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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN ITALY

-- 2015 --

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EXECUTIVE SUMMARY

1. This report covers the activities carried out in the past calendar year (1 January 2015 to 31 December 2015) by the Italian Competition Authority (AGCM or the Authority), which is the agency responsible for enforcing Italy's competition law, and, where appropriate, it highlights significant developments since January 2016.
2. The year 2015 confirmed the AGCM's commitment to increase antitrust deterrence, by strengthening its **enforcement activity** and adopting a rigorous sanctioning policy, complemented by extensive advocacy addressing both traditional issues and novel matters related to disruptive innovation.
3. The Authority completed 14 agreement **proceedings**, 3 cases of abuse of dominant position and 7 in-depth merger investigations. The total amount of **fin**es increased by 28%; from EUR 186 million in 2014 to EUR 238 million in 2015. Considering a broader timespan, the total amount of fines issued by the Authority over the last four years (2012-2015) is more than double that of the previous four years.
4. As for the advocacy activities, in 2015 the Authority issued 87 opinions and recommendations (compared to 69 in the previous year) concerning competition restrictions deriving from laws in force or upcoming legislation to policymakers and public administration bodies. In addition, it continued to work on five market studies, which have been finalised in 2016.
5. The Authority focused its attention on cartels, including 8 cases on bid-rigging in public procurement, also with a view to supporting the State's effort to reduce public expenditure in a critical economic contingency.
6. **Mergers** represented another key area of the Authority's activity in 2015, both in quantitative and qualitative terms. The Authority dealt with several Phase II reviews of mergers, which ranged from banking and insurance to the publishing sector and the media industry. Merger decisions have been increasingly supported by detailed quantitative analysis of the effects and ad-hoc market research, despite the short timeframe for review imposed by the law.
7. In both its enforcement and advocacy activities, the Authority is increasingly dealing with new issues related to digitalization and disruptive market dynamics.
8. With specific regard to the digital markets, a landmark decision concerned the MFN clauses applied by Booking.com (and Expedia) in the online hotel booking services. The Authority, in coordination with the French Competition Authority, the Swedish Competition Authority and the European Commission, accepted commitments offered by Booking.com, with a view to fostering swift and sustainable restoration of competitive conditions, while preserving the operators' ability to offer and develop innovative services. Looking at recent changes, it appears that this intervention has contributed to bring about increased competition, considering that new competitors have recently entered the market and that Tripadvisor has complemented its meta-search services with an online hotel booking platform. For the first time, the AGCM has decided, together with other European antitrust agencies coordinated by the European Commission, to carry out a monitoring exercise to collect information on the effects of the commitments in the market.
9. Moreover, the Authority is closely following the developments of a key sector for the economy, the access market for fixed broadband telecommunications network. In 2013 the Authority had imposed a EUR 104 million fine on the incumbent, which had hindered the expansion of its competitors in the retail markets by supplying wholesale access to its network at discriminatory conditions and by offering non-

replicable discounts to large clients. The decision was entirely upheld by the Council of State in 2015 and the Authority is currently assessing the organisational changes that the incumbent is undertaking to improve equivalence in the access to the network. Furthermore, the in-depth market analysis into the development of ultra-broadband networks in Italy published by the Authority at the end of 2014 has contributed, in 2015, to the definition of the government's national strategy to ensure the deployment of ultra-broadband networks.

10. The Authority has also scrutinized the regulation of emerging and digital markets, particularly in sectors affected by the disruptive effects of the sharing economy. In several public interventions and hearings at the Parliament, the Authority constantly maintained the need for a suitable regulatory framework, while intervening against those regulations that tend to unduly limit the development of this new area of the economy, e.g. regarding the provision of transportation services by Uber.

11. Indeed, **competition advocacy** represents the second pillar of the Authority's activity. For the first time, the Authority has published the results of the on-going monitoring activity of all its advocacy initiatives in order to monitor their actual follow-up and improve effectiveness. The results for 2015 suggest that the Authority made effective use of its multifaceted advocacy toolbox, which ranges from market studies, to recommendations and to the judicial challenge of restrictions.

12. Noteworthy, several laws adopted in 2015 introduced some of pro-competitive measures advocated for by the Authority, e.g. with regard to local state-owned companies and local public services, as well as other measures for the governance and the transparency of cooperative banks. The advocacy efforts of the Authority are paying off in terms of renewed awareness of the importance of competition to promote competitiveness and economic growth.

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

13. The Parliament is expected to pass market-opening measures soon by approving the annual law on competition¹. The draft law envisages competition enhancing interventions in a number of sectors, such as the full liberalisation of gas and electricity retail markets and the removal of certain restrictions for pharmacies and for some professional services companies.

14. In 2015, a new law (n. 124/2015, the "Madia law") was enacted enabling a comprehensive reform of public administration at large: the law delegates to the government the power to enact legislative decrees for a comprehensive reform of local state-owned enterprises and local public services according to key driving principles. These would include:

- making the involvement of local authorities in state-owned enterprises more transparent;
- promoting the consolidation of local state-owned enterprises across municipalities;
- defining optimal territorial areas for the provision of local public services;
- introducing mechanisms to reward local administrations that use open tendering procedures; and

¹ 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." Therefore, since 2010 the AGCM has submitted every year to the government a report containing all its advocacy proposals. In February 2015, the government adopted a draft law on competition, for the first time complying with the 2009 legislation, on the basis of the 2014 AGCM proposal. As at September 2016, the draft law, approved by the Senate is now being discussed in the Chamber of Deputies. was still being discussed in the Parliament..

- streamlining the overall regulatory framework on state-owned enterprises to prevent overlaps and contradictions.

