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Environmental Considerations in Competition Enforcement – Note by Italy

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm>.

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1. Introduction

1. The Italian Competition Authority (the Authority or the AGCM) welcomes this roundtable as an opportunity to learn about the approaches that competition authorities have taken so far when assessing antitrust cases with an environmental dimension, in light of the increasing number of initiatives towards sustainability being undertaken by the private sector and public institutions also at the national level.

2. While the AGCM has not yet reached a formal position on how to integrate environmental aspects into the competition legal framework and analysis, it has dealt with environmental considerations in some antitrust investigations (abuses of dominant positions and mergers), advocacy opinions and market studies regarding two sectors: the more traditional waste management and recycling sector, whose framework is primarily based on the achievement of environmental objectives, and an emerging sector which is going to play a fundamental role in the future for the transition to a greener economy, the development of battery-powered electric vehicles, electric mobility services and infrastructure.

3. This contribution therefore outlines the Authority's experience which has not contemplated, so far, situations of trade-off between competition and sustainability objectives. On the contrary, it has showed that restrictions of competition, through either regulation or abusive conducts of dominant firms, can also have adverse effects on the achievement of environmental objectives.

4. In section 2, in relation to the waste recycling sector, after a background on Italy's sectoral regulation, this contribution highlights the main considerations developed with respect to the interplay between competition and environmental objectives. In section 3, the contribution outlines environmental considerations in the emerging sector of electric mobility. Section 4 concludes.

2. Environmental considerations in the waste management and recycling sector

5. The Authority had the opportunity to address the interplay between competition issues and environmental considerations well before the current debate on sustainability and competition. In 2005¹, the AGCM launched a sector inquiry in the packaging waste sector and since then it has gained an increasingly deeper understanding of this complex sector and the entire waste management industry by availing of the full range of tools at its disposal, enforcement actions (mainly investigations for abuse of dominant positions), advocacy opinions and a second market study in 2016. This section will focus on the agency's considerations developed in the area of packaging waste recycling.

¹ See Sector inquiry IC26-Mercato dei rifiuti da imballaggio, decision of 03/07/2008, published on Bulletin n. 26/2008, press release in English available at <https://en.agcm.it/en/media/press-releases/2008/8/alias-1706>.

2.1. Packaging Waste Recycling: the institutional design addressing market failures

6. In Italy a law approved in 1997² established for the first time a system for managing and recycling packaging waste, based on the model of consortium of producers of packaging waste and utilisers (for recycling). The National Packaging Consortium (CONAI) was set up as a consortium that coordinates six other material-specific groups in the recycling sector including COREPLA (for plastic packaging) and COMIECO (for paper).

7. The national consortia under the CONAI system were set up to ensure the application of an important principle of the Italian and European framework, that is, the Extended Producer Responsibility (EPR), an application of the “Polluter Pays” principle, according to which a company that professionally develops, manufactures, processes, treats, sells or imports products should be responsible, also financially, for the management of the waste generating by these products.

8. Under the framework, these national consortia receive compulsory contributions from companies that produce the relevant material in return for recycling services. These consortia are participated by producers and recycling companies and are responsible for the collection of packaging waste for the different sectors. The producers pay a fee to the national consortium CONAI and to the respective sector consortium and by this contribution they fulfil their obligation for the treatment or disposal of the packaging waste.

9. Italian law established these consortia as the default companies for managing waste recycling nationwide, with the idea that market mechanisms would not be sufficient to provide a service that was desirable for environmental protection purposes, in light of the new standards imposed by the legislator. Indeed, this consortium-based system was chosen to allow for the launch of recycling services that did not exist and solve supply-side market failures, that is to provide incentives to producers of packaging waste to invest in more sustainable products over time.

10. While the consortium-based system played a fundamental role in fostering waste recycling, which was previously practically inexistent in Italy, the AGCM interventions of the last fifteen years has shown that Italy’s recycling model based on monopolistic consortia, which recycle waste on behalf of its members for a flat fee, had exhausted its initial drive and is no longer capable to deliver environmental benefits for which it was set up.

