Kluwer Competition Law Blog

The Timely Initiation of Competition Law and Consumer Protection Investigations by the National Enforcer: Just An Antitrust/Consumer Protection Matter? Just an Italian Issue? (Cases AGCM, C-491/24; Caronte, C-511/23; and Trenitalia, C-510/23)

Marco Cappai (University of Roma Tre) and Giuseppe Colangelo (University of Basilicata) · Monday, August 26th, 2024

Background

On September 5, the Advocate General Pikamäe is expected to deliver an opinion in the *Caronte* (C-511/23) and *Trenitalia* (C-510/23) cases. Despite the different legal bases, the cases revolve around the same question, that is whether competition law and consumer protection rules, read in the light of the effectiveness of administrative action, preclude national legislation, such as that arising from the application of Article 14(2) of the Italian Law on Administrative Offences (Law No. 689/1981 – ILAO), as interpreted in the most recent case-law, which requires the Competition Authority (AGCM) to initiate the investigation within a time limit of 90 days, starting from the moment the Authority has knowledge of the essential elements of the infringement, the latter of which may be met by the first report of the proceedings.

However, these are not the only two Italian cases on the subject. In fact, a third is on the way (*AGCM*, C-491/24), which results from a very recent decision involving antitrust proceedings against Apple and Amazon.

Since the three cases raise the same problem, it is helpful to review the background of the most recent one to understand why the upcoming opinions of the Advocate General should consider that the issue at hand extends beyond antitrust and consumer protection, as well as beyond the Italian context.

The *Apple/Amazon* case

With decision No. 29889 of 16 November 2021, the AGCM, imposed a fine of € 114,681,657 for the Apple Group and € 58,592,754 for the Amazon Group under Art. 101 TFEU (seehere for the fine redetermination). According to the AGCM, Apple and Amazon entered agreements that restricted access to Amazon's marketplace intermediation services for retailers —both official and

unofficial— other than those specifically authorized. These agreements discriminated against other legitimate sellers of Apple and Beats' products on geographic and subjective grounds.

The parties appealed the decision before the first instance Italian Administrative Court (IAC). One of Amazon's grounds for appeal was the allegation that the AGCM initiated the investigation after the expiration of the 90-day time limit prescribed for notifying the opening of sanctioning proceedings under Article 14(2) of the ILAO. Amazon argued that this time limit should be applied with full stringency to competition law proceedings. Indeed, Article 31 of the ICL refers to the general principles governing administrative offences, including those from Article 14(2), 'insofar as applicable.' This interpretation aligns with the predominant case law of the Council of State (CoS), the Italian Supreme Administrative Court (e.g., CoS, VI Chamber, 4 October 2022, No. 8503).

The Italian legal doctrine is unique when compared to both European law and other national legal systems. Generally, the only constraints faced by antitrust enforcers are the five-year limitation periods for imposing and enforcing fines —outlined in Articles 25-26 Reg. (EC) No. 1/2003 and, similarly, Article 28 of ILAO— along with the flexible limit derived from the general principle of 'reasonable duration of proceedings' (Articles 47 CFREU and 6 ECHR). Article 14(2) of ILAO operates in conjunction with, rather than as a substitute for, these constraints. Under this provision, the untimely notification of charges results in the annulment of the administrative fine —a provision that is not found elsewhere.

To better understand how the time limit functions in practice, it is helpful to outline the main stages of antitrust investigations conducted by the national enforcer. In Italy, a standard competition law proceeding typically follows this structure:

1. Pre-investigative activity;
2. Launch of the investigation, with the notification to the concerned party/parties of the opening decision, which is also published in the Official Bulletin of the AGCM. This decision includes the legal basis of the charge, the conduct under scrutiny, the proposed theory of harm, and the deadline for concluding the procedure (see Article 6 of the Decree of the President of the Republic No. 217 of 1998, 'Rules of procedure' or 'Presidential Decree No 217/1998, and Article 12(1) ICL);
3. Notification of the Statement of Objections (SoO), where the prosecuting office formalizes the charge and proposes the content of the final decision to the Board of the AGCM. This may involve amending the preliminary findings from the opening decision based on the evidence gathered during the investigation (Article 14(1) of the Rules of Procedure);
4. Public hearing before the Board, if requested by the involved parties (Article 14(6) of the Rules of Procedure);
5. Adoption of the final decision by the Board (Articles 14(9) of the Rules of Procedure and 15 ICL).

