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# The Standard and the Burden of Proof in Competition Law Cases – Note by Italy

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# *Italy*

## 1. Introduction

1. Italian competition law does not expressly define the standard of proof required to establish the existence of an anti-competitive infringement. However, in the experience of the Autorità Garante della Concorrenza e del Mercato (the Italian Competition Authority, hereafter the "Authority" or the "AGCM"), this standard is generally in line with the EU case law.

2. One reason for this may be a broad interpretation of Article 1(4) of Law No. 287/1990 (the Italian Competition Law), which stipulates that the substantive rules of the Italian competition law are to be interpreted on the basis of the principles of the EU antitrust law; in substance, this principle has also been extended to the burden of proof for the AGCM to establish a breach of competition rules.

3. The standard of proof required to establish an infringement of competition law is strongly influenced by the intensity of judicial review. This is particularly true in Italy, where competition enforcement is carried out under an administrative system, in which the AGCM is solely responsible for public enforcement and its decisions, which are fully effective, can be challenged before administrative Courts. In particular, the court of first instance is the Regional Tribunal of Latium, Rome (hereinafter, also the "TAR Lazio"); the judgments of the TAR Lazio can be appealed against the Council of State, acting as a court of final appeal.[1]

4. There are no restrictions on the grounds on which an appeal may be lodged. Thus, the Courts can fully examine the facts on which the AGCM's decisions are based and the soundness of the evidence relied on by the Authority. If a decision is based on incorrect facts or insufficient evidence, the Courts can set it aside.[2]

5. Judges are therefore able to conduct a broad and thorough review of whether the AGCM's assessment can withstand judicial scrutiny. It is also for this reason that, in its enforcement practice, the Authority seeks to apply a rigorous standard of proof to establish an infringement.

6. In the light of the above, this contribution, which describes the AGCM's experience with regards to the standard of proof in competition cases, is structured as follows: section 2 illustrates the standard of proof for establishing secret horizontal agreements; section 3 focuses on the standard of proof for establishing abuse of a dominant position; section 4

[1] Judgments of the Council of State can only be challenged on very limited grounds before the Corte di Cassazione (the Supreme Court which ensures the strict observance and uniform interpretation of the law). For more information see also the written contribution from Italy submitted for the OECD Roundtable on "*The standard of review by courts in competition cases*", item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019, available at https://one.oecd.org/document/DAF/COMP/WP3/WD(2019)12/en/pdf.

[2] The only remedy that can be ordered is the annulment, in whole or in part, the contested decision if it is based on a breach of law, misuse or abuse of power, or lack of competence. The Courts have no power to adopt a new act or to amend the contested act, nor can they remit the case to the AGCM for a new assessment of the merits.

discusses the relevant case law on mergers; section 5 deals with the specific features of *interim measures*; section 6 draws some conclusions.

## 2. Secret horizontal agreements

7. The standard and burden of proof are of fundamental importance in the fight against secret cartels: since cartels have an anticompetitive object "*per se*", it is sufficient to establish the infringement (and therefore to impose significant sanctions, which are essentially criminal in nature[3]), without having to prove its effects. However, this type of infringement is particularly difficult to detect, as the parties are usually aware of the illegality of their conduct, and conceal or destroy any evidence of it.

8. Therefore, Italian jurisprudence has set out a number of detailed principles, fully in line with EU jurisprudence, which the AGCM must follow in order to fully prove a cartel infringement.

### 2.1. Any reasonable means of evidence is sufficient

9. Given the behavioural and informal nature of cartels, as well as their secretive nature, it would be unrealistic to require the AGCM to produce a smoking gun to prove their existence: the concerted will of the undertakings to restrict competition can be demonstrated by any reasonable means.[4] Indeed, according to settled case law, the identification of "*serious, precise and consistent*"[5] evidence is sufficient to establish the existence of an infringement.[6]

10. Evidence obtained by the public prosecutor in criminal proceedings may also be used to prove infringements of competition rules, provided that: a) the evidence has been obtained lawfully (i.e., in accordance with the rules governing its collection and use); b) the right of defence is respected; c) the evidence has been assessed independently, applying

[3] *Ex multis*, Council of State, 2 February 2023, no. 1159, I805 - *Prezzi del cartone ondulato*.

[4] *Ex multis*, Council of State, 19 January 2023, no. 670, I805 - *Prezzi del cartone ondulato*; Council of State, 23 November 2020, no. 7320, 7321 - *I792 Gare ossigenoterapia e Ventiloterapia*; Council of State, 15 February 2018, no. 1821, I776 - *Mercato della produzione di poliuretano espanso flessibile.*

[5] *Ex multis*, Council of State**,** 20 January 2023, no. 690, I805 - *Prezzi del cartone ondulato*: "*… an agreement must be considered proven whenever there are serious, precise, and consistent indications of participation, as the fight against cartels must be effective, and the so-called "smoking gun" evidence is extremely rare due to the secretive or confidential nature of a cartel*"; see also Council of State, 6 May 2021, no. 3556, I806 - *Accordi tra operatori del settore dei servizi con elicottero*; Council of State, 10 May 2020, no. 236, *I792 - Gare ossigenoterapia e ventiloterapia*; Tar Lazio, 22 July 2021, no. 8810, 8815, 8816, 8817 e 8825, I821 - *Affidamenti vari di servizi di vigilanza privata*.

