ILLUSTRATION AND CRITICAL ANALYSIS OF THE MAIN DEVELOPMENTS IN ITALIAN ANTITRUST POLICY AND CASE LAW IN THE PERIOD FROM JANUARY 2016 TO MAY 2017

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Keywords: Cartels, Authority’s Guidelines on Fines, Single-Product Companies, Antitrust Compliance Programs, Unilateral Conducts, Excessive Prices, Merger Control

Abstract²: This article intends to highlight the main developments and trends of the Italian Competition Authority’s enforcement activities in the period between January 2016 and May 2017. The analysis of the Authority’s cartel enforcement has revealed two distinct trends: on the one hand, the Authority is focusing its enforcement activity towards the most serious distortions of competition, with an ensuing sharp increase in fines, especially in cases involving single-product companies; and, on the other, the Authority is paying a special attention to safeguarding defence rights and due process guarantees.

As far as unilateral conducts are concerned, the Authority has focused its enforcement on excessive prices: a somewhat complex and controversial hypothesis of abuse in view of its regulatory nature which needs to be handled carefully.

As far as merger control is concerned, the article stresses the scarcity of the Authority’s interventions which has once again highlighted the inadequacy of the Italian merger control regime, which actually prevents the Authority from monitoring developments and evolutions of the markets.

1. INTRODUCTION

Between January 2016 and May 2017 the Italian institutional framework has been reinforced following the implementation of the European directive on private enforcement under Legislative Decree No. 3 of 19 January 2017.

After several years of delay, the annual law on competition – though attenuated and after having been significantly amended – is in the process of being approved.³

The Italian Competition Authority (“ICA” or “Authority”) has been entrusted by the legislator with new powers of control over state-owned companies⁴ and has intervened as amicus curiae⁵ in support of UBER in the civil proceedings brought against the ban on the Uber Black service.

The period has also been marked by a significant enforcement activity of the ICA. This article will focus on the main developments in national policy and case law concerning cartels, abuses of dominance and mergers.

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² Article based on the speech given at the Conference “Main Developments in European and Italian Competition Law”, Capri, May 25-26, 2017. All the Authority’s decisions and Courts’ case law mentioned in this article refer to the period from January 2016 to May 2017.

³ The Annual Law on Competition (Law No. 124 of 4 August 2017) came into force on 29 August 2017.

⁴ The reference is to Article 5(3) of Legislative Decree No. 175 of 19 August 2016.
2. CARTELS AND CONCERTED PRACTICES: DEVELOPING TRENDS AND POLICY

In the period from January 2016 to May 2017, nine investigations in matters of cartels and concerted practices were concluded.\(^5\)

The Authority imposed fines in five cases out of nine, all of which involved hard-core infringements. The total amount of the fines imposed, as shown in the table that follows, highlights a clear increase compared to 2015.\(^6\)

If we look at the salient trends in the area of cartel enforcement in the period considered, we find that the investigations into horizontal agreements continued to focus on areas of traditional interest for the Authority. The trend, in past years, of closely scrutinising collusive behaviours in the framework of public tenders, is continuing. Bid rigging cases have featured high on the Authority’s agenda. These proceedings are also characterised by close cooperation with the National Anticorruption Authority - ANAC, partially as a result of the memorandum of understanding reached by the two authorities.\(^7\)

Another recurrent theme addressed by the Authority is that of exchanges of commercially sensitive information between competitors. The Authority’s enforcement activities have concentrated above all on markets in which trade or business associations have favoured or implemented this type of offence.

