

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Implications of E-commerce for Competition Policy - Note by Italy****6 June 2018**

This document reproduces a written contribution from Italy submitted for Item 5 of the 129th OECD Competition committee meeting on 6-8 June 2018.

More documents related to this discussion can be found at www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03432270

Italy

1. Introduction

1. The OECD Roundtable on “Implications of E-commerce for Competition Policy” offers a valuable opportunity for the Italian Competition Authority (AGCM) to present its experience regarding competition enforcement and advocacy in the digital realm, as well as some relevant interventions in the field of consumer protection. In fact, AGCM is employing a comprehensive set of tools to address competition concerns, gain a better understanding of digital economic transactions and ensure that the potential of innovation is fully realized.

2. In particular, the Authority has conducted a few investigations in E-commerce, addressing alleged anticompetitive vertical restraints to online sales, on the one hand, and possible foreclosure effects for online platforms, on the other. Questions on the role of digital sales have also arisen in the assessment of some mergers, with regard to the definition of the relevant markets.

3. Furthermore, AGCM has used its set of advocacy powers to argue against attempts to undermine the growth of innovative services through restrictive regulation in a number of sectors, including taxi and Uber-like services, long-haul bus transport, non-hotel accommodation and in-home restaurant services. In May 2017 it also launched a joint sector inquiry on Big Data with the Data Protection Agency and the Telecommunication Regulator, acknowledging that the analysis of the use of Big Data requires a multidisciplinary approach.

4. Finally, as an authority with a dual competence in competition and consumer protection, the AGCM has the opportunity to analyse market issues from a twofold perspective and to use these two competences cooperatively.

2. The development of E-commerce in Italy

5. Though still quite limited in comparison to other countries, E-commerce in Italy has been steadily increasing over the last few years. In 2017, the value of online purchases in the country grew by 17% with respect to 2016 and accounted for almost 6% of overall retail purchases. For the first time, in 2017 online sales of goods exceeded the online supply of services.

6. The most relevant sector for E-commerce in Italy is tourism, which in 2017 represented almost 40% of the total value of online sales, followed by IT products and consumer electronics (17%) and clothing products (10%). Furniture and home living, together with food and grocery, are the sectors that showed the highest growth rate.

7. It can be envisaged that purchases by smartphones will play a primary role for E-commerce in the near future. In 2017 they accounted for approximately 25% of the total value of online purchases, after an increase of 65% with respect to previous year¹.

3. The main competition cases conducted by the Italian Competition Authority

8. To date, the Authority has carried out a limited number of enforcement actions concerning E-commerce, which mainly addressed alleged vertical restraints. AGCM has not engaged in investigations on horizontal infringements or merger reviews focussing on E-commerce.

9. The vertical restraints under scrutiny have involved two different scenarios: price restrictions imposed on online dealers by manufacturers (i.e., traditional companies hindering the commercial policy of digital suppliers downstream) and parity clauses applied on hotels by online travel agencies (i.e., digital operators hindering traditional firms downstream).²

10. Moreover, in January 2017, the Authority opened proceedings against the main taxi cooperatives in Rome and Milan, for an alleged violation of Article 101 TFEU by imposing exclusivity in the vertical agreements with their affiliated members (taxi drivers), with the potential effect of foreclosing MyTaxi as a competitor in the taxi reservation and dispatch services. A final decision by the AGCM is expected in June 2018.³

11. The cases illustrated below entailed the need for AGCM to assess and balance potential anticompetitive effects and efficiencies, preserving the operators' ability to offer and develop innovative services that are valuable to consumers. The Authority has applied the current legal, investigative and analytical tools, which enabled to deal effectively with such an assessment. Although Internet is substantially changing the way in which goods and services are distributed, the economic framework and the traditional antitrust tools have proven to be still valid because the possible anti- and pro-competitive effects are roughly the same and the existing rules are flexible enough.

Box 1. Case N. I779 – Market for touristic services-Online hotel booking

In April 2015, the AGCM closed an investigation on online hotel booking services, concerning Booking.com and Expedia with respect to alleged restrictions of competition related to the use of price – as well as and others conditions – parity clauses in contracts stipulated between the main online travel agencies (OTAs) and their hotel partners. In particular, the parties 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.com and Expedia to offer consumers best price guarantees. The AGCM concern was that these clauses could restrict horizontal competition among OTAs, weakening competition more generally among all sales channels and deterring the entry of new hotel booking platforms.

The main competition concern was that parity clauses restricting the vertical relationships between the two OTAs and their hotel partners would have effects on the horizontal dimension, i.e., competition among OTAs and more generally among all sales channels. In particular, these parity clauses could have the potential to substantially restrict: a) competition between OTAs on commission fees they request to their hotel partners: in presence of parity clauses, an OTA has no incentives to offer lower fees as these lower costs for the hotels cannot be translated in lower room rates offered on its platform due to the parity obligation; and b) competition on price (and other conditions) offered to final users by hotels within the OTA channel and across the other sales channels, online and offline, direct and indirect (e.g., hotels’ own websites, traditional travel agencies).

