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Purchasing Power and Buyers' Cartels – Note by Italy

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This document reproduces a written contribution from Italy submitted for Item 4 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels.htm>

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1. Introduction

1. In the Italian competition law framework, provisions on anti-competitive agreements, abuses of dominant positions and mergers apply to the exercise of market power from the supply as well as demand side. Indeed, Articles 101 and 102 TFEU (and their national equivalents) address conducts which impose directly or indirectly unfair *purchase* or selling prices or other unfair trading conditions.

2. The Italian Competition Authority (hereafter the Authority or the AGCM) has shown an interest in buyer power and has concluded a number of cases involving the full range of possible buyer-side anticompetitive practices, even when they take place along the supply chain and involve companies that do not sell products or services directly to consumers.

3. This contribution provides the main AGCM insights on the effects of buyer power in the grocery trade sector in particular with regard to the effects of buying groups or alliances among supermarket chains. To explore issues related to buyer power, the Authority conducted an extensive market study concluded in 2013, after receiving complaints about the adverse effects of buying groups or alliances of supermarket chains and unilaterally imposed unfair trading conditions by supermarket chains on suppliers. According to the Authority, the potential negative effects of buying alliances can occur on both the supplier and purchaser side in the medium/long term. High buyer power can produce static and dynamic adverse effects on suppliers, by reducing their offered quantity or their planned investments in innovation and product quality improvement. Furthermore, buying alliances can facilitate collusion among the supermarket chains as they lead to a standardization of distribution costs and models.

4. In more recent years, the Authority has examined potential anticompetitive coordination of buyers also in the waste management and recycling sector, in the context of two cases: the first case, concluded in 2021, concerned anticompetitive agreements between buyers of scrap lead-acid accumulators put in place within Italy's collective scheme COBAT; the second case, concluded in May 2022, concerned an abuse of dominant position by Erion, a consortium active in the collection and treatment of Waste Electrical and Electronic Equipment (WEEE), which consisted in the imposition upon Erion's contractual counterparts – namely WEEE recycling facilities – of a best price clause that could have an adverse effect on other competitors. In both cases, the Authority was concerned that the exercise of buyer power could have an exclusionary effect and impair competition between compliance collective schemes at the wholesale level, in an increasingly important sector of the green economy, rather than necessarily having an immediate effect on consumers.

5. Finally, the contribution highlights other regulatory provisions outside the traditional antitrust toolbox, aimed at protecting weaker trading partners: Article 9 of Law 192/1998 prohibiting abuse by one or more companies of the status of economic dependence and applicable economy-wide and a more sector specific regulation in the agri-food sector (Art. 62 of Decree Law 1/2012).

2. Buyer power in the grocery trade sector

6. The AGCM addressed buyer power issues in its 2013 market study on the grocery trade sector¹, analysing both horizontal aspects at retail level and vertical relationships between suppliers and retailers. The market study was launched following complaints from suppliers concerning alleged anticompetitive conducts by retailers' chains and their buying groups or alliances².

2.1. Buyer power and its effects

7. In the course of its market study, the Authority reviewed the general analytical framework on buyer power and its impact on consumer welfare and competitive process, in light of the economic literature, past market studies conducted by some European competition authorities on the same sector and international case law³.

8. It was noted that, unlike the definition of monopsony power, the concept of buyer power as bargaining power, does not necessarily entail a price below the competitive level but refers to the possibility of obtaining more favourable terms, also thanks to the threat of resorting to other suppliers ("outside options").

9. The AGCM recognised the positive effects of buyer power in terms of reduced transaction costs and increased economies of scale, as a countervailing power to balance suppliers with market power and a stimulus for efficiency improvements among suppliers (incentives for aggregation where supply is too fragmented). As a result, lower purchasing prices and other benefits are likely to be passed on to consumers as lower retail prices, at least in part.

10. Nevertheless, the Authority noted that the emphasis of the "traditional" approach on the possible downstream transfer of the benefits of buyer power warrants some caution. Indeed, the competitive process may be adversely affected by the exercise of buyer power even when, in the short run, final consumers may benefit from it.

11. The AGCM in its analysis highlighted the potential negative effects that can occur on both the supplier and purchaser side in the medium/long term. High buyer power can produce static and dynamic adverse effects on suppliers, by reducing their offered quantity or their planned investments in innovation and product quality improvement. These effects are largely driven by low buyer prices and/or imposition of 'unsustainable' non-price conditions even by efficient suppliers. These are typical monopsonistic effects and/or the result of significant imbalances in bargaining power.