The reference period also registers a leniency application. In Italy, though, this instrument continues to be underexploited, if we consider the fact that from 2006 (the year in which the leniency program was formally introduced into our legal system) until now, only seven investigations have been initiated following a leniency application.\(^8\)

Outside the framework of cartels, as to vertical restraints, compared to the previous two-year period, which had registered several cases of vertical and distribution-related agreements under the Authority’s scrutiny, in 2016 only one case of a vertical agreement was examined. This was the conclusion, for Expedia, of the twin investigation to that concluded by the Authority on accepting Booking commitments relating to price parity clauses in the Mercato dei servizi turistici – prenotazioni alberghiere on - line case.\(^9\)

In the e-commerce sector, on the other hand, the Authority continues to focus more on consumer protection rules than on antitrust law. Likewise, the dynamics of the big data economy have until now been monitored in a consumer protection context, thereby confirming an

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\(^5\) Tables and Graphics - i
\(^6\) Tables and Graphics - ii
\(^7\) Tables and Graphics - iii
\(^8\) Memorandum of understanding between ANAC and ICA to fight corruption, signed by the Chairmen of the two Authorities on December 11, 2014.

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interesting trend characterized by the gradual
convergence between competition and consumer
protection policies.

Moving on to the Authority’s enforcement activity
in the area of cartels and concerted practices in
the period considered, two trends emerge clearly:
(i) on the one hand, we find the Authority’s effort
to orient its enforcement activities towards the
most serious distortions of competition, with an
ensuing sharp increase in the level of the fines,
especially in cases involving single-product
companies; and

(ii) on the other hand, we find the particular
attention paid by the Authority to safeguarding
defence rights and due process guarantees, which
– partly as a result of making a clear distinction
between the investigatory work carried out by the
investigation units and the assessment activities
carried out by the Authority’s Commissioners, in
accordance moreover with national case law and
with that of the European Court of Human
Rights – has led to an increase in proceedings
concluded without condemning the parties or
imposing fines.

The allegations against the companies were in fact
dropped in the Mercato del noleggio autoveicoli a lungo
terme case\textsuperscript{11}, which was initiated on the basis of a
purported exchange of commercially sensitive
information in a trade association framework.
According to the ICA’s decision, the investigatory
findings did not make it possible to establish a
direct or indirect connection between the
companies’ knowledge of the data exchanged and
the establishment of their commercial policy. We
also notice that in some proceedings the
Authority has refrained from fining the parties
involved. We refer, in particular, to the final
decisions passed in the 
Usi in materia di mediazione immobiliare \textsuperscript{12} and ABI/SEDA\textsuperscript{13} investigations, in
which the Authority found that the infringements
ascertained – though restrictive of competition by
object – were not serious and should, therefore,
not be fined. As far as the former case is
concerned, this was because in the ICA’s opinion
the infringement had been solicited and facilitated
by the Chambers of Commerce in the framework
of procedures reviewing customary practices
applying to real estate commissions. As far as the
latter case is concerned, the Authority took into
account the context of uncertainty and evolution
of sectorial rules, the fact that the agreement at
stake was not secret and the key significance
attached of the parties’ proposal - put forward
during the investigation - to set in place a new
system of remuneration designed to substantially
reduce the costs of the SEDA service, which was
the subject of the investigation.

If, on the other hand, we consider the Authority’s
policy as far as serious distortions of competition
are concerned, we notice that, in some
investigations involving single-product companies,
the strict application of point 12 of the ICA’s
Guidelines on fines\textsuperscript{14} – which for the most serious

\textsuperscript{11} Mercato del noleggio autoveicoli a lungo termine, Decision of 30 March,

\textsuperscript{12} Usi in materia di mediazione immobiliare, Decision of December 15,

\textsuperscript{13} ABI/SEDA, Decision of April 18, 2017, in ICA Bulletin No.
19/2017.

