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## COMPETITION POLICY AND REGULATORY REFORM: LEGISLATIVE DEVELOPMENTS IN 2007



## ANTITRUST ENFORCEMENT IN 2007



## CONSUMER PROTECTION AND MISLEADING ADVERTISEMENT IN 2007

# COMPETITION POLICY AND REGULATORY REFORM: LEGISLATIVE DEVELOPMENTS IN 2007

## INTRODUCTION

Starting in 1990, the Antitrust Authority has addressed to Parliament, the Government and local authorities more than 400 reports, formulating a number of proposals and recommendations on liberalisation and pro-competitive regulation in many sectors of the Italian economy. The common underlying assumption of such advocacy reports is that the prevalent structure of incentives should aim at making sure that both companies and individuals are rewarded for merit.

The Authority's reports clearly show that more competition does not entail a fully unregulated market. On the contrary, it leads to a rationalisation of regulatory constraints and to the ease of bureaucratic restrictions that are not essential to the pursuit of significant public interests. Competition and regulation are not, in other words, mutually contradictory; they are complementary policies that supplement each other in an integrated manner.

Some important advances have already been made towards a less rigid economic system, eliminating rules that are not justifiable in general interest terms. Better regulation initiatives have mainly involved private services, although a lot remains to be done in this field. In fact, as a consequence of diffuse and unjustified restrictive regulations, Italy has not succeeded in modernising the service sector at the degree achieved in other countries. Services in Italy are still mainly characterised by small businesses, widespread inefficiencies and a low degree of innovation. Low productivity growth has kept prices high by adding inflated costs to the value creation chain. What is required is a strong modernisation of the service sector, starting from a thorough review of its regulatory framework. The resulting productivity gains will lead to a structural reduction in prices which will restore purchasing power to citizens, to the benefit of the Italian economy.

In 2007, several legislative provisions were adopted, affecting a variety of categories and economic interests, including liberalisation, regulatory and simplification measures. Their main aim is to give an effective boost to economic activity, while reinforcing some fundamental consumer rights.

The most significant innovations concerning market regulation are summarised below. Afterwards, the new regulations concerning unfair commercial practices and those governing collective damages actions will be briefly described.

# LIBERALISATION, CONSUMER PROTECTION AND ADMINISTRATIVE SIMPLIFICATION

## CONSUMER-PROTECTION MEASURES IN LAW 40/2007

Law 40 of 2 April 2007 concerning the "Confirmation, with amendments, of Decree 7 of 31 January 2007 containing urgent measures for the protection of consumers, the promotion of competition, the development of economic activities and the establishment of new businesses" lays down measures designed to remove the obstacles hindering economic development in Italy and implements many recommendations formulated by the Authority through its consultation and reporting activities.

Chapter I of Law 40/2007 addresses inequalities in contractual power in market sectors where competition is structurally weak, which can result in significant consumer detriment. To this end, the law extends the scope of information requirements and fosters fairness in commercial practices.

In the communications sector, the new measures aim to ensure that final users are provided adequate information on actual prices and are enabled to compare competing offers on the market. Therefore, the law prohibits the levy of additional charges to top up prepaid cards, as well as the imposition of deadlines for the use of the credit purchased. Consumers should be informed of all elements relevant to the price structure of the services on offer, in order to assess the alternatives available on the market. Competition is fostered by facilitating consumer switching to other market players. Although these measures are justified by the weak competition dynamics in the sector, legislative (rather than merely regulatory) intervention on the price structure may introduce unwelcome elements of rigidity, since – were the cost structure to change in the future - companies and regulatory authorities may be prevented from selecting the optimal tariff.

The goal of empowering consumer choice through more transparent prices and contractual conditions also underpins the measures adopted for the fuel, air transport and food sectors. In the case of fuel, the law requires national road network and motorway operators to use the public information equipment installed along the roads, as well as phone networks, to inform users of the fuel prices applied by service stations on given stretches of motorway and non-urban main roads. In the air transport sector, the law provides that the advertised price should include all charges to be borne by consumers, whereas any limitation of the offer (including availability of tickets, the timing of its validity or specific booking arrangements) should be indicated clearly in the advertisement. As regards food products, the law provides that the minimum shelf-life or expiry date should be clearly legible and indelible. It should also be displayed in a way that is easy for consumers to find and read.

Although included in the consumer-protection measures contained in Chapter I of Law 40/2007, various provisions concerning the insurance sector also have the effect of fostering competition among businesses. Some measures to strengthen competition in the market of compulsory third-party liability motor insurance were already introduced

in 2006, banning exclusive distribution clauses. The Law 40/2007 extends this prohibition to all damages insurance, in order to increase competition in the sector to the benefit of consumers and insurance agents. The same legislation also intends to protect consumers by limiting the scope for insurance companies to apply a less favourable risk class for third-party motor insurance. Finally, in order to address the issues of information asymmetries and switching costs, the Ministry for Economic Development is entrusted with the creation of an information service enabling consumers to make reliable comparisons of competing rates for their respective user-profiles.

New consumer protection measures have been adopted in the banking sector as well. In this respect, the existing provisions governing early repayment, portability and substitution of mortgages have been amended. Early repayment penalties have been eliminated, albeit only for new mortgages to finance the acquisition or renovation of residential buildings or buildings where natural persons carry out their economic activity. For existing mortgages, maximum early repayment penalties should be agreed between the Italian Banking Association and consumer associations, whereas the Bank of Italy may step in if an agreement is not reached. Mortgage portability is made simpler and costless, by providing that the old bank may not refuse to accept the substitution by invoking contractual terms and that any contractual clauses obstructing the substitution or making it more burdensome are void. Such provisions facilitate the transfers of banking relationships at the initiative of mortgage holders (thus enabling consumers to reap the benefits of competition between banks) and redress to a certain extent the imbalance in contractual power between consumers and their banks.

### COMPETITIVENESS MEASURES IN LAW 40/2007

Chapter II of Law 40/2007 introduced liberalisation and de-regulation measures to foster business development and promote competition Some restrictions were eased or eliminated altogether, including supply restrictions, minimum distances, opening hours and residency requirements. Other measures promote administrative simplification, with the aim of facilitating business start-ups and growth.

The previous model, whereby market entry was often subject to mandatory licenses and restrictions on the number of outlets, has been replaced by a mere "start-of-business" declaration, although specific professional requirements may still be required on an ad hoc basis to protect other public interests in the sector. For instance, hairdressers are now only required to submit a "start-of-business" report to the town council's "one-stop shop", whereas all restrictions regarding the weekly closing day and the minimum distance between businesses or other numerical parameters established by local authorities have been eliminated. Hairdressers are still required to hold the appropriate qualifications and comply with the town planning and health and hygiene requirements applicable to their premises.

The establishment of cleaning, pest-control and porterage businesses is also subject only to a "start-of-business" declaration to be submitted to the Chamber of Commerce.

Cleaning and pest-control businesses are still required to meet compulsory integrity and economic capacity requirements. Porterage, on the other hand, has been completely deregulated. The law also removed mandatory prior authorisations as well as numerical parameters and residency requirements for tourist guides and tour leaders. They are still required, however, to hold the professional qualifications requested by regional laws. Finally, all restrictions on the number of driving instructors have been lifted. The pre-existing authorisation regime has been replaced by the submission of a start-of-business declaration to the local government. Moral and professional requirements, as well as financial capacity and organisational standards set forth in the current legislation, must still be fulfilled.

The "Single notification for establishing a business" introduced by Law 40/2007 simplifies the regulatory framework within which businesses operate, allowing for new businesses to be set up in just one day. In particular, the law provides that anyone intending to set up a business must submit a single notification to the business register, using information and communications technology (ICT) or on electronic support. This simple procedure is sufficient for all national insurance, welfare and fiscal purposes and enables the undertaking to obtain a tax code and value-added tax (VAT) number for the business. The business registrar issues a receipt that serves as valid certification to set up the business immediately, and informs the competent public offices that the notification has been submitted. These offices immediately inform the interested party and the business registrar, using ICT channels, of the tax code and VAT registration number. Within the next seven days they also provide the interested party with any other completed registration information. The notification, reception and administrative records are handled electronically and transmitted using ICT.

The Law 40/2007 was also meant to enhance the competitiveness of the natural gas market by increasing the volumes of gas exchanged and traded. Legislative provisions are designed to create more liquidity in the supply of gas on the domestic market, pending the opening of a gas "exchange", to the benefit of businesses and consumers. The royalties owed to the state by concession holders for the exploitation of gas fields will be calculated as quantities of natural gas, which concession holders will be required to place on the market, while the revenues will be paid to the Treasury.

In order to ensure that the contracts and procedures adopted for work on the high-speed rail system comply with EU and domestic law, Law 40/2007 provides that the concessions which Ente Ferrovie and R.F.I. (respectively, the state railway and network operators) issued directly to T.A.V. Spa (the company set up to design and build the high-speed lines) in 1991-92 to build stretches of line on Italian territory should be withdrawn. The effects of such withdrawal extend to all connected agreements signed by TAV with general contractors. Following this withdrawal, contracts for these works can now be awarded through competitive tenders. The law also envisages that the compensation paid by the administration to the parties concerned is limited to the actual damage, i.e. to the costs actually incurred for planning and other activities prior to the construction work already undertaken.

**THE COMPLETE OPENING OF THE ENERGY MARKETS**

Directives 2003/54/EC and 2003/55/EC[1] set the deadline of 1 July 2007 for the complete opening of national energy markets. In this light, Law 125 of 3 August 2007 concerning the "Confirmation, with amendments, of Decree Law 73 of 18 June 2007 containing urgent measures for the enforcement of Community provisions concerning the liberalisation of the energy markets" laid down important provisions for the opening of the electricity market. At the same time, it promotes the development of an effective competitive dynamic and provides adequate protection for consumers in the liberalised market, along three lines of intervention: i) corporate unbundling for operators in the sector; ii) the introduction of new forms of protection for smaller users; and iii) obligatory informational requirements to be met by operators in the sector.

As regards corporate unbundling, the law envisages that from 1 July 2007 electricity distribution should be unbundled from sales activities for operators with networks supplying at least 100,000 consumers. As a result, vertically integrated companies which until that date operated as a single corporate entity had to split and transfer to one or more separate undertakings any goods, transactions, assets and liabilities relating to sales activities.

Corporate unbundling in the energy markets had been envisaged for natural gas, but not for electricity, the only exception being Legislative Decree 79 of 16 March 1999, which had required Enel to set up separate companies for generation, distribution and sales and the exercise of ownerships rights of the national transmission grid. In addition to unbundling for electricity distribution companies, Law 125 of 3 August 2007 also gives the Authority for Electricity and Gas the power to adopt "provisions for the functional unbundling of gas storage, under Directives 2003/54/EC and 2003/55/EC". These directives impose corporate unbundling for transmission and distribution operators in the electricity market and for transport and distribution operators in the gas market. In so doing, they prescribe not just the establishment of separate companies, but also the substantive independence of these companies in carrying out their functions (functional unbundling)[2]. Hence, transmission system operators belonging to vertically integrated companies must be independent from other activities in the supply chain on the basis of minimum criteria set out in the directives in question. This applies to both their legal form and their organisation and decision-making powers. Although a number of terminological uncertainties makes the scope of Law 125/2007 somewhat unclear, it contributes to ensure the correct functioning of the market in compliance with EU

[1] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC "Statements made with regard to decommissioning and waste management activities", Official Journal L 176 of 15 July 2003; and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, in Official Journal L 176 of 15 July 2003.

[2] Articles 10 and 15 of Directive 2003/54/EC and Articles 9, 13 and 15 of Directive 2003/55/EC.

provisions by preventing any discrimination, cross-subsidies and distortions of competition.

The issue of corporate unbundling in the energy sector to foster competition had already been addressed in another significant legislative initiative last year. This was Law 46 of 6 April 2007 concerning the "Confirmation of Decree Law 10 of 15 February 2007 containing provisions for the implementation of community and international obligations" undertaken by Italy. It amended Article 1.34 of Law 239 of 23 August 2004 concerning the "Reorganisation of the energy sector and enabling authority to the Government for the reorganisation of the current provisions governing energy" (the so-called Marzano Law) and provided that companies operating in the sale, transport and distribution of electricity and gas which are concession-holders or have been entrusted with local public services or networks may only engage in so-called "post-meter" services through separate companies. This provision is supported by the ancillary obligation to make available to competitors any information and knowledge acquired during the activity conducted under monopoly conditions or in a dominant position.

In addition to the unbundling requirements, Law 125/2007 also provides adequate protection for consumers during the transition to the free market system. In particular, users who acquired eligible status with effect from 1 July 2007 are given the right to withdraw from their existing supply contracts as captive customers, under conditions established by the AEEG, and to choose a supplier other than their distributor, thus ensuring their ability to switch. In keeping with the EU universal service provisions, Law 125/2007 envisages two new electricity sales schemes: the enhanced protection service and the "supplier of last resort" service. The former is available to domestic and non-domestic low-voltage customers and small firms who have not exercised their right to withdraw from their existing supply contract, i.e. who have not entered into a supply contract in the free market. The conditions applied to these customers in terms of quality and prices correspond to those set by the sectoral regulator for the captive market.

For customers who at any time do not have an electricity supplier and are not included in the enhanced protection service, Law 127/2007 provides the so-called "supplier of last resort" service. Companies providing the service are selected through local competitive procedures. They get electricity on the wholesale market and set prices independently. Until the "supplier of last resort" service is operational, distribution companies are required to guarantee continuity of supply under publicly available and non-discriminatory conditions and prices. Special tariffs may be set by the Minister for Economic Development for economically disadvantaged users or those with certain medical conditions.

Finally, Law 127/2007 regulates information requirements to promote transparency and redress information asymmetries in the sector. First of all, in order to allow undertakings operating only in sales to formulate appropriate commercial offers and manage supply contracts, the sectoral regulator may define the conditions under which electricity or natural gas distribution companies must guarantee timely and non-

discriminatory access to the last year's consumption data for customers connected to their network[3]. This provision aims to reduce the competitive advantage enjoyed by sales operators belonging to companies integrated with distributors. Secondly, the law requires electricity sales companies to include information on the composition of the energy mix used to generate electricity over the last two years in bills and promotional material sent to their final customers. It also requires them to indicate any available sources of information on the environmental impact of generation, for energy saving purposes. Law 127/2007 also empowers the Minister for Economic Development to adopt initiatives to promote the security of the electricity system and price comparability for consumers. These include the definition of minimum information standards that must be accessible through bills, and the publication of comprehensive tables showing the prices recorded on the free market, broken down by customer category and reference price.

## THE NEW PROVISIONS GOVERNING UNFAIR COMMERCIAL PRACTICES

Legislative Decree 146 of 2 August 2007, which transposes Directive 2005/29/EC into domestic law, gave the Antitrust Authority new competences in matters concerning commercial practices between businesses and consumers. The new provisions have been incorporated in the Consumer Code[4].

The new provisions apply to "commercial practices", defined as any act, omission, course of conduct or representation, or commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers. The legislative protection hinges upon the concept of "consumer", i.e. any natural person who, in the commercial practices in question, is acting for purposes which are outside his trade, business, craft or profession. The scope of application of the new provisions is therefore wider – from an objective point of view - than the pre-existing legislation on misleading advertising, since the notion of commercial practice includes that of advertisement. This approach, inspired by Community law, merits favourable consideration, since it extends the perimeter of protection to forms of business conduct that are liable to distort the economic behaviour of consumers but do not fall squarely within the notion of advertising. From a subjective standpoint, limiting the scope of application of the law solely to natural persons acting for purposes outside their own business, trade or profession seems consistent, in systematic terms, with the general approach taken by the Consumer Code. Indeed, the protection of the interests of businesses adversely affected by misleading or unlawful comparative advertising has been removed from the Consumer Code and entrusted to separate ad hoc provisions contained in Legislative Decree 145 of 2 August 2007.

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[3] Authority for Electricity and Gas Resolution 157 of 27 June 2007, published in Official Gazette no. 164 of 17 July 2007.

[4] Legislative Decree 206 of 6 September 2005.

The new provisions prohibit unfair commercial practices. A commercial practice is deemed to be unfair when, contrary to the requirements of professional diligence, it materially distorts or could distort the economic behaviour of the average consumer whom it influences or to whom it is addressed. When the commercial practice is directed at a given target group, its unfairness is appraised in relation to the average member of that group. The legislator views the concept of unlawful commercial practices as the undue distortion of consumers' decision-making processes and the resulting impairment of their ability and freedom to make informed market choices. The distortion to consumers' economic behaviour thus occurs independently of any purchase of goods and services.

Professional diligence is defined as the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity. Reference to the average consumer as a parameter to evaluate unfair commercial practice does not seem likely to significantly affect the practice already followed by the Authority in matters of misleading advertising. The law refers explicitly to the need to ensure that those consumers most exposed to the risks connected with unfair commercial practices are adequately protected. It envisages that where a commercial practice – which in abstract terms has the potential to reach wider groups of consumers – exerts its adverse effects on a clearly identifiable and particularly vulnerable target, its unfairness must be assessed in the light of the average member of such group.