¹ Market Study No IC43 - *Indagine Conoscitiva nel Settore della GDO*, AGCM, Decision No 24465 of 24 July 2013, published on the AGCM Bulletin No 31/2013 and available on the [AGCM website](#).

² An earlier market study on the grocery sector was launched in 2005 and concluded in 2007, with a focus on the analysing price trends in grocery products following the introduction of the euro. See IC28 - *Indagine Sulla Distribuzione Agroalimentare*, Decision no 16908 of 7 June 2007, published on the AGCM Bulletin No 22/2007 and available on the [AGCM website](#).

³ The Authority mentioned the definitions of buyer power by the American Antitrust Institute ("*...the ability of a buyer to reduce the price to be paid to a supplier or to induce him to offer more favorable non-price terms*") and by Dobson, for whom buyer power derives from an asymmetrical bilateral relationship between suppliers and buyers that enables stronger buyers to "*...obtain more favorable terms from suppliers than those obtained by other buyers or those expected under normal competitive conditions*".

12. The exercise of buyer power by some power buyers may produce dynamic negative effects towards other buyers, those in a weaker position: waterbed effects which can potentially exclude or discriminate weaker buyers. Buyer power may lead to a standardization of distribution costs and models, thus facilitating collusion among buyers especially in presence of buying alliances or most favoured nation clauses. Finally, the exercise of buyer power may facilitate indirect information exchanges and therefore hub & spoke type of collusion.

2.2. Assessment of joint purchasing groups: the Italian buying alliances

2.2.1. Findings from the 2013 market study

13. The 2013 market study was prompted by the buyer power issues raised by the joint purchasing agreements of different supermarket chains, often referred to as buying groups or “buying alliances” (BAs)⁴, and their evolution in the Italian context.

14. It was found that in Italy the grocery retail sector was less concentrated at national level compared to other European countries but buyer power issues could still arise due to the presence of buying alliances. Historically, the establishment of BAs has been a reaction to the negotiating power that large multinational suppliers or manufacturers were able to exercise in their dealings with the fragmented Italian retailing sector. BAs can be based on loose forms of cooperation, on contractual arrangements or might even involve the creation of a jointly controlled company or a company in which retailers hold non-controlling stakes. Members of BAs are typically supermarket chains, pure wholesalers, wholesalers with a retail network in franchising or similar agreements, and other smaller BAs. In 2012, there were 7 large BAs (also called super alliances) which grouped 21 retail chains and accounted for 78% of the retail grocery sector in Italy.

15. The market study found competition concerns associated with the evolution of BAs in Italy. According to the AGCM, the key risk was that coordination at the purchasing level may soften competition at the downstream level or even facilitating collusion among participating retailers in the downstream markets.

16. The market study found that certain factors⁵ had increased transparency of the purchasing conditions obtained by individual BAs, leading to a standardization of negotiating terms on prices and other strategic variables. In addition, the implementation of BAs could entail the exchange of commercially sensitive information on prices and volumes which could facilitate a collusive outcome in the retail markets. In other words, buying alliances may potentially “freeze” downstream competition. Moreover, the establishment of BAs did not replace negotiations between suppliers and individual BA members thus leading to a general reduction in the efficiency of negotiations. As a result, in the long-term, membership to a BA could reduce the incentive of individual members in

⁴ For a comprehensive overview of buying alliances in the European grocery sector, see Colen, L., Bouamra-Mechemache, Z., Daskalova, V., Nes, K., *Retail alliances in the agricultural and food supply chain*, EUR 30206 EN, European Commission, 2020, ISBN 978-92-76-18585-7, doi:10.2760/33720, JRC120271. Available at: <https://publications.jrc.ec.europa.eu/repository/handle/JRC120271>

⁵ Such as: instability of BA composition (frequent switching of BA members and personnel), heterogeneity of BA composition (in terms of chain size, revenue and cost structure, geographical coverage, outlet types, strategic positioning, pricing policy) and wide scope of BA mandates (beyond prices to include promotions, category management, sales performance, co-marketing and sponsorship).

pursuing efficiencies or innovation in buying practices and increase dependency between the members of each BA.

17. In the AGCM view, the risk of collusion in downstream markets required the analysis of a number of factors, including:

- the impact of input cost on total costs since the higher input cost covered by the BA the lower the differentiation of business strategies in the retail markets;
- the degree of geographic overlap in the activities of the retailers that participate to the buying alliance;
- the presence of additional areas of collaboration between members of the same BA;
- the inclusion in the negotiations of other elements, the so-called “trade spending” conditions (e.g., contributions required from suppliers for the provision of exhibition, promotional, co-marketing services, etc.).

