

**Settle for less...? Or for more! Tips on timing, confidentiality and strategy in  
(multijurisdictional) settlement arrangements**

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## 2.1 General issues

### 2.1.1 Does your jurisdiction provide for settlement procedures with the competent competition authority?

Italian competition law does not provide for any kind of antitrust settlement similar to the procedure introduced by the Settlement Notice 2008 to speed up the procedure for adoption of cartel decisions before the Commission, reduce litigation and dedicate more time and resources to the fight against cartels.

The Italian Competition Authority (AGCM) decided not to introduce any settlement procedures in cartel cases, since it prefers to support the resort to its leniency program and it does not suffer a heavy workload in cartels cases. In short, the Italian Competition Authority feared that the chance for cartel participants to rely on settlements would result in negative effects on its leniency program, and thus hinder rather than strengthen the fight against cartels.

The AGCM is however currently reviewing its policy on fine-setting, and this might bring a new debate on the pros and cons of introducing a settlement procedure in the Italian cartel procedure.

### 2.1.2 If your jurisdiction does not provide for settlement procedures, does your jurisdiction provide for commitment decisions? (If your jurisdiction does not provide for settlement procedures, please answer the following questions from the perspective of such commitment decision procedure)

Commitment decisions are available to the parties to proceedings before the AGCM. The relevant rules were introduced by Law Decree 223/06, amending the Antitrust Act (law 287/90) by introducing the new section 14-ter. This provision is aimed at diminishing the costs and time of proceedings, simultaneously fostering the cooperation of undertakings and their prompt compliance with competition rules. A fine of up to 10% of the turnover is provided in case of infringement of the commitments.

### 2.1.3 What is the general stance towards settlement procedures [commitment decisions] in cartel matters? Are these generally considered to be a preferred route?

In compliance with EU law, the AGCM does not admit commitments in case of hard-core infringements of competition law, such as price fixing cartels. Commitment decisions are not therefore a 'preferred route' in cartel matters<sup>1</sup>.

In the initial phase of use of the commitment decisions, however, the AGCM accepted commitments also in horizontal and price-fixing cartels. In the *ABI/CO.GE.BAN* case<sup>2</sup>, the AGCM accepted the commitments proposed by the parties (the Italian banking association and the card issuer organization CO.GE.BAN) that had implemented an agreement on the interbank fees charged to customers which affected the independence of operators in determining their pricing policies. A similar case was the commitment decision concerning the *Order of Veterinary Surgeons of Turin*<sup>3</sup>, prompted by a veterinary who had been subjected to disciplinary measures for not applying minimum fees and for advertising his services.

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<sup>1</sup> In 2013, the AGCM issued 6 decisions applying sanctions for cartels, while there was only one decision accepting commitments (*Assofort /ADR-Servizi aeroportuali*, AGCM, no. 24190, 31 January 2013) which concerned an alleged case of abuse of a dominant position.

<sup>2</sup> *ABI/CO.GE.BAN*, AGCM no. 16709, 18 April 2007, Bulletin 14/2007.

<sup>3</sup> *Ordine dei medici veterinari di Torino*, AGCM no. 1668, 21 February 2007, Bulletin 8/2007.

In most of the cases, commitment decisions have been adopted in abuse of dominant position cases involving exclusionary conducts (e.g. refusal to deal, essential facilities)<sup>4</sup>.

## 2.2 PROCEDURAL ISSUES

2.2.1 At what stage can a settlement [commitment] be reached? E.g.: (i) only in the investigative procedure, (ii) before publishing a statement of objections, (iii) at any stage before an infringement decision has been taken, or (iv) at any time?

Paragraph 1 of section 14-ter of the Antitrust Act provides that it is up to the parties to propose commitments within three months from the notification of the statement of objection. Therefore, commitments can be proposed only during the initial investigative phase of an opened infringement procedure.

The three-month term has been challenged in appeal, also in light of the fact that no such deadline is set under article 9 of Regulation 1/2003<sup>5</sup>. The AGCM, in its notice on the application of section 14-ter of Law 10 October 1990, no. 287, published in 2012 (Communication) stated that it reserves the right to assess commitments proposed after the expiry of the term, but only “*in exceptional circumstances*” and “*on the basis of a clearly-justified and timely request by the party*”. This stance is justified by the aim of expediting administrative procedures and costs savings. Commitments are admitted only when they are timely and able to remove effectively the alleged anticompetitive concerns.

