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**DAF/COMP/AR(2015)56**

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

**22-Oct-2015**

**Français - Or. Anglais**

**Direction des affaires financières et des entreprises  
COMITÉ DE LA CONCURRENCE**

DAF/COMP/AR(2015)56  
Non classifié

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN ITALY**

**-- 2014 --**

**27-28 October 2015**

*This report is submitted by Italy to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 27-28 Octobre 2015.*

**JT03384843**

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## Executive Summary

1. This report covers the activities of the Italian Competition Authority (ICA or the Authority) - which is the agency responsible for implementing Italy's competition law - regarding the past calendar year (1 January 2014 to 31 December 2014).

2. Overall, the ICA enforcement and advocacy activities carried out in 2014 were aimed at fostering competition both in its static and dynamic meaning, by taking into account also a long term perspective. While in the short-term consumers need to be preserved from the effects of cartels and abuses that affect their buying power, and firms should rely on a level playing field and competition on the merits, in a longer term perspective the ICA seeks to safeguard and develop a fertile ground for dynamism and innovation. For this reason, in new or innovative markets the ICA has used commitment decisions to quickly restore competition while at the same time preserving companies' incentives to innovate and invest.

3. The 2014 figures show that the Authority's level of enforcement and fines have increased and its quality improved, and the ICA's efforts are being confirmed by the positive results of the judicial review.

4. In 2014 the ICA issued 15 decisions on anti-competitive agreements (including cartel decisions) and started 16 new cases. The ICA has oriented its activity on sectors that can have a strong impact on consumer welfare in this economic contingency, such as the **pharmaceutical sector, the transport sector and local public services**. Notably, in February 2014 the ICA imposed significant fines on Roche and Novartis (92 and 90.5 million Euros respectively), which set up a complex collusive strategy aimed at creating an artificial differentiation between a more expensive and a cheaper drug for ophthalmic treatment. The collusion may have hindered access to treatment for many patients. Moreover, the ICA estimated that the extra cost for the National Health Service may have exceeded 600 million Euros in 2014. The decision raised worldwide attention and was upheld by the Italian Administrative Tribunal having first-instance jurisdiction on the ICA's decisions.

5. The Authority's increased effort in fighting bid rigging has complemented the Italian government's enhanced action to fight **collusion and corruption in the public procurement sector**. At the end of 2014, almost half of the ongoing cartel investigations concerned competitive tenders issued by public administrations. This acceleration follows a successful initiative in 2013, when the ICA circulated to Italian procurement bodies a handbook (based on OECD work) providing guidelines for identifying warning signs of potential bid rigging. The handbook has triggered numerous complaints, boosting anti-cartel enforcement in the area of public procurement. These encouraging results have been achieved also by strengthening the Authority's relationships with the criminal judiciary and the Anti-corruption Authority, responsible for supervision on public tenders. At the end of 2014, the ICA signed a memorandum of understanding with the Anti-Corruption Authority to foster information exchange and cooperation between the two agencies.

6. With regard to **abuse of dominant position cases**, the ICA closed 3 cases and started 2 new investigations in the pharmaceutical and in the waste sector. In particular, the ICA fined the Hera Group, which holds a monopoly in the collection of municipal waste in several Italian provinces, for supplying cellulosic waste to another company of the same group at below market price. On top of preventing downstream competitors from accessing an essential input in the market for used paper, this behavior led to lower revenues for the Hera Group and, in turn, higher taxes for citizens: if waste paper had been auctioned, Hera would have used its higher revenues to reduce the cost to be paid by taxpayers for the service of waste collection. Moreover, ICA accepted commitments offered by Ferrovie dello Stato group concerning a conduct that might have hampered the entry into the high-speed rail services market by the new operator NTV.

7. To increase transparency and deterrence of its enforcement activity, in October 2014 the ICA published **Guidelines for the calculation of fines**, which are consistent with the EC Guidelines. In addition, the Italian Guidelines consider the adoption and enforcement of an adequate compliance program as a mitigating factor, as well as the introduction of an amnesty plus mitigating circumstance in order to increase the use of the leniency program. As a whole, the Guidelines indicate that ICA intends to impose heavy fines on the most serious infringements but is available to consider and reward investments in competition compliance intended to prevent violations of competition law. The new guidelines, which benefitted from the public consultation with the various stakeholders, have been well received by the legal community.

8. Overall, in terms of judicial review, in 2014, 7 out of 11 ICA's decisions were upheld partially or entirely by the TAR Lazio (the first instance level). In the same period, 8 out of 10 decisions were upheld partially or entirely by the Consiglio di Stato (the Supreme Administrative Court). In particular, the Supreme Administrative Court upheld the ICA landmark decision in *Pfizer case* concerning the scope and limits of the use of the patent system by pharmaceutical companies. The judges upheld the Authority's view that the complexity of the patent system had been exploited by the dominant company merely to reduce competition without any justification in terms of innovation. In addition, the Court provided clear indications about the circumstances in which an otherwise legitimate protection of rights and interests may become an abuse of dominant position.

9. On the **advocacy** front, the ICA continued to increase awareness of the importance of competition to promote competitiveness and economic growth. With a view to improving the Italian institutional and legal framework at national and local levels, in 2014 the ICA sent almost 70 opinions and recommendations that spurred the removal of hurdles to competition in several sectors.

10. The ICA's advocacy activity can rely on a variety of instruments that go beyond the traditional powers to send written opinions to national and local public bodies. Since 2012, the ICA has been widely using the new power to issue opinions requesting public entities to repeal restrictive administrative acts and to challenge them before the Administrative Tribunal in case of non-compliance. In addition, the ICA provides opinions to the government on regional legislation, which may lead the government to challenge restrictive regional laws before the Constitutional Court. This set of advocacy tools is key to supporting the implementation of reforms in Italy, also because liberalisation reforms designed at the national level may often be undermined by legislative and regulatory interventions at the local level.

