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1. Introduction

1. The energy price inflation observed in 2022 has posed several challenges for antitrust authorities. In many countries, including in Italy, policymakers, consumer associations, representatives of energy intensive industries and the public at large have asked competition authorities to intervene to stop “speculations” on energy spot markets and offer a remedy to high energy prices, regardless of the presence of actual infringements of competition law. In Italy energy prices started to soar in the second half of 2021, as a result of a global recovery after the Covid lockdowns and a high demand in the international liquefied natural gas (LNG) market; after the Russian invasion of Ukraine, the situation worsened into a severe cost inflation of energy goods linked to growing expectations of supply shortage of natural gas.

2. Against this background and in response to a surge in complaints, the Italian Competition Authority (the Authority or the AGCM) launched ex-officio a monitoring activity on the fuel automotive markets aimed at investigating the main reasons behind the recent price increases of the pump prices, with the expectation that this closer scrutiny would act as a moral suasion against potential anticompetitive conducts. In Section 2 of this note, the Authority will summarize the findings of its monitoring activities on the fuel markets and describe an additional monitoring activity, mandated by the Government, on the application of a windfall profit tax levied on energy firms in March 2022, in order to detect any “pass through” of the tax on final prices for energy users like households and firms since this tax was intended to finance a reduction on energy bills. The note discusses the challenges raised by this new competence in terms of resources involved and implementation.

3. Section 3 will cover what are regarded as the possible threats to the competitive process in the Italian energy markets, stemming from the current situation of high energy prices. Section 4 concludes.

2. The Authority’s activities in the energy sector

2.1. The findings of the monitoring activities in the automotive fuel markets

4. Since Autumn of 2021, the AGCM has received several complaints on price spikes of several energy products¹. When, in March 2021, just after the beginning of the war in Ukraine, automotive fuels pump prices soared in Italy well above the “psychological” threshold of 2 euros per litre (prompting a government’s intervention aimed at lowering VAT on fuels), the Authority, in response to a surge in complaints received, decided to

¹ Complaints from: natural gas for automotive (October 2021); automotive gasoline and diesel (March 2022); pellets for domestic heating (August 2022); natural gas for central heating (September 2022); district heating (September 2022).

undertake a monitoring exercise by sending requests of information to vertically-integrated oil companies and distribution outlets in order to acquire data on costs and prices².

5. The purpose of this exercise was to gather any indicia of a coordinated response of fuel retailers to an input price increase which could not be explained as an independent reaction to the supply shock³. The AGCM collected data to build time series of retail margins both for gasoline and diesel over the period January 2021 - June 2022⁴. What emerges from this first step of the analysis is that Italian fuel retailers responded to the exogenous shock in March 2022 by over-increasing pump prices for some days but, in the following weeks, they brought their margins back to the long-term level of 0,15-0,20 euro per litre. Graph 1 shows this pattern for retail margins for gasoline (a similar pattern is shown for diesel).

6. The second step of the exercise was to analyse the relationships between the retail margins for gasoline and diesel and the international cost for fuel products, given by the Cif Med Platts quotations for gasoline and diesel which are used by oil companies as proxy of refinery costs⁵. Graph 2 below shows the gasoline retail margins of Graph 1 (for the shorter period January 2022-June 2022) compared with the Cif Med Platts quotations for gasoline: it emerges that, after the peak of March 2022, retail margins return to the pre-crisis level while the Platts values for gasoline show a steady growing trend, widening the gap between retail margins and the costs of the product⁶.

7. The last step of the analysis was then to compare Platts quotations for gasoline and diesel with the Brent index for crude oil (both in euro per litre) for the period January 2021-June 2022. What can be inferred is that, after the spike in March 2022, a gap emerges between the value of finished products and the costs of oil (Graph 3), showing that refinery margins increased from the 2021 level.

² See the AGCM press release of March 18, 2022, available at: <https://www.agcm.it/media/comunicati-stampa/2022/3/DC10398>.

