

HORIZONTAL CO-OPERATION BETWEEN INSURANCE COMPANIES

The Italian experience

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SUMMARY

- Market transparency is generally seen as positive...
- ... but may be anti-competitive

AGCM AND INFORMATION EXCHANGE

- (i) Type and quality of the information exchanged
- (ii) Characteristics and structure of the market

INFORMATION EXCHANGE IN THE INSURANCE SECTOR

- Transparency in the insurance sector
- The *lama Consulting* case
- Three interesting aspects of the decision
- Judicial review
- *lama Consulting* decision and EU principles

Market transparency is generally seen as positive...

Perfect competition implies perfect information both on demand-side and supply-side

- Supply-side, the knowledge of the market and its key features facilitates the development of efficient and effective commercial strategies by market players. New entrants or fringe players may benefit from this information
- Demand-side, increased knowledge of market conditions benefits consumers, who can choose between competing products with a better understanding of the product characteristics and face lower search costs

... but may be anti-competitive

Transparency is one of the facilitating factors required for tacit collusion to be sustainable

- companies need to acquire detailed knowledge of competitors' pricing and/or output strategies to reach terms of coordination, to monitor compliance with such terms and to effectively punish deviations, the artificial removal of the uncertainty about competitors' actions can eliminate the normal competitive rivalry
- particularly in highly concentrated markets where increased transparency enables companies to better predict or anticipate the conduct of their competitors and thus align themselves to it

The Italian Competition Authority (AGCM) and information exchange

AGCM largely follows EU rulings, relying mainly on two factors

(i) Type and quality of the information exchanged

(ii) Characteristics and structure of the market

(i) Type and quality of the information exchanged

The subject matter of the exchange

- Confidential information on the essence of the business, such as prices, quantities and commercial strategies, cannot generally be disclosed to competitors
- case-by-case assessment for other matters (deliveries to customers, capacity utilisation, market shares)

The level of detail

- The greater the detail, the greater the possibility of predicting competitors' future conduct and of adjusting accordingly
- In general, AGCM does not object to the dissemination of aggregated data, as long as they prevent identification of specific companies

Frequency of exchange

- Companies can adapt their commercial policy better and more timely if data exchanges are frequent

(ii) Characteristics and structure of the market

The nature of the products in question

- It is easier for companies to coordinate prices in homogeneous product markets

The level of concentration in the market

- The more concentrated a market, the easier it is for competitors to find and enforce sustainable coordination
- Information exchange may be very problematic in oligopolistic markets, particularly if protected by high entry barriers

Information exchange in the insurance sector

Transparency in the insurance sector

- In the insurance sector a certain degree of cooperation between competitors is recognized as pro-competitive (European Commission's Block Exemption Regulation to exempt categories of horizontal agreements between insurance companies)
- Rationale: calculations, tables and studies make it possible to improve the knowledge of risks and facilitate the rating of risks for individual companies; this can in turn facilitate market entry and thus ultimately benefit consumers
- However, no unnecessary restrictions of competition are covered by the block exemption
 - agreements on commercial premiums are not exempted
 - calculations, tables or studies are only exempted if they (a) do not identify the insurance companies concerned or any insured party; (b) when compiled and distributed, include a statement that they are non-binding; and (c) are made available on reasonable and non-discriminatory terms, to any insurance undertaking which requests a copy of them

The *Iama Consulting* case

CASE SUMMARY

- AGCM objected to a database set up by an independent consultant, *IAMA*, which collated and disseminated detailed information on life and pension insurance products
- The fact that the information was **public** (disclosed to customers as required by Italian regulation and often available on the web) did not shield its exchange from competition law because it was not public **domain information**
 - information was provided directly by the participants to *IAMA*, making it more trustworthy than information collected on the web
 - each insurance company did not have the resources to implement a similar database independently
- Information exchange amounted to a concerted practice which, despite a non-concentrated market, restricted competition

PHASES OF THE INVESTIGATION

- Notifications by two Italian insurance companies of their agreements with Iama Consulting for the acquisition of Aequos, a database containing detailed information on life assurance and pension insurance products
- AGCM opens an investigation, quickly extended to all insurance companies that had acquired the database
- The Aequos database offered the buyer access to information on all insurance and pension products available on the Italian market
- That information was disaggregated (*i.e.* available for each product separately) and publicly available (taken from documents provided by insurance companies to customers)
- released on a quarterly basis

STATEMENT IN THE OPENING OF PROCEEDINGS (October 2003)

- information exchanged through Aequos was current, detailed and sensitive information on individual competing products
- dissemination could alter the conditions of competition in the market and horizontal coordination between insurance companies
- potential anticompetitive effects of an exchange of publicly available information when the individual costs for each market participant to collect such information are high
- reduction of the cost of collecting the information would not generate efficiency gains to the benefit of consumers but increase incentives to collude on the basis of the common information