11. A large part of the ICA advocacy activity was aimed at fostering compliance with the EU rules on **in-house provisions** and more transparent and competitive tendering procedures. In 2014, nearly 30 of ICA's recommendations concerned public tenders. The effectiveness of these initiatives has been strengthened by productive relationships with the criminal judiciary and the Anti-Corruption Authority, responsible for the supervision on public tenders.

12. The ICA has also provided inputs to the national strategy for the development of new generation ultra-broadband networks as an essential ingredient of a widespread digital economy. By means of a **market study** jointly carried out with the sectoral regulator, the ICA provided operators and policymakers with transparent and clear guidance from a competition policy perspective on the feasibility of a variety of options to boost investments, outlining the range of public policies that are suitable to support investments.

13. Finally, the ICA submitted to the government its yearly report suggesting a set of legislative measures to remove competition restraints in key sector such as energy, telecommunications, insurance and postal sector, locally owned companies and professional services. In February 2015, for the first time the government prepared a draft law for competition, incorporating several Authority's proposals. The draft law is being discussed in Parliament.

## 1. Changes to competition laws and policies, proposed or adopted

14. In October 2014 the ICA adopted Guidelines (the Guidelines) on the method for setting fines for the infringement of EU and national competition law (law n.287/1990), based on the outcome of a consultation process with the relevant stakeholders.

15. The Guidelines are an important step towards ensuring more transparency and coherency in competition enforcement, thus contributing to more consistent application of competition rules. Prior to the Guidelines, fines for antitrust infringements in Italy were set on the basis of a general law on criminal sanctions (Law n. 689/1981), as well as the European Commission's 2006 fining Guidelines.

16. Similar to the Commission's methodology, the Guidelines use a two-step process when setting the amount of the fine: (i) determining the basic amount, and (ii) making upwards or downwards adjustments to take into account multiple aggravating or mitigating circumstances. In any event, the final amount of the fine may not exceed 10% of the undertaking's total turnover in the previous business year, as provided for by Article 15 of the national competition law (law n. 287/1990).

17. Some highlights of the Guidelines:

- For the most serious infringements (i.e. price fixing, market sharing and output limitation), the proportion of the value of sales taken into account as the basic amount will not be lower than 15%.
- The fine can be increased up to 50% if the undertaking achieved significant worldwide revenues or belongs to a group of significant economic strength.
- There is also a possibility of further increasing the fine to guarantee the proportionality and deterrence of the sanction when the illicit gains improperly made by the undertaking can be reasonably estimated.
- An "Amnesty plus" programme is introduced, according to which the amount of the fine can be reduced up to 50% if, during the investigation, the undertaking provides information and documents that may be decisive for ascertaining a separate antitrust infringement and the contribution falls within the scope of the leniency programme.
- The adoption and effective implementation of a specific compliance programme can be recognized as a mitigating factor. However, in order for this to apply, the mere adoption of a competition compliance programme is not sufficient; the compliance programme must be specific and suitable, as well as in line with the international best practices. More importantly, the firm must show a concrete and effective commitment to applying the programme. The ICA will take into account the experience developed in other NCAs and considers providing ad hoc guidance in the future.
- Finally, the Guidelines provide specific guidance on calculation of the value of sales in relation to collusive agreements for participation in public tenders.

## 2. Enforcement of competition laws and policies

### 2.1 Action against anticompetitive practices, including agreements and abuse of dominant positions

#### 2.1.1 Summary of activity

##### Activity of the Authority

	2013	2014
<b>Anticompetitive agreements (incl. cartels)</b>	8	15
<b>Abuses of dominant position</b>	5	4
<b>Mergers of independent enterprises</b>	2	4
<b>Sector inquiries</b>	4	2
<b>Non compliance</b>	1	2
<b>Post-merger monitoring/assessment</b>	1	1

##### Proceedings concluded in 2014, divided by type and outcome

	Non-infringement of the law	Infringement of the law, conditional authorization, modification of agreements, acceptance of commitments	No jurisdiction or inapplicability of the law	Total
<b>Anticompetitive agreements (incl. cartels)</b>	2	13	-	15
<b>Abuses of dominant position</b>	1	2		3
<b>Mergers of independent enterprises</b>	36	4	5	45

18. In 2014, the Authority concluded 15 investigations concerning **anticompetitive agreements**, including cartels.

19. In 5 cases, the Authority ascertained a breach of competition rules: 3 violations of article 101 of the Treaty on the Functioning of European Union (TFEU)<sup>1</sup> and 2 violations of article 2 of the domestic competition law (see section 2.1.2)<sup>2</sup>. Having regard to the seriousness of the infringements, the Authority imposed fines totalling EUR 184,366,471 to the companies involved.

<sup>1</sup> Cases No.: I738 - Restrizioni Deontologiche Federazione Nazionale degli Ordini dei Medici Chirurghi e degli Odontoiatri, I748 - Condotte Restrittive del CNF, I760 - Roche-Novartis/Farmaci Avastin E Lucentis.

<sup>2</sup> Cases No.: I762 - Unione Mutualistica tra Notai del Veneto, I744 - Tariffario Minimo Per Gli Amministratori Professionisti di Condominio-Legge 4/2013.

20. In 8 cases the proceedings were closed with commitments (see section 2.1.2)<sup>3</sup>, while the Authority found no evidence of infringement of the law in 2 cases<sup>4</sup>.