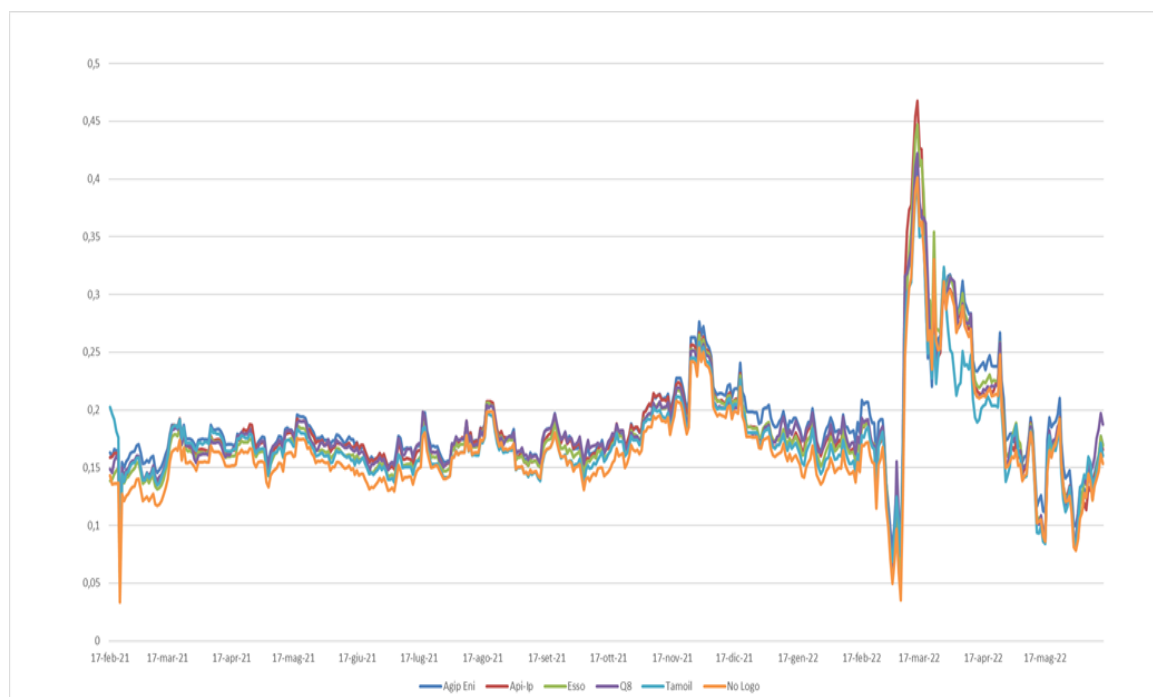
³ The Italian markets for fuel retail distribution see the presence of five integrated oil companies, two supermarket chains and a lot of independent resellers (white pumps).

⁴ Retail margins are given by final pump prices minus taxes and minus the international *Platts* quotation (Cif-Med) for the final product. Retailers use their margins to pay logistics cost and the labour cost for workers at the pump and retain what is left as a net profit.

⁵ They represent in fact the opportunity cost of refining a product instead of buying it on the cargo market.

