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ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Italy --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

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ITALY

1. Competitive neutrality and the role of the State in the Italian economy

1. The Italian Competition Authority (hereafter “ICA” or “Authority”) applies the general economic and legal framework provided for by the national and EU competition rules and procedures, when assessing the conducts of State-owned enterprises (SOEs)¹. In particular, there are no differences between SOEs and other firms in terms of the range of investigative and repressive powers the Authority can activate against infringers.

2. Nevertheless, in promoting a level playing field between SOEs and other firms the ICA has raised some concerns which stem from granting SOEs with:

- exclusive or monopoly rights over economic activities which are not clearly linked with their mandate and can be offered under normal market conditions;
- surveillance or regulatory powers in sectors where SOEs are also present as operators; and,
- direct subsidies from the government or benefit from other public forms of financial assistance to sustain their mandate.

3. In the ICA’s experience, the advantages resulting from these State’s measures may turn to be problematic if they are used to cross-subsidize other activities where SOEs face competition from privately-owned enterprises with the ultimate aim of monopolizing these markets.

4. The weight of SOEs is still relevant in the Italian economy, especially in the public utilities sectors at local level. According to a 2014 report of the Department of Treasury², in 2012 the State had a portfolio of 36,125 direct and indirect shareholdings in 8,146 companies. Most of shareholdings are in the hands of local governments: 35,311 shareholdings in 7,726 companies compared to the central-government entities which held 490 shareholdings in 423 companies.

5. While the majority of shareholdings held by local governments (32,671 of 35,311) are minority shareholdings (i.e., less than 50%) and the portion of shareholdings giving full control amount to 4% of the total, it is very frequent to find that several different local entities had an equity investment in the same company³.

6. Municipalities play the biggest role as they hold 73% of total shareholdings belonging to the local entities. Municipalities have shareholdings in 5,459 companies, 29% of which relates to the

¹ The expression is used to include enterprises owned or controlled by the State and other public entities, at central or local level.

² The Report for the year 2012 was published in July 2014, and it is available at: http://www.dt.tesoro.it/export/sites/sitodt/modules/documenti_it/programmi_cartolarizzazione/patrimonio_pa/Rapporto_Partecipazioni_DatiAnno2012.pdf

³ This phenomenon is also present, albeit to a lesser extent, at central government level where the majority shareholdings amount to 35.7% of the total shareholdings in the portfolio of central government entities.

public utilities sector: in particular, the highest number of joint shareholdings by several Municipalities is in the water and waste sectors. The majority of the companies participated by Municipalities (65%) operate in the services sector (e.g., IT, professional activities), transport sector and in the promotion of local entrepreneurship and development.

7. To ensure the coordination of multiples objectives (fiscal consolidation, efficiency of the public companies and competition), the Italian Government has recently started a process of rationalization⁴ of the companies and equity investments directly and indirectly held by all State entities at central and local level, which are due to report to the Finance Minister on their efforts in reducing their shareholdings, on the basis of some criteria⁵.

2. Competitive neutrality and application of competition law to SOEs

8. The provisions of the Italian Competition Act (Law No. 287 of October 10th, 1990) “*apply to both private and public sector undertakings and to those in which the State is the majority shareholder*”, according to Art. 8 of the Competition Act. Therefore, rules concerning cartels or other anticompetitive agreements, abuse of dominant positions and concentrations apply to all firms in all sectors of the economy.

9. The same article envisages an exemption modeled like Article 106 of the TFEU setting the rules for entities that perform services of general economic interest or are granted special or exclusive rights. Pursuant to Art. 8 of the Competition Act, competition rules do not apply to undertakings which, by law, are entrusted with the operation of services of general economic interest or operate on the market in a monopoly situation, only insofar as this is indispensable to perform the specific tasks assigned to them. Quite often, these undertakings are SOEs or former SOEs which were privatized.

10. SOEs are not prevented from operating on markets different from the ones where they operate services of general economic interest. However, if they decide to operate in other markets Art. 8 of the Competition Act imposes obligations related to separation and non-discriminatory access in order to restore a level playing field.

11. First, they must operate through separate companies (Art. 8.2-bis). Second, they must submit prior notification to the Italian Competition Authority if they intend to incorporate or acquire controlling interests in undertakings trading on markets different from the ones where they operate services of general economic interest (Art. 8.2-ter), in order not to incur in fines up to euro 50,000. Finally, when the undertakings entrusted with services of general economic interest supply their subsidiaries or controlled companies on different markets with goods or services, including information services, over which they have exclusive rights by virtue of their role, they shall make these same goods and services available to their direct competitors on equivalent terms and conditions, in order to guarantee a level playing field (Art. 8.2-quater).