This structure is largely mirrored in the standard administrative procedure followed by the AGCM to prosecute violations of consumer protection laws under Article 27 of Legislative Decree No. 206 of 2005 (Consumer Code). However, there are key differences: in this second type of investigation, the opening decision is not published in the Official Bulletin; the SoO is a more concise document; and the concerned parties do not have the right to a hearing before the Board.

The time limit established by Article 14(2) ILAO applies to the notification of the opening

decision, while the reasonable duration of the proceeding is evaluated based on the notification of the final decision.

In the case at stake, the AGCM notified the opening decision on July 21, 2020, even though it had received a complaint about the same practice from the retailer Digitech 17 months earlier, on February 22, 2019.

The IAC accepted Amazon's argument, concluding that the AGCM had initiated the investigation too late (IAC, Rome, I Chamber, 3 October 2022, No. 12507). However, the Court supported this conclusion with a slightly different line of reasoning. Consistently with its settled case law, the Court ruled that the 90-day time limit does not apply as such. The reference in Article 31 ICL to the general principles of the ILAO, according to the Court, applies only to administrative fines and not to the preliminary stage of proceedings, which is governed independently by Presidential Decree No. 217/1998. Since this Decree does not impose a similar time limit, the Court found that there is no 90-day restriction (see also IAC, Rome, I Chamber, 24 March 2022, No. 3334).

At the same time, the IAC asserts that the non-direct applicability of the 90-day time limit under Article 14(2) ILAO, and the absence of a specific regulation in secondary law, cannot justify an unlimited extension of the pre-investigative phase. Such an approach would conflict with general principles of administrative law, including the need for efficiency in administrative actions and legal certainty, as outlined in the Italian Law on Administrative Procedure (Law No. 241/1990). At the supranational level, it would also violate principles of fair proceedings (Articles 47 CFREU and 6 ECHR) and good administration (Article 41 CFREU). Therefore, the competent authority must initiate the investigation within a 'reasonable' time frame, taking into account the complexity of the case (see also IAC, Rome, I Chamber, 12 June 2018, No. 6525, and earlier, 1° April 2015, No. 4943 and 23 December 2016, No. 12811). The reasonable time limit begins not from the moment the authority becomes aware of the facts, but from when the AGCM has sufficient knowledge of the unlawful conduct to properly formulate the charge in the opening decision.

In this case, the IAC noted that the only action taken by the AGCM during the 17 months between Digitech's complaint and the initiation of the investigation was the online acquisition of company profiles of certain distributors and some e-commerce statistics, which occurred on June 4, 2020—16 months after the complaint was received. Approximately a month and a half later, the Authority initiated the proceedings. The Tribunal found that this timeline for the pre-investigative stage violated the principles of efficiency in administrative action, legal certainty, fair proceedings, and good administration. As a result, the IAC completely annulled the decision of the Italian antitrust authority.

The request for a preliminary ruling: the AGCM seeks a white card, Amazon wants a black card, and the CoS proposes a grey card while consulting the CJEU

The AGCM appealed the first-instance judgment before the CoS, arguing, among other things, that in the absence of a specific time limit in the ICL and the Rules of Procedure, the pre-investigative stage of the proceedings should not be subject to any limitation (see, consistent with this interpretation, CoS, VI Chamber, 12 February 2020, No. 1046, and, in the context of unfair commercial practices, id., December 21, 2021, No. 8492).

Moreover, the AGCM contended that, even if the Supreme Administrative Court were to recognize the existence of a time limit for launching the investigation, it would be disproportionate to annul the entire final decision solely because the opening decision was allegedly notified late. In this context, EU case law on the reasonable duration of proceedings requires the charged party to demonstrate that the excessive length of the investigation rendered the effective exercise of their right of defense impossible (e.g., *Limburgse Vinyl Maatschappij NV et al*., Case C-238/99 P). In contrast, the prevailing Italian legal doctrine establishes a genuine irrebuttable presumption: whenever the time limit expires, the concerned party's right of defense is considered to be infringed.