2.2.2 Is it possible to settle [accept commitments] with only one, or several parties involved in the alleged cartel [alleged competition infringement], or do all accused parties need to be involved? Are there any constraints with whom a settlement [commitment decision] can be reached (cartel leaders, recidivists, etc.)?

In *Tele2/Tim-Vodafone-Wind*<sup>6</sup>, the Competition Authority opened an investigation into alleged violations of Articles 101 and 102 TFEU by the three main mobile telecommunications operators in Italy. The AGCM was concerned that the three operators had abused their collective dominant position on the wholesale market for access to mobile networks by repeatedly and unjustifiably denying access to new entrants. Vodafone offered commitments to negotiate agreements granting new entrants wholesale access to its network. Following a market test, the AGCM accepted an improved set of commitments submitted by Vodafone and closed the investigation *vis-à-vis* Vodafone. The competition authority then completed the investigation against Tim and Wind, ascertained infringements of Article 102 TFEU, and imposed fines on them.

Although there have been exceptions, in principle commitment decisions cannot be reached, *i.e.* accepted, in case of hard-core cartels (e.g. price-fixing and markets sharing).

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<sup>4</sup> In the *Assofort/ADR-Servizi Aeroportuali*, above, ADR, the company managing airport services at the Rome airports, was allegedly abusing its dominant position in the market for the supply of access to common and/or exclusive use facilities necessary to carry out economic activities at the airports, thus preventing the launch of new services (in the case, low cost rental services offered outside the airport). After the market test, ADR submitted a set of behavioral commitments (e.g. availability of 8 parking bays for allowing the low cost rent a car operators to pick up their customers, fixed and non discriminatory fees for the bays) which were deemed suitable to eliminate the barriers to entry in the new market and remove the foreclosure effects caused by the ADR conduct.

<sup>5</sup> In a judgment no. 2902/2008, the Administrative Regional Tribunal for Lazio stated that the three-month term was not to be considered mandatory, also in light of the fact that such term is not provided by the corresponding EU rules on commitment decisions before the Commission.

<sup>6</sup> *Tele2/Tim-Vodafone-Wind*, AGCM no. A357, 24 May 2007, Bulletin 20/2007.

2.2.3 Could you elaborate on the possible settlement arrangements [commitment decisions]. Are these only pecuniary measures or could these involve behavioral measures as well? How are the terms of a settlement [commitment] being determined?

Commitments are not obviously related to the determination of the fines to be paid to the AGCM, as there is no ascertainment of the alleged infringement and the commitments are aimed at eliminating the anticompetitive conducts subject to *investigation*.

The scope of the commitments depend on the competition concerns alleged by the ACGM. In the case *Order of Veterinary Surgeons of Turin* mentioned in § 2.1.3 above, the AGCM accepted a number of commitments, including the removal of restrictions on the advertising of veterinary services, the interruption of all disciplinary proceedings against veterinarians who had promoted their businesses or who had not applied the fees approved by the association, the abolition of minimum fees, and some other changes to the veterinarians' professional code of conduct to make it compliant with competition law.

In the Merck case<sup>7</sup>, the AGCM alleged that Merck's refusal to supply licences for the production and export of the active ingredient Finasteride (covered by Complementary Protection Certificates not yet expired at the time of the decision), was an abuse of a dominant position. Merck proposed the following commitments: the concession of non-exclusive free licenses for the import, production, commercial promotion and/or sales of Finasteride and related generic drugs in Italy, two years before the expiry of the relevant complementary protection certificate. The AGCM accepted such commitments and closed the case without a fine.

The commitment procedure is not a negotiation between the AGCM and the parties, and the competition authority enjoys broad discretion in accepting or rejecting the commitments. In many cases, the AGCM rejected commitments proposed by the parties even at a preliminary stage (i.e. before publishing them for the market test), on the grounds that they were unsuitable for removing the alleged antitrust concerns or related to hardcore antitrust infringements<sup>8</sup>, and/or there AGCM recognised a prevailing public interest in ascertaining the infringement<sup>9</sup>.

2.2.4 Which party can take the initiative for a settlement [commitment]: is this the administrative authority only, or the suspected parties as well?

Commitments can be proposed only by the concerned undertaking(s) and never by the AGCM.

2.2.5 Are there any other institutions involved other than the competition authority? Does a settlement [commitment], e.g., require any court approval? Please elaborate on the relevant procedure.

As a general rule, besides the AGCM, and possible interested third parties, there are no other institutions nor courts involved in the assessment of commitments. Nevertheless, if the parties to the proceeding are operators active in the field of communications (e.g. postal services, television, radio, internet), the AGCM must request a non-binding opinion of the competent regulatory authority (AGCOM) before deciding whether or not to accept the commitments. The same happens in relation to operators active in the insurance sector, with the intervention of the relevant authority (IVASS).

