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**Working Party No. 3 on Co-operation and Enforcement**

**The Future of Effective Leniency Programmes – Note by Italy**

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This document reproduces a written contribution from Italy submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

More documents related to this discussion can be found at  
<https://www.oecd.org/competition/the-future-of-effective-lenency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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## Italy

### 1. Introduction

1. The Autorità Garante della Concorrenza e del Mercato (hereinafter also “the Authority” or “the AGCM”) welcomes this roundtable as an opportunity to share its experience about proactive cartel detection tools and leniency policy, the challenges faced in the effort to preserve and increase incentives for companies to self-reporting.

2. The AGCM has long relied on a proactive detection policy in order to strengthen cartel deterrence and encourage self-reporting by companies. This effort has led to significant results: since 2016, almost 90% of cartels have been detected upon *ex-officio* investigations. Following a slight decline in leniency applications in the last few years, although overall in line with international trends, the AGCM has adopted a set of comprehensive and complementary measures and initiatives in order to strengthen its cartel detection tools, including the creation of a dedicated directorate (“Cartels, Leniency and Whistleblowing”) and the introduction of a whistleblowing platform. Moreover, a recent legislative provision providing for the protection of leniency applicants from criminal liability that may arise in bid-rigging cases is expected to have a significant impact in further promoting the use of leniency programmes.

3. Section 2 describes the proactive initiatives put forward to foster *ex-officio* investigation (specifically for bid-rigging case); section 3 illustrates some trends in the number of leniency applications in Italy and analyses possible explanations for the decrease observed over the last five years; section 4 describes what has been done to reinvigorate leniency programmes; section 5 concludes.

### 2. Proactive detection: some initiatives put forward to foster *ex-officio* investigation

4. The Authority is well aware of the importance of enhancing proactive detection, mainly implementing *ex-officio* investigation. As matter of fact, only if Competition Authorities are perceived as likely to detect cartels *ex-officio*, there are sufficient incentives to apply for leniency as well as disincentive to the formation of the cartels, at a first stage.

5. Therefore, in this respect, the AGCM has sought to refine its detection tools, launching *ex-officio* investigations on the basis of public information or through cooperation with other public authorities, including contracting stations, tax police and public prosecutors' offices. More specifically, since 2016, almost 90% of cartels have been detected upon *ex-officio* investigations.

6. In this respect, where possible, the AGCM uses screening tests to identify potential cases for investigation, particularly in bid-rigging cases. More specifically, the Authority has experimented the use of screening tools both *ex-ante* and *ex-post* the opening of formal proceedings: *ex-ante*, to identify suspicious bidding patterns, although such an activity is not undertaken in a systematic manner due to the difficulties in building a reliable dataset of public bids; *ex-post*, after the

opening of an investigation, as a means to identify the scope of the anti-competitive agreement or to provide additional supporting evidence to prove the infringement<sup>1</sup>.

7. As for *ex-ante* data screening analysis, the AGCM opened two proceedings: the first one concerned a tender procedure for the procurement of cleaning services and other maintenance services in schools<sup>2</sup> and the second one addressed a tender for consultancy services on the use of European structural funds<sup>3</sup>. In both cases, the anomalies observed in the bidding behaviour led to the launch of a full-fledged investigation which confirmed the bid-rigging conduct, in violation of Art. 101 TFEU. In particular, the bidding pattern and other evidence collected during the dawn raids (contacts and exchange of information, meetings in preparation for the tender, simulations before the submission of bids leading to outcomes very similar to the actual ones) were considered to establish the infringement. Both the infringement decisions were upheld by the administrative Courts.

8. Data screening methods have also been used *ex-post* in other proceedings, either to better assess the scope of the infringement (i.e. to extend the scope of the investigation so as to include tenders for which there was no specific documentary evidence but similar bidding patterns, as in a cartel concerning tenders for the supply of water meters, in 2022<sup>4</sup>) or to provide valuable additional evidence to prove the anticompetitive agreement (as in the proceedings relating tenders for forest aerial firefighting services and helicopter rescue services, closed in 2019<sup>5</sup>).