12. In addition to Article 106 of TFEU and Art. 8 of the Competition Act, Italian public sector companies are subject to the European rules on state aid and subsidies, applied by the European Commission to state aids that Member States or other public bodies provide to any company, public

⁴ See the Stability Law for the year 2015, December 2014.

⁵ The Government suggested five “rationalization” criteria: elimination of companies and company shares that are not essential to the pursuit of its institutional goals, including through liquidation or disposal; elimination of companies that are composed of directors only, or by a number of directors greater than that of employees (elimination of “empty boxes”); elimination of equity investments in companies engaged in activities that are similar to those undertaken by other subsidiary companies or public institutions, also through mergers or internalisation of functions (elimination of “duplication investments”); aggregation of local public service companies; containment of operating costs of the State-owned companies, through the reorganization of the corporate structures and the reduction of the related remuneration.

or private. Another tool that applies is the EC Transparency Directive, which requires separate accountability for public companies that have both commercial and non-commercial activities to demonstrate how their budget is divided between commercial and non-commercial activities.

2.1 *Enforcement*

13. The Authority has closed numerous proceedings against the state-owned monopolist or dominant undertaking for alleged abuses of dominant position in order to restore a level playing field in the concerned markets. Being an independent Authority whose decisions cannot be amended by the government, the ICA has not encountered any pressure from the State when scrutinizing the conducts of SOEs and the difficulties faced in enforcing competition rules have not been particularly different from proceedings involving private companies. Illicit conducts put in place by SOEs have attracted very large fines⁶.

14. On the substantive side, in most cases the anticompetitive conduct concerned the SOEs leveraging their market power stemming from legal reservation to prevent competitive entry in the same or in a neighbouring market, for example through cross-subsidization⁷. Similar allegations were pursued also against companies owned by local government entities such as Regions, Provinces or Municipalities.

15. Several important ICA's decisions regarding SOEs and competition neutrality occurred in the crucial phase of privatisation and liberalization occurred in late 1990s⁸. The difficulties encountered by the ICA in enforcing competition rules against SOEs stem from issues concerning former monopolies under a liberalization process: (i) the access to inputs or facilities essential to compete in downstream markets, (ii) the lack of independent regulator or uncertainty of the regulatory context which may provide a protection for the allegedly abusive conducts and (iii) the definition of the activities under legal reserve vis-à-vis the activities open to competition. These issues are often intertwined to each other and will be addressed in more detail.

16. The Authority has also enforced the separation and notification obligations (pursuant to Art. 8.2-bis and 8.2-ter of the Competition Act) against public sector businesses that failed to comply with

⁶ For instance, in a case related to the telecommunications sector, the ICA punished the abuses of the incumbent SOE, Telecom Italia, with a fine totaling 104 million euros. At regional level, the ICA imposed a fine of nearly 2 million euros to the Hera Group, monopolist in the waste collection sector. These two cases are illustrated in sections 2.1.1 and 2.1.2.

⁷ There have been only a few cases of anticompetitive conducts of SOEs through pricing abuses. These cases have shown the complexity of enforcing competition law against public entities in terms of calculating the appropriate measure of costs for SOEs which can be benchmarked against similar private firms, since governance arrangements for the government businesses often lack of transparency or their accounting practices are poor. This complexity has prompted a more cautious approach, which resulted, in some instances, in commitment decisions, whereby the Authority closes an investigation without finding an infringement, by accepting binding commitments from the SOE under scrutiny.

⁸ See for instance ICA decisions: *A84 - ADUSBEF/Autostrade*, 1996 (Highways – granting exclusive rights); *A221 - SNAM-Tariffe di vettoriamiento*, 1999 (Gas transport network – refusal to access); *A263 - UNAPACE/Enel*, 1999 (Electricity sector – use of contractual clauses to hinder retail liberalization); *A227 - Cesare Fremura-Assologistica/Ferrovie Dello Stato*, 2000 (Railway Transport Services – discrimination in favour of subsidiaries); *A441 - IVA sui servizi postali*, 2013 (VAT on postal services – exploiting regulatory coverage); *A436 - Arenaways / Ostacoli All'accesso Nel Mercato Dei Servizi Di Trasporto Ferroviario Passeggeri* (Railway Transport Services – refusal to access); *A428 - Wind-Fastweb/Condotte restrittive di Telecom Italia*, 2013 (Telecommunications services - exploiting regulatory coverage); *A444 - Akron- Gestione Rifiuti Urbani A Base Cellulosica*, 2014 (Waste management – discrimination in favour of subsidiaries).

them. Over the period 2010-2014, there were twelve infringements for an overall fine amounting to euro 143,500 and in one case the ICA decided to impose the maximum fine (euro 50,000).

