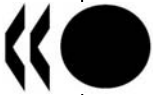


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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN ITALY**

-- 2005 --

*This report is submitted by the Italian Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 18-19 October 2006.*

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1. The annual report is divided into two parts. The first part includes a brief overview containing a summary of the activity carried out by the Italian Competition Authority and a description of the most significant cases and competition advocacy interventions. The second part contains a description of the most relevant changes to economic regulation adopted by Parliament or by Government (issues of local relevance are not covered).

## 1. Enforcement of competition laws and policies

### 1.1 Activities carried out according to law 287/1990: overview

2. In 2005, the Authority evaluated 596 concentrations, 14 agreements and 4 possible abuses of dominant position.

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#### *The Authority's activity*

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	2004	2005	January-March 2006
<b>Agreements</b>	60	14	3
<b>Abuses of dominant position</b>	24	4	3
<b>Concentrations</b>	612	596	154
<b>Fact-finding inquiries</b>	3	2	-
<b>Non-compliance with orders</b>	3	1	-
<b>Opinions submitted to the Bank of Italy</b>	21	20	1

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3. Four investigations of agreements were concluded in 2005.<sup>1</sup> In three of these cases, the proceedings ended with the finding of a violation of competition law (Article 2 of Law 287/1990<sup>2</sup> or Article 81 of the EC Treaty<sup>3</sup>). Fines were imposed totaling about €12 million.<sup>4</sup> In the fourth case proceedings were dropped following changes made to the relevant agreements by the parties concerned.<sup>5</sup>

4. In all the cases of suspected abuse of a dominant position, it was possible to rule out the existence of unlawful practices without starting an investigation. In the first quarter of 2006, the Authority found three violations of Article 82 of the EC Treaty,<sup>6</sup> in two of these cases fines were imposed totaling about €292 million.<sup>7</sup>

5. Of the 596 concentrations examined last year 546 led to the adoption of formal decisions under Article 6 of Law 287/1990, whereas in 46 cases the Authority concluded that there were no grounds for further proceedings. One case was referred to the European Commission since it fell within the scope of Council Regulation (EC) No 139/2004 (the EC Merger Regulation).<sup>8</sup> In four cases, the Authority

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<sup>1</sup> API Anonima Petroli Italiana-ENI; Prices of milk for infants; Football League-prices of play off tickets; Fee scales for insurance adjusters.

<sup>2</sup> Football League-prices of play off tickets.

<sup>3</sup> Prices of milk for infants; Fee scales for insurance adjusters.

<sup>4</sup> Prices of milk for infants; Football League-prices of play off tickets; Fee scales for insurance adjusters.

<sup>5</sup> API Anonima Petroli Italiana-ENI.

<sup>6</sup> ENI-Trans Tunisian pipeline; Glaxo-active ingredients; Hybrid electronic mail.

<sup>7</sup> ENI-Trans Tunisian pipeline; Hybrid electronic mail.

<sup>8</sup> The Dow Chemical Company-Branch of Total Petrochemicals France.

conducted an investigation and subsequently authorised the concentration.<sup>9</sup> In three cases the Authority made the granting of authorisation subject to the adoption by the businesses concerned of specific corrective measures.<sup>10</sup> The Authority also concluded an investigation aimed at assessing the need to prescribe measures to re-establish competitive conditions by eliminating the anticompetitive effects of a concentration that had already been implemented.<sup>11</sup> Lastly, the Authority conducted investigations into nine cases of non-compliance with the obligation to give prior notification of concentrations,<sup>12</sup> fines were imposed in every case for a total of about €41 million. In the first quarter of 2006, 154 additional concentrations were examined.

The Authority submitted 47 advocacy reports under Articles 21 and 22 of Law 287/1990 regarding restrictions on competition deriving from current laws, regulations and proposed legislation. Of these, 40 were issued in 2005 and 7 in the first three months of 2006. In the same period, the Authority concluded two sector inquiries<sup>13</sup> and approved the launch of five more.<sup>14</sup>

**Reporting and advisory activities by sector of economic activity (number of actions: January 2005-March 2006)**

Sector	2005	January-March 2006
Agriculture	2	
Food and drinks industry	1	
Chemicals	1	
Construction	1	1
Electricity, gas and water	1	
Pharmaceuticals	1	1
Transports		1
Telecommunications	9	
Publishing services		1
Informatics	1	
Insurance services and pension funds	4	1

<sup>9</sup> Parmalat-Carnini; Cassa depositi e prestiti-National electricity transmission grid -National grid transmission operator; Società esercizi commerciali industriali S.E.C.I.-CO.PRO.B.-Finbieticola/Eridania-Eribrand; Koninklijke Numico-Mellin. The Parmalat-Carnini case, the investigation of which ended in the first quarter of 2005, was described in last year's Report.

<sup>10</sup> Cassa depositi e prestiti- Trasmissione elettricità rete nazionale - Gestore della rete di trasmissione nazionale; Società esercizi commerciali industriali S.E.C.I.-CO.PRO.B.-Finbieticola/Eridania-Eribrand; Koninklijke Numico-Mellin.

<sup>11</sup> Parmalat-Eurolat.

<sup>12</sup> Boston Holdings-Carnini; La leonardo finanziaria-Compagnia finanziaria di investimento; Individual-Finifast; Lazio Events-S.S. Lazio; Nume-Integra; FC International Milan-Spezia football 1906; GranMilano-Debora surgelati; Friuli Venezia Giulia Region-INSIEL; DEGI Deutsche Gesellschaft für Immobilienfonds-Bodio Properties.

<sup>13</sup> Status of the liberalization of the electricity and natural gas sectors, the sector inquiry concluded in the first quarter of 2005 was described in last year's Report; Airfares for passenger transport.

<sup>14</sup> Investigation into the distribution of food and agricultural products; Local public transport; Hospital services; Trading and post-trading services; Fact-finding investigation into customer charges for banking services.

Sector	2005	January-March 2006
Financial services	1	
Education	2	
Professional and entrepreneurial activities	7	2
Waste disposal	1	
Catering	2	
Recreational, cultural and sports activities	4	
Tourism	1	
Others	1	
<b>Total</b>	<b>40</b>	<b>7</b>

### 1.1.1 *Agriculture and manufacturing activities*

#### Prices of milk for infants

6. In October 2005, an investigation into several companies that make and sell milk for infants (Heinz Italia, Plada, Nestlé Italiana, Nutricia, Milupa, Humana Italia and Milte Italia), concluded with the finding of a violation of Article 81 of the EC Treaty. The investigation was opened in view of the persistent difference between artificial milk prices in the Italian market and those applied in the major European countries, the low level of sales through major distribution channels, and the complete absence of parallel imports, despite the substantial differences between prices in Italy and abroad.

7. The Authority identified three distinct product markets in artificial milk for infants: starting milk for breast-fed babies between 0 and 4-6 months; follow-up formulas, for breast-fed infants between 6 and 12 months; and finally, special formula milks. Since they are aimed at satisfying nutritional needs in different phases of infants' development, on the demand side these three categories of artificial milk are not substitutes. The artificial milk sector in Italy is characterised by just a few operators that have maintained a substantially stable position over time, with a combined market share of over 90%.

8. During the investigation the Authority found that in the period from 2000 to 2004 the major undertakings had adopted parallel pricing practices for milk products for infants. This uniformity of conduct was found to be the result of a longstanding cartel between the undertakings, confirmed by evidence of frequent direct and indirect contacts. First, following a request by the Ministry of Health to cut prices, at trade association meetings manufactures had informed each other of their reactions to the Ministry's initiative and had agreed that no undertaking would reduce the price of its powdered milk by more than 10%. Moreover, in the period from 2000 to 2004 companies had updated each other on the prices adopted, through the dissemination to pharmaceutical distributors of lists containing recommended retail prices.

9. Taken together, these parallel practices had maintained prices at a level that was significantly higher than that prevailing in other European countries, without any evidence of this being justified by special cost conditions. In particular, prices in Italy for starting milks were generally 150% higher than prices abroad (with peaks of over 300%), and 100% higher (with peaks of over 200%) for follow-up and special formula milks. The practices of manufactures of milk for infants had, moreover, enabled undertakings to maintain their respective market shares and ossified competition within the various distribution channels, in particular among pharmacies (which account for over 60% of sales), providing no incentives for the adoption of strategies of differentiation for the distribution and conditions of sale of milk for infants. In view of the gravity and duration of the agreement (which lasted from 2000 to at least the end of 2004), the Authority imposed fines totaling €9.7 million on the companies concerned.

#### Koninklijke Numico-Mellin

10. In June 2005, following an investigation, the Authority authorised the acquisition of Mellin by Koninklijke Numico subject to certain conditions. Both companies manufacture and sell food products for infants.

11. The authority found that as a result of the acquisition Numico would become the leading manufacturer in the starting milk market and hold a market share similar to the second largest operator (Plada) in follow-up formulas. In both markets a share corresponding to about 95%, which had previously been held by five operators, would be controlled by four. Numico would also become the leading operator in the special milks market, with a share equal to about 90% controlled by the three biggest undertakings. Therefore, to the extent that it was liable to create conditions of symmetry between the major operators, the structural changes arising from the transaction risked leading to the establishment of a dominant position by Numico, Plada, Nestlé and Humana in the infant and follow-up milk markets; and by Numico, Plada and Humana in the special milks market. In particular, the operation could have facilitated the emergence of a stable collusive equilibrium with the convergence of distribution policies via pharmacies, instead of sales being distributed more widely across alternative major distribution channels.

12. The commitments made by Numico, aimed at guaranteeing a substantial increase in the presence of starting and follow-up milks in retail outlets, and especially in supermarkets (including the entry of special milks), were deemed sufficient to avert the risk of the concentration giving rise to a collective dominant position in the formula milk markets. One of these commitments was a reduction of prices (by an amount not made public) for the merging parties existing products, with exceptions allowed only in the case of substantial innovations. The net effect of these commitments was quite positive and a year after the merger prices of (branded) baby milk were almost 25% lower.

#### Parmalat-Eurolat

13. In June 2005 the Authority concluded an investigation into Parmalat aimed at assessing the need to prescribe measures to re-establish competitive conditions in the markets affected by the Parmalat-Eurolat merger of July 1999 and eliminate any anti-competitive effects of the merger, which had gone ahead despite Parmalat's failure to comply with the conditions set by the Authority. In particular, these conditions involved the divestment by Parmalat of six brands and four production plants and the withdrawal from the Lazio Region of the Parmalat fresh milk brand.

14. With particular reference to individual local markets for fresh milk, the Authority deemed that in the regional markets of Lazio and Campania, the acquisition of Eurolat had enabled the Parmalat group to acquire a dominant position, applying prices and operating margins that were significantly above the national average. In both local markets the Authority also confirmed the existence of a highly concentrated supply structure and a demand incapable of exerting strong bargaining power. These structural characteristics, together with the absence of potential competition able to effectively counter the strategic decisions of the incumbents, had bolstered the already high market share held by Parmalat in the fresh milk markets of Lazio and Campania.

15. On the basis of these considerations, the Authority deemed it necessary to prescribe measures to re-establish effective competitive conditions in the two markets in question by eliminating the anticompetitive effects that had arisen after the merger was implemented without respecting the conditions on which its authorisation depended. The Authority accordingly adopted measures (the divestment of several brands and the related production plants to other suppliers able to provide guarantees of independence and experience in the sector) consistent with Parmalat's downsizing in the markets in question, and more generally at national level, and proportional to the effects produced by the merger.

### Opinion on the formation of prices for agricultural and food products

16. In April 2005, the Authority submitted an opinion to Parliament and the Government according to Article 22 of Law 287/1990, regarding the possible anti-competitive effects of several provisions contained in draft laws on the regulation of markets in the food and agriculture sector. In particular, the Authority drew attention to the measure enabling agricultural producers to decide to suspend or limit the flow of products to the market. The Authority noted that this measure gave producers' organisations excessively wide-ranging powers to agree on how to manage supply in times of crisis, and could lead to particularly severe restrictions on competition if such organisations controlled substantial shares of the overall supply in the markets concerned.