[6] *Ex multis*, Council of State, 15 February 2018, no. 1821, I776 - *Mercato della produzione di poliuretano espanso flessibile*, where the Italian judges acknowledged that "*in the field of prohibited agreements the acquisition of a 'smoking gun' is rare and an overly strict standard of proof would risk undermining the purpose of antitrust law [therefore] it may be considered sufficient (and necessary) to identify indications of unlawful forms of collusion and coordination, provided such indications are serious, precise and consistent*". Also, Council of State, 13 June 2014, no. 3032, *Gare assicurative ASL e aziende ospedaliere campane and Council of State*, Council of State, 18 May 2015, no. 2514, *Vendita al dettaglio di prodotti cosmetici*.

the principle of mutual autonomy and parallelism between criminal and administrative proceedings.[7]

## 2.2. The principle of considering the evidence as a whole

11. Italian jurisprudence has also considered it unrealistic to require the AGCM to prove every single aspect of a cartel: the evidence must be assessed as a whole, taking into account all the factual circumstances, the relevant *indicia* and the context.[8] Therefore, the assessment of the possible existence of a cartel must be made by "*an overall evaluation of the intrinsic value of the circumstantial evidence gathered*",[9] rather than by considering each element of evidence separately.[10]

## 2.3. A single and continuous infringement

12. An infringement may consist not only of a single act, but also of a series of acts or of continuous conduct, aimed at a common anti-competitive objective. The fact that certain features of the cartel evolved over time, such as the inclusion of new participants or a reduction in the number of participants, cannot prevent the AGCM from classifying the cartel as a single and continuous infringement, since the objective of the cartel remained the same.[11]

## 2.4. Direct and circumstantial evidence: consequences on the burden of proof

13. In line with established EU case law, the Italian Courts have distinguished between direct evidence (documentary evidence of contacts, such as exchanges of information or other forms of communication between the parties) and circumstantial (or indirect) evidence (such as elements relating to the market behaviour of the undertakings, such as uniformity and parallelism of commercial behaviour, which have no plausible alternative explanation other than collusion).

14. Where there is only circumstantial evidence (i.e., no direct contact between the parties), it is for the Authority to demonstrate "*the intrinsic strangeness of the conduct*

[7] Ex multis, Council of State, 9 May 2022, no. 3570, I808 - *Gara Consip FM4, Accordi tra i principali operatori del Facility Management*; Council of State, 10 January 2020, no. 258, 246, I759 - *Forniture Trenitalia.*

[8] Council of State, 9 May 2022, no. 3570, I808 - *Gara Consip FM4, Accordi tra i principali operatori del Facility Management*.

[9] Council of State, 17 December 2007, no. 6469, I570 - *Lottomatica/Sisal*.

[10] Council of State, 10 May 2020, no. 236, I792 - *Gare ossigenoterapia e ventiloterapia*: "*the assessment of the collusive conduct requires a global assessment of the evidence gathered, in order to highlight the overall structure of the relationships between the companies. This excludes the possibility of fragmenting the individual pieces of evidence based on a merely atomistic view of them*". On the contrary, these elements must be considered as "*pieces that fit into a general framework of circumstantial evidence capable of proving the agreement itself*". See also, Council of State, 1° March 2023, no. 2117, I805 - *Prezzi del cartone ondulato*.

[11] *Ex multis*, Council of State, 2 February 2023, no. 1159, I805 - *Prezzi del cartone ondulato*; Council of State, 10 May 2020, no. 236, *I792 - Gare ossigenoterapia e ventiloterapia*; Council of State, 6 October 2020, no. 5885, 5898, 5900, 5884, 5897, 5899, I796 - *Servizi di supporto e assistenza tecnica alla PA*; Council of State, 14 October 2019, no. 6985, I793 - *Aumento prezzi cemento*.

*found and the absence of alternative explanations*".[12] The burden of proving the irrationality of the conduct is therefore on the AGCM.[13] Indeed, the parties may invoke specific circumstances, such as the design of the tender, the heterogeneity of the companies, the incumbency advantages, cost differences, opportunity costs, as possible rational explanations for the observed anomalies.

15. On the other hand, evidence of contacts between the parties shifts the burden of proof to the parties, who must not only provide a plausible alternative explanation to show that such behaviour does not stem from collusion, but also show that such evidence is insufficient to establish the existence of an infringement.[14] Such a reversal of the burden of proof does not violate the principle of the presumption of innocence, as it is always possible for the parties to rebut the Authority's allegation.