2.1.1 Access to essential inputs and facilities

17. In sectors where access to facilities or inputs is essential for providing goods or services in the downstream markets, ensuring access on a fair and non-discriminatory basis is fundamental to prevent discriminatory conducts by the SOE owning essential input or facilities and at the same time they are active in the downstream markets.

18. For instance, in 2014 the Authority fined the Hera Group, which holds a monopoly in the collection of municipal waste in several Italian provinces, for supplying cellulosic waste to its subsidiary Akron at a price below a market price, without accepting more advantageous offers received from other competitors of Akron in the recycling market. The ICA found that such conduct foreclosed downstream competitors from accessing waste, an essential input for recycled paperboard and therefore reduced competition in the market for used paper. The lack of a regulatory framework at regional level which recognizes waste as an essential inputs for several secondary markets and regulates its accessibility, contributed to the implementation of such abusive conducts and required the intervention of the ICA⁹.

19. Another sector where denial to access to infrastructure was deemed to be an antitrust illicit is the ports sector. In several cases the Authority has pointed out that the access to ports' essential facilities, subject to concession by Port Authority, must be guaranteed in accordance with equality and non-discrimination principles since access to port infrastructures is a precondition for providing port services, both cargo-handling and technical-nautical services. In some cases, the ICA dealt with the hybrid role of Port Authorities as regulators and providers of services, taking advantage of their regulatory role to benefit their economic activities¹⁰.

20. In 2012 the Authority closed an investigation into the abusive conduct by State Railways (FS), which, through its subsidiaries Rete Ferroviaria Italiana (the Italian Railway Network) and Trenitalia (the incumbent operator of rail passenger services), succeeded in impeding a new entrant Arenaways from offering its passenger services on the Turin-Milan line, by delaying access to the "traces", which are essential for the set-up of such services¹¹.

⁹ See AGCM decision on *A444 - Akron-Differentiated collection of paper waste, 2014*. A competitor of Hera's subsidiary Akron complained that the Hera Group, the monopolist waste collector in most municipalities of central and eastern Emilia-Romagna Region, had handed over the waste paper to Akron at a price below market level, without making any fair comparison with other offers received. In its decision, the ICA found that such conduct infringed Art. 3 of the Italian Competition law on abuses of dominant position. Namely, the behavior foreclosed downstream competitors from accessing an essential input for recycled paperboard and therefore reduced competition in the market for used paper. In addition, the sale at a price below market level produced an extra-profit for the Hera Group that was kept within the group and that should have been transferred to Emilia-Romagna consumers in the form of lower taxes for the municipal waste collection service. The ICA ordered the Hera Group to cease their abusive conducts and required to auction the paper waste.

¹⁰ For more information about the Authority's enforcement in ports sector, see Italy's contribution to the OECD Policy Roundtables, *Competition in Ports and Port Services*, 2011, available at: <http://www.oecd.org/daf/competition/sectors/48837794.pdf>

¹¹ See ICA decision *A436 – Arenaways / Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri, 2012*. The ICA has appealed before the Supreme Administrative Court the ruling of the Regional Administrative Court of Lazio (first instance) which annulled the ICA decision in March 2013.

2.1.2 *Lack of independent regulator and regulatory coverage*

21. In several cases, the ICA found that SOEs had exploited the lack of independence of the regulator and/or the uncertainty of the legal framework in sectors which were under a transition process (e.g., liberalization) to justify their abusive conduct.

22. To continue with the previous example in the railways sector, the infrastructure operator RFI requested to the regulator (Ministry for Transport) to assess the economic and financial impact of Arenaways's plan to enter by offering services competing with similar services performed by RFI's sister company Trenitalia on the same routes under PSOs. Indeed, between 2009 and 2010 a legislation entered into force with the aim to balance the needs of liberalising the rail transport market with preserving the economic balance in the service contracts drawn up for the provision of subsidised services. However, according to the Authority, Trenitalia had provided the Regulator a misleading representation of facts liable to deceive it; the nature of this representation was such to lead the regulator to take a decision in favour of the incumbent service operator. Indeed, the request to access the tracks was denied also on the grounds that it would have compromised Trenitalia's economic equilibrium in the provision of public services¹².