9. Several cartel investigations have been launched thanks to reporting by other public authorities (procurement agencies, tax police, public prosecutors, government departments): this type of interagency cooperation has allowed the Authority to access evidence typically found in criminal investigations (e.g., wiretaps) and therefore outside the scope of its investigative powers<sup>6</sup>.

### 3. Trends in the number of leniency applications: some possible explanations

10. The AGCM considers its leniency programme indispensable for the prosecution of illegal cartels.

11. Nevertheless, the analysis of the evolution of leniency applications in Italy shows a slight decrease in the last few years and two points of weakness. The first one is the

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<sup>1</sup> See Italy's Note on Data Screening Tools for Competition Investigations, submitted in WP3 meeting in November 2022.

<sup>2</sup> See the AGCM case no. 785 - GARA CONSIP SERVIZI DI PULIZIA NELLE SCUOLE, infringement decision no. 25802 of 22/12/2015, published in the AGCM Bulletin no. 50/2015.

<sup>3</sup> See the AGCM case no. I796 - SERVIZI DI SUPPORTO E ASSISTENZA TECNICA ALLA PA NEI PROGRAMMI COFINANZIATI DALL'UE, infringement decision no. 26815 of 18/10/2017, published in the AGCM Bulletin no. 43/2017.

<sup>4</sup> See AGCM case no. I835 - MERCATO DEI CONTATORI D'ACQUA, infringement decision no. 29981 of 01/02/2022, published in the AGCM Bulletin no. 6/2022.

<sup>5</sup> See AGCM case no. I806 - AFFIDAMENTO APPALTI PER ATTIVITÀ ANTINCENDIO BOSCHIVO, infringement decision no. 27563 of 13/02/2019, published in the AGCM Bulletin no. 9/2019.

<sup>6</sup> See a recent AGCM case no. I847 - GARE D'APPALTO BANDITE DALL'ARSENALE MARINA MILITARE DI TARANTO, opening decision no. 29759, published in the AGCM Bulletin no. 31/2021.

absolute number of annual applications, which has always been quite low, although overall in line with international benchmarks<sup>7</sup>. The second point of weakness is the limited share of leniency applications actually leading to the opening of a formal investigation and/or providing relevant additional evidence (representing a significant added value) in the context of an existing investigation.

12. In the last six years (2017-2022), only 23% of the leniency applications received by the Authority have been considered necessary and effective in order to open an investigation and/or to reinforce its ability to prove an infringement. The main reason for this is that the large majority of such applications are summary applications, whereby the European Commission has received a complete application and at least three NCAs a simplified application in relation to the same alleged cartel.

13. On the other hand, in the AGCM experience, the role of subsequent applicants should not be disregarded in light of the significant added value of their contribution to the AGCM's ability to prove secret cartels: more than 50% of our proceedings were made significantly stronger and substantiated by the contribution of subsequent applicants.

14. Hereafter, some of the main reasons usually mentioned to explain the low number and/or decline in leniency applications will be briefly discussed (without any claim of exhaustiveness), to examine to what extent they are applicable to Italy.

15. As for the limited use of the leniency programme, a frequent explanation is low competition culture and awareness of the tool. According to a survey on “*EU citizens' perceptions about EU competition policy*”, commissioned by the European Commission's Directorate-General for Competition, the Italian respondents were overall the least likely to have experienced problems caused by a lack of competition (59% did not experience any problems), in terms of higher prices, less product or supplier choice, or lower quality<sup>8</sup>. This low percentage may be considered a good proxy of the overall lack of competition awareness in Italy. In addition, the Italian economy consists of a large number of small and even micro-enterprises, which often hold a significant position in specialised or niche markets but might not be fully aware of competition rules and related tools.

