

AUTORITA' GARANTE DELLA CONCORRENZA E DEL MERCATO

ANNUAL REPORT

(1999)

I. CHANGES TO COMPETITION LAWS AND POLICIES

No amendments to the existing competition legislation have been made or proposed.

II. ENFORCEMENT OF COMPETITION LAWS AND POLICIES

Summary of activity

In applying Italy's antitrust law, in 1999 the Competition Authority evaluated 423 concentrations, 30 agreements and 15 possible abuses of a dominant position.

The Authority's activity

	1998	1999	January-March 2000
Agreements	54	30	13
Abuses of dominant position	21	15	6
Concentrations	344	423	113
Fact-finding inquiries	-	1	-
Non-compliance with orders	1	-	2
Opinions submitted to the Bank of Italy*	46	43	13
Football rights (Law no. 78/1999)	-	1	-

* This entry refers to the opinions published in the Bulletin during the reference period.

Distribution of proceedings completed in 1999 by type and outcome

	Outcome			Total
	No violation of the law	Violation of the law, conditional authorization or changes in terms of agreement leading to compliance	Cases beyond the scope of the Authority's powers or to which the law was not applicable	
Agreements	17	12	1	30
Abuses of dominant position	12	3	-	15
Concentrations	393	2	28	423

The agreements examined

The 12 fact-finding inquiries opened in 1999 into agreements between firms found that the ban on agreements restricting competition, as set out in Article 2 of Law no. 287/1990, had been violated in every case. In two cases the prohibited agreements were deemed to merit an exemption under the terms of Article 4.

The agreements examined were all horizontal and involved the joint determination by the firms involved of pricing policies, market shares, quantities produced, and the coordination of commercial policies and/or the

creation of obstacles to market access, especially in the manufacturing sector.

In view of the seriousness of the violations, in seven cases the firms were fined a total of 168.4 billion lire under Article 15.1.

**Agreements examined in 1999 by sector
(number of inquiries completed)**

Manufacturing	
<i>Agro-food products</i>	2
<i>Pharmaceuticals</i>	4
<i>Other</i>	2
Transport	2
Communications	2
TOTAL	12

In the first three months of 2000 another four inquiries were completed. Violations of the ban set out in article 2 of Law no. 287/1990 were found in three cases and the firms involved were fined a total of 10.4 billion lire. In one case the parties changed the terms of the agreements at their own initiative.

At 31 March 2000 there were nine inquiries into agreements still under way, two of which involved alleged violations of Article 81 of the EC Treaty.

Abuses of dominant position

In most of the cases of abuse of dominant position examined by the Authority there was no need to open a fact-finding investigation. Four inquiries were completed in 1999. In two of these a violation of Article 3 of Law no. 287/1990 was found, and fines amounting to 31.4 billion lire were applied under Article 15.1. In one other case Article 82 of the EC Treaty was found to have been violated.

**Inquiries into abuses of dominant position in 1999 by sector
(number of inquiries completed)**

Manufacturing	
Agro-food products	1
Other	1
Electricity	1
Methane Gas	1
TOTAL	4

In the first three months of 2000 another two violations were found, and fines totaling 7.5 billion lire imposed.

Concentrations examined

The number of planned concentrations submitted for appraisal rose to 423 in 1999. In 395 cases a formal decision was adopted under the terms of Article 6 of the law, while 28 cases were dismissed.

In six cases the Authority conducted a fact-finding inquiry under Article 16 of Law no. 287/1990; in just two cases it authorized the concentration to proceed following undertakings by the parties involved.

The Authority also carried out six inquiries into failure to comply with the requirement to give advance notice

of concentrations. In 5 cases the parties were fined under Article 19.2, for a total of 587.9 million lire.

In the first three months of 2000 a further 113 concentrations were examined. In two cases the Authority authorized the operation after the firms involved adopted corrective measures. At 31 March 2000 one procedure was under way into failure to comply with the requirement to give advance notice of concentrations.

Competition advocacy reports and opinions

The Authority submitted 36 reports pursuant to Articles 21 and 22 of Law no. 287/1990, concerning restrictions of competition arising from existing or proposed laws or regulations, of which 29 in 1999 and 7 in the first three months of 2000.

Competition advocacy reports and opinions ***(January 1999 – March 2000)***

Sector	1998	1999	January – March 2000
Food and tobacco products	1	1	-
Publishing	1	-	-
Electricity, water and gas	2	1	1
Wholesale and retail trade	6	3	1
Transport	6	1	1
Telecommunications	11	6	1
Monetary and financial intermediation	1	2	-
Insurance and pension funds	-	2	-
Professional and business services	1	1	1
Public administration	-	-	-
Education	1	-	-
Health care and other social services	3	2	-
Refuse disposal	2	3	-
Entertainment	-	-	1
Sundry services	1	4	-
Other sectors	6	3	1
TOTAL	42	29	7

Law no. 78/1999

In applying Law no. 78 of 29 March 1999 for the first time, the Authority rejected an application for an exemption that would have authorized companies to exceed the 60% threshold envisaged by this law for the acquisition of exclusive encoded broadcasting rights for matches in the League A Football Championship.

III. SIGNIFICANT CASES AND COMPETITION ADVOCACY ACTIVITIES

Agriculture and manufacturing

AGRICULTURAL AND FOOD PRODUCTS

PEPSICO FOODS AND BEVERAGES INTERNATIONAL – IBG SUD/COCA COLA ITALIA

In December 1999 the Authority completed an investigation into companies involved in the production, bottling and distribution of Coca Cola products in Italy, for alleged abuses of dominant position aimed at obstructing access by other soft drinks producers to wholesale and supermarket distribution channels and to the “horeca” (hotel, restaurant and catering) channel.

A substantial, distinct, market for colas was found to exist in the aerated soft drinks sector. In their respective operating areas, the bottles of Coca Cola products covered about 80% in volume terms of this market.

In view of its ability to exploit its image and the reputation of its products, Coca Cola was able to regulate its conduct to a large extent independently of wholesalers and organized large-scale distribution.

As regards wholesale distribution, Coca Cola’s policy of offering strategic discounts and substituting existing draught equipment dispensing Pepsi products led to many wholesalers reducing their Pepsi orders, with a resulting loss of market shares, distribution coverage and sales outlets by PepsiCo Foods and Beverages.

With regard to supermarket and organized distribution networks, Coca Cola’s policy of offering discounts in exchange for various types of reserved shelf and other display areas restricted competition by reducing the space available to competitors. This was made more serious by the combination with exclusive rights clauses.

The Authority considered the cases described to be abuses of dominant position and, with specific reference to “fidelity” discounts and the strategy adopted by Coca Cola Bevande Italia in the draught drinks market, imposed fines amounting to 30.6 billion lire, the equivalent of 3% of revenues from sales of the product in 1998.

FORMULA MILK FOR BABIES

In April 1999 the Authority launched an inquiry into the major producers of formula milk for babies, for alleged violation of Article 2 of Law no. 287/1990.

The Italian Association for the Protection of Consumers and the Environment (Adiconsum) had reported an agreement between certain producers of formula milk for babies, the aim of which was to obstruct access to the market by competitors, limit the use of distribution channels other than pharmacies, and maintain high prices on the national market.

From its preliminary inquiries the Authority discovered that pharmacies systematically applied the prices recommended by producers, and the existence of a roster system for the supply of free formula milk to hospitals and other health structures. It also noted that until the autumn of 1997, no formula milk produced by the above companies had been sold outside the pharmacy channel.

The Authority therefore notified Nestlé, Heinz, Milupa, Nutricia, Humana and Abbott that they had created an agreement within their trade association designed to exclude major distribution networks from access to the market for the sale of starting and special milks.

In view of the gravity and duration of the agreement, the Authority imposed fines amounting to nearly 6 billion

lire, the equivalent of 3% of revenues from the sale of starting and special milks.

CONSORZIO DEL PROSCIUTTO SAN DANIELE – CONSORZIO DEL PROSCIUTTO DI PARMA

In September 1998 the Parma and San Daniele ham consortia submitted an application for the extension of the authorization obtained in 1996, for a further three years. In a ruling dated 21 January 1999, the Authority rejected the application, because new quality control regulations had since been introduced for the products in question. The Authority also asked the consortia to submit a report on the measures that would be required to eliminate once and for all the restrictive agreements in their production programmes and any conduct designed to limited production.

However, the consortia claimed that the new production plan for 1999 was intended specifically as a transition between the existing system and the complete liberalization of the market.

During the investigation it emerged that, notwithstanding instructions to the contrary from the Authority, the consortia had implemented their production plans for 1999. In spite of this, the Authority considered that the consortia had been convinced of the legality of their conduct and dismissed the case.

