How Much May an Unreasonable Delay Cost? TAR Lazio Annuls the Highest Sanction Ever Issued by the Italian Competition Authority

by

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CONTENTS

Abstract

The present contribution describes and comments on recent ruling(s) issued by the Italian Regional Administrative Court of Lazio Region (TAR Lazio) which annuls

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the highest sanction ever imposed by the Italian Competition Authority (AGCM) for the breach of competition law. The Court found that the AGCM's final decision vitiated on both procedural and substantive grounds. The TAR Lazio held that the Competition Authority violated the principle of 'reasonable length of proceedings' by deferring the initiation of the investigation without valid justification. For this reason, in the last part of the contribution, the authors briefly analyse the possible consequences of the unjustified delays in the administrative proceedings on the final rulings.

Resumé

Le présent commentaire porte sur le(s) récent(s) jugement(s) rendu(s) par le Tribunal administratif régional italien (TAR Lazio) qui annule la plus haute sanction jamais imposée par l'Autorité italienne de la concurrence (AGCM) pour violation du droit de la concurrence. Le tribunal a estimé que la décision finale de l'AGCM était entachée d'irrégularités tant sur le plan de la procédure que sur celui du fond. Le TAR Lazio a estimé que l'Autorité de la concurrence a violé le principe de "durée raisonnable de la procédure" en reportant l'ouverture de l'enquête sans justification valable. Pour cette raison, dans la dernière partie du commentaire, les auteurs analysent brièvement les conséquences possibles des retards injustifiés dans la procédure administrative sur les décisions finales.

Key words: anti-competitive agreement; unreasonable delays; consequences of undue delay; AGCM; parental liability; incorrect determination of relevant market.

JEL: K19, K21, K23

I. Introduction

The Regional Administrative Court of Lazio Region (*Tribunale Amministrativo Regionale del Lazio*, hereinafter: TAR Lazio) upheld the appeal submitted by car manufacturers and related captive banks, setting aside the decision of the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato,* hereinafter: AGCM) issued in December 2018. The Regional Court has annulled the highest cartel fine ever to have been imposed by the Italian Authority due to major substantive and procedural defects during the antitrust investigation of an alleged exchange of information between captive banks in the car financing market.

The AGCM found that all parties involved had put in place a secret cartel between 2003 and 2017, aimed at altering the competitive dynamics in the car sales market through financial products provided by the captive banks of

each group. The AGCM imposed pecuniary sanctions on the captive banks in solidarity with their parent companies and two trade associations, for a total amount of approximately EUR 678 million. The companies appealed the sanctions in accordance with the provisions of the law.[1]

The explication and the following analysis concern several judicial reviews (15 in total) which, as they essentially overlap, will be considered uniformly.[2] All the appeals against the administrative decision have been upheld and the sanction annulled.

In the last part of the paper, the authors briefly analyse the possible consequences of the unjustified delays of the administrative proceedings on the final rulings.

II. Infringement proceeding at the Italian Competition Authority

On 28 April 2017, the Italian Competition Authority (AGCM) initiated administrative proceedings against 13 leading Captive Banks and their related automotive producers that sell in Italy vehicles by means of financial products, concerning a suspected cartel on the car financing market.

The proceedings in question concerned a series of concerted practices of the captive banks regarding their price policy and contractual terms applied to financial products for the purchase of vehicles. For many years, the undertakings regularly exchanged with each other many other related sensitive business information. For these reasons, they presumably violated the provisions of the Italian Competition Act[3] and Article 101 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) with regard to the prohibition of restrictive agreements.

The initial parties of the cartel proceedings were Volkswagen Bank Gmbh, BMW Bank Gmbh, FCA Bank S.p.A., FCE Bank Plc., Mercedes Benz Financial Service Italia S.p.A., Bank PSA Italia S.p.A., General Motor Financial Italia S.p.A., RCI Banque SA, Toyota Financial Services Plc. and two trade association: Assofin (*Associazione Italiana del Credito al Consumo e Immobiliare*) and Assilea (*Associazione Italiana Leasing*).

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[1] Article 135(1)(b) of the Italian Code of Administrative Process (Legislative Decree No. 104/2010).

[2] Judicial proceedings with a general register numbers 12529 – 12545 published on 24 November 2020.

