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**Procompetitive Industrial Policy – Note by Italy**

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## Italy

### 1. Introduction

1. Competition enforcement and advocacy efforts by the Autorità Garante della Concorrenza e del Mercato (hereafter the Authority) rely on key underlying principles aimed at ensuring dynamic competitive market functioning and ultimately promoting a "competition-based" industrial policy. This approach is crucial to tackling Italy's economic structural problems and undertaking a more resilient and sustainable long-term development path, while supporting the recovery of the economy after a long downturn.

2. Industrial policy is at the core of public debate in Italy, with the Government seeking to address a wide spectrum of pressing issues beyond the traditional industrial support, such as inclusion, sustainable development and resilience. The Authority is well aware that a more holistic interplay between competition and the contemporary forms of industrial policymaking is central to an adequate selection of policy instruments to cope with market, system and capability failures. This is particularly pertinent for EU economies, to ensure a balance between EU and national industrial plans<sup>1</sup> and the pursuit of the common objectives such as market opening, economic integration and industry competitiveness while avoiding undue distortions of the *level playing field* on which the single market is based. In the Authority's view, some limiting principles must be followed: in order to enhance the system's overall ability to evolve, measures should not result in supporting special interests at the expense of the competition process.<sup>2</sup>

3. According to the Authority's practice, competition and industrial policy can coexist effectively as complementary instruments whereby industrial policy is consistent with the conception and purpose of competition policy. The Authority's experience proves that public interest concerns may feed into competition policy practice, with no need to derogate from a sound application of competition rules. The Authority believes that growth and competitiveness are enhanced when markets operate based on the principle of effective competition. A well-designed competition law and its sound enforcement can complement the pursuit of non-economic public interests, contributing to reduce the overall social cost of industrial policies efforts to promote necessary structural adjustments in Italy.

4. This contribution is structured as follows. Section 2 illustrates the key principles and main tools guiding the Authority's decision-making practice in contributing to a more efficient and competition-based design and implementation of public policy, with a view

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<sup>1</sup> Among recent initiatives to stimulate EU's industrial capacity and economic resilience the Net-Zero Industry Act, stemming from the Green Deal Industrial Plan, which aims to scale up the manufacturing of clean technologies in the EU, by simplifying the regulatory framework and improving the investment environment for net-zero technologies. The Green Deal Industrial Plan has the ambitious target to promote transition to climate neutrality by 2050 and boost the competitiveness of EU industry, create quality jobs, and support the EU's efforts to become energy independent. The Chips Act proposes investments in next-generation technologies, providing access across Europe to design tools and pilot lines for the prototyping, testing and experimentation of cutting-edge chips.

<sup>2</sup> Some tensions between industrial and competition policy had already manifested themselves against different views on the role of "European champions" to face international competition, for example in connection with the Siemens/Alstom attempted merger in 2019 and more recently with regard to the proposed acquisition of ITA airways by Lufthansa.

to preserving competitive markets and fostering industrial competitiveness. Section 3 discusses how industrial policy goals are incorporated in the competitive assessments in Italy: in some limited circumstances, institutional mechanisms shape the application of competition law without in any case derogating from it. Section 4 concludes.

## 2. The role of the Competition Authority in the formulation and implementation of pro-competitive industrial policy

5. The Authority's efforts are aimed at preserving and restoring competition both before and after the implementation of industrial policy measures. This involves assisting policymakers in making comprehensive and well-informed decisions that harness the beneficial effects of competition. This is why the Authority uses its advocacy powers to highlight that compression of competition rules is not the most effective tool to pursue industrial policy goals. This was the case, for instance, in the aftermath of the Covid-19 outbreak, when the government introduced several measures to tackle the health and economic crisis, some of which unduly restricting competition.<sup>3</sup>

6. To solve potential conflicting cases, the Authority has traditionally relied on the principle of proportionality in the adoption of public measures by the legislator as a means of balancing the protection of a variety of legitimate social and economic interests, by entailing the least sacrifice for competition.<sup>4</sup> According to the Authority, sectors productivity and the dynamics of entry and exit are crucially influenced by the regulatory environment: heavy or poorly designed regulations harm the deployment of a *fair level playing field* and reduce investments, and regulatory frictions, especially in upstream sectors, are likely to negatively affect industry performance<sup>5</sup>. These principles form the foundation of the Authority's actions. To support a transition from competition-neutral interventions towards efficiency-enhancing industrial policies, it is in the Authority's opinion that policymakers should to address well-identified market imperfections, encourage investments, and achieve public interests through regulatory reforms and

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<sup>3</sup> See AS1730 (2021). Namely, the Authority intervened during the parliamentary debate for the conversion into law of the "Cure Italy Decree", which was the first intervention of the government to provide economic support to families and businesses, by inviting the Parliament to re-assess the proportionality of all measures under examination which, despite the laudable aim of safeguarding public health and protecting the weakest sectors of the economy in the immediate future, could have jeopardised recovery and growth in the long run. The proportionality test was invoked by the Authority also with respect to certain measures expected to restrict, if not suspend, competition in entire productive sectors. For more information, see the Covid-19 related webpage of the Ministry of Finance and Economy, at the following link: <https://www.mef.gov.it/en/covid-19/misure-coronavirus.html#info> and also press release April 2020, available at: <https://en.agcm.it/en/media/press-releases/2020/4/ICAsuggestions-from-the-Authority-about-some-proposed-amendments-to-the-Cura-Italia-Decree>.

<sup>4</sup> As a matter of fact, the principle of proportionality, that the EU Court of Justice has incorporated in art. 5(4) of the TFUE from several EU members constitutional traditions, requires the administration to take a measure not exceeding what is appropriate and necessary to achieve the intended purpose. In this sense, the proportionality principle is a symptomatic element of the correctness of the exercise of discretionary power in relation to the actual balancing of interests. See sentence of the National Court, Council of State sez. IV, n.964/2013.

<sup>5</sup> According to the "Doing Business" ranking drawn up by the World Bank (26th out of 27 EU members + the UK), the unfavourable regulatory environment places Italy in 50th.

enhancements in regulatory design, which take into full consideration the beneficial impacts of dynamic competition.

