

## Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

### Autorità Garante della Concorrenza e del Mercato, Italy

The following template is submitted by the **Autorità Garante della Concorrenza e del Mercato, Italy**, pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

#### I. Introduction

*Please add brief presentation/link to agency website.*

The [Autorità Garante della Concorrenza e del Mercato](#), hereafter the Authority or the AGCM, is an administrative independent authority, established by Law no. 287 of 10 October 1990 (the “Competition Act” or the “Act”), which introduced a competition law regime in Italy. The AGCM is independent from an institutional, organizational and financial point of view and its decisions are taken on the basis of the Act without any possibility of interference by the Government.

The Authority is solely responsible for public enforcement of the Act in relation to cartels and anti-competitive agreements, abuse of dominant positions and concentrations. The Authority also applies European competition rules (art. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)) when the anticompetitive practices are likely to affect trade between the EU Member States.

There is also an [English version](#) of the AGCM website in which under the sections “about us”, “scope of the activity” and “media” all the relevant information can be found. In particular, competition legislation, regulation and guidance notices concerning competition policy can be found in [Italian](#) and [English](#).

#### II. Laws, Regulations, and Policies relevant for the implementation of the CAP

*For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.*

*Please update your Template reflecting significant changes as they relate to the CAP, as needed.*

##### b) Non-Discrimination

*Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.*

Italy’s Competition Act apply to persons and undertakings that carry on business in Italy or are otherwise connected to the Italian Territory. The nationality, residence, or origin of a

person/undertaking being investigated is irrelevant to the question of whether the law applies to a person/undertaking. The AGCM conducts its investigations and enforcement activities accordingly.

### c) Transparency and Predictability

- i. *Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. *Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. *Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. *Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. *Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

All the relevant legislation, regulations and agency guidance is publicly available on the AGCM website in Italian as well as in English (for most of them). In particular:

The [Italian Competition Act](#) - the Law n. 287/1990 (hereinafter "Competition Act") introduced a competition law regime in Italy.

The AGCM investigative and enforcement procedures are contained in the Presidential **Decree n. 217/1998** (hereinafter "[Proceedings Regulation](#)"), regulating the investigations on abuses of a dominant position, anticompetitive agreements, mergers and market studies. In addition, AGCM administrative proceedings also follow the general principles laid down in Law n. 241/90 ("[Provisions on administrative proceedings](#)").

The AGCM has also issued **guidance** with specific regard to:

- i) merger notification ([Merger Notice](#) 2005, amended in 2006 and 2010);
- ii) commitments procedures ([Resolution n. 23863](#) of Sept 6, 2012, which amended Resolution n. 16015, 2006);
- iii) leniency applications (Resolution n. 16472 of February 15th, 2007);
- iv) interim measures ([Resolution n. 16218](#) of December 14th, 2006);
- v) setting fines ([Resolution no. 25152](#) of October 22th, 2014 );
- vi) compliance ([Guidelines on Antitrust Compliance](#), of October 4<sup>th</sup>, 2018).

In other areas not covered by specific national guidance (e.g., substantive assessment of mergers and merger remedies, and information disclosure in data room), the AGCM relies on the guidance provided by the European Commission in its several notices.

More recently, in view of increasing the awareness and the transparency of the Italian competition regime, the Authority has published a [Code of Competition](#), a document

collecting all primary and secondary legislation ordered by topics/themes in a systematic way. The document is available only in Italian.

All **AGCM decisions, opinions and orders are published** and publicly available on its Bulletins and website. Below further details.

Pursuant to Section 26 of the Competition Act, “the AGCM’s decisions [referred to in Sections 15 (infringements and decisions imposing penalties for infringements of sections 2 and 3), 16 (decisions concerning mergers’ investigations), 18 (decisions to prohibit a merger), 19 (fines for failure to comply with the prohibition or the notification requirements) and 25 (Government powers over mergers)] shall be published within 20 days in the AGCM’s Bulletin. The findings of the investigations provided by in Section 12(2) (Sector inquiries) shall also be published in this Bulletin, if the AGCM deems this appropriate”. The Bulletin is organized in 4 main sections: anticompetitive conducts; mergers; opinions and consumer’s protection decisions.

The AGCM’s website (<http://www.agcm.it>) collects the full text of all measures (appropriately divided by categories) adopted by the AGCM since it was established. It also provides a search engine in order to allow the public to find the relevant decision by word or year. These archives are updated each time new measures are published in the Bulletin.

Moreover, press releases related to the above-mentioned decisions are available on the website, also in the English version.