21. Seventeen investigatory proceedings were still under way as of 31 December 2014, 13 of which pursuant to article 101 of TFEU<sup>5</sup> and 4 pursuant to article 2 of law no. 287/90<sup>6</sup>.

**Agreements examined in 2014, divided by economic sectors (proceedings concluded)**

<b>Main sector involved</b>	
Transportation and hiring of means of transport	1
Health care	1
Financial services	1
Machinery	1
Telecoms	1
Insurance and pension funds	1
Professional and business support activities	4
Publishing	1
Distribution & Retail	1
Grocery trade	1
Pharmaceuticals	1
Other services	1
<b>Total</b>	<b>15</b>

<sup>3</sup> Cases No.: I718 - Enervit-Contratti Di Distribuzione, I702 - Agenti Monomandatari, I757 - Ostacoli All'accesso al Mercato di un Nuovo Operatore di Telefonia Mobile, I766 - Inverter Solari ed Eolici – Imposizioni Prezzi Minimi, I768 - Centrale D'acquisto per la Grande Distribuzione Organizzata, I773 - Consorzio Bancomat-Commissioni Bill Payments, I778 - Mercati dei Sistemi Gestionali di Base degli Istituti di Istruzione e Del Registro Elettronico, I781 - Cnappc-Pubblicazione dei Metodi e Strumenti di Calcolo dei Compensi Professionali degli Architetti.

<sup>4</sup> Cases No.: I763 - Servizi di Cabotaggio Marittimo Stretto di Messina, I769 - Sanità Privata nella Regione Abruzzo.

<sup>5</sup> Cases No.: I689C - Organizzazione Servizi Marittimi Nel Golfo Di Napoli, I744 - Gare RCA per Trasporto Pubblico Locale, I759 - Forniture Trenitalia, I761 - Mercato Dei Servizi Tecnici Accessori, I770 - Arca/Novartis-Italfarmaco, I772 - Mercato del Calcestruzzo Friuli Venezia Giulia, I775 - Procedure di Affidamento dei Servizi Ristoro su Rete Autostradale Aspi, I776 - Mercato della Produzione di Poliuretano Espanso Flessibile, I777 - Tassi Sui Mutui Nella Provincia di Bolzano, I779 - Mercato dei Servizi Turistici-Prenotazioni Alberghiere On Line, I782 - Gare per Servizi di Bonifica e Smaltimento di Materiali Inquinanti e/o Pericolosi presso gli Arsenali di Taranto, La Spezia ed Augusta, I783 - Accordo tra Operatori del Settore Vending, I785 - Gara Consip Servizi di Pulizia nelle Scuole.

<sup>6</sup> Cases No.: I765 - Gare Gestioni Fanghi in Lombardia e Piemonte, I771 - Servizi Di Post-Produzione di Programmi Televisivi Rai, I780 - Mercato Del Calcestruzzo In Veneto, I784 - Ecoambiente-Bando di Gara per lo Smaltimento dei Rifiuti da Raccolta Differenziata.

22. In 2014, the Authority concluded 3 investigations concerning **abuses of dominant position**. In one case, the proceedings confirmed the infringement of the domestic law on abuse of dominant position (article 3 of the law no. 287/90), and the Authority imposed a fine totalling EUR 1,898,700 on the company involved (see section 2.1.3)<sup>7</sup>. In another case, pursuant to article 14-ter, paragraph 1 of the law, the Authority accepted the commitments proposed by the dominant firm<sup>8</sup>.

23. In addition to the above investigations, the Authority carried out a proceeding in order to ascertain a violation to the binding commitments accepted by the Authority, although there was no ground for the finding of lack of compliance and thus for the imposition of fines on the company involved<sup>9</sup>.

24. On 31<sup>st</sup> December 2014, 4 proceedings pursuant to article 102 of the TFEU were pending<sup>10</sup>.

25. Overall, in 2014 7 out of 11 decisions of the ICA were upheld partially or entirely by the TAR Lazio (the first instance level). In the same period, 8 out of 10 decisions were upheld partially or entirely by the Consiglio di Stato (the Supreme Administrative Court), including the ICA landmark decision on *Pfizer*<sup>11</sup>.

**Abuses examined in 2014, divided by economic sectors (proceedings concluded)**

Main sector involved	
Water	1
Radio & TV	1
Waste management	1
Transportation and hiring of means of transport	1
Total	4

*2.1.2 Description of significant cases regarding anticompetitive agreements and concerted practices*

*Infringement cases*

26. One important infringement decision adopted by the Authority concerned the **pharmaceutical sector**: a large fine was imposed on the companies Roche and Novartis for infringing article 101 TFEU by participating in an anticompetitive agreement in the market for ophthalmic treatments, which is used to cure some serious vascular eyesight conditions, including age-related macular degeneration (AMD), the main cause of blindness in developed countries. The investigation was launched following complaints by an association of private hospitals and the Italian Ophthalmologic Association. The ICA assessed that starting in 2011 Roche and Novartis set up a complex collusive strategy, with a view to avoiding the

<sup>7</sup> Case No. A444 - Akron-Gestione Rifiuti Urbani a Base Cellulosica.

<sup>8</sup> Case No. A443 - NTV/FS/Ostacoli all'accesso nel Mercato dei Servizi di Trasporto Ferroviario Passeggeri ad Alta Velocità.

<sup>9</sup> Case No. A395C - Acquedotto Pugliese - Opere Di Allacciamento Alla Rete Idrica – Inottemperanza.

<sup>10</sup> Cases No.: A473 - Fornitura Acido Colico, A474 - Sea/Convenzione ATA, A476 - Conai-Gestione Rifiuti da Imballaggi in Plastica, A480 - Incremento Prezzo Farmaci Aspen.