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<sup>7</sup> *Merck Principi attivi*, AGCM n. 16597, 21 March 2007.

<sup>8</sup> In *Listino prezzi del pane*, AGCM, n. 18443, 4 June 2008, the AGCM held that commitments could not be accepted in light of the seriousness of the conduct (price fixing); in *Logistica internazionale*, no. 22521, 15 June 2011, the AGCM stated that commitments proposed by the parties were clearly unable to remove the effects of the anti-competitive conduct.

<sup>9</sup> *Consiglio Notarile di Milano/Delibera*, AGCM no., no. 24377, 30 May 2013.

### 2.2.6 Is it necessary for reaching a settlement [commitment decision] to admit being guilty?

The admission of being guilty is excluded by the nature of the procedural instrument itself. Section 14-ter of the Antitrust Act provides that, when the AGCM accepts commitments proposed by the parties, it “terminate[s] the proceeding without ascertaining the violation”.

## 2.3 Enforcement of commitments

### 2.3.1 Are there any rules as to the enforcement of a settlement [commitment decisions]? E.g. in monitoring any possible behavioral measures? What are the consequences if a settlement agreement [commitment decision] is breached?

Once the commitments have been accepted, the undertakings must carefully comply with them and generally inform the AGCM accordingly.

The AGCM can re-open the proceeding closed with the acceptance of commitments in the following circumstances:

- a change in a factual element of the case on which the decision was based;
- a breach of the commitments by the undertakings concerned;
- the decision was based on incomplete, incorrect or misleading information.

In May 2013, the AGCM, using for the first time this power, re-opened a proceeding closed against two undertakings operating in the maritime transport for passengers in the gulf of Naples and Salerno, on the basis of the breach of their commitments (accepted in 2009) and of further violations of antitrust rules<sup>10</sup>.

Section 14-ter of the Antitrust Act provides that in case of breach of commitments, the AGCM can impose fines on the undertakings concerned. The fine can be equal to up to 10 percent of their individual turnover, which is the same turnover limit provided for cartels and abuses.

The possibility of being subject to fines should discourage undertakings to act inconsistently with commitments: the deterrence effect is quite high, since the conduct to which the commitment decision is related cannot be a serious breach of competition law, whilst the sanctions for the breach of commitments can be equal to those applied to hard-core restrictions.

### 2.3.2 Is a settlement [commitment decisions] subject to appeal? Can the parties agree to waive the right of appeal?

Appeal is possible by third parties potentially damaged by the application of commitments (i.e. other parties to the same proceeding or any other subject concerned). Appeals are decided by administrative courts, i.e. the Administrative Regional Tribunal for Lazio in first instance and the Council of State for appeals against rulings of the former.

AGCM decisions rejecting commitments can obviously be appealed before by the undertaking which proposed the commitments. In the first decision appealed, *Producer of marine paints*<sup>11</sup>, the AGCM had rejected the commitments offered by five undertakings involved in an investigation into an alleged horizontal anticompetitive agreement in the market for marine paints. The undertakings had proposed to cease collecting through their trade association data necessary to prepare certain statistics. The Competition Authority concluded that the commitments were as such incapable of removing the market distortion caused by the anticompetitive arrangements. On appeal, the court upheld the Competition Authority's

<sup>10</sup> *Trasporto marittimo*, AGCM, no. 1689, 30 May 2013.

<sup>11</sup> *Produttori vernici marine*, AGCM, no. 16151, 15 November 2006.

position affirming that commitment decisions are inappropriate in cartel cases and its argumentation was whose later upheld by the highest appeal court, the *Consiglio di Stato*. Interestingly, in this case, the AGCM took the commitments proposal into account as an attenuating circumstance when determining the amount of the fines.

Case-law suggests that commitment decisions can be immediately appealed: it is not necessary to wait for the final and overall AGCM decision on the case.

Parties may not waive their right to appeal.

### 2.3.3 Would it e.g. be possible for a party reaching a settlement [commitment decisions] with a public authority to be prosecuted for the same behavior by a criminal prosecutor?

Under Italian law, competition law infringements are not criminal offences. In principle, the proposal of commitments, if containing information giving notice or evidence of a crime, might however trigger an independent criminal proceedings for the same facts. The opening of criminal proceedings, if any, would not be related to the antitrust proceeding or the commitment decision *per se*.

