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UNIVERSITÀ DEGLI STUDI DI BERGAMO
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Sala "S. Galeotti", Facoltà di Giurisprudenza,

LA TUTELA PRIVATA IN ANTITRUST:
ITALIA, U.E., NORD AMERICA
Avv. Mario Benedetti – BLB Studio Legale
Private citizens and the AGCM

1. Introduction : The Italian antitrust law and the creation of AGCM

We have been invited to discuss an interesting and important issue with a number of esteemed American colleagues. Usually, when the discussion concerns antitrust law and competition law as well, the most important thing is to avoid focusing solely on the law, and to also take into consideration the economic issues involved.

In addition to this, we have to consider that if we want to discuss Italian antitrust law seriously, it is important to also keep in mind the implication of this issue with regard to civil law and public law, and the issue of the relationship between private citizens and public institutions.

I have started my short speech asking myself this question: what relationship exists between citizens, consumers and the Italian public institution called AGCM ? What kind of protection do Italian citizens enjoy thanks to the AGCM's oversight ? And, finally, what kind of protection is available to citizens against the possible abuse of power on the part of the AGCM ?

Obviously, I have to start my speech by recalling the great expectations that the Italian antitrust law (L. 287/1990) aroused in our system more than twenty years ago. This important law created the public institution known as the AGCM, a proper public authority, (Autorità Garante del Mercato e della Concorrenza) and that law was inspired by the European legislation and also by Italian constitutional principles.

The Italian antitrust system, in fact, was created to implement the principles of article 41 of the Constitution, as we can read in the article 1 of the antitrust law (L. 287/1990).

To be clear, we have to state that our system requires rules that create competition, and ensure freedom to enter the market and to produce, as provided under the first part of the article 41 of the Constitution, but, at the same time, we must respect the principles set forth under the second part of the article 41 of Constitution, such as human dignity, social empathy, business ethics.

That is one reason why the Italian parliament created the AGCM, a public and independent authority in charge of ensuring a proper and effective anti-trust system. We were well aware, even in the early nineties, that an effective and functional antitrust system produces positive effects for the entire society, as stated by one of the professors who was most involved in the drafting the antitrust law, Mr. Guido Rossi¹. And also the Italian Supreme Court, the Corte di Cassazione, (Sent. Sez. Un. 2207/2005) wrote that ““la legge antitrust non è la legge degli imprenditori soltanto, ma è la legge dei soggetti del mercato, ovvero di chiunque abbia interesse alla conservazione del suo carattere competitivo””.

In particular, in Italy, during the nineties, we created numerous public independent institutions, such as the AGCM. This institution could be described as “independent” because the law, a specific statute, prescribes that the presidential terms of office and the term of the counsel can not be renewed, and politics cannot interfere with this institution. In addition to this, the AGCM is not connected with the offices of the general public administration. It is autonomous and has powers to operate in the market and in the legal system.

AGCM is not, nor should it be, influenced by government, parliament, and judges. It has no particular relationships with government, except some advisory powers. No particular relationships with the ordinary judges and courts, and in fact the jurisdiction over the decisions of the AGCM was devolved to the administrative courts, and, finally, it has no particular relationships with the parliament, except for the fact that both the president of Camera dei Deputati and Senato della Repubblica are required to choose the president and the top councillors of this institution.

A quite interesting theme that can be just touched upon in this debate, but not analyzed, could be the general relationship that runs between politics in general and the public independent institution. For example, in the early nineties, AGCM and the other Italian public independent authorities were very influential and powerful, but now we are seeing how politics is usurping more and more power and is trying to influence this kind of public Authority.

However, cooperation between these authorities and politics could be also a good thing in some respects. I am thinking, in particular, about the recent Italian statute (L. 99/2009) that requires the government to propose, on a yearly basis, a specific statute called “*Legge annuale per il mercato e la concorrenza*” to enforce the antitrust system, considering the suggestions made by the AGCM. This provision is one of a kind/unique in Europe, and could create a productive debate in the Italian parliament.

2. The procedures followed by the AGCM and its specific powers.

I turn now to the specific procedures that could be followed by the institution of AGCM. I will focus on the provision of the antitrust law (L. 287/1990) that must be completed with the prescriptions and the rules of the d.p.r. 217/1998.

In Italy, as we all know, the rules included in the antitrust law are aimed at addressing three different situations: agreements between corporations, concerted practices which may affect trade and the abuse of dominant position.

According to the antitrust law, the AGCM has some powers to combat the three different situations and to start a procedure, not actual legal proceedings, to consider evidence and, ultimately, to impose sanctions.

