summary statistics

12. The *ex-post* study reviewed 44 Phase II merger decisions, of which 24 cleared with remedies (see Table 1), addressing predominantly horizontal competition concerns (Table 2). In nine cases, merging parties have requested a revision or a revocation of the merger remedies that had been previously imposed by the Authority.[5]

Table 1 – Phase II merger decisions (2007-2017) by type of outcome

Outcome	Phase II investigations	
	No.	val. %
Authorisation with remedies	24	54.3%
Prohibition	4	10.9%
Unconditional clearance	6	13.0%
Revision of past remedies	9	19.6%
Withdrawal in Phase II	1	2,2%
Total	**44**	**100.0%**

Table 2 –Merger remedy decisions (2007-2017) by type of mergers

	Horizontal	Vertical	Total
No. decisions	**23**	**1**	**24**
of which:			
with «vertical» aspects	4	-	-
With «conglomerate» aspects	1	-	-

13. The majority of the mergers cleared with remedies over the 2007-2017 period involves a mix of behavioural and structural measures (Table 3). Behavioural remedies were the most frequently used, as they were prescribed in 19 out of 24 mergers. In six mergers, behavioural measures were the only form of remedy to address the competition concerns at stake. As shown in the table below, in other five cases, behavioural remedies, although combined with structural ones, responded to specific concerns unrelated to those addressed by the structural remedies.

[5] Under the Italian merger control framework, the Authority may revoke or revise, at request of the merging parties, the remedies previously imposed when changes in the market conditions or regulatory framework make them obsolete, unnecessary or disproportionate. This power allows the Authority to better align its remedies to market developments or other factors influencing the implementation of remedies which could not be predicted at the time of the merger decision. In such cases, the Authority needs to open formal proceedings to assess the merging parties' request to revise or revoke the remedies and, subsequently, issue a new decision to close the proceedings.

Table 3 – Merger remedy decisions (2007-2017) by type of remedy

Number of merger decisons containing...	number	%
only behavioural remedies	6	25.0%
Behavioural and structural remedies	13	54.2%
Of which: Unrelated	*5*	*20.8%*
only structural	5	20.8%
Total	**24**	**100.0%**

14. In reviewing the 24 merger decisions, 147 remedies were identified for the purpose of the study. A "remedy" was defined as one or more measures aimed at alleviating the same competition concerns in the same relevant product and geographic markets.[6] Thus, for instance, the divestiture of three outlets in the same geographic market was considered as one structural remedy for the purpose of the analysis while a single behavioural remedy could include one or more obligations having the same nature and pursuing the same goal.

15. The breakdown of the figures shows an almost equal split between remedies classified as structural (73 remedies) and those under the behavioural category (69 remedies).[7] Most of the 147 remedies affected the banking and insurance sector and the retail distribution (grocery and non-grocery) sector.

16. The following subsections will describe in more details the aggregate analysis of the 147 remedies.

3.2. Analysis of the structural remedies over the 2007-2017 period

In assessing the **content** of the 73 structural remedies (Table 4), the *ex-post* study found that divestitures mainly concerned the sale of outlets/stores (52) compared to the sale of on-going stand-alone businesses (5). The sale of outlets/stores posed several challenges for the implementation since the integration of such assets with the activities of the buyers was not always smooth and did require the consensus or the cooperation of other external parties (*e.g.*, tenants, franchisee/franchisors).[8]

[6] In line with the methodology used by the European Commission in its 2005 *Merger Remedies Study*.

[7] The remaining remedies (5) were classified under a third category, named "para-structural", that is, remedies enabling structural separation, for instance, the release of ship slots in maritime transport.

[8] With respect to other types of structural remedies, it is also worth noting that over the 2007-2017 period the Italian banking and insurance sector underwent a restructuring phase with several mergers taking place which justified the remedies such as the removal of personal links and interlocking directorates.