18. Furthermore, the AGCM considered that the buyer power of BAs might potentially affect also competition in the upstream markets: in the longer term, the exercise of demand-side market power may have the effect of reducing the ability of contractually weaker, albeit efficient, suppliers to compete, to adequately plan production and finance future investment in product quality and innovation.

19. Therefore, the assessment of BAs could best be appreciated by including not only the short-term effects on consumer welfare (often beneficial) but also possible distortions in medium- to long-term competitive dynamics.

20. When looking at the unilateral exercise of buyer power, the market study noted that unfair terms and conditions imposed by buying alliances or their members vis-à-vis suppliers also raised competition concerns. A particular focus was placed on *trade spending* conditions, that is, payments or contributions from suppliers to large retailers for promotional or expositive services. In the 2013 market study, the Authority conducted a survey of suppliers according to which trade spending accounted for around 40% of the total economic value of the negotiations and represented one of the main causes of tension between suppliers and large retailers. Suppliers considered unfair request of payments or contributions by retailers when they were made compulsory (i.e., as a condition for the purchases), or the alleged service for which a contribution was not requested by suppliers or they did not derive a tangible economic benefit from the service in question⁶.

21. In addition to the adverse long-term concerns on suppliers and waterbed effects on other buyers, the Authority recognized that, under certain circumstances, *trade spending* practices could be a facilitator of collusion among operators in downstream markets, weakening competition on final prices, at least to the extent that the contributions collected by supermarket chains (or BAs) exceeded what was necessary to remunerate the services required by the supplier and actually rendered by the retailer.

22. It was outlined that such contributions were improperly accounted for as remuneration for services (not) rendered, rather than as a discount on the purchase price, so that the latter was formally (on the basis of purchase invoices) higher than that actually paid. Since the retail price of the product was defined on the basis of the purchase price, the contributions collected by the retailers were not used to lower unit costs and therefore

⁶ This was particularly true for contributions financing: the costs of centralized purchasing; entry or listing; new store opening or brand changes; special events related to the retailer (recurrences, anniversaries etc.).

retail prices, but to feed “hidden” profit margins. This could soften price competition among retailers who might have incentives to set higher retail prices.

23. The Authority considered that the widespread use of trade spending practices, in cases where they were not objectively justified by the need to more efficiently allocate space and services actually rendered to the supplier, may dampen price competition among supermarket chains, shifting rivalry to variables not strictly related to competition on the merits: in particular, the contributions collected by chains may be more easily used for “structural” acquisition of market share (external growth, or opening of new outlets), rather than on a virtuous competition on product quality and prices.

2.2.2. Antitrust enforcement in the grocery trade sector

Addressing horizontal competitive concerns of buying groups

24. Competition concerns arising from joint purchasing agreements including buying alliances are generally scrutinised under Article 101(1). They may restrict competition by object if they do not concern truly joint purchasing, but consist of a mere means to incur in a disguised cartel aimed to fix prices, limit the output, or partition the market. When BAs restrict competition by effect, they are analysed by the AGCM in their legal and economic context with regard to their actual and likely effects on competition, covering both the purchasing and the selling markets. In general, the assessment first looks at horizontal competition concerns and, in absence, possible vertical effects, in line with the European Commission’s Guidelines on horizontal agreements⁷.

25. Under this framework, the Authority assessed a few agreements establishing buying alliances among supermarket chains⁸ in the period of 1997-2002 and considered them not capable of raising competition concerns. When the possibility to ex-ante notify to the Authority agreements was replaced by the general rule of the self-assessment in 2003, the monitoring of the evolution of BAs became more difficult⁹. Following complaints by

⁷ *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, OJ [2011] C 11, 1–72, para. 194–224. Market power of joint purchasing agreements can be presumed when its parties hold a combined market share exceeding 15 per cent on both the purchasing and the selling markets. In any event, when its parties hold a combined market share that does not exceed 15 per cent in one or both markets, it is likely that the conditions of Article 101(3) are fulfilled.

⁸ See AGCM case no *I498 La Rinascente-Bennet-Gruppo Pamsefim/Societa` Consortile Intermedia 90*, Decision No 10742 of 15 May 2002, in AGCM Bulletin No 20/2002; *I513 Selex-Esselunga-Agora`*, Decision No 11438 of 27 November 2002 in AGCM Bulletin No 48/2002; *I414 Coop Italia-Conad/Italia Distribuzione*, Decision No 9352 of 29 March 2001 in AGCM Bulletin No 13/2001; *I184 Generale Supermercati-Standa/ Supercentrale/Il Gigante*, in AGCM Bulletin No 16/1997, Decision No 4915 of 17 April 1997.