The case was closed with commitments undertaken by Booking.com, which narrowed the scope of application of the MFN clauses in order to strike a balance between possible negative effects on prices and the benefits for consumers that the companies were able to provide. In particular, Booking.com has committed to: i) refraining from requiring accommodations to enforce parity clauses on price and other conditions offered on any other OTA (Price Parity / Conditions Parity); ii) refraining from requiring accommodations to offer on Booking.com the same or a greater number of rooms, of any type, as those offered on any other OTA, or as is reserved for the accommodation itself (Availability Parity); iii) allowing accommodations to offer equal or better conditions on Offline Channels than those offered on Booking.com, provided that these conditions are not published online or marketed online (i.e., they are aimed at the general public); iv) refraining from restricting unpublished conditions that accommodations are able to offer, provided that these are not marketed online at the general public: in other words, Booking.com may prevent its hotel partners from offering better conditions if they are made available online to the general public (so called “narrow” MFN clause).

The outcome was coordinated with the French and Swedish competition agencies, as in this case the interests at stake went far beyond national boundaries.

In April 2017, the Italian Competition Authority, together with the European Commission and nine EU national competition authorities, published a report on the monitoring activity, conducted during 2016, in the online hotel booking sector⁴. The purpose of the monitoring activity was to assess the effects on the way in which hotels market their rooms prompted by the antitrust enforcement measures adopted in various Member States, which have led to changes into the contractual conditions applied to booking online⁵.

The results of the monitoring exercise suggest that both types of antitrust measures applied to online travel agent parity clauses, i.e., a significant reduction of the scope of the MFN clauses or the prohibition of parity clauses altogether, have generally improved conditions for competition and led to more choice for consumers. However, the report also shows a fairly low level of awareness among hoteliers of the opportunities brought about by recent changes to OTA parity clauses. Based on the results, the national competition authorities in the European Competition Network agreed to keep the online hotel booking sector under review and to re-assess the competitive situation in due course.

Box 2. Case I813 - Restrictions to online sales of stoves

In April 2018, AGCM concluded formal proceedings under Article 101 of the TFEU against Cadel, a company belonging to a major European group that produces biomass heaters. The investigation concerned the commercial policy adopted by Cadel for its online distribution channels, with the apparent aim of preventing online dealers from selling Cadel products at excessively low prices.

In particular, the company required online dealers to charge minimum sale prices and to apply the maximum discounts indicated by Cadel. Further restrictions of online sales included: (i) the obligation to market Cadel products only through Italian sites registered with the domain '.it'; (ii) the prohibition to use languages other than Italian for online offers of Cadel products; (iii) the obligation to deliver Cadel products only to customers in the Italian territory and (iv) the prohibition for dealers not admitted to the Cadel distribution network to offer and sale Cadel products online.

AGCM's competition concern was that such clauses would prevent online dealers from expanding their businesses abroad, as well as foreign customers from purchasing Cadel products, thus giving rise to anti-competitive territorial restrictions.

The Authority closed the case in light of the commitments submitted by Cadel to address the mentioned competition concerns. Namely, the party committed: (i) not to set retail prices (directly or indirectly) neither constrain commercial strategies of online dealers; (ii) to refrain from recommending retail prices for two years and (iii) to inform resellers on its new online sales policy.

4. Market definition in the E-commerce sphere

12. The issue of market definition in E-commerce has primarily arisen in the described investigations on vertical restraints in digital markets. In addition, several merger reviews conducted by AGCM, although not focused on E-commerce, prompted the Authority to examine the competitive relationship between online and offline providers, with a view to ascertaining whether the online channel represented a separate market and/or to what extent it could exert competitive pressure on offline sales.

13. In the case *I779 Market of touristic services- Online hotel booking*, AGCM considered that the relevant market for the assessment of the parity clauses was the market for online hotel booking services, distinct from the market for offline hotel booking services. The market definition took into account: (i) end consumers' preferences, in light of the substantial increase of online hotel booking vis-à-vis traditional offline booking; (ii) the different level of agency fees applied on hotels in the online and offline channels, as well as the different kind of service offered (including rating and reviews); (iii) the possibility for hotels to reach a hugely higher amount of customers through OTAs than through offline channels. As for the geographic dimension, the market was considered national given that Booking.com and Expedia operate with country-specific websites and differentiate their commission fees based on the national borders.⁶

14. In the case *I813 Restrictions to online sales of stoves*, the analysis focused on the online retail distribution of stoves. Even though the final decision refers to the markets for

the production and online sale of wood and pellet stoves, AGCM did not need to come to a more detailed market definition, in light of the commitments undertaken by the party.