15. In particular, the reform envisages a centralization of the regulatory functions which, in many sectors such as waste collection and disposal, are fragmented at various level of the government. Moreover, the reform promotes a clear distinction between the regulatory function and the provision of the services, to eliminate the conflicts of interest between the regulators and the regulated entities.

16. The Government is working on the legislation implementing the Madia reform. With respect to local public services, the objective is to inject more competition in the system by requiring local authorities to a) clearly define public service obligations; verify the scope for “competition in the market”; and c) limit the operation of services conducted on an exclusive basis to cases of market failure. The draft legislation envisages an important role of the Authority in the reform of local public services: if approved, the AGCM would be allowed to monitor ex-post local authorities’ choices among the different options available for the procurement of public services. In particular, the draft legislation provides that the choice of in-house provision requires the local authority to demonstrate, through a market analysis to be submitted to the government, that the services in question cannot be provided under competitive conditions. The AGCM would be granted access to all the submissions and would be allowed to use its Art. 21-*bis* power to challenge the decisions of the local authorities that are in contrast with the market analysis requirement.

17. With regard to local state-owned enterprises, the legislative decree n. 175/2016 of August 2016 has introduced a new framework that comprehensively regulates state-owned enterprises in line with the principles of efficient management, competition, and the need to reduce public expenditure. To limit their proliferation, new state-owned enterprises need to fall within the institutional goal of the public authority and be justified against other alternatives on the basis of an economic study. The AGCM can intervene ex-post, using its Art. 21-*bis* power, to ensure the correct application of the provisions regulating state-owned enterprises.

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*

18. In 2015, the Italian Competition Authority closed 14 investigations concerning anticompetitive agreements (including cartels), assessed 3 abuses of dominant position and carried out 7 in-depth investigation in merger area.

Activity of the Authority

	2014	2015
Anticompetitive agreements (incl. cartels)	15	14
Abuses of dominant position	4	3
Mergers of independent enterprises	4	7
Separation obligations	2	4
Sector inquiries	3	2
Non compliance	1	-
Non compliance with prior notification obligations	-	2
Article 62 – Trade relations (sale of food products)	-	2
Fines on gas quota	-	1
Recalculation of fines	-	2

Proceedings concluded in 2015, 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
Anticompetitive agreements (incl. cartels)	-	14	-	14
Abuses of dominant position	-	3	-	3
Mergers of independent enterprises	38 ²	6	7	45

19. As for the judicial review, in 2015, 4 out of 6 decisions were upheld partially or entirely by the TAR Lazio (the first instance level). In the same period, 5 out of 6 decisions were upheld partially or entirely by the Consiglio di Stato (the Supreme Administrative Court).

2.1.2 Agreements

20. In 2015 the Authority concluded 14 investigations concerning agreements³. In 13 cases the proceedings confirmed the infringement of national competition law (art. 2 of law no. 287/90)⁴, while in one case the proceeding was closed with commitments, pursuant to art. 14 *ter* of law no. 287/90. With reference to the remaining cases, in 9 cases the Authority ascertained a violation of art. 101 of the Treaty on the Functioning of European Union (TFEU)⁵, while the other 2 cases were in violation of art. 2 of the domestic law⁶. Having regard of the seriousness of the infringements, the Authority imposed fines totalling EUR 234,862,241.

21. Ten investigatory proceedings were still under way as of 31 December 2015, 9 of which pursuant to art. 101 of TFEU⁷ and one pursuant to art. 2 of the law⁸, as well as another one for non-compliance⁹.

² One of which (COOP Centro Italia/Grandi Magazzini Superconti-Superconti Supermercati Terni-Supermercati Service) was closed after a Phase II investigation.

³ Management of maritime services in the Gulf of Naples; Tenders for insurance risks associated with Third Party Liability in local public transport; Concrete market in Friuli Venezia Giulia; Tenders for catering services in ASPI motorway network; Trenitalia supply of services; Arca/Novartis-Farmaco; Market for the production of flexible expanded polyurethane; Tender for the provision of services of reclamation and waste disposal of polluted materials in the arsenals of Taranto, La Spezia and Augusta; Market for TLC technical optional services; Consip tender for schools cleaning services; Tenders for the management of muds in Lombardia and Piemonte; Post production services for RAI TV; Ecoambiente-Call for tender for the disposal of separated waste; Concrete market in Veneto.

⁴ The English version of the Italian Competition Act (law n. 287/1990) is available at the following link: <http://www.agcm.it/en/competition/competition-legislation/1727-law-no-287-of-october-10th-1990.html>.

⁵ Management of maritime services in the Gulf of Naples; Tenders for insurance risks associated with Third Party Liability in local public transport; Concrete market in Friuli Venezia Giulia; Tenders for catering services in ASPI motorway network; Trenitalia supply of services; Market for the production of flexible expanded polyurethane; Tender for the provision of services of reclamation and waste disposal of polluted materials in the arsenals of Taranto, La Spezia and Augusta; Market for TLC technical optional services; Consip tender for schools cleaning services.

⁶ Tenders for the management of muds in Lombardia and Piemonte; Post production services for RAI TV; Ecoambiente-Call for tender for the disposal of separated waste, Concrete market in Veneto.

⁷ Stainless steel rods; Price increase in the concrete market; Sale of Serie A TV rights for 2015-2018 Championships; Mortgage rates in Bolzano and Trento's Territories; Tenders for oxygen therapy and ventilation therapy; Market for

Agreements examined in 2015, divided by economic sectors (proceedings concluded)

Main sector involved	
No metal-bearing minerals	2
Waste disposal	2
Other services	2
Insurance and pension funds	1
Chemicals, plastic matters, rubber	1
Pharmaceuticals	1
Means of transport	1
Catering and food services	1
Telecoms	1
Transportation and hiring of means of transport	1
TV and radio broadcasting	1
Total	14

2.1.3 Abuses of dominant position

22. In 2015, the AGCM concluded 3 investigations concerning abuses of dominant position¹⁰. In one case, the proceedings confirmed the infringement of art. 102 of TFEU¹¹, and led to a fine of EUR 3,365,000. In the other 2 cases the Authority concluded the investigations with decisions pursuant to article 14-ter, paragraph 1 of the law, accepting the commitments proposed by the firm, without ascertaining any infringement¹².