Table 4 – Structural remedies by content

Content of divestiture package	No. Remedies	%	Purpose of remedies
Outlets / stores	52	71%	Removal of unilateral effetcs, constraints to the exercise of market power
Financial shareholdings	8	11%	Removal of coordinated effects
Business branches (brand/client portfolio, business unit, production plants)	8	11%	Removal of unilateral effetcs, constraints to the exercise of market power
Ongoing standalone business entity	5	7%	Removal of unilateral effetcs, constraints to the exercise of market power
Total	**73**	**100%**	

17. The *ex-post* study also looked at the remedy design phase. The **exact perimeter of the assets** to be divested was generally finalised after the conditional clearance due to current stringent deadlines for Phase II reviews (45 calendar days), with important implications on the timing of the implementation of the divestitures as well as their effectiveness.

18. The stringent timeline for the in-depth review also impacted the **selection of the prospective purchasers**. Over the period under examination, there were only two "fix-it-first" remedies whereby the purchaser of the divested assets was approved by the Authority before the closing of the merger investigation. The *ex-post* study also shows no use of the upfront buyer remedy[9] over the 2007-2017 period. As suggested by international best practices, merging parties were required to find buyers with adequate financial capability and technical expertise, as well as fully independent from them.

19. With respect to the implementation phase, it emerged that the use of a divestiture/ monitoring trustee was retained by the AGCM only in ten remedies (adopted in the most recent cases).[10] Similarly, the "fire sale provision", *i.e.*, the elimination of a minimum divestiture price if no suitable purchaser is found by the merging parties after a first period, was present only in one third of the remedies and concerned the most recent cases of the sample under study. Nevertheless, the presence of this provision contributed to timely implementation of the measures, within the deadlines imposed by the AGCM.

20. An important section of the *ex-post* study was dedicated to the assessment of the timing of divestiture. The period granted by the Authority for the implementation was 12 months for the majority of the remedies analysed (54 over 73 remedies), which is relatively

[9] Upfront buyer: identity of buyer is not known by the agency (unlike with the fix-it-first remedy) but the closing of the transaction is conditional to the approval by the agency of the purchaser of assets.

[10] As a primary tool for monitoring the implementation of remedies, in the conditional clearance decision the AGCM generally requests the merging parties to send to the Authority periodical reports on the status of implementation of the measures.

long compared to the practice of other agencies[11]. Despite this longer timeframe granted by the agency, only in 17 cases (23.3%) the divestitures were completed within the deadline. Indeed, an analysis of the implementation periods showed that, on average, asset divestures were completed within 15.7 months (against 6.2 months for DG Comp of the European Commission).[12] Only in 26% of cases, implementation was completed within one year, while in more than half cases (56%) asset divestitures were finalised in an interval between 12 and 24 months. For 13 remedies (17.8%), the delay in the implementation was longer than one year.

21. Unsurprisingly, divestments that most frequently exceeded the Authority's prescribed timeframe are those involving the sale of outlets or stores, due to delays in defining the exact scope of the remedy (since the identification of outlets to be sold frequently occurred *ex-post*, after the conditional clearance), finding suitable buyers and the involvement of third parties.

22. Several findings emerged from the purchaser survey responses[13] with regard to structural remedies.

23. First, 75% of buyers expressed a (partially or fully) positive opinion of the level of competitiveness of the purchased assets, even though the turnover and profitability of the acquired assets were often (i) lower than expected (taking into account other assets of the aquiring company and/or market trends) and, (ii) not or only partially integrated with the other assets of the buyer.

24. Second, responses to the questionnaires showed that in only nearly half of the cases the divestiture package was considered to be complete. In this respect, the result of the survey of buyers highlighted the importance of (i) a more precise description of all the assets to be divested, in particular the personnel (*e.g.*, a list of key personnel) and (ii) transitional arrangements (*e.g.*, supply contracts, technical assistance) to ensure the viability of assets. From the AGCM's perspective, early identification of assets would have been desirable in order to avoid lengthy interactions with the merging parties in the implementation phase after the conditional clearance, when the incentives of the merging parties change.