Misleading and aggressive practices are specific categories of unfair practices. Commercial practices are considered misleading when they are likely in any way to mislead the average consumer and therefore distort their decision-making process. Such deception may concern the characteristics of the product (including its very existence, its nature, the risks connected with its use, and its fitness for the purpose), its price, the nature and circumstances of the commercial practice or the rights of the consumer. A commercial practice can also be misleading when it fails to provide the average consumer with the information they need to make an informed commercial decision. In order to assess the relevance of the missing information, all the circumstances of the case at stake, as well as the limitations of the medium, must be taken into account. Failure to comply with mandatory information requirements set by EU law entails the unfairness of the commercial practice under scrutiny. In enforcing the relevant provisions, the different government departments involved in suppressing unfair commercial practices may need to work in close coordination to avoid unnecessary duplication and ensure that administrative action is efficient.

Finally, the following are considered unfair: 1) commercial practices that fail to identify their commercial intent if not already apparent from the context; 2) practices relating to products that could endanger the health and safety of consumers and, by omitting to inform them of this danger, could lead them to neglect the normal rules of caution and vigilance; 3) practices likely to influence children or minors and which may, even indirectly, threaten their safety. These cases too were already governed by the law on

misleading advertising, whereby the Authority has acquired significant enforcement experience over the years.

By contrast , the category of aggressive commercial practices, as a second type of unfair practice, is a new feature with respect to the previous legislation. Commercial practices that could considerably restrict the average consumer's freedom of choice and therefore distort their decision-making process, and which involve harassment, coercion or other forms of undue influence, are deemed to be aggressive. The aggressiveness of a commercial practice should be assessed taking into account its nature, timing, method and persistence; the use of threatening or abusive language or behaviour, including the threat of rash or otherwise unfounded legal action; the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement; and any burdensome or disproportionate obstacle used by the trader to prevent consumers' exercising their contractual rights. The inclusion of these types of conduct under the notion of unfair commercial practices is justified from a systematic point of view, since misleading and aggressive practices are both detrimental to the same public interest, namely the protection of economic operators' freedom of choice.

Finally, the law lists some commercial practices that must in all circumstances be considered either misleading or aggressive. The Authority will therefore prohibit the use of practices included in these "blacklists", without any need to verify their potential to distort the commercial behaviour of the average consumer targeted by them.

Directive 2005/29/EC comprehensively harmonised the national legislative frameworks governing unfair commercial practices. It did not leave member states the option of retaining existing legislation or introdu cing stricter provisions to provide greater protection for consumers. As a result, businesses may draw up and use the same marketing strategies at European level without being obstructed by differences between the applicable national laws, a development which fosters market integration.

**PROCEDURAL ISSUES**

Legislative Decree 146/2007 considerably extends the Authority's investigative and sanctioning powers. The Authority has also been designated competent body to apply Community Regulation 2006/2004/EC[5] on cooperation by the national authorities responsible for the enforcement of consumer protection laws. In enforcing these provisions, the Authority may therefore ask for assistance from consumer protection bodies in the other countries of the European Union, or assist them itself, in investigations into possible cross-border infringements of the provisions governing unfair commercial practices. It will also be possible to adopt enforcement measures on behalf of other authorities or coordinate their investigative activities, thus ensuring a

[5] Regulation 2006/2004/EC of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), published in Official Journal no. L 364 of 9 December 2004.

more rational use of the available resources and more effective action to suppress illicit practices.

From the procedural point of view, the most significant innovation introduced by Legislative Decree 146/2007 concerns the possibility for the Authority to act ex officio to verify whether a given commercial practice is unfair. As a result, the Authority may now exercise its powers without necessarily receiving a request to take action, as was the case under the previous legislation. The power to act ex officio does not rule out the possibility for any party to ask the Authority to take action against commercial practices it deems to be unfair.

Under the regulations on investigative procedures, adopted by the Authority on 15 November 2007[6], the Authority may already at the pre-investigation stage invite in writing a business to desist from conduct that is potentially unfair, if it deems that there are sound reasons to consider that the commercial practice in question is indeed unfair. This power, which is explicitly included by Regulation 2006/2004/EC amongst the minimum powers available to the competent authorities to apply consumer protection provisions in cross-border settings, will enable less serious cases to be decided more quickly. This will result in a reduction in the number of administrative proceedings and related disputes. The Authority will therefore be able to concentrate its resources more usefully on suppressing commercial practices that have a more serious impact on consumers' welfare.

The Authority may also require anyone who has information and documents relevant to the enquiry to hand them over and impose a pecuniary fine if they fail to do so. It may also obtain information and documents through inspections. Previously, the power to forcibly ask for documents or gain access to the business's premises was only available to identify the advertiser and to obtain a copy of the advertisement under scrutiny.

Finally, the Authority is given the power to obtain commitments from the undertaking concerned to end the alleged infringement by discontinuing the commercial practice or by amending it in order to eliminate any unlawful elements. When the Authority is satisfied with the proposed commitments, it can make them binding and close the proceedings without finding an infringement. This instrument will enable the Authority to balance the public interest, i.e. the investigation and suppression of unlawful acts, with the need to concentrate its resources on the cases in greatest need of protection. Commitments decisions may not be issued where the commercial practice under consideration is manifestly serious and unfair.

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[6] Resolution 17589 of 15 November 2007, "Regulation on procedures for investigating unfair commercial practices", published in Official Journal no. 283 of 5 December 2007. With Resolution 17590 of the same date the Authority adopted the "Regulation on procedures for investigating misleading and unlawful comparative advertising", published in Official Gazette no. 283 of 5 December 2007. The procedure for investigating misleading and comparative advertising does not have any singular features that would justify its being treated separately from the procedure for unfair commercial practices as illustrated in the text, to which reference should be made.

Pecuniary fines which may be imposed by the Authority for non-compliance with binding commitments range from  fine ranging from 10,000 to 150,000 euros This is equal to the penalty applied for non-compliance with injunctions or orders to remove the effects of an infringement. In such cases, moreover, the Authority may act ex officio to re-open proceedings closed when the commitments were accepted.

Legislative Decree 146/2007 envisages more severe fines for businesses adopting unfair commercial practices. More specifically, if a ruling prohibits an unfair commercial practice, the Authority may impose a fine ranging from 5,000 to 500,000 euros, with due consideration for the gravity and duration of the infringement. In the case of commercial practices that could pose a risk to the safety of minors or which involve dangerous products, the minimum fine is than 50,000 euros.

## COLLECTIVE DAMAGES ACTIONS

Law 244/2007 (the Budget law for 2008) introduced collective damages actions in the Italian legal system as a general instrument to protect consumers' interests. The new provisions have been incorporated in the Consumer Code[7]. The Authority has already advocated for the decision to introduce new procedural mechanisms to facilitate the resolution of disputes between businesses and consumers and enable the subjective judicial positions of the latter to be fully and promptly restored[8]. The redress of consumers who have suffered damage resulting from unlawful commercial practices, of which competition infringements are a significant example, cannot be ensured by a series of individual actions, since a number of factors discourage individual consumers from bringing action for damages. These include the relative complexity of the matter and of access to evidence, the disproportionate gap between the legal costs involved and the damage, usually modest, suffered by each potential actor, as well as the adjudication timescale.

The difficulties experienced by consumers in gaining access to justice undermine the effectiveness of the action taken by the public authorities to suppress anti-competitive or otherwise unlawful practices, since in the absence of collective actions de facto immunity from damages also weakens the deterrent effect of the applicable provisions and related penalties.

The new provisions envisage the possibility of bringing collective actions to remedy the damage suffered by individual consumers "in the context of legal relationships concerning contracts signed under Article 1342 of the Civil Code, or as a result of unlawful extra-contractual acts, unfair commercial practices or anti-competitive behaviour when the rights of a number of consumers or users are damaged". Under the

[7] More specifically, Article 2 paragraphs 445-449 of Law 244/2007 amends Legislative Decree 206/2005 by inserting Article 140-*bis* "class action for damages".

[8] Report on "*Provisions for the State annual and multi-year budget*" (Finance Law for 2008) of 22 November 2007, in Bulletin no. 40/2007.

new Article 140-bis of the Consumer Code, nationally representative associations of consumers and users registered in the list drawn up by in the Ministry for Economic Development are entitled to propose action for damages, as well as "associations and committees that are sufficiently representative of the collective interests being upheld". Consumers wishing to join the action must inform the proponent in writing. The system therefore requires individual consumers to actively express their intention to participate ("opt-in system"). In any case, anyone who has not signed up to the collective action still has the option of acting individually through the ordinary channels to obtain compensation for the damages suffered.

In order to limit the risk of rash or unfounded actions, the new provisions envisage a preliminary evaluation of the admissibility of applications for collective damages actions. When the request is manifestly unfounded or a conflict of interests exists, or where the judge cannot identify a collective interest in need of protection through such action, the court will pronounce the action to be inadmissible.

Of particular significance, in relation to the Authority's tasks, is the possibility for judges to postpone their ruling on the admissibility of the request when an investigation on the same matter is already under way before an independent authority. This provision is meant to avoid the risk of legal proceedings for damages overlapping and interfering with investigations by the Authority into the same matter – in particular by altering the incentive to apply for leniency.

If the court upholds the collective claim, it sets the criteria to quantify the sums to be paid to each individual participant. In the 60 days following notification of the ruling, the undertaking concerned may propose to pay a given sum. If this proposal is accepted, it is deemed to be enforceable. If no proposal is made or a proposal is not accepted, the Consumer Code envisages that a conciliatory mechanism should be established to reach an amicable settlement.

# ANTITRUST ENFORCEMENT IN 2007

## OVERVIEW

In 2007, the Italian Competition Authority assessed 864 mergers, 26 agreements and 9 alleged abuses of a dominant position.

**Activity of the Authority**

| | 2006 | 2007 | Jan-Mar 2008 |
|---|---|---|---|
| **Agreements** | 16 | 26 | 1 |
| **Abuse of dominance** | 5 | 9 | 2 |
| **Concentrations** | 717 | 864 | 203 |
| **Sector inquiries** | 2 | 1 | - |
| **Non-compliance** | 1 | 1 | - |
| **Opinions addressed to the Bank of Italy** | 20 | 1 | - |

**Proceedings concluded in 2007**

| | Non violations | Violations, commitment decisions | Outside the scope of the law | Total |
|---|---|---|---|---|
| **Agreements** | 2 | 12 | 12 | 26 |
| **Abuse of dominance** | - | 6 | 3 | 9 |
| **Concentrations** | 837 | 6 | 21 | 864 |

*Agreements*

In 2007, the Authority concluded 13 proceedings concerning agreements. In eight cases the Authority found an infringement of competition law (the legal basis was article 81 EC six times and twice article 2 of the 1990 Competition Act). In another case, the Authority found that an association of undertakings had infringed article 81 EC, while it closed the proceedings without a finding of an infringement with respect to another party who had proposed commitments under article 14 ter of the 1990 Competition Act. In one case, the Authority concluded that competition law had not been violated. In the remaining three cases, the Authority closed the proceedings by accepting the commitments proposed by the parties and making them binding. Considering the seriousness of the infringements, the Authority imposed fines on the undertakings concerned in nine cases, totalling EUR 62 millions. Finally, the Authority investigated an alleged non-compliance with a previous injunction it issued pursuant to article 81 EC, concluding that there was no infringement.

| Agreements examined in 2007 by sector (number of completed proceedings) | |
|---|---|
| **Sector** | |
| Water | 1 |
| Credit | 2 |
| Chemicals, plastic, rubber | 1 |
| Constructions | 1 |
| Pharmaceuticals | 2 |
| Wood and paper | 1 |
| Oil industry | 1 |
| Advertising services | 1 |
| Other services | 1 |
| Telecommunications | 1 |
| Transport | 1 |
| **Total** | **13** |

On March 31st 2008, ten proceedings were pending concerning agreements, seven of which based upon EC provisions and three on domestic law.

*Abuses of a dominant position*

In 2007, the Authority concluded six proceedings concerning abuses of a dominant position. In one case, the Authority found an infringement of article 82 EC, imposing a fine of EUR 23 millions. In another case, the Authority accepted the commitments proposed by one of the parties pursuant to article 14 ter of the 1990 Competition Act and closed the proceedings with reference to this undertaking, while the investigation continued vis-à-vis the other parties, which were imposed fines totalling EUR 22 millions for breach of article 82 EC. In the remaining four cases, the Authority closed the proceedings by accepting the commitments proposed by the parties and making them binding without finding an infringement.

In the first quarter of 2008, the Authority closed a proceedings by accepting the commitments proposed by one of the parties pursuant to article 14 ter of the Competition Act 1990.

| Abuses examined in 2007 by sector (number of completed proceedings) | |
|---|---|
| **Sector** | 1 |
| Constructions | 2 |
| Electricity and gas | 1 |
| Pharmaceuticals | 1 |
| Telecommunications | 1 |
| Transport | **6** |
| **Total** | |

On March 31st 2008, ten proceedings were pending concerning alleged abuses of dominance, seven of which based upon EC provisions and three on domestic law.

### *Mergers*

In 2007, the Authority assessed 864 mergers In 837 cases, a formal decision has been adopted pursuant to article 6 of the Competition Act 1990, while in 21 cases the Authority found there was no ground for action. In six cases, the authority carried out an in-depth investigation pursuant to article 16 of the Competition Act 1990. In four cases, the authorisation of the merger has been made dependent upon the undertaking's compliance with specific conditions, In two cases, the Authority prohibited the merger.

Moreover, the Authority started one formal proceedings pursuant to article 19 of the Competition Act 1990 for non-compliance with a previous decision imposing merger remedies. Finally, the Authority carried out 9 proceedings concerning the alleged non-compliance with the obligation of prior notification of mergers. An infringement has been found in seven cases, and the undertakings concerned have been imposed pecuniary sanctions totalling EUR 339.000.

In the first quarter of 2008, the Authority assessed 203 mergers and closed one in depth.-investigation, authorising the concentration subject to some conditions. Finally, 5 proceedings have been carried out concerning failure to comply with prior notification duties, all of them leading to a finding of an infringement and imposition of fines totalling EUR 25.000.

On March 31st 2008, one in depth-investigation into a merger and two proceedings for non-compliance with prior notification obligations were pending. Moreover, the Authority is considering the possibility to withdraw some of the conditions which had previously been imposed in a merger case, pursuant to article 21 of the law n. 241 of 7 August 1990.

### *Separation obligations*

In 2007, the Authority carried out three proceedings concerning the alleged non-compliance with the duties of prior notification laid down by article 8(2-ter) of the Competition Act 1990. In all cases an infringement has been found and sanctions have been imposed, totalling EUR 55.000. No proceedings concerning non-compliance with the duties of prior notification laid down by article 8(2-ter) of the Competition Act 1990 were pending on March 31$^{st}$ 2008.

### *Sector inquiries*

In 2007, the Authority has concluded one sector inquiry pursuant to article 12 of the Competition Act 1990 in the field of food distribution and has issued some preliminary

findings concerning a sector inquiry into the field of daily, periodical and multimedia publishing. On March 31st 2008, ten sector inquiries were pending.

### *Competition advocacy*

The Authority issued 63 reports in 2007 and 9 in the first quarter of 2008, concerning possible restrictions and distortions of competition flowing from existing or envisaged regulation, pursuant to articles 21 and 22 of the Competition Act 1990. As in previous years, the advocacy efforts of the Authority concerned a wide range of economic sectors.

**Advocacy reports by sector - January 2007-March 2008 (number of reports)**

| Sector | 2007 | Jan 2007-Mar 2008 |
|---|---|---|
| Water | 2 | 1 |
| Food and beverages | 3 | |
| Insurance and pension funds | 5 | 2 |
| Credit | 2 | |
| Cinema | 1 | |
| Constructions | | 1 |
| Electricity and gas | 5 | |
| Pharmaceuticals | 2 | 1 |
| Financial services | 3 | |
| Retail distribution | 1 | |
| Real estate | 1 | 1 |
| Education | 3 | |
| Oil industry | 3 | |
| Postal services | 3 | |
| Professional services | 1 | |
| Advertising | 1 | |
| Waste services | 1 | 1 |
| Restaurant | 1 | |
| Health services | 1 | |
| Other services | 10 | |
| Recreational services | 1 | |
| Telecommunications | 5 | 1 |
| Transport | 6 | 1 |
| Tourism | 1 | |
| Other activities | 1 | |
| **Total** | **63** | **9** |

# AGRICULTURE AND MANUFACTURING ACTIVITIES

## FOOD AND AGRICULTURAL PRODUCTS

### *Sector inquiries*

SECTOR INQUIRY INTO AGRI-FOOD DISTRIBUTION

In June 2007 the Authority completed an investigation into food distribution to analyse the operation of the distribution chain in fruits and vegetables. The aim of the inquiry was to verify whether the organisation and structure of the industry might be inefficient, resulting in higher prices for consumers. Another factor triggering the investigation was a widespread perception that fruit and vegetable prices had increased at the time of the lira-euro changeover.

