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Competition Law in Italy

**The first 20 years of law
and practice**

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I. INTRODUCTION

A. General Comparison of Italy's Competition Laws, Enforcement, Procedures with Those of the United States

Law No. 287 of October 1990¹ introduced the first competition rules in Italy. Before 1990, the protection of competition was guaranteed through the application of European Community (EC) competition law and the Civil Code provisions on unfair competition.

The Competition Law addresses restrictive agreements, abuse of dominant position, and the creation and/or reinforcement of a dominant position through merger. The crucial interpretative challenge posed by the Competition Law is to define the forms of collective and unilateral conduct that pose unacceptable competitive dangers. The Competition Law proscribes rather than prescribes conduct, and it does not authorize positive administrative regulation of business conduct. For example, the Competition Authority cannot set the price for goods or services. In the past few years, however, independent administrative agencies have been established to monitor prices and contractual conditions in sensitive sectors such as communications and energy.

On its face, this legal framework is similar to U.S. competition law. There are, however, significant differences between the Italian and U.S. systems with respect to both the substantive assessment and the applicable procedures. In Italy, the enforcement of the Competition Law is generally entrusted to the Competition Authority (*Autorità garante della concorrenza e del mercato*). In the banking and insurance sectors, the Competition Authority is responsible for the enforcement of the Competition Law. However, before adopting a final decision concerning undertakings active in these sectors, it must request the non-binding opinion of the Bank of Italy (*Banca d'Italia*) and of the Insurance Authority (*Istituto per la Vigilanza sulle Assicurazioni Private e d'Interesse Collettivo*), respectively. Similarly, in the communications field, the Competition Authority must request the non-

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¹ Law No. 287/1990 of October 10, 1990 [hereinafter Competition Law]. The Competition Law (*Norme per la tutela della concorrenza e del mercato*) introduced Italy's first competition rules.

binding opinion of the Communications Authority (*Autorità per le Garanzie nelle Comunicazioni*).

The Competition Law does not provide for either criminal sanctions or treble damage awards. Individuals or companies can, however, bring actions before the civil courts for damages deriving from infringement of the Competition Law.

B. Overview of Applicable Statutes

The Competition Law resembles EU competition law. In particular, Sections 2 and 4 of the Competition Law resemble Article 101(1) and (2) and Article 101(3) TFEU (ex Articles 81 and 82 TEC),² respectively, whereas Section 3 closely resembles Article 102 TFEU. Sections 5 and 7 contain a number of provisions on mergers, including definitions of concentration, the dominance test, and the concept of control. These provisions largely correspond to Sections 2 and 3 of the European Union Merger Control Regulation, Council Regulation No. 4064/89.

Presidential Decree No. 217 of April 30, 1998 (Decree No. 217/1998) contains detailed provisions governing proceedings before the Competition Authority and, in particular, the Competition Authority's powers of inquiry and the parties' rights of defense, including the right of access to files and to participate in the proceedings. Other relevant procedural provisions are contained in Law No. 241 of August 7, 1990 (Law No. 241/1990), which provides a general framework for administrative procedures (such as those carried out by the Competition Authority) and sets forth a general right of access to documents retained by administrative bodies.

Furthermore, pursuant to Section 31 of the Competition Law, the general principles governing administrative sanctions set forth under the first two sections of Law No. 689 of November 24, 1981 (Law No. 689/1981) apply, as far as compatible, to fines levied by the Competition Authority.

Special substantive provisions apply to the movie and communications industries. These provisions are contained in Law No. 153 of March 1, 1994 (Law No. 153/1994), which safeguards competition in the movie industry; and Law No. 249 of July 31, 1997 (Law No. 249/1997), which precludes dominant positions and enhances pluralism in the area of communications. The concept of dominant position under Law No. 249/1997 does not correspond to that adopted under the Competition Law.

Authority decisions are normally published in full within 20 days of their adoption in the *Bollettino dell'Autorità Garante della Concorrenza e del Mercato* (the "Bulletin"). Since 1993, the Bulletin is published weekly. A full text version of all the decisions is also available on the Authority's official website.³ Finally, the Authority releases an annual report on its activities. This report is an important and well-structured source of information on its decisional practice and policy.

² TREATY ON EUROPEAN UNION AND THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, 2010 O.J. (C83) [hereinafter TFEU].

³ The Competition Authority's website is available at <http://www.agcm.it>.

1. Main Legislative Reforms

On March 5, 2001, the Italian Parliament enacted Law No. 57/2001, which introduced a number of significant amendments to the Competition Law.

In particular, Section 11(3) of Law No. 57/2001 modified Section 8 of the Competition Law, introducing a new set of rules aimed at preventing the unlawful exploitation of the advantages enjoyed by companies in regulated markets who seek to strengthen their position in neighboring markets. Section 8 of the Competition Law, as amended, provides that: (i) firms entrusted with the operation of services of general economic interest and legal monopolists can operate in other markets only through a separate entity; (ii) the formation of the separate entity (as well as the acquisition of control of an entity active in a different market) must be previously communicated to the Competition Authority;⁴ and (iii) if the firm performing services of general interest or a legal monopolist provides its subsidiaries or the companies in which has an interest with goods or services, it must make such goods and services available to its subsidiaries' direct competitors on equivalent terms. The Competition Authority has the power to impose fines for violations of the new rules. In particular, it may impose a fine of up to €51,645 for a violation of the above-mentioned obligation to notify the Competition Authority of the creation of a new entity.⁵

Law No. 57/2001 also modified Section 15(1) of the Competition Law, which sets the limits for the fines that can be imposed for violations of the Competition Law's substantive provisions. Until April 3, 2001, the maximum fine provided for in Section 15(1) was 10 percent of each undertaking's turnover in the market affected by the infringement. As a result of the 2001 reform, the maximum fine has been significantly increased and is now set at 10 percent of the total turnover of each undertaking.⁶ As a consequence, the Competition Authority now enjoys more discretion in calculating fines, and it can now set fines having a greater deterrence effect. In addition, the 2001 reform abolished the provision which set the statutory minimum fine at 1 percent of the total turnover.⁷ In the absence of a leniency

⁴ On September 28, 2003, the Competition Authority published a notice detailing how to comply with this notification requirement. The notice covers not only future separations or acquisitions, but also requires that a communication be given to the Authority under the new procedures in respect of separations and acquisitions completed before the issuance of the notice (namely, those completed between April 4, 2001 and September 28, 2003). The communication of previous separations had to be given by November 28, 2003, even if they had already been completed, and regardless of whether a filing had been already made under the merger control rules or through other means (for example, by means of a letter that did not contain all the information required by the new notice).

⁵ Law No. 57/2001, § 11(3).

⁶ The notion of total turnover must be interpreted as referring to total worldwide turnover. *See Philip Morris & ETI v. Autorità Garante della Concorrenza e del Mercato*, 29 Oct. 2003, n. 9203/2003, (Trib. ammin. reg.). This interpretation is consistent with the EU Courts' interpretation of an equivalent provision, Article 23(2) of Regulation (EC) No. 1/2003 of 16 December 2002 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty*, 2003 O.J. (L 1) 1 [hereinafter Regulation (EC) No. 1/2003].

⁷ Law No. 57/2001, § 11(4).

program (introduced in Italy only in February 2007), the reduction of the statutory minimum fine enabled the Competition Authority to impose merely symbolic fines in order to encourage whistle-blowing.

Finally, Law No. 57/2001 introduced a new rule providing that any agreement resulting in an abuse of “economic dependence” is void.⁸ The Competition Authority is entrusted with the power to investigate any alleged violation of the rules on abuses of economic dependence and, where necessary, to impose the fines set forth in Section 15 of the Competition Law. As of June 2009, the Authority has not applied the new rules on abuses of economic dependence.⁹

The Competition Law underwent a number of significant changes in 2005 and 2006 that also resulted in a widening of the Competition Authority’s competences as well as in an enhancement of its enforcement powers.

In particular, in 2005 the Italian Parliament passed two statutes that modified the Competition Law.

First, Section 20 (parts (2), (3) and (6)) of the Competition Law was repealed.¹⁰ This provision gave the Bank of Italy the exclusive power to enforce Italian competition law in cases affecting core banking activities. As a result, the Competition Authority now enjoys exclusive competence in the enforcement of competition law in the banking sector.

Second, in the area of merger control, a merger filing fee was introduced.¹¹ The amount of the filing fee varies for each transaction in accordance with criteria set out by the Competition Authority.

⁸ “Economic dependence” is defined by Section 9 of Law No. 192 of June 18, 1998, as “the situation in which an undertaking has the power to determine, in its commercial relationship with another undertaking, an excessive imbalance in the parties’ rights and obligations. In assessing the economic dependence, the possibility for the party subjected to the abuse to actually find on the market satisfactory alternatives must also be taken into account.” Furthermore, in the context of this provision, “abuse” expressly includes a refusal to sell or purchase.

⁹ However, domestic courts have already applied this provision several times, as the application of Section 9 of Law No. 192 of June 18, 1998, is also attributed to civil courts. Such courts have generally considered this provision in the context of traditional civil law – more specifically, contract law. In this regard, the courts have emphasized that conduct that is incompatible with Section 9 need not have a negative effect on competition. Indeed, the Authority has reached the same conclusion, in an opinion addressed to the Parliament on the bill introducing this new form of abuse. *See* *Disciplina della subfornitura nelle attività produttive*, 10 Feb. 1998, n. AS121, Bulletin 5/1998. Moreover, the civil courts have noted that Section 9 introduces a broader notion of abuse, under which a dominant position in the relevant market is not required for the prohibition to apply. Finally, the civil courts have noted that although the language of Section 9 emphasizes the “excessive imbalance in the parties’ rights and obligations,” a situation of “economic dependence” (or “hold up” situation) exists, primarily, when an undertaking is the “mandatory” partner of another undertaking - that is, when the latter is forced to deal with the former where no satisfactory alternative commercial partner is available. *See, e.g.,* *Medical Sys. v. Eastman Chemical Italia*, 5 Jan. 2004 (Court of Catania), *available at* www.ilFallimento.it/giurisprudenza/117.htm; *see also* *Petrosino v. Marini Bobini, Danno e Responsabilità*, 6 May 2002 (Court of Bari).

¹⁰ Law No. 262 of 28 Dec. 2005

¹¹ Law No. 266 of 23 Dec. 2005.

In 2006, the Italian Parliament strengthened the enforcement powers of the Competition Authority, bringing them in line with the new powers now enjoyed by the European Commission following the so-called “modernization” of EU competition law.¹² More specifically, Section 14(1) of Decree Law No. 223/2006 (the Reform Package)¹³ granted the Competition Authority the power to: (i) order interim measures, (ii) accept commitments proposed by companies involved in an investigation into anticompetitive practices, and (iii) operate a leniency program.

(a) Interim Measures

The new Section 14-*bis* of the Competition Law states that in urgent cases where (i) there is a risk of serious and irreparable damage to competition and (ii) a cursory examination reveals the existence of an infringement, the Competition Authority may decide on its own motion that interim measures must be adopted. In contrast to the “modernized” enforcement system introduced with Regulation (EC) No. 1/2003, interim measures may not be renewed or extended in their duration. If the addressee of the interim measures does not comply with the decision, the Competition Authority may impose a fine of up to three percent of the annual consolidated turnover of the undertaking concerned.

(b) Commitments

The new Section 14-*ter* of the Competition Law introduces the possibility for companies to offer commitments in the context of antitrust investigations. They can do so within three months from the opening of an investigation. The commitments should aim at correcting the conduct under investigation. After assessing the suitability of such commitments, including by means of a market test, the Competition Authority may make them binding on the undertakings concerned and terminate the proceedings without ascertaining any infringement. The commitment decisions do not set fines because they do not contain findings on the merits.¹⁴

Commitment decisions have become a frequently used enforcement tool, and the Competition Authority has now closed several cases by accepting commitments, mostly in

¹² Regulation (EC) No. 1/2003.

¹³ Section 14(1) of Decree Law No. 223 of 4 July 2006 was converted by the Parliament into law, with amendments, with Law No. 248 of 4 Aug. 2006 (Sections 14-*bis*, 14-*ter* and 15(2)-*bis* were added to the Competition Law).

¹⁴ Prior to this amendment, there was great uncertainty about the possibility for undertakings to offer commitments with a view to closing an investigation into alleged anticompetitive practices. In particular, since it was not clear on which basis the Competition Authority could accept commitments without completing the investigation with a finding on the merits, the Competition Authority had no obligation to examine commitments that were offered by the undertakings concerned. In addition, the adoption of commitments did not result in any shortening of the duration of the proceedings as – even if commitments were accepted – under the then applicable rules governing administrative proceedings the Competition Authority had to continue its assessment of the allegedly illegal behavior and come to a final decision on the merits before closing the case.

cases concerning unilateral conduct by a dominant undertaking. Some commentators have even suggested that the Competition Authority is using commitments indiscriminately, especially in the field of abuses of dominant position, and is ultimately relaxing its traditionally vigorous enforcement attitude.

(c) Leniency Program

The new Section 15(2)-*bis* of the Competition Law grants the Competition Authority the power to introduce a leniency program, whereby firms actively cooperating with the Competition Authority in the detection of cartel infringements may obtain total immunity from fines or reductions in the fines imposed.

On February 15, 2007, the Competition Authority set out in a Leniency Notice the criteria it applies in granting immunity or reducing fines.¹⁵ The Leniency Notice closely follows the corresponding Notice by the European Commission¹⁶ as well as the Model Leniency Program adopted by the European Competition Network (or ECN, the network of national competition law enforcement agencies of the Member States forming the European Union).¹⁷

The Leniency Notice only applies to secret horizontal agreements and/or concerted practices—such as price fixing, market sharing, or output supply arrangements—in breach of Article 101 TFEU or the corresponding provision of Section 2 of the Competition Law. So far the Competition Authority has applied the Leniency Notice only in one case concerning a cartel in the market for chipboard.¹⁸ The final decision awarded full immunity from fines to the immunity applicant and a 30 percent reduction of the fine for companies that cooperated during the investigation beyond what was required by the statutory duty of cooperation.

2. Relationship between EU and National Competition Rules

The structure and the scope of Sections 2 and 3 of the Competition Law (prohibiting, respectively, agreements and practices in restraint of competition, and abuses of market power) are strictly modeled on Articles 101(1) and 102 TFEU, except for the “*effect on trade between Member States*” jurisdictional standard in the TFEU, which defines the boundary between conduct that is subject to EU law and conduct that is governed solely by

¹⁵ Notice on the non-imposition and reduction of fines under Section 15 of the Law of No. 287 of 10 October 1990, <http://www.agcm.it/eng/index.htm> [hereinafter Leniency Notice] (select “Leniency Program” on left side of frame; then select link to notice).

¹⁶ Commission Notice on immunity from fines and reduction of fines in cartel cases, 2006 O.J. (C 298) 17 [hereinafter Commission Notice].

¹⁷ European Commission Model Leniency Program, <http://ec.europa.eu/comm/competition/ecn/documents.html> [hereinafter ECN Model Leniency Program].

¹⁸ Produttori di pannelli truciolari in legno, 17 May 2007, n. I649, Bulletin 20/2007.

domestic law. Moreover, pursuant to Section 1(4) of the Competition Law, its provisions must be interpreted in accordance with the principles of EU competition law.

Based on the new system introduced with Regulation (EC) No. 1/2003, national courts and national competition authorities may apply Article 101 TFEU in its entirety and are actually obliged to apply this provision to conduct capable of affecting inter-state trade. This “modernization” of the EU competition rules went into effect on May 1, 2004 and, as a result, the Competition Authority has applied Articles 101 and 102 TFEU more frequently.¹⁹

The Competition Authority may, in certain cases, have a strong incentive to apply Articles 101(1) and 102 TFEU as opposed to the equivalent national substantive rules. The power to apply EU competition rules directly represents, in the Competition Authority’s view, an effective weapon against anticompetitive market conduct that, according to the undertakings involved, complies with state legislative or administrative measures.

In light of the principles of direct effect and supremacy of EU law over national law, as well as Member States’ obligation to “abstain from any measure which could jeopardize the attainment of the objectives of” the EU Treaty, any state measure undermining the effectiveness of EU competition rules may be unenforceable in the national courts. Similarly, any anticompetitive conduct that is required of undertakings by national legislation, and which would otherwise be shielded from the Competition Authority’s scrutiny, is subject to direct enforcement under the EU provisions.

In *Consorzio Industrie Fiammiferi*,²⁰ for the first time, the Competition Authority held that, pursuant to the principle of supremacy of EU law, national legislation, namely the rules on the establishment and the activities of the Italian match manufacturer consortium, were incompatible with Articles 3(1)(g), 10 and 81 TEC (now Articles 3(1)(b), 4(3), and 101 TFEU) and ordered that such rules be disregarded by the Italian courts and any public administration. The complainant (a German match manufacturer) originally filed its complaint with both the European Commission and the Competition Authority but, following consultations between the two agencies, the Competition Authority took charge of the case in light of the essentially national effects of the conduct at issue. The Competition Authority found that the relevant legislation left the parties discretion as to the mechanism to follow in allocating production quotas. The infringement of Article 101 TFEU was therefore attributable to the parties’ actions. In particular, the Competition Authority found that the consortium and its members infringed Article 101 TFEU by establishing a system to grant fidelity discounts and allocate production quotas. However, it did not impose a fine on the consortium and its members, in spite of the length (almost 80 years) and serious nature of the unlawful agreement.

The Competition Law also resembles to a large extent the EU competition law with respect to merger control rules. In particular, Sections 5 and 6 set forth the concepts of “concentration” and “control” and establish the “dominance test.”²¹ Moreover, Italian

¹⁹ Competition AUTHORITY, ANNUAL REPORT 2002, at 193 (2003).

²⁰ *Consorzio Industrie Fiammiferi*, 13 July 2000, n. I318, Bulletin 28/2000.

²¹ Section 6 of the Competition Law provides as follows: “the Authority shall appraise concentrations subject to notification under section 16 to ascertain whether they create or strengthen a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably

substantive merger control provisions must be interpreted and supplemented in light of EU merger control rules and in particular, of the EC Merger Regulation and the Commission's interpretative notices.

C. Overview of Structure, Independence and Jurisdiction of Enforcement Agencies

The enforcement of Italian competition law is entrusted to the Competition Authority, an independent agency which acts as both an investigative and decision-making body.

The Competition Authority is composed of five members who make decisions by majority vote. It is comprised of a chairman and four members who are appointed jointly by the Speakers of the Senate and the Chamber of Deputies from a group of candidates who are "clearly recognized as independent."²² To be considered for the position of chairman, a candidate must also have held an institutional position of high prominence. Each member serves a non-renewable seven-year term. The Minister of Production Activities appoints a secretary general (*Segretario Generale*) upon the recommendation of the chairman of the Competition Authority. The secretary general supervises the operation and organization of the Competition Authority.

The members of the Competition Authority are assisted by a staff of approximately 230 officials and a director general, who coordinates investigations. The Competition Authority's staff is composed of civil servants transferred from other public entities, recruited as permanent employees on the basis of performance in ad hoc competitive examinations, or hired under temporary employment contracts. The officials cannot carry out any other professional activity which may undermine their independence and must comply with the Competition Authority's ethical code. Article 14(4) of the Competition Law provides that, in exercising their duties, Competition Authority officials are considered public officials and are sworn to secrecy.

Following an internal reorganization set forth in March 2000, the Competition Authority's investigative activities are carried out by a General Investigation Directorate (*Direzione Generale Istruttoria*) that coordinates the activities of several units (*Direzioni settoriali*). These investigative units have a horizontal competence. That is, they are responsible for overseeing the enforcement of all substantive provisions set forth in the Competition Law (*e.g.*, investigating cartel and abuse cases and reviewing merger filings) in a specific economic sector.

In the course of performing its duties, the Competition Authority may correspond with any governmental department and any other statutory body or agency, and may request information from them as well as their cooperation.²³ Although the Competition Authority remains an independent administrative agency operating without governmental or Parliamentary interference, it should be noted that, in the area of merger control, the

and on a lasting basis". §§ 5 and 6 of the Competition Law largely correspond to Articles 2 and 3 of the Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, 2004 O.J. (L 24) 1 [hereinafter EC Merger Regulation].

²² Competition Law, § 10(2).

²³ Competition Law, § 10.

government retains some residual powers.²⁴ However, these powers are quite limited and are triggered only where a merger threatens the national economy or involves companies from countries that have no domestic competition law. Thus far, these powers have never been used.

The Competition Authority is funded by the central government through an annual budgetary allocation. With these funds, the Competition Authority manages its own operating expenses. Moreover, the recently-enacted Section 10(7)-*bis* of the Competition Law provides that, in order to cover the cost of its merger control activities, the Competition Authority is empowered to establish on an annual basis the filing fees to be paid for every merger control notification filed pursuant to Section 16 of the Competition Law. The determination of the fee is based on the economic significance of the concentration, which is assessed in light of the value of the notified transaction. In 1998, the Board of Auditors was created to audit the Competition Authority's accounting records and issue opinions on the draft budget and annual accounts.

The Competition Authority can apply the Competition Law not only to private undertakings, but also to public and state-owned undertakings. The Competition Law does not, however, contain provisions similar to Sections 106(1) and 106(3) TFEU, empowering the European Commission to enforce EU competition law with respect to state measures. Instead, the Competition Authority is empowered to notify the government, the Parliament, or any government agency of any existing law, draft rule, or measure that threatens to restrict competition without justification in terms of the general interest.²⁵

On its own initiative or at the request of the government or of other agencies, the Competition Authority may express opinions on legislation, regulations, or on problems relating to competition and the market.²⁶ Section 12 of the Competition Law also provides that the Competition Authority can carry out general fact-finding investigations into a market or a sector when the operation of that market or sector suggests that competition is being impeded. The Competition Authority issues an annual report on its activities.

The Competition Authority is also responsible for relations with institutions of the European Union. Much before the adoption of Regulation No. 1/2003 introducing the direct applicability of the EU competition rules by the National Competition Authorities, pursuant to Section 54 of Law No. 52 of February 6 1996 (Law No. 52/96) the Competition Authority already had jurisdiction to enforce Articles 101 and 102 TFEU.

²⁴ Competition Law, § 25.

²⁵ See Competition Law, § 21. The Competition Authority is also required to issue a binding opinion on the definition of licenses and other means regulating the exercise of public utilities, in compliance with Law No. 481 of 14 Nov. 1995, which established the independent authorities responsible for regulating and controlling specific services.

²⁶ Competition Law, § 22.

D. Overview of Structure, Independence, and Jurisdiction of Judicial Authorities

From highest to lowest, the Italian civil courts are the Supreme Court (*Corte Suprema di Cassazione*), the court of appeals (*Corte d'Appello*), the lower court (*Tribunale*), and the justice of peace (*Giudice di Pace*).

The Supreme Court reviews questions of law and ensures the exact observance and uniform interpretation of Italian law. All judgments of the court of appeals, and in certain cases, the judgments of the lower courts, can be challenged before the Supreme Court. Under Italian law, the judge is bound by the law but is not legally bound by the decision of a higher court with respect to the merits of the case. The lower courts, however, generally follow Supreme Court precedents. The Supreme Court sits in Rome and is divided into chambers, each acting through five voting members. It also sits in plenary session and acts through nine voting members when deciding conflicts of jurisdiction between different courts and in cases where a question of law is of particular importance or has been interpreted inconsistently by different chambers.

The appellate courts review lower court judgments and have exclusive jurisdiction over certain subject matters as expressly provided in the law. They have, for instance, exclusive jurisdiction with regard to all civil actions based on alleged infringements of the Competition Law. There are twenty-six courts and three branches of the courts of appeal throughout the country. They are divided into seven panels of three judges each.

The lower courts function as courts of first instance and as appellate courts in respect of the judgments of the justices of the peace. The lower courts are composed of three judges when deciding certain matters expressly enumerated in the law. For all other matters, including civil damages cases arising from alleged violations of EU competition law, only one judge presides over the case.²⁷ Justices of the peace are specially appointed judges having very limited jurisdiction.

Pursuant to Article 33(1) of the Competition Law, the Competition Authority's decisions are subject to judicial review by the regional administrative court of first instance of Latium (*Tribunale Amministrativo Regionale per il Lazio*, hereinafter also "Trib. ammin. reg." or "TAR"). Judgments rendered by the TAR may be appealed to the Supreme Administrative Court (*Consiglio di Stato*, hereinafter also "Cons. stato." (collectively the TAR and Cons. Stato are referred "Administrative Courts.")). The Administrative Courts sit in Rome.

Judgments by the Supreme Administrative Court are subject only to: (i) appeals to the Italian Supreme Court (*Corte di Cassazione*) on jurisdictional grounds; and (ii) appeals for revocation, in the cases and under the circumstances set forth in Article 396 of the Italian Civil Code of Procedure.

The Italian Constitution provides that the judiciary is subject only to the law.²⁸ Therefore, judges are autonomous and independent from the political and executive powers. No judge can be removed or suspended from his function or appointed to a different seat or function unless the removal is voluntary, or it is based upon a decision of the Supreme

²⁷ Legislative Decree No. 51 of 19 Feb. 1998.

²⁸ Costituzione [COST.], § 101(2).

Judiciary Council (*Consiglio Superiore della Magistratura*) for cause and with the guarantees provided by the law.²⁹ The Supreme Judiciary Council is an independent body that supervises the judiciary. It consists of 32 members, 20 of whom are elected by the judiciary, and is presided over by the president of the Italian Republic.

E. Additional Policy & Practical Considerations

Damages in tort for breach of Italian (or EU) competition law provisions may be claimed by victims of anticompetitive conduct pursuant to Article 2043 of the Italian Civil Code, according to which “any act committed with either intent or fault causing an unjustified injury to another person obliges the person who has committed the act to compensate the damages.”

Private antitrust litigation is governed essentially by general civil law and procedure. In addition, Section 33(2) of the Competition Law sets forth a jurisdictional and venue provision. In particular, according to this provision, petitions for actions for damages, declaratory relief (*i.e.* for a declaration that an agreement hindering competition is null and void), and requests for interim relief relating to infringements of the Competition Law must be brought before the court of appeals (*Corte d’Appello*) having territorial jurisdiction. Such court has jurisdiction at first and last instance, *i.e.* its decisions are subject to review by the Italian Supreme Court on questions of law only. In addition, pursuant to the general civil procedure rules, lower civil courts have jurisdiction with respect to, *inter alia*, private actions under EU competition law.

1. Costs and Time Considerations in Litigation

Actions for interim relief in competition matters before civil courts are normally decided within four to eight weeks. Ordinary actions before the lower courts or the courts of appeals pursuant to Section 33(2) of the Competition Law are decided, on average, within two to four years. It is difficult to estimate the cost of these proceedings because the cost varies with the complexity of the case.

2. Costs and Time Considerations in Administrative Proceedings

Once the Competition Authority opens an investigation either upon a complaint, a leniency application, or on its own motion, it fixes a time limit for the duration of the proceedings. The time limit is not legally binding, however, and the Competition Authority can extend it as many times as it deems necessary if the matter is particularly complex or new facts are uncovered during the investigation that justify an extension. Usually, the Competition Authority’s investigations last from approximately twelve to eighteen months.

In cases of notifications to the Competition Authority of concentrations, the decision as to whether to open an in-depth Phase II investigation must be adopted within 30 days of

²⁹ COST., § 107.

receiving the notification, unless the notification is deemed to be incomplete.³⁰ In such case, the thirty-day period begins upon receipt of the information needed to complete the notification. Once it opens a Phase II investigation, the Competition Authority must issue a decision within 45 calendar days. This period may be extended in the course of the investigation for a further period of not more than 30 calendar days when the undertakings fail to supply the information or data in their possession which is requested by the Competition Authority. If the Competition Authority fails to decide whether to open a Phase II investigation, it is precluded from opening a new investigation in the future.

Legal costs of proceedings before the Competition Authority are limited to attorneys' fees. Parties to the proceedings do not pay any fee to the Competition Authority. Even in cases of proceedings opened upon complaint, each party pays its own legal costs.

The only exception is now represented by the merger control cases where the notifying party is required to pay a filing fee. Such fee is equal to 1.2 percent of the value of the transaction and cannot exceed € 60,000. For transactions concerning the acquisition of undertakings also realizing a turnover in countries other than Italy, the "value of the transaction" is obtained by multiplying the agreed-upon aggregate consideration by "the ratio between the target's domestic and worldwide turnover."³¹

3. Intervention of Agencies and Political Bodies in Litigation

Agencies and political bodies can inform the Competition Authority of possible restrictions on competition. They can also intervene informally in the Competition Authority proceedings, for example, by contacting it or by sending it letters, documents, and providing relevant information, especially in cases involving highly regulated sectors. They may also be heard before the Competition Authority. Conversely, the President of the Competition Authority may (and is often called to) testify before the Parliament on issues relating to the Competition Authority's activities.

II. OVERVIEW

A. General Policies Underlying Italy's Competition Laws

1. Consumer Welfare

Consumer welfare protection is largely governed by unfair trade practice laws as well, including legislation prohibiting misleading advertising. Since 1992, the Competition Authority has been responsible for enforcing Legislative Decree No. 74 of January 25, 1992 (Decree No. 74/1992) that implemented Directive No. 84/450/EEC on misleading advertising in Italy. This decree was subsequently amended by Legislative Decree No. 67 of

³⁰ Competition Law, § 16(4).

³¹ Competition Authority's resolution No. 17711 of 27 Dec. 2007.

February 25, 2000 (Decree No. 67/2000), which grants the Competition Authority the power to monitor comparative advertising.

In enforcing the Competition Law, the Competition Authority is essentially protecting competition and maintaining the correct operation of market forces. Thus, consumers are only protected indirectly through the preservation of a competitive environment. Nevertheless, consumer associations view competition law as a valuable tool for protecting consumer interests. These associations file complaints with the Competition Authority and assist it during its investigations.

Consumer welfare is also one of the grounds for an exemption under Section 4 of the Competition Law from the prohibition against restrictive agreements contained in Section 2. This provision expressly states that:

“the Competition Authority may authorize agreements or categories of agreements which have the effect of improving conditions of supply in the market, leading to substantial benefits for consumers.”³²

2. Protection of Smaller Enterprises Against Larger Enterprises

Protection of smaller undertakings is not a concern specifically addressed by the Competition Law. However, rules aimed at prohibiting abuses of dominant positions and anticompetitive mergers that result in the creation or strengthening of market dominance are normally addressed to large undertakings that enjoy significant market power. Accordingly, enforcement of those rules may indirectly result in the protection of smaller businesses.

3. Protection of Domestic Enterprises Against Foreign Competition

Section 4 of the Competition Law provides that agreements may be authorized if they lead to substantial benefits to consumers. “Such improvements shall be identified also taking into account, among others, the need to guarantee the undertakings the necessary level of international competition.” Similarly, under Section 6, mergers and acquisitions must be evaluated taking into account, *inter alia*, “the competitive position of the domestic industry.” Finally, pursuant to Section 25(2) of the Competition Law, the government retains some residual powers in the area of merger control. These powers can be exercised when a merger involves companies from countries that do not have competition laws and in cases where a merger threatens the national economy.

Section 25 of the Competition Law has not been applied and the authors are unaware of any precedent in which the Competition Authority has applied the Competition Law in a discriminatory manner against foreign operators.

³² Competition Law, § 4(2).

B. Role of Economic Doctrines and Analysis

1. Generally

The use of economic analysis plays a very important role in the enforcement of the Competition Law. The Competition Authority set up a specialized department, the Market Analysis Department (*Ufficio Analisi dei Mercati*), which provides enhanced economic support to the investigative departments.

2. Use of Specific Economic Analysis

In general, the Competition Authority relies on economic doctrines and applies quantitative tests in determining product market definition, such as estimates of elasticities and cross-elasticities. Economic analysis is particularly important in (i) the evaluation of concerted practices, to determine whether the parties' conduct has an objective justification; (ii) essential facility cases; and (iii) merger control review.

For mergers, the Competition Authority has taken into account the Herfindahl-Hirshman Index (HHI) test to measure the degree of concentration of the relevant markets. To authorize transactions under its merger control rules, it has also applied the doctrines on strategic barriers to entry and potential competition. In this respect, it also takes into account the benefits deriving from a more efficient resource allocation (efficiency defense).³³

In *Sai/La Fondiaria*,³⁴ the Competition Authority used, for the first time, a PCAIDS (Proportionality Calibrated Almost Ideal Demand System) simulation model to assess the existence of a dominant position. The PCAIDS measures how the growth in market concentration created by a merger increases the parties' ability to fix prices independently from competitors. In *Sai/La Fondiaria*, such simulation showed that the parties would have been able to charge a substantial premium, averaging more than 10 percent above pre-transaction market levels.

In *Compagnie Aeree-Fuel Charge*,³⁵ the Competition Authority used, for the first time, the Multimarket Competition theory. According to this theory, when certain conditions are satisfied (*e.g.*, price transparency and relatively high product homogeneity), undertakings simultaneously active in various geographic markets (*e.g.*, the routes operated by air carriers) define their respective business strategies for each market by taking into account the whole of the markets in which they operate. Applying this theory, the Competition Authority considered all domestic routes in condemning the air carriers' imposition of identical surcharges for domestic flights as an anticompetitive concerted practice.

³³ Competition Authority, ANNUAL REPORT 1992, at 30-31 (1993).

³⁴ Sai-Società Assicuratrice Industriale/La Fondiaria Assicurazioni, 17 Dec. 2002, n. C5422B, Bulletin 51-52/2002.

³⁵ Compagnie Aeree-Fuel Charge, 1 Aug. 2002, n. I446, Bulletin 31/2002. In both *Compagnie Aeree-Fuel Charge* and *Sai/La Fondiaria*, the Competition Authority explicitly referred to recent economic literature.

3. Extent to Which Courts Have Embraced Economic Analysis

Civil courts apply economic analysis less frequently and more narrowly than the Competition Authority. Civil judges normally do not have an economic background and traditionally apply only legal reasoning and principles. The same is essentially true for the Administrative Courts that are competent to review the Competition Authority's decisions.

III. SUBSTANTIVE LAW

A. Horizontal Agreements and Practices

1. General Principles

(a) Introduction

Section 2 of the Competition Law provides that:

1. The following shall be regarded as agreements: agreements and/or concerted practices between undertakings, and any decisions, even if adopted pursuant to their Articles or Bylaws, taken by consortia, associations of undertakings and other similar entities.
2. Agreements between undertakings are prohibited which have as, their object or effect appreciable prevention, restriction, or distortion of competition within the national market or within a substantial part of it, including those that:
 - a) Directly or indirectly fix purchase or resale prices or other contractual conditions;
 - b) Limit or restrict production, market outlets, or market access, investment, technical development or technological progress;
 - c) Share markets or sources of supply;
 - d) Apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage;
 - e) Make the conclusion of contracts subject to acceptance by the other partners of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
3. Prohibited agreements are null and void.

Section 2 is similar to Article 101(1) and (2) TFEU. Moreover, pursuant to Section 1(4) of the Competition Law, Section 2 must be interpreted according to the principles of EU competition law.³⁶ Any agreement or concerted practice that violates Section 2 is automatically null and void.³⁷ In recent years, both the Competition Authority and the

³⁶ See, e.g., *Assitalia-Unipol v. Azienda USL Città di Bologna*, 26 Nov. 1998, n. I305, Bulletin n. 48/1998.

³⁷ Competition Law, § 2(3).

Administrative Courts have provided significant guidance on important issues such as the notion of undertaking, the burden of proof, the reliability of documentary evidence, and the value of findings in criminal proceedings in proceedings before the Competition Authority and Administrative Courts. These issues are discussed below.

(b) The Notion of “Undertaking”

Section 2 applies to agreements between undertakings. In accordance with the case law of the European Court of Justice (ECJ), the Competition Authority defines an undertaking as “any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed” and regardless of whether it seeks to obtain a profit.³⁸ An entity does not have to be incorporated under company law or take any other recognized legal form to be deemed an undertaking. It is the entity’s engagement in economic activity that makes it an undertaking for the purposes of the competition rules.³⁹ An economic activity is defined as “any activity consisting of offering goods and services in a given market.”⁴⁰ Thus, the definition of undertaking is very broad. It includes not only companies and partnerships, but also trade associations, associations of undertakings, and consortia, even when they are entrusted with a public function.⁴¹

In *Lega Calcio-Prezzi biglietti Play Off*,⁴² the Competition Authority held that soccer teams are undertakings for the purposes of the Competition Law. The *Lega Nazionale Professionisti* (the Italian Soccer Association, hereinafter the *Lega*) is comprised of Italian soccer clubs registered to play in the First and Second Division championships (*Serie A* and *Serie B*, respectively), as well as other minor championships. The *Lega* adopted a decision setting the prices of tickets for the play-off and play-out games at the end of the 2004/2005 *Serie B* season. A few days later the Competition Authority opened proceedings against the *Lega*. The Competition Authority qualified soccer teams as undertakings within the meaning of Section 2 of the Competition Law and concluded that their collusive behavior within the *Lega* could be qualified as an anticompetitive decision of an association of undertakings. Noting that compliance with decisions by the *Lega* was assisted by an effective sanctioning system, the Competition Authority found that, by fixing the ticket prices, the *Lega* had illegally restricted competition.

³⁸ Tariffe amministratori di condominio, 14 Dec. 1994, n. I101, Bulletin 50/1994 (the Competition Authority included independent workers in the concept of undertaking).

³⁹ ANIA v. Autorità Garante della Concorrenza e del Mercato and Others, 2 Nov. 1993, n. 1549 (Trib. ammin. reg.).

⁴⁰ A.I.C.I., 18 Nov. 1992, n. A30, Bulletin 22/1992.

⁴¹ Farindustria/Codice di autoregolamentazione, 7 Dec. 1999, n. I342, Bulletin 49/1999; Associazione Vendomusica/Discografiche Multinazionali-Federazione Industria Musicale Italiana, 9 Oct. 1997, n. I207, Bulletin 41/1997; Consigli Nazionali dei Ragionieri e Periti Commerciali e dei Dottori Commercialisti, 26 Nov. 1998, n. I220, Bulletin 48/1998; Consorzio del Prosciutto di San Daniele-Consorzio del Prosciutto di Parma, 19 June 1996, n. I138, Bulletin 25/1996; Consorzio Parmigiano Reggiano, 24 Oct. 1996, n. I168, Bulletin 43/1996.

⁴² Lega Calcio-Prezzi biglietti Play Off, 23 Nov. 2005, n. I650, Bulletin 46/2005.

(c) Agreements, Decisions, and Concerted Practices

Section 2 prohibits any form of cooperation between independent undertakings that prevents, restricts, or distorts competition, irrespective of whether this cooperation is achieved through informal understandings or within associations, consortia, and similar entities.⁴³

The concept of an agreement is very broad. For Section 2 to apply it is sufficient that there exists “the joint intention of two or more undertakings to stop acting independently and to conduct themselves on the market in a coordinated way.”⁴⁴ In other words, an agreement falls within the scope of Section 2 if it expresses the intention of the parties even without the existence of either a valid and binding contract under national law, or a written contract. The Competition Authority has found that there can be an agreement in cases of declarations of intent, or recommendations that do not carry any legal obligation. Participation in an agreement can be tacit.⁴⁵

Section 2 applies also to coordination between independent undertakings achieved through a trade association, a consortium, or a similar entity. A trade association or a consortium may be held liable for behavior by its members which produces anticompetitive effects. The association itself may be fined.⁴⁶ In particular, decisions by trade associations or consortia that relate to their members’ commercial policy may violate Section 2. Recommendations issued by an association have often been held to constitute a decision, even if the recommendation is not binding upon the members.⁴⁷ Even if it is approved by a public authority, an association’s decision can be struck down by the Competition Authority.⁴⁸

In accordance with principles of EU law, Section 2 also prohibits concerted practices affecting competition. The Competition Authority defines a concerted practice as a form of coordination where undertakings, without entering into any formal agreement or establishing

⁴³ Pozzuoli Ferries-Gruppo Lauro, 19 Oct. 1994, n. A49, Bulletin 42/1994; Fremura/Ferrovie dello Stato, 24 Feb. 2000, n. A227, Bulletin 8/2000.

⁴⁴ COMPETITION AUTHORITY, ANNUAL REPORT 1994, at 127 (1995).

⁴⁵ The Competition Authority referred to the principle whereby participation in an agreement can be tacit in Mercato del Calcestruzzo Preconfezionato ad Olbia, 20 Mar. 1997, n. I210, Bulletin 12/1997. Inaz Paghe/Associazione Nazionale Consulenti del Lavoro, 3 Feb. 2000, n. I308, Bulletin 5/2000.

⁴⁷ Assirevi, 26 Aug. 1991, n. I5, Bulletin 7/1991.

⁴⁸ The Competition Authority has consistently held that the fact that a public authority was aware of, participated in, or approved a restrictive agreement does not protect the agreement from the requirements of the Competition Law. *See, e.g.*, IBAR/SEA, 16 Mar. 1994, n. A56, Bulletin 11/1994 (ground-handling tariffs approved by the Minister of Transport were considered abusive under § 3); Consorzio del Prosciutto di San Daniele-Consorzio del Prosciutto di Parma, 19 June 1996, n. I138, Bulletin 25/1996 (consortia’s plans to fix production quotas that were approved by the Minister of Agriculture, the Minister of Industry, and the Minister of Health were found to be in violation of Section 2); Consorzio Parmigiano Reggiano, 24 Oct. 1996, n. I168, Bulletin 43/1996 (consortia’s plans to fix maximum production quotas that were approved by the Ministry of Agriculture were found to be in violation of § 2).

a plan of action, “knowingly substitute practical cooperation between them for the risks of competition.”⁴⁹ This can occur, for example, when undertakings inform each other of the attitude each intends to adopt and thus allow each entity to regulate its commercial conduct with the foreknowledge that its competitors will behave in the same way.

The Competition Authority has found concerted practices to exist on the basis of documents or the existence of serious, precise, and concordant elements.⁵⁰

Parallel behavior between competitors is not sufficient on its face to prove a concerted practice. The Competition Authority acknowledges that economic operators have the right to adapt themselves intelligently to the conduct of their competitors provided that they autonomously determine their commercial policy. The Competition Authority does object, however, to parallel behavior between competitors who act on the basis of artificial knowledge of their competitors’ strategies thus allowing them to predict their competitors’ behavior.⁵¹

In general, any direct or indirect contact between competitors that is designed to, or has the effect of, reducing uncertainty about their future conduct is likely to be regarded as a strong indicium of the existence of a concerted practice.

(d) Restrictive Object or Effect

Section 2 prohibits agreements and practices whose object and/or effect is to restrict competition. Where the object of an agreement is to restrict competition, there is no need to show that it may have an anticompetitive effect. The object of an agreement is not the subjective intent of the parties but the objective of the agreement.

When the object of the agreement is not restrictive in and of itself, the Competition Authority examines the effect of an agreement to determine whether Section 2 has been infringed. “Effect” refers to the impact of the agreement on the competitive conditions of the relevant market, which must be assessed by looking at the implementation of the agreement in its market context and the extent to which it affects competition.⁵² To this end, the Competition Authority takes into account elements such as the impact of national laws, the existence of intellectual property rights, and competitors’ behavior.⁵³ The Competition

⁴⁹ See Associazione Vendomusica/Case Discografiche Multinazionali-Federazione Industria Musicale, 9 Oct. 1997, n. I207, Bulletin 41/1997; Produttori di Vetro Cavo, 12 June 1997, n. I201, Bulletin 24/1997.

⁵⁰ See Produttori di Vetro Cavo, 12 June 1997, n. I201, Bulletin 24/1997; see also BMG e Ricordi S.p.A. v. Autorità Garante della Concorrenza e del Mercato, 15 Apr. 1999, n. 873 (Trib. ammin. reg.) (“[T]he existence of serious, precise and concordant elements is sufficiently relevant to demonstrate the existence of a concerted practice”).

⁵¹ Produttori di Vetro Cavo, 12 June 1997, n. I201, Bulletin 24/1997.

⁵² Assirevi, 26 Aug. 1991, n. I5, Bulletin 7/1991.

⁵³ Tariffe amministratori di condominio, 14 Dec. 1994, n. I101, Bulletin 50/1994.

Authority's assessment is not limited to the actual effects of the agreement or practice under scrutiny and extends to any potential anticompetitive effects.⁵⁴

(e) Appreciability of the Restriction

In accordance with EU competition law, a restriction of competition falls within the scope of Section 2 if its actual or potential impact on the relevant market is appreciable. The Competition Authority evaluates the impact of the agreement (*i.e.*, the extent of the restriction) on the relevant market by looking at the market shares of the undertaking concerned,⁵⁵ the structure of the market,⁵⁶ and the potential effects of the agreement on the trend of supply and demand of the relevant products or services.⁵⁷

(f) The Burden of Proof

In four important rulings, the Supreme Administrative Court has clarified the Competition Authority's burden of proof in cartel cases, and has also set fairly high evidentiary standards that are more along the lines of well-established principles of EU competition law.

In *TIM/Omnitel*,⁵⁸ the Supreme Administrative Court partially annulled a decision of the Competition Authority according to which the two leading Italian mobile telecommunication service providers, Telecom Italia Mobile (TIM) and Omnitel Pronto Italia (Omnitel), had violated the Competition Law by agreeing to fix the prices for (i) fixed-mobile communications in 1998-99 and (ii) interconnection to their mobile networks. In this case for the first time the Supreme Administrative Court outlined, in clear and detailed terms, the burden of proof that the Competition Authority must satisfy to show the existence of a concerted practice under the Competition Law. In particular, the Court, relying on the ECJ's case law, stated that conscious parallelism among competitors cannot be the only evidence of an agreement or a concerted practice. Rather, the Competition Authority must rely on strong and consistent evidence that shows: (i) the absence of alternative plausible explanations of the parallel behavior, or (ii) actual contacts or exchanges of information between the parties. The burden is on the Competition Authority to prove the absence of alternative explanations for the conduct in question. But the parties must prove the lawful purpose of any demonstrated contacts or exchanges of information. In *TIM/Omnitel*, the Competition Authority's decision was partially annulled because (i) there were several

⁵⁴ See *Raffineria di Roma/FINA Italiana/ERG Petroli/Monteshell*, 13 Mar. 1996, n. I124, Bulletin 11/1996.

⁵⁵ See *Assicurazioni rischi di massa*, 8 June 1994, Bulletin 23/1994; *Latte Artificiale per Neonati*, 2 Mar. 2000, n. I328, Bulletin 9/2000.

⁵⁶ *Tariffe amministratori di condominio*, 14 Dec. 1994, n. I101, Bulletin 50/1994.

⁵⁷ COMPETITION AUTHORITY, ANNUAL REPORT 1994, at 130 (1995); *Tariffe amministratori di condominio*, Bulletin 50/1994.

⁵⁸ *TIM/Omnitel v. Autorità Garante della Concorrenza e del Mercato*, 22 Mar. 2001, n. 1699/2001 (Cons. stato).

alternative and legitimate plausible rational explanations for TIM and Omnitel charging the same tariffs in 1998, and (ii) the parties produced sufficient evidence that their meetings had purposes other than the discussion of the prices for 1998.

The second judgment where the Supreme Administrative Court addressed the issue of the evidentiary standards required for a finding of a concerted practice was adopted in connection with the *Insurance Cartel* case.⁵⁹ There, the Court partially annulled a decision of the Competition Authority, finding that the main Italian insurance companies had violated Section 2 of the Competition Law through, among other things, concerted tying of the sale of theft and fire insurance policies to the sale of third-party liability insurance policies. The Court annulled the Competition Authority's sanction for this infringement, finding that the Authority had not proven the absence of plausible alternative explanations for the defendants' parallel conduct. The existence of parallel behavior was reflected in internal company documents and was not contested by the parties. Rather, the parties argued that this behavior was the result of individual decision-making, not collusion. The Court accepted this argument. In doing so, it also noted that the parallel behavior concerned companies representing only 58 percent of the relevant market and that the Competition Authority had failed to investigate the conduct of the other firms. In short, the *Insurance Cartel* sets a high standard for investigation in future cases by the Competition Authority.

In the *Petrol Cartel* case⁶⁰ the Supreme Administrative Court was called to evaluate again the evidence supporting a finding of a concerted practice. In this case, the Court reversed a decision of the Competition Authority condemning an alleged concerted practice among Italian oil companies and their trade association. The Competition Authority's decision was annulled on procedural grounds. However, in a very long *obiter dictum*, the Supreme Administrative Court noted that the Authority had not considered several plausible alternative explanations for the oil companies' parallel behavior, including the fact that the still heavily-regulated Italian market led to an artificial transparency facilitating the convergence of the competitors' pricing policies. The fact that the Court decided to devote an extensive discussion to evidentiary issues that were necessary for the resolution of the case leads these authors to believe that the Court meant to opine directly on an issue to which it attached particular importance. This ruling is indeed now generally recognized as a landmark ruling.

In the *Technical Gas Cartel* case⁶¹ the Supreme Administrative Court set high legal standards for the evidence required of the Competition Authority to prove the existence of a cartel. The Competition Authority had imposed significant fines on the main technical gas producers in Italy for having allegedly implemented a market allocation scheme. The

⁵⁹ Axa Assicurazioni v. Autorità Garante della Concorrenza e del Mercato, 23 Apr. 2002, n. 2199/2002 (Cons. stato).

⁶⁰ Esso Italiana v. Autorità Garante della Concorrenza e del Mercato, 20 July 2001, n. 4053/2001 (Cons. stato).

⁶¹ Sapio Produzione Idrogeno Ossigeno – Rivoira – Società Italiana Acetilene e Derivati -S.I.A.D. – Società Ossigeno Napoli – S.O.N. – Linde Gas Italia – Air Liquide Italia – SOL, 26 Apr. 2004, n. I603, Bulletin 17/2006.

Supreme Administrative Court entirely quashed the decision on the merits.⁶² Following a thorough review of the Competition Authority's findings, the Court concluded that the circumstantial evidence gathered by the Competition Authority was insufficient to prove the infringement. In relation to the so called "exogenous evidence" (or the sporadic and non-systematic contacts between local representatives of the undertakings concerned) the Court held that the evidence was inadequate to infer the involvement of the senior management too. In relation to the so called "endogenous evidence" (or the special features of the market), the Court held that the stability in the defendants' market shares could not in itself have an unequivocal evidentiary value. In particular, the Court found that the customers' low switching ratio is a peculiarity of the technical gas sector and not necessarily the result of collusion. In this respect, the Court held that the Competition Authority should have conducted an independent review of the market dynamics. Finally, the Supreme Administrative Court held that a decreasing trend of the prices in the cartel period is a feature of a competitive market. The TAR had held that while prices had actually fallen, they would have fallen even more in the absence of the cartel. The Supreme Administrative Court rejected this reasoning because this would amount to the imposition on the defendants of a burden of proof impossible to discharge. They would be required to give evidence of the levels of prices in the market absent a cartel whose existence they deny. Most importantly, the Supreme Administrative Court held that, absent smoking guns or directly incriminating evidence, the Competition Authority bears the burden of proving that parallel conduct is the consequence of a cartel and cannot be justified instead by reference to the inherent features of the market.⁶³

It can be expected that, in the future, companies will rely on this judgment to counter allegations of collusion based on simple indicia and not direct evidence.⁶⁴ The importance of the judgment is demonstrated by the unprecedented step taken by the Competition Authority, as it filed an application with the Supreme Administrative Court for the revision of the Court's judgment.⁶⁵ The Supreme Administrative Court has rejected the application on procedural grounds, finding it inadmissible because it centered on the allegation of factual mistakes by the Court and therefore amounted to a further appeal of the earlier judgment.⁶⁶

⁶² Rivoira and Others v. Autorità Garante della Concorrenza e del Mercato, 8 Mar. 2008, n. 1006/2008 (Cons. stato).

⁶³ *Id.*

⁶⁴ According to the previous (and settled) case law, serious, precise, and consistent indicia were sufficient to prove an illegal collusion. *See, e.g.*, SICO and Others v. Autorità Garante della Concorrenza e del Mercato, 15 Jan. 2007, n. 204 (Trib. ammin. reg.), ¶ 77; Disma S.p.A. v. Autorità Garante della Concorrenza e del Mercato (Jet Fuel), 20 Feb. 2008, n. 596 (Cons. stato), ¶ 4.

⁶⁵ The revision is an extraordinary procedural remedy whereby the unsuccessful party in judicial proceedings asks the court that rendered the contested judgment to declare that its judgment was flawed due to, *inter alia*, factual errors resulting from documents in the file of the case. The Supreme Administrative Court has never before revised any judgments in antitrust matters pursuant to this specific procedure.

⁶⁶ *See* Autorità Garante della Concorrenza e del Mercato v. Sapio and Others, 7 Nov. 2008, n. 6279 (Cons. stato).

(g) Reliability of Documentary Evidence

In *Lottomatica-Sisal*,⁶⁷ the Supreme Administrative Court reduced the duration of the infringement on the basis of an innovative analysis of the documentary evidence. The Competition Authority had found that Lottomatica and Sisal had entered into an anticompetitive agreement with the aim of allocating the market of gaming and betting as well as protecting their own market positions. The Competition Authority concluded that the starting date of infringement corresponded with the date of a letter of intent that had not been signed by either Sisal or Lottomatica found during a surprise inspection of Sisal's premises.

The Supreme Administrative Court, reversing the TAR judgment, held that the document could not be considered a "non-belligerence treaty" (as defined by the TAR) since the Competition Authority had not provided detailed information concerning the document in question (*e.g.*, information regarding the room in which it had been found, in which computer, or which computer user).⁶⁸ Moreover, some of the plans described in the document had not been implemented. Finally, the date of document demonstrated that it was a unilateral attempt on the part Sisal to reach an agreement with Lottomatica the day preceding a judicial hearing involving Sisal and Lottomatica as opposing parties. That agreement would have been reached only at a later stage. As a consequence, holding that the starting date of the infringement could not be based on that particular document, the Supreme Administrative Court moved the starting date of the infringement forward. This naturally resulted in a lower fine for the parties.

(h) Relevance of Criminal Findings in the Context of the Competition Authority's Investigations

In *Prodotti disinfettanti*,⁶⁹ the Competition Authority as well as the Administrative Courts, on appeal, held that court findings in criminal proceedings are not binding in the antitrust administrative procedures before the Competition Authority and the subsequent judicial review proceedings on appeal.

The Competition Authority had found that suppliers of antiseptics and disinfectants to the public health system had violated Article 101 TFEU by running a sophisticated system aimed at monitoring the market through a jointly owned consulting firm named Pan Service s.a.s. The decision followed an investigation prompted by reports from the financial police relating to collusive tendering. The Court of Milan initiated parallel criminal proceedings against some of the managers of the companies concerned. In 2004, the criminal court of Milan found that not all the elements of the criminal infringement were present, and the

⁶⁷ Lottomatica-Sisal, 25 Nov. 2004, n. I570, Bulletin 50/2004.