15. In the opening decision of the pending cases regarding vertical agreements by taxi cooperatives, taxi hailing apps have been considered part of a broader market for taxi reservation and dispatch services, which would include hailing, stand-based access, telephone and radio dispatch reservation centres.

16. In the merger case C12023 *Arnoldo Mondadori Editore/RCS Libri*, AGCM identified the online book publishing market as a separate market. By the same token, it acknowledged the existence of a distinct e-book distribution market, as well as an e-book retail market. The Authority highlighted that these markets have several specific features, including the lack of physical handling of e-books, the need for a reading device and the role of electronic infrastructures for the distribution and sale. As a consequence, the supply chain of the online publishing market is completely different from the traditional one and characterized by the presence of new operators, such as the digital platforms. The geographical scope of these markets was considered national, given that the demand is typically composed of Italian consumers and most of the e-books sold in Italy are in Italian.⁷

17. With regard to a concentration involving fragrances (C12109 *Profumerie Douglas/La Gardenia Beauty – Limoni*), the Authority identified the market for high-quality products sold under prestige brands at high prices (so-called prestige products), in line with the case law of the European Commission. Also in this case, the question was raised whether the online channel could exert a competitive pressure. AGCM held that online and in-store sales channels are not substitutable for prestige fragrances, in that only points of sales are able to provide a tangible buying experience and a direct relationship with qualified staff, to which consumers attach pivotal importance. Moreover, the Authority observed that, despite a steady growth over the last few years, online sales of cosmetics are still very limited and represent less than 3% of total sales. Therefore, AGCM concluded that the competitive pressure by the online channel is currently negligible.⁸

18. Market definition is usually based on the available data and evidence, gathered by AGCM or provided by third parties, and on the relevant case law at national and EU level. However, the Authority increasingly feels the need to carry out empirical studies to obtain an in-depth understanding of consumer habits with regard to digital services in specific sectors, as in the recent merger case concerning banks. In an on-going merger review concerning the banking sector, AGCM has entrusted the research firm Nielsen with a survey on consumers aimed at analysing consumer habits in the banking sector and assess the opportunity to revise traditional market definitions. One of the main objectives of the survey is to examine the relevance of the online channel for traditional banks and the level of competitive pressure by online operators⁹. The decision on the merger case is expected by the end of May 2018.

5. Advocacy initiatives

19. Regulation may play a key role in fostering or constraining the development of E-commerce. In AGCM's experience, innovative services offered by the digital economy have encountered two kinds of challenges: either existing obsolete regulation has been applied also to new operators, thus trying to prohibit some new services as not compliant; or new regulations have been introduced that *de facto* hindered the operability of

innovative companies and levelled the playing field with respect to incumbents. AGCM has employed its comprehensive set of advocacy tools to address these restrictions and ensure that the potential of innovation is fully realized.

20. In particular, the Authority has advocated against the application of obsolete and inappropriate existing Regulations on mobility services, namely with regard to taxi services and long-haul bus transport.

Box 3.**Mobility services: app-based private car hire**

With judgment adopted in 2015 and lately in 2017, some Italian Courts banned new forms of services like Uber, holding that they did not comply with the taxi regulation¹⁰ as well as with provisions on unfair competition.

With regard to UberPop services (non-professional drivers), the Courts observed that drivers had not license for driving private hire cars. Furthermore, they held that Uber is not a mere platform or intermediary between passengers and drivers but a truly transport operator which is not authorized by the taxi regulation of 1992.

UberBlack services (professional drivers) were also considered not complying with the existing regulation, insofar as they did not abide by the regulatory provisions that impose territorial restrictions on the provision of the service and require that drivers start and end each ride at the garage.

Notably, following interim measures adopted by the Tribunal of Rome in 2017 that banned Uber Black services throughout the country, AGCM intervened as an *amicus curiae* in the appeal procedure (pursuant to Art.15 (3) of Regulation CE 1/2003, given that there is no equivalent provision in the national legislation). In fact, the Tribunal had held that Uber Black services constituted unfair competition against taxi drivers and professional drivers who were required to return to their garage in between rides; in addition it ruled that Uber was not a mere platform or intermediary between passengers and drivers but a truly transport operator which was not authorized by the taxi regulation. Following AGCM's intervention as *amicus curiae*, the Court of Appeal affirmed that the regulatory restraints mentioned by the Tribunal did not apply.

Furthermore, also in light of several opinions sent by AGCM to the Italian Parliament and Government, a provision in the Annual Law for Competition delegated the Government to adopt a legislative decree to reform the sector, taking into account the need to promote new technologies and new forms of mobility.

A key message of AGCM's advocacy interventions was that several restrictions in the current regulation, e.g., territorial restrictions and the obligation for private hire vehicles drivers to return to their garage before offering a new ride, are all the more unjustified and anachronistic in light of the new opportunities offered by online platforms. Moreover, it highlighted that public policy objectives such as road safety and passenger security could be achieved through a light regulation as the current regulatory burdens could not be viewed as justified and proportionate, and instead they were intended only to limit the number of operators.

