

ANNUAL REPORT

ITALY

2001

1. CHANGES TO COMPETITION LAWS AND POLICIES

Law no. 57 of 5 March 2001 emended two articles of the Italian Competition Act (Law no. 287 of 10 October 1990): the provision dedicated to public undertakings (article 8) and the section related to fines for the violation of the prohibition on restrictive agreements and on abuse of a dominant position (article 15).

As for the first amendment, law no. 57 of 5 March 2001 has introduced new paragraphs to the section of the Italian Competition Act dedicated to undertakings entrusted with services of general economic interest or operating as monopolist. More specifically, the new paragraphs provide that if those undertakings intend to enter in other markets, they should “operate through separate companies”, thus introducing an obligation of corporate separation. Moreover, the new rules impose on these undertakings an obligation to notify to the Antitrust Authority any constitution of undertakings or acquisition of controlling interests in undertakings operating in other markets. Failure to comply with the prior notification requirement is sanctioned. Finally, the new law expressly states that, “in order to guarantee equal business opportunities, when [undertakings entrusted with services of general economic interest or operating as monopolist] supply their subsidiaries or controlled companies on different market ... with good or services, including information services, over which they have exclusive rights by virtue of the activities they perform, they *shall make the same goods and services available to their direct competitor on equivalent term and conditions*”.

As for the second amendment, law no. 57 of 5 March 2001 has modified the provisions on sanctions for restrictive agreements and abuses of a dominant position: first, it has eliminated the reference to the turnover achieved in the “relevant” market as the parameter to which commensurate the amount of the fine, now being the total turnover of the undertaking concerned; secondly, it has suppressed the lower ceiling (1%) of the fine, that can now range up to 10% of the turnover, making the system much more flexible.

Finally, law no. 57 of 5 March 2001 has modified the existing rule on abuse of economic dependence (art. 9 law no. 192 of 18 June 1998), expressly stating the Antitrust Authority may issues warnings and impose penalties provided by the Competition Act “against any company or companies found liable for abuse of economic dependence which is relevant to the protection of competition and the free market ...”.

MAIN INTERVENTIONS OF THE ANTITRUST AUTHORITY IN 2001 AND THE FIRST THREE MONTHS OF 2002: A STATISTICAL OVERVIEW

In applying Italy’s antitrust law, in 2001 the Authority evaluated 616 concentrations, 43 agreements and 28 possible abuses of dominant positions.

The Authority’s activity

2000	2001	January-March 2002
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Agreements	52	43	11
Abuses of dominant positions	22	28	2
Concentrations	525	616	164
Fact-finding inquiries	-	1	-
Non-compliance with orders	2	2	1
Opinions submitted to the Bank of Italy	50	29	4
Football rights (Law no. 78/1999)	1	-	-

Distribution of proceedings concluded in 2001 by type and outcome

	No violation of the law	Violation of the law, conditional authorization or compliance following changes to agreements	Cases beyond the scope of the Authority's powers or to which the law was not applicable	Total
Agreements	33	6(*)	4	43
Abuses of dominant positions	26	2	-	28
Concentrations	566	6(*)	44	616

As regards the investigations of agreements between firms, the Authority concluded nine inquiries in 2001. In two cases it found that the prohibition of agreements restricting competition of Article 2 of Law no. 287/1990 had been violated. In three cases it found that the agreements did not violate the prohibition. In another two cases the parties withdrew the communication of the agreements in view of the objections raised by the Authority. Lastly, in two cases the Authority granted exemptions pursuant to Article 4 of Law no. 287/1990. In the first three months of 2002 the Authority concluded two inquiries. In one case it found that Article 2 of Law no. 287/1990 had been violated and in the other it granted an exemption pursuant to Article 4 of Law no. 287/1990.

Turning to abuses of dominant positions, in most of the cases examined for possible violations of the law the Authority was able to exclude the existence of abusive behaviour without opening a formal investigation. It concluded three investigations: in one case the conduct was deemed to violate Article 3 of Law no. 287/1990, in another it was considered to violate Article 82 of the EC Treaty and in the last it was found that Article 3 of Law no. 287/1990 had not been violated.

In view of the seriousness of the violations, the Authority imposed fines amounting to €114.000,00 for violations of the prohibition of agreements restricting competition and to € 86 millions for abuses of dominant positions.

In 2001 the Authority examined 616 concentrations, the largest number since the entry into force of Law no. 287/1990. Only six cases were subject to second phase investigation. In two cases the Authority subsequently prohibited the transaction since it was considered likely to create or strengthen a dominant position that would cause a substantial and lasting reduction in competition; in two cases the parties withdrew the communication of the

proposed concentration in view of the preliminary results of the investigation, and in two cases the Authority authorized the operation after the parties had undertaken to adopt specific corrective measures. The Authority also investigated nine cases of failure to comply with the obligation to notify the transaction prior to its execution. In all nine cases it found that Article 19.2 of Law no. 287/1990 had been violated and imposed fines totaling around €290.000,00. In the first three months of 2001 it examined another 114 concentrations and carried out an investigation into a case of failure to communicate a proposed concentration, which was concluded with the imposition of a fine of around €3.000,00.

During the year the Authority concluded a fact-finding inquiry into the system for the distribution of fuels for motor vehicles and three investigations for failure to comply with measures laid down as the condition for the authorization of concentrations. In one of these cases it found that Article 19.1 of Law no. 287/1990 had been violated and imposed a fine of about €3.8 million.

The Authority submitted 22 reports pursuant to Articles 21 and 22 of Law no. 287/1990, concerning restrictions of competition arising from existing or proposed laws or regulations; sixteen of the reports were submitted in 2001 and the other six in the first three months of 2002. As in the past, the reports covered a wide range of economic sectors.

Competition advocacy reports and opinions by sector of economic activity (January 2001-March 2002)

(number of interventions)		
Sector	2001	January-March 2002
Electricity, water and gas	1	2
Oil products	1	
Pharmaceuticals	1	
Transport and renting of transport equipment	2	1
Publishing and printing	1	
Telecommunications	3	2
Insurance and pension funds	1	
Professional and entrepreneurial activities	5	
Advertising	1	
Sundry services	1	1
Total	16	6

AGRICULTURE AND MANUFACTURING

AGRICULTURAL AND FOOD PRODUCTS

HEINEKEN AND THE HORECA CHANNEL

In July 2001 the Authority concluded the examination of some model contracts submitted voluntarily by Heineken Italia Spa and Partesa Srl concerning the wholesale and retail distribution of beer to outlets for the sale and consumption of beverages, the so-called

horeca channel. As originally submitted, all the model contracts had an exclusivity clause for the purchasing and serving of draft beer; they also established minimum purchase quantities, indicated the distributor to buy from and required a minimum duration of 36 months. Although no clauses were deemed harmful to competition pursuant to EC Regulation no. 2790/99 on vertical agreements, the exclusive purchase obligations could have been significant in view of the fact that Heineken Italia's market share of around 33% of *horeca* beer sales was above the threshold of 30% established in the regulation for the presumption of non-restraint. The Authority deemed that the exclusivity clause was likely to reduce interbrand competition and, since it was a question of retail sales, to limit consumer choice. A further possible restrictive effect was found in the express indication of the distributor/wholesaler that outlets had to buy from, since this provision was likely to reduce intrabrand competition among wholesalers and have the effect of sharing the market.

During the inquiry the parties partially amended the content of some of the model contracts originally submitted, with special reference to the required duration, reduced to 12 months, and the minimum purchase quantities. The amendments were deemed sufficient to attenuate the risks of market foreclosure for competing producers. Accordingly, the Authority concluded that, as modified during the proceeding, the contractual restraints did not constitute a violation of the prohibition on agreements restricting competition.