⁹ Following the adoption of European Council Regulation No. 1/2003, agreements between undertakings falling within the scope of Art. 101 TFUE (i.e., affecting trade between Member States), are no longer notifiable to the European Commission for an ex-ante negative clearance or individual exemption but are to be self-assessed by undertakings involved, in terms of their compatibility with the competition rules. However, the national legislator has not introduced a similar change in the Italian antitrust regime so agreements falling within the scope of the domestic rules can still be notified ex ante to the AGCM, under art. 13 of the Competition Law. In decisional practice, the AGCM has not encouraged notifications ex. Art 13 since in most cases they may affect trade between Member States (and, as a consequence, does not fall within the scope of art. 13).

suppliers of the grocery trade sector, the Authority decided to launch a market study also to analyse the impact of the growing number of BAs and set up an analytical framework.

26. As a follow-up to its market study, in 2014 the Authority decided to open an investigation to assess the compatibility under Art 101 TFEU of the largest buying alliance in the grocery sector in Italy, called Centrale Italiana¹⁰. The Authority raised the same competition concerns identified in the 2013 market study and the investigation was closed with commitments including the termination of the buying alliance (see BOX 1 below).

Box 1. Assessing buying alliances in the grocery trade sector – the Centralia Italian case

Centrale Italiana was created in 2005 by five buying alliances and its main business consisted of entering, on behalf of its members, into framework agreements related to purchasing conditions, applicable to future supply agreements that its members and their suppliers could have entered into¹¹.

The AGCM investigation was closed with the dissolution of Centrale Italiana, as a part of the commitment package proposed by the super alliance, and the termination of any form of commercial collaboration between its members. Drawing on the market study's findings, the Authority assessed the Centrale Italiana agreement on the basis of the interdependence between the purchasing markets (procurement or wholesale markets which are national in scope) and the selling markets (retail markets, local in scope).

On the purchasing markets, the AGCM found that Centrale Italiana's market share (23 per cent) was by far above the threshold of 15 per cent envisaged in the European Commission's Guidelines on horizontal co-operation agreements. There were concerns about the super-alliance's strong buyer power and the decreased ability of suppliers to compete effectively on the market, producing negative effects on the variety and the quality of products, on innovation or investment.

These concerns were confirmed by the high concentration level on local selling markets where Centrale Italiana achieved in some areas market shares exceeding 40 per cent up to a monopoly position. In the selling markets, the participation to Centrale Italiana could have led to a coordination of marketing strategies and pricing policies or, at least, to a reduction of incentives to compete among its members. This was due to the fact that the super alliance necessarily entailed a large sharing of procurement costs, as well as a potential standardization of the services offered by individual members resulting from the joint negotiation. Moreover, the Authority observed that the exchange of sensitive business information, which took place among the companies using the services of Centrale Italiana, could further facilitate collusion between the companies. Finally, the sharing of strategic objectives and functions within Centrale Italiana considerably

¹⁰ See AGCM case no. I768 - CENTRALE D'ACQUISTO PER LA GRANDE DISTRIBUZIONE ORGANIZZATA, Decision No 25090 of 17 September 2014, published in the AGCM Bulletin No 38/2014 and available on the [AGCM website](#). For an extensive summary of the decision in English, see Annex 2 pages 76-78 of the cited report: Colen, L., Bouamra-Mechemache, Z., Daskalova, V., Nes, K., *Retail alliances in the agricultural and food supply chain*, EUR 30206 EN, European Commission, 2020, available at <https://publications.jrc.ec.europa.eu/repository/handle/JRC120271>

¹¹ Centrale Italiana defined the main conditions of purchasing goods, rebates, and other fees paid by suppliers to distributors to compensate for trade spending conditions. Members could negotiate only decentralized contractual conditions (such as, for instance, rebates related to logistics and delivery facilities). Given these double levels of negotiation Centrale Italiana did not purchase directly goods from suppliers.

increased the risk of coordination on marketing policies among its members, by symmetrically reducing the likelihood of a pass-on to consumers of the more favourable terms obtained through the negotiation.

27. Interestingly, the high bargaining power of supermarket chains and their buying groups had been invoked as a countervailing factor in the AGCM investigation concerning a cartel among pasta manufacturers¹², sanctioned in 2009, prior to the launch of the market study on the grocery sector. In the sanctioning decision, pasta producers argued that the high buyer power of supermarket chains and their buying alliances would render any attempt to cartelise ineffective, making it impossible to raise purchasing prices in absence of actual increases in input costs.

