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Antitrust Enforcement: Four New Investigations Opened by the AGCM in the First Months of 2005

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Antonio Capobianco and Stefano Fratta

Abstract

The first three months of this year have witnessed extensive enforcement activity by Italy's *Autorità Garante per la Concorrenza ed il Mercato* ("AGCM"). In the closing 90 days of the chairmanship of Professor Tesauro, former Advocate General at the European Court of Justice, the AGCM initiated a number of investigations for infringement of EC competition rules in various key markets: natural gas, telecommunication services, pharmaceuticals and postal services. The cases reported below are of particular interest since they are the first examples of enforcement of EC competition rules by the AGCM in the new "modernised" system of European enforcement.

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Italy – new article 82 cases

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By *Antonio Capobianco and Stefano Fratta, Wilmer Cutler Pickering Hale and Dorr LLP**

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Allegedly abusive conduct in the market for gas transport

On 27 January 2005, the AGCM initiated an investigation on alleged abuses by ENI S.p.A. through its wholly owned subsidiary, Trans-Tunisian Pipeline Company Ltd ("TTTCP"), on the Italian market for the sale of natural gas: *Case A358, in Bollettino AGCM 4/2005*. The AGCM considers that the alleged infringements could affect a substantial part of the common market and could therefore violate article 82 of the EC Treaty.

The case concerns the planned expansion of a pipeline that imports Algerian gas into Italy. TTCP has exclusive transport rights over the pipeline, which belongs to the Tunisian government. In 2002, TTCP decided to increase the transport capacity by adding 6.5 billion cubic meters per year. The increased capacity should have been available in 2007.

Several gas shippers showed an interest in the initiative. Consequently, TTCP allocated the additional capacity "pro quota" between all four gas shippers that had received the relevant authorisations to import.

However, the project was first delayed and then cancelled. TTCP told the shippers that it had received a communication from ENI alleging that the conditions on the Italian gas market had changed, and that these changes would affect its plans to invest in additional capacity. In particular, ENI considered that, since the group had decided to invest in alternative technologies, such as LNG (liquefied natural gas), the planned increase of the Tunisian pipeline's transmission capacity could lead to a situation of over-supply on the Italian gas market.

According to the AGCM, TTCP therefore refused to finalise the agreements with the four shippers on the basis of considerations aimed solely at the protection of ENI's dominant position on the downstream wholesale gas market.

(ENI is considered to be dominant on the Italian wholesale gas market: it holds a market share of 68% and controls almost the totality of the national production.)

It is alleged that the withdrawal of the Tunisian pipeline's expansion plans could only be justified by ENI's fear that an excess of supply on the Italian market would result in increased competition from the four gas shippers interested in the expansion of the pipeline's capacity.

The AGCM will investigate whether the unilateral decision to cancel the planned expansion may constitute an abuse of a dominant position in violation of article 82 EC. By refusing to honour its original agreement on the expansion of the pipeline, ENI/TTCP may have infringed the principle of good faith in contractual relations.

Given the special responsibility that characterises firms in a dominant position under EC competition law, this behaviour is deemed to infringe article 82 EC. According to the AGCM, ENI and TTCP were under an obligation to complete the planned expansion in accordance with the timing and the modalities agreed with the shippers. The AGCM considers that its conclusions on the alleged abuses do not depend on whether the pipeline is to be considered as an essential facility.

An interesting point raised by the decision is the reasoning on the effect on trade between member states. The AGCM considered that ENI's behaviour is likely to affect such trade because any European company could decide to acquire gas in Algeria and import it into Italy (hence, into the EU).

In addition, the AGCM quotes the Commission's guidelines on the effect on trade between member states – "when an undertaking, which holds a dominant position covering the whole of a member state, engages in exclusionary abuses, trade between member states is normally capable of being affected." It concludes that, even if ENI's behaviour concerned the import of gas from a source located outside the EC, the abusive practices could affect the market structure of other European pipelines that import gas into Italy, and could impede the creation of a market for intra-Community exchanges of gas.

As to assessment of the appreciability of the effects, the AGCM again referred to the Commission's guidelines – "in the assessment of the appreciability it must also be taken into account that the very presence of the dominant undertaking covering the whole of a member state is likely to make market penetration more difficult." It concluded that any abuse that may render access to a certain market more difficult has an appreciable effect on the intra-Community trade.

The investigation will be completed by 31 December 2005.