\textsuperscript{14} Guidelines on the method of setting fines for infringement of
competition rules under Article 15(1) of Law No. 287/90, adopted on October 22, 2014.
restrictions of competition envisage that the percentage of sales taken into account in order to quantify the fine is normally not less than 15% of the value of sales – has led to the systematic application of the maximum legal threshold of 10% of sales, provided by Article 15(1) of Law No. 287/90, in cases of hard-core restrictions. This issue has been the subject of considerable debate ever since the Guidelines on fines came into force, but it is important to stress that the levelling out of the maximum threshold:

(a) excludes any possibility of adjusting the amount of the fine to the subjective and objective element of the distortion, in clear contrast with Art. 11 of Law No. 689/81, or of taking into account any mitigating and aggravating circumstances, in breach of the principles of equal treatment and proportionality;

(b) is in contrast with the rationale of the Guidelines on fines themselves and with the recent case law of the Administrative Court of First Instance (TAR Lazio) and of the Supreme Administrative Court (Consiglio di Stato) in the Manutenenco judgement\(^\text{15}\), which, in reference to the deterrent effect, confirm that the level of the imposed fine must not exceed that which is required to induce companies to comply with antitrust rules, in accordance with the proportionality principle, thereby enabling the company to continue its business and ensuring that its economic soundness is not seriously jeopardised; and

(c) could, above all, also be counter-productive as far as the effectiveness of enforcement is concerned.

In point of fact, many of the mitigating circumstances - which, due to the aforesaid automatism, are not considered for purposes of reducing the fine - are intended to make future distortions less probable. If they are not considered at all, there will be no incentive for companies to adopt them and this, in turn, will have a negative impact on enforcement.

The Authority’s policy shows that it is fully aware of the problem. In the \textit{Accordo tra operatori del settore vending}\(^\text{16}\) decision, in which the companies involved were all single-product companies, the Authority, in fact, makes reference to and applies point 34 of the Guidelines to adjust the fine, bearing in mind the mitigating and aggravating circumstances applicable to individual companies and, in so doing, maintaining the fine’s deterrent effect.

In my opinion, even though the reference to point 34 of the Guidelines on fines was necessary in the case at stake, its application across the board would clash with the objective of transparency and predictability of fines, which the Guidelines seek to achieve. It may, therefore, be advisable to re-examine the mechanism of the Guidelines on fines as to single-product companies are concerned.

In addition, again on the issue of the seriousness and gravity of the violation and the application of the 15% minimum, it has to be highlighted the recent case law of the Administrative Courts in

\(^{15}\) TAR Lazio, Judgement No. 10309 of 26 July 2016; Consiglio di Stato, Judgement No. 928 of 26 January 2017.

\(^{16}\) \textit{Accordo tra operatori del settore vending}, Decision of 8 June, 2016, in ICA Bulletin No. 21/2016.
the Manutencoop judgments, according to which the gravity of the infringement cannot be confined to the existence of the agreement as such, but should be characterised by a particular “secrecy”, which arises only when further circumstances are ascertained.17

It is interesting to note that the Authority mentioned this case law test in order to exclude its application in the Gare ossigenoterapia e ventiloterapia18 and Agenzia di modelle19 proceedings, ascertaining in both cases the special secret value of the cartels examined.

Another interesting development that emerges in the Authority’s enforcement policy concerns the value attached to the mitigating circumstance envisaged in point 23 of the Guidelines, i.e., the fact of having implemented an effective antitrust compliance program.

In the decisions passed in the period from January 2016 to May 2017, the Authority acknowledged the mitigating circumstance of having implemented an antitrust compliance program in four cartels’ investigations out of the nine examined.20

The parties involved in the various proceedings were granted discounts ranging from 5% to 10% as a result of having adopted and implemented compliance programs.

The chart provided below sums up the situation by indicating the type of program adopted by the parties under investigation, evidence of its adoption, the date on which the program was adopted, supplemented and improved, and the percentage discount on the fine granted by the Authority.21

In summary, in the cases examined, the companies obtained discounts on fines ranging from 5% to 10% for having adopted compliance programs that were consistent with the Guidelines’ requirements, properly documented and adopted post factum and before the Statement of Objections was served. Furthermore, reading some of the decisions, it appears that if the company has already in place a compliance program, that was adopted prior to the start of the investigation, and does not update it or improve/integrate it after the start of the investigation and before the Statement of Objections is served, the fact that the company has committed an antitrust infringement shows that the adopted program is ineffective and, consequently, the reduction cannot be granted.