This represents a significant difference.

In the *Caronte* case —concerning a unilateral practice under Article 3(a) ICL, corresponding to Article 102(a) TFEU— the IAC expressed concern that Italian legal doctrine might undermine the effectiveness of EU competition law. Specifically, when national judges identify a violation of Article 14(2) ILAO, the antitrust decision is annulled in its entirety. This means not only is the sanction invalidated, but also the order to cease and desist from the unlawful conduct, potentially allowing the involved undertaking(s) to continue or resume the illegal activities. Furthermore, any remedies attached to the final decision are also invalidated.

Additionally, recognizing a binding time limit could imply an obligation to initiate investigations based on a strict chronological criterion, which might threaten the competition authority's ability to set its own enforcement priorities (see Articles 3 and 4(5) of Directive No. 1/2019/EU, the ECN+ Directive, as transposed by Article 12(1-ter) ICL). Finally, the necessity to start proceedings within a short timeframe could lead to less thorough and accurate pre-investigations (IAC, Rome, I Chamber, 1° August 2023, Order No. 12962, introducing Case C-511/23 and already discussed on this Blog here).

Interestingly, on August 8, 2023, the IAC referred the preliminary question to the CJEU, alongside a parallel request in the *Trenitalia* case concerning the public enforcement of the Unfair Commercial Practices Directive (Directive 2005/29/EC, UCPD). In Italy, as noted, this responsibility also falls to the AGCM under Article 27 of the Consumer Code (see IAC, Rome, I Chamber, 2 August 2023, Order No 13016, introducing Case C-510/23).

Further, Amazon has appealed the part of the first-instance judgment where the IAC ruled that Article 14(2) ILAO does not directly apply to antitrust proceedings but only as a 'reasonable' time limit derived from general principles. Amazon argues that the 90-day limit should literally apply to antitrust investigations conducted by the AGCM, making it a mandatory timeframe (see CoS, No. 8503/2022). Consequently, even if the AGCM's arguments about the reasonableness of the elapsed time were successful, they would not be relevant to this interpretation.

Finally, the case has reached the CoS.

As previously noted, the Italian Supreme Administrative Court's case law has been stricter than that of the IAC. Both agree that antitrust investigations must adhere to a mandatory time limit. However, while the IAC proposes a 'reasonable' term, the CoS argues that Article 14(2) ILAO directly applies, implying a strict 90-day limit.

This stance represents the 'black card': a fixed 90-day time limit whose breach leads to the

complete annulment of the final decision in all its aspects.

However, under pressure from the AGCM and the European Commission, which reportedly sent a preliminary letter to Italy under Article 258 TFEU, the IAC referred two parallel requests to the CJEU in the *Caronte* and *Trenitalia* cases. These requests question whether Italian law is compatible with the effectiveness of EU competition law.

A preliminary review of the reasoning behind these requests suggests that if the Luxembourg Court follows the IAC's line of reasoning, it may be inclined to rule that Italian law is incompatible with EU law (see here).

If the CJEU takes this route and declares Italian law incompatible with EU law, the AGCM would be freed from these constraints. Consequently, Article 14(2) ILAO would be disapplied, and the time limits for launching an investigation would align with those for adopting a final decision. Thus, the pre-investigation and investigation phases would need to adhere collectively to the principle of reasonable duration. This would give the enforcer substantial leeway and significantly reduce the chances of success for the charged parties. Clearly, this represents the 'white card' scenario.

The CoS has proposed a 'grey card,' presenting a balanced compromise solution for the first time (CoS, VI Chamber, 9 July 2024, order No 6057).

First, it confirms that, in the absence of specific exceptions in antitrust laws, the general rule established under Article 14(2) ILAO applies to this field. Therefore, the AGCM must adhere to the mandatory 90-day time limit. Second, it clarifies that this time limit begins only when the AGCM has acquired sufficient knowledge of the relevant facts. In addition to these points, the CoS introduces two new arguments that, to the best of our knowledge, have not previously been articulated so explicitly.