16. Another key element that prompts the success of leniency programmes is vigorous competition enforcement, resulting in high fines for infringers. Indeed, the risk for cartelists of being detected and the resulting fines should outweigh the expected additional profits stemming from the participation in the collusion. In this respect, it should be pointed out that cartels have always represented a priority for the AGCM, which has carried out a yearly average of five cartels over the last eight years and imposed more than 2.5 billion euro, even though this amount has been significantly reduced by the subsequent judicial review.

17. A third factor that may discourage leniency applications is liability for private enforcement actions and criminal charges. In Italy, the impact of private enforcement on leniency is unclear. In particular, in January 2017, the Antitrust Damages Directive was transposed in Italy (Legislative Decree No. 3 of 19 January 2017) and, unexpectedly, the same year was characterised by the highest number of “effective” leniency application (leniencies that have been taken into account in proceedings). However, it should also be

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<sup>7</sup> As highlighted by the Background Note “*The future of effective leniency programmes*”, 70% of OECD countries have received fewer than 50 applications in total since 2015, while only six have been able to benefit from more than 100 leniency applications over the same period.

<sup>8</sup> European Commission, Brussels (2022). Flash Eurobarometer 511 (Citizens' Perceptions about Competition Policy). GESIS, Cologne. ZA7944 Data file Version 1.0.0, <https://doi.org/10.4232/1.14028>.

acknowledged that follow-on actions for damages were barely existent before 2017 and are taking off very gradually.

18. Also criminal liability can be an obstacle to leniency applications in the case of public tenders, because in Italy bid rigging constitutes a criminal offence. However, this has been recently addressed through the transposition of the ECN+ Directive, as illustrated below.

19. Finally, the Covid-19 pandemic most probably had a negative impact on leniency application incentives, as long as it hindered the ability of competition authorities to detect and investigate cartels.

20. On the other hand, the Italian Competition Authority did not experience any drawbacks due to interference with other legal mechanisms that might have weakened the incentives to seek leniency, such as settlements, compliance programs and other mitigating circumstances in the fine setting mechanism:

1. as for settlements, only in August 2022 Law No. 118/2022 introduced the possibility for parties to antitrust formal proceedings to submit settlement proposals. In May 2023, the AGCM adopted a Notice on the relevant procedure<sup>9</sup>. Therefore, it is still premature to infer any interference;
2. since their launch in 2014, compliance programs have been part of a broader commitment of the AGCM to promote widespread competition culture, especially among SMEs which have historically shown a low awareness of competition law and principles. In its 2018 guidance, the Authority has attempted to strike a balance in terms of incentives for companies between compliance programmes and leniency programmes<sup>10</sup>;
3. mitigating circumstances relating to cooperation beyond legal obligations have never been used so far and, in any case, AGCM's 2014 Fining Guidelines define, for a single mitigating circumstance, a maximum percentage of 15% discount on the basic amount<sup>11</sup>, a percentage that has been identified also bearing in mind the objective of limiting possible interference with the leniency incentives. With the same purpose of incentivizing leniency applications, AGCM's Fining Guidelines introduced a "*leniency plus*" provision. If a company, during an investigation, provides information and evidence about the existence of a second, different cartel that is not connected to the first one under investigation, that company can be granted, to the extent that it could benefit from conditional immunity for its participation in the second cartel, a further fine reduction of up to 50% of the basic amount for its participation in the first infringement. However, so far, this provision has never been requested and used.

#### 4. What has been done to reinvigorate leniency programmes

21. In the last two years, a set of comprehensive measures and initiatives has been adopted in order to reinvigorate the Italian leniency programme.

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<sup>9</sup> See the [AGCM Notice on Settlement Procedure](#), 16 May 2023.

<sup>10</sup> For more information, see the Competition Compliance Programmes – Note by Italy – 2021.

<sup>11</sup> Par. 24 of AGCM's Guidelines on the method of setting fines, pursuant to Article 15, paragraph 1, of Law No. 287/90.