17. Commenting on the provision aimed at guaranteeing the transparency of the price-formation mechanism (labels indicating both the producer price and the final retail price), the Authority noted that while it is appropriate, in this sector, to take account of consumers' special need for information on how the final price was determined, from a competitive standpoint it is not desirable to promote the publication of strategic variables, such as the purchase price, in cases where the undertakings concerned have not voluntarily and freely chosen to make this information available.

### Opinion on the obligation to reserve space in retail outlets for regional food and agricultural products

18. In October 2005 the Authority submitted an opinion to Parliament and the Government under Article 22 of Law 287/1990 regarding several provisions of a bill requiring the Regions to fix a minimum percentage of space in large stores to be dedicated exclusively to the sale of regional agricultural and processed food products. Moreover, the bill made the granting of permits for the building or extension of major retail outlets subject to compliance with the above-mentioned obligation.

19. The Authority noted that such an obligation was in clear contradiction with national and EU competition principles. In fact, supply policies are one of the most important competitive variables for major retailers, which exploit their greater size and competitive and logistical advantages to win market share from traditional distribution channels. At least in part, this has translated into benefits for consumers in terms of prices and supply conditions.

20. Finally, the Authority found that the measure making the granting of permits for the building or extension of major retailers subject to compliance with the obligation to reserve shelf-space to regional producers unjustifiably restricted entry into the commercial distribution sector. Such a provision was at odds with the objectives of liberalisation, administrative simplification and openness to competition pursued by the reform of the law governing the retail distribution sector.

### Report on the establishment of production agreements

21. In December 2005 the Authority sent a report to Parliament and the Government under Article 21 of Law 287/1990 to highlight the anticompetitive effects deriving from a Presidential decree giving the Ministry for Agriculture and Forestry powers to authorise agreements aimed at planning production levels in relation to market outlets.

22. The Authority noted that agreements on quantities entailed restrictions on competition that were just as serious as those stemming from price-fixing agreements and might conflict with Article 81 of the EC Treaty. Moreover, the Authority emphasised that, on the basis of consolidated case-law, a ministerial decree cannot justify practices adopted independently by one or more undertakings in violation of antitrust law.

### 1.1.2 Pharmaceutical products

#### Glaxo-Active ingredients

23. In February 2006 an investigation into the pharmaceutical group Glaxo concluded with the finding of abusive practices in violation of Article 82 of the EC Treaty. Glaxo refused to grant Fabbrica Sintetici Italiana (FIS), a chemical-pharmaceutical undertaking, a licence to produce an active drug ingredient known as *Sumatriptan Succinato*, covered in Italy by a supplementary protection certificate,<sup>15</sup> for use in other Member States (in which Glaxo no longer held any patent-rights) in the production of generic drugs known as triptans for the treatment of migraines.

24. The Authority found that Glaxo, in addition to holding a quasi-monopoly on the production of *Sumatriptan Succinato* worldwide, occupied a dominant position in the Spanish and Italian markets for the production and marketing of triptans sold through hospitals. In these markets Glaxo held a particularly high market-share, equal to about 96% in Italy and 58% in Spain. As for the possibility of access for potential competitors, all the products sold in the markets concerned were found to be covered by industrial patent-rights, which were due to lapse between 2008 and 2012, with the exception of *Sumatriptan Succinato* which was not covered by any patent in the Spanish market.

25. Based on the investigation's findings, the Authority deemed that Glaxo's refusal to grant the requested licence constituted an abuse of dominant position in violation of Article 82 of the EC Treaty, since its refusal hindered the production of an active ingredient needed by producers of generic drugs, potential competitors of Glaxo, to access national markets where Glaxo did not have any exclusive rights. The Authority considered this conduct had no objective justification.

26. Despite having ascertained the abusive nature of the conduct, the Authority did not impose any fine on the group because well before the end of the investigation, Glaxo had not only granted the licences originally requested by FIS but had also set conditions allowing that company to save the time required to research and test an efficient production process for obtaining *Sumatriptan Succinato*. As a result, well before the conclusion of the proceedings, a producer of generic drugs based on this active ingredient had succeeded in entering the Spanish market.

#### Report on urgent measures for pricing pharmaceuticals not reimbursed by the National Health Service

27. In June 2005 the Authority sent a report to Parliament and the Government under Article 21 of Law 287/1990 regarding the possible anticompetitive effects of a decree law introducing: *i*) a maximum price for non-prescription and self-medication pharmaceutical products, to be fixed by the undertaking that introduces the products onto the market and indicated on the package; and *ii*) the possibility for pharmacists to apply price discounts of up to a maximum of 20%.

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<sup>15</sup> In Italy Act n.349 of 19 October 1991 extended to 38 years from filing the period of patent protection for pharmaceuticals. Because of the entry into force of EC Regulation n.1768/92 which provides a maximum period of extension of patent protection of 5 years, Act n.349/91 could no longer be applied. It produced its effects in the years 1991 and 1992 only (i.e. before the entry into force of the Regulation). Act n.112 of 15 June 2002, while maintaining the validity of this extra protection for the domestic market, introduced a procedure by which producers of generics, which had been denied a licence to export pharmaceuticals which had been granted this extra protection, could ask for a dispute settlement at the Ministry of Productive Activity and in case an agreement could not be found the law provided for the file to be sent to the competition Authority.



28. In its report the Authority criticised the introduction of restrictions on the prices of pharmaceutical products which had previously been liberalised. Such limits, it believed, would result in elements of rigidity in business practices. Moreover, the maximum price could become a benchmark referred to by undertakings to establish collusive practices.

29. As regards the prospect of pharmacists applying price discounts of up to a maximum of 20%, the Authority observed that imposing limits on the discounted price introduced de facto minimum prices for pharmaceuticals that had no economic justification whatsoever. On the contrary, this would only hinder the achievement of fully competitive conditions with negative effects for the general public. The Authority therefore called for the removal of this limit and for pharmacies to be left entirely free to set prices. Finally, it recalled the need to take steps to liberalise the sale of self-medication pharmaceuticals and allow them also to be sold in supermarkets, as is standard practice in many European countries.

#### Report on regulations for the distribution of pharmaceutical products

30. In February 2006 the Authority sent a report to Parliament and the Government under Articles 21 and 22 of Law 287/1990 on the anticompetitive effects of legislation regulating the activities of pharmacies. The report placed special emphasis on the following aspects: *i*) the incompatibility between the wholesale distribution of medicines and their sale to the general public in pharmacies; *ii*) the ban on individuals who do not have a degree in pharmacy and legal entities not composed of pharmacists to acquire pharmacies; *iii*) the ban on owning more than one pharmacy.

31. Referring to the incompatibility between the wholesale and retail distribution of medicinal products, the Authority noted that their integration might permit savings in distribution costs and, due to greater competitiveness in the retail market, the introduction of discount policies, with reductions in the retail prices of para-pharmaceutical and a substantial proportion of pharmaceutical products, to the benefit of consumers.

32. The Authority also called for the rules restricting the ownership of pharmacies to qualified pharmacists and legal entities made up of pharmacists to be reviewed, given that the obligation of the persons responsible for managing pharmacies to be entered in the register of pharmacists is sufficient to guarantee the provision of a qualified service to customers, in the interests of public health.

33. Finally, the Authority observed that the removal of the ban on owning more than one pharmacy under current legislation would enable the establishment of pharmacy chains that could operate more effectively, to the benefit of consumers.

#### *1.1.3 Electricity and gas*

##### Cassa depositi e prestiti-Terna-Gestore della rete di trasmissione nazionale

34. In August 2005 the Authority granted conditional authorisation of the acquisition by Cassa Depositi e Prestiti (CDP) of 22.9% of the national electricity grid company (TERNA), and a branch of the national transmission grid operator (GRTN) consisting in the assets for electricity transmission and dispatch activities. These acquisitions were part of the planned unification of the ownership and operation of the national grid and the subsequent privatisation of the entity formed as result of the transaction.

35. First, the Authority deemed that the relevant market was that of the transmission and dispatch of electricity which it believed constituted a legal monopoly. These activities were carried out by GRTN on the basis of an exclusive concessionary system. Furthermore, the Authority assessed the effects of the transaction on the wholesale energy market (MI) and the dispatch services market (MSD), both of which were geographically circumscribed. With regard to the four major areas into which the wholesale

electricity market is divided, it emerged that ENEL held a dominant position in the relevant wholesale markets known as “North”, “Macro-South” and “Macro-Sicily” where ENEL was able to determine the wholesale price of electricity. In the dispatch services sector, the shares held by ENEL in each segment and for every category of product or period of the day also translated into a dominant position for the company.

36. The structural effect of the transaction was that CDP would have come to hold the legal monopoly on the electricity transmission and dispatch market. Furthermore, the investigation revealed that after the transaction CDP would no longer have acted neutrally, but rather in a way that affected the conditions of competition in the downstream markets for the sale/acquisition of electricity (MI and MSD). In fact, the activities of the new operator/owner of the transmission grid presented unequivocal evidence of technical decision-making discretion that could not be eliminated, both in respect of the planning of grid development/maintenance programmes and in the dispatch activity of electricity plants, and could therefore easily be directed at discriminatory goals. The fact that following the notified transaction CDP will simultaneously be the controlling shareholder of TERNA (which will also become the network operator), with an interest of 29.99%, and holder of a 10.2% stake in ENEL. The Authority deemed that due to its cross shareholding CDP, as both controlling shareholder of TERNA and major shareholder of ENEL, could be induced to take decisions able to influence the competitive conditions of MI and MSD in a way that favoured ENEL. CDP would therefore not have been able to fulfil its role as network manager and at the same time ensure compliance with the need for neutrality and independence vis-à-vis the interests of the actors operating on the MI and MSA markets. An analysis of the effects of the transaction raised the concrete possibility that CDP’s acquisition of a dominant position on the electricity transmission and dispatch market could have hindered competition in the vertically linked wholesale electricity and dispatch services markets.

37. The Authority authorised the completion of the transaction subject to the following conditions: *i*) beginning on 1 July 2007 and within the following 24 months, CDP will have to sell its 10.2% shareholding in ENEL; and *ii*) as a temporary measure and until the first condition has been met, CDP will have to appoint at least 6 of the 7 directors to the board of directors of TERNA (assuming that the board will be comprised of 10 members), whose independence will guarantee CDP operates in conformity with the principles of neutrality and impartiality.

#### ENI-Trans Tunisian Pipeline

38. In February 2006 the Authority concluded an investigation into ENI and its subsidiary, the Trans Tunisian Pipeline Company (TTPC). The investigation found that ENI had violated Article 82 of the EC Treaty in the national market for the wholesale supply of natural gas.. In 2002 TTPC, 100% owned by ENI and holder until 2019 of exclusive rights to use the pipeline running through Tunisia to import gas from Algeria to Italy, had planned to increase the capacity of the pipeline by 6.5 billion cubic metres of gas per year. The pipeline was, in fact, completely saturated by gas from “take or pay” contracts entered into by ENI and ENEL with the Algerian supplier Sonatrach. Accordingly, the plan to increase TTPC’s capacity represented, in the closing months of 2002 and early 2003, the only opportunity for independent operators to engage in the importation of natural gas to Italy.

39. In March 2003, following the decision to increase the pipeline’s capacity, TTPC assigned the additional capacity pro rata on the basis of the requests received, entering into “ship or pay” contracts with a number of operators. These contracts were subject, however, to the fulfilment of various conditions. In November 2003, TTPC terminated these contracts, claiming that some of the conditions had not been fulfilled.

