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ITALY

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ENFORCEMENT OF COMPETITION LAW

MEASURES ADOPTED BY THE ANTITRUST AUTHORITY IN 1998 AND THE FIRST QUARTER OF 1999

In applying the legislation on the protection of competition, Law no. 287/1990, in 1998 the Authority evaluated 344 concentrations, 53 agreements and 21 possible abuses of a dominant position. After declining in 1997, the number of planned concentrations submitted for appraisal rose in 1998, in line with the upturn in mergers and acquisitions abroad. Only two transactions were deemed to create or strengthen a dominant position and were subsequently approved after the parties had made changes to their plans.

The Authority's activity (number of proceedings completed)*

	1997	1998	January-March 1999
Agreements	64	53	13
Abuses of dominant position	46	21	4
Concentrations	292	344	104
Fact-finding inquires	6	-	-
Non-compliance with orders	3	1	-
Opinions	57	46	7
Misleading advertising	506	468	94

* Includes cases that were dismissed, those in which no violation of the law was found and those that were transferred to the European Commission. The figures for misleading advertising refer only to the investigations carried out.

Distribution of proceedings completed in 1998 by type and outcome

	Outcome			
	No violation of the law	Violation of the law, conditional authorisation or changes in terms of agreement leading to compliance	Cases beyond the scope of the Authority's powers or to which the law was not applicable	Total
Agreements	38	11	4	53
Abuses of dominant position	18	2	1	21
Concentrations	314	2	28	344
Opinions submitted to the Bank of Italy				46
Misleading advertising*	150	300	18	468

* The figures refer only to the investigations carried out.

Of the 53 agreements examined, eleven were deemed to limit competition. In most of the cases of alleged abuse of a dominant position reported to the Authority in 1998, it was possible to exclude violation of the law without starting an investigation. In only two cases did the investigation find that the behaviour of a firm in a dominant position constituted an abuse. During the year, the Authority imposed fines totalling 5.1 billion lire for serious violations of the provisions prohibiting the abuse of a dominant position and anti-competitive agreements. An additional fine of 2.7 billion lire was imposed on a firm for failing to observe an order issued by the Authority in connection with an agreement limiting competition. Other fines amounting to 216 million lire were imposed on firms for failing to comply with the requirement to give advance notice of concentrations.

1. Under Articles 21 and 22 of Law no. 287/1990 the Authority sends reports to Parliament and governmental bodies on distortions arising from existing and proposed laws and regulations. As in previous years, this activity was particularly intense and covered a wide range of economic sectors.

Competition advocacy reports and opinions
(January 1998 - March 1999)

Sector	1998	January-March 1999
Food and tobacco products	2	-
Publishing	1	-
Electricity, water and gas	2	-
Wholesale and retail trade	5	1
Transport	7	-
Telecommunications	9	-
Monetary and financial intermediation	1	1
Insurance	-	1
Professional and business services	4	1
Health care and other social services	2	-
Refuse disposal	2	1
Sundry services	2	2
Other sectors	4	-
Total	41	7

The number of cases of misleading advertising referred to the Authority showed a further large increase, rising to 975. In 300 cases the advertisement was found to be misleading within the meaning of Legislative Decree no. 74/1992.

In the first three months of 1999 the Authority ruled on 13 agreements, 4 alleged abuses, 104 concentrations and 94 cases of misleading advertising.

AGRICULTURAL AND FOOD PRODUCTS

CONSORZIO PER LA TUTELA DEL FORMAGGIO GORGONZOLA

In November 1998, the Authority completed an investigation into the consortium for the protection of gorgonzola cheese aimed at verifying alleged violations of the prohibition on anti-competitive agreements. The consortium is a voluntary one, with some sixty member firms located in the area where gorgonzola, a cheese with a protected designation of origin, is manufactured. Before the entry into force of the system of controls provided for in Council Regulation (EEC) no. 2081/92, the consortium had traditionally supervised the production and marketing of gorgonzola cheese under the Italian law on the protection of denominations of origin and typical names of cheeses.

The Authority concluded that the consortium's production plans for the years from 1991 to 1998, aimed at restricting total production and dividing it among the member firms on the basis of "historical" market shares, did not fall within the scope of the objectives established by the law on the protection of denominations of origin and, by limiting competition among producers and the growth of more efficient firms, amounted to anti-competitive agreements in violation of Article 2 of Law no. 287/1990.

CONSORZIO DEL PROSCIUTTO DI PARMA-CONSORZIO DEL PROSCIUTTO DI SAN DANIELE

In January 1999, the Authority rejected the application by the Parma and San Daniele ham consortia for an extension of the authorisation of production agreements they had been granted until 31 December 1998 under Article 4 of Law no. 287/1990. In examining the application, the Authority found that the conditions obtained at the time the original authorisation was issued no longer existed. In giving its reasons for not extending the authorisation, the Authority noted that fixing the quantities to be produced was both unnecessary and inappropriate with respect to the declared objective of ensuring that the production of hams with a protected designation of origin conformed with the prescribed methods, since this task is now performed by bodies designated under Italian and Community law.

REPORT ON COMPETITIVE DISTORTIONS IN DRAFT LEGISLATION ON AGRICULTURE AND THE FOOD PROCESSING INDUSTRY

In April 1998, pursuant to Article 22 of Law no. 287/1990, the Authority sent a report to Parliament and the Government on competitive distortions in a draft legislative decree which granted exemption from the law on the protection of competition to a wide range of agreements between undertakings operating in the sector and empowered the Minister for Agricultural Policies to issue decrees extending the application of agreements entered into by trade associations to other unrelated undertakings. The Authority pointed out that these provisions were in contrast with the European Union principles and rules governing competition in agriculture and not, as the references to Community law in the preamble to the draft legislation suggested, in conformity with them.

OIL PRODUCTS

THE MARKET FOR SULPHUR

In October 1998, the Authority completed an investigation into nearly all the companies that refine crude oil in Italy and two companies that market sulphur, Zolfital Spa and Esseco Spa. The aim of the

investigation was to establish whether the relationship between the oil refiners and Zolfital and Esseco involved agreements limiting competition in the market for sulphur.

Zolfital and Esseco, which constituted a single enterprise for the purposes of Italian competition law since they were controlled by the same entity, acted as buying agents for the majority of Italian firms using sulphur as a raw material and made purchases from all the refiners in Italy. The investigation showed that the latter gave the Zolfital/Esseco group a *de facto* exclusive right to distribute sulphur in Italy.

During the investigation, Zolfital/Esseco proposed that the two companies should be separated by selling the control of Zolfital to its management. The Authority concluded that the resulting increase in the number of competitors in the market for the distribution of sulphur would overcome the market foreclosure associated with the existence of a single distributor and would be sufficient to eliminate the violations identified.

PHARMACEUTICAL PRODUCTS

ISTITUTO GENTILI-MERCK SHARP & DOHME-NEOPHARMED-SIGMA TAU INDUSTRIE FARMACEUTICHE RIUNITE-MEDIOLANUM FARMACEUTICI

In February 1999, the Authority completed its investigation into Merck Sharp & Dohme Italia Spa, Neopharmed Spa, Istituto Gentili Spa, Sigma Tau Industrie Farmaceutiche Riunite Spa and Mediolanum Farmaceutici S.p.A. for possible violations of the prohibition on anti-competitive agreements in relation to parallel movements in the prices of certain category C drugs produced by these companies. Category C drugs are paid for entirely by patients and their prices are unregulated. The investigation focused, in particular, on drugs based on the active principle known as “symvastatin”, which are used for the treatment of hypercholesterolaemia.