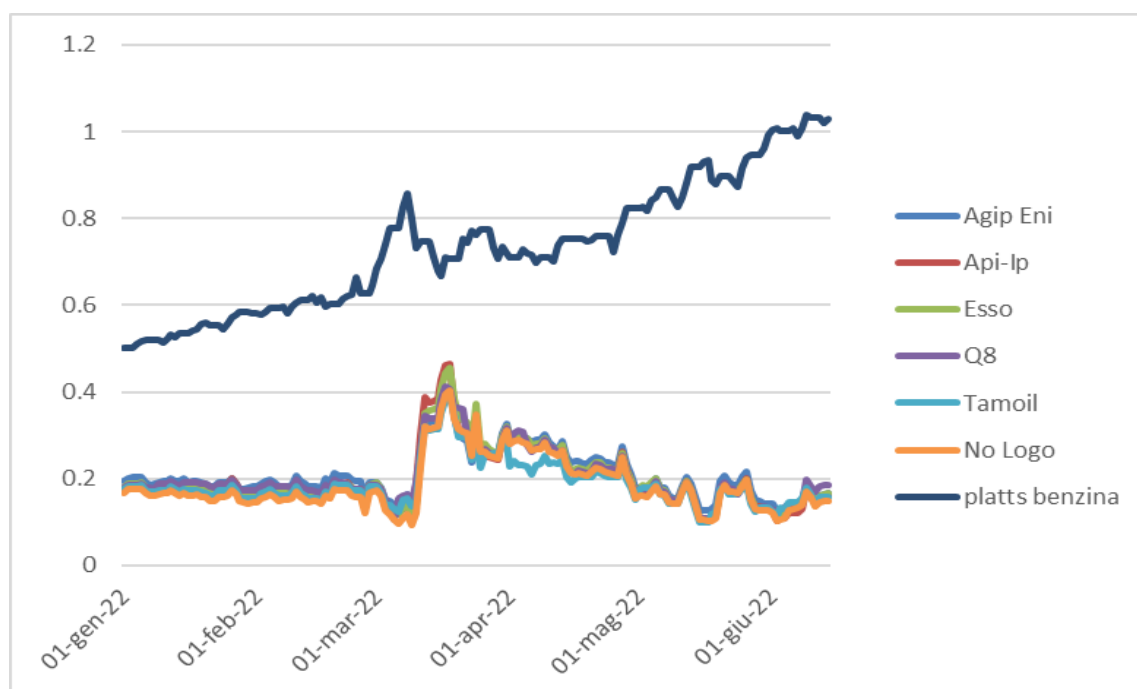
⁶ A similar pattern was shown for diesel.

Graph 1. Retail margins for gasoline in Italy (January 2021-June 2022) (Eurocent/lt)

