AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO

AGCM

[Italian Competition Authority]

Annual Report

Presentation by the President
Giovanni Pitruzzella

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Distinguished guests, ladies and gentlemen

1. The creation of neutral and independent powers by the democratic circuit does not amount to a separation of the institutional systems; on the contrary, it puts upon them the burden of obligations to make them accountable.

However, without wishing to ignore the importance of the presentation of the annual report to Parliament, it is necessary, without hypocrisy, to ask if similar appointments don't run the risk of becoming *empty liturgies,* or even worse, in self-congratulation by the institutions for the activities performed.

To stop similar risks and enhance the control function of Parliament, I believe it is necessary that the presentation of the annual report becomes part of a *plan of stable relations between the Authority and the Parliamentary Committees,* in such a way that the former can, continuously, assure the representative institutions with information on what has been done to guarantee competition in the various markets, on elements and independent technical assessments with regard to the dynamics and the changes within the various economic sectors in both the national and European spheres. From this point of view, whilst there have been numerous meetings with the Parliamentary Committees, it is necessary to continue to work on this issue to make even more effective the relationship between the Antitrust and the Parliament, naturally in respect of independence and of the role of every institution.

So, we should continue with the process of exploiting the opportunities for meetings with our *stakeholders.* In this respect I remember the periodic meetings with the consumer associations, whose contribution is fundamental for our activity, the dialogue with the legal community, which contributes to the improvement of practices and guidelines followed by the institutions, the transparency of our accounts and the independent process of *spending review,* that has allowed for a reduction in the contribution of the enterprise by 25% in respect of fixed measures, on initial application by the legislature.

2. *The Antitrust, for anti-competitive behaviour, in 2013, has imposed penalties equal to 112,873,512 euro and in the first six months of 2014, equal to 184,528,819 euro. When considering unfair commercial practices, there have been imposed penalties of 9,253,000 euro in 2013 and 8,198,500 in the first six months of 2014.*

Beside the activity of **enforcement** of the right to compete and of consumer rights, there is that of **advocacy** in respect of Government, Parliament, the Regions and of local authorities, *aimed at promoting an amendment of the rules in a pro-competitive sense*.

There have been 120 provisions aimed at obtaining reform of legal acts and measures that create barriers and obstacles to competition in the different markets.

Again in the same period The Authority has sent 21 opinions, according to art.21 bis of Italian Law No. 287 of 1990, to different public administrations to point out measures against the principles of competition. The recipient administrations of the opinions, in about half of the cases, complied with the recommendations of the Authority. In 8 cases the opinion was followed by an action in front of the Court with administrative procedures to obtain the annulment of the anti-competition act.

Because of the considerable focus dedicated to the removal of the restrictions, both regulatory and administrative, to the correct functioning of the market, the Authority has recently secured the co-ordination of a group of work of the antitrust authority (*International Competition Network* - ICN) on the promotion of competition in the sphere of international networks.

The Antitrust has also secured the new function, which became effective during the past year, in respect of the allocation of **legal ratings** to enterprises, issuing the rating to 128 businesses.

Another 273 decisions particularly concerned the application of the law on **conflict of interest** of members of the Government, the lack of which has been highlighted to Parliament with the half-yearly report sent in December 2013, in which is re-stated the necessity of a reform on the subject.

Detailed information on the total of such activity is available in the comprehensive report that will be distributed today.

3. At this stage, I believe that it is opportune to briefly ask ourselves about the *role that the Antitrust is undertaking in a period of epoch-making change*.

The crisis that erupted in 2007 in the USA in the form of a crisis of private finance, which then moved to Europe, as a sovereign debt crisis and that of the institutional architecture of the Eurozone, cannot be configured simply as a phase of the economic cycle.

Rather, especially in some countries like Italy, it seems to express *the loss of equilibrium between democracy, the market and social cohesion that has characterized the long political-constitutional experience that opened up with the end of the Second World War*. If this experience had succeeded in the difficult task – to use the words of Ralf Dahrendorf – to "square the circle", namely to create a virtuous circle between the institutions of these three spheres, favouring a very long period of growth of economic well-being and of expansion of rights, today that equilibrium is shaken to its foundations.