Together with the impossibility of adducing parallel movements in costs to explain the parallel movements in prices, additional evidence of collusion was found in correspondence in which Merck Sharp & Dohme Italia gave the other companies advance notice of its intention to raise the price of its product and invited them to follow, which they did. The Authority concluded that the practice of jointly fixing the prices of class C drugs was anti-competitive within the meaning of Article 2 of Law no. 287/1990. The horizontal agreement had the effect of increasing prices by 47 percent in just ten months and it was substantial in scope since the parties had a market share of 67 percent for the category C segment and of 63 percent for statins in general. In view of the seriousness of the limits to competition identified, the Authority fined the companies a total of 115 million lire, equivalent to 3 percent of the sales revenues for the products in question.

BYK GULDEN ITALIA-ISTITUTO GENTILI

In February 1999, the Authority completed its investigation into Byk Gulden Italia Spa and Istituto Gentili Spa in relation to parallel movements in the prices of certain category C drugs for the treatment of throat infections. The two companies distributed drugs based on the same active principle but with different trademarks. The Authority concluded that the behaviour of the two companies was the result of a price fixing concerted practice. The grounds for this conclusion were: the parallel movements in the prices of the products in question; contacts, correspondence and discussions having as their object the pricing policies of the two companies; the impossibility of adducing parallel movements in costs to explain the parallel movements in prices. The practices were deemed to constitute an anti-competitive agreement within the meaning of Article 2 of Law no. 287/1990. The effect of the agreement was substantial in scope since it

was between the two leading companies in the sector with a combined market share of 36 percent. The Authority fined Byk Gulden Italia and Istituto Gentili a total of 705.57 million lire, equivalent to 3 percent of the sales revenues for the products in question, or 705.57 million lire in total.

ASSOSALUTE-SELF-REGULATORY CODE OF CONDUCT

In March 1998, Assosalute, the trade association of the producers of non-prescription drugs, asked the Antitrust Authority to exempt, under Article 4 of Law no. 287/1990, a self-regulatory code of conduct on changes in the prices of non-prescription drugs from the prohibition on anti-competitive agreements. The Authority found that the mechanism specified in the code, based on parameters that it would have been easy for the firms involved to know, would have allowed each of them to foresee the pricing policies of the others. The distortion of the price formation mechanism produced by the code would have been accentuated, moreover, by the monitoring Assosalute was to perform to ensure compliance by the members of the association, which would have further reduced the free play of price competition. The Authority concluded that the self-regulatory code proposed by Assosalute for the determination of drug prices amounted to an anti-competitive agreement within the meaning of Article 2 of Law no. 287/1990. The Authority was not satisfied that the conditions necessary for an exemption to be granted under Article 4 existed and therefore rejected the application.

NOTIFICATION OF COMPETITIVE DISTORTIONS IN LEGISLATION ON PHARMACIES

In June 1998, the Authority sent a report to Parliament and the Government on the desirability of revising the legislation governing pharmacies in Italy in order to remove limits to competition that do not appear justified on grounds of public interest. The report examined all the main aspects of the rules and regulations currently in force, with special reference to the exclusive right to sell drugs, the determination of the number of pharmacies and the restrictions on advertising and opening hours.

The distribution of pharmacies in Italy is regulated by law. In particular, the number of pharmacies that can be licensed in each municipality is based on demographic and geographic criteria and the minimum distance between outlets. The Authority emphasised that the current restrictions were not strictly necessary on public interest grounds and pointed out that in other countries the opening of new pharmacies and the choice of their location were not subject to comparable limitations. The restrictions on the number of pharmacies in Italy appear designed more to guarantee the incomes of pharmacists than to ensure a satisfactory distribution of pharmacies. The objective of guaranteeing a minimum level of service throughout the country could be attained more effectively by identifying indicators of service adequacy, such as the minimum number of pharmacies that should be present in each locality, and by providing for municipal pharmacies only where it was found that not enough privately owned pharmacies had entered the market to provide an adequate service.

MEANS OF TRANSPORT

GORIZIANE-FIAT FERROVIARIA

In December 1998, the Authority completed an investigation following a complaint by Goriziane Spa against Fiat Ferroviaria Spa and concluded that the latter's refusal to sell competitors the spare parts needed to participate in a tender organised by the Special Government Administration of the Appulo-Lucane railway for the overhaul of Fiat/Iveco diesel railway engines amounted to abuse of a dominant position.

The Authority found that Fiat Ferroviaria had abused its dominant position in the market for diesel locomotives to extend this position to the downstream market for the overhaul of the engines, in violation of Article 3 of Law no. 287/1990. This behaviour had allowed Fiat Ferroviaria to win the contract by preventing competitors from taking part and been detrimental to the Appulo-Lucane railway, which was deprived of the possibility of choosing between alternative bids. The Authority considered Fiat Ferroviaria's refusal to be all the more serious because it was intended to stifle competition in a growing market. The Authority applied Article 15.1 of Law no. 287/1990 and fined Fiat Ferroviaria 15 million lire, equivalent to 4 percent of its turnover in the market for the overhaul of diesel railway engines, including the supply of spare parts.

OTHER MANUFACTURING ACTIVITIES

FIRMS BUILDING AND MAINTAINING LIFTS

In October 1998, the Authority completed an investigation into the main national trade association in the field of lift maintenance (Anacam), its regional sections in Emilia Romagna and Marche, and a national association of small firms operating in the same field (Conpiai). The investigation concerned the preparation, adoption and dissemination by the aforementioned associations of price lists for the ordinary and extraordinary maintenance of lifts. The Authority found that the adoption of price lists by trade associations representing nearly all the market was likely to distort competition seriously within local markets for lift maintenance, in violation of Article 2 of Law no. 287/1990.

COMPAGNIA ITALIANA ALLUMINIO (COMITAL)-COFRESCO ITALIA

In January 1999, the Authority began an investigation into the acquisition by Compagnia Italiana Alluminio Spa of the control of Cofresco Italia Spa from Cofresco Frischhalteprodukte GmbH & Co. K.G. Both Comital and Cofresco operate in the field of disposable household products, such as aluminium foil, plastic foil, oven paper, freezer bags and bin liners. Comital owns the Cuki, Misterpack, Sacco Verde and Comital registered trademarks, while Cofresco Italia was the licensee of the Domopak trademark and was to have acquired it before the transaction was completed.

Comital would have significantly strengthened its position in the Italian markets for household foils and oven paper, with its market share rising to 51.4 percent and 70.8 percent respectively in value terms, compared with the closest competitor's share of not more than 3.8 percent. It would also have come to hold a significant share of the market for metal foil containers, equal to 46 percent of the total value of sales in large retail outlets. The investigation also showed that Comital would come to own all the leading brands, which play an important role in supermarket distribution owing to the positive image effect that the presence of well-established brands has on the sales of distributors' own-label products. Nonetheless, consumers' limited brand fidelity, together with the absence of significant entry barriers, especially of a technological nature, led the Authority to conclude that the concentration would not have allowed Comital to behave in a manner significantly independent of customers and competitors and would therefore not have led to the company acquiring a dominant position at national level. Accordingly, in March 1999 the Authority closed the procedure declaring that the acquisition was compatible with Article 6 of Law no. 287/1990.