7. To convey these messages the Authority has adopted the following tools:

- Annual Reports to the Italian Government and Parliament for the purposes of the adoption of the *Annual Law on Pro-competitive Reforms (Annual Law or ACL)*, pursuant to Art. 47 of Law 99/2009<sup>6</sup> (*ex-ante* advocacy);
- Advocacy opinions, issues according art. 21 and 22 of the Italian Competition Act (Law 287/90) aimed at addressing competition concerns on existing specific regulations for the purpose of their revision (*ex-post* advocacy).

8. In 2009, Law N.99/2009 mandated the Authority to prepare annual comprehensive documents outlining a set of priority actions. In the intention of the legislator, these proposals should provide guidance to the government in formulating an Annual Law or secondary legislative actions, enabling laws such or sectoral regulations, to eliminate regulatory barriers to market entry, promote competition development, and ensure consumer protection. In principle the submission of the ACL to Parliament for adoption should occur within 60 days from the presentation of the Authority's Annual Report.<sup>7</sup>

9. The Government complied with this normative indication for the first time issuing an ACL in 2017.<sup>8</sup> Despite an initially limited implementation, the Authority never desisted from urging pro-competitive reforms and regularly submitted a comprehensive opinion each year to advice the Government with proposals to address productivity and competitiveness gap of Italian industries.<sup>9</sup> The Authority broadened the *focus* of its opinion, going further than the mere submissions of intervention proposals to facilitate market access and increase competition in some existing markets. Insufficient market competition, in the main strategic sectors of the national economy, is a "cost" to both consumers and firms, and it is the primary cause of Italy's industrial underperformance, stifling economic development. This is why along with completing liberalizations and promoting administrative simplification, the Authority expressly called the Government to implement measures and reforms fostering dynamic competition, technological progress and innovation, capable of stimulating economic growth and employment.

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<sup>6</sup> See Law 99/2009 set "*Provisions for the development and internationalization of enterprises, as well as in the field of energy*" while pursuing also others objectives such as the protection of the interests of consumers and a greater social justice by increasing opportunities to access the market.

<sup>7</sup> See Authority's Reports N. AS988 (2012), N. AS1137 (2014), N. AS173 (2021), AS1824 (2022) and AS1893 (2023).

<sup>8</sup> See ACL Law N. 124/2017.

<sup>9</sup> See Annual Report N. AS988 (2012) – Proposal for competition-based reform for the purpose of the 2013 ACL for an effective implementation of the plans of Decree-Law No. 1/2012, containing Urgent Provisions for Competition, Infrastructure Development and Competitiveness (converted and amended by Decree-Law No. 69/2013). Annual Report N. AS1137 (2014) - Proposal for competition-based reform for the purpose of the 2014 ACL in which inter alia others the Authority discusses proposals to increase transparency and mobility in the banking sector; to promote investments for the implementation of the Digital Agenda, to reduce the restrictive regulatory frameworks to favour entry in retail fuel and pharma distribution, intervene on transport infrastructure (port, airport and motorways); as well as competitive liberalization in the energy sector. Finally, the Authority took the opportunity to tackle the reform of public tenders and the mechanism for awarding public service concessions. Proposals detailed in the Authority's 2014 Annual Report AS1137 (2014) were largely incorporated into the ACL Law 124/2017.

10. This approach was made even more explicit by the Italian Government which, in 2021 endorsed competition as a driver of recovery.<sup>10</sup> The 2021 post Covid-19 Italian National Recovery and Resilience Plan (NRRP) and EU-funded instruments<sup>11</sup>, intervened making the release of funds subject to certain conditions. This confirms the key role of competition to enhance efficiency, economic growth, and social cohesion. To this end, the implementation of the NRRP's multi-year economic reform agenda<sup>12</sup> includes the timely adoption of the Annual Law to review on an annual basis the state of the legislation and assess whether regulatory constraints that unjustifiably hinder competitiveness and innovation persist, to correct market failures and promote pro-competitive reforms tailored to the socio-economic context.<sup>13</sup> This is allowing the Authority to play a more systematic role in reviewing existing and proposed laws and regulation, in addition to its traditional advocacy powers.

11. Relying on this external leverage, the Authority delivered once again comprehensive Annual Reports for the successful adoption of the 2021 and 2022 ACLs<sup>14</sup>, as well as for the adoption of the 2024 ACL by 31 December 2024.<sup>15</sup> While addressing the most problematic and strategic sectors, crucial for competitiveness and productivity of the Italian industrial system, the main objective attained by the Authority through these Annual Report proposals was to raise the policymaker awareness about the medium-term effects that could impact recovery of the economic system: industrial policies targeting public support to selected firms or those aimed at structurally strengthening entire sectors of domestic industry may have very different implications in terms of their potential on competition. This proactive approach for the design of policy or regulation seeks to go beyond the traditional either/or debate, with a view to enhancing the synergy between industrial and competition policies so as to avoid the implementation of public restrictions distorting markets or hindering competition upfront. By making policy decisions more transparent, the Authority intends to help to formulate effective pro-competitive reforms and ultimately make industrial policy goals consistent with competition. In brief, the

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<sup>10</sup> See 2021 NRRP.

<sup>11</sup> The National Recovery and Resilience Plan (NRRP) is part of the Next Generation EU (NGEU) programme, namely the € 750 billion package – of which about half is in the form of grants – that the European Union negotiated in response to the pandemic crisis. The main component of the NGEU programme is the Recovery and Resilience Facility (RRF), which has a duration of six years – from 2021 to 2026 – and a total size of € 672.5 billion – of which € 312.5 billion is in the form of grants, and the remaining € 360 billion is in the form of low-interest loans.

<sup>12</sup> In the 2021 NRRP competition and simplification reforms are so-called “enabling” reforms, that is reforms capable of removing administrative and regulatory obstacles that could hamper the implementation of the NRRP interventions. Along with enabling reforms, the NRRP contains so-called 'horizontal' reforms, which bring about structural changes that improve the business climate with regard to others missions (such as public administration and justice) and 'sectoral' reforms, which innovate specific policy areas (e.g. the framework law on stability), and the 'accompanying' reforms, which, although not directly outlined in the NRRP, are nevertheless preparatory to its implementation.

<sup>13</sup> Industrial policies operate in a social context and affect it. Though the social impact of industrial policies must be incorporated in the decision-making process, any industrial policy should at the very least try to achieve its objectives, whatever they are, at the lowest possible cost in terms of efficiency and, in particular, competition distortions.