[3] Legge 10 ottobre 1990, n. 287 – *Norme per la tutela della concorrenza e del mercato*. GU. n. 240 del 13.10.1990.

On 27 September 2017, the Italian Competition Authority decided to extend the responsibility for the anticompetitive conducts of captive banks to their 'parent companies', such as Banque PSA Finance SA, Santander Consumer Bank S.p.A., Bayerische Motoren Werke Aktiengesellschaft, CA Consumer Finance SA, FCA Italy S.p.A., Ford Motor Company, General Motors Company, Daimler AG, Renault SA, Toyota Motor Corporation and Volkswagen AG. In this manner, the AGCM attributed for the first time liability for an antitrust offence to parent companies (so-called 'parental liability') that were not majority shareholders of their subsidiaries.

The issue has its origin in the oral leniency applications filled by Daimler AG and Mercedes Benz Financial Service Italia S.p.A. (so-called Whistleblowers) on 3 March 2014 (integrated with further oral communications of August 2016, October 2016, January 2017 and December 2017). With their communications, Daimler and Mercedes Benz intended to inform the Italian Competition Authority about the anticompetitive practices that had taken place in the car financing market between the captive banks of the major automotive companies. The competition restricting agreement was meant to alter the competitive dynamics in the market of vehicle sales of the car manufacturers through the financing offered by the respective captive banks.

1. Suspected anticompetitive practices

The evidence uncovered during the protracted proceedings demonstrated that the investigated undertakings coordinated their conducts from 2003 to 2017 through a complex, regular and prolonged exchange of sensitive information on current and future prices and quantities, this means elements which should not be revealed to the public and, in particular, should remain unknown to competitors. The information exchanged were necessary to eliminate or significantly reduce the uncertainty as to the commercial strategies adopted by the captive banks in the distribution of their financial products, creating in this manner the artificial transparency of the market.

The AGCM established that the captive financial institutions, operating through Assofin and Assilea trade associations, had regularly exchanged sensitive commercial information, such as prices, quantities, future interest rates, cost of financing and other fees charged to consumers. In paragraph 83 of Decision No. 27498, the AGCM notes that the exchange of information appeared to be well-organized through periodical meetings (so-called 'captive meetings')[4], the

[4] See Decision No. 27498, paras. 111, 127, 134 and 404.

exchange of e-mails[5], documents and notes, telephone calls, as well as assistance and collaboration provided by the trade associations.[6] All of these practices have been named by the participants as 'Benchmarking for success'.

Therefore, the Italian Competition Authority qualified the parties as colluding undertakings.

2. Commitments and defensive arguments

To defend their positions, some of the undertakings involved in the proceedings presented, in August 2017, their commitments.

In September 2017, the AGCM rejected the commitments offered considering them manifestly inadequate to remove the anticompetitive effects of their conducts and deeming the infringements particularly offensive. Moreover, in accordance with the general rule, some of them could not be accepted because certain violations had already been terminated.

The companies, both through their defense and supplementary statements as well as during the oral hearing before the Authority, advanced numerous standpoints:

(a) the existence of procedural defects that considerably reduced their rights of defense. In particular, the companies stressed that the period of time that elapsed between the first declaration of the leniency applicant (3 March 2014) and the opening of the preliminary proceeding (notified to the parties on 4 May 2017) was excessive.[7] In other words, in the opinion of the parties, the AGCM should have acted in good time after receiving the whistleblower's information, which did not happen, allowing the protraction of the anticompetitive conducts. In the companies' view, such unreasonable delay constitutes a very strong factor for dismissing the possibility of AGCM to proceed, in violation of Article 14 of Law No. 689/81.

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[5] Such as, in para. 152 of Decision No. 27498, an e-mail of the FCA Bank 'I know that, in this period, we are all very busy (…) for this reason, today, I am asking you for your utmost cooperation and promptness in responding…'. See also Decision No. 27498, paras. 182, 405.

[6] The description of the trade associations' activities provided in para 92 of Decision No. 27498 may suggest that the associations in question acted as cartel facilitators by way of the collection, analysis and consequent diffusion of information and documents received by other participants.