23. An interesting example of regulatory coverage concerns a former SOE, Telecom Italia (TI), the incumbent in telecommunications markets in Italy. In 2013 the ICA fined TI for abusing its dominant position on the wholesale markets for network infrastructure access (Local Loop Unbundling - LLU) and broadband access (bitstream). One of the two abuses consisted of a constructive refusal to supply access to TI's network, implemented by rejecting a large proportion of competitors' wholesale orders to access its network (so-called 'KO') during the delivery process. The evidence suggested that the exceptionally high levels of KOs for other telecommunications providers could be attributed to the delivery process used by TI to provide wholesale services. Such process was different from the process used internally to serve TI's internal retail divisions, which did not face such a high proportion of KOs. Although the delivery process for competitors' orders was approved ex-ante by the sectoral regulator as consistent with the principles of fairness and non discrimination, the ICA found that TI was still capable to improve it as to reduce the level of KOs received by competitors but it did not have incentive to do so in order to favour its own business¹³.

24. In other circumstances, the behaviour of SOEs may be imposed or encouraged by a mandatory national law which is in conflict with Community law and with Article 102 of the Treaty

¹² The ICA findings showed that the overall strategy was aimed at limiting competition in the liberalised domestic passenger transport services. This conclusion was also based on evidence showing that Trenitalia had increased and modified routes and frequency of its commercial and PSO's trains, in order for them to overlap to a significant extent with the services that the new entrant was likely to offer. The Authority intervened in a case with similar issues concerning the cabotage services, i.e. domestic railway services offered within an international connection: see R. Coco, *Rail liberalisation and cabotage in the EU. A contribution by the ICA*, Italian Antitrust Review, Vol 1, Issue 1 (2014), available at: <http://iar.agcm.it/article/view/9937>

¹³ See ICA decision on A428 - *Wind-Fastweb/Restrictive conducts by Telecom Italia, 2013*. TI was given a total 103.8 million Euro fine for two abuses. As for the second abuse, it appeared that Telecom charged – in contracts with medium/large business customers – discounted prices not replicable by an equally efficient competitor. Specifically, Telecom adopted a margin squeeze strategy in the provision of narrowband access to medium/large business customers. The economic analysis showed that the difference between the discounted prices set by Telecom and the wholesale prices charged to other telecommunications providers for the essential inputs was not sufficient to cover the incremental (network and commercial) costs incurred by an equally efficient competitor in the provision of narrowband access services. The ICA concluded that by implementing this abusive strategy infringing Article 102 TFEU, Telecom was able to reduce the 'natural' erosion of its market share.

prohibiting the abuse of dominant market position. In such cases, according to national the EU jurisprudence, the ICA is obliged to disapply the national law.

25. A recent example involves Poste Italiane, the Italian postal service incumbent operator, which is exempted to apply VAT on services under its postal universal obligations (i.e., valid for all customers) according to an European Directive. However, when transposed into national law, this provision allowed for a broader exemption from VAT, i.e., including services for which the terms have been individually negotiated. As a consequence, Poste Italiane was able to apply a discount (equal to the VAT amount) to postal services that could be also performed by rival postal services operators but did not enjoy the VAT exemption¹⁴.

2.1.3 *Perimeter of reserved activities*

26. The ICA has intervened in circumstances where the SOEs have interpreted the perimeter of the reserved activities too broadly to encompass activities which do not pertain to public service obligations and which can be therefore provided by the market.

27. For instance, in 2009 the Authority imposed a fine on Trambus, entrusted of 80% of public transport services in Rome¹⁵. Besides this service of general economic interest, Trambus operated a touristic bus line through ancient Rome ruins. The Authority claimed that Trambus had not established a separate company for its activity in the separate touristic bus line market, in breach of Art. 8 of the Competition Act. Trambus objected that the touristic line was contemplated in the concession by the Municipality. The Authority maintained that such element was not sufficient to qualify the touristic service as a service of general economic interest, given that no public service obligation or subsidy was associated with the touristic service.

28. In other cases, e.g., local public transport, the lack of a precise and complete identification of perimeter of the reserved activities and the public service obligations (PSOs) in the service contracts may distort incentives for greater efficiency and for an adequate level of investment, leaving

¹⁴ See ICA decision on *A441 – IVA sui servizi postali*, 2013. Poste Italiane is under an obligation to discharge the so-called “postal universal services” in Italy and, in certain circumstances, is entitled not to apply VAT for these services in order to benefit all customers. However, in breach of this obligation, Poste Italiane did not apply VAT to several services provided for by individually negotiated contracts with large Italian companies. The ICA held that such contracts, according to Directive (CE) No. 112 of 2006 and the consolidated European Union case-law, could not benefit from the VAT exemption as they were not applied to all customers but only to specific clients. In such a way, the purpose of the VAT exemption was disregarded and Poste Italiane was able to apply a discount (equal to the VAT amount) to postal services that could be performed by rival postal services operators. In such a context, competition between Poste Italiane and PSOs was seriously impeded insofar as Poste Italiane could charge far lower prices for the same postal services. The behaviour of Poste Italiane, in the ICA’s view, was justified by a mandatory national law which provided for exemption from VAT for services supplied as part of Poste Italiane’s universal postal service, without excluding services for which the terms have been individually negotiated. This legislation, nevertheless, was in conflict with Community law and with Article 102 of the Treaty prohibiting the abuse of dominant market position. The decision of the European Court of Justice of 9 September 2003 (Case C-198/01) laid down that, in the event of behaviour on the part of undertakings in contrast with the prohibition against abuse of dominant position which is imposed or encouraged by a national law, the national competition authority is obliged to disapply the national law. This obligation has been recognised by Italian constitutional and administrative law.