To promote a level playing field, the Authority suggested forms of regulatory compensation to the incumbents by alleviating the current limitations on their activity – in terms of availability of taxi licenses, itineraries and timetables, promotional discounts – and even envisaged possible monetary compensations to neutralize the social costs of liberalization¹¹.

Mobility services: long-haul bus transport services

In 2014, a new regime based on authorizations replaced the previous exclusive concessions system in the interregional passenger bus transport sector. Thereafter, the sector underwent a profound transformation, with a substantial increase in the number and frequency of routes. Several new opportunities and services were introduced by companies operating digital platforms and using dynamic pricing policies (e.g., Flixbus).

The Authority intervened in favour of innovative companies by means of an opinion sent to the Ministry for Infrastructure and Transport in December 2015 with regard to the compatibility of the new price setting methodology with the legislative framework. The request of the MIT stemmed from a complaint received by the Ministry from a bus company claiming that flexible fares applied

by two newcomers – which depended on travel days, seat availability and promotional offers – where not in line with the fares indicated in the license.

In its request for an opinion, the Ministry itself noted that the liberalized bus transport services were only subject to a set of requirements including the indication of the fares that operators intended to apply. In fact, the two companies reported the maximum applicable fare and the maximum level of discount in their license. That said, the Ministry observed that, since long-haul bus transport services are neither subsidized nor entrusted with public service obligations, they may be priced without the obligation to follow set rules.

AGCM concurred with the Ministry in that the requirement envisaged by the authorization process was the mere indication of the applicable fares and discounts and that liberalized price is a competitive factor not subject to regulatory constraints. The Authority emphasized that the pricing setting methodology in question was similar to those applied in other liberalized segments of passenger transport sector, such as airlines, ferries and high speed train, or in other markets related to the tourism industry, e.g., online hotel booking¹².

21. In the tourist accommodation sector, AGCM used its power to take legal action against administrative provisions, while advocating before the Parliament and the Government, to prevent the introduction of unnecessary and disproportionate measures suitable to hamper new opportunities for consumers.

Box 4. Tourist Accommodation Services

In October 2015 the Authority issued an opinion to the Lazio Region¹³, suggesting the elimination of unnecessary and disproportioned restrictions envisaged by a new regulation for non-hotel accommodation services (including Airbnb services), which introduced minimum operational requirements, limitations to the opening days and dimensional requirements. AGCM held that several provisions were not necessary for achieving the public interests pursued – i.e., public health, environmental protection and safety of guests – and could raise unjustified barriers to entry and expansion for potential new operators.

Since Lazio Region decided not to comply with the opinion, AGCM challenged the regulation before the administrative Courts, pursuant to Art. 21-bis of Competition Act no. 287/90. The Tribunal upheld AGCM's suit and annulled the regional regulation.

More recently, Lazio Region invited the Authority to comment on a new draft legislation which, according to the Authority's new opinion¹⁴, introduces further restrictions while only partially complying with the previous opinion and the related Court rulings. Once again, Lazio Region did not take AGCM's observations into account. In light of that, in October 2017 the Authority decided to reiterate the legal action before the administrative Courts against the new version of the regional regulation¹⁵.

Still in the same market, in November 2017 AGCM sent an opinion to the Parliament and the Government to advocate against some provisions introduced by a new legislation on short-term rentals' tax regime, which appeared to be capable of altering the competitive dynamics between different operators, with possible negative effects on end users of short-term rental services¹⁶. The new rules impose on players engaged in intermediation activities, in case they collect the rent related to the short-term lease agreements, to operate "as withholding agent", i.e. to withhold a tax rate on the amount of the rent and, in case of non-resident intermediaries in Italy, also to appoint a tax representative.

While acknowledging that the legislator's intervention is aimed at achieving a fiscal public interest by thwarting tax avoidance, AGCM opined that the introduction of those obligations did not seem proportionate to the pursuit of those aims and represented an unicum within the European landscape. In particular, the tax obligation related to the role of withholding agent represents a further administrative burden that may discourage the offer of digital payment systems and alter the competitive dynamics. This would primarily affect online platforms that adopt business models based on the use of online payment instruments, which in recent years have been established in the digital economy, as they are effective in promoting and expanding the range and quality of services offered.

A reduction in the use of digital payment systems by online platforms in short-term leases, concluded the Authority, might penalize end-users, leading to a narrower and less varied offer, and negatively impact the demand itself - no longer supported by commercial guarantees related to the use of digital payment instruments - ultimately altering the competitive conditions currently existing in the entire segment of the tourist offer of traditional and non-traditional tourist accommodations.

22. The Authority finds it all the more important to monitor markets where new business models are still at a germinal stage. In these cases, incumbents are usually in a favourable position to take stance vis-à-vis the legislator, while innovative firms might still not have relevant means to strongly express their position. Competition restrictions in this delicate phase might spell the end of promising evolutions in the market.