11. For this reason, the Authority has advocated for the entry of alternative of collection and recycling systems complying with the ERP principles, possibility that was also contemplated by the regulatory framework: companies can decide to set up their own collection and recycling systems or adhere to alternative EPR compliance schemes if they do not choose to join the national consortia.

3. The interplay between competition and the environmental principles

12. The development of alternative EPR compliance schemes has been severely hindered by certain features of the regulatory framework (e.g., alternative systems must be accredited by the consortia who ensure the systems meet legal requirements, or the

² Legislative Decree no. 22 of 5/2/1997 “Attuazione delle direttive 91/156/CEE sui rifiuti, 91/689/CEE sui rifiuti pericolosi e 94/62/CE sugli imballaggi e sui rifiuti di imballaggio”, published on GU no. 38 of 15/2/1997.

requirement for alternative systems to cover the entire national territory) together with the obstructive conducts by default consortia, as shown in the AGCM interventions summarised in Box 1 below.

13. In this regard, several considerations on the relationship between competition and environmental objectives were developed by the Authority in a second and more recent sector inquiry (2016) concerning the waste sector³.

14. First of all, the Authority noted that the monopolistic position of the national consortia for recycling meant that the consortia participation/compensation fees paid to the consortia by producers did not reflect the economic, and more importantly, the environmental costs of recycling. Indeed, the Authority found that within the current consortium-based system the environmental costs of packaging recycling bear no relationship with its economic costs.

15. The consortium-based system provides waste recycling services by charging all producers of packaging made from the same material (e.g., plastic) a single fee. In this way, a producer of more easily recyclable products pays to the consortium the same “EPR compliance” fee compared to a producer of less recyclable products even if the latter products would require higher waste management costs and bear higher environmental costs. In other words, the environmental cost to manufacturers of meeting the EPR obligation currently bears no relation either to the actual environmental impact of the packaging they produce or to the cost to the consortium system of handling it. This implies the disapplication of the “Polluter Pays” principle.

16. The failure to internalise the real environmental cost of waste recycling, which is typically higher in the case of less recyclable packaging, prevents this fee from having any real impact on the final price of each type of packaging and hence on the competitiveness of manufacturers of packaging. In other words, the EPR compliance fee borne by firms does not provide price signal to consumers as to the greater or lesser environmental impact of the product. As a consequence, there is a softening of competition in the market for the production of packaging, which benefits in particular the producers of less recyclable packaging, who avoid competition based on the production of environmentally friendly goods.

17. If, on the other hand, the actual waste management costs were fully included in the final price of the packaging, the more easily recyclable products would have to be cheaper and the less recyclable products more expensive. In other words, according to the Authority, an appropriate application of the EPR principle would mean that competition between packaging manufacturers would also be based on the ability to minimise the environmental cost component of production costs, i.e. on the production of more or less recyclable packaging.

18. Therefore, the Authority’s analysis underlined that in order to fully exploit the incentives that environmental legislation provides to the production of more environmentally friendly packaging, the effectiveness of such legislation is based on the operation of competitive mechanisms. In other words, competition helps to achieve environmental objectives.

³ See Chapter V of the final report IC49 - MERCATO DELLA GESTIONE DEI RIFIUTI SOLIDI URBANI, decision of 21/01/2016, published on the AGCM Bulletin n. 3/2016. Executive summary: https://www.agcm.it/dotcmsDOC/allegati-news/IC49_sintesiindagine.pdf. Press release in English available at: <https://en.agcm.it/en/media/press-releases/2016/2/alias-2303>

19. For these reasons, the Authority called for a reform of the consortium-based system to be replaced by an EPR compliance system which, in addition to making producers fully financially responsible for the cost of packaging waste management, provided a more competition-oriented structure. The presence in the market of different compliance schemes competing to offer the packaging waste management service would in fact provide an incentive to reduce waste management costs in order to allow a reduction of the environmental contribution applicable to participating producers compared to competing systems. The search for efficiency in a competitive environment would therefore lead to the production of more environmentally friendly packaging with a lower management cost. Moreover, the competitive constraint would induce compliance schemes to differentiate the environmental contribution according to the degree of recyclability of the packaging produced by the member companies.