GRANAROLO-CENTRALE DEL LATTE DI VICENZA

In May 2001 the Authority concluded an investigation into the acquisition of Centrale del latte di Vicenza Spa by Granarolo Spa. The Authority noted that the concentration was part of the far-reaching reorganization that had been under way in the milk industry for several years and which had seen the privatization of numerous dairy companies and the exit from the market of some local producers. It also noted that during this process Granarolo and Parmalat had acquired a national dimension and a widespread presence in local markets for fresh milk and that this had given them a particular competitive advantage as a result of which one or the other was the leader in the various local markets in which they operated.

As regards the effects of the transaction, the Authority considered that in the fresh milk market in the Veneto region, where Parmalat was the leading supplier with a market share of 30-33% and Granarolo the next largest with 15-18%, the acquisition of Centrale del latte di Vicenza Spa, the fourth-largest supplier with a market share of 15-18%, would have allowed Granarolo Spa to strengthen its position and narrow the gap with respect to Parmalat in a situation already marked by a limited number of exclusively local smaller suppliers and significant barriers to entry. The Authority deemed that, together with other features of the market, this increased symmetry was likely to facilitate anticompetitive conducts by the two leading suppliers, especially as regards parallel increases in prices. It considered that the risk of Granarolo and Parmalat pursuing parallel pricing policies appeared particularly real in view of the high degree of transparency in the relevant market, in which all suppliers can easily obtain up-to-date information on quantities and prices.

The Authority accordingly ruled that the acquisition would have further weakened competition in a market that was already inherently oligopolistic and prohibited the concentration.

PARTESA-IDROS

In October 2001 the Authority concluded an investigation into the acquisition of Idros Spa by Partesa Srl, a subsidiary of Heineken Italia Spa, with the decision that there were no grounds for further proceedings. The two companies operated in the wholesale distribution of beverages and the sale of beer to horeca outlets in the province of Bologna.

The Authority had opened the investigation following the notification of the proposed concentration since it was likely to result in Heineken Italia achieving or strengthening a dominant position in the market for the sale of beer to horeca outlets in the province of Bologna. Several factors played a role in this assessment. In the first place the Authority considered that the acquisition of a drinks wholesaler by a producer of beer was the means for the latter to acquire the outlets served by the former and provide the quantities of beer previously supplied by competitors and that such a process of substitution could have led to Heineken's doubling its share of the market for the sale of beer to horeca outlets. In the second place it observed that Heineken would have come to control nearly one third of the market for the wholesale distribution of beverages and would have been the only vertically integrated producer in the relevant geographical market, with a greater market power in providing support for the sale of its products and pre-empting outlets. Thirdly, the Authority held that the acquisition of Idros would have left no independent wholesalers of any size in the relevant market capable of handling significant quantities of the products of Heineken's competitors.

During the investigation Heineken and Partesa announced that, in view of the objections raised by the Authority, they were withdrawing their notification of the concentration.

OIL PRODUCTS

FACT-FINDING INQUIRY INTO THE RESTRUCTURING OF THE NATIONAL DISTRIBUTION NETWORK FOR MOTOR VEHICLE FUELS

In June 2001 the Authority concluded a fact-finding inquiry into the progress made in rationalizing and modernizing the distribution network for motor vehicle fuels on Italy's roads and motorways pursuant to Legislative Decree 32/1998. This decree, intended to foster the liberalization of access to the market provided for the replacement of the existing regime based on public franchises with a regime based on authorizations, the removal of the obstacle to the entry of new competitors consisting in the closure of existing service stations and a broadening of the range of products that can be sold at service stations.

The inquiry found that more than three years after the approval of the decree the national network was still in a backward state, with more than one third of the 24,383 service stations consisting of pumps distributing small quantities and very often lacking the features characterizing supply in more advanced markets (self-service, parking areas, covered facilities and non-oil services). Considerable lags were also found in the adoption of the necessary implementing provisions by regions and especially municipalities. Where action had been taken, moreover, the inconsistencies between the different regional provisions and the spirit of the law had created additional difficulties. For instance, some regional plans lay down quantity objectives and regulations based on a rigid "planning" approach that conflicted with the aim of opening the market to competition. Furthermore, it was found that four years

after the abolition of franchises at national level, some regions still used them, with the consequent limitations on new entrants to the market.

API-TOTALFINA-ERG PETROLI/GESTIONE RIFORNIMENTI COMUNE

In April 2000 Anonima Petroli Italia Spa, Erg Petroli Spa e Totalfina Elf Italia Spa notified the Authority of their intention to set up a non-profit joint venture called Gestione Rifornimenti Comune (Gerico) for the joint centralized management of orders and transport scheduling for the supply of motor vehicle fuels to their service stations on Italy's roads and motorways.

The joint venture, to be set up as a cooperative, would have operated on the basis of highly confidential commercial information regarding the present and the future, transmitted continuously by each of the oil companies participating in the venture. The Authority took the view that the oil companies' participation in the joint venture was likely to cause a significant reduction in the incentives each had to compete. The integration of the downstream secondary logistical activities could easily have led to an integration of the companies' commercial policies with regard to their primary upstream logistical activities, with the overall result that scope for competition in the market for fuels retailing at the pump station among the parties of the operation would further diminish. In the face of these objections, the companies involved withdrew the notification and the Authority closed the investigation.

UNIONE PETROLIFERA-PLAN FOR THE RATIONALIZATION OF THE DISTRIBUTION NETWORK FOR MOTOR VEHICLE FUELS

In July 2001 the Authority concluded the investigation of an agreement notified by the Unione Petrolifera, an association representing the main Italian oil companies, concerning a plan for the rationalization of the distribution network for motor vehicle fuels. In particular, the plan envisaged the closing of 2,700 service stations in the three years 2001-03 and the creation of a fund to provide incentives for the decommissioning of pumps and the rehabilitation of the sites no longer used.

Several aspects of the agreement appeared to restrict competition, especially the intention to determine the number of service stations each oil company was to close on a pro rata basis according to its market share. Even though this method would not guarantee the exact replication of the ex ante situation, it would have ensured that the agreed service station closure programme had a minimum impact on the companies' market shares.

After receiving the findings of the investigation, the Unione Petrolifera amended the original agreement in which some of the companies involved declared their willingness to dispose of at least 210 and up to 250 service stations to third parties not participating in the agreement by means of public sales procedures implemented by an external auditor. This proposal was decisive in the Authority's decision that the agreement satisfied the conditions for an individual exemption.

As regards improvements in supply conditions, the Authority first considered those related to the improvement in the technical and operational aspects of the activity of providing motor vehicle fuels. The closure of marginal and obsolete outlets would free resources that could be used for additional capital spending on the best part of the distribution

network in order to improve its technical efficiency. The Authority also deemed that the agreement would bring benefits for consumers by reducing plant maintenance and fuel transport costs, as well as improvements in the quality of the services provided — as a result of shift working, longer opening hours and an increase in non-oil activities — and a reduction in the environmental risks associated with the large number of pumps currently in operation. Above all, however, the Authority took the view that the sale of service stations to third parties would have created the conditions in the following three years for new businesses to enter the relevant market and thus also overcome the entry barriers due to the existence of regional legislation that still made the opening of new service stations subject to the handing of existing authorizations.

REPORT ON THE FRANCHISE SYSTEM FOR THE DISTRIBUTION OF MARINE FUELS

In November 2001 the Authority sent the Government and the maritime and port authorities a report on the distortion to competition deriving from the manner of applying the legislation on the distribution of marine fuels by means of road tankers.

The Authority pointed out that, despite the opening to competition in the field of port activities fostered by the current legislation, many ports continued to be marked by unjustified monopoly conditions owing to an inefficient allocation of franchises for the installation and operation of fuel deposits. In particular, in some cases more than one franchise had been awarded to a single firm within the same port, or to legally different businesses that were related to a single firm; in other cases applicants had been refused franchises where other operators had been granted franchises but never actually used them. After drawing attention to the competitive distortions that the franchise system inevitably produces, the Authority stressed the need for the competent maritime and port authorities to carry out a thorough revision of the existing franchises for the installation and operation of marine fuel distribution facilities.