<sup>14</sup> See Authority's Annual Reports AS173 (2021), AS1824 (2022) with a focus on reform proposals for the electricity and integrated water service sectors, for the adoptions of ACL No. 118/2022 and ACL No. 214/2023.

<sup>15</sup> See Authority's Annual Report AS1893 (2023).

Authority's action can not only react to market dynamics but should also help shape them in a way that fosters economic resilience and growth.

12. The Annual Reports also constitute an opportunity to broaden the scope of opinions pursuant to Articles 21 and 22 of the Italian Competition Act, which – as said – represent the second main advocacy tool at the Authority's disposal to address competition concerns in specific circumstances. For example, the most frequently competitive restrictions tackled in 2021 and 2022 (69%) relate to tenders (either the design and requirements or the award of services without a competitive tender), as opposed to restrictions to access and exercise of economic activities. With respect to the strategic sectors encompassed by the 2021 and 2022 Annual Reports (broadband communication networks, motorways, ports, energy, water and waste collection), the Authority issued approximately 50 opinions (30% of the overall number of opinions) in the same two years.

13. In general terms, the Authority's regular monitoring of competition advocacy pursuant to Articles 21 and 22 of the Italian Competition Act showed that 69% of the opinions issued in 2021 and 2022 were successful, i.e. they led to changes intended to remove the relevant competition concerns. Compared to the previous two-year period, 2020-2021, the overall compliance rate is growing overall (it was 66%)<sup>16</sup>.

14. Relying on its advocacy powers, the Authority has provided the Government with guidance on designing efficiency-enhancing industrial policies and pro-competitive reforms. These recommendations target traditional supply-side instruments and include the following key policy strategies: i) public investments in projects: focusing on projects directly aimed at creating conditions conducive to economic activity development or accelerating investments in specific areas, such as large infrastructure projects; ii) the Italian Government support at the level of individual firms: they consist of financial incentives or subsidies designed to achieve public interest objectives. Boosting transparency in subsidy allocation and the selection of the least disruptive and most proportionate responses is crucial to preserve a *level playing field* and promote genuine competition. Ensuring that this kind of financial support is given without unfairly benefiting certain players over others limit the competitive distortions that these targeted incentives may introduce; iii) public direct investment or ownership: this involves government participation in business sectors, either through direct investment or ownership of enterprises. The Authority suggested careful management to avoid undue market distortions and maintain competitive neutrality. In some cases, the Authority highlighted the importance of facilitating a demand driven push for contributing to industrial transformation, digitalization and sustainable development.

## 2.1. Public investment in projects: implementation and management of strategic infrastructures

15. Over the period from 1999 to 2019, the relatively low level of investment, particularly in the public sector, is considered one of the factors that impeded the growth of the Italian economy. The NRRP's investment component aims to address this challenge, focusing its €194.4billion of grants and loans on 149 measures that should help to increase the country's growth potential in the long term<sup>17</sup>. Against this backdrop, to encourage and

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<sup>16</sup> See the English version of the December 2023 report.

<sup>17</sup> Sectoral reforms support investment under individual missions of the NRRP, with a view to improving the efficiency of the regulatory and procedural frameworks in their respective fields of intervention. The funds allocated especially for infrastructure projects represent approximately €108bn, which are very important given the significant drop in public investment in previous years.

speed up investments in strategic infrastructures, the Authority called for a rigorous application of competition rules, in infrastructures like broadband communication networks, motorways, ports, energy, water and waste collection.<sup>18</sup>

16. As a matter of fact, poor outcomes in infrastructure may result not only from suboptimal long-term investment plans but also from institutional deficiencies in a country's public investment management. Consequently, the Authority advocated for enhancing competition in public procurement by proposing a series of pro-competitive reforms<sup>19</sup>. These reforms aim to improve concession and licensing requirements, ensuring that poorly designed rules do not undermine the success of large-scale infrastructure reforms. Many of these intervention proposals were significantly incorporated into the ACLs for 2021 and 2022<sup>20</sup>. These laws introduced rules for liberalization and simplification to lessen the administrative burden associated with public authorizations and facilitate the implementation of construction plans in areas strategically important for the NRRP, such as digitalization, transport, energy, ports, and the water and waste management cycles.<sup>21</sup> Many of the Authority's suggestions, particularly those aimed at eliminating barriers to entry by reforming public tender processes and concession award mechanisms, had been highlighted in previous opinions, especially concerning the sectors of energy, ports, motorways, and local public services.<sup>22</sup>

17. In the box below, a few examples are described in greater details.

### Box 1. The Authority's interventions infrastructure for growth and competitiveness

**In the communication sector**, the Authority in its sector inquiry on broadband network<sup>23</sup> recognized digitalization as a crucial driver of productivity growth in modern economies, contributing to sustainable and inclusive growth. The Authority emphasized that, to meet the objectives of the European Digital Agenda, the development of next-generation networks (ultra-wideband) should be supported by strategic public investment plans and initiatives to enhance digital skills, particularly within Public Administrations, due to their significant multiplier effect on demand. More recently, in response to the stimulus package aimed at digital network development—a priority within the Next Generation EU economic framework—the Authority recommended the Italian Government, where feasible, to preserve infrastructure-based competition in broadband communication networks, especially in areas without market failures (the so-

<sup>18</sup> See AS1824 (2022)

<sup>19</sup> See Law n.214/2023, as well as Law n.118/2022 which depicts a series of measures to be taken with the approval of the annual laws for the market and competition for the years 2021 to 2024.

<sup>20</sup> See Law 117/2022 and Law 214/2023; cit.

<sup>21</sup> See Among others see contribution 2023 Competition in the Circular Economy – Note by Italy.