25. Third, for almost two-thirds of the divestitures, assets took up to six months from the completion of the divestiture to become operational. Finally, 65% of assets were still reported to be active at the time the survey was launched in 2019: the most recurrent explanation of the inactivity of the remaining acquired assets was insufficient profitability (36%) and market changes (25%). Other mentioned reasons were the reorganization of the distribution network and difficulties in taking over contracts with suppliers and/or customers.

[11] The average period set by DG Comp was 7.6 months from DG Comp' 2005 Merger Remedy Study.

[12] See para 9 of *Merger Remedies Study*, DG Comp, European Commission, October 2005.

[13] Information sought by the AGCM survey concerned five aspects: a) characteristics of the asset divestiture process; b) the performance of the purchased assets; c) the degree of viability of the assets; d) the level of completeness of the remedies imposed; and e) the timing and the integration process of the purchased assets.

3.3. Analysis of behavioural remedies over the 2007-2017 period

26. As shown in Table 3 above, the Authority used behavioural remedies in 19 out of 24 mergers (purely behavioural in 6 cases, in combination with structural remedies in 13 cases). The majority of them (57) were aimed at fixing horizontal competition concerns (Table 4).

Table 5 – Behavioural remedies by competition concern

Competition concerns addressed:	No. Behavioural remedies	
	Absolute value.	% Value
horizontal	55	75,4%
vertical	10	14,5%
conglomerate	2	2,9%
horizontal (indirectly)	2	2,9%
Total	**69**	**100,0%**

27. With respect to content, behavioural measures were of various kinds: prohibitions of personal/structural links (28 remedies), access remedies (7), price commitments (7), quantity commitments (2), cap on internal or external growth (5), termination or interruption of activity (4), obligations vis-à-vis clients (2) and unbundling (5).

28. When analyzing the duration imposed by the Authority, 52% of the behavioural remedies (36 out of 69) were permanent: this is the case for the prohibition of personal/structural links. 33% (23 out of 69) had limited duration ranging from six months to 5 years (on average 2.8 years): for instance, price and quantity commitments (3 years). One-off remedies were prescribed only in the 6% of the cases (4) while five remedies had an indeterminate duration and provided for an end dependent on the occurrence of certain conditions.

29. With respect to the implementation stage, the aggregate analysis showed that the majority of the behavioural remedies was implemented within the deadlines set by the Authority, with 48% of them completed by the end of the merger investigation. However, in nearly 30% of remedies, merging parties eventually requested for a revision, which was granted by the AGCM in more than half of the cases.

30. The *ex-post* study also confirmed that behavioural remedies require considerable time and resources for monitoring parties' compliance, especially when the remedy duration is not limited. Over the 2007-2017 period, on average compliance monitoring activity lasted 27.7 months but, in some cases, it took several years.

4. Conclusions

31. The findings of the *ex-post* study, combined with the experience of other competition authorities, triggered an internal reflection on the agency's practice on merger remedies with a view to improving its effectiveness, also taking into account the stringent deadlines of the Italian Phase II procedures.

32. In general, the internal review has called for a reconsideration of the balance between structural and behavioural measures, given the higher costs associated with the monitoring of compliance to behavioural remedies. The latter should be confined to instances in which structural remedies are difficult to implement and/or the competition concerns are transitory.

33. With regard to structural remedies, the *ex-post* study highlighted the importance of clearly identifying the assets to be divested in the final decision rather than during the compliance phase, despite the strict deadline for Phase II merger investigations (45 calendar days). Moreover, the study suggested that a shorter timeframe would make the divestiture of assets more effective, together with the imposition of fire sale provisions and a more regular use of divestiture trustees.

34. The analysis also suggested measures to reduce the risks associated with asset divestitures, in particular with regard to defining their scope and preserving their viability. The effectiveness of such measures, which have already been adopted in recent years, will be further strengthened if a proposal to extend Phase II to 90 calendar days, currently before the Parliament, is approved: a longer in-depth review period would allow for a more accurate identification and assessment of the assets to be divested. The approval of the new proposal is expected by the end of 2023.

35. The *ex-post* analysis described above had an immediate operational follow-up in the form of internal guidance designed to ensure greater consistency among the agency's investigation units and to improve the effectiveness of the merger remedies imposed.