PHARMACEUTICALS

REPORT ON THE COLLECTION OF DATA ON THE SALES OF MEDICINAL PRODUCTS PAID FOR BY THE NATIONAL HEALTH SERVICE

In a report published in April 2001 the Authority drew attention to the potential competition-distorting effects of some of the provisions regarding the system for collecting data on the sales of medicinal products paid for by the National Health Service (NHS) by pharmacies in the public and private sectors. Specifically, the Authority noted that the law currently provided for Federfarma, the trade association of pharmacies, to collect the data contained on the price tags of drugs they sell that were paid for by the NHS and “*the optically-readable data on prescriptions specifying the codes of the doctor and the patient and the date of issue of the prescription*”. It noted, moreover, that the law provided for these data to be transmitted to the Ministry of Health, but without excluding the possibility of their being transmitted to “*entities and companies operating in the field of market analysis and research*”.

In its report the Authority pointed to the possible restrictive effects in the event of pharmaceutical companies coming into possession of some of the information collected. The report argued in fact that the dissemination of those data could lead to an excessive increase

in the transparency of the market, thus facilitating anti-competitive practices in view of the fact that the prices of drugs paid for by the NHS were established administratively and that many markets showed a high degree of concentration. The Authority accordingly recommended that restrictions should be placed on the information that could be transmitted to private entities and that the data should be aggregated so as to make it impossible to identify the positions of competing firms in small geographical markets.

OTHER MANUFACTURING ACTIVITIES

HENKEL-LOCTITE

In December 2001 the Authority concluded an investigation into Henkel Spa for non-compliance with the measures laid down as the condition for the authorization of a concentration. Specifically, in May 1997 the Authority had authorized Henkel Spa to acquire Loctite Italia Spa and its subsidiaries subject to compliance with some measures, including the undertaking by Henkel to licence the Bostik trademark for products aimed at non-professional consumers (quantities of less than 850 grams).

The Authority found that between 1998 and 2001 Henkel had marketed two lines of adhesive products with the Henkel trademark and in quantities of less than 850 grams, generally aimed at non-professional consumers and packaged in almost exactly the same way as the products of the Bostik range. The Authority ruled that the marketing of such products was likely to cause confusion with the Bostik products in the minds of non-professional consumers and that this course of conduct amounted to non-compliance with one of the measures imposed as a condition for the authorization of the concentration. It accordingly imposed a fine of around €3.8 million, corresponding to 3% of the companies' turnover in the businesses involved in the concentration.

ELECTRICITY

ITALENERGIA-MONTEDISON

In August 2001 the Authority decided that there were no grounds for proceedings in connection with the acquisition by Italenergia Spa of approximately 52% of the share capital of Montedison Spa and the simultaneous tender offer for the remaining Montedison shares. The aim of the operation was to create an energy pole by combining the energy businesses of Montedison's subsidiaries Edison Spa and Sondel Spa with those contributed to Italenergia by the Fiat Group and to build new generating capacity. Upon completion of the operation, Italenergia's share of the Italian power generating market would have been about one sixth of that of the dominant operator, Enel Spa, and its share of the market for the supply of electricity to eligible clients about half that of the dominant operator, Enel Trade.

As a consequence of some changes to the corporate governance of Italenergia, the European Commission considered that Fiat had exclusive control over Italenergia and concluded that the operation had a Community dimension; it therefore invited the parties to notify the operation to the Commission. The Authority accordingly decided that there were no grounds for continuing its investigation into the concentration and transmitted the information in its possession to the European Commission.

REPORT ON THE MEASURES TO INCREASE THE CONTESTABILITY OF SUPPLY IN THE ELECTRICITY MARKET

In March 2001 the Authority sent Parliament and the Government some comments on the Government's proposed amendments to Legislative Decree 7/2002 containing "*Urgent measures to ensure the security of the Italian electricity system*". In particular, the proposals envisaged the addition of a provision establishing that as of 31 October 2002 and until 31 December 2010 no company could own, directly or indirectly, more than 50% of the gross operational generating capacity installed in Italy. The proposed legislation also stated that once Enel Spa had disposed of the plants necessary to comply with that threshold, it could not be required to further reduce its generating capacity or to make it available to third parties.

With reference to the latter provision, the Authority deemed it desirable to point out the risk that it could be interpreted as establishing a sort of "minimum legal threshold" for the position held by Enel in the electricity generating market, so that it would significantly restrict the powers the Authority could exercise, especially as regards the control of concentrations carried out by the dominant generator. In other words, this provision could preclude the possibility for the Authority, in the event of acquisitions carried out by Enel, to impose remedies consisting of the divestiture of additional power plants, except where the strengthening of Enel's dominant position was due to an increase in its generating capacity above the 50% legal threshold.

In addition to reaffirming on a general basis its reservations regarding statutory administrative ceilings, albeit temporary, on firms' market shares, the Authority expressed some doubts about the scale of the disposals required with a view to limiting the market power of the dominant generator. It pointed out that the experience of other European countries that had liberalized their electricity generating markets suggested positive results in terms of competition were normally achieved with a much less highly concentrated structure than was foreseen in the proposed legislation, under which one company would continue to control half the country's electricity generating capacity.

NATURAL GAS

REPORT ON THE RULES FOR AUTHORIZING IMPORTS OF NATURAL GAS FROM NON-EU COUNTRIES

In July 2001 the Authority sent Parliament and the Government a report on some provisions governing the authorization of imports of natural gas from non-EU countries. In particular, the provisions laid down that for authorizations to be granted applicants "*had to submit an investment plan that would contribute, directly or by way of subsidiary or associated companies, to the development or security of the Italian gas system through the construction or strengthening of supply infrastructure in the form of gas pipelines or liquefied natural gas terminals, and natural gas storage and distribution facilities in Italy or on the Italian continental shelf*".

In its report the Authority noted that the application of the provisions concerning "investment plans" could have competition-distorting effects in the market for the supply of gas, to the detriment of companies intending to enter the Italian market that did not have a vertically-integrated structure or that were unable to establish "contacts" with the owners of infrastructure permitting them to make the required investments.

Moreover, these provisions exempted companies from having to make investments where they diversified the producer countries from which they obtained their supplies. The Authority noted in this respect that while these provisions had the merit of providing an incentive for importers to diversify their sources, their ability to do so depended to a large extent on economic or political circumstances over which they had little or no control.

TRANSPORT

AIR TRANSPORT AND AIRPORT SERVICES

VERALDI-ALITALIA

In November 2001 the Authority concluded an inquiry into Alitalia Spa to verify whether it had abused of its dominant position in connection with the conditions it had applied to passenger flights in 1999 and the first eight months of 2000 on the Milan-Lamezia Terme route, on which it had operated as a *de facto* monopolist. The inquiry had been opened in response to a number of complaints from users, consumer associations and local bodies alleging that the price conditions applied to this route were significantly more onerous than those applied on the Milan-Reggio Calabria route, which was similar in terms of distance and geographic coverage but had a different competitive structure since it was also served by Air One.

In the first place the authority identified the relevant market as that for passenger air transport on the Milan-Lamezia Terme route, since it deemed that this route could not be replaced by any other and that there was no alternative to air transport in view of the distance between the two cities. Alitalia was found to hold a dominant position in this market, due to a market shares in excess of 90% in the last few years. Moreover, this position was protected by significant entry barriers arising primarily from the extension of Alitalia's domestic network and the related reputational advantages, economies of scope and ability to maintain customer loyalty.

As regards the evaluation of the conditions on which Alitalia supplied the service, in the absence of a uniform price for air transport services, two methods of analysis were used to test whether the prices applied by Alitalia were unfair: *i*) comparison of the prices it applied in the relevant market with those it applied profitably in similar market in which it faced greater competition; and *ii*) comparison of the sale price with the cost of the service, to be determined by taking the costs incurred by Alitalia or other carriers in the relevant market or in similar markets and regarded as a benchmark parameter for quantifying the economic value of the service provided.