40. In the Authority’s view, ENI, through its subsidiary TTPC, had adopted a set of exclusionary practices comprising a number of actions and omissions that constituted an abuse of dominant position in

violation of Article 82 of the EC Treaty. In particular, ENI had discontinued work on the upgrading of the TTPC gas pipeline, for which “ship or pay” transport contracts had been signed with a number of operators. The Authority deemed that ENI’s dominant position in the national market for the wholesale supply of natural gas, required it not to engage in any practice liable to influence, to the detriment of its competitors, the conduct of its subsidiary TTPC, owner of the infrastructure for the transport of Algerian gas to Italy. Therefore ENI did not have an obligation to upgrade the Tunisian gas pipeline, but to it has the obligation to refrain from engaging in any practice which would induced TTPC to act in a way that was contrary to the commitments it had previously made for the sole purpose of safeguarding/strengthening ENI’s dominant position in the Italian wholesale gas market. In fact if TTPC had been acting as an independent operator in the international gas transport sector, given the pre-existing contracts with the operators that had been allocated the additional transmission capacity, it would have had every interest to proceed with the upgrading of the gas pipeline.

41. The Authority concluded that because of the abuse the Italian gas market suffered a shortfall of 9.8 billion cubic metres of gas over a period of 19 months, a considerable amount if compared with annual consumption of gas in Italy (equal to 80 billion cubic metres in 2004) and, above all, with the quantities supplied by ENI (approximately 53 billion cubic metres in 2004). In view of the gravity of the violation, the Authority imposed a fine to ENI of €290 million. It also ordered ENI to grant third parties access, through its subsidiary TTPC, to 6.5 billion cubic metres per year of additional transport capacity via the gas pipeline in question. Finally, ENI had to guarantee that a first *tranche* of the additional capacity, equivalent to 3.2 billion cubic metres per year, would come on line no later than 1 April 2008, and a second *tranche*, equivalent to 3.3 billion cubic metres, no later than 1 October 2008.

#### 1.1.4 TRANSPORTS

##### Air transport

##### Sector inquiry into airfares for passenger transport

42. In April 2005, the Authority concluded a sector inquiry into airfares for passenger transport, to shed light on the factors primarily responsible for the failure to achieve a fully competitive supply structure for the provision of air transport services in Italy, notwithstanding important developments such as the EU liberalisation process and the subsequent expansion of low-cost airlines. The inquiry underscored the extent to which Italy’s air transport sector had still not been fully liberalised and how the persistence of obstacles to access on numerous domestic routes, in particular the procedures for the allocation and use of slots, had prevented significant changes to competitive structures. Take-off and landing rights were assigned in the past to long-established carriers, to the detriment of new operators, which are forced to fly at times that are unappealing to passengers. This regulatory barrier augments, in turn, the importance of economic barriers, since confining the activities of the new entrants to a small number of routes limits the development of their networks and their profitability.

43. The Authority identified several possible ways to promote the development of competition in the sector:

- assign take off and landing times in ways that promote the contestability of routes as much as possible;
- prevent incumbent carriers from misusing regulation in order to hinder access by competitors;
- stimulate competition in contiguous markets, such as airport management and services;

- enhance the transparency of airfares, so as to safeguard the value of prices in guiding consumer choices and their role as a competitive instrument between airlines.

## Rail transport

### Report on the provision of intermodal services for goods transport by rail

44. In February 2006 the Authority sent a report to Parliament and the Government under Article 21 of Law 287/1990 on the provision of intermodal services for goods transport by rail. In particular, in conformity with the principle of separating rail infrastructure management and transport activities, current legislation stipulates that whenever the infrastructure manager (Rete Ferroviaria Italiana-RFI) is unable to provide intermodal services it must take steps to entrust their management to operators that act independently of the railway undertakings, chosen on the basis of public procedures. The rationale of the law lies in the need to ensure the neutrality of the supplier of these services with respect to the railway transport undertakings, so as to help safeguard the need for fair and non-discriminatory access to intermodal infrastructures and services.

45. However, pending the definitive implementation of the legal reference framework, Cemat, a goods transport company controlled by Trenitalia (the leading railway undertaking in Italy, belonging, together with FRI, to the Ferrovie dello Stato group) provides intermodal services in 20 of the 46 terminals for which the infrastructure manager RFI holds the concession. The Authority therefore called on RFI to identify as soon as possible operators that are independent from railway undertakings to provide intermodal services or to provide such services directly.

#### 1.1.5 Telecommunications

### Opinion on urgent measures for fixing maximum call termination charges on individual mobile networks

46. In July 2005 the Authority submitted an opinion requested by the Communications Regulatory Authority under Article 22 of Law 287/1990 concerning proposed legislation on “*Urgent measures for fixing maximum call termination charges on individual mobile networks*”. The Authority first underlined the need to ensure greater competition in the supply of mobile communication services in the context of extremely rapid growth in the domestic market and a highly concentrated structure, characterised in addition by a substantial degree of vertical integration of network operators. The Authority then emphasised the need to encourage greater correlation between call termination charges on mobile networks and costs, especially in view of the substantial gap between Italian charges and the European average. Termination charges that are not cost led, in a context where these are falling, have a negative impact on competition and introduce competitive distortions between integrated and non-integrated operators.

47. Secondly, the Authority supported the idea of creating, for each mobile network operating in Italy, a single domestic market for voice termination, in line with the recommendations of the European Commission on relevant markets for products and services. Moreover, the Authority deemed that since the majority of mobile network calls are terminated using GSM technology, it is correct to make a further distinction between markets that use GSM and UMTS technology.

48. The Authority took a similarly positive view on the explicit reference to creating a voice termination market on a single network that would include calls originating from both mobile and fixed networks. The fixing of a single termination charge for calls originating from fixed and mobile networks is likely to have significant positive competitive effects, to the benefit of both communications services operators with smaller market shares and new operators.

49. Turning to the question of fixing maximum termination charges, the Authority commented favourably on the introduction of mechanisms for the reduction of prices over time that would take account of expected increases in productivity. This would provide operators with incentives to improve efficiency while also guaranteeing benefits for consumers. As regards the identification of an initial value consistent with the actual costs borne by operators, the Authority said it believed the adoption of the Long Run Incremental Costs (LRIC) accounting methodology could no longer be delayed. By enabling the accounting of non-pertinent costs to be eliminated – for example, the marketing costs of mobile operators – the Authority concluded that this is the optimal approach on which to base the fixing of maximum prices imposed by the regulation.

Opinion on the call for tenders for the supply of “fixed telephony and ip connectivity services” for governmental bodies

50. In February 2006 the Authority published the opinion it submitted to the Ministry for the Economy and Finance concerning the call for tenders for the supply of “*Fixed Telephony and IP Connectivity Services*” for government departments. In general, the Authority approved the overall approach adopted in the call for tenders in relation to problems linked to the vertically integrated nature of the former monopoly telecommunications operator. It approved the decision to exclude access services from the bids, in view of the current clear disparity between the network infrastructures of the various operators. Similarly, the Authority expressed a favourable opinion on the decision to distinguish between the supply of fixed telephony services (Lot A) and satellite services (Lot B) in order to reduce the minimum size an undertaking needed to be to compete.

51. Furthermore, the Authority underlined the need for the operator in a dominant position to be required to justify an eventual drop in long-term supply prices on the basis of real and demonstrable reductions in the costs of productive factors, with reference to the costs of the individual services comprising the offer. This is to avoid the adoption of exclusionary and/or discriminatory strategies, such as offers characterised by cross-subsidies between services in markets that exhibit different degrees of competition.

Opinion on the call for tenders for the provision of IP connectivity services to government departments

52. In February 2006 the Authority published two opinions on the call for tenders for the provision of such services to government departments in relation to the following aspects: *i)* the maximisation of the number of participants; *ii)* the procedures for participation of temporary groupings of firms; *iii)* the subdivision into lots of the supply contracts to be awarded; *iv)* the supply adjudication mechanisms; *v)* the duration of the supply contracts.

53. Referring to participation in the call for tenders, the Authority said it hoped the competition procedures would have the broadest possible access requirements, including a “qualification” mechanism based on participants’ technical and industrial capacities, without imposing specific limits in relation to particular economic or financial requirements. Turning to the fair use of legal forms such as temporary groupings of firms, the Authority deemed it appropriate to impose limits to prevent the association of two or more companies that would meet the technical requirements for participation independently. In relation to the break-up into lots of the supply contracts, the Authority noted that in general such a division is to be welcomed, in so far as it is in line with the aim of guaranteeing participation in the call for tenders by as many undertakings as possible. However, in order to reduce the risk of collusive practices, there ought to be a wider gap between the number of lots available and the number of participants. Referring to the adjudication procedure, the Authority said that from a competitive standpoint the lowest average weighted price for the services tendered is the fairest criterion for selecting the winners. Finally, the Authority reiterated that limiting the duration of the supply contracts should avert the danger of dominant positions

being formed, which arise when one or more undertaking can rely, for a long period of time, on a guaranteed and important commercial outlet such as government departments. Limits on duration should also ensure the necessary flexibility to constantly adapt the content of the agreements to developments in technology, falling costs and the changing needs of the government.

#### *1.1.6 Postal services*

##### Hybrid electronic mail services

54. In March 2006 the Authority concluded an investigation under Article 82 of the EC Treaty and found that Poste Italiane had abused its dominant position on the market for the delivery of “hybrid” electronic mail, in which it has a statutory monopoly. The abusive conduct aimed at hindering competition in the liberalised market for hybrid electronic mail services (the printing of the electronic message, personalisation and mailing of the postal dispatches), in which the company operates through its subsidiary PT Postel. The Authority reviewed, in particular: *i*) the Ministerial Decree of 18 February 1999, setting out the conditions for access to the hybrid electronic mail delivery service; *ii*) the manner of applying this decree by Poste Italiane; and *iii*) a series of practices adopted by Poste Italiane and its subsidiary Postel, aimed at limiting access to the liberalised market for hybrid electronic mail.

55. As regards the conditions for access to the hybrid electronic mail delivery service, the ministerial decree fixed a series of quantitative (50 million dispatches per year), and organisational requirements (the presence of the service in at least 10 or 5 of the areas into which the national territory is divided with at least one million dispatches per area) that hybrid electronic mail operators had to meet in order to access the state postal network at the lower rate of €0.37 compared with the ordinary tariff of €0.45. The Authority concluded that taken together these requirements represented a significant barrier for all hybrid mail operators, except Postel, and excluded both potential competitors and new operators from the market.

56. Turning to the application of the ministerial decree, the investigation highlighted that Poste Italiane had reinforced the discriminatory and exclusionary effect of the conditions envisaged under the decree. In particular, it had erected a further barrier to accessing the reduced rate, by establishing a printing centre in each territorial area. Operators were obliged to deliver the postal dispatches to these centres, whereas it would have been sufficient under the decree for the operator to deliver the correspondence merely to the area of destination.

57. During the investigation further evidence of abusive conduct by Poste Italiane emerged. In particular, it was found that Poste Italiane and Postel had never actually separated their respective activities and had acted as a single entity in the liberalised hybrid mail market. In particular, Poste Italiane: had granted economic benefits to Postel; had continued to offer hybrid mail services directly to major clients, applying delivery tariffs that were inferior to the subsidised tariff (conditions that were not replicable), thereby winning a substantial part of demand at the outset (approximately 50%), which was strategic for the access of competing undertakings; and had entered into contracts containing exclusivity clauses with potential competitors of Postel, in order to prevent them from entering the market independently.

58. In the Authority’s view these practices constituted a highly abusive strategy adopted by Poste Italiane to exclude or limit access to the liberalised market of hybrid electronic mail, both with respect to competing undertakings and in respect of Postel, which it continued to favour and which did not operate in a truly autonomous manner and on the basis of equal conditions. On 17 February 2006, when the investigation was still under way, the Ministry of Communications issued a new ministerial decree modifying the rules of access to delivery services and eliminating the conditions that constituted significant barriers to the entry of new operators. In view of the seriousness of the abusive conduct and the steps taken

by Poste Italiane during the investigation to alleviate the consequences of the violation, the Authority imposed to Poste Italiane a fine of €1.6 million.

#### *1.1.7 Radio and Television Rights, Publishing and advertising services*

Report on the sale of DVDs and videocassettes with printed matter

59. In January 2006, in exercising its competition advocacy powers under Article 21 of Law 287/1990, the Authority made several observations about the anticompetitive effects of legislation on Value Added Tax (VAT), which provides for a lighter fiscal burden for periodicals and daily publications. In particular, DVDs and videocassettes sold with publishing products are subject to the lower VAT rate of 4% while those sold independently remain subject to the regular VAT rate of 20%.