23. On 31st December 2015, 4 proceedings pursuant to article 102 of the TFEU¹³ and one proceeding on non-compliance were pending¹⁴.

24. In terms of judicial review, Italy's highest appeals court has upheld a EUR 103.7 million fine imposed by the Authority in 2013 on Telecom Italia for an abuse of dominance in the country's wholesale broadband network. The company was sanctioned EUR 88 million for having deliberately hindered rivals' access to a high number of fixed broadband and telephone infrastructure services across five markets in which other phone and broadband providers compete with it. The remaining EUR 15 million of the fine was attributed to its policy of margin squeeze¹⁵.

long-term car rental; Market for touristic services-online hotels booking; Agreement between operators in the vending sector; Fashion models agencies.

⁸ Standard contract in real estate brokerage.

⁹ Restrictive conducts of National Forensic Council (CNF).

¹⁰ SEA/ATA agreement; Provision of cholic acid; CONAI-Plastic packaging waste management.

¹¹ SEA/ATA agreement.

¹² Provision of cholic acid, CONAI-Plastic packaging waste management.

¹³ Enel Distribuzione-Compulsory removal of Smart Metering devices; E-class/Italian Stock Exchange; Price increase Aspen pharmaceuticals; Unilever/Ice-creams distribution.

¹⁴ Wind-Fastweb/Telecom Italian conducts.

¹⁵ See article: Lo Surdo, C. "The Administrative Supreme Court Confirms the ICA's Decision To Sanction Telecom For Having Abused its Dominant Position", Italian Antitrust Review, Vol 2, No 3 (2015), available at: <http://iar.agcm.it/article/view/11763/10888>

Abuses examined in 2015, divided by economic sectors (proceedings concluded)

Main sector involved	
Pharmaceuticals	1
Waste disposal	1
Transportation and hiring of means of transport	1
Total	3

2.1.4 Description of significant cases regarding anticompetitive agreements and concerted practices

- Case N. I779 – Market of touristic services-Online hotel booking

25. In April 2015 the AGCM closed an investigation on online hotel booking services. The case had been launched following complaints by the Italian Hotels Association (Federalberghi), against Booking.com (and Expedia) with respect to alleged restrictions of competition related to the use of price (and others conditions) parity clauses in contracts stipulated between the main online travel agencies (OTAs) and their hotel partners. In particular, Booking.com imposed retail Most Favoured Nation clauses requiring hotels to always offer Booking.com their lowest room price, maximum room capacity, and other “most favourable” conditions, both online and offline. These clauses allowed Booking.com to offer consumers best price guarantees¹⁶. The AGCM concern was that these clauses could restrict horizontal competition among OTAs, weakening competition more generally among all sales channels and deterring the entry of new hotel booking platforms.

26. The case was closed with commitments which narrowed the scope of application of the MFN clauses in order to strike a balance between possible negative effects on prices and the benefits for consumers that Booking.com was able to provide. Importantly, this outcome has been coordinated with the French and Swedish competition agencies, as in this case the interests at stake went far beyond national boundaries.

27. Market developments in the hotel online booking sector following the revision of the MFN clauses by Booking.com seem to suggest some positive effects of the commitment decision: it appears that new competitors have recently entered the market and that Tripadvisor has complemented its meta-search services with an online hotel booking platform. More information on the effects of the commitments will be available at the end of the monitoring exercise being carried out by the European antitrust agencies coordinated by the European Commission.

- Case N. I772 – Concrete Market in Friuli Venezia Giulia

28. In March 2015, the Authority closed an investigation into an alleged cartel in the market for ready-mix concrete in the Friuli Venezia Giulia region. The investigation was prompted by an application filed under the national leniency program. Evidence gathered through dawn-raids and hearings confirmed the existence of such a cartel, which was operated by nine concrete manufacturers, and provided details of its organization and functioning.

29. The Authority deemed that the cartel was coordinated and managed since 2010 by Intermodale, a consultancy firm which gathered and distributed information on volumes, prices, and construction sites from all participants on a weekly basis, with the aim of sharing markets and fixing prices in each relevant market. After a significant drop in demand for concrete due to the economic crisis, the manufacturers

¹⁶ A detailed description of this case can be found in the Italy’s submission to the OECD Competition Committee hearing on across platform parity agreements (APPAs), held in October 2015. The contribution is available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2015\)58&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)58&doclanguage=en)

engaged in a price war. In 2010, following the advice of Intermodale, they decided to share customers and set prices to keep each participant's market share at the pre-crisis level. To this end, the cartellists provided Intermodale with their turnover in the period 2007-2009 for it to assess the parties' pre-crisis market shares. Moreover, they provided it with weekly information reports on construction sites already started or about to start in each relevant market. Most of the times a focal price was also indicated in order to monitor the agreed allocation.

30. The investigation ended with the imposition of an overall fine of EUR 12.8 million on all the manufacturers (with exception of the leniency applicant). Following the European Courts' jurisprudence, the consultancy firm was also sanctioned for actively and intentionally contributing to a cartel between producers active on a market other than that on which the consultancy firm operates. This was the first case where the AGCM applied its guidelines on setting fines adopted in October 2014¹⁷.

31. A related cartel agreement, coordinated by the same consultancy company in a nearby region, was sanctioned in 2015 by the AGCM¹⁸.

