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Skyward Bound: Innovating the FUTURE OF AVIATION

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The new enforcement powers of the AGCM and their impact on the aviation sector

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* The views expressed are personal and do not necessarily reflect those of AGCM

Introduction and outline

- In the past three years legislative upgrades of the AGCM's toolbox:
  - **Legislative Decree 185/2021:** transposition of the ECN+ Directive (2019/1) streamlined the power of NCAs
  - **Law No. 118/2022**: Annual Competition Law 2021
    - Aligment with EU merger control law of Italian merger control
    - Stronger enforcement power in antitrust and merger pre-investigative phase
    - Digital platform and abuse of economic dependence
    - Transaction procedure for antitrust cases
    - **Merger call-in provision**
  - **D.L. No. 104/2023** (D.L. Asset): **New Competition Tool**
  - **Law No. 214/2023**: Annual Competition Law 2022
    - AGCM appointed as the national competent authority within the DMA enforcement framework
    - Extended the time-line reviewing mergers in Phase II (from 45 to 90 days)
- Focous of this presentation:
  - **New Competition Tool (NCT)**
  - **Merger call-in provision** (Art. 16(*1-bis*) national competition law)

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The New Competition Tool (NCT)

- **EU Commission consultation for the adoption of a NCT (2020):**
  - to deal with structural competition problems across markets which cannot be tackled or addressed in the most effective manner on the basis of competition rules
    - **structural risks for competition:** certain market characteristics (e.g. network and scale effects, lack of multi-homing and lock-in effects) coupled with the conduct of the companies operating in those markets can create a threat to competition.
    - **structural lack of competition:** certain market structures do not deliver competitive outcomes (i.e. a structural market failure), even without companies acting anti-competitively.
  - eventually abandoned and DMA was adopted instead to target gatekeepers in digital markets
- **NCT modelled on the market investigations** which the UK Competition and Markets Authority (CMA, formerly OFT) has been carrying out since 2002 (Enterprise Act).

The New Competition Tool (NCT)

- **NCT is spreading:**
  - Germany (July 2023)
  - Italy (October 2023)
  - Denmark (July 2024)
  - Work-in-progress: Netherlands, Hungary, Czech Republic, Norway, Sweden
- **Draghi Report** (2024)
  - The introduction of an NCT for DG COMP to carry out a Market Study to identify the problem and then a Market Investigation to determine the solution together with firms to solve it.
  - **4 areas of potential intervention** where current competition tools are known to be insufficient:
    - (i) tacit collusion;
    - (ii) markets where the need for consumer protection is more likely to be needed, for instance due to consumers belonging to sensitive categories or having behavioral biases;
    - iii) markets where economic resilience is weak, one cause of which could be market structure (e.g. reliance on a single source of raw material) leading to frequent shortages or other harmful outcomes;
    - (iv) past enforcement actions where the information/data received by the authority indicate that the commitments or remedies adopted are not delivering

Italy: From market studies to market investigation

- **Market studies/Sector inquiries** have always been part of the tools at the AGCM's disposal since its establishment (see Art. 12(2) Law No. 287/90)
- Market studies **could lead to** :
  a) **Antitrust enforcement** (prohibition of restrictive agreements or abuse of a dominant position) if conducts of undertakings or associations of undertakings in breach of antitrust rules is detected
  b) **Recommendations to the legislature** in the event of the existence of regulatory provisions distorting competition by restricting market access or the exercise of an economic activity without justification
  c) **However,** in the event that the inquiry showed sub-optimal competitive outcomes in the market(s) under investigation, which could not be ascribed either to corporate conduct or to the regulatory framework, the inquiry had to be limited to highlighting these sub-optimal outcomes without being able to intervene to correct them; a paradigmatic example being tacit collusion.
- **Art. 1(5) D.L. 104/2024 (D.L. Asset): Market investigation power**
  - Now in hypothesis (c), it is possible for the Authority to adopt structural or behavioural measures to remedy uncompetitive outcomes that may emerge in the markets