Finally, the AGCM, by March 31st of every year, submits an Annual Report on the previous year’s enforcement to the Government and Parliament. On that occasion, the AGCM’s Chairman exposes the general policy adopted by the Authority and underlying its decisions. In particular, the Annual Report describes all the cases launched and concluded during the previous year (including as well the advocacy opinions), the substantive standards applied and the developments occurred in the enforcement and case-law. The Report is then published and posted on the AGCM’s website.

#### **d) Investigative Process**

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

#### Anti-competitive agreements (incl. cartels) and abuse of dominant positions

- i. Notification of the investigation and its content*

Pursuant to Section 6(4) of the Proceeding Regulation, the Authority shall notify the opening of the investigation to the undertakings and parties concerned, as well as to the persons which, pursuant to Section 12(1) of the Act, have a direct, immediate and present interest in the investigation and have submitted reports or complaints of relevance to the commencement of the investigation.

In Italy, the decision to start an investigation coincides in time with the opening of the proceedings and, as a result, the engagement with the parties starts immediately. In particular, the opening decision is sent to all the undertakings under investigations and states the names and activities of the undertakings involved, and it provides details of the alleged collusive conduct and the markets potentially affected.

Pursuant to Section 6(3) of the Proceeding Regulation, the Authority's decision to initiate an investigation dealing with restrictive agreements and abuses of dominant position shall indicate, among the other things, the **essential elements** relative to alleged infringements, that is, the main factual and legal aspects of the case, including the legal basis (national or European legislation) of the violation, a description of the alleged anticompetitive conduct and the legal context in which alleged anticompetitive behavior has taken place.

In addition, the decision officially opens the administrative proceedings and it declares the name and contact details of the case team manager in charge of the investigation (pursuant to art. 4 of law 241/90 on administrative proceedings), the deadline for requesting the first hearings with the case team (60 days) and the term for closing the proceedings.

Upon launching of the investigation, the Authority may decide to carry out an unannounced **inspection of a business premises**. In order to do so, the Board of the AGCM may adopt an "inspection decision" without the requirement of a court warrant. This decision can be adopted only following a formal decision to open an investigation. In view of fully ensuring the exercise of the rights of defence, the scope of the inspection is clearly defined as the content of the inspection decision includes the following elements: i) designation of the inspecting authority; ii) the legal basis empowering the AGCM to conduct inspections; iii) the addressees of the inspection; iv) the description of the suspected infringement; v) penalties or legal consequences that may be imposed in case the undertaking or association of undertakings refuses to cooperate with the AGCM officers during the inspections.

*ii. Opportunities to engage with the Authority*

Immediately after the notification of the opening decision, parties may have access to the case's file. Therefore, in the course of the proceeding, AGCM's case team and the parties under investigation have the opportunity to discuss the evidence gathered and their relevance to the investigation.

Indeed, pursuant to Section 14(1) of the Competition Act, the owners or legal representatives of undertakings or entities subject to an AGCM's investigation may submit representations in person or through a special attorney by the deadline set at the moment of notification, and may make submissions and opinions at any stage during the course of the investigation, as well as further representations before the investigations are completed.

In addition, in the Authority's practice, in the course of the investigations, there can be informal opportunities for parties to meet and consult with agency case team. However, there

are no rules or established procedures for such meetings, e.g. predetermined state of play meetings.

*iii. Requests for information to the Parties*

Pursuant to Section 14(2) of the Competition Act, “the Authority may, at any stage in the investigation, request undertakings, entities and individuals to supply any information in their possession and exhibit any documents of relevance to the investigation”.

Requests for information (“RFIs”) and requests of exhibition of documents are regulated by Section 9 of the Proceeding Regulation which indicates the minimum content such as the purpose of the request; the deadline for reply and the procedures for submitting confidential information.

Case law clarified that the elements required by Section 9(2), albeit briefly illustrated, must always be specified in the RFI, especially with reference to the purpose. However, their omission may be able to invalidate the entire request for information, but not the entire proceeding or the final decision.

Section 9(2) also states that the deadline set by the Authority is consistent with the urgency of the case and the nature, quantity and type of information requested, and taking account of the time needed to obtain it. In case replying within the time limit identified by the AGCM is difficult or altogether impossible, parties may ask for an extension of the deadline. If the case team consider the request to be well founded, depending on the complexity of the information asked, additional time may be granted. The same reasoning applies in case parties consult with the Authority’s case team regarding the scope of the request for information.