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Alleged restrictions of competition in telecommunications services

On 23 February 2005, the AGCM decided to start an investigation into the Italian mobile telecoms market: *Case A357*, in *Bollettino AGCM 8/2005*. In particular, the AGCM intends to scrutinise a number of individual and collective practices by the three main Italian mobile operators – Telecom Italia Mobile S.p.A., Vodafone Omnitel N.V. and Wind Telecomunicazioni S.p.A. – to assess whether any of the practices could amount to an infringement of either article 81 or article 82 EC.

First, the AGCM will investigate whether TIM, Vodafone and Wind, which are considered to hold a collective dominant position on the national wholesale mobile market, had refused to negotiate access agreements to their mobile networks, with the purpose of preventing entry by alternative operators into the retail mobile communications services market, including MNVO (mobile virtual network operator). In this respect, the AGCM suggests that such conduct, performed homogeneously and simultaneously by all three mobile telephony operators against all applicant operators, could be an anticompetitive agreement.

Second, complainants have alleged that TIM, Vodafone and Wind charged their competitors higher prices for their landline-mobile termination services than those charged to their own business customers for their integrated landline-mobile service.

More specifically, TIM, Vodafone and Wind allegedly offered favourable financial or technical conditions to their own commercial divisions for the sale of termination services with the aim of excluding their competitors from the market for integrated services for business clients.

Third, the AGCM will investigate whether the three mobile operators have engaged in commercial practices designed to prevent telecoms operators from using business contracts in order to resell services to their end customers, thereby preventing any kind of competition on the mobile services retail market. Again, the AGCM believes that such conduct may be the result of an agreement concluded between the three companies in order to restrict competition.

Finally, it was shown in the AGCM's preliminary investigation that TIM and Vodafone charged almost identical prices for certain commercial offers to their business customers, allegedly in violation of article 81 of the EC Treaty.

The investigation will be completed by 28 April 2006.

Allegedly abusive conduct against generics in pharmaceutical markets

On 23 February 2005, the AGCM opened two separate investigations into alleged abuses of dominant positions by GlaxoSmithKline and Merck & Co Inc (*Cases A363 and A364 respectively, both in Bollettino AGCM 8/2005*), preventing the development of the market for certain generic drugs. In particular, the AGCM is investigating alleged refusals to license active principles (*i.e.* the primary ingredients for the production of pharmaceutical products) where patents had expired, or are about to expire in the near future, and where they are indispensable inputs for producers of generics to enter specific product and geographic markets.

Both investigations originated in complaints from producers of generic drugs, who complained that they were refused licences by Glaxo and Merck on active principles. The complainants considered that they needed the principles in order to be able to compete with Glaxo's and Merck's products.

The relevant product market on which the conduct will be assessed has been defined by reference to the fourth level of the ATC (Anatomical Therapeutic Classification). From a geographic perspective, the AGCM has concluded as a preliminary that these markets are national because of the different national healthcare regulations in place and the different patent regimes applicable, and because of the need for national authorisation for marketing the products.

Within these national markets, the AGCM has further distinguished between two different distribution channels – sales through pharmacies and sales through hospital facilities – which have clearly distinguishable conditions of competition and are considered to be separate relevant markets.

Both Glaxo and Merck have been deemed to be dominant on a number of national markets:

- Glaxo is considered to be dominant in the following markets for *triptans*: in the Italian market for sales through hospitals (96%), in both the pharmacy and hospital distribution channels in the UK (74% and 89% market shares respectively), and in the German and Spanish markets for sales through hospitals (with 57% market shares in both cases).
- Merck is considered to be dominant in the following markets for *carbapenems*: in the market for sales through pharmacies in Italy (with a market share of 73%, the remaining 27% being held by Merck's licensees), in both the pharmacy and hospital distribution channels in the UK (100% and 67% market shares respectively), and in the French market for sales through hospitals (97% market share).

According to the AGCM, the dominant positions held by Glaxo and Merck in these markets should not be abused to prevent or restrict competition in the markets of the two active principles. Such markets include drugs containing the two active principles and any other drug that is substitutable for them, regardless of whether it is based on other active principles.

The AGCM's decision to investigate Glaxo's and Merck's refusal to supply is based on the fact that the patents on the two active principles have in many cases expired or are about to expire in the medium term. A refusal to license the only input needed by competing producers to enter the market is only aimed at extending the exclusive use of the active principle beyond what is legitimately allowed by the patent.

According to the AGCM, this conduct is at the same time exclusionary, since it prevents the development of competing products, and exploitative, since it allows the owner of the active principle to charge higher prices (absent competitive pressure), and may amount to an abuse under article 82 EC.

That applies also for the refusal to license the active principle for sale in countries where the patent has not yet expired but will expire in the medium term, since the refusal has the effect

of preventing a timely and effective entry in these markets once the patent has indeed expired.