<sup>11</sup> Case No. A431 – Ratiopharm/Pfizer.



commercial success of Lucentis being hindered by the ophthalmic applications of Avastin, sold at a much cheaper price<sup>12</sup>. Indeed, the significant difference in price - while an injection of Lucentis in Italy costs € 900 (down from an earlier price of € 1 700), the price of an off-label injection of Avastin tops at € 81 – led the two firms to collude in order to create an artificial product differentiation between Avastin and Lucentis, in order to influence prescriptions by doctors and health services for eyesight conditions.

27. According to the ICA, the economic rationale of the companies' conduct stemmed from the relationship between the Roche and Novartis groups: while Roche collects significant royalties from the sales of Lucentis, which was developed by its subsidiary Genentech, Novartis benefits directly from Lucentis' sales and holds a more than 30% share in Roche. The efforts of Roche and Novartis intensified as a growing number of independent comparative studies supported the equivalence of the two drugs for ophthalmic uses. In the ICA's view, this illicit collusion may have hindered access to treatment for many patients and caused the Italian National Health Service to bear additional expenses estimated at € 45 000 000 in 2012, while increased future costs might possibly exceed € 600 000 000 per year. In light of the seriousness of the infringement, the ICA imposed on Roche and Novartis fines totalling respectively € 90 500 000 and € 92 000 000.

28. Other infringement decisions adopted by ICA involved professional services and focused on anticompetitive agreements put in place by professional associations in an attempt to hinder the on-going liberalization process.

29. In October 2014, the ICA found that two separate decisions issued by the Italian National Bar Association ('CNF') infringed Art. 101 TFEU, by restricting competition in the Italian market for **legal professional services**. The ICA found that CNF published on its website a note stating that – notwithstanding the liberalization process – lawyers' fees below the (repealed) minimum tariff may fall short of professional ethics and attract disciplinary sanctions. The ICA considered that such conduct represent a restriction of competition by object, as it discourages lawyers from engaging in price competition. With a separate note, the CNF held that advertising of legal services on online platforms could also be construed as a deontological breach. According to the ICA, the ensuing limitation of advertising might create a significant obstacle to effective competition in the relevant market, to the detriment of consumers. The ICA imposed fines totalling almost € 1 million. The ICA intervention occurred in a context where numerous legislative interventions had changed the regulation of the legal profession with the explicit goal of promoting competition in the sector. In particular, such reforms led to a comprehensive liberalization, entailing inter alia the abolition of minimum tariffs and the freedom to advertise legal services.

30. Similar conducts were put in place by the Italian association of directors of property management companies (CONFIAC), which adopted and disseminated among its members a set of tariffs and a Code of Ethics and Conduct aimed at predetermining the minimum remuneration payable to directors of property management services. In this case, however, the Authority did not impose any financial penalty since the agreement had been voluntarily communicated and implementation had been extremely limited.

31. The ICA also tackled certain provisions of Code of Conduct for **doctors and dentists** limiting advertising. In particular, the ICA found that the following rules restricted competition contrary to Article 101 TFEU: (i) the obligation on doctors and dentists to obtain ex ante authorization from the Provincial

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<sup>12</sup> Originally, the use of Avastin was approved for the treatment of some forms of cancer. Yet since mid-2000 it has been used off-label to treat common eyesight conditions in accordance with the Italian regulatory framework. Lucentis, a more recently developed drug which contains an active substance similar to Avastin, has received regulatory approval upon request of Genentech – a subsidiary of Roche – in the US, and of Novartis everywhere else, specifically for some of these eyesight conditions.

Associations for any advertising activity; (ii) limits on how doctors and dentists can diffuse the information on their services and, particularly, strict limitations on the use of websites (such as Groupon) for advertising and distributing such services; and (iii) the strict prohibition of any forms of advertising based on prices or on comparison of prices. These rules, issued by the National Federation of the Associations of Doctors and Dentists (FNOMCEO) and enforced by the Provincial Associations of Doctors and Dentists, were found to limit the possibilities for the doctors and dentists to advertise their services. Following the ex-officio investigation, the ICA received several complaints from doctors and undertakings managing dental clinics, claiming that advertising was widely hampered by some provisions of the Code of Conduct and a very restrictive interpretation of the concept of "professional decorum". In addition, failure to comply with the Code of Conduct made individual professionals subject to the risk of disciplinary proceedings. Information gathered during the investigation showed that the rules put severe constraints on the possibility for doctors and dentists to advertise their services and thereby limited the use of an important competitive tool. A fine of approximately € 832 000 was imposed on FNOMCEO together with the obligation to modify the Code of Conduct.

#### *Commitment cases*

32. Having regard to the proceedings concluded with commitments, several decisions could be highlighted among the nine adopted in 2014 which, by quickly restoring competition, have brought benefits in sectors of particular importance for the development of the economy.

33. Several commitment decisions concerned **vertical restraints**. In May 2014, the ICA issued a commitment decision, accepting the corrective measures proposed by major national **insurance companies** to meet the competition concerns stemming from their vertical agreements with insurance brokers. The allegation was that existing contractual arrangements with major insurance companies de facto prevented brokers from dealing with more than one insurance company and thereby infringed Article 101 TFEU. In Italy, the liberalization package adopted by the Government in 2006 in the insurance sector banned all exclusivity clauses in agreements between insurance companies and brokers, in an effort to open the market and increase price competition, particularly in the sector of mandatory motor insurance. Following its investigation, the ICA considered that the network of parallel agreements between brokers and insurers – while formally complying with the applicable regulatory framework – could significantly narrow the scope of and dilute incentives for the brokers to offer the services of several companies. The insurance companies committed not to include in their contracts with brokers any references to exclusivity clauses, prior communication obligations and commission differentiation in case of serving other insurers.