60. The Authority highlighted that this dual fiscal system distorted competition, discriminating against undertakings which did not have links with publishing groups that sell DVDs and videocassettes.

#### *1.1.8 Insurance services and pension funds*

Fee scales for insurance adjusters

61. In November 2005 an investigation into the National Association of Insurance Undertakings (ANIA) and several of the largest associations of insurance adjusters operating in Italy ended with the finding of a violation of Article 81 of the EC Treaty, consisting in two separate anti-competitive agreements. The first agreement concerned fee scales for insurance adjusters; the second related to procedures and criteria for assessing claims for damaged goods.

62. The fee scales had been fixed in a two-year agreement signed in March 2003 between ANIA and the adjusters' associations. Given that the agreement established fees for adjusters' services it had to do with one of the major competitive variables in the market. The Authority accordingly considered that it restricted competition, in violation of Article 81 of the EC Treaty. Moreover, the applicable legislation stipulated that the fees established by ANIA and the associations of adjusters should have been subject to approval by the competent government department. In reality, however, this approval procedure for the tariffs was never followed, making it possible to assert that the contracting parties were responsible for the agreement, which had arisen from their own independent decision-making power.

63. It also emerged from the investigation that the ANIA/adjusters' agreement, given how it defined the criteria for assessing the value of damaged goods (such as the prices of spare parts, repair and substitution times, and the hourly cost of labour), had also been the basis for coordinated practices aimed at harmonising the cost parameters referred to in calculating compensation. The uniform definition of indemnification criteria by ANIA had therefore provided associated businesses with the elements they needed to adopt shared strategies to fix the costs of claims, an important factor in the calculation of policy premiums, and therefore limited competition in violation of Article 81 of the EC Treaty.

64. To calculate the fine for the agreement aimed at fixing the fee scales of insurance adjusters, the Authority took into account the fact that the conduct was partly favoured by the legislative framework, and that the agreement was discontinued following the launch of the investigation. It imposed a fine of €200,000 on ANIA and of amounts of between €800 and €1000 on the individual associations of adjusters. In relation to the agreement aimed at establishing uniform cost criteria for the calculation of compensation, the Authority imposed a fine on ANIA of €2 million.

Opinions on changes to the current legislation on insurance

65. In 2005, in exercising its advocacy powers under Article 22 of Law 287/1990, the Authority commented three times on the draft legislative decree on “*Changes to the current legislation on insurance*”.

66. On the first occasion, the Authority welcomed interventions to enhance the transparency of contractual conditions and the information provided prior to, during and after the conclusion of contracts, in order to facilitate consumers’ decision-making processes.

67. The Authority subsequently addressed the provisions relating to third-party car insurance, and called for the introduction of a direct compensation system to replace the current indirect system. In particular, in the indirect system the compensated party is not the insured party but a third party who has no contractual ties with the insurance company that must pay the claim. The indirect system, which distinguishes between the insured party and the damaged party who benefits from compensation, produces two effects: *i*) the insured party is, in fact, indifferent to the quality of service in the pay-out phase, given that he or she is not the beneficiary; *ii*) insurance companies calculate premiums and determine service quality with reference to a future economic service aimed at someone, i.e. the damaged party, other than the person who acquired the policy.

68. A third-party car insurance mechanism based, instead, on direct compensation offers numerous benefits in terms of efficiency. It would: stimulate potential customers to look for the best insurance company; provide incentives for insurance companies to compete on the quality of services provided because the person that would most benefit from qualitative improvements is the customer of the company who invests in these improvements; promote cost control, thus permitting a lasting relationship to be forged between the company and the damaged party, and thereby reducing incentives for opportunistic conduct. This system would also enable insured parties to draw up personalised policy conditions, clearing the way for greater competition between insurance companies to the benefit of consumers.

Opinions on the legislation governing complementary retirement schemes

69. In 2005, in exercising its advocacy powers under Article 22 of Law 287/1990, the Authority intervened on two separate occasions during the approval of the legislation reforming complementary pension schemes.

70. The Authority welcomed the legislator’s decision to encourage the adoption of complementary social security schemes and put the various existing additional social security instruments on the same level, so as to allow workers who decide not to maintain their severance pay with their employer and to choose an alternative form of retirement benefit, with provision also made for transferring this to other pension schemes later on. The increase in the range of options available to workers is likely to increase the degree of competition in the complementary pension market, with positive effects on the price and quality of the products offered. However, in order for this to happen, it is first necessary to establish rules enabling different retirement benefits to be put on the same level and making it easier to compare the range of options available, intervening where necessary to ensure the real simplification of products.

71. The Authority therefore called for the adoption of rules aimed at: *i*) guaranteeing *ex ante* the full comparability of various options, both upstream (the maintenance of the severance pay system or its transfer to a form of supplementary scheme) and downstream (choosing from among the various alternative schemes); *ii*) permitting an efficient transferability of pensions *ex post*; and *iii*) stipulating particularly strict rules on investments in cases where there is a conflict of interest.



### 1.1.9 *Financial services and credit*

Opinion on the provisions regarding the protection of savings

72. In April 2005, in exercising its advocacy powers under Article 22 of Law 287/1990, the Authority submitted several observations to the Parliament on the bill regarding the protection of savings, with specific reference to the measures aimed at promoting greater transparency in the provision of financial services. In particular, the Authority pointed out that precisely because of the complexity of such services and – within certain limits – their fiduciary nature, greater transparency enables consumers faced with various proposals to make a well-informed choice, and to monitor the quality of provided services.

73. According to the Authority, in order to have a positive impact, the transparency of financial markets must be based on information that is simultaneously comprehensive and easy to understand. This information must address the fundamental variables that guide investors in their choice of financial services, in other words: the risk, yield and cost of the product. The easier it is to compare the characteristics of the products offered by various undertakings (for example by banks, insurance companies and fund management companies), all characterised by a certain degree of overlap between the services provided, the more competitive pressure will be generated. Having said this, transparency must be effective both when customers make investment choices and during a business relationship. Only if there is effective transparency also in this second phase can clients voice possible dissatisfaction with intermediaries and begin to look for alternatives.

### 1.1.10 *Professional and entrepreneurial activities*

Reporting and advisory activities in relation to professional activities

74. In 2005 the Authority exercised its advocacy powers on several occasions with regard to professional activities, calling the legislator's attention to the benefits that greater competition can bring to the sector. In particular, in accordance with Article 22 of Law 287/1990, the Authority formulated several observations during the examination of the following measures: the draft law on the establishment of the register of promoters of pharmaceutical products; the draft legislative decree on the establishment of the Order of Accountants and Accounting Experts; the draft legislative decree on professional activities; the bills amending the legislation on condominium administrators; and the draft Presidential decree on the rules governing the requirements for admission to the State exam for a substantial number of professions.

75. In April 2005 the Authority sent an opinion to Parliament and the Government under Article 22 of Law 287/1990, concerning the possible anticompetitive effects of the draft law on the establishment of the register of promoters of pharmaceutical products.

76. The Authority felt that the establishment of new Professional Orders is justified only when this satisfies needs of a general nature and is necessary to resolve significant imperfections in markets (such as information asymmetries and externalities), otherwise likely to produce unfair and inefficient results. Given that the pharmaceutical undertakings that use the services of professionals to promote the drugs that they produce with doctors so as to inform them of their characteristics are both qualified interlocutors who do not require any particular safeguards, the Authority concluded that the activity in question does not meet these exceptional criteria.

77. Again in April 2005, in exercising its advocacy powers under Article 22 of Law 287/1990, the Authority formulated an opinion on the possible anticompetitive effects of the adoption of a legislative decree on the establishment of an Order of Accountants and Accounting Experts.

78. The Authority stressed the unjustified distortions of competition that would derive from the attribution of areas of exclusive competence to accountants and accounting experts. Assigning specific functions on an exclusive basis can only be justified in the case of professions whose exercise is strictly linked to the safeguarding of public interests guaranteed under the constitution and only insofar as such reserves are strictly necessary to guarantee minimum standards of service. These conditions are not met in the case of accountants and accounting experts.

79. The Authority also used its notification powers regarding the draft legislative decree on professional activities, in relation to the following aspects: the composition of exam committees for access to professions; the establishment of new professional registers; the fixing of professional fee scales; and bans on advertising.

80. Regarding the composition of exam committees, the Authority emphasised the need to curtail the number of representatives of Orders to safeguard the principle of impartiality in the procedures for accessing professional activities. To this end and in order to guarantee the impartiality of the awarding body, the Orders should not play a dominant role in the initial phases of the selection process when the candidates' qualifications are evaluated. Competing professionals should not determine the number of those who can access a certain profession.

81. Turning to the establishment of new registers, the Authority pointed out that placing certain professions, currently carried out in a free market system, under the aegis of Professional Orders, would significantly restrict competition by hindering the entry of new operators and creating exclusive areas of activity. Reserve systems should be restricted, instead, exclusively to activities whose exercise is characterised by involving constitutionally protected interests, such as the right to health and defence, and where their inadequate provision would have high social costs or the complexity of the services provided would prevent users from assessing, also *ex post*, the quality of the service and the fairness of the prices charged.

82. Referring to the setting of minimum or fixed fee scales, the Authority reiterated their inappropriateness for guaranteeing the quality of the services provided. The adoption of minimum fees is neither a benchmark for clients faced with making choices in the marketplace, nor is it an incentive for professionals to offer better quality services than their competitors.

83. Addressing advertising for professional services, the Authority clarified that advertising *per se* does not tarnish the image of the profession and that, in any event, the total ban on advertising is not justifiable on the grounds of the general interest. On the contrary, advertising that refers both to the characteristics and prices of the services offered by professionals is an important factor in overcoming information asymmetries.

84. In exercising its advocacy powers under Article 22 of Law 287/1990, the Authority also submitted an opinion on the creation of a special public list of condominium administrators.

85. The Authority stressed that by making performance of the activity of condominium administrator subject to prior obligatory enrolment in a specific list, the proposal would have unjustifiably restricted competition. The Authority reaffirmed the principle according to which the exercise of a profession is, generally speaking, free, and accordingly limits placed by the legislator on its exercise must be exceptional and justified by the particular importance of the activity in question. The creation of a public list of condominium administrators did not respond to the need to safeguard general interests, nor was it proportional with the aim of correcting significant market failures, liable to produce unfair and ineffective competitive conditions. Indeed, enrolment in the list would not guarantee users the technical and professional ability of registered administrators.

86. Finally, in March 2006, in exercising its advisory powers under Article 22 of Law 287/1990, the Authority made some observations on a draft decree on the rules governing the requirements for admission to the State exam for a substantial number of professionals (including land and forest experts, agronomists, architects, social workers, actuaries, biologists, chemists, work consultants, pharmacists, geologists, surveyors, journalists, engineers, land surveyors, industrial engineers and psychologists).

87. The Authority reiterated that the qualitative requirements for access to professions must be not surreptitiously introduce quantitative restrictions. This means that the requirements for admission to the State exam, including an obligatory period of professional training, must be proportional to the professional practices it authorises, and must not be unjustly restrictive. To this end the Authority felt that the introduction of an obligatory training period where this was not currently envisaged or its excessive duration was unjustified. The limits placed by the legislator on the exercise of a profession must be of an exceptional nature and justified by the particular importance of the activity in question, and therefore solely when the protection of proven general interests is at stake.

#### Report on market access for self-medication pharmaceuticals

88. In September 2005 the Authority sent a report to Parliament and the Government under Article 21 of Law 287/1990 on access to self-medication pharmaceuticals (so-called over-the-counter drugs). In particular, current legislation prohibits the installation of automatic dispensers which customers could access when pharmacies are closed.

89. The Authority confirmed the need to liberalise the sale of over-the-counter drugs, stressing that the barriers to their sale are not justified by any public interest. The prohibition to install automatic distributors only strengthens the anticompetitive effects of an already severely pervasive regulation, in terms of limits on access, shifts and working hours, all of which makes it more difficult for customers to access self-medication pharmaceuticals.