These investigations have two aspects of particular interest. First, both investigations have a clear multinational dimension. The AGCM has concluded as a preliminary that both Glaxo and Merck are dominant in several member states and, although this is not said explicitly, that the effects of the alleged abuses will affect countries other than Italy. Such allegations will have to be tested in the course of the investigation, which may not be possible for the AGCM to do without requiring the cooperation of the competition authorities of those countries where Glaxo and Merck are allegedly dominant. This may be one of the first cases for application of article 22(1) of Regulation 1/2003, according to which

[t]he competition authority of a member state may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another member state in order to establish whether there has been an infringement of article 81 or article 82 of the Treaty.

Second, in the Merck proceeding, the AGCM is for the first time considering the possibility of issuing interim measures. According to the AGCM, this is a new power conferred on the AGCM (and on all other NCAs) by article 5 of Regulation 1/2003.

While this provision is directly applicable in all member states, it may be questioned whether the AGCM can make use of it in the absence of national rules defining, for example, the type of interim measures that can be ordered, the substantive and procedural circumstances for imposing such measures, the judicial authority competent to review the AGCM's decision on the interim measures, and the applicable due process safeguards. This clearly appears to be a test case and is likely to be litigated before the administrative courts.

Both investigations will be completed by 23 February 2006.

Allegedly abusive conduct in hybrid postal services

On 23 February 2005, the AGCM opened an investigation into the conditions under which Poste Italiane S.p.A., the Italian postal service, offers access to the so-called "hybrid electronic mail" to its competitors: *Case A365, in Bollettino AGCM 8/2005*.

The investigation aims to assess whether the conduct under review amounts to an infringement of article 82 EC. Similar unilateral conduct by Poste Italiane was found to be an infringement of the Italian Competition Act in 1998 before national implementation of the EU directive on postal services.

"Hybrid electronic mail" is a service consisting of various operations:

- receipt of the electronic transmission of the mail message from the sender
- formatting the electronic message for printing
- personalisation of the message (such as the addition of corporate logos, commercial information, etc)
- printing the message
- preparing the message for mailing
- stamping and dispatching it
- actual delivery of the message to the final addressee

Hybrid mailing services are regulated by national provisions implementing the EU directive on the liberalisation of postal services. According to the existing legislation, Poste Italiane enjoys a legal monopoly over the last of the phases that characterise hybrid mailing services, *i.e.* the actual delivery of the message to the final addressee. Therefore, operators of hybrid mailing services compete in all the other upstream services, but all of them have to use Poste Italiane's delivery service.

The charge for the delivery service is set by Poste Italiane on the basis of the ordinary postal tariff or, if a number of cumulative conditions are met, it is charged at a substantially lower tariff. The conditions previously set by Poste Italiane and then "incorporated" into the national regulation are set at such a high level that only nationwide operators, with substantial activities at local level in each postal district, can have access to this more favourable price regime.

The AGCM has decided essentially to investigate the following issues.

First, whether the conditions set by Poste Italiane for obtaining the lower tariff represent the correct methodology for measuring lower costs or increased efficiencies derived from the delivery of the hybrid mail. Only in such a case could the favoured pricing scheme be justifiable. The AGCM provisionally held that this is not the case, since the conditions imposed are not directly related to the areas and services that may generate efficiencies in hybrid mail.

Second, whether these same conditions, and the prices charged according to whether the conditions are met or not, are discriminatory rather than purely linear. According to the AGCM, the price regime imposed by Poste Italiane discriminates against those operators that do not meet the conditions regardless of the fact that their volumes of mail generate efficiencies and costs savings that would justify price reductions from Poste Italiane.

Third, whether the fact that Poste Italiane charges the ordinary postal tariff to those operators who do not meet the conditions for the lower tariff may be an exploitative abuse because the ordinary tariff does not reflect the services offered to operators of hybrid mailing services. According to the AGCM, it appears that the ordinary postal tariff includes services that Poste Italiane offers to the general public but that hybrid mail operators in part provide themselves. The price charged is therefore not cost-oriented.

Because the conduct has been partly favoured or legitimised by the current Italian regulatory framework, the investigation will also assess whether the national regulatory framework complies with articles 10, 82 and 86 of the EC Treaty.

This would be one of the first applications of the ruling by the European Court of Justice in the recent judgment in *Consorzio Industrie Fiammiferi (C-198/01)*, according to which national competition authorities have an obligation to disregard national laws that create the conditions in which firms may infringe EC competition rules.

This investigation will be completed by 31 March 2006.

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