16. In the AGCM's experience, circumstantial evidence alone is rarely sufficient to build a solid case. The required standard of proof is usually met by a combination of direct and circumstantial evidence: evidence of contacts is therefore crucial to a successful prosecution and dawn raids are usually crucial to gathering such evidence.

## 2.5. The principle of "narrative consistency"

17. A key factor valued by the Courts is what is known as "narrative consistency", which means that the allegations identified by the Authority, supported by several coherent lines of evidence, should be "the only one capable of explaining the facts or, in any event, clearly preferable to any abstract alternative hypothesis".[15] In any case, "the possible existence of certain inconsistencies in the context of the evidence will not be sufficient to undermine the overall strength of the accusatory framework, except in cases (...) where the

[12] Council of State, 10 July 2018, no. 4211, I759 - *Forniture Trenitalia*.

[13] *Ex multis*, Council of State, 6 May 2021, no. 3555 e 3556, 9 September 2021, no. 6744, I806 - *Accordi tra operatori del settore dei servizi con elicottero* "*where exogenous [direct] evidence is found, pertaining to the existence of contacts and exchanges of information between undertakings, it is for the undertakings to provide an alternative explanation for to the lawfulness of their conduct. In the absence of such evidence, the burden of proving the endogenous [circumstantial] element, i.e., the irrationality of the conduct, rests with the Authority*"; Council of State, 1° February 2023, no. 1466, I794 - *ABI/SEDA*, "*in the absence of significant so-called exogenous evidence, the AGCM bears the burden of proving that any parallel behaviour is the result of a cartel and cannot be reasonably justified in any other way, for example, by reference to the intrinsic characteristics of the reference market*".

[14] Council of State, 23 May 2012, no. 3026, *Prezzo del GPL*: "*Deliberate parallel conduct by companies operating in a given market, which is lawful in itself, may be considered to be the result of an anti-competitive agreement if it is impossible to provide an alternative explanation of the parallel conduct as a plausible result of entrepreneurial initiatives. In such a case, the burden of proving the impossibility of alternative explanations lies with the proceeding Authority. However, if there are external circumstantial elements indicating collusion or abnormal collaboration, the burden of proof to explain the rationale of the conduct lies with the companies involved".* See also, Council of State, 2 February 2023, no. 1159, I805 - *Prezzi del cartone ondulato*; Council of State, 19 January 2023, no. 670, I805 - *Prezzi del cartone ondulato*.

[15] *Ex multis*, Council of State, 24 October 2014, no. 5274, 5275, 5276, 5277, 5278, I701 - *Vendita al dettaglio di prodotti cosmetici*; Council of State, 12 October 2017, no. 4733, I782 - *Gare per i servizi di bonifica e smaltimento di materiali inquinanti e/o pericolosi presso gli arsenali di Taranto, La Spezia e Augusta*.

discrepancies are so serious and significant as to undermine the overall coherence of the reconstructive picture outlined by the Authority".[16]

18. A comprehensive and in-depth analysis of all the evidence, taking into account the characteristics of the sector and the lack of alternative explanations for the behaviour in question, is in any case necessary, as it makes it possible to construct a convincing 'story' and to increase the consistency of the decisions, thus facilitating judicial review. This is because the reference point for the Italian administrative judge is the overall coherence of the version presented; hence, the standard of proof is satisfied if the 'story' proposed by the AGCM is the only convincing one, or at least the most convincing one, capable of explaining all the factual elements of the case.

### 2.6. The probative value of statements made under a leniency programme

19. The mere fact that information was submitted by undertakings seeking to benefit from the leniency programme does not undermine its probative value: the desire to obtain immunity from fines or a reduction in the amount of fines, does not necessarily create an incentive to provide distorted evidence as to the involvement of the other participants in the cartel.

20. Although the statements made by the leniency applicant cannot be considered "*per se*" as complete proof of the existence of a collusive arrangement, they should be given a non-negligible probative value.[17] They have a high degree of reliability, especially when corroborated by other evidence.[18] If a company statement is reliable, this fact justifies a lesser degree of corroboration, both in terms of precision and depth.

21. In any event, the Authority has a wide discretion in assessing the specific contribution made by the leniency applicant: "*the information provided by the leniency applicant does not in any way limit the Authority's power to make an unfettered legal assessment of the facts; indeed, the finding of the infringement contained in the Authority's final decision may differ, even partially, from the facts as presented and admitted by the cooperating firm*".[19]

## 3. Abuses of dominant position

22. In line with EU case law, the AGCM's practice in identifying abuses of dominant position has done well beyond a formalistic approach to rely on more sophisticated economic reasoning.