⁶⁸ Lottomatica and Sisal v. Autorità Garante della Concorrenza e del Mercato, 17 Dec. 2007, n. 6469 (Cons. stato).

⁶⁹ Prodotti disinfettanti, 26 Apr. 2006, n. I639, Bulletin 17/2006, ¶¶ 211-217.

managers were acquitted. The companies involved in the antitrust investigation argued that the Competition Authority should have considered this outcome in its proceedings. The Competition Authority rejected this argument, stating that the antitrust investigation is distinct from the criminal investigation as it has different aims as well as different standards of proof.

The parties challenged the decision before the TAR and subsequently before the Supreme Administrative Court. Both Administrative Courts upheld the Competition Authority's position that criminal findings are not binding for the Competition Authority. Moreover, the Courts also held that criminal findings are not binding for the administrative judge. The TAR, in particular, held that the evidence relied upon by the criminal judge and by the Competition Authority was different since the Competition Authority based its findings mostly on the evidence collected during the surprise inspections that took place after the criminal ruling.⁷⁰ The Supreme Administrative Court, then, held that criminal proceedings are binding for the administrative judge only in relation to those material facts that were considered as having actually occurred and were thus relevant for the final criminal judgment.⁷¹

(i) Successor's Liability

In *Variazione di prezzo di alcune marche di tabacchi*,⁷² there was a question as to whether a company acquiring a business involved in a violation becomes liable for the acquired business' previous antitrust violations in a situation where the previous parent company (the seller of the business concerned) still exists. The precise answer to this question is uncertain under both EU and Italian competition law.⁷³

In an important decision concerning a cartel among tobacco manufacturers, the Competition Authority addressed the issue of the attribution of liability and fines for infringements of the Competition Law.⁷⁴ The Competition Authority found that the two leading tobacco companies operating on the Italian cigarette market—Philip Morris (PM) and Amministrazione Autonoma dei Monopoli di Stato (AAMS), a public authority in charge of managing the state tobacco monopoly—had entered into and implemented a restrictive agreement between 1993 and 2001. In 1999, AAMS became a state-owned private company under the name of ETI S.p.A. (ETI).

Considering the serious nature of the offenses, the Authority imposed total fines of €50 million on five companies within the PM group that were parties to the agreement, as well as

⁷⁰ *Sanitas and Others v. Autorità Garante della Concorrenza e del Mercato*, 7 Mar. 2007, n. 4123/2007 (Trib. ammin. reg.), ¶ 5.1.

⁷¹ *IMS-International Medical Service S.r.l. and Others v. Autorità Garante della Concorrenza e del Mercato*, 29 Feb. 2008, n. 760 (Cons. stato), ¶ 3.

⁷² *Variazione di prezzo di alcune marche di tabacchi*, 13 Mar. 2003, n. I479, Bulletin 11/2003.

⁷³ For EU competition law, see Case C-49/92 P, *Commission v. Anic*, 1999 E.C.R. I-04125, ¶ 145, and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, C-219/00 P, *Aalborg Portland A/S and Others*, 2004 E.C.R. I-00123, ¶¶ 358-359.

⁷⁴ *Variazione di prezzo di alcune marche di tabacchi*, 10 Mar. 2003, n. I479, Bulletin 11/2003.

total fines of €20 million on ETI. However, on July 14, 2003, the TAR annulled the portion of the Competition Authority's decision finding ETI responsible for infringements that occurred prior to its formation. The Competition Authority had maintained that, after ETI was created, AAMS had ceased to carry out any economic activities, and thus, in order to preserve the effectiveness of competition law, any fines relating to AAMS's previous commercial behavior had to be imposed on its economic successor ETI. The TAR rejected this approach and concluded that, to achieve consistency with the case law of the European Union Courts,⁷⁵ ETI could not be held liable for infringements committed by a different legal entity which still existed at the time the fine was issued. Therefore, the TAR remanded the case to the Competition Authority to reassess the amount of the fine.⁷⁶

On further appeal, the Supreme Administrative Court sought the assistance of the ECJ pursuant to Article 267 TFEU (ex Article 234 TEC). With a request for a preliminary ruling, it asked the ECJ whether, in a case such as this, fines should be levied on the economic successor. In its preliminary ruling, the ECJ held that the principle of personal liability does not preclude the penalty for the infringement commenced by AAMS and continued by ETI from being imposed in its entirety on ETI.⁷⁷

The question of assessment of antitrust liability of a successor undertaking has also been addressed by the Competition Authority in situations in which the undertaking was a legal entity at the time of the infringement but subsequently lost its separate legal personality when it was absorbed by a larger corporate entity. This situation was analyzed by the Competition Authority in *RC Auto*.⁷⁸ This case establishes the principle that when the economic and functional successor of an undertaking continues the same basic activities, and also assumes the assets and liabilities of the undertaking, that successor may be held liable for the actions of its predecessor. In this context, there is no need to prove that the economic successor was involved in, or carried on, the unlawful activities. This solution is

⁷⁵ See, e.g., Case T-6/89, *Enichem ANIC S.p.A. v. Commission (Polypropilene)*, 1991 E.C.R. II-1623; Case T 327/94, *SCA Holding Ltd. v. Commission*, 1998 E.C.R. II-1373, *aff'd* Case C-297/98 P, *SCA Holding Ltd v. Commission*, 2000 E.C.R. I-10101. According to these cases, when an undertaking is identified as a participant in the infringement, it cannot escape fines (or avoid being the addressee of an infringement decision) by selling or otherwise disposing of the infringing assets.

⁷⁶ *Philip Morris & ETI v. Autorità Garante della Concorrenza e del Mercato*, 29 Oct. 2003, n. 9203/2003 (Trib. ammin. reg.). For examples of the Competition Authority's previous practice, see *Tubi Dalmine Ilva/General Sider Italiana/Arvedi Tubi Acciaio*, 14 Dec. 1995, n. I135, Bulletin 50/1995, and *Byk Gulden Italia/Istituto Gentili*, 25 Feb. 1999, n. I332, Bulletin 8/1999. In particular, in the latter case, Istituto Gentili (IG) had divested in 1997 all its assets in the relevant market to Abiogen. IG claimed that responsibility for the infringement should not have been attributed to IG but rather to Abiogen. However, the Competition Authority rejected this argument, holding that IG was responsible for operating the undertaking involved in the infringement (*i.e.*, the divested business) at the time the infringement took place. Since IG was still in existence, it could be held liable even though it had disposed of the assets in the market concerned.

⁷⁷ Case C-280/06, *Autorità Garante della Concorrenza e del Mercato v. Ente Tabacchi Italiani and Others*, 2007 E.C.R. I-10893.

⁷⁸ *RC Auto*, 28 July 2000, n. I377, Bulletin 30/2000.

justified by the possibility that if no liability were imposed on the economic successor, liabilities and fines would be circumvented altogether.⁷⁹

2. Cartel Enforcement

The Competition Authority is among the most active national competition law enforcement agencies in Europe in the fight against cartels. In fact, in the last several years, Italy has been by far the most aggressive jurisdiction, other than the U.S. and Canada, in prosecuting international cartels. In 2004, Italy accounted for 35% of the cartels discovered by the “other” national authorities, although its rate of discovery has diminished to about two cases per year since 1999. In 2008 alone, the Competition Authority imposed fines for such violations totalling approximately €28 million.

(a) Agreements Covered

(i) Fixing of Prices or Other Contractual Obligations

The first example of prohibited agreements listed in Section 2 is the direct or indirect fixing of purchase or reselling prices or any other contractual conditions.⁸⁰ The Competition Authority considers price fixing to be a very serious infringement since pricing is an essential form of competition. The Competition Authority’s practice is to strike down any price-fixing agreement related to selling prices,⁸¹ minimum selling prices,⁸² maximum

⁷⁹ The solution adopted by the Competition Authority is in harmony with the EU Courts’ case law. *See, e.g.*, Joined Cases 40, 48, 50, 54-56, 111, 113-114/73, *Suiker Unie and Others v. Commission*, 1975 E.C.R. 1663.

⁸⁰ Competition Law, § 2.

⁸¹ *See, e.g.*, *Federazione Italiana Spedizionieri*, 31 Mar. 1993, n. I164, Bulletin 61/1993; *Pro.Cal.*, 22 Jan. 1992, n. I32, Bulletin 10/1992; *ANIA*, 18 Nov. 1992, n. A30, Bulletin 22/1992; *Assicurazioni rischi di massa*, 8 June 1994, n. I74, Bulletin 23/1994; *BYK Gulden Italia-Istituto Gentili*, 25 Feb. 1999, n. I332, Bulletin 8/1999; *Istituto Gentili-Merck Sharp & Dohme-Neopharmed-Sigma Tau Industrie Farmaceutiche Riunite-Mediolanum Farmaceutici*, 25 Feb. 1999, n. I333, Bulletin 8/1999; *Tim-Omnitel Tariffe Fisso Mobile*, 28 Sept. 1999, n. I372, Bulletin 39/1999.

⁸² *See, e.g.*, *Consorzio Abruzzo Conglomerati Cementizi*, 12 Feb. 1992, n. I15, Bulletin 3/1992; *Consorzio Produttori Calcestruzzi Perugia*, 12 Feb. 1992, n. I16, Bulletin 3/1992; *Consorzio Sciacca Terme*, 12 Feb. 1992, n. I17, Bulletin 3/1992.

selling prices,⁸³ price increases,⁸⁴ amounts of rebate,⁸⁵ recommended or target prices,⁸⁶ and elements of the price.⁸⁷

Setting a particular price level that is presented to the market as the listed price or the official price⁸⁸ circumscribes the opportunity for customers to negotiate with producers, and deprives them of the benefits that would otherwise be available through the free play of competitive forces.⁸⁹

The Competition Authority has decided that since contractual clauses, such as payment terms or the transport costs for the delivery of goods, play a major role in competition, agreements on those conditions can be likened to agreements on prices. Indeed, Section 2 defines such agreements as equivalent to price fixing.⁹⁰

In September 2000, the Competition Authority found that an agreement between the Italian Association of Physicians, Surgeons and Dentists and supplementary health care service providers, that offered the services of medical professionals to their clients, violated Section 2 of the Competition Law by fixing the terms and conditions to be applied in contractual relationships between the service providers and all the members of the Association.⁹¹ In particular, the Association imposed a so-called “open list” principle, pursuant to which the health care service providers were obliged to enter into contracts with only those professionals whose names were supplied by the Association. As a result, health care service providers were restricted from freely selecting physicians to be part of their networks on the basis of the quality or price of their medical services. Following its investigation, the Competition Authority found that (i) physicians had no incentive to compete with each other to enter the network of a given health care provider, and (ii) the bargaining power of the health care providers in their relations with individual physicians was significantly diminished. The Competition Authority concluded that the Association’s actions were expressly designed to prevent competition among its members in their relations with supplementary health care providers, and that this was a violation of the Competition Law.

(ii) Market Allocation

⁸³ See, e.g., Cardile Bros, 10 Oct. 1992, n. I60, Bulletin 19/1992.

⁸⁴ See, e.g., Associazione Italiana Editori, 26 Mar. 1999, n. I368, Bulletin 12/1999.

⁸⁵ See, e.g., Tubi Dalmine Ilva/General Sider Italiana/Arvedi Tubi Acciaio, 14 Dec. 1995, n. I135, Bulletin 50/1995; Cardile Bros, 10 Oct. 1992, n. I60, Bulletin 19/1992.

⁸⁶ See, e.g., Istituto Gentili-Merck Sharp & Dohme-Neopharmed-Sigma Tau Industrie Farmaceutiche Riunite-Mediolanum Farmaceutici, 25 Feb. 1999, n. I333, Bulletin 8/1999; Tariffe amministratori di condominio, 14 Dec. 1994, n. I101, Bulletin 50/1994.

⁸⁷ See, e.g., ANIA, 2 July 1993, n. I43, Bulletin 15-16/1993; Associazione Vendomusica/Discografie Multinazionali-Federazione Industria Musicale, 9 Oct. 1997, n. I207, Bulletin 41/1997.

⁸⁸ See, e.g., Federazione Italiana Spedizionieri, 31 Mar. 1993, n. I64, Bulletin 6/1993.

⁸⁹ See, e.g., Ce.Di.C., 18 Nov. 1992, n. I39, Bulletin 22/1992.

⁹⁰ See, e.g., Tubi Dalmine Ilva/General Sider Italiana/Arvedi Tubi Acciaio, 14 Dec. 1995, n. I135, Bulletin 50/1995 (parties coordinated their contractual conditions of supply).

⁹¹ Ordine dei Medici e Chirurghi Odontoiatri, 27 Sept. 2000, n. I222, Bulletin 39/2000.

The Competition Authority condemns market allocation agreements. The types of market allocations considered by the Competition Authority mainly relate to quota allocations, output restrictions (such as production limitations and investment limitations), input restrictions, and allocation of customers.

Quota allocation. In *Consorzio Industrie Fiammiferi*,⁹² the Competition Authority held that a consortium and its members infringed Article 101 TFEU (i) by allocating production quotas among the consortium members; (ii) by agreeing with Swedish Match, a leading company in the European match market, to allocate a percentage of the Italian match consumption to Swedish Match in exchange for a commitment by Swedish Match not to directly enter the Italian market; and (iii) by entering into an exclusive purchase agreement with another consortium of match distributors to establish fidelity discounts for distributors, thereby making entry into the Italian market extremely difficult for other European manufacturers.

The Competition Authority recognizes that a cartel might be able to earn supracompetitive profits by agreeing to restrict its members' output. In *Ce.Di.C.*,⁹³ the Competition Authority found that the parties infringed the Competition Law by agreeing on a quota system whereby each of them supplied a specified proportion of the entire industry outputs. In another case, the Competition Authority found that an agreement between competitors to fix prices supported by quotas, whereby each party maintained its share of the demand, was also incompatible with the Competition Law.⁹⁴

Output restrictions. In several instances, the Competition Authority has condemned agreements to limit production that supported an agreement on prices. For example, it found that the members of a cartel infringed the Competition Law by agreeing to curtail production or to restrain supply to support the jointly agreed-upon prices.⁹⁵ The Competition Authority also condemns quota systems in which the parties allocate to each other a maximum permissible volume of production.⁹⁶

In *Nord Calce* and *Pro.CaL*,⁹⁷ the Competition Authority condemned a system whereby consortia allocated deliveries among their members on the basis of the market share that each member held. The Competition Authority has also struck down agreements regulating the establishment, transfer, and enlargement of new plants belonging to parties to the agreement.⁹⁸ Similarly, the Competition Authority found that an agreement whereby

⁹² *Consorzio Industrie Fiammiferi*, 13 July 2000, n. I318, Bulletin 28/2000.

⁹³ *Ce.Di.C.*, 18 Nov. 1992, n. I39, Bulletin 22/1982.

⁹⁴ *Raffineria di Roma/Fina Italiana/Erg Petroli/Monteshell*, 13 Mar. 1996, n. I124, Bulletin 11/1996.

⁹⁵ *Pro.Cal.*, 22 Jan. 1992, n. I32, Bulletin 10/1992; *Ce.Di.C.*, 18 Nov. 1992, n. I39, Bulletin 22/1982.

⁹⁶ *See, e.g.*, *Consorzio del Prosciutto di San Daniele-Consorzio Prosciutto di Parma*, 19 June 1996, n. I138, Bulletin 25/1996.

⁹⁷ *Nord Calce*, 23 July 1993, n. I47, Bulletin 18-19; *Pro.Cal.*, 22 Jan. 1992, n. I32, Bulletin 10/1992.

⁹⁸ *See* the following Competition Authority decisions on eight agreements in the cement market: *Pro.Cal.*, Bulletin 10/1992; *Ce.Di.C.*, 18 Nov. 1992, n. I39, Bulletin 22/1982; *Cementir/Merone*, 17 June 1992, n. I25, Bulletin 12/1992; *Cementir/Sacci*, 15 May 1992, n. I29, Bulletin 9/1992; *Consorzio Abruzzo Conglomerati Cementizi*, 12 Feb. 1992, n. I15, Bulletin 3/1992; *Consorzio Calcestruzzi Salemi*, 1 Apr. 1992, n. I21, Bulletin 7/1992; *Consorzio Edile Marsicano (CO.E.M.)*, 4

producers agreed to distribute their products only through pharmacies infringed the Competition Law.⁹⁹ It also held that an agreement concerning the allocation of television rights between the two main operators on the market was restrictive because its consequences were the creation of barriers to entry and the reduction of competition between the two companies.¹⁰⁰

In a different case, the Competition Authority found that the Italian national pharmacy association, as well as the pharmacy associations of several Italian cities and regions, violated the Competition Law by prohibiting its members from advertising through the media (or even simply reporting their existence) and from making deliveries to their customers' homes.¹⁰¹ These prohibitions amounted to output restrictions and, as a result, limited the pharmacies' ability and incentive to compete against each other.

More recently, in *Consortio Grana Padano*,¹⁰² the Authority concluded that two resolutions adopted by a consortium of approximately 200 producers of Grana Padano cheese violated Section 2 of the Competition Law because the resolutions were aimed at reducing the consortium members' output. The resolutions provided for the assignment of economic incentives to those members of the consortium that utilized or sold their milk for purposes other than to manufacture Grana Padano cheese. The Authority observed that the consortium's measures amounted to the creation of production quotas, and that, as a result of the decreased production of cheese, wholesale prices increased artificially. In light of the serious nature of the infringement, a €120,000 fine was levied against the consortium itself.

Customer Allocation. The allocation of customers can take the form of refraining from dealing with the other party's customers. In several cases, the Competition Authority found that the parties explicitly agreed to supply only their own customers. For example, in *Cementir/Sacci*, the Competition Authority negatively assessed an agreement whereby the parties allocated to each other the customers in various Italian regions.¹⁰³

(iii) *Boycotts*

The Competition Authority has held that a collective boycott is a very serious infringement of the Competition Law as it is a form of collusion between competitors aimed at interfering with the commercial policies of other undertakings. In *Inaz Paghe*,¹⁰⁴ the Competition Authority found that the Italian national association of labor consultants (ANCL) violated the Competition Law by urging its members to refrain from dealing with

Mar. 1992, n. I22, Bulletin 5/1992; *Consortio Piceno Calcestruzzi Perugia*, 12 Feb. 1992, n. I16, Bulletin 3/1992.

⁹⁹ *Latte Artificiale per Neonati*, 2 Mar. 2000, n. I328, Bulletin 9/2000.

¹⁰⁰ *Rai-Mediaset-R.T.L.-Mediatrade*, 10 Dec. 1998, n. I283B, Bulletin 49/1998.

¹⁰¹ *Selea/Ordine dei Farmacisti*, 14 Feb. 2002, n. I417, Bulletin 8/2002.

¹⁰² *Consortio Grana Padano*, 24 June 2004, n. I569, Bulletin 26/2004.

¹⁰³ *Cementir/Sacci*, 15 May 1992, n. I29, Bulletin 9/1992. *See also* *Assicurazioni rischi di massa*, 8 June 1994, n. I74, Bulletin 23/1994.

¹⁰⁴ *Inaz Paghe/Associazione Nazionale Consulenti del Lavoro*, 3 Feb. 2000, n. I308, Bulletin 5/2000.

Inaz Paghe Srl, a supplier of software to labor consultants, including ANCL's members. Here, for the first time the Competition Authority imposed a fine on a trade association.

(iv) Covenants Not to Compete

The Competition Authority may assess covenants not to compete under Section 2. However, these agreements are typically analyzed in the context of a merger or acquisition. In particular, the notifying party must indicate the restraints (including the non-compete clauses) it deems directly related to, and necessary for, the concentration's successful implementation (so-called "ancillary restraints"). Unlike the Commission's more recent practice inspired by changes in the applicable rules,¹⁰⁵ the Competition Authority's assessment of the notified transaction contains an analysis of such clauses. Thus, clearance decisions also cover restrictions considered by the Competition Authority to be ancillary. In assessing whether a given restriction may be characterized as ancillary to the notified concentration, the Competition Authority follows the principles laid out in the Commission notice on restrictions directly related and necessary to concentrations.¹⁰⁶

(v) Refusal to Grant Access to Services

The Competition Authority has seemingly focused on anticompetitive arrangements resulting in the refusal to grant access to services to third parties.

In *Audipress*,¹⁰⁷ for instance, the Competition Authority imposed a fine on A.D.S. for its refusal to grant access to its service to Metro and other companies operating in the free press. A.D.S. is an association providing certification data on the circulation of the daily and periodical press. The data is used by advertising companies to select the best newspaper to advertise their product, with an aim to maximizing the audience for their messages. The Competition Authority found that despite many requests, A.D.S. had repeatedly refused to supply its service to Metro (a free daily newspaper) and other free newspapers. The Competition Authority held that A.D.S. was an association of undertakings under the meaning of Article 101 TFEU and found that its decision not to grant access to its data had an anticompetitive effect. More specifically, it held that such a decision restricted competition in the downstream market of advertising for newspapers since it prevented the free press from increasing the volume of its advertising space through the use of the data gathered by A.D.S.

¹⁰⁵ See Article 8(1) of the EC Merger Regulation.

¹⁰⁶ Commission Notice on Restrictions Directly Related and Necessary to Concentrations, 2005 O.J. (C 56) 24.

¹⁰⁷ A.D.S. Accertamenti Diffusione Stampa-Audipress, 17 May 2007, n. I651, Bulletin 19/2007 (Audipress).

(vi) Other Horizontal Practices - Information Exchanges

The Competition Authority and the Administrative Courts continue to be very strict with respect to information exchanges.

In accordance with EU competition law, the Competition Authority condemns information exchanges on their own or together with other restrictions. The assessment of an information exchange agreement depends mainly on the market structure, the type of information exchanged, and the frequency of information exchange.¹⁰⁸

These communications raise particular concerns when they facilitate collusive behavior among competing undertakings since the exchange of information is likely to improve the monitoring of the activities of competitors.¹⁰⁹ Indeed, the Competition Authority has stated that each producer should act independently on the market and not coordinate its behavior with that of its rivals.¹¹⁰ Information agreements are normally permitted if they have as their sole object an exchange of experience, joint market research, or the joint preparation of comparative studies of industries or of statistics and surveys.¹¹¹

With approximately 40 insurance companies involved, representing roughly 80 percent of the Italian car insurance market, the Competition Authority had an opportunity to deal with an extremely broad “information agreement” in *RC Auto*.¹¹² The Competition Authority held that the companies violated the Competition Law by exchanging sensitive commercial information, thereby rejecting the parties’ arguments that the exchange of information was legal because: (i) the information was collected by a third company completely independent from the insurance companies; (ii) the data was publicly available or historical in nature; and (iii) some of the companies would have been able to calculate the prices charged by the others on their own, without using external information.¹¹³

The Supreme Administrative Court affirmed the Competition Authority’s ruling, holding that the determination whether information exchanges are unlawful depends on the nature of the information exchanged and the exchange’s potential anti-competitive effects.¹¹⁴ The parties countered that in the *UK Tractors* ruling¹¹⁵ the ECJ held that it was also necessary to consider the structure of the relevant market and, in particular, its degree of

¹⁰⁸ See, e.g., *Federazione Industria Musicale Italiana*, 26 Mar. 1999, n. I366, Bulletin 12/1999.

¹⁰⁹ In *Federazione Italiana Spedizionieri*, 31 Mar. 1993, n. I164, Bulletin 6/1993, the Competition Authority held that an agreement regarding the publication of price lists in a daily newspaper was an infringement of § 2 because this information was an instrument used to force uniformity of prices in the market concerned.

¹¹⁰ *Forniture Pezzi di Ricambio Caldaie a Gas*, 22 Apr. 1999, n. I115, Bulletin 6/1993; *Associazione Vendomusica/Discografie Multinazionali-Federazione Industria Musicale Italiana*, 9 Oct. 1997, n. I207, Bulletin 41/1997; *Assicurazioni rischi di massa*, 8 June 1994, n. I74, Bulletin 23/1994.

¹¹¹ See, e.g., *Federazione Industria Musicale Italiana*, Bulletin 12/1999.

¹¹² *RC Auto*, 28 July 2000, n. I377, Bulletin 30/2000.

¹¹³ *Id.*

¹¹⁴ See, e.g., Case C-7/95 P, *John Deere v. Commission*, 1998 E.C.R. I-3111; Case C-8/95 P, *New Holland Ford v. Commission*, 1998 E.C.R. I-3175.

¹¹⁵ See, e.g., Case C-7/95 P, *John Deere v. Commission*, 1998 E.C.R. I-3111; Case C-8/95 P, *New Holland Ford v. Commission*, 1998 E.C.R. I-3175.

concentration. However, the Supreme Administrative Court rejected this argument, holding that exchange of highly confidential and sensitive information (*e.g.*, prices charged to customers) is unlawful not only in oligopolistic markets, but also in more heterogeneous and competitive markets.¹¹⁶

In *RAS Generali/IAMA Consulting*,¹¹⁷ the TAR held that sharing confidential information among competitors is a *per se* violation. The Competition Authority had found that thirteen Italian life insurance companies and a consulting firm (Iama Consulting) had concluded agreements/concerted practices for the regular exchange of sensitive information on the terms and conditions of the insurance companies' respective life insurance products. The Competition Authority's investigation showed that Iama Consulting had systematically supplied a database with such information to each of the life insurance companies. In rejecting the parties' claim that Iama Consulting had compiled the database from independent market analyses, the Competition Authority found that, with a view to having this information distributed to all market players, the insurance companies had regularly supplied Iama Consulting with the information. The Competition Authority found the exchange of sensitive, recent, and disaggregated information unlawful as it encouraged collusion. Also, it deemed relevant the fact that the database was only available to the participating life insurance companies and not their customers in a market that is relatively concentrated and in which consumer choice is limited by both the inherent complexity of life insurance products and the broad use of exclusive distribution agreements.

The Competition Authority thus introduced a distinction between information having a public nature and information in the public domain. Both types of information are publicly available, but while information in the public domain is easily accessible in a complete form without bearing any costs, more time and effort is required to collect information having a public nature.

On appeal, the TAR ruled against the Competition Authority and attenuated the strict stance of its decision. It held that the information exchanges among competitors are *per se* illegal where two conditions are met: the information exchanged is confidential in nature

¹¹⁶ See *Axa Assicurazioni v. Autorità Garante della Concorrenza e del Mercato*, 23 Apr. 2002, n. 2199/2002 (Cons. stato), ¶ 7.2.2. This holding seems consistent with *UK Tractors*. In that case, the information exchange did not directly concern prices. Rather, it concerned only the exchange of statistics providing information on sales and market shares of individual firms. The Commission held that, given the oligopolistic nature of the UK tractors market, exchange of this commercial information was unlawful since it created a transparency that allowed the parties to predict competitors' actions earlier than would otherwise be the case. See *Case C-7/95 P, John Deere v. Commission*, 1998 E.C.R. I-3111, ¶¶ 87-90. This fact could facilitate the alignment of prices or other conditions of sale by eliminating the incentive temporarily to undercut competitors' prices. The rationale behind this finding is that, in highly concentrated markets that are prone to conscious parallel behavior, uncertainty and secrecy between suppliers are vital elements of "hidden" competition, and information exchanges (also those not strictly related to price) eliminate even this narrow margin for competition.

¹¹⁷ *RAS-Generali/IAMA Consulting*, 30 Sept. 2004, n. I575, Bulletin 40/2004.

and it reveals the market position or strategies of individual competitors.¹¹⁸ In this case, neither of these conditions was met. Further, the TAR rejected the distinction between information of a public nature and information in the public domain. Moreover, the TAR accepted that it was economically rational for the insurance companies to exchange information through Iama Consulting because it would have been more expensive to procure the same information individually.

In *Rifornimenti aeroportuali (Jet Fuel)*,¹¹⁹ the Supreme Administrative Court found that it is illegal to exchange confidential historic data as well as data that may be obtained from sources other than the competitors. The Competition Authority found that the six oil companies had put into effect a number of collusive strategies, including the exchange of confidential information, and imposed fines totaling € 370 million. On appeal, the TAR upheld the decision as regards the merits of the Competition Authority's assessment.¹²⁰ Following a second appeal, the Supreme Administrative Court confirmed the TAR ruling and held, in particular, that (i) an infringement exists when the information exchanged has a commercial value and is sensitive information, such as the information on the quantity or the price of jet fuel that a producer plans to supply to a certain airport within a certain period of time; (ii) even historic data that are not public may be considered as sensitive information for purposes of finding infringing conduct; and (iii) information could be considered sensitive even when it could have been obtained from a source other than a competitor.¹²¹

(vii) Complex Cartels

The Competition Authority is very active in the fight against cartels even when they take the form of complex overall arrangements that include different types of conduct over a long period of time. In *Prodotti disinfettanti*,¹²² the Competition Authority fined nine pharmaceutical companies for engaging in collusive practices aimed at restricting competition on the market for the supply of disinfectant and antiseptic products to the National Health System.

The investigation unveiled collusion between pharmaceutical companies to coordinate bids in public tenders and share the market. In addition, the Competition Authority found that the pharmaceutical companies arranged meetings and exchanged sensitive information through a consulting firm that provided them with market monitoring services.¹²³ The

¹¹⁸ San Paolo IMI and Others v. Autorità Garante della Concorrenza e del Mercato, 8 Aug. 2005, n. 6088 (Trib. ammin. reg.).

¹¹⁹ Rifornimenti aeroportuali, 14 June 2006, n. I641, Bulletin 23/2006.

¹²⁰ Disma S.p.A. v. Autorità Garante della Concorrenza e del Mercato (Jet Fuel), 27 Feb. 2007, n. 1750 (Trib. ammin. reg.).

¹²¹ Disma S.p.A. v. Autorità Garante della Concorrenza e del Mercato (Jet Fuel), 20 Feb. 2008, n. 596 (Cons. stato), ¶¶ 6.1 *et seq.*

¹²² Prodotti disinfettanti, 26 Apr. 2006, n. I639, Bulletin 17/2006.

¹²³ Pan Services periodically collected sensitive and disaggregated information concerning the clients and the prices applied by each pharmaceutical company in order to prepare “client lists,” which indicated the clients assigned to each company, and “price lists”.

customer lists and price lists were then distributed to all the pharmaceutical companies, which would in turn discuss these lists and decide which of the cartel members should be awarded which tender. According to the Competition Authority, the market sharing scheme was carried out mainly through bilateral meetings and contacts aimed at maintaining a balance with regards to the companies' respective client bases.

(b) Exemption from Prohibition

According to Section 4(1) of the Competition Law, the Competition Authority may authorize, for a limited period of time, agreements restraining competition provided that these agreements:

“Have the effect of improving the conditions of supply in the market, leading to substantial benefits for consumers. Such improvements shall be identified taking also into account the need to guarantee the undertakings the necessary level of international competitiveness and shall be related, in particular, to increases of production, improvements in the quality of production or distribution, or to technical and technological progress. The exemption may not permit restrictions that are not strictly necessary for the purposes of this subsection, and may not permit competition to be eliminated in a substantial part of the market”.

In any case, the benefits to consumers must outweigh the negative consequences that the agreement could produce.¹²⁴

Section 4(1) also provides that the Competition Authority may exempt categories of agreements from Section 2 by decision. So far, however, the Competition Authority has not exempted any categories of agreements and has applied Section 4 in only a few cases.

Section 13 of the Competition Law provides for the possibility to file voluntary notification with the Competition Authority, with a view to obtaining:

- a negative clearance (*i.e.*, a formal decision confirming that the notified agreement does not restrict competition within the meaning of Section 2 of the Competition Law); or
- an individual exemption (*i.e.*, a formal decision granting an exemption based on Section 4 of the Competition Law).

Following the adoption of Regulation (EC) No. 1/2003 that, *inter alia*, eliminated the possibility to file voluntary notifications with the European Commission, the national legislator has not introduced a similar change in the Italian antitrust regime, by repealing Section 13 of the Competition Law.¹²⁵ However, in its decisional practice, the Authority declares Section 13 notifications inadmissible, arguing that the notified agreement may

¹²⁴ Ristrutturazione Rete Distributori Carburante, 26 June 1993, n. I53, Bulletin n. 14/1993.

¹²⁵ This provision provides for the possibility to file voluntary notifications with the Competition Authority, in connection with agreements falling within the scope of §§ 2 and 4 of the Competition Law.

affect trade between Member States (and, as a consequence, does not fall within the scope of Section 13) even in cases where their effects are clearly limited to the national territory.

From a practical standpoint, this results in a lack of legal certainty. In order to avoid the risk of sanctions, the undertakings concerned must assess on their own the compatibility of the agreement with the competition rules, with the support of their in-house or external legal counsel (the so called “self-assessment”). For several years, this was true also with respect to agreements involving significant financial resources, such as those leading to the creation of full-function cooperative joint ventures. In fact, these agreements, at the EU level, fall within the scope of the EC Merger Regulation (provided the turnover thresholds set therein are met), while at the Italian level they initially did not qualify as operations of concentration and continued to be subject to the rules applicable to agreements.

(c) Cooperation with Other Competition Authorities

(i) Cooperation within the European Competition Network

The ECN was established as a Europe-wide cooperation tool and a forum for discussion between the Commission and the European national competition authorities (NCA’s) in cases where Articles 101 and 102 TFEU are applied. The basic foundations of the functioning of the ECN are laid out in Regulation (EC) No. 1/2003,¹²⁶ the Commission Notice on cooperation within the Network of Competition Authorities,¹²⁷ and in the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities.¹²⁸

(ii) Cooperation between National Competition Authorities

In *Price of Specialty Milk*,¹²⁹ the Competition Authority fined baby milk producers for coordinating pricing and advertising policies of newborn infant formula and follow-on milk in violation of Article 101 TFEU, which would have resulted in substantially higher prices in Italy than in other European countries. This case is noteworthy as it offers a good illustration of the close cooperation within the ECN, pursuant to Section 22(1) of Regulation (EC) No. 1/2003, that resulted in coordinated investigative efforts. The French, German, and Spanish NCA’s carried out dawn raids in their respective territories on behalf of the Competition Authority with a view to securing relevant documentation.

¹²⁶ Regulation (EC) No. 1/2003, *supra* note 6, Recitals 15-18.

¹²⁷ Commission Notice on cooperation within the Network of Competition Authorities, 2004 O.J. (C 101) 3.

¹²⁸ Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, *available at* <http://register.consilium.eu.int> (document no. 15435/02 ADD 1).

¹²⁹ *Prezzi del latte per l’infanzia*, 12 Oct. 2005, n. I623, Bulletin 40/2005. In *Soc. Milte Italia S.p.A. and Others v. Autorità Garante della Concorrenza e del Mercato*, 3 Oct. 2006, n. 9878 (Trib. ammin. reg.), the TAR rejected entirely all appeals against the decision.

(iii) Cooperation between the European Commission and National Authorities

In *Vendita al dettaglio di prodotti cosmetici*,¹³⁰ the European Commission and the competent NCA's conducted dawn raids in Austria, the Czech Republic, Germany, Italy, and Spain targeting firms active in the production and supply of cleaning products and/or personal care items. The NCA's carried out the surprise inspections in close collaboration with the Commission. While the Commission was looking into conduct affecting the market for detergents, the NCA's focused on conduct affecting cosmetics and toiletry products. The Italian investigation, in particular, was prompted by a whistle-blower (*i.e.*, an immunity applicant).

(d) Amnesty/Leniency Program

(i) The New Leniency Program

On February 15, 2007, the Competition Authority adopted its first leniency program.¹³¹ With it, it introduced in the domestic competition regime a system of total or partial immunity from penalties for cartel members reporting their participation in a secret horizontal form of collusion amounting to an agreement and/or a concerted practice. The Leniency Notice follows closely the principles and rules enshrined in the Commission Notice¹³² as well as the Model Leniency Program adopted by the ECN.

The Competition Authority may grant full immunity even to a ringleader, whereas ringleaders cannot apply for immunity under the EU leniency program. For companies that do not qualify for full immunity, the Competition Authority may grant a reduction, "generally not exceeding 50 percent" of the fine that would otherwise be imposed on the applicant.¹³³ This is different from the EU leniency program which provides for three bands of reduction, namely, 30 to 50 percent for the first leniency applicant obtaining a reduction of the fine, 20 to 30 percent for the second leniency applicant, and up to 20 percent for all the subsequent leniency applicants.¹³⁴

The Leniency Notice does not provide for any deadline within which the undertakings may submit a leniency application. In practice, however, applications for leniency tend to take place before the issuance of the statement of objections. This is also different from the

¹³⁰ *Vendita al dettaglio di prodotti cosmetici*, 12 June 2008, n. I701, Bulletin 23/2008. The case is still pending at the time of writing.

¹³¹ Notice on the non-imposition and reduction of fines under Section 15 of the Law of No. 287 of 10 October 1990.

¹³² Commission Notice on immunity from fines and reduction of fines in cartel cases, 2006 O.J. (C 298) 17.

¹³³ Leniency Notice, § 4.

¹³⁴ Commission Notice, § 26.

Commission's practice which may accept leniency applications even after the issuance of a statement of objections.

In relation to corporate statements, undertakings prefer to submit oral statements since they might be sued before national courts for damages and be required to turn in the written evidence in their possession. This is especially true for multinational companies involved in worldwide cartels covering jurisdictions with compulsory evidence discovery regimes, such as the United States.

Under the Italian rules of civil procedure, however, it is not clear whether undertakings can be obliged to produce a document related to or supporting their leniency application. An Italian judge may issue an order requiring a party to hand over a document only upon request of the other party containing a precise indication of the document.¹³⁵ It is not possible for a court to request the submission of all evidence relating to a certain event.

The Leniency Notice also provides for the option to submit short-form immunity applications.¹³⁶ This is available in cases where the Commission is thought to be the best placed authority to deal with the case and the undertaking has already submitted, or is about to submit, a detailed immunity application to the Commission.

This provision alleviates the burden associated with multiple parallel leniency applications in Europe, benefitting both the undertakings and the national competition authorities involved. In substance, the content of the simplified application is roughly similar, although not exactly identical, to that of a request for a "marker." Where the summary application is successfully perfected in a timely fashion, the immunity application will be deemed to have been submitted in its entirety on the date of filing of the summary application.¹³⁷

(ii) General Application of the New Leniency Program

The President of the Competition Authority has recently stated that the leniency program in Italy needs some improvements, such as the introduction for the first-in-line of immunity from private damages claims. However, he has also indicated that the Italian leniency program is beginning to work well and that in 2008 the Competition Authority was working on twelve cases.¹³⁸ The available figures suggest, however, that the leniency program has not produced very satisfying results so far.

¹³⁵ See Article 212 of the Italian Code of Civil Procedure and Article 94 of the Implementing Provisions to the Italian Code of Civil Procedure.

¹³⁶ But note that companies intending to file a leniency application (i.e., an application for the reduction of the fine in a situation where the immunity slot is no longer available) may not submit a summary application.

¹³⁷ Leniency Notice, § 18.

¹³⁸ Antonio Catricalà, Chairman of the Competition Authority, Presentation of the 2004 Annual Report, June 24, 2008, available at the of Competition Authority official website (<http://www.agcm.it>).

As of January 30, 2009, the Competition Authority has applied its Leniency Notice and granted full immunity in only one case.¹³⁹ In another case the Competition Authority has reduced the fines of some companies to reward their cooperation regarding the evidence of the alleged infringements as well as their partial admission to committing the infringement.¹⁴⁰ The Competition Authority has opened only one investigation following a leniency application.¹⁴¹

Though the Italian leniency program has thus far been met with limited success, the Competition Authority's enforcement efforts against anticompetitive agreements have been assisted by complaints lodged by consumers associations.¹⁴² Further, most of the time the Competition Authority initiates its investigations of anticompetitive decisions by associations of undertakings – a form of collusion that the Competition Authority deems serious and is generally easier to investigate than secret cartels – following a complaint by a member of the association itself.¹⁴³

(iii) *The First Leniency Case*

In *Produttori di pannelli truciolari in legno*,¹⁴⁴ the Competition Authority fined eight chipboard manufacturers for entering into an agreement aimed at market sharing and price fixing in the market for the production and commercialization of chipboards. This was the first decision where the Competition Authority applied its Leniency Program. The initial dawn raids of December 2, 2005, were prompted by the information and the documents provided on a voluntary basis in 2004 by three companies belonging to the same group (Trombini Group). Following the enactment on August 11, 2006 of Section 15(2-bis) of the Competition Law, which granted the Competition Authority the power to introduce the

¹³⁹ See *Produttori di pannelli truciolari in legno*, 17 May 2007, n. I649, Bulletin 20/2007 (Competition Authority applied retroactively its Leniency Notice and granted full immunity from the fine as well as reductions of fines). See also the investigation opened by the Competition Authority though its decision in *Vendita al dettaglio di prodotti cosmetici*, Bulletin 23/2008, which was prompted by a leniency application. (The investigation is pending at the time of writing).

¹⁴⁰ *Produttori vernici marine*, 10 Apr. 2007, n. I646, Bulletin 4/2007, ¶¶ 252 and 254 (Competition Authority did not, however, refer directly to its Leniency Program).

¹⁴¹ In the decision of the Competition Authority opening the investigation in the retail distribution of cosmetic products, *Vendita al dettaglio di prodotti cosmetici*, 12 June 2008, n. I701, Bulletin 23/2008, the Competition Authority refers to “information received [by the Authority]” regarding supposed anticompetitive agreements taking place within a trade association.

¹⁴² See, e.g., *Listino prezzi della pasta*, 10 Oct. 2007, n. I694, Bulletin 38/2007; *Ordine dei medici veterinari di Torino*, 21 Feb. 2007, n. I668, Bulletin 8/2007; *Listino prezzi del pane*, 4 June 2008, n. I695, Bulletin 22/2008; *Mercato dell’editoria scolastica*, 24 Apr. 2008, n. I692, Bulletin 16/2008; *Distribuzione di farmaci senza obbligo di ricetta alle parafarmacie*, 20 Sept. 2007, n. I678, Bulletin 35/2007.

¹⁴³ See, e.g., *Ordine dei medici veterinari di Torino*, Bulletin 8/2007. See also *Federfarma Teramo*, 29 May 2008, n. I684, Bulletin 21/2008, where the Competition Authority commenced its investigation after receiving in anonymous form a letter from the Association to its members on maximum discounts.

¹⁴⁴ *Produttori di pannelli truciolari in legno*, Bulletin 20/2007.

Leniency Program, in December 2006 the Trombini Group formally applied for immunity. During the investigation, the companies belonging to the Trombini Group were proactive and provided additional documents and clarifications. Ultimately, the Competition Authority decided to grant the Trombini Group a full immunity from fines. Moreover, the Competition Authority granted a 30 percent reduction of the fines to the companies that cooperated during the investigation “beyond their duty of cooperation under the existing law.”¹⁴⁵

Interestingly, when the Trombini Group first submitted evidence of the cartel activities, the Italian Leniency Program had not yet been formally adopted.¹⁴⁶ Thus, by granting the Trombini Group total immunity from fines, the Competition Authority has in substance retroactively applied its Leniency Program, possibly with a view to quickly having a precedent showing the benefits of such program.

(e) Penalties

(i) General

The Competition Authority closely follows the fining practice of the European Commission, which is currently based on the 2006 Fining Guidelines.¹⁴⁷

The 2006 Fining Guidelines abandon the earlier classification of “minor,” “serious,” and “very serious” infringements and the corresponding “likely fines” expressed in absolute numbers. Indeed, through their reliance on the relevant turnover in the affected market, the 2006 Fining Guidelines potentially eliminate or at least significantly reduce the risk of disproportionate fines for purely local cartels. It is still possible, however, that a fining practice by the Competition Authority largely relying on the Commission’s 2006 Guidelines would still result in significant fines. This is particularly true for hardcore infringements of a longer duration. Under the new 2006 Fining Guidelines, the basic fine is increased by 100 percent for each year of duration of the infringement.¹⁴⁸

¹⁴⁵ In relation to the reduction of the fines, the Competition Authority made no express reference to the Leniency Notice but referred to a “mitigating circumstance.” *Id.* ¶ 265.

¹⁴⁶ Before the adoption of the Leniency Notice, there was a sort of *de facto* leniency program in Italy. For example, in *Italesplosivi v. Autorità Garante della Concorrenza e del Mercato*, 18 June 2004, n. 6760 (Trib. ammin. reg.), the TAR upheld the Competition Authority’s decision not to impose fines on a cartel member that had materially contributed to the finding of the anticompetitive conduct.

¹⁴⁷ Guidelines on the Method of Setting Fines Imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, 2006 O.J. (C 210) 2 [hereinafter 2006 Fining Guidelines].

¹⁴⁸ 2006 Fining Guidelines, § 24.

(ii) The Criteria Used to Determine the Amount of the Fines - Excessive or Disproportionate Fines

In *Mercato del calcestruzzo*,¹⁴⁹ the TAR partially annulled the Competition Authority's decision imposing fines for an anticompetitive agreement in the market for ready mixed concrete.¹⁵⁰ The TAR found that the decision imposed excessive and disproportionate fines compared to the gravity of the infringement since the latter had not had a significant impact on the market and therefore could only be qualified as "serious," and not as "very serious" under the previous 1998 Fining Guidelines of the Commission.

The TAR held that, because the gravity of the infringement is of particular importance when setting the amount of a fine and the national legislator did not provide further indications on how to ascertain such gravity, the Competition Authority must conduct the assessment of the gravity of the infringement according to the then applicable Commission's 1998 Fining Guidelines where violations are categorized as "minor," "serious," and "very serious." According to the TAR, the Competition Authority needs to carry out in each case an assessment of the infringement's "actual impact on the market." And this also applies in cases of infringements that could in principle be qualified as "very serious" such as horizontal cartels. The TAR concluded that, since the Competition Authority had not provided sufficient evidence of the "actual impact on the market," its fining decision was flawed.

The TAR's ruling shows that the specific circumstances of a case can justify deviations from an overly strict application of the Commission's Fining Guidelines. In particular, the Commission seems more prudent as regards the relevance of the infringement's impact on the market as a factor influencing the basic amount of the fine, consistent with the Fining Guidelines that state that the impact on the market will only be taken into account "where this can be measured."

(iii) Aggravating and Attenuating Circumstances

In *Mercato del calcestruzzo*,¹⁵¹ the TAR reached conclusions regarding the treatment of recidivism (typically, an aggravating circumstance) that are not in line with EU practice and

¹⁴⁹ *Unicalcestruzzi and Others v. Autorità Garante della Concorrenza e del Mercato*, 2 Dec. 2005, n. 12835 (Trib. ammin. reg.). An appeal by the Competition Authority to the Supreme Administrative Court is pending.

¹⁵⁰ *See Mercato del calcestruzzo*, 29 July 2004, n. I559, Bulletin 31/2004, where the Competition Authority found that ten companies active in the manufacturing and distribution of ready-mixed concrete had violated competition law by entering into an agreement to share the supply of concrete for building sites in the Province of Milan. In determining the fine for each participant, not only did the Competition Authority take into account the market share and the size of the groups to which each cartel member belonged, but also whether such groups were vertically integrated in the upstream cement market.

¹⁵¹ *See Unicalcestruzzi and Others v. Autorità Garante della Concorrenza e del Mercato*, 2 Dec. 2005, n. 12835 (Trib. ammin. reg.). An appeal by the Competition Authority to the Supreme Administrative Court is pending.

case law. In this case, the TAR annulled the increase of Calcestruzzi's and Cemencal's fines because the increase was based on a previous violation of the Competition Law that had occurred in 1992, 14 years prior. The TAR based its conclusions on Section 8-*bis* of Law No. 689 of 24 November 1981, according to which the harsher punishment for those who are recidivists is subject to a limitation period of five years.

Although it was applying a specific provision of domestic law, the TAR's approach to the aggravating circumstance of recidivism is more lenient than the EU practice. Indeed, the Commission has increased fines due to recidivism for previous infringements that had taken place over 20 years earlier,¹⁵² an enforcement choice that has been upheld by the EU courts.¹⁵³

Under Italian competition law, legitimate expectations as to the lawfulness of a certain behavior are an attenuating circumstance. The Supreme Administrative Court recognized this principle in *Prezzi del latte per l'infanzia*,¹⁵⁴ where it annulled the fine for a cartel among infant milk producers imposed by the Competition Authority¹⁵⁵ that had been upheld by the TAR.¹⁵⁶

On appeal, the infant milk producers argued, *inter alia*, that one of the types of conduct sanctioned by the Competition Authority (*i.e.*, the publication of recommended sale prices) had already been considered and not subjected to a fine by the Competition Authority itself in a previous cartel decision in the same market.¹⁵⁷ The appellant companies took the view that through that precedent the Competition Authority had implicitly cleared such type of conduct, and that as a result the Competition Authority had exhausted its enforcement powers and could not impose a fine in a subsequent decision.

The Supreme Administrative Court rejected this claim. It decided that the Competition Authority has the power to modify its position and to qualify as unlawful—and hence to subject to a fine—a behavior that in the past had not been considerate illegitimate. Indeed, as the Supreme Court underlined, in its previous cartel decision the Competition Authority had not expressly declared legal that particular conduct. It had simply considered the facts without reaching a final legal qualification. Ultimately, however, the Court decided that when setting the fine the Competition Authority should have considered the specific circumstances of the case. The fact that the Competition Authority had already considered the same behavior in a previous investigation without sanctioning it was a sufficient ground for generating in the companies under investigation reasonable doubts as to the unlawfulness

¹⁵² See Commission Decisions of 29 Sept. 2004, Case COMP/C37.750/B2, Brasseries Kronenbourg–Brasseries Heineken, 2005 O.J. (L 184) 57; and 20 June 2001, Case COMP/E-2/36.041/PO, Michelin, 2002 O.J. (L 143) 1.

¹⁵³ Case T-38/02, Groupe Danone v. Commission, 2005 E.C.R. II-4407, ¶ 353, *aff'd*, Case C-3/06 P, Groupe Danone v. Commission, 2007 E.C.R. I-1331.

¹⁵⁴ Heinz Italia and Others v. Autorità Garante della Concorrenza e del Mercato, 30 Oct. 2007, n. 501 (Cons. stato).

¹⁵⁵ *Prezzi del latte per l'infanzia*, 12 Oct. 2005, n. I623, Bulletin 40/2005.

¹⁵⁶ Milte Italia and Others v. Autorità Garante della Concorrenza e del Mercato, 21 June 2006, n. 9878/2006 (Trib. ammin. reg.).

¹⁵⁷ Latte artificiale per neonati, 2 Feb. 2000, n. I328, Bulletin 9/2000.

of the conduct itself. The Court ordered that the fines be reduced by 25 percent, concluding that the Competition Authority should have taken into account the parties' legitimate expectations.

This judgment echoes similar precedents by the EU courts where legitimate expectations as to the lawfulness of a certain behavior have been considered a mitigating circumstance for purposes of calculating a cartel fine.¹⁵⁸ This solution is also consistent with the 2006 Fining Guidelines, which now expressly include legitimate expectations in their non-exhaustive list of attenuating circumstances.

In *Lega Calcio-Prezzi biglietti Play Off*,¹⁵⁹ the Competition Authority fined the Italian Soccer League (*Lega*) for fixing the price of tickets for the play-off and play-out games at the end of the 2004/2005 *Serie B* season. The Competition Authority rejected the argument that the *Lega's* authority to organize the play off and play out matches also gave it the power to set the ticket prices. It decided that, to the extent that the matches were not played in a neutral stadium, *Serie B* soccer teams had to be free to set access prices for their own matches.

The Competition Authority acknowledged, however, that as a result of the Soccer League's cooperation during the investigation, the *Lega's* decision did not have anticompetitive effects. Immediately after the opening of the investigation, the League issued a communication addressed to all teams concerned stating that the ticket prices it had indicated were mere price recommendations rather than binding provisions. Thus, it made clear that the teams remained free to set ticket prices autonomously, which they then did. Moreover, the Soccer League undertook not to suggest any price structure for future soccer matches. Taking these elements into account and considering the fact that the 2004-05 season was the first season in which play-off and play-out had been introduced, the Competition Authority imposed on the Soccer League only a symbolic fine of €2,000.

(iv) Fines Imposed on Associations of Undertakings

In two recent cases, rather illustrative of the general practice in Italy, the Competition Authority imposed small fines on two associations of undertakings for their anticompetitive conduct. On May 29, 2008, it fined the association of pharmacists of the city of Teramo with respect to a decision indicating to its members (*i.e.*, the pharmacists) the maximum discounts that they could apply on the prices of over-the-counter (OTC) drugs.¹⁶⁰ On June 4, 2008, it fined the association of bakers of the city of Rome in connection with a decision indicating to its members (*i.e.*, the bakers) the minimum prices and the minimum price increases for all the types of bread.¹⁶¹

The Competition Authority assessed the infringements as “very serious” and “serious,” respectively. It therefore imposed fines corresponding to 8 percent of the turnover of the

¹⁵⁸ See, e.g., Case T-65/99, *Strintzis v. Commission*, 2003 E.C.R. II-05433, ¶ 200.

¹⁵⁹ *Lega Calcio-Prezzi biglietti Play Off*, 23 Nov. 2005, n. I650, Bulletin 46/2005.

¹⁶⁰ *Federfarma Teramo*, 29 May 2008, n. I684, Bulletin 21/2008.

¹⁶¹ *Listino prezzi del pane*, 4 June 2008, n. I695, Bulletin 22/2008.

associations concerned, when the statutory maximum is 10 percent. As expected, according to the applicable rules on fines the relevant turnover was considered to be the sum of the membership fees paid to each association by its members. As a result, the total fines imposed on the two associations were very small, €11,200 and €4,430, respectively.

Indeed, for purposes of calculating the fine to be imposed on an association of undertakings for an infringement consisting of a decision affecting competition, the Competition Authority must consider the association's turnover (*i.e.*, the sum of the membership fees paid by the members of the association, and not the sum of the members' turnovers). Section 15 of the Competition Law has not been amended to reflect the new rules under EU competition law, namely Article 23 of Regulation (EC) No. 1/2003. Under this provision, which forms part of the modernization of EU competition law introduced in 2004, the fine imposed on an association of undertakings can be much larger, as it "shall not exceed 10 percent of the sum of the total turnover of each member."¹⁶²

This is of course believed to have beneficial effects from a deterrence point of view with respect to anticompetitive conduct that has a potential to harm competition in a market that goes well beyond the size of the turnover of an association. Indeed, the rationale of the EU rules is that the influence that decisions of associations may have on the market is not reflected in the size of their turnover, but rather in the turnovers of their members, which can give a more accurate indication of the size and economic power of an association.¹⁶³

Unlike the Competition Authority, the Commission also has other means to fight against anticompetitive behavior of associations of undertakings. Under Article 23(4) of Regulation (EC) No. 1/2003, if an association cannot pay a fine that was set taking into account the turnover of its members, it is obliged to call for contributions from its members to cover the fine. Further, under the same provision:

"Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may [first] require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association [and subsequently may require payment of the balance from] the members of the association which were active on the market on which the infringement occurred".

