

Communiqué of June 22 2014

ROME ANTITRUST FORUM

Summary of the inaugural meeting of the Forum on 13 June 2014

The Rome Antitrust Forum is an initiative co-organised by the Scuola Nazionale dell'Amministrazione (Rome) and the Law Department of the European University Institute (Florence). The purpose of the Forum is to bring together distinguished antitrust practitioners (both lawyers and economists), leading figures in antitrust enforcement from abroad and representatives of the Italian Competition Authority to discuss, on a non-attributable basis, the way in which the Italian system of antitrust enforcement operates. The Forum facilitates an exchange of views among participants in order to stimulate discussions about antitrust enforcement in Italy. It is hoped that the views of these stakeholders may have some influence on the possible evolution of the system.

The Forum considered two broadly framed issues: first, the effectiveness of the Italian Competition Authority as an enforcer of the law; and second, the relationship between the Authority and the Italian (administrative and civil) Courts. Below we set out some of the major issues that emerged from the reflections of the Forum participants.

The Authority as an effective enforcer

The Italian antitrust authority, like many other antitrust enforcers in the world, should spell out its enforcement priorities in advance, an initiative that could benefit from a stakeholder engagement exercise (i.e. public review and comment). The adoption of clear priorities could be done in a way that avoids rigidity (in other words, a statement of priorities can be drafted so as not to be used to block the Authority from engaging in necessary actions outside of the priority areas) but promotes transparency and predictability. Published priorities, subject to periodic revision, could strengthen the Authority's capacity to communicate to stakeholders the areas characterized by widespread competition problems (thereby enhancing the incentives of private parties to cooperate with the Authority in the enforcement of the law in those areas).

The design of the Authority's leniency and fining approaches could be reconsidered to strengthen detection of collusion and deterrence.¹

¹ The AGCM is in fact currently (until the end of June) consulting on the envisaged content of Fining Guidelines. See <http://www.agcm.it/component/content/article/173-consulotazioni-pubbliche/6933-consultazione->

- With respect to fines, undertakings should receive higher fines for serious offences than those imposed at present. It was also considered that fines should be set with criteria that afford as much predictability as possible.
- Higher fines would have a direct impact on the success of the leniency programme because undertakings would then see a real benefit of cooperating (and may perceive greater urgency in doing so), which may be lacking if the fines are too low.
- The other factor affecting deterrence is the probability of being caught in the first place: at this level, the very recent enforcement initiative by the Authority is to be welcomed.
- As for compliance programmes, while in principle it may be appropriate to enhance the incentives of firms to adopt them, it was felt that, before a firm could be eligible to benefit from a reduction of fines for having such a programme in place, it would be necessary to better understand the specific characteristics that a rigorous and adequate compliance programme should have.
- Furthermore, given the structure of the Italian economy, and considering in particular the greater relative importance of small and medium sized enterprises compared to many other advanced economies, it may be particularly effective for the Authority to take specific measures to actively inform these enterprises and their legal advisers with regard to: the official fining policy; the existence and criteria of the leniency programme; and more generally, the objectives pursued by the antitrust rules.

In line with many of the foregoing observations, several participants expressed support for the idea of creating a Cartel Directorate, which could lead to better coordination of the Authority's efforts in the fight against hard core cartels.

The use of economic analysis by the Authority is welcomed, but concerns were expressed about the way this could be kept in better check by internal procedures and more effective judicial review. Ensuring a credible theory of harm backed up by relevant evidence is vital.

The Authority and the Courts

With respect to public enforcement, it was noted that the best means to ensure observance of the highest standards for an authority which combines the role of prosecutor and decision-maker are first, robust judicial review, and second, a decision-making structure that removes the risk of prosecutorial bias.

On this point, the most radical reform would be to turn the Authority into a prosecutor that would have to try its cases before a judge. In light of the *Menarini* judgment of the European Court of Human Rights, such a reform is very unlikely. However, a number of less aggressive measures could serve to improve public enforcement. These include the following:

- The team responsible for the case should have to convince a separate case team that claims of anticompetitive conduct contained in the Statement of Objections are sufficiently robust. This is the way the UK Competition and Markets Authority works, for example.
- Increasing the contacts between the Authority and the parties before the Statement of Objection is issued, for example with more state of play meetings and hearings that allow for a proper discussion of the legal and economic issues. These meetings would serve as a forum to identify both the points where the two sides are in agreement and those where there is a difference of opinion.
- It was also felt that judicial review by the TAR and by the Consiglio di Stato was erratic: at times, judicial control was thorough while at other times it was less so. The Forum participants felt that internal reforms in the way these two courts functioned could serve to enhance the capacity of judges to try these cases effectively. The lack of economic expertise in the Administrative Courts could be addressed by the appointment (in the Consiglio di Stato) of judges with expertise in economics (including the possibility of appointing professional or academic economists with little or no formal legal training). In any case Courts should organize themselves so as to provide more time for hearings; and should be encouraged to appoint experts so as to better allow them to check the empirical evidence contained in the Authority's decisions.

In terms of private enforcement, it was noted that the number of cases pending in some of the Italian Courts is quite substantial. It was noted that among these cases there were a fair number of stand-alone cases, which (if meritorious) may be the result of under-enforcement by the Authority. Furthermore, many of the claims were filed even before the adoption by the European Parliament of the EU Damages Directive in April of this year. However, as in the public enforcement context, the quality of economic analysis in civil court judgments too could be improved by appointing judges well trained in economics, following the positive experience of the Cour de Cassation in France. There was also some discussion of many mechanisms by which the Courts were facilitating plaintiffs' claims (e.g. by treating the Authority's decision as privileged evidence, and by appearing to ease plaintiffs' burden of proof). The adoption of the Damage Directive at the national level will further enhance the position of the plaintiff, in particular because of the disclosure requirements, which will entail significant reforms to Italian rules of civil procedure.

Conclusion

The discussion served to focus attention on the style of antitrust enforcement in Italy. In planning future events the organisers will take into consideration the views of participants and of the Authority so as to focus discussion on what are perceived to be the most salient issues. It was also felt that the participation of judges from the Italian courts would be extremely valuable for a better understanding of the shape and specificities of Italian antitrust enforcement.