

Communiqué of 18 September 2015

ROME ANTITRUST FORUM

Summary of the second annual meeting of the Forum on 18 September 2015

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 identify key challenges confronting antitrust enforcement in Italy. The Forum ends with some suggestions and recommendations which, if taken on board, could lead to a more effective system of antitrust enforcement in Italy.

This year the Forum considered two issues: the role of indirect evidence in proving the existence of a cartel, including in the context of public procurement, and the challenges facing the Italian Authority in the promotion of a pro-competitive system of regulation.

Below we set out some of the major challenges that emerged from the reflections of the Forum participants and conclude with some suggestions.

Cartel-busting in Italy: principles, instruments and performance

In Italy, firms do not seem to take sufficient advantage of the leniency programme. One of the reasons for this is the ignorance of many firms and their legal advisers of antitrust law, and of the opportunities leniency offers. As mentioned last year in the first edition of this Forum, given the structure of the Italian economy and in particular the greater relative importance of small and medium sized enterprises compared to many other advanced economies, it seems particularly desirable for the Authority to take specific measures to actively inform these enterprises and their legal advisers with regard to: the official fining policy (as reflected in the Authority's fining guidelines); the existence and criteria of the leniency programme; and more generally, the objectives pursued by the antitrust rules. We continue to believe that such an effort could produce very good results, enhance the business community's understanding of the antitrust rules, and promote compliance.

Given the relatively weak results of the leniency programme, the Italian Authority often relies on indirect evidence to identify cartels. The Forum discussed the standards that the

Authority should maintain when seeking to prove the existence of a cartel without smoking gun evidence. Recent case law shows that the EU courts and the Italian administrative courts have at times been quite demanding. For example, the General Court has stated that, in the presence of simple parallel behaviour, the use of indirect evidence – such as the fact that competitors met but without a precise indication of the content of their conversations – cannot by itself be used as proof of them agreeing not to compete. On the other hand, in other instances the Courts use a number of presumptions. For example, exchanging sensitive information among competitors is prohibited by object, unless it can be proved that it is beneficial to competition.

In the Italian practice, indirect evidence is particularly common in the context of bid rigging, where the Authority may consider as evidence the setting up of ‘super-abundant’ consortia, or the lack of participation in the bidding process or bid rotation. The high number of investigations that the Authority conducts in this sector is to be welcomed given its economic significance. The bids to be investigated are usually reported to the Authority by the contracting authorities. An extra effort should be made by the Authority in the promotion of its recently issued *Vademecum* for contracting authorities to ensure the cooperation of public procurement officials in the identification of suspicious signals on the part of competitors in the procurement process.

Some *ex officio* cases (mainly those associated to bid rotation) could be brought on the basis of closer cooperation with ANAC, the Italian anticorruption agency. It is particularly important for data to be collected and organized by ANAC in a way that allows screens for identifying anticompetitive practices to be applied. The Forum suggests that the cooperation between the Authority and ANAC should include the creation of a well structured database that could be used to identify anticompetitive practices, along the lines of what is done in South Korea or in Sweden.

As for the more substantive part, the Forum suggests that in order to connect some indirect evidence to an infringement, the Authority should prove that the probability that a given practice originates from an infringement is high and that the probability that it does not originate from an infringement is low. Both probabilities should be assessed qualitatively, and the Authority’s final decision should contain a convincing argument in this respect.

As for international cooperation in cartel busting, one of the problems the Authority faces is that in order to exercise its powers of investigation, it needs to formally open proceedings. By contrast, the European Union and other European authorities can exercise their investigative powers without necessarily opening formal proceedings. These procedural differences may jeopardize effective cooperation across Europe. The Forum suggests that in

this respect the Authority's procedural powers should be adapted to those prevailing at the European level.

Competition Advocacy

In the Italian antitrust law of 1990, competition advocacy was considered to be just as important as antitrust enforcement. The system was well thought out. Article 21 gave the Authority the power to issue reports when it believed that existing rules distort competition. According to article 22, the Authority could suggest that legislative proposals be improved in order to eliminate competition problems. Further, article 23 – providing that the Authority's Annual Report was to be submitted to the Prime Minister, who in turn was to submit it to Parliament – implies that the Report raises significant issues for the Government to consider and respond to. (However, in practice no Prime Minister has ever submitted the Authority's Annual Report to Parliament with observations or evaluations). Finally, article 24 ordered the newly created Authority to produce three reports to the Prime Minister on the functioning of particular sectors where competition did not work as expected: public procurement, retail trade and the concessions.

The Authority took great advantage of these powers and issued over 1,000 advocacy reports since its establishment. The effectiveness of these reports has been variable. In the early 1990s, the three sectoral reports submitted to the Prime Minister according to article 24 were very influential, and they have prompted quite extensive regulatory reforms, even many years after their submission.

Until 2006, not much happened in terms of competition-oriented reforms, outside the context of public utilities. The over 500 competition advocacy reports were largely ignored. Then, in June 2006 and in January 2007, the Minister for Economic Development Bersani issued two decrees that liberalized many sectors of the Italian economy, from the liberal professions to banks, insurance companies, cafeterias, restaurants and pharmacies. The decrees drew directly on about thirty of the Authority's advocacy reports, which were cited in the press releases issued by the ministry as having provided a baseline for the Government's action.