First, the Supreme Administrative Court argues that Article 14(2) ILAO would be more compatible with EU law if the AGCM's role during the pre-investigative stage were clarified. According to the CoS, the opening decision should only outline, among other things, the legal basis for the charge, the conduct under scrutiny, and the proposed theory of harm. Any further investigation should be reserved for the investigative stage. In other words, the AGCM should not be allowed to exercise its powers to request information and documents (Article 9), conduct inspections (Article 10), or carry out appraisals, even appointing external experts (Article 11), during the pre-investigative phase.

Most notably, the CoS suggests refining its case law regarding the legal consequences of delays. It proposes that the time limit under Article 14(2) ILAO, designed to regulate proceedings for imposing administrative fines and to ensure the right of defense, should apply only to the exercise of the sanctioning power under Article 15(1-bis) ICL. Therefore, if the Authority fails to meet this time limit, it can still exercise its remaining powers, including finding an infringement, issuing a cease-and-desist order, and, if applicable, imposing remedies under Article 15(1) ICL.

According to the CoS, this balanced compromise solution would not undermine the effectiveness of EU competition law. This is supported by Recital 14 of the ECN+ Directive. The latter indicates that the safeguards outlined in Articles 41 and 47 CFREU and the relevant case law represent only a minimum level of protection. Member States are allowed to provide additional safeguards, as long as these do not render the effective application of Articles 101 and 102 TFEU practically

impossible or excessively difficult. Given the proposed adjustments to Italian law, this would not be the case.

Waiting for the CJEU

By rejecting the binary choice between fully upholding or fully invalidating the administrative decision, the CoS's solution offers two main advantages.

First, it emphasizes the very essence of antitrust decisions: complex administrative acts resulting from the combined exercise of various powers. According to the ECN+ Directive, NCAs have the authority to determine if an infringement of Articles 101 or 102 TFEU is ongoing or has occurred in the past (Article 10), to impose proportionate remedies (Article 10), and to impose fines (Article 13). Therefore, a simplistic sanction/non-sanction approach is inadequate. When challenging a final decision from a competition authority, a broader perspective is needed (see extensively here). The CoS's reasoning aligns well with this understanding.

Second, the Supreme Administrative Court's solution eliminates the need for the charged party to prove that the delay in initiating the investigation has genuinely compromised its right of defense. Such a requirement imposes a *probation diabolica* and often renders the guarantee ineffective in practice.

Certainly, balancing individual rights with the general interest can be a challenging task. For example, the CJEU might argue that by reducing the likelihood of facing a fine in Italy, the solution proposed by the CoS could undermine the deterrent effect of EU competition law. However, one could counter this by pointing out that the CoS's interpretation still upholds the portion of the final decision related to finding an infringement. This finding is essential for follow-on litigation. According to Recital 3 of Directive 2014/104/EU, 'the full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone… can claim compensation before national courts for the harm caused to them by an infringement of those provisions.' Thus, maintaining the infringement finding might be sufficient to achieve the directives' objectives.

On a different note, the CJEU might object to the part of the preliminary request where the CoS argues that the AGCM should be prohibited from using its fact-finding powers, such as requesting information and documents, during the pre-investigative stage. Often, these requests are essential for assessing the reliability and robustness of the received complaint or the information gathered *ex officio*. Additionally, the reference order notes that the powers described in Articles 8-11 of the Rules of Procedure should be exercised only after the notification of the opening decision, not before. However, this provision needs to be aligned with the revised Article 12(2-bis) ICL, which, following the implementation of the ECN+ Directive, explicitly allows the AGCM to request information and documents 'at any time.' Notably, under Article 2(3) of Commission Regulation No 773/2004 and Articles 17-22 of Regulation No 1/2003, the DG COMP is explicitly empowered to conduct raids and submit requests for information and documents before adopting an opening decision. Proper pre-investigations can actually benefit the charged party, as additional evidence may lead the enforcer to reconsider starting the investigation. Furthermore, fact-finding activities help enforcers to allocate their resources more effectively, in line with the priorities they set.