Finally, pursuant to Section 12 of the Proceeding Regulation, the AGCM is bound to use the information acquired in the activity of enforcing the Competition Act and Proceeding Regulation only within the purpose for which they have been requested. Therefore, the AGCM has the power to gather the information necessary for pursuing the objective of protection of competition, but this power must be exercised in accordance with the rights of defense of the parties. This implies that the AGCM cannot ask for information and documents that are not related to the investigation and that, when the Authority sends a request for information (or in case of inspections), it has to specify the purpose for which the information is required.

Merger Review

Within the statutory timeframe provided for the Phase I investigation, the notifying parties are promptly informed in writing of the decision of the AGCM to clear the transaction or to open a Phase II investigation. In the decision to open a Phase II investigation, the Authority states its prima facie assessment of the transaction, in particular the reasons why the transaction under scrutiny may not pass the relevant merger test.

At the end of the Phase II investigation, although not provided for by the Competition Act, the AGCM usually sends a Statement of Objections (SO) to the merging parties, identifying the anticompetitive effects of the transaction. This practice was introduced to enhance due process and increase transparency in favour of the merging parties.

In order to make its merger review more effective, transparent and efficient, in July 2005 the Authority issued a [Merger Notice](#) on introducing a procedure that enables the parties to consult the Authority during the phase prior to the formal notification of transactions which satisfy the criteria indicated in Section 16(1) of the Act. Through this procedure the AGCM can anticipate and discuss with the parties any problems raising from the transaction. These contacts are triggered by the submission of a briefing memorandum or more frequently of a draft notification form. The latter option may reduce the risk of a subsequent formal declaration of incompleteness since it allows the notifying parties to amend and supplement the draft form in light of the case team's requests and suggestions.

The Notice also introduced pre-merger publicity to concentrations through a notice on the Authority's website, with the authorization of the interested parties, in order to increase and improve the participation of interested third parties in the review process.

### **e) *Timing of Investigations and Enforcement Proceedings***

*Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.*

#### Anti-competitive agreements and abuse of dominant positions

Section 31 of the Act, through a reference to Law no. 689/1981 on administrative sanctions, envisages a limitation period for the prosecution of antitrust violations of five years commencing with the termination of the infringement.

In the case of investigations dealing with anticompetitive agreements and abuses of dominant position (Sections 2 and 3 of the Competition Act), pursuant to Section 6(3) of the Proceeding Regulation, the deadline is clearly stated on the AGCM's decision - usually from 240 days to 1 year - which is notified to the parties under investigation and published on the Authority's website. The deadline can be postponed either at the parties' request or when the Authority considers that more time is needed, for instance, in order to properly assess the evidence or more evidence shall be gathered.

In addition, the decision to open an investigation always indicates the deadline (usually 60 days) within which the undertakings and other interested persons may exercise the right to make representations in writing or orally before the case team.

Before the end of the investigation, the case team sends the "Statement of Objections" to the parties concerned, a report outlining the main findings of the investigation and setting the deadline for the closing of the investigation which shall occur at least 30 days after the notification of the SO (see Section 14(2) of the Proceeding Regulation). The parties under investigation may still make further written submissions and submit documents up to five days before the closing date of the investigation (see Section 14(4) of the Proceeding Regulation).

Before the final decision is taken by the Authority, parties may ask for a final hearing before the Board (this request shall be made within 5 days from the date of notification of the SO).

Commitments proposed by the undertaking concerned are assessed in a sub-proceedings with a specific timeframe envisaged by the Authority's notice ([Resolution n. 23863](#) of Sept 6, 2012, see the section "Commitment procedures" under section j).

### Merger review

In the case of merger review (Sections 5, 6 and 7 of the Competition Act), the AGCM has a statutory deadline of 30 days – starting from the parties' notification of the transaction - to decide whether to clear the merger or initiate a Phase II investigation (Section 16(4)(8) of the Competition Act). In case of serious inaccuracies, omissions or untruths in the notification, the 30-day deadline shall be restarted from the date upon which the information supplementing the original notification is received by the Authority.

Phase II investigations last 45 days and this period may be extended in the course of the investigation for a further period of not more than 30 days whenever the undertakings fail to supply the information and the data in their possession upon request.

### **f) Confidentiality**

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

The AGCM has established policies and procedures to obtain and protect confidential information obtained during investigations and they are publicly available online. The procedures for the protection of confidential information follow the provisions of [Art. 14 of the Act](#) and of [Section 13 of the Proceedings Regulation](#).