¹⁵ See ICA decision *SP109 - TRAMBUS/ATTIVITÀ€ AUTOBUS DI LINEA GT*, 2009.

room for conducts aimed at preserving dominance in non-regulated markets segments, especially when significant subsidies are granted to the service provider¹⁶.

29. The issues illustrated above could not be fixed through the enforcement action of the ICA as a change in the regulation or law is required. In such cases, the Authority has extensively used its advocacy powers to complement its enforcement actions as described in the section 2.2.

2.2 *Advocacy*

30. The ICA has used its advocacy powers to encourage efficient and fair competition between public and private sector businesses. In some circumstances, advocacy may be the most effective approach, for example when competitive distortions arise from a deliberate decision by a government to favour its SOEs.

31. Over the past few years the ICA, supported by new powers (see Box below), intensified its competition advocacy activity in this area, especially vis-à-vis local administrations and Municipalities, with the adoption of a pro-active strategy, in which opinions are issued not only to react to the introduction of restrictive measures, but also to urge the policy makers to liberalize and open markets to competition.

Box - The new advocacy tools of the Italian Competition Authority

In the Italian institutional framework, legislative and regulatory powers in many important sectors are exclusive competence of regional and local authorities or, at the best, shared with the central government with unclear boundaries. In addition, the weight of SOEs, regulated companies and/or public services in the Italian economy is greater at local level. In this context, monitoring secondary or local legislation and regulation plays a crucial role in ensuring the success of liberalization measures through an effective implementation. In some cases, liberalization reforms launched at central government level have been in fact watered down or delayed by local administrations.

To address this problem, the Italian competition law was amended and advocacy powers have been strengthened. Thus, pursuant to Art. 21bis, the ICA can issue an opinion requesting public local entities or administrations to repeal any administrative act that, in ICA's view, is contrary to competition law and principles. In case of non-compliance to its opinion, the ICA may challenge the act before the Administrative Tribunal. In 2014 the ICA questioned 23 regional and local provisions, particularly in the sectors of insurance, retail distribution, public transport, often in the context of public procurement. The deterrence effect attached to the threat of challenging the administration before the Court has resulted in the majority of public administrations complying with the ICA' opinion.

Another important tool to mention is the increased cooperation with the Prime Minister's Office (PMO) which ask for an opinion of the ICA when assessing the conformity of draft regional legislation to the constitutional principles. From January 2012 to 31 December 2014, the ICA issued 29 opinions to the PMO, suggesting to challenge regional laws in contrast with competition principles. In view of the opinions given, in 17 cases the PMO decided to appeal the regional laws before the Constitutional Court, also based on competition grounds proposed by the Authority.

Another important advocacy power at the ICA disposal is the Annual Law on Competition. By this law, every year, the recommendations of the ICA are put in a liberalization law that is for discussion and potential approval by parliament. Since 2009, the ICA has submitted four advocacy reports, the latest released in July 2014 containing proposals accompanied by the necessary legislative amendments for numerous sectors.

¹⁶ For more information, see Italy's contribution to the OECD, Policy Roundtables, *Recent Developments in Rail Transportation Services*, 2013 (p.125), available at: <http://www.oecd.org/daf/competition/Rail-transportation-Services-2013.pdf>

2.2.1 *Advocacy solutions to address competitive neutrality*

32. In its advocacy activity, the ICA has offered a variety of recommendations to deal with the issue of competitive neutrality depending on the particular case in question.

- Improving the corporate governance of SOEs and their standards of transparency and disclosure

The ICA has recently suggested to create a single statute setting out clear and applicable rules to all publicly-owned companies in order to make the currently extremely fragmented regulatory framework more coherent¹⁷. The Authority has also advocated for a rationalization of the number of SOEs and for the adoption of bring private sector objectives and associated incentives in the operation of the SOEs: for instance, greater accountability and transparency on management may help the market understand more clearly the commercial responsibilities versus the social responsibilities and the impact on other private sector competitors.