In applying the first method, the Authority compared the prices charged by Alitalia on the Milan-Lamezia Terme route and the Milan-Reggio Calabria route. The analysis revealed that the range of ticket types was narrower in the relevant market, that the prices charged for identical ticket types were systematically higher and that a smaller number of less expensive seats were allocated. These differences led to revenue per passenger being about 50% higher on the Milan-Lamezia Terme route than on the Milan-Reggio Calabria route, both in 1999 and in the first eight months of 2000. However, since Alitalia operated at a loss on the latter route, it was not possible to arrive at a clear conclusion with regard to the unfairness of the prices it applied on the Milan-Lamezia Terme route.

In applying the second method, the Authority considered the cost per passenger carried that Alitalia incurred on a sample of routes having similar features as regards the provision of the service to those of the Milan-Lamezia Terme route and on which it operates in competition with other carriers. The cost indicator obtained in this way was compared with the average revenue per passenger recorded by Alitalia in the relevant market. The latter was found to have been 32% higher in 1999 and 31% higher in the first eight months of 2000. Although substantial, this margin did not appear clear evidence of a disproportionate difference between the price and the economic value of the service. It was thus not possible to interpret it unambiguously for the purpose of evaluating the unfairness of the price conditions applied by Alitalia in the relevant market.

In conclusion, the inquiry did not find sufficient evidence to demonstrate that the pricing policies adopted by Alitalia on the Milan-Lamezia Terme route constituted abuse of a dominant position.

ASSOVIAGGI-ALITALIA

In June 2001 the Authority concluded an inquiry under Article 82 of the EC Treaty into certain conducts of Alitalia Spa concerning the system of commissions it applied to travel agents for the sale of its tickets.

The relevant markets were identified as that of the ticketing services provided by travel agents to airlines and that of scheduled passenger air transport services to and from Italy. The Authority found that Alitalia was the dominant buyer in the market for air transport travel agency services. It reached this conclusion on the basis of a series of factors, such as the company's share of that market (between 35% and 45%, while that of its leading competitor, Lufthansa, was between 10% and 20% and the combined share of its five leading competitors was between 20% and 30%), its share of the market for passenger air transport to and from Italy, its acting autonomously with respect to its competitors and travel agents, and the information advantages it possessed vis-à-vis travel agents. In the market for passenger air transport to and from Italy Alitalia had a share of between 40% and 50%, while each of its main competitors had a share of less than 10%. The Authority also noted that no travel agent could realistically consider not supplying its airline ticketing services to Alitalia without incurring an irremediable loss and that this allowed Alitalia to act independently of the other airlines in purchasing travel agents' airline ticketing services.

As regards the abusive conducts, the Authority first ascertained that the incentive schemes for travel agents amounted to target loyalty rebates. The inquiry found that the incentive schemes did not relate the size of the commission to the volume of travel agents' ticket sales in absolute terms but to the increase in their sales with respect to the previous year. In this way commissions were linked to travel agents' loyalty rather than to efficiency gains achieved by Alitalia. This meant that each travel agent had a strong incentive not only to maintain its previous year's volume of Alitalia ticket sales but also to increase that volume to the extent requested by Alitalia. In the light of the foregoing, the Authority deemed that the incentive schemes adopted by Alitalia constituted abuse of a dominant position insofar as they were likely to produce a strong loyalty-creating effect on travel agents and thus to obstruct the activity of competing carriers in the market.

The Authority also deemed that the incentive schemes adopted by Alitalia constituted abusive practices within the meaning of Article 82 of the EC Treaty because they permitted

the application of dissimilar conditions to equivalent transactions and discriminated between travel agents. In particular, by ignoring the volume of tickets sold in absolute terms, those incentive schemes produced different revenues for travel agents that sold the same quantity of tickets when the quantities sold in the previous year were different.

The Authority concluded that Alitalia's conducts constituted a violation of Article 82.1, points b) and c), of the EC Treaty and deemed the violation to be serious, *inter alia* because it could undermining the benefits of the liberalization of the air transport sector under way at Community level. Accordingly, the Authority imposed a fine on Alitalia of around €26.8 million, corresponding to 1.3% of the company's revenues from the provision of passenger air transport services to and from Italy.

RAILWAY TRANSPORT

REPORT ON A PROVISION CONCERNING RAILWAY INFRASTRUCTURE AND TRANSPORT

In February 2002 the Authority sent Parliament and the Government a report drawing attention to the potentially competition-distorting effects of a provision of a bill concerning railway infrastructure and transport under discussion in the Chamber of Deputies. This provision referred to the engineering design and construction of infrastructure for the High Speed railway project and envisaged the repeal of the existing rule, which called for contracts for these activities to be awarded by means of tenders.

While sharing the objective of endowing Italy with a railway infrastructure comparable with that to be found in other European countries, the Authority pointed out that this provision did not appear to conform with the EU directives on the award of public works contracts. The Authority also stressed that the proposed repeal was incompatible with the general principles established for the protection of competition. Moreover, as it had already made clear on numerous other occasions, the Authority reaffirmed that the recourse to competitive procedures was the most effective way to identify the firms best able to carry out works efficiently, in terms of both production and organization, and thus ensure the minimization of the related costs. In the specific case of railway infrastructure, the Authority stated that the recourse to tenders based on objective, non-discriminatory, proportional and transparent principles sanctioned by Community and national law was the competitive procedure most likely to promote the achievement of the objectives of efficiency and quality in the construction of works for the High Speed project.

ROAD TRANSPORT

EDIZIONE HOLDING-AUTOSTRADA CONCESSIONI E COSTRUZIONI AUTOSTRADA

In September 2001 the Authority concluded an investigation into Autostrade Spa for failing to comply with the measures laid down as the condition for the authorization of the acquisition of Autostrade Concessioni e Costruzioni Autostrade by Edizioni Holding Spa. In particular, the non-compliance proceedings concerned the failure to award the catering franchises due to expire on 31 December 2000 by means of tenders and the failure to make the necessary arrangements for such tenders on schedule.

In March 2001 Autostrade had submitted a request for the re-examination of the measure authorizing the concentration and for an extension, until 31 December 2003, of the

deadline for awarding the catering franchises that had expired on 31 December 2000. In support of its request, the company stated that it had launched an experimental programme involving the construction of motels, business centres, entertainment parks and the supply of financial services at motorway service areas selected on the basis of their potential development and volume of traffic. According to Autostrade, the extension would have allowed the new franchises to be granted taking into account also the results of the experimentation.

The Authority considered that Autostrade's plans for upgrading its service areas were likely to have a significant impact on the structure, content and value of the franchises to be awarded for catering services on the motorway network. In these circumstances the extension appeared necessary in order to permit a thorough assessment of the results of the experimentation under way and of their impact on the profitability of service areas before the franchises were awarded again. However, since the extension appeared likely to produce some competition-distorting effects in the relevant market, the Authority made approved Autostrade's request conditional upon some additional commitments.

AUXILIARY TRANSPORT SERVICES

REPORT ON THE REGULATORY ACTIVITY OF THE PALERMO PORT AUTHORITY

In March 2001 the Authority issued a report on some of the provisions contained in an order issued by the Palermo port authority regulating bunkering operations in the port of Palermo. In particular, the order made it obligatory for firms providing ships with liquid fuels and lubricating oils by means of road tankers to obtain their supplies from the only deposit existing within the port area.

The Authority deemed that, by not allowing firms to obtain supplies from deposits outside the port and thus excluding several competing suppliers, the order was likely to have anti-competitive effects in the provision of fuels and lubricants in the port of Palermo that were not justified on grounds of the need to protect security in the port area.

