AGCM
AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO

ANNUAL REPORT

2011

Executive Summary

It would be difficult to assess the Italian Authority's activity in 2011 without taking into account the very serious economic situation that the country had to face over the year (affecting, among other things, the Authority's budget).

However, the Authority sees with satisfaction an increasing awareness of the contribution that a strong competition policy can give to economic recovery and growth. In this respect, the Authority played an important role in supporting recent liberalization efforts.

In January 2012, following the urgent financial and stabilization measures already adopted by the Government and in view of its intention to introduce a package of reforms aimed at opening markets and introduce greater competition the Italian Authority timely resolved to provide a technical contribution by identifying the sectors where the reforms were most needed and the measures that might be adopted to increase their competitiveness.

The authority proposed an advocacy report with measures to be included in the Annual Law on Competition. By this law, every year, the advocacy proposals of the competition authority are put in a liberalization law that is for discussion and potential approval by parliament. (Article 47(2) of Law 99/2009 states that "*the Government, acting on a proposal from the Minister for Economic Development […] taking into account any recommendations submitted by the Authority […] shall submit the annual bill on markets and competition to Parliament.*"). The aim of the law is to "remove normative or administrative regulatory obstacles to opening markets, promoting competition and enhance consumers' protection".

The Authority's report concerned different sectors with the idea that interventions of a general nature might be more successful in **overcoming the resistances of individual groups**
The proposed measures were focused on sectors where the **introduction of greater competition might foster growth** by reducing input costs for businesses (energy, transport, local public services, liberal professions).

For the Natural Gas sector the Authority advocated ownership unbundling of the transport network and storage infrastructure controlled by the incumbent Eni in order to introduce incentives for the operation of gas transport and storage activities

The Authority recommended the establishment of an independent regulator for the **Transport Sector** (similarly to the institutional framework adopted in other liberalized sectors) suggesting that the regulator should be entrusted with tasks such as supervising access to **rail transport** network, the definition of a pricing system providing incentives

for the investment needed to enlarge capacity in **airports** and regulatory powers in the management of motorways infrastructures.

The Authority advocated the most widespread and rapid recourse to competitive tendering for the award of local public services on an exclusive basis. The Authority in particular suggested limiting in house provision only when analysis of the market shows that it is not possible to liberalize the operation of a service and that there are clear and direct benefits deriving from its in-house production.

The Authority recommended eliminating any residual cases of mandatory application of fee schedules **in the Liberal Professions**.
The Authority proposed several measures aimed at opening up the markets and increasing competition in several service activities. For the **retail sector** the Authority took a favourable view into the complete liberalization of business hours and underscored that derogations should be strictly limited for reasons of general interest.

Several of these proposals were adopted in the reform package adopted by the Government and Parliament and the Authority's advocacy powers were considerably strengthened. The Authority will be asked to provide an obligatory opinion on law and regulations introducing restrictions to entry or limiting the scope of economic activities based on a proportionality principle. Moreover it will be possible to challenge in front of an administrative Court provisions issued by a public administration that restrict competition.

The Authority is aware that the efforts to promote a competition culture need to be supplemented with vigorous enforcement policy. Deterrence is a very important element of competition policy and the Authority intends to strengthen its efforts to achieve results in this area.

1. Changes to competition law and policies

1. 1. Advocacy powers

The Italian Competition Authority's advocacy powers were strengthened with Decree Law 201/2011, converted into Law 22 December 2011 n. 214.

Firstly the Decree repealed all legislative and administrative constraints which can restrict the exercise of economic activities. In order to guarantee the effectiveness of the principle of liberalization of economic activities, the Decree has entrusted the ICA with the duty of delivering a binding opinion on government bills and regulations introducing access restrictions to economic activities.

In particular article 34 provides an obligatory opinion of the ICA on law and regulations introducing restrictions to entry or limiting the scope of economic activities based on a proportionality principle.

Secondly the Decree calls on the ICA to oversee the possible (re)introduction of restrictive measures, upon knowledge of provisions issued by a public administration that restrict competition. The ICA may, within sixty days, express an opinion indicating the specific nature of the restrictions. Should the public administration fails to comply with the opinion within sixty days of notification, the Authority may challenge the provisions in front of an administrative Court.

The adoption of these new provisions is very recent and still at a very first stage of implementation.

1. 2. Changes in the law regarding the composition of the Authority's Board

Section 23(1) of Decree Law 201/2011, converted into Law no. 214 of 22 December 2011 on urgent measures for the growth, equity and consolidation of public finances, reduces the number of members from five to three, including the Chairman. Such provision does not apply to members already appointed as of the date the Decree enters into effect that will therefore stay in charge until the end of their mandate.
The mandate of one of the Commissioners expired in December and the Board is now composed by four members, including the Chairman holding a casting vote.

1. 3. Merger Review Thresholds and Filing Fees

Article 5 bis, Law Decree n.1 of January 24, 2012, converted with modifications by Law n.24 of March 24, 2012 introduced some significant reforms in the merger review system that will be effective in January 2013.

In particular, the turnover thresholds provided by Art. 16 of the Law 287 of 1990 shall no longer be considered alternative, but rather cumulative. As a consequence, corporations will have to notify a merger only if and when both the thresholds provided by the law are achieved (i.e. when both the combined aggregate domestic turnover of all corporations concerned and the target's aggregate domestic turnover exceed the turnover

thresholds as yearly readjusted by the Authority). Therefore, according to the new cumulative thresholds, a considerable number of mergers which are now reportable to the ICA will, in the future, no longer require filing in Italy.
The new norms also repealed, **As of January 2013,** merger filing fees.