<sup>22</sup> See In 2023, Legislative Decree No. 36/2023, regarding the «Public Contracts Code in implementation of Article 1 of Law No. 78 of June 21, 2022, delegating to the government on public contracts» (“New Public Contracts Code”) replaces and repeals Legislative Decree No. 50/2016, that implemented the 2014 Public Contract Directive and 2014 Concession Contract Directive and the 2014 Utility Contract Directive

<sup>23</sup> See IC48 - Access Markets and Broadband and Ultra Broadband Telecommunications Networks.

called black areas).<sup>24</sup> In other areas (grey areas), to address the infrastructure gap, the Authority suggested careful consideration of various public investment allocation options: this includes transparent and non-discriminatory competitive procedures<sup>25</sup>, and possibly co-investment projects.<sup>26</sup>

**In the port and logistics sector**, the Authority recognized that enhancing the competitiveness of the national port system is essential for expanding hinterland and transshipment activities and strengthening the competitive position of national ports as strategic hubs within the global supply chain. This is seen as vital to capitalizing on the recent rapid growth in international trade<sup>27</sup>. To this end, the Authority proposed to address obstacles to investment and efficiency by reforming the entire port legislation, which dates back to 1994<sup>28</sup>. Specifically, the Authority considered it appropriate to tackle the issue of port concessions in state-owned areas to facilitate the entry of the most efficient operators. This involves reformulating current provisions to establish clear, transparent, and non-discriminatory criteria for the award, duration, and revocation of port authorisations for carrying out port investments and operations (i.e. concessions for the use of docks, lands on which the port stand and water)<sup>29</sup>. To facilitate significant infrastructural investments and achieve a competitive scale for services such as container terminals, the Authority, additionally, proposed limiting the prohibition on cumulating more concessions to smaller ports only. In these ports, it is more likely that market power could arise, or for types of activity limited to the individual port<sup>30</sup>. Finally, to address the interlink between competition and incentives to enhance port service operators' efficiency, the Authority suggested repealing the rule limiting the right to *self-handle* port operations and services. This change aims to increase the attractiveness,

<sup>24</sup> See AS1730 (2021) where the Authority went further asking to repeal paragraph 4-bis of Article 50-ter of the Electronic Communications Code, pursuant to Legislative Decree No. 259 of 1 August 2003.

<sup>25</sup> The Authority's proposal to run procedures for allocating public aid could put operators in competition by assessing the public resources required and the technical-economic conditions for offering services at the same time, favouring (i) solutions that grant multiple co-investors long-term structural rights, such as indefeasible rights of use (IRUs) over complete passive primary and secondary networks, as opposed to a model based on mere wholesale access over individual lines; and/or (ii) the provision of wholesale-only services, allowing several operators to hold complete fibre-off-the-shelf networks for primary and secondary tracts, enabling them to operate independently.

<sup>26</sup> See AS1730 (2021). Co-investment had indeed been endorsed in the European Electronic Communication Code as a relevant option for conciliating investment and competition.

<sup>27</sup> See AS1893 (2023).

<sup>28</sup> The main regulatory framework for Italian port is Law No. 84/1994, which radically changed the port organizational system. Pursuant to this law, port operations could be awarded to private companies entitled to operate under a concession. The main actors are Port Authorities and Port facilities, with administrative and planning duties, and Terminal operating companies, with operational powers to manage terminal and handle cargoes. Legislative Decree N. 169/2016 was issued to make Italian framework compatible with EU regulation.

<sup>29</sup> The Authority invoked a reformulation of Art. 18 of Law No. 84/1994 that deals with the allocation of maritime state property concessions (see also Navigation Code and implementing regulation Presidential Decree No. 328/1952). The Authority advised that public tenders should also foresee concessions revocation rules, where the awarded companies do not fulfil the conditions defined in the service contracts.

<sup>30</sup> The Authority called for a reform of § 7 of Article 18 of the 84/1994.

including internationally, of the port sector in Italy, thereby strengthening competitive and market dynamics in the exercise of port activities.<sup>31</sup>

**In the energy sector**, the Authority dedicated its advocacy efforts to removing obstacles, primarily related to the authorization procedures necessary for completing the Ten-Year Electricity Grid Development Plan<sup>32</sup>. This multi-year public investment project aims to upgrade electricity grid infrastructure to eliminate bottlenecks that contribute to market segmentation and potential market power in upstream generation. Additionally, it seeks to create conditions conducive to the development of renewable energy sources, thus promoting substitution on the supply side<sup>33</sup>. Additionally, to complement the major future challenge for electricity grids due to growing addition of intermittent—often distributed—renewable energy sources, the Authority set proposals for strengthening incentives to deploy smart grids (i.e. new smart metering infrastructure). New smart meter infrastructure (second-generation smart meters) is expected to facilitate the formulation of dynamic price offers (differentiated by time ranges) and virtuous demand behaviour leading to more rational consumption over time (so-called demand response)<sup>34</sup>. Furthermore, the Authority put forward a policy proposal to manage the completion of the Utilities' liberalization in national retail electricity markets, which is set to benefit end-users, including residential customers and small firms. The regulated regime for these consumers will be phased out by July 2024. To ensure that the so-called "*vulnerable customers*" category also benefits from retail competition, the Authority advocated for enhanced information transparency to foster active engagement on the demand side. Finally, to closely monitor the market structure, the Authority proposed competitive methods to identify suppliers for *vulnerable customers*. It suggested that, in public tenders for the protection service, the winner of each lot should also serve as a supplier for those vulnerable customers. This approach is intended to ensure that vulnerable customers receive reliable service while also benefiting from the competitive dynamics for the market<sup>35</sup>.

18. To address structural weaknesses in infrastructure, the Authority scrutinized their governance and management. Indeed, the efficiency of infrastructure is a crucial factor in ensuring the benefits of public investments. In the water sector, the Authority drew the Government's attention to the risks posed by incomplete governance structures. These risks

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<sup>31</sup> The Authority reiterated the anti-competitive scope of the rule introduced by Article 199-bis of Law Decree no. 34/2020, as converted by law no. 77/2020 (Article 16, 4bis and ter, of Law no. 84/1994) that severely limited the right to self-handling of port operations and services, making those activities a mere residual option.

<sup>32</sup> See AS1824 (2022).

<sup>33</sup> According to Law n. 300/2017, new entities qualified for the supply of so-called balancing services should be identified as also for their participation in the so-called balancing market (MSD).

<sup>34</sup> This end-to-end communication is a prerequisite for the improved balancing coordination of electricity generation, transmission, distribution, and consumption, as well as for the emergence of new business models in distribution networks. New infrastructure deployment can represent an opportunity to make downstream markets more competitive.