[7] In accordance with Decision n. 4211 of the Council of State (*Consiglio di Stato*) of 10.07.2018, the Competition Authority should act and notify the parties within 90 days (if resident in Italy) or withing 360 days (if resident abroad) of the initiation of preliminary proceedings.

(b) the absence of an effective competitive relationship among the parties involved in the investigation that could justify an anticompetitive agreement. In this context, the captive banks asserted that there was no relevant competitive relationship between them, since they operate in favor of their car manufacturers and offer only those products and services which are strictly related to the sale of vehicles produced by the affiliated companies. Therefore, they face significant competition from independent financial institutions that offer their financial products/services for any brand of vehicles.
(c) the lack of a 'sensitive' character of the information exchanged.
(d) the incorrect analysis of the market context. The undertakings highlighted the contradiction between the decision to initiate the proceedings and the communication of the results of the investigation (*Comunicazione delle Risultanze Istruttorie*, hereinafter: CRI). The contradiction lays in the identification of the relevant market. Initially, the AGCM considered markets related to the financial products for the sale of cars. However, in its final document concerning the communication of the results of the investigation (the CRI), the relevant market was described as that relating to the sale of vehicles by means of financial products offered by the captive banks. In this regard, the Parties stressed that these are two completely different markets and thus, they stressed that the AGCM had not analyzed the competitive dynamics of that second market at all. If the relevant market would have been the market of the sale of cars by means of financial products, the conducts of the captive banks should not have been considered as unlawful, since they do not operate on such market.
(e) the incorrect qualification of occasional and sporadic exchanges of information.
(f) the incorrect application of the 'parental liability' theory. Some of the Parties, such as Renault, Toyota Motor Company, General Motors Company and BMW, have stated that they are not involved in the activities carried out by their captive banks. In this regard, they have contested the automatic application of the presumption of their parental liability. Moreover, the FCA Italy stressed that the AGCM has failed to provide evidence of the decisive influence of the parent company over the subsidiary, as well as the effective exercise of such influence.[8] On the other hand, the captive banks have declared that they are independent organs in relation to their industrial parent companies.

[8] Decision No. 27498, paras. 216 and 217.

In this context, the relationship between the captive bank and the car manufacturer shall be considered only as a business partnership.

(g) the incorrect interpretation of documents which went beyond what had been declared by the leniency applicant.

In its response, the AGCM affirmed that the time limits *ex* Article 14 of Law No. 689/1981 are not directly applicable to antitrust investigations. However, even hypothetically assuming their possible application, the time-limit within which the AGCM must notify the initiation of an investigation is not linked to committing the alleged violation, but to the 'acquisition of full knowledge of the unlawful conduct'.[9] In the Authority's opinion, in the case at hand, the date at which the AGCM acquired 'full knowledge of the unlawful conduct' was 31 January 2017. Consequently, it was only from that date the AGCM was obliged to open its investigation.

Another issue concerns the role of the independent financial institutions. The suspected cartelists stated that the Authority did not take into consideration the role of independent institutions and their position in the examined market. However, in paragraph 172 et seq. of its Decision No. 27498, the Italian Competition Authority narrated the information received from these independent intermediaries. They affirmed that their financial products were unable to compete with those offered by the captive banks, because of the prices and particular contractual conditions proposed in relation to the purchase of a vehicle directly from the car manufacturer. In addition, it has been noted that the captive banks are more likely to bear potential risks, as they are far more interested in selling vehicles than other financial institutions.

In paragraph 176, the AGCM highlights that the captive banks consider the independent institutions only as 'partial competitors' on the market of loans related to car purchases.

3. Termination of the proceeding

On 20 December 2018, the AGCM terminated its proceeding against the leading captive banks, their related car manufacturers and the two named trade associations. The Authority ascertained the suspected infringements stating that the undertakings had engaged in a concerted practice aimed at coordinating their pricing and other contractual conditions.

Considering the severity and duration of the infringement, the AGCM imposed a total fine of 678 million euros.

[9] In this meaning, see Cons. Stato, VI, 2.02.2012, n. 582; of 5.08.2013, n. 4085 and of 22.07.2014, n. 3896.

III. Judicial review(s) of the Regional Administrative Court of Lazio

1. Introductory remarks

This section briefly describes the judgments issued by the Regional Administrative Court of Lazio and published on 24 November 2020. There are 15 judgments, as many as the appellants, however the author will consider them jointly as they are almost the same.