ELECTRICITY

OPINION ON THE DRAFT LEGISLATIVE DECREE IMPLEMENTING DIRECTIVE 96/92/EC AND OTHER LEGISLATIVE DEVELOPMENTS

In November 1998, the Authority submitted an opinion on the draft legislative decree implementing Directive 96/92/EC concerning common rules for the internal market in electricity, and put forward some suggestions designed to maximise the opportunities for increasing competition in the sector.

For potentially competitive activities in the electricity industry, the Authority reaffirmed the need to replace public franchises with administrative authorisations, thereby making the conditions of entry into the market less dependent on the discretion of governmental bodies. The Authority also stressed that the draft decree appeared to provide for an excess of regulatory intervention extending to activities that have been liberalised. Equally, the broad decision-making powers that the decree entrusted to the Government, to the detriment of the powers of the Energy and Gas Authority, appeared to conflict with Law no. 481/1995 containing “Rules on competition and the regulation of public utilities”. The Authority stressed that the development of competition in a sector such as electricity, which in Italy had been removed from the free play of market forces for so long, required a delicate balance to be struck between rules and incentives. In this perspective, there appeared to be a need for the measures designed to promote and protect competition that the Electricity and Gas authority and the Antitrust Authority are called upon to take, within their different but complementary spheres of sectoral and general responsibility.

As regards the generation of electricity, which is widely recognised as being possible to carry out on a competitive basis, the draft decree introduced a prohibition on any one undertaking directly or indirectly controlling more than 50 percent of the electricity produced in Italy as of 1 January 2003. The Authority considered that it would have been preferable to adopt productive capacity rather than production as an indicator of market power and that fixing a limit of 50 percent in terms of market share in a market with very high entry barriers as a consequence of the sunk capital involved did not appear sufficient to exclude the risk of a dominant position; it therefore recommended that the 50 percent limit should be lowered. The Authority also recommended that the measures for verifying Enel’s compliance with the obligation to reduce its generating capacity by 15,000 MW by 2003 should exclude the possibility of the sales discriminating against new entrants. Lastly, while it appeared reasonable to use public franchises for the assignment of the main water resources for hydroelectric generation, the proposed duration of thirty years appeared less acceptable, as did the discriminatory duration of franchise renewals: thirty years for Enel and until 31 December 2010 for private generators.

With a view to the prospective liberalisation of the electricity market, the Authority recommended that, regardless of the ownership of the transmission network, it should be made clear that, in accordance with Article 7 of Directive 96/92/EC, the decision-making and implementing powers regarding the maintenance, operation and development of the transmission network will be attributed to the system operator, which should be independent of electricity suppliers. The Authority also stressed the need for the various Enel subsidiaries entrusted with the generation, transmission, distribution and sale of electricity to be mutually independent and floated as soon as possible, with explicit provision made for the transitory nature of their belonging to a single group.

As regards the downstream phases of the productive process, the Authority stressed that, whereas the distribution of electricity at the local level had the characteristics of a natural monopoly, its sale to final users could be organised separately and on a competitive basis. The draft decree, on the contrary, provided for the two activities to be performed by a single undertaking, thereby implicitly extending the franchise to

engage in distribution to selling. This would exclude the possibility, even in the medium term, of developing competition in the sale of electricity to tied customers, who make up 60 percent of the market.

NATURAL GAS

SNAM-CARRIAGE CHARGES

In February 1999, the Authority completed an investigation into an alleged abuse of a dominant position by Snam in the markets for the transport of natural gas in the national gas pipeline network and the primary distribution of natural gas. The abuses of which Snam was accused concerned in particular: *i)* Snam's refusal to grant Assomineraria (the natural gas producers' association) access to its national network for gas for uses other than electricity generation and own-consumption; *ii)* Snam's refusal to accept Assomineraria's request to revise the agreement of 22 December 1994 with regard to the carriage of natural gas produced in Italy, with special reference to the price of the service; and *iii)* Snam's practice of monitoring the final destination of the gas carried on behalf of Edison Gas Spa.

In view of Snam's dominant position in the market for the transport of natural gas and the essential nature of its transport facilities, the Authority concluded that the company was not justified in refusing access to its national network of gas pipelines to actual and potential competitors and that they therefore had the right to the carriage of natural gas in cases other than use for electricity generation and own consumption.

Moreover, the Authority found that the method of calculating the charge for carriage laid down in the 1994 agreement of allowed Snam to fix the price level independently of the effective demand for the transport of third parties' gas and was likely to lead to the imposition of unjustifiably burdensome contractual conditions, in violation of Article 3 of Law no. 287/1990. In view of the seriousness and duration of the violations identified, the Authority fined Snam 3,584 million lire, equivalent to 9 percent of the company's revenues in 1997 for the carriage of gas for third parties.

RETAIL TRADE

SCHEMAVENTUNO-PROMODÈS/GRUPPO GS

In June 1998, the Authority completed an investigation into the acquisition of the joint control of the GS group, which operates in Italy in the retail distribution of grocery products, by Promodès, a leading French group operating in commercial distribution. The concentration had originally been notified to the European Commission, which, at the request of the Authority pursuant to Article 9.2a) of Council Regulation (EEC) no. 4064/89, referred the case for the Turin, Vercelli and Aosta areas to the Authority.¹ This was the first time the Commission had devolved the investigation of a concentration with a Community dimension to the Authority.

As initially notified, the concentration would have resulted in substantial structural changes in some of the local markets in question and given the new group considerable market power. In order to overcome the objections raised by the Authority concerning the possible creation of dominant positions in the various markets, the parties undertook to dispose, within a given time limit, of seven stores with a total floor space of 7,500 m² located in the areas most affected by the concentration. On the basis of this undertaking, the Authority authorised the concentration on the grounds that, although it strengthened the position of the GS-Promodès group, it did not result in competition being eliminated or substantially and lastingly reduced.

REPORT ON COMPETITIVE DISTORTIONS IN LEGISLATION ON SELLING BELOW COST

In April 1998, the Authority sent a report to the Presidents of the Senate and the Chamber of Deputies, the Prime Minister and the Minister for Industry on some provisions of Legislative Decree no. 114/1998 (“Reform of wholesale and retail trade”), concerning the practice of selling below cost. The report emphasised that, from the point of view of competition, the practice frequently adopted by large retail outlets of selling some well-known products at particularly attractive prices in order to boost the total sales of their stores should be evaluated on a case-by-case basis in relation to the influence the practice has on the conditions of sale of the whole range of products available. In the Authority’s opinion the question of selling below cost could have been effectively regulated by the prohibition on the abuse of dominant position contained in Law no. 287/1990, without any need for specific legislation.

AIR TRANSPORT AND AIRPORT SERVICES

ALITALIA-MERIDIANA

In January 1999, the Authority completed the investigation into Alitalia Spa and Meridiana Spa it had initiated following the notification by Alitalia of code-sharing agreements between the two companies. The Authority was asked to verify that the agreements were not anti-competitive and, failing that, to grant an exemption.

In view of the commercial co-ordination deriving from code-sharing, the Authority concluded that the agreements resulted in a reduction in competition, both on the routes where Alitalia and Meridiana actually competed, owing to the change from a situation marked by the presence of two independent carriers to one of monopoly, and on the routes where they were found to be potential competitors, since the planes of the two carriers would allow them to operate on both types of route.

