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AUTORITÀ GARANTE DELLA CONCORRENZA
E DEL MERCATO

Antitrust at a glance

July 2011

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Chairman

Antonio Catricalà

Members of the Board

Piero Barucci

Carla Bedogni Rabitti

Antonio Pilati

Salvatore Rebecchini

Secretary General

Luigi Fiorentino

Why “Antitrust at a glance”

The purpose of this leaflet is to provide the reader with a quick reference tool and a support to better understand what the Antitrust Authority is and what it does.

The Authority would like to reach all its stakeholders (consumers, professionals, students etc.) through this concise text which explains the Authority’s powers and the legislation it applies, as well as the procedures for submitting information to its departments, thus guaranteeing the utmost transparency on its activity.

“Antitrust at a glance” provides guidance for firms and consumers through each area of the complex legislation applied by the Authority, concerning competition enforcement, consumer protection and conflicts of interest of government-office holders.

The leaflet contains a summary of the Authority’s scope and activities as following:

What the Antitrust Authority is and what it does

Competition enforcement
- *Scope of activities*
- *Powers and procedures*

Consumer protection
- *Scope of activities*
- *Powers and procedures*

Conflicts of interest
- *Scope of activities*
- *Powers and procedures*

What the Antitrust Authority is and what it does

Institutional framework

The *Autorità garante della concorrenza e del mercato* (hereinafter "the Antitrust Authority") is an independent administrative Authority, established by Law No. 287 of 10 October 1990 (the Competition and Fair Trading Act, hereinafter also "the Act"), which introduced antitrust law in Italy for the first time. Being an independent Authority it has the status of a public agency whose decisions are taken on the basis of the Act without any possibility of interference by the Government.

The Authority's Board, consisting of the Chairman and other four Members, is a collegial body, which makes its decisions by majority rule.

The current members of the Board are: the Chairman Antonio Catricalà (appointed 18 February 2005), Antonio Pilati (appointed 29 December 2004), Piero Barucci and Carla Bedogni Rabitti (appointed 3 March 2007) and Salvatore Rebecchini (appointed 12 February 2009).

The Secretary General of the Antitrust Authority (Luigi Fiorentino) is in charge of the operational and office management. The staff is currently made up of 263 units.

The Authority's role

The primary tasks assigned to the Antitrust Authority are:

a) the implementation of the Competition and Fair Trading Act;
b) the implementation of the laws on unfair commercial practices, and misleading and unlawful comparative advertising;
c) the implementation of conflict of interests law to government-office holders.

Relationship with the public

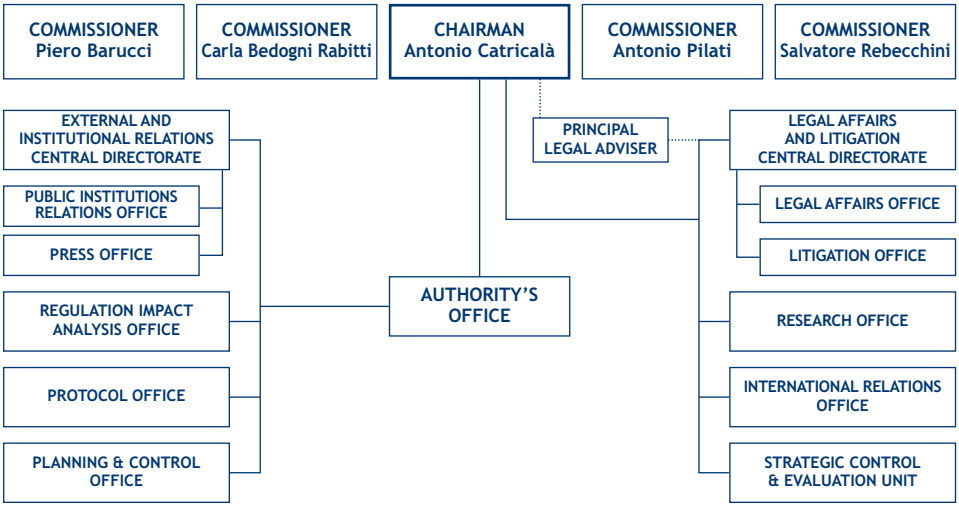
Anybody can report to the Authority antitrust infrigements, misleading advertising and unfair commercial practices as well as any violation concerning the law on conflicts of interest, by writing directly to:

