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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMMITTEE ON COMPETITION LAW AND POLICY

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ROUNDTABLE ON JOINT VENTURES

-- Note by Italy --

The attached note is submitted by the Italian Delegation to the Committee on Competition Law and Policy FOR DISCUSSION at its forthcoming meeting on 24-25 October 2000.

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1. Introduction

1. The Italian competition authority has not issued specific guidelines concerning the treatment of joint ventures. The approach taken, therefore, can be drawn by looking at the relevant provisions of the competition law as well as the actual decade-long enforcement practice.

2. This note starts by looking at the issue of definition and categorisation of joint ventures in the Italian legal framework. Observations regarding the actual treatment of joint ventures in the enforcement experience of the competition authority follows. The topic of the reliance on commitments imposed on the concerned enterprises to reduce the anticompetitive effects, as well as the description of two joint venture cases in more detail, are contained in the fourth and fifth sections of the note.

2. Joint ventures in the Italian competition policy framework

3. The Italian competition law (Law n° 287 of October 10th, 1990) does not provide for a specific definition of joint ventures nor does it subject them to distinct antitrust rules other than those applicable to concentrations or restrictive agreements. The only direct reference to joint ventures in the law is contained in art. 5 (1) which states that concentrations are deemed to arise when, inter alia, "*two or more undertakings create a joint venture by setting up a new company*"[1]. Art. 5 (3), however, specifies that "*operations which have as their main object or effect the co-ordination of the actions of independent undertakings shall not constitute concentrations*".

4. The competition authority, when enforcing the law, distinguishes, therefore, between "concentrative joint ventures", which are assessed according to Art. 6[2] together with the related ancillary restrictions, and "co-operative joint ventures" falling under Art.2[3] dealing with restrictive agreements.

5. Joint ventures are deemed concentrative when: a) they are subject to joint control by two or more independent firms; b) they enjoy functional and organisational autonomy in their market operations and; c) when their controlling (parent) companies are not present - or cease to operate - in the same or in contiguous markets. When such conditions are not met, joint ventures are deemed of the co-operative type. This applies particularly to joint ventures mainly supporting (or depending on) the activities of the parent companies or otherwise lacking real market autonomy.

6. Such distinction between concentrative and co-operative joint ventures is both of a procedural and substantive nature. With regard to procedures, it relates to the different timetable for antitrust review and to the compulsory pre-merger notification for concentrative joint ventures[4]. The timetable for the review of concentrations, in fact, is prescribed in the competition law (30 days plus 45 additional days, if in-depth scrutiny is required). As regards agreements, the law does not provide for specific deadlines, but proceedings concerning restrictive agreements usually last around nine months. Furthermore, article 13 provides that firms may notify the competition authority of any agreement they enter into, and that no investigation can be initiated by the authority after 120 days from the said notification.

7. With regard to substance, different review criteria apply. Concentrative joint ventures are subject to a dominance test: they are prohibited when they create or strengthen a dominant position on the domestic market with the effect of eliminating or restricting competition to a significant extent and on a lasting basis.

8. As far as agreements are concerned, on the other hand, they are prohibited when their object or effect leads to an appreciable restriction or distortion of competition. According to art. 4[5], however, the competition authority may authorise, upon explicit request from the parties, otherwise anticompetitive

agreements, which have the effect of improving the conditions of supply in the market and of leading to substantial benefits for consumers.

9. Such improvements must be identified "taking also into account the need to guarantee to the undertakings the necessary level of international competitiveness and must be related, in particular, with increases in production, improvements in the quality of production or distribution, or with technical and technological progress. The exemption may not permit restrictions that are not strictly necessary for the purposes to be attained and may not permit competition to be eliminated in a substantial part of the market". The competition authority may revoke an exemption in cases where the parties concerned abuse it, or when any of the conditions on which the exemption was based no longer apply[6].

3. The treatment of co-operative joint ventures in the Italian enforcement practice

3.1. General observations

10. To date, the vast majority of joint ventures where the Italian competition authority opened a formal investigation were co-operative joint ventures involving the creation of a separate legal entity[7]. Therefore, they were all reviewed according to the substantive and procedural rules applying to agreements.

11. In terms of actual enforcement practice, two general observations are in order. First, as already mentioned, prohibited agreements include those having either the *object* or the *effect* (or both) of preventing, restricting or distorting competition. In this respect, a distinction can be made between joint ventures that are examined before they start operating (as a consequence of a prior notification), and those that already operate in the market (this is the case when the review is launched on the basis of a complaint or ex officio).