¹⁶² 2006 Fining Guidelines, *supra* note 147, ¶¶ 14, 33. Under the corresponding preexisting provision (Article 15(4) of Regulation No. 17: First Regulation implementing Articles 85 and 86 of the Treaty, 1962 O.J. (L 13), 2, "[t]he Commission may by decision impose on undertakings or associations of undertakings fines of from 1,000 to 1,000,000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently (a) they infringe Article 85(1)".

¹⁶³ *See* Case C-298/98 P, *Metsä-Serla Sales Oy v. Commission*, 2000 E.C.R. I-1057, ¶ 66, where the European Court of Justice confirmed that "when a fine is imposed on an association of undertakings, whose own turnover most often does not reflect its size or power on the market, it is only when the turnover of the member undertakings is taken into account that a fine with deterrent effect can be determined." To that effect, *see also* the judgment in Case 100/80 to 103/80, *Musique Diffusion Française and Others v. Commission*, 1983 E.C.R. 1825, ¶¶ 120, 121.

Though the Competition Law has been amended in the last few years to introduce new enforcement powers in line with some of the new powers of the European Commission, it has not seen the introduction of amendments that would render the enforcement of competition rules against associations of undertakings more effective. This is unfortunate, as the introduction in 2007 of the leniency program in Italy has not yet produced the expected results and the Competition Authority has as a result to some extent focused its resources on several investigations of anticompetitive conduct of associations of undertakings, which were mostly prompted by complaints lodged by consumer associations, as in the case of the Rome bakers.¹⁶⁴

(v) The “Relevant Turnover” for the Calculation of the Fine - Sales of Joint Ventures

As a general principle, to ensure sufficient deterrence, the fines must be commensurate to the economic size of the undertaking concerned.

In *Aviapartner/Società aeroporto Guglielmo Marconi di Bologna*,¹⁶⁵ the TAR clarified that in calculating the economic size of the undertaking concerned, only the revenues that are under its direct control are relevant. The case originates from a decision of the Competition Authority fining Società Aeroporto di Bologna (SAB)—the operator of the Bologna airport—for an abuse of dominant position.¹⁶⁶ When calculating SAB’s financial size, the Competition Authority had considered not only SAB’s revenues (around € 59 million) but also the revenues of BAS (around € 11 million), a service company jointly controlled by SAB and ATA. On appeal, SAB argued that BAS’s revenues should have not been considered when evaluating its economic size. The TAR found in SAB’s favor and annulled in part the Competition Authority decision.

The TAR based its reasoning on Section 15 of the Competition Law, according to which fines shall not exceed 10 percent of the revenues of the undertaking concerned in the previous year. As a result, the economic size of the undertaking concerned must exclusively be measured based on its own revenues. Since BAS was a separate legal entity from SAB and the latter had no control of BAS’s revenues, the TAR decided that BAS’ revenues should have not been considered in the calculation of the fine. The fact that SAB had joint control over BAS had no bearing on this conclusion.

The TAR showed that it favors a narrow reading of Section 15 of the Competition Law. In some cases, this approach could result in an underestimation of the financial capabilities of the undertaking concerned and ultimately in fines being set below the deterrence level.

In a recent cartel case, the Supreme Administrative Court reached surprising conclusions as to the relevance of intra-group revenues for purposes of the calculation of the

¹⁶⁴ Listino prezzi del pane, 4 June 2008, n. I695, Bulletin 22/2008.

¹⁶⁵ *Aeroporto Guglielmo Marconi and Aviapartner v. Autorità Garante della Concorrenza e del Mercato*, 10 May 2006, n. 7807 (Trib. ammin. reg.).

¹⁶⁶ *Aviapartner/Società Aeroporto Guglielmo Marconi di Bologna*, 29 May 2003, n. A303, Bulletin 22/2003.

fine. In *Prodotti disinfettanti*,¹⁶⁷ the Competition Authority had fined Nuova Farmec for its participation in an anticompetitive agreement (bid rigging) in the market for disinfectants. On appeal, Nuova Farmec sought the annulment of the fine arguing that its entire production was in fact sold to other companies of the same group and was thus irrelevant for antitrust purposes. While the TAR rejected the plea,¹⁶⁸ the Supreme Administrative Court found in favor of Nuova Farmec.¹⁶⁹ The judgment relies on a previous merger decision by the Competition Authority concerning the same entities where it was expressly stated that Nuova Farmec's entire production was captive.¹⁷⁰ This circumstance showed, according to the Supreme Administrative Court, that Nuova Farmec was not operating "on the market" and its behavior was therefore irrelevant under the Competition Law. The Supreme Administrative Court ultimately annulled in full the decision as regards Nuova Farmec.

This judgment raises some perplexities as it seems to mix two separate issues. First, for purposes of calculating the fine the Competition Law does not require that the relevant turnover be made through sales to third parties. Such an approach would seem unjustified, and is inconsistent with EU precedents. Indeed, under the Commission's practice and the EU Courts' settled case law, captive sales are relevant when calculating the fine in cartel cases.¹⁷¹ Second, the applicability of the Competition Law is seemingly made dependant on the existence of sales to third parties. Although Nuova Farmec had not sold its production on the market, for a certain period it had taken part directly in (rigged) bidding procedures. This is behavior that should now be sufficient to make it imputable under the Competition Law. In this respect, the judgment seems to be inconsistent with a prior Commission decision and a ruling by the Court of First Instance (now General Court) upholding a more recent Commission decision imposing a fine on a consultancy firm, AC Treuhand.¹⁷² In this more recent case, in particular, the Commission fined AC Treuhand for its instrumental role (a kind of "facilitator" of the cartel) in the *Organic Peroxide* cartel, although it had never been active as a producer or distributor on the cartelized market.

(f) Treatment of Intra-Group Conspiracy or Acts by Related Companies

It is a well-established tenet of EU law that Article 101(1) TFEU does not apply to agreements between undertakings belonging to the same group. This exclusion applies to the

¹⁶⁷ *Prodotti disinfettanti*, 26 Apr. 2006, n. I639, Bulletin 17/2006.

¹⁶⁸ *Sanitas and Others v. Autorità Garante della Concorrenza e del Mercato*, 7 Mar. 2007, n. 4123 (Trib. ammin. reg.).

¹⁶⁹ *IMS-International Medical Service and Others v. Autorità Garante della Concorrenza e del Mercato*, 29 Feb. 2008, n. 760 (Cons. stato).

¹⁷⁰ *B.T.L./Farmec-Nuova Farmec*, 3 Aug. 2006, n. C7565, Bulletin 10/2006.

¹⁷¹ *See, e.g.*, Commission Decision of 3 December 2003, Case C.38.359, Electrical and mechanical carbon and graphite products, 2004 O.J. (L 125) 45, ¶¶ 37 and 291-295, *aff'd* Case T-68/04, *SGL Carbon v. Commission*, 2008 E.C.R. II-2511; Case T-16/99, *Lögstör Rör v. Commission*, 2002 E.C.R. II-01633, ¶ 360 (referencing additional precedents).

¹⁷² Commission Decision of 17 December 1980, Case IV/29.869, Italian cast glass, 1980 O.J. (L 383) 19; Case T-99/04, *AC-Treuhand v. Commission*, 2008 E.C.R. II-1501.

extent that, although legally independent, such undertakings form a single economic unit within which they have no freedom to determine their own course of action on the market and the agreements relate merely to the allocation of tasks within the group.¹⁷³

The Competition Authority acknowledged in its first Annual Report¹⁷⁴ that this rationale should apply to Section 2 of the Competition Law when it stated that as a general rule, the legislature did not contemplate regulating agreements between undertakings of the same group. In so doing, the Competition Authority expressly referred to the ECJ's concept of the group as a single economic unit.

(g) Remedies/Sanctions

(i) Structural Remedies

Under the Competition Law, there is no equivalent to Article 7 of Regulation (EC) No. 1/2003 which gives the Commission the power to impose “structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.” However, in recent rulings the Administrative Courts have opined in such a way that appears to leave the door open to the Competition Authority's ability to impose structural remedies in competition law cases, with a view to making more effective its enforcement powers.

In *Jet Fuel*, the Competition Authority assessed conduct by six oil companies (ENI, the former Italian monopoly in the energy sector, and the Italian subsidiaries of some of the main multinational companies active in the same sector; the “Oil Companies”) resulting in the market allocation of the jet fuel supply market and the foreclosure of potential competitors.¹⁷⁵ In addition to total fines of about €315 million, the Competition Authority imposed structural remedies. In this respect, the Competition Authority found that certain joint ventures controlled by the Oil Companies and providing jet fuel storage and delivery services (“JVs”) played a central role in the implementation of the anticompetitive arrangement. The Competition Authority ordered the Oil Companies to eliminate their joint shareholdings in such JVs.

On appeal, the TAR annulled the part of the decision imposing the structural remedies.¹⁷⁶ In a somewhat contradictory ruling, the TAR on one hand ruled that neither national legislation nor Regulation (EC) No. 1/2003 conferred on the Competition Authority the power to impose such remedies. The Court then urged the national legislator to intervene in order to explicitly confer to the Competition Authority “the power to impose structural measures that the text of the Regulation reserves to the Commission.”¹⁷⁷ The TAR went on

¹⁷³ Case 15/74, *Centrafarm v. Sterling Drug*, 1974 E.C.R. 1147, 1167; Christian and Nielson, 1969 O.J. (L 165) 12.

¹⁷⁴ COMPETITION AUTHORITY, ANNUAL REPORT 1991, at 32 (1992).

¹⁷⁵ *Rifornimenti aeroportuali*, 14 June 2006, n. I641, Bulletin 23/2006.

¹⁷⁶ *Disma S.p.A. v. Autorità Garante della Concorrenza e del Mercato (Jet Fuel)*, 27 Feb. 2007, n. 1750 (Trib. ammin. reg.).

¹⁷⁷ *Id.*

to analyze the compatibility of the structural remedies with the principle of proportionality. It appears, therefore, that the Court may have implicitly affirmed that the Competition Authority was entitled to impose this type of remedy. Ultimately, in what can be considered as a rather striking ruling, the TAR apparently tried to fill a statutory gap, the existence of which the Court itself explicitly recognized. This is somewhat perplexing in a Continental legal system like Italy's where precedents cannot "create" new legal remedies.

As regards the proportionality test, the TAR held that the Competition Authority "should not only verify the abstract suitability of the remedy to achieve the result aimed at by the Competition Authority, but also the (un)substitutability of that remedy with other less invasive, but equally efficient ones."¹⁷⁸ In other words, the Competition Authority should undertake a three-step assessment of the remedies it intends to impose. First, it must assess the type of remedy (behavioral or structural) that is intrinsically more suitable to the attainment of its objectives. Second, if both types of remedies were deemed to be suitable, it should choose the least burdensome. Finally, the Competition Authority should apply the chosen remedy in a way that is proportional to the illegal conduct.¹⁷⁹

In *Technical Gas*,¹⁸⁰ the Competition Authority refused to renew the individual exemption granted years before to two joint ventures active in the production of technical gases in the South of Italy and formed by some of the companies involved in a cartel that was sanctioned with the same decision. It imposed significant behavioral and structural remedies designed to guarantee the full separation between the management of the JV's and the parent companies.

On appeal, the TAR annulled the decision with regard to the assessment of the joint ventures and the imposition of the structural remedies.¹⁸¹ The TAR found the structural remedies unreasonable and disproportionate. More specifically, according to the Court the anticompetitive concerns identified by the Competition Authority could have been effectively removed through behavioral remedies requiring the parent companies to ensure (i) the full separation between the management of the JVs and the activities of the parent companies and (ii) the absence of exchanges of information on the volumes of products sold by the JVs to the parent companies. On further appeal, the Supreme Administrative Court quashed the initial cartel decision on the merits.

¹⁷⁸ *Id.*

¹⁷⁹ On further appeal, the Supreme Administrative Court confirmed that the Competition Authority had infringed the principle of proportionality.

¹⁸⁰ Sapio Produzione Idrogeno Ossigeno – Rivoira – Società Italiana Acetilene e Derivati -S.I.A.D. – Società Ossigeno Napoli – S.O.N. – Linde Gas Italia – Air Liquide Italia – SOL, 26 Apr. 2004, n. I603, Bulletin 17/2006. The Competition Authority grounded its refusal first and foremost on the assumption that the competitive assessment of the joint ventures was intimately linked to and affected by the unlawful practice put in place by the companies which, ultimately, deprived consumers of the possible benefits resulting from the joint production.

¹⁸¹ SICO and Others v. Autorità Garante della Concorrenza e del Mercato, 15 Jan. 2007, n. 204 (Trib. ammin. reg.).

B. Mergers and Acquisitions

1. Transactions Covered

(a) Mergers

Section 5(1) of the Competition Law provides:

“A concentration shall be deemed to arise when: a) two or more undertakings merge; b) one or more persons controlling at least one undertaking or one or more undertakings acquire the direct or indirect control of the whole or parts of one or more undertakings, whether through the acquisition of shares or assets, or by contract or any other means; c) two or more undertakings create a joint venture by setting up a new company”.

Therefore, a merger within the meaning of Section 5(1) of the Competition Law occurs when two or more independent undertakings merge into a new undertaking and cease to exist as separate legal entities. A merger may also occur when one undertaking is absorbed by another, with the latter retaining its legal identity while the former ceases to exist as a legal entity.

In interpreting this provision, the Authority draws guidance from the Commission’s decisional practice.¹⁸²

(b) Acquisition of Control

Acquisitions of control are the most common type of concentration scrutinized by the Competition Authority. This category of concentration encompasses a number of transactions, including the acquisition of shares and assets, irrespective of the means by which the acquisition is accomplished.

(i) The Notion of Control

The notion of control under the Competition Law is consistent with that accepted under EU merger control rules. “Control” is broadly defined as the ability to exercise decisive influence over the whole or parts of an undertaking based on rights, contracts, or any other means. In particular, Section 7 of the Competition Law provides:

“Control is acquired in the cases provided by Article 2359 of the Civil Code, and through rights, contracts or other legal relations which, separately or collectively, and taking into account all relevant factual and legal circumstances, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) the ownership or right of use over all or part of the assets of an undertaking; (b) rights, contracts or other legal relations

¹⁸² Commission Consolidated Jurisdictional Notice, 2008 O.J. (C 95) 1 [hereinafter Jurisdictional Notice].

which confer a decisive influence over the composition, resolutions or decisions of the board of an undertaking. Control is acquired by persons or undertakings or groups of persons or undertakings which: (a) hold the rights, benefit from the contracts or are parties to the other legal relations mentioned above; (b) while not being holders of the rights or beneficiaries under the contracts or parties to the other legal relations mentioned above, have the power to exercise the rights deriving therefrom”.

According to the Competition Authority, a part of an undertaking is any set of assets which, as part of the organization of an undertaking, allows for the exercise of economic activity or which, in any case, produces any turnover. These assets may include goodwill, contracts, technology, patents, trademarks, or inventory. For instance, the Competition Authority held that the acquisition of brands or licenses to which a turnover can be clearly attributed is an “operation of concentration” under merger control rules.¹⁸³

Indeed, the Competition Authority has expanded the notion of concentration so as to include even the acquisition of assets that have never produced a turnover, but will do so following the acquisition.¹⁸⁴ The acquisition of control can be in the form of sole or joint control.¹⁸⁵

(ii) Acquisition of Sole Control

In *Ferrocemento Costruzioni e Lavori Pubblici/Società Italiana per le Condotte d'Acqua*,¹⁸⁶ the Competition Authority held that, although Ferrocemento acquired only 49.9 percent of the voting shares of Condotte from Fintecna, with the latter retaining the other 50.1 percent, Ferrocemento had acquired sole control over Condotte since it had the power to appoint four of the seven directors and the CEO pursuant to a shareholders agreement.

¹⁸³ Specifically, in *Fater/Procter & Gamble*, 21 Feb. 2002, n. C5064, Bulletin 8/2002, the Authority held that the grant of an exclusive license of a trademark for an undetermined period was a concentration. See *Polymer Latex/BASF*, 11 June 1998, n. C3001, Bulletin 24/1998 (concentration consisted of the acquisition of a ten-year worldwide exclusive license for the manufacture and sale of a number of chemical products); *Sorin Biomedica/Solco Basel*, 19 Jan. 1995, n. C1810, Bulletin 3/1995 (transfer of know-how, technology and a trademark license relating to pharmaceutical products was deemed to be a concentration).

¹⁸⁴ *Tamoil Petroli/Impresa Individuale*, 22 Dec. 1998, n. C3338, Bulletin 52/1998 (concerning the acquisition of a gas station under construction).

¹⁸⁵ While joint control is exercised where two or more undertakings have the ability to exercise decisive influence over another undertaking (in particular, joint control may exist if a party has the ability to prevent the adoption of decisions which significantly influence the commercial activities of the controlled undertaking, including, for example, through the exercise of a veto right), sole control is characterized by the fact that the decisive influence is exercised, directly or indirectly, only by one undertaking.

¹⁸⁶ *Ferrocemento Costruzioni e Lavori Pubblici/Società Italiana per le Condotte d'Acqua*, 28 Apr. 1997, n. C2732, Bulletin 16/1997.

In *Comifar/Commerciale Farmaceutica*,¹⁸⁷ the Authority held that, although Comifar had acquired only 30 percent of the share capital of *Commerciale Farmaceutica*, it possessed sole control nonetheless because it had the power to appoint the majority of the members of the executive committee, which was fully authorized under the company's bylaws to determine the company's business policy.

In *Same Deutz-Fahr Holding & Finance/Deutz*,¹⁸⁸ the Authority held that Same's acquisition of 22.2 percent of the share capital of Deutz, a listed company, conferred sole control over Deutz, since 60 percent of the share capital was dispersed among the public and other primary shareholders (Deutsche Bank and Volvo holding 10.5 percent and 7.1 percent, respectively) did not have the power to veto Deutz's strategic decisions. The Authority's reasoning was that in such a situation it is unlikely that smaller shareholders vote together at shareholders meetings.¹⁸⁹

In *Buzzi Unicem/Dyckerhoff*,¹⁹⁰ following the transaction, Buzzi held a 43.7 percent stake in Dyckerhoff, but it was nonetheless found to have acquired sole control based on the following reasons: (i) Buzzi was by far the largest shareholder and was close to having a majority of the voting rights; (ii) Buzzi was an industrial partner capable of exercising the industrial leadership of Dyckerhoff; and (iii) the second largest single shareholder was a bank, IMI, that coordinated with Buzzi in view of its financial minority acquisition and was, therefore, likely to follow the commercial strategy determined by Buzzi.

In the film distribution market, the Authority held that the acquisition of the right to negotiate for and acquire the theatrical release rights for films to be shown in 19 movie theatres in Rome for a period of 21 months amounted to an acquisition of control over those movie theatres. The Authority's conclusion was based on the fact that selection of films to be shown in a movie theatre represents the essential element in the film distribution market.¹⁹¹

In exceptional circumstances, a minority shareholder may acquire decisive influence over an undertaking simply because it holds veto rights over the undertaking's strategic decisions (so-called "negative" sole control). This occurs when a shareholders' agreement requires a special quorum for certain strategic decisions, including the appointment of senior management and the approval of budgets and business plans, thereby conferring a veto right on a minority shareholder.¹⁹²

¹⁸⁷ *Comifar/Commerciale Farmaceutica*, 27 Mar. 1997, n. C2718, Bulletin 13/1997.

¹⁸⁸ *Same Deutz-Fahr Holding & Finance/Deutz*, 29 Apr. 2004, n. C6422, Bulletin 18/2004.

¹⁸⁹ See *Hexcel Corporation/Ciba Geigy Composites Division*, 21 Dec. 1995, n. C2210, Bulletin 51-52/1995; *Monte dei Paschi di Siena/SO.R.I.T.*, 30 Mar. 1995, n. C1973, Bulletin 13/1995; *Compagnia Finanziaria di Investimento/Beni Stabili*, 21 June 2001, n. C4645, Bulletin 25/2001.

¹⁹⁰ *Buzzi Unicem/Dyckerhoff*, 12 Dec. 2002, n. C5592, Bulletin 50/2002.

¹⁹¹ *Cecchi Gori/Cinema Roma e Firenze*, 26 Jan. 1995, n. C1737B, Bulletin 4/1995.

¹⁹² See, e.g., *SO.GE.PA.-Società Generale di Partecipazioni/Ansaldo Trasmissione & Distribuzione*, 4 Sept. 2003, n. C6044, Bulletin 35-36/2003; *De Agostini/Albachiara*, 4 Apr. 2001, n. C4531, Bulletin 14/2001; *Holding Gruppo Marchi/Burgo*, 26 Feb. 2004, n. C6283, Bulletin 9/2004; and *Marconi Mobile/Telit Mobile Terminals*, 22 Feb. 2001, n. C4449, Bulletin 8/2001. In the latter case, Marconi Mobile was deemed to have acquired sole control over Telit Mobile Terminals, even though it held only 19.9% of the share capital.

(iii) Acquisition of de Facto Control

Control of a company may be the result of a de facto situation rather than the result of regulation or a contractual arrangement. Moreover, it may also result from the ownership of a “qualified minority” of voting rights in the shareholders’ general meeting.

*Sai/La Fondiaria*¹⁹³ provides a good illustration of both of these issues. First, it shows that a finding of de facto control may be the result of a very complex and thorough analysis of the context of the transaction and the structural links between the parties. In this case, the Competition Authority was notified of the acquisition of 29.9 percent of La Fondiaria Assicurazioni (Fondiaria) by Sai-Società Assicuratrice Industriale (Sai) and their subsequent merger into a new company (Fondiaria-Sai). Following an in-depth investigation, which included rare (for merger cases) dawn-raids by its officials, the Competition Authority found that the transaction resulted in a de facto acquisition of joint control of Fondiaria-Sai by Premafin Finanziaria Holding (Premafin), which already controlled Sai with a 70.7 percent stake and owned 9 percent of Fondiaria, and by Mediobanca Banca di Credito Finanziario (Mediobanca), which held a 13.8 percent stake in Fondiaria and a 3.1 percent stake in Sai. The Authority based its finding on the following elements: (i) Mediobanca’s leading role during the entire transaction, in which Mediobanca was a significant shareholder of Fondiaria, structured the transaction, and acted as Premafin’s financing bank; (ii) the strong common interests of Mediobanca and Premafin in the acquisition of Fondiaria; (iii) the substantial indebtedness of Premafin toward Mediobanca; and (iv) the tight personal links between the management personnel of the two companies. In addition, the Authority’s investigation showed that Mediobanca held de facto control over Assicurazioni Generali (Generali), the main competitor of Fondiaria-Sai in several markets for damage insurance. Mediobanca held a 13.8 percent stake in Generali, which would be combined with the 2.4 percent held by Fondiaria-Sai. But Generali’s remaining shares were dispersed among so many shareholders that the analysis of participation in its shareholders’ meetings in the last four years showed that the combined shares of Mediobanca and Fondiaria were sufficient to attain a voting majority.¹⁹⁴

In *Emilcarta/Agrifood Machinery*,¹⁹⁵ the Competition Authority found de facto control even in the absence of a minority stake in the controlled company. The Authority held that, despite its previous rejection of Tetra Pak’s proposed acquisition of Italtapack S.r.l. (Italtapack),

¹⁹³ Sai-Società Assicuratrice Industriale/La Fondiaria Assicurazioni, 17 Dec. 2002, n. C5422B, Bulletin 51-52/2002.

¹⁹⁴ Following formal requests by Mediobanca, Premafin, and Fondiaria-Sai, the Competition Authority subsequently reviewed its analysis and concluded that Mediobanca no longer held joint control of Fondiaria-Sai, because (i) Mediobanca reduced its stake in Fondiaria-Sai to 2%, and (ii) Premafin extinguished its indebtedness towards Mediobanca. See Sai-Società Assicuratrice Industriale/La Fondiaria Assicurazioni, 12 June 2003, n. C5422B, Bulletin 24/2003. This review resulted in the revocation by the Competition Authority of all of the undertakings imposed on the parties in the decision of December 17, 2002.

¹⁹⁵ Emilcarta/Agrifood Machinery, 29 July 2004, n. C812B, Bulletin 31/2004.

and despite the fact that Italtel was formally acquired by Eaglepack Italia (a third independent company) in 1995, Tetra Pak had nonetheless exercised control over Italtel for approximately ten years. This conclusion was supported by the following elements: (i) the substantially exclusive, stable, and integrated commercial relationships between the companies, which intensified over time and which culminated in Italtel acting almost exclusively (*i.e.*, approximately 90percent dedicated) to satisfy orders from Tetra Pak; (ii) Italtel's use of machinery leased free of charge from Tetra Pak; (iii) Tetra Pak's influence in appointing some of Italtel's senior management (a number of whom originated from Tetra Pak or were trained by Tetra Pak); and (iv) the joint management of supplies, as well as the sharing of an IT system which ensured Tetra Pak's access to important commercial information on Italtel's activities.¹⁹⁶

(iv) Acquisition of Control by Means of Contractual Arrangements

"Control" can also result from a series of contractual arrangements, as the Competition Authority found in *Fiat/W.L.T.*¹⁹⁷ The Competition Authority qualified the acquisition by Fiat of 51 percent of the shares of Worknet Lavoro Temporaneo (W.L.T.), a company active in the provision of temporary employment, as an acquisition of sole control, despite the fact that approval of the budget and business plan also required the agreement of the minority shareholders. The share purchase agreement, however, provided that after three years Fiat would have acquired all the shares of W.L.T., and that, in the event of a continuing deadlock in the board of directors, the transfer of shares to Fiat would be accelerated.¹⁹⁸

(v) Call Options

The likely exercise of an option to purchase shares can be taken into account as an element that, in conjunction with others, may lead to a finding of sole control. In *Autogrill/Ristop*,¹⁹⁹ the Competition Authority concluded that the acquisition of 45 percent of a company's shares, coupled with a call option for the remaining 55 percent of its shares, resulted in an acquisition of sole control. The finding was based on (i) the acquirer's significant shareholding interest, (ii) the short exercise period of the call option (expiring two years later), and (iii) the fact that the high purchase price paid for the call option could

¹⁹⁶ *Id.*

¹⁹⁷ Fiat/Worknet Lavoro Temporaneo, 14 Dec. 2000, n. C4306, Bulletin 50/2000.

¹⁹⁸ The Competition Authority's approach to staggered operations is consistent with the Commission's practice. *See, e.g.*, Jurisdictional Notice, *supra* note 182, ¶ 38 (indicating that "a second scenario is an operation leading to joint control for a starting-up period but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders. As the joint control situation may not constitute a lasting change of control, the whole operation may be considered to be an acquisition of sole control").

¹⁹⁹ Autogrill/Ristop, 5 Sept 2002, n. C5249B, Bulletin 35-36/2002.

be deducted from the purchase price of the shares that were the subject of the call option (which made it likely that the purchaser would exercise the option).²⁰⁰

2. Transactions That Do Not Constitute a Concentration

Certain transactions do not constitute a concentration within the meaning of the Competition Law. These transactions include:

- (a) acquisitions of purely financial interest;²⁰¹
- (b) any transaction leading to the creation of a cooperative joint venture;²⁰²
- (c) transactions between undertakings that are not independent (intra-group transactions);²⁰³ and
- (d) transactions involving companies not engaged in economic activities.²⁰⁴

(a) Acquisitions of Purely Financial Interest

An acquisition involving a bank or a financial institution acquiring shares in an undertaking upon its formation, or upon the increase of the undertaking's share capital, with the intention of reselling those shares on the market, does not constitute a concentration. However, the acquiring bank or financial institution may not exercise any voting rights vested in those shares while it holds them and must dispose of the shares within 24 months.

(b) The Creation of a Cooperative Joint Venture

Transactions leading to the creation of a joint venture may have as their object or effect the coordination of the competitive behavior of the parents.²⁰⁵ As explained above, where such coordination outweighs the structural effects of the transaction for the undertakings concerned, a joint venture is considered to be cooperative in nature (and, thus, not regarded as a "concentration" under the merger control rules). A joint venture is also deemed to be cooperative when it does not perform all the functions of an autonomous economic entity. To assess the cooperative or concentrative nature of a joint venture, the Competition Authority continues to apply the criteria set forth in the Commission's Notice on the

²⁰⁰ The Competition Authority's treatment of the call option is in line with European Commission practice. *See, e.g.*, Jurisdictional Notice, *supra* note 182, ¶ 60.

²⁰¹ Competition Law, § 5(2).

²⁰² *Id.*, § 5(3).

²⁰³ *Modalità per la comunicazione di un'operazione di concentrazione fra imprese*, 1 July 1996, Bulletin 19/1996, as further amended [hereinafter Italian Merger Control Form], § I.A.2.(c). The Italian Merger Control Form is available at the Competition Authority's website <http://www.agcm.it>.

²⁰⁴ Italian Merger Control Form, § I.A.2.(d).

²⁰⁵ Pursuant to Section 5(3) of the Competition Law, "operations whose main object or effect is the coordination of the actions of independent undertakings shall not constitute a concentration."

Distinction between Concentrative and Cooperative Joint Ventures²⁰⁶ that, at the EU level, has been replaced by the Jurisdictional Notice. Cooperative joint ventures are assessed under the criteria provided in Article 101 TFEU (and/or in its Italian equivalent, Sections 2 and 4 of the Competition Law) and subject to procedural rules including time limits applicable to investigations concerning restrictive agreements.

(c) Transactions between Undertakings That Are Not Independent

“Intra-group” transactions are those that occur between two undertakings that are not independent from each other. Initially, the Competition Authority provided a somewhat formalistic definition of intra-group transactions, stating that they only include operations between a natural or legal person and one or more companies in which such person holds the absolute majority of the share capital or the voting rights. In *Eni/Italgas*,²⁰⁷ the Authority implicitly modified this formalistic and restrictive approach. In this case, the notified transaction consisted of the tender offer launched by Eni for Italgas, 44 percent of which was already owned by Eni. The Authority concluded that since Eni’s minority participation was already sufficient to confer de facto control over Italgas, any further acquisition by Eni of Italgas’ share capital did not amount to a concentration and, therefore, was not reportable.

(d) Transactions Involving Companies Not Engaged in Economic Activities

These are transactions involving companies or individuals that neither engage in economic activities nor hold directly or indirectly a controlling interest in other undertakings. Examples would be an acquisition of an undertaking carried out by one or more individuals who do not control other undertakings and an acquisition of a real estate company not engaged in any other economic activity (unless the parties to the acquisition are active in the real estate market).²⁰⁸ However, this category of transactions is limited in scope, since it is sufficient that the acquired company holds a license, authorization, concession, or other type of permission for engaging in economic activity to qualify the transaction as a concentration.

3. Concentrations That Must Be Reported

Transactions that do not fall under the EC Merger Regulation must be reported to the Competition Authority if the combined aggregate Italian turnover of all the undertakings concerned exceeds €461 million in the preceding fiscal year, or if the aggregate Italian

²⁰⁶ See Commission Notice on the Distinction between Concentrative and Cooperative Joint Ventures O.J. 1994 (C 385) 1, superseded by Commission Notice on the Distinction between Concentrative and Cooperative Joint Ventures O.J. 1998 (C 66) 1.

²⁰⁷ *Eni/Italgas*, 20 Dec. 2002, n. C5626, Bulletin 51-52/2002.

²⁰⁸ *Miroglio/Rami di Azienda di Ing Real Estate Development Castel Guelfo-Pedroni Immobili-Santoni Costruzioni*, 22 Apr. 2004, n. C6433, Bulletin 17/2004.

turnover of the target undertaking exceeds €46 million in the preceding fiscal year.²⁰⁹ Under Section 16 of the Competition Law, the Competition Authority adjusts such turnover thresholds annually by an amount equal to the increase in the gross national product price deflator index.

In determining whether a concentration is reportable under Section 16(1) of the Competition Law, the Authority looks at the turnover of the undertakings concerned. Broadly speaking, the undertakings concerned are those entities whose turnover is combined or merged by the concentration. Because control may be exercised jointly, there may be more than one undertaking concerned on the acquiring side. In calculating the turnover, account is taken of: (i) the total sales of the group to which the acquiror belongs;²¹⁰ (ii) the total sales of the target of the acquisition, (*i.e.*, the acquired company and its subsidiaries, or the acquired assets). The seller of a business is not an undertaking concerned, unless it retains joint control with another undertaking.²¹¹

Aggregate Italian turnover refers to the revenue resulting from sales of products and services to customers located in Italy in the last fiscal year less returns, rebates, and taxes directly related to the sale of products or the performance of services. In the case of companies located outside the Euro-zone, the turnover expressed in foreign currency shall be converted into euros by using the average exchange rate of the fiscal year to which the turnover is attributed. Where two or more acquisitions occur within a two-year period between the same persons or undertakings, they shall be treated as the same concentration arising on the date of the last transaction.²¹²

²⁰⁹ *Rivalutazione soglie fatturato ex art. 16, comma 1, della Legge n. 287/90, 27 July 2009, Bulletin 27/2009.* These figures are increased each year by an amount equal to the increase in the gross national product price deflator index (originally the figures amounted to L500 million and L50 million, respectively).

²¹⁰ The companies (belonging to the group of the acquiring or merging undertakings) that must be taken into account for the purposes of turnover calculation are those companies having their affairs managed by the undertaking concerned. In other words, the test used to identify the companies belonging to the “group” is different from the test of control explained above to determine the existence of a “concentration.” While the former case is easier to prove on the basis of factual evidence (more than half of the capital, voting rights, members of the board or, more generally, the right to manage its affairs), the latter requires a more thorough analysis. The notion of control to assess whether a concentration arises is broader, as it includes “negative control” (the power to block the adoption of strategic decisions). *See Sai-Società Assicuratrice Industriale/La Fondiaria Assicurazioni, 17 Dec. 2002, n. C5422B, Bulletin 51-52/2002; Aeroporti Holding/Aeroporto di Firenze, 13 Nov. 2003, n. C6086, Bulletin 46/2003.*

²¹¹ In general, the Authority makes explicit reference to the Commission’s Notice on the Concept of Undertakings Concerned, 1998 O.J. (C 66) 12, which has been replaced by the Jurisdictional Notice, *supra* note 182.

²¹² The Authority interprets this rule as requiring notification of transactions that would both not be reportable, if considered separately. In contrast, the Authority does not seem to require notification in connection with a transaction where it would meet the thresholds set forth in § 16(1) only if considering a previous concentration (notified to the Authority in the preceding two years) that occurred between the same seller and buyer.

Given the alternative nature of the two turnover thresholds set forth in Section 16(1), an obligation to file a mandatory notification is also triggered upon acquisition of targets with a trivial or negligible presence in Italy if the acquiring undertaking alone meets the first turnover threshold. As a result, undertakings are frequently subject to heavy procedural burdens, including a possible fine for violation of the reporting obligation, for transactions with little or no substantial impact in Italy. Moreover, this proliferation of filings leads to an inefficient use of Authority resources.

More generally, calculation of turnover to assess whether the thresholds set forth in Section 16(1) are met should be conducted in a manner consistent with the principles set forth in the Commission Notice on calculation of turnover.²¹³

However, Section 16(2) of the Competition Law provides specific criteria for calculating the turnover of banks, financial institutions, and insurance companies. In particular, pursuant to this provision: (i) for banking and financial institutions “turnover is considered to be equal to 10 percent of [their] total assets, minus memorandum accounts”;²¹⁴ and (ii) for an insurance company, the turnover is considered to be “equal to the value of collected premiums.”

4. Concentrations That Do Not Need to Be Reported

Transactions without any economic effects on the Italian market do not require notification under the Competition Law. In particular, the Competition Authority maintains that acquisitions of foreign undertakings that did not generate any turnover in Italy, including through subsidiaries, at the time of the acquisition and in the preceding three years, need not be reported. If, however, the foreign target will start generating turnover in Italy after completion, the transaction must be reported. Along the same lines, the creation of joint ventures or mergers resulting in the formation of a new company involving at least one foreign undertaking need not be reported if the foreign undertaking has not generated any turnover in Italy at the time of the transaction or in the preceding three years. In these cases,

²¹³ Commission Notice on calculation of turnover, 1998 O.J. (C 66) 25.

²¹⁴ Interestingly, this provision is based on the old formulation of Article 5(3) of Council Regulation (EEC) No. 4064/89 of December 21, 1989. Accordingly, old EC rules applicable to the calculation of financial institutions’ turnover remain useful in interpreting Article 16(2) of the Competition Law. Notwithstanding the generic wording, in the Bank of Italy’s practice the latter provision seems to be interpreted as referring solely to assets located in Italy (this interpretation is consistent with the first paragraph of Section 16 of the Competition Law, which explicitly refers to Italian turnover). In practice, the Bank of Italy considers the assets owned by Italian credit and financial institutions or, in the case of foreign credit or financial groups, the assets owned by their Italian subsidiaries. For financial holding companies whose main purpose is to acquire and manage participation in other non-financial undertakings, the criterion laid down in ¶¶ 217 *et seq.* of the Jurisdictional Notice applies by analogy. Therefore, the turnover of a financial holding company is equal to the sum of one-tenth of its financial assets located in Italy, plus the Italian turnover of its industrial subsidiaries.

however, the transactions must nevertheless be reported if the new undertaking will commence economic activities on the Italian market after completion.²¹⁵

5. Appraisal of Concentrations

(a) Market Definition

Market definition is the initial and central element of the Authority's appraisal. The relevant product and geographic markets determine the scope within which the market power of the undertaking resulting from the concentration must be assessed. These markets represent, respectively, the smallest group of products and the smallest geographical area in which, given the existing substitution possibilities, a dominant position can be created or strengthened.

The main purpose of market definition is to identify the competitive constraints that a merged entity will face. The objective of defining a market is to identify those actual competitors of the merging entity that are capable of constraining its behavior and of preventing it from behaving independently of an effective competitive pressure. Market definition makes it possible, *inter alia*, to calculate market shares conveying meaningful information regarding market power.

The notion of relevant product and geographic market mirrors the one followed by the EU institutions, and the criteria used to assess the boundaries of a relevant market are fully consistent with those laid down in the Commission notice on the definition of the relevant market.²¹⁶

In practice, the Authority tends to follow market definitions adopted or suggested by EU institutions.

(b) The Test of Dominance

The Competition Authority assesses the concentration to establish whether its effect is the creation or reinforcement of an individual or collective dominant position on the Italian market that is capable of eliminating or restricting competition on a lasting basis.

Section 6 of the Competition Law provides that the Competition Authority must take into account the following factors:

- the position in the market of the undertakings concerned;
- the structure of the relevant markets;

²¹⁵ As it is normally difficult to forecast the probability of future sales in Italy following completion of the transaction, this exemption may be interpreted in light of the parties' intention, *i.e.*, if the notifying parties envisage that the undertaking will target Italian customers by actively promoting its products and/or services in Italy, the transaction will be subject to a filing requirement.

²¹⁶ See Commission Notice on the definition of relevant market for the purpose of EU competition law, 1997 O.J. (C 372).

- the existence of barriers preventing entry into markets by competing undertakings;
- the condition of access to supplies or markets;
- the alternatives available to suppliers and users;
- the supply and demand trends for the relevant goods or services; and
- the competitive position of the domestic industry.

Regarding the criteria relating to the relevant markets and the parties' position, the Competition Authority has held that a 70 to 80 percent market share is a strong indication of the existence of a dominant position²¹⁷ since it indicates a prima facie possibility of market power in the relevant market. The Competition Authority has never opened a Phase II investigation of a concentration where the market shares were below 15 percent.²¹⁸ Consistent with EU law and practice, however, the Competition Authority has repeatedly stated that market shares alone do not establish that an undertaking holds a dominant position capable of eliminating or substantially reducing competition on a lasting basis in the relevant market.²¹⁹ Such a conclusion can be drawn only after taking into account other crucial factors such as barriers to entry, the number and strength of the competitors existing in the market, and the degree of vertical integration.²²⁰

(c) The Appreciable and Long-Lasting Elimination or Restriction of Competition

The creation or reinforcement of a dominant position is not enough to prohibit a transaction. The Competition Authority also takes into account the effects of the operation on competition and considers the following elements:

²¹⁷ Euler/Siac-Società Italiana Assicurazioni Crediti, 12 Mar. 1998, n. C2927, Bulletin 52/1998.

²¹⁸ In *Ecoservizi/Nova Spurghi*, 4 Dec. 1991, n. C180, Bulletin 13/1991, the Competition Authority decided to open a second phase investigation even though the undertaking resulting from the concentration had a market share of 17%. This is the lowest market share giving rise to a second phase investigation.

²¹⁹ *Alitalia/Malev*, 14 Apr. 1993, n. C804, Bulletin 7/1993. In *Alitalia/Malev* the Competition Authority cleared with conditions the concentration although the market share reached by the undertaking following the transaction was 100%, because the parties undertook to remove the barriers to entry making it possible for new operators to enter the market. Consistent with this view, in the few cases in which the Competition Authority decided to prohibit a concentration, the decision was never exclusively based on the market share resulting from the transaction. For example, in *Sio/Pergine*, 10 Jan. 1994, n. C1115B, Bulletin 37/1993, the Competition Authority considered the following elements: the parties' 75% market share, the weakness of competitors, the high financial barriers to entry, and the wide range of product offered by the undertaking resulting from the transaction.

²²⁰ See *Unilever Italia/Star-Stabilimento Alimentare*, 26 Feb. 1998, n. C2980, Bulletin 9/1998; *Veronesi Finanziaria/Gruppo Pavo*, 12 Feb. 1998, n. C3003, Bulletin 7/1998; *Compagnia Italiana Alluminio-Comital/Colfresco Italia*, 4 Mar. 1999, n. C3298, Bulletin 3/1999.

- the presence of qualified competitors²²¹ in the relevant market, which increases the choices for users or suppliers;
- the characteristics of the demand, including price elasticity, or the trend and the consumption modes;²²²
- barriers to entry (in this respect, the Competition Authority adopts a broad definition of barriers to entry, including access difficulties due to capital start-up costs, investments needed to obtain specific technical and technological standards,²²³ difficulties in obtaining specific know-how,²²⁴ administrative regulations for the sector which could restrict access to the market for new operators or lengthen the entry period,²²⁵ the loyalty of consumers to the trademark²²⁶ due to high investment in advertising,²²⁷ the strong trust bonds between suppliers and consumers due to the

²²¹ According to the Competition Authority, an important factor to be taken into account is the gap existing between the market share of the entity resulting from the concentration and those of the other companies in the market. The high market share that an undertaking holds as a result of a concentration is all the more significant when competitors' market shares are particularly low. The Competition Authority has, for example, deemed that a concentration could have the effect of restricting competition in the affected markets because the resulting market share of the new entity would be from two to six times higher than the one of its main competitor. *See* Schemaventuno-Promodes/Gruppo GS, 18 June 1998, n. C3037, Bulletin 25/1998. By contrast, in *Compagnia Italiana Alluminio-Comital/Cofresco Italia*, 4 Mar. 1999, n. C3298, Bulletin 3/1999, the presence of private labels was found sufficient to conclude that the concentration could not lead to the creation of a dominant position restricting competition. Similarly, in *Barilla/Pavesi*, 27 May 1992, n. C461, Bulletin 10/1992, the Competition Authority referred to the existence of small independent competitors on the market, so-called mavericks, which constituted a significant competitive constraint on the undertaking resulting from the concentration and which served to prevent the creation (or the strengthening) of a dominant position capable of restricting competition on the relevant market.

²²² *Sara Lee Personal Products/Lovable*, 27 July 1999, n. C2467, Bulletin 31/1996; *Phoenix International Beteiligungs/S.A.M.-Società Adriatica Medicinali*, 5 Dec. 1996, n. C2610, Bulletin 49/1996; *Finmeccanica-Gec Marconi/Alenia Marconi Systems*, 20 Oct. 1998, n. C3248, Bulletin 43/1998. In *Finmeccanica-Gec Marconi*, for example, the fact that there was only one buyer on the demand side, the Italian government, was considered by the Competition Authority sufficient to guarantee control over the possible strengthening of market power by the undertaking resulting from the concentration, and therefore to exclude the possibility that the concentration would significantly alter the competitive situation on the market.

²²³ *Agfa Geveart/Hoechst Italia*, 21 Dec. 1995, n. C2252, Bulletin 52-52/1995.

²²⁴ *See, e.g.*, *Italtel/Mistel*, 10 Dec. 1992, n. C574, Bulletin 23/1992; *Italtel/General 4 Elettronica Sud*, 10 Dec. 1992, n. C574, Bulletin 23/1992. In these two cases, the proposed concentrations were prohibited, among other reasons, because of the significant barrier to entry represented by technological know-how.

²²⁵ *See, e.g.*, *Edizione Holding-La Leonardo Finanziaria-Movenpick Holding/SME*, 16 Feb. 1995, n. C1937, Bulletin 7/1995; *Schemaventuno-Promodes/Gruppo GF*, 18 June 1998, n. C3037, Bulletin 25/1998.

²²⁶ *Henkel/Loctite*, 9 May 1997, n. C2641, Bulletin 19/1997.

²²⁷ *Unichips Finanziaria/Alidolce*, 23 Feb. 1993, n. C174, Bulletin 24/1992.

sophistication of the product, and the existence of any kind of obstacle to distribution channels both for national and foreign companies);²²⁸

- the ability of consumers to satisfy their requirements for the relevant product or service internally,²²⁹ and
- the structure of related or contiguous markets.²³⁰

6. *Joint Ventures*

Section 5(1)(c) of the Competition Law expressly refers to the situation in which two or more undertakings create a new company jointly controlled by the parents. However, consistent with well-established EC merger control principles, the Authority has broadly interpreted Section 5(1) of the Competition Law to provide that a concentrative joint venture may arise from any of the following transactions: (i) the change from sole to joint control of an existing undertaking; (ii) the creation of a new undertaking jointly controlled by two or more parent companies; or (iii) the sale by one parent company to a third party of its joint control interest.²³¹

As the Competition Law has not been amended to reflect changes introduced in the EC Merger Regulation in 1997, the original distinction between “concentrative” and “cooperative” joint ventures remains applicable to Italian merger control rules. Thus, to assess the concentrative nature of a joint venture, the Authority applies the criteria set forth in the *Commission Notice on the distinction between concentrative and cooperative joint ventures*.²³²

Accordingly, a joint venture constitutes a “concentration” within the meaning of Section 5 of the Competition Law if:

- (a) it is jointly controlled by two or more undertakings;
- (b) it performs all the functions of an autonomous economic entity on a long-term basis (*i.e.*, if it is full-function); and
- (c) its main object or effect is not the coordination of the behavior of the parent companies.

²²⁸ SIO/Sogeo Finanziaria, 31 Mar. 1993, n. C655, Bulletin 6/1993.

²²⁹ Finsiel/Eurosystem, 11 Mar. 1992, n. C128, Bulletin 5/1992; Teksid/Montupet, 7 Aug. 1992, n. C548, Bulletin 15/1992.

²³⁰ Emilcarta/Agrifood Machinery, 6 Aug. 1993, n. C812, Bulletin 20-21/1993.

²³¹ COMPETITION AUTHORITY, ANNUAL REPORT 1994, at 165.

²³² Commission Notice on the distinction between concentrative and cooperative joint ventures, 1994 O.J. (C 385) 1. At the EU level, the 1994 notice was replaced in 1998 with the Notice on the Concept of Full-function Joint Ventures, 1998 O.J. (C 66) 1, which, in its turn, has been replaced by the Jurisdictional Notice, *supra* note 182. See *Acea-Impregilo/Acquedotto De Ferrari Galliera-Acquedotto Nicolay*, 28 Jan. 2000, n. C3798, Bulletin 4/2000 (making explicit reference to the 1994 Notice despite the adoption of the new 1998 Notice).

(a) Joint Control

Joint control occurs when two or more parent companies have the power to block actions that determine the strategic commercial behavior of another undertaking.²³³ In other words, joint control is characterized by the possibility of a deadlock resulting from two or more persons or entities having the power to reject proposed strategic decisions.

The simplest example of joint control occurs when two undertakings each hold half of the shareholdings, half of the voting rights and equal representation on the board of directors or other corporate bodies of the jointly held company. The parent companies, therefore, will be necessarily obliged to jointly make decisions concerning the controlled undertaking, each having an effective veto right.

Joint control is also acquired when one or more minority shareholders (including those with shareholdings well below 50 percent) have veto powers regarding strategic decisions relating to the business policy of the joint venture. Veto rights granting joint control may be set out in the bylaws of the controlled undertaking or, more frequently, are conferred by shareholders' agreements.²³⁴ The determination of whether or not joint control exists is based upon an assessment of these rights as a whole. The acquisition of joint control may merely result from a shareholders' agreement between two or more existing shareholders.²³⁵

In exceptional cases, joint control has been found to occur on a de facto basis where two or more shareholders share such "strong common interests" as to make it extremely likely that they will act together to exercise their rights in relation to the controlled undertaking.²³⁶

In situations where joint control temporarily exists for a start-up period prior to being converted to sole control, the entire transaction will usually be considered an acquisition of sole control from the onset.²³⁷

²³³ See Italian Merger Control Form, § I.A.1.(b).

²³⁴ Rights which confer joint control must go beyond the veto rights normally granted to minority shareholders to ensure protection of their interests and typically include the right to veto the approval of the budget or business plan, the appointment of senior management, or the decision to engage in major investments. For example, in *Credito Italiano/Banca Cattolica*, 26 Jan. 1994, n. C1286, Bulletin 4/1994, Credito Italiano held only 35% of the share capital of Banca Cattolica, the other 65 percent being held by Banca Popolare di Molfetta. The Authority maintained, however, that Credito Italiano enjoyed joint control over Banca Cattolica since strategic business decisions of the company required the approval of 11 of the 13 directors and, under the shareholders agreement, Credito Italiano had the power to appoint the general manager and four directors. Also, in *Networking-Italgas-Team Management/We Cube.com*, 18 May 2000, n. C3925, Bulletin 20/2000, the parent companies each held 33.3% of the shares and the main strategic decisions required the approval of four of the five directors. However, only two of the three parent companies had joint control over the company because they could each appoint two directors.

²³⁵ For example, in *Edison-Società Nordelettrica Sondel-Gemina/Sistemi di Energia*, 9 May 2002, n. C5221, Bulletin 19/2002, the notified transaction consisted of entering into a shareholders agreement that required special majorities for the adoption of strategic decisions. Prior to the shareholders agreement, none of the shareholders controlled Sistemi di Energia because none of them had a majority of the voting rights and the bylaws provided for no special majorities.

²³⁶ In this respect the Competition Authority's practice reflects the position taken by the European Commission in its Jurisdictional Notice, *supra* note 182, ¶¶ 76-77.

(b) Full-Functionality

A joint venture qualifies as “full-function” if it is able to perform all the functions of an autonomous economic entity on a long-term basis. In general, the Authority considers whether the joint venture has all of the economic, financial, and personnel capabilities necessary for it to act as an independent operator in the market, and whether it is intended to so operate on a lasting basis. For example, joint ventures have been considered full-function when they are entities already operating in the market²³⁸ or when the parties pool their businesses in a given market into the joint venture.²³⁹ By contrast, when a joint venture is primarily dependent on the input of the parent companies²⁴⁰ or is intended to sell the vast

²³⁷ Fiat/Worknet Lavoro Temporaneo, 14 Dec. 2000, n. C4306, Bulletin 50/2000. In this decision, the Authority determined that Fiat’s acquisition of 51% of the shares of Worknet Lavoro Temporaneo, a company active in temporary employment placement, was an acquisition of sole control despite the fact that approval of the budget and business plan also required the agreement of the minority shareholders. In fact, the share purchase agreement provided that after three years Fiat would have acquired 100 % of the shares of Worknet Lavoro Temporaneo, and that in the event of a continuing deadlock among the members of the board of directors, the transfer of shares to Fiat would have been accelerated.

²³⁸ Api/Semeraro, 10 Jan. 1994, n. C1252, Bulletin 1-4/1994.

²³⁹ See Compagnie Gervais Danone-The Spring of Eden/The Danone Spring of Eden, 7 Aug. 2003, n. C6007, Bulletin 32/2003 (the parent companies conferred to the joint venture all of their European activities in the supply of water-coolers).

²⁴⁰ See, e.g., Seabo-Engineering Ingegneria Informatica/Famula On-Line, 18 Oct. 2001, n. I493, Bulletin 42/2001. In that case, the joint venture had its own personnel and financial resources, but was not considered full-function because a substantial portion of services required for its functioning was provided by one of its parent companies. An unusual and yet interesting decision on this point is Qatar Petroleum-ExxonMobil Italiana Gas-Edison LNG/Terminale GNL, 25 Mar. 2004, n. I615, Bulletin 13/2004. In this case, the Authority was notified of the creation of a joint venture (“Terminale Adriatico”) between Qatar Petroleum (“QP”) and an Italian subsidiary of ExxonMobil (“EM”). Both parent companies held a 45% controlling stake, with the remaining 10% being owned by Edison. Terminale Adriatico was set up with the purpose of building an off-shore re-gasification terminal. A large portion (80%) of the terminal’s capacity was to be allocated to Edison for the re-gasification of natural gas purchased pursuant to a 20-year take-or-pay supply agreement entered into with Ras Gas II, a Qatari joint venture between QP and EM. The Authority held that the notified transaction did not amount to a concentration primarily because Terminale Adriatico was the instrument through which the parent companies were able to sell natural gas extracted by Ras Gas II in the Italian market. In fact, Edison did not have an independent re-gasification capacity and the remaining 20% of the terminal’s capacity was to be allocated to an independent operator who was to purchase natural gas from Ras Gas II. Under these circumstances, notwithstanding the fact that the re-gasification services were not to be provided to EM and QP but to the minority shareholder (“Edison”) and to a third independent operator, Terminale Adriatico depended on its two parent companies for the supply of natural gas to re-gasify.

majority of its production to or through its parents,²⁴¹ its full-function character may be called into question.