23. A relevant example in this regard is AGCM's intervention to ward off regulation concerning home restaurant services.

Box 5. Home restaurant services

In February 2017, the Authority criticized several provisions contained in a legislative initiative to regulate one of the forms of the sharing economy, the home restaurant economic activity¹⁷. By defining it as occasional activity, the draft bill envisaged quantitative limits on the home restaurant activity, in terms of maximum number of meals and turnover per year).

AGCM totally unjustified and being in sharp contrast with the constitutional principles of free economic initiative and competition as well as the liberalization principles set by the Italian and EU law.

In particular, the Authority recalled that restrictions in terms of market access may be imposed, according to European law, only if they are non-discriminatory, justified by a well-identified "imperative motive of general interest", pursuant to art. 4 (8) of the Services Directive (Directive 2006/123/EC), proportionate and necessary. In addition, any regulation of the activities of the collaborative economy, by taking into account the specific features of the innovative service offered, should not favour a business model at the expense of others.

Furthermore, the Authority contested the obligation to use only one channel - online platforms - to deliver home restaurant services, since it would inevitably reduce the demand of these services by customers unused to the use of apps and the supply from traditional markets which have a direct contact with final users. In addition, the Authority found it restrictive the obligation to actually pay for the benefit before using it, resulting in difficulties in last minute cancellation.

6. Other initiative related to E-commerce

24. AGCM has engaged in a number of initiatives to improve its understanding of the novel competition dynamics brought about by E-commerce.

25. In May 2017, AGCM launched a Sector Inquiry on Big Data in cooperation with the Italian Communication Regulator and the Italian Data Protection Authority, to make sure that the analysis of Big Data could take into account all the different issues at stake (*IC53 Big Data*)¹⁸. E-commerce is intrinsically linked to data gathering and processing: Big Data play a key role in most online markets and underlie platforms' capabilities to generate value and provide innovative services. At the same time, Big Data may raise serious concerns both for competition and for individuals' privacy.

26. In its opening decision of the inquiry, the Authority acknowledged that Big Data may foster competition and pluralism and contribute to create new forms of value. That said, the inquiry intends to assess whether, and under which circumstances access to Big Data might constitute an entry barrier, or in any case facilitate anticompetitive practices that could possibly hinder development and technological progress.

27. In more detail, the aim of the survey is to (i) assess whether and under what conditions Big Data may provide market power, (ii) analyse possible abusive or collusive

conducts by online operators stemming from Big Data, (iii) understand the competitive relevance of privacy and (iv) and identify regulatory frameworks suitable to foster static and dynamic competition.

28. The study is examining consumers' awareness and attitudes towards the gathering of personal data, also by means of empirical research. Furthermore, it is focusing on competitive issues brought about by Big data in online advertising and in the banking and insurance sectors. The analysis will also encompass the impact of Big Data on data protection and information pluralism. Indeed, online news access increasingly occurs through digital intermediaries such as social networks and search engines that are able to employ users' information as a strategic asset and might influence the representations of reality. The findings of the survey are expected to be published by the end of 2018.

29. Furthermore, in February 2018 the Authority established a Working Group on Algorithms. In the face of a widespread usage of algorithms by e-suppliers to improve their pricing models, customize services and predict market trends, the Working Group intends to examine both the related efficiencies and the possible anti-competitive effects. Another relevant area of possible analysis concerns the interplay between the algorithms used by the online sellers and the algorithms adopted by the online platforms in which these sellers operate. In particular, firms' incentives to adopt certain pricing strategies might be affected by the algorithms used by online platforms and marketplaces that determine sellers' visibility. In light of that, it appears important to understand the impact of pricing algorithms considering both intra-platform and inter-platform online competition.

30. Technical expertise may be helpful for screening and investigation purposes, as well as for solving the traditional issue of distinguishing between intelligent adjustment (lawful tacit collusion) and collusive infringements in the new context characterized by the presence of algorithms. To the same end, in order to improve its technical skills, AGCM is in the process of hiring a number of IT experts, including an algorithm specialist (i.e., a data scientist).

31. Finally, it is worth mentioning that AGCM, as a co-Chair of the ICN Unilateral Conduct Working Group, is contributing to a joint reflection on competition issues associated with the digitalisation of global economy promoted by the International Competition Network. In particular, the ICN Working Group launched a Vertical Restraints Project, which envisages the development of papers, based on hypothetical scenarios, that examine the effect on competition and potential resulting efficiencies of specific vertical restraints. In particular, these papers will analyse the common or divergent approaches used by competition authorities in the assessment of the vertical restraints in various jurisdictions.

7. Consumer protection enforcement

32. The marketing of new products, services and the advent of new business models in the digital realm exacerbates the risk of emerging consumer detriment, as information asymmetries peak in the absence of prior contracting experiences. Moreover, consumers may fail to fully appreciate the legal and practical implications of their consenting to contractual terms attached to the new products.