When privatization was considered by the government, the Authority has always been of the view that such intervention should go in parallel with a liberalization process to ensure that the competition issues existing prior to the State ownership would not be replicated, or at worse exacerbated, in the new privatized contest. For instance, in the contest of privatised natural monopoly assets, the ICA has advocated to separate the competitive parts of vertically integrated service providers such as utilities, while the natural monopoly parts ought to be subject to direct regulation by an independent regulator. The legal unbundling model introduced in the Italian electricity and gas sector proved to be inadequate because it neither prevented anticompetitive behaviours of the vertically-integrated operators nor it provided the right incentives for investments in the electricity and gas networks. The Authority successfully advocated for a structural unbundling in the gas sector. In other sectors where privatization occurred such as telecoms, the Authority might face a situation whereby a former SOE may strategically use its ownership of monopoly assets to influence future technology choices over the same assets¹⁸.

- Separating commercial and non-commercial activities (e.g., a definition of public service obligations that is clear, sounded and proportional);

The importance of an appropriate definition of public service obligations and standards of transparency and accountability for SOEs has been advocated by the Authority in several sectors. For instance, in the postal services, the ICA has questioned the extensive definition of “universal service” adopted by the legislator which included services clearly directed to business customers that send large volumes of mail. Furthermore, the Authority has recommended introducing compulsory assessment of the efficiency and quality of the universal service provided by the incumbent SOE, Poste Italiane, as well as criteria for greater transparency in the funding system. It has suggested the removal of Poste Italiane’s exclusive right to provide services related to the notification of judicial documents, as well as of all the types of implicit subsidies such as the VAT exemption, is necessary to make the market more competitive. Finally, banking and financial activities of Poste Italiane (through the division BancoPosta) should be incorporated in a new separate company, subject to

¹⁷ In the ICA recommendation AS1137 - *PROPOSTE DI RIFORMA CONCORRENZIALE AI FINI DELLA LEGGE ANNUALE PER IL MERCATO E LA CONCORRENZA*, July 2014, there is a specific session concerning publicly -owned companies.

¹⁸ See section 2.2.3 below.

banking regulations, in order to remove Poste Italiane's competitive advantage in the banking industry and to avoid potential cross subsidies¹⁹.

- Introducing an regulator/controller that is independent from SOEs and the government

The importance of an independent regulator to ensure a level playing field is particularly crucial in the transport sector, both at national and local level. A regulator fully independent from the SOE was eventually set up in 2014 following an intense advocacy activity which outlined how problematic the enforcement of competition law is in instances where SOE and regulator are under the same ownership, i.e., when the State is both regulator and service provider²⁰.

2.2.2 *Competitive neutrality in the context of public procurement*

33. Another area where the ICA has intervened to enhance competitive neutrality is public procurement, in particular local public services (transport, waste etc.). The ICA has issued opinions to procurement agencies or local administrations in charge of procurement on the design of tenders aimed at increasing participation of market players, preventing collusive behaviour and reducing competitive advantages of incumbents. Several issues have been raised in this regard.

34. First, the ICA has stigmatized the limited recourse to competitive tender procedures. Direct award and in-house allotment to publicly-owned incumbents are still a frequent choice at local level. Extensions of in-house contracting have been granted too often and in many cases in contrast with the EU rules on in-house providing. However, the ICA found that even when tender procedures are set up, participation is rather low, and publicly-owned providers win in most of the cases. Therefore, the design of service contracts and tender procedures is crucial for an meaningful and wider participation and they have been under the close scrutiny of the ICA.

35. Features of the service contract (definition of the object, technical requirements, allotment criteria) as well as elements of tender/auction design (e.g., participation/selection criteria) have often been shaped in such a way that only the incumbent SOE could actually meet all of them. For instance, an artificial or unjustified extension of the perimeter of the service may restrict participation of more specialized firms. In the context of local public services, this issue is often linked with the definition of the perimeter of the reserved activities. The problem often encountered by the ICA is that service contracts mainly mirror former concessions to municipality-owned providers, both in terms of the services obligations and in terms of the geographical areas concerned, without any economic justifications (e.g., in terms of efficiencies, demand patterns).

36. Similarly, the ICA has spelled out general principles with respect to allotment criteria in order to balance the trade off between the demand aggregation and the level of participation, having regard to the structure of the affected markets from both demand and supply side. The ICA is of the view that the benefits of aggregating demand in a single allotment (e.g., increase in bargaining power,

¹⁹ The separation obligation has been recently implemented while the recommendation on the services related to the notification of judicial documents has been included in a government draft bill on competition, currently being discussed in the Parliament.