REPORT ON THE LAW AND REGULATIONS GOVERNING PROTECTED DESIGNATION OF ORIGIN

In July 1999 the Authority sent Parliament and the Government a report on the measures contained in the draft legislation on Provisions for complying with the obligations arising from Italy's membership of the European Community – Community Law 1999 (A.S. 4057/13th legislature) and Rules on protected designation of origin and certification of specificity (A.S. 3529/13th legislature), which raised questions of compatibility with the relevant Community law and Italian antitrust law.

Pursuant to Council Regulation no. 2081/92¹, the application of brands or special marks is the final stage in the process of verifying whether products correspond with the requirements set out in the relevant rules and regulations. The provision in the bill that charges consortia with the task of applying the brands and quality marks, would therefore entrust one stage of the verification procedure to operators who do not possess the qualities required by Article 10 of the aforementioned Community Regulation.

The Authority also pointed out that the provisions contained in both the bills would allow the consortia for the protection of DOP, IGP and AS certifications to draw up agreements and adopt resolutions providing for a limitation of production under Article 11 of Legislative Decree no. 173 of 30 April 1998, concerning agreements between farmers and between farmers and firms. Yet the consortia represent exclusively, or predominantly, the interests of food processing companies. In conclusion, as of 31 March 2000 no comprehensive regulations had been adopted on protected designations of origin or on certificates of product specificity.

FACT-FINDING INQUIRY INTO THE BEET AND SUGAR SECTOR

In July 1999 the Authority completed a general fact-finding inquiry to analyse the principal characteristics of the beet and sugar sector from the point of view of competition. This sector has numerous highly specific

¹ [Council Regulation (EEC) no. 2081/92, of 14 July 1992, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, in OJ no. L053 of 24 July 1992.]

structural, functional and legislative features; in particular, beet and sugar production is characterized by extensive public intervention, justified more by historic and political reasons than by market criteria. In order to ensure continuity and profitability of production, the European Union, which is world's leading sugar exporter, set up a Common Market Organization (CMO) in 1968. This, in keeping with the Common Agricultural Policy, provides agricultural producers with profitable price levels and guaranteed outlets. In the beet and sugar sector there is, however, a quantity limit to the guarantee system. This is established by setting a production ceiling shared out pro-rata among the member states; each member state then divides out its share to the sugar companies operating in its territory.

Cultivation contracts between sugar companies and growers are the principal means of vertical integration between agriculture and the industry. Through these contracts, the industry is assured of raw material supplies and an optimal use of plant through predetermined production schedules, while the agricultural side enjoys advance guarantees both of placing its beet crop, and of prices. In most European countries, in a set period of the year – usually before the cultivation contracts are drawn up – it is common practice to conduct a collective negotiation between all the sugar factories and all the farming associations. This results in the so-called inter-professional agreement, which in effect regulates all the operations needed for the smooth functioning of the beet and sugar sector. Overall, the competition mechanisms in this sector appear to be characterized by very reduced margins of business autonomy and a low level of incentives to improve efficiency. However, the most striking anomaly is the fact that the strongest impact of a legislative framework designed basically to support the agricultural sector is actually felt in the related industrial sector.

Under the conditions laid down by the beet associations and sugar firms in the inter-professional agreement, only distributors authorized by the associations and/or sugar factories can operate in the seed distribution market, applying uniform prices and selling conditions agreed by the two sides. This mechanism does not, however, appear to be justified by any need to safeguard the quality of the end product; all that is needed to guarantee suitably high quality levels for the seed used is an effective system for the certification of the origin and variety of seed sold by distributors.

OIL PRODUCTS

AGIPPETROLI – ANONIMA PETROLI ITALIANA – ESSO ITALIANA/PETROVEN

In June 1999 the Authority opened a fact-finding inquiry into AgipPetroli, Esso and Api, the aim of which was to identify any restrictions of competition in the oil sector resulting from the agreement concerning the creation of a jointly-owned company called Petroven, as notified on 3 March 1999.

The creation of Petroven was part of a project, backed by the competent local authorities of the Veneto, Friuli-Venezia Giulia and Trentino Alto Adige Regions, to transfer and rationalize the Porto Marghera chemical and oil-refining plants with the aim of gradually implementing the environmental plans to remove oil-related traffic from the Venice lagoon.

The companies involved are vertically integrated oil companies which also operate in the refining and final distribution stages of oil products. The two major shareholders of Petroven, AgipPetroli and Esso, are the principal logistics operators in Italy and jointly control two thirds of the petrol distribution network.

The Authority observed that the agreement notified by the companies in question could have significant negative repercussions on competition in view of the possible coordination between the parent firms, which would restrict competition between them and restrict the access of third-party companies that did not possess

sufficient alternative storage capacity to supply the downstream markets.

After the inquiry had been launched, the parties proposed some changes to the terms of the agreement. In addition to the guaranteed minimum of 10%, they undertook to make any other unutilized capacity available to third-party companies and to renounce any pre-emptive rights with respect to third parties.

Petroven undertook to arrange for the data on any handling capacity still available for the following year to be published promptly in one of the sector's nationally distributed periodicals. The parties also undertook not to restock the depot jointly, except in cases of temporary and exceptional unavailability of the product.

As a result of these changes to the terms of the agreement and the other undertakings entered into by the parties the Authority concluded that the agreement would not substantially restrict the play of competition in the markets in question.

PHARMACEUTICALS

FARMINDUSTRIA – SELF-REGULATORY CODE OF CONDUCT

In December 1999 the Authority completed an investigation into Farmindustria, the trade association to which numerous pharmaceutical firms belong, to determine whether the self-regulatory code of conduct covering ethical category C drugs and various practices designed to coordinate the conduct of member firms were compatible with antitrust rules and regulations.

From an examination of the documentation it emerged, firstly, that some of the association's activities were intended to control the prices of category C ethical drugs, for which prices and distribution margins can be freely set. Secondly, Farmindustria was very active in controlling and reducing representational-promotional activities vis-à-vis doctors, for all medicines. Through the self-regulation code Farmindustria intended to set the maximum increases in the sales prices of category C drugs, using a mechanism based on parameters to which firms had ready access. With regard to the reduction of competition in promotional campaigns, the provisions of the ethical code specified in detail the conduct to be followed by firms in their representational-promotional activity; these provisions were well in excess of those laid down in the national laws and regulations regarding the correctness of medical-scientific information. The code was underpinned by a series of obligations that also included a system for investigations and penalties.

Farmindustria was also found to have taken significant steps to reduce competition in the hospital supplies field. It had established a general basic presumption, to the effect that bids at a price lower than the minimum discount laid down by law should be considered as selling below cost (below the average variable cost) and thus constituting unfair competition, unless demonstrated otherwise. In this respect, the Authority underlined that there was no link between discounts of over 50% and selling below cost, which should be examined case by case on the basis of precise economic criteria. It also emerged from the documentation that Farmindustria had defined the conditions to be applied for supplying health-care structures to which the hospital discount regulations did not apply. These conditions included the same discount as applied to the distribution channel (33%), the payment terms, and the possibility or otherwise of providing direct supplies.

The last violation concerned the association's efforts to prevent or restrict the development of the market for generic drugs in Italy. The Authority considered this conduct to constitute an unlawful coordination by member firms of an element that closely affected their commercial and business autonomy. It also emerged that an agreement reached within Farmindustria between multinationals and Italian small and medium sized firms for the granting of licenses for low-cost products was creating links between multinationals and small firms.

These links were designed on the one hand to satisfy small firms' requirements for drug licensing agreements, and on the other to reduce incentives for such firms to enter the generic pharmaceuticals market.

The Authority considered all the forms of conduct described above to be further evidence of anti-competitive agreements and ruled that Farindustria should cease and desist from implementing the practices in question.

BRACCO – BYK GULDEN ITALIA – FARMADES – NYCOMED AMERSHAM SORIN SCHERING

In January 2000 the Authority received a report from a Tuscan local health agency (ASL) complaining that, in a tender for the supply of non-ionic contrast medium for radiological use in 1997, five pharmaceutical firms had presented identical bids. The ASL also claimed that similar conduct had already been noted in the previous four years.

From the information gathered by the Authority it emerged that the practice described by ASL 12 of Versilia had also occurred in other ASLs and hospital agencies in Tuscany.

The procedure, which at 31 March was still under way, also aims at verifying whether or not the parallel pricing observed in the bidding process was evidence of a wider understanding at the national level between the firms involved.

CONSTRUCTION PRODUCTS, CEMENT AND CONCRETE

CONSORZIO QUALITÀ VENETA ASFALTI

In July 1999 the Authority concluded an investigation into the Consorzio Qualità Veneta Asfalti and thirteen associate companies.

The Consorzio Qualità Veneta Asfalti is a private, non-profit consortium, which all tar conglomerate producers based and operating in the Veneto Region can join. The constituent instrument and bylaws of the Consortium contained provisions designed to share out production on the basis of previous production quotas, define certain terms and conditions for the supply of tar conglomerate by member firms in cases where the allocated quotas were exceeded, and set minimum selling prices. It also contained an explicit ban on selling below cost by associate companies, and arrangements for the regular exchange of information on average unit production and marketing costs. Provision was also made for mechanisms to monitor the conduct of associates and penalties in the case of failure to respect the provisions of the consortium.