The results of the inquiry show that product and geographic markets vary a great deal, in terms of the number and characteristics of the enterprises operating at the various stages of the distribution chain. The intersection of products, varieties, zones of origin, destination areas, and categories of suppliers and purchasers at each stage gives rise to a myriad of "micro-markets" that often are characterized by excessively long distribution chains which in turn lead to high costs and result in high prices for consumers.

A sample of 267 fruit and vegetable distribution chains was investigated with the help of the Finance Police. It emerged that direct supply of sales outlets by producers is fairly limited, mainly to purchases by large surfaces. In contrast, a significant number of distribution chains has three or four intermediaries. The mark-up over costs in the 267 supply chains examined ranged from 77% to just under 300%, according to the length of the distribution chain, giving an average of 200%.

The investigation highlighted the need to facilitate the process of shortening the supply chain in order to increase efficiency and reduce prices for consumers. The more organised and concentrated the operators at the two ends of the chain, the greater the chances of shortening it. In order for large surfaces to be able to purchase directly from producers a reorganisation of agricultural production and wholesale markets would be needed, so as to be able to meet modern distribution requirements. In particular agricultural production, which now is excessively fragmented, needs to be reorganized (for example by creating consortia) so that large quantities with homogenous qualities be available.

Turning to wholesale distribution, the inquiry found that for products that are not perishable and are easy to store, a short distribution chain is feasible and efficient. On the other hand products characterised by scattered sources of supply that are highly seasonal, perishable, and difficult to store, as is typically the case for fresh vegetables, it appears difficult to eliminate wholesalers altogether.

Wholesalers could certainly become more efficient, shortening the chain and enabling the whole range of value-added services – those that are needed to supply final distributors with a sellable product – to be performed more completely and effectively.

Existing organized wholesale markets could be reformed and improved by creating a network of multi-functional centres offering high-value-added services to suppliers and customers.

More in general, the Authority underlined that efficiency gains in the distribution chain should not be accompanied by a reduction in competition. In the case of wholesale distribution, it suggested that in standardising and rationalising the functions of the fruit and vegetable organized local wholesale markets, steps should be taken to ensure that an adequate degree of competition is maintained between service providers.

### *Reporting and advisory activities*

BAN ON ADVERTISING FOR ARTIFICIAL FOLLOW-ON FORMULA MILK

In December 2007, the Authority submitted an opinion to the Ministry of Health and the Ministry for Economic Development under Article 22 of the 1990 Competition Act concerning the competition-distorting effects of Articles 11 and 12 of the "Regulation on the implementation of the provisions of Directive 2006/141/EC concerning infant formulae and follow-on formulae as intended for Community countries and infant formulae and follow-on formulae as intended for export to non-EU countries". These articles established a total ban on advertising (apart from advertising in scientific publications specialising in children's health and care) not just for infant formulae, as governed by Directive 2006/141/EC, but also for follow-on formulae.

The Authority suggested that the advertising ban for follow-on milk unjustifiably restricted competition and exceeded Directive 2006/141/EC's provisions.

The domestic ban on advertising for follow-on milk was likely to reduce incentives to distribute infant formulae through channels other than pharmacies and weaken the competitive pressure of low-cost products sold under less well-known brand names. In light of these considerations, the Authority deemed that the Ministry of Health (in conjunction with the Ministry for Economic Development) should eliminate the regulations introducing the advertising ban for follow-on formulae.

## OIL PRODUCTS

### *Agreements*

FUEL PRICES ON NATIONAL NETWORK

In December 2007 the Authority closed an investigation initiated under Article 81 of the EC Treaty into oil companies Eni, Esso Italiana, Kuwait Petroleum Italia, Shell Italia, Tamoil Italia, Total Italia, API Anonima Petroli Italiana and ERG Petroli without finding an infringement. The Authority accepted the commitments proposed by these companies under Article 14-ter paragraph 1 of the 1990 Competition Act, made them obligatory and closed the investigation. The proceeding had originated from a complaint by the Associazione Nazionale Artigiani e Piccole e Medie Imprese del Trasporto Merci

(National Association of Goods Transport Small- and Medium-Sized Enterprises) about the uniform trend over the previous 12 months in fuel prices.

The starting point for the Authority's investigation was an exchange of information between the oil companies. This was done by notifying the specialized press of: i) their national recommended prices, in advance of their publication on the Ministry for Economic Development's web site; and ii) the additional components of these prices, the so-called "supplementary differentials", not published by the Ministry and not available through other channels.

The Authority thought that this price transparency might have facilitated the parallel pricing observed on the market. The parallel pricing might have also been favoured by the structure of the fuel distribution network in Italy: a small number of operators (eight with nine brands), with a high degree of cooperation among them especially in the use of logistical structures; high barriers to entry; product homogeneity; and a lack of contractual power on the demand side.

To resolve the competition problems highlighted by the Authority at the start of the investigation, the oil companies proposed commitments, subsequently amended and supplemented, under Article 14-ter paragraph 1 of the 1990 Competition Act. The parties committed themselves to limit the transparency of recommended prices and supplementary differentials by ceasing all notifications to the specialist press. Eni, Erg, Tamoil and Esso also undertook to define recommended prices on a local, rather than national, basis in future. Furthermore they committed themselves to improve the conditions for competition in the market by increasing the degree of product differentiation and encouraging the entry of new operators, promoting the entry and development of large retailers in the gasoline market under various types of partnership agreements with the oil companies. Finally, the parties committed themselves to allow access to their logistical structures under fair, non-discriminatory and transparent conditions. Some enterprises committed themselves to end recommended-price transparency, publicising more widely the prices actually applied at each sales point.

## PHARMACEUTICAL PRODUCTS

### *Agreements*

#### COMPETITIVE TENDERS FOR THE SUPPLY OF STOMA PRODUCTS

In August 2007 the Authority completed an investigation into Bristol-Myers Squibb, Braun Milano, Coloplast and Hollister. It found that the coordination of their conduct in response to two invitations to tender issued by the Local Health Agency of Ferrara for the supply of medical products for stoma patients was a violation of Article 2 paragraph 2 of the 1990 Competition Act. The proceeding was initiated by a complaint that the four main companies commercialising stoma products had engaged in parallel conduct. The market of stoma medical products was considered to be national, given the small number of enterprises producing and selling these products, the limited incidence of transport costs and the specific national regulations.

During the investigation, the Authority found that these companies had collectively agreed (by exchanging information on their strategies) not to participate in two tenders by the Ferrara's Local Health Agency in 2003 and 2004. As a result, the Ferrara's Health Agency was obliged, according to Italian law, to divide up the bided quantity among all suppliers.

The Authority considered the agreement to be a very serious violation of the law and it imposed fines on the companies concerned totalling about 4 million EUR.

DISTRIBUTION OF OVER-THE-COUNTER MEDICINES TO "PARA-PHARMACIES"

In September 2007, the Authority completed an investigation under Article 2 of the 1990 Competition Act into Alliance Healthcare Italia, Comifar, S.A.F.A.R. - Servizi Autonomi Farmacisti Abruzzesi Riuniti Società Cooperativa and Itriafarma Società Cooperativa, all engaged in pharmaceutical distribution. It found that the companies had entered into a competion restricting agreement by coordinating their commercial policies to obstruct the entry of new competitors (parapharmacies) in the retail distribution of over the counter drugs in the regions of Abruzzo, Basilicata and Puglia.

The most significant evidence gathered during the investigation was the existence of contacts between the wholesale distribution companies and between these and pharmacists in order to obstruct the commercialisation of pharmaceuticals outside of pharmacies. Only after the Authority began its investigation did the companies begin to systematically supply over the counter drugs to parapharmacies in the three regions concerned.

The Authority considered the only plausible explanation of the companies' conduct to be coordinated action. It would have been in the interests of individual wholesale distributors to extend their offering of over the counter drugs to new operators in the regions concerned by expanding their activity, diversifying their customer-base and subtracting market share from competitors. Taking into account the limited period the violation took place, from August to early October 2006, the Authority fined Alliance Healthcare, Comifar, SAFAR and Itriafarma about 25,000 EUR in total.

## CONSTRUCTION, CEMENT AND CONCRETE PRODUCTS

### *Abuse of dominant position*

MARKET FOR AUTOCLAVED AERATED CONCRETE

In October 2007 the Authority completed an investigation under Article 81 of the EC Treaty, finding that RDB and Xella International had agreed to coordinate their commercial strategies with a view to artificially share among themselves the Italian autoclaved aerated concrete (AAC) market. Furthermore RDB had abused its dominant position, violating Article 82 of the EC Treaty, by creating a complex predatory strategy designed to drive out a competitor from the Italian AAC market.

First of all from the end of 2004, Xella and RDB had agreed on a coordinated increase of AAC prices. They had also coordinated their conduct in order to avoid competition in specific segments of the domestic AAC market. Furthermore RDB had committed itself not to operate on the French territory. Finally, the two companies had agreed to acquire the remaining competitors operating in the market.

The main instrument used by the parties to implement their coordinated action was the RDB Hebel production joint venture and in particular the fact that the total production of the J-V was totally assigned to RDB by an exclusive distribution agreement. As a result, the main domestic competitor of RDB, Italgasbeton, did not have access to the essential input produced by the J-V.

Furthermore the Authority found that in 2005, RDB had adopted a complex predatory strategy against Italgasbeton, offering below cost prices to Italgasbeton customers and, more in general, to customers localized in the local markets where Italgsbeton had been most active.

In view of the gravity and duration of the agreement, the Authority issued fines amounting to 510,000 EUR for Xella and 1.86 million EUR for RDB. The Authority also required the two companies to end their joint presence in the share capital of the RDB Hebel J-V. Finally, the Authority imposed a fine of 1.96 million EUR on RDB for abuse of a dominant position.

### OTHER MANUFACTURING ACTIVITIES

#### *Agreements*

CHIPBOARD PANEL PRODUCERS

In May 2007 the Authority completed an investigation that ascertained that Gruppo Trombini, Sacic Legno, Sit, Sia, Sama, Gruppo Frati, Fantoni, Saib and Xilopan had violated Article 81 of the EC Treaty, by cartelising the national chipboard panel market. The investigation started with a liniency application by the Gruppo Trombini.

The investigation found that since 2004 the companies under examination had established a complex system to keep prices high and maintain their respective market shares. This strategy was supported by an intensive and constant exchange of sensitive information.

To artificially maintain the market price, they had adopted a mechanism to restrict chipboard panel production. The companies had established an agreed timetable of obligatory, scheduled production stoppages, balanced by a system of constantly monitored corrective adjustments. This had resulted in a notable reduction in the production of panels, without changing the companies' respective market positions.

The Authority also found that to crystallise their positions the parties had adopted a mechanism whereby they divided up their customer base along strictly observed lines. This was backed by penalties and compensatory mechanisms when parties deviated

from the agreement. In addition, the companies had jointly determined the prices and contractual conditions of supply for chipboard panels, differentiating their strategies on the basis of product quality and the characteristics of the customers served.

Complementing this agreed mechanism was a plan to simultaneously define their wood procurement policies by setting up a consortium that would have enabled them to eliminate any remaining uncertainty over competitors' strategies or costs. This project, however, had not actually been implemented, partly because it was conceived only a short time before the investigation started.

In view of its nature and duration, the Authority deemed the infringement to be particularly serious. The Trombini Group, which had played a decisive role in the discovery of the infringement, was granted leniency and was not fined. The fines imposed on the other companies involved in the infringement varied in light of the specific circumstances applicable to each and amounted to 30.7 million EUR.

## ELECTRICITY AND NATURAL GAS

### *Abuse of dominant position*

ENEL DISTRIBUZIONE – ACTIVATION OF SUPPLY ONLY AFTER PAYMENT OF ARREARS

In October 2007, the Authority closed the investigation into Enel and its subsidiary Enel Distribuzione by making the commitments proposed by these companies under Article 14-ter paragraph 1 of the 1990 Competition Act obligatory, without finding an infringement. The proceeding had been initiated in order to verify whether under making the activation of a new electricity supply conditional upon the payment of arrears still unpaid by a previous contracting party for the same domestic site would represent a violation of Article 3 of the 1990 Competition Act.

Indeed Enel Distribuzione, supplying electricity to about 30 million out of a total of 34.4 million distribution withdrawal points and with a 73% market share, had a dominant position in the market.

The parties committed themselves to redefine and simplify the procedures for the activation of supply and transfers of contract for electricity supplies to new customers in sites where a previous customer had left arrears unpaid. Any conditions or preliminary procedures not normally applied to or requested of customers in general would be eliminated. New customers taking over an electricity supply previously cut off for arrears will only be asked for their name, tax code and customer/new supply number, thus ensuring compliance with the principle of equal treatment between consumers applying to take over/activate a supply contract. The parties also undertook to step up the checks and controls on the activity of operators in contact with customers, and to adopt a rapid customer reimbursement procedure in the event of mistakes in applying the new procedure.

## WATER AND WASTE MANAGEMENT SERVICES

### *Agreements*

ACEA –SUEZ ENVIRONNEMENT-PUBLIACQUA

In November 2007 the Authority completed an investigation into Acea Spa (Acea) and Suez Environnement Sa (Suez Environnement), concluding that the two companies had violated Article 81 of the EC Treaty coordinating their commercial strategies in the national market for the operation of water services.

Contracts for the delivery of water services are awarded in Italy through public tender procedures where a small number of companies, always the same, compete for the contracts to be awarded. During the investigation, the Authority found that in 2001 Acea and Suez Environnement had reached a general agreement to coordinate their activities in the water services sector. Under this agreement, they had agreed to take part jointly, or in combination with third parties, in numerous water management tenders in Italy with a view to influencing their outcomes.

As part of their wider strategy to coordinate their activities, Acea and Suez Environnement had agreed, in particular, to participate jointly in four tenders conducted in Tuscany, while deciding to leave the Lazio Region to Acea.

The intensity and extent of this general cooperation plan were further demonstrated by specific episodes of coordinated action. These were Acea's acquisition of Crea, facilitated by Suez Environnement's intervention with the selling group, and a Suez Environnement subsidiary's non-participation in a tender in Tuscany to avoid obstructing the temporary consortium led by Acea.

The companies' systematic joint participation in the tenders in Tuscany was deemed by the Authority to go beyond what was necessary for establishing a temporary consortium, since the joint participation was decided irrespective of the characteristics of the tenders and the two companies' ability to be awarded the contract individually. According to the Authority, the creation of temporary consortia by Acea and Suez Environnement served to coordinate their actions under their joint plan to divide up the market. In view of the gravity and duration of the infringement, the Authority fined Acea 8.3 million EUR and Suez Environnement 3 million EUR.

## TRANSPORT AND VEHICLE HIRE

### *Agreements*

ALLIANCES FOR PARTICIPATION IN TENDERS FOR LOCAL PUBLIC TRANSPORT (LPT) CONTRACTS

In October 2007 the Authority completed an investigation ascertaining a violation of Article 81 of the EC Treaty by a number of companies operating in local public transport (Sita, APM Esercizi, ACTV – Azienda Consorzio Trasporti Venezia, G.T.T. – Gruppo Torinese Trasporti, Societè europeénne pour le développement des transports

publics – Transdev, ATCM, Trambus, ATC (Bologna), ATAF, ATC (La Spezia), ATP, Tempi, TEP, APAM and COTRI – Consorzio Italiano Trasporti, Sinloc, TAG and Arpa). In particular the Authority found that these companies had participated to a number of agreements restricting competition in response to invitations to tender issued by local authorities for local public transport (LPT) contracts. In structural terms, the LPT market in Italy is served by a number of small companies, each linked to its own traditional operational "catchment area". This market structure is not affected by the liberalisation of the sector, as envisaged by Legislative Decree 422/1997. In the early years of the reform, with prospective tenders in mind, some important operators, especially foreign ones, had acquired smaller companies.

During the investigation, the Authority found that from 2001 to 2006 the operators had formed strategic alliances and had also established actual consortia or companies, with a view in both cases to coordinating their participation in tenders.

Of the groupings involving the main companies in the sector, the following were particularly relevant: Retitalia, which included GTT, ATCM, ACTV, APM, Transdev, Arpa, CTT Srl (Pistoia) and ACTF Spa (Ferrara); TP NET, which included Trambus, ATC Bologna, ATAF, CTM Cagliari and CSTP Salerno; and Associazione 60 milioni di Km (60 MC), an agreement involving companies in the provinces of Parma (TEP), la Spezia (ATC), Genoa (Tigullio), Mantua (Apam) and Piacenza (Tempi).

Besides these groupings and aggregations, temporary groupings and consortia of small- and medium-sized local operators (some of them privately owned companies) were also created. The aim of these temporary groupings was to take part in tenders in the catchment areas of the participants, much more so than in tenders outside their catchment areas. More specifically, LPT companies had entered into agreements establishing macro-groupings of national significance (Retitalia, TP NET and 60 MC). Over time, these evolved into consortia or consortium companies for coordinated participation in tenders. Their express aim was to limit competition between the parties and protect the traditional catchment areas of operators already active in the various geographical areas (so-called "defensive bids").

It also emerged that temporary groupings and consortia, whose size and importance were entirely disproportionate to the requirements laid down in the invitations to tender, had been set up to support the lead operator. These grouping were distinguished more by their anti-competitive motivation than by any synergistic goal of improving the offer.