<sup>35</sup> The Authority also expressed its opinion on the Draft Ministerial Decree on the regulation of criteria and modalities for the conscious entry of domestic customers into the free electricity market (advocacy opinions S4647, 2023). The 8th Environment, Ecological Transition, Energy, Public Works, Communications and Technological Innovation Commission of the Italian Senate held a series of hearings to examine the provision, requiring (in its May 2023 conclusions) that take into account the Authority's position should be taken into account.

could hinder integrated water service operators from accessing funds from the NRRP, which are essential for the necessary investments in water and sewer networks to bridge persistent infrastructure gaps across the territory.<sup>36</sup> To achieve the NRRP's goals for environmental and territorial cohesion, the Authority emphasized the importance of accelerating the process to assign all integrated water services activities to a single operator through transparent allocation procedures.<sup>37</sup>

19. In the same vein, the Authority advocated increased competition in motorways concessions award mechanisms. The Authority welcomed the temporary transfer of the management of motorways to the Ministry of Infrastructure and Transport, pending competitive procedures completion aimed at correcting the current system of awards<sup>38</sup>. This decision avoids producing the effects of a *de facto* extension of the awards to the current concessionaires, thwarting competition for the market.<sup>39</sup> However, in the context of the management of services that are also available on the market, the Authority took the opportunity to reiterate its warning against the abuse of the self-procurement regime (i.e., in-house procurement)<sup>40</sup> that characterizes Italy's preference for awarding public

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<sup>36</sup> The water sector is one of the areas in which the NRRP's set reforms. Under Mission 2 Green Revolution and Ecological Transition the NRRP's missions specifically refers to "Measures to ensure full management capacity of integrated water services", including strengthening the industrial development of the sector, especially in the South.

<sup>37</sup> See AS1824 (2022). In several southern Italian regions, smaller entities are still managing activities that should, instead, be consolidated under the so-called Integrated Water Service (IWS), often through direct contracting and, in some cases, without adhering to the legal requirement of "similar control" that applies to self-procurement. The IWS is a means to handle the complex management of a structured system, including water and sewer networks, wastewater treatment plants, and purification plants, ensuring quality water is delivered to final users and safely returned to the environment within a well-defined Territorial Division (ATO).

<sup>38</sup> See Legislative Decree No. 36/2023 which sets out the new Public Contracts Code, implementing the delegation of power conferred on the Italian Government by Law No. 78/2022. This new provision stems from the Constitutional Court judgement no. 218/2021, ruling the constitutional unlawfulness of Article 177(1) of Legislative Decree No. 50 of 2016 "to favour the opening up to competition, through the restitution to the market of segments of activities taken away from it, inasmuch as they were the subject of concessions entrusted to the concessionary companies without a tender". On concessions and motorways, the Authority expressed specific opinions in previous occasions, see AS1684 (2020) AS135 (1998) and AS1137 for the 2014 ACL.

<sup>39</sup> See AS1893 (2023). The Authority repeatedly highlighted that it is in the interest of the market to strike a careful balance between the short-term benefits of granting extensions in favour of the previous concessionaires and the possible costs that might arise over a longer time horizon by postponing the competitive confrontation for the market. The Authority further advised that such extensions should not exceed the real needs of the administrations, in order to allow the efficient allocation of public resources through competitive procedures.

<sup>40</sup> In the case of motorways, it is explicitly recognized that the Ministry of Infrastructure and Transport may award concessions to in-house companies of other public administrations, including ad hoc vehicles for the purpose of the operation of public services. To this end, the Ministry can exert the requirement of "similar control" over the in-house company directly or through a committee governed by a special agreement pursuant to Article 15, Law No. 241/1990, to the exercise of the relevant powers over the in house companies. The EU recognizes, that, under certain conditions, a community's right to collective self-provision of local public services. Those general principles of self-provision were transposed into the new Public Procurement and Concession Contracts Code National (Art. 7). The right to self-provision is a basic principle of antitrust law, also implemented in Italy in Article 9 of Law 287/90.

services.<sup>41</sup> The Authority asked the contracting authority to thoroughly justify self-procurement as opposed to competitive outsourcing, balancing the benefits to the community and the externalities generated by the *in house* model, with the economic fairness of the offer from those *in-house* company and the social cost it entails.<sup>42</sup>

20. The Authority also intervened with respect to the postal sector. Due to their intrinsic characteristics, mail and logistics services encompass a plurality of services (collection, sorting, transport and distribution) which make it necessary for competing postal companies to operate by means of “networks” potentially managed by several operators, across the national territory. Allowing for a larger number of operators to participate effectively in tendering procedures may achieve the objectives of an effective liberalisation of the postal market.<sup>43</sup> This is why the Authority recommended not to unduly extent by law the actual Universal Postal Service contracts, but rather to opt for public competitive tenders for entrusting the universal service operator obligations.

21. Finally, in its advocacy efforts, the Authority has gone so far as to point out the two main nodes to be dismantled in Italy to relaunch public investment projects<sup>44</sup>: the quality of public administrations and the modernisation of its institutions. Efforts in this direction, combined with simplifying processes (in awarding and authorisation procedures), have the potential to enhance the operational capacity of public administrations and general contractors to tackle the current shortcomings in managing technically complex projects. Ultimately, these initiatives are intended to expedite the completion of public works.<sup>45</sup>

## 2.2. Italian Government support at the level of individual firms

22. At the micro-level, the Authority scrutinised policies involving subsidies provided to former monopoly public utilities. The allocation of any form of public financial support in the form of subsidies, or more generally including measures such as direct grants, tax breaks, subsidised loans, or repayable advances, may be a source of competition concerns. Depending on their design and target, this type of public fund allocation can distort competition and create productive and allocative inefficiency insofar as it interferes with

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<sup>41</sup> See AS1730 (2021) and AS1736 (2021) ANAC Schema di linee guida sugli oneri motivazionali nei casi di affidamento in house”. The Italian Court of Auditors, in its annual Report, highlighted the prevalence of in-house providers. In the health sector, for example, only 878 out of a total of 14,626 assignments were awarded to third parties’ companies and the entrustments to mixed company, with two objects tenders, equal to 178 (2019 data).

<sup>42</sup> See. cit.

<sup>43</sup> In light of the amendment to Decree-Law no. 59/2021 which extend until 31 December 2026 the actual concessions, further delaying for additional three years competition for the market (the previous deadline was due by 31 December 2023). See also AS1627 - Draft Program Contract Ministry - Poste Italiane for the five-year period 2020-2024 and AS1550 - Concessions and competitive criticality. And AS1137 (2014) Proposal for ACL 2014.