Production quotas were allocated partly in advance, through mechanisms to redistribute quotas and share out supply contracts among member firms, and partly through subsequent corrective measures, such as re-dividing up the major client base.

The price-setting system was entirely in line with the production quota mechanism, in that both inhibit price competition among firms.

The Authority concluded that, in view of the market share held by the firms in the production and sales markets for tar conglomerate (which oscillated between 87% and 98%), the understanding had the potential to produce a considerable reduction in competition. It therefore imposed fines ranging from 1 to 5% of the firms' turnover, for a total of over 4 billion lire.

OTHER MANUFACTURING ACTIVITIES

SUPPLY OF SPARE PARTS FOR GAS BOILERS

In April 1999 the Authority concluded an investigation into four producers of wall-mounted boilers: Saunier Duval Spa, Iaber Spa, Robert Bosch Industriale e Commerciale Spa and Vaillant Spa.

During the investigation it emerged that since 1991 the major boiler producers in Italy had had a trade association, which was transformed in 1995 into a consortium called the Pool Aziende Servizio Sicurezza Gas (Pool of Gas Safety Service Companies).

In order to control the boiler replacement process and at the same time obstruct the access of new operators to the maintenance and installation field, the members of the consortium agreed on measures to deal with the new situation that had been created in the service market by the introduction of a requirement for the periodic maintenance of boilers. The agreement provided for regional exclusivity for Technical Assistance Centres (TACs), required TACs to purchase original spare parts solely from the producing company and banned TACs from operating in the primary boiler market.

The investigation also found that the firms had coordinated their strategies in order to present a joint, uniform response to requests for spare parts for their products from SIS, the main national heating system service company. The firms also decided that the agreement should be conditional on “brand-for-brand” replacement of boilers.

The Authority considered that the agreement described above not only was designed to restrict competition in the markets for gas boiler production and service but had also produced a double set of restrictive effects, affecting both independent service providers and competition among producer firms, which together held over 50% of the total Italian market for wall-mounted boilers.

The Authority therefore deemed that the companies taking part in the meetings of the consortium’s Executive Committee during the period to which the agreement was applicable had violated Article 2 of Law no. 287/1990, and imposed fines amounting to over 13 billion lire, the equivalent of 2.5% of turnover.

ELECTRICITY

UNAPACE – ENEL

In April 1999 the Authority completed an investigation into Enel Spa, which had been opened following a report by the Unione Nazionale Aziende Produttrici e Consumatrici di Energia Elettrica (Unapace). Enel was said in particular to stipulate contracts with clients with high annual consumption levels, containing two clauses with the potential to restrict competition. The first concerned the extension from one to three years of the sole electricity provider agreement; the second gave Enel pre-emptive rights in cases where its clients received more advantageous offers from competitors (the so-called “English clause”).

The extension of the sole provider relationship to a minimum of three years allowed Enel to tie so-called eligible clients into longer contracts (under the effects of Directive 96/92/EC eligible clients can contract their supplies freely with producers other than Enel). Furthermore, by creating a disincentive to the formulation of more advantageous offers, the pre-emptive right that Enel enjoyed, all offers being equal, had the potential to obstruct and limit the entry of new competitors into the national electricity market.

During the procedure Enel changed the conditions under which each client can withdraw from the supply

contract. After establishing a unilateral right of withdrawal lasting for one year from the date of acquiring eligible client status, it then eliminated the pre-emptive clause. These changes to the contractual conditions were considered to be sufficient to remove the distortions to competition arising from the previous formulation.

NATURAL GAS

REPORT ON THE LIBERALIZATION OF THE INTERNAL NATURAL GAS MARKET

The Authority observed that the model for the opening up of the natural gas markets envisaged by Directive 98/30/EC, which was approved by the European Parliament and by the Council on 22 June 1998 and came into force on 10 August 1998, is based on freedom to contract gas supplies by so-called “eligible clients” and on the availability of gas transportation capacity for new entrants. According to Article 18 of the Directive, gas plants for electricity production and all other final clients with annual consumption levels of over 25 million cubic metres per withdrawal point are to be considered eligible clients. The Authority pointed out that since the implementation of the Directive does not involve any restriction of gas users’ guaranteed negotiating right, the status of “eligible client” should be assigned to all consumers who, collectively or individually, currently negotiate their supplies with Snam Spa.

Moreover, a time limit should be set after which customers currently subject to the “franchised clients” tariff system would also be entitled to “freedom of supply”.

The Authority then recommended that competition between firms be facilitated, starting with the supply of natural gas. For this to be effective, two things were needed. Firstly, constant monitoring by the Authority for Electricity and Gas would be called for. And secondly, in order to introduce greater competition on the supply side, Eni should be required to sell to third parties, competitors of Snam, a share of its supply of natural gas. In the initial phase, Snam itself could sell part of its foreign supplies to its competitors, under the same contractual conditions as agreed with the supplier.

Given the particular starting position of the Italian natural gas market – the absence of legal monopolies from which the sector needed to be freed – the Authority recommended that separate companies be set up for the transportation, storage, supply and sale of gas. At present, these activities are vertically integrated in Snam. A deadline should also be set by which the separation of the ownership of companies operating in the same sector should be carried out, as an essential step towards the creation of a fully competitive structure for the Italian natural gas market.

The enabling law also brings out the importance of re-defining the various parts of the public utility service. In compliance with the principle of subsidiarity, the European Directive acknowledges that the member states may, in the general interest, impose public utility obligations on natural gas companies with regard to the safety, including security of supply, regularity, quality and price of supplies, and environmental protection. These requirements must be clearly defined, transparent, non-discriminatory and verifiable. In order to guarantee security of supply, it might be appropriate to oblige each natural gas company to maintain strategic reserves, with the result that continuity of supply would be guaranteed even in crisis conditions.

Finally, the Authority noted that Article 19 of Directive 98/30/EC² was an appropriate and adequate instrument

² *[In particular, Article 19 of the Directive is intended to ensure reciprocity in situations of disparity between the individual Member States in the composition of gas consumption by usage sectors, envisaging in the first place that “contracts for the supply of gas [...]with an eligible customer in the system of another Member State shall not be prohibited if the customer is considered as eligible in both systems involved” (paragraph 1, letter a); and in the second*

for guaranteeing suitable competition conditions in the European market for Italian firms, in view of the disparities between the single member states in gas consumption profiles by usage sector. In the Authority's view, the adoption of any further measures based on restrictions to the eligible customers category would therefore be superfluous and would not necessarily produce the desired result.

COMMERCIAL DISTRIBUTION

SVILUPPO DISCOUNT – GESTIONE DISCOUNT

In November the Authority opened an inquiry into the acquisition of joint control, by Centro-nord Discount and the seven members of Coopitalia that make up the Polo delle Cooperative, of Sviluppo Discount Spa. Although this company appears to be able to carry out most of the business functions needed to run its discount outlets in almost total functional and management autonomy, it will operate in the same supermarket distribution markets as the controlling companies. Accordingly, the acquisition of joint control of Sviluppo Discount amounts to an agreement under Article 2.1 of Law no. 287/1990.

During the inquiry, which at 31 March 2000 was still under way, the Authority intends to examine in more detail the overall impact of the operation on competition.

OPINION ON REGIONAL MEASURES IMPLEMENTING LEGISLATIVE DECREE NO. 114/1998 ON COMMERCIAL DISTRIBUTION

In April 1999 the Authority submitted an opinion on the general lines and criteria that the Regions should follow in exercising their powers in the implementation of Legislative Decree no. 114/1998. The Regions should have defined, no later than 24 April 1999, the general lines for setting up commercial activities and the planning criteria to be applied to the commercial sector.

The innovative impact of Legislative Decree no. 114/1998, with respect to the previous legislation, lies in its objective of “ensuring, by indicating the objectives for the presence and development of large-scale sales outlets, the respect of free competition, and fostering the balanced development of the different types of distribution”. This objective should be pursued not through quantitative constraints on market access, but by using the measures envisaged in the decree itself for the recognition and enhancement of the role of small and medium-sized enterprises. The Authority therefore underlined that the regional guidelines for setting up commercial activities should include a system under which permit applications could only be rejected in cases where acceptance might be prejudicial to the achievement of specific general interest objectives. Any framework that merely protected the interests of the firms already operating should be avoided.

The elimination of product tables, as envisaged by Legislative Decree no. 114/1998, was another key aspect of the reform of the sector, and their reintroduction at the regional level should be avoided.

