

Unclassified

DAF/COMP/WD(2016)18

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

13-Jun-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 31 May 2016

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Italy--

15-17 June 2016

This document reproduces a written contribution from Italy submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm

JT03397968

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/WD(2016)18
Unclassified

English - Or. English

1. Introduction

1. Commitment procedures in antitrust cases were introduced in Italy in 2006, along with other powers, to align the Italian legal framework with the EC Regulation n. 1/2003 and increase consistency with the EC antitrust enforcement system.

2. This contribution provides an overview of the legal framework and the practice of the Italian Competition Authority (the “Authority” or the “AGCM”) between 2007 and 2015, and outlines the challenges in balancing the potential benefits and risks associated with this tool.

2. The Italian Framework for Commitments

2.1 *The legislative provision*

3. Commitment procedures as envisaged in Art. 9 of Regulation n. 1/2003 were introduced in Italy in 2006, under art. 14-ter of the Italian competition law (law n. 287/1990). Pursuant to this provision, companies may offer commitments that would correct the competition concerns under investigation. After assessing the suitability of such commitments to remove the competition concerns, the Authority may make them binding on the parties and terminate the proceedings without ascertaining the infringement.

4. Unlike the EU provision, the Italian framework envisages a term for the presentation of commitments to the AGCM, that is, within three months from the notification of the opening decision. The presence of such deadline stems from the fact that in the Italian antitrust proceedings the opening decision describes the facts and the alleged violations giving the parties under investigation the elements to decide whether to propose commitments¹.

5. Art. 14-ter also regulates the instances of non-compliance. If the commitments made binding are not complied with, the Authority may levy a fine of up to 10% of turnover. In any event, the AGCM may, upon request or on its own initiative, reopen the proceedings:

- a) where there has been a material change in any of the facts on which the decision was based;
- b) where the undertakings concerned act contrary to their commitments; or
- c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

2.2 *The procedures*

6. In relation to the implementation procedure for the adoption of commitments, the AGCM issued a Notice in 2006 which was lastly revised in September 2012². According to the Notice, as a general policy, commitments may not be accepted by the Authority in three instances: (i) the conducts under investigation are considered serious competition offences deserving the imposition of heavy fines; (ii) the final commitments are submitted blatantly late; or (iii) the proposed commitments are manifestly inadequate to address the competition concerns raised by the AGCM in its opening decision. Moreover, commitments must be suitable to fully and timely be implemented and be easily verifiable.

¹ See section 5.1 and footnote n. 12.

² The 2012 Notice is available in Italian only on the [AGCM website](#).

7. In terms of procedural stages, the new procedures set a peremptory term of three months, running from the date when the decision to start the investigation was notified, for the presentation of the final version of the commitments. In exceptional circumstances, an extension of this deadline can be granted by the Authority for justified reasons (upon request of the companies). However, the term for the presentation of commitments has been interpreted by the courts as non-mandatory³.

8. While the final commitments proposal is expected no later than three months from the start of the antitrust proceedings, draft proposals may be forwarded by the companies within this time frame. After the presentation of the commitments, the companies can be heard by the investigative Directorate solely for the purpose of clarifying or specifying the substance of the proposed commitments. Both draft and final proposals should be drafted on the basis of the template provided by the Authority and available on its website.

9. Once a commitment proposal is received the Authority shall open sub-proceedings to assess the proposed commitments.

10. First of all, the Authority is called to assess the admissibility to the market test of the proposed commitments within the term of 45 days from their presentation in the final version: the Authority may reject the proposed commitments because they are late, manifestly unfit of resolving the antitrust concerns, because the conduct is susceptible of integrating a serious breach of competition law or because there is a special interest for a full assessment due to the novelty of the case; otherwise, the AGCM may officially decide to publish them on its website for market test purposes⁴.

11. Interested third parties may present their written observations regarding the proposed commitments within 30 days from the date of publication of the commitments on the website. Within 30 days from the deadline for the submission of third party comments (i.e., 60 days from the publication of the commitments for market test purposes), the parties involved may make written comments to the Authority on the observations presented by third parties and – in light of those observations – may introduce further changes to the commitments. Revisions shall be strictly related to the outcome of the market test and cannot radically change the commitments already submitted.