TELECOMMUNICATIONS

UMTS AUCTION

In June 2001 the Authority concluded an investigation into the companies that had taken part in the bidding for the award of UMTS third-generation mobile telephony licences (Tim Spa, Omnitel Pronto Italia Spa, Wind Telecomunicazioni Spa, H3G Spa, formerly Andala Opco, Ipse 2000 Spa and Blu Spa) and ruled that on the basis of the findings there was no evidence of an anticompetitive conspiracy among the participants in the bidding.

The Authority had initiated the investigation after the termination in October 2000 of the auction of five individual licences for the installation and operation of UMTS services. In particular, the invitation to tender had specified that if there were five or less participants, the number of awardable licences could be reduced before the start of the competitive bidding phase, so as to ensure that there would be effective competition between the companies participating. In the event, the tendering procedure ended early when Blu Spa announced its withdrawal after the start of the competitive bidding phase, by which time it was impossible to reduce the number of licences to be awarded. Blu's decision to withdraw had led to

allegations of an agreement or concerted action involving two or more participants in the procedure aimed at restricting competition in the market for the acquisition of third-generation mobile telephony licences.

The investigation showed, however, that the companies involved had not concluded any agreements aimed at restricting competition in the tender procedure. The Authority noted that the evidence collected suggested a different reconstruction of the events that led to the termination of bidding. In particular, it was found that there had been profound disagreement among Blu's shareholders, which reached a climax with the company's withdrawal while the bidding procedure was still under way. In the light of these considerations, the Authority ruled that there had been no violation of competition rules.

NOKIA ITALIA-MARCONI MOBILE-OTE

In March 2002, by way of an individual exemption, the Authority authorized an agreement between Nokia Italia Spa and Marconi Mobile Spa to set up a consortium to research, develop and market private mobile radio (PMR) communications equipment and services for the Italian Police forces. In particular, under the agreement the partners intended to develop a common interface that would allow the Italian police forces to use simultaneously both the current analogue radio communications systems and future digital systems based on TETRA technology. They also intended to use the consortium to participate in any tenders organized by the Ministry of the Interior for the supply of PMR systems in the South of Italy.

On the basis of the findings of its investigation, the Authority considered that the agreement was likely to restrict competition in the market for digital mobile radio communications equipment by permitting the coordination of the activities of Marconi, the leader in Italy with a strong position in a market characterized by an earlier technology due for replacement, and Nokia, an important potential competitor that could threaten the position of the incumbent firm by developing a technology capable of substituting the existing one. In view of the Authority's objections, the parties to the agreement notified some amendments aimed at reducing the scope of the consortium's commercial activities and increasing the possibility for third parties to have access — on transparent, fair and non-discriminatory terms — to copyrighted products resulting from its R&D activities. In particular, the parties declared that the joint marketing activity on the part of the consortium would be restricted to a number of tenders not exceeding one third (33%) of the total value of the contracts for the supply of digital mobile radio communications equipment to the Italian police forces.

The Authority considered that the foregoing changes reduced the scope of the commercial cooperation and limited it to what was strictly necessary to test the results of the consortium's R&D activities and therefore granted an individual exemption until June 2003.

INFOSTRADA-TELECOM ITALIA-ADSL TECHNOLOGY

In April 2001 the Authority concluded an investigation from which it emerged that Telecom Italia Spa had abused its dominant position in the upstream market for the supply of local loop services to pursue an overall strategy aimed at strengthening that dominant position at a time when the supply of infrastructure was being liberalized and at strengthening its position in the markets for data transmission and Internet access services. In particular, the

investigation showed the illicit nature of several Telecom Italia practices: *i*) refusal to supply competitors with direct analogue circuits that were part of the regulated supply; *ii*) marketing of final services based on ADSL technology without allowing competitors to operate on an equal footing in the markets for data transmission and Internet access services; and *iii*) marketing final services based on the more advanced x-DSL and SDH broadband technologies without allowing competitors to operate on an equal footing in the markets for data transmission and Internet access services.

The Authority considered that Telecom Italia's practices were to be evaluated in the following markets: the upstream market for the supply of local loop services and the downstream markets for data transmission and value added services and Internet access services. For all these markets the relevant geographical dimension was deemed to be the national market.

As regards the question of Telecom Italia's dominant position, the Authority considered that, in view of the company's de facto monopoly on public switching equipment and on the supply of dedicated lines, of the absence of alternative infrastructure (such as TV cable networks and public utility networks) and of the irrelevance of other technological solutions (given the limited development of wireless local loops and UMTS), the supply of local loop services was limited almost exclusively, and would be for some time to come, to that of Telecom Italia. The Authority also deemed Telecom Italia to be in a dominant position in the markets for data transmission and Internet access services in view of its leading role in terms of market share in each segment, vertical integration and de facto monopoly on the upstream market for the supply of local loop services. According to the Authority, this meant that Telecom Italia was the only company that, while operating in the downstream markets for services, also supplied its competitors with the local loop services they needed in order to compete in those markets.

The investigation revealed that Telecom Italia had put in place a strategy intended to exclude competitors and pre-empt the market by means of the following practices: *i*) in the local loop market it had refused, without a technical justification, to provide dedicated analogue lines in order to preserve its dominant position in that upstream market and, consequently, in the downstream market for final services and *ii*) in the markets for the final services of data transmission and Internet access it had violated the principle of non-discrimination by marketing final services based on the application of innovative technologies to the infrastructure of the public switched network without allowing competitors to re-sell the same services.

In view of the seriousness of these practices, Telecom Italia was ordered to pay a fine for each of the offences ascertained. The total amount of the fines was equal to about €9.5 million.

REPORT ON THE IMPLEMENTATION OF THE DIRECTIVES IN THE TELECOMMUNICATIONS FIELD

At the request of the Ministry of Communications, the Authority submitted a report on a draft decree of the President of the Republic on the implementation of Directive 97/51/EC. In the first place the Authority stressed the importance of transposing the directives in the telecommunications field as soon as possible, so as to create uniform technical and legal conditions throughout the Community for the supply of services and the access to and use of telecommunications networks.

The Authority also drew attention to the need to align the draft provisions with the Community principles concerning the economic conditions for the supply of leased lines laid down in Directive 92/44/EEC, which called for the tariffs for leased lines to be cost-orientated and transparent and required telecommunications organizations notified as having considerable market power to adopt an adequate system for calculating the cost of leased lines containing, *inter alia*, the direct costs incurred by the telecommunications organizations for their setting up, operation and maintenance, and for related marketing and billing activities. The Authority also highlighted the need to ensure a uniform and homogeneous legislation, with special reference to the regulatory activity of the Communications Authority, on the terms for the supply of voice telephony services, number portability and carrier preselection.

MONETARY AND FINANCIAL INTERMEDIATION

INSURANCE PRODUCTS AND PENSION FUNDS

ASSICURAZIONI GENERALI-CARDINE BANCA

In December 2001 the Authority concluded an investigation into a voluntarily notified agreement between Assicurazioni Generali, Adria Vita and Cardine Banca for the distribution of life insurance policies through the banking channel. The aim of the investigation was to verify whether the agreement was likely to create a foreclosure effect in a number of provincial markets, especially in the North-East of Italy.

The product market was taken to be the distribution of type III life insurance policies, which include those linked to investment funds. In geographical terms the relevant market was found to be the province, in view of the key role played by closeness to the distributor in the sale of life policies owing to the relationship of trust between intermediaries and potential policyholders. It was also found that supply conditions were not the same across the country, with both the participants in the market and the products insurance companies prepared for banks varying from province to province.

The analysis of the market positions of the parties to the agreement showed that in some provinces the banking group and the insurance company played a marginal role, while in others in which the parties to the agreement held significant positions, there were other leading companies that employed a variety of different distribution channels. The agreement was therefore deemed not likely to cause serious restrictions of competition in the provincial markets concerned.