28. In its reply, the AGCM noted that it was precisely the bargaining power of the buying alliances of retailers, and the inability of smaller pasta producers to obtain price increases, the motivation behind the formation of the cartel and the participation to it even by smaller pasta suppliers: only through the cartel, all pasta producers, even the small ones with little bargaining power, could impose price increases on the retailers in a jointly manner.

Addressing unilateral conducts of buying alliances

29. In its 2013 market study on the grocery sector, the AGCM noted the challenges to tackle unilateral conducts of buying alliances within the framework of traditional dominance. First, if the assessment of dominance on the demand-side were to mirror the supply-side analysis, the scope for enforcing abuse of dominance provisions to instances of “buyer power” would be rather limited since buyer power often produces effects below the market share thresholds used for establishing dominance. In other words, market shares can be a poor indicator of buyer power if understood as the ability to obtain more favourable terms than those available to other buyers, or which would otherwise be expected under normal competitive conditions.

30. Therefore, the Authority highlighted the complexity of applying the concept of dominance in the classical sense, noting that in the case of buyer power dominance is less sensitive to the importance of market share and more depending to the analysis of effects and other circumstances, including the multiple roles played by supermarket chains vis-à-vis the supplier as of: buyer, competitor (through private labels), seller of shelf space and “gate keeper” to the main distribution channel. For example, the need for food manufacturers to secure a geographically distributed presence may also make them “dependent” on supermarket chains with a small share of the purchasing markets, but that have outlets distributed widely throughout the territory, or concentrated in certain local markets.

31. A second challenge related to the applicability of the dominance concept to buyer power is that, as illustrated in section 2.1, the assessment of the effects of buyer power requires a complex balancing exercise between the possible short-term benefits to consumers and the medium-term distortions inflicted on the competitive process, including adverse effects on suppliers (lowering incentives to improve quality or innovate) and other small buyers (*waterbed effects*).

¹² AGCM case *I694 - LISTINO PREZZI DELLA PASTA*, decision n. 19562 of 25/02/2009, published on the AGCM Bulletin n. 8/2009., available on the [AGCM website](#).

32. As an alternative solution, the Authority could evaluate the exercise of unilateral buyer power through the antitrust analysis of vertical relationships between suppliers and buyers. However, there is not always a clear distinction between unilaterally imposed conditions and vertical “agreements” or “concerted practices” necessary for the application of Art. 101 TFEU, which by definition implies that the parties have expressed their joint intention to conduct themselves on the market in a specific way.

33. In its market study on the grocery sector, the AGCM reviewed the unfair trading practices unilaterally imposed by supermarket chains to suppliers, including *trade spending* practices, and it expressed concerns that such practices could soften price competition among supermarket chains by keeping input prices high and minimising the pass-on on consumers, have a discriminatory or exclusionary effects on other buyers (waterbed effects) and undermine the long term viability of efficient suppliers but in a weaker bargaining position (see section 2.2.1 above). However, the AGCM has never applied Art. 101 to vertical relationships between suppliers and retailers in the grocery sector.

3. Buyer power in other sectors

34. In more recent years, the Authority has dealt with issues related to buyer power also in other sectors, analysing complex conducts involving both demand and supply sides, even when they take place along the supply chain and involve companies that do not sell products or services directly to consumers.

3.1. Purchasing agreements within waste management consortia

35. The Authority examined potential anticompetitive coordination of buyers also in the waste management and recycling sector which is characterised in Italy by the presence of several national consortia which in turn are participated by producers and recycling companies and responsible for the collection of waste for the different sectors.

36. In the sector for collection and recycling of used lead batteries, in 2021 the Authority assessed an agreement between the buyers of scrap accumulators (i.e., smelters who treat scrap batteries in their facilities in order to produce recycled lead, which they then sell to producers of automotive or industrial batteries) to fix ex-ante, by exchanging sensitive information, the purchasing prices and quantities to be applied to COBAT, the main consortium for the collection of used lead batteries and scrap lead, and other competing consortia¹³. Under normal competitive conditions, smelters would individually compete to procure used lead batteries from producers/collectors by offering higher purchasing prices. The AGCM closed the investigation with commitments offered by the parties to modify the agreement in order to resolve the competition concerns raised by the Authority (see BOX 2 for a more detailed description of the case).