The Authority also recommended that the municipal authorities should only resort to the possibility/option of blocking the entry of small shops/stores for two years, on the basis of criteria adopted by the Regions, in cases where this limitation was absolutely necessary for the achievement of general town planning or consumer

place, that if “the customer is eligible in only one of the two systems, the Commission may oblige, taking into account the situation in the market and the common interest, the refusing party to execute the requested gas supply, at the request of the Member State where the eligible customer is located” (paragraph 1, letter b).]

protection objectives. These might include, for example, programmes for the improvement of the commercial network designed to create suitable infrastructures and services to meet the needs of consumers, which are explicitly mentioned in the legislative decree.

REPORT ON THE REGULATION OF PHARMACIES' OPENING HOURS AND DUTY ROSTERS

In February 1999 the Authority sent a report to the Presidents of the Regional Governments, the Regional Councils and the autonomous Provinces of Trento and Bolzano, on the distortions to the functioning of the market resulting from the current laws and regulations concerning the arrangements for pharmacies, with particular reference to opening hours and duty rosters.

The Authority, which had already dealt with this subject on previous occasions³, observed that the general interest objective of guaranteeing a continuous, widely available service throughout the country could be guaranteed by obliging pharmacies to respect opening hours and duty rosters also on non-working days and at night. Any other arrangements, apart from these opening hours and duty rosters, designed to hinder the provision of services would appear to be not only superfluous, but anti-competitive.

Far from protecting customers, the existence of limitations regarding the right to decide on daily or weekly opening times, the obligatory Sunday or holiday closures, minimum annual holidays, or the imposition at the regional or municipal level of requirements for uniform opening hours, appeared to be designed to stabilize the income of operators in the sector. In fact, such rules minimized the possibility of the clientele of one pharmacy migrating to another, thus dramatically reducing the incentives for operators to improve the quality of the services provided to consumers. In this perspective, the Authority recommended that the regional regulations be reviewed, with the aim of eliminating any limits to and distortions of competition that are not justified by general interest considerations.

TRANSPORT

AIR TRANSPORT AND AIRPORT SERVICES

REGULATION OF SCHEDULED AIR SERVICES WITH NON EU-MEMBER STATES

In July 1999 the Authority sent the Minister of Transport and Navigation an opinion on the supplementary review of Convention no. 4372 of 15 April 1992 between the state and Alitalia, adopted on 31 March 1999 and the regulation of scheduled air services with non-EU countries.

The Authority called on the Government to take the necessary steps to designate a plurality of Italian carriers when renegotiating bilateral agreements with non-EU countries, and to encourage the entry into force of open-sky agreements providing for complete freedom of traffic on connecting routes for all airlines in the contracting countries.

With specific reference to the review of the Convention with Alitalia, the Authority noted that the possibility of operating the routes in question via intermediate points in Italy allows Alitalia to cover two domestic destinations using just one aircraft, and thus *de facto* reintroduces privileges that had existed in the previous Convention.

³ [See, in particular, “*The Regulation of Pharmacies*”, *Bollettino* no. 23/1998.]

Similarly, the provision in the review that would allow Alitalia to operate the routes in question on the basis of code sharing and code sharing/block space agreements with other carriers might cause the code sharing agreements between Alitalia and the foreign carrier designated by the other country to create a monopoly instead of a duopoly, with a possible reduction in available capacity and an increase in prices.

The Authority called for the review of the Convention with Alitalia to be amended as appropriate to eliminate provisions that might harm the interests of users of air services.

RAIL TRANSPORT

CESARE FREMURA/ASSOLOGISTICA – FERROVIE DELLO STATO

In February 2000 the Authority completed a fact-finding inquiry into the Ferrovie dello Stato Spa (FS) for alleged violations of Article 3 of Law no. 287/1990. As a result of the inquiry the Authority determined that FS had abused the dominant position it held as a result of a legal reserve, in the rail haulage market. FS had discriminated in favour of Italcontainer, an FS subsidiary operating in the intermodal container transportation market, and Cemat, in which FS hold a stake, a company operating in the bimodal transportation of crates, to the disadvantage of competitors.

Intermodal container transportation and bimodal transportation of crates are two particular forms of goods transportation service that differ in organizational terms from other forms of traditional goods transport.

Rail haulage is indispensable for both since large quantities of goods could not be transported by road over medium-long distances (port/terminal links or terminal/terminal links) at a comparable cost. The rail transportation of containers and crates can be organized under two distinct sets of conditions called “complete-train traffic” and “diffuse traffic”. The first involves the use of complete trains of various sizes, the supply of which is planned by FS on the basis of customers’ requirements, compatibly with the general requirements of rail services. Diffuse traffic involves the use of single wagons or groups of wagons on trains traveling according to timetables and routes defined by FS.

The conduct of FS under investigation primarily concerned the definition of the tariff system (prices, discounts, penalties) for the sale of haulage services to operators in the two combined-transport sectors. The Authority discovered that the major changes made to the tariff structure after 1995, mainly involving complete train traffic for the transportation of containers and diffuse traffic for the transportation of crates, had no basis in efficiency or profitability. The documentation found in FS offices showed, on the contrary, that the company had applied a tariff policy that often failed to cover even variable costs.

The tariff system was also applied in a manner that was clearly intended to favour Italcontainer and Cemat in their respective markets. The privileges FS had granted to these companies included:

- special deferred payment terms;
- advance payment of *ristorni* (special forms of discount) on a three-monthly basis;
- a different penalty system.

With specific reference to the container market, the evidence also showed that structural links between the companies and FS (including overlaps between the senior management at Italcontainer and the FS Division that deals with combined transport, Asa Logistica Integrata) had enabled Italcontainer to exploit information advantages regarding its competitors’ schedules and costs.

In the transportation of crates the Authority noted that the privileged position accorded Cemat had been further accentuated by entrusting it with the management of the main FS-owned intermodal terminals. This provided

Cemat with a considerable competitive advantage in the organization of terminal services.

The inquiry found that during the period under consideration the conduct of FS in the intermodal container transportation market had produced discriminations that allowed Italcontainer, whose share of train movements rose from 25% to over 44%, to benefit fully from the growth in the container transportation market, to the detriment of other competitors whose position remained more or less stable in terms of train movements and deteriorated significantly in terms of market share. In order to benefit at least in part from the privileges enjoyed by Italcontainer, some of the competitors were obliged to become clients of this company. In the crate transportation market, the abusive conduct of FS obstructed any form of potential or actual competition, and played a part in maintaining a substantially monopolistic market.

It thus needs to be stressed that the separation between Italcontainer and Cemat, on the one hand, and FS on the other, did not prevent the latter from abusing its dominant position in ways that distorted competition in the combined-transport market. The Authority found the restrictions put in place by FS to be particularly serious, since they were intended to use the market power deriving from a legal monopoly to limit competition in non-reserved markets. To this should be added the fact that the violations were largely similar to, and in many respects more serious than, those for which the Authority had already challenged the company in another procedure, completed in 1993, concerning abuse of dominant position (FREMURA-FS⁴). Taking all these elements into account, the Authority imposed a fine on FS amounting to 6,288 million lire, corresponding to 3.5% of the revenues from the sale of rail haulage services to operators in the combined-transport market.

ANCILLARY TRANSPORT SERVICES

EDIZIONE HOLDING/AUTOSTRADA-CONCESSIONI E COSTRUZIONI AUTOSTRADA

In January 2000 the Authority opened an inquiry pursuant to Article 16.4 of Law no. 287/1990 into the acquisition by Edizione Holding Spa, which operates in various markets, including the motorway catering market through its subsidiary Autogrill Spa, of a controlling interest in Autostrade Spa.

In the Authority's view, the concentration could have reinforced Autogrill's dominant position. In the first place, acting on instructions from Edizione Holding, Autostrade and its subsidiaries could, on the expiry of sub-franchises, have supplied motorway catering services directly, at least in the service stations of greatest strategic importance. This would have allowed Edizione Holding to subtract some service stations from the tender-based allocation system. The effect of this would have been to keep stations where Autogrill already operates within the group and to facilitate the acquisition of those currently held by other companies.

The Authority also considered that even if the catering services were allocated by public tender, the concentration would in any case have strengthened Autogrill's dominant position owing to factors such as the privileged information that would inevitably have been available to companies belonging to the same holding company.

Finally, following the concentration, Autogrill would have enjoyed benefits arising from its membership of the same group as Autostrade, including the chance to influence the re-design of service stations to bring them more closely into line with Autogrill's requirements. This advantage would have translated into an incentive to engage in strategic group conduct, such as the presentation of systematically higher bids for franchise allocations than those of other bidders.

⁴ [Bollettino no. 18-19/1993]

In March 2000 the Authority authorized the operation on condition that the following undertakings were respected:

- i) that Autostrade Spa and the other motorway service franchisees it controlled should not engage directly in the supply of catering services but should always entrust them to third parties through transparent and non-discriminatory competitive procedures that were correctly publicised;
- ii) that Autostrade Spa and the companies controlled by it should entrust the aforementioned competitive procedures to one or more independent and suitably experienced third parties;
- iii) that the share of motorway catering points entrusted directly or indirectly to Autogrill (currently 72%) should not increase.