REPORT ON POSSIBLE MEASURES AIMED AT COUNTERING THE INCREASES IN THIRD-PARTY CAR INSURANCE PREMIUMS

In April 2001 the Authority sent the Government a report on the competitive distortions that could have derived from the adoption of some measures aimed at countering the adverse effects on consumers of the increases in third-party car insurance premiums. The Authority stressed the fact that in a market in which consumers were under an obligation to acquire the product, adopting measures to provide tax relief for insurance companies or consumers or some other form of subsidy would inevitably lead to further price increases. According to the Authority, far from having any impact on the underlying structural causes, such measures would encourage insurance companies not to change their behaviour. In

particular, it noted that transferring resources to consumers would amount to a form of support for the companies concerned, since purchase subsidies reduced customers' interest in searching for the most advantageous policy and thus contributed to keeping prices high by crystallizing the distribution of customers among the companies in the market. It also noted that, *a fortiori*, granting tax relief to insurance companies, far from having any effect on the real causes of the high level of premiums, would sanction their inefficient behaviour and not produce any benefits for consumers in the longer run. The Authority therefore expressed the hope that the principal objective of any measures to alleviate the burden borne by consumers would be to provide an incentive to increase the efficiency of the industry by fostering the development of competition.

PROFESSIONAL AND BUSINESS SERVICES

REGIONAL FEDERATIONS OF ARCHITECTS' AND ENGINEERS' ASSOCIATIONS IN VENETO

In December 2001 the Authority concluded an investigation into the regional federations of the Veneto associations of architects and engineers, some provincial associations of architects and engineers and the National Council of Architects. The aim of the investigation was to determine whether some of the measures adopted by these bodies in defining the tariffs their members were to apply could be considered as restrictive agreements.

The legislation currently in force provides for the tariffs of architects and engineers to be established by the Minister of Justice, in agreement with the Minister for Public Works, acting on a joint proposal from the National Councils of Engineers and Architects. The minimum tariffs may not be waived, except that for the design of public works or works of public interest whose cost is wholly or partly borne by governmental bodies, they may be discounted by up to 20%.

The Authority found that some measures adopted by the above-mentioned associations had restricted competition in the market for professional services regarding the design and management of works awarded in Veneto for an amount below the threshold falling within the scope of Community rules. These measures required architects and engineers to pursue pricing policies that were less favourable to the public entity that had called for bids than was allowed by law. In addition, the possibility for architects and engineers to provide services was restricted where the provincial associations had issued intimations not to submit bids in tenders whose price conditions fell short of those the associations recommended.

The Authority accordingly ruled that these practices constituted agreements forbidden by Article 2 of Law no. 287/1990 and that they had substantially restricted competition in the relevant market.

SELEA-CHEMISTS' ASSOCIATIONS

In February 2002 the Authority concluded an investigation into several national and regional chemists' associations with regard to restrictive agreements in the sale of pharmaceutical-related products by pharmacies. These products were those other than pharmaceuticals — such as sanitary articles, alimentary integrators, special foods, articles for children and cosmetics — that were not distributed exclusively through pharmacies and

whose price was freely determined. The information and documents acquired during the investigation showed that the associations had entered into three types of restrictive agreements serving to: *i*) impose constraints on publicity by pharmacies; *ii*) limit the scope for pharmacies to provide home-delivery services; and *iii*) solicit uniform pricing behaviour for pharmaceutical-related products (in particular, the preparation and dissemination of price lists and invitations to comply with manufacturers' recommended prices and not to grant discounts on an individual basis).

In view of the special regulations governing pharmacies (regulated prices for drugs, controls on the number and location of outlets, limits on opening hours and shifts), the Authority stressed that the pricing of those products and the publicizing of pharmacies were the main means of competition left to chemists. It therefore considered that the agreements on prices and publicity were likely to eliminate all competition in the sector and violated Article 2 of Law 287/1990. Accordingly, the Authority fined the associations investigated a total of around €95.000.

REPORT ON THE RECRUITMENT OF STAFF FOR GOVERNMENT DEPARTMENT PRESS OFFICES

In July 2001 the Authority issued some comments on the statutory provisions on the recruitment of staff for government department press offices. In particular, it noted that under the rules currently in force, such staff did not have to be public employees but had to be enrolled in the national register of journalists.

The Authority deemed it necessary to draw attention to the fact that the foregoing registration requirement led to unjustified restrictions on the access of persons qualified to provide information services on behalf of government departments that were not justified by the interests to be protected. The Authority took the view that the tasks to be performed by the staff of a government department press office did not appear to be such that they could not be performed capably by non-journalists who were duly qualified by possessing one of the educational qualifications required by law. In addition, the Authority observed that the nature of the demand for these services did not justify making the activity the exclusive preserve of persons entered in the register of journalists since there was no information asymmetry in government departments' recruitment of persons to use in their press offices. In view of the distortion of competition to the benefit of a single category and the lack of any justification in the need to protect the general interest, the Authority expressed the hope that this legislation would be amended.

REPORT ON THE REGULATION OF THE ACTIVITY OF COMMERCIAL AGENTS AND REPRESENTATIVES

In October 2001 the Authority sent a report to Parliament and the Government with some comments on the statutory provisions requiring registration for persons wishing to perform the function of commercial agent and representative.

The Authority drew attention to the fact that Italian legislation in this field had long been superseded by Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents, which did not subject their activity to any conditions. The Authority also noted that no need existed to guarantee particular forms of protection for principals who intended to make use of the services of commercial agents. In fact, considering that the professional collaboration between agents and principals was

characterized, by definition, by a degree of stability, it argued that it was reasonable to presume that principals were able not only to identify exactly the type of service an agent was required to provide but also to evaluate the adequacy of the service provided in relation to their needs and hence to assess the effective ability of the agent. The Authority accordingly expressed the hope that the Italian legislation in this field would be brought into line with Community law in order to eliminate every possible restriction of competition.

REPORT ON THE CREATION OF A REGISTER OF PHARMACEUTICAL INFORMATION COMMUNICATORS

In November 2001 the Authority sent a report to Parliament and the Government drawing attention to the potential distortions of competition inherent in proposed legislation concerning the creation of registers of pharmaceutical scientific information communicators. In particular, it noted that the proposed provisions envisaged: *i)* the creation of provincial registers of such communicators in which those resident in each province would have to be entered in order to perform their activity; *ii)* deletion from the register of communicators found to have performed the activity outside the province in which they were registered; and *iii)* the obligation for pharmaceutical companies to refer to the register when recruiting communicators.

The Authority stressed two potential restrictions of competition inherent in the creation of the register: first, the introduction of an unjustified barrier to entry into the market for the services provided by pharmaceutical scientific information communicators and, second, the rigid segmentation of the market on the basis of communicators' province of residence. As regards the first aspect, the Authority was of the opinion that the creation of registers of communicators did not appear justified because their interlocutors were doctors who were not in a position of information asymmetry vis-à-vis the providers of the service. As for the provisions requiring each communicator to be entered in the register of the province in which he or she resided and the inclusion among the cases leading to deletion from the register that of communicators who performed their activity in other provinces, the Authority deemed that they were likely to result in a segmentation of the market. In conclusion, the Authority noted that similar registers were not to be found in other EU countries, so that the proposed legislation was likely to introduce a factor of rigidity in contrast with the Community principle of the freedom of circulation of workers, to give rise to a disparity of treatment and to result in an unjustified restriction on the market access.

REPORT ON THE ENTRY OF PART-TIME STATE EMPLOYEES IN THE REGISTER OF LAWYERS

In December 2001 the Authority sent a report to Parliament and the Government on the possible distortions of competition inherent in some bills aimed at introducing an incompatibility between exercising the profession of lawyer and working as a part-time government employee. In particular, it noted that the proposed provisions would amend the existing legislation, which allowed part-time public employees to be entered in professional registers and to carry on intellectual professions, and would make an exception just for lawyers.