The inquiry also revealed that an agreement was in place between Sita and APM regarding their coordinated participation in expected or existing invitations to tender in Lazio and Abruzzo. This created the conditions to restrict direct competition between two large operators who could have taken part independently in any of the tenders. The main outcome of this coordinated action was that the two companies took part jointly in a tender announced in 2005 for services in Rome and set up Tevere TPL to make it easier to take part in future tenders. The COTRI Consortium also took part in this agreement, albeit only marginally.

On the basis of the evidence gathered, the Authority concluded that Sita, APM Esercizi, ACTV – Azienda Consorzio Trasporti Venezia, GTT – Gruppo Torinese Trasporti, Societé européenne pour le développement des transports publics – Transdev, ATCM, Trambus, ATC (Bologna), ATAF, ATC (La Spezia), ATP, Tempi, TEP, Apam Esercizio and Consorzio Italiano Trasporti – COTRI had set up agreements restricting competition and violating Article 81 of the EC Treaty. These agreements were intended to ensure that contracts for LPT services continued to be awarded to the incumbent or to reduce competition between potential competitors taking part in tenders outside their usual catchment area.

Considering the gravity and duration of the agreements, the Authority fined the companies concerned for a total of 9.9 million EUR.

### *Abuse of dominant position*

AUTOSTRADE-PREPAID VIACARD

In July 2007 the Authority closed an investigation initiated under Article 3 of the 1990 Competition Act, accepting the commitments proposed by Autostrade per l'Italia under Article 14-ter of the law and making them mandatory. The investigation was opened following a complaint over the toll payment operator's failure to reimburse unused, or partly used, prepaid decremental toll magnetic cards (Viacard ) at the end of the two year period of validity. Being Autostrade in a dominant position, this impossibility of reimbursement might have been considered an abuse of dominant position.

To resolve the competition issues pointed out by the Authority, Autostrade per l'Italia committed itself to the complete elimination of the expiry date for Viacard cards, whether still to be issued or already distributed to users. To ensure that users were fully informed of these initiatives, Autostrade per l'Italia committed itself to conduct a communication and information campaign. The Authority accepted these commitments and made them mandatory.

## TELECOMMUNICATIONS

### *Abuse of dominant position*

TELE2-TIM-VODAFONE-WIND

In August 2007 the Authority completed an investigation under Article 82 of the EC Treaty ascertaining that Telecom Italia Spa (formerly Tim Italia Spa) and Wind Telecomunicazioni Spa (Wind) had abused their dominant position in the wholesale markets fo9r termination services on their networks.

The investigation had been opened following complaints by Tele2 Italia and other operators (ReteItaly, Startel and Trans World Communication). It emerged that Tim, Vodafone and Wind had refused to negotiate wholesale access to their networks for operators applying for such access in order to operate as Mobile Virtual Network Operators (MVNO) or Enhanced Service Providers (ESP).

These same operators had also refused to enter into wholesale phone traffic reseller contracts with operators wishing to act as Air Time Resellers (ATR). The complainants also pointed out that the three operators had engaged in individual abusive practices by offering fixed-mobile (F-M) termination services to their competitors at a higher price than that proposed to their commercial divisions.

The relevant markets affected by these practices were:

1) the wholesale market for call access services on the mobile network. This includes the access services offered by Tim, Vodafone and Wind to operators with no network infrastructure, such as MVNO, ESP and ATR, to provide voice and data mobile services in the downstream market;

2) the markets for wholesale call termination services on each mobile network. These consist of routing and delivery services for calls originating from fixed network subscribers or calls from mobile subscribers to subscribers of another mobile operator.

A peculiarity of termination services is that they include as many distinct product markets as there are mobile networks. In each of these the network operator, as sole supplier, is in a dominant position. To evaluate the effects of the behaviours adopted in these markets, the Authority also considered:

3) the market for final mobile telephony services; and

4) the market for F-M services for business users, which can be distinguished from those offered to residential customers since their overall needs differ in terms of service quality and assistance.

During the proceeding, the Authority made the commitment proposed by Vodafone under Article 14-ter paragraph 1 of the 1990 Competition Act obligatory and closed the investigation into the company without finding an infringement. Vodafone committed itself to open its network to virtual operators, signing contracts with BT Italia and Poste Italiane Spa. In particular, BT Italia would be able to compete in offering integrated F-M/M-M services, especially to business customers. The contract also provided for BT Italia to offer these service entirely independently of Vodafone and establish its own commercial conditions of supply and prices for final customers.

As regards Tim and Wind, the other two mobile operators under investigation, the inquiry found that they had engaged in conduct intended to exclude competitors both from the wholesale markets for termination services and from the connected retail market of F-M services for business customers. More specifically, Tim and Wind, which also held licences to operate fixed-network telephony services, had applied more

favourable prices to their own commercial divisions than to their competitors for F-M call termination on intercom and "on net" mobile numbers.

Tim and Wind's abusive conduct in the termination markets had produced concrete effects, as it had obstructed wholesale re-selling of termination services by eliminating any alternative way for their competitors to procure wholesale termination services. They had also prevented their competitors from formulating competing F-M offers for their business customers. In this context, Tim's abusive conduct was considered more serious than that of Wind, as Tim is a dominant operator at group level, not just in the upstream market for the provision of termination services but also in the downstream market of fixed-mobile services for business users.

Taking into account the gravity of Tim's abusive conduct, starting at least in mid-1999, and that of Wind, starting at the end of 2001, and considering that such conduct was still on-going, the Authority fined the two operators 20 million EUR and 2 million EUR respectively.

## POSTAL SERVICES

### *Abuse of dominant position*

POSTE ITALIANE – POSTAL SERVICE LICENSEES

In February 2008 the Authority accepted the commitments proposed by Poste Italiane under Article 14-ter of the 1990 Competition Act, closing an investigation initiated under Article 82 of the EC Treaty without finding an infringement. The inquiry had originated from reports submitted by some of the main associations of postal businesses operating in Italy. They had complained about alleged anti-competitive behaviour by Poste Italiane in contractual relations with former licensees under Articles 4 and 23 of Legislative Decree 261/1999 for a series of postal services included in the legal reserve attributed to Poste Italiane.

The proceeding concerned supply agreements that Poste Italiane had entered into with delivery agencies between December 2000 and January 2007 and the invitation to tender issued in May 2007 for contracts for various postal services. The Authority deemed that the contractual conditions Poste Italiane had included in these supply contracts were likely to alter current and potential competitive conditions for the delivery of postal services. This was because they would reduce the competitive capacity of the former licensees and erect barriers to entry in the lead-up to the complete liberalisation envisaged by 2011 at the latest.

The Authority also noted that the invitation to tender envisaged clauses that would be particularly onerous for the ex-licensees, since they: substantially modified the object of the tender in terms of the type of services awarded; significantly reduced the quantities awarded without envisaging any constraints on Poste Italiane with respect to the services to be awarded; and contained non-competition and acceptance clauses that

favoured Poste Italiane. To resolve these competition issues, Poste Italiane committed itself to:

1) calling a new tender to award the contracts for distributing and collecting correspondence and non-addressed mail and providing ancillary services in urban districts (increasing the number of lots from 50 to 70, increasing the value of outsourced services up to 168 million EUR, introducing a flexible cap on the maximum amount of services to be awarded to each company);

2) an increase in the percentage of outsourced registered mail up to 40% of the total economic value of the activities included in the tender and the introduction of a minimum percentage (25%) of guaranteed registered mail for each lot;

3) reviewing its plan to immediately and fully "in-source" the activities carried out by the delivery agencies and, instead, in-source them gradually up to 31 December 2007;

4) complying with the Decree issued by the Minister for Communications on 9 April 2001 concerning the "Approval of the general conditions of the postal service" and the applicable regulations in force;

5) promoting the implementation of the Memorandum at that time being drawn up by the Ministry for Communications, Poste Italiane, the delivery agencies and the trade unions; and

6) undertaking to respond to the consumers associations' request to set up a discussion on service quality.

The Authority deemed that these commitments would remove the anti-competitive effects under investigation and decided to make them obligatory under Article 14-ter, paragraph 1, of the 1990 Competition Act. More specifically, the Authority felt that the extension of Poste Italiane's contracts with the delivery agencies for the first quarter of 2008 would enable the former licensees to continue their activity until the outcome of the tender was announced and the new contracts awarded. The commitments concerning the value of the activities included in the new tender and the guaranteed minimum annual award for each enterprise were also sufficient to enable the delivery agencies to maintain their production capacity until the complete liberalisation of the postal markets by 1 January 2011.

## BROADCASTING, PUBLISHING AND ADVERTISING RIGHTS

### *Agreements*

A.D.S. ACCERTAMENTI DIFFUSIONE STAMPA-AUDIPRESS

In May 2007, the Authority closed an investigation into ADS-Accertamenti Diffusione Stampa, finding a violation of Article 81 of the EC Treaty. The infringement concerned the markets for survey services for the periodical and daily press and for advertising in the daily press. The proceedings had been opened upon a complaint over ADS and

Audipress's refusal to include Metro, a free daily newspaper, in the certification systems for the diffusion and readership surveys conducted by the two associations.

ADS provides a certification and dissemination service for data on the circulation and diffusion of the daily and periodical press, while Audipress conducts quantitative and qualitative sample surveys on the readership of publications that have obtained ADS certification. Audipress surveys and ADS certification are used as benchmarks in the publishing sector to assess a publication's penetration in the various socio-economic categories and assign a value to the related advertising space (rating).

The Authority considered that ADS and Audipress's refusal to include Metro in their certification and survey systems might result from an agreements designed to restrict access to their services by publishers of free dailies,. The conduct of the two associations also seemed capable of restricting competition in the market for advertising in the daily press, since free papers were prevented from capitalising on their advertising services, to the advantage of the publishers of for-payment newspapers.

Considering that free papers often have an extensive network of local editions, and the presence of advertisers at the local level, ADS and Audipress's conduct seemed likely to affect not just the national advertising market but also advertising sales in provinces where free dailies are distributed.

The Authority completed its investigation in February 2007 without finding an infringement by Audipress, which had submitted commitments under Article 14-ter, paragraph 1, of the 1990 Competition Act. In essence, survey regulations were amended to include the free papers in Audipress's twice-yearly surveys. The new provisions eliminated the need for prior certification of the paper by ADS, thus removing any obstacle to the participation of free daily papers and periodicals in Audipress's survey system.

The proceedings continued against ADS, which had consistently refused to admit free newspapers to their certification scheme. The Authority deemed that ADS's conduct had caused immediate damage to the publishers of free papers by preventing them from competing on an equal footing with other publishers in the sale of advertising space. It had also created an indirect disadvantage for readers since, if the free daily press had more funding at its disposal from increased advertising revenue, it could offer more information content. The Authority imposed a fine of 8,000 euros on ADS Accertamenti Diffusione e Stampa.

### *Concentrations*

SEAT PAGINE GIALLE - 1288 SERVIZIO DI CONSULTAZIONE TELEFONICA

In April 2007 the Authority prohibited the acquisition by Seat Pagine Gialle of 12.88 Servizio di Consultazione Telefonica, a company that provides telephone information services to subscribers. As a result of the merger, Seat Pagine Gialle would have acquired the rights to use the "1288" and "1248" numbers, as well as the licence for the

brand. The Authority deemed the relevant market to be that of directory assistance services (fixed or mobile), for which alternative information sources constitute only imperfect substitutes. In geographical terms the market was deemed to be national, since the electronic archives refer to a national user base, demand is expressed at the national level and the language used is Italian.

In Italy, subscriber information services are currently provided through numbers such as "12XY" and "892UUU" and are based on the information contained in the single national telephone subscribers database, . set up under the rules laid down by the Communications Authority. Telecom Italia, BT Albacom and Eutelia were selected as the operators authorised to make the database available to third parties at a fair, reasonable and non-discriminatory price.

The investigation found that the concentration would have strengthened Seat's dominant position in the national market for directory assistance services. First, the Authority considered that acquiring the third operator would give Seat 60-70% of the market.

Seat was the only operator that was allowed after liberalisation to go on using the same "89.24.24 Pronto Pagine Gialle" number it had had since 2001. As a result, it continued to enjoy the benefits of its advertising investments and retained its customer base and goodwill. Finally, the Authority considered that the merger would give Seat a strategic advantage, since it could exploit the synergies deriving from access to the combined information base of advertising in the Yellow Pages (paper-based and online) and the White Pages directories.

The merger would strengthen Seat's dominant position, since existing competition would be eliminated, while potential competition would be curbed by rising entry barriers. Finally, the Authority noted that, on completion of the operation, the probable elimination of the "1288" brand would have led to a reduction in consumer choice and the loss of one of the specialised directory assistance operators. The Authority therefore prohibited the operation.

### *Sector inquiries*

SECTOR INQUIRY INTO THE DAILY, PERIODICAL AND MULTIMEDIA PUBLISHING SECTOR

In July 2007 the Authority completed the first part of an inquiry into the daily, periodical and multimedia publishing sector. The inquiry concerned the effects of public subsidies and limits on concentrations for daily newspapers. Its aim was to examine whether and how the overarching goal of protecting information pluralism can be accomodated with the protection of competition.

At present there are essentially two types of public support for publishing: direct economic support for certain publishing businesses; and more general indirect economic support, consisting of tariff reductions, tax incentives and soft loans.

According to the Authority, direct subsidies can prove an important instrument to safeguard pluralism, while at the same time promoting competition, inasmuch as they foster the entry of new operators. It may therefore be useful for new publishers to be supported during start-up.

More generally, however, the Authority wondered whether the open-ended nature of the available subsidies might result in some publications becoming systematically dependent on public support. As regards the effects on pluralism, the fact that structural dependence on public funding could limit a publication's autonomy with respect to those responsible for deciding on the beneficiaries of, and resources available for, the subsidies cannot be ignored.

Time limited subsidies would help only publications of interest, and force operators to seek new ways of achieving positive commercial results. Stricter allocation criteria should be enforced to prevent opportunistic behaviour and monitor the use of resources by beneficiaries.

The main indirect subsidy takes the form of special postage rates,. They are clearly intended to encourage subscription sales, in view of their advantages for publishers. In economic terms, publishers benefit from advance payment and can count on reliable revenues. As regards content, the continuity that a body of subscribers provides enables publishers to engage in an on-going dialogue with their readers. This can be spread over a number of successive editions, along with more targeted editorial, commercial and marketing initiatives.

The current system of postal incentives seems open to improvement, both in achieving more intense competition between the undertakings concerned and in protecting pluralism. The Authority considered that special postal terms were not an effective means of developing subscription sales. Italy, in fact, is one of the western countries with the lowest percentage of subscriptions in relation to total sales of dailies and periodicals. Publishers attribute this gap entirely to Italy's slow postal service.

Moreover, since the amount of the postal incentive depends on the number of copies sent to subscribers, only a small part of the public expenditure on these special postal rates helps protect pluralism by fostering increased subscription-based circulation for smaller or lesser known publications.

The rest goes to the major publishing groups. For them, however, the subsidy has a minimal impact on overall sales and does not significantly encourage the development of subscription sales. Finally, the Authority underscored that special tariff terms are only envisaged for services provided by Poste Italiane, while publishers relying on other operators or delivery systems are excluded from the subsidy.

This system hinders competition amongst postal companies and reduces Poste Italiane's incentives to improve the quality of its service, where reliability and speed are decisive factors in increasing subscription sales.

Therefore, the Authority drew up some suggestions with a view to linking postal subsidies more directly to the goal of protecting pluralism and reducing potential distortions of competition.

First of all, a ceiling should be set on state subsidies in order to keep the amount available for small publishers unchanged while limiting the amount spent on the large publishing groups.

A more radical intervention would be to provide incentives for alternative forms of delivery, e.g. so-called "newsstand subscriptions", where subscribers pick up their newspapers or magazines at the outlet.

Public funding could then be re-directed to initiatives supporting demand for subscriptions, addressed for example to certain target groups (such as schools or cultural centres) or to easier and/or cheaper distribution methods, such as subscriptions to publications disseminated over the Internet.

Demand-side subsidies entail less interference in competition dynamics than supply-side subsidies since resource allocation is dictated by consumers' choices,. Greater recourse to subscription sales would lead to increased price competition amongst publishers. Indeed, subscription sales are typically characterised by attractive pricing, because publishers often resort to promotional offers.

As regards the limits on concentrations, domestic sectoral regulation considers dominant any operator which, as a result of a concentration, ends up controlling publishers of daily newspapers whose circulation exceeds 20% of total circulation in Italy, or 50% of the circulation in an inter-regional context,.

The Authority observed that ceilings based on circulation figures for the daily press cannot appropriately measure the undertaking's influence on public opinion, since circulation is less significant than other indicators, such the number of readers reached,. Moreover, applying the limit only to the publishers of daily papers excludes periodicals from the group of titles monitored, while the latter may play a decisive role in achieving pluralistic information. Lastly, the Authority observed that any consideration of pluralism must take into account the specific circumstances of the market and the role of daily newspapers in disseminating information. The information market as a whole has been influenced by two key factors in recent decades: increased concentration and a growing use of multimedia in the form of an interrelation between multiple channels and forms of communication. As a result, limits on ownership calculated in relation to the entire market of communications media have been introduced.