The Authority did not find the conditions existed for granting an exemption, either in terms of an improvement in the service supplied under the agreement (since it had not resulted in the activation of new routes or an increase in the frequency of flights) or in terms of benefits to business or tourist users (since the data gathered showed that the agreement had led to a substantial increase in fares on the routes concerned). The Authority accordingly concluded that the agreement between Alitalia and Meridiana had the object and the effect of substantially hindering competition in violation of the prohibition contained in Article 2 of Law no. 287/1990 and rejected the request for it to be exempted under Article 4 of the same law.

ALITALIA-MINERVA AIRLINES

In January 1999, the Authority completed the investigation into Alitalia Spa and Minerva Airlines it had initiated following the notification, in accordance with Article 13 of Law no. 287/1990, of a commercial agreement between the two companies, providing for the co-ordination of the two companies’ scheduled flights on all the routes operated by Minerva and for Alitalia to grant Minerva its trademark and give support in the form of distribution structures in a manner typical of franchising agreements between airlines. The flights of the combined network were to be marketed and advertised under the AZ label and provision was made for some routes to be operated on a code-sharing basis. The fact that the franchising agreement covered the entire area of Minerva’s operations and resulted in its fare schedule being integrated with that of Alitalia was deemed to imply the elimination of potential competition between Alitalia and Minerva in the markets concerned. The Authority therefore concluded that the object of the agreement between Alitalia and Minerva was to impose a substantial obstacle to competition in violation of the

prohibition contained in Article 2 of Law no. 287/1990. As regards the request for the agreement to be exempted under Article 4 of the same law, the Authority concluded that the parties to the agreement had supplied sufficient evidence to show that the conditions for exemption were fulfilled since the agreement was found to have brought benefits, in terms of both increased supply and cost reductions, that, at least in part, had been passed on to customers.

The Authority accordingly decided to authorise the agreement until 31 January 2001. Three years (equal to the minimum contractual duration of the agreement) had been indicated by Minerva as the minimum lapse of time needed to recover the investments made to upgrade its services to the standard required by Alitalia and to achieve the benefits referred to above.

OPINION ON THE TEMPORARY MEASURES FOR THE DIVISION OF AIR TRAFFIC BETWEEN THE AIRPORTS OF LINATE AND MALPENSA

In October 1998, the Authority submitted a report to the Prime Minister and the Minister for Transport pointing out that the provisions of the decree issued by the Minister for Transport on 9 October 1998 on the division of air traffic between Malpensa and Linate were likely to have substantial anti-competitive effects on the Linate-Rome route, the most important domestic route in Italy.

The decree results in a strengthening of the dominant position of Alitalia on the Linate-Rome route, since it leaves the company free to choose how to vary and, if it so wishes, to increase the number of its flights, whereas its only competitor at present is actually forced to reduce the number of its flights. The Authority accordingly stressed that the regulatory regime introduced by the decree contributed to strengthening the company in a dominant position at the expense of its only competitor and prevented other companies from entering the market. In view of the importance of the Linate-Rome route, the decree, despite its temporary nature, appeared seriously detrimental to consumers since the weakening of the only competitor and its possible withdrawal from the market could plausibly be expected to have effects beyond the expiry of the decree.

Lastly, the Authority, with a view to restoring sufficient competition on the Linate-Rome route, recommended the removal of the restrictions limiting the services supplied by companies that had begun to fly on this route following the liberalisation of air transport in accordance with Council Regulation (EEC) no. 2408/92 and by companies that intended to start flights and giving such companies the possibility to fly on other domestic routes starting from Linate. This would have prevented the carrier in a dominant position from being, de facto, the only one able to fly on these routes and would have provided greater protection for consumers at a time when the links from the center of Milan to Malpensa were inconvenient and inadequate.

RAILWAY TRANSPORT

OPINION ON THE DRAFT REGULATION IMPLEMENTING DIRECTIVE 91/440/EEC ON THE DEVELOPMENT OF THE COMMUNITY'S RAILWAYS

In June 1998, the Authority submitted a report to Parliament and the Government with its opinion on the draft regulation implementing Directive 91/440/EEC on the development of the Community's railways, as approved by the Council of Ministers on 27 March 1998. The draft regulation, in conformity with the provisions of the Directive, was explicitly based on the principles of ensuring the management independence of railway undertakings, improving their financial structure, ensuring that the accounts for business relating to the provision of transport services and those for business relating to the management of

railway infrastructure are kept separate or that the businesses are run by separate companies, and ensuring access to goods and passenger markets.

In its report, the Authority stressed that the introduction of more competition in the railway sector required complete implementation of the principle of separating the management of infrastructure from that of transport services and an effective guarantee of new operators' right of access to the railway network. In this respect the real impact of the implementation of the "framework" Directive (91/440/EEC) would depend largely on the measures subsequently adopted in implementing Directives 95/18/EEC on the licensing of railway undertakings and 95/19/EEC on the allocation of railway infrastructure capacity.

As regards the management of the railway network and the supply of transport services, the Authority observed that the draft regulation complied with the separation obligation imposed by Directive 91/440/EEC by providing for accounting separation, which is the solution involving the least separation among those available. Accounting separation was not, however, a suitable means in itself of guaranteeing that transport services would be supplied in competitive conditions. The obligation to keep separate accounts should be no more than an intermediate step towards the outright separation of the two activities. The Authority accordingly hoped to see a rapid reorganisation of the railway system that would separate, both legally and in terms of ownership, the activity of network management from that of supplying transport services. In particular, as regards the transport of goods, where there are no public service obligations and the benefits of a vertically integrated structure are less pronounced, outright separation would foster the opening of the market to competition.

As for the question of guaranteeing rights of access to the network, the report recommended that Directives 95/18/EEC and 95/19/EEC should be implemented shortly in order to complete the regulatory framework for the sector and reduce the transitory period to the minimum. The Authority also pointed to the need for the requirements and procedures for the issue of licenses to companies wishing to provide railway transport services not to hinder access to the market unjustifiably. For the same reasons, it stressed the need to entrust an independent body with the task of issuing the safety certificates intended to ensure that only companies that comply with appropriate safety and reliability standards obtain access to the network. Lastly, the Authority recommended that the methods adopted to determine the charges for access to the railway infrastructure should be established in a way that did not allow any discrimination between those having right of access.

AUXILIARY TRANSPORT ACTIVITIES

OPINION ON THE EXTENSION OF MOTORWAY LICENSES

In May 1998 the Authority submitted a report to the Chairman of the State Road Agency (Anas) and the Minister for Public Works on the twenty-year extension of Autostrade Spa's franchise to build and operate motorways and the intention manifested by Anas of following the same policy for the other companies holding motorway licenses. As a general principle, the Authority recommended that franchises for the operation of sections of motorway should be renewed by means of transparent procedures.. The Authority also observed that where the franchise to be renewed was for a motorway with characteristics allowing it to be divided into several sections, their operation could be put out to tender separately and contracts awarded to different companies.

The Authority expressed the hope that these general considerations would be taken into account both as regards the twenty-year renewal of Autostrade Spa's franchise, in order to avoid giving an unjustified advantage to the leading motorway operator (which already runs more than 50 percent of the network), and

as regards the extensions Anas intended to grant to the other operating companies to offset its liabilities towards them.