33. AGCM's activity in the field of consumer protection has proven to be complementary to competition enforcement and advocacy. Indeed, consumer protection

enhances trust and transparency, which are necessary requisites for competition to function properly. In addition, it is not rare in E-commerce to find instances where antitrust concerns overlap with consumer protection issues. In these cases, AGCM may benefit from its dual competence and select the more appropriate tool to intervene. Consumer protection cases may result swifter, since they do not entail a precise definition of the relevant market, nor the assessment of dominance, which may require complex economic analysis. Finally, consumer protection enforcement provides AGCM with additional opportunities to gain a better understanding of new business models and their implication on consumer habits.

34. AGCM has engaged in a comprehensive strategy aimed to foster consumer trust by repressing unfair conducts such as non-delivery of paid goods, denial or obstacles to refund applications and false information about the real availability of the product. Over the last three years, the Authority conducted 56 formal proceedings concerning E-commerce suppliers. In 18 cases AGCM imposed fines totalling more than 3 million euro. In four cases the Authority accepted and made binding commitments submitted by the parties, while in other 34 instances the e-suppliers promptly amended the information content provided to consumers to ensure compliance with the provisions of the Consumer Code. AGCM's activity encompassed a number of different sectors, including tourism, transport, consumer electronics, e-ticketing and clothing products.

35. An important area of AGCM's consumer protection activity in E-commerce relates to the information provided to consumers prior to their purchase. Since the "depersonalization" of the purchase relationship typical of distance contracts may weaken the purchaser's position, the information provided by e-sellers should be clear, comprehensible, precise and exhaustive, both with reference to the essential characteristics of the products sold and the terms and conditions of the contract. A recent case concerning Amazon is paradigmatic in this respect.

Box 6. PS9353 Amazon – Marketplace – Legal guarantee

By decision of March 2016, the Authority found that the informative regime applied by Amazon – as regards both direct sales and the marketplace platform - did not provide consumers with precise and complete information. Therefore, AGCM deemed that the conduct was in breach of the Consumer Code and imposed a fine on Amazon¹⁹.

As regards to direct sales made by Amazon, the Authority concluded that the purchase procedure did not provide information immediately perceivable concerning the right to withdraw, the provision of after- sale assistance and related terms, after-sale services and commercial guarantees, and the note on the existence of the legal guarantee of conformity of the goods. Although the sections “Terms and Conditions” and “Returns” were accessible through links at the bottom of the page, AGCM held that they were not necessarily visible during the purchase procedure. As emphasized in the guidelines for the implementation of Directive 2011/83/EU, traders are obliged to provide said information “right before” the conclusion of the contract, “in a clear and evident way” and “in proximity”, so that consumers can see it and read it before submitting the order without being obliged to leave the page in use.

Regarding the marketplace platform, the Authority claimed that Amazon did not provide specific information concerning its role as mere intermediary in the transaction. AGCM underlined that this lack generated confusion since Amazon, in some cases, manages the shipping of the products and the return service directly. Furthermore, AGCM found that, in case of marketplace purchases, Amazon limited the exercise of after-sale consumer rights by refusing to give assistance and redirecting consumers to third sellers to obtain the legal guarantee.

36. Furthermore, comparison tools and electronic marketplaces play a key role in E-commerce. In the digital realm, consumers are often exposed to a flood of information that may be difficult to handle and duly consider. Comparison tools may allow consumers to quickly and easily compare prices and other conditions of products or services across a large number of online sellers. This facilitates consumer choice and leads firms to compete more aggressively on prices. However, these positive effects on competition depend on the extent to which consumers are provided with transparent and trustworthy information and might thus be undermined by unfair practices that can distort consumer choice.

37. In 2015, the Authority carried out two investigations concerning car insurance comparison websites, which acted as brokers for some insurance companies, thereby having incentives to encourage purchases of specific insurance policies. Consumers were not aware that the comparison websites were not presenting all the offers on the market and that the products compared were not always homogeneous. AGCM identified a lack of transparency resulting in an unfair practice, and obliged the parties to display detailed information on the website about the business model of the comparison tool, while modifying the algorithm to list homogeneous options²⁰.

38. In August 2017, the Authority also imposed a 5 million Euros fine on Trenitalia, the main train operator in Italy for passenger rail transport, because the travel options proposed by its corporate website neglected regional trains. The algorithm steered consumers towards more expensive travel solutions (high-speed and Intercity train options), without informing consumers that the results displayed did not include all the options available²¹.

8. Comments and conclusions

39. In the experience of AGCM to date, competition policy has proven to be well equipped and flexible enough to adapt its analytical tools to the challenges brought about by digital innovation. In its case regarding E-commerce, the Authority has been confronted with familiar issues, in a much more dynamic world due to the speed of innovation. In particular, in the investigations concerning vertical restraints, AGCM applied the same analytical framework and theories of harm as those used in offline markets: the assessment focused on the effects rather than the form of the alleged restraints of competition, weighing their pro-competitive upsides (typically, increased efficiency and effectiveness) and anti-competitive downsides (above all in terms of foreclosure).