23. In particular, with regard to the **existence of a dominant position** in a given market, the AGCM normally carries out a comprehensive analysis based not only on market

[16] *Ex multis*, Council of State, 9 May 2022 no. 3572, I808 - *Gara Consip FM4 - Accordi tra i principali operatori del Facility Management*; Council of State, 6 May 2021, no. 3555 e 3556, I806 - *Accordi tra operatori del settore dei servizi con elicottero*.

[17] *Ex multis*, Council of State, 9 May 2022 no. 3572, I808 - *Gara Consip FM4 - Accordi tra i principali operatori del Facility Management*; Council of State, 24 October 2014, no. 5274, 5275, 5276, 5277, 5278, I701 - *Vendita al dettaglio di prodotti cosmetici*.

[18] Council of State, 9 May 2022 no. 3572, I808 - *Gara Consip FM4 - Accordi tra i principali operatori del Facility Management*.

[19] Council of State, 13 June 2022, no. 4779, I814 - *Diritti Internazionali*.

shares[20] but also on a combination of various elements. These may be factors which, taken separately, are not necessarily determinative, such as: the competitive pressure exerted by potential competitors,[21] the exclusive availability of technical and financial resources,[22] the quality features of the company's offer,[23] possible countervailing buyer power.

24. With respect to **establishing the conduct**, the AGCM has found that evidence of abuse can come from a variety of sources, including the economic and market context, contemporaneous documents and/or economic analysis. In general, the Authority does not need to prove the company's intent to exclude its competitors or negligence, as the company's subjective objectives are irrelevant in establishing the abuse. In particular, with the exception of certain specific conduct (predatory pricing, vexatious administrative proceedings, sham litigation), it is sufficient that the company intended to engage in the illegal conduct and that it could not have been unaware of the anti-competitive nature of its conduct.[24] In any event, the Authority may take into account evidence of intent in order to establish the existence of an infringement.[25]

25. In its decision-making practice, the AGCM, , has often resorted to **economic analysis** in order to prove the abusive conduct, using the so called '*as efficient competitor*' test ("AEC test"),[26] even when this is not strictly necessary. This happened, for instance, in a case where the incumbent operator in the postal sector was found to have charged retail customers a discounted price that was lower than the price charged to competitors for the

[20] In this respect, case law has established that very large market shares are, save in exceptional circumstances, evidence of the existence of a dominant position, see for instance Council of State, 1 April 2021, no. 2727, A487 - *Compagnia Italiana di Navigazione-Trasporto Marittimo delle Merci da/per la Sardegna*.

[21] Council of State, 13 March 2020, no. 1832, A480 - *Incremento prezzo farmaci Aspen*, which established that "*Although this criterion does not require proof that the potential competitor will actually enter the market in question, nor that it will subsequently be able to operate there on a lasting basis, it must be excluded that a potential competitive relationship could result from the mere hypothetical possibility of market entry*".

[22] For example, if the company is part of a vertically integrated group or has special economic advantages. See TAR Lazio, 30 August 2023, no. 13477, A493 - *Poste italiane/Prezzi recapito*, where the Italian incumbent in the in the postal sector was a monopolist in the intermediate market for multiple items and dominant in the end-to-end market, partly because of the exclusive availability of a complete postal network present throughout the national territory.

[23] Council of State, 1 April 2021, no. 2727, A487 - *Trasporto marittimo di merci da e per la Sardegna*, highlighting *inter alia* the "*qualitative characteristics of the services offered (in terms of the frequency of sailings, including the transport capacity of the vessels, and the number of routes from the island to the peninsula that can be offered to users on a permanent basis)*".

[24] Council of State, 15 December 2022, no. 10993, A531 – *Riciclo imballaggi primari/Condotte abusive COREPLA*.

[25] Tar Lazio, 4 June 2019, no. 7175, A487 – *Compagnia Italiana di Navigazione - Trasporto marittimo merci da e per la Sardegna*: "*to strengthen an already solid accusatory structure ... [the Authority may] legitimately use documents found at the companies and statements by third parties to demonstrate the recurrence of the intent to harm*", confirmed by Council of State, 1 April 2021, no. 2727.

[26] The AEC test assesses the ability of a hypothetical competitor of the dominant undertaking that is equally efficient in terms of cost structure to offer customers a tariff that is sufficiently advantageous to induce them to switch, despite the disadvantages incurred, without that causing that competitor incurring losses.

inputs necessary to provide the service to the same customers (where the AEC test was in principle not necessary, as the application of such a price to retail customers did not *ex se* allow competitors to operate profitably in the market, without the need for further analysis).[27]

26. If, on the other hand, the Authority does not have sufficient evidence to meet the standard of proof, it closes the investigation with a decision stating that "*the evidence in the file does not prove that the dominant undertaking has engaged in the abuses alleged in the decision to open an investigation*". In the past, such decisions have been adopted where the Authority was unable to prove the existence of a dominant position[28] or of a significant restriction of competition.[29]