Another important issue not addressed in the preliminary reference is how the duty of NCAs and

DG COMP to coordinate enforcement actions within the ECN affects the Italian statutory time limit for initiating investigations. By analogy with Recital 70 and Article 29 of the ECN+ Directive, it seems reasonable to suspend the time limit to allow for the assessment of whether the Authority is appropriately positioned within the ECN framework (see Commission Notice on cooperation within the Network of Competition Authorities, para. 16).

It remains uncertain whether effectiveness will outweigh procedural autonomy in this case. In our opinion —considering the proposed adjustments— there is room to declare the CoS's solution compatible with EU law. This is particularly true given that, unlike in other Member States, the AGCM is not bound by a statutory deadline for concluding investigations. Instead, it determines the timeline for each investigation in its opening decision, which can be extended if deemed justified based on the AGCM's discretionary assessment.

Just an antitrust/consumer protection matter? Just an Italian issue?

That said, our goal is not to delve into this complex forecasting issue. Instead, with the Advocate General expected to deliver an opinion in the *Caronte* and *Trenitalia* cases on September 5, we aim to highlight two important methodological points.

First, this issue extends beyond antitrust and consumer protection. Although the preliminary references involve Article 101 TFEU (*AGCM*, C-491/24), Article 102 TFEU (*Caronte*, C-511/23), and the UCPD (*Trenitalia*, C-510/23), there is a significant risk that a narrow judgment from the Luxembourg Court could trigger a wave of similar requests from Italy. The reason is straightforward: the Italian debate has focused on the AGCM's (antitrust/consumer protection) powers largely because sector-specific laws in other areas of EU administrative economic law explicitly set time limits, often extended. For example, there are 180-day limits in the energy sector (Article 45(5) Legislative Decree No 93/2011) and in the banking and financial sectors (Article 195(1) Legislative Decree No 58/1998), and 120 days in the privacy sector (Article 166(5) Legislative Decree No 196/2003 and table B, point 2, V line of the Garante per la Protezione dei Dati Personali's Regulation No 2/2019).

Notably, in all these legal fields a delayed launch of the investigation results in the complete annulment of the final decision. Therefore, from the CJEU's perspective, it is irrelevant whether the Italian statutory time limit originates from a general law (ILAO), as seen in antitrust and consumer protection, or from sector-specific laws, as in other areas. Given this, the Court should avoid 'flattening' its responses relying solely on the specifics of European secondary law and Italian procedural legislation in antitrust and consumer protection. Instead, the Court should aim to deliver a reasoned, principle-based decision, potentially by its Grand Chamber. It should adopt a constitutional perspective, grounded in fundamental rights, to develop a minimum set of legal principles applicable to all situations where EU administrative sanctions are imposed.

Second, for the same reasons, the Court should recognize that this issue extends beyond Italy.

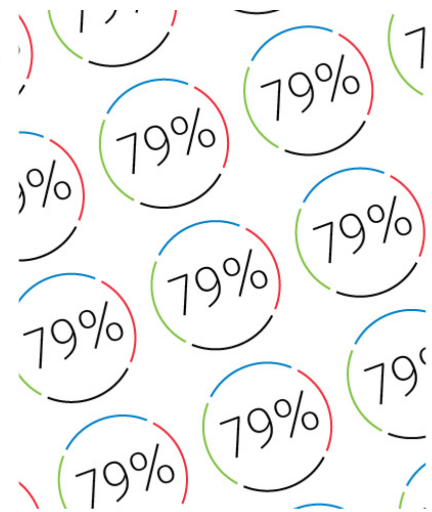
In conclusion, the question of the timely initiation of EU administrative punitive proceedings is not limited to antitrust or consumer protection investigations by the AGCM, nor is it confined to Italy alone. Therefore, it would be prudent for the CJEU to provide more than a simple statement of whether EU law 'precludes' or 'does not preclude' the solution advanced by the CoS in the Apple/Amazon case.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Monday, August 26th, 2024 at 4:52 pm and is filed under Consumer protection, European Court of Justice, Investigations, Italy, National competition authorities (NCAs)
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.