The criteria to obtain a discount that can be drawn from the Authority’s policy are extremely useful. In my opinion, however, in order to create a clearer framework for companies - also bearing in mind what the ICA’s Chairman, Professor Pitruzzella said in his presentation of the 2016 ICA’s annual report, with regard to the Authority’s commitment towards spreading the culture of competition and antitrust compliance - it would be useful if the Authority could provide a clearer indication of the factors it considers in order to establish the discount

17 See above footnote 12.
20 The Authority acknowledged the mitigating circumstance of having implemented an antitrust compliance program also in one abuse of dominance case.
21 Tables and Graphics - iv.
percentage and of the most important elements it uses in order to determine the amount of the reduction (structure of the program, evidence submitted, time of adoption and integration of the program), and specify moreover whether a minimum threshold of evidence is required in order to obtain the reduction.

Finally, it should be noted that, if a reduction were to be envisaged only for compliance programs adopted post factum, this could discourage companies from setting up compliance programs ex ante and – consequently – reduce the probability of averting the perpetration or discovery of offences made possible precisely as a result of the ongoing monitoring implemented through compliance programs. This could, in turn, have indirect effects in terms of depressing the already marginal utilisation of the leniency applications.

### 3. UNILATERAL CONDUCTS: TRENDS AND POLICY DEVELOPMENTS

In the period from January 2016 to May 2017, nine investigations were concluded with reference to unilateral conducts. Only one investigation ended with the infringement being ascertained and with fines being imposed. We refer to the ICA’s decision in the *Aspen* case, which was also followed by a decision to start a non-compliance proceedings against the same company.

On the subject of non-compliance, it is worth noting the important judgment No. 11169 adopted by TAR Lazio on 11 October 2016, in relation to the ICA’s decision concerning the non-compliance of the *Consiglio Nazionale Forense - National Lawyers’ Council*. In its judgment, the administrative judge clearly states that exactly the same rights of defence and due process guarantees that characterise antitrust proceedings concerning cartels and abuses of dominance must also apply to non-compliance proceedings, on account of the “… particular afflictive nature of the fine” that typifies both ordinary antitrust proceedings and non-compliance proceedings. It follows that, in such proceedings, all the procedural guarantees must apply and, first and foremost, that of the necessary “… diversification between the roles and responsibilities of the investigation units – entrusted with activities of acquiring investigative evidence and serving the parties with the statement of objections, thereby meeting the fundamental requirement of ensuring due process and guaranteeing rights of defence – and the responsibilities of the Authority’s Commissioners, which are responsible for the assessment activities vested in the Authority, including that of hearing the parties …”.

Going back to the ICA’s enforcement activities in the area of unilateral conducts, it should be noted that in the period from January 2016 to May 2017, the number of concluded investigations has increased compared to the previous two-year period and that the Authority has made frequent use of commitments decisions.

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It should also be noted that in the *Hera-Affidamento Gruppi Misura Gas/Termini di Pagamento*\textsuperscript{25} case, for the first time ever the ICA has made use of the abuse of economic dependence, applying the recent rules regulating delays in payments to small and medium-sized companies, which are defined by law as abuses of economic dependence.

But, above all, in the period observed, we see that the Authority has focused its enforcement activity on excessive prices conducts.

In this respect, it should be stressed that the decision, under which the Authority fined the pharmaceutical company Aspen with reference to an abnormal increase in the price of certain life-saving drugs, has drawn the attention of the entire international antitrust community to the issue of excessive prices\textsuperscript{26}. Although this is still a somewhat controversial case of abuse in light of its regulatory nature, it is emerging as an important antitrust tendency in the pharmaceutical sector. This is, moreover, demonstrated by the proceedings recently started, also against Aspen, by the European Commission\textsuperscript{27}; by the *Pfizer-Flynn*\textsuperscript{28} case, recently decided in the United Kingdom; and by the *Actavis* and *Concordia*\textsuperscript{29} investigation currently pending before the UK Competition and Market Authority.