But for another 5 years not much happened on the competition front until the Monti decrees of 2011. More importantly, this year (2015) – for the first time since its establishment in 2009 (art. 47 of law no. 99 of 23 July 2009) – the Annual Law on Competition is in the process of being approved.

While it seems very difficult to adapt the regulation of general economic activity to competition principles, the Authority was quite successful in promoting a reform of public utilities operating nation-wide. This initiative went farther than what was required by the

applicable EU directives: functional separation was introduced in telecoms; electricity generators were privatized with the objective of creating a competitive industry and the market share of ENEL, the former electricity monopolist, is now down to around 25%; the network infrastructure, both in electricity and in gas, was separated; and in the rail sector, Italy is the only country in the world where there is competition in high speed services.

With regard to regulatory reform, although a number of sectors are much more open today due to the efforts of the Authority, the reforms introduced have not been able to address the rigidity of the regulatory structure, which is based more on specific and detailed legal provisions than on a system where the law identifies general principles and then leaves the details of its implementation to independent authorities or to the competent Administration.

It would be very important to introduce a much more flexible system of regulation to boost growth and competitiveness. The toolkit for promoting competition in Italy has been strengthened in recent years, and it only requires minor refinements for it to become more effective. At the moment, the powers of the Authority are difficult to use because of the lack of coordination between all the existing legal provisions. In particular, the September 2008 adoption of a decree (decree no. 170 of 11 September 2008) providing that regulatory impact analysis (RIA) and competition impact assessment had to be performed on all draft laws subject to approval by the Council of Ministers was meant to introduce a technical discussion of the different options available and to avoid the introduction of unjustified restrictions. These impact assessments have to be performed on all proposed measures except in cases of urgency and complexity. But it is not the exceptions that matter, even if complexity should not be a justification for not performing an impact analysis. The problems originate in the regular practice. The reports that accompany each new piece of economic legislation are usually written in a formalistic way and they do not actually serve a disciplinary function for avoiding the introduction of restrictive regulations, in part because the Authority is not involved in the process.

More recently, in December 2011, one of the first decrees of the Monti Government (decree no. 201 of 6 December 2011) gave the Authority two additional powers: first, the power to perform an independent competition impact assessment, though only at the request of the proposing Ministry (art. 34); and second, the power to initiate judicial review of secondary legislation that may lead to an unjustified restriction of competition (art. 35). While the experience of the Authority with competition impact assessments as provided in article 34 has been almost nil, the Authority has actively intervened against anticompetitive secondary legislation, especially in cases associated with the granting of concessions for the provision of local public services. Many of these cases are still pending before the Italian

courts, and an assessment is premature.

Regrettably, the entire process of competition impact assessment has failed to work properly. Article 34 has only been used to address the constitutionality of regional laws affecting competition; it has not been used to refine provisions to be approved by Council of Ministers, as the proposing ministries would never admit that the draft rules were restrictive of competition (which is the prerequisite for requesting the Authority's advice).

In order to make the system described above more effective, it would be advisable to eliminate the possibility of invoking complexity as an acceptable justification not to perform an assessment of the impact on competition. Indeed, it is precisely when the issue is sufficiently complex to be governed by a rule or regulation that impact analysis becomes particularly important and useful. Furthermore, the Authority should be involved directly in the process of competition impact assessment. One possible way forward would be to require that the RIA reports that ministries prepare in order to discuss their proposal at the Council of Ministers be sent in advance to the Authority or to a specific Body to be created at the Prime Minister's office and of which the Authority forms part.

Conclusion

In brief, the recommendations by the Forum on indirect evidence and competition advocacy are as follows:

- It may be particularly desirable for the Authority to take specific measures to actively inform enterprises (often active only locally) 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 the promotion of its recently issued Vademecum for bidding bodies, an extra effort should be made by the Authority to ensure the cooperation of public procurement officials in the identification of suspicious signals on the part of competitors in the procurement process.
- Bid rigging can be identified by screens on bidding data along the lines of what some authorities have already done. To this end, the cooperation between the Authority and ANAC should be strengthened and it should lead to the creation of a well structured database of adjudication bids.
- As for international cooperation in cartel busting, one of the problems the Authority faces is that, in order to exercise its powers of investigation it must formally open proceedings. This distinguishes the Authority from the European Commission and other European authorities, which can exercise

their powers without necessarily opening formal proceedings. These procedural differences may jeopardize effective cooperation across Europe. The procedural powers of the Italian Authority should thus be adapted to those prevailing at the European level.

- In order to make RIA more effective, it would be advisable to eliminate complexity as an acceptable justification not to perform an assessment of the impact of a proposed regulation.
- The Authority should participate directly in the process of competition impact assessment, for example by making it mandatory that the RIA reports ministries prepare be sent in advance to the Authority or to a specific Body to be created at the Prime Minister's office and of which the Authority forms part.