12. This very last version of the commitment proposal shall be assessed by the Authority: if rejected, the AGCM will close the commitments proceedings, inform the interested parties and continue the investigation within the main antitrust proceedings. Alternatively, in the final decision the Authority shall make the commitments binding on the parties involved and end the antitrust proceedings without ascertaining any infringement⁵.

13. In general, the AGCM's commitment decisions impose on the parties an obligation to report on the subsequent implementation of the commitments on a regular basis (every six month or yearly) as they often are behavioural in nature while structural commitments might not require periodic reporting.

³ See decision of the Supreme Administrative Court (*Consiglio di Stato*) n. 2479, 15 May 2015, related to the Authority case A428 - *Wind-Fastweb/Condotte Telecom Italia*.

⁴ The decision on the admissibility of the proposed commitments may not be appealed autonomously by the relevant party, but only within the contest of an appeal of the final AGCM decision closing the case.

⁵ The commitment decision can be challenged by third parties potentially damaged by their application (i.e. other parties to the same proceeding or any other subject concerned).

3. The AGCM practice

3.1 Trends in commitment decisions over the period 2007-2015

14. Since the introduction of a legal framework for the adoption of commitment procedures in 2006, commitments have been used in 62 proceedings (as of April 2016), pursuant to EU and national antitrust rules. In this section, the analysis of the Authority's practice will be limited to the period 2007-2015, in which the number of commitment outcomes is 60⁶. After an extensive use during the first years (2007-2011), commitment decisions have become much less common in more recent years, accounting for a more limited share of the overall number of proceedings opened by the AGCM: between 2012 and 2015 the share has plunged to 27% while infringement decisions have nearly reached 60% of the total (Table 1).

Table 1 – Use of commitment decisions over the period 2007-2015

	2007-2011	2012-2015	2007-2015
Total investigations	82	63	145
of which			
<i>closed with commitments</i>	43	17	60
%	51	27	41
<i>closed with infringements</i>	37	37	74
%	44	59	51
<i>other outcomes</i>	4	9	13
%	5	14	9
Notes: (1) The number of investigations is lower than the outcomes because in two cases in 2007 the proceedings led to two separate outcomes at the same time since commitments were proposed and accepted only by some of the parties under investigation. (2) Other outcomes" include proceedings closed with no violation (e.g., lack of evidence) but exclude the proceedings opened to re-determine the sanctions or to ascertain the breach of commitments and the other instances in which the case was dismissed with no ground for action.			

Source: AGCM

15. Commitment decisions have involved a variety of industries, notably the utilities sector such as electricity and gas (14 cases) and telecoms (5), as well as transport (7), publishing (4), banking (3) and pharmaceutical (3) sectors.

16. In terms of type of offences, 55% of the commitment decisions (34) over the period 2007-2015 concerned investigations on alleged abuses of dominant positions, while in 38% of the cases (26) the proceedings related to alleged anticompetitive restraints (other than cartels); in 5 instances (8%), the investigation was opened under the two types of allegations.

17. Commitment decisions were adopted in relation to proceedings investigating a variety of allegedly illicit conducts concerning in particular unfair or exclusionary contractual clauses, refusal to supply or license and obstacles to access to input/infrastructure. Consequently, many commitments made binding by the AGCM consisted of modification or elimination of the incriminated contractual clauses, or removal of obstacles to ease access or entry by new competitors.

⁶ There has been only one commitment decision in 2006, the year of introduction of this type of procedures and two (in the hotel online booking services and in financial information services) in the first four months of 2016. While the investigations in the hotel online booking sector was closed in 2016, the commitment decision related to Booking.com, one of the two companies under investigations, was adopted in 2015 and therefore it is included in the analysis.

18. All commitments made binding on the parties by the Authority over the reference period are behavioural in nature; however, recently (February 2016) the AGCM closed an investigation pursuant to Art. 102 TFEU in the financial information services sector in light of structural commitments (divestiture of a business branch) proposed by the party⁷.

19. Draft commitments were rejected as inadmissible by the AGCM in 38% of the investigations leading to an infringement decision (28 out of 74): only in three instances, the rejection of the commitment proposals occurred after the market test. In a few cases, the rejection decisions were contested within the appeal of the final decisions ascertaining the violation⁸.