3.2. Abuse of dominance on the buyer side

37. With respect to the sector for collection and treatment of waste electrical and electronic equipment (WEEE), in May 2022 the Authority closed with commitments an investigation into alleged abuses of dominant position by the consortium ERION on both

¹³ See AGCM case no 1838 - *RESTRIZIONI NELL'ACQUISTO DEGLI ACCUMULATORI AL PIOMBO ESAUSTI*, commitment decision no 29718, published on the AGCM Bulletin no 27/2021 and available on the [AGCM website](#).

demand and supply side¹⁴. On the demand side, the initial allegation was that ERION, as the dominant buyer of recycled WEEE, would abuse its position by imposing, in its contracts with recycling facilities, MFN clauses whereby the latter could not negotiate more favourable fees (e.g., for transport and treatment services) than those obtained by ERION, damaging other buyers of recycled WEEE, that is, other alternative collective systems. In other words, buyers more efficient than the dominant ERION could not attract recycling facilities since any lower fees negotiated with the treatment facilities would have to be applied to ERION, thus depriving alternative systems of the incentives to maximise efficiency in their operations. To address the above competition concerns on the demand side, ERION offered to eliminate the MFN clauses in its contracts with recycling facilities (see BOX 2 for a more detailed description of the case).

Box 2. The AGCM's investigations concerning waste management consortia

Case no. I838 – Agreement between purchasers of lead-acid scrap accumulators

In December 2019, the Authority opened proceedings against COBAT and COBAT's shareholders, which were the main purchasers of lead-acid scrap accumulators present on the Italian market, considering that the latter may have coordinated their purchasing behaviour within COBAT's board of directors.

In Italy, producers of lead-acid accumulators for automotive vehicles and industrial appliances are required to adhere to a waste management scheme, which will ensure that the products which have been put on the market are collected once they end their life-cycle. Once collected, scrap batteries undergo a treatment process that generates so-called secondary lead, which is the main input in the production of new lead-acid batteries (primary lead obtained from mining is limited). The sector is thus characterised by the presence of the following players: (i) compliance schemes, which act as intermediaries between scrap collectors and recycling companies. Compliance schemes act on behalf of producers/importers who put on the market new lead-acid batteries; (ii) recycling companies (also called smelters) perform the treatment and recovery of scrap batteries. In Italy, smelters can purchase scrap batteries only from compliance schemes; (iii) battery manufacturers, who acquire secondary/recycled lead from recycling companies. Some battery manufacturers are vertically integrated with scrap battery collectors or outsource the recycling process to recycling companies under tolling agreements.

Until 2008, in Italy there existed a single collective scheme named COBAT, which was established by law as a consortium participated by companies active at the different level of the production chain (i.e., COBAT was participated not only by battery manufactures but also by all recycling companies present in Italy). In other words, all the main purchasers of scrap batteries present on the Italian market participated to COBAT as shareholders. In 2008, the legislative framework has been changed introducing the principle of competition between compliance schemes in the collection of waste, and producers became free to establish individual schemes or set up collective schemes competing with COBAT; however, COBAT's shareholding pattern remained unchanged in the sense that all the recycling companies present in Italy, who post-

¹⁴ See AGCM case no *A544 - ERION WEEE/CONDOTTE ANTICONCORRENZIALI*, commitment decision no. 30130, published on the AGCM Bulletin no 18/2022 and available on the [AGCM website](#).

liberalisation could buy their main productive input from a series of competing collective schemes, were actually part of one of such schemes (namely COBAT).

The Authority commenced a case against COBAT based on a complaint submitted by a competing collective scheme which reported possible exclusionary conduct put in place by COBAT's shareholders within COBAT's board of directors, aimed at foreclosing COBAT's competitors' access to treatment facilities.

Under normal competitive conditions, COBAT's smelters, who buy lead-acid scrap batteries from COBAT as the main input for their treatment process, and COBAT's main producers, who have tolling agreements with COBAT's smelters which secure a continuous flow of secondary lead for their production facilities, would individually compete to buy scrap lead-acid batteries from competing compliance schemes by offering higher purchasing prices. Conversely, in the Authority's view, Italy's recycling companies and main batteries manufacturers coordinated their purchasing behaviour within COBAT in two ways: first, COBAT's shareholders had set up an agreement within COBAT's board of directors (which they controlled by majority) aimed at securing a constant and exclusive supply of all scrap batteries collected by COBAT (approximately 65% of Italy's lead-acid waste), setting the price and quantities of scrap sold to each shareholder and excluding from accessing to such an important input other interested players (namely recycling companies established in neighbouring Member States). Second, COBAT's shareholders – which, as mentioned, comprised all recycling companies active in Italy – coordinated their purchasing behaviour also vis-à-vis COBAT's competitors, agreeing to reduce the prices paid to other compliance schemes for the purchase of scrap accumulators, thereby putting them at a competitive disadvantage compared to COBAT.

