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# INTERNATIONAL COOPERATION AND THE ROLE OF MULTILATERAL ORGANISATIONS: THE ITALIAN EXPERIENCE<sup>1</sup>

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## **Abstract:**

In the 2013-2019 period, opportunities for cooperation among competition authorities, both within regional networks and internationally, have increased considerably, involving even those authorities that were not exposed to this type of activity. In the author's view, and from his experience at the Italian Competition Authority, mutual trust and familiarity are necessary ingredients for successful coordination and cooperation, even in the presence of legal instruments facilitating the exchange of information with, and/or investigatory assistance from, other cooperating authorities. Therefore, it is argued that, in a world where regional networks and bilateral agreements are of growing importance, multilateral organisations such as the ICN can still play an important role in boosting confidence and trust among competition authorities and developing tailored and cost-effective tools for cooperation.

## **Keywords:**

international cooperation, multilateral organisations, ECN, ICN, OECD, UNCTAD, AGCM

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1 The article expresses the views and the opinions of the author only; the usual disclaimer applies.

## INTRODUCTION

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In the 2013-2019 period, opportunities for cooperation among competition authorities, both within regional networks and internationally, have increased considerably, involving even those authorities that were not exposed to this type of activity. This increase may be attributed to several factors, including the internationalisation and digitalisation of businesses, the rise of competition law regimes and enforcers around the world, the increased availability of information and news of other authorities' enforcement activities (due to the internet and the development of specialised media services), thus expanding the awareness of cooperation opportunities, the development of cooperation tools (including ad-hoc legal instruments) and the increase in familiarity and mutual trust among competition authorities, also thanks to their participation in regional or international networks.

Indeed, cooperation is at the top of the agenda of the main multilateral organisations such as the ICN, the OECD and the UNCTAD. In 2019, the ICN and the OECD launched a joint project to study international cooperation between 2012-2018, and to draw up suggestions for potential amendments to their respective recommendations.<sup>2</sup> In July 2019, the UNCTAD published its first guidelines on international cooperation, after a two-year discussion among its members.<sup>3</sup>

This article is organised as follows. Starting from a description of the experience in cooperation of the Italian Competition Authority within its regional network and internationally (section 2), the article discusses the main benefits and challenges of cooperation, distinguishing between formal and informal cooperation (section 3) and highlights the role of multilateral organisations in fostering cooperation (section 4) by concluding for the importance of mutual trust.

## THE EXPERIENCE OF THE ITALIAN COMPETITION AUTHORITY

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### **Cooperation within the regional network**

The experience in cooperation of the Italian Competition Authority (hereafter the AGCM) started and developed mainly at a regional level, in the context of the European Competition Network (the ECN), the main platform for cooperation in Europe,

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2 See ICN MWG (2015) *Practical Guide to International Enforcement Cooperation in Mergers*. Available from: <https://www.internationalcompetitionnetwork.org/portfolio/merger-cooperation-guide/> [Accessed September, 12 2020]; ICN (2018), Recommended practices for merger notification & review procedures. Available from: <https://www.internationalcompetitionnetwork.org/portfolio/merger-np-recommended-practices/> [Accessed September, 12 2020]; OECD (2014) *Recommendation concerning international co-operation on competition investigations and proceedings*. Available from: <https://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm> [Accessed September, 12 2020].

3 See UNCTAD (2019) *Guiding Policies and Procedures under Section F of the UN Set on Competition*. Available from: [https://unctad.org/meetings/en/SessionalDocuments/ccpb\\_comp1\\_%20Guiding\\_Policies\\_Procedures.pdf](https://unctad.org/meetings/en/SessionalDocuments/ccpb_comp1_%20Guiding_Policies_Procedures.pdf) [Accessed September, 12 2020].

established among the Member States of the European Union through the Council Regulation 1/2003 of December 2002.