(c) No Risks of Coordination

Finally, if the joint venture fulfills the two previous requirements, the Competition Authority will verify whether there are risks of coordination between the parent companies through the joint venture.²⁴² The Competition Authority typically finds that there are no risks of coordination when (i) the parent companies transfer all their activities in the relevant market to the joint venture and withdraw from that market;²⁴³ (ii) the parent companies do not operate in the same product or geographic market as the joint venture;²⁴⁴ or (iii) only one parent company is active in the same market as the joint venture.²⁴⁵

²⁴¹ See Benetton/CSP, 2 Oct. 1991, n. I12, Bulletin 9/1991. In this case, the Authority rejected the contention that the transaction was a concentration, holding that the joint venture was dependent on the administrative, productive, and distribution structures of the parent companies and hence was devoid of the means to operate as an autonomous economic entity. In particular, the joint venture outsourced its production to CSP and marketed its products exclusively through Benetton's distribution network. See also Commercial Union Vita-Banca Popolare Commercio e Industria, 12 Dec. 2002, n. I540, Bulletin 51-52/2002. In that case, Banca Popolare Commercio e Industria ("BPCI") acquired joint control of Risparmio Vita Assicurazioni S.p.A. ("RVA"), a 100% subsidiary of Commercial Union Vita ("CU Vita"), holding a license for the provision of life insurance products. A parallel agreement provided that RVA's life insurance products would have been distributed on an exclusive basis by BPCI for a 5-year (tacitly renewable) term. RVA did not have its own personnel and sourced out the know-how and all services (including support, IT, and administrative services) necessary to manage its activity from CU Vita. Moreover, its insurance products would only have been distributed through the other parent company's (BPCI) distribution network. Under these circumstances, the Authority concluded that RVA qualified as a cooperative joint venture and was created with the sole purpose of coordinating the respective activities of its mother companies in the context of the exclusive distribution agreement.

²⁴² See, e.g., Cementir/Sacci, 15 May 1992, n. I29, Bulletin 9/1992 (the Authority found that both Sacci and Cementir remained active in the same market as the joint venture and, therefore, considered the transaction to be cooperative).

²⁴³ See, for instance, San Pellegrino-Garma/Compagnie Financiere Du Haut Rhin, 21 Feb. 1994, n. C1207, Bulletin 8/1994, where San Pellegrino and Garma established Compagnie Financiere du Haut Rhin, a jointly controlled holding company to which both conferred all their assets in the mineral water and single-dose soda aperitif markets. See also Exxon Chemical Company/Nalco Chemical Company, 21 Sept. 1994, n. C1636, Bulletin 38/1994, where Exxon and Nalco formed a joint venture to produce and distribute so-called "energy chemicals" on a worldwide basis, conferring all their respective businesses in this product segment to the newly created joint venture.

²⁴⁴ See Unicalcestruzzi/Ubical, 26 Jan. 1994, n. C1280, Bulletin 4/1994 (both parent companies were active in the market for concrete production and distribution, but not in the same geographic market of the joint venture). See also Meridian Technologies/Teksid, 29 Sept. 1994, n. C1644, Bulletin 39/1994.

²⁴⁵ See, for example, Api/Semeraro, 10 Jan. 1994, n. C1252, Bulletin 1-4/1994; Vis/Vetreria Cerina, 15 July 1994, n. C1528, Bulletin 28-29/1994; and Krupp Uhde-Norfin/Uhdenora, 1 Mar. 2001, n. C4468, Bulletin 9/2001, where both parents were active in the engineering and construction

The acquisition by API-Anonima Petroli Italiana S.p.A. (API) of a 90 percent stake in its direct competitor IP S.p.A. (IP) provides a clear illustration of the differences between the Italian and EU rules dealing with joint ventures. In fact, because the Competition Law was not amended to reflect changes introduced in 1997 in the old EC Merger Regulation,²⁴⁶ the original distinction between “concentrative” and “cooperative” joint ventures remains applicable to Italian merger control rules.²⁴⁷ The Competition Authority held that the 10 percent stake in IP kept by the seller, the Italian oil and gas company ENI S.p.A. (ENI), was sufficient to confer joint control over IP, because: (i) it was accompanied by a number of veto powers on significant decisions; and (ii) pursuant to three five-year supply agreements entered into simultaneously with the acquisition by API, IP committed to source the vast majority of its oil requirements from ENI. Moreover, IP qualified as a full function joint venture since it was an existing company with significant resources. However, its creation resulted in a risk of coordination between the two parent companies, both active in the oil distribution market. Accordingly, the Competition Authority found that the notified transaction did not amount to a “concentration” within the meaning of Section 5 of the Competition Law.²⁴⁸

7. Notification and Procedure

(a) Filing Procedures

The Competition Law provides for a system of compulsory prior notification when either of the relevant turnover thresholds is met. Contrary to EU competition law, there is no fixed statutory time in which the Competition Authority must be notified. A transaction must be notified before its implementation once the parties have reached an agreement on the essential elements of the transaction itself.

The Competition Authority’s approach has deviated from the Commission’s previous practice of requesting the submission of a “legally binding agreement” between the parties as a pre-condition to the notification of the related concentration. In *Ondeo*

business, but one of them transferred its entire relevant business to the joint venture and thereby exited the market, eliminating all risks of coordination with the other parent company.

²⁴⁶ See Council Regulation (EEC) No. 4064/89 of December 21, 1989.

²⁴⁷ API-Anonima Petroli Italiana/IP, 30 June 2005, n. C7018, Bulletin 25/2005.

²⁴⁸ The Competition Authority simultaneously initiated an in-depth investigation of the agreement between API and ENI for the formation of a cooperative joint venture. See API-Anonima Petroli Italiana-ENI, 30 June 2005, n. I653, Bulletin 25/2005. As a result, API and ENI modified their initial agreement by transforming the transaction into API’s acquisition of 100% shares of IP. In addition, the parties reduced the scope of the supply agreements between ENI and IP by allowing the latter to source at least 20% of its requirements from companies other than ENI. In light of the amendments, the Competition Authority unconditionally cleared the transaction qualifying it as a concentration. See API-Anonima Petroli Italiana/ENI, 25 Aug. 2005, n. C7200, Bulletin 32-33-34/2005.

Nalco/Castagnetti-Accadueo,²⁴⁹ for example, the Competition Authority analyzed a transaction that was notified on the basis of a simple memorandum of understanding outlining the essential elements of the transaction. In its decision, the Authority explicitly noted that the submitted agreement was “non-binding.”

A transaction is considered to be implemented when the buyer acquires the ability to exercise substantial influence on the behavior of the target. In cases of mergers, notice of the transaction must be given before the merger contract is executed. In stock acquisitions, prior notice of the transaction is deemed given if the contracts are conditioned upon the Competition Authority’s advance approval. Finally, in cases of creation of a joint venture by setting up a new company, notice of the transaction must be given before registering the Articles of Association of the joint venture in the Companies’ Registrar.

On June 15, 2005, the Competition Authority published a notice introducing two new procedural rules that are consistent with a well-established EU practice,²⁵⁰ namely:

- (i) notifying parties are now formally advised to conduct confidential pre-notification discussions with the Competition Authority regarding the concentration as well as any concerns about its possible anti-competitive effects when the second threshold set forth in Section 16(1) of the Competition Law (concerning the Italian turnover of the undertaking being acquired) is met. Pre-notification contacts serve the purpose of ensuring that notification forms are complete from the outset. In particular, the notifying parties may file a preliminary memorandum with the Competition Authority 15 calendar days prior to the expected date of the formal filing;²⁵¹
- (ii) after receiving a notification, the Competition Authority will post a brief notice on its official website providing the essential information regarding the notified transaction and inviting interested third parties to submit comments within five days of publication of the notice.²⁵² This new rule applies only to concentrations where the two turnover thresholds set forth in Section 16(1) of the Competition Law are *both* met.²⁵³

The Competition Law does not provide for suspension of the closing of the transaction either before or after the notification. Therefore, once notice of a transaction is made, the closing can take place. Most parties, however, choose not to implement their transactions

²⁴⁹ *Ondeo Nalco/Castagnetti-Accadueo*, 29 Nov. 2001, n. C4908, Bulletin 48/2001. This change in the Competition Authority’s practice presaged what has become the new system applicable to merger filings submitted to the European Commission under the new EC merger control regulation. *See* EC Merger Regulation art. 4(1).

²⁵⁰ *Comunicazione concernente alcuni aspetti procedurali relativi alle operazioni di concentrazione di cui alla Legge 10 ottobre 1990, n. 287*, 1 May 2006, Bulletin 22/2005, amended by a Competition Authority’s resolution of 26 Sept. 2006, Bulletin 35-36/2006.

²⁵¹ *Id.*

²⁵² *Id.* To this end, the Competition Authority added a new section to the notification form where the parties can indicate their consent to such publication. If the notifying parties refuse to provide consent, adequate justification should be provided.

²⁵³ *Id.*

pending review by the Competition Authority. This is advisable where the transaction is particularly complex or raises serious competitive concerns since the Competition Authority might open an in-depth “Phase II” investigation and in parallel order that the consummation of the concentration be suspended. In cases of prohibition, the Competition Authority may order the restoration of conditions of effective competition, including the divestiture of the acquired business.²⁵⁴

The notification must be filed by persons or entities acquiring exclusive or joint control, parties to a full merger, and the offeror in the case of a public offer. Notification can also be filed by the parents of the above-mentioned subjects.

(b) Filing Fees

Section 10(7)-*bis* of the Competition Law, introduced by Section 1(69) of Law No. 266 of December 23, 2005, provides that, in order to cover the cost of its merger control activities, the Competition Authority is empowered to establish on an annual basis the filing fees to be paid for every merger control notification filed pursuant to Section 16 of the Competition Law. The determination of the fee is based on the economic significance of the concentration, to be assessed in light of the value of the notified transaction.

The filing fee was originally set by the Competition Authority at one percent of the transaction value with a € 50,000 cap and a € 3,000 floor. On December 27, 2007, the Competition Authority modified the criteria for determining the amount of the filing fee.²⁵⁵ The new criteria aim to achieve two objectives, namely: (i) to render the amount of the filing fees proportionate to the overall cost of merger control activities²⁵⁶ and (ii) to link the amount of the filing fee to the importance of the target’s presence in the Italy.

In particular, the Competition Authority established that the filing fee shall be equal to 1.2 percent of the value of the transaction (and thus no longer 1 percent) and raised the cap for the filing fee to € 60,000 (the floor remains € 3,000). Furthermore, in the case of transactions concerning the acquisition of undertakings also realizing a turnover in countries other than Italy, the “value of the transaction” is obtained by multiplying the aggregate consideration agreed by the parties for “the ratio between the target’s domestic and worldwide turnover” (the so-called “correction factor”).²⁵⁷

²⁵⁴ Competition Law, § 18.

²⁵⁵ *Criteri per la determinazione della contribuzione sulle operazioni di concentrazione*, 28 Dec. 2005, Bulletin 50/2005, as further amended.

²⁵⁶ The costs related to merger activity represent about 40% of the Competition Authority’s overall financial needs.

²⁵⁷ By applying the new criteria to a transaction in which, for example, the consideration agreed to by the parties is equal to €5 million and the target’s Italian and worldwide turnovers are, respectively, € 10,000 and €10 million, the filing fee to be paid will no longer be equal to the €50,000 maximum fee, as under the pre-existing criteria, but to the €3,000 minimum fee. While 1.2% of the value of the transaction (€5 million) would be €60,000, the application of the “correction factor” based on the ratio between the target’s domestic and worldwide turnovers (0.1%) would reduce such amount to only €60, so that the payment of the €3,000 minimum filing fee would be required.

(c) Initial Information Requirements

Notifications must be filed with the Authority using a model form devised by the Authority (the above-mentioned Italian Merger Control Form).²⁵⁸

Under Article 5 of Decree No. 217/1998 a notification must contain the information and include the necessary attachments indicated in the Italian Merger Control Form, together with all further elements necessary for evaluating the transaction.

The complexity of the Italian Merger Control Form (that is not very different in substance from the Form CO used to submit merger filings to the European Commission) as well as the quantity and quality of the items of information to be submitted depends on whether the transaction involves so-called affected markets (*mercati interessati*). The markets affected by the concentration are the relevant product and geographic markets in which:

- two or more of the participants to the concentration are simultaneously active and will hold a combined post-merger market share of at least 15 percent;
- one participant to the concentration will hold a post-merger market share of at least 25 percent, and at least one other participant is active in a market that is upstream or downstream of the aforementioned market (in this case, both markets will be deemed to be affected markets); and
- an undertaking being acquired or merged holds a market share of at least 25 percent, even though the other participants to the transaction are active in different markets that are not upstream or downstream of the aforesaid market.²⁵⁹

The Form requires information related to personal and financial links, market size, and the parties' and their competitors' market shares only in relation to markets qualifying as affected markets. In theory, therefore, in the absence of any "affected" market(s), the information required by the Form is extremely limited and may affect the Competition Authority's ability to perform an adequate substantive assessment of the notified concentration. As a consequence, the Authority normally requires at least information regarding market shares of the undertakings concerned and their competitors within the past year in the relevant geographic markets and in Italy. In order to avoid a declaration of incompleteness and/or formal follow-up requests for information that could interrupt (not simply suspend) the statutory terms for review, it is advisable to provide this data in the notification even if not formally required.

There are two types of forms, the short form and the long form. The latter includes more detailed information about the relevant markets. The Competition Authority requires that the long-form notification be submitted for concentrations between independent undertakings falling within the scope of Section 16(1) of the Competition Law if:

²⁵⁸ *Modalità di comunicazione di un'operazione di concentrazione*, available at the Competition Authority's website <http://www.agcm.it>.

²⁵⁹ Italian Merger Control Form, § I.C.1.

- two or more participants to the concentration are simultaneously active in an affected market and will, following the concentration, have a market share of at least 25 percent; or
- one participant in the concentration will, following the transaction, have a market share of at least 40 percent where at least one other participant is active in a market upstream or downstream to the aforementioned market.²⁶⁰

However, long-form notification is not required if the market share of the undertaking being acquired or merged is below one percent. The long-form notification addresses all affected markets for which at least one of the two conditions mentioned above is met, and, if the second condition is met, all upstream or downstream markets.

In cases where a long form is not formally required, the Competition Authority reserves the right to request any information that is required for long form notification where, in its opinion, the short form notification does not permit an adequate evaluation of the transaction. In these cases, the time period set forth in Section 16(4) of the Competition Law will commence from the date of the Competition Authority's receipt of a long form notification.

The Competition Authority has become increasingly demanding and strict as to the nature and level of detail of information and data to be submitted, making the occurrence of a finding of incompleteness more frequent and, as a result, extending the statutory deadlines for the issuance of its decisions. In some instances, the Competition Authority's attitude is questionable because: (i) the type of additional information requested at times goes beyond what is strictly required by the Form; and (ii) the Competition Authority's requests for additional information are usually made shortly before the expiration of the 30-day statutory limit, thereby unduly extending the short time limit of the procedure. As noted above, a formal information request causes the clock for the 30-day review period to restart from the day of receipt by the Competition Authority of all information it requested.

Finally, pursuant to Section 16(7) of the Competition Law, the Competition Authority can open an investigation well beyond the statutory limits set forth in Section 16 if it discovers that a notification was cleared on the basis of seriously incomplete, inaccurate, or untrue information.

If in the context of a concentration the parties sign other agreements aside from the concentration agreement itself, these agreements must also be reported to the Competition Authority, which will then assess whether they are ancillary to the concentration. To this end, the Competition Authority typically applies the criteria set forth in the Commission's notice on restrictions ancillary to concentrations.

The form must be completed in Italian. However, the Authority normally does not require the translation into Italian of the agreements affecting the notified transaction, at least where they have been drafted in a language that is known by the officials (normally English and French). The notification must be signed by the legal representatives of the undertaking(s), or by a person who has been granted power of attorney, and must contain the following declaration: "The undersigned declares that the information contained herein is

²⁶⁰ Italian Merger Control Form, § I.D.3.(a).

complete and truthful and that the attached documents are complete and true copies of the originals”.²⁶¹

Two copies of the form and the attached documents must be sent by registered mail or delivered by hand to the Secretary General, or his deputy, who shall issue a receipt, between 9:00 a.m. and 5:00 p.m., Monday to Friday (on Friday the register closes at 4:30 p.m.), at the Authority’s premises in Rome.

(d) Subsequent Investigatory Stages and Information Requirements

(i) Phase I

Phase I is the initial phase following a notification.²⁶² During Phase I, the Authority has no coercive investigative powers. Accordingly, it may only request informally clarifications or additional information from the notifying parties.²⁶³ In this case, the informal request does not stop the clock and the Authority remains bound to adopt a decision within 30 days of notification.

The Competition Authority must decide within thirty days of receipt of a notification whether it is necessary to open an in-depth Phase II investigation,²⁶⁴ unless it finds that the notification is seriously incomplete, inaccurate, or untrue. In those cases, it informs the parties and sends a request for additional information. The thirty-day period begins upon receipt of this additional information by the Competition Authority.²⁶⁵ The TAR has held that a notification is incomplete when the information provided does not enable the Competition Authority to fully assess the transaction.²⁶⁶

The power of the Competition Authority to deem a notification incomplete should be exercised only in exceptional circumstances. The Competition Authority, however, uses its discretion to make such findings relatively frequently, thus extending the statutory deadlines for the issuance of a decision. Where the Competition Authority finds that further investigation is unnecessary, it issues a decision that is published in the Bulletin and is available on the Internet. It also sends a clearance letter to the parties and the Ministry of Industry and Trade.

The Competition Authority might also request information from third parties, including customers and competitors. However, in such a case, the Competition Authority has no coercive powers to induce the third party to provide the requested information.

²⁶¹ Italian Merger Control Form, p. 22.

²⁶² Pursuant to Article 5 of Decree No. 217/1998, a notification must contain all the information necessary for the full assessment of the proposed transaction.

²⁶³ It is actually quite frequent that the case handler contacts the representative(s) listed in the Form to gather additional information by phone.

²⁶⁴ In the case of public offers, the time period to start an investigation is reduced to fifteen days from notification, and the offeror must notify the Competition Authority and the CONSOB.

²⁶⁵ Decree No. 217/1998, § 5.

²⁶⁶ Fininvest and others v. Garante radiodiffusione and others, 24 Mar. 1993 n. 497 (Trib. ammin. reg.).

(ii) Phase II

After opening the in-depth Phase II investigation, the Competition Authority must communicate its final decision to the parties and the Minister of Industry and Trade within 45 days. The period can be extended by an additional 30 days whenever the parties fail to supply information and data that is requested. The Competition Authority sometimes postpones its decision when the parties offer undertakings or propose to amend their agreements.²⁶⁷

When opening an in-depth investigation, the Competition Authority may simultaneously order the undertakings concerned not to proceed with the concentration until the investigation is concluded.²⁶⁸ In 2002, for the first time since its establishment, the Competition Authority ordered merging parties not to implement their notified concentration until the Authority's final determination.²⁶⁹ It did so in two cases in which the suspension order was adopted together with the decisions to open a Phase II in-depth investigation. In each case, the Competition Authority justified the suspension order on the ground that consummation of the transaction would have had restrictive effects and would have irreparably altered the competitive relationships between the companies concerned.

In Phase II, the Competition Authority has the same powers as during proceedings under Sections 2 and 3 of the Competition Law. Accordingly, the parties enjoy certain procedural safeguards. The parties have the right to: (i) be heard by the competent Competition Authority's officials within the time limit indicated in the decision to open a Phase II investigation; (ii) obtain a final oral hearing before the Competition Authority's Board shortly before the end of the investigation; (iii) submit documents and memoranda; and (iv) access the Competition Authority's file.²⁷⁰

Access to the Authority's file is regulated by Article 13 of Decree No. 217/1998. Documents in the file containing personal, commercial, industrial, or financial information of a confidential nature are accessible, in whole or in part, only if they include evidence against the proposed merger or information essential to the parties in arguing and defending their case.

In line with the European Commission's practice, the Competition Authority does not grant access to its notes, proposals, or any other documents drafted by its officials for internal purposes in the course of the investigation or in preparation of the official documents relating to the case. In addition, the Authority may choose to deny access to their

²⁶⁷ See *Fiatimpresit-Mannesmann-Techint/Italimpianti*, 15 Feb. 1996, n. C2227, Bulletin 7/1996 (the Competition Authority deemed it appropriate to postpone its decision for thirty days to allow the parties to finalize the undertakings). See also *Schemaventuno-Promodès/Gruppo GS*, 18 June 1998, n. C3037, Bulletin 25/1998 (the parties agreed to modify the structure of the proposed concentration and the Competition Authority postponed its decision to evaluate their new proposal).

²⁶⁸ Competition Law, § 17.

²⁶⁹ See *Groupe Canal+/Stream*, 28 Feb. 2002, n. C5109, Bulletin 7/2002; *Autogrill/Ristop*, 24 July 2002, n. C5249B, Bulletin 29/2002.

²⁷⁰ Competition Law, § 14(1).

internal meeting minutes and correspondence with EU and other foreign institutions, as well as international organizations.

The parties exercise their right of access by submitting a written request, on which the official responsible for the case must decide within 30 days.²⁷¹

(e) Final Orders/Sanctions by the Competition Authority

(i) Coercitive Powers of the Competition Authority

The Competition Law vests a number of coercive powers upon the Authority. In particular, the Competition Authority may:

- prohibit a transaction if it deems that it creates or strengthens a dominant position in the national market as a result of which competition is significantly reduced on a lasting basis (Prohibition decisions can be issued only following a Phase II investigation);²⁷²
- when opening a Phase II investigation, order the undertakings concerned not to proceed with the concentration until the investigation is concluded;²⁷³
- subject its approval to the adoption of remedies “offered” by the parties, and attach conditions and obligations to its decisions in order to ensure compliance with them;²⁷⁴ and
- where the concentration has already been consummated, impose any measures aimed at restoring competitive conditions in the affected market.²⁷⁵

(ii) Fining Power of the Competition Authority

Section 19(2) of the Competition Law provides that the Competition Authority may impose a fine on the undertaking responsible for reporting of up to 1 percent of the turnover realized in the preceding year when such undertaking fails to notify the Competition Authority of a concentration.²⁷⁶

²⁷¹ Decree No. 217/1998, § 13(1).

²⁷² Competition Law, §§ 6(2), 18(1).

²⁷³ *Id.*, § 17(1).

²⁷⁴ Remedies are to be considered an integral part of the clearance decision. The Competition Authority also issues conditional decisions at the end of Phase I. Unlike the Commission, the Authority has the power to “impose” remedies as a condition of clearance additional to those offered by the parties. Competition Law, § 6(2).

²⁷⁵ Competition Law, § 18(3).

²⁷⁶ The Competition Authority took a broad view of the concept of an undertaking’s responsibility in *Nutricia Belgie/Milupa*, 4 Nov. 1999, n. C3696, Bulletin 44/99, where it fined Royal Numico Bv, the Dutch holding of the group, because it maintained that Royal Numico Bv was responsible for orchestrating the acquisition of control over a rival group (Milupa AG) and because Royal Numico Bv had handled proceedings before the Competition Authority directly. In *Costruzioni Elettromeccaniche Ascensori Montacarichi-Otis/Varie Società*, 28 Jan. 1999, n. C3156B, Bulletin 4/1999, the Competition Authority held that Otis and CEAM were the undertakings responsible

Pursuant to Section 19(1) of the Competition Law, fines are also imposed if a company implements a concentration despite a prohibition or fails to comply with the conditions imposed by the Competition Authority to clear the transaction. The fine ranges from 1 percent to 10 percent of the turnover relating to the business forming the object of the transaction. To detect and sanction failure to comply with its decisions or the reporting obligation, the Competition Authority opens an ad hoc investigation. These investigations are subject not to the general procedural rules provided in the Competition Law and in Decree No. 217/1998, but to the procedural framework established by Law No. 689/1981, where compatible, which offers a less rigorous protection of the rights of defense. Pursuant to Article 18(1) of Law No. 689/1981, within 30 days from being served a decision to open an investigation, companies may submit written briefs and/or a request to be heard. The hearing normally takes place before Competition Authority officials. The decision to open an ad hoc investigation normally specifies the duration of the investigation, which is usually 90 days. The Competition Authority issues a decision shortly thereafter.

In *Henkel v. Autorità Garante della Concorrenza e del Mercato*,²⁷⁷ the TAR clarified the scope of the prohibition provided for in Section 19(1) of the Competition Law. In this ruling, the TAR held that a fine may result from non-compliance with a remedy upon which the Competition Authority has conditionally cleared a concentration. The TAR rejected Henkel's claim that the Competition Authority does not have the power to impose fines for the violation of an undertaking. Relying on the principle of legality,²⁷⁸ under which no penalty can be imposed for any form of conduct unless explicitly provided for by the law, Henkel argued that Section 19(1) explicitly contemplates the power to impose fines only: (i) if a company implements a concentration despite a prohibition, or (ii) if a company fails to comply with the measures required by the Competition Authority once a concentration has already been completed. In Henkel's view, the Competition Authority has the power to take measures to restore competition, and only if such additional measures are not complied with may the Competition Authority impose fines. In rejecting this argument, the TAR interpreted the term "prohibited concentrations," as it is contained in Section 19(1) of the Competition Law, as including not only those concentrations that are explicitly prohibited by the Competition Authority, but also concentrations that are conditionally authorized but for which the prescribed conditions are not fully respected. The TAR made it clear that, in determining the amount of the fine, the relevant turnover is the turnover realized in the market affected by the notified concentration.²⁷⁹

because the concentrations of which the Competition Authority was notified formed part of the Otis strategy in the relevant markets and the two companies admitted their responsibility for late notification in their submission.

²⁷⁷ *Henkel v. Autorità Garante della Concorrenza e del Mercato*, 2 Aug. 2002, n. 6929 (Trib. ammin. reg.).

²⁷⁸ With respect to administrative violations, § 19(1) of the Competition Law is codified in §1(1) of Law No. 689/1981. For more background, see COST, § 25.

²⁷⁹ In *Henkel*, the TAR annulled the part of the decision concerning how to determine the amount of the fine because the Authority (i) had included in the relevant turnover the revenues derived from the sale of sealing compounds (*i.e.*, products that were not the subject of the Authority's concerns when

A few months after *Henkel* was decided, the Competition Authority imposed a significant fine (€ 15.8 million) on Edizione Holding for its failure to comply with an undertaking given in connection with the 2000 conditional clearance of the Autostrade acquisition.²⁸⁰

In 2004, the Competition Authority imposed the highest fine ever under Section 19(1) of the Competition Law (over €5 million) on Tetra Pak International SA (“Tetra Pak”) for its failure to comply with a prohibition decision.²⁸¹ The Competition Authority concluded that Tetra Pak, by exercising de facto control over the target company, breached a 1993 decision prohibiting Tetra Pak’s proposed acquisition of Italtapack S.r.l. (“Italtapack”). In determining the amount of the fine, the Competition Authority took into account not only the fact that Tetra Pak’s behavior led to the same anticompetitive effects that the Authority intended to prevent by its 1993 decision, but also the particularly long period of time—almost ten years—during which the breach had been consummated.

(f) Special Provisions for Unsolicited Takeover Bids

Particular rules apply to concentrations realized through public tender offers. Pursuant to Section 16(5) and (6) of the Competition Law, the public tender offer must be notified to the Competition Authority concurrently with its formal communication to the Italian Securities and Exchange Commission. Moreover, the normally applicable statutory 30-day term for Phase I is reduced to 15 days.

Finally, pursuant to Section 17(2) of the Competition Law, the Competition Authority cannot prevent the acquiring undertaking from purchasing the target’s shares, provided that the voting rights attached to the acquired shares are not exercised.

(g) Confidentiality

Information collected by the Competition Authority is treated as confidential upon request pursuant to Section 14(3) of the Competition Law and Articles 12 and 13 of Decree No. 217/1998. The notifying parties may indicate which documents, or extracts thereof, are to be treated as private and confidential, specifying the reasons why the information contained in these documents should not be disclosed or published. There is no formal deadline to communicate a confidentiality request to the Competition Authority. However,

it imposed its undertakings); and (ii) had not given sufficient weight to the modest market effects caused by Henkel’s violation. Based on the above, the TAR concluded that the appropriate level of the fine would have been 1% of the turnover of the affected market (*i.e.*, the whole adhesives business). Interestingly enough, the TAR found that the Competition Authority correctly included in the relevant turnover the sales of industrial sealing compounds, even if the undertaking breached by Henkel was not likely to have an impact on this specific segment of the relevant market.

²⁸⁰ Edizione Holding/Autostrade-Concessioni e Costruzioni Autostrade, 12 Dec. 2002, n. C3818D, Bulletin 50/2002. For the clearance decision, *see* Edizione Holding/Autostrade-Concessioni e Costruzioni Autostrade, 2 Mar. 2000, n. C3818, Bulletin 9/2000.

²⁸¹ Emilcarta/Agri-food Machinery, 29 July 2004, n. C812B, Bulletin 31/2004.

no confidentiality request may be submitted once the Competition Authority has adopted its decision.

With respect to information and documents filed with the Form, the request for confidentiality is normally filed together with the notification or shortly thereafter.

(h) Exemptions

Though it has not accepted the failing company defense in any case thus far, the Competition Authority might take into account the possible financial or industrial problems of the undertaking that is being acquired. In accordance with EU law principles,²⁸² the Competition Authority has suggested that a concentration giving rise to the creation or the strengthening of a dominant position would not be capable of substantially altering the competitive situation in the relevant market if the following conditions occur: (i) the target undertaking would otherwise be forced to exit the market due to its irreversible crisis situation if it was not acquired by another undertaking, (ii) the acquiring undertaking would get the target undertaking's market share without acquiring it should the target undertaking exit the market; and (iii) there is no alternative to the acquisition which is less restrictive of competition in the relevant market.²⁸³

In *Groupe Canal+/Stream*,²⁸⁴ the Competition Authority held that the proposed merger between the two major Italian pay-TV operators could have led to the strengthening of a dominant position in the Italian pay-TV market and related activities. The Competition Authority found that the "failing firm" defense, advocated by the parties, was not sufficiently corroborated by the evidence.²⁸⁵ In particular, the Competition Authority found that the three conditions outlined by the European Commission for such a defense to be relevant were not satisfied: (i) the target (Stream) would not otherwise be forced to exit the market due to an irreversible crisis situation if it was not acquired by Canal+, because it was controlled by two significant financial groups (News Corporation and Telecom Italia) and its initial losses had been forecast in its business plan; (ii) the parties did not prove that, should Stream exit the market, Canal+ would capture Stream's market share without acquiring it; and (iii) the parties did not produce sufficient evidence that there was no alternative to the acquisition that was less restrictive of competition in the pay-TV market. Nevertheless, the Competition Authority recognized that the Italian pay-TV market was characterized by a "clear element of critical nature" and that, in these circumstances, it was possible to remove

²⁸² See *Kali und Salz/Mdk/Treuhand*, Case IV/M.308, 1997 O.J. (L 186) 38; *Boeing v. McDonnell Douglas*, Case IV/M.877, 1997 O.J. (L 336) 16.

²⁸³ *Banco di Sicilia/Sicilcassa/Mediocredito Centrale*, 29 Jan. 1998, n. C2988, Bulletin 15/1998. Before the above-mentioned opinion, the Competition Authority had acknowledged that the failing company defense might apply under certain circumstances. See also *Fiatimpresit-Mannesmann-TechNet/Italimpianti*, 15 Feb. 1996, n. C2227, Bulletin 7/1996.

²⁸⁴ *Groupe Canal+/Stream*, 13 May 2002, n. C5109, Bulletin 19/2002.

²⁸⁵ It could be argued that in this case, the proffered "failing firm" defense deserved more careful consideration.

the durable anticompetitive effects of the transaction through an adequate set of undertakings.

(i) Sanctions for Failure to Notify

Pursuant to Section 19(2) of the Competition Law, failure to notify a reportable transaction may result in a fine up to 1 percent of the turnover realized in the preceding year by the responsible undertaking.²⁸⁶

The analysis of the recent cases relating to failure to notify reveals that the fine imposed pursuant to Section 19(2) of the Competition Law amounts to an average of €5,000. Such a modest amount reflects a number of mitigating circumstances normally taken into account by the Competition Authority for the purposes of assessing the gravity of the infringement, namely: (i) the good faith of the undertaking; (ii) the substantial absence of any anticompetitive effects arising from the concentration; (iii) the fact that the undertaking subject to the obligation to notify eventually filed on a voluntary basis a delayed notification of the concentration; and (iv) the short period of time elapsed between the aforesaid notification and the closing of the transaction.²⁸⁷

Remarkably, additional reductions of the fine may occur when further particular circumstances are validly put forward by the undertaking concerned. Indeed, on January 27, 2005,²⁸⁸ the Competition Authority concluded its investigation against Parmalat S.p.A. (Parmalat) for failing to comply with the filing obligation relating to the acquisition of Carnini S.p.A. (Carnini). The investigations revealed that, while Parmalat formally withdrew the notification of the proposed acquisition of Carnini,²⁸⁹ it implemented the transaction by means of a nominee company Boston Holdings Corporation. Interestingly, the Competition Authority sanctioned Parmalat with a symbolic €1,000 fine, taking into consideration the delicate financial situation of the company at that time.

The Competition Authority also clarified that failure to comply with the obligation to submit a pre-merger filing is a *permanent* infringement.²⁹⁰ Accordingly, the five-year statute

²⁸⁶ The Competition Authority took a broad view of the concept of an undertaking's responsibility in *Nutricia Belgie/Milupa*, 4 Nov. 1999, n. C3696, Bulletin 44/99, where it fined Royal Numico Bv, the Dutch holding of the group, because it maintained that Royal Numico Bv was responsible for orchestrating the acquisition of control over a rival group (Milupa AG) and because Royal Numico Bv had handled proceedings before the Competition Authority directly. In *Costruzioni Elettromeccaniche Ascensori Montacarichi-Otis/Varie Società*, 28 Jan. 1999, n. C3156B, Bulletin 4/1999, the Competition Authority held that Otis and CEAM were the undertakings responsible because the concentrations of which the Competition Authority was notified formed part of the Otis strategy in the relevant markets and the two companies admitted their responsibility for late notification in their submission.

²⁸⁷ *See, e.g.*, *Veolia Propreté/Bartin Recycling*, 15 May 2008, n. C9215, Bulletin 19/2008; *Alliance Medical/Linea Medica*, 13 Mar. 2008, n. C8980, Bulletin 10/2008.

²⁸⁸ *Boston Holdings/Carnini*, 27 Jan. 2005, n. C4722B, Bulletin 4/2005.

²⁸⁹ *Parmalat/Carnini*, 14 Dec. 2000, n. C4236, Bulletin 3/2001.

²⁹⁰ *Thüga/Fingas/Sudgas*, 1 Aug. 2002, n. C5200, Bulletin 31/2002.

of limitations applicable to violations of the Competition Law²⁹¹ only starts to run from the day on which the parties actually cease to violate the law by submitting the merger filing. As a result, several years after a merger has been implemented without any prior merger filing, the Competition Authority may still impose a fine as provided for under Section 19(2) of the Competition Law.

Finally, Section 8 of the Competition Law, as amended by the 2001 reform, now provides that the Competition Authority may impose a fine of up to € 51,646 if undertakings—either in a monopoly position or which provide services of general economic interest—fail to communicate (i) the incorporation of, and/or (ii) the acquisition of controlling interests in, undertakings trading on markets other than those markets in which the undertakings operate in a monopoly situation or provide services of general economic interest.²⁹²

8. Substantive Test: Principal Evaluative Criteria

Section 6(1) of the Competition Law has not been amended to reflect the new substantive test introduced for the assessment of mergers at EU level in 2004. The substantive test under Section 6(1) of the Competition Law measures “whether a concentration creates or reinforces a dominant position on the Italian market capable of eliminating or restricting competition appreciably and on a lasting basis.”²⁹³

Dominance is not defined in the Competition Law. The Competition Authority, relying on the concept developed by the Commission and EU courts, defines dominance as the power to behave to an appreciable extent independently of competitors, suppliers, or customers. The concept of dominance does not require the absence of all competition, but rather the ability to exercise market power. In assessing whether a given transaction may create or strengthen a dominant position, the Competition Authority endeavors to predict the likelihood that a given concentration may result in higher prices or reduced output to the detriment of consumers, or in exclusionary effects to the detriment of competitors.

The concept of dominance traditionally encompasses both: (i) single-firm dominance, where one firm alone is able to exercise market power; and (ii) collective dominance, where two or more firms together have market power and may be expected to act in parallel.

²⁹¹ Law No. 689/81, § 28(1).

²⁹² The Competition Authority has already utilized its power to impose fines for violations of Section 8. In *Italgas*, 12 Feb. 2004, n. SP1, Bulletin 7/2004, the Competition Authority levied a €25,000 fine on *Italgas*.

²⁹³ The Authority normally conducts an overall analysis without distinguishing between two steps, the first being whether the concentration creates or strengthens a dominant position and the second being whether such dominant position brings about an appreciable and lasting elimination or restriction of competition. However, in certain instances, the Authority has explicitly broken down its assessment. *See, e.g.*, *Ferrovie dello Stato/Sogin*, 20 Dec. 1993, n. C1159, Bulletin 40-41/1993; *Solvay/Sodi*, 10 Apr. 1997, n. C2626B, Bulletin 15/1997; *Cirio/Centrale del Latte di Roma*, 23 Oct. 1997, n. C2863, Bulletin 43/1997.

Consequently, the legal test under the Competition Law is not formally suitable to capture non-cooperative oligopolies.

Italian merger control rules are designed as an instrument created to ensure a system of undistorted competition. Accordingly, the Competition Authority has consistently rejected suggestions that its appraisal take account of public interest elements in the form of industrial, social, or employment consideration and has firmly resisted attempts to politicize the application of merger rules. Notwithstanding the reference in Section 6(1) of the Competition Law to the competitive position of the domestic industry, we are not aware of any instance in which the Authority referred to this factor when approving a given transaction.

However, Section 25 of Competition Law grants the government (*i.e.*, the Council of Ministers) certain powers to protect interests other than competition. The government, upon a proposal by the Minister of Industry and Trade, determines criteria upon which the Competition Authority may authorize mergers that are normally prohibited under Section 6 of the Competition Law, when the general interests of the national economy are involved. Such authorization is permitted provided that competition is not eliminated from the market or restricted to an extent that is not justified by the general interests. In these cases, the Competition Authority prescribes the measures necessary to restore conditions of full competition. Section 25 states that the prime minister, acting on a resolution of the Council of Ministers upon the proposal of the Minister of Industry and Trade, may prohibit any concentration that includes corporate entities from countries that do not have laws protecting the independence of corporate entities equivalent to Italian substantive competition law, or from countries that apply discriminatory rules or impose clauses that have discriminatory effects in relation to acquisitions by Italian entities. This provision has not been applied so far.

From 2004 to 2008, the Competition Authority reviewed 3,631 transactions, 3,410 of which were cleared in Phase I. Interestingly, a number of Phase I clearance decisions have been adopted following the presentation of undertakings by the notifying parties. While Italian merger control rules do not provide for the possibility to condition Phase I decisions upon undertakings offered by the interested parties, the Competition Authority traditionally assesses—and eventually accepts—undertakings as amendments to the originally notified transaction. The presentation of undertakings has the effect of restarting the thirty-day statutory term set forth for Phase I.

A Phase II investigation pursuant to Section 16(4) of the Competition Law has been opened only in 18 cases.²⁹⁴ Following such in-depth investigation, only 2 concentrations have been blocked. In 13 of these 18 cases, clearance has been conditioned upon the implementation of undertakings imposed by the Competition Authority pursuant to Section 6(2) of the Competition Law.

²⁹⁴ For the sake of completeness, please note that, out of the total 3,631 notifications, 199 concerned transactions that were considered not to amount to an “operation of concentration” within the meaning of § 5 of the Competition Law; six cases concerned transactions that were abandoned following their notification; and one case was referred to the European Commission.

(a) Single-Firm Dominance

(i) Horizontal Mergers

In assessing the competitive effects of a merger, the Competition Authority employs a market-based approach that attempts to determine the existing parameters and dynamics of competition on the affected market and predict the effect of a given transaction on that market. The Competition Authority compares the competitive conditions that would follow the merger with those that would prevail in its absence, and endeavors to determine whether the merging firms will face sufficient residual competition to make it unprofitable to increase prices or decrease output.

The starting point in the Competition Authority's assessment is represented by the merging parties' post-transaction market shares. However, the Competition Authority also takes into account other important factors, including market concentration, number and strength of competitors, barriers to entry, characteristics of demand, and the degree of vertical integration.

The Competition Authority considers that a post-transaction market share above 70 percent is a strong indication of the existence of a dominant position since it indicates the prima facie possibility of exercising market power.²⁹⁵ These transactions have been almost invariably²⁹⁶ either prohibited or made subject to compliance by the parties with significant remedies.

Market shares. The Competition Authority prohibited the *Società Sviluppo Commerciale/Iperpiù*²⁹⁷ merger, where the merging entity would have increased its market share from 50 to 83 percent, leaving only three competitors on the relevant market. In *Unichips Finanziaria/Alidolce*,²⁹⁸ the Competition Authority cleared the proposed concentration only upon significant commitments considering that the merged entity would have increased its market share from 45.1 to 71.5 percent, eliminating one of the three competitors in the market. Similarly, the Competition Authority cleared *Euler/Siac-Società Italiana Assicurazioni Crediti*²⁹⁹ only upon the acquiror's commitment to sell its subsidiary active in the same market as the target company; absent this commitment,

²⁹⁵ Euler/Siac-Società Italiana Assicurazioni Crediti, 12 Mar. 1998, n. C2927, Bulletin 52/1998.

²⁹⁶ The Authority, for example, cleared in Phase I the acquisition by H.C. Starck GmbH ("Starck"), a subsidiary of Bayer AG, of sole control over CSM Holding Inc. As a result of the acquisition, Starck would have had a share of between 80 to 90% in the EC market for molybdenum powder for thermal spraying. However, the Authority considered that Starck would not be able to act autonomously from its customers and competitors because of the (i) very small size of the market (about €2.5 million), (ii) absence of technical and regulatory barriers to entry, (iii) presence, on the demand side, of firms with strong bargaining power, and (iv) presence, on the supply side, of firms able to rapidly and inexpensively increase their production (H.C. Starck/CSM Holding, 25 Jan. 2001, n. C4304, Bulletin 4/2001).

²⁹⁷ Società Sviluppo Commerciale/Iperpiù, 19 Mar. 2001, n. C4419, Bulletin 12/2001.

²⁹⁸ Unichips Finanziaria/Alidolce, 23 Feb. 1993, n. C714, Bulletin 4/1993.

²⁹⁹ Euler/Siac-Società Italiana Assicurazione Crediti, 12 Mar. 1998, n. C2927, Bulletin 11/1998.

the merged entity would have held a 76.4 percent share in a relevant market characterized by high entry barriers.

Where one of the merging parties already holds a dominant position, even a slight increase in its market share is likely to raise competitive concerns. In *Emilcarta/Agri-food Machinery*,³⁰⁰ for example, the Competition Authority prohibited the proposed concentration because, by increasing its market share from 80 to 86 percent and eliminating one of the four players in the market, the acquirer would have strengthened its dominant position.

Transactions resulting in market shares slightly below 70 percent are also subject to very strict scrutiny. In *Baxter/Clark*,³⁰¹ despite the fact that Baxter would have achieved a 60-70 percent market share in the peritoneal dialysis (“PD”) market, the Competition Authority unconditionally cleared the transaction concluding that Baxter’s dominance did not significantly reduce competition in a long-lasting manner. The Competition Authority’s conclusion was based on a number of considerations: (i) Baxter’s market share significantly diminished in the previous seven years (from 70-80 to 40-50 percent), showing that the Italian PD market was highly competitive; (ii) the tender procedures adopted by major clients (public hospitals and local health care public service bodies) guaranteed market access to minor competitors whose products were highly competitive in terms of both price and quality; (iii) the technological entry barriers could be overcome by major operators due to the latter’s great economic strength; (iv) potential competition from major PD producers at the international level and from operators in the contiguous market for hemodialysis treatment; and (v) the growth potential of the Italian PD market.

In one instance, the Competition Authority prohibited two parallel transactions where the resulting entity would have had a market share below 60 percent. In *Italtel/Mistel*³⁰² and *Italtel/General 4 Elettronica Sud*,³⁰³ the Competition Authority stated that it could not allow a concentration where an undertaking would experience an increase in market share from 35 to 51 percent, with the remaining competitors each holding a market share below 20 percent.

In *R.T.I./Europa TV*,³⁰⁴ the Competition Authority authorized the acquisition of Europa TV’s digital video broadcasting assets and related business contracts by Reti Televisive Italiane S.p.A. (RTI), a company wholly owned by Mediaset, which controls three of Italy’s most important free-to-air TV channels. RTI’s plan was to develop a multiplex that uses digital video broadcasting-handheld (DVB-H) technology, which would allow RTI to deliver multimedia and broadcast content, including videos, to mobile phones. The Competition Authority’s investigation revealed that, post-merger, RTI would have increased its market share in the Italian digital video broadcasting market (the relevant market) to 47.5 percent, while the market shares of its competitors would have been significantly lower. Notwithstanding the above, the Competition Authority cleared the transaction, on grounds that it did not give rise to the creation of a dominant position. Indeed, in the Competition

³⁰⁰ *Emilcarta/Agri-food Machinery*, 6 Aug. 1993, n. C812, Bulletin 20-21/1993.

³⁰¹ *Baxter/Clark*, 22 Dec. 1997, n. C2850, Bulletin 52/1997.

³⁰² *Italtel/Mistel*, 10 Dec. 1992, n. C574, Bulletin 23/1992.

³⁰³ *Italtel/General 4 Elettronica Sud*, 10 Dec. 1992, n. C574, Bulletin 23/1992.

³⁰⁴ *R.T.I.-Reti Televisive Italiane/Europa TV*, 16 Apr. 2006, n. C7493, Bulletin 13/2006.

Authority's opinion, the strong position RTI would have reached in the relevant market was temporary for several reasons. First, under Italian Law, all video broadcasting operators were required to convert their analog video broadcasting technology into digital video broadcasting technology by December 31, 2008. Following the conversion of such operators' analog technology, RTI's market share in the relevant market would have automatically dropped. Secondly, the Competition Authority considered that after the conversion of its analog technology into digital technology, the most important operator in the relevant market would have been RAI (the State-owned national broadcaster). Thirdly, RTI undertook: (i) to use the DVB-H infrastructure in order to offer DVB-H services exclusively to telecommunications operators and not to final consumers, so to avoid any possibility of customer preemption; (ii) to grant access to the DVB-H infrastructure on fair and non-discriminatory conditions to all the telecommunications operators applying for it; (iii) to allow the telecommunications operators to use the infrastructure to deliver to their mobile-phone clients not only the contents supplied by RTI but also the contents supplied by third parties; and (iv) not to use the DVB-H infrastructure for RTI's advertising purposes, but only for the use and profit of mobile-phone operators.

Market concentration. The Competition Authority applies the *Herfindahl-Hirschman index* (the "HHI") and the CR4/CR8 index when assessing market concentration. The HHI is a measure of overall market concentration and is obtained by summing the squares of the market shares of each competitor in the market.³⁰⁵ The market concentration indexes CR4 and CR8 represent the share accumulated by the first four or eight, respectively, undertakings present in the market.³⁰⁶

In its 1995 Annual Report, the Authority seems to suggest that, provided the merged entity's market share is above 15 percent, it may be necessary to open an in-depth investigation only where the CR4 index is above 35 percent.

Presence of qualified competitors. A crucial factor for the Competition Authority's assessment is also the presence of qualified competitors in the relevant market. In *Barilla/Pavesi*,³⁰⁷ for example, the Competition Authority referred to the existence of small but qualified independent competitors (representing a significant competitive constraint on the merging entity) as a factor preventing the creation of a dominant position capable of restricting competition on the relevant market.

Likewise, in *Compagnia Italiana Alluminio-Comital/Cofresco Italia*,³⁰⁸ the significant presence of private labels was sufficient to conclude that the concentration could not lead to the creation of a dominant position restricting competition. Conversely, in *Solvay/Sodi*,³⁰⁹

³⁰⁵ See Davide Campari Milano/Società Italiane Koninklijke, 14 Dec. 1994, n. C1705, Bulletin 50/1994; Euler/Siac-Società Italiana Assicurazioni Crediti, 12 Mar. 1998, n. C2927, Bulletin 11/1998; Società Esercizi Commerciali Industriali-S.E.C.I.-Co.Pro.B.-Finbieticola/Eridania, 1 Aug. 2002, n. C5151, Bulletin 31/2002.

³⁰⁶ See Davide Campari Milano/Società Italiane Koninklijke, 14 Dec. 1994, n. C1705, Bulletin 50/1994; Cirio/Centrale del Latte di Roma, 23 Oct. 1997, n. C2863, Bulletin 43/1997.

³⁰⁷ Barilla/Pavesi, 27 May 1992, n. C461, Bulletin 10/1992.

³⁰⁸ Compagnia Italiana Alluminio-Comital/Cofresco Italia, 4 Mar. 1999, n. C3298, Bulletin 9/1999.

³⁰⁹ Solvay/Sodi, 10 Apr. 1997, n. C2626B, Bulletin 15/1997.

the transaction was approved only following substantial modifications as the Competition Authority would have prohibited a concentration through which the already dominant firm acquired one of its most dynamic competitors. Likewise, the Competition Authority also takes into account the gap between the market share of the merged entity and those of its competitors. The high market share that an undertaking holds as a result of a concentration is all the more significant when competitors' market shares are particularly low. In *Schemaventuno-Promodes/Gruppo GS*,³¹⁰ the Competition Authority has, for example, deemed that the concentration could have restricted competition in the affected markets because, *inter alia*, the resulting market share of the new entity would have been from two to six times higher than that of its main competitor.

Similarly, in *Sai/La Fondiaria*,³¹¹ the concentration was cleared only subject to significant behavioral remedies because, *inter alia*, the merged entity's market share would have been from two to three-and-a-half times higher than that of its main competitor.

Barriers to entry. The analysis of barriers to entry plays an important role in the Competition Authority's assessment. When barriers to entry are high, existing competitors, including the merging entities, are less likely to face relevant competitive constraints. The Competition Authority adopts a broad definition of barriers to entry, including access difficulties due to capital or sunk start-up costs, difficulties in obtaining specific know-how, economies of scale favoring incumbent suppliers, legislation or administrative regulations for the sector which could restrict access to the market for new operators or extend the entry period, overcapacity and declining or stagnant demand, consumer loyalty to trademarks, strong bonds of trust between suppliers and consumers due to product sophistication, and the existence of any kind of obstacle to access distribution channels.³¹²

By contrast, when potential entrants do not face significant barriers to entry, the Competition Authority has taken a tolerant stance even if the merging parties hold high market shares. In *Sandoz Pharma/Gazzoni 1907*,³¹³ for example, the Competition Authority concluded that a market share of more than 70 percent did not give rise to a dominant position mainly because the absence of barriers to entry prevented the merging parties from exercising market power.

Characteristics of demand. The characteristics of demand are also relevant to the Competition Authority's assessment. If demand is dispersed among numerous small purchasers, the bargaining power of the merging entity will normally be stronger. By contrast, the existence of a limited number of large or sophisticated customers, with strong bargaining power, may neutralize an increase of market power of the undertaking resulting from the concentration (so-called "countervailing buyer power").

³¹⁰ *Schemaventuno-Promodes/Gruppo GS*, 18 June 1998, n. C3037, Bulletin 25/1998.

³¹¹ *Sai-Società Assicuratrice Industriale/La Fondiaria Assicurazioni*, 17 Dec. 2002, n. C5422B, Bulletin 51-52/2002.

³¹² *See, e.g., Unichips Finanziaria/Alidolce*, 23 Feb. 1993, n. C714, Bulletin 4/1993; *Heineken Italia/Birra Moretti*, 4 July 1997, n. C2347, Bulletin 27/1996.

³¹³ *Sandoz Pharma/Gazzoni 1907*, 1 Dec. 1993, n. C1109, Bulletin 37/1993.

In *Pierburg/Magneti Marelli*,³¹⁴ for example, notwithstanding the fact that Pierburg would have achieved a post-transaction market share of 64 percent in one of the relevant markets, the Competition Authority cleared the concentration in Phase I primarily because the demand was represented by large car manufacturers able to countervail Pierburg's increased market power. Finally, the Competition Authority takes into account the ability of purchasers to satisfy their requirements of the relevant product or service internally.

Vertical integration. The Competition Authority also considers whether the merging parties would have material competitive advantages over rival suppliers that would make it difficult for competitors, either individually or in the aggregate, to effectively constrain the entity resulting from the concentration to a sufficient degree. Such advantages may result from vertical integration or privileged access to supply, which is the case when the merging entity is integrated downstream or upstream, or has established sufficient control of the supply of upstream products.³¹⁵

(ii) Vertical Mergers

As a practical matter, the Competition Authority typically focuses on whether a vertical merger results in a significant degree of market foreclosure by enabling the merged entity to restrict competitors' access to supplies or outlets.³¹⁶

Exclusionary pressures may arise on either the supply or the demand side. For example, a firm acquiring a position in a supply market might gain the ability to render rivals' access to that supply more difficult or expensive, thus raising their costs, weakening them, and potentially creating or reinforcing a dominant position on the downstream market. Similarly, on the demand side, a firm acquiring a position in a purchasing market might gain the ability to exclude competitors from that outlet, thereby strengthening its position on the upstream market. In both situations, the Competition Authority generally examines whether the transaction would change the incentives of the merging parties to deal with third parties on competitive, fair, and objectively justifiable terms.³¹⁷

The Competition Authority's analysis in complex vertical mergers is exemplified in *Edizione Holding/Autostrade-Concessioni e Costruzioni Autostrade*.³¹⁸ This merger entailed Edizione Holding S.p.A.'s ("Edizione") acquisition of Autostrade-Concessioni e Costruzioni Autostrade S.p.A. ("Autostrade"). Autostrade was entrusted with the management of a large portion of the Italian overall motorway network and held a license to provide services (including restaurants/refreshment services) on motorways it managed. Service stations located on such motorways represented 48 percent of all Italian motorway service stations. Autogrill S.p.A. ("Autogrill"), a subsidiary of Edizione, operated as a sub-licensee of 180 of

³¹⁴ *Pierburg/Magneti Marelli*, 22 Dec. 1999, n. C3779, Bulletin 51-52/1999.

³¹⁵ *See, e.g., Heineken Italia/Birra Moretti*, 4 July 1997, n. C2347, Bulletin 27/1996.

³¹⁶ *See, e.g., Italcalsestruzzi/Calcestruzzi*, 5 June 1997, n. C2741, Bulletin 23/1997.

³¹⁷ *See, e.g., Heineken Italia/Birra Moretti*, 4 July 1997, n. C2347, Bulletin 27/1996.