Considerably more information is available to consumers and enterprises now than in 1987, the year in which limits on concentration were established for daily papers. The most significant innovations correspond to the spread of the Internet and the success of the free papers, which have led to increased opportunities for access to information.

In the wider sector of telecommunications, the progressive development of satellite television, the digitalisation of radio frequencies and the transmission of content, including purely informational content, through mobile phones – in other words,

communication vehicles that sit alongside generalist television – also merit attention. In view of these considerations, the Authority deemed that conditions where a wide range of information sources and vehicles for comment and analysis are made available to consumers should be promoted and that obstacles hindering entry by new publishers should therefore be reduced.

## INSURANCE SERVICES AND PENSION FUNDS

### *Reporting and advocacy activities*

THIRD-PARTY MOTOR INSURANCE

In November 2007 the Authority submitted to the Parliament, the Government, the Minister for Economic Development and the Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo (ISVAP) a report under Article 21 of the 1990 Competition Act on the distortions of competition that might result from the regulations governing the transparency of third-party motor insurance contracts .

The Authority observed that any informative documents provided by insurers tend to focus on aspects which are common to the market as a whole, without referring to the specificities of each individual offer and that the information on general contractual conditions is neither fully transparent nor genuinely comprehensive. The ensuing difficulties consumers encounter in comparing contractual terms offered by competing insurance companies result in low demand elasticity.

Such opacity stems – at least to a certain extent – also from the sectoral regulatory framework. Therefore, the Authority called for a review of the rules governing transparency, with a view to redressing the information imbalance between undertakings and consumers.

In order to facilitate consumers when comparing the alternatives available on the market for third party motor insurance, the Authority envisaged the drawing of a document common to all undertakings setting out standard contractual terms, while each competitor could draw a simple background note summarising the key factors differentiating its individual offer. The Authority also noted that the contractual conditions should no longer make indirect reference to refer readers to laws or regulations whose content is not spelled out clearly in the contract, or to clauses amending or supplementing other clauses in the same contract.

Finally, mandatory information requirements should be supported by credible threats of sanctions for non compliance.

## FINANCIAL SERVICES

### *Agreements*

ABI-CO.GE.BAN INTERBANK AGREEMENTS

In April 2007 the Authority completed an investigation under Article 81 of the EC Treaty concerning the interbank agreements established by the Italian Banking Association (ABI) for RiBa (automated bank receipts) and RID (direct interbank bill collection) payment services. The inquiry also concerned the agreements drawn up by the Convenzione per la Gestione del Marchio Bancomat (Convention for the management of the Bancomat trademark, CO.GE.BAN) for the cash withdrawal service using Bancomat cards at affiliated automated teller machines (ATM).

Interbank commission represents an intermediate price paid by banks to each other. Its function is to share out the revenue for services banks provide to each other for services they offer jointly to consumers. Since such commission is set centrally and is the same for all banks, the Authority intended to ascertain its compatibility with competition rules.

During the investigation the parties proposed commitments, under Article 14-ter, paragraph 1 of the 1990 Competition Act, consisting in the elimination of two interbank commission charges, and in a considerable reduction of other charges. Lastly, the parties undertook to publicise on their web sites the commission they charged and any future changes , and to check every two years any cost reductions likely to be reflected in the interbank commission level.

The Authority deemed the proposed commitments to be adequate and closed the investigation without finding an infringement. As a consequence of the full implementation of the commitments, interbank commission was reduced, with effect from July 2007, by between 34% and 85% for RID and RiBa services and by 18% for the Bancomat ATM service.

ABI-UNILATERAL CHANGE TO CONTRACTUAL CONDITIONS

In July 2007 the Authority completed an investigation into the Italian Banking Association (ABI), which had addressed to the associated banks a document endorsing a restrictive interpretation of the provisions of Article 10 of Law 248 of 4 August 2006 concerning “Unilateral amendments to contractual conditions”. This law had eliminated closing charges for bank accounts and imposed on the banks the obligations to notify their customers directly and in advance of any changes in the applicable contractual conditions.

The Authority considered ABI’s initiative to have a direct impact on the competitive structure of the financial services and banking markets by facilitating uniform conduct of ABI member banks with respect to: i) the circumstances justifying a modification of contractual conditions (ius variandi); ii) the right of withdrawal and the determination of which items should be included in the notion of closing charges; and iii) the

arrangements for applying interest rates. Therefore, the Authority deemed that ABI's conduct amounted to an anticompetitive agreement contrary to Article 81 EC.

During the proceedings, ABI adopted a number of measures, including the immediate and definitive withdrawal of the document under scrutiny. ABI also decided to start an internal discussion in order to avoid that its interpretation of legislative provisions merely reflect its members' positions. Although it found that ABI had infringed Article 81 EC, the Authority did not impose any sanction on the ABI in view of the specific nature of the case and of the voluntary measures that had already been adopted.

### *Concentrations*

BANCHE POPOLARI UNITE – BANCA LOMBARDA E PIEMONTESE

In April 2007 the Authority authorised the incorporation of Banca Lombarda e Piemontese Spa in Banche Popolari Unite Scpa (hereinafter, UBI Banca), subject to some conditions.

The relevant product markets were: deposits and loans to households and SMEs; the distribution of insurance products; and the distribution of managed savings products.

In the deposit market, which is provincial in scope, the merger would increase UBI Banca's capacity in two provinces of Northern Italy, increasing the degree of concentration in the relevant markets and creating a dominant position. The competitive risks posed by the merger were amplified by the fact that that the new entity would have been a major cooperative bank, with very strong local roots in its area of operations. The governance of cooperative banks, which are practically non contendible, would allow the post-merger entity to enact strategies aimed at further strengthening its market position. The same competitive risk were not considered significant in the markets for households and SMEs loans in the same provinces, as well as for the distribution of investment funds and asset management.

The Authority authorised the concentration subject to conditions designed to prevent UBI Banca from gaining a dominant position that would entail a significant and lasting reduction of competition.

First, the Authority required the divestiture of some branches in the relevant geographical markets for deposits. Moreover, UBI Banca was prevented from entering in any agreement or interlocking directorate's arrangements with Intesa San Paolo, in order to avoid any structural and personal ties between the two competitors which could weaken competition.

UNICREDITO ITALIANO-CAPITALIA

In September 2007 the Authority authorised, subject to some conditions, the incorporation of Capitalia in Unicredit.

The impact of the merger was assessed with reference to several product markets, including deposits, loans and consumer credit. The Authority also analysed the sectors of asset management; the life insurance sector and investment banking. .

The Authority first noted that the merger would take place in a peculiar context of complex webs of direct and indirect cross- shareholdings between the new bank and other market players, including most notably the investment bank Mediobanca and the insurance company Assicurazioni Generali. Since both Unicredit and Capitalia had a shareholding in Mediobanca exceeding 18% in total and take part in the agreement amongst Mediobanca's main shareholders.

The Authority deemed that in a post-merger scenario Unicredit would enjoy de facto control over Mediobanca, a situation that would have a cascade effect on Generali, since Mediobanca (Generali's main shareholder) exercised de facto control over the company,. At the same time, Generali was a member, with Unicredit and Capitalia, of Mediobanca's shareholders' agreement.

The Authority found that the concentration would have created or strengthened a dominant position in a number of markets, including: i) deposits; ii) households loans; iii) SMEs loans; iv) distribution of investment funds. Major competitive problems were thought to arise at regional level in Sicily (loans to SMEs and to medium-to-large undertakings) and Friuli (loans to public bodies). As far as the investment banking sector is concerned, the post merger entity also was to gain a dominant position through Unicredit-Capitalia's de facto control over Mediobanca the leading market player In the insurance sector, the merger would result in Unicredit's enjoying a dominant position in some markets through its indirect de facto control of Generali. The distribution of life insurance products would also be adversely affected, since the reduction of competitive pressure would be amplified by the complementarity of distribution channels, as Generali products are largely distributed by its network of agencies and sales agents.

The Authority authorised the operation subject to compliance with a number of measures. These were designed to:

1) maintain competitive conditions in the provincial markets for deposits andloans by divesting 150-180 branches to one or more independent third parties not holding shares in the new bank;

2) significantly reduce commission charges for withdrawals from ATMs belonging to other banks;

3) safeguard competitive conditions in the insurance sector, prohibiting any production and/or distribution agreements with Assicurazioni Generali, for as long as Unicredit/Capitalia remains a shareholder of Mediobanca, and envisaging the divestiture of the entire shareholding in Generali within a given time limit;

4) Unicredit/Capitalia was also required to:

5) bar any of its board members holding a governance role in Mediobanca and/or Assicurazioni Generali from taking part in the board's discussion and voting of resolutions concerning the investment banking and insurance markets in Italy;

6) adopt internal organisational measures to ensure that no sensitive information concerning these markets is included in the information supplied to board members affected by this measure; and

7) reduce its holding in Mediobanca by divesting 9.39% of its share capital.

SOCIETÀ PER I SERVIZI BANCARI-SSB/SOCIETÀ INTERBANCARIA PER L'AUTOMAZIONE – CEDBORSA

In April 2007, the Authority authorised, subject to some conditions, the incorporation of Società Interbancaria per l'Automazione – Cedborsa Spa (SIA) in Società per i Servizi Bancari (SSB).

The relevant product markets affected by the merger were: i) retail clearing services offered under the interbank data transmission system (Sitrad); ii) data processing services for payments using Italian debit cards; and iii) network services. The geographic dimension of these markets was considered national

The concentration the would bring together two major providers of services instrumental to banks' payments system activities, and might determine some market foreclosure. In particular, the operation could lead to SSB acquiring a dominant position, resulting from the integration of SIA's network services with SSB's data processing activities for domestic debit card payments and clearing activities for domestic payment services.

The Authority devised specific conditions to avoid any potential anti-competitive effects flowing from the merge. In particular, SSB was required to:

1) create a separate operating unit for network activities;

2) ensure functional interoperability on all interbank connections in the shortest possible time,;

3) setting tariffs for transmitting interbank data to customers, according to transparent and non-discriminatory criteria irrespective of the chosen applications centre;

4) not apply discriminatory conditions to SSB customers who, in the peripheral sections of the network, choose an operator other than SIA.

INTESA SANPAOLO – CASSA DI RISPARMIO DI FIRENZE

In January 2008, the Authority authorised, subject to conditions, the acquisition of Cassa di Risparmio di Firenze Spa. by Intesa Sanpaolo Spa.

The Authority deemed that the operation could impact on some retail banking markets (deposits, credit cards, consumer credit, managed savings and loans to households and SMEs).

In the deposits markets, the geographical concentration and capacity resulting from the operation could increase the risk of Intesa Sanpaolo acquiring a dominant position in some provinces of central Italy. The Authority also considered that the operation could produce significant overlaps in the household and SMEs loans market in the same provinces. Moreover, Intesa San paolo would acquire a dominant position in the markets for the distribution of investment funds and asset management services in the provinces of Terni, Pistoia and La Spezia.

Finally, the Authority analysed the effects of the concentration in the consumer credit sector. It noted that, following the merger, Intesa Sanpaolo would have operated in these markets through three subsidiaries, holding significant market shares both in the direct credit market (at the regional level) and in the linked credit market (at the national level). to the post-merger entity would gain a dominant position in the direct credit market in the regions of Veneto, Piedmont and Lombardy.

The Authority authorised the merger subject to certain conditions. First, the divestment to third parties of 29 branches owned by Intesa San Paolo/CARI Firenze in the geographical markets most seriously affected by the merger, . Secondly, the Authority required Intesa Sanpaolo to dispose of its entire holding in Agos, one of the subsidiaries operating in the consumer credit markets, in order to exclude the risks of anti-competitive effects in this sector.

## PROFESSIONAL SERVICES

### *Concentrations*

BS investimenti SGR-Ramo d'azienda S.A.F.E.-Società autotrasporti fiduciari europei and BS investimenti SGR-Securcontrol (Macerata)-Securcontrol (Ascoli Piceno)-Metropol security service

In April 2007 the Authority prohibited the acquisition of S.A.F.E., a branch of the company active in Pavia, by Sicurglobal Vigilanza Srl, and authorised the acquisition of Securcontrol, Securcontrol PSG and Metropol Security Service, active in the provinces of Macerata, Pesaro Urbino, Ascoli Piceno, Teramo and Fermo.

The three relevant markets affected by the operations were: i) the market for fixed security or guard duties; ii) the market for mobile security or patrols and remote alarm systems; and iii) the market for the transport of valuables and counting services. From a geographical point of view, the extent of the market depends on the licence granted by the competent Prefect's office which has always a municipal or a provincial extension.

Besides needing a licence from the Prefect's office to enter the market, two important competition variables, staff recruitment and price-setting, are subject to authorization.

As a result of the investigation, the Authority concluded that Sicurglobal's acquisition of S.A.F.E. could have created or strengthened a dominant position in the province of Pavia, where the already low competitive pressure would have been further reduced.

Even before the operation, Sicurglobal held a significant position in this province in the markets for fixed and mobile private security (57% and 38% respectively). The company being acquired was the second operator in these same markets (with 16% and 22%), and the only provider in the market for counting services and the transport of valuables.

As a result of the operation, the main competitor of Sicurglobal in Pavia would have been eliminated, while the other competitors were much smaller and constrained by regulation in terms of endogenous growth, so that they would have been much les able to respond to increases in prices.

Lastly, the nature of the regulatory framework meant that a sufficient degree of competition could not be ensured either through the entry of new competitors, given the regulatory barriers to entry, or through the exercise of contractual power by customers, for the most part small- and medium-sized enterprises operating locally. For all these reasons, the Authority blocked the operation since it would have created or strengthened a dominant position for Sicurglobal in the province of Pavia.

The Authority reached similar conclusions with respect to Sicurglobal's acquisition of Securcontrol, Securcontrol PSG and Metropol Security Service considering the negative effects on competition in the provinces of Macerata, Ascoli and Pesaro Urbino.

As a result of the concentration Sicurglobal's market shares in the provinces of Macerata and Ascoli would have risen from 68% to 100% for the fixed surveillance service and from 92% to 100% for the mobile security service. In the province of Pesaro-Urbino, market shares would have risen from 59% to 66% and from 78% to 80% respectively. Lastly, in Ascoli, its share would have risen from 13% to 55% for the fixed service and from 45% to 75% for the mobile service.

This increase in market shares was particularly worrying because it was accompanied by a low elasticity of demand and competitors unused capacity was particularly low. Also in Macerata, Ascoli and Pesaro-Urbino the operation would have eliminated the main competitor in a context characterised by notable barriers to entry, limited power on the demand side and the low competitive capacity of the remaining operators.

As a result, the operation would have enabled Sicurglobal to gain a dominant position in the markets concerned. The operation would also have led to a significant reduction in competitive pressure on the price and quality of the services offered, to the detriment of client firms.

In light of these competition issues, Sicurglobal proposed commitments designed to prevent dominant positions being created in the various provincial markets. After

evaluating these commitments, which it considered sufficient to resolve the problems, the Authority authorised the merger subject to the following conditions:

1) Sicurglobal should forego the acquisition of the Macerata and Ascoli Piceno operations of Securcontrol, the former operating in the provinces of Macerata and Pesaro-Urbino, and the latter in Ascoli Piceno province;

2) those licences which, as a result of the acquisition of Metropol Security Service, were no longer necessary since they referred to services already provided by the purchasing company in the province of Ascoli Piceno were to be returned to the Prefect of Ascoli Piceno;

3) a request should be submitted to the Prefect of Ascoli Piceno to reduce the number of authorised Sworn Guards in excess of those actually employed in the province by Sicurglobal, Sicurglobal Vigilanza and Metropol Security Service;

4) in the province of Ascoli Piceno, the numbers of Sworn Guards employed and vehicles used to transport valuables could not be increased with respect to those in operation at that time and at the disposal of Sicurglobal, Sicurglobal Vigilanza and Metropol Security Service.

# CONSUMER PROTECTION AND MISLEADING ADVERTISEMENT IN 2007

## SUMMARY INFORMATION

In 2007 the number of complaints submitted to the Authority increased substantially with respect to the previous year, from 899 to 1591. This strong increase in the number of complaints was largely the result of the entry into force of Legislative Decree 146 of 2 August 2007 concerning unfair commercial practices, which significantly expanded the range of competencies of the Authority. Of the 1591 complaints received 855 were dismissed. 54% of these were manifestly groundless, 29% were inadmissible or concerned matters outside the scope of application of the law, while the rest was dismissed because the information provided was insufficient to open an investigation.

Finally, during the first three months of 2008, the Authority opened 608 proceedings against unfair commercial practices (595 of which resulting from complaints) and 83 proceedings concerning misleading and comparative advertising.

**TABLE 1: Outcome of investigations in 2007** *(number of investigations)*

| | |
|---|---|
| **Misleading and comparative advertising** | **241** |
| *- of which misleading* | *205* |
| *- of which unlawful comparative* | *9* |
| *- of which suspended* | *22* |
| **Non-compliance** | **16** |

In 2007 the number of cases for which an investigation was opened increased from 242 to 257. In 205 cases the investigation found the advertisement to be misleading, while in 9 cases the rules governing comparative advertisement were violated. In 22 cases the Authority adopted interim measures, a significant increase with respect to the 10 cases of 2006. In 3 cases the Authority imposed on the advertiser to publish a corrective statement, so as to ensure that consumers be correctly informed. Finally in 13 cases companies were ordered to bring their product packaging into line with requirements.