TELECOMMUNICATIONS

TIM-OMNITEL FIXED-MOBILE TARIFFS

In September 1999 the Authority completed an inquiry to determine whether there had been any violations of the ban on agreements restricting competition by the two companies which, during the period being examined, were the only mobile communications operators: Telecom Italia Mobile Spa (Tim) and Omnitel Pronto Italia Spa (Opi).

In Italy, unlike most other European countries, where the regulatory framework attributes ownership of fixed-mobile communications to the operator of the fixed network, the fixed-mobile service was considered part of the telephony service provided by the mobile network operator. Therefore, until the Communications Authority's Ruling of 22 December 1998 came into force, Tim and Opi were free to define these conditions, subject only to an obligation to provide information to the issuer of their licenses.

With regard to pricing policies for the supply to the public of mobile communications services, the inquiry demonstrated first and foremost that there had been repeated meetings and exchanges of information between the parties on the supply conditions for TACS and the new public GSM service offered by both companies. The existence of parallel pricing also emerged, with absolutely identical economic conditions for the supply to the public of the fixed-mobile segment of the service. These terms, which had their own peculiar structure, were also, as the fact-finding investigation opened by the European Commission on this subject in January 1998 clearly showed, extremely burdensome with respect to the European average. The two companies also pursued their objective of keeping the revenue from fixed-mobile communications at a high level by attempting jointly to eliminate arbitrage based on international triangulation in fixed-mobile traffic, given the high value of the peak-time fixed-mobile prices applied to the public.

Lastly, after a three-year period during which the companies continued to apply a reciprocal interconnection cost initially set in 1995, Tim and Opi agreed to raise the cost of interconnection between their respective networks to the highest of the costs that the two mobile operators had separately declared to the Ministry for Communications as applicable to the winner of the bid for the third DCS 1800 technology mobile license. The increase in this cost, during the start-up phase of the new competitor Wind, and before the negotiations for interconnection with the new fixed network operators took place, appeared designed to create barriers to access

to the market by producing higher costs for new entrants. In evaluating the degree of restrictiveness of the agreement under investigation, the Authority observed that the objective and effect of both the practice agreed for 1998 and the agreement of 6 January 1999, as well as the agreement on the price applied to the other telecommunications operators of interconnection to their respective mobile networks, had been a substantial restriction of competition in the personal mobile communications market. In view of the seriousness of this conduct, the Authority imposed fines on the two companies amounting to 1.8% of turnover for the agreements on the prices of fixed-mobile communications, 1.1% of turnover for the agreement of 6 January 1999, and 1% of turnover for the agreement on interconnection prices. In total, the fines amounted to around 100.4 billion lire for Tim and 46.9 billion lire for Opi.

TISCALI/ALBACOM – TELECOM ITALIA

In September 1999, following complaints from Tiscali Spa and Albacom Spa, the Authority opened a fact-finding inquiry into Telecom Italia Spa for alleged abuse of dominant position in the markets for the supply of telecommunications services.

The complaints concerned Telecom's conduct during the negotiation of the contract covering the termination of calls originating from Telecom network numbers and addressed to numbers belonging to the complainants' networks (known as reverse interconnection). In particular, establishing a tariff that did not correspond to the actual use of the switched public network in cases where calls terminated on the networks of the new operators would reduce the payments they received for calls terminating on their numbers. This would put these operators at a disadvantage in the final telecommunications services markets in which they are competing with Telecom Italia. At 31 March the inquiry was still under way.

OPINION ON THE MEASURES TO GUARANTEE CONDITIONS OF REAL COMPETITIVENESS IN THE MOBILE AND PERSONAL COMMUNICATIONS MARKET

In June 1999, at the request of the Communications Authority, the Antitrust Authority submitted an opinion on the provisions contained in the resolution the former adopted on 9 June 1999, containing "Measures to guarantee conditions of effective competition in the mobile and personal communications market by all operators and criteria and procedures for the allocation of frequencies."⁵

While agreeing with the Government's decision to adopt a tender mechanism for the allocation of an additional mobile license after additional frequencies became available in the 1800 Mhz band, the Authority noted the substantial competitive disadvantage under which the new undertaking would initially have to operate, especially from a structural point of view. The new undertaking would also, presumably, come up against greater difficulties than its competitors in locating suitable sites, because of the lag with which it will start operating and the new health-related rules on radio frequency ceilings.

The Authority recommended that these disadvantages be compensated through the introduction of suitable forms of positive discrimination. It also underlined the need to guarantee that the timing and terms of the site-sharing negotiations were respected, where necessary, by means of prompt intervention by the regulatory Authority, and the need to ensure compliance with the 1 July deadline for the activation of number portability

⁵ [Resolution adopted by the Communications Authority on 9 June 1999 and published in *Gazzetta Ufficiale* no 139 of 16 June 1999. For earlier opinions on the subject, see last year's *Relazione Annuale*, p. 122.]

on mobile networks.

Finally, with regard to the allocation to all existing operators of frequencies that become available in the future, the Authority stressed the need to introduce a market mechanism for the allocation of scarce resources, such as allocation to the operator making the highest bid in an auction.

OPINION REGARDING THE RESULTS OF THE FACT-FINDING INQUIRY TO IDENTIFY UNDERTAKINGS WITH SIGNIFICANT MARKET POWER IN THE TELECOMMUNICATIONS SECTOR

The identification of operators having significant market power and their notification to the European Commission is provided for in Directives 92/44/EC,⁶ 97/33/EC⁷ and 98/10/EC.⁸ Article 22.1a) of Presidential Decree no. 318/97 charges the Communications Authority with these tasks. The decree defines significant market power as the position of an undertaking holding over 25% of a particular telecommunications market nationally or in the geographical area in which it is authorized to operate. It also states that, subject to consultation with the Antitrust Authority, the Communications Authority may derogate from these terms if market conditions make it necessary to set different thresholds or criteria. The Communications Authority has identified the undertakings having significant market power as: i) Telecom Italia, in the market for fixed telephony services/networks, the market for leased line systems and the national interconnection market; ii) Telecom Italia Mobile, in the market for mobile communications systems and the national interconnection market; and iii) Omnitel Pronto Italia, in the market for mobile communications systems. The Communications Authority also asked the Antitrust Authority for its opinion on which further criteria, in addition to market share, should be adopted to evaluate the true market position of the undertakings operating in the most important markets.

In the opinion submitted in August 1999 the Antitrust Authority concluded that Telecom Italia was the operator with significant market power in the markets under consideration, since the company still has a considerable ability to determine market conditions by reason of its former telecommunications monopoly position and its current role as sole provider of the universal service at national level. Nor does there seem to be any doubt about the dominant position held by Telecom Italia Mobile in the provision of mobile services based on the technologies currently available in Italy.

With regard to Omnitel Pronto Italia, the Antitrust Authority agreed with the Communications Authority's opinion that a situation requiring notification currently exists, since Omnitel has substantially strengthened its market position as a result of the growth in the number of subscribers and the increase in the profitability of its activities. Furthermore, with regard to means of access to final users, Omnitel has managed to build up a growing subscriber base by, for example, continually expanding its distribution network and offering new commercial options.

The Authority therefore recommended that, following the notification of Tim and Omnitel as undertakings with

⁶ [Council Directive 92/44/EEC, of 5 June 1992, on the application of Open Network Provision (ONP) to leased lines, in OJ no. L165/27 of 19 June 1992.]

⁷ [Directive 97/33/EC of the European Parliament and the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of Open Network Provision (ONP), in OJ no. L199/32 of 26 July 1997.]

⁸ [Directive 98/10/EC of the European Parliament and the Council of 26 February 1998 on the application of Open Network Provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, in OJ no. L101/22 of 1 April 1998.]

significant market power in the provision of interconnection services, the Communications Authority should set a deadline by which these operators would be obliged to guarantee the application, in the access network, of functions such as choice of operator under the terms of Article 4.5 of the Ministerial Decree of 25 November 1997 on individual licenses, insofar as this is technically feasible. This would increase competition in exploiting the two major mobile networks already available in Italy, with resulting benefits for consumers.

OPINION ON THE PRICES OF FIXED-MOBILE COMMUNICATIONS

In December 1999, at the request of the Communications Authority, the Antitrust Authority rendered its opinion on the draft measure regarding termination interconnection with mobile networks and the prices of fixed-mobile communications originating from the Telecom Italia network.