³¹⁸ *Edizione Holding/Autostrade-Concessioni e Costruzioni Autostrade*, 12 Dec. 2002, n. C3818D, Bulletin 50/2002. For the clearance decision, *see Edizione Holding/Autostrade-Concessioni e Costruzioni Autostrade*, 2 Mar. 2000, n. C3818, Bulletin 9/2000.

the 249 total restaurants/refreshment facilities located in the motorway network managed by Autostrade, accounting for over 80 percent of the overall turnover from restaurants/refreshment services provided on that network. In the Competition Authority's view, this vertical merger would have strengthened Edizione's dominant position in a way such that competition on the market for the award of sublicenses of restaurant services would have been significantly impeded on a lasting basis. The Competition Authority was particularly concerned with the risk that Autostrade would favor Autogrill in tender procedures for the sublicensing of restaurant services along the highways. Accordingly, clearance was granted upon a number of conditions. Autostrade assumed the obligation: (i) not to directly supply refreshment/restaurant services; (ii) to commission third parties to supply these services using transparent, non-discriminatory, and adequately publicized competitive tender procedures; (iii) to commission one or more independent and highly qualified third parties to manage these procedures; (iv) to lay down the conditions for admission to the tender and the criteria for adjudication; and (v) to adequately publicize all the relevant information. In addition, Autogrill assumed the obligation not to increase its present 72 percent share of the total number of refreshment/restaurant facilities located on the motorways managed by the Autostrade group.

(iii) Conglomerate Mergers

In exceptional circumstances, conglomerate mergers between two firms that are neither competitors nor in any customer-supplier relationship have been subject to scrutiny, although the general presumption is that such transactions do not raise competition law concerns.

In *Enel-France Telecom/New Wind*,³¹⁹ the Competition Authority held for the first time that the acquisition of a company active in a market other than the market in which the acquiring party holds a dominant position may be prohibited or subject to conditions. In this case, the Competition Authority determined that the acquisition of joint control of the Italian telecommunications operator Infostrada by Enel and France Télécom would have strengthened Enel's dominant position in the electricity generation and sales markets. In particular, the Competition Authority held that the acquisition of Infostrada would have enabled Enel to become a multi-utility company and, as a result, capture the loyalty of electricity customers by virtue of its ability to bundle telecommunications services with electricity. Therefore, to promote competition on the electricity market, the Competition Authority initially made the acquisition subject to the divestiture of at least 5,500 Mw of Enel's generating capacity (an amount equal to the aggregate generating capacity of Enel's competitors at that time). This decision was first annulled by the TAR Lazio, which found that Enel did not enjoy a dominant position in the electricity sales market. Later, the Supreme Administrative Court struck down the TAR's judgment and referred the case back to the Competition Authority since the Competition Authority had not assessed whether the undertaking imposed was proportionate to the advantage held by the merged parties in the

³¹⁹ *Enel-France Telecom/New Wind*, 28 Feb. 2001, n. C4438, Bulletin 8/2001.

electricity sales market. In rejecting Enel's claim that conglomerate mergers are not technically concentrations and, as such, are not subject to the merger control rules, the Supreme Administrative Court confirmed that, consistent with Commission decisions under the EC Merger Regulation, Italian merger control rules apply to conglomerate mergers.

(b) Collective Dominance

For the first time, in *Granarolo/Centrale del Latte di Vicenza*,³²⁰ the Competition Authority prohibited a concentration because it would have created a collective dominant position capable of significantly impeding competition on a lasting basis. The transaction consisted of Granarolo's attempted acquisition of Centrale del Latte di Vicenza, one of its strongest remaining competitors in the market for milk and milk products in the Veneto region. Following the transaction, Granarolo would have increased its market share from 15-18 percent to 25-28 percent, similar to that of its main competitor Parmalat (30-33 percent). Consequently, the combined market shares of the two main players on the Veneto fresh milk market would have been nearly 60 percent. In addition to the market shares, the Authority took into account the level of concentration in the market, as shown by an HHI test. The Competition Authority held that a 326-point increase in the HHI was excessive.³²¹ The Competition Authority further noted that the market was characterized by the following features, the combination of which indicated that the market was conducive to oligopolistic behavior: (i) stagnating milk consumption and a low likelihood of market growth; (ii) product homogeneity; (iii) technology not subject to significant improvements; (iv) producers' homogeneous cost structures; (v) high barriers to entry and a low probability of new market entrants; and (vi) transparent prices. By reducing the asymmetry of market shares held by Granarolo and Parmalat, the transaction was likely to increase the risk of tacit convergence in the market conduct of the two firms, allowing them to act independently of their competitors and consumers. According to the Competition Authority, the likelihood of future parallel anticompetitive behavior was enhanced by the fact that Granarolo and Parmalat followed similar acquisition strategies throughout Italy. The resulting economic interdependence between the two players in several geographic markets created a strong disincentive for the adoption of aggressive pricing policies in each market individually considered, since an action by one of them aimed at gaining market share in one market could have been "punished" through retaliatory measures in another market.

³²⁰ *Granarolo/Centrale del Latte di Vicenza*, 24 Mar. 2001, n. C4502, Bulletin 21/2001. See *Società Esercizi Commerciali Industriali-S.E.C.I.-CO.PRO.B.-Finbieticola/Eridania*, 1 Aug. 2002, n. C5151, Bulletin 31/2002 (taking into account the structural and behavioral conditions – set out a few weeks earlier by the European Court of First Instance (now General Court) in Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II-2585 – that make possible the creation of a collective dominant position).

³²¹ In this respect, the Competition Authority referred to the U.S. Merger Guidelines, under which an increase by more than 100 points in similar situations is likely to produce restrictive effects on competition.

*British American Tobacco/Ente Tabacchi Italiani*³²² provides the second instance in which the Competition Authority concluded that a notified concentration resulted in the creation of collective dominance. The Authority conditionally authorized the acquisition of sole control of the state-owned Italian tobacco manufacturer and distributor ETI S.p.A. (ETI) by British American Tobacco plc (BAT). The Competition Authority found that the acquisition would have created a collective dominant position on the Italian cigarette market for both the combined BAT/ETI entity and the Italian market leader Philip Morris. Besides the resulting high combined market shares of the two competitors (between 85 percent and 90 percent), the Authority identified the presence of three elements indicating the existence of a collective dominant position: (i) market transparency (prices of cigarettes are published in the Official Journal); (ii) internal stability (BAT/ETI and Philip Morris have an incentive to tacitly coordinate their conduct on the market, with tacit coordination being sustainable over time); and (iii) external stability (customers and competitors are not able to destabilize the parties' dominant position).

The Competition Authority focused its analysis on the internal stability of the collective dominant position. It noted that the two companies would be discouraged from applying aggressive pricing policies because each would have feared retaliatory measures from the other. Philip Morris would have had the ability to terminate the existing agreement under which ETI manufactured a significant part of Philip Morris's cigarettes sold in Italy, thereby inflicting substantial damage on BAT/ETI. Also, according to the Authority, BAT/ETI would have had the ability to use ETI's wholesale distribution network for tobacco products (the only such Italian network) to the detriment of Philip Morris (*e.g.*, by delaying market access of Philip Morris' products). To eliminate the interdependence between the two players, the Authority approved the acquisition subject to BAT's agreement not to renew its production agreement with Philip Morris after its expiration at the end of 2005. Once the risk of Philip Morris' retaliation was removed, the Authority concluded that the collective dominant position was no longer created because the three above-mentioned conditions need to be *cumulatively* satisfied for a situation of collective dominance to arise.

On June 15, 2005, the Competition Authority conditionally cleared the acquisition by Koninklijke Numico (Numico), the Dutch baby food group, of Mellin.³²³ In the Competition Authority's view, the transaction could have significantly hindered competition in the following Italian infant formula milk markets: (i) starting milk for newborns, (ii) follow-on milk for infants aged 6-12 months, and (iii) special formula milk for premature infants and infants with specific diseases. In particular, the Competition Authority concluded that the transaction would have induced tacit collusion among the four main players (Numico-Mellin, Plada, Nestlé, Humana), by facilitating the development and maintenance of common commercial strategies, particularly in the distribution of baby milk products through pharmacies, where prices tend to be far higher. In reaching this conclusion, the Competition Authority applied the collective dominance test, as set out by the General Court

³²² *British American Tobacco/Ente Tabacchi Italiani*, 17 Dec. 2003, n. C6133, Bulletin 51/2003.

³²³ *Koninklijke Numico/Mellin*, 15 June 2005, n. C6941, Bulletin 23/2005.

in *Airtours*.³²⁴ Based on the above, the transaction was cleared subject only to a number of behavioral remedies, including Numico's undertaking to lower its prices for baby milk products and significantly increase distribution through "low-priced" retail outlets (*i.e.*, supermarket chains and baby stores), as opposed to the "highly priced" pharmacies.

Another interesting application of the *Airtours* case law is represented by the *Generali/Toro* case (Generali and Toro Assicurazioni are the two major providers of non-life insurance in Italy).³²⁵ This case also shows the particular attention that the Competition Authority pays to the antitrust implications of the network of structural, economic, and personal links that traditionally characterizes the banking and insurance sectors in Italy. In this case, the Competition Authority's analysis of the structural, economic, and personal links was twofold, and can be summarized as follows.

First, the Competition Authority concluded that Mediobanca exercised *de facto* control over Generali. This conclusion was grounded mainly on the following considerations: (i) Mediobanca usually represented about one-third of the share capital present at the shareholders' meeting and (ii) Unicredito and Capitalia (two other major shareholders of Generali) were also the major shareholders of Mediobanca as well as parties to the shareholders agreement of such bank and a consultation agreement concerning Generali. Together with Unicredito and Capitalia, Mediobanca was therefore able to exercise the majority of voting rights usually represented in Generali's shareholders' meeting, while the remaining shareholders did not hold significant shares and were mainly institutional investors (as such, they normally followed the major shareholder's vote). In light of the above, the Competition Authority concluded that in Generali there were no shareholders' meeting majorities alternative to that of Mediobanca.

Furthermore, the Competition Authority carried out an extensive analysis of the strong links between Generali/Mediobanca and FonSai, another important player in market for non-life insurance. Such analysis focused on, *inter alia*, the following aspects:

- (i) FonSai held a number of "strategic" minority stakes in Generali (2.4 percent) as well as in the share capital of Mediobanca and Capitalia;
- (ii) FonSai had a relevant exposure to the performance of Generali because FonSai's direct and indirect stake in Generali represented 22 percent of the whole capitalization of FonSai and 47 percent of the whole investment of Premafin, the company controlling FonSai, in such company;
- (iii) FonSai's stake in Generali was not merely "financial" given that FonSai:
 - planned to have representatives in Generali's board of directors;

³²⁴ Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II-2585. In this leading case, the Court ruled that a concentration in a highly transparent and concentrated market is able to create collective dominance when: (i) the undertakings have an incentive, as well as the necessary capacity, to cooperate; (ii) adequate deterrents guarantee the maintenance of a long-term incentive not to depart from the commonly pursued policy; and (iii) the undertaking does not have any actual or potential competitors, let alone customers or consumers, who are able to react effectively.

³²⁵ *Assicurazioni Generali/Toro Assicurazioni*, 4 Dec. 2006, n. C7951, Bulletin 47/2006. In this case, the transaction originally fell within the scope of the EC Merger Regulation. However, Generali obtained the referral of the case to the Authority pursuant to Article 4(4) of said regulation.

- was a party to the Mediobanca shareholders agreement;
 - had representatives in the board of directors of Capitalia and Mediobanca (where matters concerning Generali are dealt with);
 - also held strategic shares in RCS and Pirelli, two companies whose shareholders agreements and board of directors include representatives of Generali and Mediobanca, as well as Fonsai; and
- (iv) Mediobanca held a share of about 2 percent in FonSai and was the major supplier of capital to the FonSai group, followed by Capitalia.

In the Competition Authority's view, the above links between Mediobanca/Generali and FonSai resulted in the risk of mutual influence in the respective strategic-policies and in the likelihood of the adoption of a common course of action. This was particularly true in light of the characteristics (high level of transparency, uniformity of regulations and products, no incentive to deviation and limited possibility of, and incentive to, market reaction) of the Italian insurance sector which were favorable to the coordination of the commercial strategies.

The acquisition was nonetheless authorized subject to certain conditions pursuant to Section 6(2) of the Competition Law. In particular, Generali was required to divest one non-life insurance business to an undertaking independent from Generali and Mediobanca and that did not achieve a 2005 aggregate turnover (in terms of insurance premiums in the motor vehicle insurance market) higher than Toro's turnover. According to the Competition Authority, the implementation of this remedy would have reduced Generali/Toro's market share and guaranteed the establishment of a stand-alone, viable competitor.

On May 17, 2007, the TAR annulled the Competition Authority's decision.³²⁶ The TAR rejected the arguments presented by the appellants in connection with the absence of Mediobanca's control over Generali and the strong ties between Generali/Mediobanca and FonSai. However, TAR Lazio agreed with the appellants' arguments concerning the absence of a dominant position held collectively by Generali and FonSai. The TAR, relying on *Airtours*,³²⁷ acknowledged the results of the analysis carried out by the Competition Authority with respect to: (i) the application of the HHI index as a tool for the assessment of the impact of the transaction on the relevant markets, to be included within a complex evidentiary framework and (ii) the "transparency" test with regard to the easy access to prices on insurance contracts, usually published also in the website of the insurance companies and representing the elements immediately perceivable both for consumers and competing companies offering similar products.

However, the TAR concluded that the Competition Authority failed to prove "factors playing a significant role in the assessment of whether a situation of collective dominance exists, such as, for example, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that

³²⁶ Assicurazioni Generali S.p.A. v. Autorità Garante della Concorrenza e del Mercato, 10 July 2007, n. 6230 (Trib. ammin. reg.).

³²⁷ Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II-2585.

might be exerted by other operators”.³²⁸ In this respect, TAR Lazio noted that the Competition Authority had not adequately proved that the other smaller players in the market had no incentives to compete with the allegedly dominant firms, so that they would automatically align with such allegedly dominant firms’ possible price increases.

The TAR remarked that, in certain markets, smaller competitors account for approximately 60 percent of the market and many of them have shares over 10 percent. Furthermore, the TAR quashed the Competition Authority’s argument that a combined market share of 35 percent (held by Generali and FonSai in several markets) could be used as an adequate threshold to confirm the existence of a collective dominant position. Accordingly, absent the creation or strengthening of a collective dominant position, the transaction should have been approved without remedies.³²⁹

9. Treatment of Efficiencies

The Competition Law does not make any reference to an efficiencies defense, nor to the need for the Competition Authority to take into account the development of technical and economical progress to the benefit of consumers.

As far back as its 1992 Annual Report, the Competition Authority suggested that (i) it may consider whether the technological progress brought about by a concentration could reduce or outweigh its anticompetitive effects; and (ii) this would only be possible in markets where technology develops rapidly and in which competition in innovation is likely to keep the marketplace competitive.³³⁰

In one instance, the Competition Authority explicitly considered whether efficiencies stemming from a concentration could counteract its anticompetitive potential.³³¹ The Competition Authority conducted a simulation based on the PCAIDS model to verify how the post-merger increase in market concentration would have augmented the merged entity’s pricing independence. This analysis was aimed at ascertaining the post-merger variation in price levels, taking into account, among other factors, the possible efficiencies stemming from the concentration. The results of the simulation showed that the concentration would have allowed the merged entity to significantly raise prices in most of the relevant markets, even assuming the existence of all efficiencies as put forward by the parties.

10. Jurisdictional Issues

³²⁸ Assicurazioni Generali S.p.A. v. Autorità Garante della Concorrenza e del Mercato, 10 July 2007, n. 6230 (Trib. ammin. reg.).

³²⁹ The judgment was appealed by the Competition Authority before the Supreme Administrative Court. Generali, Mediobanca, and NT filed a cross-appeal requiring the Supreme Administrative Court, *inter alia*, to quash TAR’s position on Mediobanca’s control over Generali and their ties with FonSai. The appeals are still pending.

³³⁰ COMPETITION AUTHORITY, ANNUAL REPORT 1992, at 30-31.

³³¹ Sai-Società Assicuratrice Industriale/La Fondiaria Assicurazioni, 17 Dec. 2002, n. C5422B, Bulletin 51-52/2002.

Decisions in which the Competition Authority prohibits a concentration under Section 6(2) of the Competition Law may be appealed. The same is true with regard to decisions in which the Competition Authority authorizes a concentration subject to remedies—parties to the proposed concentration may dispute the legality of the conditions imposed by the Competition Authority, as well as the finding of the creation or strengthening of a dominant position, which the conditions are meant to remedy.³³²

It is also possible to appeal decisions imposing fines for failure to notify,³³³ as well as decisions imposing fines upon companies implementing a concentration despite its prohibition³³⁴ or failing to comply with measures upon which the Competition Authority's clearance was conditioned.³³⁵

It should also be possible to appeal decisions taken by the Competition Authority pursuant to Section 17(1) of the Competition Law, whereby parties to a proposed concentration are ordered to suspend implementation pending a final determination by the Competition Authority. However, given the severe time constraints under which the Competition Authority must adopt a final decision on the notified transaction,³³⁶ the question is likely of a purely academic interest as confirmed by the fact that, to our knowledge, no such appeals have been brought to date.

As to decisions to open a Phase II investigation (and/or decisions to carry out inspections, which the Competition Authority may adopt pursuant to Section 14 of the Competition Law following the decision to open a Phase II investigation), it is highly debatable whether an appeal may be brought.³³⁷ In any event, the same practical

³³² See, e.g., *Autorità Garante della Concorrenza e del Mercato v. Enel*, 1 Oct. 2002, n. 5156 (Cons. stato).

³³³ Competition Law, § 19(2).

³³⁴ Pursuant to § 19(1) of the Competition Law, fines may also be imposed upon companies that fail to comply with remedial measures imposed by the Competition Authority (pursuant to § 18(3) of the Competition Law) in order to ensure that the restrictive effects of a prohibited concentration (implemented prior to the final decision) are eliminated. Decisions imposing fines in these circumstances also may be appealed.

³³⁵ Competition Law, § 19(1). See, e.g., *Henkel v. Autorità Garante della Concorrenza e del Mercato*, 2 Aug. 2002, n. 6929/2002 (Trib. ammin. reg.).

³³⁶ Decisions ordering the notifying parties to suspend the implementation of the proposed concentration may be issued only at the time the Authority decides to open an in-depth investigation pursuant to § 16 of the Competition Law. As seen above, the in-depth investigation may last for a maximum of 45 days.

³³⁷ An appeal of a decision to initiate proceedings pursuant to § 14 of the Competition Law for a suspected violation of the prohibition of restrictive agreements laid down in § 2 thereof was allowed in *ANIA v. Autorità Garante della Concorrenza e del Mercato and Others*, 2 Nov. 1993, n. 1549 (Trib. ammin. reg.). In that case, ANIA (the National Association of Insurance Companies) claimed that the Competition Law did not apply, in its entirety, to the association. Therefore, ANIA maintained that it was not subject to the powers of surveillance and enforcement vested in the Authority by the Competition Law. In the context of the application of the merger control provisions, however, such precedent is arguably not relevant. Indeed, if the acquiring party claims that it is not subject to the merger control provisions, it would simply refrain from notifying. If the

considerations that make the issue of appeal of a decision under Section 17(1) of the Competition Law largely academic (primarily the time constraints of the merger proceedings before the Competition Authority as compared to those of proceedings in front of the Administrative Courts) would also be applicable in this situation.

With respect to decisions clearing a proposed concentration (either at the end of Phase I or at the end of a Phase II in-depth investigation), the issue is whether companies other than the parties to the transaction have *locus standi* to bring an appeal.³³⁸

11. Remedies

The Competition Authority may clear a transaction where the parties propose commitments so as to remove the competitive concerns raised by the Competition Authority. The Competition Authority's practice with respect to remedies is consistent with that of the European Commission. However, the Commission only has the power to assess the adequacy of remedies "offered" by the parties. By contrast, the Competition Authority has the power to "impose" additional remedies as a condition of clearance under Section 6(2) of the Competition Law.

Indeed, the Competition Authority has often availed itself of the power to impose upon the undertakings concerned corrective measures aimed at remedying the possible anticompetitive effects of the notified transaction. In most of these cases, clearance of the notified transaction was conditioned upon implementation of an articulated package of structural and behavioral remedies. However, in a number of instances, the Competition Authority also cleared problematic transactions exclusively upon behavioral remedies, that are notoriously more difficult to monitor and to enforce.³³⁹

In assessing whether a remedy will restore effective competition, the Competition Authority considers all relevant factors relating to the remedy itself, including, *inter alia*, the type, scale, and scope of the remedy proposed, together with the likelihood of its successful, complete, and timely implementation by the parties. Moreover, these factors are judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other players on the market.³⁴⁰ It follows that it is incumbent upon the parties, from the outset, to remove any uncertainties as to any of the factors that might cause the Competition Authority to reject the proposed remedy.

*Groupe Canal+/Stream*³⁴¹ is a good illustration of the variety of remedies that the Competition Authority might consider in a borderline case. The notified merger between Canal+/Telepiù and Stream could have led to the strengthening of a dominant position in the

Authority were to take a different stance, it would issue a decision pursuant to § 19(2) of the Competition Law, and there is no doubt that such decision may be appealed.

³³⁸ This topic is address in part III.I.1.(a) of this Chapter.

³³⁹ See, e.g., Koninklijke Numico/Mellin, 15 June 2005, n. C6941, Bulletin 23/2005.

³⁴⁰ See, e.g., Alitalia/Volare, 5 July 2006, n. C7667, Bulletin 26/2006; Telecom Italia/Megabeam Italia, 7 Aug. 2003, n. C5838, Bulletin 32/2003.

³⁴¹ Groupe Canal+/Stream, 13 May 2002, n. C5109, Bulletin 19/2002.

Italian pay-TV market. Nevertheless, as mentioned above, the Competition Authority recognized the peculiarities of the Italian pay-TV market and concluded that it was possible to remove the anticompetitive effects of the operation through an adequate set of remedies. Among others, these remedies included requirements that Canal+/Telepiù: (i) not enter into certain premium pay-TV contracts exceeding a specified duration; (ii) relinquish and not re-acquire certain rights on non-satellite transmission platforms; (iii) permit termination of certain license agreements with major Italian soccer teams and the most important Hollywood Studios; (iv) divest all assets relating to terrestrial broadcasting; (v) allow competitors to distribute their pay-TV offers through the new DTH platform; and (vi) grant to any interested party operating on non-DTH platforms Telepiù's premium pay-TV offer at "retail minus" conditions. This overall set of remedies, subjected to extensive market tests involving a wide range of operators active at different levels in the Italian marketplace, was considered adequate to reduce the merged entity's market power and to restore conditions necessary for effective competition. In particular, in the Competition Authority's view, the remedies caused a significant reduction in the barriers to access to the satellite platform, and also created conditions conducive to the growth of competitors operating alternative means of transmission (including cable and terrestrial transmission) by granting them access to the merging parties' content.

In practice, the burden is on the parties to remove any uncertainties as to the factors that might cause the Competition Authority to reject the proposed commitment. As shown in *BS Investimenti SGR/Ramo d'azienda di SAFE*,³⁴² in complex Phase II investigations the Competition Authority normally conducts a thorough market test in order to collect interested third parties' views as to the adequacy of the proposed set of remedies. In this case, the transaction was blocked pursuant to Section 18(1) of the Competition Law, because the acquiring party failed to offer adequate corrective measures. The transaction would have entailed the acquisition by Sicurglobal S.p.A. (Sicurglobal) of a line of business of Società Autotrasporti Fiduciari Europei S.p.A. (SAFE). Both Sicurglobal and SAFE were active in the Italian market for private security services. In the province of Pavia, the merged entity would have reached a market share exceeding 50 percent. Further sources of concerns were represented by the high barriers to entry (governmental licenses were required to operate in the relevant market) and by the fact that the combined entity would have achieved dominance with respect to the whole range of activities relating to the market for private security services within that Province. In order to overcome the above competitive concerns, the parties undertook: (1) to divest a line of business made of contracts with customers worth € 1,5 million (or, alternatively, decrease the combined entity's turnover of the equivalent amount), (2) to hand back to the Prefect of Pavia the governmental licenses granted to SAFE, and (3) not to increase the number of authorized armed guards and vehicles operating in the Province beyond the number already available to the combined entity. However, in the Competition Authority's view, the above undertakings were not sufficient since they were merely aimed at impeding a further growth of the combined entity

³⁴² BS Investimenti SGR/Ramo d'Azienda di S.A.F.E.-Società Autotrasporti Fiduciari Europei, 18 Apr. 2007, n. C8271, Bulletin 14/2007.

or reducing its actual turnover. Indeed, it deemed that only structural remedies would have been appropriate, such as the divestiture of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis (normally, a viable business is an existing one that can operate on a stand-alone-basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period).

(a) Revocation/Amendments of Remedies

The Competition Law does not contain any specific provisions expressly providing for the power of the Competition Authority to revoke/amend remedies. However, Section 21-*quinquies* of Law No. 241/1990 has been considered to be a valid legal basis to that effect. Pursuant to that provision, any administrative resolution endowed with long lasting effects may be revoked by the administrative body from which it was issued in case of supervening public interest reasons, factual material changes, or a fresh assessment of the public interest originally taken into consideration.

On May 10, 2006,³⁴³ the Competition Authority applied for the first time the provision mentioned above. It withdrew the corrective measures previously imposed on August 1, 2002,³⁴⁴ ultimately granting an unconditional clearance to the acquisition of Eridania S.p.A. by Finbieticola, CO.PRO.B. and S.E.C.I. In particular, the Competition Authority justified the withdrawal of the corrective measures with the effects stemming from the changed regulatory framework of the economic sector concerned (the sugar sector).

The Competition Authority applied Section 21-*quinquies* of Law No. 241/1990 also in the *Alitalia/Volare* case.³⁴⁵ On July 5, 2006, following an in-depth investigation, the Competition Authority had conditionally authorized the acquisition by Alitalia of all the assets of the Italian low-cost carrier Volare.³⁴⁶ The Authority concluded that the transaction would have led to the creation and/or strengthening of Alitalia's dominant position on two of the national routes (Linate-Bari and Linate-Lamezia Terme), as well as on the Milan-Paris route. The transaction was nonetheless authorized subject to certain conditions pursuant to Section 6(2) of the Competition Law, namely: (i) the release of one slot on each of the Linate-Bari and Linate-Lamezia Terme routes for four IATA seasons (there are two IATA seasons per year, the winter and summer season, each lasting for six months); and (ii) the release of two slots on the Linate-Paris Orly route for six IATA seasons.³⁴⁷ After these

³⁴³ Società Esercizi Commerciali Industriali S.E.C.I.-CO.PRO.B, Finbieticola/Eridania, 10 May 2006, n. C5151, Bulletin 19/2006.

³⁴⁴ Società Esercizi Commerciali Industriali S.E.C.I.-CO.PRO.B, Finbieticola/Eridania, 1 Aug. 2002, n. C5151, Bulletin 31/2002, amended by Società Esercizi Commerciali Industriali S.E.C.I.-CO.PRO.B, Finbieticola/Eridania-Eribrand, 6 July 2005, C5151B, Bulletin 27/2005.

³⁴⁵ Alitalia/Volare, 25 June 2008, n. C7667B, Bulletin 25/2008.

³⁴⁶ Alitalia/Volare, 5 July 2006, n. C7667, Bulletin 26/2006.

³⁴⁷ In the Competition Authority's view, the structural nature of these remedies would have partially solved the imbalance between the total slots held by Alitalia and its competitors at Linate, a congested airport considered strategic in the Italian air transport industry.

IATA seasons, beneficiaries of the slots could have used them also on routes different from those affected by the transaction. The clearance decision was challenged before the TAR both by Alitalia (which considered that the acquisition deserved unconditional clearance) and its main competitor in the domestic market, AirOne (which argued that the acquisition should have been blocked or at least conditioned to more stricter commitments). These actions are still pending at the time of writing. Moreover, the validity of the bidding process that resulted in the selection of Alitalia as candidate purchaser of Volare's assets was the object of a complex web of administrative and civil litigation proceedings, which resulted in serious uncertainty as to the legality and durability of Alitalia's control over such assets. In light of the above, Alitalia obtained a number of postponements of the implementation of the remedies imposed on it (the implementation of the remedy consisting in a release of slots would have impaired Alitalia's ability to re-sell or return the acquired business in case of loss of title over it). Ultimately, on October 24, 2007, the Competition Authority opened an investigation aimed at ascertaining the opportunity to review and eventually amend or even revoke said remedies. Besides the possible revocation of the result of the bidding process, the Competition Authority justified this decision in light of the need to ascertain possible changes in market conditions of the domestic airline industry, the actual competitive positioning of Alitalia, and the future scenario relating to the ownership of the Alitalia group.³⁴⁸ On June 25, 2008, the decision concluding the proceedings was eventually adopted and the structural undertakings originally imposed were modified into temporary behavioral measures. Pursuant to these remedies, for the 2008/2009 IATA Winter season and for the following four IATA seasons, Alitalia committed to reallocate the slots on the Linate-Lamezia Terme, Linate-Paris, and Linate-Bari³⁴⁹ routes gained in connection with the acquisition of Volare either on newly established routes or, in any event, on routes in which Alitalia held a market share below 60 percent.

A review and amendment of remedies by the Competition Authority may also occur following the appeal of the Competition Authority decision before the Administrative Courts. In *Motorola v. Autorità Garante della Concorrenza e del Mercato*,³⁵⁰ the Court agreed with the appellant's arguments that the remedies accompanying the clearance decision did not effectively address the competition concerns raised by the vertical integration resulting from the concentration. Ultimately, the Court partially annulled the clearance decision and referred the case back to the Competition Authority for a fresh assessment of the necessary remedies.³⁵¹ Remarkably, by referring the case back to the

³⁴⁸ Alitalia/Volare, 24 Oct. 2007, n. C7667B, Bulletin 40/2007.

³⁴⁹ Pursuant to the decision of 25 June 2008 and in light of the fact that in the last two IATA seasons the combined market share of Alitalia and Volare was slightly below 60%, the temporary slots reallocation on such route had to be implemented only if at any time during the course of the following four IATA seasons Alitalia's market share was found to be above 60%.

³⁵⁰ *Motorola v. Autorità Garante della Concorrenza e del Mercato*, 14 June 2004, n. 3685/2004 (Cons. stato).

³⁵¹ See *Società Esercizi Commerciali Industriali S.E.C.I.-CO.PRO.B.-Finbieticola/Eridania-Eribrand*, Bulletin 27/2005, where the Competition Authority ordered a modification of the By Laws of Italia

Competition Authority, the Court affirmed the Authority's power to reassess the impact of a concentration following a court judgment annulling the initial decision on the same transaction. This is an important development, because unlike the EU merger control system, the Competition Law establishes mandatory time limits for the review of a proposed concentration. In particular, as it does not contain a provision similar to Article 10(5) of the EC Merger Regulation,³⁵² one could have argued that the Competition Authority's power to assess a given transaction has already expired by the time a judgment annulling its initial decision is rendered.

12. Third-Party Rights

(a) Phase I

Third parties have no formal right to participate in a Phase I investigation. Before the Competition Authority's 2006 adoption of a notice according to which at least in certain cases a public communication of a new filing is given on the Competition Authority's website,³⁵³ interested third parties did not even have the right to be *informed* about the notification of a concentration. Indeed, until then the Competition Authority never provided public information regarding the receipt of the notification of a concentration. If they happened to be informed about the notified transaction through other means, interested third parties could spontaneously file written observations with the Competition Authority expressing their position on the notified concentration that the Competition Authority was free to take into account for purposes of its evaluation.

Today, in case of concentrations triggering both the turnover thresholds set forth in Section 16(1) of the Competition Law, the Competition Authority, after receiving a notification, posts a brief notice on its official website providing the essential information regarding the notified transaction and inviting interested third parties to submit comments within five days of publication of the notice. This change represents a valuable new factor in terms of enhanced procedural transparency and acknowledges the important role played by third parties who are generally able to provide from the outset of the proceedings precious "targeted" information relating to the notified transaction.

(b) Phase II

Zuccheri S.p.A. (one of the two entities into which Eridania had been split) as well as a decrease within 18 months of Finbieticola's shareholding into Italia Zuccheri from 49% to 30%.

³⁵² Article 10(5) provides: "[W]here the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit [...] the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to art. 6(1)."

³⁵³ *Comunicazione concernente alcuni aspetti procedurali relativi alle operazioni di concentrazione di cui alla Legge 10 ottobre 1990, n. 287*, 1 May 2006, Bulletin 22/2005, amended by the Competition Authority's resolution of 26 Sept. 2006, Bulletin 35-36/2006.

Articles 7(1)(b) and 16(1) of Decree No. 217/1998 set forth the conditions under which parties other than the notifying parties can formally participate in the proceedings. After publication of the decision to open a Phase II investigation, interested third parties may file a reasoned application to participate in the proceedings within ten days of the publication of the Competition Authority's decision in the Bulletin.³⁵⁴ Once third parties are admitted to participate to the investigation, they have a right to: (i) access the Authority's file (with the exception of confidential information) and (ii) produce written submissions, documents, arguments, and opinions. In addition, they may be heard by the Competition Authority's officials and, upon reasoned request, the Competition Authority may allow them to participate in the final oral hearing, if such a hearing is requested by the notifying parties.

13. Post-Closing Review

The Competition Authority's practice shows how it closely monitors, and enforces, the full implementation of its merger decisions and levies heavy fines in case of failure to comply with them.

For example, on July 29, 2004, the Competition Authority imposed a fine on Tetra Pak pursuant to Section 19(1) of the Competition Law for failure to comply with its 1993 decision prohibiting Tetra Pak's proposed acquisition of Italtapack.³⁵⁵ However, on appeal the TAR ascertained that Tetra Pak's control over Italtapack lasted for a period shorter than that established by the Competition Authority (until 1999 instead of 2001) and, accordingly, referred the case back to the Competition Authority for a new determination of the amount of the fine.³⁵⁶

14. Provisions Applicable to Special Sectors

(a) Banking Sector

Law No. 262 of December 28, 2005 repealed Section 20(2), (3), and (6) of the Competition Law, which entrusted to the Bank of Italy the power to enforce Italian

³⁵⁴ Decree No. 217/1998, §§ 7(1)(b) and 16(1).

³⁵⁵ Emilcarta/Agrifood Machinery, 29 July 2004, n. C812B, Bulletin 31/2004.

³⁵⁶ Tetra Pak International SA v. Autorità Garante della Concorrenza e del Mercato, 10 May 2005, n. 3572 (Trib. ammin. reg.). The TAR judgment has been appealed by both Tetra Pak and the Competition Authority before the Supreme Administrative Court. The appeal is still pending. Other cases where the Competition Authority levied a fine pursuant to § 19(1) of the Competition Law include Edizioni Holding/Autostrade-Concessioni e Costruzioni Autostrade, 10 Nov. 2004, n. C3818F, Bulletin 46/2004, in which Edizione Holding S.p.A. was fined €6.79 million for failure to comply with the conditions set forth in the Competition Authority's decisions of 2 Mar. 2000 and 13 Sept. 2001, in order to clear the acquisition of Autostrade-Concessioni e Costruzioni Autostrade S.p.A. Similarly, in Parmalat/Eurolat, 27 Jan. 2005, n. C3460D, Bulletin 6/2005, Parmalat was fined €11.18 million for failure to comply with the decision in Parmalat/Eurolat, n. C3460B, Bulletin 29-30/1999, in which the Competition Authority conditioned the acquisition of Cirio's milk production line of business on the implementation of a package of structural remedies.

competition rules in cases affecting core banking activities. As a consequence, the Bank of Italy has closed all its pending investigations and has dismantled its specialized Antitrust Unit and all merger cases concerning banks now fall within the exclusive and general jurisdiction of the Competition Authority. However, the Bank of Italy retains jurisdiction over the assessment of whether mergers in the banking sector comply with national prudential rules.

The amended Section 20 of the Competition Law provides that the Competition Authority and the Bank of Italy must include their respective assessment and resolutions (on competition law for the Competition Authority and prudential rules for the Bank of Italy) in a single decision. This joint decision must be issued within 60 days from notification, thus implicitly extending, with regard to banking cases, the normally applicable statutory 30-day Phase I duration.

This legislative reform coincided with a merger wave in the Italian financial sector, which caused a significant increase of the concentration level of the Italian banking sector. In particular, the two most important transactions concluded following the reform (namely, the *Intesa/Sanpaolo*³⁵⁷ and *Capitalia/Unicredito*³⁵⁸ mergers) led to the consolidation of four independent Italian banking groups into two new entities. These two main transactions were also accompanied by other important mergers.³⁵⁹

Remarkably, notwithstanding the considerable consolidated turnovers generated by the entities involved in the aforesaid transactions, the Competition Authority retained jurisdiction on all these cases pursuant to the so-called “2/3 rule” set forth in Article 1(2) of the EC Merger Regulation³⁶⁰ or following a referral pursuant to Article 4 of the EC Merger Regulation.

When assessing all these transactions, the Competition Authority paid particular attention to the implications of the network of structural, economic, and personal links traditionally characterizing the Italian financial sector. In particular, the Competition Authority has taken a very strict and critical attitude towards these links since it considers that they contribute to a large extent to the lack of an adequate level of competition in the Italian market.³⁶¹ Accordingly, in most of the above-mentioned mergers, the Competition

³⁵⁷ Banca Intesa/San Paolo IMI, 20 Dec. 2006, n. C8027, Bulletin 49/2006.

³⁵⁸ Unicredito Italiano/Capitalia, 18 Sept. 2007, n. C8660, Bulletin 33/2007.

³⁵⁹ Banche Popolari Unite-Banca Lombarda e Piemontese, 12 Apr. 2007, n. C8277, Bulletin 13/2007; Intesa SanPaolo/Cassa di Risparmio di Firenze, 17 Jan. 2008, n. C8939, Bulletin 2/2008; Banca Monte dei Paschi di Siena/Banca Antonveneta, 7 May 2008, n. C9182, Bulletin 18/2008.

³⁶⁰ Pursuant to this provision, a concentration that meets the EU turnover thresholds does not have “Community dimension” if “each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.”

³⁶¹ The Competition Authority’s negative and strict attitude towards these links has been formally confirmed in its 2006 Annual Report, available at http://www.agcm.it/legal_index.htm. During the presentation of the 2006 Annual Report, the Chairman of the Competition Authority emphasized the existence of “a strong network of structural links, participations and financing relationships among banks, as well as among banks and insurance companies” and affirmed that “this market equilibrium may lead to conflicts of interests and, in some cases, may represent a serious pathology. The convergence of interests between competing undertakings lessens competition.” Accordingly, the

Authority utilized its merger control powers and prerogatives with a view to dismantling these links, even by adopting a quite creative (and sometimes questionable) approach.

Another common feature of these banking cases is that the Competition Authority carried out its competitive assessment with an emphasis on the analysis of the concentration's effects at the local level. In many cases, the Competition Authority required the divestiture of numerous branches, according to a narrow delimitation of the relevant geographic markets, defined as being limited to the provincial level.

(b) Insurance Sector

The Competition Authority is responsible for the enforcement of the Competition law with respect to insurance companies.³⁶² It must request, however, the non-binding opinion of *ISVAP-Istituto per la Vigilanza sulle Assicurazioni Private e d'Interesse Collettivo* ("ISVAP"). The non-binding opinion must be issued by ISVAP within 30 days of receiving the documentation on which the proposed decision is based. Although the period in which the ISVAP must render its opinion suspends the statutory 30 day duration of Phase I, the Competition Authority may nonetheless adopt its decision if the ISVAP's opinion is not issued within 30 days.

The statutory 30 day duration of Phase I is suspended pending the issuance of ISVAP's opinion. Consequently, Phase I decisions may be adopted by the Competition Authority up to 30 days after the expiration of the statutory deadline, in order to account for the additional term applicable to ISVAP.

In *RC Auto*,³⁶³ the Supreme Administrative Court put forward a number of considerations regarding the nature of ISVAP's opinion as well as the relationship between the Competition Authority and ISVAP in the application of domestic competition rules within the insurance markets. First, the Supreme Administrative Court clarified that the interested undertaking has no right to express its view as to the content of ISVAP's opinion because the opinion is relevant only to the Competition Authority's decision-making process and, accordingly, does not form part of the fact-finding phase of the administrative procedure. Furthermore, the Supreme Administrative Court confirmed that the Competition Authority should not necessarily transmit its entire final draft decision to ISVAP, but rather only the essential elements on which it intends to base its future decision. Finally, the Court affirmed that the considerations expressed in ISVAP's opinions vary in authoritative weight depending on whether they refer to the characteristics and regulations specific to the insurance sector or to how domestic competition rules should apply in a particular case. In either case, the Competition Authority may depart from ISVAP's positions, but in the first case the rationale behind such departure should be particularly persuasive. In the same

Chairman communicated the Competition Authority's intention to initiate a sector investigation aimed at analyzing in more detail the drawbacks of these links. *See* IC 36, *La corporate governance di banche e assicurazioni*, 23 Dec. 2008, Bulletin 49/2008.

³⁶² *See* Competition Law, § 20(4).

³⁶³ *Autorità Garante della Concorrenza e del Mercato v. Assicurazioni Generali and other*, 23 Apr. 2002, n. 2199 (Cons. stato).

judgment, the Supreme Administrative Court confirmed that competition law is fully applicable to the insurance sector and that the function of ISVAP's opinions is merely to provide the Competition Authority with industry-specific information related to the insurance sector, which has been traditionally characterized by idiosyncratic mechanisms and extensive and specific regulation.

(c) Communications Sector

Within the media and communications sector the Authority is responsible for the enforcement of the Competition Law, though it must request the non-binding opinion of the Communications Authority (*Autorità per le garanzie nelle comunicazioni*). Pursuant to Article 1(6)(c)(11) of Law No. 249/1997, this non-binding opinion must be issued by the Communications Authority within 30 days of receiving the documentation on which the proposed decision is based. The Competition Authority, however, may adopt its decision if the opinion is not issued within this time limit. The Competition Authority reads this provision as providing that the 30-day time limit for the Communications Authority to issue its opinion must be added to the statutory time limits set forth in the Competition Law for the merger control procedure.

Law No. 249/1997 also sets forth specific rules preventing the creation of a “dominant position” in the media and telecommunications sector. Article 2(3) of Law No. 249/1997 provides for a broad notification obligation. Pursuant to this provision, undertakings active in the telecommunications and media sectors must notify the Competition and the Communications Authority about *all* agreements and concentrations to which they are party so that the agencies may engage in the “exercise of their respective functions.”

In two important judgments,³⁶⁴ the Supreme Administrative Court confirmed that the Competition Authority and the Communications Authority are entrusted with different yet complementary responsibilities—the protection of competition and the safeguard of pluralism of information, respectively. These judgments resolve the ambiguous language of Law No. 249/1997, by specifically addressing its reference to the notion of “dominant position”. They also confirmed that the diversity of the authorities’ respective goals justify the existence of two separate bodies of rules, each with distinct and specific evaluation criteria and each enforced by different authorities. Consequently, while the Competition Authority applies the typical merger control standard of analysis (*i.e.*, the assessment of whether the notified transaction results in the creation or strengthening of a dominant position likely to substantially reduce competition), the Communications Authority assesses whether the notified agreement or concentration creates a “dominant position,” as prohibited under Article 2 of Law No. 249/1997 (*i.e.*, a situation which is detrimental to the principle of pluralism of information).

³⁶⁴ *Autorità Garante della Concorrenza e del Mercato v. RAI-Radiotelevisione Italiana*, 5 Feb. 2002, n. 2869 (Cons. stato); *Telecom Italia v. Autorità per le Garanzie nelle Comunicazioni*, 12 Mar. 2001, n. 1852 (Cons. stato).

Thus far, the Competition Authority and the Communications Authority have adopted diverging decisions only in one instance. This occurred in connection with the acquisition by Seat Pagine Gialle, a subsidiary of the telecom incumbent operator Telecom Italia (“TI”), of sole control of Cecchi Gori Communications, an Italian free to air broadcaster. While the Competition Authority conditionally authorized the transaction pursuant to the Competition Law,³⁶⁵ the Communications Authority declared it incompatible with applicable regulations of the telecommunications, radio, and television sectors.³⁶⁶ In particular, the Communications Authority argued that Article 4(8) of Law No. 249/1997 prohibits the “exclusive licensee” providing public telecommunications services from also being active in the broadcast of radio or television programs. According to the Communications Authority, although TI was no longer an “exclusive licensee” following the liberalization of the telecommunications market, it still held a quasi-monopolistic position. Therefore, the prohibition should continue to apply. On appeal, the TAR annulled the Communications Authority’s decision, holding that as a result of the liberalization introduced in the 1990s, Telecom Italia could no longer be considered an “exclusive licensee” and that, accordingly, the prohibition contained in Article 4(8) was no longer applicable to this undertaking.³⁶⁷

(d) Film Distribution

Decree No. 28/2004 provides for special rules aimed at safeguarding competition in the film distribution industry. Pursuant to Article 26(1) of Decree No. 28/2004, an obligation to file a mandatory notification with the Authority is triggered when ad hoc thresholds are met. Specifically, notification is requested where, as a result of the concentration, the merged entity “holds directly or indirectly, more than 25 percent of: (1) the total sales deriving from film distribution in any of the twelve main cities for film distribution (Rome, Milan, Turin, Genoa, Padua, Bologna, Florence, Naples, Bari, Catania, Cagliari and Ancona); and (2) the number of movie theatres active in any such city.”

The Competition Authority assesses the impact of the notified transaction on the market based on the standard dominance test set forth in the Competition Law.

(e) General Economic Interest Services and Legal Monopolies

On August 28, 2008,³⁶⁸ the Italian Government amended the legal framework³⁶⁹ governing the special bankruptcy proceedings applicable to “large insolvent companies”

³⁶⁵ Seat Pagine Gialle/Cecchi Gori Communications, 23 Jan. 2001, n. C4158, Bulletin 3/2001.

³⁶⁶ Case 51/01/CONS, Seat Pagine Gialle/Cecchi Gori Communications, 19 Jan. 2001.

³⁶⁷ Telecom Italia v. Autorità per le Garanzie nelle Comunicazioni, 12 Mar. 2001, n. 1852 (Trib. ammin. reg.). The TAR’s judgment was subsequently upheld by the Supreme Administrative Court, with an even more elaborate reasoning. See Autorità per le Garanzie nelle Comunicazioni v. Telecom Italia, 26 June 2001, n. 3463 (Cons. stato).

³⁶⁸ Law No. 134 of 28 Aug. 2008.

³⁶⁹ Law No. 347 of 23 Dec. 2003, amended by Law No. 39 of 18 Feb. 2004. This body of rules, in essence, provides for the appointment by the government of an “extraordinary administrator” in

(*i.e.*, companies with no fewer than 500 employees and aggregate indebtedness of not less than €300 million). This reform sets forth a special merger control regime applicable to the review of concentrations involving large insolvent companies providing “essential public services,” which as a result are exempted from the need to obtain clearance from the Competition Authority under the applicable national merger control regime.³⁷⁰ Nonetheless, the parties involved remain subject to the obligation of notifying the proposed transaction to the Competition Authority along with a proposal of behavioral remedies aimed at preventing, following the implementation of the transaction, the application to consumers of higher prices or other unjustifiably unfair contractual conditions.

Within 30 calendar days from the date of notification, the Competition Authority, moving from the aforesaid proposal, adopts the final decision providing for the most suitable package of remedies and establishing the date (no sooner than three years) by which monopoly positions possibly resulting from the reviewed transaction must be terminated. Failure to comply with such behavioral remedies or time limit would lead to pecuniary sanctions pursuant to Section 19 of the Competition Law.

This particular regime was applied for the first time in the context of the consolidation of the two most important Italian airlines (Alitalia and Airone), under the control of Compagnia Aerea Italiana (CAI). The merged entity was found to be dominant on a considerable number of national routes and, thus, in a decision adopted on December 3, 2008,³⁷¹ the Competition Authority set forth the behavioral remedies—some of which had been offered at the outset by the notifying parties—aimed at preventing CAI from unlawfully exploiting its market power. In particular, the Competition Authority decided that for a period of three years from the commencement of CAI’s operations: (i) CAI shall establish a frequent flyer program ensuring a broad coverage of both national and international routes; (ii) CAI’s published fares shall be structured in such a way as to fulfill customers’ needs on all the market’s segments—in particular, discounted fares shall be adequately accessible throughout the year, on all routes, on every flight; (iii) in order to protect the most price-sensitive passengers’ segment, CAI shall guarantee availability on every flight of at least 10 percent of tickets at the lowest economy fare offered by the Alitalia and Airone groups on the same route during the previous corresponding IATA season; (iv) in order to ensure more user friendly and transparent service’s conditions, within one month from the commencement of the operations, CAI shall set up a free telephone line, a specific information area on its website, and a mobile phone message service aimed at managing service problems and providing passengers with real time

charge of managing the business of the debtor and formulating a plan of reorganization to be approved by the Government. Remarkably, prior to the reform, the aforesaid special proceedings were only available to companies pursuing a reorganization plan aimed at restructuring the company as a going concern. Now the reorganization plan entails the divestiture of the debtor’s assets to third party purchasers, whether as a whole or as one or more lines of business.

³⁷⁰ The provision applies to concentrations that do not fall within the exclusive jurisdiction of the European Commission under the EC Merger Regulation.

³⁷¹ Compagnia Aerea Italiana/Alitalia Linee Aeree Italiane-Airone, 3 Dec. 2008, n. C9812, Bulletin 46/2008.

information as regards possible flight cancellations or serious delays; and (v) in order to favor the improvement of services quality above and beyond the requirements provided for by EU regulations, CAI shall grant its customers compensatory payments in proportion to the cost of the ticket in case of flight cancellations/delays or failure to provide adequate rerouting (*i.e.*, arrival at destination with a delay exceeding two hours). Moreover, the Competition Authority acknowledged CAI's commitments to redistribute 50 slots from the Linate-Fiumicino route to other routes into and out of the Linate airport. The Competition Authority also expressly reserved its right to monitor and eventually intervene on possible abusive conduct carried out by airport management companies—in which CAI's shareholders hold an interest—aimed at discriminating against CAI's competitors. Finally, the Competition Authority set December 3, 2011, as the date before which any possible monopoly position resulting from the reviewed transaction should be terminated.

C. Abuse of Dominant Position

Section 3 of the Competition Law bans the abusive exploitation of a dominant position. In particular, it provides that:

“The abuse by one or more undertakings of a dominant position within the domestic market or in a substantial part of it is prohibited. It is also prohibited:

- (a) directly or indirectly to impose unjustifiable burdensome purchase or selling prices; or other contractual conditions;
- (b) to limit or restrict production, market outlets or market access, investment, technical development or technological progress;
- (c) to apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage;
- (d) to make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

An undertaking violates Section 3 only if it abuses its dominant position. Dominance itself is not an offense. Section 3 does not define the term abuse but lists examples of abusive conduct.³⁷² Therefore, the crucial interpretative challenge is to define the forms of conduct that pose unacceptable competitive dangers. Pursuant to Section 1(4) of the Competition Law, Section 3 must be interpreted according to the principles of EU competition law. To determine whether an undertaking has abused a dominant position, the Competition Authority must define the relevant market, whether the undertaking has a dominant position within the national market or in a substantial part of it, and whether such undertaking abused its dominance.

³⁷² Apc/Compag, 6 July 1992, n. A24, Bulletin 13/1992.

The first step in analyzing an abuse case is to identify the relevant product market. The Competition Authority recognizes the crucial importance of this step in ascertaining whether an undertaking holds a dominant position. The Competition Authority's approach to defining the product market is consistent with the Commission's approach and is based on the interchangeability/substitutability test.³⁷³

The Competition Authority typically analyses the demand-side substitutability and the cross-elasticity between products and services. Moreover, the Competition Authority considers the characteristics and degree of similarity between the products and services in question, the differences in the end use to which the goods are put, and the differences in price between these products and services.

For example, in *Marinzulich/Tirrenia*,³⁷⁴ the Competition Authority held that the regular service of maritime transport and the irregular service of maritime transport constitute separate product markets. The Competition Authority took into account economic factors, such as regularity of the service, predetermination of tariffs, and characteristics of the typical users of the type of service. In *3C Communications*,³⁷⁵ the Competition Authority identified the relevant product market on the basis of the means utilized to make payments to operate public phones.

In some cases, the Competition Authority considers the supply-side structure. For example, in *Goriziane/Fiat Ferroviaria*,³⁷⁶ the Competition Authority decided that the market for diesel engine overhaul services was characterized by high supply-side substitutability. Each operator who provided overhaul services for one type of engine was able to perform these services on any other type of engine.

The Competition Authority also uses the so-called SSNIP test ("small but significant and non transitory increase in prices"), and assesses the reactions of customers to a hypothetically small, but lasting change in prices.³⁷⁷

In *Veraldi/Alitalia*,³⁷⁸ the Competition Authority set forth a detailed assessment of the relevant market for air transport services. This assessment was consistent with the European Commission's well-established practice, as well as with the EU Courts' case law. The Competition Authority distinguished the supply of airline seats to tour operators for incorporation into package tours (charter flights) from sales to individuals (scheduled flights) on the ground that the provision of these services is not substitutable, as prices and purchase conditions are different. For scheduled flights, the Competition Authority stressed that a further distinction must be made according to routes because the service to a certain destination cannot be substituted with service to a different destination. More specifically, the substitutability between routes depends on a number of factors, such as the distance

³⁷³ See also Commission Notice on the definition of relevant market for the purposes of EU competition law, 1997 O.J. (C 372), ¶ 5.

³⁷⁴ *Marinzulich/Tirrenia*, 10 Apr. 1992, n. A13, Bulletin 7/1992.

³⁷⁵ *3C Communications*, 4 Mar. 1992, n. A5, Bulletin 5/1992; *Ducati/SIP*, 24 Mar. 1993, n. A27, Bulletin 6/1993.

³⁷⁶ *Goriziane/Fiat Ferroviaria*, 17 Dec. 1998, n. A51, Bulletin 51/1998.

³⁷⁷ *Consorzio Industrie Fiammiferi*, 13 July 2000, n. I318, Bulletin 28/2000.