12. Indeed, particularly for newly operating joint ventures, the review primarily looks at the contractual provisions governing the creation and expected functioning of the joint venture to assess whether those provisions entail a significant risk of co-ordination among the parties with respect to important variables of their market behaviour (such as, for example, their pricing or output decisions). When such a risk of co-ordination does exist, then an in-depth analysis is carried out to assess, on the basis of the characteristics of the relevant market and the parties' shares therein, whether the joint venture is likely to appreciably restrict competition. For existing joint ventures, on the other hand, their actual effects on market conditions are usually analysed in the first place and may provide sufficient evidence of a violation of the law, irrespective of the objective (or intended) scope and content of the parties' contractual arrangements.

13. Second, unlike other jurisdictions, no distinction exists in the Italian law between "sham" (disguised cartels) and "structural" (involving real economic integration) joint ventures: both types are subject to the same provisions, pursuant to art. 2. As a matter of fact, however, sham joint ventures are much more likely to be ruled illegal and extremely unlikely to qualify for an authorisation.

3.2. The treatment of joint ventures involving real integration

14. An example of competition-restricting joint ventures authorised on efficiencies and consumer benefits grounds, is contained in the 1994 *Son-Igi-Siad/Igat* decision[8] involving three companies producing and marketing liquid gas (oxygen, nitrogen, argon, etc.) for industrial uses. The companies had notified their intention to set up a liquid gas production joint venture to the competition authority. Their plans were

to market independently the additional gas produced by the joint company, at the same time maintaining their pre-existing production levels. The parties accounted for around 28 percent of total nation-wide sales[9]. Considerable fixed investments costs and significant scale economies were main characteristics of the relevant market. The authority argued that, because of the common stakes in the joint venture, competition among the parent companies would likely be eliminated with respect to their sales of liquid gas, both jointly as well as independently produced. In view of the parties' position on the relevant market and the significant barriers to entry the joint venture was therefore deemed to appreciably restrict competition.

15. However, the competition authority exempted the joint venture, granting it a ten year authorisation, because of the expected considerable efficiencies, ultimately leading to net benefits for consumers. The joint venture, in fact, allowed for the creation of substantial additional production capacity - leading to lower prices and wider product choice - that the parent companies would otherwise have been individually unable to fund. Furthermore, it was found that the joint venture would not completely eliminate competition from the market for the presence of an incumbent independent operator, holding a significant market share, would still ensure the existence of an acceptable degree of market rivalry.

3.3 The treatment of "sham" joint ventures

16. With regard to "naked" agreements among competitors aimed exclusively at fixing prices, sharing markets or restricting outputs, these have been invariably considered as the most serious violations of the competition law. While the law itself does not provide for any *per se* prohibition, these types of agreements are generally deemed illegal as well as void of any redeeming benefit, and are usually subjected to severe sanctions. This approach vis-à-vis naked hard-core restrictions also applies when such restrictions take place within the context of sham joint ventures, not leading to any real economic integration.

17. The type of assessment of hard-core restrictions usually carried out by the competition authority in the joint venture context can be seen in the 1993 *Nord Calce*[10] case involving lime producers. The concerned companies had notified the creation of a joint marketing company charged with purchasing and reselling at a commonly agreed price the lime produced independently by each supplier. The companies had agreed on production quotas allocation and on profit-sharing. The authority prohibited the joint venture.

18. The parties had asked for an exemption, claiming that through the joint venture they would have been able to promote research efforts with respect to alternative uses and applications for lime. Neither efficiencies nor R&D integration benefits were found likely to arise from the venture, as this was simply involved with allocating orders among the parent companies. The competition authority, rejecting the request for exemption, also stressed that those joint research efforts could have been undertaken by engaging in joint R&D activities without having to resort to joint sales initiatives.

4. The Italian competition authority's reliance on commitments to minimise joint ventures' anticompetitive effects

19. In the Italian competition enforcement experience joint ventures under investigation have often been cleared only after the parties involved had modified the initial agreement to reduce the likelihood of anticompetitive effects, and subject to the parties' continuous compliance with all the obligations undertaken in the course of the proceeding.

20. Binding commitments have been particularly common in relation to co-operative joint ventures with the concerned parties integrating their activities with respect to initial or intermediate phases of the production process. The authority has maintained a favourable approach vis-à-vis such forms of arrangements[11] as long as the involved parties put in place measures to reduce to the fullest extent possible collusive and exclusionary effects in the concerned as well as in upstream or downstream markets.