- Case n. I759 – Trenitalia supply of services

32. In March 2015, the Authority closed proceedings against several operators in the electromechanical sector for an alleged breach of Art. 101 TFEU, by engaging in bid-rigging behaviour in relation to 24 public tenders awarded by Trenitalia S.p.a., a major train service provider in Italy, in the period 2008-2011. The investigation stemmed from an *ex officio* analysis based on the preliminary results gathered in criminal proceedings. The Authority found that the aim of the cartel was to predetermine the winner for each public tender, so as to define in advance the allocation of each contract, as well as the prices to be applied to Trenitalia SpA. The Parties used to make contacts in different forms (through phone calls, e-mails, meetings, exchange of documents) and to keep records of the cartel meetings.

33. Based on the overall evidence gathered, the AGCM found that the companies involved put in place a single, complex and continued infringement in the form of a secret horizontal cartel which affected the whole national territory. Moreover, the public tenders concerned were potentially open to the participation of foreign undertakings since the economic amount of these tenders was suitable to attract other European competitors.

34. The AGCM closed the proceedings with an infringement decision imposing approximately EUR 2 million fine on the companies involved: as mitigating factor the Authority took in consideration their precarious financial conditions (some of them were subject to winding-up proceedings).

- Case N. I785 – Consip tender for schools cleaning services

35. In December 2015, the AGCM concluded an *ex-officio* investigation pursuant to article 101 TFEU into an alleged bid rigging cartel concerning a public procurement for cleaning, maintenance and other services related to Italian public schools. The tender was launched by Consip, Italy's central public procurement body, in 2012 and included 13 lots of schools in different regions. The complex tendering process included both financial and technical bids, and had rules restricting the number of contracts a single company could be awarded.

¹⁷ See section 1 of the AGCM Annual Report 2014, available at: <http://www.agcm.it/en/component/joomdoc/annual-reports/AnnualReport2014.pdf/download.html>

¹⁸ Market for concrete in Veneto.

36. The main parties involved were Consorzio Nazionale Servizi (CNS), a consortium participating in the public procurement as the principal of a temporary association of undertaking, Manutencoop Facility Management S.p.A. (Manutencoop), a member of the CNS consortium, and Roma Multiservizi S.p.A. (Roma Multiservizi), operating under the influence of Manutencoop due to corporate governance rules and shareholder relationship.

37. The Authority found that Manutencoop, although belonging to the CNS consortium, decided to bid separately in the procedure, but it coordinated its bidding strategy with the consortium by exchanging information on their respective tendering processes, in order to protect their market positions within the cleaning services sector. As a result, they had misused the tender's group bidding rules to get more contracts than allowed. In addition, the Authority found that three parties had orchestrated an agreement whereby Roma Multiservizi did not bid for the tender in exchange for being made subcontractor.

38. According to the AGCM, the cartel was proved by several elements including the information exchange between parties, the written compensation agreements, the use of subcontracts as means of compensation and parallelism of conducts in tender strategies.

39. The Authority therefore imposed a fine of more than EUR 110 million on all companies involved for rigging a public tender concerning the provision of cleaning, maintenance and sanitation services to national schools across the Italian territory.

- Case N. I761 – Market for technical ancillary services

40. In December 2015, the Authority closed an investigation against six companies for an alleged violation of art. 101 TFEU in relation to technical services ancillary to the provision of unbundled fixed telecommunication lines. The investigation was launched following a complaint filed by Wind Telecomunicazioni S.p.A. (Wind), a telecom operator and in July 2013, it was extended to include Telecom Italia, the incumbent, under the allegation that it might have supported the coordination activities between the six maintenance companies. In 2012, a liberalisation reform introduced the unbundling of technical ancillary services for wholesale access to fixed telecoms networks: until then, additional services had been part of a package offered by the Telecom Italia to other operators looking for wholesale access.

41. According to the AGCM, the evidence gathered supported the operation of the alleged coordination. In particular, such coordination was achieved through several communications and meeting among the parties involved, as demonstrated by several emails and internal documents. The Authority found that the six companies active in the supply of technical ancillary services, under the backing of the incumbent network owner, had coordinated their commercial offers to two rivals of the incumbent, including the complainant (Wind). The cartel therefore attempted to fix the price of these services and influence the on-going developments of the network maintenance services market.

42. The AGCM closed the investigation with an infringement decision and imposed a EUR 28 million fine on the parties involved.

2.1.3 Description of significant cases regarding abuses of dominant positions

- Case N. A474 SEA / Convenzione ATA

43. In March 2015, the Authority closed an investigation against Società Esercizi Aeroportuali S.p.A. (SEA) for an alleged violation of art. 102 TFEU, based on a complaint filed by Cedicor Sociedad Anonima (Cedicor). SEA is the company in charge for the management of Milano Linate and Milano Malpensa airports under a concession granted by the regulator ENAC. SEA is also active in the provision of airport

handling services through its subsidiary SEA Handling (now Airport Handling). Cedikor, the complainant, is a company active in the management of several international airports in Europe.

44. Cedikor made an attempt to enter the market for airport services by acquiring, through a competitive tender procedure, Ali Trasporti Aerei SpA (ATA), which operated in the relevant market by virtue of a sub-concession contract concluded with SEA. The latter terminated such sub-concession contract soon after.

45. Based on the evidence gathered during the investigation, the Authority deemed that SEA had abused its dominant position by strategically terminating the sub-concession contract with ATA soon after knowing that Cedikor had presented the best offer for acquiring ATA. SEA's intent was, according to the Authority, to undermine the final award of the tender to Cedikor; subsequently SEA submitted a higher offer for the acquisition of ATA and, as a result of its conducts, it allegedly prevented Cedicotr's entry. The Authority closed the investigation by sanctioning EUR 3.7 million to SEA for a violation of art. 102 TFEU.