In this procedure, firstly, AGCM must respect the requirements imposed under the general Italian law (L. 241/1990) on administrative proceedings. Secondly, AGCM must respect the rules provided under the specific antitrust law.

A major problem that many professors have noted, concerns the actual regulation of the procedure followed by the AGCM and its compatibility with the guarantees of raising a private defence. Honestly, this is an extremely important question to ask our system, especially considering that Italy is under a duty to also honor European legislation. And, in particular, after the Treaty of Lisbon, the Treaty of Nice (2000) also came into force, as well as the CEDU, and, indeed, the principles arising under such Treaties, such as the due process.

But what guarantees for citizens are there in the procedure regulated by the antitrust law ?

I will try to answer to this question after considering one of the most important powers that the antitrust law gives to private citizens: the personal initiative to report breaches of the antitrust law to the institution.

In fact, an investigation of the AGCM can be initiated following a report by citizens. For example, in 2009, an interesting report addressed to the AGCM was filed by the federation of Italian journalist and press corporation (FIEG), against the service *Google Italia news*.

In that case, after the report of an abuse of dominant position, the AGCM decided to start the inquiry concerning that possible violation of the law. However, not every report is acted upon, becoming immediately and automatically a real inquiry conducted by the authority. In fact, every report is analyzed by a specific commission that must decide whether the private report is founded.

An inquiry by the AGCM can start with a private report, but usually it is the authority itself that starts the inquiry based upon elements that it has already found.

For this reason, the Italian antitrust law tries to give to the corporation or the private citizens involved in the AGCM procedure certain defensive powers. There is a sort of bilateral debate between the different parties (corporations and AGCM) in order to clarify the situation and to give the AGCM all the elements to issue a decision on sanctions. The point is that AGCM, just like all public and independent institutions, must pursue the public interest of a competitive market, in the context of a truly liberal system, but it cannot pursue this goal while frustrating the private interests/rights that are guaranteed.

For this reason, during the procedure, private parties can always write and send briefs and documents in order to clarify the commercial business operations under discussion, and they can ask to review the documents filed in the procedure.

This is an important guarantee for citizens and corporations, although it is limited as compared to provisions of the general law (L. 241/1990) on administrative proceedings. The Italian system, in fact, is a system in which usually there is, or there should be, publicity and transparency in relationships between the public administration and private citizens during a procedure.

In addition to this, after the reforms made by the Italian parliament to the antitrust law in 2006, corporations have another important guarantee (almost a power) against possible sanctions that AGCM may inflict upon them.

During the procedure, they can undertake certain commitments and sign specific document in which they describe certain specific actions they will take to remedy the possible breach of the antitrust law and therefore to avoid the economic sanction.

For example, in the procedure against *Google news Italia* started upon a report made by FIEG, at the end of the inquiry, the AGCM chose not to punish Google with economic sanctions, but stated as binding the specific documents that Google had signed to remedy the breach consisting in the abuse of a dominant position.

AGCM resolution no. 21959/2010 provides that the specific action proposed by Google to remedy the breach is deemed sufficient to effectively address the concern that the AGCM harbored at the beginning of the procedure.

In particular, in this case, the procedure concerned a specific service rendered by *Google news Italia* and the possibility for the press corporation to exit from the service without negative repercussions on the *Google search Italia* system.

The last major problem on this point regards the final decision by the AGCM at the end of the procedure. According to many scholars, in fact, the Italian antitrust law does not impose any criteria upon the AGCM with regard to its consideration of evidence and documents. Many people and eminent professors are of the view that the AGCM enjoys an “excess of discretion” with regard to the manner in which it arrives at its decisions. This is, without any doubt, an aspect of the law that should be improved.

3. The judicial appeal against the decision of the AGCM

To complete this short analysis, I think it is important to mention the provisions of article 33 of the antitrust law on the “appeal” against decisions and sanctions imposed by the AGCM.

Under Italian law, exclusive jurisdiction rests with the administrative judges of the Lazio region (Tar Lazio). This because the specific subject matter often imposes a specific jurisdiction.

At this point, I would like to try to explain the kind of discretion enjoyed by administrative judges in their judgment on decisions issued by the authority. This issue helps us understand what kind of protection citizens have in our system against decisions of the AGCM.

I am perfectly aware that this could be such an important matter for discussion that it should be addressed at a specific meeting, but I strongly believe it is worth mentioning .

This issue was addressed at length in two recent cases that I will use to explain the problem.

I am talking about judgments no. 2199 and no. 5156 issued by the Consiglio di Stato, in 2002. In that case, the court of the Consiglio di Stato specified that decisions issued by the AGCM can be reviewed only on legal ground . In particular, administrative judges of the “Tar” and of “Consiglio di Stato” may have vast knowledge on the legal irregularity of decisions issued by the AGCM, but they cannot review the discretionary aspects of such decisions.