For leniency cases, the Authority adopted in 2013 a specific communication ([Notice on the non-imposition and reduction of fines under section 15 of Law no. 287 of 10 October 1990](#)), whereby it provided that, unlike the addressees of the statement of objections, third parties, even though admitted to the antitrust proceedings, are not allowed to have access to corporate statements and the annexed documents (point 10-bis).

The violation of secrecy obligations is criminalized and in addition it may give rise to civil damages actions.

Access to confidential documents is permitted, in whole or in part, to the extent that this is necessary for the undertakings in order to defend themselves from an allegation of infringement. As confirmed by the case law, the Authority needs to strike a balance between the right of defence and the protection of confidential information.

In all requests for information, as well as in the written record of the inspections and hearings, the parties to the proceedings and the addressees of the RFIs are always clearly informed that undertakings and persons are required to specify which documents or parts of documents should be treated as confidential and clarify the reasons thereof. Therefore, in the request for information, the Authority provides guidance for recipients of requests for information on how to claim confidentiality for information in their submission.

The Authority provides notice to the party or third-party claiming confidentiality of its intention to disclose information designated as confidential, in compliance with the general principles laid down in Law n. 241/90 (the general law on administrative proceedings). Under national and European law, there is no need to inform the parties to the proceedings of the disclosure of information, when it is imposed by law (e.g. information exchange with the Public Prosecutor for the purpose of investigating criminal proceedings or between ECN members under Art. 12 of Reg. 1/2003).

The **review of confidentiality claims** is carried out by the case manager who may deny a request for confidential treatment of information if he/she decides that its disclosure would not cause competitive harm to the disclosing party. The case manager sends a reply to the requesting undertaking explaining its conclusions and why confidentiality should be denied, granting the party additional time to present their arguments and object to the decision to consider the documents or parts of it as confidential.

### **g) Conflicts of Interest**

*Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.*

The Competition Act 1990 establishes that when exercising their functions, the employees of the AGCM are “public officials” and therefore subject to the obligations of all public officials: in particular they shall maintain professional secrecy with respect to all facts, information and documents to which they have access in the performance of their duties. This general provision is important because it contributes to create an “awareness” of the duties of integrity and impartiality that concern the staff across all the public administration bodies.

In addition, and to complement this provision, the Authority has, since 1995, adopted a Code of Ethics which applies to its employees. The [Code of Ethics](#) forms an integral part of the employment contract and lays down instructions for standards of conduct among the employees toward the public. According to the Code of Ethics, the employee must act with impartiality and respect confidentiality and behave irreproachably in his/her dealings with everyone involved in the course of their duties. The Code of Ethics also establishes practical measures relating to matters of: i) conflict of interest (ethics rules cover financial interests and personal relationships and affiliations); ii) restrictions on gifts or benefits from outside sources; and, iii) conducts towards media and the public in general. General principles ruling the conducts of the AGCM officials have been included in the [AGCM’s Personnel Regulation](#), updated in 2018.

Directors and those in charge of any offices within the AGCM are called to monitor the application of the rules of the AGCM Personnel Regulation and the rules of the Code of Ethics concerning the conflicts of interests that may arise within the office of their competence.

Any queries related to the correct interpretation and application of the Code of Ethics can be addressed to a designated person, appointed externally to the AGCM: the Supervisor of the Code of Ethics is generally chosen from the judiciary, public administration or academic



community. The Supervisor has an advisory role by providing opinions to the AGCM's Secretary General who is responsible for the AGCM functioning and organization.

According to the Code of Ethics and the Personnel Regulation, officials are required to disclose any potential conflict of interest when they arise during the permanence of the employee in a given office or when starting in a new office.

Other disclosure obligations, coming from the general government-wide rules (legislative decree n.39/2013), are in place. Annually the employee is requested to declare that he/she is not involved in any other activity or role within the public sector. Directors and office managers ought to annually declare that their situations meet the criteria of compatibility (i.e., holding no additional offices outside the AGCM) and admissibility (e.g., no conviction).

In 2013, another primary legislation (legislative decree n.33/2013) was introduced to strengthen the ethics of the public administration sector by introducing: (i) standards for transparency, accountability, impartiality and preventing corruption; (ii) restrictions (e.g., incompatibility clauses, conflict of interests) for access to decision-making positions (e.g., the board of the AGCM and sector regulators), including provisions limiting the phenomenon of revolving doors.

The National Anti-Corruption Authority (ANAC) has provided guidelines to help public administrations to fulfill the above obligations, including the preparation of their own plans for ensuring transparency and integrity and preventing corruption.