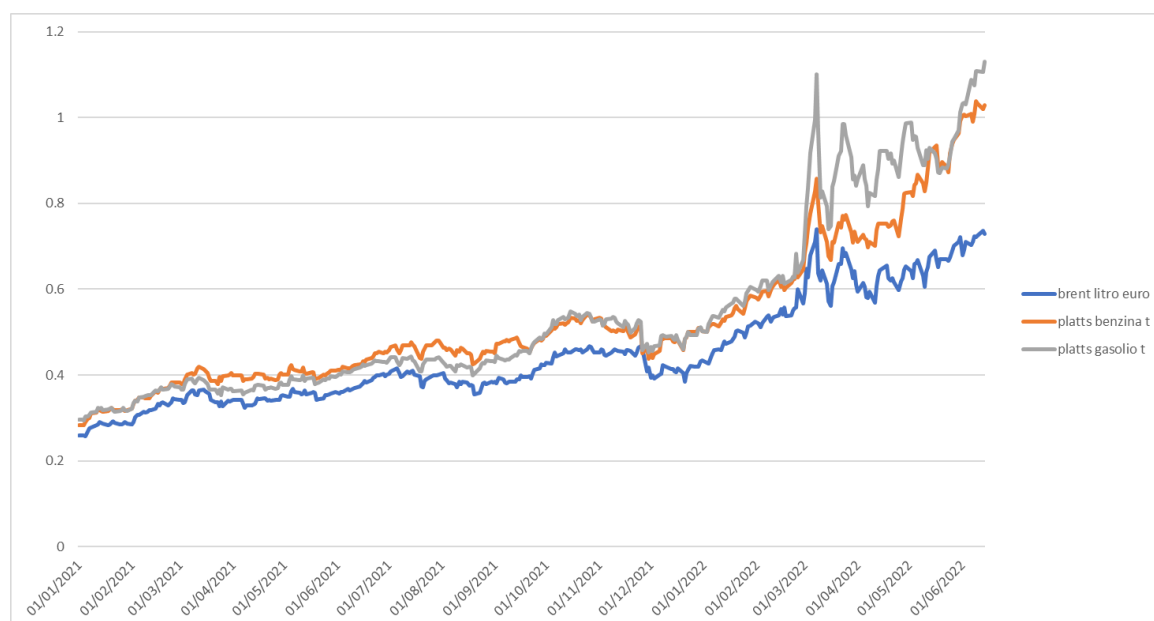


Source: the AGCM elaboration on data given by firms and taken from public source (Quotidiano Energia). The blue line is the retail margin of Agip Eni, the red API/Ip's, the green Esso's, the velvet Q8's, the light blue is Tamoil's and the orange is the average retail margins of the no logo outlets distributing fuels in Italy.

Graph 2; Gasoline Platts Cif Med and retail margins (January – June 2022) (Eurocent/lt)



Source: AGCM's elaboration on data given by firms and taken from public source (Quotidiano Energia).

Graph 3: Platts Cif Med for gasoline and diesel and Brent Index (euro/lt)

Source: AGCM's elaboration on public data.

8. The preliminary conclusion reached by the AGCM is therefore that the likely reason explaining high pump prices observed even after March 2022 surge has to be ascribed to tensions in the international cargo market, reflected in growing Platts quotations which have been passed through in final pump prices. Retailers seem to have passed on the increase in Platts Quotations to pump prices, whilst maintaining their margins at their historical long-term level⁷.

9. So far, the AGCM analysis has identified no country-specific related factor explaining the tensions in the markets. The gap between crude oil price and Platts values, which has meant higher refinery margins for vertically integrated firms, was a global trend that can be explained by a variety of factors⁸. Since the monitoring activity could not single out any specific conduct of Italian integrated oil companies which could be scrutinised under the competition law framework, the Authority has not taken any action so far while still monitoring the situation, also in light of the recent declining trend of pump prices (as of October 2022, they are at 1,6-1,7 euro per litre)⁹.

⁷ For independent retailers (no logo) which resell in Italy fuels bought on the cargo market (priced at Platts) this essentially means that, other costs (logistic and workers at the pump) being equal, the share of retail margins on pump prices retained as a profit has shrunk. The evidence from the graphs shows also vertically integrated majors retail margins moving as the no logo's ones, despite the fact that they can supply fuels for their network from their refinery facilities in Italy. A way to see this is that the oligopolistic competition in the Italian fuel retail distribution market tend to absorb external shock quite quickly and reverse back to a "natural" long term retail margins which, other cost being equal, means reducing the ratio of net profitability on final pump prices.

⁸ In particular: a) the shutdown or the revamping of refinery capacity around the world during (or after) the lockdowns period (also due to long-term green transition programs); b) tight refinery margins in 2021; c) post-Covid growth faster than expected; d) the effect on the supply side (especially for diesel) of the Ukraine war and of sanctions on Russia products.

⁹ Furthermore, the Italian market is showing new features with respect to the past such as a price for diesel steadily higher than the one for gasoline.

2.2. The AGCM's new competence: monitoring a government's windfall tax on extra profits of energy companies

10. To mitigate the burden of rising energy bills for household and firms, during 2022 the Italian Government approved several support measures, one of which is financed by a new windfall tax on “extra profits” of energy companies, introduced by article 37 of Decree 21/2022¹⁰. This provision attributes to the AGCM the task of monitoring the (monthly) margins of around 300 energy companies affected by the windfall tax in order to detect any “pass through” of the tax on final prices for the period May 2022 – December 2022, which would have frustrated the efforts of alleviating the costs of high energy bills on domestic users and firms¹¹.

11. To start the implementation of this new task, the Authority has issued an online questionnaire requesting monthly disaggregated operating costs and revenues data for each line of business of the firms concerned, with the plan of finalising data collection by the end of March 2023¹². Once the dataset is built, the Authority will proceed with analysis mandated by the law.