The Authority has also made use of the provision against excessive prices practiced by dominant undertakings in the investigation that ended with Enel’s commitments relating to the increased costs sustained by Terna in 2016 on dispatching services in the Brindisi area. These commitments are expected to lead to considerable saving for consumers.\textsuperscript{30}

Now, although, on the one hand, it is significant that the Authority is focusing its attention on this type of abuse in sectors where consumers are affected by the dominant company’s behaviour, excessive prices nonetheless remain a somewhat complex and controversial hypothesis of abuse in view of its regulatory nature. Indeed, even though both European and national law envisage it explicitly - unlike the laws in force on the other side of the Atlantic, where conduct of undertakings with market power which merely exploits customers is generally not considered to infringe competition law - until now the Commission and the Authority have been reluctant to make use of that provision against excessive prices practiced by dominant undertakings.

We are reminded of this in the opinion of Advocate General Wahl, published on April 6\textsuperscript{th}, in the framework of the *Collecting Society* case\textsuperscript{31}, in which the criteria to be applied in evaluating this


\textsuperscript{27} On 15 May 2017 the European Commission initiated an investigation against Aspen Pharma Trading Limited and Aspen Pharma/Ireland Limited for an alleged breach of Article 102 TFEU (register No. 40394).

\textsuperscript{28} CMA, *Phenytoin sodium capsules: suspected unfair pricing*, issued on 18 December 2016.

\textsuperscript{29} CMA, *Hydrocortisone tablets: alleged anti-competitive agreements and abusive conduct*, initiated on 12 April 2016.


\textsuperscript{31} Opinion of Advocate General Wahl, delivered on 6 April 2017 in Case C-177/16 (request for a preliminary ruling from the Latvia Supreme Court) followed by the Judgement of the Court of Justice, in Case – 177/16 of 14 September, 2017, which was issued after the Conference date.
type of abusive conduct are clearly set out. More specifically, for this evaluation Advocate General Wahl warmly recommends the possibility of combining different methods of analysing the excessiveness of the price and carefully evaluating other essential factors such as potential entry barriers and the presence of a regulator in the market. He then goes on to conclude that, for a price to be considered excessive, it must be higher than the benchmark price over time, in a significant and persistent manner. As far as the concept of significance is concerned, according to Advocate General Wahl, an antitrust authority should intervene only in cases where the difference between the reference price and the price actually practised by the dominant company is such that there can be virtually no doubt that the latter price is unlawful. Once it has been established that the price is excessive, it is for the dominant company to provide the authority investigating the case with possible justifications for the higher price. In order to prove that the price is not unfair, the dominant company will have to demonstrate, for example, that it has sustained higher production or marketing costs, as well as possible research and development costs, or that the consumers had a greater willingness to pay for that particular product. In fact, it is only in cases where there is no rational economic explanation that a price can be held excessive within the meaning of Article 102 of the TFEU.

I believe that excessive prices remain a complex and controversial hypothesis of abuse in light of its regulatory nature and should continue to be carefully assessed on a case by case basis and confined to cases which are characterised by abnormal and unjustified price increases and by the existence of substantial and permanent barriers to entry of new or more competitors in the market. It is clear, in fact, that regulatory type of interventions may ultimately produce the effect of discouraging investment, thereby impeding a competitive development and evolution of markets.

4. MERGERS: IS THE ITALIAN MERGER CONTROL REGIME ADEQUATE?

In the area of merger control, in the period considered, seventy-three mergers and acquisitions were notified and four proceedings were concluded with conditional clearances after the adoption of corrective measures.