The Authority pointed out that this bills would have a discriminatory effect insofar as they referred exclusively to lawyers and that the regulations of the lawyers activity appeared sufficient to guarantee the general interest in the proper exercise of the profession by lawyers

who were also part-time government employees. It noted in fact that such part-time government workers had to have passed the exam to practice as lawyers in order to be entered in the register and that the aim of the exam was precisely to guarantee clients that legal services were provided only by persons with certain qualifications.

REPORT ON THE REGULATION OF CONSULTING SERVICES PROVIDED BY EXPERIMENTAL ZOOPROPHYLACTIC INSTITUTES

In December 2001 the Authority issued some comments on the restrictive effects on competition of a provision of a law of the Tuscany region on the consulting services provided by experimental zooprophyllactic institutes. This rule allows these institutes to provide consulting services to the private sector, in competition with laboratories specialized in carrying out analyses. The Authority stressed that allowing the same entity to perform the public activity of carrying out controls and that of a private nature of providing consulting services gave experimental zooprophyllactic institutes an unjustified competitive advantage. It went on to point out that national law left broad scope for the regions to legislate on this matter and therefore expressed the hope that the Tuscany region would amend its law so as to prevent experimental zooprophyllactic institutes from enjoying an advantage that was likely to have the effect of restricting competition in the market for consulting services.

LEISURE, CULTURE AND SPORTS

CANAL PLUS-STREAM

In December 2001 the Authority concluded, with the decision that there were no grounds for further proceedings, an investigation into the acquisition of a 75% interest in the share capital of Stream Spa by Canal Plus, both directly and indirectly via its subsidiary Telepiù.

The relevant product market for the evaluation of the transaction was identified, in accordance with numerous national and Community precedents, as the supply of pay-TV services. In view of linguistic differences and disparities in consumers' preferences for the various categories of programmes, the Authority deemed that the relevant geographical market was the national one. The concentration was also evaluated in the light of its potential effects on the national markets for television sports and premium film rights for pay-TV, on the market for administrative and technical services for pay-TV and on the market for interactive digital television services.

The Authority noted that the concentration would have led to the Canal Plus group, a multinational firm with a high degree of vertical integration (from the upstream market of film production and distribution, to the downstream market of conditional access systems) becoming the only pay-TV operator in Italy. This would have risked causing a significant and lasting reduction in competition in the Italian market that would have been seriously harmful for consumers in view of the absence of incentives to improve the quality and variety of services offered, and for the competitiveness of prices and other commercial conditions.

The Authority also noted that the concentration would have hindered potential competition by making it more difficult for new operators to enter the market. In this respect the Authority pointed out that the transaction would have raised the already high entry

barriers attributable to Telepiù's extensive and long-lasting exclusive rights to sports events and premium films and to the effect of increasing the loyalty of its substantial subscriber base. The transaction would therefore have allowed the Canal Plus group to acquire the remaining sports and film rights held by the company to be acquired, thereby rendering unavailable to any new entrants the contents that traditionally represent the indispensable basis with which to operate in the pay-TV market. In evaluating the entry barriers, the Authority also considered that the Canal Plus group owned the conditional access system that de facto would have become the only standard used in Italy and whose availability was necessary in order to offer pay-TV services.

It thus did not appear possible for the effect of the concentration, consisting in the reduction of the pay-TV market to just one operator, to be attenuated by the existence of a potential competition, especially in view of the entry barriers that the transaction would have made even higher in terms of the exclusive rights owned by the acquirer and the bargaining strength it would have in purchasing the transmission rights for premium contents. As a consequence of the objections raised by the Authority, Canal Plus and Telepiù announced their withdrawal of the notification of the concentration.

SEAT PAGINE GIALLE-CECCHI GORI COMMUNICATIONS

In 2002 the Authority evaluated Telecom Italia Spa's compliance with the conditions it had imposed in January 2001 for the authorization of Seat Pagine Gialle Spa's purchase of the Tmc and Tmc2 (now La Sette) TV channels from Cecchi Gori Communications Spa. In particular, one of the conditions required Telecom Italia to grant telecommunications operators that applied, with effect from 1 April 2001 (subsequently postponed to 10 July 2001), access to all the infrastructure in its possession so as to permit the laying of optical fibre cables for the supply of interactive and multimedia services.

The findings of the investigation showed that the delays in carrying out the order were not due to Telecom Italia having pursued a strategy aimed at excluding competitors but to the difficulty of identifying the steps to be taken in order to fulfil the obligation and to technical problems that were overcome during the course of the investigation.

CINEMA

AGREEMENT BETWEEN FILM DISTRIBUTORS AND CINEMA OPERATORS

In July 2001 the Authority concluded an investigation into some course of conduct followed by film distributors, cinema operators and their respective associations aimed at fixing the contractual conditions for renting films, cinema ticket prices and ways of sharing information between distributors and operators on the box office receipts and audiences of each cinema in Italy.

In its investigation the Authority focused first on the framework agreement concluded in 1993 by the national association of cinema operators (ANEC) and the national union of film distributors (UNDF, subsequently renamed UNIDIM), to which the Italian federation of multimedia audiovisual distributors-editors (FIDAM), subsequently adhered. The purpose of the agreement was to regulate film rentals. The Authority deemed it to be a vertical agreement between trade associations serving to fix an intermediate price, although it was called a

maximum price, and as such constituted a form of coordination of the conduct of the member firms with reference to a key competitive variable. According to the Authority, the agreement was likely to restrict competition substantially in view of the fact that the associations involved represented almost all the film distributors and cinema operators present in Italy. The investigation also found that the association of cinema operators and the associations of film distributors had taken a series of steps between 1991 and 1999 aimed at standardizing cinema ticket prices and promotions.

The seriousness of the agreement, in view of its anticompetitive purpose and its having been in force for nearly ten years and involved the bulk of the industry, the Authority imposed the following fines: 2% of members' subscriptions for ANEC and UNIDIM and 1% in the case of FIDAM since its violation had been less long-lasting, for a total of around € 20.000.

PUBLIC PROCUREMENT

REPORT ON THE SELECTION PROCEDURES FOR THE PRODUCTION OF ADVERTISEMENTS OF AN INSTITUTIONAL NATURE

In January 2002 the Authority published a report on some of the provisions of a proposed Presidential Decree on the criteria for choosing the firms to be invited to bid for the production of advertisements of an institutional nature for government departments. Specifically, it noted that the proposed decree required that bidders' financial soundness be demonstrated by their total turnover from advertising campaigns carried out in the three years preceding that of the tender.

The Authority considered that using turnover as the only criterion for demonstrating financial soundness was likely to limit the participation in tenders of firms that could provide other appropriate attestations of their financial solidity and would exclude, in particular, firms entering the market for the first time. It therefore expressed the hope that, in accordance with national and Community rules, provision would be made for additional criteria.

LOCAL PUBLIC SERVICES

REPORT ON THE REGULATION OF LOCAL PUBLIC SERVICES

In October 2001 the Authority sent Parliament and the Government a report drawing attention to the potential competition-distorting effects of some of the provisions of the Finance Bill for 2002 concerning the regulation of local public services. More specifically, these rules provided for the local authorities to be allowed to separate the activity of supplying services from the ownership and operation of the related networks.

The Authority pointed out that in the production of local public services it was normal for a number of different suppliers to be allowed to compete. It therefore hoped that the separation between the operation of networks and the supply of services would remain not merely a possibility but be clearly preferred in the law.

As regards the operation of networks, the Authority noted that the bill left intact the possibility for local authorities to entrust networks and infrastructure directly, without recourse to public tender procedures, to ad hoc bodies set up in the form of special companies

(*aziende speciali*) or consortia of public-law entities or in alternative by means of tenders. The Authority took the view that, in order to permit a more effective use of competition *for* the market, the law should give preference to the award of contracts by means of public tender procedures.