27. With regard to the rules on the **burden of proof**, the Council of State has recently delivered two judgments following preliminary rulings by the Court of Justice of the European Union ("CJEU"). The two judgments, described in the box below, acknowledge that the standard of proof for the ability of an abuse to have exclusionary effects is still an open debate. Discussions are also ongoing at EU level, following the amendments to the Commission's Guidance on enforcement priorities in abuse cases[30] and the recent publication of the draft Guidelines on the application of Article 102 TFEU.[31]

### Box 1. Standard of Proof and Exclusionary Effects, Recent Case Law

In particular, on the basis of two preliminary rulings by the CJEU, the Council of State found that the standard of proof had not been met in one case and had been met in the other:

- in a case concerning an abuse in the recently liberalised electricity market, the CJEU clarified that a competition authority discharges its burden by showing that a certain practice could affect the competition structure without having to prove direct harm to consumers; instead, it is for the dominant company to prove that the conduct is incapable of producing actual restrictive effects.

In the following decision, the Council of State held that the Authority had failed to prove the existence of an abuse because it had not shown "on the basis of evidence, such as behavioural studies" that the contact had discriminatory effects vis à vis third parties,

[27] TAR Lazio, 30 August 2023, no. 13477, A493 - *Poste italiane/Prezzi recapito*.

[28] AGCM Decision of 18 April 2023, no, 30609, A549 - *Rida/Ecologia Viterbo.*

[29] AGCM Decision of 30 March 2021, no. 28629, A517 - *Mercati di Manutenzione di Dispositivi Diagnostici* and of 29 October 2021, no. 29869, *A537 - Mercato della Produzione di Contenitori in Pet*.

[30] Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2023/C 116/01), where the Commission recognizes that "*in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure*" (para. 24).

[31] Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, published in August 2024.

even though in the case in question a significant percentage of consumers had agreed to receive offers only from the incumbent company (Court of Justice, Case C-377/20, 12 May 2022, Servizio Elettrico Nazionale and Council of State, 1 December 2022, no. 10571, Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica);

- in another case concerning selective rebates and exclusivity clauses in the market for the distribution of impulse ice cream, the CJEU held in its preliminary ruling that the AEC test is not mandatory for a competition authority to establish the existence of an abuse. However, such an authority must demonstrate, on the basis of concrete evidence, that the conduct is indeed capable of restricting competition on the merits, in particular where the dominant undertaking disputes the abusive nature of the conduct; any doubt in this regard must be to the benefit of the undertaking engaging in such conduct. In addition, the Authority must assess the probative value of the AEC test when it is submitted by the dominant undertaking (Court of Justice, C-680/20, 19 January 2023, Unilever Italia Mkt. Operations Srl).

The Italian Council of State, following the principles established by the CJEU, confirmed that the AGCM was not obliged to carry out the AEC test and that it was entitled to consider that the economic studies submitted by the dominant company did not have probative value. Indeed, the Italian Court stressed that the AEC test, as formulated in the Intel judgment (Court of Justice, 6 September 2017), concerned rebates granted to distributors and was not appropriate in the case at hand, which concerned the dominant company's entire commercial policy, including selective rebates, exclusivity clauses and other strict contractual conditions. Therefore, the AGCM was right to conclude that the analyses submitted did not provide any significant information and were methodologically flawed.

The judge also confirmed that the Authority had sufficiently demonstrated the capacity of the conduct to restrict competition on the basis of several elements, such as the position of absolute dominance held by the dominant company in the relevant market and the fact that the conduct concerned a significant percentage of the market (Council of State, 11 July 2023, no. 6806, A484 - Unilever/Distribuzione Gelati).

28. With regard to **the review of technical assessments of AGCM's decisions, and in particular of complex economic assessments**, the Italian Courts have shown an increasing willingness to discuss the evaluation carried out by the Authority in order to examine possible methodological errors in the AGCM's decision. Some examples are particularly significant:

- with regard to the assessment of dominance, in a recent judgment concerning an abuse in the organisation of amateur equestrian competitions, the Council of State considered that the delegation to the Italian Federation of regulatory powers that would affect the ability of competitors to operate in certain sectors was not sufficient to prove dominance;[32]
- in a case concerning predatory pricing in tender procedures, the Council of State found that the AGCM's analysis of long-term incremental costs was flawed due to,

[32] Council of State, 5 June 2024, no. 5054, A378E - *Federitalia/Federazione Italiana Sport Equestri*: "*while the possession of such exclusive rights - which do not directly affect all the areas that make up the relevant market for events as identified by the Authority - may be a particularly important element, it does not appear to exhaust the analysis that the Authority should have carried out*".

inter alia, to (i) procedural flaws, as the AGCM did not take into account the specific costs incurred for the provision of the services, but allocated to these services resources that were mainly used for other services; (ii) methodological flaws, as the AGCM's analysis was based on regulatory accounts, without taking into account the additional regulatory costs due to universal service obligations. In particular, the AGCM considered that the price of the service offered by the incumbent was lower than that of the competitor, whereas according to the Council of State it was higher due to regulatory costs and thus not in itself capable of producing exclusionary effects;[33]

- in another case of exploitative abuse concerning a life-saving medicine, the Council of State examined and confirmed the assessment made by the AGCM to establish that the price of such a medicine was excessive.