In Europe, and in particular in Italy, there has opened up a phase of deep **change;** we are at the start of a new constitutional cycle, following the end of that of the second post-war period, the outcome of which is still very uncertain.

The Antitrust is affected by this process of change. Also because *the Antitrust has always found itself at the crossroads between democracy, the market and social cohesion*. Suffice it to consider its origins in the North-American experience, where as a reaction against the cartels and the attempts of monopolization of the markets, there were the smallholders, farmers and small businessmen upon which the large enterprises in the sectors of transport, communication and energy imposed very unfair economic conditions. So was born the *Sherman act* of 1890. The antitrust discipline didn't have as an objective solely that of protecting the general economic well-being, but it was also an instrument to combat private economic power and to give freedom to the "little people" and to the independence of political power.

As we know, the original inspiration has gradually diminished until being totally lost. But only recently, against such developments there have been raised some critical voices who contend that the crisis imposes a return to the inspirational ideas of American capitalism.

4. The target of this thinking is ***crony capitalism*** that in Italy is called the ***capitalism of relations***. This latter is based *upon the relationships between a few large economic powers, on their relations with the political and administrative powers, searching for "advantageous positions"*.

Crony capitalism is based upon privilege rather than merit, exacerbates inequalities making for a closed, static, not open to competition and innovation society. Equally, sacrificing the aspirations of the individual from being able to improve their social position, exclusively by virtue of their merit. Therefore, prejudicing that particular type of equality that is *equality of opportunity*.

These tendencies, in countries like Italy have fostered *the expansion of **public expenditure** for some of these unproductive and inefficient components,* designed to satisfy the individual interests of *lobbies* and of **income hunters** (*the rent seekers)*. In this way there has been created the enormous **public debt** that constitutes a large obstacle to economic growth and a burden unjustly loaded onto new generations.

Labelling the Italian economy, as a whole, as an example of *crony capitalism* would be *unjust for the large part of Italian companies that compete successfully in international markets, that are able to be leaders in innovation, for the many that have been able to overcome the crisis and for those that have suffered even because of an unfriendly legal and institutional environment. Rather, capitalism of relations constitutes a component of the overall system, which damages the vital and competitive part of the Italian economy*.

Today this structure of the economy, its relationships with the political and administrative institutions is subjected to a significant change.

To sustain this *process of change* forces and different needs converge: the imperative to put public accounts in order, complying with European obligations, the need to strengthen the competitiveness' of the economy to kick-start economic growth, the need to renew the legitimisation of public institutions and of economic stakeholders taking into account the very serious scandals that have significantly undermined the confidence of public opinion.

It is sometimes a matter of events that involve criminal aspects that must be assessed by the judiciary in respect of individual rights of defence. But alongside these events, there are others in which antitrust *enforcement* enters into play.

5. Media attention, even at international level, has been impressed by the decisions of the Authority that has imposed penalties of more than 180 million euro on **two pharmaceutical multi-nationals that had established a cartel** to promote the sale of enormously over-priced medicines (more than 900 euro per application), in respect of those more economical (from 15 to 80 euro per application), making it impossible for the Health Service to refund the latter.

This cartel, according to our estimations, would have meant a major outlay to the Health Service equal to 540 million euro in 2013, which would have grown to about 615 million in 2014. Affecting public finances and additionally affecting consumers, who, in many cases, were forced to suspend treatment, with risk to their health, due to the lack of availability by the health services of the more expensive medicines.

The companies penalised have challenged our decision with the Regional Administrative Court. But it is interesting to observe that the Superior Health Council has recognised, already having made independent international authoritative studies, the therapeutic equivalent of the two medicines in the care of maculopathy and that the Government has adopted legislation with which has been amended – particularly in respect of the use of *off-label* medicines – *prescribing and refunding the less expensive medicine with significant savings for the public accounts and advantages for the consumers*.

Another case, still pharmaceutical related, decided by the Authority, was recently confirmed by the Health Council. This is the case of **Pfizer,** where the pharmaceutical multi-national, exploiting the complexity of the patent law and establishing purely instrumental disputes, managed to delay the market entry of alternative generic medicines compared to those that they produce and market, imposing on the Health Service large outlays quantified to about 14 million euro.