21. An industry where commitments have been largely used in the context of joint ventures is, for example, the oil sector. Joint ventures have been frequently set up to combine storage and logistics infrastructures used for the distribution of oil and of other fuel products (one of such cases is described in detail further below)[12]. The reliance on commitments aimed at avoiding possible collusive arrangements among the parent companies and exclusionary practices vis-à-vis existing or potential competitors. The commitments usually undertaken included:

1) the independent use (i.e. not according to predetermined quantities) by the parent companies of the logistic and transportation capacity owned by the joint venture;
2) the obligation on the joint venture not to engage in any co-ordination of the parent companies' commercial activities;
3) the design and implementation of specific rules to ensure that confidential and strategic information available to the joint venture management would not be shared with the parent companies;
4) the obligation to make unused capacity available for other oil suppliers on the basis of transparent and non-discriminatory conditions, particularly in those areas of the country where the establishment of new capacity in the relevant market was limited, or impeded, by administrative constraints introduced for environmental protection purposes.

5. Detailed description of joint venture cases treated by the Italian competition authority

5.1. AgipPetroli-Anonima Petroli Italiana-Esso Italiana/Petroven case

22. In June 1999, the competition authority launched an investigation on the possible anticompetitive effects deriving from the establishment of a new enterprise (Petroven), to be jointly controlled by three independent oil companies. Terms and conditions of the joint venture's operations had been notified to the authority for approval[13].

23. All three parties to the joint venture were major market players, vertically integrated in the oil (as well as other fuels) refinery, logistics, and retail distribution. AgipPetroli and Esso, in particular, held together a 65 percent share of oil retail distribution in Italy. Petroven had been established to combine all the storage and logistics capacity for the distribution of fuel products in three regions in the north-east of Italy (Veneto, Friuli Venezia Giulia and Alto Adige regions) previously owned, and managed on a separate basis, by the three companies. More specifically, the role of Petroven was to run warehouse and storage facilities and to supply fuel products to gasoline road retail stations, to other inland fuel outlets, and for bunkering[14] activities provided by the three parent companies.

24. The joint-venture aimed inter alia at a reduction in the storage and logistics structural excess capacity existing in the Venice area. This objective was to be pursued by closing down some of the warehouses run by the three companies. The restructuring initiative intended to represent a joint response to the requests advanced by local authorities to reduce oil and chemical products traffic in the concerned geographic areas. These areas, and in particular the Lagoon of Venice, had over the years suffered substantial environmental damage.

25. The competition authority intended to verify whether the notified joint venture could have produced anticompetitive effects, due to possible co-ordination of the parent companies' operations and restriction in market access for third companies not holding sufficient storage capacity in the relevant areas. Petroven, in fact, was expected to have access to sensitive information about the parent companies' business activities that might have been used for collusive purposes. Also, in the relevant areas, substantial administrative constraints existed, representing obstacles for the creation of new logistics capacity by existing or new competitors[15].

26. In the course of the proceeding, Petroven's parent companies modified some of the modalities of operation of the joint venture, in order to reduce its anticompetitive implications. In particular, they committed to make available to third parties any additional unused capacity, in addition to the 10 percent share already foreseen in the original plan. Moreover, third parties would be given adequate information on the availability of unused capacity through announcements published in newspapers enjoying wide coverage.

27. The parties also committed themselves to the adoption and application of a binding "Code of Conduct" to be observed by all employees of Petroven and imposing strict confidentiality rules on information related to the parents' business downstream activities. Finally, the parent companies would use Petroven facilities according to their needs without setting pre-determined quotas[16].

28. In view of the amendments made to the initial joint venture agreement and of the commitments undertaken by the involved parties, the authority closed the investigation declaring that the joint venture did not result in a substantial lessening of competition according to article 2 of the competition law.

5.2 Generale Supermercati-Standa-Il Gigante/Supercentrale case.

29. In April 1997 the authority completed an investigation concerning a joint purchasing agreement between three enterprises: Generale Supermercati (GS) Spa, Standa Spa and Il Gigante Spa[17]. The three companies, which operated retail chain stores, had signed (and notified) an agreement to establish a joint-venture, called "Supercentrale", to whom they would assign the task of negotiating general purchasing conditions on their behalf. Under the notified agreement, however, Supercentrale was not supposed to make purchases directly.