  This analysis was based on the two-step United Brands test: (a) with regard to the first part of the test (excessive/disproportionate price), the Court recognised the accuracy and reasonableness of the assumptions made by the Authority, which were based on the data most favourable to the party; (b) as regards the second part of the test (unfairness of the excessive price), the judge considered that the Authority had correctly established the unfairness of the price "*per se*", relying, *inter alia*, on the absence of significant investment and quality improvements in the medicine and on the lack of viable benchmarks due to irreconcilable differences with pricing systems in the other countries where the medicine was authorised.[34]

29. Finally, it should be noted that the technical nature and complexity of the evidence and the expertise required to assess it make the evaluation of abuse decisions particularly challenging for the Courts. Under Italian law, Courts may be assisted by a technical advisor if such contribution is "indispensable",[35] although this has only happened in one recent case. In particular, in reviewing an AGCM decision concerning an anti-competitive strategy to hinder the development of investments in ultra-wideband network infrastructure, the Court requested a technical consultant to verify whether or not the investments made by the incumbent operator had or not a margin of profitability. The case is still pending.[36]

## 4. Interim measures

30. As regards the standard of proof required for the imposition of interim measures, the Italian Competition Law[37] requires the following three conditions: *fumus boni iuris* (*i.e.*, *prima facie* infringement of competition law), *periculum in mora* (*i.e.*, a risk of serious and irreparable damage to competition) and urgency (requirement of immediate action in order to prevent the damage to competition from materialising during the main

[33] Council of State, VI, 6 May 2015, no. 2302, A413 - *TNT Post Italia/Poste Italiane*.

[34] Council of State, judgment of March 29, 2024, no. 2967, A524 - *Leadiant Biosciences/Farmaco per la cura della Xantomatosi Cerebrotendinea.*

[35] Article 63(4) of the CPA.

[36] Council of State, order of 1 June 2023, no. 5413.

[37] Article 14-*bis* of Law no. 287/90, which has similar wording to Article 8 of Reg. no. 1/2003.

investigation on the merits, *i.e.*, the damage to the public interest determined by the alteration of the competitive process).[38]

31. The standard of proof for the ***fumus boni iuris*** is lower than that required for a full assessment of an infringement on the merits.[39] However, the *fumus boni juris* must be greater than that which led the AGCM to initiate an investigation.[40] In this regard, case law has established that the cursory investigation cannot be based on hypothetical assessments; rather, the existence of serious, recent and consistent evidence - from which the existence of the unlawful conduct can be inferred - is a necessary and sufficient condition.[41]

32. With regard to the ***periculum in mora***, the AGCM must prove that there is a risk of serious and irreparable damage to competition: the seriousness must be measured in terms of its impact on the public interest protected; the irreparability of the damage must be demonstrated by showing that it could not be remedied by the final decision.[42]

33. In other words, the standard of proof is based on the "*likelihood*" of two events: the probability of the existence of an infringement according to a reasonable presumption

[38] Council of State, 16 December 2021, no. 8402, A531- *Corepla.* As regards to the objective of the *interim* protection, the Court specified that: "*The purpose of precautionary measures is to ensure the effectiveness of the final administrative decision and to prevent serious and irreparable damage to the public interest from occurring during the period necessary to carry out the necessary investigations, pending the outcome of the* [main antitrust] *proceedings*". See also, Council of State, 3 March 2020, no. 1547, A521 - *Attività di intermediazione della domanda di servizi taxi nel Comune di Torino.*

[39] Council of State, 16 December 2021, no. 8402, A531- *Corepla* explaining that "t*he urgency of taking action is therefore generally incompatible with a full assessment of the existence of the infringement, which requires - once again - an examination of the appearance of its integration*".

[40] Tar Lazio, I, 7 September 2021, no. 9524, I840 - *Ostacoli alle arene a tirolo gratuito*, in which it specified that "*The degree of probability must be higher than that which led the Authority to open an investigation pursuant to Article 14 of law 287 of 1990, but in any event lower than that required to close the investigation after a full preliminary investigation*". Also, Council of State, 3 March 2020, no. 1547, A521 - *Attività di intermediazione della domanda di servizi taxi nel Comune di Torino* specifically clarified that "*the precautionary nature of the measure (...) does not justify, (...) either a summary assessment or a referral to another proceeding, given the logical legal priority of defining the relevant market - a key issue in proceedings for abuse of a dominant position,*".