34. Competition concerns were expressed in relation to certain clauses (e.g. special discounts and/or non-contractual benefits) in the contracts between two **mobile operators** and their multi-brand dealers which might foreclose new entrants in mobile markets from the best performing distribution channels. The two mobile operators, Telecom Italia (TI) and Wind Telecomunicazioni (Wind) offered commitments to address the ICA's competition concerns: TI committed to eliminate from its distribution agreements an exclusivity clause, whereby the dealer agreed "*not to sell goods or services of operators other than those already part of the commercial distribution agreement with the buyer [...]*"; also Wind committed to amend the relevant agreements, so that that the clause at stake would only be applicable vis-à-vis mobile operators holding a higher market share than Wind itself. These commitments were considered suitable to address the competition concerns raised by the alleged vertical restriction flowing from the described distribution agreements, as they remove the barrier to the entry of mobile operators lacking an adequate proprietary distribution infrastructure.

35. A system of **minimum resale prices** was under scrutiny in the investigation concerning Power-One Italy Spa (Power-One), an Italian undertaking selling renewable energy converters (i.e. systems to convert solar or, to a much lesser extent, wind energy into useable grid-connected power) to its Italian

distributors. In February 2014, Power-One offered commitments to the ICA, intended to remove the RPM clause in the territory of the European Union. These commitments were market tested, and in July 2014 the ICA considered them appropriate and sufficient to meet its competition concerns. Moreover, Power-One offered to refrain from including in the new contracts, for a 3-year period from the adoption of the ICA's decision, any provision concerning territorial and product exclusivity. After 3 years, the distribution contracts may include provisions providing for territorial and product exclusivity for active sales, but not for passive sales.

36. In relation to **horizontal agreements**, two commitment decisions are worth mentioning. In the **large-scale distribution sector**, which was the focus of an inquiry in 2013, the ICA closed in September 2014 an investigation into an alleged infringement of Article 101 TFEU by five retail chains after it accepted and made binding the commitments proposed by the undertakings to put an end to their buying alliance, Centrale Italiana, whose main role was to negotiate their procurement conditions with suppliers. The market shares of the parties involved in the alliance account for 23% of Italy's upstream procurement market and around 40% on the downstream retail markets in some local areas. The binding commitments consist not only of terminating the commercial negotiations by Centrale Italiana on behalf of the involved distribution chains from 2015 onwards, but also of the interruption of any form of commercial cooperation between the five retail chains as to reduce the risk of coordinated behaviour in respect of products that play a pivotal role in competition between retail chains.

37. In the **market for the provision of payment services**, the ICA accepted the Bancomat's commitments to reduce commissions – the multilateral interchange fees (MIFs) - for every transaction from 0.10 to 0.07 Euros (Bill Payment). The Bancomat Consortium represents one of the most widespread circuits in Italy, both in terms of the debit cards in circulation (approximately 30 million units, the equivalent of 80% of the total in 2012) and in terms of the active Points of Sale (POS) (approximately 1.2 millions, the equivalent of 85%). The investigation was launched to ascertain the possible existence of collusive behaviour among the affiliated members of the Bancomat Consortium. The latter also committed to anchor commission fees to the costs incurred by the operators, and therefore to the efficiencies which might result at system level.

#### *On-going investigations in 2014*

38. Fighting collusion in public procurement remains one of the priorities of the ICA which has launched six investigations during 2014 with respect to tenders involving various services, such as school cleaning, food motorway and waste management.

39. Ten investigations were initiated in other sectors including the ready-mix concrete market and financial services.

#### *2.1.3 Description of significant cases regarding abuses of dominant positions*

40. The ICA sanctioned abuses by dominant players which tried to exclude competitors from the market or distorted an intermediate market, thus leading to higher prices for final consumers.

41. In 2014 the Authority fined the Hera Group, which holds a monopoly in the collection of municipal waste in several Italian provinces, for **supplying cellulosic waste** to its subsidiary Akron at a price below a market price, without accepting more advantageous offers received from other competitors of Akron in the recycling market<sup>13</sup>.

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<sup>13</sup> For more information about the case No. A444 - Akron-Gestione Rifiuti Urbani a Base Cellulosica, see: Tesi, V., Esposito, F. M., "Opening the market for municipal paper waste in Italy: the Akron case",

42. A competitor of Akron complained that the Hera Group, the monopolist waste collector in most municipalities of central and eastern Emilia-Romagna Region, had handed over the waste paper to Akron at a price below market level, without making any fair comparison with other offers received. In its decision, the ICA found that such conduct infringed Art. 3 of the Italian Competition law on abuses of dominant position. Namely, the behavior had foreclosed downstream competitors from accessing an essential input for recycled paperboard and therefore reduced competition in the market for used paper. In addition, the fact that Akron paid a price below market level to buy waste paper from mixed collection and could sell recovered paper at a price incorporating its market power enabled the HERA group to create and keep within the group a profit that would have been otherwise passed to citizens: if waste paper had been auctioned, Hera would have used its higher revenues to reduce the tax paid by citizens for the municipal waste collection service. The lack of a regulatory framework at regional level which recognizes waste as an essential inputs for several secondary markets and regulates its accessibility, contributed to the implementation of such abusive conducts and required the intervention of the ICA. The ICA ordered the Hera Group to cease their abusive conducts and required to auction the paper waste.