- Case N. A476 - Conai-Plastic packaging waste management

46. In September 2015 the AGCM closed with a commitment decision an investigation against Conai and Corepla for an alleged violation of article 102 of the EU Treaty. According to a complaint filed by Aliplast S.p.A. (Aliplast), Conai and Corepla engaged in an exclusionary behaviour in the industrial packaging waste management market, hindering the entry of a new competitor Aliplast. Conai is a consortium that coordinates six other groups in the recycling sector including Corepla, which focuses on plastic packaging. Companies are not legally required to be members of the groups, but must provide their own alternative collection systems if they do not choose to join. These must be accredited by the consortia who ensure the systems meet legal requirements.

47. In this context, Aliplast, an Italian plastic packaging producer and collection company which created its own collection system (the Pari system), complained to the Authority about Corepla's obstructive practices. Corepla, with the support of Conai, allegedly engaged in restrictive practices aimed at Aliplast's Pari collection system. In particular, the two consortia allegedly abused their positions as official accreditors to file an overly critical review of Pari, hindering its certification. Conai refused to sign an with Aliplast an agreement aimed at quantifying the contribution fee to be paid to Conai for managing the quota of packaging waste which Aliplast would not be able to handle within its own collection system. The conclusion of this type of compensation agreements was a pre-condition for the formal authorization of any autonomous system, including the Pari system.

48. The Authority closed the proceedings by accepting the market-tested commitments offered by the Conai and Corepla, which undertook, among other things, to employ independent inspectors to accredit alternative recycling facilities.

2.2 Mergers and acquisitions

2.2.1 Statistics

49. In 2015 the Authority received 51 merger notifications, 37 of which were cleared in Phase I, while 7 notifications were dismissed for lack of jurisdiction or for inapplicability of law no. 287/90.

50. The Authority carried out 6 Phase II investigations: in 4 cases, the notified transactions were authorized with remedies¹⁹, in one case the transaction was cleared unconditionally²⁰ while in another case the notification was withdrawn²¹.

51. The Authority also conducted proceedings for non-compliance with prior merger notification obligations (with the imposition of fines totalling EUR 1,000)²² and proceedings for post implementation revision of the remedies imposed to a merger previously authorised²³.

52. As for judicial review, the Supreme Administrative Court (Council of State) upheld –the Authority’s decision prohibiting a merger in the gas distribution services (case n. *C11878 Italgas - Acegas-Aps/Isontina Reti Gas*)²⁴.

2.2.2 *Summary of significant cases*

53. In 2015, several Phase II concentrations were approved subject to structural remedies.

- Case C11982: Enrico Preziosi – Artsana / Newco - Bimbo Store

54. The notified concentration included a number of connected transactions, by which Bimbo Store (BS) would be purchased by Giochi Preziosi (GP), which would be purchased by Enrico Preziosi. Then, GP and Artsana would have created a new company (Newco) to which GP, BS and Artsana, holder of a famous brand Chicco, would transfer their retail activities in the baby products sector.

55. In the Authority’s view the notified concentration could potentially have horizontal and vertical anticompetitive effects. The AGCM identified as relevant markets the retail markets for baby products sold in geographic areas based on 40 minute isochrones. While the baby products sector includes a wide range of products which are distributed through several channels, the AGCM ascertained that “baby store format”, which is the specialised channel accounting for the 28.5% of total industry turnover, was a distinct market compared to other channels, in particular large scale distribution channel (e.g., hypermarkets), due to its characteristics in terms of product category range, brand width, ex-ante and ex-post sales services.

56. The Newco would have concentrated the operations of the three main players in the baby store market, aggregating several top brands in 500 stores and leaving the market with only 200 stores served by fringe competitors unable to constrain the market power of the merged entity. The adverse impact of the proposed transaction was evident in 16 local markets where post-merger market shares would have been above 50%. In addition, the AGCM was concerned about the vertical integration of the post-merger entity since no other competitor was active in the entire supply chain ranging from the manufacturing to the retailing of products for new born babies and children (nursery, clothing, toys etc.).

¹⁹ Enrico Preziosi-Artsana/Newco-Bimbo Store; Sel-Electric Company Altoatesina/Electric Firm; Libero Acquisition/Seat Pagine Gialle; Onorato Partecipazioni-Newco/Moby-Compagnia Italiana di Navigazione.

²⁰ Coop Central Italy /Superconti Department Store-Terni Supermaket-Superconti Service.

²¹ EI Towers/RAI Way.

²² Cooperative Pharmacy Shopkeepers; Fairfin-Socrefarma; Cooperative Pharmacy Shopkeepers/Al-Pharma.

²³ Società per i servizi bancari-SSb/Società interbancaria per l’automazione-CedBorsa; Moby/Toremar.

²⁴ For more information, see article: D’Amore, C., “The Administrative Supreme Court Confirms the ICA’s Decision Prohibiting A Merger In The Gas Distribution Services (The “Isontina Case”)", Italian Antitrust Review, Vol 2, No 3 (2015), available at: <http://iar.agcm.it/article/view/11761/10887>

57. The proposed concentration was authorised by the AGCM subject to structural remedies, which included the divestiture of 27 point of sales in the identified geographic markets.

- Case C11990: Sel- Società Elettrica Altoatesina / Azienda Energetica

58. The notified transaction concerned the merger between the Società Elettrica Altoatesina Spa (SEL) and Azienda Energetica Spaa (AE) through the incorporation of SEL and AE in a newly established Newco. The merging parties were the two main operators in the energy sector in South Tyrol region. According to the Authority, the adverse effects of the concentration were capable to unfold in several relevant markets affected by the transaction: the combined market share would have been 85-90% in the retail market of natural gas sold to small size customers, 50-55% in the retail market for electricity sold to residential customers and 65-70% in the retail market for electricity sold to non-residential customers connected to low voltage.

