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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Italy --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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-- ITALY --

1. Introduction

1. This contribution provides an overview of the standards used by the Italian Competition Authority (the Authority or AGCM) in prohibiting mergers and in clearing them with remedies. As in the majority of jurisdictions, most of Phase II merger cases assessed by the Authority is closed with remedies while prohibition is a much less frequent outcome.

2. The contribution also highlights the various factors influencing agency decision making process and, in particular, certain features of the Italian merger regime analytical framework and the experience gathered so far in implementing and monitoring merger remedies decisions.

2. Legal and analytical framework

3. The Italian merger review system envisages two phases[1]. During **Phase I, lasting 30 days**, the AGCM may either clear the merger with an unconditional authorization or start a **Phase II in depth investigation** lasting 45 days if the Authority considers that a merger may be subject to prohibition. At the end of the Phase II investigation, the Authority may either prohibit the merger, or clear it with measures aimed at preventing its anticompetitive effects.

4. There is no express deadline for the presentation of remedies in the course of a Phase II proceeding[2]. All merger decisions can be appealed before the Administrative courts.

5. Mergers are assessed on the basis of a **dominance test** in line with the pre-2004 EU Merger Regulation (EUMR) substantive test. According to the Italian Competition Law (the Law)[3], the Authority has to ascertain whether notified mergers create or strengthen a dominant position on the domestic market so as to eliminate or significantly and durably restrict competition. Although the introduction of the new EUMR substantive test was not followed at national level[4], the AGCM interprets its dominance test more extensively, since the Italian competition law is largely modelled on EU legislation and Article 1(4) of the Law explicitly provides that its substantive domestic provisions on agreements, abuse of dominance and mergers, have to be interpreted in accordance with the principles of EU competition law.

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1 For an overview of the Italian merger regime and remedies assessment, see Italy's submission to the OECD Policy Roundtable Remedies in Merger Cases 2011, available at: http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf

2 While remedies may not be offered in Phase I, they can formally be submitted by the parties at any moment in time during the 45 days of Phase II. Although this is not provided for by the Law, the AGCM usually sends a Statement of Objections (SO) to the parties in relation to mergers in Phase II. In this case, the parties are asked to submit any comments and/or remedy proposal or additional remedies within the timeframe established by the Authority. This may also allow the parties to formally offer remedies after having received the SO.

3 Law n. 287/1990, whose English translation is available at: http://www.agcm.it/en/competition/competition-legislation/1727-law-no-287-of-october-10th-1990.html

4 The Authority has advocated the introduction of the EUMR substantive test in several circumstances: for instance, in its 2013 opinion to the Government for the purpose of the annual law for competition.

6. There is no statutory consideration of **merger specific efficiencies** as a possible defence for otherwise anticompetitive concentrations. Efficiency gains may nonetheless be incorporated in the overall assessment of a proposed merger. In principle, the consideration of merger specific efficiencies, and more generally of the pro-competitive effects of a merger, is not to be excluded given that the legal test provides for two logically distinct steps, respectively focusing on the creation or strengthening of a dominant position and on the expected effects of the merger on competition.

7. For the substantive assessment of mergers and remedies, the AGCM has not adopted guidelines but it relies upon the principles and guidance laid down by the European Commission in its Notices on relevant markets, horizontal and non-horizontal mergers, and remedies[5].

3. Agency practice on merger decisions

3.1 Merger statistics

8. Over the period 2016-2005, clearance subject to remedies was outcome of the merger review process in the majority of cases (68%): in 27 out of 40 Phase II investigations (see table below). Prohibition decisions (4) represented a 10% while unconditional authorization was granted in 20% of the cases (8). Only in one case (2%) the transaction was withdrawn by the parties. If the 2016-2011 period is considered, out of 23 merger decisions, only in two cases the in-depth merger review led to a prohibition decision while in other 15 cases the AGCM cleared the transactions subject to conditions.