3.2 *Compliance and monitoring*

20. During the period 2007-2015, the AGCM re-opened the proceedings to assess the compliance with commitments in four cases⁹, ascertaining a breach only in one case concerning two undertakings operating in the maritime transport for passengers in the gulf of Naples and Salerno. In this instance, the AGCM re-opened proceedings closed in 2009, conducted dawn-raids and re-assessed the case on the basis of the breach of commitments and further violations of antitrust rules¹⁰.

4. **Commitments and private enforcement**

21. In the absence of a formal finding of an infringement committed by the parties, commitment decisions are not per se suitable to ground a follow-on damage claim: as a consequence, in this case damaged third parties should provide evidence of the occurred infringement and the recovery of damages may be more burdensome and difficult to obtain. At the same time, the use of this type of commitment decisions has raised the issue of their evidential value in damage redress actions.

22. In this respect, some recent case law in Italy provides indications on the private enforceability of decisions accepting commitments from parties in national courts¹¹. Indeed, the risk for the relevant parties to be subject to private enforcement claims is not completely eliminated. Firstly, a sufficiently detailed description of the relevant markets and of the unlawful behaviour may be found in both the decision to opening proceedings¹² and the commitment decision (as well as the information collected during the

⁷ See Case Number A482 - E-CLASS/BORSA ITALIANA.

⁸ In the first rejection decision appealed, the AGCM had rejected the commitments offered by five undertakings involved in an investigation into an alleged horizontal anticompetitive agreement in the market for marine paints (case No. I646 - Produttori Vernici Marine, 2007). The undertakings had proposed to cease collecting through their trade association data necessary to prepare certain statistics. The Competition Authority concluded that the commitments were as such incapable of removing the market distortion caused by the anticompetitive arrangements. On appeal, the court upheld the Competition Authority's position affirming that commitment decisions are inappropriate in cartel cases and its arguments were later upheld by the highest appeal court, the *Consiglio di Stato*.

⁹ Cases No.: A357 – Tele2/Vodafone-Wind; A395 – Acquedotto Pugliese; A396 – Gargano Corse / ACI; I689 – Organizzazione Servizi Marittimi nel Golfo di Napoli.

¹⁰ For more information about this case: Coco, R., Mazzarini, L. “Maritime Transport in the Gulfs of Naples & Salerno. A Leading Case For Infringement of Commitment Decision and Reassessment of Facts”, *Rivista Italiana Antitrust / Italian Antitrust Review*, Vol 2 No. 1 (2015), available at: <http://iar.agcm.it/article/view/11383/10562>

¹¹ See for instance decision n. 9109/2015 of the specialized section of Milan's Tribunal, *BT Italia v. Vodafone*.

¹² Unlike the European Commission, the AGCM's opening decisions do open the formal proceedings. A opening decision typically contains a description of the subject matter and purpose of the investigation and

market test). Secondly, national case-law appears to be in favour of an extension of the scope of follow-on actions, stating that commitment decisions introduce an “effective doubt” on the existence of an antitrust infringement, so that the burden of proof on the claimant might be reduced, though not eliminated. Commitment decisions therefore do not cause any immunity from a civil law stand point and private enforcement actions cannot be prejudged by the adoption of commitment decisions¹³.

23. Additional useful evidence for civil actions may be obtained through access to the antitrust file. This principle is established in the EU case law (*Pfleiderer* and *Donau Chemie*)¹⁴ which acknowledged the courts’ fundamental role to balance the conflicting interests related to the disclosure of evidence, that is, the right of full and direct compensation on the one side, and the right to confidentiality on the other side. Access to- and disclosure of evidence are dealt with in the EU Directive 2014/104/EU (currently being transposed into the national system), regulating antitrust damages actions. In particular, Article 6 of the Directive sets special rules concerning the disclosure of evidence included in the file of a competition authority, providing a list of information that may be requested only after a competition authority has closed its proceeding (so-called grey list): as such list includes “information that was prepared by a natural or legal person specifically for the proceedings of a competition authority”, proposed commitments which were not published for the market test may not be disclosed prior to the adoption of the final decision¹⁵. It is worth noting that disclosure of leniency statements and settlement submissions cannot be ordered at any time (so-called black list).