The growing, albeit still limited, experience of the AGCM confirms that the ECN provides a platform for extensive cooperation in cartel and abuse of dominance cases, as well as the discussion of general policy issues. The ECN facilitates the exchange of both confidential and non-confidential information that can be helpful in conducting investigations. ECN agencies exchange views and foster the coherent application of EU antitrust rules in horizontal working groups (e.g. leniency) and sector-specific subgroups (e.g. energy, financial services). In the case of inspections on the premises of a company located within the EU, a competition authority of the ECN can ask for the assistance of the competition agency of the Member State in which the company is located, so that the latter can carry out the inspections on behalf of the requesting competition agency: the AGCM has recently used of this type of assistance on two occasions (2016 and 2019).

Within the ECN, cooperation usually takes place before opening an investigation, in order to (i) share information (e.g. complaints) and preliminary views, and (ii) allow for an efficient case allocation (by selecting the best placed authority) as well as for the coordination of investigative measures (e.g. parallel inspections). Cooperation is generally carried out through meetings, emails or phone calls, according to an alerting mechanism developed within the network.

Outside of Regulation 1/2003, ECN agencies share their experiences in merger cases too, and the best practices for merger cooperation approved by the ECN in 2011 are increasingly becoming a reference point for several network agencies due to the increase in multijurisdictional mergers that do not fall within the jurisdiction of the European Commission.<sup>4</sup>

Cooperation served as a way to improve the effectiveness of the AGCM enforcement action in investigations concerning online parity clauses of booking platforms for accommodation, which took place in 2015-2016.<sup>5</sup> For the AGCM, this case represented the first example of extensive cooperation conducted in parallel with other agencies. In this case, the ECN and its rules on cooperation provided a very useful framework allowing the competition authorities of France, Italy and Sweden to have very useful discussions on the issues at stake, ultimately paving the way for the alignment of their final commitment decisions.

On the procedural side of this case, the AGCM considered it important to align its investigation timetable to ensure the continued coordination with the other agencies involved. The domestic deadline for submitting the final commitments package (three months from the launch of antitrust proceedings) was extended to allow the continuation

4 See MWG (2011) Practices on cooperation between EU National Competition Authorities in merger review (adopted 8 November 2011). Available from: [https://ec.europa.eu/competition/ecn/nca\\_best\\_practices\\_merger\\_review\\_en.pdf](https://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf) [Accessed September, 12 2020].

5 Resolution of AGCM No 25940 in case No. I779 [2016] *Mercato Dei Servizi Turistici-Prenotazioni Alberghiere On Line* (commitment decision). *AGCM Bulletin*, 11.

of discussions among the cooperating agencies and drafting a common commitment package by the undertaking concerned.

The importance of the ECN framework in this case may be appreciated if one considers that the Italian legal system does not contain specific provisions concerning international cooperation with competition agencies, and no bilateral or multilateral agreements have been concluded. Therefore, the AGCM has used, and continues to use, the legal basis provided by Regulation No 1/2003 for cooperation within the regional network.

In another instance, the AGCM was able to coordinate with other two ECN agencies in order to define the scope of their respective cartel investigations and conduct simultaneous inspections stemming from a common leniency applicant.

The recent investigations<sup>6</sup> launched by the AGCM against some digital platforms, such as Amazon and Google, will likely entail some forms of coordination with the European Commission and other ECN authorities.

In area of mergers, apart from the regular activity of case allocation based on the referral mechanisms envisaged by the European Commission Merger Regulation (the ECMR), the scope of cooperation in multi-jurisdictional filings falling outside the ECMR might increase in the future. It will be interesting to see whether and to what extent the wider differences in the national merger review regimes within the EU will impact on the feasibility and success of cooperation.

### **Cooperation outside the regional network**

Outside the ECN, case-specific cooperation opportunities are still limited, though they are likely to increase, especially in the area of an abuse of a dominant position involving global digital companies active on numerous national markets.

So far, the AGCM's cooperation has consisted of sharing experience and practices with other agencies via participation in multilateral organisations such as the ICN and the OECD, or through bilateral relationships.

Participation in multilateral organisations has always been considered important by the AGCM, as they expanded with the objective of achieving convergence towards best practices and fostering efficient and effective cooperation.