43. In the **passenger high-speed rail market**, the ICA accepted commitments from the Ferrovie dello Stato (FS), Italy's incumbent rail operator which in turn controls RFI, the manager the national rail network which enjoys a legal monopoly position, and Trenitalia, the main railway company in Italy. The investigation was prompted by a complaint from NTV, the only competitor to Trenitalia in the passenger high-speed rail market, which accused FS of operating a margin squeeze and delaying access to the railway infrastructure through various conducts. The allegation was that FS conducts significantly increased the cost of entering the high-speed rail market for NTV and unfairly protected the dominance of its own subsidiary Trenitalia, in the downstream market of the passenger high-speed rail market. FS agreed to open up access to train routes, to reduce the cost of railway access by 15 per cent and to provide rival rail operators with more space within stations.

44. As of December 31, 2014, there were four on-going antitrust probes concerning, *inter alia*, the **pharmaceutical** and **recycling** sectors.

## 2.2 *Mergers and acquisitions*

### 2.2.1 *Statistics and significant cases*

45. In 2014, the Authority received 45 merger filings: in the majority of cases (36), the notified transactions were cleared within the 30 day initial review period while 5 cases were dismissed for lack of jurisdiction or for inapplicability of law no. 287/90.

46. One notified transaction<sup>14</sup> required an in-depth review which led to a conditional clearance. In this case, the Authority cleared with conditions the creation of a joint venture between Messaggerie and Feltrinelli Groups in the **market for the distribution of books**. The purpose of the joint venture was to focus on logistics and distribution to libraries, bookstores and large retail chains. In this market, the Authority estimated Messaggerie as holding 25 to 30 per cent market share, and Feltrinelli 10 to 15 per cent, with the joint venture taking a 35 to 40 per cent market share.

47. The ICA was concerned that the joint venture would eliminate the price constraints each distributor had exerted on the other since the transaction would have combined the two main operators in the market for distributing non-educational books to publishers that are not vertically integrated publishing

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Rivista Italiana Antitrust / Italian Antitrust Review, Vol 1, No. 2, 2014, available at: <http://iar.agcm.it/article/view/10201/9492>

<sup>14</sup> Merger case No.: C11957 - Emmelibri-Effe 2005 Gruppo Feltrinelli/Newco.

groups. In addition, the Authority found that the presence of groups Messaggerie and Feltrinelli in upstream (publishing) and downstream (retailing of books) markets would likely generate unilateral exclusionary effects with respect to publishers not vertically integrated and independent bookstores.

48. The transaction was cleared subject to measures obliging the joint venture to maintain existing contracts with small medium-sized publishers (identified with reference to a maximum turnover threshold) until 31 December 2016, without modifying any current contractual terms. In relation to independent publishers not distributed by the Messaggerie and Feltrinelli groups, the Authority has obliged to offer, if requested, a distribution contract at conditions equivalent to those applied to existing customers<sup>15</sup>.

49. In 2014 the Authority activated its post-merger implementation procedures to analyse the request received from the merging parties to a previously authorised transaction for a revision of the imposed remedies, in the light of the evolution of the market conditions. In all three cases<sup>16</sup>, the Authority allowed the parties to obtain a revised remedy which reflected relevant changes to the competitive situation.

50. For instance, in the **banking sector**, the ICA revoked the measures imposed on Intesa Sanpaolo and Generali in its 2006 conditional clearance of the merger between two major banks, Banca Intesa and San Paolo IMI, which consolidated into Intesa Snapaolo<sup>17</sup>. The 2006 merger investigation had confirmed the collective dominant position held jointly by Intesa Sanpaolo, the merged entity, and Generali, an insurer, due to corporate and personal ties between them. However, in light of Intesa Sanpaolo group restructuring of its insurance business, in 2010 the ICA replaced some of the 2006 measures with new ones, including governance measures aimed at neutralising the role of Generali, by excluding information flows between the two companies and the exercise of voting rights by Generali's representatives who are in the Intesa Sanpaolo governance bodies. In 2014 Intesa Sanpaolo and Generali requested the repeal of the 2010 measures for two reasons: Generali participation in Intesa Sanpaolo decreased below 2 per cent; in 2012 a law was passed prohibiting *interlocking directorates*, on the basis of the recommendations issued by the ICA following the publication of the outcome of a sectoral inquiry concerning corporate governance in the banking and insurance sectors in 2008<sup>18</sup>.

### **3. The role of the competition authority in the formulation and implementation of other policies**

51. The set of advocacy powers and tools available to the Authority is rather broad. It ranges from non-binding opinions or recommendations on existing and draft legislation (pursuant to art. 21 and art. 22 of law n.287/1990 respectively) to the power to challenge before the Administrative Court any acts of the public administration (pursuant to art. 21-bis) which is incompatible with competition principles, and the power to carry out market studies when circumstances suggest that competition may be impeded, restricted or distorted in the marketplace (pursuant to Art. 12(2)).

<sup>15</sup> For more information on the merger case, see: Vigliotti, G., "Merger analysis in the non-educational book distribution market: the conditional authorisation for the Feltrinelli - Messaggerie joint venture", *Rivista Italiana Antitrust / Italian Antitrust Review*, Vol 2, No. 1, 2015, available at: <http://iar.agcm.it/article/view/11384/10563>

<sup>16</sup> Merger cases No.: C3932B - Telecom Italia/Seat Pagine Gialle, C8027D - Banca Intesa/Sanpaolo Imi, C11524C Unipol Gruppo Finanziario/Unipol Assicurazioni-Premafin Finanziaria-Fondiarria Sai-Milano Assicurazioni.

<sup>17</sup> Merger Case No.: C8027D - Banca Intesa / San Paolo IMI.

<sup>18</sup> Market Study No.: IC36 - La Corporate Governance di Banche e Assicurazioni.