In 16 cases the Authority identified non-compliances with a previous Authority ruling. In 15 cases advertisers continued to use messages already found to be misleading. In one case the Authority challenged advertisers' non-compliance with a request to produce a copy of the advertisement.

**TABLE 2: Complainants and findings in 2007** *(number of investigations)*

| | **Total** | of which *Misleading* | of which *Unlawful comparison* |
|---|---|---|---|
| Individual consumer | 108 | *96* | |
| Competitors | 49 | *38* | *7* |
| Consumers' associations | 43 | *32* | *1* |
| Government department | 38 | *37* | |
| Not classifiable | 2 | *1* | *1* |
| Competitors' associations | 1 | *1* | |
| **Total** | **241** | ***205*** | ***9*** |

As regards the origin of complaints, 108 cases originated from complaints by individual consumers (up from 98 in 2006), 49 from competitors (up from 43 in 2006), and 32 from government departments (up from 32 in 2006). The number of complaints by consumers' associations remained stable (at 43, 32 of which resulting in the advertisement being found misleading), while complaints from competitors' associations continued to remain not very important (decreasing, with respect to 2006, from 6 to 1). A high proportion of investigations were closed with a finding of an infringement, regardless of the origin of the complainant (ranging from 77% to 100%, with an average of 89%).

**TABLE 3: Alleged infringements and findings** *(number of infringements)*

| | **Total** | **Infringements** |
|---|---|---|
| Characteristics | 190 | 168 |
| Price | 99 | 91 |
| Status of advertiser | 46 | 40 |
| Recognisability of the advertisement | 48 | 38 |
| Protection of health and safety | 8 | 8 |
| Specification of content and extent of the guarantee advertised | 4 | 3 |
| Protection of children and adolescents | 3 | 3 |
| Comparative | 10 | 9 |
| **Total** | **344** | **308** |

Turning to the reason why an advertisement was considered misleading, the large majority had to do with the characteristics of goods and services and their price. A significant number of infringements originated for the fact that the advertisement was not clearly recognised and could have been confused with some form of "independent" information.

**TABLE 4: Medium used to disseminate the advertisement** *(number of advertisements)*

| | **Total** | **Infringements** |
|---|---|---|
| Daily and periodical press | 93 | 86 |
| Internet | 69 | 59 |
| Printed material (brochures, leaflets etc) | 61 | 55 |
| National television | 23 | 19 |
| External advertising | 17 | 12 |
| Packaging | 13 | 13 |
| Radio | 8 | 7 |
| Local television | 6 | 6 |
| Postal service | 5 | 3 |
| Telephone | 4 | 3 |
| E-mail | 3 | 3 |
| Fax | 2 | 2 |
| **Total** | **304** | **268** |

As regards the source of advertisements, particularly important were those published on the press, while Internet advertising, while still important, slightly declined with respect to 2006.

| **Tabe Fines resulting from proceedings** | Amount under Article 26(10) (EUR) | Amount under Article 26(7) (EUR) | Total (euros) |
|---|---|---|---|
| Unlawful comparative | | 106,800 | 106,800 |
| Misleading | | 4,573,300 | 4,573,300 |
| Non-compliance | 342,700 | | 342,700 |
| **Total** | **342,700** | **4,680,100** | **5,022,800** |

In the course of 2007 the fines remained more or less at the level of 2006 at around 5 million EUR.

## DEVELOPMENTS IN THE LEGISLATIVE FRAMEWORK AND INITIAL APPLICATION OF LEGISLATIVE DECREE 146/2007

Legislative Decree 146/2007 entered into force in August of 2007 and therefore the experience with its application is still quite limited. However, already in these first months, it has become clear that the decree extends quite substantially the powers of the Authority allowing effective action against business behaviours which, although connected to the sale of goods or services, could not be immediately categorised as commercial advertising.

In particular, as soon as Legislative Decree 146/2007 entered into force, the Authority opened an investigation against the practice of including charges in telephone bills for calls and connections to international satellite numbers and special numbers, which customers claimed they had never made. Consumers had complained that the telephone operator had taken no action to stop this situation but had demanded the immediate and full payment of the sums allegedly owed, threatening otherwise to disconnect their phone lines (PS/24 TELECOM – BILLING FOR SATELLITE CALLS AND/OR CALLS TO SPECIAL NUMBERS).

The Authority considered the conduct of the telephone operator as an aggressive commercial practice and observed that prompt action was necessary, The Authority adopted interim measures, ordering the telephone operator to suspend the practice of disconnecting telephone lines for late or non-payment of bills involving calls or connections to the numbers under examination, pending the outcome of the proceeding in front of the Authority.

The investigation is still on-going at 31 March 2008.

The flexibility in the notion of commercial practice introduced by Legislative Decree 146/2007 enables the Authority to carry out a unified evaluation of complex business strategies. Under the previous legislation, these practices would have had to be artificially broken down to enable the Authority to focus its action only on misleading advertising.

For example, the Authority opened an investigation against Enel, the major supplier of electricity in Italy, to determine whether all practices aimed at convincing customers to continue to be supplied by ENEL in the free market for electricity and gas were aggressive. More specifically, some customers complained that the company had set up electricity or gas supplies that they had not asked for. Other consumers reported that advertisement seeking to persuade users to enter into contracts with the supplier in question was possibly misleading. Indeed these advertisements did not indicate clearly that the company applied non-regulated prices that were subject to market variations. (PS/91 ENEL ENERGIA – RICHIESTA CAMBIO FORNITORE (APPLICATION TO CHANGE SUPPLIER). Under previous legislation the Authority would have been constrained to

open the proceedings only with respect to possible misleading advertising. Today the investigation address the whole range of aggressive practices. As of 31March 2008 the investigation is still on-going.

Legislative Decree 146/2007 allows the Authority to close a proceeding without ascertaining a violation, accepting commitments from the parties and making them binding. As a result, the number and overall duration of minor inquiries will be reduced, enabling the Authority to concentrate its resources on those unfair commercial practices likely to be most detrimental to consumers. However by March 31 2008, no case yet has been closed with a commitment decision.

Conversely, during the period preceding an investigation, it is quite common for the Authority to invite enterprises to eliminate any unfair aspects of a given commercial practice. This faculty is envisaged by the regulation governing investigative proceedings.

Article 4 of this regulation provides that, if there are grounds to believe that a commercial practice may be unfair, the Authority may notify the enterprise of its concerns and ask it to take any steps necessary to bring its conduct into line with the legislation. Naturally, this possibility does not arise in particularly serious cases, in which the predominant interest is to investigate, identify, repress and punish the unfair practice, to ensure that the Authority's action has the required deterrent effect.

In the early months of 2008 the Authority's pre-investigation activities under this provision were concentrated in the tourism, agri-food and telecommunications sectors.

The flexibility with which the Authority can exercise its new powers to define proceedings, combined with its power to open an investigation even in the absence of a complaint, will enable it to identify strategic lines of intervention. It will also be able to give priority to sectors and markets in which competition conditions, informational imbalances or other indicators, such as complaints from consumers or businesses' conduct, give reason to believe that consumers' well-being has been undermined.

### *Advertising of dangerous products*

The consumer code provides a specific form of protection for consumers targeted by advertisements for products that could endanger their health or safety but, by failing to inform them of this, could lead them to disregard the normal rules of caution and vigilance. Article 21.3 of the Consumer Code[9] identifies a particular form of advertising that misleads by omission.

Advertisements likely to endanger the health and safety of their targets are a serious violation of the rules governing misleading advertising. For this reason, the consumer code envisages a higher statutory minimum for fines issued by the Authority in these

[9] Formerly Article 24, prior to the entry into force of Legislative Decree 146/2007.

cases: Legislative Decree 146/2007 concerning unfair commercial practices raised this fine from 25,000 to 50,000 EUR.

The reason for such additional rigor for advertising that fails to identify the risks connected with the use of a product depends on the fact that consumers are highly unlikely, before the damage to their health has actually occurred, to find out the relevant information that would enable them to adopt correct consumption behaviour. As a result the Authority needs additional instruments (besides fines and cease and desist orders) for making sure that consumers are well informed. Indeed in such cases the Authority may order the enterprise to publish a corrective statement at its own expense.

In 2007, the Authority challenged a number of advertisements promoting food supplements with breaching Article 24 of the Consumer Code. More specifically, it banned any further dissemination of an advertisement suggesting that taking a certain supplement would treat sexual ailments affecting both men and women. Not only were the claims regarding the product's properties unfounded, but taking it at the dosages recommended in the advertisement would have caused an abnormally high intake of certain substances. This would have caused a serious toxicological risk (PI/6008 NITROXX). The Authority instructed the advertiser to publish a corrective statement on its Internet site and issued a fine of 38,100 EUR.

Furthermore the Authority considered an advertisement for food supplements that implied that they had no contraindications and that no particular precautions were required when taking them, to be misleading and liable to place consumers' health and safety in danger. Some of the substances contained in these supplements could indeed be harmful, especially if the user takes them for a prolonged period of time or suffers from certain physiological conditions or illnesses (PI/6088 KALORY EMERGENCY 1000). The Authority instructed the advertiser to publish a corrective statement in the press and fined the company 47,500 EUR.

Lastly, the Authority prohibited any further dissemination of an advertisement to promote a new venue, which invited potential customers to "*get drunk on your favourite beer (and more)*". The Authority felt that the message urging consumers to drink alcohol excessively, encouraged the spread of potentially dangerous consumption patterns and was liable to lead consumers to disregard the normal rules of caution and vigilance (PI/5593C UBRIACARSI A LOS PANINEROS).

### *The protection of children and adolescents*

Children and adolescents who may be targeted by misleading advertising enjoy special protection under Italian law. Article 25 of the Consumer Code, as originally formulated, provided that "*Misleading advertising is considered to be that which, being liable to reach children or teenagers, may, even indirectly, threaten their safety or abuse their natural credulity or lack of experience or that which, using children and teenagers in advertisements, save for the prohibition pursuant to Article 10, paragraph 3 of Law no. 112 of 3 May 2004, takes advantage of the natural feelings of adults towards children*".

Legislative Decree 146/2007 simply specifies that "*any commercial practice which, being liable to reach children or teenagers, may, even indirectly, threaten their safety*" must be considered misleading (Article 21.4 of the consumer code, new text).

The new provision does not reduce the protection of minors established by the consumer code. First of all Legislative decree 146/2007 provides for a general ban of advertisements that are likely to distort the economic behaviour of the average member of particularly vulnerable groups, including of course the youngsters. Furthermore the provision explicitly prohibiting advertising that plays on adults' natural feelings for children and contained in the old article 25 of the Consumers' Code (and now disappeared) was designed to ensure that advertisers do not unduly influence consumers' behaviour by exploiting their feelings towards children and young people. Such commercial strategies could be defined as aggressive and therefore prohibited under the new version of the Consumers' Code.

In the course of 2007, the Authority challenged just one case of infringement of the rules protecting the youngsters. The case concerned a television advertisement promoting the purchase of ring-tones, logos and screensavers for cell phones. The service was activated by sending an SMS to a dedicated number. After the subscription was activated, consumers would receive a logo and a ring-tone on their phone each week, against payment, while the first delivery would have been accompanied by an additional free service (PI/5769 DOWNLOADABLE RING-TONES FROM 48428). The advertisement indicated that the service was only intended for adults. This information, however, was provided in a running message superimposed on the screen and was very difficult to read because of speed and small prints. A number of factors indicated that the advertisement was intended for a young audience: first, the type of products on offer is mainly purchased by teenagers; second, the overall setting of the television advertisement was designed to attract the attention primarily of children and teenagers; and third, the time slot chosen for the advertisement supported the conclusion that the advertisement was intended for younger viewers.

In fact, the advertisement placed an entirely disproportionate emphasis on the free gift linked to the first two incoming messages as compared to the contractual constraints resulting from subscribing via SMS. In addition, the information on the price charged to use the service seemed to be inaccurate and far from complete. The Authority fined the advertiser 46,500 EUR.

### *Hidden advertising*

Advertisements that seek to disguise their promotional intent in the form of a disinterested and neutral message are highly insidious forms of misleading advertising. Hidden advertising aims to circumvent the normal barriers that consumers erect against business communications and can unduly influence their economic decisions.

Even before Legislative Decree 146/2007 entered into force, the Consumer Code provided that advertising must be clearly and plainly distinguished from other forms of

communication to the public so that the distinction is fully evident. The provisions of Legislative Decree 146/2007 governing non-transparent advertising are set in the context of misleading omissions. They envisage that "*a commercial practice shall be regarded as misleading*" when a trader "*fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that they would not have taken otherwise*".

Therefore, in the new legislative context hidden advertising must be considered on a par with unfair commercial practices when it is likely to adversely influence the economic behaviour of consumers. From this perspective, Legislative Decree 146/2007 does not introduce any significant change with respect to the past.

Of course, in assessing possible cases of hidden advertising where complaints concern the existence of a client/supplier relationship between the drafter/author and the alleged advertiser, the Authority must take special care to ensure that consumers' interest in correct and transparent information is reconciled with the constitutionally protected freedom of expression (PI/5861 DACIA LOGAN MCV ARTICLE IN LEGGO).

In such cases, identifying that a communication is intended for advertising purposes does not just depend on whether it is likely to have an objective promotional effect that could indirectly benefit the products mentioned in an information piece. It depends, rather, on whether it has a promotional aim that in itself is incompatible with information or entertainment purposes: a judgement that, in the absence of direct proof, can be applied in cases of allegations supported by serious, precise and concordant evidence (PI/6226B HIDDEN ADVERTISING QUATTRORUOTE VENDO & COMPRO AUDI).

When an advertisement is found to have a promotional purpose, the Authority considers the degree to which this is recognisable by the target audience.

To identify the promotional purpose of the advertisement, the Authority has used so-called intrinsic indicators, basing its investigations primarily on an analysis of the graphic and textual content, with a particular focus on the description of the product. In this respect, the Authority lends particular significance to the adoption of an emphatic style or register typically used in business communication, as well as the central position the offering may hold in the overall thrust and layout of the advertisement. In extreme cases, this takes the form of omitting any comparison whatsoever with alternatives available on the market.

Following this approach, it could be assumed that articles extolling the features and performance of certain vehicles by praising their superior qualities in uncritically flattering and admiring terms were promotional in intent (PI/5864 FIAT BRAVO ARTICLE IN LEGGO). The way a product is shown can also be considered a reliable indicator that the text is promotional in intent, if presented in a way that is unnatural or artificial in the context of the article. This is especially true when the image appears to be used merely to reinforce the product's alleged superior performance and is not justified by narrative or stylistic requirements (PI/5861 DACIA LOGAN MCV ARTICLE IN LEGGO).

It is important to consider the context of the message and the nature of the publication. For example, specialized journals are structured around articles and features on companies and their products (since they are addressed to a specialised target audience with an interest in new developments in the sector and in contacting the various operators). These cannot be assumed to be promotional in intent just because such content is present or the source of the information might be a company. (PI/6226 HIDDEN ADVERTISING QUATTRORUOTE VENDO & COMPRO PORSCHE).

In a case concerning a feature published in a section dedicated to engines, the Authority underlined that more than half of the page was taken up with superlative descriptions of the performance and fittings of a car in tones that could have been lifted directly from an advertising catalogue. It also showed an image of the dashboard in the middle of the page. The Authority therefore concluded that the feature was promotional in intent and noted the absence of any comparison with other products in the same category or of remarks or observations of an objective and critical nature (PI/5860 MITSUBISHI PAJERO ARTICLE IN LEGGO).

Conversely, an article that appeared in a specialised automobile magazine was found not to be promotional in intent since the text did not heap unjustified praise on the vehicle. Rather, its intention seemed to be to illustrate the features of the guarantee offered by the manufacturer by presenting its advantages and disadvantages in a balanced way and in tones that were hardly compatible with those of an advertisement (PI/6226D HIDDEN ADVERTISING QUATTRORUOTE VENDO & COMPRO CHRYSLER).

In another case, the Authority concluded that an article hade a promotional intent since its content coincided with the text of "advertisements" preceding and following it. In addition, the first part of the article was printed on special paper, clearly commissioned by the manufacturer. In this context, the graphic prominence given to the company's telephone number and web site, both in very emphatic characters, also suggested that the article was intended to promote the post-sales support offered by the company (PI/6226 HIDDEN ADVERTISING QUATTRORUOTE VENDO & COMPRO PORSCHE).

As regards the recognisability of the promotional nature of advertisements, the Authority's assessment is based upon a number of indicators, i.e. the precautionary measures adopted by the company to make it clear that it is an advertisement, considering that the absence of any explicit indication will not necessarily, in itself, prevent the advertising intent from being recognisable to readers.