These cases are characterised by the existence of complex administrative regimes that require the co-operation of private parties. These latter can thus influence the decisions of the public administration obtaining from it competitive advantages, that are even greater if they occupy a dominant position in the reference market. In this hypothesis the private company – especially if in a dominant position – can manipulate to its advantage the administrative procedure, obtaining benefits that, not being based on merit, are converted to suit their own advantageous position. With regard to similar hypotheses there has emerged a new form of abuse, defined as *abuse of administrative procedures*.

In this situation, there applies the decision on the **case Coop-Esselunga**, recently confirmed by the State Council.

The Authority had established the abuse engaged in by the society, in a dominant position in the market, by large-scale commercial distribution in the province of Modena, consisting in the systematic movement of obstacles of access to new entrants, including instrumental interference in the town planning procedure and in that of authorisations initiated by the competitor with the local administration. The Authority, with the full endorsement of the court, has deemed that the formalities in respect of the procedural administrative rules (in this case) of the town council do not apply, per se, to the occurrence of the other conditions set out by the antitrust law, to exclude the illicit competitive conduct. The principle is obviously capable of finding applications in numerous spheres.

The contribution of case law of The Regional administrative Court and of the State Council is fundamentally to guarantee certainty to the law of competition and to consolidate the new guidelines. An effective, quality judicial review strengthens the Authorities actions, also in those cases in which our measures are all or in part, reformed by the Judiciary and especially in the important cases that I have cited, where decisions have been confirmed that have attracted attention across national borders.

6. Then there are all that threads of antitrust cases that concern the conduct of the ex-monopolists, those, moreover, above all recently, that have shown themselves significantly more sensitive to the competition rules of play. In some situations, however, they have continued to have **privileges sanctioned by legislative provisions** that have effectively distorted competition. An example of this type is the provision that exempted the Italian Post Office from VAT in its postal services subject to individual negotiation. The Authority has considered the provision in contrast with the European directive, as interpreted by the Court of Justice, and has *overturned it*. The decision has been confirmed by the Regional Administrative Court of Lazio and is now subject to appeal in the State Council.

In other situations the ex-monopolists have exploited their dominant position to obstruct market penetration of the competition. We have penalised with almost 104 million euro, Telecom Italia for the conduct of abuse of position in order to slow the growth of competition in the service markets of voice telephony and access to the internet and broad band. The decision is in respect of access to the Telecom Italia network and the effects on a strategic sector for economic growth, by reason of its central position, in the development of broad band, of the access of alternative operators to a part of the local Telecom network, also in presence of investments in its own infrastructure.

The decision has been confirmed by the Regional Administrative Court.

Finally, I cite the decision regarding the FS Group, in proceedings initiated by a complaint by NTV, regarding conditions of access to high speed networks. In this case the proceedings closed with the acceptance of commitments, undertaken by the FS Group, in order to remove some obstacles to the use of the network that has resulted, amongst others, to the reduction of costs of access to the network for NTV to an extent equal to 15%.

To prevent conduct like those briefly mentioned it is therefore the **deterrent function of sanctions** that is central**.** It goes beyond the cases decided and sends out to all the economic operators the warning that the violation of regulations on competition can incur heavy economic sanctions. For this, in accordance with the practice of the European Commission, decisions with sanctions are more numerous than the decisions that include the commitment of the company to remove the anti-competitive behaviour. In 2013 and in the first six months of 2014 decisions with commitments have been only 3 out of a total of 18 proceedings of instructions concluded by the Authority.

In addition, in order to make the criteria followed in the imposition of sanctions more transparent for the companies and to facilitate the judicial review on decisions of the Authority, in the course of a year has been initiated the *process* for the issuing of Guide Lines, according to *best practices* recommended at European level.

Often **the privileges and favoured conditions for certain economic operators have been sanctioned by public administration acts.** The Antitrust has intervened against these acts thanks to the new powers that have been granted by art. 21 bis of Italian Law No. 287 of 1990. Emblematic, in this sense, is the recourse proposed by the Authority against the decisions of the Ministry for Infrastructure and Transport that continues to substantially hold an artificial fixing of minimum prices for road transport activity: on this matter The European Court of Justice will pronounce shortly.