The Authority considered the measures adopted to eliminate the differences between the time bands for fixed-mobile calls and the other fixed network communications and the practice of distinguishing the prices of fixed-mobile calls on the basis of the tariff profile chosen by the mobile user called (business or residential) to be of particular significance. In view of the mobile operators' collusive conduct found in the TIM-OMNITEL procedure, another aspect that appeared particularly important from the standpoint of competition was the planned change in the price applied to the public on the basis of the underlying termination cost. As regards the maximum termination price for the mobile operators Tim and Omnitel, identified by the Communications Authority as 360 lire/minute (the peak and off-peak average), the Antitrust Authority noted that this was excessively high with respect to European values. It therefore suggested that the termination prices applied by the other European mobile operators in 1999 be adopted as a benchmark for a cost-oriented termination price. This turned out to be less than 300 lire/minute.

OPINION ON THE CONTRIBUTION TO THE FUND TO FINANCE THE UNIVERSAL TELEPHONY SERVICE

In June 1999 the Antitrust Authority rendered an opinion to the Communications Authority on the mechanism for contributing to the fund to cover the cost of universal telephony service obligations.

The Authority pointed out that regulatory measures that would increase the already large gap between the market positions of the former monopolist and the new operators should be avoided. In this respect the Authority considered that there were no grounds for contributions to the universal service fund for 1998.

The Authority also expressed some doubts as to whether a net cost actually existed for the universal service, and noted that the regulatory framework introduced in other EU countries definitively ruled out a contribution to the universal service. This was because the indirect benefits to firms from being charged with providing the universal service appear to make up for any costs generated by this task. The Authority recommended that any mechanism for new firms in the sector to be exempted from paying the contribution should be based on a minimum operativity quota for each new entrant to the market. Below this, the exemption from contributing to the net cost of the universal service would come into play. The Authority considered that in the Italian context this quota should be no lower than the 4% set in Germany and should go hand in hand with an active role in providing the universal service in the areas or to the clients that the designated provider has declared itself no longer willing to serve.

The operators charged with providing the universal service should be selected on the basis of competitive criteria, in order to guarantee maximum efficiency levels.

Finally, with particular reference to contributions by mobile operators, the Authority stressed that the

obligation to contribute to any net cost of the universal service appears ultimately to be determined by the degree to which the switched public network is used for the provision of services in competition with the fixed telephony service.

POSTAL SERVICES

OPINION ON THE DRAFT LEGISLATIVE DECREE IMPLEMENTING THE COMMUNITY DIRECTIVE ON POSTAL SERVICES

In May 1999 the Authority submitted an opinion on the draft legislative decree implementing Directive 97/67/EC on postal services.⁹ In particular, the draft decree provided for the reserved sector in Italy to be the largest of those permitted by the Directive.

The Authority expressed concern about this, stressing the fact that the Directive allowed individual member states to expand their reserved postal services only where there were good reasons connected with the need to ensure the financial equilibrium of the operator entrusted with supplying the universal service.

Furthermore, the Authority noted that in defining the universal service the draft decree set the weight limit for the sorting and distribution of postal packages at 20 kilograms, the maximum allowed by the Directive. This choice, according to the Authority, entailed an additional burden for the supplier of the universal service that would inevitably have an adverse effect on its efficiency and profitability, as well as affecting competitors through the financial compensation mechanism envisaged. The Authority also noted that the draft decree provided for the control of the quality of the universal service to be performed by the regulatory authority but did not make any provision for the supplier to inform users of the service standards or for the regulatory authority to publish the results of its control at least once a year or to impose corrective measures.

The Authority observed that the draft decree provided for the delivery of electronically generated correspondence, such as hybrid electronic mail, to be included in the reserve up to the price limit envisaged, even though it had earlier found that there was no justification for creating a legal monopoly for this activity.

The Authority drew attention to the fact that the determination of the contributions to the fund intended to compensate the universal service provider was not based on separate accounts for the universal service, which the draft decree required to be introduced by 10 February 2000. Accordingly, the Authority considered that if the introduction of such accounts were postponed, the compensation fund should not be set up immediately. It also noted that there was no justification for imposing a contribution obligation on holders of a “general authorization” either in the reasons for setting up the compensation fund or in Community law. Lastly, it noted that the maximum contribution, set equal to 10% of the gross revenues deriving from the authorized activity, appeared to be a serious handicap for new entrants, which other countries had exempted from paying the contribution, at least until they achieved a given market share.

The final version of the decree¹⁰ that was approved on 22 July 1999 did not incorporate the suggestions put forward by the Authority.

⁹ [Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service, in OJ no L015 p. 14, 1998/01/21.]

¹⁰ [Legislative Decree no. 261/1999 “Implementing Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service”.]

MONETARY AND FINANCIAL INTERMEDIATION

FINANCIAL SERVICES

GROUP OF FRIENDS OF BANKING

The Bank of Italy opened an inquiry in April 1999 into thirteen banks: Cassa di Risparmio delle Provincie Lombarde, Banco Ambrosiano Veneto, Cassa di Risparmio di Parma e Piacenza, Banca Commerciale Italiana, Banca di Roma, Banco di Sicilia, Banca Monte dei Paschi di Siena, Banca Nazionale del Lavoro, Banca Popolare di Milano, Banca Popolare di Novara, Credito Italiano (now UniCredito Italiano), Deutsche Bank and Istituto Bancario San Paolo di Torino - Istituto Mobiliare Italiano. The inquiry originated in the documentation on meetings that had supposedly been held among representatives of the thirteen banks — referred to in the documentation as the “Group of Friends of Banking” — with a view to coordinating marketing policies.

Common lines of conduct on the part of the thirteen banks were also agreed during the meetings.

The case in question mainly involved typical banking services, such as fund-raising and lending, and only marginally concerned financial services, such as asset management, regarding which the Authority did not open a procedure of its own.

It clearly emerged from the documentation transmitted to the Bank of Italy that, considering the sensitive nature of the information exchanged, the recent period to which it referred and the practice of accompanying exchanges of information with analyses and recommendations, the actions of the banks involved a very high degree of restriction of competition.

Finally, the restrictions of competition that were found had been created by the ten leading Italian banking groups. On the basis of these considerations and in the light of the duration and seriousness of the understanding in question, the Authority found there were grounds for imposing a fine under Article 15.1 of Law 287/1990 with reference to the services covered by the understanding.

The Bank of Italy, with the measure it adopted in January 2000 to close the inquiry,¹¹ accordingly ordered the banks to put an end to the ascertained violation by abstaining from any agreement and agreed practice that might have a similar object or effect to that found and, in particular, from holding meetings beyond those required for legitimate associative purposes. In view of the seriousness of the violation, the Bank of Italy imposed fines on the banks equal to 3% of the relevant revenues for a total of more than 33.261 billion lire.

BANCA INTESA - BANCA COMMERCIALE ITALIANA

In October 1999 the Bank of Italy opened an inquiry into the concentration involving the acquisition of control of Banca Commerciale Italiana (Comit) by Banca Intesa. The concentration would have resulted in the Intesa and Comit groups strengthening their position and having a combined market share of between 32% and 57% in twelve provincial deposit markets; the Intesa group would have reinforced its position of leadership in the loan markets of Lombardy and Calabria, with market shares some three times greater than those of its principal competitor.

Aware of the competitive problems connected with the operation, the parties proposed the adoption of compensating measures consisting in the disposal of a total of 45 bank branches within one year of the close of the inquiry and a commitment not to open new branches for two years in any of the areas in question.

¹¹ [Bollettino, 1-2/2000.]

In the opinion it submitted to the Bank of Italy, the Authority judged that the undertakings with regard to the disposal of branches were satisfactory, but that the commitment of the parties not to open new branches in the interested areas for two years was a possible source of collusive conduct in those areas.

In addition, the Authority had decided in October 1999 to open an inquiry into Intesa and Comit regarding other markets for financial services.

In particular, it was found that the operation would have significant consequences in the markets for the production and distribution of investment fund and collective portfolio services, since the Intesa group would strengthen its position of leadership both at the national level and in some of the local markets in which the two banks were widely present.

Following the objections raised by the Authority, the parties undertook to dispose of 45 branches.

As regards the production of investment fund and collective portfolio management service, the Authority found that the consolidation of the two groups at the national level would reinforce the position of Intesa, already the market leader, but without causing structural changes that would create or strengthen a dominant position, since other large intermediaries holding appreciable market shares would continue to provide effective competition. Accordingly, the Authority authorized the concentration, as modified by the commitments given, and ordered the parties to notify their fulfillment within a year of the date of notification of the measure.

PROFESSIONAL AND BUSINESS SERVICES

Activity carried out by the Authority

ASSIREVI – AUDITING FIRMS

In January 2000 the Authority completed a fact-finding inquiry into the Associazione Nazionale Revisori Contabili (National Auditors' Association - Assirevi) and 17 member firms, in which it found a violation of Article 2 of Law no. 287/1990. The conduct being investigated concerned the regulation of fees by drawing up tariff and hourly fee schedules, the coordination of bidding for engagements, and other forms of coordination with regard, among other things, to participation in tenders called by the Public Administration, quality control and the exchange of information.