#### *1.1.11 Educational, recreational, cultural and sporting activities*

##### Football League- Play Off ticket prices

90. In November 2005 an investigation into the National Professional Football League (the League) concluded with the finding of an anticompetitive agreement that consisted in the fixing of ticket prices for play-off and play-out matches for the 'Serie B' 2004/2005 Football Championship. The League is an association of private football companies registered in Serie A and B, which is responsible for organising the various sporting events.

91. Since the National Professional League's regulations stated that decisions made in the League's official meetings were also binding on absent and dissenting clubs, and made provision for a disciplinary system aimed at guaranteeing compliance by the League's members, the Authority deemed that the decisions in question arose from an anticompetitive agreement, in violation of Article 2.2 of Law 287/1990.

92. Following the launch of the investigation the League adopted a new circular in which it clarified that the prices established in the previous decision should be seen as indicative, leaving companies free to fix alternative price categories. It later emerged that following this new circular, the companies did go on to fix different and often significantly lower prices than those indicated by the League. Accordingly, the agreement did not give rise to significant anticompetitive effects on the market. In view of the lack of concrete limits on competition, as well as the conduct of the League following the launch of the investigation, the Authority imposed a minimum fine of €2,000.

#### Report on the provision of services to horserace and sports betting concessionaires

93. In April 2005, under Article 21 of Law 287/1990, the Authority recommended the abrogation of a measure restricting access to sports betting activities, and in particular to horserace betting, to entities that already had valid contracts with at least 300 concessionaires of betting agencies. In Italy there are about 800 concessionaires for horse and sports betting, of which 550 are affiliated to a sole provider of services. It follows that, since the requirement was likely to be met by a sole operator, the condition set by the law was liable to give rise to unjustified restrictions on access to the betting sector.

94. The Authority stressed that the criteria chosen to identify those who qualify to carry out a given activity must be of an objective/qualitative nature, aimed at applicants meeting standards of efficiency and in any event comply with the principles of necessity and proportionality. This provision, however, meant that just one provider would continue to operate in the betting sector, and could therefore offer less efficient services at more disadvantageous conditions.

#### Opinion on the services for the management of horseracing and sporting events

95. In June 2005, in exercising its advocacy powers under Article 22 of Law 287/1990, the Authority highlighted elements at odds with the principles of competition in the selection procedures adopted by SOGEI, a company owned by the Ministry of the Economy and Finance, for the assignment to third parties of services for the management of horseracing and sporting events. In particular, the call for tenders set out criteria aimed at assessing the technical capacity and financial soundness of the aspiring participants (expressed in terms of turnover and number of employees) which were disproportionate to the services to adjudicated.

96. The Authority first noted that several of the requirements for participation in the call for tenders were incommensurate with the services to be awarded, and therefore, went beyond the objective needs of the contracting party. This unjustly restricted the participation of smaller undertakings (penalised by the excessively high level of turnover requested, almost four times that of the starting level for tenders; and the number of employees required - 300, despite the fact that just 25 persons were expected to provide the services).

##### *1.1.12 Public procurement*

#### Report on the call for tenders for the provision of alimentary services to inmates

97. In June 2005, in exercising its advocacy powers under Article 21 of Law 287/1990, the Authority highlighted the elements at odds with the principles of competition in the call for tenders for the provision of alimentary services to inmates, announced by the Ministry of Justice for the period from 1 April 2005 to 31 December 2007. Community law on supply contracts was not complied with, on the presumption of a higher public interest in the security of prisons, and admission to the competition restricted to companies in possession of certain requisites. These included: comparable agreements with state entities in the preceding three years; the achievement of specific turnover thresholds; and the ability to provide both food and canteen management services.

98. In the case of the provision restricting participation in the tender to undertakings that had already supplied similar services, the Authority considered this criterion to be unrelated to the participants' actual technical abilities and unlikely to produce the best offer for the service. On this issue, both Community and national law on supply contracts require the assessment of companies' technical ability and financial soundness to be carried out in an objective and transparent manner.

99. In relation to the subject of the call for tenders – the joint provision of both food and canteen management services – the Authority pointed out that this provision could have prevented categories of operators able to supply just one of the above services from taking part in the tender.

100. Finally, excluding companies from participating on the basis of just their turnover was liable to unduly extend the set of exclusionary criteria already outlined. In this respect, national and Community laws allow undertakings to demonstrate their financial soundness with reference to a range of instruments, indicating a series of alternative criteria that can be used by the contracting administration to demonstrate the suitability of the operators to provide the requested service.

#### Opinion on the procedures for assigning local public services

101. In June 2005 the Authority commented on the legitimacy of assigning local public services directly without completing the public procedures for the selection of service providers.

102. Including for services whose value was less than the threshold established by EU directives, the Authority urged the adoption of non-discriminatory, fair and transparent criteria, and therefore, the use of tenders as an adjudication procedure. The Authority also stressed that the duration of the services contract should be such that long-standing monopolies and the consequent unjustified returns be avoided. Finally, for local entities that intend to assign public services through an in house procedure, the Authority recalled the need that the circumstances justifying the desirability of following this procedure be stated always and clearly.

#### Report on selecting a supplier of tags for the protection of intellectual property rights

103. In July 2005 the Authority compiled a report under Article 21 of Law 287/1990 on the selection procedures followed by the Italian Authors and Publishers Association (SIAE) to identify suppliers of tags for the safeguarding of intellectual property rights. In particular, the Authority drew attention to aspects of the procedure that might conflict with Community and national law on tenders. SIAE, in fact, had directly assigned the supply of these tags to the same undertaking, without using competitive procedures. Given its status as a public body, however, SIAE was obliged to respect the principles of public contracts laid down in national and European law on the supply of goods and services.

104. The Authority took the view that SIAE's decision to use just one kind of tag, and the fact that the law envisaged specific characteristics and procedures for affixing the tags to avoid counterfeiting (their inalterability, as well as certain and unequivocal authentication by the police), should not have prevented regular competitions from being carried out. In this sense SIAE could have followed procedures that while guaranteeing its needs were met, enabled the selection of the supplier able to provide the most suitable product, at optimal economic conditions. Accordingly, the lack of application of the rules on public supply contracts did not appear to be justified by reference to the objectives pursued. Moreover, a competitive review undertaken periodically would have enabled the contracting party to benefit from technological advances developed by a number of undertakings.

#### Opinion on the tender for the reduction of toxic-harmful substances in the sea

105. In August 2005 the Authority published the opinion it submitted to the Ministry of the Environment under Article 22 of Law 287/1990 on the tender-competition for the design of a system to detect and intervene to reduce hydrocarbons and other toxic and harmful substances in Italy's coastal waters.

106. The Authority stressed that the request for a high number of naval units with very specific technical characteristics and equipment, to be supplied, moreover, within a very limited time, could have

given rise to objective difficulties in assembling these units by undertakings not already engaged in similar activities. The Authority therefore highlighted the need to always verify the content of calls for tenders to avoid granting possible advantages to companies that already provided similar services and therefore had the requisite means and instruments at their disposal.

## **2. Changes to competition laws and economic regulations**

### **2.1 *introduction***

107. During 2005 numerous legislative measures were approved affecting competitive conditions in important sectors of the Italian economy. This year the Antitrust Authority's Report focuses on the changes that occurred in competition law and competition policy with reference exclusively to the measures approved by Parliament; in future years the analysis will be extended, as far as possible, to include the measures approved by local administrations.

108. An intense activity of codification of provisions has led to the adoption, during the year, of the codes of consumers, insurance, industrial property, **e-government**, television and environment. These initiatives are commendable, not only in general but also from the standpoint of the proper functioning of the market. In fact the proliferation of regulations and the confusion in the primary legislation due to the enactment over time of a plethora of often conflicting provisions had made it difficult to identify the rules applicable in practice and led to administrative action being arbitrary and opaque. The thematic codes referred to above bring together all the relevant regulations and provide an important baseline for economic agents and governmental bodies themselves, thus fostering impartial, transparent and objective legislation, to the advantage of competition and consumers.

109. The choice of the legislative measures to consider in this Report was made in the light of their importance and their impact on competition. In particular, the Report focuses on the legislation that has profoundly modified the regulatory framework and the competitive structure of financial markets (the law on the regulation of financial markets and the insurance code), given consumers greater protection (the consumer code), urged reductions in retail prices (the prices of pharmaceuticals), regulated the non-medical professions in the health sector, liberalised road haulage and interregional bus transport, and simplified compliance with administrative obligations (the 2005 simplification law). Furthermore, Act 23 December 2005, n. 26 "*Provisions for the State annual and multi-year budget* ), has introduced a fee system for the notification of concentrations. In particular, the law provides for the Antitrust Authority to determine each year the fees that firms have to pay to cover the costs supported for mergers' control (estimated to be about 35% of the total), fixing a minimum and a maximum amount of the fee. The law also imposes the fee not to exceed 1.2% of the value of the transaction. For the year 2006 the Authority has accordingly established to set the fee at 1% of the value of each transaction notified with a minimum amount of €3,000 and a amount maximum of €50,000.

### **2.2 *Financial markets***

110. The new law on the regulation of financial markets entrusts the Antitrust Authority with the implementation of competition law in the banking sector. There is also a clear intention to ensure the transparency of the regulatory decisions: the obligation to give the reasons for decisions introduced by the law will benefit those who wish to grow, innovate and expand by guaranteeing legal certainty about the rules to be applied and the time of the decisions. As for the development of markets, the law specifies that, more than in the past, any new merger will be the result of the decisions of economic operators, in the observance of the law and the aims of stability and competition pursued.

111. The insurance code, divided into 355 articles, replaces and updates more than one thousand provisions regulating the sector by unifying, simplifying and modernising the rules. Above all the provisions governing access to the insurance market and improving the transparency towards the clients will have positive effects on competition. In particular, a whole title of the code deals specifically with contractual conditions' transparency, aiming at protecting insureds, with special attention to the need to guarantee the adequacy and transparency of the information provided to clients. These provisions are very important for the promotion of more informed choices and to increase the mobility of insureds, both between different companies and products. An increase in the clients' propensity to change company fosters competition and reduces the possibility to exercise market power, deriving mainly from the inertia of the insureds' behaviour.

### 2.2.1 *The law on the regulation of financial markets*

112. The new law regulating financial markets (Act 28 December 2005, n. 262) has intervened on the Italian anomaly by which the Bank of Italy was responsible for the application of competition law with regard to the behaviours of banks, at least with reference to the effects on credit markets. The new provisions have indeed entrusted these powers to the Antitrust Authority.<sup>16</sup>

113. The International Competition Network (ICN), which gathers almost all the antitrust authorities in the world, approved, in 2005, 10 recommendations concerning regulation and competition in the banking sector. With regard to the assignment of antitrust powers, the ICN has underlined the necessity for a "*a proper separation between the enforcement of the regulation on the stability of financial markets and the regulation on competition*". The new law on the regulation of financial markets has taken into account these suggestions, bringing Italy into line with the best international practice and harmonising the institutional framework with the one prevailing in most industrial countries.

114. In particular, the Antitrust Authority is now fully competent to apply national and Community law on restrictive agreements and on abuse of a dominant position in the banking sector.

115. As for mergers involving banks, the new law introduces a mechanism of joint authorisation by the Bank of Italy and the Antitrust Authority, each one for its own competence, issued with a single act within sixty days from the notification or the completion of the information required. Therefore for the merger control involving banks, the procedures to be followed partially differ from those referring to other sectors as they require the coordination of the provisions of the law regulating financial markets with the general rules laid down in the competition Act n.287/1990.

116. The new law appropriately lays down that each transaction for which a single act is required must be assessed in a unitary manner and it does not provide for any procedural distinctions when the transaction also produces effects in markets other than the banking market. In fact the need to assign the antitrust powers in the banking sector to an antitrust authority derives from the fact that, especially for mergers' control, the relevant markets involved in the transaction may include services provided by non-bank operators. A functional division of powers, such as that introduced by the new law, permits a full assessment of developments of this kind, so that it would be wrong to base the choice of control regime on *a priori*, and often economically unjustified, definitions of markets.