The judicial reviews are the result of the appeals brought by the involved parties, including: Banca PSA Italia S.p.A., Banque PSA Finance S.A., Santander Consumer Bank S.p.A., BMW Bank GmbH, BMW AG, FCA Bank S.p.A., FCA Italy S.p.A., CA Consumer Finance S.A., FCE Bank Plc., Ford Motor Company, General Motor Financial Italia S.p.A., General Motors Company, RCI Banque S.A., Renault S.A. , Toyota Financial Services Plc., Toyota Motor Corporation, Volkswagen Bank GmbH, Volkswagen AG., as well as Assofin and Assilea before the TAR Lazio[10] against the sanction issued by the Italian Antitrust Authority (AGCM), at the end of the antitrust procedure.[11]

As it has been already affirmed, the Regional Court has annulled all the effects of the AGCM's decision – TAR Lazio has fully upheld the appeals lodged by the sanctioned companies and trade associations, finding the companies' complaints to be justified on both procedural and substantive grounds.

The Regional Court of Lazio followed the applicants' reasons and considered that the initiation of the proceedings three years after the first leniency application violated the principle of 'reasonable time', provided by the law to protect the investigated entities from excessively long administrative proceedings as well as the general constitutional right of defence. In addition, the Court also considered as admissible the appeals on their merits, stating that the decision was based on an incorrect identification of the relevant market, the inconsistency of the investigation – also in terms of the subjective extension of the procedure – and the absence of sufficient objective evidence of the existence of a single and complex cartel.

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[10] The Italian Regional Administrative Court of Lazio – the 1st instance court for national administrative proceedings.

[11] No. 27498 'I811 – *Finanziamenti Auto*', available at https://agcm.it/media/comunicati-stampa/2019/1/Vendita-auto-tramite-finanziamenti-cartello-tra-i-principali-operatori-sanzionato-per-oltre-670-milioni-di-euro, (accessed on 16.07.2021).

2. Grounds of appeals and the AGCM's position

2.1. Appeals' complaints

As mentioned above, all of the appeals to the Regional Court against the AGCM's sanctions are based on procedural and substantive complaints that can be considered jointly.

Firstly, all the companies invoked the violation of several fundamental principles, such as the collegiality principle, excess of power in all its symptomatic figures and a 'reasonable delay of the procedure' considering not only the judicial trial, but also the administrative proceedings, in accordance with the principles of fair proceeding, the equality of arms and the right of defence, as well as impartiality and efficiency of public administration.[12] In the light of the facts alleged by the applicants, the principle of collegiality has been violated because the administrative decision was adopted by two members of the decision-makers' college, without the necessary presence of the President of the AGCM.[13]

Other irregularities listed by the Parties regard the omission of their fundamental defensive arguments presented in their notes and during the final hearing. Appellants stressed the excessive duration of the pre-instruction phase and the insufficient time between the final hearing and the adoption of the final decision. According to the Parties, the Authority did not respected the terms established by law and failed to apply the general principles of 'fair procedure' and 'efficiency of public administration', *ex* Article 1, Law No. 241/1990. The applicants argue that the initiation of the proceedings three years after the first leniency application is contrary to the aforementioned principles and, in particular, to Article 14 of Italian Law No. 689/1981.[14]

The last violation constitutes the 'pillar' of the rulings of TAR Lazio.

The applicants based their appeals on erroneous identification of the relevant market, incongruent investigation regarding the subjective extension of the procedure to the parent companies, and insufficient objective elements that could prove the existence of a single, complex anticompetitive agreement. The applicants, in particular, observe that the initial phase of the proceeding considered as the relevant market the market of the 'financial products for

[12] These principles are provided by Articles 24 and 97 of the Italian Constitution; Article 6 of the European Convention on Human Rights; Article 41 of the EU Charter of Fundamental Rights; Articles 1 and 3 of the Act No. 241 of 7 August 1990.

[13] See the Presidential Decree (D.P.R.) No. 217/98 and the AGCM's Regulation No. 26614/2017.