40. That said, technological complexity, speed of innovation and novelty of business models that characterise E-commerce often require a thorough case-by-case analysis that needs to take into due account the features and specificities of the markets under scrutiny. In this perspective, market studies – such as the sector inquiry on Big Data launched by AGCM in cooperation with the Italian Data Protection Authority and the Italian Telecoms Regulator – can be an effective tool to gain a better understanding of the competition issues at stake. By the same token, in-house skills and knowledge are crucial to ensure that competition concerns, in both their static and dynamic aspects, are correctly identified. Technical expertise may also be very helpful for screening and investigation purposes.

41. AGCM has experienced the complementarity of competition enforcement with competition advocacy and consumer protection. Advocacy is a powerful tool to prevent restrictive regulation that might undermine the benefits of digital innovation. While being fully aware that competition authorities only play an indirect role in the design of regulation, AGCM uses its know-how to recommend the most competition friendly options.

42. At the same time, appropriate consumer protection enforcement may promote rivalry between firms, by effectively empowering consumers and ensuring that they are not misled in their selection of the most efficient and effective offer and thus reap the full benefits of a genuinely competitive environment. In E-commerce, this might not be always the case, in light of imperfect information, transaction costs and behavioural biases that may need to be addressed by consumer protection action. Therefore, competition and consumer policies may be construed as interdependent instruments, each capable to advance the goals pursued by the other, operating to the ultimate benefits of consumers.

43. The virtuous outcomes of such coordination may be more easily achieved when enforcement responsibilities are located within a single institution, as in the case of AGCM. Such institutional arrangement, in the experience of the Authority, allow for the most appropriate selection of policy instruments to meet the needs of particular fact-situations, while at the same time fostering synergies between the two instruments.

44. Finally, the multi-jurisdictional nature of most competition infringements in E-commerce, as well as the global nature of many digital platforms, requires increasing international cooperation between competition authorities. A pertinent example is represented by vertical restraints in the online hotel booking sector, which were addressed in a number of different jurisdictions throughout the world.

45. In the light of the above, it is important that competition authorities develop a common understanding of the novel issues brought stemming from the digitalization of the economy and promote consistent standards for their assessment. In this respect, international organizations play a crucial role in fostering discussion and experience sharing, which can enhance the ability of competition authorities to deal with the changes brought about by digital innovation, on the one hand, and increase convergence in their approach, on the other.

¹ Source: Osservatorio eCommerce B2c, School of Management of Politecnico of Milan and Netcomm.

² Decision no. 25021 of 9 July 2014, I718 ENERVIT – DISTRIBUTION OF SPORTS FOOD SUPPLEMENTS, <http://www.agcm.it/concorrenza/intese-e-abusi/download/41256297003874BD/AF574670CF31D5D4C1257D3900371540.html?a=p25021.pdf>;

decision no. 25422 of 21 April 2015, I779 MARKET FOR TOURISTIC SERVICES-ONLINE HOTEL BOOKING, <http://www.agcm.it/concorrenza--delibere/concorrenza-provvedimenti/open/41256297003874BD/660EE2E99780F7B5C1257E350039D1CD.html> and decision no. 25940 of 23 March 2016, I779 MARKET FOR TOURISTIC SERVICES-ONLINE HOTEL BOOKING <http://www.agcm.it/concorrenza--delibere/concorrenza-provvedimenti/open/41256297003874BD/4AC063DE04DC3DB1C1257F92003FE656.html>

(for additional information in English, see the Note presented by Italy at the OECD Hearing on Across Platform Parity Agreements of 27-28 October 2015, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2015\)58&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)58&doclanguage=en)); case I813 - RESTRICTIONS TO ONLINE SALES OF STOVES (the final decision will be published shortly).

³ I801A TAXI DISPATCH SERVICES IN ROME – I801B TAXI DISPATCH SERVICES IN MILAN. The opening decisions available online: <http://www.agcm.it/concorrenza/intese-e-abusi/open/41256297003874BD/91CD53A9AF355718C12580B800544D52.html> and <http://www.agcm.it/concorrenza/intese-e-abusi/open/41256297003874BD/C56496D81342C91AC12580B800544D57.html>.

⁴ The report is available at http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf. The other nine national competition authorities involved in the monitoring exercise were the ones of Belgium, Czech Republic, France, Germany, Hungary, Ireland, Netherlands, Sweden and UK.

⁵ The participating authorities sent a uniform electronic questionnaire to a sample of 16,000 hotels in the ten Member States involved, plus questionnaires to 20 online travel agents, 11 metasearch websites and 19 large hotel chains.