Therefore, the Authority welcomed the smelters' commitment to sell their shares held in COBAT, and decided to close the case based on a positive evaluation of this measure considered necessary to remove a structural obstacle to the proper functioning of competition between collective schemes. The Authority closed the case in May 2021 accepting a series of other behavioural measures, including a commitment to assign all scrap batteries collected by COBAT only through public auctions open to all interested parties, and under open, fair and non-discriminatory terms.

Case no. A544 – Abuse of dominance in the recycling of waste electrical and electronic equipment

The Erion case, concluded in May 2022, concerns a buyer-side abuse of dominant position put in place by Italy's dominant WEEE collective scheme. Differently from the collection of lead-acid batteries, the Italian legislative framework – based on the European WEEE directives – opted since the beginning for a model of competing schemes set up by manufacturers of Electrical and Electronic Equipment (“EEE”) to fulfil their producers' responsibility. In other words, EEE manufacturers are free to establish individual schemes or set up collective schemes to face their take-back obligations and would typically choose a system that charges lower collection fees; therefore, WEEE collective schemes compete against each other in the market for the provision of waste management services to producers of EEE by setting lower tariffs, which in turn they can do to the extent they manage to minimize the costs incurred for their management activities. Since collective schemes are intermediaries (who collect waste at the municipal level and arrange for its transportation and treatment at recycling facilities), the major costs they bear are typically represented by the fees paid to recycling companies for the treatment of waste.

In this context, the Authority received a complaint by two minor collective schemes which considered that Erion, the dominant consortium with a market share of approximately 70%, imposed a most favoured nation clause upon its contractual counterparts, including almost all recycling companies active in Italy, which depended upon Erion’s continuous supply of input. The Authority opened proceedings against Erion considering that clause could have a potentially adverse on competition between WEEE collective scheme to the extent that it secured preferable pricing conditions for Erion and did not allow competitors to benefit from lower treatment tariffs in case of efficiency generated in their logistics activities. More specifically, the contractual provision was drafted using a series of indefinite parameters (in terms of time, material and geographic scope of the clause) that generated very little predictability about the exact price that would be paid by Erion; therefore, in the Authority’s view, the MFN clause had the potential effect of forcing suppliers to offer services to other buyers at a higher price than those that are offered to Erion, thereby raising their costs and putting them at a competitive disadvantage in the primary market in which they competed (the provision of compliance services to WEEE producers). The Authority closed its case by accepting Erion’s commitment to eliminate the MFN clause from its contracts with all recycling companies. The case represents an example of intervention against buyer power in the form of purchasing price discrimination aimed at foreclosing rivals, which is indeed an important precedent in the European competition landscape.

4. Buyer power: outside the traditional antitrust toolbox

38. To fill the gap and tackle instances of unilateral exercise of buyer power that fall short of “dominance” or for which it is not easy to identify a concurrence of wills by the powerful buyer and the weak seller, the Italian legislator has introduced legislation protecting trading partners in weaker bargaining positions.

39. Under Article 9 of Italian Law n. 192/1998, economic dependence exists where a company can impose an “*excessive imbalance of rights and obligations*” in its commercial relationship with another company, taking into account “*the effective possibility for the party suffering the abuse to find satisfactory alternatives on the market*”. Abuse of economic dependence may consist in a refusal to sell or a refusal to buy, the imposition of unjustifiably onerous or discriminatory contractual conditions, or the arbitrary interruption of existing commercial relations. Any agreement or practice through which the abuse of economic dependence is carried out shall be null and void. While the enforcement of Art. 9 provisions is entrusted to civil courts which can grant interim measures and damages, in 2001 the legislator considered it important to reinvigorate its enforcement by allowing the AGCM to apply the power to apply Art. 9 provisions to situations “*in which the Authority itself finds that an abuse of economic dependence has relevance to the protection of competition and the market*” (Art. 9, para 3-bis, of Law 192/1998).

40. The Authority has rarely applied Art. 9 provisions sine it has focused its attention on those cases of abuse that can have an impact beyond the individual contractual relationship in which it occurs, either due to the size of the abusive conduct (e.g., by looking at its geographical or temporal scope and/or the number of “weak” enterprises involved, as well as how long the abusive practice has been perpetuated) or its adverse effects which , although limited to a single contractual relationship, may have a “signalling” effect for the entire market. In the AGCM practice, an example of abuse of economic dependence that

can be relevant from a competition perspective is the one capable of excluding a competitor from the market, whether through arbitrary termination of contractual relations or the imposition of unfair contractual terms.