The AGCM is one of the 14 founding members of the ICN and a member of its Steering Group; it is also very active on transgovernmental forums such as the OECD and the UNCTAD.

In the AGCM's experience, international cooperation is generally initiated during the investigation, or after its conclusion. For instance, AGCM cartel or abuse investigations against undertakings with an international profile have led to informal consultations with agencies that were about to launch investigations on similar conduct by the same or other undertakings. Such consultations typically involve the sharing of non-confidential

6 Resolution of AGCM No 27623 [2019] in case No. A528 - *Fba Amazon/AGCM* (opening decision). *AGM Bulletin*, 16; Resolution of AGCM No 27771 [2019] in case No. A529 - *Google/Compatibilità App Enel X Italia Con Sistema Android Auto* (decision opening investigation). *AGCM Bulletin*, 20.

information or documents, such as the publicly available version of the AGCM's final decisions, or the provision of courtesy translations.

The most interesting cooperation occurred in the area of mergers, where the AGCM reviewed a transaction in parallel with another non-EU agency. Cooperation started in phase 1 and continued in phase 2, involving an exchange of views and a discussion on theories of harm and potential remedies. Cooperation occurred through regular phone calls between the cooperating agencies, and was made possible thanks to confidentiality waivers obtained by the merging parties.

The main challenge for cooperation in this case was not so much the absence of a legal basis, but the misalignment of investigative timetables, due to the timing of notifications chosen by the parties, as well as different statutory review periods, with the Italian phase 2 being particularly short compared to international standards (only 45 calendar days with possibility of a 30-day extension). The result was that the AGCM's decision to authorise the merger with remedies occurred eight months earlier than the decision of the other cooperating agency.

## **BENEFITS AND CHALLENGES FOR INTERNATIONAL COOPERATION**

In the experience of the AGCM, the most beneficial activity of cooperation in general is the sharing of non-confidential information regarding the status of investigations, the substantive theories of harm as well as the timing of the investigations.

Within the ECN framework, other beneficial aspects of cooperation include the possibility of coordinating the timing of antitrust investigations, sharing business information and documents absent waivers (as it was in the online booking investigation), and obtaining investigative assistance from other agencies.

Outside the ECN, and in the absence of a legal basis for cooperation, confidentiality waivers have proven to be useful to discuss more freely the theories of harm and types of evidence with other cooperating agencies. More generally, cooperation has been useful to the AGCM enforcement, in that it helped with learning from similar experiences in other countries and enhancing the AGCM's investigative strategies.

However, cooperation made a difference in those instances where the AGCM's ability to investigate and prosecute cases are where confidential information can legally be shared and investigatory assistance can legally be provided, as it happens in the EU framework of Regulation No 1/2003.

In the area of mergers, the main challenge has so far been the alignment of investigative timetables, mainly due to the relatively short review period for phase 2, while there have not been obstacles in obtaining a waiver for sharing confidential information from the merging parties.

## THE ROLE OF MULTILATERAL ORGANISATIONS IN FOSTERING EFFECTIVE COOPERATION

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International organisations have long recognised that the development of international cooperation in competition enforcement requires competition authorities to overcome challenges faced in cross-border investigations, such as the differences between legal systems, the special procedures for gathering evidence and the varied leniency and immunity programmes. More recently, enforcement cooperation has become one of the priorities in the agenda of international organisations.

The recommendations and guiding principles are based on the idea that informal cooperation, i.e. cooperation that is possible without any formal cooperation agreements, is just as important as formal cooperation, which generally helps overcome one of the main obstacles to cooperation – the legal obstacle to the exchange of confidential information. The discussions around these best practices have highlighted that, while overcoming legal obstacles might be the ultimate goal of such best practices, as it would require changes in legislation, which in turn entails a gradual process, informal cooperation may represent a good starting point as it enables the most relevant areas of interest to be identified, along with the most effective tools, which may differ according to the characteristics of competition agencies and their legal frameworks. This is true especially when the competition agencies concerned have no history of cooperation and are relatively new to each other.