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<sup>16</sup> In the past the Antitrust Authority had observed on several occasions, most recently in its opinion on the "Provisions for the protection of savings and the regulation of the financial markets" (in Italian in *Bollettino*, no. 16/2005), that the extension of its powers to traditional banking activity would be an important result and in line with the situation in the other leading industrial countries.

117. Paragraphs 12 and 13 of Article 19 of Law 262/2005, which specify the manner of applying the new control regime in practice, are not without problems. In the first place Article 19.13 provides for the Bank of Italy and the Antitrust Authority to issue a single act that should contain the Bank's assessment of sound and prudent management and the Authority's authorisation pursuant to Article 6.2 of Law 287/1990 or clearance in the case of acquisitions of non-controlling minority interests.

118. The law on the regulation of financial markets addresses a wide range of issues. Some of these have a bearing on competition, notably those intended to promote the transparency of the decisions taken by regulatory authorities and of the conduct of firms. In the first place Article 24 makes it compulsory for regulatory authorities to give reasons for the individual measures they adopt. The obligation to give reasons is important, not only because it allows the persons involved to defend themselves in court but above all because all the participants in the market can thus acquire a better understanding of the criteria used by the regulatory authority in reaching its decisions, at least in view of the publicity given to disputes, and adopt consistent courses of conduct in their own decision-making. In addition, the law tends to make markets more transparent by eliminating the unjustified privileges of some operators with respect to others (specifically Article 8 on conflicts of interest in the disbursement of credit) and thus fosters a uniform regulation of highly substitutable financial products characterised until now by fragmented rules (Articles 9 and 11).

#### 2.2.2 *The insurance code*

119. The new insurance code, endorsed by the Council of Ministers on September, 2<sup>nd</sup>, 2005, revises all the legislation in this field and performs an important function of clarification and simplification. The code is based on the examples provided by the codified laws on banking and finance and regulates the activity of insurance and reinsurance companies and other operators in contact with the public. In addition to the legal doctrine on the access conditions and on the pursuit of business by insurance companies and intermediaries, the code introduces rules on the pre-contractual and contractual phases and on the execution of contracts concluded in the insurance business.

120. As it results from the preparatory documents, the purpose of the code is to simplify the legislative framework applicable to the private insurance sector. To some extent the code reduces the amount of primary legislation by reserving the detailed rules to secondary legislation.

121. Some of the provisions regulating access to insurance business, and above all some rules that improve transparency in relations with insureds are likely to have beneficial effects from the point of view of competition. In particular, in the field of insurance mediation the insurance code implements Directive 2002/92/EC, which standardises the rules on insurance intermediaries in relation to: a) the conditions and requirements for the pursuit of insurance business; and b) the obligations vis-à-vis customers and the protection of customers.

122. Strict rules of conduct are envisaged for those distributing insurance products. Intermediaries are required to verify customers' needs and propose appropriate products; before contracts are concluded, they must describe the characteristics of the policies and the claims the insurance company must pay. The greater confidence in the market that these provisions bring may reduce the risks that customers perceive in changing supplier and thus foster competition. Moreover, the code stimulates greater direct competition by reducing the barriers to the entry for new players and the time it takes for foreign insurance companies to obtain access to the Italian market thanks to the innovation of the "single registration" with an authority appointed by each Member State. As a result of this registration mechanism, insurance intermediaries will be able to pursue their activity in any Member State.



123. Again in implementing Directive 2002/92/EC, the insurance code lays down rules for the protection of consumers in their dealings with insurance intermediaries by introducing provisions on transparency and on contractual information to be provided to customers. A whole title of the code (Title XIII) is devoted to the transparency of transactions and the protection of insureds. In particular, Article 185 requires the conclusion of contracts to be preceded by the delivery not only of the insurance conditions but also of a document containing the information, other than advertising material, permitting the insurance company and the insured to make an informed assessment of their contractual rights and obligations.

124. On several occasions the Antitrust Authority had stressed that transparency in dealings with consumers was of crucial importance in the insurance sector, in view of the complexity of the products supplied and the difficulty for consumers to compare alternative offers and understand the real conditions proposed by different companies<sup>17</sup>. Accordingly, the improvement in consumer information deriving from the provisions of the code may well have positive feedback effects on competition by permitting a better understanding of the conditions offered and, hence, an easier and more informed comparison of the services supplied by different companies.

125. With specific reference to third-party motor-vehicle insurance, one of the most important innovations of the insurance code is the introduction of compulsory direct indemnification<sup>18</sup>. Under this system, in the case of compensation for damages to things or for damages of small entity to persons, the injured party will apply directly to his own insurance company which will be indemnified subsequently by the insurance company of the person who caused the accident. In particular, Article 149 makes this procedure obligatory for accidents – involving two motor vehicles that are identified and have compulsory third-party insurance – in which the vehicles involved are damaged or their drivers suffer minor bodily injuries. The rules provide for especially rapid payment of claims (not more than 60 days if only the vehicles are damaged and 90 days if persons also suffer bodily injury).

126. Insurance companies are thus required, unless they contest the request submitted, to pay claims rapidly. If an injured party does not consider the compensation offered to be satisfactory, he can still bring a legal action against his insurance company. In such cases the amount already paid by the company will be considered a payment on account if the court awards a larger sum.

127. The code does not directly specify how claims are to be settled between insurance companies but provides for an implementing regulation to be drawn up within 90 days of the law's approval. The regulation must specify the principles on the basis of which insurance companies are to regulate the activities needed to make the system of direct compensation work, with the objective of streamlining operations<sup>19</sup>.

128. Direct compensation was already provided for, but exclusively in the case of agreed reports on accidents involving motor vehicles. This procedure had consequently been little used. The important aspect of the innovation is that direct compensation is now compulsory for all the cases specified in Article 149 of

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17 Opinion on the "Revision of the provisions in force in the insurance field – the insurance code" (in Italian in *Bollettino*, no. 22/2005).

18 The introduction of the system of obligatory direct indemnification is in line with numerous observations by the Antitrust Authority, first formulated in "Fact-finding inquiry into the motor-vehicle insurance sector" (in Italian in *Bollettino*, no. 16-17/2003 and repeated in the opinion referred to above in footnote no. 2.

19 The Antitrust Authority addressed this matter in its opinion on the "Rules on payment of damages caused by road accidents" (in Italian in *Bollettino*, no. 4/2006) and expressed the hope that a system of direct compensation would be applied with simple rules based on principles of efficiency and competition.

the code. The legislator's aim in introducing this innovation is to simplify compensation procedures and reduce the time taken to settle claims. In fact, at least in the simpler cases, claims are paid within the framework of the relationship between the injured party and his own insurance company, thereby simplifying the procedures (insofar as two players are involved instead of three) and permitting the time required for the settlement of claims to be short and certain. Another aim of direct compensation is to reduce recourse to legal actions and thus to curb the costs incurred by insurance companies. In fact direct compensation attenuates the risk of opportunistic behaviour by the injured party and by those who play a part in determining the amount of compensation (repair shops, coach-builders, etc.) by increasing the incentives for insurance companies to impose or suggest systems (such as registered repair shops) serving to reduce costs or compensation consisting in the direct repair of vehicles. Such cost reductions will hopefully be passed on in the form of lower premiums.

129. The benefits of a system of direct compensation stem from the creation of a handy and simple instrument that allows insurance companies to cover the costs of repairing the damage to the vehicles of their insureds while introducing incentives to minimise these costs. This implies insurance companies agree on the levels of compensation that are not too far from the real cost of repairs, but such that they have an incentive to achieve savings. This is a problem that has not been solved by the insurance code and that will be clarified only by the choices that will be made regarding the principles to be laid down in the above mentioned implementing regulation.

### **2.3 The protection of consumers**

130. The consolidation of existing legislation texts on the protection of consumers' economic interests, a field in which the provisions were previously not perfectly coordinated, was the main legislative intervention in 2005. Pursuant to Article 22 of Law 287/1990, the Antitrust Authority had expressed a generally favourable view on the codification project in its opinion on the draft legislative decree reorganising the provisions in force concerning the protection of consumers.<sup>20</sup> At the same time the Antitrust Authority had put forward some considerations on the draft decree, some of which were incorporated in the final text. The code makes the whole matter more accessible, permits a more uniform interpretation and links the various aspects together in a single structure, thereby promoting a more even application of the provisions for the protection of consumers in Italy. However, since the field is still a new one, of largely Community origin and in continuous evolution, the choices made are not always consistent with the most recent European initiatives. In particular, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market marks the difference between practices that harm consumers and those that affect the conduct of traders, a distinction that is not always contemplated in the consumer code. The transposition of the directive into Italian law will therefore be complicated and will require a broad revision of the relevant legislation.

131. The code does not alter the competences or powers of the Antitrust Authority in repressing misleading advertising. However, looking ahead, the entry into force at the end of 2006 of another Community regulation,<sup>21</sup> aimed at fostering cooperation among the Member States on the protection of consumers, risks causing some problems in cross-border cases in relation to the powers the Authority has at present to investigate domestic cases. It is to be hoped that these problems will be overcome.

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<sup>20</sup> "Reorganization of the provisions in force concerning the protection of consumers" (in Italian in *Bollettino*, no. 18/2005).

<sup>21</sup> Regulation (EC) no. 2004/2006 on consumer protection cooperation.

132. Other measures adopted in 2005 to protect consumers included those reducing the prices of over-the-counter drugs and the mandate given to the Government to set up professional orders for some non-medical workers in the health sector.

### 2.3.1 *The consumer code*

133. With Legislative Decree no. 206 of 6 September 2005 Parliament issued the consumer code, which harmonised and reorganised the rules governing consumer transactions to ensure a high level of protection of consumers and users. The consumer code is part of a broader strategy for the reorganisation of the legislation in this field with a view to its simplification, in accordance with the better regulation objectives laid down by Law no. 229 of 29 July 2003. The creation of a codified version of the domestic measures transposing the *acquis communautaire* concerning the protection of consumers' economic interests into Italian law serves to remedy the lack of coordination in the implementation of the individual directives. Prior to the adoption of the code, the legislation on the protection of consumers, almost entirely of Community origin, was fragmented in a whole series of uncoordinated and sometimes poorly drafted legislative instruments, including articles of the Civil Code.

134. From this standpoint the systematisation that has been achieved with Legislative Decree 206/2005 is undoubtedly significant: the codification of consumer law, on the basis of the French model, makes the whole subject matter more accessible, permits its homogeneous interpretation and allows the various aspects to be linked together in a unitary structure. Especially commendable is the decision to combine the treatment of the exercise of the right to withdraw from distance contracts and contracts negotiated away from business premises, which resolves the interpretative doubts caused by the earlier legislation. By contrast, assessing the removal from the Civil Code of the rules on unfair terms in consumer contracts and on the sales of consumer goods and associated guarantees is more complicated. In fact the new collocation of these provisions suggests that they are separate from the general law of contract, thus reversing the opposite decisions made in 1996 and 2005. In this respect it should be noted that in its report of 4 May 2005 the Antitrust Authority had recommended leaving the provisions in question in the Civil Code in order to avoid dividing an organic system of rules on contracts between texts that would tend not to develop homogeneously.

135. The distinguishing feature of the rules on misleading advertising is that they serve to protect the interests not only of consumers but also of businesses, for example in the case of the advertising of intermediate goods in an industrial process and in that of denigratory comparative advertising.

136. Legislative Decree 206/2005 takes this peculiarity of advertising law into account: while Article 3 considers consumers, defined as natural persons acting for purposes outside their professional activity, to be the focus of the legislation on protection, Article 19 specifies that the aim of the provisions on misleading and comparative advertising is to protect not only consumers but also persons who engage in an economic activity and in general the interests of the public. This is an essential clarification since, as noted by the Antitrust Authority,<sup>22</sup> restricting the notion of consumer relevant for the activation of the Authority's powers would have caused an unacceptable narrowing of the interests protected by the rules on commercial advertising, and thus conflicting with Directive 84/450/EEC (transposed by Legislative Decree 74/1992), which defines misleading advertising as including advertising that deceives or is likely to deceive the natural or legal persons to whom it is addressed.