Italy: from market studies to market investigations

- **Art. 1(5) D.L. Asset:**
  - «If, as a result of a **market** investigation, the Authority finds **competition problems hindering or distorting the proper functioning of the market**, it may impose on the undertakings concerned, **any structural or behavioural measures necessary and proportionate**, with a view to eliminating distortions of competition", adding "to this end, in the air passenger transport markets, the Authority may consider, inter alia, the following elements: the structure of the market; the way in which prices are set; the risks for the competitive process and for consumers arising from the use of algorithms based on artificial intelligence or on user profiling; the competitive and price dynamics linked to the seasonality of demand; the needs of territories that are difficult to reach by means of transport other than air; the need to protect particularly vulnerable classes of consumers»
- **Council of State** provided clarification on the interpretation of the above-mentioned provision in **Opinion No. 61/2024:**
  - «The [judge] agrees with the interpretation of Article 1, paragraphs 5 and 6 of Decree-Law no. 104 of 10 August 2023, as converted by Law no. 136 of 9 October 2023, in the sense that **the** sanctioned **attribution to the AGCM of the power** to formulate sanctioned requests for information, to carry out inspections and **to impose structural or behavioural measures aimed at restoring competitive conditions in the markets concerned** by the market investigations […] **is of a general nature and scope of application, without sectoral and/or product-related limitations»**.

The Italian Market Investigations

- **The AGCM Communication on the market investigation procedure (May 2024)**
  - **PHASE I: fact-finding phase:** similar to previous market studies, it is aimed at acquiring information on the market, its functioning and the relations between operators, as well as the regulatory framework
  - **DRC (Delibera delle Risultanze Conoscitive) indicates:**
    - a. competition problems capable of hindering or distorting the proper functioning of the market and thereby harming consumers;
    - b. the possible types of measures which the Authority considers, *prima facie*, to be necessary and proportionate to overcome the competition problems;
    - c. the undertakings concerned which are potentially addressees of the measures;
    - d. a time limit, not less than 45 days, for the submission of written pleadings and documents, for the exercise by the undertakings concerned of their right to be heard before the Offices, and for the submission of any undertakings.

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The Italian market investigations

- **PHASE II: remedial phase:** adversarial with the undertaking concerned
  - Possibility of submitting commitments to eliminate the problems hindering or distorting the proper functioning of the market identified in the DRC that are market tested + the request for opinion of the sector regulator (if any)
  - Definition of remedial measures which are communicated to the companies and published in the Bulletin, discussion with the parties (written and possibly oral), request for the opinion of the sector regulator (if any), adoption of the final decision
- The Italian regulator for energy and gas (ARERA) lodged an appeal against the Communication, pleading an invasion of its competence by the AGCM when applying this new power in one of the sectors regulated by ARERA

On-going market investigations

- Market investigation concerning **Price Algorithms in Air Passenger Transport on National Routes to and from Sicily and Sardinia (IC56)**
- Started on 14 November 2023:
  - Preliminary Report expected in October 2024
- IC56 opened following the closing of case I/863 where no proof of anticompetitive contacts between competitors was found
- **The issues:**
  - verify **the spread of price algorithms in the revenue management systems** used by the various airlines and to analyse their main characteristics and possible effects of hindering and/or distorting competitive dynamics, as well as possible prejudice for consumers also in terms of opportunities and conditions of choice
  - asses **whether and under what conditions the algorithms used by airline companies might be able to affect -** or actually affect - **in a negative way the conditions under which air transport services are offered to consumers,** also with regard to price differentiation and customisation policies and the socially undesirable effects of an improper functioning of the market
  - examine how **the prices of airline tickets and their various components are made known and accessible to the public,** given that these methods affect both the degree of transparency of the prices themselves and their comparability, with a possible impact on the formation of consumers' purchasing decisions and on the mobility of demand and, therefore, with potential repercussions on the sector's competitive dynamics

On-going market investigations

- **Market Investigation in Educational Publishing (IC57)**
  - Launched on 10 September 2024
- **The issues:**
  - Sector characterised by a strong and **growing degree of concentration**
  - **Distinctive features:** those who choose the textbooks (the teachers) and those who pay for them (the students' families) are different subjects
  - **The specific dynamics of distribution:** new possibilities of direct downloading of works in digital format and the evolutions observed in the wholesale and retail stages, where, alongside traditional operators, both large-scale retail trade (GDO) and online platforms have been operating for some time now
  - **Secondary markets** for paper editions seem to experience problems due to the succession of renewed editions of the same title . Alternative ways aimed at containing the costs borne by consumers (e.g. rental, loan for use) have not so far found substantial development in the national context.
    - **E-books: specific issues** and disputes relating to ownership and licensing rights, with significant effects on the organisation and development of the relevant secondary markets.
  - How **competition at the retail level is affected by Law n. 15/2020** (Legge Levi) - that has established stringent limits to discounts and promotional activities (Genakos, Pagliero, Sabatino, Valletti, *The Impact of Fixed Book Price Regulation on Prices and Variety: Evidence from the Italian Book Market*(2023)).