Recently, after a decision<sup>12</sup> condemning Roche and Novartis for a cartel aimed at promoting Novartis's Lucentis, an expensive eye drug, over Roche's Avastin, a cheaper off label product with allegedly the same therapeutic use, Italian prosecutors opened an investigation for possible market manipulation and fraud against Italy's national health service in connection with suspected collusion to hamper use of a Aventis.

## 2.4 Confidentiality and Privilege

### 2.4.1 Is a settlement arrangement [commitment proposals] made public? What information is made public? Does this, e.g. include the settlement agreement [commitment decision] itself, any documents and/or statements leading to such settlement [commitment decision]?

In order to allow the market test in commitments proceedings, the decision concerning the opening of the procedure and the commitment proposal are published on the AGCM web site. Once the commitments are accepted, also the commitment decision is published on the AGCM website.

### 2.4.2 If the parties do not reach a settlement [commitment decision], can statements and/or documents used in trying to reach a settlement [commitment decision], be used against the accused (or other) parties?

In assessing commitments, the AGCM has the task to evaluate the remedies suggested for the purpose of removing the alleged competition concerns and not the role to collect information to ground a decision of breach.

Parties proposing commitments may however, unintentionally, during the hearing or in filing documents useful to assess the commitments, disclose information which are part of the proceedings file and may be potentially used against them in the event the commitments are rejected.

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<sup>12</sup> *Roche-Novartis/Faraci Avastin e Lucentis*, AGCM, n. [24823](#), 27 February 2004. See the press release at the following link <http://www.agcm.it/en/newsroom/press-releases/2106-i760-pharmaceuticals-and-antitrust-the-italian-competition-authority-fines-roche-and-novartis-over-eur-180-million-for-cartelizing-the-sales-of-two-major-ophthalmic-drugs-avastin-and-lucentis.html>.

2.4.3 Do parties who have settled their case [proposed commitments] get any protection from any possible follow-on damage claims in civil proceedings?

Commitment decisions are not *per se* able to ground a follow-on damage claim, since there is no assessment of any breach committed by the undertakings concerned<sup>13</sup>. In possible damage claims, the interested party should therefore first give evidence of the anticompetitive infringement occurred (and only alleged in the procedure closed with the commitment decision).

Nevertheless, it has been underlined<sup>14</sup> that the risk to be subject to private enforcement claims is not completely eliminated: firstly, both the decision opening the proceeding and the commitment decision itself (as well as the information collected during the market test) may contain a sufficiently detailed description of the relevant markets and of the unlawful behaviour; secondly, the case-law, both at EU and national level, has proved to be quite in favour of an extension of the scope of follow-on actions, stating that commitment decisions introduce an “*effective doubt*” on the existence of an antitrust infringement, so that the burden of proof on the claimant might be reduced, though not eliminated.

In conclusion, Italian Competition law does not grant any special protection to undertakings whose commitments are accepted. The Tar Lazio, in the case Tim-Vodafone-Wind<sup>15</sup>, expressly stated that the commitment decisions do not cause any immunity from a civil law stand point. The elements and evidence collected up to the acceptance of the commitments might be therefore used in a claim for damages.

Third parties may acquire information and documents filed during the antitrust proceeding on the basis of the rules on access to documents, and/or through judicial order in the event of a judicial procedure for damages (and/or denial of access by the competition authority).

During the proceedings, third parties admitted to the proceedings can access any non-confidential documents in the AGCM’ file; after the closing of the proceedings, third parties (not party to the proceedings) have the right to request access to the non confidential documents if they have a relevant interest to its access. The undertaking concerned has the right to oppose or limit such disclosure, and the AGCM, in deciding whether to allow access or not, must counterbalance the interest of the third party with the interest of the undertaking concerned. In the past, after the closing of a procedure, the Italian competition authority has not generally granted access to its filings to third parties claiming damages before civil courts<sup>16</sup>.

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<sup>13</sup> According to current Italian law, not even AGCM decisions ascertaining an antitrust infringement have the authority of *res iudicata*.

<sup>14</sup> A. Pera, *Le decisioni con impegni ed il rilievo nell’antitrust private enforcement*, in L.F. Pace (eds.), *Dizionario sistematico del diritto della concorrenza*, Naples, 2013, pages 379-387.

<sup>15</sup> TAR Roma, sez. I, 7 April 2008, nn. 2900 e 2902.

<sup>16</sup> TAR Roma, sez. I, 2 November 2009, no. 10615, *Fallimento ELINET S.p.A.*; TAR Roma, sez. I, 10 February 2012, no. 1344, *Alitalia*.