1.4. New method of funding

As of January 2013, in order to contribute to the financing of the ICA and to compensate for the loss of income from repealing the filing fee, an annual tax will be levied on all corporations making more than EUR 50 million in turnover. The tax shall be equivalent to the 0.008 percent of the income resulting in the last official financial accounts of the undertaking. A company making EUR 50,000,000 should e.g. pay a yearly tax of EUR 4,000. There is, however, a maximum amount of EUR 400,000.

2. Enforcement of competition laws and policy

2. 1. Action against anticompetitive practices, including agreements and abuses of dominant positions

In 2011, the application of anti-trust laws involved the examination of 532 mergers, 8 agreements and 7 alleged abuses of dominant position.

Proceedings concluded in 2011, distribution by type and outcome

	Non-violation of the law	Violation of the law, conditional authorization, modification of agreements, acceptance of commitments	No jurisdiction or inapplicability of the law	Total
Agreements (*)	1	5	2	8
Abuses of dominant position (*)	-	7	-	7
Mergers of independent enterprises	510	4	18	532

(*) only investigatory proceedings are considered

2. 1. 1. Agreements

In 2011, 8 investigatory proceedings regarding agreements were concluded[1].

In five cases the proceedings confirmed violations of the prohibition on competition-restricting agreements, with three cases concerning the violation of article 101 of the TFUE[2] and two cases concerning the violation of Law no. 287/90, article 2[3].

In one case, the Authority found that there was no restriction of competition[4].

[1] INTERNATIONAL LOGISTICS, HEALTHCARE TENDER FOR MAGNETIC RESONANCE MACHINES, 2009-2010 REMUNERATION GUIDE FOR ADVERTISERS, HEATING PLANT MAINTENANCE IN THE MUNICIPALITY OF POTENZA, PRICE INCREASES FOR BITUMEN, FEDERITALIA/ITALIAN FEDERATION OF EQUESTRIAN SPORTS (FISE), PAPER WASTE MANAGEMENT – COMIECO, INSURANCE TENDERS FOR CAMPANIA ASL AND HOSPITALS.

[2] INTERNATIONAL LOGISTICS, HEALTHCARE TENDER FOR MAGNETIC RESONANCE MACHINES, CAMPANIA INSURANCE TENDERS FOR ASL AND HOSPITALS.

[3] 2009-2010 REMUNERATION GUIDE FOR ADVERTISERS, HEATING PLANT MAINTENANCE IN THE MUNICIPALITY OF POTENZA.

[4] PRICE INCREASES FOR BITUMEN.

In two other cases, the proceedings led to decisions pursuant to article 14-*ter*, paragraph 1, of Law no. 287/90, with the Authority accepting obligatory commitments by one of the parties without the ascertainment of a violation[5].

In consideration of the seriousness of the infractions, a total of over 95 million Euros in fines were imposed on the companies in five of the cases of violation of TFE articles 1 and 2 of Law no. 287/90.

Agreements concluded in 2011, by economic sector

Sector of prevailing interest		
		1
Waste disposal		1
Oil industry		
Healthcare and other social services	1	
Recreational activities		1
Electricity and gas		1
Insurance and retirement funds		1
Logistics		1
Advertising services		1
Total		**8**

2.1.2. Abuses of dominant position

In 2011, seven investigatory proceedings regarding abuses of dominant position were concluded[6].

In four cases, the conduct was held to be in violation of EC Treaty article 102[7] and over 50 million Euros in fines were imposed.

[5] FEDERITALIA/ITALIAN FEDERATION OF EQUESTRIAN SPORTS (FISE), PAPER WASTE MANAGEMENT - COMIECO

[6] TNT POST ITALIA/POSTE ITALIANE, SAPEC AGRO/BAYER-HELM, SKY ITALIA/AUDITEL, VARIOUS MUNICIPALITIES –EXECUTION OF TENDERING FOR GAS DISTRIBUTION SERVICES, GIOCHI 24/SISAL, AND POLIS/AUDIPRESS, FEDERITALIA/ITALIAN FEDERATION OF EQUESTRIAN SPORTS (FISE).

[7] TNT POST ITALIA/POSTE ITALIANE, SAPEC AGRO/BAYER-HELM, SKY ITALIA/AUDITEL, VARIOUS MUNICIPALITIES –EXECUTION OF TENDERING FOR GAS DISTRIBUTION SERVICES.

In three other cases, the investigatory proceedings led to the adoption of decisions pursuant to article 14-*ter*, paragraph 1, of Law no. 287/90, with the Authority accepting obligatory commitments by one of the parties without the ascertainment of a violation[8].

Abuses concluded in 2011, by economic sector

Sector of prevailing interest	
Electricity and gas	1
Printing and publishing	1
Pharmaceuticals industry	1
Recreation, culture and sports	2
Postal services	1
Radio and television	1
Total	**7**

2.1.3. Description of significant cases

I731 CAMPANIA INSURANCE TENDERS FOR HEALTHCARE UNITS AND HOSPITALS

In September 2011, pursuant to TFEU article 101, the Authority concluded an investigation involving several insurance companies (HDI-Gerling Industrie Versicherung AG, Faro Compagnia di Assicurazioni and Riassicurazioni S.p.A., Navale Assicurazioni S.p.A and Primogest S.r.l). with the ascertainment of an agreement sharing the market among these companies and undermining the competitive dynamics of the tendering procedures for the "Third Party Liability" and "Employer's Liability" policies of various local Healthcare Units and Hospitals in Campania.