24. Third parties may acquire information and documents filed during the antitrust proceedings on the basis of the rules on access to documents. Procedural regulations envisage that throughout the proceedings, intervening third parties may access any non-confidential documents in the Authority’s file; after the closing of the proceedings, any third parties may request access to non-confidential documents they have a relevant interest into¹⁶. The undertakings concerned have the right to oppose or limit such disclosure in order to protect confidential information. The AGCM, in deciding whether to grant access, must weigh the interest of requesting third parties against the interest of the undertakings concerned. In the past, after the closing of proceedings the Italian competition authority had generally denied access to the file to third parties claiming damages before civil courts, but in recent years it has taken a more favourable approach.

the market allegedly affected by the anticompetitive conduct; the names of the other parties, a detailed description of the markets and the contested conduct, or the term within which the AGCM is supposed to close its investigation. As a result, the dialogue with the parties (also by means of several hearings held at different stages of the investigation) starts immediately and they can access to file. Only at the end of the investigation activity is the case team sends the Statement of Objections (SO) setting out the main findings and charges.

¹³ See the decisions of the Supreme Administrative Court (*Consiglio di Stato*), n. 4773, 22 September 2014, related to the Authority case *A407 - Conto TV/Sky* and n. 2479, 15 May 2015, related to the Authority case *A428 - Wind-Fastweb/Condotte Telecom Italia*.

¹⁴ Judgment of the EU Court of Justice of 14 June 2011 “*Pfleiderer*” case C-360/09; Judgment of the EU Court of Justice of 6 June 2013 “*Donau Chemie*” C-536/11.

¹⁵ In addition, in the Italian antitrust proceedings commitments published for the market test are also available to the complainant.

¹⁶ See in particular sections 12 and 13 of the Presidential Decree no. 217/98, available on the [AGCM website](#).

5. Assessment of the AGCM practice: balancing benefits and risks with the use of commitment decisions

5.1 Lessons learnt: the 2012 Notice

25. The first years after the introduction of commitment procedures in the Italian legal framework in 2006 were characterized by an extensive use of the new tool. Starting from 2011 the Authority has engaged in a critical review of its initial practice, that has entailed a more careful use of such instrument, as shown in the previous section. A turning point in this process has been the revision of the 2006 Notice on Commitments in September 2012.

26. The 2012 Notice, that incorporates contributions and suggestions submitted by stakeholders during a public consultation, has introduced more stringent rules for the parties, notably regarding the timeframe for the entire commitment procedure and the scope for modifications of the commitments allowed to the relevant parties to account for the market test review.

27. More specifically, to enhance procedural economy and efficiency, the 2012 Notice re-stated the time limit of three months for the presentation of commitments after the launch of the investigation and introduced a time limit of three months for the entire procedure for assessing commitments, with extensions granted only in exceptional circumstances. The time limit on the presentation of commitments, although the jurisprudence has not interpreted as compulsory, is important to prevent opportunistic behaviour by the parties intended to delay the process by offering commitments towards the end of the investigation¹⁷. Therefore, companies must act with promptness after the launch of the investigation in order to offer their commitments. Furthermore, the new Notice now fixes a deadline for the market test (30+30 days) which, together with the overall time limit of three months for the entire commitment procedure, was introduced to ensure procedural economy and quick resolution of cases, which were not fully delivered in the first years of practice of the AGCM.

28. In addition, to increase transparency in the process, the 2012 Notice states that changes to commitments in light of the market test may be proposed to the Authority only once. Moreover, they must be closely related to the outcome of the market test and constitute, therefore, a further elaboration of the commitments already submitted. Indeed, the experience gained by the Authority over the years suggested to preclude the continuous review of commitments, which could be strategically corrected, modified or supplemented by the parties, with the risk of artificially extending the timing of the proceedings and affecting transparency.

29. Overall, it appears that the new regime managed to attain the expected results in terms of procedural economy and increased transparency.

30. While recognising the potential benefits of the commitments, in terms of a swift resolution of the competition issue and lower and more efficient use of resources, which may be released for other investigations, the AGCM considers that the possible downsides should be carefully weighed when using its discretion in deciding to close a case with commitments. Possible negative effects on deterrence and a clear assessment of the practices, the prevention of the development of a court jurisprudence which establishes legal certainty and predictability, the negative effects on private enforcement should be carefully taken into account. At the same time, competition authorities should endeavour to avoid any overlapping between adjudication and regulation functions.