⁶ In 2013 online hotel booking through OTAs represented nearly 70% of the online channel (in terms of turnover of hotels), and [25-30]% of total hotel reservations. Room booking at the hotel websites represented only [5-15]% of total hotel reservations.

⁷ Decision no. 25932 of 23 March 2016, case C12023 ARNOLDO MONDADORI EDITORE/RCS LIBRI http://www.agcm.it/concorrenza/concentrazioni/download/41256297003874BD/C26F762FD16A_A33FC1257F85004CEBED.html?a=p25932.pdf. Similar considerations already applied to previous merger reviews. E.g., C11957 - EMMELIBRI-EFFE 2005 GRUPPO FELTRINELLI/NEWCO, 4 December 2014.

⁸ Decision no. 26927 of 17 January 2018, case C12109 PROFUMERIE DOUGLAS/LA GARDENIA BEAUTY – LIMONI, <http://www.agcm.it/concorrenza/concentrazioni/download/41256297003874BD/3545C5A811C3E67DC125821E003ACA97.html?a=p26927.pdf>.

⁹ C12138 CASSA CENTRALE RAIFFEISEN DELL'ALTO ADIGE/GRUPPO BANCARIO COOPERATIVO DELLE CASSE RAIFFEISEN. The opening decision is available at: <http://www.agcm.it/concorrenza/concentrazioni/download/41256297003874BD/67803DD8F5404297C125825C0050A0CA.html?a=p27074.pdf>.

¹⁰ A description of taxi regulation in Italy can be found in the Authority's contribution to the 2018 OECD Roundtable on Taxi, ride-sourcing and ride-sharing services, available at: <http://www.oecd.org/daf/competition/taxis-and-ride-sharing-services.htm>

¹¹ See AGCM opinion n. AS1354 - RIFORMA DEL SETTORE DELLA MOBILITÀ NON DI LINEA, in Bulletin n.9/2017, available at: <http://www.agcm.it/bollettino-settimanale/8663-bollettino-9-2017.html>

¹² For more information, see the AGCM written contribution submitted for the 62nd meeting of the Working Part No. 2 on Competition and Regulation on 28 November 2016, available at the following link: [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2016\)11/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2016)11/en/pdf)

¹³ See AGCM opinion n. AS1239 - NUOVA DISCIPLINA NEL LAZIO DELLE STRUTTURE RICETTIVE EXTRA ALBERGHIERE, in Bulletin n. 47/2015, available at: **Error! Hyperlink reference not valid.**

¹⁴ See AGCM opinion n. AS1380 - NUOVA DISCIPLINA NEL LAZIO DELLE STRUTTURE RICETTIVE EXTRA ALBERGHIERE, in Bulletin n. 22/2017, available at: **Error! Hyperlink reference not valid.**

¹⁵ See AGCM opinion n. AS1447 – REGIONE LAZIO - NUOVA DISCIPLINA DELLE STRUTTURE RICETTIVE EXTRA ALBERGHIERE, in Bulletin n. 44/2017, available at: <http://www.agcm.it/bollettino-settimanale/9020-bollettino-44-2017.html>, page 24-28.

¹⁶ See AGCM opinion AS1451 – LAW DECREE 50/2017 – SHORT-TERM RENTAL AND TOURIST OFFER, in Bulletin No. 45/2017.

¹⁷ See AGCM opinion n. AS1365 - DISEGNO DI LEGGE SULLA DISCIPLINA DELL'ATTIVITÀ DI HOME RESTAURANT, in Bulletin n. 13/2017, available at: **Error! Hyperlink reference not valid.** The draft law n. 2647, currently under review of the Senate, is available at: <http://www.senato.it/japp/bgt/showdoc/17/DDLPRES/1000674/index.html>

¹⁸ Sector enquiry IC53 BIG DATA. The press release concerning the opening of the market study is available at: <http://www.agcm.it/en/newsroom/press-releases/2384-%E2%80%9Cdig-data%E2%80%9D-italian-regulators-open-a-sector-inquiry.html>

¹⁹ Decision no. 25911 of 9 March 2016, case PS9353 AMAZON – MARKETPLACE – LEGAL GUARANTEE, <http://www.agcm.it/consumatore/consumatore-delibere/download/C12560D000291394/1DAB422CC30D49FAC1257F9200402431.html?a=p25911.pdf>.

²⁰ PS9212 - PS9518 Sites comparison of RC car insurance commitment policies binding on Facile.it and 6Sicuro, <http://www.agcm.it/en/newsroom/press-releases/2225-ps9212-ps9518-sites-comparison-of-rc-car-insurance-commitment-policies-binding-on-facileit-and-6sicuro.html>.

²¹ PS10578 Trenitalia Booking System, <http://www.agcm.it/stampa/comunicati/8878-ps10578-trenitalia-esclude-dai-propri-sistemi-di-prenotazione-alcune-soluzioni-con-regionali,-multa-da-5-milioni-di-euro-e-obbligo-di-informare-i-consumatori.html>.