Inspired by the ANAC guidelines, the AGCM adopted its own **three-year plan for transparency, accountability and anticorruption**.

The [AGCM 2019-2021](#) plan defines (i) the steps and initiatives to make available to the public all the data and information for which a transparency obligation exists (organization structure, staff performance, external consultants, procurement activities etc.); and (ii) the offices or areas potentially more subject to corruption (primarily, procurement services office), the measures for prevention (including training programs), the timing for implementing such measures, the staff responsible and the related sanctions for violations.

#### **h) Notice and Opportunity to Defend**

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the*

*requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*

- iii. *Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

The Authority can enforce its investigative powers (including the possibility to raid companies' premises) only after proceedings have been formally opened. Therefore, the decision to start an investigation coincides in time with the opening of the proceedings and, as a result, the parties under scrutiny to exercise their rights of defense from the very beginning.

This means that parties under investigation can access the case file as soon as the Authority has collected the documents, independent of their origin (e.g. inspections, requests for information, third parties' submissions). In practical terms, undertakings access the file several times during the proceedings (every time the Authority adds new information to the file) and have a fair amount of time to study it - equal to that at the Authority's disposal.

After the investigation is completed, pursuant to Section 14 of the Proceeding Regulation, the AGCM's Board, after having ascertained that the proposal submitted by the case team on the basis of the evidence acquired is not manifestly unsubstantiated, shall authorize the **Statement of Objections (SO)** to be sent on the undertakings concerned. The SO is an act of the case team and contains the provisional findings of the investigation based on all evidence gathered.

The SO document is generally structured in the following sections describing: 1) the proceedings; 2) the Parties; 3) the evidence gathered; 4) the arguments of the Parties; 5) Assessment (reply to arguments of the parties); 6) gravity and duration of the conduct; 7) proposal to the Board (e.g., cease and desist order + sanction).

After being notified the SO, the parties may still exercise their rights of defence by making further written submissions and disclosing documents up to five days before the closing date of the investigation (see Section 14(4) of the Proceeding Regulation).

Before the final decision is taken by the Authority, parties may ask for a **final hearing** before the Authority's Board. On receipt of this request, the Board shall set a date for the hearing and notify the undertakings concerned. The Board may also hear other parties to the proceedings which have submitted a reasoned request to be heard. The Board may also hear submissions from undertakings and interested parties, both separately and jointly. In the case of joint submissions, due account shall be taken of the concern of the undertakings that no commercial secrets relating to their activities be divulged.

In merger cases, merging parties may fully engage with the Authority and exercise their rights of defense only after the opening of a formal proceeding with the Phase II investigation. This right is exercised through the submission of briefs and documents, meetings with case team and a final oral hearing before the Board, after the SO is sent to the parties, according to the same provisions highlighted above.

## **i) Representation by Counsel and Privilege**

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

Pursuant to Section 14(1) of the Competition Act, the undertakings concerned have the right to be represented by legal counsels of their choice at any stage during the course of the investigation.

Pursuant to Section 7(4) of the Proceeding Regulation, in the course of the hearings, the interested parties may be represented by their legal representative or by a person holding a special power of attorney for the purpose. They may also be assisted by consultants of their choice, even though this shall not entail the suspension of the hearing.

Moreover, the AGCM cannot ask for information which would violate the privilege against self-incrimination: although not explicitly foreseen by the Competition Act, a “right of the party not to incriminate oneself” also exists in the national jurisdiction in the terms established by the European Court of Justice. In fact, according to the of the European case law, in order to guarantee the rights of defence, cannot be imposed on undertakings obligations to provide answers which would led to admit the existence of an infringement, which, on the contrary, ought to be proven by the competition authority.

Furthermore, although there is no specific provision in the Competition Act, the Authority generally recognises the legal professional privilege (LPP), within the scope recognised by the European case law. Therefore, parties based on LPP can decline to provide letters, e-mails, memorandum and other communications with their legal consultants on possible antitrust violations they might have committed.

On the contrary, parties may not refuse to provide the requested information - if relevant for the investigation - claiming that personal data are contained; rather, the parties may omit sensitive data in a non-confidential version of their reply which third parties may access. If the personal data are in itself irrelevant for the investigation, in fact, the AGCM makes it inaccessible to third parties.

Moreover, parties have no duty to provide documents which they do not possess.