²⁰ Before the introduction of the Transport Authority, the Ministry of Infrastructure and Transportation was in charge of transport policy and regulation (e.g., definition of public service obligations, PSOs), with the task of monitoring Rete Ferroviaria Italiana Spa (RFI), responsible for the infrastructure operations and access conditions. However, RFI is integrated in the downstream market of railway passenger services with Trenitalia, the incumbent service provider both in segments open to competition and under PSOs. Both RFI and Trenitalia belong to the State-owned group FS. For more information, see Italy's contribution to the OECD, Policy Roundtables, Recent Developments in Rail Transportation Services, 2013 (p.125), available at: <http://www.oecd.org/daf/competition/Rail-transportation-Services-2013.pdf>

avoid duplication of transaction costs, increase in scale economies) are less clear when the product/service is differentiated. In addition, another concern is the risk of the buyer's being locked in by a dominant supplier, which translates into a reduction of the degree of competition over time.

37. The ICA also pointed out difficulties for new entrants to access infrastructure and equipment, and has advised procurement agencies to oblige the incumbent to divest ancillary goods and equipment necessary to perform the service for the new comer.

38. Information asymmetry between the contracting agency and incumbent providers often prevent the former to properly design the content of the service contract: as a result, bidders are reluctant to participate in tenders where there is little information on important aspects of the service in question, while the SOEs retain all the information advantages. Thus, the Authority has suggested the contracting agencies to impose an obligation for the incumbent provider to release all the necessary information and data.

39. The ICA has made recommendations to foster not only "competition for the market" as illustrated above but also "competition in the market" where possible. In local public transport and waste management, the ICA has recommended introducing the possibility of providing local public transport services even in cases in which routes overlap with those operated exclusively by the concessionaire, upon payment of a compensation royalty if economic equilibrium can be proven to be compromised by the new entrant.

40. All the issues mentioned above with regard to the design of tenders and service contracts have been addressed in the area of local public transport by the recently established transport regulator, in its consultation document published in March 2015: the framework outlined in the document is consistent with the ICA's recommendations formulated over the years.

41. Another element to account for when promoting competitive neutrality in local public services predominantly provided by SOEs is the presence of "social" clauses in the contract services. These clauses (such as the obligation upon the winner to absorb debts and labour force of the former concessionaire) may restrict participation and therefore be in conflict with competition goals while pursuing other public policy objectives.

42. This is an important issue in Italy given that regulated utilities are in most cases companies owned by local governments. These companies pursue, even if not explicitly, objectives to favor their owners: increase the number of employees, increase the salaries of employees, minimize the pressure to reduce the cost of supplies etc., without fearing the risk of bankruptcy. These business strategies are largely accepted by the owners (local governments), which extract their political dividend. In addition, the owners, being also regulators, have incentive to keep tariffs at low level, accumulating deficits and losses which keep away prospective participants from tenders.

43. For these reasons, the ICA has proposed the Government a rationalisation of all publicly-owned companies either through a process of privatisation or through the non-renewal of concessions for entities operating at a loss: in the latter case, the decision of the public body to cover the loss should meet the same criteria that would have been adopted by a private competitor.

2.2.3 *Sector enquiries on SOEs*

44. Several market studies involving SOEs entrusted with legal monopolies and/or public service obligations were conducted in the Nineties, prompted by the liberalization packages introduced with the European Directives on the telecoms, transport and energy sectors. The issues raised are similar to those addressed in the previous sections.

45. In several occasions, the ICA advocated for a careful scrutiny of the scope of public service obligations, to avoid that potentially competitive markets were excluded from competition²¹. Other advocacy interventions focused on the need to ensuring clear separation between regulated and non-regulated activities²². In other sectors, the Authority has put a strong effort to foster access of new players in sectors in course of liberalization²³.

46. The use of market studies continues to be an important tool to address the issues related to competitive neutrality. Recently, the ICA has released a joint market study on the next generation access networks, jointly carried out with the Communications Regulator AGCOM. The choice of the technology was considered as a strategic variable with several implications for competition (especially in a dynamic perspective), as this choice could be influenced by the incumbent operator which, as a former SOE, maintains the ownership of the network²⁴.

47. In assessing the project of developing networks based on Fiber-To-The-Building/Home (FTTB/H) in alternative to the networks based on Fiber-To-The Cabinet (FTTC), the two Authorities found that the FTTC-based technology is not capable to deliver in the long term an end-to-end infrastructure-based competition although it does not require considerable investments over a long time period and does not create uncertainty over the possibility of recoupment as it is in the case of FTTB/H-based networks.

48. In particular, focusing on the dynamic aspects, the market study has outlined the circumstance that the incumbent Telecom Italia might have the ability and incentives to abandon any plans for further development of FTTB/H network in favor of a FTTC-based project which continues to recognize a central role in its existing copper network, thus influencing the choices of the other operators.