Table 1. AGCM merger decisions by outcome (from 2005 to October 2016)

	Phase II review	Prohibition	Conditional Authorization	Unconditional Authorization	Withdrawn Transaction
2016 (October)	*2*		*2*		
2015	*6*		*4*	*1*	*1*
2014	*1*		*1*		
2013	*2*	*1*		*1*	
2012	*7*		*5*	*2*	
2011	*5*	*1*	*3*	*1*	
2010	*1*			*1*	
2009	*1*		*1*		
2008	*2*		*2*		
2007	*6*	*2*	*4*		
2006	*5*		*4*	*1*	
2005	*4*		*3*	*1*	
TOTAL	40	4	27	8	1

5 See European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 05.02.2004, p. 5-18; Commission notice on the definition of the Relevant Market for the purposes of Community competition law, Official Journal C 372, 09.12.1997, p. 5; Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No 802/2004, no. 2008/C 267/01, Official Journal C 267, 22.10.2008, p. 1-27. Available at: http://ec.europa.eu/competition/mergers/legislation/notices_on_substance.html#hor_guidlines

3.2 Standard in prohibition decisions

9. When reviewing mergers, AGCM attempts to ascertain whether the transaction is likely to be harmful for competition. If so, the merger in question – in the form which has been notified - should be prohibited. Otherwise the merger may be cleared with remedies. In line with the EC approach, the Authority follows the standard of proof based on the balance of probabilities (the merger is "more likely than not" harmful) as it is flexible enough to account for all future potential scenarios that merger review must consider in its forward looking exercise.

10. Once the balancing act establishes the competitive harm that the merger is likely to bring, the question is whether there exists remedies that remove the harm. The question whether remedies might not be offered by the parties is not relevant in the Italian merger review system since the Authority may impose conditions to the transaction even when no remedy proposal was made by the parties (see section 3.3).

11. Prohibition decisions are generally taken when no remedial action is considered appropriate because it would not resolve the competition problem (o create additional ones), and/or it would entail high risk of failure, i.e., when no remedy would be effective.

12. In assessing two transactions, one in 2011 (C11205) and one in 2015 (C11987), affecting the same relevant markets and involving the same acquirer, the Authority was confronted with the question on the magnitude of anticompetitive effects and the admissibility of any remedial action (see BOX 2 below). The decisive element for the accepting remedies rather than prohibiting the 2011 transaction was the presence of an important albeit dormant competitor potentially able to constrain the merged entity at horizontal level, while the proposed remedies to provide access to infrastructure on FRAND terms were deemed capable to address the vertical competition concerns. In 2015, the target of the second transaction was the only remaining potential competitor (which was about to "enter" the market), and consequently the merger would have generated a monopoly at horizontal level and serious foreclosure concerns at vertical level. In its Phase II opening decision, the Authority did not consider an extension of the 2011 remedies a solution capable of rebalancing the substantial loss of competition. The transaction was eventually withdrawn before the Authority's final assessment.

Box 1. Remedy decisions in the hosting infrastructure and broadcasting services (Cases C11205 and C11987)

The case *C11205 – EI/DMT (2011)* concerned the acquisition of the sole control of Digital Multimedia Tecnologies (DMT) by Elettronica Industriale (EI) and it affected the market for the provision of hosting infrastructures (towers) for tv and radio broadcasters and mobile telecommunications. Towers are an essential input for DTT (Digital Terrestrial Television) broadcasters, which in turn are the gateways for the TV content providers. In Italy the biggest TV platform is DTT followed by satellite (DTS) and Internet (IPTV).

The concentration raised horizontal concerns since besides the merging parties DMT and EI, the only other remaining tower company operating in the whole country was Rai Way, a subsidiary of the state-owned broadcaster RAI. However, Rai Way had implemented a captive-oriented strategy, providing hosting services mainly to its parent company RAI (i.e., only a small share of its towers were used by third parties). Local companies were able to offer hosting space to national DTT broadcasters but with some limitations: in some regions there were no local tower companies, their hosting services had a lower quality and higher transaction cost due to several agreements needed. In addition, due to the regulation on electromagnetic pollution, it is highly difficult to add new towers.