<sup>44</sup> See Report AS1730 (2021) and AS1893 (2023) and Authority’s Annual Relations of its activities. It suffices to recall that in Italy the average construction time for public works costing more than 50 million euros is about 14 years. The risk been that the significant resources envisaged in the RRNP will not be able to be promptly translated into public works, and thus into investments and infrastructure.

<sup>45</sup> The Authority highlighted those measures aimed at simplifying the administrative procedures for the exercise of the free private enterprise and removing unjustified barriers to entry in order to make the administrative requirements to be more effective and efficient, while respecting the principle of proportionality.

market signals. Nonetheless, some subsidies fulfil an important role in correcting market failures and improving social welfare: state aid regulation and reciprocity rules may be better instruments to deal with EU competitiveness and unfair unbalances, than policies attempting to *pick winners* in a suboptimal manner.<sup>46</sup>

23. Following this reasoning, many early actions by the Authority were directed at subsidies provided to public utilities and their attempts to prevent entry or extend market power into liberalised markets. To correct those rent-seeking behaviours, the Authority urged for the application of the competitive neutrality principle in order not to impair the *level playing field* and promote competition on fair grounds. In rail transportation, the Authority took the view that unclear and mis-defined public service obligations (PSO) and incompleteness in public service contracts (PSC) may result in distortions of competition *in and for* the market<sup>47</sup>. According to the Authority, poorly designed subsidy schemes may distort incentives for greater efficiency and for an adequate level of investment, leaving room for conducts aimed at preserving dominance in non-regulated market segments, especially when the size of the subsidies is significant.<sup>48</sup>

24. The Authority observed that better PSO and PSC design may also allow to minimize unnecessary subsidies and offer compensation schemes that promote a wider participation in tenders for non-contestable service segments. This could prevent the allocation of aid to providers whose more aggressive bids reflect expectations to reinforce their market power. For instance, in the postal sector, it may be argued that the Universal Service concessionaire still receives subsidies according to a PSC, even for services included in the PSO that the market has demonstrated can be delivered competitively (such as non-retail and bulk mail services).<sup>49</sup> This is why the Authority suggested progressively reviewing the scope of the Universal Service concession. The exclusivity regime should be limited to addressing well-identified market failures according to changes in demand and the impact of digital transformation, on mails and parcels volumes. Some services provided to business customers, such as bulk mailings or parcel services, no longer reflect market failures. Furthermore, the Authority intervened to enhance transparency and accountability of the Universal Services financing system. Under the current framework, VAT exemption still applies to all postal services delivered under the PSC. This system creates an artificial price-discrimination, unduly conferring an economic advantage to the Universal Service operator over competing companies when delivering profitable services in competition. Therefore, the Authority strongly recommended correcting the compensation schemes and explicitly called for the abrogation of the VAT exemption.<sup>50</sup>

25. Likewise, the Authority recognized the importance of reorienting public incentives in sectors such as publishing, cinema and audio-visual media towards initiatives that offer

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<sup>46</sup> For instance, the Authority expressed its concerns about the scale of direct and indirect industrial subsidies, as unfair tax competition between Member States may constitute a serious distortion of the level playing field within the single market. Similarly, it recognized that the purpose of EU Foreign Subsidies Regulation is to correct an unchecked imbalance concerning subsidies granted by non-EU countries to companies doing business in Europe.

<sup>47</sup> See AS901 (2012) – Proposals for the Annual Competition Law.

<sup>48</sup> According to the AGM to overcome a potential prejudicial impact on public service requirements with liberalisation, other market players could be required to contribute to the provision of public services, under pre-determined compensation schemes.

<sup>49</sup> See AS1627 (2019) Advocacy on Plan for contract 2020-2024 between the Ministry of development, economic and the national Postal Service concessionaire

<sup>50</sup> See AS1893 (2023). See also AS1627, AS1137 (2014) and AS901 (2012).

higher social and cultural value, particularly in cases where the market funding alone would not suffice.<sup>51</sup> This reorientation is aimed at promoting diversity in both the production and distribution of content. However, the Authority also underlined the importance of balancing cultural promotion with economic accountability. To this end, it recommended introducing economic criteria to allow for an ex-post assessment of the use of funds allocated to these activities. This approach can enhance transparency regarding government financial contributions, ensuring that these funds are used effectively and make meaningful contributions to cultural and social objectives.

26. Finally, the Authority acknowledges that demand side innovation policies can be inspired by sectoral policy goals. Demand-pull policies can create the necessary demand to support scaling up infrastructure, such as the expansion of ultra-broadband networks. The Authority highlighted that demand-side strategies could play a crucial role in enhancing the effectiveness of digitalization plans. By boosting overall connectivity and facilitating a more rapid and broad-based digital transformation, these strategies align with the EU Digital Agenda and the NRRP. Those types of policies may involve speeding up the digitalization of public administration services or providing economic incentives to private end-users directly to encourage the activation of ultra-broadband connections.<sup>52</sup>

### 2.3. Direct public investments (shareholdings)

27. The Authority has not opposed public participation in the economy. It recognizes that public ownership can sometimes be more effective than private ownership, especially in sectors where market-driven short-term financial goals may not adequately address long-term investment needs or in areas characterized by high innovation and significant positive externalities. Public ownership may be particularly appropriate in cases where investments are substantial and benefits span over extended periods.

28. In the light of the above, the Authority did not question the Italian Government's decision to maintain centralised ownership and management of the electricity network under public control. Strategic public control over critical infrastructure – such as the electricity network – ensures that the operation of the network is driven by the public interest, leading to improved access conditions for users. This governance structure may allow for the management and expansion of the network to meet broader social and economic objectives. In particular, policies aimed at ensuring an efficient, reliable and sustainable network development with high service standards, in line with technological advancements and demand evolution can be more easily implemented.<sup>53</sup>

29. On the other hand, State ownership can become problematic when public intervention is aimed at maintaining control over ailing "*national champions*", thus raising barriers to exit for inefficient firms. This is the case of legislation temporarily suspending merger control for public companies in financial crisis.<sup>54</sup> In such difficult circumstances, the Authority maintained that the competition principles should not be relaxed, irrespective of ownership.