7. Also apart from the presence of antitrust offences, there have been other instruments used to overcome the capitalism of relationships that can prejudice competition.

Suffice it to think how much has been exposed in the examination of the Unipol-Fonsai concentration. Naturally we have been busy only in regard to its consequences for the levels of competition opening up in the insurance market.

We have subordinated the concentration of some measure pro-competition imposing, in the first place, the sale, on the part of the new group, of assets in such a way that even at the provincial level the market portion held wasn't more than 30%. But we have intervened – and this is a significant change – also in the relations between the new entity post-merger and important financial operators. In particular, *the measures imposed have involved the termination of financial links, stocks and personal with some of the main banking and insurance groups in the Country.*

In the report for the formation of the annual laws on competition, that the Authority is about to define, will be evidenced the existence of numerous economic sectors in which the regulatory framework prevents competition based on merit and favours the privileges of position.

For example, the Antitrust considers there is now a need for a reform intervention in the **insurance** market for the civil responsibility arising from the circulation of cars and motorcycles, where the prices paid by the consumer are between the highest in Europe and the movement of insurance from one company to another is particularly low.

Also in the banking sectors it is necessary to continue the process of the termination of personal links between different institutes, initiated, from a suggestion by the Authority, with the introduction of the prohibition of *interlocking directorates.* Now this restriction has been made even more effective by the **banking foundations.** Moreover, it is necessary to realise a strengthening of the separation between transferee foundations and banks, extending the restriction of holding participation of control in banking companies even in cases in which the control is exercised, actually, jointly with other shareholders.

Not only growth at the local level, but even the development of *utilities* that could produce wealth for the Country, they are, in many cases, blocked by **municipal capitalism,** based on the concessions between the apparatus and companies controlled by them or participants that carry out public services or instrumental activities. We must proceed to a work of radical reorganisation of **public companies,** foreseeing disposals or nonetheless the possibility of not renewing the facilities for those companies that are loss-making or furnishing goods and services at prices higher than those of the market. The time seems right to insert into the reform agendas that of the discipline of local public services, overcoming the traditional approach based on a general model and elaborating on particular disciplines suitable for the nature of different services, in a way to make room for the competition in

those spheres in which you cannot find technical justification for maintaining exclusive rights, and enhancing competition in the market in other cases

Other reform interventions indicated in the imminent notification are a few directives to remove barriers and links that obstruct competition based on merit, but creating an environment that favours the entrepreneurial initiatives in crucial sectors for growth. In this situation, for example, should be viewed the proposals in respect of the digital agenda, the use of radio spectrum, electric energy, professional services.

8. As I said at the start, a redefinition of the relations between democracy, the market and social cohesion is underway.

On the one hand, there is a *model of capitalism founded on the relations between some large economic powers, on the privileged relationship between the public apparatus, on protection against competitors, above all foreign suppliers.* On the other hand, there is a *model inspired by an open view of the economy and society, where competition based on merit is central, which pushes towards innovation and places at the centre of the initiative consumer well-being.* Towards this latter aspect are driven forward the Antitrust decisions, both when the Authority deals with single cases and when it undertakes its *advocacy* function.

Through the creation of an order of a more open market, characterized by a **competition based on merit,** rather than that rendered by position, less dependent on the decisions and from favours of the public apparatus, you can achieve a double objective: improving the well-being of the consumer and strengthening the competitiveness of the Italian economy, promoting economic growth.

From here a dual consequence: the choice of sectors in which to concentrate Antitrust intervention; the close connections that exist, in the legal system and in practices, between the protection of competition and of consumers.