As the table below shows, the number of notified mergers has remained basically the same from year to year.\textsuperscript{32}

It has to be highlighted, however, that the mergers notified in 2016 account for just over 7% of all M&A transactions carried into effect in Italy during the year.\textsuperscript{33}

This data raises doubts as to the effectiveness of monitoring mergers on the basis of the Italian legislative framework geared to turnover thresholds, which are among the highest in Europe. On the one hand, the current system\textsuperscript{34} actually prevents the Authority from monitoring the evolution of

\textsuperscript{32} Tables and graphics - v

\textsuperscript{33} Source: 2016 annual report on M&A activities in Italy – KPMG.

\textsuperscript{34} Please note that the turnover thresholds triggering merger control filings before the ICA, have been amended by Law No. 124 of 4 August 2017.
markets, whereas, on the other, it appears to go against the trend that has emerged in the recent debate on broadening the criteria based on the value of the transaction, currently under discussion at the international level, especially as far as monitoring mergers in the digital and pharmaceutical sectors is concerned.

5. CONCLUSIONS

The analysis of the main developments and trends of the Authority’s enforcement activities in the period from January 2016 to May 2017 as to cartel infringement has revealed two distinct trends: on the one hand, we find that the Authority is striving to orient its enforcement activities towards the most serious distortions of competition, with an ensuing sharp increase in fines, especially in cases involving single-product companies; and, on the other, we find the special attention the Authority is paying to safeguarding defence rights and due process guarantees and how this has led to an increase in proceedings that have ended without condemning the parties or imposing fines.

As far as unilateral conducts are concerned, we have seen that the Authority’s enforcement has focused on excessive prices: this is a return to the past which needs to be handled carefully.

As far as merger control is concerned, the scarcity of the Authority’s interventions has once again highlighted the inadequacy of the Italian merger control regime, which in the last years has actually prevented the Authority from monitoring developments and evolutions of the markets.

Finally, looking at the Authority’s enforcement activities, we see a significant synergy and a gradual convergence between competition and consumer protection policies.
6. REFERENCES


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KPMG – 2016 Annual Report on M&A Activities in Italy.
TABLES AND GRAPHICS

i Table

<table>
<thead>
<tr>
<th>Case</th>
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<tr>
<td>I/792 Gare ossigenoterapia e ventiloterapia</td>
<td>Oxigen and Medical Gas Supply</td>
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<td>I/789 Agenzia di modelle</td>
<td>Model Management Services</td>
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<td>I/783 Accordo tra operatori nel settore <em>vending</em></td>
<td>Vending Machines Sector</td>
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<td>I/790 Vendita diritti televisivi serie A 2015 – 2018</td>
<td>TV Services</td>
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<td>I/777 Tassi sui mutui nelle provincie di Bolzano e Trento</td>
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<td>I/710 Usi in materia di mediazione immobiliare</td>
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<td>I/794 ABI/SEDA</td>
<td>Payment Systems</td>
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<td>I/791 Mercato del noleggio autoveicoli a lungo termine</td>
<td>Long Term Vehicle Rental Services</td>
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<tr>
<td>I/779 Mercato dei servizi turistici – prenotazioni alberghiere <em>on-line</em></td>
<td>On-line Booking of Hotel Rooms</td>
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ii Graphic

![Pie chart showing the amount of fines in different industries.](chart.jpg)

**Amount of Fines**

- Gare ossigenoterapia e ventiloterapia € 46,873,014.00
- Agenzia di modelle € 46,567,800.45
- Accordo tra operatori nel settore *vending* € 100,750,030.00
- Vendita diritti televisivi serie A 2015–2018 € 66,412,964.04
- Tassi sui mutui nelle provincie di Bolzano e Trento € 26,866,384.00

**TOTAL:**

Euro 245,470,792.49
### iii Table

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<th>I/789 Agenzia di modelle</th>
<th>I/792 Gare ossigenoterapia e ventiloterapia</th>
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<td>Implementation of antitrust code of conduct and training seminars delivered to the company’s employees</td>
<td>Training seminars delivered to top managers and employees operating in antitrust sensitive area/business</td>
<td>Compliance program which provides the involvement of top management, the identification of the compliance officer, training seminars and activities, audit and monitoring procedures</td>
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### v Table

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