12. There are several challenges posed by this activity requested by the Government. First, the mandated task – detecting a pass-through of a tax – goes beyond the scope of the institutional mission of the AGCM and entails resource intensive activities, such as data collection from around 300 firms, which may frustrate the attainment of the core business of the agency.

13. Second, complex methodological challenges are envisaged in the construction of a counterfactual scenario that is necessary to ascertain whether a pass through of the tax has occurred for each of the firms concerned: by comparing the counterfactual margins with the actual (factual) ones, over the period of interest, the Authority will strive to detect whether or not energy players have increased their margins as a reaction to the tax¹³.

¹⁰ To be precise the tax actually hits the 25% of extra revenues (as they emerge from VAT reporting) gained in the semester October 2021 – March 2022 as opposed to October 2020 - March 2021.

¹¹ Paragraph 9 of Art. 37 states: “In order to avoid, for the protection of the consumer, undue repercussions on the consumer prices of energy products and electricity, for the period from May 1 to December 31, 2022, the persons required to pay the contribution referred to in paragraph 1 shall communicate by the end of each calendar month to the Competition Authority the average price of purchase, production and sale of electricity, natural gas and methane gas as well as petroleum products, relating to the previous month. The Authority ascertains the existence of the prerequisites for the adoption of the measures within its competence on the basis of the data received and special verifications, as part of an extraordinary plan of checks on the veracity of the communications referred to in this paragraph. The modalities for the transmission of data are established by the Competition and Market Authority”.

¹² At the end of October 2022, the AGCM already gathered monthly data for May and June 2022 and sent a request of information for building up a series of pre-tax benchmark margins for the period January 2021 to April 2022. Another six questionnaires will be sent to firms in the coming months to obtain data for the period from July to December 2022.

¹³ There are several methods to build up a counterfactual scenario, which adopt different assumptions and require different data. For instance, conducting a difference-in-difference analysis would require (panel) data both on the companies that were subject to the tax and similar companies that were not subject to the tax. One possibility to conduct a counterfactual analysis is to use firm-level historical data to compare, for each firm monitored, the margins data in the pre-tax period with those in the post-tax period, trying to control for exogenous factors that can affect the evolution of profitability. An approach of this kind would require dealing with a number of such factors, such as,

14. Third, the above described benchmarking analysis will raise questions as to the interpretation of results, e.g., to what degree a divergence in the post-tax margins would constitute a proof of pass-through and hence a violation of the new provision, and the most appropriate follow-up actions. On this latter point, the Decree states that the Authority should use its enforcement powers when it ascertains that a firm passed through the tax on final prices in the relevant period. However, antitrust investigations can be launched only in presence of a dominant position or an agreement/concerted practice of a number of firms on the same relevant market with the objective to pass through the tax in a coordinated way. Alternatively, a potential outcome of this monitoring activity would be to report to the Government on any pricing issues which might give rise to potentially anticompetitive conducts by specific firms.

3. Potential competitive threats in the energy markets in Italy

3.1. Liquidity crisis and the likely exit of some traders

15. As prices of natural gas and energy have ramped up in 2022 and showed extremely high volatility, trading at the energy exchanges in Europe became very expensive in terms of liquidity requirements necessary to meet the so-called “margin calls”¹⁴. The liquidity constraints of many sellers of natural gas and electricity, by acting as a disincentive to sell gas or energy to traders and/or final users, have magnified the current shortage of these inputs: in Italy, many traders have been facing difficulties in ensuring supply to their retail customers and some of them, especially those not vertically integrated, might exit the market since they are unable to cope with the very harsh supply terms and liquidity conditions on wholesale markets.