22. In November 2021, the Italian Competition Act was amended by the Legislative Decree No. 185 of 8 November 2021 (entered into force on 14 December 2021), transposing the EU Directive 1/2019 (ECN+ Directive), with reference to the interplay between leniency immunity and criminal charges for individuals. More specifically, the legislator introduced a protection of applicants for immunity from criminal liability that may arise in bid-rigging offences. This protection encompasses current and former directors, managers and other members of staff of the undertaking applying for immunity<sup>12</sup>.

23. The same Legislative Decree, transposing the ECN+ Directive, also codified the leniency programme in the Italian Competition Act, introducing six new provisions (from art. 15-*bis* to 15-*septies*). The main developments to the Notice on the non-imposition and reduction of fines (dating back 2007 and amended several times) are the following:

- the introduction of a legal definition of “secret cartel”<sup>13</sup>, corresponding to the definition provided in the ECN+ Directive (art. 15-*bis*, par. 2), thus ensuring a greater legal certainty as to the scope of the leniency programme;
- the exclusion from eligibility for immunity of companies that have coerced other companies to join or remain in a secret cartel (art. 15-*bis*, par. 4);
- the provision of a more detailed list of conditions for granting immunity (art. 15-*quater*), as illustrated in the Box 1 below;
- the provision clarifying that where the European Commission receives a full application and the AGCM receives one or more summary applications in relation to the same alleged cartel, the AGCM will consider the Commission as the main interlocutor of the applicant, as long as it is uncertain as to whether the Commission will investigate the case. Where the Commission informs the AGCM that it does not intend to pursue the case, the AGCM can urge the applicant(s) to submit a complete application within a reasonable period of time (art. 15-*septies*, par. 3-5).

#### Box 1. List of conditions for granting immunity under the Italian leniency program

In order to benefit from the leniency programme for participation in secret cartels, the applicant must meet the following conditions:

<sup>12</sup> Besides being a competition violation, bid-rigging is also a criminal offence (Art. 353 of Italian Criminal Code), and criminal sanctions can be imposed on individuals by the Courts. As a consequence, employees and directors of companies involved in a bid-rigging conspiracy may be subject to criminal penalties even though their companies have been granted full or partial leniency by the AGCM. This is a relevant issue in Italy given that the AGCM has the duty to inform the public prosecutor of any criminal offence, and the public prosecutor can ask the AGCM for all the documentation of the case, including documents obtained under the leniency programme.

<sup>13</sup> More specifically, defined as: “*an agreement or a concerted practice between two or more competitors, the existence of which is concealed, in whole or in part, with the aim of coordinating their competitive conduct on the market or of influencing the relevant competition parameters by means of practices consisting of, inter alia, fixing or coordinating purchase or sale prices or other transaction conditions, including in relation to intellectual property rights, in allocating production or sales quotas, in allocating markets and customers, inter alia by means of tender manipulation, import or export restrictions or anti-competitive actions directed against other competitors*”.

a) it has terminated its participation in the alleged secret cartel at the latest immediately after submitting the application for leniency, except to the extent that, in the Authority's opinion, it is reasonably necessary to preserve the integrity of its investigation;

b) it is cooperating, genuinely, fully, and on an ongoing and expeditious basis, with the Authority from the time the application is made until the Authority closes the proceedings against all the parties under investigation by making a decision or until it otherwise closes the proceedings; this cooperation shall include the following:

1. promptly providing the Authority with all the relevant information and evidence concerning the alleged secret cartel which the applicant is in possession of or has access to, in particular:
  - the name and address of the applicant;
  - the names of all the other undertakings which are participating in or have participated in the alleged secret cartel;
  - a detailed description of the alleged secret cartel, including the products covered, the geographical scope, the duration and nature of the conduct of the alleged secret cartel;
  - information on previous leniency applications made to any other competition authority in relation to the alleged secret cartel, or information on possible future requests;
2. remaining at the Authority's disposal in order to respond to any request which may assist in establishing the facts;
3. making the directors, managers and other members of staff available for hearings before the Authority and making reasonable efforts to do the same with former directors, managers and other personnel;
4. not destroying, falsifying or concealing relevant information or evidence; and
5. not disclosing that it has submitted the application for leniency nor disclosing any part of its contents before the Authority has sent the notification of the preliminary findings in the proceedings, unless otherwise agreed; and
6. during the period in which it expects to submit a leniency application to the Authority, it shall not:
  - destroy, falsify or conceal relevant evidence concerning the alleged secret cartel; or
  - disclose that it intends to submit an application and disclose any of its contents, with the exception of other competition authorities in the European Union and third countries.