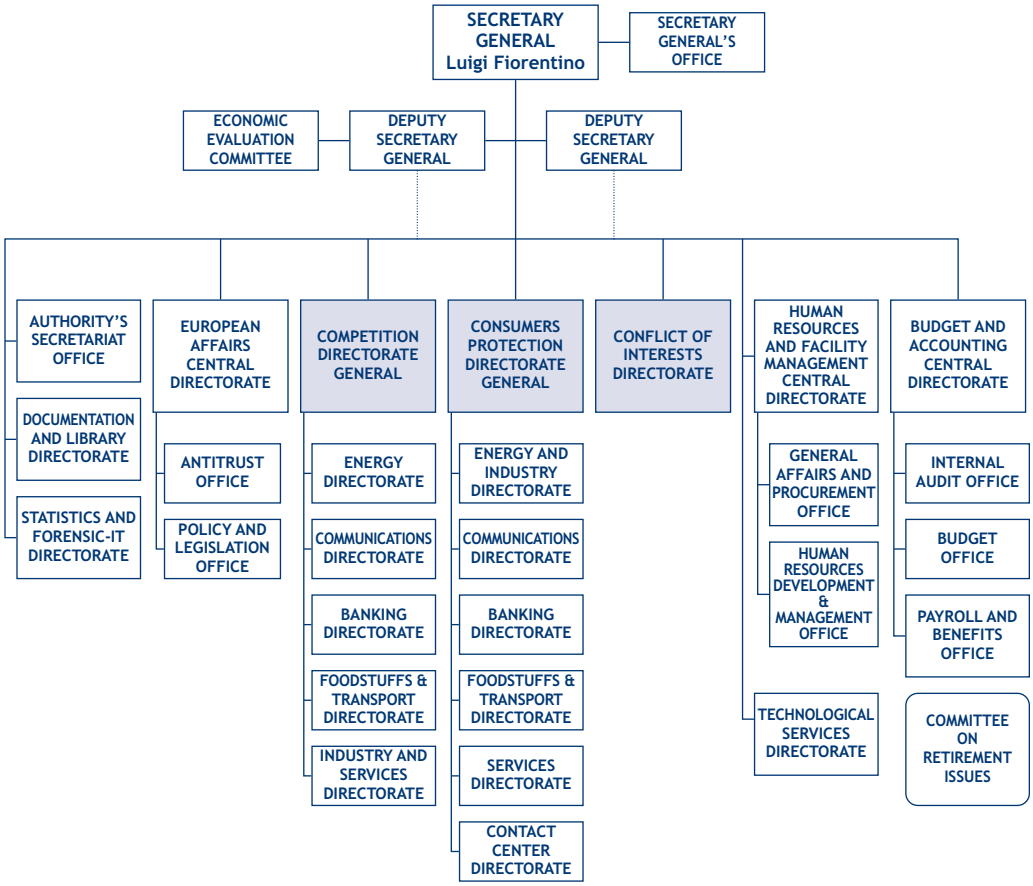
Autorità garante della concorrenza e del mercato
Piazza G. Verdi no. 6/A - 00198 Rome (Italy)
Phone: +39 06 858211 Fax: +39 06 85821256

With regards to unfair commercial practices, a form has been created for reporting such practices, and a toll-free number has been activated:

Toll-free number: 800166661 (Monday-Friday 10am-2pm).

Organization chart





Competition enforcement

Scope of activities

According to the Competition and Fair Trading Act, the Antitrust Authority is responsible for detecting:

a) agreements restricting competition,
b) abuses of dominant position,
c) mergers involving the creation or strengthening of dominant positions in ways that eliminate or substantially reduce competition on a lasting basis.

Agreements restricting competition

Undertakings sometimes conclude agreements and coordinate their market behaviour. Cooperation between undertakings may have as its object or effect the restriction of competition.

This happens, for example, when several undertakings jointly fix prices or divide the market between them by setting up cartels which restrict competition. Competition may also be hampered by agreements between undertakings operating in successive phases in the production process (for example, exclusive agreements between the manufacturer and the distributor of a product, or between the supplier of raw materials and a manufacturer), particularly when these are likely to raise market entry barriers against new competitors. When agreements between undertakings, even if only potentially, may substantially reduce competition within the national market or in a substantial part of it, they are prohibited (Section 2 of the Act).

After the entry into force of EC Regulation No. 1/2003 of the Council of 16 December 2002[1], concerning the application of competition rules referred to in Articles 101 and 102 of the TFEU (Treaty on the Functioning of the European Union), whenever restrictive agreements are likely to prejudice trade between member States the Antitrust Authority must apply Article 101 of the Treaty instead of Section 2 of the Act.

[1] In force since 1 May 2004.

Abuses of dominant position

The level of competition is not necessarily distorted when a business grows. Indeed, efficiency-related aspects at times require large-scale operational levels or being present in several markets. In addition, a firm's growth may even be a direct consequence of "virtuous" market behaviour, with better-priced or higher-quality products that satisfy consumer needs.