(I) TYPE AND QUALITY OF THE INFORMATION EXCHANGED

- The information contained in the Aequos database was actually supplied to lama Consulting by the insurance companies, and was not independently collected from the market by lama Consulting
- The information contained in Aequos had an added value in comparison with the information that individual insurance companies could collect directly from the market and from public sources
- Data were not in the public domain in as far as they were not immediately and easily accessible to the insurance companies at little or no cost.
- Consumers could not buy the Aequos database (product reserved to insurance companies). This restricted the advantages of the increased transparency to suppliers alone

(II) CHARACTERISTICS AND STRUCTURE OF THE MARKET

- The nine insurance companies that had acquired the Aequos database held a combined market share of 75% in the market for life insurance products
- The structure of the relevant market was moderately concentrated (CR4 56%, HHI 1000)
- A certain instability in market shares

DECISION

- In September 2004, after an in-depth investigation, AGCM prohibited the acquisition of Aequos by the insurance companies
- Parallel acquisition of the Aequos database by a large number of insurance companies amounted to a concerted practice for the horizontal exchange of sensitive information between insurance companies

Three interesting aspects of the decision

1. *Irrelevance of the public nature of the information exchanged when the cost of collecting such information is high*
 - The European Courts have held that the exchange of publicly available information should not be considered an infringement of EC competition rules
 - The General Court noted that disclosure between competitors of information in the public domain (as a result of a compulsory publication or easily deduced from publicly available information) cannot be considered an infringement (Judgment of the Court of First Instance *Atlantic Container*, 30 September 2003. The judgment has not been appealed)
 - In the *Iama Consulting* decision, the AGCM considered that the fact that the information was obtained by Iama Consulting directly from the different insurance companies indicated that the information itself was not in the public domain. If the information was readily available, there would be no reason to set up a costly exchange system

2. Transparency on the supply side versus transparency on the demand side

- The AGCM found that the exchange of information was beneficial only to the insurance companies (supply side) and had no efficiency effect on the demand side since consumers and their associations had no access to the Aequos database
- The AGCM suggested that, if the market transparency achieved extends also to the benefit of consumers, this may generate positive effects on competition capable of counterbalancing possible collusive effects
- Rationale
 - greater market transparency renders the demand more elastic, which generally leads to a lower price equilibrium
 - increased elasticity of demand may undermine any potential collusive practice insofar as transparency on the demand side facilitates comparison between offers and creates incentives for companies to abandon the collusive behaviour

3. The exchange of information may have anticompetitive effects even in non-concentrated markets

- Even in non-oligopolistic markets an exchange of information may be restrictive of competition if it concerns prices and if consumers do not benefit from the greater transparency
- The fact that an exchange of information takes place in a relatively non-concentrated market cannot be used to exclude that the exchange of information has no anticompetitive effects
- Exchanges of information are all the more necessary to ensure the stability of a collusive agreement in a non-concentrated market, where the costs of collecting information and monitoring the strategies of competitors are higher than in concentrated oligopolistic markets

Judicial review

The Lazio Administrative Tribunal dismissed AGCM's decision

Two elements rule out the anti-competitive nature of the practice:

- i. the information subject to exchange is public, even though not in the public domain
- ii. if the information is public in nature, it cannot be considered “sensitive” because there is no particular uncertainty, opacity or grey area which can encourage competition and which therefore must be protected (not exchanged)

The Council of State reformulated the Lazio Administrative Tribunal ruling

“the presumed public nature of the information exchanged (...) cannot qualify as irrelevant a concerted agreement which (...) aims to regularly and widely exchange sensitive information (since it directly affects the competitiveness and commercial strategy of each company), which would be accessible on the market only with additional costs and with higher margins of uncertainty” and in any case would not be available *“in a complete, aggregate, periodic and comparative way*

The Council of State upheld AGCM's view

The information acquired through "Aequos" is

- public in nature but not in the public domain (not otherwise obtainable by the companies on their own, except perhaps at much higher cost and less efficiency in terms of the completeness and correctness of the information)
- sensitive (suitable to directly affect the competitiveness and commercial strategy of each company)

Iama Consulting decision and EU principles

Consistency with the EC Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (2011)

- “The *likely effects* of an information exchange on competition must be analysed on a case-by-case basis”
 - comparison between likely effects of the information exchange and competitive situation in the absence of the information exchange
- Whether or not an exchange of information will have restrictive effects on competition depends on both the *economic conditions* on the relevant markets and the *characteristics of information* exchanged

- In general, exchanges of *genuinely public information* are unlikely to constitute an infringement of Article 101
 - Genuinely public information is information that is generally equally accessible (in terms of costs of access) to all competitors and customers...
- Information ‘in the public domain’ is not genuinely public if the costs involved in collecting the data deter other companies and customers from doing so