In third party liability, the insurance company commits to indemnifying the healthcare facility for any sums disbursed for accidental damage, in the form of deaths, personal injuries or property damage, caused by its employees to third parties in providing healthcare services. In Employer's Liability, the insurance company commits to indemnifying the healthcare facility for any sums disbursed for any occupational accidents suffered by its own employees and technicians while providing the insured activities.

The demand side in this sector consists of the local Healthcare Units and Hospitals, that can be distinguished from other types of public sector offices due to the strong link between the type of coverage required and the type of services

[8] GIOCHI 24/SISAL, E POLIS/AUDIPRESS, FEDERITALIA/ITALIAN FEDERATION OF EQUESTRIAN SPORTS (FISE).

provided, characterized by the specific risk factors associated with the practice of healthcare professions. The Authority, therefore, defined the market for the relevant product as the market for liability insurance supplied to Hus and Hospitals through tendering. The scope of the investigation addressed a total of 18 different tendering procedures carried out by local administrations in Campania between 2002 and 2008.

The investigatory analysis determined that the participants in the tender engaged in a form of collusion that involved partitioning their respective shares of participation, both during the tendering process and afterwards (by means of co-insurance), the trading of lots and/or contracts under different procurement entities and the retraction of one party to be replaced by another party in order to restrict competition.

The coordination of these activities was entrusted to Primogest, a broker, and it was accomplished by dividing up the shares and/or finding new ways to divide up and take over shares without tendering, i.e., a mutually beneficial arrangement for the companies themselves (with their interest in avoiding aggressive tender bids and sharing the risks as much as possible by dividing up shares of services across multiple tenders) and Primogest (with its goal of maximizing on commissions).

The Authority deemed the horizontal agreement among the three insurance companies and one joint agency to be very serious on account of the restriction of competition, the role and representativeness of these companies in their market and the extended duration (over five years) of the agreement.

I722 INTERNATIONAL LOGISTICS

In June 2011, the Authority concluded an investigation into several international logistics companies and into the National Federation of Enterprises of International Freight) with the ascertainment of a restrictive agreement pursuant to article 101 of the Treaty on the Functioning of the European Union. The agreement engendered a concerted increase in the prices for international shipping to and from Italy by road.

The investigation was initiated in November 2009 after Deutsche Bahn AG submitted a simplified verbal request for leniency, which was followed by the requests for admission to the leniency program presented by Agility Logistics International BV, Deutsche Post Ag and (after the proceedings had already begun) S.I.T.T.A.M. – Spedizioni Internazionali Trasporti Terrestri Aerei Marittimi. All of the *leniency applicants* were granted the benefit on condition of compliance with their collaborative obligations throughout the course of the proceedings.

The investigation's findings enabled the Authority to ascertain the coordination of the commercial strategies of the main operators in the market for international shipping by road to and from Italy.

In particular, the practices ascertained in the course of the investigation were designed to coordinate price increases for international shipping by land, and the Parties justified these hikes as resulting from upward trends in production costs, such as gas oil costs, highway tolls and administrative costs.

The coordination took place in the context of numerous regularly-held meetings scheduled on the initiative of the trade association and during which the companies

exchanged sensitive information on cost structures in order to reach an agreement on price increases for the different services offered on the market.

Due to the seriousness of the infractions that were ascertained and their duration, which persisted without interruption at least from March 2002 to fall 2007, the Authority fined these companies a total of 76.5 million EUR, a sum which was apportioned among the different companies on the basis of relative size, the effective significance of their activities in the market in question and the duration of their effective participation in the coordinated activities.

Pursuant to Art. 15 of Law 287/90, Schenker Italiana (of the Deutsche Bahn group) was granted immunity, while Agility Logistics, DHL Express, DHL Global Forwarding (Italy) (both from the Deutsche Post group) and S.I.T.T.A.M were granted the benefit of respective fine reductions of 50%, 49%, 49% and 10%.

A432 - TENDERING FOR GAS DISTRIBUTION SERVICES

In December 2011, the Authority closed an investigation launched in October 2010 in response to two complaints submitted by the municipalities of Rome and Todi, claiming that the incumbent for gas distribution services (Italgas) had refused to provide the information needed to prepare the contract notices for reassigning the service in these two municipalities, thus determining an exclusory abuse of dominant position by Italgas in violation of TFEU article 102.

This conduct fell, more specifically, under an *antitrust* profile of dilatory conduct along with the refusals by Italgas to provide the information that it had acquired by virtue of over 25 years of monopoly and that the local authorities needed to prepare notices for competitive tendering and by competitors to formulate competitive bids for participating in the tenders.

The Authority found that the company's behavior restricted competition and would create a significant competitive bias in the markets for gas distribution in the municipalities of Rome and Todi, where the tendering process itself is the only possible manifestation of market competition. The conduct of Italgas was in fact able to obstruct and delay the competitive tendering procedures, thus enabling the company to extend the duration of its monopoly position. The contested conduct, therefore, was liable to produce exclusionary effects by prejudicing the participation of other competitors and their actual capacity to compete effectively for the service contract, for which it is essential to have equal access to the same complete *set* of information as the *incumbent*.