³⁷⁸ *Veraldi/Alitalia*, 15 Nov. 2001, n. A306, Bulletin 46/2001.

between the point of origin and destination, the distance between the different airports situated on each end of the route, and the frequency of flights available on each route. Based on these factors, the Competition Authority concluded that each point-of-origin/point-of-destination pair constitutes a relevant market, and that such markets include a route or bundle of routes comprising: (i) the non-stop flights between the two airports concerned; (ii) non-stop flights between the airports whose respective catchment areas (geographical service area) significantly overlap with the catchment area of the airports concerned; and (iii) indirect flights between the airports concerned to the extent that these flights are substitutable for the non-stop flight.³⁷⁹

After determining the relevant product market, the Competition Authority must then determine the relevant geographic market. As defined by the Competition Authority, the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services, and in which the conditions of competition are sufficiently homogeneous.³⁸⁰

Factors considered in assessing the relevant geographic market include the nature and characteristics of the products or services, the existence of entry barriers or consumer preferences, appreciable differences in the undertakings' market share or substantial price differences between neighboring areas, transport costs, and increasing market size at the international level.³⁸¹

For example, in *Fornitura Pezzi di Ricambio Caldaie a Gas*,³⁸² the Competition Authority decided that the market for gas boilers had a national dimension since prices were uniform at the national level. On the other hand, the Competition Authority found that certain commodities, such as cement, are so expensive to transport that it would not be efficient to attempt to sell them on distant markets.³⁸³

In some cases, the Competition Authority defines the relevant geographic markets very narrowly. For example, the Competition Authority found that maritime transport services in the north and the south of Sardinia constituted two different markets.³⁸⁴

1. Definition of Dominance

(a) The Notion of Dominance

³⁷⁹ Substitutability as between direct routes and indirect routes depends on a number of factors, such as the flight time or the frequency and schedule of the routes.

³⁸⁰ In *Goriziane/Fiat Ferroviaria*, 17 Dec. 1998, n. A51, Bulletin 51/1998, the Competition Authority identified a local market for the supply of spare parts and overhaul services and a national market for rolling stocks.

³⁸¹ This factor has been considered in the sectors of electricity, gas, and postal services.

³⁸² *Fornitura Pezzi di Ricambio Caldaie a Gas*, 22 Apr. 1999, n. I115, Bulletin 16/1999.

³⁸³ For example, the Competition Authority has identified regional markets for cement because of high transport costs. See *Tekal/Italcementi*, 9 Feb. 1995, n. A76, Bulletin 6/1995.

³⁸⁴ *Marinzulich/Tirrenia*, 10 Apr. 1992, n. A13, Bulletin 7/1992.

Once the Competition Authority has defined the relevant market, it must analyze whether the undertaking has a dominant position in that market.

In line with the well-settled case law of the EU Courts,³⁸⁵ a dominant position is: “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.”³⁸⁶

Additionally, the Competition Authority has found that “such a position does not preclude some competition, which does occur where there is a monopoly or a quasimonopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on, the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.”³⁸⁷

Finally, consistent with EU practice,³⁸⁸ the Competition Authority has held that a dominant position derives from a combination of factors that, taken separately, are not necessarily determinative.³⁸⁹ Therefore, the Competition Authority carries out a comprehensive survey of the competitive conditions on the relevant market to determine whether an undertaking enjoys a dominant position.

In determining whether a firm enjoys market power and holds a dominant position, the following factors are taken into consideration: market shares, structure of the market, existence of barriers to entry, characteristics of the product, level of production, conduct, and performance of the undertaking concerned. Market share is a very important element in establishing dominance. An insignificant market share (7 to 8 percent) is an element which is contrary to the existence of a dominant position.³⁹⁰ The Competition Authority generally does, however, take into account other factors to determine whether dominance exists. Further, the Competition Authority, in accordance with the principles of EU competition law, has found that a decreasing market share does not necessarily negate the findings of the existence of a dominant position.³⁹¹

³⁸⁵ Case C-85/76, *Hoffman La Roche v. Commission*, 1979 E.C.R. 461; Case C-27/76, *United Brands v. Commission*, 1978 E.C.R. 207. Since the beginning of its activity, the Competition Authority has made reference to this notion in all its decisions concerning abuse of dominant position.

³⁸⁶ *See, e.g.*, *Marinzulich/Tirrenia*, 10 Apr. 1992, n. A13, Bulletin 7/1992; *Apca/Compag*, 6 July 1992, n. A24, Bulletin 13/1992.

³⁸⁷ *Id.*

³⁸⁸ In *United Brands*, 1978, E.C.R. 207, the ECJ held that “[i]n general a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative. In order to find out that an undertaking [holds] a dominant position on the relevant market it is necessary first of all to examine its structure and then the situation in the said market as far as competition is concerned.”

³⁸⁹ *See, e.g.*, *Marinzulich/Tirrenia*, 10 Apr. 1992, n. A13, Bulletin 7/1992; *Consorzio Risposta/Ente Poste Italiane*, 17 Dec. 1998, n. A218, Bulletin 51/1998.

³⁹⁰ *M.Y.C./S.I.A.E.*, 27 May 1992, n. A19, Bulletin 10/1992.

³⁹¹ *Tekal/Italcementi*, 9 Feb. 1995, n. A76, Bulletin 6/1995.

The Competition Authority also considers whether an undertaking enjoys exclusive rights. An exclusive license to provide certain services is evidence of a dominant position in the market for those services³⁹² and can be one of the elements used to determine whether a dominant position exists in a neighboring market.³⁹³ For example, the Competition Authority might consider the owner of the exclusive license for the provision of certain services dominant in the provision of other similar services because he benefits from the synergies of simultaneously providing the two types of services (e.g., use of same distribution network and use of the same brand name). The Competition Authority may consider vertical integration as one element in determining whether an undertaking enjoys a dominant position.³⁹⁴

The Competition Authority also examines the structure of the relevant market. For example, a dominant position can be identified in a market characterized by high barriers to entry.³⁹⁵ In the *Costituzione Rete Dealer GSM*,³⁹⁶ the Competition Authority took into consideration brand loyalty as an element indicating dominance. Similarly, in *Ente Poste Italiane*³⁹⁷ and *Associazione Nazionale Internet Providers*,³⁹⁸ the Competition Authority identified ownership of a network to which competitors required access an indicator of the existence of dominance.

³⁹² See *Aeroporti di Roma*, 4 Nov. 1999, n. A247, Bulletin 44/1999 (the exclusive dealer of handling services in Rome-Fiumicino airport was considered to be in a dominant position); *3C Communications*, 4 Mar. 1992, n. A5, Bulletin 5/1992 (the Competition Authority recognized the dominant position of SIP in the voice-telephone sector, because SIP was the exclusive dealer of that service); *UNAPACE/ENEL*, 9 Apr. 1999, n. A263, Bulletin 13-14/1999 (referred to a decree recognizing the existence of the economic power of ENEL in the electricity sector); *Consorzio Risposta/Ente Poste Italiane*, 17 Dec. 1998, n. A218, Bulletin 51/1998 (the Competition Authority recognized the dominant position of Poste in the universal postal service because Poste is entitled by law to be the exclusive dealer of the service).

³⁹³ *Costituzione Rete Dealer GSM*, 2 May 1996, n. I167, Bulletin 18/1996.

³⁹⁴ In *Associazione Nazionale Internet Providers*, 28 Jan. 2000, n. A255, Bulletin 4/2000, vertical integration and nationwide network services were the relevant factors considered when the Competition Authority found Telecom Italia, the incumbent Italian telecom operator, to be in a dominant position. This case also illustrated the importance of the connection between the upstream and downstream markets when evaluating an alleged dominant position. See also *Goriziane/Fiat Ferroviaria*, 17 Dec. 1998, n. A51, Bulletin 51/1998 (*Goriziane Ferroviaria* was found to enjoy a dominant position because it was active not only in the market of diesel engines, but also in the market of diesel engines' spare parts).

³⁹⁵ In *Marinzulich/Tirrenia*, 10 Apr. 1992, n. A13, Bulletin 7/1992, the relevant geographic market was defined as the two commercial routes Genova-Cagliari and Livorno-Cagliari. Tirrenia had a monopoly position on the first route, which was characterized by barriers to entry such as "reputation and costs of entering." The existence of barriers to entry was considered likely to confer Tirrenia an advantage on the other route, where Tirrenia operated in a competitive market. The Competition Authority reached this conclusion because Tirrenia could have subsidized the second route with the high profits reaped from the first route.

³⁹⁶ *Costituzione Rete Dealer GSM*, 2 May 1996, n. I167, Bulletin 18/1996.

³⁹⁷ *Consorzio Risposta/Ente Poste Italiane*, 17 Dec. 1998, n. A218, Bulletin 51/1998.

³⁹⁸ *Associazione Nazionale Internet Providers*, 28 Jan. 2000, n. A255, Bulletin 4/2000.

Further, when a vendor cannot decline to offer a supplier's product without inflicting significant harm to its own business, this circumstance indicates that the supplier is in a dominant position. In *Assoviaggi/Alitalia*,³⁹⁹ the Competition Authority found that Alitalia's important position in the air transport services market made it an indispensable business partner for travel agents. Because sales of Alitalia tickets accounted for a very large proportion of Italian travel agencies' total turnover, no travel agent could decline to offer Alitalia tickets to its customers without incurring major damage to its business. Alitalia was therefore found to be in a dominant position as a purchaser in the Italian market for air travel agency services.

(b) Collective Dominance

The Competition Law prohibits the abuse "by one or more undertakings" of a "dominant position."⁴⁰⁰ Although the Competition Authority has not yet applied the concept of collective dominance in abuse of dominance cases, it is likely that it will follow EU competition law principles if the issue is brought before it. As discussed above, the Competition Authority has already applied the concept of "collective dominance" in merger cases.

In *Tele2/Tim-Vodafone-Wind*,⁴⁰¹ where the issue of a possible abuse of a collective dominant position was one of the concerns that initially prompted the opening of the investigation, the Competition Authority concluded that there was insufficient evidence to demonstrate a collective abuse of dominant position held by Telecom Italia (TI), Vodafone, and Wind on the wholesale market for the access to mobile network infrastructures. The Competition Authority considered that their own networks sustained different maintenance costs (the costs of Wind's network were approximately 10 percent higher than those of TI and Vodafone, because Wind had different transmission frequencies). This aspect eliminated potential incentives to engage in collusive conduct. Since the involved undertakings were all vertically integrated, the Competition Authority analyzed also the downstream retail market of the final mobile services. It noticed that the market shares of TI, Vodafone, and Wind were substantially different, being approximately 42 percent, 35 percent, and 15 percent, respectively. The lack of symmetry between these operators would not facilitate a tacit coordination. Finally, the Competition Authority considered that the growing market share of the fourth operator, H3G (approximately 9 percent), had the effect of increasing the competitiveness of the commercial strategies of the undertakings involved in the proceedings.

2. Abuse Behavior - General Notions

³⁹⁹ *Assoviaggi/Alitalia*, 27 June 2001, n. A291, Bulletin 26/2001.

⁴⁰⁰ Competition Law, § 3.

⁴⁰¹ *Tele2/Tim-Vodafone-Wind*, 24 May 2007, n. A357, Bulletin 20/2007 (concluding proceedings against Vodafone); *Tele2/Tim-Vodafone-Wind*, 3 Aug. 2007, Bulletin 29/2007 (concluding proceedings against TI and Wind).

An undertaking will be found in violation of Section 3 of the Competition Law only if it has abused its dominant position. As noted above, under Italian Competition Law (and in line with EU competition law) dominance per se is not an offense. Conduct that could be considered an abuse if engaged in by a dominant undertaking might not constitute an abuse if engaged in by a non-dominant undertaking. Indeed, an undertaking in a dominant position has a special responsibility to avoid impairing undistorted competition in the relevant market.⁴⁰² This principle does not imply that it cannot implement its own commercial policy, compete on the market, and achieve further growth through legitimate means. For example, in *Associazione Consumatori Utenti v. Alitalia*,⁴⁰³ the Competition Authority stated that “an undertaking that is in a dominant position cannot disentitle itself from protecting its own commercial interests if they are attacked, and that such an undertaking must be afforded the right to take such reasonable steps as it deems appropriate to protect its said interests; such behavior cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.” Section 3 of the Competition Law lists examples of abusive conduct, but does not define the term abuse.⁴⁰⁴ The definition, therefore, must be deduced from the relevant EU and Italian case law.

Abusive practices include both exclusionary and exploitative acts.

In accordance with EU competition law, the Competition Authority considers that the intent of the dominant undertaking to gain a competitive or economic advantage is not relevant to a finding of anticompetitive behavior. The intent of the party, however, is taken into account by the Competition Authority as evidence that the behavior is part of a plan aimed at outstaying its competitors in the market⁴⁰⁵ and as an element that is useful to determine the gravity of the conduct that is in turn relevant to set the amount of the fine which is imposed on the dominant undertaking.⁴⁰⁶ Moreover, the abusive behavior is considered unlawful only if it has the effect of hindering the (limited) level of competition still existing in the market or the growth of that competition.⁴⁰⁷

⁴⁰² Apc/Compag, 6 July 1992, n. A24, Bulletin 13/1992; Ciba Gergy/Pioneer, 29 July 1996, n. A124, Bulletin 31/1996; Consorzio Risposta/Ente Poste Italiane, 17 Dec. 1998, n. A218, Bulletin 51/1998; SNAM/Tariffe di vettoriamento, 28 Feb. 1992, n. A221, Bulletin 8/1999.

⁴⁰³ Associazione Consumatori Utenti/Alitalia, 11 Nov. 1996, n. A102, Bulletin 45/1996.

⁴⁰⁴ Apc/Compag, 6 July 1992, n. A24, Bulletin 13/1992.

⁴⁰⁵ Tekal/Italcementi, 9 Feb. 1995, n. A76, Bulletin 6/1995.

⁴⁰⁶ SNAM/Tariffe di vettoriamento, 28 Feb. 1992, n. A221, Bulletin 8/1999.

⁴⁰⁷ *BMG e Ricordi S.p.A. v. Autorità Garante della Concorrenza e del Mercato*, 15 Apr. 1999, n. 873 (Trib. ammin. reg.); *Federazione Nazionale Spedizionieri v. Autorità Garante della Concorrenza e del Mercato*, 6 June 1998, 1879 (Trib. ammin. reg.). As to the appreciability of the effects, in *Ciba-Geigy/Pioneer*, 29 July 1996, n. A124, Bulletin 31/1996, the Competition Authority did not find Pioneer in violation of the Competition Law since loyalty bonuses were granted very rarely. In the same case, referring to well-established EU case law, the Competition Authority found that “the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance

Finally, conduct by a dominant firm violates Section 3 only if it cannot be objectively justified. Conduct leading to cost reduction has been found to be objectively justified and, thus, not abusive under Competition law. A typical example of such competitive behavior is the grant of quantity rebates by a dominant undertaking.⁴⁰⁸

Cases assessed by the Competition Authority in recent years encompass various types of abusive conducts of dominant undertakings. For this reason, it is difficult to treat them under a single category of abuse. Moreover, relying on the non-exhaustive nature of the list of conducts mentioned in Section 3 of the Competition Law, a number of conducts sanctioned as abusive cannot be reconciled within any traditional categories of abuse. However, except for a few cases in which the Competition Authority seemed to endorse a particularly severe and, to some extent, “creative” approach, the Italian precedents are, from a substantive standpoint, fully consistent with the EU practice and case law.

It is also important to highlight that the Competition Authority closed a relevant number of cases concerning alleged abuses of dominant position accepting, and making binding, commitments proposed by the undertakings involved. This trend, which started even as of the entry into force of Section 14-*ter* of the Competition Law, shows the Competition Authority’s willingness to rely intensively upon the commitments procedure in the context of abuse of dominance cases. The Competition Authority has applied this procedure in both exclusionary and discriminatory abuse cases. Particularly, from the entering into force of Section 14-*ter* of the Competition Law until December 1, 2008, the Competition Authority levied fines in only three cases involving abuse of dominant position, while in twelve cases it accepted their commitments, therefore closing proceedings without imposing any fine.

In recent years, the Administrative Courts adopted a number of judgments addressing various issues that are relevant for the concept of abuse of dominance.

In Enel Trade-Clienti Idonei,⁴⁰⁹ the TAR clarified that, in order to establish an abuse of dominance, it is sufficient to demonstrate a potential prejudice to competition, and it is not necessary to prove that the conduct had concrete anticompetitive effects. The latter, on the contrary, are relevant as regards the amount of the fine to be levied. In this context, the TAR also affirmed that neither the negotiation of the clauses with the counterpart, nor their consistency with the provisions of the Italian Civil Code, were elements sufficient to exclude the unlawfulness of the conduct.

In *Comportamenti abusivi di Telecom Italia*,⁴¹⁰ the Competition Authority found that Telecom Italia (TI) abused its dominant position in the Italian markets for telecommunication services to business customers. The illegal conduct encompassed the following activities: (i) use of exclusivity provisions, “English clauses” (which allowed TI to

of the degree of competition still existing in the market or the growth of that competition”. *See also* Tekal/Italcementi, 9 Feb. 1995, n. A76, Bulletin 6/1995.

⁴⁰⁸ Cesare Fremura/Ferrovie dello Stato, 23 July 1993, n. A35, Bulletin 18-19/1993.

⁴⁰⁹ Enel S.p.A. v. Autorità Garante della Concorrenza e del Mercato, 20 Oct. 2006, n. 10678 (Trib. ammin. reg.). *See also* Aeroporto Guglielmo Marco di Bologna S.p.A. v. Autorità Garante della Concorrenza e del Mercato and Aviapartner S.p.A., 30 Aug. 2006, n. 7807 (Trib. ammin. reg.).

⁴¹⁰ Comportamenti abusivi di Telecom Italia, 16 Nov. 2004, n. A351, Bulletin 47/2004.

realign its offer to the most favorable competing offer),⁴¹¹ fidelity rebates and discounts in contracts with large business customers, with the aim of hindering the entry of newcomers into the market; and (ii) practices relating to price squeezing with respect to contracts concluded by TI with both large and small business customers.

TI challenged the decision before the TAR,⁴¹² which reversed the Competition Authority's decision for lack of investigation. In particular, the TAR stated that, in order to assess whether the exclusionary clauses at stake constituted an abuse of dominant position, the Competition Authority should have considered that these clauses had been inserted in the contracts upon request of, and after negotiation with, large business customers and not unilaterally imposed by TI. The subsequent judgment of the Supreme Administrative Court,⁴¹³ however, reversed this finding. The Supreme Administrative Court held that the acceptance of, or even the request for, such conditions and terms by customers, in fact, could not exclude or mitigate TI's liability for its abusive conducts.⁴¹⁴ The TAR had also found that the Competition Authority had failed to take into due account the circumstance that clauses inserted in the contracts entered between TI and its costumers had been previously approved by the Communications Authority. The Supreme Administrative Court reversed the TAR judgment on this point as well, stating that the Communications Authority's prior review could not bar the Competition Authority from establishing an abuse of dominant position. However, the Supreme Administrative Court found that, in light of this circumstance, TI's conduct could not be deemed an "intentional infringement." Accordingly, TI's conduct was not be classified as a serious breach of Competition Law and, therefore, a mere warning, rather than a pecuniary sanction, should have been imposed.⁴¹⁵

⁴¹¹ An "English clause" in supply contracts allow the purchaser to switch suppliers if a supplier is able to offer more favorable terms provided that the dominant original supplier is not willing to match such terms. The presence of this type of clause has been held to be an abuse of a dominant position since it could have the effect of preventing suppliers other than the dominant supplier from attracting customers through a more advantageous offer unless the dominant supplier decides not to match it. In UNAPACE/ENEL, 9 Apr. 1999, n. A263, Bulletin 13-14/1999, the Competition Authority found that the incumbent Italian electricity supplier infringed the Competition Law by using an English clause, with the effect of impeding the development of competition in a newly liberalized market.

⁴¹² Telecom Italia S.p.A. v. Autorità Garante della Concorrenza e del Mercato, 11 May 2005, n. 3655 (Trib. ammin. reg.).

⁴¹³ Telecom Italia S.p.A. v. Autorità Garante della Concorrenza e del Mercato, 10 Mar. 2006, n. 1271 (Cons. stato).

⁴¹⁴ This finding is consistent with the case law of the European Court of Justice, pursuant to which exclusivity provisions capable of foreclosing competition in the relevant market are not rendered legitimate by the circumstance that they are willingly accepted or even requested by the customers of the dominant undertaking. *See, e.g.*, Case 85/76, Hoffmann-La Roche v. Commission, 1979 E.C.R. 461.

⁴¹⁵ Pursuant to § 15 of the Competition Law, the Competition Authority can impose fines only with respect to those infringements that can be classified as "serious."

(a) Exclusive Dealing/Single Branding

The imposition of exclusive dealing obligations by an undertaking in a dominant position may constitute an abuse of that position under Section 3 when the conduct has the effect of significantly foreclosing market access to competitors.

In *Costituzione Rete Dealer GSM*,⁴¹⁶ the Competition Authority disallowed the distribution system of the dominant mobile telecommunications operator. The Competition Authority found that the system foreclosed the market for the sale of mobile phone services to the detriment of competitors. The dealers were compelled to sell subscriptions only for the services of the dominant operator. If the distributor did not comply, the dominant operator imposed penalties. The Competition Authority found that the dominant operator signed contracts with the majority of the biggest distributors active in the market and that, as a result of the distribution system, its competitors' access to that market was hindered.

In *Ais/Ati-Italkali*,⁴¹⁷ the Competition Authority found that Ais, the dominant Italian supplier of salt, abused its dominant position by imposing on all its customers an exclusive purchasing obligation coupled with the threat that supplies would be withheld if the customer did not comply. The Competition Authority found that such arrangements prevented customers from satisfying their requirements from other sources and prevented the dominant firm's competitors from having access to such customers.

In *Diritti calcistici*,⁴¹⁸ the Competition Authority found that Mediaset, the main Italian TV operator, violated Article 102 TFEU on the market for the sale of TV advertising lots. In 2004, Mediaset had concluded with the major Italian soccer clubs various contracts concerning the broadcasting rights of their *Serie A* (the main Italian soccer league) home matches for the 2004-2007 seasons. Moreover, Mediaset had negotiated with the same clubs exclusive preemption rights for the transmission of their matches through all platforms (including Internet, mobile phones, Digital Terrestrial Television DTT, satellite, and other future potential platforms) from 2007 until 2016. More specifically, through exclusivity and "English" clauses and preemption rights Mediaset had rendered de facto unavailable for a long period of time relevant TV contents for its competitors. In the Competition Authority's view the purchase of broadcasting rights of soccer matches, which in Italy attract a vast audience, had to be considered as a way to increase the sale of advertising lots. In the course of the proceedings, Mediaset sold the broadcasting rights via satellite to Sky Italia and committed itself to retain the exclusive rights only for the DTT platform, thus making available to other TV operators the broadcasting rights via all the other platforms. Mediaset also reduced the duration of the preemption rights from 2016 to 2009.

The Competition Authority deemed those commitments satisfactory and, consequently, while maintaining that Mediaset had violated Article 102 TFEU, closed the procedure

⁴¹⁶ *Costituzione Rete Dealer GSM*, 2 May 1996, n. A156, Bulletin 18/1996.

⁴¹⁷ *A.I.S./A.T.I./Italkali*, 11 Feb. 1994, n. I65, Bulletin 37/1993.

⁴¹⁸ *Diritti calcistici*, 28 June 2006, n. A362, Bulletin 26/2006.

without imposing any fine. Notably, Section 14-ter of the Competition Law (*i.e.*, the provision which now governs the commitment procedure) was not yet in force at the time of the adoption of this decision. This explains why the Competition Authority, notwithstanding its favorable assessment of the commitments offered by Mediaset, formally ascertained the latter's infringement of the Competition Law (Section 14-ter now specifically sets forth that, after assessing the suitability of the commitments, the Competition Authority may make them binding on the undertakings concerned and terminate the proceedings *without ascertaining any infringement*).

(b) Tied Selling & Bundling

Section 3 prohibits conduct by an undertaking in a dominant position in the market for a particular product or service (the tying product or service) from conditioning the sale of that product or service upon the purchase of another product or service (the tied product or service). When a dominant undertaking engages in this type of behavior, it forces its customers to buy two independent products or services which, by their nature or according to commercial usage, have no connection.⁴¹⁹ Tying has been found to be abusive even though there was a nexus in commercial usage or there were natural links between the two products. In *Albacom Servizio Executive*,⁴²⁰ the Competition Authority found that the incumbent telecommunication operator infringed Section 3 of the Competition Law by making certain rebates on the price of a non-liberalized service conditional upon attaining certain traffic volumes in a liberalized service.⁴²¹

(c) Rebates

(i) Quantity Rebates

Rebates do not infringe the Competition Law when they are objective discounts based on volume of products purchased and when they are applied in a transparent manner by the supplier to all actual or potential customers. These rebates are generally deemed to be objectively justified when they are likely to reflect cost savings (e.g. reduction in transport costs for the supplier), are related to economies of scale (*e.g.*, lower overheads per unit on larger orders), or have another commercial justification.⁴²² However, the granting of quantity rebates, in the absence of any objective economic justification, could amount to an anticompetitive and discriminatory practice in violation of Section 3. In *Fremura/Ferrovie*

⁴¹⁹ Competition Law, § 4(d).

⁴²⁰ *Albacom Servizio Executive*, 29 May 1997, n. A156, Bulletin 22/1997.

⁴²¹ Liberalized services are those services such as transport, energy, postal services and telecommunications, which, after being once exclusively provided by national bodies in a monopoly context, are now opened up to competition, following the adoption of specific national acts based on the relevant EU legislation. The opening up of such markets requires additional regulation to ensure that public services continue to be provided and that the consumer is not adversely affected.

⁴²² *Id.*

*dello Stato*⁴²³ and *Infocamere/Cerved*,⁴²⁴ the Competition Authority held that certain discount systems infringed the Competition Law since the thresholds to obtain the discounts were so high that the only companies that could benefit from the discounts had economic links with the undertaking in the dominant position.

(ii) Loyalty Rebates

Loyalty or fidelity rebates are discounts conditioned upon the customer obtaining all or most of its requirements from a dominant supplier.⁴²⁵ These discounts operate as an incentive for the purchaser to increase its purchases from the dominant supplier to the exclusion of rival suppliers. Purchasers become linked to suppliers and rival suppliers are denied sales opportunities. The Competition Authority has found fidelity rebates contrary to a system of workable competition because they have two main effects: discrimination against certain customers and foreclosure of market access.⁴²⁶

In *Marinzulich/Tirrenia*,⁴²⁷ the Competition Authority deemed unlawful a dominant undertaking's proposal to grant discounts to customers who used only the undertaking's vessels. The same reasoning was followed by the Competition Authority in *Pozzuoli Ferries/Gruppo Lauro*.⁴²⁸ Further, the Competition Authority held that Aeroporti di Roma (AR) operated a system of discounts on its ground-handling services that was likely to hinder competitors' access to the recently liberalized market for these services.⁴²⁹ The Authority found AR's discount system objectionable in two areas. First, the discounts were based on the total sales of all of AR's ground-handling services to an air carrier. As a result, an air carrier would have an incentive to retain AR to handle the entire range of its needs for ground handling services in order to obtain the best discount rate. Second, AR offered discounts in multi-year contracts and tied them to the length of the contract, with the discount rate increasing for each additional year. Thus, even though such contracts would give air carriers the right to withdraw, the discount system would give them an incentive to stay with AR in order to obtain the higher discounts.

⁴²³ *Fremura/Ferrovie dello Stato*, 24 Feb. 2000, n. A227, Bulletin 8/2000.

⁴²⁴ *Infocamere/Cerved*, 6 Nov. 1997, n. A129, Bulletin 45/1997.

⁴²⁵ The extent of the requirements depends on a case-by-case analysis.

⁴²⁶ In *Ciba-Geigy/Pioneer*, 29 July 1996, n. A124, Bulletin 31/1996, the dominant firm abused its position on the market by removing or restricting the buyer's freedom to choose his sources of supply or by barring competitors from access to the market.

⁴²⁷ *Marinzulich/Tirrenia*, 10 Apr. 1992, n. A13, Bulletin 7/1992.

⁴²⁸ *Pozzuoli Ferries/Gruppo Lauro*, 19 Oct. 1994, n. A49, Bulletin 42/1994. In this case, Group Lauro, the dominant operator in the Napoli-Ischia ferries routes, granted travel agencies very favorable prices on the condition that they dealt exclusively with the companies in the group. The abusive nature of this conduct was not abated by the fact that discounts were granted even when the agencies did not comply with their obligation. The Competition Authority made clear that "the fact that in certain cases the rebate was granted despite the lack of fidelity on the part of the customers does not change the fact that the threat of its discontinuance or the mere risk of it being discontinued prevented customers from getting supplies from other sources."

⁴²⁹ *Aeroporti di Roma/Tariffe del Groundhandling*, 20 Sept. 2000, n. A247, Bulletin 38/2000.

(iii) Target Rebates

Finally, a dominant undertaking may violate Section 3 of the Competition Law if it grants rebates based on whether the customer reaches a specified sales target. The effect of that discount system is to induce the customer to acquire larger quantities from the dominant undertaking.⁴³⁰ This method of calculating rebates differs from quantitative rebates in that target rebates are not dependent on quantities fixed objectively and applicable to all purchasers but are based on case-by-case estimates of the individual customer's requirements. Target rebates can be regarded as an abusive conduct since the supplier's terms exert on the customers a pressure to reach the targets, that has foreclosing effects.

In *Assoviaggi/Alitalia*,⁴³¹ Alitalia was found to abuse its dominant position as a purchaser in the Italian market for air travel agency services by virtue of its tying commissions to travel agents to sales targets at a level equal to or higher than their sales of Alitalia tickets in the previous year. Consistent with established case law of EU Courts,⁴³² this rebate scheme was considered abusive because it gave travel agents a strong incentive to sell Alitalia tickets instead of those of other airlines, thus creating an artificial barrier-to-entry for Alitalia's competitors in the air transport market.

(d) Refusal to Deal/Essential Facilities

Section 3 of the Competition Law prohibits refusals to deal by a dominant undertaking not only when it harms consumers or competitors, but also when it substantially weakens competition in the relevant market and is not objectively justified. Refusal to deal comprises a considerable range of practices, including the refusal to supply products, the refusal to provide services, the refusal to provide information, and the refusal to grant access to an essential facility.

Other practices such as refusal to begin negotiations, refusal to renew a contract, or even unilateral termination of a contract are also considered instances of refusal to deal. This conduct infringes the Competition Law only when it weakens competition in the market where the dominant undertaking operates or in a different market.

⁴³⁰ The Competition Authority considered this type of behavior in *Tekal/Italcementi*, 9 Feb. 1995, n. A76, Bulletin 6/1995. In that case, the dominant producer had set targets and offered an additional discount for each ton purchased beyond and over the target. It also set a penalty, equal to or even higher than the discount, for each ton that the client did not buy to reach the target. The Competition Authority found that this system had the same result as a fidelity rebate scheme. Even if, in practice, Italcementi never applied the penalties and, by contrast, often granted the discounts even when the targets were not passed, the Competition Authority held that the mere threat of denying the discount was sufficient to dissuade the clients from buying the products from Italcementi's competitors.

⁴³¹ *Assoviaggi/Alitalia*, 27 June 2001, n. A291, Bulletin 26/2001.

⁴³² See, e.g., Commission Decision of 14 July 1999, Case Comp IV/D-2/34.780, *Virgin/British Airways*, 2000 O.J. (L 30) 1.

Additionally, a refusal to deal by a dominant undertaking cannot be an abuse under Section 3 if it is objectively justified. This is true when the dominant undertaking does not have enough capacity to satisfy its own needs, the customer is insolvent, or the reputation of the dominant undertaking is at risk.⁴³³

(i) Refusal to Supply

The Competition Authority has applied the principles mentioned above in a number of cases.⁴³⁴ For example, in *Goriziane/Fiat Ferroviaria*,⁴³⁵ the Competition Authority found that Fiat Ferroviaria (FF), the dominant firm in the markets for FIAT/IVECO diesel locomotives, locomotive engines, and spare parts infringed the Competition Law by refusing to supply original spare parts to its customers who were, at the same time, competitors on the related market for locomotive engine maintenance and servicing. The supply of these spare parts was one of the essential requirements for participating in a public tender. The Competition Authority found that FF's behavior was not objectively justified and had the effect of impeding the development of competition in a new market by reserving the market to FF itself.⁴³⁶ Refusal to supply a new client can also be an abuse of a dominant position.⁴³⁷

The imposition of certain conditions by a dominant undertaking before granting access to a service might have the same effect as an outright refusal to deal, and, therefore, can be considered unlawful. In *Infocamere/Cerved*,⁴³⁸ the Competition Authority found a dominant undertaking, Infocamere, in violation of the Competition Law because it conditioned the access to its database, *inter alia*, upon the customers having capital stock of ITL 5 billion (approximately € 2.5 million). The Competition Authority decided that the requirement prevented many operators from gaining access to information that was necessary for them to compete in the market.

However, it is worth noting that, in a ruling annulling a decision in which the Competition Authority held that Otis/Ceam, Kone, and Schindler had abused their dominant positions in the markets for original spare parts for their respective elevators, the TAR held

⁴³³ See, e.g., *SNAM/Tariffe di vettoriamiento*, 28 Feb. 1999, n. A221, Bulletin 8/1999.

⁴³⁴ *Telsystem/Sip*, 10 Jan. 1995, n. A71, Bulletin 1-2/1995; *Sign/Stet-Sip*, 27 Apr. 1995, n. A65, Bulletin 17/1995; *De Montis Catering Roma/Aeroporti Roma*, 2 Mar. 1995, n. A61, Bulletin 91/1995; *Consorzio per il nucleo di industrializzazione Campobasso-Boiano/Società Gasdotti del Mezzogiorno*, 3 July 1997, n. A110, Bulletin 27/1997; *Goriziane/Fiat Ferroviaria*, 17 Dec. 1998, n. A51, Bulletin 51/1998.

⁴³⁵ *Goriziane/Fiat Ferroviaria*, 17 Dec. 1998, n. A51, Bulletin 51/1998.

⁴³⁶ The Competition Authority's decisional practice makes extensive reference to the European case law. Case C-6-7/73, *Commercial Solvents v. Commission*, 1974 E.C.R. 223; Case C-311/84, *Centre Belge d'Etudes De Marché-Télémarketing (CBEM) v. SA Compagnie Luxembourgeoise de Télédiffusion (CLT) and Information Publicité Benelux (IPB)*, 1985 E.C.R. 3261; Case C-241/91, *RTE and Independent Television Publications Ltd v. Commission*, 1991 E.C.R. 743.

⁴³⁷ Many cases of refusal to supply do not concern existing customers. See *Telsystem/Sip*, 10 Jan. 1995, n. A71, Bulletin 1-2/1995; *Consorzio per il nucleo di industrializzazione Campobasso-Boiano/Società Gasdotti del Mezzogiorno*, 3 July 1997, n. A110, Bulletin 27/1997.

⁴³⁸ *Infocamere/Cerved*, 6 Nov. 1997, n. A129, Bulletin 45/1997.

that the Competition Authority had applied the incorrect evidentiary standard by failing to establish a “solid and convincing” body of evidence.⁴³⁹ According to the TAR, evidence of a single refusal to supply by a subsidiary of one of the three groups involved in the investigation was insufficient, because a refusal to supply by a dominant firm is abusive only if such conduct is repeated and generalized and is thus capable of clearly proving the anticompetitive intent of the undertaking concerned.

(ii) Refusal to Grant Access to Essential Facility

Consistent with the principles of EU competition law, the Competition Authority defines an essential facility as “a facility or an infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means.”⁴⁴⁰ An undertaking that owns or controls such infrastructure and refuses to grant access to it, or grants access to it at discriminatory terms, without an objective justification, infringes Section 3 of the Competition Law.⁴⁴¹ To be characterized as an essential facility, access to the facility must be essential to operate in the relevant market. Additionally, there cannot be viable alternatives available or the possibility of duplication due to technical, legislative, and economic constraints.⁴⁴²

Refusal to grant access to an essential facility is not unlawful if the Competition Authority finds that there is an objective justification for the refusal. A refusal to grant access might be justified, for example, when the owner of the facility does not have enough capacity (capacity saturation), when the counterpart is insolvent or does not respect the contractual conditions, or when the undertaking requesting access does not have the technical or security requirements needed for it to have a secure access to the infrastructure. Conversely, lack of an unsatisfied demand in the downstream market is not an objective justification for such refusal.

In *Gestione e utilizzo della capacità di rigassificazione*,⁴⁴³ the Competition Authority opened proceedings against Eni in connection with an alleged violation of Article 102 TFEU

⁴³⁹ Otis v. Autorità Garante della Concorrenza e del Mercato, 21 Feb. 2001, n. 1371/2001 (Trib. ammin. reg.).

⁴⁴⁰ SNAM/Tariffe di vettoriamento, 28 Feb. 1999, n. A221, Bulletin 8/1999.

⁴⁴¹ 3C Communications, 4 Mar. 1992, n. A5, Bulletin 5/1992; IBAR/Aeroporti Roma, 17 Mar. 1993, n. A11, Bulletin 6/1993; IBAR/SEA, 16 Mar. 1994, n. A56, Bulletin 11/1994; Telsystem/Sip, 10 Jan. 1995, n. A71, Bulletin 1-2/1995; De Montis Catering/Aeroporti Roma, 2 Mar. 1995, n. A61, Bulletin 91/1995; Associazione Consumatori Utenti/Alitalia, 11 Nov. 1996, n. A102, Bulletin 45/1996; Albacom/Telecom Italia Circuiti Dedicati, 30 Oct. 1997, n. A178, Bulletin 4/1997.

⁴⁴² SNAM/Tariffe di vettoriamento, 28 Feb. 1999, n. A221, Bulletin 8/1999.

⁴⁴³ *Gestione ed utilizzo della capacità di rigassificazione*, 6 Mar. 2007, n. A371, Bulletin 8/2007. The Panigaglia plant is the sole Italian terminal where LNG can be regasified. The regasification service consists of the receipt, unloading, storage, and reconversion of LNG into natural gas, which is successively introduced in the national pipelines. The markets involved were indeed the markets for access to the continuous regasification capacity and for the supply of natural gas delivered in Italy. According to the Competition Authority, regasification terminals belong to a separate market from pipelines; for this reason, GNL Italia was a de facto monopolist on this market.

for potential abusive conduct in the continuous re-gasification services of Liquefied Natural Gas (LNG) at the Panigaglia terminal. This is the sole Italian terminal where LNG can be re-gasified. It was managed by GNL Italia, an Eni's subsidiary. The alleged abuses consisted of: (i) buying up by Eni, which transported natural gas in Italy through its subsidiary Snam Rete Gas, of the whole re-gasification capacity of the terminal, in order to prevent its competitors from using the infrastructure; and (ii) the discriminatory refusal of GNL Italia to grant access to the terminal to undertakings other than Eni, although it was aware that Eni would have not used the whole available capacity of the terminal. The Competition Authority deemed that this conduct, carried out by companies belonging to the same group, was capable of realizing an exclusionary strategy on the relevant market. In the course of the proceedings, Eni proposed a number of commitments, consisting of a gas release procedure, either through a bid or through pro-quota allocations. The Competition Authority deemed those commitments capable of removing all the anticompetitive aspects of the abusive conducts and closed proceedings without imposing any fine on the undertakings involved.

(iii) Other Types of Refusal

A refusal to renew a contract can amount to abusive conduct. In *Aeroporti Roma/Gruppo di Sicurezza*,⁴⁴⁴ the Competition Authority decided that Aeroporti Roma (AR), the company managing the airport services in the Rome airport, infringed the Competition Law by refusing to renew the rental contract for the premises from which its competitor operated to provide security services in the airport. The Competition Authority found that AR did not have any objective justification for this refusal and that its behavior was an attempt to remove the competitor from the market.

In *Eni-Trans Tunisian Pipeline*,⁴⁴⁵ the Competition Authority considered as an abuse of dominance the unreasonable termination of the "ship or pay" agreements signed by Eni's subsidiary, Trans Tunisian Pipeline Company (TTPC), with independent operators.

TTPC holds the exclusive transportation rights over gas pipelines that ship LNG from Tunisia and Algeria to Italy until 2019. In 2002, TTPC decided to increase its natural gas pipeline capacity by 6.5 million cubic meters and, therefore, it entered into agreements with seven shippers, whereby TTPC granted them additional pipeline capacity. Since at that time the capacity was overfilled, this increase represented the only opportunity for newcomers to enter the market for importing natural gas into Italy.

In order to limit TTPC's investment risk, the entry into force of these contracts was subjected to certain preliminary conditions and authorizations, to be fulfilled by the shippers. Since none of them met all the conditions by the agreed deadline, the latter was postponed by TTPC. Nevertheless, the shippers failed to fulfill the outstanding conditions by the second deadline. Thus, TTPC decided not only to terminate the contracts, but also to stop the expansion project of the pipeline.

⁴⁴⁴ *Aeroporti Roma/Gruppo di Sicurezza*, 17 Nov. 1993, n. A44, Bulletin 35/1993.

⁴⁴⁵ *Eni-Trans Tunisian Pipeline*, 15 Feb. 2006, n. A358, Bulletin 5/2006.

The Competition Authority acknowledged that the conditions imposed upon the shippers were legitimate in that they aimed at sharing the investment risk between TTPC and the shippers. However, in its view, taking into account the economic weight of the project, TTPC's refusal to grant a further extension for the shippers to satisfy the contractually agreed conditions was contrary to its economic interests. Indeed, had TTPC acted as an independent operator in the gas transportation market, it would have been profitable to pursue the pipeline extension, since it would have increased its transport capacity.

The Competition Authority found that the decision to stop the capacity increase of the pipeline had been imposed by the controlling company Eni, which feared an oversupply of natural gas in Italy. It also found that such decision was aimed at protecting Eni's dominant position in the downstream market for the wholesale supply of natural gas.

According to the Competition Authority, as a dominant undertaking, Eni had a special responsibility not to interfere with the business decisions of its subsidiary, which had already started an extension project of the Tunisian pipeline. For these reasons the Competition Authority imposed a fine of €290 million on Eni, the largest fine ever imposed upon a company by the Competition Authority.⁴⁴⁶ Moreover, Eni was obliged to grant 6.5 million cubic meters of the pipeline's transport capacity to third-party operators.

This decision was challenged before the TAR, which opined on the merits of the case only with respect to the amount of the sanction and remanded the case to the Competition Authority for its reduction. The TAR rejected all the other claims of Eni.⁴⁴⁷

In *Enel Distribuzione/Attivazione fornitura subordinata a pagamenti. Morosità Pregresse*,⁴⁴⁸ the Competition Authority found that Enel, through its subsidiary Enel Distribuzione, abused its dominant position on the markets for the distribution and the retail sale of electricity. In particular, Enel Distribuzione conditioned the conclusion of new supply contracts of electricity for domestic use to the payment of past arrearages relating to the same domestic connections. It was irrelevant whether the outstanding electricity bills referred to the same customer and/or to a former one having no relations with the new customer. In essence, to obtain the electricity supply a new customer was obliged either to pay the outstanding debts of a former customer for the only reason that they referred to the same domestic connection or to give evidence that the new customer had no relations with the former defaulting customer. The Competition Authority found that this requirement imposed unjustified and arbitrary economic burdens on customers in relation to a service of general interest.

⁴⁴⁶ Notably, the Competition Authority followed in this case the "intent test" doctrine, pursuant to which there is an abuse of dominant position when the objective of the undertaking that refuses to deal is to monopolize the market. Such conduct is deemed legal only if the undertaking has justifiable and legitimate business reasons.

⁴⁴⁷ *Eni S.p.A. v. Autorità Garante della Concorrenza e del Mercato*, 30 Mar. 2007, n. 2798 (Trib. ammin. reg.).

⁴⁴⁸ *Enel Distribuzione/Attivazione fornitura subordinata a pagamenti. Morosità Pregresse*, 18 Oct. 2007, Case A390, Bulletin 39/2007.

Following the opening of the proceedings and the adoption of interim measures obliging Enel to immediately modify its internal procedures, the latter proposed to the Competition Authority a number of commitments, consisting, *inter alia*, of a new determination and simplification of its internal procedures for the conclusion or the replacement of contracts relating to the supply of electricity and eliminating the requirement that a new customer demonstrates the absence of any relation with the former defaulting customer. Furthermore, the company also undertook to create a specific internal body in order to constantly verify the efficiency of its customer care and the implementation of these new procedures. Finally, Enel undertook to adopt “quick reimbursement” procedures for its customers to remedy possible inefficiencies or mistakes in the most appropriate way. The Competition Authority deemed those commitments capable of removing all the anticompetitive aspects of the abusive conducts and therefore closed the proceedings without imposing any fine on Enel.⁴⁴⁹

(e) Predatory Pricing

Predatory pricing is the commercial strategy by which a dominant firm first lowers its prices in order to force its rivals out of the market and, once the competitors are successfully ousted from the market, raises its prices and reaps the rewards of being the sole provider of the goods or services. This amounts to an abusive practice since it aimed at removing from the market a competitor who does not have sufficient financial resources to withstand sales below average variable costs for a long period.⁴⁵⁰

The Competition Authority issued its first finding of predatory pricing in 1995 in *Tekal/Italcementi*.⁴⁵¹ In accordance with EU competition law,⁴⁵² the Competition Authority held that: “the sale of concrete at prices below average variable costs for a long period of time by a dominant undertaking in the market has the effect of hindering access to the market by competitors and thus amounts to an abuse of the dominant position, pursuant to Section 3 of the Competition Law.”⁴⁵³ The Competition Authority found Italcementi’s conduct abusive although Italcementi was unable to recoup the losses it incurred by initially lowering its prices. This reasoning is similar to that in *Tetra Pak I*,⁴⁵⁴ where the Court of Justice stated that in any determination of whether conduct is abusive, it is not necessary to demonstrate conclusively that the predator will be able to raise its prices following the elimination of rivals. The fact that the predatory price is likely to eliminate the dominant firm’s rivals will suffice. This contrasts with U.S. case law, which requires a showing that

⁴⁴⁹ Notably, in proceedings regarding the same abuses on the market for the connection to the fixed telephone network, the Authority accepted the commitments proposed by Telecom Italia, consisting of measures similar than those proposed by Enel. *See* Morosità pregresse Telecom, 21 Aug. 2008, n. A398, Bulletin 32/2008.

⁴⁵⁰ *Tekal/Italcementi*, 9 Feb. 1995, n. A76, Bulletin 6/1995.

⁴⁵¹ *Id.*

⁴⁵² Case C-62/86, *AKZO Chemie BV v. Commission*, 1991 E.C.R. I-3359; Case T-83/91, *Tetra Pak International v. Commission*, 1994 E.C.R. II-755.

⁴⁵³ *Tekal/Italcementi*, 9 Feb. 1995, n. A76, Bulletin 6/1995.

⁴⁵⁴ Case C-334/96, *Tetra Pak v. Commission*, 1996 E.C.R. I-5951.

the dominant firm has a reasonable likelihood of recouping the losses it suffered by predation.⁴⁵⁵

In *Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana*,⁴⁵⁶ a landmark decision as regards predatory pricing, the Competition Authority modified its approach for assessing this type of conduct by dominant firms by applying recent American economic theories. Instead of relying on average variable costs, as it did in cases such as *Tekal*,⁴⁵⁷ the Competition Authority focused on long-run and short-run average incremental costs. More precisely, *Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana* provides the following principles: (i) a price is predatory if it is lower than the short-run average incremental cost; (ii) a price is not predatory if it is higher than the long-run average incremental cost; and (iii) if a price falls between the two costs, the assessment of whether it is predatory will include the competitive context of the dominant firm's behavior, and, in particular, evidence of the intent to eliminate a competitor.⁴⁵⁸ Ultimately, the Competition Authority found that the dominant firms charged prices below both their short-run and long-run incremental costs, and that the prices were therefore predatory.

In *Mercato del calcestruzzo cellulare autoclavato*,⁴⁵⁹ the company RDB was fined for predatory pricing conduct implemented on the market for autoclaved cellular concrete.⁴⁶⁰ In particular, the Competition Authority found that RDB's price strategy had the purpose to force its competitor Italgasbeton to exit the market. Recalling the well-established case law of the EU Courts,⁴⁶¹ the Competition Authority carried out an economic analysis to ascertain the relation between the prices adopted by RDB, the average avoidable costs, and the average total costs. The Competition Authority found that (i) a substantial number of sales were made at prices below the average total costs, and (ii) RDB's strategy could not be deemed as a general commercial policy since predatory pricing offers were more frequent in those geographic areas where a significant number of Italgasbeton's clients were located.

⁴⁵⁵ *Brook Group v. Brown & Williamson Tobacco*, 509 U.S. 940 (1993).

⁴⁵⁶ *Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana*, 17 Apr. 2002, n. A267, Bulletin 16/2002. The Competition Authority found that Tourist Ferry Boat and Caronte abused their dominant position on the ferry boat routes between Calabria and Messina (Sicily) by charging predatory prices in order to hinder access to the market by their competitor Diano, which had just entered that market.

⁴⁵⁷ *Tekal/Italcementi*, 9 Feb. 1995, n. A76, Bulletin 6/1995.

⁴⁵⁸ *Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana*, 17 Apr. 2002, n. A267, Bulletin 16/2002, ¶ 144.

⁴⁵⁹ *Mercato del calcestruzzo cellulare autoclavato*, 24 Oct. 2007, n. A372, Bulletin 40/2007.

⁴⁶⁰ *Mercato del calcestruzzo cellulare autoclavato*, 24 Oct. 2007, n. A372, Bulletin 40/2007. Autoclaved cellular concrete is a building material known as gasbeton and is deemed to be a strategic product for effective competition in the coming years since it enables relevant energy savings. In the same decision, the Competition Authority also fined RDB (together with Wella International) for a violation of Article 101 TFEU on the same market. The fine relating to the abuse of dominant position was upheld by the TAR in *Xella International GmbH and Others v. Autorità Garante della Concorrenza e del Mercato*, 26 June 2008, n. 6213 (Trib. ammin. reg.).

⁴⁶¹ *Case C-62/86, AKZO Chemie BV v. Commission*, 1991 E.C.R. I-3359; *Case T-340/03, France Télécom S.A. v. Commission*, 2007 E.C.R. II-107.

(f) Exploitative Conduct

(i) Excessive Pricing

Section 3 expressly provides that abuse may exist if an undertaking directly or indirectly imposes unfair selling or purchasing prices. Under both EU and Italian competition laws, prices charged by a dominant undertaking are abusive when they have no reasonable relation to the economic value of the product or service supplied.⁴⁶²

To assess the character of prices charged by a dominant undertaking, the Competition Authority engages in an in-depth cost analysis to determine whether the difference between the costs actually incurred and the price actually charged is excessive.⁴⁶³ If the analysis cannot be completed or is inconclusive, the Competition Authority compares the prices charged by the dominant undertaking with those charged by competitors for the same product or service in other markets.⁴⁶⁴ In *SNAM/Tariffe di Vettoriamento*,⁴⁶⁵ the Competition Authority held that:

“When an undertaking holding a dominant position imposes for its services fees which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In that case, it is for the undertaking in question to justify the difference by showing objective differences between the situation in the Member State concerned and the situation prevailing in all other Member States”.⁴⁶⁶

In other cases, the Competition Authority has applied both tests in its assessment of prices charged by the dominant undertaking.⁴⁶⁷

In *Veraldi/Alitalia*,⁴⁶⁸ the Authority’s investigation began in response to numerous complaints from passengers, consumers’ associations, and local authorities that fares on the Milan-Lamezia Terme route were unjustifiably higher than those charged on the comparable Milan–Reggio Calabria route. The Competition Authority conducted a two-stage analysis. First, it compared the conditions offered by Alitalia on the relevant route with those

⁴⁶² *SNAM/Tariffe di vettoriamento*, 28 Feb. 1999, n. A221, Bulletin 8/1999. In this decision, the Competition Authority quotes, at 199, the judgment of the ECJ of 13 November 1975, Case 26/75, *General Motors Continental N.V. v. Commission*, 1975 E.C.R. 1367.

⁴⁶³ *See, e.g.*, *IBAR/SEA*, 16 Mar. 1994, n. A56, Bulletin 11/1994.

⁴⁶⁴ *S.I.L.B./S.I.A.E.*, 28 July 1995, n. A48, Bulletin 30/1995.

⁴⁶⁵ *SNAM/Tariffe di vettoriamento*, 28 Feb. 1999, n. A221, Bulletin 8/1999.

⁴⁶⁶ *Id.* In this decision, the Competition Authority quoted, at ¶ 210, the judgment of the ECJ of 13 July 1989, *François Lucazeau and others v. Société des auteurs, compositeurs et éditeurs de musique (Sacem)*, Case 110-241-242/88, 1989 E.C.R. 2811.

⁴⁶⁷ *Ancic/Cerved*, 10 Apr. 1992, n. A221, Bulletin 7/1992.

⁴⁶⁸ *Alitalia/Veraldi*, 15 Nov. 2001, n. A306, Bulletin 46/2001.

available on a comparable route where Alitalia was subject to competitive constraints (*i.e.*, Milan–Reggio Calabria). This comparison showed that Alitalia’s revenue per passenger on the Milan–Lamezia Terme route was more than 50 percent higher than the revenue per passenger on the comparable route. The Competition Authority noted, however, that Alitalia always reported significant losses on the Milan–Reggio Calabria route and, thus, the fares charged on this route did not constitute a valid benchmark to assess the fairness of the prices on the dominated market.

In the second stage of the analysis, the Competition Authority compared Alitalia’s return per passenger on the relevant route with the cost of offering the service. The Competition Authority determined that Alitalia’s 32 percent profit margin on the route in 1999 and 31 percent profit margin in 2000 “did not unequivocally show any unreasonable disproportion between the price and the commercial value of the service provided.” In conclusion, the Competition Authority held that the evidence was not sufficient to demonstrate that Alitalia’s pricing policies on the Milan–Lamezia Terme route constituted an abuse of a dominant position. This decision suggests that it is particularly difficult to establish the existence of excessive pricing.

(ii) Price Discrimination

Price discrimination is regulated by Section 3, which prohibits the application of dissimilar conditions to equivalent transactions because it places one trading party at a competitive disadvantage.⁴⁶⁹

The essential elements of such abuse are (i) equivalence of the transactions and (ii) placement of the dominant undertaking’s trading parties at a competitive disadvantage. To assess whether the transactions are similar, it is necessary to examine the nature of the products or services concerned (*i.e.*, composition, quality, and variety).

In *Ancic/Cerved*,⁴⁷⁰ the Competition Authority found that the pricing policy applied by Cerved to its customers infringed Section 3. Cerved ran the only database containing all official information about Italian companies registered in the Italian Public Register. It offered different subscription fees to its customers for access to its database. These fees had no relation to the quantity of the service purchased. The Competition Authority pointed out that this pricing policy was not objectively justified and caused an alteration of the competitive dynamics in the downstream market where the customers operated.⁴⁷¹

In *Assoviaggi/Alitalia*,⁴⁷² the Authority found that Alitalia’s incentive schemes for travel agents were discriminatory because in some cases, different commissions were

⁴⁶⁹ Competition Law, § 3(c). *See* IBAR/Aeroporti Roma, 17 Mar. 1993, n. A11, Bulletin 6/1993. In this case, the Competition Authority found that Aeroporti di Roma, which was granted an exclusive concession for handling services in the Rome Airport, infringed the Competition Law by applying reduced tariffs for such services to only two air companies with no objective justification for the reduction.