In addition to this principle, in those judgments, the Consiglio di Stato also stated that, starting from 2000, the year in which an Italian law also admitted in administrative proceedings court-appointed technical consultancy, the administrative courts are entitled to “jump on” the facts on which the decisions of AGCM are based.

This because the AGCM analyzes economic facts and events that must be compared with the requirements offset forth in the antitrust law but in this process, the AGCM has extensive powers of analysis.

But, to be precise, Italian administrative judges say that they can have just a “weak control” over the reasonableness of the analysis of facts conducted by the AGCM. They do not have any “strong control” to superimpose their own analysis on economic facts and events.

The distinction between a “weak control” over an economic fact from a “strong control” of the same fact is not always clear, but is very important for the Italian administrative judges to find out precisely where that distinction lies. This is because, according to the Consiglio di Stato, the Italian Supreme Administrative Court, a judgment in which “strong control” is exercised would be inadmissible.

This is the special relationship between the authority, AGCM, and the administrative judges that are called upon to review the decisions issued by the AGCM.

4. The AGCM and its function for the consumer.

As I am about to conclude this brief speech, I do acknowledge that an additional aspect shall be emphasized. While I highlighted aspects related to the protection of private citizens *from* the independent Authority, one cannot neglect the existence of another related issue: the protection of private citizens *within* the independent authority. The issue is in this sense twofold: the Authority is by all means an institution that needs *ad hoc* tools for its

own protection from possible excess of discretion and such protection must be granted by the system itself, like we already stressed. At the same time however, the Authority is an Institution that citizens turn to in order to seek and obtain protection.

This brings us back to the initial remarks concerning competition as an overarching tool to protect democracy itself. Even the Constitutional Court, particularly under rulings 14/2004 and 272/2004, has taught us that we should not only protect competition as a value, but also promote it in the interest of the citizenry, even more so in the interest of the most vulnerable groups, *id est* consumers.

Consumer protection lies thus at heart of the last part of this contribution.

I asked myself why the Italian parliament chose to include additional powers reserved to the AGCM within the consumer code (D.Lgs 206/2005). In particular, the power to stop the unfair practices in market. I am referring to article 20 and the following articles of the consumer code.

Consumers, in fact, can ask to the AGCM to investigate a particular unfair practice that could amount to a breach of the consumer code, and the AGCM has the power to stop this particular practice and to inflict economic sanctions upon the corporations committing such breaches.

These requirements under the consumer code give extensive power to the AGCM to protect and safeguard consumers.

The breadth of the spectrum of action granted by the legislator to the Authority is a double-edged sword. On the one hand, it is an opportunity to seize, as it allows to fully grasp even the trickiest commercial strategies that do not rely on acts or documents but simply on behaviours or practices that penalise consumers. On the other hand, it also represents a risk as it forces the Institutions to come face to face with instances of “micro-conflictuality” that do not inherently address widespread or systemic issues.

So, the action of the AGCM is not limited to the three situations and specific violations described in the antitrust law, that we have already mentioned, but this authority has the power to give protection also to consumers against possible abuses of the market. The unfair practices described in the consumer code are the particular situations, often quite small and “invisible” that, nonetheless, could generate significant damages to consumers and citizens.

In 2009, for example, there were 2,597 consumer reports of this kind of practice addressed to the AGCM . I know that just 30% of these reports were required to be followed by an inquiry and a sanction, but this statistic is significant to show that consumers and citizens in general are aware of their rights and that AGCM can give them protections in these kinds of situations.

These are certainly to be regarded as positive signs, as we are aware that while competition benefits consumers as it prompts the emergence of improved goods and services at lower prices, it can only fully manifest itself when consumers are free and aware. In this light, the recent attempt by AGCM to develop a policy aimed at educating on consumption is yet another positive sign. It can be regarded as a preventive intervention for the benefit of consumers. The range of communications activities by the institutions and the establishment of a “contact centre” are precise tools that enable the emergence of aware and informed consumers, capable of ‘punishing’ uncompetitive markets.

In a nutshell, the protection of consumers and competition are mutually reinforcing factors.

Their relationship is mutual and the activities of an independent authority like AGCM, unencumbered by concerns related to representation and political dependence, must be capable of facing the aforementioned challenges, in a general system in which the authority does not enjoy absolute discretionary power, but rather facilitates the creation of a transparent bilateral debate between the AGCM and private citizens and, in an indirect way, between AGCM and administrative judges.