The Authority considered that all these forms of coordination fell within the scope of the ban on agreements restricting competition, since they were likely to influence the conduct of the individual firms in formulating their bids, and to limit the adoption by the same firms of autonomous pricing policies and strategies to attract clients. It also appeared that the various types of agreements found in the inquiry could be traced back to an anti-competitive strategy that could be imputed primarily to the six major auditing firms. Assirevi's decisions provided the means for implementing this strategy. In view of the serious nature of the infractions, the Authority fined Arthur Andersen, KPMG, Coopers & Lybrand, Price Waterhouse, Reconta Ernst & Young and Deloitte & Touche a total of over 4.5 billion lire, the equivalent of between 1.15% and 1.4% of their revenues from auditing services provided on both a mandatory and a voluntary basis.

INAZ PAGHE – NATIONAL ASSOCIATION OF EMPLOYMENT CONSULTANTS

In February 2000 the Authority concluded a fact-finding inquiry that had been opened following a complaint by Inaz Paghe Srl, a company supplying software applications for personnel management and administration, about alleged boycotts by bodies representing employment consultants, in response to Inaz's decision to extend its activity from simply supplying software to include payroll processing.

The inquiry focused on conduct by the Associazione Nazionale Consulenti del Lavoro (ANCL), the Consiglio Nazionale dei Consulenti del Lavoro and the Consigli Provinciali dell'Ordine dei Consulenti del Lavoro of

Milan, Rome and Catania.

As bodies representing firms, the trade associations involved in the procedure were defined for the purposes of the law as associations of firms. Referring to well-established Community jurisprudence, the Authority observed that the fact that the law attributes to these bodies the performance of functions of a public nature is not in itself sufficient to exempt their activity from compliance with competition rules.

The inquiry did not produce sufficient evidence to consider the conduct of the National and Provincial Councils as being part of a joint plan to boycott Inaz Paghe.

The Authority did consider, on the other hand, that the steps taken by the ANCL were the fruit of a single competition-restricting agreement designed to undermine Inaz Paghe's operations in the software market with the aim of bringing the company to abandon its plan to provide new data processing services for personnel management and administration. In consideration of the serious nature and duration of this violation, the Authority imposed a fine of 29 million lire on the ANCL, the equivalent of 4% of the Association's overall revenues.

REPORT ON LAWS AND REGULATIONS RESTRICTING OR DISTORTING COMPETITION

In April 1999 the Authority sent the Presidents of the Chamber of Deputies and the Senate and the President of the Council of Ministers a report on the restrictions and distortions of competition deriving from the regulatory framework for certain professional activities.

The Authority began by observing how the requirement to be entered in a professional roll in order to be admitted to public competitions often amounts to a *de facto* impediment to access to the market, especially in cases where the qualifications and experience required to practice the profession in question do not actually envisage registration. One example is the competition system for management positions in the health sector,¹² which resulted in the exclusion of aspiring applicants holding qualifications in chemistry and pharmaceutical technologies, for whom no *ad hoc* roll exists. This is in spite of the fact that under the law in force holders of these two degrees are eligible to take part in the competition in question.¹³ In the Authority's opinion, any guarantees that might be required as to the technical skills and expertise of participants in public competitions could be provided by a requirement to have passed the State exam.

Unnecessary requirements are sometimes also requested for entry in a professional roll. For example, Law no. 396 of 24 May 1967, which sets out the requirements for the biology profession, requires public employees to prove that they are allowed to exercise the profession, the actual practice of which should be a direct consequence of the authorization and not confer an entitlement to a place on the roll.

Still in the sphere of restrictions on access to the market, Law no. 39 of 3 February 1989 states that the activity of brokering is incompatible with any public or private employment, unless with firms or companies operating in the same field, and with entry in other professional rolls or similar associations.¹⁴ The Authority observed that it would be sufficient to limit this incompatibility to cases where an employment relationship existed between the broker and one of the parties involved in the transaction.

With respect to laws and regulations that confer unjustified competitive advantage on some operators, the Authority examined the cases where an undertaking operating in competition with other firms is appointed

¹² [See Legislative Decree no. 502 of 30 December 1992 on the requirements for access to the first management grade in the health service and Presidential Decrees no. 483 and 484 of 10 December 1997.]

¹³ [See the Ministerial Decree of 30 January 1982 which establishes this equivalency for the public competitions in question.]

¹⁴ [See Law no. 39 of 3 February 1989 containing "Amendments and additions to Law no. 253 of 21 March 1958 concerning the regulation of the profession of broker" and Ministerial Decree no. 452 of 21 December 1990, containing the implementing provisions.]

quality controller for services provided on the market. The report also covered cases where the laws and regulations allow only a few professional categories to perform an activity that is complementary to others performed freely on the market. For example, Presidential Decree no. 322 of 22 July 1998 authorizes some categories of tax advisers to send the tax authorities computerized data relating to income tax returns, but excludes others. This exclusion produced an unjustified advantage for the authorized categories, which can offer clients a more streamlined, complete service than the others.

Finally, with regard to laws and regulations involving price-setting mechanisms, the Authority examined various forms of obligatory fixed or minimum tariff schedules, which are often defended by the need to guarantee minimum income levels in order to ensure that the quality of the services offered remains high, or to ensure that sufficient resources are available to respect contractual obligations, the requirements of the employment legislation and the payment of the various forms of contributions. The Authority recommended that certain unjustified minimum tariff systems be eliminated.

LEISURE, CULTURE AND SPORTS

SPORTS RIGHTS

SALE OF TELEVISION RIGHTS

In July 1999 the Authority concluded an inquiry to determine whether there had been any violations of the ban on agreements restricting competition by the Lega Nazionale Professionisti, also known as the Lega Calcio, an Association operating under private law to which the 38 football clubs taking part in the A and B League Football Championships are affiliated. It seemed from the Lega's Organisational Regulations that the football clubs had made the Lega exclusive responsible for handling the encoded and unencoded rights to the Football Championship and Coppa Italia matches. Moreover, until the 1998-1999 football season the Lega had sold the encoded and unencoded television rights to the A and B League Football Championships and the Coppa Italia on a collective basis and even after that season the sale of the television rights appeared to depend on the decision of the Lega Calcio.

The Lega Calcio's institutional tasks included the sharing out among member clubs of the revenues from the commercial exploitation of the television rights to the A and B League Championships, the Coppa Italia and the Lega SuperCup. These consisted in the revenue from the sale of the radio-television rights and from sponsorship contracts, to which can be added the revenue from betting schemes assigned to the Lega Calcio by Italy's National Olympic Committee (CONI) through the Italian Football Federation (FIGC), the association which, under the aegis of CONI, brings together all the bodies promoting football in Italy.

In March 1999, after the preliminary inquiry had been opened, the Lega Calcio notified the Authority that it had amended its regulations, to the effect that individual teams could now sell the television rights for the A and B League Championship, and that it had drawn up new criteria for the distribution of revenues among the member teams.

The agreement reached by the Lega Calcio member teams, embodied in Articles 1 and 25 of the Regulations and having as its subject the collective sale of television rights, was applied in full at least until the date of amendment of the Lega Calcio regulations. However, the possibility of selling the rights individually remained subject to the adoption of a formal resolution to this effect by the Lega Calcio Assembly, which never took place. For this reason, the clubs that had been first to negotiate their rights individually demanded that the "Lega Calcio clause" be inserted in the contracts, in order to avert any legal risk that might arise from any challenge of the contracts by the Lega Calcio.

To sum up, the Authority decided that the agreement on the collective sale of the television rights to the

League A and B football championship and the Coppa Italia, for the periods 1993/96 and 1996/99, constituted a violation of Article 2 of Law no. 287/1990. The centralized negotiation of a significant part of the television rights to the most important matches not only gave the Lega Calcio a high degree of market power but was also likely to favour the allocation of these rights to a single broadcaster and thus to contribute to the closure of the pay-TV market. However, in view of the amendments introduced by the Lega Calcio to its Organisational Regulations, the Authority concluded that there were no grounds for imposing a fine under Article 15.1 of Law no. 287/1990.

In its letter of 19 March 1999 the Lega Calcio formally presented the Authority with an application for a six-year derogation, applicable only to the collective sale of the rights to the Coppa Italia, for the period following the presentation of the application. The Lega Calcio maintained that the centralized sale of the rights to the Coppa Italia championship would encourage the transition from a mutualistic system, which revolved around the collective sale of all the rights, to a system where a large share of the rights was negotiated individually and the mutualistic aspects were pursued through the redistribution of only a part of the revenues.

On the basis of these considerations the Authority granted a derogation under Article 4 of Law no. 287/1990 for the collective sale of the rights to Coppa Italia direct elimination rounds only, for a three-year period from 30 June 1999 to 30 June 2002.

In the meantime, the move from collective to individual negotiation has encouraged the entry of a second pay-TV broadcaster, thus preparing the way for a greater degree of competition in the Italian pay-TV market, to the benefit of final customers.