The merger raised also vertical concerns as the target, DMT, was the only non-vertical integrated national tower company, while the acquirer EI, being a wholly owned subsidiary of Mediaset S.p.A., was active also as DTT broadcaster. According to the Authority, EI had the incentive to foreclose input (total or partial foreclosure) to its competitors both in the DTT broadcasting market and in the free tv/tv advertising market. Foreclosure was possible by denying access to towers (total foreclosure) or by rising prices and bundling services (e.g. maintenance) to hosting services.

The transaction was eventually cleared with remedies addressing both the horizontal and vertical competition concerns. Remedies, whose implementation was subject to the monitoring of the AGCM, included:

- access to towers under FRAND terms: i.e., the hosting services were not to be bundled to other services (maintenance, set up, etc.)
- full transparency: public catalogue indicating geographic coordinates of the towers, prices and other relevant information, standard contract published by EI/DMT and price cap (at DMT pre-merger levels).

The decisive element for the accepting remedies rather than prohibiting this transactions was that Rai Way, was still considered an important albeit dormant competitor potentially able to constrain nationwide the exercise of market power by the merged entity EI-DMT.

In November 2014, Rai Way was listed after an IPO launched by RAI. The listing was going to change the strategic position of Rai Way as a tower company, increasing its incentives to offer its services to third parties. In February 2015 EI Towers informed the market about a takeover bidding to acquire the sole control of Rai Way.

In this case (*C11987 – EI Towers/Rai Way*), the horizontal effects analysis was very similar to the previous case with the exception that only local tower companies would remain after the merger, with a share of 25-30% of the market.

This second transaction raised more serious concerns on the vertical aspects given that the target, Rai Way, was acting not only as a tower company but also as a DTT broadcaster on behalf of its parent company Rai. Therefore, the Authority's foreclosure concerns involved also the broadcasting market, with respect to a set of complicated services needed to operate the multiplexes of the state-owned RAI. According to the contract between RAI and Rai Way, the former had the (almost) exclusive right to develop all the future technologies concerning DTT broadcasting network. Post transaction Mediaset, the parent company of the acquirer EI, would have access to the technology of the DTT network of its first competitor in the television advertising market, influencing the future evolution of DTT broadcasting. In sum, through this second transaction Mediaset would have a greater incentive and an enhanced capability to foreclosure competitors than in the past.

A fundamental question in assessing this second transaction was whether the remedies imposed in the first transaction could be "extended". According to the Authority, the second transaction would have changed the market structure and situation in a way that the previous remedies would no longer be adequate to fix the competition concerns. At horizontal level, the second transaction would have eliminated Rai Way - the only remaining nationwide operator –even if it was seen only "potential" competitor" in the first decision. However, the decision to list Rai Way in 2015 was also seen as step forward for serving third parties, thus turning into an actual competitor of EI. In addition, this second transaction raised risk of coordination between the merging parties in other related markets: TV platforms and advertising.

At vertical level, the assessment of the second transaction highlighted that RAI Way acted as a DTT broadcaster for RAI providing a new set of services subject to technological evolution: the merged entity would have the sole control of the DTT technology and its future developments while this concern was not raised by the first transaction. Thus, any behavioural remedy was considered neither suitable to solve these extremely critical issues raised by the merger nor easy to be monitored.

The transaction was withdrawn by the merging parties before the Authority adopted its final decision on the merits.

13. In one prohibition case (C11878 see BOX 1 below), the Authority dealt with a transaction that would reduce the number of potential credible bidders in future tenders for the awarding of gas distribution concession; it was considered that no remedy was suitable to address the competition concerns, apart from the withdrawn of the deal. In this case, the Authority forward looking exercise was heavily based on a survey of the existing market participants to form its view about the potential competition to be expected in future.

Box 2. C11878 - Italgas-Aceagas-APS/Isontina Reti Gas (2013)

In 2013, the AGCM blocked the proposed change of control of the Italian gas distributor Isontina Reti Gas, which would shift from joint control by Acegas and ENI to joint control by Acegas and Italgas, being respectively a major local distributor in the northwest Italian regions and the largest gas distributor in Italy with a nation-wide presence[6]. The joint venture Isontina Reti Gas was active as distributor in the northeast regions of Italy. The transaction was explicitly aimed at creating a vehicle whose purpose was the participation in the competitive tenders, to be issued 2-3 years after the merger investigation, for the awarding of the concessions for the gas distribution in six predetermined geographic areas (so called ATEMs). Indeed, a liberalization reform had made it compulsory to use competitive tender procedures for the awarding of gas distribution concessions which had been granted.