137. More recently Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market radically altered the framework set by Directive 84/450/EEC

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<sup>22</sup> Opinion on the "Reorganization of the provisions in force in the field of consumer protection" (in Italian in *Bollettino*, no. 18/2005).

with respect to misleading and comparative advertising. In fact the latter is now applicable only to practices that harm business interests. Under the new directive practices likely to impinge on the collective interests of consumers are subject to a separate legal regime, that deserves to be noted for three reasons. In fact Directive 2005/29/EC:

1. introduces a general clause prohibiting unfair commercial practices, i.e. practices that, contrary to the requirement of professional diligence, distort the economic behaviour of the average consumer;
2. specifies that misleading and aggressive practices are two examples of the general category of unfair commercial practices;
3. contains an annex with a list of commercial practices that must always be considered unfair. The list can be amended, moreover, only by the Community legislator.

138. The process of transposing the directive into Italian law is complicated. As is frequently the case, the text produced by the Community institutions is the fruit of a compromise that is not always satisfactory. In particular, the directive sometimes refers to notions that are already the subject of a large body of case law and academic work in very different contexts from that of commercial practices. Consequently, national legislators have to make an additional effort that serves to safeguard the harmonising nature of the new legislation while nonetheless ensuring that it ties in with existing law, so as to avoid potential conflicts.

139. If the Italian legislator succeeds in facing this challenge, the directive will undoubtedly have a positive impact on the Antitrust Authority's institutional activity. The extension of the scope of the new rules to all unfair commercial practices will make it easier to control practices that, although related to the supply of goods and services, appeared hard to link to the notion of advertising, albeit interpreted extensively by court decisions. The introduction of a general clause based on the principle of good faith will allow a more rapid and effective response to new types of commercial practices made possible by technological progress. Lastly, the contextual regulation of misleading and aggressive practices takes account of the fact that the collective interests involved in the two cases are the same and consequently harmonises the legal response to their being harmed.

140. Under the new rules comparative advertising is relevant only in the case of communications directed at consumers and thus only when it is misleading or creates confusion. Directive 2005/29/EC is accordingly based on the assumption that the other forms of illegal comparative advertising are not relevant for the protection of the interests of consumers and only concern relations between professionals. Consequently, they continue to be regulated by Directive 84/450/EEC.

141. In the light of the foregoing considerations the consumer code appears the natural place for the transposition of the directive on unfair commercial practices into Italian law. This cannot be done, however, simply by replacing the present Title III of the code, since it will be necessary to maintain the present rules on commercial advertising likely to harm exclusively business interests.

142. Following the reorganisation of this part of the legislation on commercial advertising, the Antitrust Authority and the courts will need to provide the necessary interpretative linkages, as is the case, besides, for the existing legislation.

### 2.3.2 *Community regulation on consumer protection cooperation*

143. Both Directive 84/450/EEC and Directive 2005/29/EC are referred to in the annex to Regulation (EC) no. 2006/2004 on cooperation between national authorities responsible for the enforcement of

consumer protection laws. The regulation, modelled in part on Regulation (EC) no. 1/2003 on the modernisation of competition rules, is intended to facilitate the cross-border application of the main provisions concerning the protection of the collective interests of consumers. To this end it calls for Member States to establish a network of public enforcement authorities with powers for the repression of intra-Community infringements of consumer law.

144. The powers in question concern investigation and enforcement and can already be exercised by the Antitrust Authority in the field of competition but not in that of misleading advertising. Among the most important are the power to obtain relevant information from any persons holding it; the power to carry out on-site inspections and the power to obtain undertakings from those committing infringements.

145. The regulation also contains provisions on mutual assistance among competent authorities. Under these rules, which will enter into force at the end of 2006, if a commercial practice harming the interests of Italian consumers originates in another Member State, the Antitrust Authority will be able to ask the corresponding public authority competent under national law to carry out the investigation needed to establish the existence of an infringement and possibly to take enforcement action against the offender in accordance with the law in that state.

146. The new rules on mutual assistance will undoubtedly increase the effectiveness of the Antitrust Authority's action in the case of cross-border commercial practices by finally remedying the present lack of a legal basis for cooperation, the cumbersomeness and slowness of investigations, and the impossibility of enforcing corrective measures abroad.

147. Although directly applicable in principle, the regulation will require the enactment of implementing measures, some of which will have to be contained in primary legislation.

### 2.3.3 *Drug prices*

148. Decree no. 87 of 27 May 2005 containing "*Urgent provisions concerning the price of drugs not reimbursed by the National Health Service*" is intended to ensure a reduction in the prices paid by the public for non-reimbursable drugs and those for self-medication by introducing some obligations and easing some restrictions.

149. In the first place the decree states that when pharmacists are presented with a prescription they must inform the customer of any comparable product with a lower price and leave the customer to choose. However, the application of such rule cannot be controlled and no sanctions are envisaged. Moreover, since the information on the alternative drug is provided by the pharmacist, the probability of the customer buying the cheaper product, normally a generic drug, is low. It would have been better to require doctors to prescribe the active principle rather than the drug, thereby giving patients a greater guarantee of the pharmaceutical validity of the cheaper alternative or to prescribe both the branded drug and the generic equivalent if cheaper.

150. For drugs not requiring a prescription and for self-medication drugs the decree also lays down that the price on the packet be the maximum and alterable only once every two years. Since these drugs are usually in competition with each other, the effects of these measures are neither clear nor unambiguous. Fixing the resale price, even if the maximum, makes for rigidity in firms' behaviour and encourages collusive strategies among the producers, which can monitor the prices each prints on its packets. In view of the likely low variability of the prices of substitute drugs, pharmacists will tend to adapt accordingly. Lastly, a two-yearly price adjustment mechanism tends to reinforce the above phenomena by introducing certainty into producers' competitive strategies and prevents any reductions in cost from being passed promptly on to consumers. It would have been better not to give price indications for these types of drugs.

151. Lastly, the decree provides for the possibility of discounting retail prices by up to a maximum of 20%. Starting from a fixed-price regime, this is a positive step and benefits consumers. It is nonetheless not clear why the decree establishes a maximum. It would have been better to leave pharmacies free to set prices while eliminating the restrictions on advertising that unjustifiably hinder competition at present.

152. At all events, as the Antitrust Authority has argued on several occasions,<sup>23</sup> there is no reason for restricting the sale of self-medication drugs to pharmacies. Allowing more outlets to sell such drugs would lead to a substantial increase in competition and significant price reductions, of up to 30% on the basis of the UK experience.

#### 2.3.4 *Non-medical health professions*

153. Law no. 43 of 1 February 2006 containing “Provisions regarding the nursing, midwifery, rehabilitation, technical sanitary and prevention professions and powers for the Government to establish the related professional orders” overhauled the legislation concerning non-medical health professions. The law responded to the need to give effect to the amendments to Title V of the Constitution following the entry into force of Constitutional Law no. 3 of 18 October 2001, with specific reference to the professions in the health sector. The new text of Article 117 of the Constitution includes this field among those covered by concurrent legislation, whereby the State establishes the fundamental principles while the regions are responsible for the perceptive and detailed measures. Accordingly, the provisions of Law 43/2006 establish the fundamental principles and thus the limits of future interventions by the regions.

154. In particular, the law empowers the Government to issue one or more legislative decrees to establish professional orders for the nursing, midwifery, rehabilitation, technical sanitary and prevention professions as governed by Law no. 251 of 10 August 2000 and makes the exercise of these professions subject to entry in the appropriate register. To this end the law lays down the minimum requirements for the exercise of the professions in question, including the award of a university diploma following the passing of a final exam qualifying the taker to exercise the profession and professional updating to be carried out in the same way as for the medical profession.

155. This provision is likely to lead to the establishment of numerous new professional orders, some of which will derive from the transformation of the existing colleges of nurses, midwives and radiology technicians while others will have to be established *ex novo* for physiotherapists, laboratory technicians, health assistants, and prevention, rehabilitation and technical sanitary technicians. During the examination of the bill in Parliament, a motion was proposed that was passed as a recommendation, calling on the Government “to include the professions of dental technician and optician among the non-medical health professions and to establish appropriate registers.

156. In general the establishment of a register leads not only to a structural restriction on access to the market but also to the obligation for registrants to comply with a code of conduct or rules that are likely to limit competition among the members of the profession: the application of minimum charges, the impossibility of advertising, and the application of territorial limits within which the profession can be exercised are examples of measures that add to the rules establishing the requirements for entry to the profession (training period, qualifying exam, competitive exam) and those serving to guarantee the quality of the services provided. If such measures are approved by an order, they are agreements falling within the scope of competition law and therefore subject to control by the Antitrust Authority. If, instead, they are

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<sup>23</sup> Reports on “Urgent provisions concerning the price of drugs not reimbursed by the National Health Service” (in Italian in *Bollettino*, no. 22/2005) and the “Regulation of the distribution of drugs” (in Italian in *Bollettino*, no. 4/2006).

adopted in a decree, as is the case for many professions, they continue to restrict competition but are no longer undertaking agreements, so that it is much harder to remove them.

157. The risk of anti-competitive restrictions associated with professional orders is not in itself a sufficient reason for denying their role and usefulness in protecting important general interests. For non-medical health professions it is only true in some cases that the informational asymmetry between consumer and provider regarding the quality of services requires forms of selection, e.g. that exercise of the profession be subject to completing an obligatory university-level course and passing a qualifying exam, and control.

158. Not all the health professions need to be safeguarded to the same extent, however, because in many cases the service is not provided directly to the patient but is acquired by a technically qualified structure such as a hospital or a laboratory. And even when the service is acquired directly by the patient, any informational asymmetries could be overcome without establishing a professional order, for instance by requiring the successful completion of a university-level course – as suggested, moreover, by the European Commission, most recently in its February 2004 *Report on competition in professional services*, which, although not specifically concerned with the health professions, nonetheless lays down general principles for professional activities.

159. It is accordingly to be hoped that in exercising the powers it has been granted the Government will not automatically establish a new order for every non-medical health profession. Such alternative course is permitted by Article 3 of the law, which leaves all the regulatory options open.

#### **2.4 *Administrative Liberalisation and simplification***

160. For years now the Italian Parliament has been working to remedy the excess of regulation, the complexity of the procedures and the opacity of many administrative processes. Much progress has been made in simplifying the Italian legislative system and keeping regulatory constraints proportional to the general interests pursued.

161. Last year also saw some important initiatives. As regards the liberalisation of markets, the adoption of new rules for road haulage and interregional bus transport removed a series of unjustified legislative restrictions and laid the basis for growth of the two sectors more closely in line with the needs of users. As regards the streamlining of the legislative framework, Law no. 246 of 28 November 2005 concerning “*Legislative simplification and reorganisation for the year 2005*” imposes constraints on and regulates future legislative activity, so that simplification is once more, as originally intended by Parliament, a condition for the working of the system even more than for its improvement and modernisation.

##### **2.4.1 *Liberalisation of the road haulage sector***

162. With the adoption of Legislative Decrees nos. 284, 285 and 286 the Government reformed the road haulage sector and that of long-distance bus transport. The decrees were issued pursuant to Law no. 32 of 1 March 2005 with a “*Mandate for the Government to reorganise the legislation governing the road transport of goods and persons*”. The general guidelines for the subsequent legislative decrees were as follows: “*the reorganisation of the rules and their adaptation to Community law in a context of open and competitive markets*”, “*the safeguarding of competition between firms in the sectors of the road transport of goods and persons*” and “*the protection of safe driving conditions and road safety*”.

163. More specifically, the road haulage sector was re-regulated by Legislative Decree no. 286 of 21 November 2005 containing “*Provisions for the legislative reorganisation and liberalisation of the activity*”.