An undertaking is said to hold a dominant position when it is able to behave quite independently both from its competitors and from consumers. The law does not prohibit the dominant position as such but its abuse (Section 3 of the Act). This may happen when an undertaking has some degree of market power. In these circumstances imposing terms and conditions which are unjustifiably burdensome or acting in such a way as to impede market access by other competitors or induce them to exit from the market might constitute an abusive conduct, infringing competition law.

As for restrictive agreements, according to EC Regulation No. 1/2003, whenever an abuse of a dominant position is likely to prejudice trade between member States the Antitrust Authority must apply Article 102 of the Treaty instead of Section 3 of the Act.

Mergers and acquisitions

An undertaking can grow not only by increasing its sales (internal growth) but also by combining its activities with those of other firms (external growth). A "concentration" or merger occurs when a company merges with another or when it acquires control over another firm or part of it, enabling the acquirer to exercise a decisive influence on its operations (Section 7 of the Act). A concentration may also occur when two undertakings create a joint controlled undertaking operating as an independent economic entity (a.k.a. full functional) in every respect (Section 5 of the Act). Under the law, there is no obligation to submit notification of transitional acquisitions of shares by banks or financial institutions, of the "infra-group" mergers (operations carried out by undertakings controlled by a single firm), or when the parties involved do not carry out an economic activity.

The main concern, from the point of view of competition, is that a merger or an acquisition of another undertaking which was previously independent might substantially reduce competition on a lasting basis and lead to higher post merger prices to the detriment of consumers**.** The Antitrust Authority must examine all notified mergers to check their effects on competition. When a merger is deemed to create or strengthen a dominant position that substantially reduces competition on a lasting basis, it is prohibited (Section 6 of the Act). Wherever possible, a merger or acquisition which may restrict competition can be authorised by the Authority, provided that the original project is amended in order to remove the anticompetitive effects**.**

Section 16 of the Act requires prior notification of mergers whenever the turnover of the acquired undertaking on the Italian territory or the turnover of the undertakings involved in the operation on the Italian territory exceeds, respectively, 47 million and 472 million Euros[2], provided the absence of conditions that require the merger to be notified to the European Commission.

Since 1 January 2006, companies notifying a merger or acquisition are required to pay a fee (Section 10(7-bis) of the Act). This fee, updated at the end of 2010, is set at 1.2% of the transaction value, with a minimum limit of 3,000 Euros and a maximum limit of 60,000 Euros[3].

Powers and procedures

The Authority's powers

In case of abuse of dominant position and restrictive agreements, the Authority, at the end of an investigation, by decision warns firms to stop the unlawful behaviour and may also impose fines on the offenders, according to the seriousness of the offence. The fine can amount up to ten per cent of the gross turnover of the undertakings involved.

When there is a risk of serious, irreparable damage to competition, the Authority, before the conclusion of the investigation, may order interim measures for a specified time (Section 14-*bis* of the Act) and levy fines of up to 3% of turnover if companies do not abide by such measures.

Undertakings may submit commitments intended to eliminate the anti-competitive profiles that triggered the investigation. After assessing their suitability through a *market test*, the Antitrust Authority may make such commitments mandatory and terminate the investigation without ascertaining the violation.

The importance of fighting cartels has led the Authority to adopt a leniency program. In accordance with Community law, in fact, the Antitrust Authority may opt to cancel or reduce the pecuniary administrative fines for restrictive agreements if the companies involved collaborate fully and effectively by providing elements that are useful for assessing the violation. This power derives from Section 15(2 *bis*) of the Act, and the Antitrust Authority has issued a notice outlining the conditions and procedures for the application of the leniency program.

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[2] Thresholds are adjusted every year to take account of increases in the GDP deflator index.
[3] Authority's resolution 22 December 2010, No. 21906.

With regard to mergers, if the Authority considers that they may restrict competition it can block their implementation. If the parties involved proceed anyhow with such operation they can be fined. A fine is also imposed if undertakings fail to notify a merger or acquisition to the Authority.

How the Authority acts with regard to competition enforcement

The Authority may initiate an investigation after a complaint that the alleged conduct may restrict competition. The party reporting the conduct can be a competitor, a consumer or consumers' associations, or a public body. Individuals may contact the Authority directly, submitting a report with a summary description of the facts: in any case they will receive a reply.

The Authority may also undertake an investigation on its own initiative, regardless of whether a violation has been reported or not, if it suspects that a behaviour may be harmful to competition.