TELECOMMUNICATIONS

In the early stages of liberalisation, the shift from a state monopoly to a competitive regime requires active intervention by the public authorities in order to create a suitable environment. The need to verify compliance with the numerous statutory rules that the creation of a competitive market requires has been met in Italy by the creation of the Communications Regulatory Authority, which became fully operational in 1998. The new Authority's first investigations concerned the supply of direct circuits and interconnection conditions; the related measures were adopted after consulting the Antitrust Authority and made an important contribution to the liberalisation process.²

PRIVATISATION OF SEAT: TELECOM-SEAT PUBLISHING AGREEMENTS

In May 1998, the Authority completed an investigation into the contracts between Telecom Italia Spa and Seat Spa for the joint distribution of telephone directories and Yellow Pages, the packaging of these publications and the classification of data on business users. It ruled that the agreements in question violated Article 2 of Law no. 287/1990 since they significantly restricted competition. The Authority found that the contracts for the joint distribution and the packaging of telephone directories and the Yellow Pages produced by Seat gave this company significant cost advantages compared with its competitors. Furthermore, the joint distribution allowed Seat to benefit from the association of its Yellow Pages, a typically commercial product, with the country's official telephone directories produced in the public interest pursuant to Presidential Decree no. 156 of 29 March 1973.

OPINION ON THE RULES FOR THE TENDER FOR THE AWARD OF A DCS 1800 MOBILE TELEPHONY LICENSE

In the opinion it submitted in April 1998 on the rules for the tender for the award of a DCS 1800 mobile telephony license, the Authority reaffirmed the conditions it had identified in its earlier report of March 1998 as necessary for the fully competitive development of Italy's mobile telephony markets: the immediate award of two national DCS 1800 licenses; the removal of the existing restrictions on the use of frequencies in the 1800 MHz band; and a rapid reallocation of frequencies in the 900 MHz band currently assigned to TACS analogue mobile services, so as to boost services based on the latest digital techniques. The Authority also confirmed its view that it would be desirable to introduce a pricing mechanism for the assignment of frequencies in order to optimise the allocation of a scarce resource and that asymmetrical pro-competitive measures should be employed, especially to shorten the time before new entrants actually started commercial services.

Since the final text of the "Outline of measures to guarantee conditions of effective competition in the mobile and personal communications market" diverged from the recommendations put forward by the Authority in March, in particular by postponing the call for further bids in the tender for the award of a fourth license and providing for a different mechanism to that suggested by the Authority for the asymmetrical measures to be incorporated in the bidding, in its opinion on the rules for the tender, the Authority provided additional indications aimed at guaranteeing its efficiency and transparency. Specifically, it was deemed necessary: to reduce the numerous and complex requests for information from participants; identify just a few clear and objectively quantifiable criteria that would to minimise the scope for discretion in the evaluation process; and notify the evaluation criteria in advance to the participants. The opinion also mentioned the possibility of the winner forfeiting its performance bond or having its

license revoked in the event of its subsequently failing to fulfil the undertakings entered on submitting its bid.

OPINION ON THE NEW CHARGES FOR THE SUPPLY OF LEASED LINES AND TARIFF SCHEDULES FOR VOICE TRAFFIC

In September 1998, in response to a request from the Minister of Communications, the Authority submitted an opinion on proposals put forward by Telecom Italia concerning the economic conditions at which it intended to supply leased lines and some tariff schedules for voice telephony. The Authority stressed that, in the light of the relevant Italian and Community law, both fixed public telephony services and leased lines should be supplied in conformity with the guidelines laid down for public services in Law no. 481/1995, including the specification of a tariff system that is certain, transparent and based on predetermined criteria. In particular, the Authority observed that the supply of leased lines, which new telecommunications operators must have to be able to provide their services, is still an activity for which Telecom Italia has a monopoly; it therefore stressed that the determination of the charges for the supply of leased lines should follow principles of transparency, objectivity and cost orientation and that the imposition of excessively high prices by the dominant operator should be avoided and mechanisms introduced to foster the productive efficiency of national network operators in supplying network infrastructure.

The Authority recommended that approval of the new charges proposed by Telecom Italia for leased lines and the new discounts for voice telephony services should be preceded by an analysis of their impact both on the overall tariff structure for telecommunications services, including voice telephony and the supply of dedicated lines, and on the technical and economic conditions of interconnection with the public switched network.

OPINION ON THE DRAFT MEASURE CONCERNING THE EVALUATION OF THE REFERENCE INTERCONNECTION OFFER AND TELECOM ITALIA'S REQUEST FOR IT TO BE MODIFIED

In November 1998, the Communications Regulatory Authority sent the draft measure concerning Telecom Italia's request for modification of the reference interconnection offer to the Antitrust Authority for its opinion pursuant to Article 4.9 of Presidential Decree no. 318/1997 and Article 14.8 of the Ministerial Decree of 23 April 1998, with a view to the adoption of the final text of the measure.

In its opinion, the Antitrust Authority expressed general agreement with the changes made by the Communications Regulatory Authority to the text originally proposed by Telecom Italia with the aim of rendering the charges less heavy and the interconnection conditions less discriminatory against new operators. The Antitrust Authority nonetheless considered it worth putting forward some specific suggestions aimed at enhancing the immediacy and effectiveness of the Communications Regulatory Authority's measure. In the first place, in relation to the proposed structural changes in the provision of interconnection (changes to the gateway areas and the definition of charges based on distance) and those concerning the shift to defining and calculating interconnection charges on the basis of distance, the Antitrust Authority stressed the need to set time limits within which the proposed innovations, appropriately evaluated, were to lead to the reformulation of the conditions at which Telecom Italia provides interconnection.

In the second place, although the Antitrust Authority took a favourable view of the reference in the measure to the obligation of the dominant operator to provide interconnection services at the local and distribution network levels on the basis of a price list, it expressed reservations about the methods chosen to achieve this. The period of nine months set for the definition of the manner of introducing the service on

a price-list basis appeared inconsistent with the objective of avoiding the continued existence of a monopoly at the local level and encouraging the installation of new infrastructure in the medium term. The Antitrust Authority accordingly considered that it was necessary, in order to achieve the objective of fostering competition, to adopt a shorter time limit so as to ensure that new entrants had access as soon as possible to interconnection services at the disaggregated network level.

The Antitrust Authority also took the opportunity to address the question of the title to the fixed-mobile charge, which, at the time the opinion was prepared, pertained to the mobile company of the recipient of the call. The Authority hoped that the deadline of 1 January 1999 would be an opportunity for a comprehensive re-examination of the anomaly created by this system and argued that the charges for the service provided should be fixed by the operator from whose infrastructure the call originated on the basis of its own network costs and the interconnection charge applied to it by the operator of the infrastructure on whose infrastructure the call terminated.

Lastly, as regards the interconnection charge proposed by the dominant operator, the Antitrust Authority expressed its appreciation of the choice made by the Communications Regulatory Authority in its measure to take account of the Community benchmarks for determining interconnection charges. The Antitrust Authority nonetheless observed that, precisely because the choice was made pending verification of the conformity of Telecom Italia's cost accounting system and accounting separation with Presidential Decree no. 318/1997 and the switch to the accounting method based on forward-looking long-run incremental costs, it would have been advisable to follow a criterion of neutrality in applying the principle of adjustment to the Community values. Accordingly, the reference to the Community benchmarks should not have consisted in imposing the obligation to adjust charges to the maximum values indicated by the Community but in identifying appropriate values within the interval laid down for 1998 in Commission Recommendation 98/195/EC and subsequent amendments, so as not to produce competitive distortions to the advantage of either the dominant operator or its competitors.