[14] It is national administrative law that asks for a timely notification of administrative sanctions, in particular, it requests that the violation's details must be notified to the interested parties within 90 days of the assessment.

the purchase of motor vehicles'. For this reason, the proceeding originally only involved the captive banks, in relation to their activities concerning the distribution of financial products linked to the vehicles produced by the car companies. However, at a later time, the procedure was subjectively extended to also include the car manufacturers, as the parent companies of the captive banks, establishing their parental liability for the infringements. Consequently, the relevant market has changed, shifting to the market of car sales through financing where a 'vehicle' constitutes the principal product. Nevertheless, the Authority failed to analyse the dynamics of the new market. Moreover, the AGCM did not provide any evidence of the capacity of the captive banks in restricting competition in the 'new' relevant market. Also, the exclusion of independent financial companies from the relevant market seemed highly unreasonable.

In relation to the relevant competitive character of the data exchange, the appellants affirmed the incorrect application of Article 101 TFUE and Article 2 of the Italian Law No. 287/90, the misuse of powers in terms of: illogicality of the measure, its unreasonableness, the distortion of the legal and factual points of view, the lack of adequate preliminary investigation and reasoning. It has been stressed that the exchanged data did not have any competitive importance and the contested conducts were not capable of altering the competition balance.

2.2. Arguments of the Italian Competition Authority

On the other hand, the Authority argues that the proceedings and, in more general terms, the investigation were carried out rapidly and within the appropriate time considering the complexity of the case. The AGCM pointed out that the first leniency application (in 2014) was not sufficiently completed, as it was submitted in a 'simplified' form which did not allow the Authority to promptly launch the proceedings. It only permitted the leniency applicant to 'book' a place in the leniency system of the AGCM.[15] At that time, therefore, the Authority – which did not have full knowledge of the infringement, but only a very brief view of it – could not take any investigative steps. Only after two further years, has the same leniency applicant integrated its original ('simplified') application, reporting to the Authority, albeit still in a summary form and without the submission of written evidence, further facts related to the initial application.

In defending its position, the Authority stressed that the investigation did not focus on establishing an agreement between the Parties to homogenise the

[15] Meanwhile, the companies Daimler AG and Mercedes Benz Financial Services Italia S.p.A. decided to submit an application for leniency to the Commission.

prices charged to final consumers, but on sharing the necessary information revealing important elements underlying the commercial policies of its competitors, in order to exclude any possible uncertainty regarding them (par. 318 of the Decision No. 27498). The AGCM stated, in particular, that all the elements traded allowed each of the captive banks 'to know key elements used by their competitors in determining their own commercial policies, in terms of budgeting and marketing plan as well; in doing so, captive banks would enter into an anticompetitive agreement in favour of their respective car groups, creating a single, continuous and complex practice, restrictive of competition by object, capable of altering competitive market dynamics'.[16]

2.3. Judgment(s) of the Regional Administrative Court of Lazio

The Regional Court found that the appeals' considerations were well founded; first of all, TAR Lazio approved of the procedural grounds of the appeals – which absorbed the grounds of substance and which, therefore, would be sufficient to grant the appeal – but also accepted the reasons of merit, with regard to the erroneous relevant market identification.

As regards the procedural complaints, in the light of the 'reasonable delay of the procedure' principle, the regional court has deemed the pre-instructive phase to have had an excessively long duration. In relation to the first leniency application[17], TAR Lazio explains that the Authority did not present any proof that may presume the lack of necessary elements to immediately open proceedings concerning a suspected existence of an anticompetitive practice. The Court emphasised that the first leniency application has already contained all the essential elements that would allow the launching of an administrative investigation. In fact, it was noted that, from the presented documentation, it did not appear that Daimler's leniency application from 2014 – but also the subsequent two integrations of 2016 – was rendered in a 'simplified' form – in fact, the Court argued that there was no evidence of this in the relevant notes nor in the narrative part of the final decision. The Court also specified that is not possible to apply directly Article 14 of the Act No. 689/1981 in antitrust proceedings in relation to the duration of the investigative phase[18]; however, this inapplicability cannot justify the limitless and unreasonable carrying out of a pre-instructive activity, since such a *modus operandi* would

[16] Decision No. 27498, para. 330.

[17] Obtained by the AGCM in March 2014.