52. More recently, the Presidency of Council of Ministers (PCM) has started to consult with the ICA when reviewing the compatibility of the draft legislation proposed by the Regions with national legislation and Constitution principles.

53. Another important advocacy power at the ICA disposal is the Annual Law for Competition. According to a law enacted in 2009, every year the Government is asked to present to the Parliament a liberalization bill (Annual Law for Competition), taking into account the opinions and the recommendations delivered by the ICA. Since 2009, the ICA has submitted four reports, the latest released in July 2014 containing proposals accompanied by the necessary legislative amendments for numerous sectors including energy, communications, banking and insurance, transport and professional services<sup>19</sup>.

### 3.1 *Opinions and recommendations*

54. In 2014, pursuant to articles 21 and 22 of law no. 287/90, the Authority issued 62 non-binding opinions and recommendations concerning competition restrictions stemming from existing or proposed laws to policymakers and public administration bodies. Opinions concerned a wide range of sectors as shown in the table below.

**Reporting and advisory activities, divided by economic sectors (number of interventions carried out)**

Sector	2014
Cinema	1
Electricity and gas	6
Financial services	3
Food and drinks industry	2
Human health activities	5
Information technology	1
Insurance and retirement funds	1
Oil industry	5
Services (business services)	1
Services (other)	7
Pharmaceutical industry	1
Postal services	2
Printing and Publishing	2
Real estate activities	1

<sup>19</sup> The four reports are available at the link: <http://www.agcm.it/segnalazioni/legge-annuale.html>

Telecommunications	5
Transport	2
Transportation and hiring of means of transport	10
Tourism and leisure services	2
Waste disposal	1
Water supply	1
Wholesale trade (large scale distribution)	2
Total	62

55. Moreover, the ICA issued 7 opinions to public administration bodies pursuant to article 21-*bis* of law no. 287/90. As in previous years, this power of appeal of administrative acts has been used in a very diverse group of economic sectors and in almost all cases the Authority's opinion was addressed to local administrations. The rate of compliance to the ICA recommendations is higher for opinions issued under art. 21-*bis* of the law no. 287/90 (which applies to administrative acts only): only in two out of seven cases the ICA has started proceedings before the Administrative Tribunal as a result of the refusal of the administration to comply with the opinion of the Authority.

56. Trends in recent years have confirmed that opinions delivered on legislation at the drafting stage can be more effective than those on existing laws. In this perspective, increasingly important is the cooperation with the Presidency of the Council of Ministers (PCM) which welcome ICA inputs when assessing the conformity of draft regional legislation to the constitutional principles. From January 2012 to 31 December 2014, the ICA issued 29 opinions to the PCM, suggesting to challenge regional laws in contrast with competition principles. In view of the opinions given, in 17 cases the PCM decided to appeal the regional laws before the Constitutional Court, also based on competition grounds proposed by the Authority. In 9 out of the 17 cases the Constitutional Courts repealed the regional law by agreeing with the reasoning of the PCM and, indirectly, with the points raised by the Authority.

57. The advocacy activity focused on removing unjustified restriction of competition in public procurement procedures: in 2014, nearly 30 recommendations issued by the ICA concerned public tenders, promoting the use of more transparent and competitive tendering procedures and advocating for the compliance with the EU rules on in-house providing.

### 3.2 *Market studies*

58. The ICA considers market studies as tools for gaining a better understanding of the functioning of certain markets or sectors. These enquiries allow the Authority to identify unjustified restrictions originating from regulation or from anti-competitive behaviour and, in general, gain a better understanding of industry behaviour. The information acquired with market studies can serve as a background for enforcement or advocacy interventions. In this respect, market studies are not a substitute, but a complement to both enforcement and advocacy.

59. In the period of reference, the Authority concluded two sector inquiries, one in the district heating sector and the other on the telecoms sector. Furthermore, at the end of 2014, five sector inquiries were on-going<sup>20</sup>.

*Competition in the district heating sector<sup>21</sup>*

60. The ICA closed its market study in the district heating (DH) sector in March 2014, with the aim of providing a general industry overview, analysing the economic and legal barriers to heating systems competition, and assessing whether a national regulation was needed. The study was prompted by the numerous consumers complaints about the high price of DH service and the mounting debate on the necessity to regulate DH in a context where regulation is, if present, local and prices are often regulated by DH service provision licenses granted by municipalities.

61. The study has highlighted that the DH sector in Italy is characterized by a variety of networks, based on biomass, natural gas and, in some cases, waste and, as a result, network heat generation costs vary widely. While DH regulation is local, the study found that regulation differs between areas served by natural gas transportation and distribution network (“methanized” areas) and other areas.

62. In methanized areas DH service is provided by vertically integrated, municipality-controlled firms, usually under a local public service (LPS) concession. In methanized areas, a sort of price-cap regulation, based on natural gas price, was found in place while in non-methanized mountain areas, DH service provision is not explicitly based on LPS concession and there is no explicit price regulation. In non-methanized mountain areas, realization of DH networks seems to be subject to a lighter regulatory regime and private initiative seems more common than in methanized areas.

63. Therefore, one of the key issues raised by the market study was whether a national regulation would be able to capture these two models and foster the development of privately-owned DH networks competing with other heating systems keeping price controls at a minimum level. The monopolist nature of the DH network and the public interest connected to it would imply the need for regulation allowing only competition for the market (like in other LPS areas). However, according to the ICA, the appropriateness of a form of regulation in the DH sector depends on the extent of actual market failures at stake.