59. In addition, the concentration could have considerably reduced the number of potential participants to future tender procedures for the award of gas distribution concessions in the designated service area around Bolzano. Therefore, one of the concerns was that the merged entity could restrict competition in these tender procedures since the parties already controlled the incumbent operators.

60. To solve these competition concerns, and given the significant entry and exit barriers in the local energy sector, the Authority requested the divestiture of the subsidiaries involved in the tender procedures for the awarding of the gas distribution service and the divestment of a business, amounting to the 30 per cent share held in the market for the supply of natural gas to small-sized customers.

- Case C12001: Libero Acquisition / Seat Pagine Gialle

61. The acquisition of the sole control of Seat Pagine Gialle (Seat) by Libero Acquisition (Libero) affected several relevant markets, such as the market for directory assistance services, online advertising, direct marketing services as well as the provision of web services.

62. The investigation confirmed that the notified operation was liable to determine the strengthening or creation of a dominant position in the market for directory assistance services (by telephone) since the market share of the merged entity would have been much higher than that of the main competitor, Vodafone, and given that Seat and Libero could be considered each other's closest competitors. To remedy this concern, the merging parties proposed the divestment of a well-known telephone number used in order to provide directory assistance services. The Authority approved this structural measure as it was considered capable of neutralising the potential adverse effects of the concentration.

- Case N. C.11968: Coop Centro Italia / Grandi Magazzini Superconti-Superconti Supermarkets Terni Superconti Service

63. The proposed transaction involved the acquisition of SuperConti chain (32 supermarkets and grocery stores) by the macro-regional consortium of grocery cooperatives Centro Coop Italia (CCI). CCI, in turn, is a member of the nation-wide consortium Coop Italia, which acts not only as a buying group vis-à-vis the suppliers but also as a holding company, shaping the pricing, the marketing and the promotion policy of all its members.

64. In opening the Phase II review, the Authority was concerned by the dominant position of the merged entity in the relevant product market for hypermarkets and in two geographic markets defined by the administrative boundaries of the provinces of Terni and Viterbo, in central Italy. In particular, in the province of Terni, the combined market share of CCI and SuperConti would have reached 60%, with the

second operator Conad holding about 36%, while in the province of Viterbo the notified transaction would have simply attributed SuperConti's market share (6.3%) to the new entrant CCI. However, according to the Authority, it was important to consider in the substantive assessment the presence, in the province of Viterbo, of two other regional cooperatives belonging to the Coop Italia system: Unicoop Tirreno, with a share of around 45%, and Distribuzione Roma, with a share of about 7.5%. As a result, the combined market share held by the Coop Italia members active in the province of Viterbo would have risen up to 60% as a result of the merger, the only remaining competitor being Conad with a share of 39.1 %.

65. During the Phase II investigation, the competitive analysis the Authority also decided to carry out a consumer survey to assess the relationship of substitutability between the merging parties in these two provinces and to estimate the unilateral effects of the concentration, i.e., the likely price increase by computing the upward price pressure (UPP) indicators.

66. The quantitative analysis carried out by the Authority outlined that the acquirer CCI was not the closest competitor of SuperConti in Terni Province and no evidence of unilateral effects was found in this area. With reference to the province of Viterbo, while the UPP indicators did not provide conclusive results, the overall evidence gathered by the Authority led to a view that the transaction in question would not be problematic. Therefore, the AGCM unconditionally cleared the transaction.

2.3 *Other activities and competences*

- Art. 8 obligations

67. Pursuant to art. 8 of law n. 287/90, the provisions of the Italian Competition Act do not apply to companies which, by law, are entrusted with the operation of services of general economic interest or operate on the market in a monopoly situation, only insofar as this is indispensable to perform the specific tasks assigned to them. These companies are not prevented from operating on other markets, but are subject to some constraints. In particular, they must operate through separate companies (Art. 8 (2) *bis*) and they must give prior notice to the AGCM if they intend to acquire or merge with companies active in other markets (Art. 8(2) *ter*). Finally, when they supply to their subsidiaries or controlled companies active on different markets goods/services over which they have exclusive rights by virtue of their role, they have to make the same goods and services available to their direct competitors on equivalent terms and conditions, in order to guarantee a level playing field (Art.8 (2) *quater*).

68. In 2015 the Authority concluded 4 proceedings ascertaining the infringement of art. 8. In 3 cases the Authority ascertained the non-compliance with the obligations of separation and of prior notification pursuant to art. 8(2) *bis* and *ter* of law no. 287/90²⁵. In one case, for the first time, the Authority closed a proceeding finding a breach of art. 8(2) *quater* of the law, i.e. finding a violation of the obligation to provide to third parties goods/services at the same conditions applied to controlled firms. The case concerned a mobile operator HG3 which was denied the access to the exclusive postal network of Poste Italiane (PI), the incumbent in the postal services sector, on equivalent terms to those offered to Poste Mobile, a subsidiary of PI operating in the retail mobile market. The Authority ordered PI to refrain from similar behaviour in future²⁶.

²⁵ Di Maio Travels/Transportation and rental services; Piombino Dockers and Boatman Group-Harbour's operations and works; Save-Handling services in Venice airport.

²⁶ Case N. SP157 - H3G/CONDOTTE POSTE ITALIANE E POSTEMOBILE..

- Article 62 – Trade relations regarding sale of food and agricultural products

69. Art. 62 of Law-Decree no. 1/2012, later converted into law no. 27/2012, concerns vertical relationships within the agricultural food chain and is designed to prevent unfair conduct in case of significant imbalance of contractual power²⁷. The provision entrusts the AGCM with surveillance and fining powers. For the provision to be applicable, a dominant position is not required: it suffices the presence of an asymmetric contractual power.