[18] Article 14 could be applied only to financial administrative penalties, and not to the rules governing the investigation phase of antitrust proceedings, in relation to which the case is distinctly and independently regulated (TAR Lazio, Sez. I, 28.7.17, n. 9048).

be in direct conflict with the principles contained in Law No. 241/90 and, more generally, with the need for efficiency of administrative action and certainty of the professional[19] who is subject to the proceedings.[20] The obligation to act within a reasonable period also descends from Article 6 of the ECHR[21] and Article 41 of the Charter of Fundamental Rights of the European Union[22] that, in conjunction with national[23] and European case law[24] in requiring prompt action, consider a particular complexity of a given case.

In relation to the substantive elements of the appeals, the Regional Court considered them well-founded, because the AGCM's arguments were focused on an incorrect identification of the relevant market and the inconsistency of the investigation, in particular in terms of the subjective extension of the procedure without providing enough objective elements that could prove the existence of a single and complex cartel. As it has been already stated in case law, the activity of delineating the relevant market 'is functional to the delimitation of the scope in which the cartel itself may restrict or distort the competitive mechanism'. Consequently, its extension and definition must be provided by the Authority case-by-case, as a result of an accurate and correct assessment which can be controlled and judged by the administrative court only with regard to defects of 'extrinsic illogicality' of the AGCM's assessment.[25] The Court emphasised here that the proceedings were originally initiated exclusively against the captive banks, considering only the financial products relating to the sale of vehicles. Subsequently, the Authority extended the investigation to some of the parental companies – car manufacturers – only to determine their joint responsibility for the conducts of the captive banks on the market of financial products. Nevertheless, such extension has been considered incorrect by the TAR Lazio because, after the subjective extension, no objective extension followed. In this manner, the AGCM failed to analyse the market of the sale of cars (that should have been rigorously examined).

As a result, the Authority failed to analyse the dynamics of that market focusing exclusively on that of car financial products/services. In the Court's opinion, the AGCM should have considered, even if only hypothetically and

[19] No one should be left for too long being uncertain as to his/her legal position.

[20] See TAR Lazio, Sez. I, 23.12.16, n. 12811; Sez. I, 1.4.15, n. 4943.

[21] The Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force on 3 September 1953.

[22] Charter of Fundamental Rights of the European Union, OJ 2012, C 326/403, p. 13.

[23] See for instance TAR Lazio No.12811 of 23.12.2016.

[24] See CFI judgment of 09.09.1999, Case T-127/90 *UPS Europe SA v. Commission*, ECLI:EU:T:1999:167.

[25] See Consiglio di Stato, Sez. VI, 2.07.2015, n. 3291 and of 26.01.2015, n. 334.

potentially, the 'new' wider market, where not only the captive banks operate, but also other independent financials.[26] Such considerations and analysis remained totally unproven.

IV. Conclusions

The case in question and the relevant rulings of the TAR Lazio provide useful guidance on some particular aspects of administrative proceedings. There are many interesting elements to highlight, such as:

- the 10% fine reduction applied to companies that decided to implement a compliance programme prior to the launch of the proceedings;
- the lack of joint liability of parent companies for the payment of the penalty issued to their captive banks;
- the benefit of total immunity from sanctions granted to the undertakings (Daimler AG and Mercedes Benz Financial Services Italia S.p.A.) that filed the leniency application[27];
- irregularities in the adoption of the final decision (absence of the President of the AGCM);
- the strong limitation imposed to a judge concerning his power to reformulate the technical assessments and to review of the factual elements regarding the determination of the relevant market provided by the AGCM.[28]

However, the authors decided to focus their attention on the aspects concerning the unreasonable delays in the initiation of the administrative proceedings.

Running out the clock

It must be emphasized that administrative organs, such as competition authorities, are subject to the principle of reasonable duration of their proceedings. Such principle is strictly connected to the principle of legal certainty (Perfetti, 2010).

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[26] The latter companies remained outside the proceedings because, according to the Authority's statement, they do not represent a 'marketing lever' for the sale of cars, not belonging to any group active in the sale of cars.

[27] As noted by (Gonzalez, 2017, p. 333): 'full protection from fines constitutes an important reward for cartel participants and motivates cartel conspirators to report illegal activity (…) and cooperate in the investigation of the case'.