64. According to the Authority, the presence of competing heating systems suggests that DH is not an essential service. In addition, the ICA stressed the importance of ex-ante competition countervailing potential ex-post exploitation: before the customer connects to the network, DH competes with others heating suppliers to serve that customer but after he has connected to a network he is subject to the monopoly power of DH supplier only, because of lack of retail competition. Indeed, ICA price-cost analysis reported no systematic excessive exploitation of monopoly power enjoyed post-connection by the network supplier. The ICA recommended the legislator to define a unitary framework, with basic DH provider obligations and introduce regulation only in the geographic areas where DH has no alternative.

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<sup>20</sup> Market Studies No.: IC47 - Condizioni Concorrenziali nei Mercati Del Trasporto Pubblico Locale (Competition in Local Public Transport), IC41 - Indagine Conoscitiva sul Settore Audiovisivo (Audiovisual Sector), IC31 - Servizi di Negoziazione e Post-Trading (Trading and post trading services), IC30 - Settore delle Prestazioni Sanitarie Ospedaliere (Health Care Services), IC49 - Mercato della Gestione dei Rifiuti Solidi Urbani (Management of Urban Solid Waste).

<sup>21</sup> Market Study No.: IC46 - Settore del teleriscaldamento, March 2014.



*Access to market of broadband telecommunications*<sup>22</sup>

65. At the end of 2014, the ICA published the results of an in-depth market analysis into the development of ultra-broadband networks in Italy, in cooperation with the sectoral regulator AGCOM (IC48 – Mercati di accesso e reti di telecomunicazioni a banda larga e ultralarga). The study moved from the observation that Italy is lagging behind other European countries in the modernization of its telecoms infrastructure, with obvious implications on the competitiveness of the overall economy. The market analysis showed that one of the main reasons for Italy's poor performance lies in the lack of infrastructure competition stemming from the absence of cable networks.

66. In this context, the ICA used the market analysis to provide operators with transparent and clear guidance from a competition policy perspective on the feasibility of a variety of options to boost investments. Operators' investment plans mainly focused on the deployment of Fiber-To-The Cabinet (FTTC) networks in some areas of the territory. In the short and medium term a FTTC-based technology is more feasible in terms of investment costs and timing of deployment as it is based on a repowering of the incumbent's current copper infrastructure, but at the same time it is not considered to be future-proof and is not capable to deliver an end-to-end infrastructure-based competition. In fact, each FTTC network has to rely to some extent on access to the last-mile copper network of the incumbent operator and, in addition, technological solutions, such as vectoring, that can be used to increase the speed of these networks may not accommodate competition between several FTTC operators.

67. The market analysis considered three scenarios that could support the deployment of Fiber-To-The-Building/Home (FTTB/H) networks as an alternative to the Fiber-To-The Cabinet (FTTC) networks: (i) the deployment and management of a FTTB/H network by an operator which is not vertically integrated in the provision of services to end users; (ii) market integration between the main FTTB/H wholesale-only operator (Metroweb) and the incumbent (Telecom Italia); (iii) a joint venture between several operators. The market study identified the possible advantages and disadvantages that each option has for competition, in both its static and dynamic dimensions, and provided the operators with a transparent framework to assess the compatibility with competition law of possible joint ventures or other structural solutions to support investments in FTTB/H projects.

68. The market analysis also addressed the issue of the definition of a national strategic plan for the development of new generation networks, as well as the range of public policies that are suitable to support investments.

### **3.3 Annual Law on Competition**

69. The compilation of this report for the purposes of the discussion of the annual law on competition provided the ICA with the opportunity to suggest priorities and policy options, address the arguments of vested interests, monitor the implementation of the past reforms. The priorities are selected on the basis of ICA's evaluation of their potential impact on competition and growth on one hand and State budget on the other hand.

70. In February 2015, the government incorporated many of the 2014 July recommendations into the first draft Annual Law for Competition, which is now being discussed by the Parliament. Other ICA recommendations contained in the July 2014 report have found echoes on other government measures. For instance, the ICA recommendation for opening up the Italian mutual banking sector to competition was

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<sup>22</sup> Market Study No.: IC48 - Mercati di Accesso e Reti di Telecomunicazioni a Banda Larga e Ultra Larga, November 2014.

implemented in the decree law n.3/2015, as one of a series of measures aimed at attracting foreign investment to Italy.

#### **4. Resources of competition authorities**

##### **4.1 Resources**

###### *4.1.1 Annual budget*

71. The Italian Competition Authority does not have a specific competition-related budget. The overall expenditure incurred in 2014 amounted to € 48.9 million, a 7% decrease compared to the previous year due to a thorough spending review process that did not affect the core activity. The overall expenditure figure also includes costs for non-competition competences (concerning unfair commercial practices, misleading and comparative advertising, conflicts of interest, unfair contractual clauses, legality rating).

72. Law Decree n. 1/2012 introduced a new system of funding for the Italian Competition Authority (effective in 2013). The Decree introduced a mandatory contribution (.08 per thousand) for companies incorporated in Italy whose turnover exceeds a threshold of 50 million euros. The revenues from this contribution replace all previous forms of funding (merger fees and public budget). For the 2014, the ICA reduced the contribution levy to .06 per thousand (from .08), following a strict spending review process.

###### *4.1.2 Number of employees*

73. The total staff of the ICA at the end of 2014 was 288. This includes all human resources working for the Authority, also in non-competition areas (concerning unfair commercial practices, misleading and comparative advertising, conflicts of interest, unfair contractual clauses, legality rating).

74. Approximately 120 officers work on competition (24 as support staff and 96 as non-administrative staff). The non-administrative staff is composed of 47 lawyers, 44 economists and 5 other professionals.

##### **4.2 Authority's Board**

75. In March 2014 one of the Members of the Board, Professor Piero Barucci, concluded his mandate. He was replaced by Ms Gabriella Muscolo in May 2014.