70. In 2015 the Authority concluded 2 proceedings pursuant to Art. 62 for the first time since the introduction of the provision. In one case it ascertained a non-violation of the law²⁸, while the second case was closed with an infringement decision and the imposition of a fine amounting to EUR 49,000²⁹.

71. In applying this provision, the Authority had regard to its impact on the competitive dynamics (whether there is at least indirect evidence that the unfair practice does have an appreciable effect on the correct functioning of competition in the markets) and its pervasiveness (whether it is widespread and thus have a high potential to impact on the competitive level playing field).

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

72. The AGCM is endowed with extensive advocacy powers and tools to intervene in the legislative process. Pursuant to art. 21 of law n. 287/1990, the AGCM may notify Parliament, the Prime Minister, other relevant ministers, and the relevant local authorities of distortions arising as a result of existing legislative measures. At the same time, pursuant to art. 22 of the law n. 287/1990, Authority may express opinions on draft legislation or regulations and on problems relating to competition and the market whenever it deems this appropriate or whenever requested to do so by the government departments and agencies concerned. Furthermore, the AGCM has 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)).

73. Since 2011, the advocacy toolkit of the AGCM has been expanded and strengthened. Pursuant to art. 21-bis the AGCM may challenge before the Administrative Court any acts of the public administration sector which are incompatible with the competition law and the competition principles embedded in the primary legislation. With a similar intent, by acting ex-ante, the Authority is now regularly consulted by the Presidency of Council of Ministers (PCM) when the latter reviews the compatibility of the legislation proposed by the Regions with national legislation and Constitution principles. Therefore, art. 21-bis and the cooperation with the PCM are two ways for the AGCM to monitor the implementation at local level of liberalization reforms approved by the central government. Finally, another important advocacy power at the Authority's disposal is the "Annual Law on Competition". According to a law enacted in 2009, every

²⁷ According to Art. 62 of Law decree n. 1/2012 (Urgent provisions on competition, development of infrastructures and competitiveness), contracts shall be formalized in writing (they must indicate: duration, characteristics and price of the products, mode of delivery and payment terms). Also, the following commercial practices are forbidden: a) imposing unfair price conditions, as well as non-contractual and retroactive conditions; b) applying objectively different conditions to equivalent transactions; c) subordinating implementation of the contract to other obligations that are not connected with the subject matter of the contract; d) obtaining undue unilateral services that are not justified by the nature or content of trade relations; e) putting in place any other conduct that can be considered unfair in light of typical commercial relations in the sector.

²⁸ Eurospin/Modification of contractual terms with providers, Coop Italia-Centrale Adriatica/Contractual terms with providers.

²⁹ Coop Italia-Centrale Adriatica/Contractual terms with providers.

year the Government is asked to present to the Parliament a liberalization bill, taking into account the opinions and the recommendations delivered by the AGCM in previous years³⁰.

3.1 *Opinions and recommendations*

74. In 2015, pursuant to Articles 21 and 22 of law no. 287/90, the Authority issued 68 non-binding opinions and recommendations concerning competition restrictions deriving from laws in force or upcoming legislation to policymakers and public administration bodies. Opinions concerned a wide range of sectors as shown in the table below.

75. Moreover, in 2015 the cooperation between the AGCM and the PCM in assessing the conformity of draft regional legislation to the constitutional principles has continued: the Authority issued 15 opinions to the PCM (pursuant to Art. 22), suggesting to challenge regional laws in contrast with competition principles.

Advocacy activities, divided by economic sectors (number of interventions carried out in 2015 pursuant to art. 21 and 22)

Sector		2015
Energy		11
	Electricity and gas	6
	Water supply	3
	Oil industry	1
	No metal-bearing minerals	1
Communications		10
	Information technology	5
	Telecommunications	2
	TV Rights	1
	Electronic and electric raw materials	1
	Radio & TV	1
Finance		6
	Postal services	3
	Financial services	2
	Banks	1
Food		4
	Food and drinks industry	2
	Pharmaceutical industry	1
	Wholesale trade (large scale distribution)	1
Transports		16
	Transportation and hiring of means of transport	16
Manufacturing		1
	Other manufacturing activities	1
Services		20
	Services (others)	11
	Human health activities	5
	Professional services	2
	Education	1
	Catering	1
Total		68

³⁰ See footnote n.1 above.

76. In addition, pursuant to article 21-*bis* of law no. 287/90, the AGCM issued 19 opinions (compared to 7 in 2014) to public administration bodies with the power of challenging their restrictive measures before the courts in case of non-compliance to Authority's recommendations. As in previous years, this power of appeal of administrative acts (introduced in 2011) 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.

Advocacy activities, divided by economic sectors (number of interventions carried out in 2015 pursuant to art. 21 bis)

Sector		2015
Energy		5
	Electricity and gas	2
	Water supply	2
	Oil industry	1
Communications		1
	Information technology	1
Finance		4
	Financial services	2
	Postal services	1
	Insurance and pension funds	1
Food		1
	Pharmaceutical industry	1
Transports		5
	Transportation and hiring of means of transport	5
Services		3
	Services (others)	2
	Tourism	1
Total		19

77. As for hearings, the AGCM chairman appeared 9 times before Parliament Committees in 2015. He reported on several matters such as the legislation regarding shop opening hours and the public service obligations of the state-owned broadcaster and in two occasions he was invited to contribute to the parliamentary discussion of the draft annual law on competition.

3.1.1 Description of significant advocacy interventions

78. The Authority paid particular attention to regulatory acts addressed to sectors that were experiencing novel forms of service, with a view to preventing undue restrictions from undermining more convenient opportunities for consumers. While advocating to ensure that policies did not hamper innovation through restrictive regulation in favour of the incumbents, the Italian Competition Authority endeavoured to proactively identify more competition-friendly solutions to manage the transition.