Due to the seriousness and duration of the contested infractions, the Authority imposed a 4,671,447 EUR pecuniary administrative fine on Italgas S.p.A.

A422 SKY ITALIA-AUDITEL

In December 2011, the Authority concluded an investigation, pursuant to TFEU article 102 into Auditel Srl, a dominant firm in the market for television audience surveys based. Auditel is considered in the television sector as the sole subject delegated to survey and distribute reliable and shareable *audience* data. Since

audience surveys play a central role in defining the strategies assumed by television broadcasters, especially in the planning of their programming schedules and in decisions about advertising investments, Auditel's conduct was found to be liable to restrict competition in the television advertising market, the *pay tv* market and the wholesale market for television channels.

In particular, Auditel, refused the publication of platform-by-platform data although technical difficulties had been removed, maintaining that it was irrelevant to the planning of advertising investments and that the daily publication of a platform-by-platform breakdown for the different channels would seriously reduce the statistical reliability of the survey.

The Authority ascertained that the digitalization process and the growing number of digital channels endowed audience data that was broken down by platform type with a strategic significance for the various operators in the television sector by permitting a segmented analysis of the public viewing of televised contents on different types of platforms. As for the contested statistical reliability of the data, the Authority considered how the Auditel Survey already included other sub-surveys characterized by small sample size (e.g., certain time slots, specific targets and broadcasters with fewer viewers) which had never impeded the publication of the related data.

In general terms, the Authority found that Auditel's practices made it impossible to obtain a full purview of the impact of the profound changes (in terms of the performance of different platforms) under way in the television sector, and were liable raise entry costs for television broadcasters who rely on strategies of audience erosion from the traditional broadcasters. The contested behavior protected traditional broadcasters (as represented by Auditel's main shareholders), from the negative effects that would result from distributing their audience data, which is signaling significant reductions due to the changes under way.

During the data processing phase, Auditel had also mistakenly attributed *panel*-based audience figures to the non-TV owner subpopulation. In January 2008, Auditel was advised of the opportunity to correct this error, and yet, after a single unsuccessful attempt to resolve it, the question was not confronted again until December 2010. Even in full awareness of the overestimations of television audiences entailed by the employment of this method, therefore, Auditel unjustifiably decided not to make the changes that would have made the survey sounder from a statistical point of view.

The Authority found that this behavior was liable to produce discriminatory effects among the operators participating in the Survey, in light of the fact that this method's artificial inflation of audience data only affected one subset of broadcasters by benefiting the broadcasters characterized by the largest *audiences*, i.e., those of the company's main shareholders. The conduct was deemed to configure prejudicial behavior with respect to operators acting in the markets described above and whose correct functioning depends on truthful assessments of television *audiences*.

In consideration of what was found to be the serious nature of the contested abuses and their duration, the Authority imposed a 1,806,604 EUR administrative fine on Auditel.

2. 2. Mergers and acquisitions

With respect to mergers, 532 different cases were examined for the period in question. The Authority found no violation of the law in 510 cases, and another 18 cases were closed due to non-applicability of the law.

There were five cases in which the Authority conducted investigations pursuant to Law no. 287/90, article 16. The operation was prohibited in one case[9] and authorized in one other[10], while in the remaining three cases the Authority conditioned its authorization of the operation on previously-imposed corrective measures[11].

The Authority also conducted ten investigations concerning the failure to communicate the obligatory advance notice of a merger operation[12]. Seven of these cases involved violations of article 19, paragraph 2 of Law no. 287/90[13], with a total of 65,000 EUR in pecuniary fines being imposed on the parties.

During the course of 2011, the Authority also concluded one investigatory proceeding initiated pursuant to article 19, paragraph 1 of Law no. 287/90[14] without finding any violation due to non-compliance with corrective measures.

As of 31 December 2011, one investigatory proceeding was still under way for non-compliance with the obligation to furnish advance notice of mergers[15].

C11072 - MOBY/TOREMAR-TOSCANA REGIONALE MARITTIMA

In July 2011, the Authority closed a Phase II review on Moby Spa's acquisition of exclusive control over Toremar Spa.

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[9] CVA-COMPAGNIA VALDOSTANA DELLE ACQUE /DEVAL-VALLENERGIE.

[10] EDENRED ITALIA/RISTOCHEF, in which no violation of the law was found.

[11] INTESA SAN PAOLO/BANCA MONTE PARMA, ELETTRONICA INDUSTRIALE/DIGITAL MULTIMEDIA TECHNOLOGIES, MOBY/TOREMAR-TOSCANA REGIONE MARITTIMA.