When receiving a formal request for information the party have the possibility to indicate the information that it considers to be confidential (business secrets; etc.) as illustrated in the response to section f) on confidentiality. The AGCM will examine the request of confidentiality (whether it is well grounded) and if it considers it grounded it will restrict the access to the confidential documents by third parties.

## j) Decisions in Writing

- i. *Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. *Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

All AGCM decisions, opinions and orders are published and publicly available on its Bulletins and website. Below further details.

Pursuant to Section 26 of the Competition Act, “the AGCM’s decisions [referred to in Sections 15 (infringements and decisions imposing penalties for infringements of sections 2 and 3), 16 (decisions concerning mergers’ investigations), 18 (decisions to prohibit a merger), 19 (fines for failure to comply with the prohibition or the notification requirements) and 25 (Government powers over mergers)] shall be published within 20 days in the AGCM’s Bulletin. The Bulletin is organized in 4 main sections: anticompetitive conducts; mergers; opinions and consumer’s protection decisions.

In addition, decisions to open an investigation, commitment decisions and decisions adopting interim measures are published on the AGCM’s Bulletin and website. In addition, the commitments submitted by the parties and accepted by the Authority are published in full on the AGCM website and are also part of the final decision.

### *Commitment procedures*

Under Art. 14-ter of the Act, undertakings may offer commitments that would correct the competition concerns under investigation. After assessing the suitability of such commitments to remove the competition concerns, the Authority may make them binding on the parties and terminate the proceedings without ascertaining the infringement.

As for the procedure for the adoption of commitments, the AGCM issued a Notice in 2006 which was lastly revised in 2012 ([Resolution n. 23863](#) of Sept 6, 2012). Once a commitment proposal is received the Authority shall open sub-proceedings to assess the proposed commitments. First of all, the Authority is called to assess the admissibility to the market test of the proposed commitments within the term of 45 days from their presentation in the final version: the Authority may reject the proposed commitments because they are late, manifestly unfit of resolving the antitrust concerns, because the conduct is susceptible of integrating a serious breach of competition law or because there is a special interest for a full assessment due to the novelty of the case; otherwise, the AGCM may officially decide to publish them on its website for market test purposes.

The decision on the admissibility of the proposed commitments may not be appealed autonomously by the relevant party, but only within the contest of an appeal of the final AGCM decision closing the case.

Interested third parties may present their written observations regarding the proposed commitments within 30 days from the date of publication of the commitments on the website. Within 30 days from the deadline for the submission of third-party comments (i.e., 60 days from the publication of the commitments for market test purposes), the parties involved may make written comments to the Authority on the observations presented by third parties and – in light of those observations – may introduce further changes to the commitments. Revisions shall be strictly related to the outcome of the market test and cannot radically change the commitments already submitted.

This very last version of the commitment proposal shall be assessed by the Authority: if rejected, the AGCM will close the commitments proceedings, inform the interested parties and continue the investigation within the main antitrust proceedings. Alternatively, in the final decision the Authority shall make the commitments binding on the parties involved and end the antitrust proceedings without ascertaining any infringement. The final decision closing the investigation by accepting the commitments contain the original version of the binding commitments while a non-confidential version is available in the decision which is published online and in the AGCM Bulletin.

In merger review proceedings, merging parties may submit remedies any time during the Phase II investigation, in particular after receiving the SO, although the very stringent timetable does not allow the Authority carry out a formal market test of the proposed remedies.

#### **k) Independent Review**

*No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).*

The addressees of the AGCM infringement and/or sanctioning decisions have the right to challenge them before the administrative Courts. In particular, the review court of first instance is the Regional Tribunal of Latium, Rome (TAR Lazio). The judgments issued by the TAR Lazio can be appealed before the Council of State, acting as a court of last instance. Both, the TAR Lazio and the Council of State, when deemed necessary, can make a referral to the European Court of Justice according to art. 267 TFEU.

The review of AGCM decisions is full and effective and extends to all factual and legal issues raised by the decision under scrutiny, including technical criteria employed by the Authority in its economic assessment. In relation to the fines imposed by the Authority, Courts can replace the AGCM's assessment with their own and adopt a new decision, either confirming, reducing or annulling the fine. They can also indicate the criteria and remit to the Authority a new determination of the fine.

The European Court of Human Rights (ECHR), in its *Menarini* judgment, held that the Italian judicial review on the antitrust decisions is compliant with human rights insofar as the control exercised by the Council of State is a full jurisdiction control. In particular, the ECHR highlighted that the Italian administrative Courts are able both to ascertain the appropriateness and proportionality of the measures adopted by the AGCM and to exercise control over assessments of technical nature.