According to the Authority's theory of harm, the controlling entities (Italgas and Acegas) would have avoided competing against each other for the concessions in the 6 ATEMs located in the northeast of Italy: not only would the JV be dominant in at least 4 of 6 ATEMs; but also no other local distributors was interested in participating in the tenders for those areas where the merging parties were already present. Therefore, the Authority considered that the transaction would have reduced the number of "credible" participants in the relevant tenders. In particular, from the market survey carried out by the Authority it emerged that Italgas and Hera/Acegas Aps were to be considered as two of the three main potential competitors in four of the six relevant tenders. This would have affected negatively the competitiveness of the tenders and ultimately the service supplied to final consumers. The court of first instance annulled the agency decision on appeal by the merging parties but the Supreme Administrative Court upheld the AGCM decision[7].

The peculiarity of this case is that the Authority had to deal with "future markets" in the sense that the tendering procedures were set to happen in 2-3 year time; as such, existing market shares did not have informative value although it was found that incumbency still played a significant role. The AGCM therefore focused on the analysis of potential competition by carrying out a survey of the market players in order to form a view about the prospective participants to the tenders and their characteristics. Merging parties did not offer any remedies in the course of the proceedings.

3.3 Standard of proof in remedies decisions

14. As a general principle, remedies will be assessed by the Authority in their capacity to address the competition concerns raised by the merger: therefore, the standard adopted is that remedies should solve every competition concerns raised by the AGCM.

15. For instance, in a transaction concerning retail markets of a full range of products for infants and children, the AGCM cleared the proposed concentration subject to structural remedies, which included the divestiture of 28 point of sales, one of which was added to the parties' remedy package by the Authority itself. Before the first instance court (Tar Lazio), the parties contested, among other things, the additional divestiture imposed by the Authority and the proportionality of the remedy, which required the potential purchaser to be of a certain type (i.e., to sell the full category range) in order to be able to be an effective competitor of the merged entity. The Tar Lazio confirmed the Authority's decision in its entirety, finding no manifest error or misuse of power in the method used by the AGCM for identifying the stores to be divested.

6 See DESOGUS, Claudia; SICCA, Renato. Merger analysis in the gas distribution sector in Italy: the "Isontina case". *Rivista Italiana di Antitrust / Italian Antitrust Review*, [S.l.], v. 1, n. 1, mar. 2014. ISSN 2284-3272. Available at: http://iar.agcm.it/article/view/9936/9269

7 See: D'AMORE, Claudia. The Administrative Supreme Court Confirms the ICA's Decision Prohibiting a Merger in the Gas Distribution Services (the "Isontina Case"). *Rivista Italiana di Antitrust / Italian Antitrust Review*, [S.l.], v. 2, n. 3, mar. 2016. ISSN 2284-3272. Available at: http://iar.agcm.it/article/view/11761/10887

Box 3. Case n. C11982 - Enrico Preziosi-Artsana/Newco-Bimbo Store (2015)

The remedy decision concerns a joint venture among the three main players in the retail sales of a full range of products for infants and children, sold through the so-called baby stores (specialised stores selling all the 11 product categories). The Newco would have concentrated the operations of the three main players in the specialised stores market, and the adverse impact was evident in 16 local markets where post-merger market shares would have been above 50%. The proposed concentration was authorised by the AGCM subject to structural remedies, which included the divestiture of 28 point of sales, one of which was added to the parties' remedy package by the Authority. Before the first instance court (Tar Lazio), the parties had contested the AGCM narrow market definition (based on the specialised sales channel) and the proportionality of the remedy, which required the potential purchaser to operate specialised stores selling all the 11 product categories in order to be able to be an effective competitor of the merged entity.