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<sup>51</sup> See 2023 Annual Report on the state of competition in the sector of distribution pursuant to Art. 31, § 4, of Law n.220/2016.

<sup>52</sup> See also Big Data Survey.

<sup>53</sup> See AS278 - Reunification of ownership and management of the national electricity grid.

<sup>54</sup> See Law Decree 134/2008 converted and emended by Law 166/2008 (Urgent provisions on restructuring large firms in crisis), introducing derogations to merger scrutiny.

30. In 2008, in order to prevent Alitalia's bankruptcy, a new Italian airline company (CAI) was created by merging Alitalia's main operating assets with those of its competitor AirOne. This led to an overlap between the parties' activities on some domestic short-haul routes. In order to address these competitions concerns, the Authority adopted a decision imposing a series of price control and consumer protection remedies for a period of three years to "*prevent the risk of prices or other contractual conditions that would be unduly burdensome for consumers*"<sup>55</sup>. Following the expiry of the behavioural commitments, in 2011, the Authority opened a monitoring exercise to review the impact of the merger. The investigation was closed in 2012 with an order to release a number of slots.

31. In 2020, the legislator adopted a special regulation temporarily limiting the Authority's merger control function to the imposition of behavioural remedies. This regulation applied to mergers involving companies in financial distress that provide labour-intensive services or of general economic interest<sup>56</sup>. Under this framework, the Authority reviewed a merger in the postal sector involving Poste Italiane's acquisition of its competitor Nexive Group. To address competition concerns, the acquisition was made conditional on Poste Italiane's compliance with a set of behavioural measures specifically designed to mitigate the risk of deterioration in existing conditions for users, while ensuring the overall viability of the transaction.<sup>57</sup>

32. Similarly, an equivalent provision provided in the so-called Relaunch Decree (2020) initially exempted from antitrust scrutiny mergers carried out within the context of public support to banks in compulsory administrative liquidation. The Authority

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<sup>55</sup> Law Decree 134/2008 aimed at dealing with the restructuring of firms in crisis, while introducing a temporarily derogation to merger control, preserved the Authority's option to impose behavioural remedies if the merger concerned i) labour intensive companies; ii) which provide public services and iii) have been losing money in the last three years. Provisions laid down by Law Decree No. 134/2008 de facto barred the Authority to prohibiting the transaction and imposing structural remedies such as the divestiture of airport slots. This provision had been deemed constitutionally compliant by Constitutional Court ruling No. 270/2010, which confirmed the possibility for the Legislature to order the authorization of mergers "with a view to balancing with other constitutionally relevant interests, other than those inherent to the competitive structure of the market" (in this case, the need to avoid the dissolution of a strategic enterprise and ensure the continuity of air transport)".

<sup>56</sup> The so-called "August Decree" (2020), converted into Law No. 126/2020, including measures to support, inter alia, employment and the economy, authorised, by way of derogation from the provisions of the Italian Competition Act (Law No. 287/90), merger transactions notified to the Authority by 31 December 2020 that meet certain specific requirements: in particular, the provision applied to merger transactions that did not have a Community dimension; that involved companies operating in markets characterised by the presence of labour-intensive services (as defined by Article 50 of Legislative Decree No. 50 of 18 April 2016, no. 50) or of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union, which had recorded balance sheet losses in the last three financial years and which, also due to the effects resulting from the health emergency, could cease their activity.

<sup>57</sup> The Authority imposed inter alia to Poste Italiane (i) a commitment to maintain the service levels applied to existing customers for 24 months, as well as (ii) obligations aimed at guaranteeing the access of Poste competitors to the latter's infrastructure network. Those remedies, were considered suitable, in the light of the circumstances, to remedies to the competition concerns, in a number of areas, such as the business user mail sector, due to the fact that the target company was the only other company with an end-to-end network in the country.

successfully called for a drastic review of this exemption, with a view to ensuring that competition principles are upheld even in challenging financial contexts.<sup>58</sup>

33. State involvement in the economy can sometimes lead to conflicts of interest within public entities when performing regulatory and operational functions, like in local public transportation. When contracting authorities choose to fulfil public interest tasks through self-production rather than *outsourcing* via public procurement, the Authority advocates for a rigorous improvement in governance. This includes clearly separating regulatory and control functions from service management, to ensure transparency and prevent conflicts of interest.<sup>59</sup>

34. Another facet of industrial policy, which the Authority has not yet been fully confronted with, is the special powers exercisable by the Italian Government (*Golden power*) to safeguard the ownership structure of companies operating in sectors deemed strategic for the national interest- The purpose of this legislation is to ensure mechanisms to screen foreign direct investments in the national territory on grounds of security or public order. These special powers cover the areas of defence and national security, as well as other key strategic sectors such as energy, transport, communication, technology-intensive sectors, broadband telecommunications networks based on fifth generation (5G) technology, health, agri-food and financial sectors (including credit and insurance).<sup>60</sup>

35. The Golden power regime applies to transactions that may be subject to merger control by the Authority. Since the entry into force of the Golden power regime in Italy, the Authority has reviewed eight relevant mergers in the following sectors: communications (3), defence and national security (2), energy, health and financial services (1 each). None of the cases raised competition concerns nor required trade-off assessment.

### 3. How industrial policy considerations are incorporated into the Authority substantive assessments

#### 3.1. Institutional mechanisms for considering trade-offs

36. The issue of balancing public interest considerations into competition enforcement assessment may concern the protection of legitimate interests or other public interests.<sup>61</sup> The national legislator explicitly foresees that the public interest should be taken into

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<sup>58</sup> See opinion n. AS1684 published in the Authority Bulletin n. 28/2020, available at: [https://www.agcm.it/S3940\\_segna1azione%20ex%20art.%202021.pdf](https://www.agcm.it/S3940_segna1azione%20ex%20art.%202021.pdf)

<sup>59</sup> See Among others AS1730 (2021).

<sup>60</sup> See Law n. 10/2023 converting Decree-Law No. 187/2022 on recent "Urgent measures to protect the national interest in strategic production sectors" and the implementing decrees (Assets Decrees). The regime was expanded in light of EU Regulation 2019/452 to include critical infrastructures, critical technologies and dual-use products, security of supply of critical production factors; access to sensitive information; freedom and pluralism of the media.