20. Moreover, according to the Authority's analysis, competing systems for collection and recycling of waste can foster innovation in exploring solutions that are not only economically efficient but also better performing from an environmental perspective. This aspect was highlighted in the 2020 infringement decision concerning COREPLA: when assessing the degree of gravity of the infringement, the Authority stated that the abusive conduct of COREPLA had hindered the unfolding of the environmental protection effects which, in accordance with the model of Extended Producer Responsibility (EPR), derive from competition between compliance systems (para 195 of the infringement decision). The conduct had prevented in this case the implementation of an innovative environmental project (the CORIPET project), which would have resulted in an increase in the collection and recycling of separate waste, especially in geographical areas with lower environmental performance.

Box 1. AGCM interventions in the waste management and recycling sector

In July 2008, the Authority concluded an in-depth market study on packaging waste industry, in particular the regulation and activity of the national consortium CONAI and the sub-groups responsible for several recyclable materials (paper, glass etc.)⁴, with a view to assess competitive distortions in the implementation of the legislation introduced in 1997. The knowledge and the expertise built in this market study was useful for the subsequent antitrust investigations on abusive conducts hindering the entry of alternative EPR systems.

In April 2009, the AGCM closed an investigation into anti-competitive agreements in the lead battery recycling industry, concluding that **COBAT**, the mandatory consortium for **collection and recycling of used lead batteries**, and several lead recycling companies had restricted competition by hindering any attempt to develop recycling activities outside COBAT, thus preventing manufacturers from taking advantage of a commercial practice for recycling used batteries that would have led to a reduction in the cost of producing new batteries. The industry association of recycling companies, AIRPB, took an active coordinating role and was used by the companies as to reach common decisions⁵.

⁴ See AGCM IC26 - MERCATO DEI RIFIUTI DI IMBALLAGGIO, infringement decision of 03/07/2008, published in the AGCM Bulletin n.26/2008.

⁵ I697 - RICICLAGGIO DELLE BATTERIE ESAUSTE, infringement decision of 29/04/2009 published on the AGCM Bulletin n. 17/2009. For a description of this case, please see the AGCM

In 2011, the AGCM also intervened with a commitment decision with respect to the conduct of **COMIECO**, the consortium responsible for the collection, recovery and recycling of **waste paper** associating approximately 3,500 firms active in paper manufacturing⁶. The Authority investigated the system in use to assign paper waste to its members. It found that the amount of waste assigned to each associated paper manufacturer was based on historical market shares as it was proportional to the quantity of paper packaging introduced in the consumption phase the year before. After the opening of the proceedings COMIECO presented commitments to assign 40% of the packaging waste controlled by the Consortium through competitive auctions. The Authority deemed that these commitments would address the competition restrictions identified in the opening of the investigation. The remaining 60% of paper waste being assigned pro-quota was considered justifiable in order to pursue the environmental objectives fulfilled by COMIECO. An interesting effect for competition of the COMIECO case was that the outcome of the auctions showed that the waste paper as a secondary raw material had a market value, which prompted many producers to leave the Consortium and sell the waste paper themselves⁷.

In September 2015, the AGCM closed with a commitment decision an investigation against CONAI and **COREPLA**, the national consortium for the collection, recycling and recovery of **plastic waste**, for a suspected abuse of dominant position in the industrial packaging waste management market, by hindering the entry of a new alternative consortium Aliplast⁸. In particular, the two consortia had allegedly abused their positions as official accreditors to carry out an overly critical review of the autonomous system put in place by Aliplast, delaying its certification.

In January 2016, the Authority concluded a **market study in the house waste collection and management** and proposed far-reaching changes in order to ensure that this sector plays an essential role in the production of more environmentally friendly materials, making an important contribution to environmental objectives⁹.