In practice, when advertisements were presented in a graphic format entirely similar in style, nature and character size to the publications articles, this was considered a decisive factor in preventing the advertising intent from being recognisable (PI/5710 - ENEL HIDDEN ADVERTISING IN LINUS). In this case, the Authority imposed fines of 8,600 EUR on the publisher and 18,600 EUR on the advertiser.

Where it had found a message to be promotional in nature, the presence of extrinsic expedients designed to conceal this led the Authority to rule that the nature of the message was not recognisable. Thus, the format of the message, with title and subhead,

page number and inclusion in the periodical's contents page were considered to be likely to confuse readers as to the real aim of the article (PI/6226 HIDDEN ADVERTISING QUATTRORUOTE VENDO & COMPRO PORSCHE). In this case, the Authority fined the advertiser 19,100 EUR and the owner of the publication 14,100 EUR.

Similarly, in the case of advertisements broadcast by television channels and with the appearance of journalistic or news items, the absence of explicit wording indicating the promotional intent of the feature is not in itself an infringement of the legislation on hidden advertising, except when an overall consideration of the message indicates that its real nature is not clear to the audience.

In this respect the Authority considered the case of an advertisement inserted in a TV news programme whose informational role is not compatible with the promotional nature of business communications. The Authority considered the display of the TV news programme's logo while the images of the promotional feature were showing on the screen, as well as the announcement of the feature by the news presenter in a form not dissimilar to that used to introduce the other content of the programme, as being relevant to its judgement that the advertising intent of the feature was not recognisable (PI/5814 LUCCHI GIOCATTOLI ON TG ARENA). The owner of the TV channel was fined 3,700 EUR while the advertiser was fined 4,100 EUR.

### *Comparative advertising*

The Authority takes a particularly favourable view of comparative advertising This form of advertising, if conducted fairly, enables consumers to compare the alternatives available on the market more easily and helps them make efficient economic decisions. For these beneficial effects to occur, the comparative advertising naturally has to be true and must not mislead consumers as to features or information that might influence their market behaviour (PI/5626 ITALSOFT: SOLO I MIGLIORI NON TEMONO PARAGONI-ONLY THE BEST NEED NOT FEAR COMPARISON).

As a first condition for advertising comparisons to be lawful, the Consumer Code states that they must not be deceptive. At the same time, the Code also lays down further requirements designed to protect the interests of those competitors against whom the comparison is being made[10]. For the comparative advertisement to be lawful, all these conditions must be satisfied cumulatively.

[10] Under Article 4.1 of Legislative Decree 145 of 2 August, the wording of which coincides on this point with that of Article 22.1 of the Consumer Code as previously in force, comparative advertising that is not deceptive is permitted when these further conditions are met:
- *it compares goods or services meeting the same needs or intended for the same purpose;*
- *it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;*
- *it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor;*
- *it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods,*

In the course of 2007, the Authority took action on various cases of comparative advertising in response to requests by competitors who felt they had been unjustly damaged by the form of comparison applied to them.

The Authority reiterated its well-established position on the notion of comparative advertising, according to which it only includes so-called "direct" comparative advertising, i.e. advertising that makes a comparison with one or more given competitors. Direct advertising comparisons may be explicit, when the name of the competitor or the brand of its products or services are specifically mentioned. Or it may be implicit, when the identity of the competitor can be inferred from the context of the promotional initiative (PI/6006 HTI HI TECH INTERNATIONAL).

Comparative advertising is lawful when the comparison is between goods or services that meet the same needs. In a case where a food supplement was compared with a pharmaceutical product, this condition was not satisfied, since these product categories have dissimilar functions and modes of use (PI/6008 NITROXX). The fine imposed in this case amounted to 38,100 EUR.

The Authority concluded that the condition whereby the comparison must be objective if the comparative advertising is to be considered lawful had not been observed in a case concerning the promotion of electronic software packages for business use. Here, a package capable of satisfying many needs in the field of construction planning and design was compared to a series of different programs, each with specific functionalities. The Authority noted specifically that not all of the technical features compared were verifiable, since some of the competitors' products had not yet been launched on the market (PI/5626 ITALSOFT: ONLY THE BEST DON'T FEAR COMPARISONS). The advertiser was fined 15,100 EUR.

Similarly, the Authority concluded that a very general and precise statement that a specific water softener, was more innovative than competing ones was misleading because it did not rely on pertinent, verifiable and representative features (PI/6189 CULLIGAN ITALIANA WATER SOFTERNER). The Authority fined the company 3,600 EUR.

Denigration of a competitor was present when negative opinions were not justified by the aim of highlighting the benefits arising from use of the advertiser's products. The law is violated only when the chosen mode of communication manifestly exceeds the legitimate aim of effectively promoting the advertiser's own commercial offering. Thus, an advertisement by a boat builder who exploited an isolated failure in one of a competitor's boats (sarcastically described as a "shipwreck") to cast doubts on its

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*services, activities or circumstances of a competitor;*
- *for products with designation of origin, it relates in each case to products with the same designation;*
- *it does not take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;*
- *it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.*

reliability was judged to be intentionally denigratory (PI/6006 HTI HI TECH INTERNATIONAL). The Authority fined the company 13,600 EUR.

Similarly, an advertisement promoting a tour operator, which implied that his main competitor applied rates that were always exorbitant and unjustified, was judged to be denigratory since disproportionately negative (PI/5820 ESCURSIONI DI GENTES INTERNATIONAL TOURS). The advertiser was fined 14,600 EUR.

Finally, a corporate communication promoting supply and maintenance services for fire prevention equipment described a competitor's products, which were subject to hydrofluorocarbon recovery and recycling obligations, as "hazardous waste". This advertisement too was considered denigratory (PI/5855 GIELLE: NAF S-III? NO THANKS).

***Non-compliance with the Authority's provisions***

In the course of 2007, the Authority was called on several occasions to take action with respect to alleged non-compliance by advertisers with obligations originating in the Authority's decisions. Most of the complaints and reports concerned cases of non-compliance with cease and desist orders, through which the Authority had prohibited any further dissemination of advertisements deemed to be misleading. In this context, the Authority confirmed its position, already supported by the decisions of the Courts, according to which failure to observe a cease and desist order does not necessarily consist merely in re-publishing the promotional message found to be deceptive. On the contrary, the operator has disregarded the Authority's order when the advertisement, although appearing to be formally new with respect to the one to which the original prohibition order applied, reproduces without substantive changes the features deemed to be deceptive in the original version.

In application of this principle, the Authority challenged a commercial operator with failure to comply with a provision adopted in May 2002. The provision had prohibited any further dissemination of a communication promoting inclusion, on a for-payment basis, in a guide listing trade fairs. The communication had implied that replying to the offer made through the postal service did not entail any cost.

In the course of 2007 the Authority received many requests to take action on this matter. These reported that the company in question was distributing new leaflets promoting the same initiative, with characteristics substantively reproducing those the Authority had already found deceptive. Considering that it was the second time the company had failed to comply with an Authority's decision, the fine was up to the statutory maximum of 50,000 EUR (IP/18 FAIR GUIDE PUBLICATION)[11].

[11] In this respect it should be noted that the maximum statutory fine in cases of non-compliance with the Authority's provisions is now 150,000 euros under the provisions of Legislative Decree 146/2007.

In a very similar case, a fine of 25,100 EUR was applied to a company that had failed to comply with a precautionary measure adopted by the Authority in response to an advertisement promoting registration in an "Italian Business Internet Directory". The advertisement led its target audience to believe that registration was free of charge (IP/12 DAD ITALIAN BUSINESS INTERNET DIRECTORY ).

In the agricultural and food sector, the Authority challenged an advertiser for non-compliance with a provision whereby the wording on packages of smoked salmon had been found to be misleading. The wording falsely implied that the salmon had been processed following a long-standing family tradition. The operator had not changed the packages within the timescale set out in the Authority's decision, but had merely added a white label on top of the misleading wording. The Authority observed that the company should have replaced all the packages still at its disposal, that is, all those that had not yet been delivered to distributors. The company was fined 23,500 EUR (IP/19 EUROFOOD'S KV NORDIC SALMON).

Lastly, according to Article 26 of the Consumer Code, "*The Authority may also demand that the advertiser or the owner of the medium that spread the advertisement produce a copy of the advertisement considered to be misleading or unpermitted. If such demand is not complied with the Authority may also exercise its powers pursuant to Article 14, paragraphs 2, 3 and 4 of Law no. 287 of 10 October 1990 […] For failure to comply with requests to furnish the information or documentation […] the Authority shall impose an administrative fine of between 2,000 euros and 20,000 euros*".

In the case in question, the demand to produce a copy of the advertisement on which the Authority had been asked to intervene had been made in writing. The demand had then been reiterated during the inspection carried out in the company's premises and again in a subsequent communication. However, the advertiser had failed to respond to these demands and had only taken steps to look for the film containing the advertisement several months after receiving the demand from the Authority. The TV company in question was therefore fined 2,000 EUR (IP/16 SUPER QUIZ GOLD TEL).

## DECISIONS BY SECTOR

### TELECOMMUNICATIONS

The prominent position occupied by the telecommunications sector in the activity carried out by the Authority under the Consumer Code was confirmed In the course of 2007. Many of the Authority's actions concerned advertising promoting integrated telecommunications services and promotional offers in the fixed and mobile telephony markets.

These markets are characterised by strong rivalry between operators, which originates from innovation and the entry in the markets of new products and services and from the introduction of different tariff plans, each related to a specific consumption pattern.

As a result advertising is a permanent feature of competition in these markets and is carried out through the Internet, on the daily and periodical press, on TV and on billboards.

The problem is that the relative complexity of the features and conditions of use of telecommunications services does not always allow for these to be conveyed accurately in advertisements, especially advertisements characterized by precise space and time constraints. The highly diversified – sometimes extremely so – tariff plan structures are difficult to convey in a style typical of corporate communication, based on simple, striking wording and on performance claims that immediately attract and hold the attention of potential purchasers.

It is no surprise, therefore, that most of the Authority's actions in the telecommunications sector were intended to ensure the clarity and completeness of promotional messages concerning the services on offer and the price that consumers actually have to pay to use them.

In evaluating the possible deceptiveness of the advertisements on which it was asked to intervene, the Authority followed its well-established approach, where the completeness and comprehensibility of the information provided by advertisers is the minimum requirement they must meet to ensure that their customers gain an accurate impression of the true value and cost-effectiveness of their proposals (PI/5596 TIM CANCELS TOP-UP COSTS).

As regards any gaps in the information provided on the service features and usage conditions on offer, the Authority reiterated that not every omission is necessarily relevant in judging whether or not an advertisement that has given rise to a complaint is deceptive. The question of whether the omissions on which the complaint is based could significantly limit the scope of the statements contained in the advertisement and mislead the target audience as to the actual extent and/or cost-effectiveness of the offer, must be assessed on a case-by-case basis (PI/5577 ALICE ALL-INCLUSIVE).

Cases in which relevant information is provided in an obscure, ambiguous, contradictory manner or in a manner not easily intelligible by the audience can also be equated with actual omissions. In the telecommunications sector this can happen, most notably, as a result of the use of very small print, in the case of promotional messages disseminated through newspapers or periodicals, or through the use of fast-moving running banners superimposed on television adverts.

As regards the features of the services provided, the Authority ruled that an advertising campaign concerning an innovative telephony service that the operator claimed would have enabled users to use a single portable device for fixed and mobile services was misleading. While the advertisement implied that the service could be used interchangeably with traditional fixed telephony, it emerged from the inquiry that it

involved usage limitations and differentiated tariff schemes based on the area of use of the device. In fact, users had to pay additional charges to receive calls on their fixed number when the device was outside the residential catchment area for their geographical number.

Moreover, the service, while open for reservations, was not yet available, though the advertisement suggested otherwise. Although consumers had been notified of this when they first made contact with the advertiser, the Authority, in line with the position already confirmed by the administrative courts, considered it irrelevant that consumers may not have suffered economic damage. This is because damage to users' freedom of choice, in the form of their ability to make transactional decisions free from undue interference, was in itself sufficient to establish an infringement of the provisions. The Authority therefore imposed a fine of 54,100 EUR on the advertiser (PI/5598 VODAFONE FIXED NUMBER SERVICE).

On several occasions the Authority intervened against advertising strategies that attracted consumers with offers that were much less appealing than suggested. For example, the Authority took action against a number of television advertisements promoting the combined purchase of two SIM cards from the same operator, to which was associated free reciprocal phone traffic. The calls, however, were not free, since the offer envisaged a charge of 15 eurocents on reply. The claim of free phone traffic was in any case limited to fifty minutes of conversation per day (after which a specific, and costly, tariff scheme was applied). The advertiser was fined 23,100 EUR (PI/5822 SAN VALENTINO - H3G TOP-UP POWER).

Similarly, an advertisement for an integrated phone service with a fixed monthly tariff described as "without limits" failed to mention that a limit did in fact exist since calls could only be made under the scheme to numbers on the same operator's network. It was therefore judged to be deceptive, since it was liable to mislead consumers as to a key feature of the offer (PI/5577 ALICE ALL-INCLUSIVE).

As regards the price of the service, an advertisement suggesting "*all-inclusive. TV, Internet and telephone – without limits. From 1 euro a day*" was considered misleading, since the claim was immediately contradicted by a note near the bottom of the poster excluding television services from the offer available at the price indicated. The misleading nature of the advertisement was very much connected to the fact that it was a street poster and passer byes would generally not be read the whole poster, but just absorb its main message.

Equally relevant in judging whether the advertisement was deceptive was the omission of information concerning the need to pay a particularly high activation fee to take up the offer. In such a case the Authority fined the advertiser 62,100 EUR (PI/5577 ALICE ALL-INCLUSIVE).

Finally, the Authority concluded that a television advertisement for a residential fixed network telephone service at "zero cost to fixed and mobile numbers" was misleading. In actual fact, a charge on reply was envisaged. For calls to mobile numbers this was

nearly double the charge that would otherwise have applied. Moreover, the claim of free calls was actually limited since the service envisaged a ceiling on the number of traffic minutes and, only for calls to mobile numbers. The Authority fined the advertiser 73,100 EUR (PI/5637 TELECONOMY ZERO-ZERO)

The Authority was asked to decide on the possibly misleading nature of advertisements referring to the elimination of fixed costs associated with recharging SIM cards prior to the reform implemented by Decree Law 7 of 31 January 2007 (the "Bersani-bis" decree), subsequently confirmed as Law 40 of 2 April 2007. Article 1 of the decree, as amended, provides that: "*to encourage competition and tariff transparency, provide consumers with an adequate level of information of the true prices of the service, and facilitate comparison of the offers available on the market, telephony operators, televisions networks and electronic communications networks are prohibited from applying fixed costs and top-up charges for pre-paid cards; this includes top-ups made using banks' ATM or remotely using electronic systems, that are additional to the cost of the telephone traffic or service requested*".

Before this provision entered into force, some operators had launched services that claimed to eliminate or reduce the fixed cost associated with recharging pre-paid phone cards. In this context, the Authority found a television advertisement promising "*the only tariff that eliminates recharging charges*" to be misleading. The Authority observed that these fixed costs did actually have to be paid by consumers, who would later be fully reimbursed in the form of free phone traffic, up to three times a month. Use of this credit, however, was heavily restricted as regards the direction of traffic and period of validity. The Authority fined the company 64,600 EUR (PI/5596 TIM CANCELS OUT TOP-UP COSTS).

The Authority also considered an advertisement promoting mobile telephony services provided through pre-paid cards following the entry into force of Decree 7/2007. In this case, it ruled that the advertisement, which contained the wording "without recharging charges", was unlikely to suggest that the offering had some sort of non-existent superior qualities or mislead consumers into believing, wrongly, that the elimination of these costs was the result of a decision reached independently by the advertiser in the absence of legislative constraints. Rather, the Authority deemed that the advertisement had performed a useful informational function, not least in view of the period during which it was disseminated (between the issue of the decree and its confirmation in law) (PI/5912 YOU & VODAFONE).

The consumer protection measures adopted with Decree 7/2007 led the Authority to consider unlawful an advertisement of a pay-per-view digital terrestrial channel. The advertisement reminded holders of pre-paid cards that, since at their expiry date any remaining credit would be lost, consumers should use their credit up.

In fact Article 1 of Decree 7/2007, had disposed that "*time limits on the use of traffic or service purchased are prohibited*". Therefore the Authority concluded that the advertisement appeared likely to distort consumers' decisions, and consequently to be

detrimental to their economic behaviour (PI/6152 MEDIASET PREMIUMCARD). The Authority fined the company 29,600 EUR.

**PERSONAL CARE**

In the sector of cosmetics and, more generally, of personal care, any assessment of whether advertisements are or are likely to be misleading will have its own specific features. The Authority has always placed a special emphasis on the subjective conditions of the users targeted by these advertisements, both in evaluating whether they were likely to materially and adversely influence their economic behaviour, and in considering the relative gravity of infringements.

For example, in evaluating an advertisement promoting a food supplement alleged to act on people's metabolism after meals, considerably reducing their calorie intake from the food eaten, the Authority noted explicitly that the product was intended for consumers presumably suffering from weight problems and therefore in a particularly fragile psychological state.