POSTAL SERVICES

CONSORZIO RISPOSTA- ENTE POSTE ITALIANE

In December 1998, the Authority completed its investigation into Poste Italiane Spa (formerly Ente Poste Italiane) for alleged anti-competitive behaviour aimed at impeding competitors' supply of hybrid mail services. During the investigation, it was found that Poste Italiane made suppliers of hybrid mail services pay a price for delivery alone significantly and unjustifiably higher than both its costs and the price applied by Poste to its subsidiary company Postel for hybrid mail delivery services.

The Authority concluded that Poste Italiane's practice of charging PT Postel a much lower price for delivery than it charged other hybrid mail service providers, which carry out all the phases up to sorting, constituted an obstacle to new entrants in the market and, since it put competitors at an unjustified disadvantage, was discriminatory and violated Article 3 of Law no. 287/1990.

INSURANCE

ASSITALIA-UNIPOL/BOLOGNA LOCAL HEALTH AGENCY

In November 1998, the Authority completed an investigation into the insurance companies Assitalia Spa and Compagnia Assicuratrice Unipol Spa. The investigation revealed the existence of a long-standing and stable collaboration between the two companies in the Bologna area aimed at agreeing on how to respond to invitations to tender issued by public bodies for the conclusion of insurance contracts. In view of the seriousness of the case, Assitalia and Unipol were fined 180 and 220 million lire, respectively, equivalent to 5 percent of the premiums they received in 1997 from the insurance of public bodies in the Bologna area.

REPORT ON THE INSURANCE OF ACCIDENTS AT WORK AND OCCUPATIONAL DISEASES

In February 1997, the Authority submitted a report to Parliament and the Government on the existing law on the insurance of accidents at work and occupational diseases, together with its observations on proposed legislation that would significantly affect the role of INAIL (the National Institute for Insurance of Accidents at Work).

In the first place the Authority noted that State intervention was essential to guarantee workers' right to be provided, in conformity with Article 38 of the Constitution, with adequate sustenance in the event of an accident at work or occupational disease. In order to protect this constitutional right completely, economically and efficiently, it was essential that public intervention, which might operate through the setting up of a fund run by auxiliary governmental bodies, should define the conditions that would ensure all workers received compensation, even if the employer had not fulfilled his obligation to provide insurance, and the level of minimum compensation required to provide workers with "adequate sustenance". Within this framework, the Authority pointed out that, insurance services could be entrusted to companies operating in competition. It also noted that, as confirmed by the judgements of the European Court of Justice, activities of a social nature should be performed by a legal monopoly only if no other alternative were available, in the sense that the service could not be provided economically by private undertakings.

In the specific case of insurance against accidents at work, the Authority reported that an analysis of the relevant Italian legislation had not revealed elements of solidarity that would preclude the activity being performed on an economic basis and that financial equilibrium could be achieved with the premiums paid. The Authority accordingly recommended a comprehensive review of the forms of public intervention in the insurance of accidents at work and occupational diseases, directed at opening the sector up to competition by recognising the possibility for companies possessing adequate capital and meeting all the legal conditions necessary for the protection of workers to enter the market.

FINANCIAL SERVICES

Opinions submitted pursuant to Articles 2, 4 and 6 of Law no. 287/1990 on cases investigated by the Bank of Italy

PAGOBANCOMAT

In September 1998 the Authority sent the Bank of Italy its opinion on the Bank's investigation into the Pagobancomat agreement. The agreement had been sent to the Bank of Italy by the Convenzione per la Gestione del Marchio Pagobancomat (CoGeBan) in accordance with Article 13 of Law no. 287/1990, to be declared not restrictive within the meaning of Article 2 or, failing that, to be authorised under Article 4.

CoGeBan is an association that was created to regulate and develop the Bancomat payment service at point-of-sale (POS) terminals, which allow cardholders to buy goods or services in shops which have signed up to provide the service. In the opinion it submitted to the Bank of Italy the Authority observed that some of the clauses of the standard contracts under the PagoBancomat agreement regulated important economic conditions in a way that could limit banks' ability to compete by altering the contents of their contracts. Another provision in the PagoBancomat agreement that was considered to raise problems for competition was that requiring participating banks to make it obligatory for shopkeepers not to offer worse treatment (in terms of price and other conditions) to clients who pay by PagoBancomat than to those who pay by cash (the so-called Non-Discrimination Rule).

Upon completing its analysis of the potentially restrictive impact on competition of the conditions of the PagoBancomat agreement, the Authority went on to express its opinion on the request for its authorisation under Article 4 of Law no. 270/1990.. Accordingly, even though the standard contractual conditions regulating banks' relationships with shopkeepers and cardholders tended to limit competition, it was necessary to determine whether they were necessary to promote the use of the PagoBancomat service, the latter being the aim of the PagoBancomat agreement.

From this point of view, the system provided for in the agreement of charging different interbank commissions according to type of shop did not appear to be indispensable. In the first place this practice might suggest that interbank commissions were not effectively cost oriented and secondly it might encourage banks themselves to differentiate between shops in a similar way.

Lastly, the Authority addressed the conditions governing membership of CoGeBan and the restrictions on the use of the PagoBancomat trademark jointly with trademarks of similar services provided by non-banks. On these matters it observed that the undeniable need to protect the PagoBancomat trademark and the security of the Italian interbank network by avoiding confusion with other logos and verifying the characteristics of the sub-contracting banks should be met by adopting methods which conform to the rules on competition and avoiding unjustified discrimination between banks and non-banks.

BANCO DI SICILIA-SICILCASSA-MEDIOCREDITO CENTRALE

The Authority sent the Bank of Italy its opinion on the concentration consisting in the acquisition by Banco di Sicilia of the assets and liabilities of Sicilcassa Spa and the purchase of 40.9 percent of Banco di Sicilia's capital by Mediocredito Centrale. The Bank of Italy had begun an investigation to assess the impact on competition of these transactions, since they involved the two largest banks in Sicily. The Authority observed that, although Sicilcassa was in compulsory administrative liquidation at the time, there

was no reason to believe that its share of the market would necessarily have passed to Banco di Sicilia. Consequently, the increase in market power resulting from the concentration did not appear to be irrelevant.

The Authority stressed that the important stability objectives the concentration was intended to achieve had to be considered jointly with the need to maintain adequate competition. Moreover, in view of the dominant position acquired by Banco di Sicilia in the markets most affected by the concentration, the Authority was of the opinion that its authorisation should in any case be subject to remedial measures that would limit the market power of Banco di Sicilia and stressed the importance of measures, such as divestment in favour of existing or potential competitors, that tend to restore competitive balance by reducing the dominant company's structural capability to supply markets. In this respect, the sale of branches may be appropriate, provided that all the branches' assets, liabilities and legal relationships are transferred and that the buyer has the financial and technical resources needed to provide real competition.

PROFESSIONAL AND BUSINESS SERVICES

CONSORZIO NAZIONALE SERVIZI-COPMA

The Authority completed an investigation into Consorzio Nazionale Servizi Srl (CNS), a consortium of 170 firms operating in a variety of sectors, in connection with a rule designed to regulate the participation of members in tenders for services. The rule resulted in CNS co-ordinating the activity of member firms, with special reference to the choice of the geographical area within which to operate which amounted in practice to an allocation of the market among the member firms. The Authority concluded that the decisions taken by the consortium in this matter constituted an anti-competitive agreement intended to produce an artificial allocation of the market for cleaning contracts in violation of Article 2 of Law no. 287/1990. The Authority fined CNS 24.6 million lire, the equivalent of 2 percent of the revenues it earned in the relevant market.