⁴⁷⁰ *Ancic/Cerved*, 10 Apr. 1992, n. A221, Bulletin 7/1992.

⁴⁷¹ *Id.*

⁴⁷² *Assoviaggi/Alitalia*, 27 June 2001, n. A291, Bulletin 26/2001.

granted to travel agents for reaching similar sales targets. Thus, the agreements placed some travel agents at a competitive disadvantage relative to the others, without an acceptable justification.

(g) Other

Pursuant to Section 3 of the Competition Law, abuse may consist of conduct having the effect of limiting production, markets, or technical development to the detriment of consumers or competitors. This provision covers a wide range of practices, some of which are discussed below.

(i) Unfair Terms and Conditions

Section 3 prohibits the direct or indirect imposition of unfair trading conditions. The Competition Authority typically considers the effects of this conduct on both customers (unfairness) and competitors (foreclosure).⁴⁷³ An example of unfair trading conditions is the imposition of a contract clause whereby customers are prohibited from reselling products bought from a supplier. In *Ancic/Cerved*,⁴⁷⁴ the Competition Authority condemned Cerved, the dominant undertaking in the market for the provision of services concerning company information filed with the Public Register, for preventing its customers from reselling the information without added value. The Competition Authority found that Cerved's contractual prohibition was a conduct resulting in the elimination of competitors. The same type of anticompetitive clause has been condemned by the Competition Authority in *Ais v. Ati-Italkali*, a case concerning the industrial salt market.⁴⁷⁵

In *Autostrade/Carta prepagata Viacard*,⁴⁷⁶ the Competition Authority alleged an abuse of dominant position by Autostrade, the main Italian operator in the motorway sector, and its subsidiary Autostrade per l'Italia (ASPI). ASPI, the licensee for the construction and the maintenance of approximately 64 percent of the Italian motorway network, issues and manages a motorway's payment instrument toll called "Carta prepagata Viacard" (Viacard cards) which is the only electronic payment instrument for motorway tolls that does not require a bank account. The abusive conduct consisted in refusing to grant to customers the reimbursement of the remaining credit of these cards after their expiration. Following the opening of the investigations, ASPI offered to remove the expiration date from already issued and future Viacard cards and to properly advertise this decision through specific announcements in newspapers, on the Internet, and in the toll stations. The Competition Authority considered these commitments adequate and, therefore, closed the proceedings without imposing a fine.

⁴⁷³ In one case, the Competition Authority assessed the effects of the conduct towards the customers only. See *Viacard*, 25 July 1994, n. A68, Bulletin 30-31/1994.

⁴⁷⁴ *Ancic/Cerved*, 10 Apr. 1992, n. A221, Bulletin 7/1992.

⁴⁷⁵ *A.I.S./A.T.I./Italkali*, 11 Feb. 1994, n. I65, Bulletin 37/1993.

⁴⁷⁶ *Autostrade/Carta prepagata Viacard*, 26 July 2007, n. A382, Bulletin 28/2007.

(ii) Discrimination Other Than Price Discrimination

The Competition Authority has dealt with non-price discrimination in several cases.⁴⁷⁷ In *Unire*,⁴⁷⁸ the Competition Authority condemned Unire, a legal monopoly with the exclusive right to manage the horse-race betting business within and outside of the hippodromes. Unire licensed the business by private negotiation only to Spati S.p.A. This practice, according to the Competition Authority, had the effect of eliminating competition in a substantial part of the relevant market and discriminating against other operators that had the same characteristics as Spati. The Competition Authority held that Unire should have conducted a competitive bid in order to license that business.

(iii) Other Exclusionary Practices

In *Assoutenti/Alitalia*,⁴⁷⁹ the Competition Authority found that Alitalia, the national airline, infringed the Competition Law by canceling several Milan-Rome flights after obtaining a large majority of the airport slots available on the Milan-Rome route. In this way, Alitalia “obstructed competing air carriers from access to the market by hunting the availability of a resource material to air transport activity.”⁴⁸⁰ The Competition Authority found that the systematic cancellation of Alitalia flights was neither efficient nor objectively justifiable.

In September 2000, in *Aeroporti di Roma/Tariffe del Groundhandling*,⁴⁸¹ the Competition Authority issued a decision applying the infrequently-used Section 9 of the Competition Law. This provision establishes an exception to the exclusive rights of legal monopolists by providing that a statutory monopoly cannot prevent third parties from producing the goods or services covered by the monopoly for their own internal use, so-called “captive production.” Applying this provision, the Competition Authority found that Aeroporti di Roma (AR) violated Article 102 TFEU by preventing the air carrier Meridiana from providing ramp supervision and aircraft balancing services on its own aircrafts through its subsidiary Aviation Services. AR claimed that these services fell within its statutory monopoly because they had not yet been liberalized. The Competition Authority held that, irrespective of the implementation of any liberalization directive, Section 9 of the Competition Law gave Meridiana the right to independently engage in any service used exclusively within its group.

⁴⁷⁷ Consorzio Capri, 22 Dec. 1993, n. I78, Bulletin 40-41/1993; TAV, 21 Feb. 1994, n. I79, Bulletin 8/1994; Consorzio Trevi, 21 Feb. 1994, n. I80, Bulletin 8/1994; Snai/Unire, 13 Apr. 1995, n. A59, Bulletin 15-16/1995; Associazione consumatori Assoutenti/Alitalia, 11 Nov. 1996, n. A102, Bulletin 45/1996.

⁴⁷⁸ Snai/Unire, 13 Apr. 1995, n. A59, Bulletin 15-16/1995.

⁴⁷⁹ Associazione consumatori Assoutenti/Alitalia, 11 Nov. 1996, n. A102, Bulletin 45/1996.

⁴⁸⁰ *Id.*

⁴⁸¹ Aeroporti di Roma/Tariffe del Groundhandling, 20 Sept. 2000, n. A247, Bulletin 38/2000.

(h) Remedies/Sanctions

A 2005 judgment adopted by the TAR sheds further light on the criteria that should govern the assessment of a fine in antitrust cases. In *Poste Italiane v. Autorità Garante della Concorrenza e del Mercato*,⁴⁸² the TAR granted an appeal brought by Poste Italiane (PI) against a decision of the Competition Authority, adopted on remand from the TAR for an abuse of its dominant position on the Italian market for cross-border mail. In its original decision,⁴⁸³ the Competition Authority had found that PI had unilaterally adopted abusive measures, such as blocking cross-border mail, requesting excessive charges, and opening and destroying mail, in order to prevent the so-called “ABA remailing” (whereby mail originating from and destined to country A is re-routed via the postal services of country B, in order to benefit from lower postal fees in country B). The Competition Authority had imposed a fine of €7.5 million on PI. In a first judgment on appeal lodged by PI, the TAR partially annulled the Competition Authority’s decision, stating that the fine was excessive and disproportionate, as the Competition Authority had not taken into account the gravity of the infringement, and, in particular, the intensity of the “intentional element.”⁴⁸⁴ According to the TAR, the Competition Authority had unduly neglected the following factors: (i) ABA mailing was an illegal activity, and PI was acting to protect itself against this illegal behavior; (ii) its conduct was unintentional and it was committed as a result of excessive zeal in attempting to put an end to this illegal activity; and (iii) PI promptly terminated the infringement.

As a result of this first judgment, the Competition Authority issued a new decision in which it simply reduced the fine to €3.5 million. PI appealed again. In the second appeal, the TAR observed that in the Italian legal system, no fine may be imposed for any criminal, disciplinary, or administrative infringement unless two factors occur: (i) the conduct must be objectively illegal (the objective factor), and (ii) the conduct must be intentional or negligent (the subjective factor). According to the TAR, by simply reducing the amount of the fine originally imposed on PI, without providing reasons or criteria regarding its reassessment, the Competition Authority failed to follow these principles. The TAR therefore sent the case back to the Competition Authority once more for reassessment of the level of fine.⁴⁸⁵

⁴⁸² See *Poste Italiane S.p.A. v. Autorità Garante della Concorrenza e del Mercato*, 28 Jan. 2005, n. 689 (Trib. ammin. reg.) (referencing *International Mail Express/Poste Italiane*, 22 Dec. 2003, n. A299, Bulletin 52/2003).

⁴⁸³ *International Mail Express Italy/Poste Italiane*, 23 May 2002, n. A299, Bulletin 21/2002.

⁴⁸⁴ *Poste Italiane S.p.A. v. Autorità Garante della Concorrenza e del Mercato*, 11 Dec. 2002, n. 11962 (Trib. ammin. reg.); *Autorità Garante della Concorrenza e del Mercato v. Poste Italiane S.p.A.*, 7 Oct. 2003, n. 5928 (Cons. stato).

⁴⁸⁵ The decision reassessing the final amount of the fine is not publicly available.

D. Unfair Practices and Other Prohibited/Reviewable Practices

1. Deceptive Marketing Practices

(a) Unfair Competition

Article 2598 of the Italian Civil Code provides a list of unfair practices (*i.e.*, practices which are contrary to fair trading and tend to damage other market operators including competitors). Those practices include, for example, using another entity's brand names and circulating disparaging information about another's products. The civil courts can declare an act unfair, issue injunctions stopping the behavior, and award compensatory damages. The Supreme Court has stated that the purpose of the Competition Law differs from that of Unfair Competition Law.⁴⁸⁶ The Competition Law seeks to keep markets competitive, while Unfair Competition Law protects individual freedom of action in the marketplace. Therefore, the non- applicability of the Competition Law based upon a lack of prejudice to the competitive structure of the market does not necessarily exclude the application of unfair competition civil rules if an operator's freedom of action is unfairly limited.

(b) Consumer Deception

On September 21, 2007, Legislative Decrees No.145/2007 and No. 146/2007 came into force, transposing Directives No. 2006/114/EC and No. 2005/29/EC into Italian law and introducing new rules governing misleading and comparative advertising in relations between traders with new forms of protection for consumers against unfair commercial practices.

The Competition Authority applies the new rules to all forms of unfair commercial practices and misleading and comparative advertising after September 21, 2007.

(i) Unfair Commercial Practices

A commercial practice is unfair if it is contrary to the requirements of professional diligence which materially distorts or is likely to materially distort the economic behavior of consumers in their choice of a product presented to them.

There are two types of unfair commercial practices: "misleading practices," which may consist of misleading actions or misleading omissions; and "aggressive practices," which cause consumers to take commercial decisions which they would not otherwise have taken, as a result of harassment, coercion, or other forms of undue influence.

⁴⁸⁶ Ferro Angelo and Pavan Mapimpianti S.p.A. v. Mafin S.p.A. and Pavan Mario, 1 Feb. 1999, n. 827 (Cass).

The new rules specifically identify a series of per se misleading and aggressive practices for which there is no need to demonstrate that they are likely to either distort or falsify consumer choice.

(ii) Misleading and Comparative Advertising

The new rules governing unlawful misleading and comparative advertising is for the sole protection of traders in their commercial relations and basically reiterate the previous rules that also apply to consumers. In essence, they prohibit any form of advertising, which being misleading, can distort the economic conduct of the parties at which it is targeted, or is likely to harm a competitor.

(iii) The Competition Authority's Powers

Under the new rules the Competition Authority may investigate irregular commercial practices and misleading and comparative advertising acting on its own authority—that is to say, without having to wait for an external complaint to be submitted. It has investigative powers which give it the authority to access any relevant document, request information and documents of relevance to the investigation from any party, impose penalties in the event of refusal or if untruthful information and documents are submitted, conduct inspections, use the offices of the Customs and Excise Police (the *Guardia di Finanza*), and order expert testimony.

Once a violation has been ascertained, the Competition Authority may order the party to cease the offending conduct, issue rectifying statements to be published at the expense of the company, and issue penalties of between € 5,000 and € 500,000. If the practice relates to hazardous products that could even indirectly threaten the safety of children or adolescents, the minimum penalty is € 50,000. In the event of non-compliance with the Authority's measures, the penalty can range from €10,000 to €150,000.

A system of undertakings has also been instituted: except for cases of manifest unfairness and gross violations, the Competition Authority may waive the need to prove that a violation has been committed if the trader undertakes to remove the unlawful aspects from its commercial practices.⁴⁸⁷

⁴⁸⁷ *Regolamento sulle procedure istruttorie in materia di pratiche commerciali scorrette*, Competition Authority's resolution of 15 Nov. 2007 n. 17589, as further amended, § 8. The resolution is available at the Competition Authority's website, <http://www.agcm.it>.

E. Vertical Agreements and Practices

1. Overview: Standards of Evaluation

Section 2 of the Competition Law prohibits vertical agreements “which have as their object or effect, appreciable prevention, restriction, or distortion of competition within the national market or within a substantial part of it.”

In contrast with the Commission’s historical legal formalism in applying Article 101(1) TFEU, the Competition Authority relies on an economic approach to vertical restraints, incorporating a rule of reason in the interpretation of Section 2 of the Competition Law. As a result, when assessing the compatibility of a vertical agreement with Section 2 of the Competition Law, the Competition Authority focuses its analysis on the overall competitive impact in the relevant markets rather than on the restrictive character of single clauses in the agreement. If, after such analysis, it appears that a vertical agreement does not have appreciable effects on competition, the Competition Authority normally concludes that the agreement is outside the scope of Section 2 of the Competition Law, even though it may contain clauses that the Commission would consider subject to Article 101(1) TFEU, such as noncompetition obligations, resale price maintenance, and territorial restrictions.⁴⁸⁸

Generally speaking, it is fair to say that the Competition Authority has never been very active in the area of vertical agreements. This is also due to the Commission Guidelines on Vertical Agreements that provide useful guidance to undertakings.⁴⁸⁹ The Competition Authority has not utilized its power to adopt block exemptions, as provided under Section 4 of the Competition Law. By contrast, on a few occasions, the Competition Authority used its power to grant individual exemptions also provided under Section 4 of the Competition Law.

In particular, the last decision of the Competition Authority finding for non-application of the Competition Law in relation to a vertical agreement was adopted in 2003 in the long-lasting saga of ice cream exclusive distribution contracts.⁴⁹⁰ This is the last case where the Competition Authority set out its policy on vertical agreements. The Competition Authority found that distribution agreements containing an exclusivity clause requiring the retailers to acquire all of their ice cream products from Sagit and not to carry brands in competition, in return for a five percent discount, were not in breach of competition law. During its investigation the Competition Authority carried out a comprehensive assessment of the industrial ice cream market in Italy, obtaining evidence that each of the four principal Italian operators (*i.e.*, Sagit, Sammontana, Nestlé and Sandon, representing 98% of the market)

⁴⁸⁸ See, *e.g.*, *Il Tucano Franchising*, 13 Nov. 1997, n. I270, Bulletin 46/1997.

⁴⁸⁹ Commission notice - Guidelines on Vertical Restraints, 2000, O.J. (C 291), 1.

⁴⁹⁰ *Sagit-Contratti vendita e distribuzione del gelato*, 30 Jan. 2003, n. I487, Bulletin n. 5/2003. In 1996 the Competition Authority had decided that the agreements between the main ice cream producers and the impulse ice cream retailers constituted a violation of § 2 of the Competition Law, with respect to the exclusive distribution clauses since the exclusivity hampered dealers from selling rivals’ products in their own outlets. *Contratti di distribuzione esclusiva di gelati*, 23 Dec. 1996, n. I212, Bulletin n. 4/1997.

used similar exclusive distribution mechanisms. The Competition Authority was thus concerned in particular to verify if there was effectively a foreclosure of the market through the exclusive networks of outlets so as to impede the possible entry of different competing brands. In this case, the Competition Authority determined that the tied points of sale amounted to approximately 57 percent of the entire market, a number that was declining due to other market trends. Moreover, prior to the conclusion of the Competition Authority's investigations, Sagit undertook to reduce its exclusive sales points to not more than 50 percent of its total sales points and introduced other changes to its agreements to reduce anticompetitive effects. In parallel to the negative clearance decision (*i.e.*, the vertical agreement did not violate the Competition Law) the Competition Authority also found that Sagit did not have a dominant position in the relevant market.

Smaller suppliers of ice cream appealed the decision before the TAR.⁴⁹¹ The TAR held that the exclusivity arrangements did not infringe the Competition Law in light of the share of the market that was tied by the exclusivity provisions and the fact that Sagit had communicated that it would not apply the exclusivity provision to more than 50 percent of its served outlets. In the end, on final appeal the Supreme Administrative Court partially annulled the decision because the Competition Authority did not provide a complete reasoning in relation to its statement that Sagit did not have a dominant position on the relevant market.⁴⁹²

The last decision of some relevance clearing a vertical agreement following a notification was *Sony Music Entertainment Italy/Rivenditori*.⁴⁹³ This decision concerned an agreement between Sony and a number of retailers and wholesalers, according to which Sony suggested a lower resale price applicable for two-month periods accompanied by lower wholesale prices available on the condition of purchases of certain minimum volumes of products. Following a notification on March 6, 2003, on the eve of the entry into force of Regulation (EC) No. 1/2003, the Competition Authority issued a "negative clearance" and found that the notified agreement was not incompatible with Section 2 of the Competition law.

2. Resale Price Maintenance

The Competition Authority did not find a resale price maintenance agreement restrictive when, given the very small market shares of the parties to the vertical agreement, such agreement did not have appreciable effects on competition.⁴⁹⁴

With the exception of *Sony Music Entertainment Italy/Rivenditori*,⁴⁹⁵ there are no Competition Authority precedents analyzing resale price maintenance or recommended

⁴⁹¹ Società ambrosiana Gelati s.a.s. and Others v. Autorità Garante della Concorrenza e del Mercato, 24 Feb. 2004, n. 1715 (Trib. amm. reg.).

⁴⁹² Società ambrosiana Gelati s.a.s. and Others v. Autorità Garante della Concorrenza e del Mercato, 2 Oct. 2007, n. 463 (Cons. stato).

⁴⁹³ Sony Music Entertainment Italy/Rivenditori, 26 Feb. 2004, n. I564, Bulletin 9/2004.

⁴⁹⁴ *Id.*

⁴⁹⁵ Sony Music Entertainment Italy/Rivenditori, 26 Feb. 2004, n. I564, Bulletin 9/2004.

resale prices in situations where the agreement might have appreciable effects on competition under Section 2 of the Competition Law.⁴⁹⁶ It is likely that the Competition Authority would apply the general principles of EU competition law, as foreseen in Section 1(4) of the Competition Law.

3. *Exclusive Dealing*

The Competition Authority has found exclusive distribution or licensing agreements restrictive of competition only when they create significant market foreclosure (*i.e.*, when they have the effect of preventing new competitors from entering the market).⁴⁹⁷ In assessing whether a vertical agreement has foreclosing effects, the Competition Authority takes into account the market shares held by the parties to the agreement, the existence of significant barriers to entry into the relevant market, and the duration of the agreement.⁴⁹⁸

Exclusive agreements that do not have foreclosing effects fall outside the scope of Section 2 of the Competition Law.⁴⁹⁹ Moreover, agreements whose foreclosing effects are outweighed by other procompetitive effects may be exempted by the Competition Authority, pursuant to Section 4 of the Competition Law.⁵⁰⁰

F. *Intellectual Property*

In 2006 and 2007, the Competition Authority adopted two landmark decisions departing slightly from the established EU competition law rules and principles concerning the issue of refusal to license.

In *Glaxo-Principi Attivi*,⁵⁰¹ the Competition Authority found that Glaxo abused its dominant position by refusing to grant to Fabbrica Italiana Sintetici (FIS), an Italian chemical company that produced and sold active ingredients to generic drug producers, a

⁴⁹⁶ The Competition Authority has so far analyzed recommended prices only as evidence of horizontal collusive price fixing.

⁴⁹⁷ Mercato dello Zolfo Grezzo, 29 Oct. 1998, n. I298, Bulletin 44/98. See Assicurazioni Generali/Unicredito, 28 May 1997, n. I219, Bulletin 22/1997; Contratti di Distribuzione Esclusiva di Gelati, 23 Dec. 1996, n. I212, Bulletin 52/1996; Associazione Italiana Calciatori/Panini, 31 Oct. 1996, n. I195, Bulletin 44/1996; Costituzione Rete Dealer GSM, 2 May 1996, n. I167, Bulletin 18/1996; San Paolo/La Fondiaria/Milano Assicurazioni, 11 Feb. 1994, n. I13B, Bulletin 6-7/1994; Sagit-Contratti vendita e distribuzione del gelato, 30 Jan. 2003, n. I487, Bulletin n. 5/2003.

⁴⁹⁸ San Paolo/La Fondiaria/Milano Assicurazioni, 11 Feb. 1994, n. I13B, Bulletin 6-7/1994.

⁴⁹⁹ Unicredito Italiano/Ras-Riunione Adriatica di Sicurtà, 27 Oct. 1999, n. I394, Bulletin 43/1999; Italiana Assicurazioni/Deutsche Bank, 29 Oct. 1998, n. I353, Bulletin 44/1998; Istituto Bancario San Paolo di Torino/Reale Mutua di Assicurazione, 11 June 1998, n. I324, Bulletin 24/1998; Banca Popolare Novara/Novara Vita-Nuova MAA, 3 July 1997, n. I254, Bulletin 27/199; Credito Italiano/Riunione Adriatica di Sicurtà, 19 June 1997, n. I246, Bulletin 25/1997; Vevy Europe/Res Pharma, 26 Feb. 1992, n. I7, Bulletin 4/1992; Ist. San Paolo Torino/Fondiaria, 20 Nov. 1991, n. I13, Bulletin 12/1991.

⁵⁰⁰ INA/Banca di Roma, 30 Oct. 1993, n. I61, Bulletin 30/1993.

⁵⁰¹ *Glaxo-Principi Attivi*, 8 Feb. 2006, n. A363, Bulletin 6/2006.

license for the production in Italy of an active ingredient (Sumatriptan Succinate) for export purposes. Italian legislation provides that holders of pharmaceuticals supplementary protection certificates (SPCs) granted in Italy before the entry into force of Regulation (EC) No. 1768/92 are under an obligation to negotiate with interested third parties, before the Italian Ministry of Productive Activities, for the release of voluntary royalty-bearing licenses for production in Italy (and later export into countries where patent protection has already expired) of the active ingredients covered by the SPCs.⁵⁰² Based on this legislation, FIS requested a license from Glaxo for the production in Italy of the active ingredient Sumatriptan and its later export to countries such as Spain, where patent protection had expired. Following Glaxo's refusal to grant FIS the requested license, the Ministry informed the Competition Authority, which initiated proceedings.

In the Competition Authority's view, by refusing to grant the requested license, Glaxo, virtually the sole producer of Sumatriptan and the sole marketer of Sumatriptan-based drugs in Europe, prevented the production of a scarce input indispensable for the production of generic triptans, as the other active ingredients that could be used for the production of such products were still covered by patent protection everywhere in the EU. Indeed, Glaxo's refusal was aimed at preventing the entry of generics manufacturers into the geographic markets where Glaxo's patent protection had already expired, thereby depriving consumers of substantial price reductions which typically follow the introduction of generics.⁵⁰³ Specifically, Glaxo was protecting its market position in Spain, where it no longer held intellectual property rights to triptans.

During the course of the proceedings, however, Glaxo not only released to FIS the requested license, but it also granted FIS a license for the production of a key component necessary for the production of Sumatriptan. Moreover, Glaxo provided FIS with its technological know-how concerning the production process. This allowed FIS to immediately begin the production and the marketing of the active ingredient. Indeed, Glaxo's redeeming behavior was considered to completely remove the anticompetitive effects stemming from its initial refusal to license. The Competition Authority thus imposed no fine.

⁵⁰² Under the Italian patent law (Royal Decree No. 1127/39), the duration of a patent is 20 years. However, before commercializing a pharmaceutical product in the Italian market, the owner of the patent must obtain a specific authorization. For this reason, and in order to effectively protect a pharmaceutical patent for 20 years, Law No. 349/91 introduced the SPCs, which extend the patent term for a period corresponding to the time necessary to obtain the mentioned authorization. The maximum duration of these SPCs was fixed to 18 years, a period exceeding the five years provided by the EC Regulation No. 1768/92. Consequently, in order to align the Italian discipline with the EU legislation, Law No. 112/02 was adopted, which established that the owner of an SPC is obliged to negotiate an export license with undertakings wishing to produce and commercialize drugs in countries other than Italy, where the patent or the SPC has already expired, by using ingredients still covered by SPCs in Italy. In case of disagreement, the Italian Ministry of Productive Activities should intervene to solve the dispute and if it does not succeed, the Authority is called in order to assess the legality of the parties' conducts.

⁵⁰³ In this case the Authority expressly followed the so-called "*Bronner*" doctrine. See Case C-7/97, Oscar Bronner GmbH & Co. KG, 1998 E.C.R. I-7791.

The Competition Authority's substantive analysis arguably departs from established EU case law, whereby refusals to license intellectual property rights may be found abusive only if a number of cumulative conditions are met, including that the refusal prevents the emergence of a new product for which there is potential consumer demand. Clearly, this condition was not met in Glaxo's case. Indeed, FIS intended to produce exactly the same active ingredient produced and marketed by Glaxo. Likewise, generics manufacturers would have offered an identical product. In its decision, the Competition Authority argued that the case at hand was different from those analyzed in the relevant EU case law, insofar as Glaxo's refusal prevented commercialization of both Sumatriptan and Sumatriptan-based drugs in countries where it did not hold any intellectual property rights covering the active ingredient. According to the Competition Authority, Glaxo's conduct did not fall within the subject matter of its SPCs because it prevented the development of competition in markets falling outside the scope of protection guaranteed by the SPCs.

In a parallel case, *Merck-Principi Attivi*,⁵⁰⁴ the Competition Authority followed a similar approach. Dobfar, a manufacturer of active ingredients for generic producers, requested Merck & Co. (Merck) to release a license for the production and export of the active ingredients Imipemen-Cilastatin and Finasteride. Such request was based on the above-mentioned Italian legislation for the holders of SPCs. The Competition Authority found that Merck's refusal to grant a license for the production and export of active ingredients into countries where the relative patents have been already expired was capable of having an anticompetitive impact in the downstream pharmaceutical markets and was not justified by any legitimate reason. Accordingly, by way of an interim measure, the Competition Authority ordered Merck to release the mentioned licenses. In the course of the proceedings, Merck concluded a license agreement with Dobfar, granting it, in compliance with the order issued by the Competition Authority, a license for the production in Italy of Imipemen-Cilastatin, whose relevant SPC had in the meantime expired. Moreover, Merck committed to grant non-exclusive free licenses to make possible the production and sale of the Finasteride active ingredient and the relative generic medicines two years before the expiration of the relevant SPC. The Competition Authority deemed these commitments capable of removing all the anticompetitive aspects of the abusive conducts in question, and hence it closed the proceedings without imposing a fine.

G. Agency Enforcement

1. National Enforcement

(a) Responsible Agencies & Structure

The enforcement of the Competition Law is entrusted to the Competition Authority. The structure of the Competition Authority is discussed in Part I.C. of this Chapter, *supra*.

⁵⁰⁴ Merck-Principi Attivi, 21 Mar. 2007, n. A364, Bulletin 11/2007.

(b) Formal & Informal Consultation and Guidance

Informal consultation with the Competition Authority is possible and is particularly useful to identify in advance the Competition Authority's possible concerns.

In the area of merger control, notifying parties are now formally advised to conduct confidential pre-notification discussions with the Competition Authority regarding the concentration as well as any concerns about its possible anticompetitive effects when the second threshold set forth in Section 16(1) of the Competition Law is met.⁵⁰⁵ Pre-notification contacts serve the purpose of ensuring that notification forms are complete from the outset. In particular, the notifying parties may file a preliminary memorandum with the Competition Authority 15 calendar days prior to the expected date of the formal filing.⁵⁰⁶

(c) Investigative Powers and Procedures

Procedure before the Competition Authority is regulated by the Competition Law and Decree No. 217/1998. The merger procedure is slightly different from the ordinary procedure and, thus, it has been discussed separately.

Pursuant to Section 12 of the Competition Law, the Competition Authority may open an investigation after assessing the information in its possession or brought to its attention by third parties, such as public authorities and consumer associations.

The Competition Authority must acknowledge receipt of a complaint in cases where one is filed. It may refuse, however, to deal with a case. In the event of such refusal, the Competition Authority sends a letter to the complainant explaining its position. The Competition Authority may also open an ex officio investigation following a general fact-finding investigation.

(d) The Rights of the Parties in the Proceedings

Under Section 14(1) of the Competition Law, the companies under investigation have the right to: (i) be heard by the Competition Authority within the time limit indicated in the decision to open proceedings, (ii) obtain a final oral hearing before the Competition Authority before the end of the investigation, (iii) submit documents and written submissions, and (iv) access the case-file.

Right be heard following the decision to open proceedings. At the beginning of the investigations, the Competition Authority has only preliminary information, and the hearing is used as an opportunity to submit further evidence and explain aspects of the market that might have been overlooked by the officials. The hearing is usually chaired by the official who is in charge of the investigation. At the hearing, the officials may ask questions and

⁵⁰⁵ *Comunicazione concernente alcuni aspetti procedurali relativi alle operazioni di concentrazione di cui alla Legge 10 ottobre 1990, n. 287, 1 May 2006, Bulletin 22/2005, amended by a Competition Authority's resolution of 26 Sept. 2006, Bulletin 35-36/2006.*

⁵⁰⁶ *Id.*

request that further information be submitted. Minutes of the hearing are drafted and signed by an official and a representative of the party involved.⁵⁰⁷

Right to obtain a final oral hearing before the Competition Authority. Pursuant to Article 14 of Decree No. 217/1998, if the companies under investigation request to be heard by the Competition Authority's College, a final hearing takes place, typically on the date of closure of the investigation. Any complainants or third parties admitted to the proceedings under Article 7(1)(b) of Decree No. 217/1998 are allowed to participate in the final hearing. If they so request, the parties may be heard separately in order to safeguard confidentiality.

Right to submit documents and written submissions. Pursuant to Article 7 of Decree No. 217/1998, the parties to the proceedings can file memoranda and other documents at any time prior to five days before the end of the compilation of evidence (such term is set forth in the statement of objections).

Right to access the case-file. Upon opening an investigation, the Competition Authority creates a file in which all information and documents obtained in the course of the investigation are kept. The file contains minutes of all the hearings and decisions issued by the Competition Authority in the matter. The parties under investigation have access to the file under Article 13 of Decree No. 217/1998. They must send a written request for access to the file to the official in charge of the proceedings who must reply within thirty days. Access can be postponed until such time as the statement of objections is issued.

The parties may indicate which parts of the document provided to the Competition Authority contain business secrets or other information that should not be made public.⁵⁰⁸ The party who seeks to keep a document or parts thereof confidential must file a written request to that effect with the Competition Authority. The request must include a list of documents or parts thereof for which the party seeks protection and must state the reasons supporting the contention that the documents are confidential.⁵⁰⁹

The Competition Authority must balance the right to access to the file against confidentiality considerations. Generally, the Competition Authority grants access to all documents useful to the preparation of the defense and denies access to documents containing confidential information, such as business secrets.

Internal Competition Authority documents, drafts, working papers, and all other documents prepared in contemplation of a formal decision are not accessible.⁵¹⁰ The Competition Authority may choose to deny access to the minutes of its meetings as well as its correspondence with EU institutions, other foreign institutions, and international organizations to the extent the correspondence is deemed confidential.⁵¹¹

Under Section 17 of Decree No. 217/1998, undertakings have no right of access to information or documents gathered by the Competition Authority in the context of a general fact-finding investigation of a certain market or industry under Section 12(2) of the Competition Law. The TAR, however, has recognized that parties to an antitrust

⁵⁰⁷ Competition Law, § 14.

⁵⁰⁸ Decree No. 217/1998, § 13.

⁵⁰⁹ *Id.*, § 13(7).

⁵¹⁰ *Id.*, § 13(5).

⁵¹¹ *Id.*, § 13(6).

investigation in a market that had previously been the subject of a Section 12(2) market investigation have a limited right of access to the documents gathered, in that context, by the Competition Authority.⁵¹² The TAR held that a request for access to the file with respect to documents previously gathered in a survey can only be satisfied with respect to documents (i) mentioned in the Competition Authority's decision opening the antitrust investigation; (ii) referred to in a document under (i); or (iii) specifically identified in the request. As for documents under (iii), the applicant must demonstrate why such documents will be of assistance in illustrating its position, and must also demonstrate that the communication of such documents will not result in the disclosure of confidential information or business secrets.

On appeal in the *Prezzi del latte per l'infanzia*⁵¹³ cartel case, the Supreme Administrative Court clarified the relationship between the principle of fair process and the right to have access to the file in administrative proceedings before the Competition Authority. Humana and Nutricia had initially challenged a TAR ruling⁵¹⁴ upholding a decision by the Competition Authority to impose a fine for a cartel in the market for infant milks.⁵¹⁵ They had argued that they had been denied access to the case file on the ground of confidentiality of some raw economic data which the Competition Authority had used to support its charges. Humana and Nutricia claimed that, by being unable to access those data, they had been incapable of understanding the methodology used by the Competition Authority in preparing some tables intended to show collusion and parallelism of behavior among cartel participants. In rejecting the appeals, the Supreme Administrative Court acknowledged that the Competition Authority had indeed used the data in supporting its allegation. However, it concluded that in the context of the Competition Authority's charges, such data played a "completely marginal role in demonstrating the existence of an infringement".⁵¹⁶ Therefore, knowledge of such data was not "essential" or "absolutely necessary" for the exercise of Humana and Nutricia's rights of defense. This ruling is the source of some concerns as it seemingly limits the protection of the defendants' rights of defense. In particular, the decision on what is of "essential relevance" for the exercise of the rights of defense apparently now is for the Competition Authority to take and not the defendants. Understandably, the Competition Authority must follow a criterion of reasonableness when evaluating confidentiality claims and requests for access to confidential data. However, information used by the Competition Authority when formulating its charges—albeit only peripherally—should be fully available to the parties. In the present case, it appears that the raw data could have at least potentially helped explain the higher level of prices in Italy vis-à-vis other countries, thus providing further defense

⁵¹² *Medusa Film & Cinema 5 Gestione v. Autorità Garante della Concorrenza e del Mercato*, 14 Sept. 2000, n. 7089/2000 (Trib. ammin. reg.).

⁵¹³ *Heinz Italia and Others v. Autorità Garante della Concorrenza e del Mercato*, 30 Oct. 2007, n. 501 (Cons. stato).

⁵¹⁴ *Milte Italia and Others v. Autorità Garante della Concorrenza e del Mercato*, 21 June 2006, n. 9878 (Trib. ammin. reg.).

⁵¹⁵ *Prezzi del latte per l'infanzia*, 12 Oct. 2005, n. I623, Bulletin 40/2005.

⁵¹⁶ *Id.*

arguments to the parties. Unfortunately, the reason why such raw data were considered by the Court to be virtually “useless” to this end are not explained fully in the Court’s opinion. Finally, the requirement that information must be “essential” or “absolutely necessary” for the exercise of the rights of defense sets a very high standard for requests for access to confidential documents which finds no equivalent in the Commission’s Notice on Access to File.⁵¹⁷

(e) The Competition Authority’s Powers of Investigation

Decree No. 217/1998 lays down the relevant procedural rules for the enforcement of the Competition Law. The list of investigative powers provided for in Section 14 of the Competition Law and the Decree No. 217/1998 is exhaustive and does not include the exercise of any type of general surveillance powers such as bugging, telephone tapping, or trailing individuals allegedly involved in cartel conduct.

Pursuant to Section 8 of Decree No. 217/1998, the Competition Authority may exercise its investigative powers only after it serves on the companies involved, typically at the outset of an on-site surprise inspection, the decision to open proceedings. This decision must clearly indicate the presumed facts that it intends to investigate.

For companies established outside of Italy, service of process of the Competition Authority’s decisions to open proceedings is accomplished through the diplomatic channel, which takes considerably longer than notification by the Competition Authority officials before the commencement of a dawn raid. Accordingly, where a dawn raid is staged to take place simultaneously at the premises of several companies, companies established outside of Italy and in a country other than a Member State of the EU are not raided, even with the assistance of the local antitrust authority’s staff.

Under the new investigative powers granted to the National Competition Authorities (“NCAs”) of the Member States under Article 22 of Regulation (EC) No. 1/2003, in particular, the Competition Authority may now seek the assistance of another NCA to carry out investigative activity in the latter’s jurisdiction on its behalf.

In *Price of Specialty Milk*,⁵¹⁸ the Competition Authority fined baby milk producers for coordinating pricing and advertising policies of newborn infant formula and follow-on milk, in violation of Article 101 TFEU, which would have resulted in substantially higher prices in Italy than in other European countries. This case is noteworthy as it offers a good illustration of the close cooperation among the NCAs, pursuant to Section 22(1) of Regulation (EC) No. 1/2003, that resulted in coordinated investigative efforts. The French, German, and Spanish NCA’s carried out dawn raids in their respective territories on behalf of the Competition Authority with a view to securing relevant documentation.

⁵¹⁷ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 101 and 102 TFEU, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004, 2005 O.J. (C 325) 7.

⁵¹⁸ *Prezzi del latte per l’infanzia*, 12 Oct. 2005, n. I623, Bulletin 40/2005. In *Soc. Milte Italia S.p.A. and Others v. Autorità Garante della Concorrenza e del Mercato*, 3 Oct. 2006, n. 9878 (Trib. ammin. reg.), the TAR rejected entirely all appeals against the decision.

The Competition Authority's key investigatory powers are the following: to order the production of specific documents or information; to carry out compulsory interviews with individuals, only with regard to a company's legal representatives and in the course of an unannounced search of business premises or a hearing; to carry out an unannounced search of business premises (as opposed to residential premises); to image computer hard drives using forensic IT tools; to require an explanation of any documents or information supplied by the company being investigated; and to secure premises overnight by seal.

Requests for information and documents. The Competition Authority may request in writing information and documents from any individual, undertaking, or entity in possession of such information and documents.

Pursuant to Article 9 of Decree No. 217/1998, a formal request for information must indicate:

- a brief description of the cartel agreement or practice in relation to which the information is required;
- the information/documentation required and the purpose of the request;
- a reasonable time frame within which the information and/or the documents requested must be furnished;
- the detailed form in which the information is to be supplied; and
- the fines for failure to supply information or for the provision of untrue, incorrect or misleading information.

Requests for information and disclosure of documents may be also made orally in the course of hearings or inspections. Oral requests and responses thereto are recorded in the minutes of the hearing or of the inspection. Responses provided during the hearing or the inspection may be supplemented within the deadline set forth in the minutes.

The undertakings concerned are obliged to cooperate actively with the Competition Authority, which implies that they must make available to the Competition Authority any and all information in their possession, only insofar as it relates to the subject-matter and the purpose of the investigation, as described in the decision to open proceedings. The use of information obtained by the Competition Authority in the course of an investigation for purposes other than that for which it was requested is prohibited, although such information may provide circumstantial evidence which may, in some cases, be used to decide whether it is appropriate to initiate a separate antitrust procedure.

The Competition Authority may impose sanctions of up to €25,822 against companies that refuse or fail, without objective justification, to provide the information or produce the documents requested by the Competition Authority in the exercise of its investigative powers. The same applies by analogy to companies refusing to submit themselves to on-site inspections. Moreover, fines of up to € 51,645 may be imposed against companies that provide misleading information to the Competition Authority. To date, companies have been fined for providing misleading information in only one instance.

In *Axa Assicurazioni v. Autorità Garante della Concorrenza e del Mercato*,⁵¹⁹ the Supreme Administrative Court referred explicitly to EU case law in holding that, under the Italian antitrust regime, an undertaking under investigation has no right to evade the investigation on the ground that the results thereof might provide evidence of an infringement of the competition rules.⁵²⁰ The Supreme Administrative Court also stressed that the Competition Authority may compel an undertaking to provide all necessary information that may be known to it, and may also compel an undertaking to disclose relevant documents in its possession even if such documents may be used to establish the existence of anticompetitive conduct. But the Authority may not, by means of a decision calling for information, undermine the defense rights of the undertaking concerned. Thus, the Competition Authority may not compel an undertaking to provide answers that might involve an admission on the latter's part of the existence of an infringement—the very thing the Competition Authority is attempting to prove.

Expert reports and analysis. The Competition Authority may request independent experts to prepare reports and economic or statistical analyses in relation to any matter of relevance to the investigation. Article 11 of Decree No. 217/1998 provides that the decision to consult experts and the result of their analysis must be made available to the parties to the alleged cartel and any third parties admitted to intervene in the procedure.

Inspections. The Competition Authority can carry out inspections on the business premises of the parties to the alleged cartel or those of third parties deemed to be in possession of documents of relevance to the investigation. The officials must show an *ad hoc* authorization issued by the Competition Authority indicating, among other things, the object and purpose of the investigation and the penalties provided for refusal to supply information or the provision of incorrect or misleading information.⁵²¹

In the course of the inspections, Competition Authority officials may be assisted by the Italian Customs and Excise Police (*Guardia di Finanza*). Although the raided company's legal advisors may assist it, the inspection cannot be delayed by the company's request to wait for their arrival to the premises.

Competition Authority officials have the power to enter any premises, land, and/or means of transport of the parties, with the exception of premises in which no business activity is conducted; examine books, business records, and documents which are relevant to the undertaking's activity; to make copies of any relevant information; to ask for oral explanations; and to request information.⁵²²

Italian law protects the confidentiality of communications between a lawyer, who is a member of the Bar of an EU Member State, and his clients. To the extent that such communications are exchanged in the exercise of the client's right of defense, they are covered by professional legal privilege and cannot be used by the Competition Authority for the purposes of a cartel investigation. However, pursuant to Italian law, membership of the

⁵¹⁹ *Axa Assicurazioni v. Autorità Garante della Concorrenza e del Mercato*, 23 Apr. 2002, n. 2199/2002 (Cons. stato).

⁵²⁰ *See id.* (citing Case 374/87, *Orkem v. Commission*, 1989 E.C.R. 3283).

⁵²¹ Decree No. 217/1998, § 10.

⁵²² Decree No. 217/1998, § 10.

Bar is incompatible with, *inter alia*, the status of employee. Accordingly, in-house lawyers, who are employees of the company for which they work, cannot be members of the Bar, and, therefore, their communications and/or advice are not covered by the rules of privilege.

All activities carried out by the Competition Authority are recorded in the minutes of the inspection, which must be signed by the Competition Authority officials and the parties' representatives. The contention that the information requested by the Competition Authority officials contains sensitive information or is confidential is not a justification to refuse the provision of such information.⁵²³ Competition Authority officials are, however, under a duty to use this information only for the purpose of the relevant investigation and cannot disclose the information.

In *Axa Assicurazioni*⁵²⁴ the Supreme Administrative Court held that the Competition Authority is entitled to take copies of documents that refer to matters falling outside the scope of the decision to open the investigation. Moreover, in reliance on the case law of the European Court of Justice, the Court held that the Competition Authority can, as a basis for a new investigation, make use of the evidence it has seized in the context of a different investigation.

Illustrative of these powers is *Sagit-Contratti di vendita e distribuzione del gelato*,⁵²⁵ in which the Competition Authority, following the notification to it of new distribution agreements by ice cream producers, broadened the scope of an ongoing investigation to include each main ice cream producer (due to the similarity of the various contractual arrangements). Those arrangements gave rise to concerns of a “network” or “cumulative” effect. As a result, the Competition Authority also conducted dawn raids at the premises of other producers who had neither prompted the investigation by the initial filing nor were party to the agreement forming the subject matter of the initial filing.

Additionally, two recent cases indicate that the Competition Authority has started to conduct inspections in merger cases following the decision to open a Phase II investigation.⁵²⁶

Hearings. Pursuant to Article 8(2) of Decree No. 217/1998, the Competition Authority can hear third parties to gather their position as to the agreement or practice being investigated and evidence that may be useful for its proof and assessment. Hearings are usually organized also with the parties in order to discuss the Competition Authority's concerns as formulated in the decision to open proceedings, as well as possible commitments. Competition Authority officials and representatives of the undertakings

⁵²³ These arguments, however, can be used to oppose a request for information during a fact-finding investigation under § 12 of the Competition Law.

⁵²⁴ *See id.* (citing Case 85/87, *Dow Benelux v. Commission*, 1989 E.C.R. 3137).

⁵²⁵ *Sagit-Contratti di vendita e distribuzione del gelato*, 30 Jan. 2003, n. 1487, Bulletin 5/2003.

⁵²⁶ *Sai-Società Assicuratrice Industriale/La Fondiaria Assicurazioni*, 17 Dec. 2002, n. C5422B, Bulletin 51-52/2002; *Autogrill/Ristop*, 5 Sept. 2002, C5249B, Bulletin 35-36/2002. In *Autogrill/Ristop*, following an inspection, the Competition Authority gathered an impressive amount of documentation, including evidence of failure to comply with the undertakings set forth in a previous clearance decision and a broad range of restrictive arrangements between the parties.

concerned must sign the hearing minutes at the end of each hearing. Hearings may be recorded on tape for the sole purpose of drafting the minutes.

(f) Procedural Steps

(i) The Decision to Open Proceedings and Access to the File

Pursuant to Section 6 of Decree No. 217/1998, the decision to open proceedings sets: (i) the date of termination of the proceedings, by which the Competition Authority must adopt its final decision, in which sanctions may be imposed; (ii) the time limit within which the representatives of the companies involved may be heard at their request; (iii) the essential elements of the alleged infringement; (iv) the name of the case handler; and (v) the office where documents and other evidence will be kept.

The Competition Authority serves the decision upon the parties concerned,⁵²⁷ (*i.e.*, the parties whose conduct is at issue and third parties who submitted complaints or reports to the Competition Authority). The decision is served by one of the Competition Authority's officials or by mail. If the number of parties being notified is significant the decision can be served by publication in at least two national newspapers or by other suitable means. Decisions can be served on parties outside of Italy by mail or via the appropriate consulate. Notice of the commencement of a proceeding is provided by the publication of such decision in the Bulletin and the Competition Authority's website.

Any third parties having a direct interest in the end result of the proceedings may request to intervene in the investigation. The addressees of the decision to open proceedings and any intervener may file written submissions and documents as well as have access to the case file.

Following the opening of the proceedings, the Competition Authority can exercise the powers described above. Usually, the parties request a hearing. Minutes of all hearings and oral depositions must be signed by Competition Authority officials and parties at the end of each hearing.⁵²⁸

(ii) The Statement of Objections

Where it deems to have acquired sufficient evidence of the collusive practice in question, the Competition Authority issues the statement of objections ("SO") (*Comunicazione delle risultanze istruttorie*), by which it notifies the companies involved and any complainant of its objections against the cartel members. Though technically it

⁵²⁷ Competition Law, § 14.

⁵²⁸ Decree No. 217/1998, § 18. In *Aziende Vetraie Industriali Ricciardi S.p.A, Vetrerie Italiane S.p.A, Zignago Vetro S.p.A., Bormioli Rocco e Figlio S.p.A. v. Autorità Garante della Concorrenza e del Mercato*, 14 Jan. 2000, n. 103 (Trib. ammin. reg.), the TAR annulled a Competition Authority decision because the Competition Authority failed to take minutes of oral depositions. The Competition Authority had decided not to take minutes because it took the position that these depositions did not contain any information used in the investigation.

contains the Competition Authorities' "preliminary findings" of fact and their legal assessment, similar to the procedure followed by the European Commission, the SO is issued towards the end of the investigation and contains an extensive elaboration of the reasons underlying the Competition Authority's assessment of the case. The issuance of the SO is authorized by the Competition Authority's College, provided that the latter considers the Staff's conclusions not to be manifestly devoid of grounds.

Together with the SO, the Competition Authority notifies all interested parties (*i.e.*, the companies being investigated, the complainants, if any, and any other third parties admitted to the proceedings) of the date of closure of the investigation (*i.e.*, the last day on which the Competition Authority may exercise its investigatory powers and the parties, the interveners, and the complainants, if any, may get access to the case-file), which must be at least 30 days later than the date of notification of the SO. The parties to the alleged cartel, the complainants, if any, and any other third parties admitted to the proceedings may file written submissions in response to the SO as well as other documents up to five days before the date of closure of the investigation.

If the companies being investigated request to be heard by the Competition Authority's College, a final hearing takes place, typically on the date of closure of the investigation. Any complainants or third parties admitted to the proceedings under Article 7(1)(b) of Decree No. 217/1998 are allowed to participate in the final hearing. If they so request, the parties may be heard separately in order to safeguard confidentiality.

(iii) The Final Decision

After the final hearing, the Competition Authority issues a decision. If the Competition Authority decides that there was an infringement of the Competition Law, it orders the infringement to end within a time limit set out in the decision.⁵²⁹ If the infringement is serious, the Competition Authority could impose a fine.

Competition Authority decisions: (i) identify the undertakings concerned; (ii) provide a description of the main stages and results of the investigation and a definition of the relevant market; (iii) set forth a legal assessment, including a reply to the parties' main arguments; and (iv) state the corrective measures that will be taken, including the issuance of cease and desist orders and the imposition of fines.

Decisions are administrative acts. The Competition Authority must set out the principles of law and facts upon which its decision is based in a concise, clear, and relevant manner. Under the principles of Italian administrative law, the Competition Authority need not address all arguments raised by the parties or considered during the administrative proceedings that in its opinion do not affect the outcome. The statement supporting the decision must be sufficient to allow a court to exercise its powers of review and to provide the undertaking concerned with the information necessary to enable it to determine whether

⁵²⁹ Competition Law, § 15. The Competition Authority, however, does not always fix a time limit to end to the infringement in its decision.

or not the decision is well-founded. Decisions are served on the parties and published in the Bulletin. They are also available on the Competition Authority official website.⁵³⁰

(g) Interim Measures

The 2006 Reform Package introduced a new provision into the Competition Law formally granting the Competition Authority the ability to order interim measures. Under Section 14-*bis* of the Competition Law, in urgent cases where there is a risk of serious and irreparable damage to competition (*periculum in mora*) and a cursory examination reveals the probable existence of an infringement (*fumus boni iuris*), the Competition Authority may now order interim measures. Unlike under Article 8(2) of Regulation (EC) No. 1/2003, interim measures may not be renewed or extended in their duration. If the decision ordering interim measures is not complied with, the Competition Authority may impose a fine of up to 3 percent of the concerned party's turnover.⁵³¹

The Competition Authority used the new Section 14-*bis* powers immediately after the enactment of this new provision. On September 14, 2006, in *Associazione Bancaria Italiana*⁵³² it ordered ABI (the Italian Banks' Association) to suspend immediately the distribution to its members of a circular letter suggesting a certain approach on the application of new legal provisions on unilateral changes to the contractual terms governing current accounts. The interim measure was ordered *ex parte*. And the Competition Authority made a very cursory assessment of whether the "urgency" criterion was met.

In *Enel Distribuzione/Attivazione fornitura subordinate a pagamenti morosità pregresse*,⁵³³ the Competition Authority ordered interim measures against Enel Distribuzione, the Italian incumbent operator active in the retail distribution of electricity to household customers. Prompted by a complaint by a consumer, the Competition Authority found that Enel Distribuzione refused to start supplying electricity to customers moving into houses for which there were unpaid electricity bills from the previous occupant. Enel Distribuzione was ordered to immediately modify this practice and start supplying those new customers. As in the *ABI* case, the risk of a "serious and irreparable damage to competition" was not examined in depth by the Competition Authority. It merely noted that Enel Distribuzione had a dominant position against which customers had little means of

⁵³⁰ The Competition Authority's website is available at <http://www.agcm.it>.

⁵³¹ In the past, the Competition Authority had already ordered interim measures when applying the EC Treaty provisions on competition law. See *Merck-Principi attivi*, 15 June 2005, n. A364, Bulletin 23/2005. Even though under Italian law the Competition Authority did not have formal powers in this respect, it had done so by relying on the direct applicability of Article 5 of Regulation (EC) No. 1/2003. Under this provision, the National Competition Authorities of the Member States have the power to order interim measures when applying Articles 101 and 102 TFEU. Though the TAR had confirmed that the Competition Authority was entitled to do so, *Merck v. Autorità Garante della Concorrenza e del Mercato*, 7 Mar. 2006, n. 1713 (Trib. ammin. reg.), there were still uncertainties as to the boundaries of such power.

⁵³² *ABI/Modifica unilaterale delle condizioni contrattuali*, 14 Sept. 2006, n. I675, Bulletin 35-36/2006.

⁵³³ *Enel Distribuzione/Attivazione fornitura subordinate a pagamenti morosità pregresse*, 18 Oct. 2007, n. A390, Bulletin 39/2007.

protection, given the imperfect state of liberalization of the energy market. The decision seems to suggest that the existence of a dominant position can be per se sufficient to satisfy the requirement of the “serious and irreparable damage to competition,” a seemingly very expansive reading of Section 14-*bis* of the Competition Law.

In *Distribuzione di farmaci senza obbligo di ricetta alle parafarmacie*,⁵³⁴ the Competition Authority issued an interim measures decision against a number of pharmaceutical wholesalers who had allegedly engaged in a boycott by agreeing to restrict supplies of pharmaceuticals to parafarmacie (*i.e.*, pharmacies with a license limited to the sale of non-prescription drugs). Again, this decision was adopted ex parte, without first hearing the views of the parties concerned. The companies subjected to the Competition Authority’s order challenged it on the ground that they had not been given the possibility to express their views. On appeal, the TAR annulled the Competition Authority’s decision holding that, save for exceptional circumstances where any delay in the adoption of an interim measures order could jeopardize its effectiveness, the Competition Authority must first hear the parties concerned.⁵³⁵ The TAR noted that the procedural conditions for the adoption of a decision ordering interim measures under Italian competition law are the same as those under Regulation (EC) No. 1/2003. Indeed, under Article 27 of this regulation the parties concerned must be given the opportunity to express their views prior to the adoption of the decision ordering interim measures.

This ruling found an immediate application in a subsequent case. In *Listino prezzi del pane*,⁵³⁶ the Competition Authority investigated the decision of the Rome bakeries association to distribute to all bakeries a detailed price list for all bread products. In the decision opening the investigation, the Competition Authority considered the case suitable for the adoption of interim measures and granted the parties a deadline for presenting observations and exercising their right to be heard. Following an oral hearing and the submission of written observations, the bakeries’ association informed the Competition Authority that it had alerted all its members of the potential anticompetitive nature of its earlier communications and had invited them to autonomously determine their prices. The Competition Authority concluded that the initiative had removed the risk of an irreparable damage to competition and ultimately decided not to order interim measures.⁵³⁷

⁵³⁴ *Distribuzione di farmaci senza obbligo di ricetta alle parafarmacie*, 20 Sept. 2007, n. I678, Bulletin 35/2007.