[12] BRIDGEPOINT CAPITAL/HISTOIRE D'OR EUROPE, SL DIAGNOSTIC SERVICES ITALY/SAN GREGORIO, COMPAGNIA ITALIANA ENERGIA/AGENZIA PER L'ENERGIA FOR CUNEO PROVINCE, HENKEL NEDERLAND/PURBOND INTERNATIONAL HOLDINGS-PURBOND, HADLEIGH PARTNERS/MANZARDO, OVIESSE/CORPORATE DIVISION OF F.LLI GIULIANI, MEDI & C., ESSELUNGA/BARBARA CONNELLA-EGISTA MARIA TOGNOTTI- DUECI (LUCCA), ESSELUNGA/PAGNI VINI (LA SPEZIA), ESSELUNGA-TALVERA-QUADRILATERO/8 SALES POINTS (LIVORNO), FINIFAST/5 SERVICE AREAS "CALAGGIO SUD"-"CAMPAGNOLA EST"-"SESIA EST"-"VALLE SCRIVIA"-"ARDA EST".

[13] BRIDGEPOINT CAPITAL/HISTOIRE D'OR EUROPE, SL DIAGNOSTIC SERVICES ITALY/SAN GREGORIO, COMPAGNIA ITALIANA ENERGIA/AGENZIA PER L'ENERGIA FOR CUNEO PROVINCE, HENKEL NEDERLAND/PURBOND INTERNATIONAL HOLDINGS-PURBOND, HADLEIGH PARTNERS/MANZARDO, ESSELUNGA/BARBARA CONNELLA-EGISTA MARIA TOGNOTTI- DUECI (LUCCA), ESSELUNGA/PAGNI VINI (LA SPEZIA).

[14] BANCA INTESA/SANPAOLO IMI.

[15]. LIFE & LUXURY/OLLI RESORTS

Both Toremar and Moby were active in the maritime transport sector for passengers, vehicles and cargo. In specific, Toremar had been assigned to meet public service obligations in the maritime connections between the Tuscan Archipelago and mainland Italy.

The operation, therefore, concerned the transport of passengers, vehicles and cargo between the mainland and the different islands of the Tuscan Archipelago. In specific, the relevant markets were identified as passenger transport lines by hydrofoil, passenger transport lines with/without vehicles, and cargo transport on a variety of distinct routes.

The Piombino - Portoferraio route represented 76% of passenger traffic and 87% of the vehicles transported in the Archipelago, making it the route most heavily affected by the merger. In 2010, there were three companies operating on this route: Moby (which accounted for over 55% by volume and 59% by value), Toremar and Blu Navy. The merger of Moby and Toremar created an operator with shares of no less than 95% in both passenger and vehicle transport and cargo transport.

Prices were considered only one of the important variables in these market in these markets the other being an adequate offer of a minimum number of round trips. The consumers, in fact, were especially sensitive to waiting times and the overall length of the travel time. On the other hand, the organization of a regular, economically-sustainable service requires access to a minimum number of port *slots* that are spaced appropriately throughout the day. The new entity would have held over 80% of the departure *slots* servicing the main route, and only one portion of the remaining *slots* could have been used to construct a daily schedule of trips that would be both technically feasible and economically viable. This would have impeded the entrance of another competitor and hindered the existing competitor from growing their supply.

The merger, therefore, gave the new entity a dominant position due to its new degree of independence from the actual behavior of its competitors and customers. It also enabled Moby and Toremar to forge important synergies in terms of the rationalization of routes and schedules and the acquisition of various inputs and services. In the absence of any significant competitive pressure, however, there was no reason to presume that these increases in efficiency would be passed on to consumers.

For these reasons the Authority authorized the merger while ordering Moby to respect a series of conditions deemed sufficient to ensure the prospective entry and growth of one or more competitors and the possibility to propose schedules of sufficient quality. This entailed the release of up to 6 *slots* on the Piombino – Portoferraio route and fixing this route's destination in favor of companies other than Moby and its subsidiaries, as well as the obligation to exchange, at the request of its competitors, temporally adjacent *slots* in order to enable them to create technically and economically viable operating schedules.

C8027B -BANCA INTESA SAN PAOLO IMI

In July 2011, the Authority concluded proceedings pursuant to Article 19, paragraph 1 of Law no. 287/90 in regard to Intesa Sanpaolo Spa. The proceedings were initiated in May 2009 in order to ascertain whether Intesa Sanpaolo Spa had complied with the Authority resolution of 20 December 2006, which authorized the merger by incorporation of Sanpaolo IMI Spa in Banca Intesa Spa on condition of the full and effective execution of various measures.

In specific, with respect to the prescribed measure ordering the new *post merger* entity to transfer 551 branches to Crèdit Agricole, which Banca Intesa Spa had already identified as the purchaser on the basis of a pre-existing agreement between the two parties, the Authority had objected that the branches should be transferred to a third party who was capable of exerting effective competitive pressure on the *post merger* entity, and that for this purpose it would be necessary for the purchaser to be a valid actual or potential competitor who was independent and unconnected to the parties. Crèdit Agricole did not fit these requirements, and for this reason Banca Intesa and SanPaolo IMI made a commitment that the *post merger* entity would break all organizational, personnel and commercial ties with Crédit Agricole. This would be accomplished by: reducing Crèdit Agricole's ordinary share capital in the new bank down to 5% by 31 December 2007; ensuring that none of the members of the Supervisory Board and Management Board of the new bank, or any other administrative/managerial body, were direct or indirect representatives of Crèdit Agricole; ensuring that Crèdit Agricole did not participate in any shareholder's agreements related to the new bank.

It turned out, however that Intesa San Paolo's (ISP) transfer of the network of branches did not respect the conditions that were intended to ensure the necessary independence between Crédit Agricole and Intesa San Paolo.