24. In January 2023, in the context of an internal reorganisation, a new directorate, specifically named Cartels, Leniency and Whistleblowing, was set up with the specific aim of giving greater impetus to the detection of cartels and encouraging the use of tools such as the leniency programme, especially in cases of bid-rigging.

25. In February 2023, the AGCM, following the best practices of the European Commission and numerous national competition authorities, introduced its own Whistleblowing platform on the its website. Anyone in possession of confidential information on competition infringements can interface directly with the investigation

Directorates without having to reveal their identity. More specifically, the platform is equipped with an encrypted system that enables whistleblowers to send information in an anonymous way regarding the alleged anticompetitive practices and the undertakings involved. Moreover, the Legislative Decree No. 24 of 10 March 2023 introduced some provisions in order to protect the whistleblower, such as a prohibition on his employment dismissal. The AGCM is confident that this tool strengthens the fight against secret cartels and other anti-competitive practices, insofar as it encourages the collaboration by individuals who, also because of their proximity to the companies involved, do not want to reveal their identity.

26. Finally, in a context of increased sophistication of cartels, which entails higher standards of proof and therefore additional efforts in the investigation, the AGCM is well aware of the importance of increased and effective international cooperation. In this respect, the AGCM actively participated in the elaboration of the ICN “*Guidance on Enhancing Cross-Border Leniency Cooperation*”<sup>14</sup>, as cooperation in cross-border leniency applications can help the agencies involved to better delineate the scope of the parallel proceedings, better target and coordinate investigative steps (such as dawn raids), reduce duplication of effort and streamline the information-gathering process. Moreover, international cooperation is beneficial at the later stage, when determining the case outcome and the sanctions, with a view to avoiding double counting.

27. In this perspective, in February 2023, the AGCM signed a Memorandum of Understanding with the Australian Competition Authority (ACCC), providing for new opportunities to cooperate on investigations where there are areas of common interest and/or cross-border issues, also in order to facilitate the search for convergent solutions. Key areas of interest identified for collaboration between the AGCM and the ACCC and the include cartels, digital platforms and market studies. Over the last few years, other similar initiatives have been pursued also with non-EU Competition Authorities, including the Brazilian CADE.

## 5. Conclusions

28. The Italian Competition Authority is aware that the success of leniency programmes depends on a coordinated effort that encompasses all the “6Cs criteria”<sup>15</sup>, namely: (i) clarity; (ii) commitment; (iii) credibility (in terms of credible threat of detection irrespective of leniency); (iv) confidentiality; (v) co-operation and co-ordination between authorities; and (vi) context and culture.

29. The recent legislative provision providing for the protection of leniency applicants from criminal liability that may arise in bid-rigging cases is expected to have a significant impact in further promoting the use of leniency programmes.

30. Furthermore, modern and effective investigative approaches require a full range of innovative and proactive detection tools (including whistleblowing and cartel screening), that are all complementary to traditional leniency programmes, in order to credibly increase

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<sup>14</sup> See ICN, *Guidance on Enhancing Cross-Border Leniency Cooperation*, 2020. This guidance is intended to provide practical advice for competition agencies to assist them in engaging with other jurisdictions on matters involving multi-jurisdictional leniency applicants, with the two parallel aims of first, making international enforcement efforts more effective and second, helping to reduce disincentives for prospective leniency applicants.

<sup>15</sup> See Volpin, C. and P. Chokesuwattanaskul (2023), *Leniency programmes*, Edward Elgar Publishing Limited, <https://doi.org/10.4337/9781839102875>.

the threat of detection and result in effective deterrence and successful leniency programmes.