In the case in question, the advertisement implied that by taking the supplement constantly, users could reduce the amount of calories absorbed during meals. It even quantified the potential reduction as amounting to over 1000 calories. But in the opinion of the *Istituto Nazionale di Ricerca per gli Alimenti e la Nutrizione* (National Institute for Food and Nutrition Research – INRAN), none of the product's components actually had the ability to interfere with the absorption of sugars, fats or starch and therefore combat calorie assimilation. The role of each component in regulating weight loss appeared entirely insignificant compared with exercise or a low-calorie diet (PI/6088 - KALORY EMERGENCY 1000). In view of the gravity of the infringement, the Authority fined the advertiser 47,500 EUR.

The special psychological condition of heavily overweight consumers to advertisements stating that by taking certain products they will achieve miraculous weight loss without engaging in physical exercise or following a calorie-controlled diet, was again considered significant by the Authority in another proceeding. This concerned advertisements promoting dietetic products. The advertisement in question implied that a certain product had intrinsic qualities that would bring rapid, considerable and lasting weight loss without any need for users to change their eating habits. The INRAN clarified that any slimming effects produced by the product's ingredients, in the quantities present, would be entirely negligible. The product could at most be used as a dieting aid, but had no ability to cause weight loss on its own if users did not follow a balanced low-calorie diet (PI/5813 AMERICAN DIET SYSTEM GIORNO E NOTTE). The advertiser was fined 80,000 EUR.

Turning to cosmetics, in the course of 2007 the Authority took action on advertisements illustrating the effectiveness of certain products in excessively categorical and assertive or deliberately confusing. Such advertisements could lead consumers to misunderstand the advantages they could actually achieve by using the products, and therefore be

detrimental to their economic behaviour. More specifically, an advertisement promoting an anti-wrinkle treatment and referring frequently to the term "botulinus", even in the very name of the product, was deemed to be misleading. The use of this term was likely to create confusion as to the product's real nature and composition by implying that it contained botulinum toxin. This substance should only be used by specialised medical personnel and has properties similar to those of a true pharmaceutical product (PI/5753 COVERMARK BOTULINE). The Authority fined the advertiser 16,100 EUR.

Finally, the Authority prohibited any further dissemination of an advertisement promoting a tooth whitening dental care system since it falsely implied that the treatment could whiten, and completely remove marks from, users' teeth. The product, however, if used in the way and at the dosages recommended by the advertiser, had only a modest whitening effect. The results actually obtainable were largely dependent on the state of the teeth at the outset and on the chosen evaluation method. The scientific documentation produced by the operator to support its advertising claims did not justify the emphatic and categorical nature of the claims contained in the advertisement (PI/6095 AQUAFRESH GENTLE WHITE). The Authority fined the company 29,100 EUR.

**TRANSPORT**

In the air transport sector, the Authority's actions on misleading advertising in the course of 2007 concerned information regarding the true cost of the service and the conditions for using it. Air transport markets are characterised by intense price competition by carriers, amplified by the commercial success of low-cost operators and, for those consumers, the absence of brand loyalty. As a result, operators in the sector frequently resort to promotions offering a certain number of very cheap tickets on some routes.

With respect to advertisements for these offers, the Authority first of all checked that the number of tickets available at the stated fare corresponded to that indicated in the communication and that the price payable by consumers to take up the offer was the same as the advertised price.

As regards the price of air transport services, the Authority reiterated its long standing position that the fare indicated in advertisements must include every cost payable by consumers, who must be able to calculate the total in advance. Alternatively, it must show contextually, and in a sufficiently clear graphic and/or audio format, all the components included in the calculation of the total price, to ensure that potential purchasers were provided with clear, complete information. More specifically, when the advertiser intends to break the fare down into a basic rate and a series of additional supplements, the final price must in all cases be shown clearly to consumers in a precise and timely manner.

In light of these considerations, the Authority found that an advertisement suggesting that up to 200,000 plane tickets were available for purchase on various routes at the promotional fare of one cent was misleading. The quoted fare did not include airport

taxes, administrative costs and the fuel surcharge, all of which had to be added on. These costs, to which consumers were referred by an asterisk, were shown in very small characters, in a barely legible format, and with less graphic impact than that of the principal claim (PI/5643 MYAIR.COM – MY COSÌ ITALIANA MY COSÌ LOW COST). The Authority fined the company 7,100 EUR.

The Authority applied the same considerations with respect to an advertisement promoting the purchase of tickets on the Milan-Amsterdam route at a particularly low price. The substantial list of additional costs was set out separately in microscopic characters in colours that were very hard to see (PI/5741 TRANSAVIA.COM "VOLA PIÙ FACILE"). The Authority fined the advertisers 26,100 EUR and 31,100 EUR respectively.

Similarly, the phrase "*excluding taxes and supplements*" shown in small characters was not considered sufficient to prevent an advertisement from being deceptive, given the impact of airport taxes on the total price of the ticket. In the case in question this was 60% higher than the advertised fare (PI/5467 AIR MALTA "APRI LE BRACCIA E VOLA"). The Authority fined the company 5,600 EUR.

Largely similar considerations led the Authority to rule that an advertisement promoting sea transport on routes to and from Sardinia and Sicily was misleading. Here too, the advertisement made emphatic claims as to the very low price of services. However, the additional taxes and supplements ended up quadrupling its actual cost to consumers. In addition, the advertisement did not specify that the tariff in question only applied to one-way tickets (PI/6167 TIRRENIA NAVIGAZIONE). The Authority fined the company 28,600 EUR.

Finally The Authority found an advertisement disseminated by a tour operator promoting discounted prices for Brazil to be misleading. The price indicated in the advertisement did not include a number of additional components such as airport taxes, registration fees, health insurance and baggage (PI/5988 OSTIENSIS VIAGGI NETWORK-BRASILE FORTALEZA). The Authority fined the company 6,100 EUR.

**TOURISM**

In the tourism sector, operators' commercial proposals are noteworthy for their complexity. Indeed, not only can a series of services be provided within the same contract (for example, transport, board and accommodation in the case of all-inclusive packages), but each of these has a series of characteristics (such as the level and facilities of the hotel, or the type of air transport) that are all evaluated jointly by consumers making their choice from the options available.

This raises the question of the relevance to consumers' decision-making processes of erroneous information revolving around non-material characteristics of the advertised services. In this respect the Authority reiterated the long held position that all information that consumers might reasonably consider in deciding whether to purchase

under the conditions described in the advertisement must be considered relevant in judging whether or not it is misleading.

This interpretation appears to be supported by the text of Legislative Decree 146/2007. However, in linking an advertisement's potential deceptiveness to the capacity of the practice to lead average consumers "*to take a transactional decision that they would not have taken otherwise*" the law clarifies that "transactional decision" must be understood as the decision not just on whether or not to buy a product, but also on "*whether, how and on what terms*" to do so. Therefore, if the information misleading consumers hinges on a feature of the service that is likely to alter their subjective perception of the value of the offer, this means that the advertisement is misleading.

In application of this principle, the Authority considered an advertisement promoting a tourism structure to be misleading because the seawater swimming pool mentioned in the catalogue was out of service as a result of restructuring work in the first half of the year (PI/6243 HOTELPLAN ITALIA VIAGGI INCONFONDIBILI CARAIBI). The Authority fined the company 24,100 EUR.

Similarly, an advertisement of a hotel claiming that it contained a spa and fitness centre with facilities for massage, aromatherapy and beauty treatments which did not in fact exist was found to be misleading (PI/6234 LUAN TRAVEL–HOTEL SAN TEODORO). The Authority fined the companies 11,100 and 10,100 EUR respectively.

### FINANCIAL SERVICES

In the financial services sector, the Authority's interventions were particularly important considering the significant vulnerability of potential purchasers. First, potential users of personal loans frequently experience difficulties in obtaining access to credit through ordinary banking channels and are therefore placed at a disadvantage by their economic condition. Moreover, financial services are particularly complex as regards the nature of the service and the conditions of use or the calculation of it's the price. These can make it difficult for consumers to evaluate whether or not an offering is cost-effective or affordable.

Well aware that taking out a loan can have detrimental consequences for consumers and their families, the Authority checks very carefully that advertisements promoting loans indicate the full and precise costs resulting from the contract, the nature of the service provider, the time taken to deliver the loan, and any other conditions associated with the credit offered.

As regards the cost of loans, the Authority considered that the total effective annual interest rate (Italian acronym TAEG) must be indicated to enable consumers to be informed of the true cost and the value of the offer. The regulations governing financial services also require advertisements and consumer credit or personal loan offers that declare the interest rate or other cost-related figures to indicate TAEG and the period for which it applies, regardless of the medium used.

The TAEG must be indicated precisely. Wording referring generically to the maximum envisaged by law is not sufficient to prevent the advertisement from being misleading (PI/5675 FINANCIAL PRIME; PI/5672 PRESTOFIN DI BAGNOL ALESSANDRA; PI/6255C CENTRO SERVIZI FINANZIARI). The method chosen by the advertiser to express TAEG must in all cases ensure that it is easily legible (PI/5661 MULTIPRESTITI).

As regards the nature of the service provider, the Authority intervened on several occasions in 2007 with respect of companies that in effect were offering credit in exchange of a commission. More specifically, such advertisements were considered likely to be deceptive when they included information referring to compliance with the legal obligation for brokerage companies to include in printed advertisements details of their entry in the Ufficio Italiano Cambi (UIC) register. Such information is in fact comprehensible only to persons familiar with the regulations governing the sector (PI/5661 MULTIPRESTITI; PI/6255C CENTRO SERVIZI FINANZIARI).

The Authority deemed that these advertisements could inspire unfounded confidence in consumers as to the possibility of prompt access to credit, which actually depends not on the service provider but on the subject entitled to deliver the loan. In this context, the advertisers' claims that the sums applied for or payments on account would be delivered promptly were considered to be misleading since enquiries and procedures must be carried out by the funding body before payment can be made (PI/5661 MULTIPRESTITI; PI/5672 PRESTOFIN DI BAGNOL ALESSANDRA).

Finally, the Authority prohibited any further dissemination of an advertisement claiming that a number of loans could be renegotiated and consolidated as one single loan. This involved redeeming the existing loans, with a resulting substantial monthly saving and payment of just one instalment per month. Taking into account the subjective condition of the advertisement's target audience, the Authority observed that the advertisement was likely to mislead consumers as to the duration and cost of the new loan, a key factor in evaluating its cost-effectiveness (PI/5990 SALVA RATE IBL DI IBL BANCA). The Authority fined the company 16,100 EUR.

**ENERGY**

Electricity and gas were recently liberalised and a number of new companies entered the market. The contendibility of residential customers, no longer tied to a particular supplier, has prompted operators to make greater use of advertising. This is especially true of new entrants. The former monopolists, however, have also reacted to the increased competitive pressure by investing in advertising.

The electricity and gas markets are characterised by a significant informational imbalance between suppliers and consumers: even price comparisons, the main competitive variable, are complicated by the mismatch between the items shown in bills, the lack of uniformity in tariff formation processes and a notable lack of transparency in contractual supply plans. For these reasons, the Authority's actions were

designed to make sure that commercial communications were accurate and complete to enable users to see and understand how cost-effective the offers proposed to them actually are.

Thus, an advertisement in which a company operating in the electricity supply market claimed that its tariffs were cheaper than a competitor's was judged to be misleading since the "advantage" was shown by comparing different components and unlawfully magnifying the true difference between the prices applied by the operators. The advertisement also omitted to say that the tariffs applied by the competitor were liable to quarterly variations and that on the gas market such variations can result in significant economic advantages for consumers (PI/6215 ENEL GAS PREZZO GAS). The company was fined 8,100 EUR.

Similarly, the Authority concluded that an advertising leaflet attached to gas bills sent to users' homes was misleading. The supplier's aim in sending the leaflet was to promote an electricity supply contract with a view to fostering customer loyalty. The advertisement unconditionally proposed the free supply of a certain amount of electricity to new customers, without specifying the costs and terms involved in activating this supply. Basing its evaluation also on the information contained in the Commercial Code of Conduct for the sale of electricity to eligible customers adopted by the Authority for Electricity and Gas, the Authority considered it essential for consumers to be adequately informed, from their first contact with the supplier, of the contractual conditions and costs entailed in the supply of electricity (PI/6193 ITALCOGIM FORNITURA ENERGIA ELETTRICA). The Authority fined the company 12,600 EUR.

### CALL CENTRE UNIT

In light of the new competences attributed to the Authority by Legislative Decrees 146/2007 and 145/2007, in November 2007 the Authority set up a toll free number with a view to bringing the administration closer to citizens. The number is intended to be used for the tasks assigned to the Directorate General for consumer protection and to provide the public with initial information and support on consumer related matters.

The primary aim of the structure, called the Call Centre Unit, is to receive complaints regarding unfair commercial practices, or regarding unlawful misleading or comparative advertising[12].

Through the call centre all stakeholeders, such as consumers, businesses, competitors, government departments and consumers' associations, can immediately, directly and easily communicate with the Authority. At the same time, it enables the Authority not only to give users concrete answers to questions regarding commercial practices but

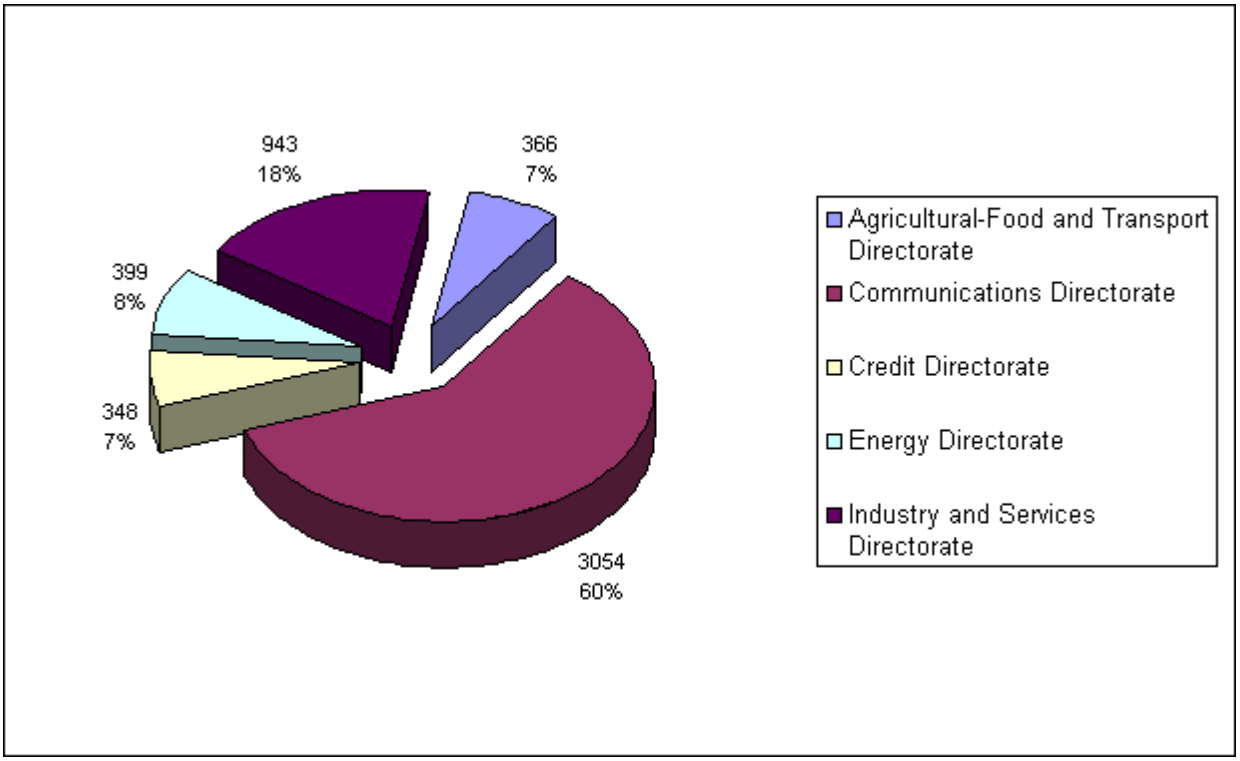
[12] The Call Centre Unit was established by provision 17922 of 24 January 2008, published in Bulletin no. 3/2008.

also to receive information that might start enquiry proceedings. The information received through the call centre enables the Authority to extensively monitor the market and to use the powers to take action at its own initiative where appropriate.

The first six months of the new service saw a total of about 32,000 contacts. Many of these telephone reports gave rise to proceedings by the Authority to ascertain whether the reported commercial practices were in fact unfair. Other reports providing additional information to that already held by the administration were channelled into investigations under way. Finally, other reports, while not justifying investigations, were forwarded by the Authority to other government departments.

The Call Centre Unit therefore serves to promote more effective protection of consumers' rights and is both a link between citizens and the Authority and a useful additional instrument for its offices in carrying out their evaluations before and during investigations and proceedings.

**Reports received by the Call Centre, broken down by Directorate**




| | |
|---|---|
| Agricultural-Food and Transport Directorate | 366 |
| Communications Directorate | 3054 |
| Credit Directorate | 348 |
| Energy Directorate | 399 |
| Industry and Services Directorate | 943 |
| **Total** | **5110** |