[28] For more information, see (Vese, 2019; Basilico, 2011) and also Cass. Civile Sez. Unite, 20.01.2014, n. 1013.

Despite the fact that cartel cases are usually complex and thus very long[29], from a procedural perspective, national administrative authorities, as well as the European Commission, are subject to the general principle of a 'reasonable time' requirement when conducting administrative procedures. This important requisite has even constitutional value (Scordamaglia, 2009) and is also guaranteed by Article 6 of the ECHR and Article 41 of the Charter of Fundamental Rights of the European Union. Nonetheless, there is no legal definition of what 'reasonable time' of a proceeding means. As the Court of First Instance affirmed 'the question whether the duration of an administrative proceeding is reasonable must be determined in relation to the particular circumstances of each case and, in particular, its context, the various procedural stages to be followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved'.[30]

Consequently, we should be perfectly aware that procedural delays may occur and may even be inevitable in some particular cases. Moreover, there is a wide discretion granted to the authorities to condone the delays, but they must provide specific and reasonable motivation.[31] The objective of such a requirement is obvious; an excessive duration of proceedings may have many negative consequences infringing the fundamental right to effective legal protection.

In the case in question, the procedural defects described above, concerned the deferred initiation of the AGCM's investigation and the excessive length of the preliminary phase. The claimants argued that the Competition Authority had violated procedural rules by postponing the launch of the administrative proceedings. The TAR Lazio was of the same opinion, finding no valid justification for numerous deferrals of the AGCM. The Court emphasized that, in the circumstances of the case, the Authority was in a position to open an investigation much earlier, because the first leniency submission could not be considered incomplete or 'simplified'[32], as stated by the AGCM. On

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[29] Especially if there are several parties involved with the multiplicity of confidential issues.

[30] CJ Judgement of 22.10.1997, Joined Cases T-213/95 and T-18/96 Stichting Certificatie Kraanverhuurbedrijf and Federatie van Nederlandse Kraanverhuurbedrjven v Commission of the European Communities, ECLI:EU:T:1997:157, par. 57. See also ECHR Judgment of 29.09.1987, No. 9616/81 Erkner and Hofauer v Austria.

[31] In this regard, see TAR Lazio, Sez. I, 07.10.2013, n. 8671.

[32] '(…) dalla documentazione versata in atti, non risulta che la domanda di clemenza di Daimler del 2014 e le successive due integrazioni del 2016 siano state rese in forma «semplificata» nel senso invocato dalla parte resistente; di ciò, infatti non vi è traccia nei relativi verbali né nella parte «narrativa» del provvedimento finale' TAR Lazio, Sez. I, No.12529/2020. In its judgment No. 12544/2020, TAR Lazio adds that the AGCM was disposed, two times, to grant the benefit of the non-imposition of a sanction, and this proves the completeness of the

the contrary, in the judge's opinion, it was completed with all the necessary elements that could allow the Authority to launch investigative activities. Moreover, the same AGCM's decision No. 27498 affirms that the proceeding was launched 'following the presentation of a leniency application received on 3 March 2014' and yet, no specific measures had been taken by the AGCM prior to January 2017.

The judge reached the conclusion that the AGCM had unreasonably delayed the launch of the proceedings for three years.[33] In this manner, the Competition Authority violated the parties' right to a reasonable duration of administrative proceedings. Such conducts infringe, in a particular manner, the general principles of sound administration and efficiency of administrative actions, since the proceedings were aimed at sanctioning the anticompetitive agreement 'by object'. As Ginsburg and Owings (2015, p. 48) said 'competition agencies should be required to act as expeditiously as circumstances will allow, lest due process be denied by inaction rather than action'.

Accordingly, the principle of a 'reasonable time' requirement also means that undue delay can regard either action or inaction[34], and thus public authorities shall promptly open their investigations, that means, as soon as they have obtained all the essential data, without unjustified deferrals.[35] It should be kept in mind that what constitutes a reasonable length of time may vary depending on the nature of the administrative decision and also of the case.

Having established what an unjustified delay consists of, it is necessary to determine the exact moment when the duration of a proceeding or a deferral becomes excessive and, therefore, when a resulting delay is to be considered 'unreasonable', and which consequences such delay may have in relation to an administrative decision? May the violation of the principle which requires that action shall be taken within a reasonable time justify the annulment of a final decision?