CONSIGLI NAZIONALI DEI RAGIONIERI E PERITI COMMERCIALI E DEI DOTTORI COMMERCIALISTI

In November 1998, the Authority completed an investigation aimed at verifying possible violations of the prohibition on agreements restricting competition by the *Consiglio Nazionale dei Dottori Commercialisti* and the *Consiglio Nazionale dei Ragionieri e Periti Commerciali*. The object of the investigation primarily concerned the following practices: a) the active role played by the two bodies in determining professional fees, which went well beyond the advisory function attributed to them under current law; b) the invitation by the *Consiglio Nazionale dei Ragionieri e Periti Commerciali* to its members to apply the fee schedule it had approved before it was authorised by the Ministry of Justice; c) the joint determination of fees by the two bodies in order to align the pricing policies of the two professions. The Authority concluded that the resolutions adopted by the two bodies violated the prohibition on anti competitive agreements.

OPINION ON THE REFORM OF THE PROFESSIONS

In February 1999, in response to a request from the Ministry of Justice under Article 22 of Law no. 287/1990, the Authority sent Parliament and the Government a report with its opinion on bill no. 5092 delegating the reorganisation of the professions to the Government.

The Authority reaffirmed that the reserve system for professional activities and the related professional orders should be an exception limited to activities whose performance is marked jointly by reference to

principles and values laid down in the Constitution (such as the right to health and defence), a high degree of complexity that prevents users from evaluating the quality of the service and the congruousness of the prices charged, and the size of the social costs associated with inadequate performance of the service.

As for the rules governing access to the professions, the Authority recommended that the obligation to be registered should be prescribed only for reserved activities. As regards the regulation of the performance of reserved activities, the Authority reaffirmed that it should be designed primarily to correct possible information asymmetries in markets and should avoid introducing unjustified limits to competition. The Authority accordingly expressed a favourable opinion on the publication and dissemination of quality standards for services and codes of conduct, the elimination of the prohibition on advertising professional services and the dissemination of information on their prices, provided such information is gathered ex post by independent observers. On the other hand, it objected to the provision permitting professional orders to adopt non-binding price schedules, albeit only as guidelines, since this was more likely to limit competition among members of the profession than safeguard users. The adoption of binding price schedules that the bill prescribes for obligatory services should be limited to the cases where the prices are the maximum allowed and users are in an especially weak position.

The Authority considered that the contents of the codes of conduct professional orders are required to draw up should not cover the economic behaviour of the members of the professions. It also recommended that the legislation governing professional firms should permit a wide range of organisational solutions from which members of the professions would be free to choose. Lastly, the Authority recommended easing the current rigid rules on the incompatibility between professions, which are often unjustified or disproportionate with respect to the objectives they are intended to achieve.

RADIO AND TELEVISION BROADCASTING AND THE DAILY AND PERIODICAL PRESS

With the entry into force of Law no. 249/1997, and after the Communications Authority had expressed its opinion, the Antitrust Authority assumed responsibility (formerly attributed to the Broadcasting and Publishing Authority, now suppressed) for applying the provisions of Law no. 287/1990 on agreements, abuses of dominant market position and concentrations to firms in the broadcasting and publishing sectors. Decisions by the Antitrust Authority are taken after the newly established Communications Authority has expressed its opinion.

RAI-MEDIASET-R.T.I.-MEDIATRADE

In February 1997, the Broadcasting and Publishing Authority had opened an inquiry into an agreement between RAI and RTI, aimed at discovering whether RAI and RTI had violated the prohibition on anti-competitive agreements referred to in Article 2 of Law no. 287/1990. Subsequently, following the entry into force of Law no. 249/1997 and the resulting transfer of responsibility for applying Law no. 287/1990 to television broadcasting companies, the investigation into the RAI-RTI agreement was taken over and completed by the Antitrust Authority.

The Authority observed, first of all, that the agreement clearly demonstrated an intention by the two parties involved to prevent Cecchi Gori Communications from acquiring the television rights to the principal sporting events. The Authority noted in particular that in the light of legislation limiting the supply of advertising space available to operators and the fact that RAI and RTI were approaching the saturation levels envisaged by law, any move to block the acquisition of television sporting rights by Cecchi Gori could be equated to a reduction in the supply of advertising space.

The agreement was judged to be substantial in scope, in view of the fact that the two participating companies jointly held about 98 percent of the television advertising market. The Authority therefore concluded that the conduct of RAI and RTI amounted to an anti-competitive agreement within the meaning of Article 2.2 of Law no. 287/1990. This evaluation of the agreement between RAI and RTI tallied with the opinion expressed by the Communications Regulatory Authority during the inquiry. The Authority concluded that the violation was serious, especially in view of the parties' commanding market position in the sale of television advertising space. It therefore fined each party to the agreement 2,408 million lire, equivalent to 3 percent of their revenues from the sale of advertising space linked to the television rights in question.

RAI-CECCHI GORI COMMUNICATIONS

In December 1998, the Authority completed a second investigation into agreements between television broadcasting companies for the sharing out of the television rights to high profile sporting events. This inquiry involved a contract drawn up by RAI, Cecchi Gori Communications and RTI at the end of a complex legal case relating to the allocation by the National Professional Footballers' League, known as the Lega, of the television and radio rights (encoded and unencoded) for A and B League, Coppa Italia and Lega Supercup matches for the 1996-99 football seasons.

The Authority observed that the way in which the television rights had been shared out showed that the parties had been fully aware of the potential impact of the agreement on the advertising market and, taken together, underlined the agreement's potential to restrict competition. It observed that the three broadcasters accounted for almost 100 percent of the demand for free-to-air television rights for sporting events attracting a high audience share, and of the television advertising market. Finally, the Authority considered that entry into the television advertising market in which the agreement had the greatest potential to affect competition was subject to substantial administrative barriers, and that the market shares held by the two principal operators were basically stable. In the light of the evidence that emerged during the investigation, the Authority concluded that the agreement between RAI, Cecchi Gori Communications and RTI violated the prohibition laid down in Article 2 of Law no. 287/1990, as it had the potential to produce significant changes in the competitive dynamics of the television advertising market and, in particular, of the advertising revenues directly or indirectly generated by the exploitation of the television rights to sporting events.

During the investigation, RAI and RTI applied for exemption under Article 4 of Law no. 287/1990. The Authority concluded that an authorisation could not be granted as the agreement between the three broadcasters did not meet the requirements laid down in Article 4, especially as it involved restrictions to competition that were not strictly justified on grounds of improvements in supply conditions in the television advertising market.

In view of the barriers to entry into the television advertising market and its oligopolistic structure, the violation was judged to be serious, as it constituted a horizontal agreement aimed at dividing up a strategic input among nearly all the companies present in the market. The Authority fined RAI, RTI and Cecchi Gori Communications a total of 53 million lire, equivalent to 1 percent of the revenues from the sale of advertising space in connection with Coppa Italia television rights.