[41] Tar Lazio, I, 7 September 2021, no. 9524, I840 - *Ostacoli alle arene a titolo gratuito*: "*it is therefore necessary and sufficient that there are serious, recent and consistent indications from which the existence of unlawful conduct may be inferred*". Council of State, 3 March 2020, no. 1547, A521 - *Attività di intermediazione della domanda di servizi taxi nel Comune di Torino* ruled that: "[Though AGCM] *provides on the basis of a necessarily summary and rapid investigation, (…) this should in any case take place in the light of certain and already stable evidence of illicit conduct, which resisti non potest*". See also Administrative Court, Tar Lazio, I, 24 July 2020, no. 8731, A531 - *Corepla* specified that pursuant to Article 14-*bis* of the Competition Act "*the existence of the so-called fumus boni iuris, which is not based on the acquisition of certain and definitive evidence, but rather on the existence of elements from which it is possible to deduce with a sufficient degree of certainty the existence of anti-competitive practice, and the periculum in mora, which is consistent with the finding of irreversible consequences deriving from that practice before the conclusion of the procedure pursuant to Art. 14 cit*.".

[42] Tar Lazio, I, 7 September 2021, no. 9524, I840 - *Ostacoli alle arene a titolo gratuito*, confirmed that "*The exercise of the precautionary power* [by AGCM] *is based on the existence of the conditions typical of emergency measures, and therefore does not require that the damage to competition and the proper functioning of the market has already occurred, but rather that it can be foreseen with a reasonable degree of certainty following the outcome of a probabilistic assessment*".

criterion and the ability of the alleged conduct to cause serious and irreparable damage to competition.

34. The measures must be based on the **principles of absolute proportionality and strict necessity** and should be taken if they prove to be "*indispensable*" to the effectiveness of a future decision bringing the conduct to an end. In any event, the content of the decision on interim measures cannot go beyond what the AGCM could impose in the final decision.[43]

## 5. Mergers

35. With regard to merger control, the standard of proof for the prohibition of a transaction under Italian law is the existence of **a serious impediment to competition**, in particular as a result of the creation or strengthening of a dominant position. The above test was introduced in 2022, in line with the EU Merger Regulation, replacing the so-called "*dominance test*" previously used.

36. Under the new test, the Authority can challenge not only mergers that would create or strengthen a dominant position (as under the previous test), but also those that would "*significantly impede effective competition*", even in the absence of a dominant position.[44]

37. It is worth noting that the AGCM has always carried out a robust analysis, including the risk of anti-competitive effects in tight oligopolies, even if, according to the previous test, structural indicators such as market shares were not sufficient to raise competition concerns.

38. So far, the Authority has opened an investigation into a merger in the distribution of food and non-food products that would "*significantly impede effective competition*", expressing concerns also in areas where the *post*-merger entity might not achieve a dominant position but might have anti-competitive effects, thus applying the new test. The case is still pending.[45]

39. In assessing mergers, the Authority may use **various types of evidence** in order to predict the future effects of the parties' proposed transactions. Economic evidence generally plays a relevant role; in line with the Commission's practice, such evidence may include data on costs, output, sales, prices, capacity, product characteristics, supply flows, customer characteristics, bidding details, entry barriers, business strategies, all factors considered in combination with the market shares of the parties and other players in the relevant market. In this respect, case law has clarified that the prospective assessment may include the possibility that the merging parties may engage in anti-competitive behaviour.[46]

40. In addition, the AGCM may also take into account the criteria normally used in the assessment of collusive agreements, since both mergers and agreements may be relevant "*as potentially restrictive of competition practices, regardless of the formal form they take*

[43] Council of State, 16 December 2021, no. 8402, A351 - *Corepla*.

[44] Law no. 289/1990, Article 6, as modified by Article 32, para.1, letter a), of Law no. 118/2022.

[45] AGCM's Decision of 24 September 2024, no. 31329, C12667, Pac2000a/Rami di Azienda di Doc Roma-Unicoop Firenze.

[46] Council of State, 12 February 2007, no. 550, C7065 - *Cassa Depositi e Prestiti /trasmissione elettricità rete nazionale-gestore della rete di trasmissione nazionale*.

*in each case*".[47] On the contrary, although the Authority recognises the growing importance of the efficiency analysis in the assessment of mergers, it is very reluctant to take into account the company's intention to achieve greater economic efficiency through the transaction, which does not in itself limit the potential distortion of competition.[48]

41. In terms of judicial review, the consistency and reliability of the AGCM's technical assessment have been subject to rigorous scrutiny by administrative Courts. Some examples are given in the box below.