*of road haulage*” in implementation of the mandate granted in Article 1.1b) of Law 32/2005. The most important innovation is introduced by Article 3 of the decree, which eliminated one of the main competitive restrictions affecting the sector by abolishing the system of compulsory road haulage rates.

164. Law no. 298 of 6 June 1974 on “The establishment of a national register of road hauliers, the regulation of road haulage and the establishment of a system of maximum and minimum road haulage rates” had introduced a compulsory system of rates approved by the Minister for Transport acting on a proposal from the central committee of the national register of road hauliers, according to which the rate applied could be between a maximum and a minimum separated by a range of 23%. The rate for a given transport could be fixed without any restriction within the range, while it was strictly forbidden to conclude contracts based on prices outside it.

165. This system of tariff regulation was subsequently extended and strengthened by Decree Law no. 82 of 29 March 1993 with “*Urgent measures for the road haulage sector*”, which was ratified as Law no. 162 of 27 May 1993 and established that the system of maximum and minimum charges was to apply to every road haulage contract (Article 3). The system thus applied automatically to all the contracts involving road haulage for which the price had previously been freely negotiable, including by means of tenders. Another provision of the decree law (Article 2) strengthened the system of price predetermination by requiring the rights deriving from road haulage contracts which were to be subject to a maximum and minimum to lapse after five years by way of derogation from the general principle laid down in Article 2951 of the Civil Code, according to which the period was one year for transport contracts. The most direct and striking effect of this complex legislation was an artificial determination of road haulage rates, independent of market mechanisms and based instead on the intervention of an administrative authority.

166. The new legislative decree incorporates the suggestions that the Antitrust Authority had already put forward in a 1993 report<sup>24</sup> and in Article 4 states that “*the rates for road haulage services are to be freely negotiated by the parties that conclude the transport contract*”. This removed the most serious constraint on road haulage activity, which, as the Antitrust Authority had earlier stressed, was in conflict with Regulation (EEC) no. 4058/89 of 21 December 1989 on the fixing of rates for the carriage of goods by road between Member States.

167. It should be noted, however, that while the new rules deserve a positive assessment insofar as they restore the fixing of prices to negotiation between the parties, there must be some reserves from a competitive standpoint about the provision regarding voluntary agreements concluded between associations of carriers and those of users of road haulage services. In fact Article 5.3 of the decree states that such agreements may “*provide for the adoption of a reference index showing the annual change in costs, with special reference to the cost of fuel, to permit the exchange of sensitive information among the parties*”. Although the provision merely gives the associations a right without actually imposing an obligation, the application of a reference index and the exchange of sensitive information could in practice nullify the abolition of the system of maximum and minimum rates and thwart the objective of restoring the establishment of road haulage rates to negotiation between the parties. It will therefore be particularly important to monitor the ways in which this provision is implemented to prevent its use to surreptitiously orient the conduct of hauliers that, by creating an artificial transparency of the market, could undermine the principle of free price negotiation established by Parliament.

168. In order to improve the quality of road haulage services, the reform introduces the principle of responsibility shared among all the parties, including users, involved in the transport chain, strengthens the controls on the safety and regularity of services, introduces quality standards for the haulage of delicate goods (e.g. pharmaceuticals, foodstuffs, industrial waste and dangerous products); it also lays down new

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<sup>24</sup> Antitrust Authority report on “*Road haulage*” of 20 May 1993 (in Italian in *Bollettino*, no. 4/2006).



rules for the initial qualification and periodic training of drivers of vehicles used to transport goods or persons in implementation of Directive 2003/59/EC. Lastly, the reform measures adopted by the Government concerned the public bodies that already operated in the goods haulage sector and entrusted the road haulage general council with responsibility for governing the sector and the central committee for the register of road hauliers with the related operating competences (Legislative Decree no. 284 of 21 November 2005 concerning *“The reorganisation of the road haulage general council and the central committee for the register of road hauliers”*).

169. The new legislation liberalises the pricing of road haulage activities and fosters road safety, in part through the new system of driver training. The liberalisation does not extend, however, to the procedures for entering the road haulage sector and leaves intact the system of structural regulation of the market introduced by Law no. 298 of 6 June 1974 and amended by Law no. 132 of 30 March 1987. This legislation not only requires natural and legal persons to be entered in the national register to be authorised to engage in road haulage but also lays down that *“the Minister for Transport shall adopt the measures needed to ensure that the supply of road haulage services matches the demand”* and that in these measures *“the Minister shall establish the priorities for allocating the limited supply of licenses”* (Article 41.10).

170. In the 1993 report referred to above the Antitrust Authority had already criticised these provisions for entrusting the competent administrative authority with the task of making a discretionary assessment of supply and demand equilibrium in the road haulage sector. This is a discretionary assessment designed to pursue the objective of preventing rate reductions to the benefit of consumers and efficiency without reference to any other objectives promoting the general interest. It should also be noted in this respect that Article 1.108 of Law no. 266 of 23 December 2005 with *“Provisions concerning the preparation of the annual and multi-year State budget (the Finance Law for 2006)”* provided for the establishment of a fund called *“Fund for measures to accompany the reform of the road haulage sector and the development of logistics”* to foster the reform of the sector by *“encouraging the upgrading of the entrepreneurial system, including by means of growth in the size of firms, so as to make them more competitive in Italy and abroad”*. The introduction of financial support for the less competitive road hauliers would have made it possible to eliminate the regulation of access to the market, thereby encouraging a reorganisation of road haulage services that would allow them to meet the needs of users better, with significant benefits for consumers and the Italian economy as a whole.

#### 2.4.2 Liberalisation of interregional bus services regulated by the state

171. Legislative Decree no. 285 of 21 November 2005 concerning *“The reorganisation of interregional bus services regulated by the State”* liberalises the rules on road transport services by means of buses, with an undifferentiated supply, provided continuously or periodically over a route that links more than two regions with predetermined stops, times, frequencies and prices. Like the road haulage legislative decree, this one was issued in implementation of Law 32/2005 and included the following among the guidelines for the reorganisation of the sector: *“the elimination of rents and exclusive rights through the gradual shift from a concession regime to an authorisation regime”* and *“the introduction of parameters intended to raise the safety standards and quality of the services provided to users”*.

172. In conformity with these criteria Legislative Decree 285/2005 sets out to introduce competition into the sector by removing the concession system dating back to 1939 and introducing the possibility for firms to operate on the basis of an authorisation having a validity of at least five years issued by the Ministry for Infrastructure and Transport in accordance with procedures and criteria to be laid down in a subsequent ministerial decree. To ensure the safety of passengers and the quality of the services provided, the legislative decree details the requirements for the granting of the authorisation to provide interregional bus services and in the absence of which the Ministry may reject applications with a motivated decision.

173. While most of the requirements for authorisation specified in Article 3 of the legislative decree are justified and proportional, one provision states that firms “must propose a service that does not consist exclusively of the most profitable of the existing lines”.

174. Although this provision reflects Parliament’s desire to ensure interregional bus services are provided uniformly across the country, it appears to allow the competent administrative authority excessive discretion in evaluating applications. Given that it is not possible to establish in advance which services are to be considered profitable or capable of becoming so in the future, the power given to the competent administrative authority is likely to lead to the discretionary granting of authorisations, unconnected to any objective parameter and therefore also easily used with potentially distortionary effects on competition.

175. Unfortunately the legislative decree provides for a long transition period for the new competitive regime to become effective. Until 31 December 2010 the concessions already awarded will remain valid although, in order to foster passenger mobility, the decree provides that new services may be authorised before that date and changes made to those already existing at the date of the decree’s entry into force. No reason is given for the length of the transition period and this does not appear justified by the characteristics of the sector, which in general are entirely compatible with a competitive regime.

#### 2.4.3 *Administrative simplification and impact analysis of regulation*

176. The 2005 simplification law (Law no. 246 of 28 November 2005 concerning “*Legislative simplification and reorganisation for the year 2005*”) contains numerous provisions intended to streamline, rationalise and simplify the legislative framework, and notably Article 5, which grants the Government a mandate to simplify the bureaucratic formalities in all the various phases of business activity and promote one-stop shops for productive activities. In particular, the guidelines the secondary legislation must comply with include: “*provision for forms of self-regulation, where these do not conflict with essential public interests, to foster competition among economic agents and an increased productive capacity of the Italian economy*” and “*the substitution, where possible, of prescriptive rules with systems of incentives and disincentives*”. In addition to complying with these guidelines, the revision of existing legislation must be in conformity with Article 20 of Law 59/1997, as amended by Law 229/2003 and Law 246/2005, which includes among the guidelines for the reorganisation and codification of legislation “*the elimination of authorisations and measures limiting contractual freedom*”, unless this conflicts with specific public interests. If these provisions are applied appropriately, they could lead to the elimination of many unjustified restrictions on competition contained in the sectoral regulations that come up for reorganisation and to the maintenance of regulations only where this is strictly necessary to achieve clearly identified general interests.

177. No less important from the point of view of the quality of regulation is Article 14 of the above-mentioned law, entitled “*The simplification of legislation*”; this repealed Article 5 of Law 50/1999, which had initiated the experimental phase of the Analysis of the Impact of Regulation (AIR), and introduced new rules in this field. As is well known, AIR is a useful instrument for curbing the excesses of regulation and ensuring its quality. The law’s most important innovation is the passage to the routine operation of the system, including the systematic application of the Verification of the Impact of Regulation (VIR), to be carried out two years after the entry into force of the law in question and the presentation not later than 30 April each year of a report by the President of the Council of Ministers on the application of AIR.

178. In addition, in order to foster effective cooperation between the various levels of government and aware that making the best use of AIR as a means of controlling regulation requires its extension to local authorities, Article 20-ter introduces the possibility for the central government, the regions and the autonomous provinces “*to conclude agreements defining homogeneous criteria, procedures and instruments with which to promote the quality of state and regional legislation and establish uniform*

*procedures for the analysis and verification of the impact of regulation and for consultation with employers' organisations on the adoption of state and regional legislative measures*". Since local authorities are increasingly responsible for economic regulation in the Italian legal system, AIR is an appropriate instrument for imposing discipline on them in this activity and preventing regulatory excesses.

179. Although the new law provides for AIR to become fully operational, this will not occur immediately, since a period of 180 days from the law's entry into force is provided for the specification, in a decree issued by the President of the Council of Ministers, of general guidelines for the application of AIR, including the consultation phase, the relevant types of regulation and the cases and manner of exclusion from AIR and VIR. In this new context, in which the Legal and Legislative Affairs Department of the Presidency of the Council of Ministers is assigned a key role, it would be appropriate to include the requirement for legislators to identify the instruments least restrictive of competition with which to pursue a particular objective of general interest and involve the Antitrust Authority in the evaluation of the measures impinging most directly on the market process.

180. The reform contemplated by the article of the simplification law referred to above (Article 14) is especially important for the modernisation of the rules governing legislative activity and the reorganisation of legislation. It requires the Government, within 24 months of the entry into force of the law, to catalogue all the state legislation in force, indicating the legislative incongruities and antinomies present in the various sectors of legislation, and to submit a final report to Parliament. In the 24 following months the Government is authorised to issue legislative decrees identifying the provisions of state legislation published before 1 January 1970 whose continued effectiveness is considered indispensable on the basis of various guidelines laid down by the law, including: "*identifying the provisions indispensable for the regulation of each sector, inter alia by using the procedures for the analysis and verification of the impact of regulation*". At the expiration of this time limit all the provisions of state legislation published before 1 January 1970, even if subsequently amended, will be repealed. The only exceptions are some fundamental bodies of law, such as codes, codified laws, provisions concerning constitutional entities or of constitutional significance, provisions concerning social security and assistance, taxation and the budget or fulfilling Community obligations or ratifying international treaties.

181. These provisions, although mainly important for the moment at the planning level, could provide the opportunity not only to systematise the examination of the impact on competition of new national and regional legislation but also to remove the regulations dating furthest back and stratified over the decades, which have remained untouched by every attempt at modernisation. In this way it would be possible to ensure that only the measures needed to achieve objectives of truly general interest remain in force.