In October 2020, the Authority fined EUR 27 million COREPLA for preventing a rival consortium of plastic bottle manufacturers, CORIPET, from competing on a level-playing field with COREPLA in the **plastic waste recycling**. In April 2018, CORIPET was authorised with a temporary license¹⁰. To win the right to permanently operate its consortium, CORIPET had to prove it could recycle a certain quota of plastic bottles in

submission to the 2013 OECD Roundtable on Waste Management Services, available at: <https://www.oecd.org/daf/competition/Waste-management-services-2013.pdf>

⁶ I730 GESTIONE DEI RIFIUTI CARTACEI COMIECO, commitment decision of March 16 2011, published on the AGCM Bulletin n. 11/2011.

⁷ The participation fee to COMIECO, conversely, dropped from 22 euro/tonne in 2011 to 6 euro/tonne in 2013.

⁸ A476 - CONAI-GESTIONE RIFIUTI DA IMBALLAGGI IN PLASTICA, commitment decision of 03/09/2015, published on the AGCM Bulletin n. 33/2015.

⁹ IC49 - MERCATO DELLA GESTIONE DEI RIFIUTI SOLIDI URBANI, decision of 21/01/2016, published on the AGCM Bulletin n. 3/2016. Executive summary: https://www.agcm.it/dotcmsDOC/allegati-news/IC49_sintesiindagine.pdf Press release: <https://en.agcm.it/en/media/press-releases/2016/2/alias-2303>

¹⁰ A531 - RICICLO IMBALLAGGI PRIMARI/CONDOTTE ABUSIVE COREPLA, infringement decision of 27/10/2020, published in the AGCM Bulletin n. 45/2020.

an efficient, effective and autonomous manner by April 2020, then extended to June 2021.

The AGCM found that notwithstanding the provisional authorization issued to CORIPET by the Italian government, and the decision of many plastic bottle producers to move to CORIPET's services and to pay for them to the new consortium, thus ceasing to pay COREPLA, COREPLA refused to share the household plastic packaging waste with CORIPET, denying the right of CORIPET to manage the plastic packaging waste originating from the products of its members. Furthermore, the investigation showed that COREPLA's agreement to collect plastic waste from the National Association of Italian Municipalities (ANCI) – which represents nearly all of Italy's municipalities – also included exclusivity clauses that prevented the latter from using another consortium to recycle its plastic bottles¹¹. In the Authority's view, COREPLA's conduct, by preventing CORIPET from achieving the full authorization within the statutory two years' period, was aimed at driving the only competitor out from the market for the compliance services to EPR obligations and therefore was deemed to be a particularly serious breach of Art. 102 Treaty on the Functioning of the European Union (TFEU).

In May 2021, the AGCM launched an investigation in the collection and treatment of waste electrical and electronic equipment, for a suspected abuse of dominant position by the consortium ERION WEEE, in particular through: (i) the inclusion in its contracts with recycling facilities a best price clause, which would not provide incentives to competing consortia to offer lower fees resulting from greater efficiency gains in their logistic activities and (ii) the use of exclusivity clauses to foreclose other collective schemes¹².

4. Electric mobility infrastructure and services sector

21. One of the major global trends in the transition to a greener economy is the growth of electric, software-enabled forms of mobility as several automakers have announced to sell only zero-emission vehicles by 2035-40¹³. For these reasons, the development of electric mobility services and infrastructures to enable and promote the use of battery-powered electric vehicles is becoming a key priority for governments and has attracted the attention of several competition authorities in Europe, including the AGCM¹⁴.

22. Recently, the AGCM has had the opportunity to elaborate environmental considerations in the emerging sector of electric mobility in Italy, first in the context of a unilateral conduct investigation, subsequently in an advocacy report to the government and more recently in the review of a merger transaction that could affect the competitive

¹¹ At the beginning of investigation, the Authority ordered to COREPLA interim measures which included, inter alia, the removal of any exclusivity clauses in the contracts with local authorities and sorting plants so as to allow the allocation of plastic waste to consortia other than COREPLA.