In case of concentrations, it is up to the merging firms to notify the operation to the Authority. It is the Authority itself which establishes whether the specific case requires a more in-depth investigation.

The procedures for investigations concerning competition enforcement are established by Presidential Decree no. 217 of 30 April 1998, on the "Regulation of investigation procedures conducted by the Authority".

Advocacy and consultative powers

Besides its competition enforcement activity, the Authority is also empowered, through its advocacy powers, to request Parliament and the Government to give adequate consideration to consumers' and market needs when drafting statutes and secondary legislation.

The Authority can notify the Government, Parliament or any Government agencies concerned of any existing or draft rules or measures that introduce restrictions on competition without justification in terms of the general interest (Sections 21 and 22 of the Act). Since 2009, the Authority's recommendations are incorporated in the form of a law - the annual law on competition[4] - that requires the Government each year to submit to the Parliament a bill, within 60 days from the transmission of Authority's Annual Report, containing the necessary pro-competitive reforms.

When the Authority envisages that competitive conditions in a market or in a particular sector may be restricted, it may carry out general fact-finding inquiries into that market or sector. As of April 2011, more than forty inquiries have already been concluded.

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[4] Pursuant to Section 47(4) of the Law No. 99/2009.

Finally, as regards the appropriate enforcement action, the Authority is required to issue a binding opinion on the definition of concessions and other means which regulate the exercise of public utilities, in compliance with Law No. 481/95 establishing the independent agencies that are responsible for regulating and controlling specific services.

Consumer protection

Scope of activities

In accordance with the Consumer Code[5] (Sections 18-27) and the provisions contained in Legislative Decree No. 145 of 2 August 2007, the Authority is called upon to protect:

a) consumers from unfair commercial practices by firms;
b) firms from misleading and unlawful comparative advertising by competitors.

Unfair commercial practices

The term "commercial practice" includes any commercial action, omission, conduct, statement or communication, including advertising and *marketing*, carried out by a firm in relation to the promotion, sale or supply of goods or services to consumers. New advertising vehicles, such as Internet, continue to emerge alongside traditional ones, like television, dailies and periodicals, banners, direct marketing (mailings, phone calls and door-to-door sales), radio, cinema and product packaging itself. The Code clearly applies to all forms of advertising regardless of the specific means used.

Commercial practices are considered unfair if they do not comply with the requirements of professional diligence and materially distort or are likely to materially distort the economic behaviour of the average consumer whom they reach or to whom they are addressed.

The Consumer Code distinguishes two main categories of unfair commercial practices. One concerns "misleading practices" (Sections 21*ff* of the Consumer Code), actions or omissions which may induce the average consumer to take a transactional decision that he/she would have otherwise not taken. Misleading practices may regard elements relating to the characteristics of the product (including the existence of the product itself, its nature, the risks connected with its use, its suitability for purpose), or its price. The Authority, for example, will consider unlawful any practice which lead

[5] Legislative Decree 6 September 2005, No. 206.

the consumer to disregard normal rules of prudence or vigilance in relation to the use of products liable to endanger health and safety or those which may threaten - even indirectly - the safety of children or adolescents.

"Aggressive practices", on the other side, are those that use harassment, coercion or other forms of undue influence to pressure the average consumer into making commercial decisions he/she would not have made otherwise (Sections 24*ff* of the Consumer Code). The aggressiveness of a commercial practice depends on its nature, the period and means used to carry it out, and any recourse to physical or verbal threats.

Sections 23 and 26 of the Consumer Code also identify commercial practices which are in all circumstances considered misleading or aggressive: for example, behaviour whereby the economic operator promises to sell a product at a certain price and then refuses to accept orders for a certain period of time, or claims falsely to have obtained all the authorizations, or again claims to be about to cease trading, in order to mislead consumers regarding the particularly low prices proposed.

Misleading and unlawful comparative advertising

Decree No. 145/2007 also empowers the Authority to intervene in order to protect firms from misleading advertising and from its unfair consequences, and to establish the conditions to guarantee fairness in comparative advertising through all the channels.

Comparative advertising is a type of advertising used by businesses to promote their goods and services by comparing them with the products of their competitors. It is lawful when it is not misleading, it compares goods or services that serve the same needs or share the same objectives, it makes objective comparisons, it does not generate confusion between different undertakings, it does not discredit the competitor.

Powers and procedures

Antitrust Authority's powers

Once a violation has been established, the Antitrust Authority may prohibit its continuation and impose pecuniary fines ranging from 5,000 to 500,000 Euros, depending on the seriousness and duration of the infringement. If the practice involves products that could even indirectly threaten the well-being of young children or adolescents, or if, regarding harmful products, neglects to mention it expressly, the minimum fine rises to 50,000 Euros. The Antitrust Authority may also prescribe the

publication of declarations at the expense of the business responsible for the conduct, in order to prevent the practice from continuing to produce effects that harm the consumer, even after the practice has ceased.