Under the first profile, is evidenced *the commitment of the Authority focussed, and continuing to be focussed, on those sectors in which the presence of capitalism of relations has been stronger and in those where, by a correct competitive dynamic, a boost to competitiveness and growth is to be expected. These are the sectors indicated more often by the European Commission: energy, transports, services, electronic communications, online business and financial services.*

Under the second profile, is underlined the activity of the Authority founded on **two equally important premises: the protection of competition and the protection of consumers against incorrect commercial practices.**

With respect to these latter ones, in the last months, with Italian Legislative Decree No. 21 of 2014 has passed a situation of uncertainty on the conferred powers for the suppression of incorrect commercial practices. It has been clarified that the general competence – in all sectors, even those regulated – relating to Antitrust, will be exercised the same way with full regard to the regulation of the sector and in collaboration with the other Authorities. Collaboration that is currently experiencing a particularly happy time thanks to the commitment of all the Authorities, in the belief that the consumers are interested in rapid and just responses, and the companies are interested in the predictability and the exclusion of contradictory intervention. With the same legislative decree has been given implementation to the directive on *consumer rights,* attributing to the Antitrust the function of the protection of the consumer in contracts with professionals, with particular reference to those concluded at a distance.

The activity and the protection of the consumer are concentrated in particular on those sectors that, for the newness of commercial relations, can give life to new forms of consumer exploitation. For these reasons, amongst the priorities of the Antitrust there is *e-commerce, a* sector in which we have concluded important cases that have led to the shutdown of 160 sites that sold counterfeit products and of 3 sites that sold medicines subject to medical prescription. We have, moreover, initiated 3 preliminary petitions against large operators of new markets opened up by the internet, such as Google, Apple, Amazon and Gameloft in the sectors of free application for *smartphone and tablet,* Tripadvisor in the market of *online reviews* and Groupon in that of *e-couponing*. *E-commerce* offers extraordinary possibilities for economic growth, but the internet cannot become a *Wild West* where everything is allowed. The activity of the Authority in matters of e-commerce is particularly intense even at international level where it is involved in the annual sectorial measures of verification of internet sites *(sweep)* and to the community project *European Unfair Terms Strategy (*EUTS). In these undertakings the Authority has distinguished itself for its breadth and depth of experience achieved in its *enforcement* activities, unanimously recognised amongst the most effective in the European environment.

Next to these new fronts remains commitment on the more traditional sectors, like air transport, food products, travel, telecommunications, and energy.

9. The push towards an order of more open markets, with a competition based on merit and not on advantageous position, must be linked with the need to strengthen the social cohesion put to the test by the great crisis that we have seen.

We cannot ignore the critics – carried out in the name of the ideology, which is predominant nowadays, i.e. that of rights – according which, the market rides roughshod over rights and increases inequality.

To overcome similar dangers – certainly in existence – we need to address ourselves to an idea of market very different from that of a spontaneous order entrusted to the free play of demand and supply, governed exclusively by the celebrated "invisible hand".

The idea of market that is determined by European Treaties is that of a legal order, where rights not only define the external frameworks (for example the rules on contracts), but they also confirm the market structure, in order to remedy the negative external influences, to prevent the abuse of economic power, to realise competition where the natural dynamic could lead to the monopoly, to protect consumers, as well as to recognise the fundamental rights of European citizens.

This is the **social economy of the market** that constitutes the cultural roots of the antitrust discipline and that is included amongst the constitutional principles of the European Union. In practice, things have often turned out differently, but these must lead us to make effective the principles of the social economy of the market, rather than to repudiate competition.

10. The market is not only made compatible with rights, but under another profile its presence and its efficiency are necessary to make it effective. The fact is that – as was pointed out in a book of some years ago by Holmes and Sunstein – "all rights cost".

The protection of every right, from traditional rights of freedom (like those of ownership, requiring the operation of public authorities to safeguard it against any invasion by a third party) to the attainment of social rights that presuppose a positive entitlement on the part of public powers, requires the use of financial resources. This means, in contrast with the ultra-liberal position, that the protection of rights also depends on taxation, from which the resources for their protection are obtained.

But it also means that it is even more indispensible an economy that produces that wealth, from which obtaining the resources to guarantee those rights.

To this end, we have no better mechanisms concerning the market economy. The alternative that we know of is the Constitution of the USSR that formally recognises a fairly broad catalogue of rights, leaving them however mainly on the paper!

Furthermore, the competitive market leads to the widening of choices and the lowering of prices that sensibly increases the degree of effectiveness of many rights.