¹² A544 - ERION WEEE/CONDOTTE ANTICONCORRENZIALI, opening decision of 18/05/2021, published on the AGCM Bulletin n.22/2021.

¹³ See for instance General Motors press release of 28 January 2021, available at: <https://media.gm.com/media/us/en/gm/home.detail.html/content/Pages/news/us/en/2021/jan/0128-carbon.html>

¹⁴ Some competition authorities, such as those of Austria, Germany and UK, have recently undertaken market studies.

development of the infrastructures for recharging electric cars and its related mobility services.

23. In the unilateral conduct investigation (see Box 2 below), the Authority assessed the abusive conduct also with respect to the indirect effects on the development of electric mobility in a crucial phase of its launch. While the conduct concerned an ancillary service, the Authority considered its wider repercussion, in terms of detrimental effects to a more rapid diffusion of electric vehicles and, therefore, to the transition towards a more environmentally sustainable mobility. These environmental considerations were also included in the final decision ascertaining the infringement and, in particular, when assessing the gravity of the conduct for the purpose of sanction setting.

Box 2. AGCM infringement decision in the market for mapping services for electric car recharging stations

In May 2021, Google was sanctioned for its refusal to render its Android Auto system interoperable with Enel X, a rival's app providing services related to the recharging of electric vehicles and was imposed an interoperability remedy by the AGCM¹⁵. More specifically, by refusing Enel X interoperability with Android Auto, Google unfairly limited the possibilities for end users to avail themselves of Enel X app to search a station through a mapping services when driving an electric vehicle. Google has consequently favoured its own Google Maps app, which runs on Android Auto and enables functional services for electric vehicle charging. In addition to imposing the sanction, the AGCM has ordered Google to make available to Enel X, as well as to other app developers, tools for the programming of apps that are interoperable with Android Auto.

Although the market affected by the conduct provides an ancillary service to the electric mobility sector, the AGCM has nevertheless pointed out that Google's conduct could influence the development of electric mobility in a crucial phase of its launch. According to the Authority, Google's conduct, by hindering and delaying the entry of an app that would have made it possible not only to search for a charging station and obtain the relevant information for recharging, but also to book the use of the infrastructure and carry out other activities functional to recharging, is likely to result in a reduction of consumer welfare and a restriction of supply and consumer choice, with regard to the number of operators, the differentiation of services, and potentially, the very quality of services.

In addition, since the services in question are necessary for electric mobility, Google's conduct could also be detrimental to a more rapid diffusion of electric vehicles and, therefore, to the transition towards a more environmentally sustainable mobility. Indeed, the development of a network of recharging infrastructures in line with the needs of users of electric cars, who typically suffer from the so-called "anxiety of recharging", can contribute to the spread of electric mobility, with obvious benefits also in terms of environmental protection.

¹⁵ See Case n. A529 GOOGLE/COMPATIBILITÀ APP ENEL X ITALIA CON SISTEMA ANDROID AUTO, infringement decision of 13/04/2021, published on the AGCM Bulletin n. 20/2021. See also the AGCM press release of 13 May 2021, available in English at the following link: <https://en.agcm.it/en/media/press-releases/2021/5/A529>

In the Authority's view, Google's refusal to supply – which lasted for more than two years - has already produced adverse effects in terms of reduction of the user choice and is likely to generate permanent effects, by altering the structure of the market, with regard to services connected to electric recharging offered through apps, with consequent dispersion of the investments in technology made by its rival Enel X and loss of a business model alternative to that of Google Maps. In the Authority's view, all this represents an obstacle to innovation in the sector of services connected to electric mobility, in a crucial phase of its emergence, and may also affect the development of a network of charging infrastructures for electric cars that is adequate to the needs of demand, thus potentially jeopardizing a more rapid diffusion of electric vehicles and the transition towards a more environmentally sustainable mobility.