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The traditional principles of the European merger control system

In the EU, the merger control system has traditionally been based on meeting **certain thresholds**:

- the competence of the European Commission or national authorities was always determined on the basis of the **turnover of the undertakings party to the** transaction
- the only exceptions at EU level were Spain and Portugal, where the notification obligation is also triggered when the **market shares of the parties** exceed certain thresholds (the calculation of the shares presents elements of uncertainty)

Based on the *one-stop-shop* principle, (**as a rule**) the Commission has exclusive competence to examine mergers with an **EU** dimension, whereas the competence of national authorities extends to transactions without an *EU* dimension

The genesis of recent developments in European merger control

Over the past decade, a debate has developed on the inability of the traditional merger control system to counter the growing phenomenon of the acquisition of companies that play a significant competitive role in the market, or could play such a role, while generating little or no turnover at the time of the merger (such transactions include '*killer acquisitions*')

For example, it was noted that GAFAM made over 900 acquisitions between 2000 and 2020: '*Worldwide, approximately 97% of these tech company acquisitions have not even been vetted by any competition authority*' (Kwoka and Valletti)

Acquisitions not reviewed by any authority in the EU

(except UK which approved them unconditionally in Phase I)

2012: acquisizione di Instagram da parte di Facebook

(oggi i due principali *social network*)

2013: acquisizione di Waze da parte di Google

(oggi Google Maps e Waze sono le due principali app di navigazione)

The introduction of thresholds based on transaction value

To examine transactions that would have escaped the traditional turnover-based thresholds, thresholds based on transaction value were introduced in **Germany** and **Austria** in 2017:

- €400 million in Germany (provided that the combined turnover of the parties exceeds €500 million and the German turnover of a party exceeds €50 million)
- €200 million in Austria (provided that the parties' combined turnover exceeds €300 million and their Austrian turnover exceeds €15 million)

In both cases, for the notification obligation to be triggered, it is required that **the acquired company has significant activities** in Germany or Austria (a notion that presents questions of interpretation)

Article 22 of the Merger Regulation

Article 22 of the Merger Regulation allows the Commission to exercise**, at the request of one or more Member States,** the power to examine transactions that do not have an *EU dimension*:

i. are likely to **significantly affect competition** in the referring State(s)

ii. have an **impact on trade between Member States**

Since its introduction in 1990, this instrument has made it possible to benefit from a *one-stop shop* for complex mergers that might otherwise be subject to parallel scrutiny by several authorities (the provision also allowed authorities without jurisdiction to join the referral request)

The Commission assesses the effects of the concentration **within the territory of the referring States** (unless it is necessary to assess the effects of the concentration in a wider territory, e.g. due to the size of the geographic market)

Until 2021, the Commission discouraged national authorities from making Article 22 referral requests *for* transactions that were not even subject to the jurisdiction of the requesting authority under the national regime because they were sub-threshold. This was on the basis of "*experience showing that such transactions generally did not have a significant impact on the internal market*" (Communication of 2021, § 8)

The Commission's position: new interpretation of Article 22

In March 2021, the Commission indicated its intention to encourage and accept Article 22 referrals of transactions:

- **sub-threshold** under the regimes of all Member States
- that may have a **significant impact on competition** (particular attention is paid not only to the digital sector, but also to the pharmaceutical sector, sectors in which innovation is the key parameter of competition)
- provided that **no more than six months have elapsed since the *closing*** (although the door is also left open to postponements beyond that period)

In April 2021, the Commission accepted the request for referral of the ***Illumina/Grail* case** made by the French authority, which, under its national regime, was not competent to examine the transaction (a referral request also joined by five other EU and EFTA authorities, which also lacked jurisdiction)