49. In its *Italian strategy for next generation access network*, the government has set out a framework for the development of ultra-broadband networks: taking into account the concerns related to the technology choice, the framework has underlined the importance of technologies which are *future proof*, in order to build the future competitiveness of the country and achieve the objectives of the EU Digital Agenda. The Strategic Plan clarifies the objectives of the government and the role of

²¹ For instance, in its opinion on the proposal to reform the communications industry issued in 1995 (*IC- Trasmissione dati*), the Authority emphasised the need to introduce a more specific indication regarding the features and the substance of the universal service. It also emphasised the need for the then-state-owned carrier Telecom Italia to introduce an accounting system that would identify any additional costs connected with the provision of universal service and enable the regulatory authorities to verify them.

²² For example, the Authority published a survey on the natural gas industry in 1997 (*IC12 – Settore del gas metano*), whereby the Authority suggested that the SOE Snam should be split into two separate companies, one to manage the transport infrastructure and storage facilities, and the other to manage imports and primary distribution. In an opinion issued in 1999, the Authority added that public utility obligations on natural gas companies with regard to the safety, including security of supply, regularity, quality and price of supplies, and environmental protection, should be clearly defined, transparent, non-discriminatory and verifiable. In 2000, a legislative decree implementing a European Directive liberalised natural gas imports and primary distribution and Snam's activities in this field were conferred upon a distinct company in Snam's group.

²³ For example, in 1997 the Authority issued an opinion on a draft legislative decree concerning the electricity market (*AS087 – Riforma del settore elettrico*), and put forward some suggestions designed to maximise the opportunities for increasing competition in the sector. For potentially competitive activities in the electricity industry, the Authority reaffirmed the need to replace public concession with administrative authorisations, thereby making the conditions of entry into the market less dependent on the discretion of governmental bodies.

²⁴ See ICA market study *IC48 - Mercati di accesso e reti di telecomunicazioni a banda larga e ultra larga*, November 2014.

the State vis-à-vis the private operators in terms of models for infrastructure deployment and geographic coverage.

3. Conclusions

50. In Italy, the enforcement of competition law is neutral as to ownership of companies. Competition law applies to conduct of both private and public economic entities.

51. The Italian Competition Authority has used all its powers and tools to deal with competitive neutrality problems registered in many sectors, in particular public utilities and local public services (e.g., transport, ports and waste). In the latter the presence of the State is still predominant while the public utilities sector (e.g., electricity, gas, telecoms) has been affected by processes of liberalization and privatization started in the 1990s.

52. The Authority has intervened several times to enforce competition law with respect of SOEs in many sectors of the Italian economy. The most common infringements related to competitive neutrality have concerned abuses of dominant position in the form of outright or constructive refusal to access to essential facilities or infrastructures (raising rival's costs), raising barriers to entry; using cross-subsidization to monopolize other markets. In the very few cases of pricing abuses, the difficulty of engaging in a full cost analysis due to lack of transparent and reliable accounting has led to a more cautious approach, which resulted, in some instances, in closing the investigation with commitment decisions.

53. The Authority has also intervened with its advocacy powers to complement its enforcement actions, whenever a decision by the government or legislator favoured a SOE over its competitor of the private sector, recommending changes in the legislation and regulation related to the economic activities performed by the SOEs. The recent new advocacy powers, allowing a more effective monitoring of legislation and a more timing intervention, has contributed to address competitive neutrality problems more effectively, especially at the level of local public services.

54. In sectors with natural monopoly assets, the ICA has advocated for a structural separation of the competitive segments from the natural monopoly parts. The Authority has advocated for the adoption by the SOEs of corporate governance best practices that mirror those of the private sector, especially in terms of transparency and accountability, and other governance principles, to harmonize the very fragmented and complicated framework governing SOEs, especially at local level.

55. Procurement has also attracted the attention of the ICA in the context of competitive neutrality since the new entrants can be held back by the advantages enjoyed by the publicly-owned incumbents: indeed, the latter usually benefit from information, contacts and access to data that provides them with a competitive advantage unrelated to their own capabilities.

56. The presence of a regulator that is independent from SOEs and the government, and endowed with effective powers, is important to overcome many of the competition neutrality problems: the recent establishment of an independent transport regulator will bring improvements in the regulatory framework, especially at local level, consistently with the Authority's recommendations.

57. Lastly, the Authority has welcomed the government initiatives to rationalize publicly-owned companies and has strengthened the cooperation with the Government in monitoring secondary legislation in order to remove ex ante anticompetitive restrictions which may hold back the full implementation of liberalization measures.