16. The Authority's standard of proof is also influenced by other factors. First, the Authority's policy is to favour non-transitory remedies of a structural nature, and this preference also stems from the agency direct experience of the difficulties associated with monitoring compliance of behavioural remedies and the risk of long lasting litigation[8]. Accordingly, most of the merger remedies cases assessed by the Authority in the last five years involved structural remedies, often in combination with behavioural ones. Nevertheless, the implementation of structural remedies may also involve considerable efforts by the Authority[9].

17. Second, remedies can only be offered (or imposed) in Phase II, when the agency has clearly identified the competition concerns and, even more relevantly, when remedies will be binding. This is fundamental in order to decide whether there exist suitable remedies. However, the stringent timeline for Phase II (only 45 calendar days with the possibility of extending it up to 30 days) implies that a more extensive use of pre-notification talks can play an important element for an effective merger review process and even for a preliminary identification of appropriate remedies. Early contacts with the merging parties - to discuss the transaction and the notification information requirements, and to identify relevant markets and potential competition concerns - could provide an opportunity to engage a discussion on potential remedies and to gather preliminary views of competitors on all these aspects.

18. Another important aspect is that the Authority may revoke or revise, at request of the merging parties, the remedies previously imposed when changes in the market conditions or regulatory framework make them obsolete, unnecessary or disproportionate. This power allows to Authority to better align its remedies to market developments or other factors influencing the implementation of remedies which could not be predicted at the time of the merger decision[10].

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8 See case n. *C3818 - Edizione Holding/Autostrade-Concessioni E Costruzioni Autostrade*, in which the acquirer was sanctioned twice (in 2002 and in 2004) for non-compliance with the behavioural remedies. The case also highlights the crucial role played by the advisor and its relationship with the merged entity (its mandate) for an effective implementation of the remedy measures.

9 For instance, in a merger concerning the insurance sector cleared with conditions in June 2012 (C11524 – *Unipol Gruppo Finanziario/Unipol Assicurazioni-Premafin Finanziaria-Fondiaria Sai-Milano Assicurazioni*), the Authority ascertained in October 2014that the non-compliance of merging parties with respect to the timeline for the divestiture process (and for the definition of the perimeter of the assets to be divested) were attributable to external factors; in addition the parties, albeit late, signed an agreement in March 2014 for the prescribed divestment.

10 For instance, in the merger case n. *C3932B - Telecom Italia/Seat Pagine Gialle*, the AGCM reviewed one of the measures imposed at the time of the merger between Telecom Italia and SEAT (2000). The merger had been cleared on condition, inter alia, that Pagine Bianche (the new phone directory) and Pagine Gialle (the Italian incumbent phone directory for residential and business numbers) were not jointly distributed. In January 2014 the Authority, taking into account corporate and legislative changes since its decision, decided to remove this prohibition.

4. Final remarks

19. As in the majority of jurisdictions, the tendency for the Authority has been to favour clearance with remedies over prohibition decisions. Between 2005-2016 only in 4 cases out of 40 the Authority blocked the transaction while clearance with remedies was outcome of the merger review process in the majority of cases (27). Prohibition decisions were imposed when there were no remedial action that solved all competition concerns, or the remedies were considered costly and risky in terms of implementation, monitoring and effectiveness.

20. As for the remedies decisions, it is important for the Authority that proposed remedies address all competition concerns identified. However, the relatively short Phase II proceedings impose severe constraints on the assessment of the proposed remedies while in the assessment of remedies “the devil is in the details”. Because of the relatively short time frame which is generally available – the parties often tend to present the finalised remedies only at the end of Phase II – there is a risk of accepting measures that turn out to be less effective than originally envisaged, resulting in lenient conditional clearance decisions.

21. The consideration that in some cases outright prohibition instead of clearance with remedies might have worked better have led some competition agencies to the step of conducting ex-post studies of merger decisions and merger remedies. In this regard, the Authority is exploring the possibility of carrying out an ex-post evaluation of a sample of merger decisions, as a part of an overall exercise to improve the effectiveness of its enforcement actions.