The Authority ascertained, first of all, that Crédit Agricole owned a larger share in ISP than the limit indicated by the Authority; secondly, the failure to comply with the condition forbidding Credit Agricole from taking part in the *governance* of ISP, due to the stipulation of an agreement between this particular company and Assicurazioni Generali Spa to provide for the coordinated management of their respective shares in ISP, thus giving Crédit Agricole a de facto presence in ISP *governance* via members of the Supervisory Board and the Management Board who were appointed at Generali's recommendation or nomination. Last of all, the Authority noted the failure to comply with the commitment to ensure that Crédit Agricole would not participate in any ISP-related shareholder's agreements, as seen where the agreement with Generali provides for the presentation of joint lists of candidates for the nomination of ISP's entire Supervisory Board, with each party to indicate four candidates and joint voting with all the ISP shares owned by Credit Agricole and Generali over time.

During the course of the proceedings, the Authority examined a variety of new initiatives presented by Intesa SanPaolo (ISP) and Crédit Agricole (CA). First of all, the agreement between CA and Generali was annulled. CA also deposited its entire residual share of 3.819% in ISP in two separate safe custody accounts with

Clearstream. The first account (a.k.a. "restricted account") now holds the outstanding shares in ordinary capital and the second account holds the minimum residual share. CA provided Clearstream with irrevocable instructions to prevent the exercise of voting rights for the shares in the restricted account. In regard to the minimum residual share in the second account, CA committed itself not to submit a list of nominees for the ISP Supervisory Board, not to participate in voting for Supervisory Board renewals and, in any case, neither to nominate nor express any exponents of CA or any of its direct or indirect associates in the ISP supervisory, managerial or executive bodies.

The Authority found the set of initiatives submitted by CA and ISP to be fit, as long as they are fully implemented, to guarantee the eradication of all ties between the two banks and thus to ensure compliance with the measures; not having established any non-compliance with its prior measure, no sanctions were imposed on ISP.

3. Reporting and advisory activities

In 2011, pursuant to articles 21 and 22 of Law no. 287/90, the Authority published 106 reports and opinions in regard to restrictions on competition that were detected in existing laws and/or upcoming legislation. As in previous years, these reports and opinions concerned a wide variety of economic sectors.

Reporting and advisory activities, by economic sector

(number of interventions)

Sector	2011
Water	4
Insurance and retirement funds	4
Agriculture and livestock	1
Electricity and gas	13
Construction	2
Printing and publishing	2
Pharmaceuticals industry	3
Recreation, culture and sports	1
Financial services	2
Waste disposal	10
Professional and entrepreneurial activities	2
Misc. services	13
Telecommunications	3
Transport and means-of-transport rental	17
Radio and television	2
Misc.	2
Healthcare and other social services	5
Steel and metal industry	1
Petroleum industry	3
Non-metallic minerals	1
Education	3
Other manufacturing activities	2

Electrical and electronic materials	2
Food and drinks industry	3
Education	3
Restaurant industry	3
Tourism	1
Postal services	1
Total	**109**

PHARMACEUTICAL PRODUCTS

AS819 - NEW PROVISIONS ON BIOSIMILAR MEDICINES

In March 2011, pursuant to Article 22 of Law no. 287/90, the Authority published an opinion on the competition-distorting impact of draft law no. 1875, containing new provisions on the issue of biosimilar medicines.

These provisions foretold the exclusion of the principle of therapeutic equivalency from the process with which healthcare units purchase biosimilar medicines. This therefore impeded the commissioning bodies from preparing contract notices on the basis of the principle of therapeutic substitution, in which biotechnological drugs and proprietary biosimilar products are posed in mutual competition in a single lot.

The Authority found this prohibition to be likely to result in an unjustified restriction of competition between the two drug types that was not proportional to the goal of guaranteeing the protection of public health.

The verifications conducted by the Authority revealed that the characteristics of biotechnological medicines, which are the proprietary product of reference for the biosimilars, allow for a perfectly adequate competitive comparison between these two types of medicines. In fact, in spite of how a biosimilar drug cannot embody an "exact copy" of the *originator* product, due to specific details of the manufacturing process employed for biological drugs, the marketing authorization process requires the demonstration of substantial equivalency with the effectiveness, safety and quality of the drug of reference. It always remains possible, on the other hand, that the biosimilar product exhibits even better safety characteristics than the *originator*.

The Authority therefore recommended that the Draft Law in question be modified in order to foster competition between biotechnological and biosimilar drugs, as circumscribed by the need to safeguard public health. It was also emphasized how these modified conditions would be likely to achieve substantial savings in public expenditures, especially medicinal spending by the National Healthcare Service, which would be obtained through the competitive pricing of biosimilar drugs and the proprietary biological products of reference.

ELECTRICITY AND NATURAL GAS

AS821 - INTERNAL ENERGY MARKET - LEGISLATIVE DECREE INCORPORATING THE THIRD PACKAGE OF EUROPEAN DIRECTIVES

In March 2011, pursuant to Article 22 of Law no. 287/90, the Authority formulated several observations concerning the draft legislative decree on the implementation of three Community directives from the third package of energy measures.

In specific, the Authority found that certain provisions might undermine the effects on competition that the decree strives for in the national systems for gas and power. Other important aspects of the liberalization process for energy sector markets were pinpointed in the Authority's January 2012 report, as described in the Executive Summary.