The *Illumina v. Commission* saga

The companies challenged the Commission's decision before the **General Court,** and the latter, in its judgment of 13 July 2022 (Case T-227/21), **endorsed the Commission's position,** but the General Court's **ruling was set aside by the Court of Justice in its judgment of 3 September 2024** (Joined cases C-611/22P and C-625/22P):

- The Commission may accept a referral under art. 22 Reg. 139/2004 only by a national competition authority which is competent under its national merger control law to review the transaction
- "*The broad interpretation of the first subparagraph of Article 22(1) […] is at odds with the principle of institutional balance, characteristic of the institutional structure of the European Union, deriving from Article 13(2) TEU, which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions*" (para 215)

The new Article 16(1-*bis*) of Law No. 287/90

- Art. 16 (1-*bis*) has been introduced by Law n. 118/2022 and attributes to the AGCM the power to call-in (i.e. request the notification) a concentration that, although not subject to notification on the basis of the parties' turnover, cumulatively fulfils three conditions:

  i. the transaction must exceed **one of the two turnover thresholds in Italy** laid down in Law No 287/1990 **or** the total worldwide turnover of all the undertakings concerned must **exceed €5 billion**

  ii. the transaction must raise '***real risks for competition in the national market***, *or in a substantial part of it, also taking into account the detrimental effects on the development and spread of small companies characterised by innovative strategies*'

  iii. no ***more than 'six months'*** must have elapsed since the transaction was finalised

If these conditions are met, AGCM may require the undertakings concerned to notify the concentration '*within 30 days*'.

The first application of the new provision by the AGCM

On 13 December 2022, following market consultation, the AGCM adopted a notice defining the procedural rules for the application of the new discipline

Companies can voluntarily inform AGCM of a below thresholds transaction by providing a given set of information

- The AGCM undertook to inform, within 60 days of receiving a complete voluntary submission, whether it intends to request a notification of the transaction

To date, the AGCM has **requested the notification of nine below-thresholds concentrations:**

- **three as a result of voluntary notification** (compared to seven notification received), of which one is in Phase I, one was withdrawn shortly after the start of Phase II and one was approved in Phase II with conditions;
- **five following reports** (from a competitor and, above all, anonymously through the Authority's whistleblowing platform), four of which were approved in Phase I , while one was approved in Phase II with conditions;
- **one on the basis of the Authority's constant monitoring of announced or completed acquisitions.**

The interaction between Article 22 Reg. 139/2004 and Article 16 para. 1-*bis*

Three possible scenarios (with respect to a below-thresholds merger affecting various parts of the EU, including Italy):

- **The Authority joins a referral *pursuant to* Art. 22**: it is no longer possible to recall the transaction pursuant to Art. 16 para. *1-bis*
  - The Commission will examine the effects of the transaction also with regard to the Italian territory
- **The Authority call-in a merger pursuant to Art. 16 c. *1-bis***: it is always possible to make or join an Art. 22 referral; in that case, however, the proceedings are closed at national level
  - Exploit synergies between Art. 16(1a) and Art. 22 to ensure effective control of problematic below-thresholds transactions
  - This scenario has become especially relevant post CJUE's ruling in Illumina v. Commission, in order to have the Commission reviewing (loyal cooperation Art. 4(3) TEU)
- **The Authority**, before or after the referral of an Art. 22 transaction by one or more Member States, **call-in the transaction *under* Art. 16 c. *1-bis* and does not join the** referral
  - Close coordination with the Commission is necessary (see Germany in Kustomer/Facebook)

The merger call-in provision and the aviation sector

- **Airlines mergers and alliances:**
  - These deals are generally scrutinized by the EU Commission under EU merger control rules (Reg. 139/2004)
- **Airport mergers:**
  - Consolidation of airport operators
  - See case C12611 - F2I LIGANTIA/SO.G.AER.
    - F2I holds the airport of Alghero and Olbia
    - SO.G.AER. holds the airport of Cagliari
- **Other operators** in the aviation sector:
  - GDS (Global Distribution System)
  - Handling
  - Etc.

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Conclusions

- «With great power comes great responsibility»
- The NCT and the merger call-in provision are necessary and powerful tool to guarantee effective protection of competition in markets where competition does not work well or where it could be put at risk
- However, they must be used with caution…