16. With a view to limiting a further wave of energy price increases of long-term supply contracts, in August 2022 the Italian Government decided to freeze, until April 2023, the possibility for energy traders to renegotiate energy price conditions of fixed-price contracts signed on the liberalised segment of the retail market¹⁵. This also contributed to worsen liquidity conditions of many small traders; some industry associations in September 2022 announced that up to 100 traders were near bankruptcy¹⁶. For this reason, the Italian energy regulator ARERA introduced measures aimed at alleviating liquidity conditions (easing same payment terms and allowing to pay monthly the transport capacity booked by traders to serve customers).

17. The liquidity problems of traders resulted in disruptions in the retail markets given that some traders, faced with the impossibility to renegotiate the fixed price contracts, decided instead to terminate their supply contracts with domestic users on the ground of

for example, seasonality, the (possible) presence of trends and/or structural breaks. For example, the war in Ukraine may have created a structural break in the margins data in February/March 2022, which requires proper treatment to avoid drawing incorrect conclusions.

¹⁴ To hedge from price risk, energy producers usually sell forward their power (till up to three years in advance) on energy exchanges, but this also requires making security deposits to guarantee to the clearing house of the exchange future deliveries in case of default. These deposits - known as margin calls - have risen sharply in line with price since 2022, leaving several companies badly exposed to bankruptcy as they are unable to find cash fast enough.

¹⁵ See article 3 of Decree 9th of August 2022 n. 115 (so called *Aiuti bis*)

¹⁶ See <https://www.ilsole24ore.com/art/la-volatilita-dell-energia-affonda-anche-trader-su-cinque-rischio-AEttkvB>

their excessive costs. In response to complaints from domestic customers, the regulator ARERA and the AGCM, also competent for consumer protection, have issued a joint statement to clarify the admissible conducts for traders¹⁷. However, preventing traders to unilaterally terminate their supply contracts, while it may address consumer protection concerns about their energy supply, could force the exit of some players due to the much higher costs of complying with their contracts, with the subsequent increase in concentration in energy markets in Italy. Therefore, a trade-off between competition and consumer protection objectives is likely to emerge for the Authority which has both competences¹⁸.

18. The exit risk is higher for small and medium energy traders which are not (vertically) integrated in the import of gas and in electricity generation and are active only on the liberalised markets, i.e., they do not avail of a more stable customer base as it is the case for retailers supplying the regulated tariff regime (which is set to expire by 2024). Former state-owned incumbents (ENI and ENEL) and some big municipality-owned utilities might then benefit from this situation and increase their market share.

3.2. Competitive threats in wholesale gas market

19. Another source of potential threat to competitive conditions in the Italian energy markets might come from the fact that Italy, like other European countries, has been trying to diversify the procurement of natural gas in order to reduce dependence from Russian imports in the long run¹⁹. Notwithstanding these efforts, it cannot be ruled out the possibility that the Italian gas market will experience shortages in the winter 2022/2023 (or even in winter 2023/2024) in presence of particularly low temperatures; in such cases, any supplier of natural gas could become “pivotal”, that is, essential to satisfy the residual demand and therefore could enjoy substantial market power in times of peaks in demand. In this scenario, a closer vigilance from the regulator ARERA and the AGCM would become indispensable.

3.3. Increased risk of collusion among energy firms

20. The exit of energy traders or the downsizing of many new entrants due to liquidity crisis (see section 3.1 above) could pave the way for a restoration of dominant positions by former incumbent players; this “re-concentration” process could be even reinforced by a growing political support, at a European level, for the creation of European energy champions that are able to cope with the energy price inflation, for instance through the creation of a European consortium of buyers of gas²⁰.

¹⁷ See <https://www.agcm.it/media/comunicati-stampa/2022/10/Energia-modifiche-contrattuali-possibili-solo-a-specifiche-condizioni>

¹⁸ Indeed, using its consumer protection powers, on the 18th of October 2022 the Authority opened four proceedings against four energy traders allegedly for having disregarded the provision of article 3 of Decree 115/2022 in their business relations with domestic clients.