79. In October 2015 the AGCM issued an opinion ex art. 21-bis to the region of Lazio, suggesting the elimination of unnecessary and disproportioned restrictions envisaged by a new regulation for **non-hotel accommodation services** (including apartments located through the Airbnb platform) in the region and in the city of Rome³¹. The new regulation introduced several restrictions in the provision of the services. Namely, it envisaged a new classification of non-hotel accommodation services (e.g., hostels, guesthouses, B&B, vacation apartments), by defining characteristics and minimum operational

³¹ Opinion, AS1239 - Nuova Disciplina nel Lazio delle Strutture Ricettive Extra Alberghiere, October 2015.

requirements which, according to the Authority, adversely affected their ability to compete vis-à-vis hotel accommodation services. The new regulation introduced closing periods and limitations to the opening hours which, according to the Authority, would unduly restrict the operations of non-hotel accommodation, and were not proportionate to the objectives of improving quality standards and safety envisaged in the regulation; moreover, it defined minimum floor spaces and maximum numbers of rooms and other requirements which could raise barriers to entry and expansion to potential new operators. The AGCM successfully challenged the restrictive regulation before the courts after the local authority decided not to comply with the AGCM opinion.

80. Another key advocacy intervention regarded the **passenger transport sector**, Uber-like services, leading the AGCM to be one of the first agencies to address the challenges posed by disruptive innovations in the transportation sector. In September 2015, the Ministry of Internal Affairs asked the Authority (and other government departments and agencies) for an opinion³² on the applicability of the 1992 taxi regulation on Uber services, after they were banned by the Tribunal of Milan in July 2015. In its opinion, the AGCM advocated a separate legislative definition for non-scheduled mobility services offered by apps like UberPop, i.e. online platforms connecting passengers with “non-professional” drivers. This would create a third type of provider of non-scheduled mobility services (the other two being licenced taxis and licenced rental cars with drivers). To satisfy basic requirements such as road safety and passenger security concerns, the Authority recommended a least invasive minimum regulation for the new type of service providers, which includes the set-up of a register for the platforms and identification of a set of requirements and obligations for the private ‘non-professional’ drivers. In addition, the Authority argued that the minimum regulation should not impose rigid limits to working hours for private ‘non-professional’ drivers, which may represent an implicit form of compensation for drivers of licenced taxis burdened with public service obligations.

81. Furthermore, considerable advocacy efforts were concentrated in the transport sector, in particular in the **regional/local public transport**, dominated by local state-owned enterprises often sheltered from competition due to an unclear and uncertain regulatory framework. For instance, the AGCM issued an opinion on the tendering rules for the procurement of such services in two Italian regions, Liguria and Toscana, highlighting critical issues concerning the design of the lots (both in terms of optimal territorial area and type of services), the participation criteria, access to services and accessory facilities and the regulatory framework in general³³. The Authority found that the tender rules under scrutiny included disproportionate or unnecessary restrictions in the participation requirements to tenders and designed the scope of the tender too broadly to the benefits of incumbents or very large players only.

3.2 Monitoring of advocacy and reporting activities

82. Since 2013 the Authority has systematically monitored and assessed its advocacy efforts. Every six months, a detailed analysis is undertaken to assess the outcome of the Authority’s opinions and recommendations in terms of compliance. Data are broken down by type of advocacy tools used, public administration involved (central versus local), source of the opinion (ex-officio or originated by a complaint or request) and economic sector involved. This allows the Authority to closely assess the effectiveness of its advocacy interventions and to have a better understanding of the key factors that make competition advocacy successful.

³² Opinion n. AS1222 - Legge Quadro per il Trasporto di Persone mediante Autoservizi Pubblici non di Linea, September 2015.

³³ Opinion n. AS1214 - Regione Liguria-Avviso per L'individuazione Degli Operatori Economici Per Il Trasporto Pubblico Locale, June 2015; opinion n. AS1184 - Regione Toscana - Procedure di Affidamento in Concessione dei Servizi di Trasporto Pubblico Locale, February 2015.

83. In relation to the period January 2014 – June 2015, the monitoring exercise has highlighted an overall compliance score, in terms of implementation of the Authority's suggestions by the recipients, of 51%, with higher rates in case of opinions on draft legislations (58%). Having regard to the opinions adopted pursuant to Art. 21 bis, it emerges that over the same period in 50% of the cases the recipient has changed the regulation to comply with the Authority's opinion. A similar success rate has been registered for the opinions delivered to the Presidency of the Council of Ministers³⁴.

4. Market studies

84. In 2015 there were 5 on-going market studies, four of which were concluded in the first half of 2016 and focused on the following sectors: local public transport, solid waste management, milk supply chain, vaccines for human use.

5. Resources of competition authorities

5.1 Annual budget

85. The Italian Competition Authority does not have a specific competition-related budget. The overall expenditure incurred in 2015 amounted to € 46.8 million, a further 4% 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).

86. Pursuant to Law Decree n. 1/2012, the system of funding for the Italian Competition Authority is based on a mandatory contribution (now 0.06 per thousand) for companies incorporated in Italy whose turnover exceeds a threshold of EUR 50 million. The revenues from this contribution replace all previous forms of funding (merger fees and public budget).

5.2 Number of employees

87. The total staff of the AGCM at the end of 2015 was 287. 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).

88. 121 officers work on competition (24 as support staff and 97 as non-administrative staff). The non-administrative staff is composed of 51 lawyers, 41 economists and 5 other professionals.

³⁴

For an in-depth reporting of the monitoring activities, see: Argentati A., Coco, R., "Success Rates of Competition Advocacy by Italian Competition Authority: Analysis and Perspectives", Italian Antitrust Review, No 1 (2016), available at: <http://iar.agcm.it/article/view/12026>