### Box 2. Judicial Review of a Complex Economic and/or Technical Assessment

In terms of judicial review, the consistency and reliability of the AGCM's technical assessment have been subject to rigorous scrutiny by the administrative Courts, which have examined, inter alia:

- the proportionality of the remedies imposed by the AGCM in the merger decision: in particular, a clearance decision subject to remedies was successfully challenged by a third party, which argued that the measures in question were insufficient to prevent anti-competitive risks in a proportionate and plausible manner. The Italian Court referred back to the Authority the power to adopt new compensatory measures (Council of State, 21 March 2005, no. 1113, C5151 - Società Esercizi Commerciali Industriali-S.E.C.I.- CO.PRO.B.-Finbieticola/Eridania). In particular, the judge noted that, although the AGCM had pointed out that the vertical integration of the merging entity could give rise to serious anti-competitive risks, it had considered the undertaking given by the company not to influence the business decisions of the vertically integrated company to be sufficient.
- In another case, the Council of State shared the view of the notifying party that the remedies unilaterally imposed by the Authority on the corporate governance of the company were too intrusive and inappropriate (Council of State, 12 February 2007, no. 550, C7065 - Cassa Depositi e Prestiti);
- the plausibility of the technical assessments proposed by the parties and the alternatives to those on which the decision was based. In a judgment on the legality of a decision clearing a merger subject to remedies, the Court examined the arguments put forward by the parties on the market definition but found them to be "logically unacceptable" (TAR Lazio, I, 10 February 2016, no. 1934, C11982 - Enrico Preziosi).

## 6. Conclusions

42. The practice of the Authority shows a balanced and thorough approach with regard to the burden of proof and the standard of proof, in line with that adopted at EU level.

43. First, as regards the **standard of proof** required to meet the burden of proof, there have been no significant changes over time. In particular, as noted above, any type of

[47] Council of State, 26 January 2015, no. 334, C11878 – *ItalgasAcegasAPS/Isontina Reti Gas*.

[48] *Ibidem*.

evidence is admissible, provided that: (a) it is credible, taking into account all relevant factors (including the nature and dynamics of the markets concerned); (b) it was lawfully obtained; and (c) in the case of evidence directed against the defendant, the defendant has been given a reasonable opportunity to defend itself.

44. It is important that the evidence used is accurate, reliable and consistent, and that all the characteristics of the sector are taken into account in order to support the conclusions drawn and build a convincing 'story' to facilitate judicial review.

45. Second, **economic reasoning** is increasingly used in all competition cases to support or refute the evidence and arguments in a given case. The relevance of the economic evidence may vary from case to case. It may have a decisive influence on the analysis of a merger, whereas in cartel cases resulting from leniency applications, economic evidence may be less relevant. This allows for sufficient flexibility according to the characteristics of each case.

46. In any event, as the Authority's enforcement practice shows, decisions are usually supported by a rigorous and comprehensive analysis of market structure and competitive conditions in order to assess the intensity of potential antitrust risks in competition cases.

47. Finally, the Italian case law shows an increasing **willingness on the part of the administrative Courts to examine all the factual and legal issues** raised by the decision under review, including the technical criteria used by the AGCM in its economic assessment. Recent trends show that administrative courts appear to be more rigorous in verifying that the evidence relied upon is accurate, reliable, consistent and capable of supporting the conclusion reached. Particularly in the case of complex economic assessments, and given that the administrative Courts cannot substitute their own assessment for that of the AGCM, the Courts have progressively established stricter criteria for their review.

48. As a result, not only have the Courts fully recognised the growing importance of economic analysis in competition law enforcement, but the Authority has also, in response to such scrutiny, generally engaged in an intensive antitrust analysis, which has had a positive impact on the quality of its decisions.

49. It remains to be seen how the case law on the standard of proof for interim measures and on the ability of abusive practices to restrict competition will develop, as the debate is still open at EU level.

50. As regards interim measures, the Courts have on some occasions found that the "*likelihood*" of an infringement had not been proven. Nevertheless, the strict requirements for the imposition of such measures have an impact on the possibility of using a tool that can be particularly effective in ensuring timely action by the Authority, which is particularly important in the context of fast-moving markets. This has recently led a commitment by the European Commission to analyse whether there are means to facilitate the adoption of such measures within the ECN.[49]

51. Furthermore, the standard of proof for abusive exclusionary conduct does not seem to be fully settled. As noted above, Italian administrative Courts, following a referral to the CJEU, have reached different conclusions on the ability of abusive exclusionary conduct to restrict competition, holding in one case that the standard of proof was not met and in the other that it was. At EU level, the European Commission has recently published its draft

[49] See Report from the Commission to the Council and the European Parliament on the legal framework for and the use of interim measures by national competition authorities, 5 September 2024, COM(2024) 394 final.

Guidelines on abusive exclusionary conduct, which also aim to increase legal certainty and ensure that Article 102 is applied in a predictable and transparent manner[50].

[50] See Amendments to the Guidance on the Commission's enforcement priorities in abuses and Draft Guidelines on the application of Article 102, under public consultation.