As regards the possibility of awarding contracts for the supply of services of “*entrepreneurial importance*” to companies selected by means of tenders, the Authority noted that since this implied competition *for* the market it was to be considered a valid solution only for sectors in which objective technical and economic aspects of the activity justified limiting the number of operators. Where this was not the case, the Authority argued, services should be supplied with all the operators competing *in* the market, as provided for by Article 86.2 of the EC Treaty, on the basis of which competition between all possible operators (competition *in* the market) was the rule, while regimes that provided for a few operators or just one to have special or exclusive rights were the exception.

The report also emphasized that for services of entrepreneurial importance, rather than being considered merely an option, public tender procedures should be made the rule, both for the operation of networks and for the supply of services. Otherwise, the Authority noted, local authorities would still be able to entrust such services directly to *aziende speciali* and joint ventures without having to organize tenders, thereby excluding competition *for* the market.

As for the existing situation, the bill envisaged that the rights and franchises awarded to incumbent providers of local public services would remain until their original expiry dates. In this respect the Authority expressed the hope that limits would be set on the duration of rights and franchises awarded without the use of public tender procedures since it argued that long-lasting awards tended to hinder or prevent liberalization and permitted the automatic consolidation of the status quo.

In conclusion, the Authority stressed the risks inherent in giving priority to privatization over liberalization and in prolonging the provision of services awarded without the use of public tender procedures, which could lead to public monopolies being replaced by private monopolies.

SUNDRY

REPORT ON THE REFORM OF THE REGULATION AND PROMOTION OF COMPETITION

In January 2002 the Authority sent Parliament and the Government a report on the “Reform of the regulation and promotion of competition”. The reform of the regulation of economic activities in the last decade had led in various countries to a widespread reduction in legal obstacles to the working of the market and brought a significant opening of markets to competition. Italy played a positive part in this process, with important results in terms of reducing the number of regulatory constraints and improving the quality of legislation. In order to ensure the continuation of the process and its extension to sectors hitherto out of the mainstream of liberalization, it was necessary to have a clear overall picture that would provide guidance, in the legal and economic spheres, in preparing a systematic and pro-competitive revision of the existing legislation. To this end, after providing a reference framework serving to set the general problems of regulation, the Authority identified some shortcomings of the present regulatory arrangements and indicated possible measures to adopt to foster competition.

The report considers four areas requiring intervention: regulatory procedures; the ownership and structure of firms; the reduction of barriers to entry; and the removal of unjustified regulatory restrictions on the ways firms conduct their business.

As regards regulatory procedures, the Authority stressed the importance of making the promotion of competition an explicit objective of new legislation. In addition, the Authority drew attention to two important requirements that needed to be taken into account in the process of formulating and revising the rules: the participation of those to whom they would apply through appropriate forms of consultation (with the introduction of mechanisms of the notice-and comment type); and the evaluation using cost-benefit analysis of the proportionality and adequacy of regulatory measures likely to have an impact on entrepreneurial activity. The Authority also pointed to the need for a pro-competitive stance in the legislation produced at the regional and local levels, which was bound to increase in importance under the new federalist legal order and stressed the need to ensure that it did not become excessive or over-restrictive by comparison with supranational and national law. To this end, the Authority expressed the hope that mechanisms would be put in place for the systematic comparison of decentralized regulatory procedures in order to encourage the adoption of best practices.

As regards the ownership and structure of firms, the Authority, while expressing appreciation of the scale and scope of the privatization programme carried out in Italy over the last ten years, highlighted the need for privatizations to be preceded by careful analysis of the economic characteristics of the sectors involved, so as to take the necessary liberalization and restructuring measures first and create a truly competitive context. According to the Authority, such preliminary action was particularly desirable for local public services, which had been affected to a lesser extent by Community liberalization measures. With special reference to services of public utility, the Authority reaffirmed that where monopolies existed, it was necessary to prevent the monopoly operators from improperly extending their dominant position to newly-liberalized segments of the market and hindering the entry of competitors. In order to eliminate the incentive for incumbents to behave in this way, the Authority hoped that structural measures would be taken to separate the ownership of the components operating in competitive and natural monopoly regimes, in line with the recent recommendation of the OECD Council.¹ It noted, moreover, that with the separation of ownership, firms were less able to dissimulate the costs of regulated activities and that this made the task of the control authority much easier because it only had to supervise firms' market power and not prevent them from engaging in exclusive practices.

Particular attention was paid in the Report to the introduction of so-called antitrust ceilings to prevent integrated companies from serving more than a given share of the liberalized part of the market. According to the Authority, measures to promote competition were generally more effective when they did not require constant monitoring. It was therefore of the view that such ceilings should be used only temporarily to force companies in a dominant position to dispose of plants, after which they should be abolished.

As regards entry barriers, the Authority noted that, despite the progress made with recent reforms, Italian law still imposed a variety of quantitative and qualitative restrictions that limited access to some markets. According to the Authority, quantitative constraints,

¹ OECD, *Council Recommendation concerning Structural Separation in Regulated Industries*, C(2001)78.

consisting in the direct or indirect determination of a maximum number of operators (such as granting a reserve to a single company, fixing a minimum distance between outlets and rationing the number or surface area of outlets) did not foster the fulfilment of objectives of general interest. It had found that, contrary to what the protected categories frequently claimed, such restrictions did not in themselves guarantee correct information on operators' qualifications nor prevent the supply of poor quality services or opportunistic conduct, while they gave rise to high social costs by imposing a rigid structure of production and causing higher prices for consumers. The Authority consequently considered that quantitative supply restrictions should be abolished except where the available resources were objectively scarce (radio frequencies, public land, etc.), when the scarce resource should in any case be allocated by means of tenders. Turning to qualitative restrictions, the Authority stressed that their introduction should be based on an overall evaluation of the risk of a significant decline in quality in their absence, of the resulting harm to consumers and of the cost and probability of success of public intervention. In its examination of the legal instruments available for regulating the access to markets, the Authority deemed that it was necessary to eliminate administrative franchises that were not justified by the existence of a reserve granted to the authorities (as in the case of radio and television and transport services) and to replace them with non-discretionary authorizations.

In addition to entry barriers, the Report analyzed other widespread regulatory constraints that impinged on business activity, such as the setting of prices and tariffs, restrictions on the range of eligible products or the geographical area of operations, and the imposition of maximum opening hours and minimum quality standards and prices for services. The Authority expressed the hope that all the rules fixing minimum prices for the sale of goods and services would be eliminated, including the recent provisions regarding sales below cost and those restricting the size of discounts on publishers' recommended prices. According to the Authority, fixing minimum prices did not meet the need to ensure suppliers' professional and technical ability since it did not prevent poorly qualified suppliers from continuing to supply low-quality services. As for the fixing of maximum prices, it argued that this was a practice to be avoided, except for monopoly public services or where there was a special need to protect consumers (as in the case of taxi services), since it often led firms to collude by aligning their prices at the highest level set by the regulator.

The Report's analysis of restrictions on the range of eligible goods showed that they were likely to result in higher costs and prices and less innovation, since they eliminated the possibility of exploiting economies of scope and tended to rigidify the structure of the market. The Authority therefore concluded that such restrictions appeared justified only if they prevented socially undesirable effects (e.g. in terms of hygiene, conflicts of interest or market stability).

The Authority also pointed out that imposing uniform minimum standards for the quality of goods and services, a solution that was generally invoked in the general interest where there were large information asymmetries between service providers and customers, tended to increase their cost and the related prices. Rather than forbidding the marketing of low-quality products, the Authority suggested that greater recourse should be made to self-regulation.

Similarly, the Authority considered that universal service requirements should be imposed only where, in their absence, the supply produced by the market would be less than what would be "socially desirable", bearing in mind that this concept changed over time. In

this connection, the Authority also pointed out that it was necessary to decide whether the additional cost such requirements entailed had to be borne by national or local taxpayers or divided among all or some of the operators involved, in which case it would be preferable not to impose an excessive burden on new entrants to the market and to ensure that competing firms did not receive unjustifiably different treatments.