It will be possible to assess the current set-up more fully if, as appears probable, a football league made up of prestigious European clubs is created; this would give rise to a supra-national championship with less need to redistribute resources among its participants, but with the added need to subsidize national championships.

CINEMA

OPINION ON FILM DISTRIBUTION

In February 2000 the Authority sent an opinion to the Presidents of the Senate and the Chamber of Deputies, the President of the Council of Ministers and the Minister for Culture, concerning possible distortions of competition resulting from the adoption of some of the provisions of the government sponsored bill containing "Provisions to encourage the circulation of films" (AC 6467).

The Authority considered that the setting of ceilings on cinema availability and on the days available for the screening of the films distributed could end up by introducing excessively rigid structural restrictions into the markets in question, the results of which would be to prevent opportunities for competition by more efficient operators, and to create incentives to collusion by the major existing operators.

With regard to the first provision, the setting of ceilings for cinema availability, the Authority considered that although the setting of thresholds for the identification of a dominant position introduced a greater degree of certainty with regard to how and when to intervene, it also ruled out any opportunity for a broader assessment. Thresholds laid down in legislation should not be in the form of absolute prohibitions but of limits, the overstepping of which triggers an obligation to notify the responsible body, and subsequently an analysis of the impact of concentrations on competition.

With regard to the second provision, the Authority observed that the introduction of ceilings to the number of days available for screenings did not seem appropriate for the cinema sector, a key feature of which is the difficulty of forecasting the success of films and therefore the optimal time for which they should be screened. It follows that the respect of the thresholds envisaged by the bill might translate into inefficiencies for operators, whose scope for independent business decisions would be severely restricted, with possible negative repercussions on competition between operators and on the diffusion of European and other films.

The major distributors might also be induced to divide up the available cinema space among themselves, in an attempt to avoid the provisions of the law and maintain their respective market shares, which would be damaging to smaller operators.

In view of these considerations, the Authority recommended that suitable amendments be introduced to the government-sponsored bill.

HEALTH SERVICES

LAWS AND REGULATIONS FOR THE RATIONALIZATION OF THE NATIONAL HEALTH SERVICE

In May 1999 the Authority expressed its views on the draft legislative decree on the reform of the National Health Service as approved by the Council of Ministers on 14 April 1999, in implementation of enabling law no. 419 of 30 November 1998. The draft legislation envisages that health policy objectives should be pursued by containing the overall services available at the national level, regardless of whether they are paid for by the patient or by the National Health Service. In the Authority's opinion the rules governing some of the mechanisms envisaged by the bill, such as accreditation and authorization to provide health care, needed to be revised. This was especially true in the case of services paid in full by the patient, since some aspects might have been unjustifiably restrictive of competition. The Authority recommended that these two mechanisms should be evaluated on the basis of objective criteria rather than the exercise of discretionary powers.

In the first place, the outline decree envisages that the creation of structures for health-care and related social services and the provision of health care services should be subject to authorizations, whether they are covered by the National Health Service or private operators. In this respect the Authority observed that the dividing line between structures and services, and consequently the distinction between authorization to create structures and authorization merely to provide services, should be clearly defined. The Authority noted that in the current version of the draft decree the former was conditional on discretionary evaluations of the location of the structures and the overall regional health care requirement. It pointed out that this could create a situation where operators already holding authorizations were induced to increase the level of service they provided in order to reduce the potential demand for assistance, on which the number of authorizations depended, and consequently reduce the opportunities for more efficient operators to enter the sector. According to the Authority, the second type of authorization, for the provision of services, should be based exclusively on objective, non-discriminatory criteria hinging on the verification of the necessary professional qualifications and the quality standards of the structures and equipment involved.

As for accreditation, the Authority observed that it was issued subject to verification not only of the fulfillment of certain objective requirements but also to compliance with regional planning policies, which meant that the evaluation contained a discretionary element. In the Authority's view, since accreditation was simply a pre-condition and not a guarantee of access to the sector, it should be based on evaluations of the efficiency of would-be operators rather than financial compatibility, and should be subject to regular checks that the requirements were still being met. For this purpose, it was vitally important that a National Commission for Accreditation and Quality in the Health Services be created, as envisaged in the draft decree.

OTHER AREAS OF INTERVENTION

LOCAL PUBLIC SERVICES

OPINION ON THE REORGANIZATION OF LOCAL PUBLIC SERVICES

In October 1999 the Authority sent the Presidents of the Senate and the Chamber of Deputies and the President of the Council of Ministers an opinion on the bill containing “Amendments to Articles 22 and 23 of Law no. 142 of 8 June 1990, on the reorganization of local public services and transitional measures”. The bill was designed to promote the opening up of local public services to competition by reforming the rules governing the management of “industrial level” services (energy distribution, gas supply, management of the water cycle and the solid urban and similar waste cycles, and public transport) and of services excluded from this category. The bill had envisaged that the services be “assigned” solely on the basis of tenders and that relations between local authorities and operators should be regulated by a “service contract”. The Authority noted, however, that there was a danger that in practice this “assigning” would be more similar to a licensing arrangement. In structural terms such mechanisms are more restrictive of competition than others, and are only necessary where the technological or economic characteristics of the market require the number of authorized operators to be restricted.

For services that could not be described as “industrial”, the bill envisaged the assignment of contracts, on a direct or tender basis, or on an institutional or flat-rate basis /??/?/ when “the activities in question cannot be carried out on a competitive basis”.

The bill also envisaged that the implementing regulations should define the “local public services to be carried out on a competitive basis, subject to the issuing of licenses or permits”. In order to ensure that this rule could not be interpreted as conflicting with Article 86.2 (*ex 90*) of the EC Treaty, the Authority stressed that the law should state clearly that any local services, or segments of services, not included among those directly “assigned”, should be considered to be open and competitive, and that the regulations should specify which of them could only be performed subject to the issuing of permits or licenses.

The Authority also considered the regulations governing mixed companies controlled by local authorities which, under the terms of the bill, could be directly assigned (without a tender) to run public services that could not be carried out under competitive conditions and were not “industrial” in nature. To ensure that these “assigned” services did not extend beyond the essential core of the public service, the Authority suggested that the bill should set precise limits on the mandates of these companies.

According to the Authority, the provision preventing any direct assignee, national or foreign, from bidding in tenders for “industrial” local public services, taken together with that waiving this ban in the transitional phase (during which the effect of the law was to be suspended) for direct assignee companies operating in Italy, the Authority concluded that an unlawful discrimination might arise between Italian and foreign operators.

The Authority then underlined that the inclusion in tender notices of requirements that were not strictly necessary or proportionate to the need to ensure that participant firms possessed the required economic, financial and operational capabilities, should be avoided as far as possible.

Finally, the Authority recommended that any extensions to the existing arrangements, as regulated by the transitional provisions envisaged in the bill, should be kept to the absolute minimum. As of 31 March 2000, the process of reforming the regulatory framework for local public services was still under way.

IV. BREAKDOWN OF THE COMPETITION AUTHORITY'S STAFF

At 31 March 2000 the Authority had 125 permanent employees, of which 76 were managers and officers, 39 clerical staff and 9 auxiliary staff. In addition, the Authority had 42 persons working on fixed-term contracts (13 managers and officers, 21 specialization contract staff, 6 clericals and 1 auxiliary) and 5 persons seconded from government offices (3 managers and 2 auxiliaries).

Table A.1 - Staff of the Antitrust Authority
Secretariats of the Chairman and Members

	Permanent employees		Contract staff		Seconded staff		Total	
	31-03-99	31-03-00	31-03-99	31-03-00	31-03-99	31-03-00	31-03-99	31-03-00
Managers and officers	8	6	1	1	0	1	9	8
Clerical staff	5	5	1	1	0	0	6	6
TOTAL	13	11	2	2	0	1	15	14

	Permanent employees		Contract staff		Seconded staff		Total	
	31-03-99	31-03-00	31-03-99	31-03-00	31-03-99	31-03-00	31-03-99	31-03-00
Managers	15	15	1	1	1	1	17	17
Officers	54	56	12	11	1	1	67	68
Specialization contract staff	-	-	23	21	-	-	23	21
Clerical staff	35	34	5	6	-	-	40	40
Auxiliary staff	9	9	1	1	2	2	12	12
TOTAL	113	114	42	40	4	4	159	158

The composition of the staff in terms of qualifications and professional experience shows little change compared with the previous year.

Table A.2 - Managers and officers (excluding specialization contract staff)
by type of qualifications and previous professional experience

	<i>Qualifications</i>			
	Law	Economics	Other	Total
<i>Previous experience</i>				
Civil service	11	4	4	19
Corporate sector	4	13	5	22
University or research centre	3	25	4	32
Professions	6	-	1	7
Other	10	2	1	13
Total	34	44	15	93