The procedures for identifying the "infrastructures consistent with national energy policy"

The draft decree provided for the Government to identify the minimum requirements for building and expanding generation facilities for electricity, the regasification of liquefied natural gas (lng), the storage of natural gas and petroleum product and facilities for power transport and transmission and for the international connections that would be needed to achieve the "*national energy policy objectives*" and to ensure the "*safety, affordability and competitiveness of the energy supply.*" The Authority pointed out a variety of potential discriminatory effects.

The Authority found that the provision could lead to arrangements in the natural gas and electricity sector that would be inefficient from the perspective of selecting the projects that were the best in industrial and competitive terms and recommended that the draft decree be changed so that the Government would focus less on identifying the minimum number of plants and facilities needed to achieve its own objectives and more on informing the market of the minimum needs for each category of plant or facility, broken down by large geographical areas and indicating the preferred timeframe for achieving the objective.

Various measures concerning the retail sales sector

The Authority expressed a favorable assessment of the laws that were designed to foster the development of competition in the retail gas and electricity sales. It did, however, detect an ambiguity where the law provides for changes of operators to be implemented within three weeks of the customer's request, finding that changes would be needed to clarify that this particular time limit refers to the completion of all of the different phases required to implement the changeover.

In view of the greater competitiveness of the wholesale electricity market as compared to the natural gas market, the Authority then found that the peculiarities of Italy's current protection regime in the electricity sector may come gradually to be abandoned as progress is made in liberalization and, therefore, as domestic

consumers switch over to the free market, and in order to enhance the final customers' selection of suppliers and delivery prices.

To guarantee the proper operation of competition in the retail markets as the protection regime is surmounted, the Authority found that special attention is required to prevent companies who have not yet unbundled the two activities - free vs. subsidized energy sales - from enjoying unwarranted competitive advantages, especially in terms of access to advantageous commercial information and their relationships with final customers.

PHARMACEUTICAL DISTRIBUTION

AS796 – RESTRICTIONS ON THE OPENING OF PARA-PHARMACIES

In February 2011, pursuant to Article 22 of Law no. 287/90, the Authority expressed its opinion on a proposed change in the law on pharmaceutical distribution that was designed to reverse the effects of recent liberalization and, more specifically, to hinder the opening of new sales points by making it more burdensome through the application of a sort of "authorized staff strength" to parapharmacies. The Authority expressed its perplexity regarding the measures suggested by the proposal in question, measures that were deemed likely to obstruct the opening of new parapharmacies by making it easier for existing parapharmacies to transfer to other parts of the same municipality or to other municipalities that are lacking parapharmacies or at least are willing to issue an authorization by the competent authority.

The Authority, therefore, noted that the text in question appeared to be capable of reducing the range of choices for consumers, with likely negative effects on price levels and the quality of services offered, thus resulting in a significant attenuation of the pro-competition effects that could be exerted by the unrestricted growth of this new distribution channel for pharmaceuticals.

Therefore, in order to increase competitive pressures to the benefit of the system, the Authority recommended that the proposal be rejected and that, on the contrary, the liberation process for drug distribution be continued by increasing the number of businesses as well as by allowing class C drugs (medicines sold directly to patients bearing a prescription) to be sold outside of pharmacies, although only in the presence of a pharmacist.

TRANSPORT

AS885 – PROVISIONS ON ROAD TRANSPORT

In November 2011, pursuant to art. 21 of Law no. 287/90, the Authority advised Parliament and the Government of the potential distortions of competition that would derive from the changes made to article 83-*bis* of Law no. 133 of 6 August 2008 by Law no. 148 of 14 September 2011.

The first aim of the Authority was to reiterate a message it had already expressed in a previous recommendation paper regarding the law on road transport - the

provision of voluntary agreements, designed to identify 'minimum operating costs' among the associated organizations of transport workers represented by the General Council on Road Transport and Logistics is not an appropriate tool for guaranteeing the satisfaction of the quality and safety *standards* of this service. Instead, this particular system ended up being translated into the fixing of minimum fees for the clientele, revealing itself as a means for heightening profitability regardless of whether the supplier was providing inefficient and low quality services.

The Authority emphasized how the changes introduced by the new law - according to which these 'minimum operating costs' are subject to preliminary assessment by the General Council on Road Transport and Logistics - appear to be ill-suited to eliminate the risk of the identification of such costs being translated, de facto, into the fixing of minimum fees.

Lastly, the Authority revealed how the new law, by subordinating the effectiveness of minimum costs to their publication by decree of the Ministry for Infrastructure and Transport, appears likely to endorse their lawfulness even in the presence of antitrust violations.

TELECOMMUNICATIONS

AS904 REGULATION OF ACCESS SERVICES FOR NEXT-GENERATION NETWORKS

In July 2011, pursuant to Art. 22 of Law 287/1990, the Authority responded to a request for an assessment by presenting the Chairman of the Regulatory Agency for Communications (Autorità per le Garanzie nelle Comunicazioni, hereafter "AGCom") with its assessment of the draft measure on the "*Regulation of access services for next-generation networks.*"

The Authority first noted the particular significance of the measure from a regulatory point of view, since it addresses infrastructures, such as the so-called NGN networks (*Next Generation Network),* that are still in the programming phase and whose upcoming and gradual diffusion is certain to make profound changes in the wholesale and retail markets for access to fixed networks.