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leniency application. ('Al contrario, la disponibilità dell'AGCM, data per ben due volte, ad accordare il beneficio della non imposizione della sanzione, depone per la completezza della domanda e per la specificità della delle informazioni ivi rese').

[33] For a very similar case see the aforementioned judgment TAR Lazio No. 12811 of 2016.

[34] In the same meaning, TAR Milano Sez. II, 31 October 2018, n. 2455, stated that the duration of procedure must be functional to the preliminary investigation and the defensive activities. However, it becomes excessive, and thus illegitimate, if it results in unjustified inertia.

[35] See i.e., ECJ judgments: of 24.11.1987, Case 223/85 *RSV v Commission of the European Communities*, ECLI:EU:C:1987:502; of 18.03.1997, Case C-282/95 P *Guérin automobile v. Commission of the European Communities*, ECLI:EU:C:1997:159; and of 15.10.2002, Case C-238/99 P *Limburge Vinyl Maatschappij NV and Others v. Commission of the European Communities*, ECLI:EU:C:2002:582.

With regard to the first question, it seems that the exact moment cannot be determined *a priori*. In the opinion of the Court 'it should be observed (…) that the reasonableness of a period cannot be assessed by reference to a prices maximum limit determined in an abstract manner but, rather, must be appraised in the light of the specific circumstances of each case'.[36] In assessing the reasonableness of a period of time, account must also be taken of the importance of the case for the parties involved, of 'its complexity and the conduct of the applicant and of the competent authorities'.[37] 'An initial general examination is carried out to determine whether the period in question is *prima facie* too long having regard to the procedure being conducted. If it is, a more specific examination is required as to whether there have been any actual delays which cannot be justified by the circumstances of the case'.[38]

In relation to the second question, the general rule is that the failure to comply with the analyzed principle 'cannot affect the validity of the administrative procedure[39] and therefore be regarded only as a cause of damage'.[40] Nevertheless, the annulment of a decision may be justified if undue delay constitutes a violation of fundamental rights, such as the right of defense of the parties concerned.[41]

Similar considerations have been reached by the TAR Milano on 31 October 2018 in its Judgment No. 2455 where it declared that the Italian Energy Authority (ARERA)[42] had not acted within a period that the ARERA itself considered reasonable, and then issued a decision (after 6 years) at

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[36] CJ Judgement of 15.10.20002 – Joined Cases C-238/99 P *Limburge Vinyl Maatschappij NV*, C-244/99 P *DSM NV and SMN Kunststoffen BV*, C-245/99 P *Montedision SpA*, C-247/99 P *Elf Atochem SA*, C-250/99 P *Degussa AG,* C-251/99 P *Enichem SpA*, C-252/99 P, *Wacker-Chemie GmbH* and C-254/99 P *Imperial Chemical Industries plc v Commission of the European Communities*, ECLI:EU:C:2002:582, para. 192.

[37] CJ Judgment of 17.12.1998, Case C-185/95 P *Baustahlgewebe GmbH v. Commission of the European Communities*, ECLI:EU:C:1998:608, para. 29.

[38] Joined Cases C-238/99 P Limburge Vinyl Maatschappij and others, para. 193.

[39] In the same meaning, Cons. Stato Sez. VI, 27/02/2012, n. 1084 and of 08.07.2015, n. 3401; TAR Milano, Sez. III, 15.12.2014, n. 3037.

[40] Joined Cases C-238/99 P Limburge Vinyl Maatschappij and others, para. 173.

[41] For this reason, in para. 174 of the Joined Cases C-238/99 P *Limburge Vinyl Maatschappij and others,* one of the applicants stated that 'in the present case, the sole legal consequence of the unreasonable delay which is capable of guaranteeing the enforcement of the fundamental right in question' (it means right of defense) 'is the nullity of the decision adopted'. See also the GFI Judgment of 20.04.1999 in Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and others*, ECLI:EU:T:1999:80, in particular para. 122.

[42] The Italian Regulatory Authority for Energy, Networks and Environment, one of the Italian independent administrative authorities.

the end of an 'unfair' procedure. Such a violation of the rule of procedural legality leads to the illegality of the measure adopted which must, therefore, be annulled.

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