Multilateral organisations like the ICN and the OECD have contributed significantly by laying out a pathway for competition agencies to become familiar with each other's systems, establish working relationships and develop tailored solutions in order to maximise the benefits of informal cooperation.

Firstly, the ICN and the OECD have created a list of contact points, which are updated regularly, recognising that competition authorities often do not know whom to approach when they wish to contact another competition agency. Secondly, the ICN has developed a wide range of tools to foster effective cooperation, such as templates for confidentiality waivers, for requests of information and, in order to ensure the mutual understanding of each other's legal framework, a template setting out the main features of the ICN members' competition regimes. Lastly, multilateral organisations provide a privileged context in which competition authorities can develop mutual trust and a network of contacts that ensures a mutual understanding of each other's competition policy and practices. Indeed, workshops and roundtables regularly organised by the ICN and the OECD help to build a working relationship at staff level.

In the author's view, and from his experience as a liaison officer for cooperation matters, mutual trust and established working relationships are one of the most important factors for successful cooperation. Even when no confidential information can be provided, due to the absence of formal cooperation agreements, the engagement and the resources devoted to the exchange of non-confidential information might be higher if

the request comes in the context of a well-established relationship between the agencies. The incentive to cooperate will be all the more elevated if there is a perception that it will be crucial for the other agency to come up with a more informed decision (effectiveness) and that the counterpart might reciprocate the favour in a future case (reciprocity).

In practice, the level of accuracy and responsiveness of the exchange might vary significantly according to the quality of interaction between the two agencies. Even the best designed request for information might fail to achieve its objectives if the respondent agency does not have at least a general knowledge of the legal and economic environment in which the requiring agency operates. In addition, the possibility for officers on both sides to discuss the background and the national issues underlying the request in detail enables the reply to be framed better.

In the AGCM's experience, multilateral cooperation, notably in the context of international forums such as the ICN, the OECD and the UNCTAD, appears to be very relevant as it provides an opportunity to discuss and share competition issues in light of the respective legal and economic frameworks. On top of enhancing mutual understanding, these meetings favour direct interaction among the competition executives and officers that may set the foundation for bilateral and regional cooperation.

Participation in multilateral organisations may encourage informal case-specific cooperation, also thanks to cooperation toolkits that have been developed. In the AGCM's experience, informal case-specific cooperation may be very valuable in the form of discussions on theories of harm and legal and economic framework, and exchanges of non-confidential information may prove to be sufficient for an effective investigation in most cases.

Multilateral meetings might also trigger initial forms of bilateral cooperation, such as study visits, which in turn lead to more structured capacity building projects. The increased contacts and knowledge between the two agencies may create the appropriate environment for case-specific informal cooperation.

## CONCLUSIONS

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The experience of the Italian Competition Authority has showed the importance of regional cooperation allowing for early coordination, investigative assistance and exchange of confidential information, three advantages provided by Regulation EU n. 1/2003.

Outside the regional network, case-specific cooperation is still rare and cannot be as extensive as within the ECN as it does not benefit from the same advantages. The AGCM's cooperation has therefore been limited to sharing experiences and practices in multilateral organisations or bilaterally.

Notwithstanding this, one of the most important factors for successful cooperation is the mutual trust among cooperating agencies. This factor may be easily developed within regional networks as well as international organisations. In this respect, the presence of formal cooperation agreements is not a pre-requisite, while participation in the activities promoted by international organisations can contribute to increased familiarity among

the competition agencies and mutual understanding of each other's legal frameworks. The ICN, being the only international organisation run exclusively by competition agencies, has been successful in this regard – developing tools for cooperation tailored to a specific agency's needs, without introducing formal mechanisms with the risks of unduly increasing the costs of cooperation.

As a final remark, formal and informal cooperation can be viewed as complementary. Informal cooperation may be a step in the process that ends with formal cooperation. The ECN is a clear example of this complementarity because, rather than being a mere channel for formal communication, it also represents a precious platform for the exchange of non-confidential information in bilateral and multilateral forms, as well as for discussions aimed at promoting the coherent application of EU antitrust rules in different Member States.