These environmental considerations were included in the final decision ascertaining the infringement. In particular, when assessing the gravity of the conduct for the purpose of sanction setting, the Authority noted (at paragraph 419) that the abusive conduct is likely to influence the development of electric mobility, in its crucial phase of laying out a network of infrastructures for recharging electric cars that is adequate for the growth and evolution of the demand: the Authority underlined repercussions of the conduct on a more rapid diffusion of electric vehicles and on the transition towards a more environmentally sustainable mobility.

24. These considerations also formed the basis for an advocacy intervention to the government in the context of the National Recovery and Resilience Plan. According to the AGCM, large-scale deployment of new electric vehicles requires adequate public charging infrastructures in urban and suburban areas with not only sufficient deployment characteristics but also widespread interoperability, as highlighted by the Authority's investigation described above¹⁶.

25. As the sector develops, the AGCM will also monitor M&A activity to ensure that dynamic competition is protected. In October 2021, the Authority opened a Phase II investigation with respect to a proposed joint venture between Volkswagen Group and Enel X with the purpose to create and manage a network of recharging points for electric vehicles in Italy¹⁷. In light of the dynamic evolution of this new sector, the AGCM decided that this proposed transaction between the German carmaker and the Italian vertically-integrated electricity incumbent Enel, both with plans to develop recharging points, warrants an in-depth assessment of its potential foreclosure effects and impact on innovation. With respect

¹⁶ See AGCM opinion AS1730 - PROPOSTE DI RIFORMA CONCORRENZIALE AI FINI DELLA LEGGE ANNUALE PER IL MERCATO E LA CONCORRENZA ANNO 2021, published in the AGCM Bulletin n. 13/2021, and available at the following link:

<https://www.agcm.it/competenze/tutela-della-concorrenza/attivita-di-segnalazione/legge-annuale>.

The Authority's proposals focus on the conditions necessary to ensure that, in the development phase of the sector, no distortions are created by the regulatory framework that could compromise its efficient functioning in the future. In particular, with a view of simplifying procedures and providing incentives for the construction of charging infrastructures for electric cars, the AGCM has called for (i) the removal of any regulated tariff scheme for the remuneration of the cost of electricity at the charging stations and for (ii) the set-up of transparent and non-discriminatory procedures for the allocation of public spaces for the installation of recharging stations, to avoid concentration at local level as well as the application of adequate competitive procedures by all public concessionaires (e.g., motorway concessionaires).

¹⁷ C12404 - ENEL X-VOLKSWAGEN FINANCE LUXEMBOURG/JVC, Phase II opening decision of 29/10/2021, published on the AGCM Bulletin n. 44/2021 and available at: <https://www.agcm.it/dotcmsdoc/bollettini/2021/44-21.pdf>

to horizontal effects, the merging parties currently own roughly half of the existing recharging points, and the AGCM noted that Enel X and Volkswagen have both agreed not to build or construct any charging stations in Italy outside of the joint venture, with potential deterrent effects on the entry of prospective competitors. As for the vertical effects, the in-depth investigation will assess whether post transaction the parties will have the ability and incentives to foreclose rivals in the downstream markets for mobility services. The assessment of the proposed joint venture is ongoing and will conclude on December 13, 2021.

5. Final remarks

26. The cases assessed by the Italian Competition Authority in the waste and electric mobility sectors have so far highlighted that anti-competitive conduct can hinder the achievement of environmental objectives that are sometimes also set in the legislation. In that regard, the removal of the illegal conduct can help the development of a more competitive framework and the achievement of a more sustainable environment.

27. However, the consideration of environmental aspects in competition cases is likely to be more challenging in markets that are emerging or undergoing a profound transformation like the mobility sector, where sustainability objective might be pursued through horizontal agreements or mergers that might raise competition concerns.

28. The Authority has decided to establish an internal working group on sustainability and competition to conduct research on current findings and experience from other authorities. The result of this research will provide a preliminary guidance on how to assess antitrust cases with an environmental dimension and give more prominence to sustainability considerations when prioritising interventions.

29. In this respect the AGCM would welcome future roundtables or hearings in the Committee addressing sectors affected by significant technological changes such as, for example, electric mobility sector which will play a fundamental role in the transition to a more sustainable economy.