30. The competition authority defined the relevant market having regard to the different kinds of products as well as the different services offered to consumers. Large retailers and supermarkets supply a large number of different products, e.g. food and products for domestic use, and services, allowing consumers to purchase several products for daily or weekly use in the same location. It was therefore pointed out that the modern retail chains market (i.e. large retailers, supermarkets, hard discounts) had to be considered as a distinct market from the more "traditional" distribution activities of small and medium retailers. As regards the geographic boundaries of the modern retail chains market, the competition authority ascertained that this market had mainly a local dimension, due to the importance for consumers of retailers' location and proximity.

31. The authority evaluated the agreement with reference to its impact on competition both among existing large retailers of grocery products and among retailers' suppliers of such products. As for the impact on suppliers, it was pointed out that Supercentrale held only modest market shares in the purchasing market, similar to those held by other joint-purchasing entities; moreover, the counterparts were generally large suppliers, with significant bargaining power.

32. With reference to the effects on the retail services market, it was ascertained that the joint purchasing agreement would not lead to more homogeneous commercial policies and to uniform selling

prices, by the three retailers. Particularly, the specific terms of operation of the joint venture were found to provide sufficient guarantees against the risk of an anticompetitive exchange of sensitive commercial information among the individual parent companies. Therefore, the authority concluded that the joint purchasing arrangement would not appreciably restrict competition in the relevant markets.

NOTES

1. Based on the authority's enforcement practice, concentrations are defined as to also include transactions that lead to the joint control of an existing firm by two or more independent firms.

2. Art. 6 states: " 1.The authority shall appraise concentrations subject to notification under section 16, to ascertain whether they create or strengthen a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis. This situation shall be appraised taking into account the possibilities of substitution available to suppliers and users, the market position of the undertakings, the access conditions to supplies or markets, the structure of the relevant markets, the competitive position of the domestic industry, barriers to the entry of competing undertakings and the evolution of supply and demand for the relevant goods or services. 2. Whenever the investigation under section 16(4) shows that the operation entails the consequences referred to in subsection (1) the authority shall either prohibit the concentration or authorize it laying down the necessary measures to prevent such consequences ."

3. Art. 2 states: " 1. *The following shall be regarded as agreements: accords and/or concerted practices between undertakings, and any decisions, even if adopted pursuant to their Articles or Bylaws, taken by consortia, associations of undertakings and other similar entities. 2. Agreements are prohibited between undertakings which have as their object or effect appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it, including those that: a) directly or indirectly fix purchase or selling prices or other contractual conditions; b) limit or restrict production, market outlets or market access, investment, technical development or technological progress; c) share markets or sources of supply; d) apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 3. Prohibited agreements are null and void. "*

4. Only concentrative joint ventures whose turnover exceeds the thresholds set in the competition law are subject to compulsory notification.

5. Art. 4 of the competition law closely resembles article 81.3 of the Rome Treaty,

6. The Competition authority does not employ an ad hoc standard for the review of joint ventures, rather the same one used for the analysis of mergers and restrictive agreements applies. For both mergers and restrictive agreements the applied standard is strongly biased toward consumers' welfare.

7. This submission refers exclusively to joint ventures among actual or potential competitors and not among parties in a vertical (buyer-seller) relationship.

8. I 88 *Son-Igi-Siad/Igat*, Bulletin No 8/1994.

9. The relevant geographic market was viewed as having a national dimension.

10. I 47 *Nord Calce*, Bulletin No 18-19/1993.

11. See, for example, Relazione Annuale dell'Autorità Garante della Concorrenza e del Mercato (Annual report), 30 Aprile 1996, page 175.

12. The oil distribution sector is characterized in Italy by high concentration and substantial administrative constraints impeding new entry and the expansion of the capacity of existing suppliers at all levels of production (logistics, distribution, etc.).

13. I387 *Agip Petroli-Anonima Petroli Italiana-Esso Italiana/Petroven*, Bulletin No 7/2000.

14. Bunkering refers to the supply of fuel for maritime transportation.

15. Petroven had been defined as a cooperative joint venture, to be assessed as an agreement according to article 2.1 of the competition law because it did not perform all functions of an enterprise (all storage and logistic activities were performed to the benefit of the parent companies).

16. Petroven would not perform any type of role with respect to coordination of the commercial activities undertaken by the parent companies.

17. I184 *Generale Supermercati-Standa/Supercentrale/Il Gigante*, Bulletin No 16/1997.