41. Recently, this provision has been enforced to address a situation of buyer power. In July 2021, the Authority found that the main postal services operator, Poste Italiane, abused of the economic dependency vis-à-vis Soluzioni S.r.l., a company that for the period 1999-2017 provided, on behalf of Poste Italiane, collection and distribution services of undelivered mails in the city of Naples. Over the course of their commercial relationship, Soluzioni had become de facto integrated into the operations of Poste Italiane, in order to meet the specific requirements of the main operator.

42. Poste Italiane was found to have applied unfair trading practices: in particular, it prohibited Soluzioni to transport and delivery Poste Italiane's own products jointly with those of third parties; it unilaterally and significantly reduced or increased the quantity and type of products to be delivered by Soluzioni and it extended (often, retroactively) the duration of its contract with Soluzioni. Moreover, the latter was forced to provide additional services for free or falling outside the scope of its contract with Poste Italiane.

43. According to the AGCM, all these practices were capable of undermining the very existence of the company, thus hampering competition on the market for mail distribution and collection in the city of Naples. In particular, Poste Italiane's conduct excluded a company that could have provided services to alternative postal operators from the market and eliminated a potential competitor to Poste Italiane. Indeed, although Soluzioni was operating on a smaller scale than Poste Italiane and only at local level, it had the potential to profitably expand its activities and become a competitor of Poste Italiane. As a result, the Authority imposed a penalty of 11.3 million euros on Poste Italiane¹⁵.

44. The Italian legislator has also introduced specific legislation on commercial relations in the agri-food sector, by creating a sort of presumption of economic dependence for suppliers/producers in their relationships with distributors and wholesalers (see BOX 3 below).

Box 3. Art. 62 of Decree Law 1/2012 on commercial relations in the agricultural and agri-food sector

In 2012 the Italian legislator introduced specific protection in the agribusiness sector, namely Article 62 of Decree Law 1/2012, entrusted to the Competition Authority until 2021 and now to the relevant Ministry . The first application by the Authority of the regulation protecting weaker trading parties in the agrifood sector concerned precisely the abusive exploitation of its position of commercial strength by two buying groups of supermarkets, Coop Italia and Centrale Adriatica, to the detriment of Celox Trade, a long-standing supplier of pears . The Authority considered that the imposition of a series of excessively onerous discounts and economic contributions to Celox Trade were disproportionate given the relationship between the parties. The conduct of the two buying groups was found to be contrary to the principles of transparency, correctness, proportionality and reciprocal services for payment. The Authority imposed a sanction of totalling €49.000 on the two undertakings concerned.

¹⁵ See AGCM case A539 - *POSTE ITALIANE/CONTRATTI FORNITURA SERVIZIO RECAPITI*, decision no. 29782 of 20/07/2021, published on the AGCM Bulletin no. 32/2021 and available on the [AGCM website](#).

In 2019, the AGCM applied Art. 62 to the commercial relations and contractual conditions between bread producers (bakeries) and large retailers . The complaint was made by the National Association of Bread-makers against some retail chains about requirements related to unsold goods. The conduct consisted in imposing on suppliers of fresh bread the obligation to withdraw and dispose of the entire quantity of unsold bread products at the end of the day at the supplier’s own expenses. The Authority imposed a sanction of totalling €680.000 on the six undertakings concerned.

5. Concluding remarks

45. In assessing buyer power, the Authority has supported a consumer welfare standard that also takes into account long-term effects on consumers resulting from a reduction in dynamic competition in upstream markets (alteration of investment capacity, production, innovation of suppliers) and a softening of competition in downstream markets (alignment of pricing or marketing policies, distribution formats). This was evident in the context of the grocery sector, when in 2013 the Authority studied the impact of buying alliances by supermarket chains and their evolution over time, and intervened in one case to impede that a buying alliance of some major supermarket chains would continue to operate in a way that could undermine competition in the purchasing and selling markets.

46. When the buyer power is exercised unilaterally, the Authority acknowledges the challenges in applying the framework of dominance in the classical sense, noting that market shares thresholds for establishing the presumption of dominance might be lower in the context of buyer power and less meaningful, since its assessment would rely more on the analysis of its effects and other circumstances.

47. In the Italian framework, unfair practices unilaterally imposed by buyers can be tackled with other regulatory tools to protect weaker trading partners, such as the prohibition on abuse of economic dependence: the Authority has applied such provision through its competition “lenses” and its track records appear to show that repeated violations of these rules protecting the weaker trading partners may in the medium to long term also have repercussions on the competitive process.