¹⁹ Gas imports from Algeria and LNG imports from Africa, Middle East, Asia and USA should provide additional volumes; new measures of demand reduction (also through economic incentives) and solidarity among EU Member States should also help to limit the disruption derived from a possible stop in Russian imports.

²⁰ See COM(2022) 553 final; *Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic And Social Committee And The*

21. In terms of anticompetitive conducts that the Authority might expect to arise in the near future, exploitative abuses in the form of excessive prices by energy firms are unlikely to occur given the continuing attention of media and public opinion on the level of energy prices. However, it can be expected other types of firm's behaviour which might indirectly influence the competitive structure of energy markets: for example, agreements to share infrastructure (in energy transport or logistics) or to pool certain costs, and agreements creating joint buying mechanism.

22. In the Authority's view, it cannot be excluded that the assessment of these types of agreements might raise tensions between competition and other public interest goals, such as resiliency or diversification of supply chains. Furthermore, cooperation agreements aimed at improving primarily the resilience of energy companies in these difficult times might be presented and often justified on the grounds of substantial environmental benefits accruing from the cooperation itself. In reviewing such claims, the AGCM will carefully assess the sustainability benefits and weigh them against the anti-competitive effects, following the principles laid down in Article 101 (3) of the TFEU and the guidance provided by the European Commission in this area.

3.4. Impact on the liberalization process of energy retail markets

23. The current phase of energy price inflation could also trigger political pressure to smoothen the on-going opening process of energy markets and further delay the end of the regulated tariff system in the retail sale of electricity and gas. By January 2024, Italy's regulated tariff regime for both natural gas and electricity is set to expire, after several postponements implemented by the Italian Government in recent years. However, in September 2022 the energy regulator ARERA advocated for a further postponement of this deadline, fearing that the current liquidity shortage in energy markets on one side and the still rising final prices on the other side could hamper an orderly switch for many millions of domestic energy clients from the regulated regime to the liberalised market²¹.

24. In the Authority's view, any further extension of the regulated tariff regime, if somehow justified by the current situation, warrants a careful assessment to ensure that this measure is temporary and proportionate to its objective. Restoring a regulated tariff regime to protect users from the energy price inflation, while being a short-term solution that policymakers might be tempted to adopt, might generate adverse long-term effects in terms of higher risks of systemic failure of energy markets if they become more consolidated and less competitive.

4. Conclusive remarks

25. The Italian experience shows that the large energy price increases occurred in 2022 can be largely explained by the tensions in the international markets. Competition authorities are not well equipped to address in the short run a situation of high energy prices as their modus operandi require a longer timeframe due to their investigative procedures and the complex assessments often needed. Nevertheless, the AGCM ex-officio monitoring activity in the automotive fuel markets was launched as a form of moral suasion mindful

Committee Of The Regions; Energy Emergency - preparing, purchasing and protecting the EU together.

²¹ See ARERA advocacy opinion, available at <https://www.arera.it/it/docs/22/461-22.htm>

that a volatile market environment, like that one experienced in the three quarters of 2022, may increase the chance of anticompetitive behaviour in a situation of increasing prices.

26. Unlike the Covid-19 crisis which saw temporary price spikes in health-related services and products, the high levels of energy prices experienced in 2022 are likely to stay in the coming years, as the adjustments in energy markets and other global factors may take some time to occur. In addition, at least in Europe new ideas about regulatory measures to counteract the consequences of high energy prices are being discussed. These new efforts to re-design energy markets will have to balance different policy objectives and it is important that competition principles are duly considered.

27. The Italian experience highlights the importance of involving competition authorities also in the definition of short-term responses of the Government to alleviate the negative consequences of tensions in the energy markets. The Government's efforts to avoid further increases in energy bills by freezing the re-negotiations of traders has resulted in a liquidity crisis in the supply chain, with potential repercussions on the competitive dynamics that will have to be traded off against consumer protection concerns.