¹⁷ As explained in footnote n. 11, the opening decision of the AGCM opens formally the proceedings enabling the Authority to exercise its investigative powers to carry out the investigation.

31. Notwithstanding this, commitments can be an effective tool, provided that they are used wisely and with care. For instance, when timing is crucial and companies swiftly propose actions that can quickly address the competition concerns, commitments can be a sensible option. Moreover, commitments may incorporate comments submitted by the stakeholders during the market test, which also enable a better understanding by the Authority of the possible impact of the commitments in the market. Indeed, in certain cases commitments may be a good solution for all stakeholders: consumers and competitors swiftly get rid of restrictive conducts; the investigated companies avoid long-lasting proceedings and a finding of infringement; the competition agency saves administrative and investigative resources.

32. For instance, the commitment decision of the AGCM in the passenger high-speed rail market facilitated the access to the infrastructure (train routes, stations) for new entrants; in the large-scale distribution sector, commitments terminated a buying alliance among the five biggest retail chains which went beyond the original intent of negotiating their procurement conditions with suppliers; in professional services the commitment accepted by the Authority aimed at restoring prices as a competitive levy among the architects; in the insurance sector, commitments were set to restoring competition among the brokers, providing them with incentives to offer the services of more than one insurance companies¹⁸.

5.2 *Commitments in novel and fast-moving markets*

33. Commitments can be particularly effective in novel and fast-moving markets. One of the key issues in applying antitrust law in the online world is to prevent potential restrictions to competition while preserving operators' ability to offer and develop innovative services that are valuable to consumers: commitments can help in striking the balance.

34. In the Authority's view, this was the case in the Booking.com/Expedia investigation, where the issues of novel markets and online vertical restraints have played a key role. Booking.com imposed retail Most Favoured Nation clauses requiring hotels to always offer Booking.com their lowest room price, maximum room capacity, and other "most favourable" conditions, both online and offline. These clauses allowed Booking to offer consumers best price guarantees.

35. While it is difficult to argue against the value for consumers created by online platforms such as Booking.com, it was evident to the AGCM that these clauses were suitable to restrict horizontal competition among hotel booking platforms, weakening competition in the long term and strengthening Booking.com position.

36. In tackling this case, the AGCM concluded that commitments that narrowed the scope of application of the MFN clauses were appropriate in striking the trade-off between possible negative effects on prices and the benefits for consumers that Booking.com was able to provide.

37. Importantly, this outcome has been coordinated with several other European agencies, as in this case the interests at stake went far beyond national boundaries. For this reason, the AGCM has devoted a lot of energies to cooperate with other agencies and come up with an agreed solution, even when that required us to adjust the Authority's timetable for the presentation and the assessment of commitments.

¹⁸ See Case Number: A443 - NTV/FS/Ostacoli All'accesso Nel Mercato Dei Servizi Di Trasporto Ferroviario Passeggeri Ad Alta Velocità; I768 - Centrale D'acquisto Per La Grande Distribuzione Organizzata; I781 - CNAPPC-Pubblicazione Dei Metodi E Strumenti Di Calcolo Dei Compensi Professionali Degli Architetti; I702 - Agenti Monomandatari.

38. Market developments in the hotel online booking sector following the revision of the MFN clauses by Booking.com seem to suggest some positive effects of the commitment decision¹⁹. More information on the effects of the commitments will be available at the end of the monitoring exercise being carried out by the European antitrust agencies coordinated by the European Commission.

6. Conclusion

39. After ten years since the introduction of commitment procedures in the Italian legal framework, the Italian Competition Authority has come to fully appreciate their potential benefits and risks.

40. The revision of the AGCM's Notice on Commitments in 2012 has served as a thoughtful a critical review of its initial practice and it has called for a more cautious use of this important tool.

41. According to the Authority, commitments can be an useful tool, provided that they are used wisely and with care as explained in the previous section. Nevertheless, full-fledged investigations aimed to detect, substantiate and punish infringement are and remain the key antitrust tools to ensure deterrence, foster legal certainty and protect consumer welfare. This explains why, in Italy as in most jurisdictions, commitments are not acceptable in the face of serious competition infringements that deserve the imposition of heavy fines.

¹⁹ For instance, one operator, Tripadvisor, has launched its own booking platform which complements its meta search business, while outsiders, like American Express, are making their entry into this sector.