⁵³⁵ *Alleanza Salute and Others v. Autorità Garante della Concorrenza e del Mercato*, 14 Sept. 2007, n. 8952 (Trib. ammin. reg.).

⁵³⁶ *Listino prezzi del pane*, 10 Oct. 2007, n. I695, Bulletin 22/2008 (decision opening proceedings).

⁵³⁷ *Listino prezzi del pane*, 13 Dec. 2007, n. I695, Bulletin 47/2007 (non-adoption of interim measures) The investigation continued and the Competition Authority ultimately found a breach of § 2 of the Competition Law (*i.e.*, the domestic equivalent of Article 101(1) TFEU) and imposed a fine on the association. *See Listino prezzi del pane*, 10 Oct. 2007, n. I695, Bulletin 22/2008 (decision opening proceedings).

(h) Commitments

With the same 2006 Reform Package, the Competition Authority was also given the power to accept and ultimately make binding on the parties concerned commitments intended to avoid the negative effects of potentially infringing conduct.⁵³⁸ As per the equivalent procedure under Article 9 of Regulation (EC) No. 1/2003, a commitment decision does not contain a finding on the merits of the potential or alleged violation and does not impose fines on the parties concerned.

Since 2006, the Competition Authority has made widespread use of this new power. In fact, with very few exceptions concerning cartels cases, the Competition Authority has always adopted a commitment decision where commitments were offered by the companies under investigation.⁵³⁹ The vast majority of cases where the Competition Authority concluded the investigation with a commitment decision (without imposing a fine), concerned unilateral conduct by dominant undertakings. Some critics observe that the Competition Authority may have even exceeded the scope of this new power, which should be strictly limited to those situations where the interest in having a quick removal of potentially anticompetitive conduct prevails over the benefits of having a finding of an infringement (especially helpful for follow-on civil damages actions) and the deterrence of fines. There is indeed the risk that undertakings, especially dominant undertakings, will rationally decide to engage more often in abusive conduct, having weighed the costs and benefits of the latter and concluded that the risk of an antitrust sanction is marginal given the high likelihood that the Competition Authority will accept commitments, assuming it will open an investigation in the first place. In this respect, the Competition Authority's practice diverges from those of other European NCA's, such as the French⁵⁴⁰ and the British⁵⁴¹ Competition Authorities, which have published guidelines stressing that commitment decisions can be considered suitable only after careful consideration, and are per se excluded in a number of situations (including serious abuses of a dominant position, or in case of recidivism).

The following are cases that we believe accurately reflect the Competition Authority's practice concerning commitment decisions.

In *Comportamenti restrittivi sulla borsa elettrica*,⁵⁴² the Competition Authority applied its new power for the first time. It accepted and rendered binding the commitments offered by Enel to allay the Competition Authority's concerns regarding Enel's strategies on the

⁵³⁸ Competition Law, § 14-ter.

⁵³⁹ Produttori vernici marine, 25 Jan. 2007, n. I646, Bulletin 4/2007; Produttori di pannelli truciolari di legno, 17 May 2007, n. I649, Bulletin 20/2007; Servizi aggiuntivi di trasporto pubblico nel Comune di Roma, 30 Oct. 2007, n. I657, Bulletin 41/2007; Gare per la fornitura di dispositivi per stomia, 3 Aug. 2007, n. I666, Bulletin 30/2007.

⁵⁴⁰ Conseil de la Concurrence, Notice on Competition Commitments of 3 Apr. 2008, ¶ 11, available at http://www.conseil-concurrence.fr/doc/cpro_enga_uk.pdf.

⁵⁴¹ UK's office of Fair Trading Enforcement Guidelines of December 2004, ¶¶ 4.4, 4.5, Annex ¶ A.15, available at http://www.offt.gov.uk/shored_offt/business_leaflets/ca98_guidelines/oft_407.pdf.

⁵⁴² Comportamenti restrittivi sulla borsa elettrica, 27 Dec. 2006, n. A366, Bulletin 49/2006.

supply of the wholesale electricity market. Following a referral from the Italian Gas and Electricity Authority, the Competition Authority had opened an investigation into an alleged abuse of dominant position by Enel. The Competition Authority's preliminary findings in the decision opening its investigation were that Enel had leveraged its pivotal position on the Macro-Area Southern Italy, raising its rivals' costs by altering the price for export or import of electricity to and from other Macro-Areas within the national territory. Enel proposed commitments, which the Competition Authority market tested by seeking the views of interested third parties (competitors, customers, traders, wholesalers) as well as of the Italian Gas and Energy Authority. The third parties claimed that Enel's commitment to sell for two years virtual power plant capacity (VVP) was insufficient to eliminate the Competition Authority's initial concerns largely based on Enel's position in the market. Indeed, the third parties challenged the core elements of the commitment proposed. They suggested a stronger one such as the sale of physical capacity. They also indicated that the commitment should be of a much longer duration, suggesting as adequate a commitment of undetermined duration that would last until the competitive structure of the market was such as to prevent Enel's abusive conduct. Similar observations were submitted by the Italian Gas and Energy Authority. Ultimately, Enel submitted a set of modified commitments, reflecting in part the comments made to the earlier set of its commitments, which the Competition Authority accepted. The second set of commitments proposed by Enel were not subjected to a new market test. In the decision closing the proceedings, the Competition Authority acknowledged that the commitments were indeed incapable of removing Enel's dominant position. However, it also noted that they were strong enough to restrict Enel's interest in the short run to exert its market power by driving up the electricity price in the Power Exchange. The duration of the commitment was finally limited to two years, although the Competition Authority reserved its right to reopen the investigation should it observe any change in the underlying factual situation or should Enel contravene to the obligations it had undertaken.

This first commitment decision is paradigmatic of what can be described as the Competition Authority's now prevailing practice with regards to this new type of decision. Though the market test was largely negative, including negative views expressed by another independent Authority with sector-specific regulatory competence, the Competition Authority ultimately considered sufficient and accepted commitments that included seemingly minor modifications relative to what the views expressed in the course of the market test would have considered sufficient. Based on the first two and half years of practice (Fall 2006 to Winter 2009), this sort of outcome is not unusual. Also, it has now become a common practice for the Competition Authority not to market test any amendment or improvement to the commitments initially offered by the parties under investigation.

In *Ordine dei medici veterinari di Torino*,⁵⁴³ the Competition Authority accepted numerous commitments from the Veterinarians' Association of Turin and the Italian National Federation of Veterinary Councils. It has thus closed an investigation prompted by a veterinary who had been subjected to disciplinary measures for not applying minimum fees and for advertising his services. The commitments included the removal of restrictions

⁵⁴³ *Ordine dei medici veterinari di Torino*, 21 Feb. 2007, n. I668, Bulletin 8/2007.

on the advertising of veterinary services, the closure of all disciplinary proceedings initiated against veterinarians who had promoted their businesses or who had not applied the Association-approved fee grid, the abolition of minimum fees, and further changes to the veterinarians' professional code of conduct. All these changes were intended to bring the Association's rules and practices in line with competition law principles. This was the first commitment decision in a case concerning the alleged violation of Section 2 of the Competition Law, the national equivalent of Article 101 TFEU.

By contrast, in *Produttori vernici marine*,⁵⁴⁴ the Competition Authority rejected the commitments offered by five undertakings involved in an investigation into an alleged horizontal anticompetitive agreement in the market for marine paints, which are used in the maintenance of large cargo ships and passenger liners. The undertakings had proposed to cease gathering through their trade association data necessary to prepare certain statistics on the merchant navy. While the Competition Authority concluded that the commitments were as such incapable of removing the market distortion caused by the anticompetitive arrangements, it took them into account as an attenuating circumstance when determining the amount of the fines. This is the first case in which the Competition Authority refused to accept commitments. On appeal, the TAR upheld the Competition Authority's position on what has now become a consolidated practice of the Competition Authority affirming that commitment decisions are inappropriate in cartel cases.⁵⁴⁵ The TAR relied on Recital 13 of Regulation (EC) No. 1/2003 according to which "commitment decisions are not appropriate in cases where the Commission intends to impose a fine."

In *Tele2/Tim-Vodafone-Wind*,⁵⁴⁶ the Competition Authority opened an investigation into alleged violations of Articles 101 and 102 TFEU by Tim, Vodafone, and Wind, the three main mobile telecommunications operators in Italy. In particular, the Competition Authority was concerned that these companies had possibly abused their collective dominant position on the wholesale market for access to mobile networks by repeatedly and unjustifiably denying access to new entrants. Vodafone offered commitments to negotiate agreements granting new entrants wholesale access to its network. Following a market test, the Competition Authority accepted an improved set of commitments submitted by Vodafone and closed the investigation vis-à-vis Vodafone with a partial (*i.e.*, concerning just one of the three defendants) commitment decision. It then completed the investigation against Tim and Wind, found violations of Article 102 TFEU, and imposed fines.

This last decision was challenged by TIM and Wind, and the appeals gave the TAR the opportunity to opine in detail on a number of important issues concerning this new procedure.⁵⁴⁷

⁵⁴⁴ *Produttori vernici marine*, 10 Apr. 2007, n. I646, Bulletin 4/2007.

⁵⁴⁵ *Hempel (Italy) and Others v. Autorità Garante della Concorrenza e del Mercato*, 22 Dec. 2007, n. 14157 (Trib. ammin. reg.).

⁵⁴⁶ *Tele2/Tim-Vodafone-Wind*, 24 May 2007, n. A357, Bulletin 20/2007.

⁵⁴⁷ *See Wind v. Autorità Garante della Concorrenza e del Mercato*, 7 Apr. 2008, n. 2900 (Trib. ammin. reg.); *Eutelia v. Autorità Garante della Concorrenza e del Mercato*, 7 Apr. 2008, n. 2902 (Trib. ammin. reg.).

The two judgments provide useful clarifications as to the conditions for acceptance of commitments and the boundaries of the commitment decisions. In short, the TAR held that the Competition Authority is entitled to accept commitments and settle the case as to only one of the undertakings under investigation, while continuing to investigate the behavior of the others—on which it may also impose a fine. Moreover, explicitly referring to its earlier judgment in the *Produttori vernici marine*⁵⁴⁸ cartel case, the TAR clarified that the natural area for commitment decisions encompasses cases of unilateral conduct (abuse of dominance) and agreements others than price fixing, market sharing, and bid rigging. This shows that the TAR views commitment decisions as unsuitable in those cases where the interest in obtaining the immediate termination of the potentially infringing conduct may prevail over the imposition of a sanction. Further, according to both the TAR and the Competition Authority, the availability of the commitment decision procedure in hardcore cartel cases could jeopardize the effectiveness of the leniency program by making immunity unattractive as the same type of benefit would become available through this other procedure.

(i) Consistency between Statement of Objections and Final Decision

On appeal in the *Variazione di prezzo di alcune marche di tabacchi*⁵⁴⁹ cartel case, the Supreme Administrative Court clarified the principle of the necessary consistency between

⁵⁴⁸ Though the decision under appeal was about unilateral conduct by dominant undertakings with no connection to horizontal collusion between competitors, the TAR dwelled at length on this point in response to the applicants' argument that the Competition Authority's acceptance of Vodafone's commitments meant that Vodafone's conduct necessarily implied that it was a "non serious" violation. According to the applicants, this should have led to the conclusion that their own conduct should not have called for fines. The TAR held that the Competition Authority has a large margin of discretion in regards to the appropriateness of a commitment decision in any given case, with the only exception being cartel cases, and that its acceptance of Vodafone's commitments earlier on in the proceedings was not incompatible with its subsequent decision to impose fines on Tim and Wind. To reach this conclusion, the TAR also referred to and relied upon (citing it as relevant authority) a little known document (a sort of press release) issued in 2004 by the Commission to explain the new Article 9 commitment decisions, shortly after Regulation (EC) No. 1/2003 came into force: MEMO/04/217 of 17 September 2004, "Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour) – Frequently asked questions and answers." In this document, the Commission explained that it can consider adopting a commitment decision "when [...] the case is not one where a fine would be appropriate (this therefore excludes commitment decisions in hardcore cartel cases)," a sentence that the TAR quoted in full. The Competition Authority had also relied on this document. See *Tele2/Tim-Vodafone-Wind*, 24 May 2007, n. A357, Bulletin 20/2007, ¶ 391.

⁵⁴⁹ *Philip Morris & ETI v. Autorità Garante della Concorrenza e del Mercato*, 11 Apr. 2006, n. 1999 (Cons. stato). In this case, ETI and Philip Morris had challenged the TAR ruling confirming a decision of the Competition Authority imposing fines for a cartel in the market for tobacco. See *Philip Morris & ETI v. Autorità Garante della Concorrenza e del Mercato*, 29 Oct. 2003, n. 9203 (Trib. ammin. reg.); *Variazione di prezzo di alcune marche di tabacchi*, 13 Mar. 2003, n. 1479, Bulletin 11/2003.

the charges formulated against a company in various stages of the proceedings. In this case, ETI and Philip Morris argued, *inter alia*, that by altering in the final decision the substance of the charges contained in the statement of objections, the Competition Authority had violated their rights of defense. In particular, while the final decision found the existence of a bilateral agreement between ETI and Philip Morris, the SO had identified an illegal agreement between all cigarette producers. Furthermore, while the SO had identified three different infringements (price fixing, coordination on the introduction of new products, and licensing contracts between competitors), the final decision concluded that there was a single and overall infringement.

The Supreme Administrative Court rejected the appeal on this claim. According to the Court, the final decision had simply interpreted in a different way the same conduct that had already been considered in the SO. In essence, the Court drew a line between changes in the “factual framework” initially established in the SO, which require the adoption of a new or supplementary SO, and changes in the “legal qualification” of the same facts, which do not require a new SO prior to the adoption of a final decision.

(j) Penalties

Pursuant to Section 15(1) of the Competition Law, where the Competition Authority finds an antitrust violation, it orders the companies involved to put an end to the infringement. The Competition Authority typically asks the party to desist immediately from the anticompetitive conduct, to enact positive measures to restore conditions of effective competition in the affected market(s) within a specific period,⁵⁵⁰ and to report on its progress.⁵⁵¹

Moreover, in case of serious violations of competition rules, such as cartels, the Competition Authority may also impose on the undertaking involved a fine of up to 10 percent of the total turnover realized in the financial year prior to the notification of the final decision.

The notion of total turnover must be interpreted as referring to total worldwide turnover. With regard to fines imposed on associations of undertakings for infringements that they have committed, it is the Competition Authority’s practice to calculate the amount of the

⁵⁵⁰ These periods may vary. *See, e.g.*, Federazione Italiana Spedizionieri, 31 Mar. 1993, n. I164, Bulletin 6/1993 (where the Competition Authority assigned a thirty-day period; Nord Calce, 23 July 1993, n. I47, Bulletin 18/1993, (assigning a 90-day period); Ibar/Aeroporti di Roma, 17 Mar. 1993, n. A11, Bulletin 6/1993 (assigning a 180-day period).

⁵⁵¹ Reporting obligations were imposed, for example, in Cementir/Sacci, 15 May 1992, n. I29, Bulletin 9/1992, where the Competition Authority assessed the legality of a joint venture agreement and found that it was in violation of § 2, and in Produttori di Vetro Cavo, 12 June 1997, n. I201, Bulletin 24/1997, on a complex cartel of glass producers. In some cases dealing with an association of undertakings, the Competition Authority ordered that its decision be circulated among members of the association. *See* Latte-Associazione Esercenti, 9 Mar. 1994, n. I92, Bulletin 10/1994; Federazione Italiana Spedizionieri, 31 Mar. 1993, n. I164, Bulletin 6/1993.

fine based on the association's revenues or membership fees,⁵⁵² rather than the members' turnover, as allowed under EU law.⁵⁵³

In setting the amount of the fine, the Competition Authority must take into account the gravity⁵⁵⁴ and duration of the infringement. In its recent decisions, the Competition Authority has been relying increasingly on the principles set out by the Commission in its 1998 and 2006 Guidelines on the method of setting fines⁵⁵⁵. The Competition Authority has not adopted separate guidelines in this matter.

Furthermore, Section 31 of the Competition Law refers to the principles laid down by Law No. 689/1981, insofar as they are compatible with the Competition Law. According to Article 11 of Law No. 689/1981, the specific actions taken by the author of the infringement to eliminate or reduce its effects, its personality, and economic conditions must also be taken into account in the calculation of the amount of an administrative financial penalty, such as that provided for by Section 15(1) of the Competition Law.

Pursuant to Article 28 of Law No. 689/1981, the Competition Authority may collect the monies owed by the infringers within five years of the date on which the violation was committed. In case of continuous illegal conduct such as cartels, the statutory limitation period begins to run on the day on which such conduct ceases. No statute of limitation exists for the Competition Authority's powers to investigate and find a cartel infringement, without imposing fines.

If an undertaking fails to comply with an order to cease its conduct, the Competition Authority may apply a fine of up to 10 percent of the relevant turnover or, if the original decision provided for a fine, the new fine can be no less than double the fine already imposed up to 10 percent of the relevant turnover.⁵⁵⁶ If an undertaking repeatedly violates

⁵⁵² See, e.g., *Accordo Distributori ed Esercenti Cinema*, 26 July 2001, n. I363, Bulletin 30/2001. In this case, the Competition Authority found that the association of movie theatre owners (ANEC) and the associations representing movie distributors (UNIDIM and FIDAM) had violated the Competition Law by entering into an agreement (i) to fix the fees for the hire of movies shown in theatres and (ii) to coordinate the ticket pricing policies of theatres. The Competition Authority did not impose any fine on the individual members of the trade associations, but rather imposed fines on the three associations amounting to a small percentage (1-2%) of their respective annual membership fees.

⁵⁵³ Article 23(4) of EC Regulation (EC) No. 1/2003.

⁵⁵⁴ The Competition Authority usually finds that price fixing and market share agreements are serious infringements of the Competition Law. In *SNAM/Tariffe di vettoriamento*, 28 Feb. 1999, n. A221, Bulletin 8/1999, the Competition Authority held that the infringement was serious because (i) the competitive conditions on the market were hampered by the presence of an undertaking with a dominant position, and (ii) SNAM deliberately acted in a way that resulted in a further restriction of competition. The Competition Authority usually finds that infringements affecting a large proportion of the market are serious because they harm consumers. See, e.g., *Rai-Mediatset-R.T.I.-Mediatrade*, 10 Dec. 1998, n. I283B, Bulletin 49/1998 (the parties to an agreement represented approximately 98% of the relevant market).

⁵⁵⁵ See *supra*, note 147.

⁵⁵⁶ *Operatori nel settore degli esplosivi da mina*, 26 Nov. 1998, n. I239B, Bulletin 48/1998; *Associazione Italiana Calciatori-Panini*, 11 Sept. 1997, n. I195B, Bulletin 37/1997.

the order of the Competition Authority, the latter may suspend the undertaking's activities for up to thirty days.⁵⁵⁷

Finally, even though violations of Sections 2 and 3 of the Competition Law do not result in per se criminal sanctions, in certain instances antitrust infringements may constitute criminal behavior as well, and therefore result in sanctions provided for under criminal law.⁵⁵⁸

(k) Rights of Third Parties

Articles 7(1)(b) and 16(1) of Decree No. 217/1998 set forth the conditions under which the complainant(s), if any, and any other interested third parties—undertakings, individuals, consumer associations, competitors, or other bodies whose interests might be directly and immediately harmed by the alleged cartel or any measures adopted as a result of the investigation—may be admitted to participate in the investigation. Within 30 days of publication of the decision to open proceedings in the Bulletin, interested third parties may file a reasoned application to participate in the proceedings. Where a third party is admitted to participate, it has the right: (i) to access the case-file (with the exception of confidential information) and (ii) produce written submissions, documents, arguments and opinions.

In addition, admitted third parties may be heard by the Competition Authority officials and, upon their reasoned request, be allowed to participate in the final oral hearing, if such a hearing is requested by the parties.

H. Judicial & Administrative Procedures

1. Relevant Courts

As described above, under I.D., pursuant to Article 33(1) of the Competition Law, the Competition Authority's decisions are subject to judicial review by the regional administrative court of first instance of Latium (TAR). Judgments rendered by the TAR may be appealed to the Supreme Administrative Court.

Judgments by the Supreme Administrative Court are subject only to: (i) appeals to the Italian Supreme Court (*Corte di Cassazione*) on jurisdictional grounds; and (ii) appeals for revocation, in the cases and under the circumstances set forth in Article 396 of the Italian Civil Code of Procedure.

⁵⁵⁷ Competition Law, § 15.

⁵⁵⁸ COMPETITION AUTHORITY, ANNUAL REPORT 2002, at 15 (2003) (referring to cartels' rigging of public tenders, as in *Aziende di Trasporto Pubblico Locale - Petrolieri*, 20 Feb. 2003, n. 1474, Bulletin 8/2003).

2. Independence of the Judiciary

The Italian Constitution provides that the judiciary is subject only to the law.⁵⁵⁹ Therefore, judges are autonomous and independent from the political and executive powers.

No judge can be removed or suspended from his function or appointed to a different seat or function unless the removal is voluntary, or it is based upon a decision of the Supreme Judiciary Council (*Consiglio Superiore della Magistratura*) for cause and with the guarantees provided by the law.⁵⁶⁰ The Supreme Judiciary Council is an independent body that supervises the judiciary. It consists of 32 members, 20 of whom are elected by the judiciary, and is presided over by the president of the Italian Republic.

3. Mechanics for Initiating Proceedings and Appeals

(a) Timing of the Appeal Proceeding and Scope of the Review

The Competition Authority's decisions are subject to review by the TAR and the Supreme Administrative Court.⁵⁶¹

The parties may file an appeal within 60 days from receipt of the notifications of the decision of the Competition Authority. The parties can ask the TAR for a stay of execution of the Competition Authority's decision. Hearings for interim measures are usually granted within a short time of the filing of a notice of appeal. A hearing on the merits of a case usually takes place within one year of the filing of an appeal. If the appeal is successful, the decision is annulled. If the appeal is denied, the party may appeal to the Supreme Administrative Court. Decisions by this court are final and cannot be appealed.

Law No. 205/2000, enacted on July 21, 2000, introduced significant changes to the procedural rules applicable to court proceedings brought before the TAR and the Supreme Administrative Court with respect to decisions of all Italian independent agencies, including the Competition Authority. Such changes were aimed, *inter alia*, at reducing the length of proceedings and widening the scope of the administrative judges' fact-finding powers.

As to the duration of the proceedings, the 2000 reform has been a clear success. By contrast to the procedural rules for proceedings held before the EU Courts, all annulment proceedings concerning the Competition Authority's decisions are now automatically and effectively conducted under a "fast-track" procedure. Generally, appeals before the Administrative Courts now have a total duration not exceeding two years,⁵⁶² and the procedure before the TAR usually lasts for only a few months.

⁵⁵⁹ COSTITUZIONE [COST.], § 101(2).

⁵⁶⁰ COST., § 107.

⁵⁶¹ Competition Law, § 33(1).

⁵⁶² Such improvement has now been confirmed by the Competition Authority. See COMPETITION AUTHORITY, ANNUAL REPORT 2002, § 33 (2003).

In a number of recent judgments, the Supreme Administrative Court addressed the scope of judicial review over the Competition Authority's decisions.⁵⁶³ In particular, the Supreme Administrative Court stated that the scope of the TAR's review of substantive findings, such as a finding of a dominant position, is limited to an assessment of whether the Competition Authority based its conclusions on accurately-stated facts and supported its decision on adequate and coherent grounds.⁵⁶⁴

For example, in one case the Competition Authority found that Enel enjoyed a dominant position in the recently-liberalized market for the sale of electricity.⁵⁶⁵ In annulling the decision, the TAR held that the loss of market share suffered by Enel excluded the possibility of a dominant position.⁵⁶⁶ Finally, the Supreme Administrative Court criticized the TAR because it had, in fact, substituted its own appraisal of the facts for that of the Competition Authority, and thus exceeded its powers of judicial review.⁵⁶⁷ The Court stated that such an assessment implies a complex and technical appraisal, on the basis of "non-scientific" and disputable rules (such as economic rules), of the relevant circumstances of each case. Therefore, according to the Court, such assessment is within the discretionary powers vested in the Competition Authority, and the TAR is not entitled to substitute its own appraisal for that of the Competition Authority.

(b) Standing to Appeal Decisions of the Competition Authority

In a landmark judgment, *Motorola v. Autorità Garante della Concorrenza e del Mercato*,⁵⁶⁸ the Supreme Administrative Court finally overturned the traditional position of the Administrative Courts, under which only the addressees of the Competition Authority's decisions had locus standi to seek the decisions' annulment. In *Motorola*, the Court clearly stated that a rule precluding persons other than those to whom a decision is addressed from appealing would infringe the fundamental constitutional principle of the effectiveness of

⁵⁶³ See, e.g., *Autorità Garante della Concorrenza e del Mercato v. Enel*, 1 Oct. 2002, n. 5156 (concerning a merger case). For a similar position by the Supreme Administrative Court concerning a cartel case, see *Axa Assicurazioni v. Autorità Garante della Concorrenza e del Mercato*, 23 Apr. 2002, n. 2199/2002 (Cons. stato) (referring to the E.C.J.'s judgments on the scope of the judicial review in Case 42/84, *Remia v. Commission*, 1985 E.C.R. 2545, Joined Cases 142 & 156/84, *BAT & Reynolds v. Commission*, 1987 E.C.R. 1849, and Case 6-7/95 P, *John Deere v. Commission*, 1998 E.C.R. I-3111). Meanwhile, for a case of abuse of dominance, see *Coca-Cola v. Autorità Garante della Concorrenza e del Mercato*, 19 July 2002, n. 4001 (Cons. stato), and, more recently, the TAR judgment in *Ristomat v. Autorità Garante della Concorrenza e del Mercato*, 10 Mar. 2003, n. 1790 (Trib. ammin. reg.).

⁵⁶⁴ By contrast, the Supreme Administrative Court held that the TAR has the power of full judicial review with respect to the imposition of fines and cease and desist orders. See *Coca-Cola v. Autorità Garante della Concorrenza e del Mercato*, 19 July 2002, n. 4001 (Cons. stato).

⁵⁶⁵ *Enel-France Telecom/New Wind*, 28 Feb. 2001, n. C4438, Bulletin 8/2001.

⁵⁶⁶ *Enel v. Autorità Garante della Concorrenza e del Mercato*, 14 Nov. 2001, n. 9534 (Trib. ammin. reg.).

⁵⁶⁷ *Autorità Garante della Concorrenza e del Mercato v. Enel*, 1 Oct. 2002, n. 5156 (Cons. stato).

⁵⁶⁸ *Motorola v. Autorità Garante della Concorrenza e del Mercato*, 14 June 2004, n. 3685 (Cons. stato).

judicial protection. Therefore, persons other than addressees may be entitled to appeal a decision, provided that such persons are directly and individually prejudiced by it. This is typically (but not exclusively) the case for competitors, as implicitly confirmed by the fact that the Competition Law and Decree No. 217/1998 provide specific procedural rights⁵⁶⁹ to all interested third parties in connection with Competition Authority proceedings that may directly and immediately prejudice them.

The Court also noted that its conclusion is in line with Court of Justice case law interpreting Article 263(4) TFEU (ex Article 230 TEC).⁵⁷⁰ Indeed, the Competition Authority is entitled to apply Articles 101 and 102 TFEU and, pursuant to a well-established case law of the EU Courts, persons other than those to whom a decision is addressed may, under certain circumstances,⁵⁷¹ lodge an appeal. The *Motorola* judgment - even though adopted in relation to a decision exempting a restrictive agreement under Section 4 of the Competition Law - affirms principles, and is supported by arguments, that could also apply to decisions clearing a proposed concentration.⁵⁷²

Indeed, in *Fondiarie Industriale Romagnola*⁵⁷³ the Supreme Administrative Court extended the scope of the *Motorola* judgment, reaching the same conclusions in the area of merger control and holding that third parties can challenge merger clearance decisions. Based on the then-settled case law, the TAR had initially rejected as inadmissible *Fondiarie Industriale Romagnola*'s (FIR) appeal against a decision authorizing, subject to certain conditions, the acquisition and the subsequent division in two separate corporate entities of Eridania, the largest sugar producer in Italy, by *Seci-Sadam*, *Co.prob* and *Finbieticola*. The Supreme Administrative Court reversed this judgment, holding that third parties (such as

⁵⁶⁹ These third-party procedural rights include: (i) the right to participate in the proceedings; (ii) the right to be notified of the Authority's decision to open an investigation; and (iii) the right to participate in the final hearing before the Authority's Board. See Presidential Decree No. 217/1998, §§ 6(4), 7 and 14(5).

⁵⁷⁰ Pursuant to Article 263(4) TFEU, "[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

⁵⁷¹ Such appellate rights exist if a decision affects third parties by reason of certain peculiar attributes, or if a decision differentiates them from all other persons, and by virtue of these factors distinguishes them individually (as is the case with the person to whom the decision is actually addressed).

⁵⁷² For example, in *Società Ambrosiana Gelati S.a.s. and others v. Autorità Garante della Concorrenza e del Mercato*, 24 Feb. 2004, n. 1715 (Trib. ammin. reg.), the TAR held that persons other than the addressees may be entitled to appeal a decision adopted by the Authority pursuant to Article 101 TFEU (and its Italian equivalent, § 2 of the Competition Law), provided that such persons can show that the activity "illegitimately authorized" by the decision is unfairly prejudicial to them, as well as to free competition, in the relevant market. In some passages, the TAR's reasoning also explicitly refers to merger control decisions. The TAR judgment was subsequently quashed by the Supreme Administrative Court on grounds different from the one addressed in this section. See *Società Ambrosiana Gelati S.a.s. and others v. Autorità Garante della Concorrenza e del Mercato*, 2 Oct. 2007, n. 5070 (Cons. stato).

⁵⁷³ *Fondiarie Industriale Romagnola S.p.A v. Autorità Garante della Concorrenza e del Mercato*, 21 Mar. 2005, n. 1113 (Cons. Stato).

competitors or consumer associations) have standing to appeal such decisions if they can demonstrate that their interests can be directly and immediately harmed by the Competition Authority's decision. The Court noted that its ruling was in line with the EU courts' case law on direct actions under Article 263 TFEU, and was also consistent with the rationale behind the Supreme Civil Court's (*Corte di Cassazione*) recent judgment on consumers' standing to claim damages from undertakings violating Italian competition law.⁵⁷⁴ As it was clear that the appellant was the main competitor of the companies involved in the transaction authorized by the Competition Authority, the Supreme Administrative Court found that FIR had a direct interest in the outcome of the merger control proceedings.

Finally, private parties are entitled to claim damages for injuries to their "legitimate interests," a peculiar form of private right under Italian law which, out of deference to government action, used to be less protected than direct rights.⁵⁷⁵ Thus, it is theoretically possible to bring an action for damages against the Competition Authority, following the annulment of a wrongful decision by the TAR Lazio. At present, there is no case law on the point. Based on case law developed in other areas of administrative law, it is likely that the Administrative Courts will apply very strict criteria in assessing the wrongful nature of administration activity and other conditions for granting damages.

I. Private Actions

Private antitrust actions in Italy have increased over the past few years. This trend may be due to several reasons: (i) the general awareness of remedies offered by private antitrust enforcement, which was further stimulated by the publication in 2005 of the Commission's *Green Paper on Damages Actions for Breach of the EC Antitrust Rules* (the *Green Paper*);⁵⁷⁶ (ii) the circumstance that, before the Competition Authority was given in 2006

⁵⁷⁴ Unipol v. Ricciardelli, 4 Feb. 2005, n. 2207 (Cass).

⁵⁷⁵ Comune di Fiesole v. Vitali, 22 July 1999, n. 500 (Cass). In a recent judgment, the Italian Constitutional Court affirmed that actions for damages complement the judicial remedies available against illegitimate activities by administrative entities. See judgment of 6 July 2004, n. 204.

⁵⁷⁶ The Green Paper was accompanied by a *Commission Staff Working Paper on Damages Actions for Breach of the EC antitrust*, 19 Dec. 2005, SEC(2005) 1732, available at http://ec.europa.eu/competition/antitrust/actionsdamages/sp_en.pdf. The purpose of these documents was to stimulate a debate on possible options that could facilitate and boost private damages actions at the national level. Public consultation was open until 21 Apr. 2006 and, by that time, the Commission had received several comments from private firms and public institutions. Also on the basis of indications and suggestions received, the Commission has recently finalized a *White Paper on Damages Actions for Breach of the EC Antitrust Rules* [hereinafter the White Paper] that puts forward concrete follow-up proposals on this matter. The final White Paper is available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf. The White Paper is accompanied by a *Commission Staff Working Paper on Damages Actions for Breach of the EC antitrust rules*, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf, and an *Impact Assessment Report*, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/impact_report.pdf. The

with the power to impose *ex officio* interim measures pursuant to Section 14 *bis* of the Competition Law, civil courts had the exclusive power to grant interim relief measures in relation to alleged infringements of national antitrust provisions; and (iii) a 2005 landmark judgment of the Italian Supreme Court, which reversed a much-criticized prior ruling and finally recognized that consumers are entitled to bring private actions in tort before civil courts for breach of Italian antitrust provisions.⁵⁷⁷ The adoption in February 2007 of the first Italian leniency program may further boost follow-on litigation for damages arising from cartel infringements. Similarly, the recent introduction of class action provisions in the Italian legal system may increase the number of antitrust damage proceedings.⁵⁷⁸ Finally, proposals set forth in the White Paper by the Commission, if adopted, could remove certain current obstacles to private antitrust actions and stimulate damages claims related to anticompetitive conduct.⁵⁷⁹

1. Types of Private Actions Available in the Italian Legal System

Private antitrust actions that can be filed with the Italian civil courts in connection with alleged violations of Italian (or EU) competition rules have different forms, namely: actions for damages,⁵⁸⁰ actions for injunctive relief, and actions for nullity.⁵⁸¹

Commission has now conveyed some of the proposals of its White Paper in a draft directive. If this directive were eventually to be adopted by EU institutions and implemented by Member States, antitrust actions for damages at national level could effectively be boosted.

⁵⁷⁷ Unipol v. Ricciardelli, 4 Feb. 2005, n. 2207 (Cass).

⁵⁷⁸ Section 140 bis of Legislative Decree No. 206/2005 (the Italian Consumer Code), as recently amended.

⁵⁷⁹ The White Paper, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

⁵⁸⁰ The term “action for damages” also comprises and refers to those claims filed with civil courts for the mere purpose to obtain a declaratory judgment establishing that the plaintiff is not liable for possible antitrust damages suffered by third parties. Through this anticipated lawsuit, the plaintiff (*i.e.*, the undertaking that is suspected to have committed the infringement) has the possibility to secure jurisdiction before a given national court, possibly different from that that alleged victims would have seized. Though not very familiar to the antitrust field, such course of action has been undertaken, *e.g.*, before the Milan Courts in relation to an alleged cartel concerning the markets for synthetic rubbers. *See* judgment of May 5, 2009, n. 53825, Milan Tribunal, which has been appealed and is now pending before the Milan Court of Appeal.

⁵⁸¹ Private antitrust actions can be filed in relation to anticompetitive agreements and abuses of dominant positions. On the contrary, it is unlikely that private enforcement originates from violations of Italian merger control rules. In the merger control area, the Competition Authority has an exclusive power to review concentrations and assess the compatibility of the latter with antitrust rules. Also, in its judgment *Soc. Moto v. Soc. Autogrill*, 3 June 2004, the Milan Court of Appeal stated that the Competition Authority has an also exclusive power to verify compliance with its own merger control decisions. If such reasoning were to be followed also by other courts, private litigation might be virtually precluded within the ambit of Italian merger control. Certain commentators, however, argue that follow-on litigation (*i.e.*, subsequent to a decision of the

(a) Actions for Damages

(i) Ground and Standing

Damages in tort for breach of Italian (or EU) antitrust provisions may be claimed by victims of anticompetitive conduct pursuant to Article 2043 of the Italian Civil Code, according to which “any act committed with either intent or fault causing an unjustified injury to another person obliges the person who has committed the act to compensate the damages.”

In *Unipol v. Ricciardelli*,⁵⁸² the Italian Supreme Court (sitting en banc) clarified that consumers also have standing to bring damages actions in tort for breach of the Competition Law. In this case a policyholder sued his insurance company before a lower court asking for the refund of part of the insurance premium he had paid, arguing that the latter had been increased as a result of an upstream cartel previously ascertained by the Competition Authority to which its insurance company had been part. The lower Court upheld the claim but the insurance company appealed the judgment before the Italian Supreme Court arguing, *inter alia*, that consumers did not have standing to bring damages actions based on infringement of Italian antitrust provisions. The Italian Supreme Court dismissed the appeal on this point, clarifying that the objective of Italian antitrust rules is to ensure, in common and public interest, that competition in the national market is not restricted. Anyone, including consumers alleging prejudice resulting from reduced competition, should thus be entitled to claim damages in tort from undertakings that have breached the Competition Law.⁵⁸³ That being said, the Italian Supreme Court clarified that, pursuant to Section 33(2) of the Competition Law, Courts of Appeals have exclusive jurisdiction with reference to damages actions for breach of the Competition Law. Therefore, it concluded that the policyholder had wrongly sued his insurance company before a lower Court. *Unipol v. Ricciardelli*, therefore, stands as a very important precedent that reversed *AXA v. ISVAP and Camillo*,⁵⁸⁴ a previous judgment of the Italian Supreme Court holding that consumers have no standing to bring damages actions in tort based on the infringement of the Competition Law since the latter is intended to protect only undertakings and not consumers.⁵⁸⁵

However, conduct amounting to an antitrust infringement may also give rise to damages actions based on contract liability. For instance, a company that is part of a horizontal price

Competition Authority establishing the infringement of Italian merger control rules) would still be possible.

⁵⁸² *Unipol v. Ricciardelli*, 4 Feb. 2005, n. 2207 (Cass).

⁵⁸³ The right of consumers to bring damages actions in tort for breach of Italian antitrust provisions was then confirmed by the Italian Supreme Court in *SAI v. Nigriello*, 2 Feb. 2007, n. 2305 (Cass).

⁵⁸⁴ *AXA v. ISVAP and Camillo*, 9 Dec. 2002, n. 17475 (Cass).

⁵⁸⁵ For a recent case in which tort damages were awarded to consumers who paid higher premiums for their third-party liability insurance as a result of an upstream cartel among insurance companies, see *Nigriello v. SAI*, 3 May 2005, Naples Court of Appeal.

fixing agreement may be found liable, pursuant to Italian Civil Code rules on contracts, to its customers for breach of principles of good faith and fairness.⁵⁸⁶

Moreover, pursuant to Section 1(2)(e) of Law No. 281/1998 (now Section 2(e) of Legislative Decree No. 206/2005) consumers and end-users enjoy a fundamental right “to honesty, transparency and fairness in contractual relationships relating to goods and services.” Therefore, an undertaking acting in breach of Italian (or EU) antitrust provisions (*e.g.*, implementing a price-fixing agreement entered into with its competitors) might be held liable for damages towards their costumers also for breach of such right.⁵⁸⁷

(ii) Burden and Standard of Proof

On the basis of general civil law liability principles, the burden of proof lies with the plaintiff, who must prove the facts on which his claims are founded. The defendant, on the other hand, must provide evidence in support of his objections or counterclaims. In particular, a plaintiff claiming antitrust damages in tort is required to prove: (i) an intentional or negligent violation of antitrust provisions by the defendant, (ii) the damages suffered, and (iii) a direct causal link between the defendant’s conduct and the alleged damages.

All evidence normally admitted in civil liability proceedings, including witness testimonies, documents, and expert opinions, is admissible. Courts may also order one of the parties or a third party to submit relevant documents, which must be reasonably identified by the party applying for the disclosure order, or request documents from the Competition Authority’s file.⁵⁸⁸ The Court shall weigh any evidence provided by the parties, except where the value of a given means of proof is specifically mandated by law (*e.g.*, a party’s confession is by law irrefutable proof of confessed facts, provided it concerns disposable rights). The Court may also base its findings of fact on circumstantial evidence provided it is strong, precise, and conclusive.

The Italian Supreme Court has recently held that, based on probability rules, a casual link between damages suffered by consumers who entered into downstream contracts with members to the upstream cartel may be presumed. However, such presumption in favor of the plaintiff is rebuttable.⁵⁸⁹

The court may also appoint an expert to assist in matters requiring specific technical expertise (*e.g.*, definition of the relevant market or liquidation of damages). Findings made by the Competition Authority in the context of administrative proceedings are not binding on the judge, although they may constitute element of proof or even create a sort of rebuttable presumption.

⁵⁸⁶ Bari Court of Appeal judgment of 22 Nov. 2001; Naples Court of Appeal judgments of 9 Nov. 2007, 26 Oct. 2007 and 12 July 2007.

⁵⁸⁷ De Gaetanis v. Sara, 30 Jan. 2003, Giudice di Pace of Lecce.

⁵⁸⁸ Please note that pre-trial discovery is not available in Italian civil litigation, including for private antitrust actions.

⁵⁸⁹ SAI v. Nigriello, 2 Feb. 2007, n. 2305 (Cass.). *See also* Naples Court of Appeal of 12 July 2007.

(iii) Calculation of Damages

Damages granted in antitrust actions are limited to plaintiff's actual loss (*i.e.*, "out of pocket" loss plus loss of income). Punitive or exemplary damages are not available in the Italian legal system. Plaintiffs can only claim damages that they actually and effectively incurred. Where a precise amount cannot be determined, the Court may also calculate damages to be granted on an equity basis.⁵⁹⁰

Liquidation of damages based on loss of income is especially difficult to calculate where the injured company could not even enter the market due to the incumbent operator's abusive conduct. In the *Telsystem v. SIP*,⁵⁹¹ the Court commissioned an expert report on losses suffered by a potential first mover into the sector for leased-lines services, which failed to enter this new market because of a dominant phone company's refusal to grant access to certain essential facilities. The damage liquidation was based, *inter alia*, on the advantage that plaintiff would have had as first entrant into the sector for leased-lines services. The Court, however, considered also that in a free market economy, monopolist rent, such as that of a first mover, tends to be neutralized by competition within a certain timeframe.

Similarly, in *Albacom v. Telecom*,⁵⁹² the plaintiff claimed it could not enter the sector for x-DSL/x-SDH services, one of several possible systems for the data transmission, where the dominant phone company was already present as sole operator and denied access to certain essential facilities at fair conditions. The Court multiplied plaintiffs' market shares in the general market for data transmission prior to beginning of the abuse by the value of the market for x-DSL/x-SDH services during the whole period of the anticompetitive conduct. It then assumed that the resulting amount corresponded to the turnover that the plaintiff would have generated if it could have accessed the essential facilities needed for entering the market. Hence, the Court awarded damages equal to 10 percent of this figure, assuming that profits of an undertaking operating in the sector at stake were around the mentioned percentage of turnover accrued.

In *Bluvacanze v. Viaggi del Ventaglio and others*,⁵⁹³ the plaintiff (a travel agency) claimed damages incurred as a result of a boycott by several tour operators, which

⁵⁹⁰ Judgment of 28 June 2007, n. 2513, Naples Court of Appeal. Apart from damages, also restitution has been granted in certain cases. For instance, in its judgment *Avir v. Eni*, 16 Sept. 2006, the Milan Court of Appeal found that the incumbent gas operator abused its dominant position by imposing price increases that did not bear a reasonable relation to the cost of gas. This conclusion was reached comparing increase of Eni's gas prices with the trend of gas quotations at the London Commodity Exchange during the disputed period. The difference between the two growth rates was found to constitute an (exploitative) abusive overcharge and the relative amount was awarded to the claimant as restitution. The Court also decided that additional damages were to be quantified by a separate judgment.

⁵⁹¹ *Telsystem v. SIP*, 18 July 1995 and 24 Dec. 1996, Milan Court of Appeal.

⁵⁹² *Albacom v. Telecom*, 20 Jan. 2003, n. 261, Rome Court of Appeal. *See also* *Wind v. Telecom*, 20 Jan. 2003, n. 262, Rome Court of Appeal; *Cable & Wireless v. Telecom*, 20 Jan. 2003, n. 266, Rome Court of Appeal.

⁵⁹³ *Bluvacanze v. Viaggi del Ventaglio and Others*, 30 Apr. 2003, Milan Court of Appeal.

collectively refused to supply it with travel packages from April to June 2001. The Court first added the plaintiff's monthly average turnover generated by the sales of travel packages of those tour operators from January through March 2001 (the period before the infringement) to the value resulting from multiplying the latter figure by the percentage increase of sales expected during next months as regards the same products (in the period comprised between January through March 2001, in fact, this kind of business usually shows an increase). It then multiplied the resulting figure by three (*i.e.*, the number of months that boycott lasted), assuming that this was the turnover that the plaintiff would have earned by sales of travel packages of tour operators involved in the infringement if it had not been victim of the anticompetitive practice. Hence, the Court awarded damages equal a percentage of the resulting sum, representing probable profit the travel agency would have enjoyed from the hypothetical turnover. The Court also awarded additional damages to the plaintiff, calculated on an equitable basis, as compensation for the harm the collective boycott had caused to its reputation.

In *Inaz Paghe v. Associaz. naz. consulenti lav.*,⁵⁹⁴ the Court awarded damages based on loss of profits arising from contracts terminated by clients of a software provider as a result of a collective boycott organized by national and local employment consultant associations. In order to identify these contracts the Court compared the number of contracts terminated in the two-year period before and after the boycott to the number of contracts terminated during the two-year boycott. It then multiplied the average profit for each client identified in the opinion rendered by expert appointed by the Court by the number of contracts that have been supposedly terminated because of the boycott, assuming a potential residual contractual duration of two to three years. The Court did not award any damage for potential new customers that the plaintiff had allegedly not been able to win due to the boycott, as it found the plaintiff had failed to prove these allegations adequately.

(iv) *Passing on Defense*

Defendants may use any defense that is normally employed against civil liability claims.

The passing on defense is not recognized as such. However, as already mentioned, pursuant to Italian Civil Code liability rules a claimant may only seek compensation for damages it actually suffered. In principle, therefore, the claimant would have no standing with respect to damages it passed along downstream to customers. This reasoning appears to be endorsed by the Court in *Unimare v. Geasar*.⁵⁹⁵

In *Indaba v. Juventus*,⁵⁹⁶ however, the Court also clarified that compensation is not available to those undertakings that willfully entered into an anticompetitive agreement with the clear intent to pass on to the final customers any possible damages they may suffer.

⁵⁹⁴ *Inaz Paghe v. Associaz. naz. consulenti lav.*, 10 Dec. 2004, Milan Court of Appeal.

⁵⁹⁵ *Unimare v. Geasar*, 23 Jan. 1999, Cagliari Court of Appeal.

⁵⁹⁶ *Indaba Incentive Company v. Juventus F.C.*, 6 July 2000, Turin Court of Appeal.

(v) Joint Liability

Under general civil liability principles, where damages are caused by more than one undertaking, each is held jointly and severally liable to the claimant. The share of damages for each defendant is to be determined in proportion to the seriousness of his fault and the materiality of the effect of its conduct. Where such assessment is not possible, all defendants are held liable for an equal amount of damages. The defendant who is required by claimant to pay more than its share of damages can seek contribution from the other defendants or can sue them for indemnification of its costs.

In principle, Italian law allows contribution and indemnity contract provisions according to which a party undertakes to indemnify (totally or in partially) the other party from possible damages liability arising from the agreement they have entered. However, if the co-defendants are unable to show a legitimate interest as to why they agreed to such an obligation, the indemnity provision may be held null for lack of contractual cause or as contrary to public order.

(vi) Statutes of Limitation

The limitation periods for damages actions based on tort or breach of contract are five and ten years, respectively. The Supreme Court has recently clarified that the limitation period for antitrust damages actions starts running when the claimant is (or, using reasonable care, should be) aware of both the damage and its unlawful nature (*i.e.*, that the damage was caused by an antitrust infringement).⁵⁹⁷

(b) Actions for Nullity

In *Liquigas v. Girelli*,⁵⁹⁸ the Italian Supreme Court stated that nullity of a horizontal anticompetitive agreement pursuant to Section 2(3) of the Competition Law is not automatically reflected on downstream contracts entered into by customers with members to the upstream cartel and therefore maintain their validity. Some commentators and lower courts' judgments, however, still argue that nullity of an upstream cartel may affect also the validity of downstream contracts, which may result to be (in part) null or void pursuant to contract rules set forth in Italian Civil Code.⁵⁹⁹

It is also worth mentioning that, in recent judgments, the Italian Supreme Court recognized and stressed the strong links existing between an upstream cartel and downstream agreements.⁶⁰⁰ Accordingly, future trends may lead to apply nullity provided by Section 2(3) of the Competition Law not only to upstream agreements but also to those contracts by which the former are implemented.

⁵⁹⁷ SAI v. Nigriello, 2 Feb. 2007, n. 2305 (Cass.). *See also* Naples Court of Appeal of 12 July 2007.

⁵⁹⁸ *Liquigas v. Girelli*, 11 June 2003, n. 9384 (Cass.).

⁵⁹⁹ *See, e.g.*, C.V. v. Soc. Milano Assicur., 12 Sept. 2003, Giudice di Pace of S. Anastasia.

⁶⁰⁰ *Unipol v. R.M.*, 4 Feb. 2005, n. 2207 (Cass.), *SAI v. Nigriello*, 2 Feb. 2007, n. 2305 (Cass.).

Clauses of an agreement that constitute and amount to an abuse of dominant position may also be found null. In *Avir v. Eni*,⁶⁰¹ the Milan Court of Appeals found that price clauses contained in gas supply agreements, through which the incumbent gas operator had abused its dominant position by imposing an excessive purchase price (so-called exploitative abuse), were null because they violated Section 3(a) of the Competition Law.

Pursuant to Article 1422 of the Italian Civil Code, declaration of nullity is not subject to statutes of limitation.

(c) Actions for Injunctive Relief

Actions for injunctive relief can have different purposes. For instance, the plaintiff can request the Court to order a dominant company to grant access to certain essential facilities or a cartel member to stop colluding with competitors. Injunctions can be granted either as a final award or as an interim measure.

Pursuant to Articles 700 *et seq.* of the Italian Civil Procedure Code, an interim measure may be requested if a plaintiff reasonably fears that its rights are likely to be irreparably damaged during the time that is necessary for reaching an ordinary proceeding decision or judgment. In certain cases a defendant has been ordered to enter into a supply agreement⁶⁰² or to cease and desist from continuing its unlawful behavior⁶⁰³ until an ordinary proceeding decision or judgment can be reached.

2. Contingency Fees

Pursuant to new rules passed in 2006, outcome-based fee arrangements are now permitted, arguably including “no win, no fee” arrangements.⁶⁰⁴ These types of arrangements are to be stipulated in written form and consistent with the principle of proportionality.

3. Class Action

The Italian Parliament has recently introduced in the Italian legal system a class action system that, to a certain extent, appears to be similar to those of certain Common Law countries.⁶⁰⁵

In particular, Article 140 bis of the Italian Consumer Code provides that, in case of anticompetitive conducts affecting a number of consumers or users, any of them has

⁶⁰¹ *Avir v. Eni*, 16 Sept. 2006, Milan Court of Appeal.

⁶⁰² Judgment of 29 Apr. 1995, Milan Court of Appeal; Judgment of 12 Feb. 1995, Rome Court of Appeal.

⁶⁰³ Judgments of 13 July 1998, Milan Court of Appeal and 29 Sept. 1999, Milan Court of Appeal.

⁶⁰⁴ Decree Law No. 223 of 4 July 2006, then converted into Law No. 248 of 4 Aug. 2006.

⁶⁰⁵ See Section 140 bis of Legislative Decree No. 206/2005 [hereinafter Italian Consumer Code], as recently amended. This new class action is applicable only with respect to infringements committed after August 15, 2009.

standing to file a class action with the competent Court.⁶⁰⁶ The latter, at the end of the first hearing, has to decide whether all conditions for the certification of the class are met.⁶⁰⁷ If the class action is certified (*i.e.*, admitted), a notice about the lawsuit is made public and all consumers or users who claim to have a right identical and homogeneous to that for which the class has been established can join it. The opt-in declaration is to be filed with the register of the competent Court within a certain time.⁶⁰⁸ Consumers and users who opt-in do not assume the role of parties to the proceeding and, as such, do not have any procedural power. If the Court eventually finds that the class action is well founded, it will condemn the defendant to pay a certain sum to each member of the class or, alternatively, establish the criteria on the basis of which these sums are to be calculated and then liquidated.

Finally, it is worth mentioning that, pursuant to Articles 139 and 140 of the Italian Consumer Code, consumer associations which are registered with the Ministry for Productive Activities have standing to request (i) cease-and-desist orders against certain conduct that may harm consumer interests as well as (ii) appropriate measures for correcting or eliminating the detrimental effects thereof. However, it is not clear whether such orders and measures may also be sought in relation to anticompetitive conduct.

J. Jurisdiction

1. Extraterritorial Application of Law

To the extent that the anticompetitive conduct taking place outside Italy has effects within the Italian territory or a substantial part of it, such conduct falls within the scope of the Competition Law and, possibly, Article 101 TFEU, if it affects trade between Member States. As a consequence, such conduct may be investigated and sanctioned by the Competition Authority.

The Competition Law arguably is not applicable to companies established in Italy that engage in cartel conduct affecting only foreign trade, including where the anticompetitive agreements or practices take place within the domestic territory.

2. International Agreements & Cooperation

Italy is not party to any treaty or international agreement concerning the territorial scope of the application of its competition laws or the cooperation of the Competition Authority's powers with those of enforcement agencies of countries other than those of the European Union.

⁶⁰⁶ The class action can be submitted by the consumer or user also through (i) committees of which he is member as well as (ii) associations.

⁶⁰⁷ The class action can be rejected by the Court for a number of reasons: for instance, when the consumer or user who has filed it has interests conflicting with those of the proposed class or does not seem to be able to protect adequately the class' interests.

⁶⁰⁸ The opt is not mandatory: individuals can decide not to join the class and file a separate lawsuit on their own.

The Competition Authority was a founding member of the International Competition Network (“ICN”), an international body comprised of national and multinational competition authorities. The ICN seeks to provide antitrust authorities with a specialized, yet informal, venue for maintaining regular contacts and addressing practical competition issues. The focus is on improving world-wide cooperation and on enhancing convergence through focused dialogue. The ICN does not exercise any rule-making function. Rather, it is a competition authority forum supported by participating authorities themselves. The ICN initiative is project-oriented. The ICN’s recommendations are not binding and it is left to the individual antitrust agencies to decide whether and how to implement them. This can be accomplished through unilateral, bilateral, or multilateral arrangement.