OTHER RECREATIONAL, CULTURAL AND SPORTING ACTIVITIES

ASSOCIAZIONE NAZIONALE ESERCENTI CINEMATOGRAFICI LOMBARDA

In December 1998, the Authority completed its investigation into the Lombardy branch of the National Association of Cinema Operators (Anec Lombarda) and 27 cinemas in the city of Milan. It emerged from the investigation that numerous meetings had taken place between the cinema operators in question. During these meetings, various pricing proposals had been discussed and the price structure drawn up that was eventually publicised in an Anec press release. Under the terms of the understanding, cinema operators in Milan agreed both the basic price of tickets, and any discounts to be applied at certain times or days of the week or for particular categories of cinema-goers. This collective price setting was considered to limit competition in respect of one of the sector's key economic variables. In view of the gravity and duration of the anti-competitive conduct of the cinema operators taking part in the understanding, the Authority judged a total fine of approximately 2.2 billion lire to be appropriate.

OPINION ON THE FIXED PRICE OF BOOKS

In an opinion submitted to Parliament and the Government in June 1998, the Authority set out its objections to the provisions contained in a Parliamentary bill concerning the price fixing mechanism for the retail book trade. In its report, the Authority maintained that the bill in question would impose a generalised system of resale price maintenance which would not only prevent retail traders from using price as a competitive policy tool, but would also reduce competition among publishers, who would no longer be able to encourage the purchase of certain types of books through targeted promotional campaigns. The Authority pointed out that a collective resale price maintenance system would translate into an increase in the end-price of books and result in a quantitative reduction in sales, at least for the readers whose purchases were noticeably price sensitive. In the Authority's opinion, final price regulation was not an effective way of achieving the bills' declared objective of protecting the traditional channels of distribution. The Authority therefore recommended promotional measures for the publishing industry that, by safeguarding the existence of a wide range of distribution channels, would respect the principles of competition.

HEALTH SERVICES

REPORT ON HOSPITAL HEALTH SERVICES

In June 1998, the Authority reported to Parliament and the Government on certain aspects of the health reform introduced by Legislative Decree no. 502/1992, and on the implementing measures adopted by the regions. The Authority also identified measures that would distort competition in the bill approved by the Chamber of Deputies on 26 May 1998 delegating the Government to enact a reform of the National Health Service and adopt a consolidated law on the organisation and functioning of the Service.

Basing its comments on an analysis of developments in the sector, the Authority observed in its report that the objectives of creating a level playing field for health-care providers and guaranteeing patients freedom of choice still appeared far from being achieved in a satisfactory manner. This was largely the result of choices made by the regions, which in some cases had applied wholly discretionary criteria in the selection of health-care providers eligible to work for the National Health Service. The Authority noted that the achievement of the objectives of free user choice and price containment was being hindered by Local Health Agencies performing the dual functions of provider and purchaser-payer. The effect of any mixing of these two roles was to distort competition and the efficient allocation of public resources.

The Authority suggested the following possible remedies:

- (i) a structural separation within Local Health Agencies between the functions of provider and purchaser-payer of health services. In this way health services would be provided by the public or private structures able to supply them at the best value-for-money conditions;
- (ii) the adoption of fair, objective and transparent criteria for the selection of providers of services paid for by the National Health Service, with the possibility of ex post quality checks, carried out if possible by the paying party;
- (iii) limits on the supply of services based on mechanisms designed to reduce National Health Service refunds; where the number of services exceeded a pre-set limit, refunds to the providers would only cover a part of the actual price. Mechanisms of this type could result in strong incentives for service providers to reduce their costs.

In the Authority's opinion, the application of these remedies would highlight the need to separate the functions of (a) planning, (b) service provision, and (c) payment of health services, by allocating them to different "players". The planning function should fall to the regions; the service-provider function should be performed by the public or private health structures accredited by the regions; the payment function, and the power to check and monitor the quality of the services provided by the accredited structures should fall to Local Health Agencies.

OTHER OPINIONS

OPINION ON MEASURES FOR THE REVIEW AND SUBSTITUTION OF PUBLIC FRANCHISES

In October 1998 the Authority submitted to Parliament and the Government a report concerning measures for the review and substitution of public franchises. The report pointed out cases in which public franchises no longer appeared to be justified in the light of Community and national law and therefore needed to be replaced by other instruments, and others in which franchises, although justified, needed to be revised and simplified.

As a preliminary consideration, the Authority noted that, from the point of view of competition, using public franchises to regulate the exercise of economic activities entailed discretionary restrictions on market access and a privileged position for franchise holders. The principles of competition dictated that public franchises could only be justified in the presence of laws that, without breaching Community law, reserved exclusive title to public functions, property or economic activities to the State or public authorities.

The Authority observed that the reserve relating to the exercise of economic activities was gradually being phased out as a result of national and Community liberalisation measures. It remained only in partial or limited contexts, such as the management of the infrastructure of some network services. In deregulated sectors franchises were no longer justified, as they clashed with the principle of freedom of economic enterprise guaranteed by Community law and Article 41 of the Constitution. In these sectors, public control should be limited to the exercise of powers of guidance and co-ordination, and should not involve direction, as it did in the case of public franchises. Lastly, where the reserve was eliminated, the use of franchises could not be justified by the need to guarantee universal service or public controls for social purposes. These objectives could be achieved by means of mechanisms serving to regulate the ways in which services were provided, products specified and tariffs set.

The Authority then described in detail the sectors in which the reserve in favour of the public authorities had never existed or had been eliminated (for example bus services, scheduled shipping lines, and

broadcasting and telecommunications network management and services) and the sectors in which its scope had been reduced (in the railway sector, the reserve should be limited to the installation and operation of infrastructure; in the electricity and natural gas sector, to the operation of transport and distribution networks; in port and airport services, to the use of state land). In these contexts, the franchising regime should be eliminated: completely in the first case and partly, for services that were no longer reserved, in the second.

In the sectors where franchises would in time be eliminated, alternative solutions, founded on objective, transparent and non-discriminatory regulatory criteria, would need to be found, where necessary, to regulate unreserved economic activities. In some areas administrative authorisations could be used, as is already envisaged, for example, for telecommunications. These could be stand-alone or accompanied by service contracts, depending on whether they involved business activities or public services, and should be available to all users at a reasonable cost. The Authority also pointed out that restrictions on the number of authorisations granted could only be justified in the case of services requiring the use of scarce resources and should only be applied in full respect of the principles of proportionality, objectivity, non-discrimination and transparency.

Finally, in some areas the possibility of replacing franchises with contractual instruments such as supply and service tenders (for example, for the management of automated information services in the public administration) should be evaluated. In the areas still subject to a reserve, both the arrangements for the issuing of new franchises and the renewal of existing ones should be reviewed, even where the franchising scheme continued to be justified. In particular, the Authority recommended that the scope for applying discretionary selection procedures in the choice of franchisees should be reduced, and emphasised the need for non-discrimination and equal treatment.

NOTES

1. Article 9.2a) of the EC Merger Regulation provides for the Commission to devolve the investigation of a concentration with a Community dimension to the competent authorities of the member state concerned where the concentration threatens to create or strengthen a dominant position that would significantly impede effective competition in a market within the member state that has all the characteristics of a distinct market.
2. Resolution passed by the Communications Regulatory Authority on 28 October 1998 and published in *Gazzetta Ufficiale*, no. 263, 10 November 1998; resolution passed by the Communications Regulatory Authority on 25 November 1998 and published in *Gazzetta Ufficiale*, no. 289, 11 December 1998.