Having considered the innovative significance of the law, the Authority found it essential to adopt a well-defined regulatory framework that would have the capacity to provide incentives for investments while at the same time allowing it to deploy itself in a fully competitive market.

The changes to Telecom Italia's obligations concerned the two markets for (physical) access to the fixed network infrastructures; and b) wholesale access to broadband.

In regard to the measures on the wholesale market for accessing network infrastructures, the Authority noted how the obligation to provide *end-to-end* access services, consisting of alternative operators (OLO) who provide connections all the way from the processing center to the user's location, does not seem to be an appropriate replacement, from the perspective of competition, for the obligation to provide disaggregated access to the fiber-optic network (*unbundling* of fiber). In fact, it would prevent OLOs from enjoying the certainty that the *incumbent* operator

would provide access to the resources required to field competitive offers in a timely manner.

With respect to the second market, the AGCom introduced the obligation to supply different levels of *bitstream* access services. The AGCom also established that the price control and bookkeeping obligations for this type of supply shall only apply in zones where no real competition has existed or is not expected to develop in the near future. It also reserved the authority to introduce a data limit above which the obligatory *bitstream* access service would be retracted in areas characterized by infrastructural competition between next-generation networks (*sunset clause*).

The Authority found that the territory-based diversification of the obligations was not warranted by the mere presence of multiple competing infrastructures in specific zones. The Authority recommended, lastly, that the delicate transition phase from 'copper' to next generation networks will be monitored with particular vigilance in order to prevent the *incumbent* operator from efforts at *pre-emption* in the context of the nascent retail market for fiber-based offers.

POSTAL SERVICES

AS786 INCORPORATION OF THE COMMUNITY DIRECTIVE ON POSTAL SERVICES 2008/6/CE

In January 2011, the Authority formulated a set of observations on the methods with which Italy was preparing to incorporate the third postal directive.

The Authority revealed how certain aspects of the draft implementation decree contain distortions of Community regulations and the rules on protecting competition that slow down the liberalization of postal services in Italy, including the characteristics of the designated regulatory agency and the procedures for assigning the Universal Service and for defining the structure and financing of related costs.

With respect to the first profile, the Authority found that in the Italian context, in which Poste Italiane S.p.A. (the former monopolistic postal operator) is a publicly-owned corporation, the draft decree exhibits a serious problem with its competitive profile because of how the decree defines the regulatory entity as an Agency at the service of the Public Administrations within the national system and subject to a Ministry's guidance and oversight, as opposed to an Entity that, as required by the directive, is independent from the Government. The Authority, therefore, emphasized how the postal regulator's lack of independence would be likely to slow down the liberalization process that was already under way by privileging the former monopolist position of Poste Italiane over the other existing or future operators in the postal markets.

In regard to the second profile, which concerns the provisions on universal service, the Authority found that the decision to entrust all aspects of the universal service for the entire nation directly to Poste Italiane for a total of 15 years fails to embrace the opportunities represented by Community law and is incompatible with the opening to competition in the sector.

The Authority reasserted the possibility for a short term contract that would facilitate a public procedure for tendering all or part of the universal service for all or part of the national territory, highlighting in particular the anti-competitive effects of the criterion of *experience in the sector* and *any previous relations with the public administration in the specific sector and a positive outcome*, since it is obvious that no operators other than the historical one would ever satisfy these requirements.

The Authority noted how the Community provisions envisioned different variations of universal service in terms of its geographic and product-based extension, whereas the draft decree only contemplated the possibility of one single operator providing the entire Service throughout the entire nation.

Since it cannot be denied, nonetheless, that the liberalization process under way could develop a market structure that would make the fragmentation of the service more efficient by allowing new entrants to operate under universal service conditions in one portion of the country or for specific products only, the Authority pointed out how it would be desirable to evaluate the possibility of limiting these services to essential services that the users would otherwise be unable to purchase individually. The universal service could exclude *bulk mail*, for instance, i.e., the mass mailing of large quantities of correspondence, a service which is already being provided by Poste Italiane's competitors and for which lively competition develops following the abolition of the reservation on mailings that weigh less than 50 grams.

Last of all, the Authority observed that a narrowing of the context of the universal service would reduce the restrictive effects connected to the current supplier's enjoyment of fiscal benefits (such as the VAT exemption) that represent an unwarranted competitive advantage with respect to other operators.

The Authority emphasized, lastly, how the management of the equalization fund that is used to finance the universal service duty needs to be characterized by the criteria of independence, transparency and non-discrimination and to be entrusted to an independent entity in order to keep the contributions to this duty from becoming penalizing for new operators or from translating into a competitive advantage in Poste Italiane's favor.

In conclusion, the Authority found that the text in question, which is fundamental to the liberalization of the postal sector, may be deficient in the basic measures needed to foster the development of effective competition.

4. Resources of the Italian Authority

4.1. Annual Budget

The budget for 2011 was 57,7 €/mil. There was a decrease of 9,6 €/mil from the previous year.

4.2. Number of employees

The total staff of the Authority, at the end of 2011, was 256 (this includes all resources, also in non competition areas - e.g. consumer protection, conflict of interest, etc.). Approximately 119 of the Authority's staff work on competition (34 support staff and 85 non administrative). The non administrative staff is composed of 46 lawyers, 34 economists and 5 other (statisticians, etc.).