11. An argument used to paralyse competition policies is that according which, in order to exit from the crisis would have needed key policies of fiscal stimulus, while competition would have had social costs insupportable in times of high unemployment (because it forces inefficient companies to exit from the market).

But if the moment is reached to enter the policy for growth fully into the European agenda, we need to avoid feeding these illusions. Because, when a State becomes a "Debtor State" inevitably it depends on a "double confidence", that of its voting citizens and that of the financial operators, from which it has need of credit to avoid default. A State, like ours, that has a need every year of about 400 billion of euro to renew its debt, has therefore significant limits in the use of fiscal politics in countering the cyclic trend. Therefore we must play the competition card to attract investment and create conditions for the success of our businesses in the global markets. Here "structural reforms" and liberalization enter into play. *The opening of markets to competition favours innovation, that is the principal engine of growth, reduces prices with advantages for the competitiveness of the businesses that operate in "downstream markets" and with an increase to consumer welfare*.

Competition will also have social costs, because inefficient businesses leave the market and this could bring unemployment. But the seriousness of similar consequences should lead not so much to sterilize competition as much as to **improve *welfare* mechanisms** and to strengthen the policies for the re-deployment of workers. Moreover, the costs of the lack of competition can be greater, in terms of lack of growth, of lack of creation of new work places, of restrictions to innovation, of higher prices paid by consumers.

12. The role of the Antitrust that, on the basis of recent experience I have tried to outline, fits within the environment of a European dimension. The Antitrust is a double-sided institution:

An institution that is envisaged by the national law that regulates it, but that acts under the European umbrella, because it applies directly the European legislation and the acts of soft law of the Commission, because it operates within the network of the competition authority of the 28 Member States, because it concerns cases of European relevance, because it continuously co-operates with the Commission and the other Authorities in the discussions of cases, in the exchange of information, in the elaboration of common practices and of regulations aimed at the uniform application of the rights of competition in all of the European Union.

In this way the Italian Antitrust contributes to the consolidation of the single market. After all, in many fields – in the sectors of energy, in financial services, in manufacturing sectors, in transport, in online services – the process of the opening national markets and the protection of competition can achieve their full potential in terms of price reduction, widening the possibilities of consumer choice, innovation if they are parts of a more ambitious project directed to the effective implementation of internal markets.

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To conclude, I thank warmly all those who have made possible our activities: women and men that with passion and expertise work for the Antitrust. To them goes the deepest appreciation for the quality of their work carried out and for the remarkable abilities demonstrated in addressing extremely complex cases. With great satisfaction I can in addition affirm that within the Authority the principle of gender equality has been fully implemented: today, women represent 59% of personnel and cover about half of the leadership positions.

I am grateful to the Secretary General, to the Head of Cabinet and to the Head of my *staff* for the expert direction both cultural and legal that they imprint, continuously, on the institutional activities.

I thank, in addition, the Trade Union Organisations for the constructive dialogue that I hope can be always more profitable.

It is for me a pleasure to welcome in the College Gabriella Muscolo, who was recently nominated Commissioner of The Authority, giving further confirmation of the existence in the female world of those employed at high professional levels: to her and to Salvatore Rebecchini go my most heartfelt thanks for the continued commitment shown in the institutional activities.

A particular recognition for their precious contribution goes to Carla Rabitti Bedogni and Piero Barucci who until some months ago formed part of the Board of the Authority.

A heartfelt informal thank you goes to the Finance Police, whose professional contribute is indispensable for the success of our investigations, to the Regional Administrative Tribunal of Lazio and to the Council of State, whose interaction with our decisions contributes to the formation of competition rights both effective and predictable, to the Attorney General Office, that defends us in court and assists us with great legal wisdom, to the regulation Authority, to the consumer associations, to the community of Italian and European "antitrust"-supporters, to colleagues and friends who work in the European *network*.

I thank all of you because you have had the patience to listen to me and even more because everyone, in its own professional or institutional role, is working so that after the crisis Italy can return to growth and to conquering that role of the great economic and political actor to which it is entitled on the European and global scene. But above all I thank those millions of our fellow citizens who, far from the spotlight of the public scene, with their sacrifice, their work, their intelligence are the main hope of a great future for our extraordinary country.