In some particular cases, if the Authority considers that waiting for the conclusion of the investigation may harm seriously and produce irreversible effects on consumers, it may temporarily suspend the practice[6].

The law allows firms to submit commitments in order to eliminate the profiles of unlawfulness of the commercial practice[7].

How the Authority acts with regard to consumer protection

The Authority may initiate an investigation after a complaint but also on its own initiative if it suspects that certain commercial behaviour is harmful to consumers.

The complaint must indicate the reporting party's general details and identify the allegedly harmful commercial practice. The Authority always reply to complainants.

Furthermore, when in presence of an alleged unfair behaviour, the Authority, before opening a formal investigation, may attempt to exert a *moral suasion*, inviting the firm to remove the unfair behaviour.

The investigation procedures are established by the "Regulation of investigation procedures regarding unfair commercial practices" and by the "Regulation of investigation procedures regarding misleading and unlawful comparative advertising", both adopted by the Authority's resolution of 10 March 2010.

[6] Section 27(3) of the Consumer Code and Section 8(3) of Legislative Decree No. 145/2007.
[7] Section 27(7) of the Consumer Code and Section 8(7) of Legislative Decree No. 145/2007

Conflicts of interest

Scope of activities

Conflict of interest arises whenever holders of government offices, in their public interests role, also pursue a private interest in conflict with the public interest.

Rules on conflict of interest were established by Law No. 215 of 20 July 2004 which was designed to ensure that government-office holders are able to dedicate themselves to the exclusive promotion of public interests and to refrain from any deeds or collegial deliberations in a situation of conflict of interest.

The law applies to the President of the Council of Ministers, to Ministers, to Deputy Ministers, to Undersecretaries of State and to special government Commissioners. On the contrary the law does not apply to local government representatives.

The law empowers the Authority to intervene in cases of:

a) situations of incompatibility concerning holders of office;
b) actions performed in conflict of interests.

Situations of incompatibility

The law, as a preventive measure, identifies a variety of specific situations that are incompatible with government mandates (Section 2 of Law No. 215/2004). Most of these concern public, professional, corporate and working types of appointments that must necessarily be terminated by the date they are sworn in to office.

The incompatibility regarding offices or functions held in public bodies, in companies or in organizations or bodies with significant business interests, as well as those regarding professional activities, may be extended for up to twelve months after the end of government mandate (post-term incompatibility).

Actions performed in conflict of interests

The law distinguishes between two main categories of conflicts of interest (Section 3 of Law No. 215/2004).

The first one (*conflict due to incompatibility*) arises when the office holder takes part in the adoption of an act or fails to perform an obligatory act under circumstances that are legally defined as incompatible.

The second type (*conflict due to impact on one's assets*) arises when the office holder takes part in the adoption of an act (or fails to perform a compulsory act) and this behaviour subsequently results in an economic advantage for him/herself, his/her spouse or relatives up to the second degree and to the detriment of the public interest.

Powers and procedures

How the Authority acts with regard to conflicts of interest

Government-office holders must submit to the Authority a declaration regarding the situation of incompatibility within 30 days of taking up office; in addition, they, their spouses and their relatives up to the second degree must disclose to the Authority, within 90 days from the beginning of their mandate, details about their own assets, including equity holdings.

The Authority may undertake an investigation on its own initiative or following the reporting of conflicts of interest by any public or private parties.

With its resolution of 16 November 2004, the Authority adopted the Regulation concerning the "Criteria for the assessment and investigation procedures regarding the application of Law No. 215 of 20 July 2004, on the resolution of conflicts of interest".

Antitrust Authority powers

The Antitrust Authority must ascertain the existence of incompatible circumstances, verify compliance with the resulting prohibitions and, in case of non-compliance, encourage: a) the competent Administration or supervisory body to remove the individual from office or terminate the position; b) the suspension of the employment relationship or of public or private work; c) the suspension of membership in professional rosters and registers, which requires the submission of request to the competent professional orders.

In terms of conflicts of interest, the Antitrust Authority is competent to establish possible violations of law and may impose pecuniary fines on undertakings which have profited from the conflicting actions.

The Antitrust Authority in case of investigations must inform the Presidents of the Senate and of the Chamber of Deputies of the conclusion of its assessment.

More generally, every six months the Authority must submit to Parliament a report on the state of its monitoring and supervision activities concerning conflicts of interest.

Rome 2011, Studio Centrone S.r.l.