<sup>61</sup> Though Article 21(4) of the Merger Regulation (EC) No 139/2004 refers to the "protection of legitimate interests", such as public security, media plurality and prudential rules, in the EU framework Competition Authorities are not legitimate to incorporate considerations other than the protection of market integrity into the application of competition law. In others jurisdictions, like in South Africa, 'merger-specific' employment-conditions to approval of mergers are a key public interest consideration set out in the Competition Act, No. 89 of 1998 (as amended), with the aim at the safeguard of employment of 'unskilled' or 'semi-skilled' employees.

account in merger control (Art. 25 and Art. 20, para 5-bis of the Competition Act 287/90) and with respect to services of general economic interest (Art. 8).

37. Pursuant to Art. 25 of the Competition Act, the Authority may be asked to exceptionally authorise transactions that would otherwise be problematic from a strict competition point of view, provided that they meet certain criteria to be defined *ex-ante* and that competition is not completely eliminated or unduly restricted. The use of this provision has been limited. Instead of relying on Art 25, whose underlying general criteria have not yet been defined<sup>62</sup>, the Italian Government has preferred to introduce *ad hoc* legislative instruments to deal with the "*failing firm defence*" of national champions in compulsory administrative liquidation, when they operate in public services deemed "essential" for the maintenance of key social functions or economic activities.<sup>63</sup> In these circumstances, as illustrated in the examples given above, the Authority has been able to avoid a total competition ban, by granting merger clearance under specific conditions.<sup>64</sup>

38. The public interest clause established in Art. 25 is theoretically applicable to all sectors. However, it is not useful for the appraisal of mergers intended to rescue banks, as special rules apply to bank insolvency. Banking mergers are subject in Italy to a concurrent review by both the Authority and the banking regulator (Bank of Italy or BdI).<sup>65</sup> In trade-offs cases, the BdI may invoke clearance on financial stability grounds, even if the transaction may create or strengthen a dominant position, when one or more of the merging banks or banking groups are deemed essential for preserving financial stability (Art. 20 of the Competition Act).<sup>66</sup> To maintain a proper balance between competition and systemic effects on financial stability, competition derogations can only be approved if the restrictions are strictly necessary to achieve the specified purpose (Art. 20, 5bis). In practice, a *failing firm defence* of distressed or defaulting banks on financial stability grounds has never been invoked.<sup>67</sup> In the few conflicting cases, the merger assessment led to an effective coordination mechanism with the banking regulator to settle the transactions

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<sup>62</sup> The application of Art. 25 lay, indeed, on a number of stringent conditions. First, the Italian Government has to set in advance the general criteria the Authority has to apply for the assessment of mergers; second the adverse effects on competition the transaction may cause have to be strictly necessary to pursue major general interests of the national economy; third, these effects do not have to be of such magnitude to result in monopoly or oligopoly.

<sup>63</sup> Among others see Directive (EU) 2022/2557.

<sup>64</sup> The Alitalia/AirOne review according to the framework of the Decree-Law No. 134/ 2008, amended by Law No. 166/2008 (Urgent provisions on the restructuring of large companies in crisis). And PostItaliane / Nexive Group transaction assessed on the grounds of the August Decree" (2020), converted into Law No. 126/2020.

<sup>65</sup> See Law 262/2005, as amended by the Law 303/2006. Under the current framework the Authority evaluates the competitive effects of mergers, assessing whether the merger significantly impedes effective competition; meanwhile, the BdI examines the impact of mergers to ensure they do not put at risk the sound and prudent management of the banks involved.

<sup>66</sup> See European Central Bank, Opinion of 23 December 2005, (CON/2005/58). In cases in which the BI invoke Art. 20(5), the Authority can neither oppose to the determinations of the banking regulator nor unilaterally impose remedies for the competition problems of the merger, thus in weighting competition and stability considerations, those latter may prevail whether a dominant merger is necessary to avert financial instability.

<sup>67</sup> This position is consistent with the thinking of the European Commission, which opposes to relax competition law enforcement at harsh economic times.

with appropriate remedies.<sup>68</sup> Derogations from competition rules in the banking sector are not limited to mergers. The same provision specifically empowers the Bdi to seek clearance from the Authority for anticompetitive agreements related to the functionality of the payment system. Such clearances are limited in time and must be capable of introducing innovation.<sup>69</sup>

39. With regards to services of general economic interest, Article 8 of the Italian Competition Act foresees the non-application of *antitrust* rules to operators active in those markets<sup>70</sup>. Nevertheless, the Authority has interpreted this provision narrowly, especially when the public service operator make advantage of it to unduly obstacle liberalisation processes, such as in the rail transport and energy sectors.<sup>71</sup>

40. Another institutional mechanism is envisaged for *antitrust* enforcement decisions in some regulated sectors. Pursuant to the Electronic Communications Code, the Authority and the sectoral regulator (AGCOM) have distinct and parallel power attributions in the electronic communications sector. The Authority retains general competence over *antitrust* enforcement in telecom, broadcasting and publishing sectors, while the AGCOM has regulatory sector-specific responsibilities<sup>72</sup>. AGCOM provides mandatory but non-binding opinions regarding *antitrust* proceedings affecting companies operating in the electronic communications sector. The Authority may depart from those opinions provided it gives adequate reasons for doing so. Conversely, for the purpose of the *ex-ante* regulation according to the so-called Framework EU Directive, the AGCOM carries out the analysis of relevant markets after consultation with the Authority<sup>73</sup>. Their relations are informed by a principle of loyal cooperation. In 2020 a Big Data Sector Inquiry, was jointly conducted

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<sup>68</sup> See for example C12287 (2020) Intesa Sanpaolo/Ubi Banca-Unione di banche italiane; also C2988 (2018) Banco di Sicilia Sicilcassa Medio Credito Centrale.

<sup>69</sup> See Art. 20(5bis) of the Competition Act, introduces an exception to the prohibition of illicit agreements under the national Art.2 of the same 287/90 Competition Act according to Art. 4. The national legislature further intervened with the Decree Law 1/2012, which amended Article 12, para. 9, Decree Law 201/2011, stipulating that companies, business associations (primarily the Italian Banking Association - A.B.I. ) and consortia involved in the payment services system "shall define, by June 1, 2012, and apply within the following three months, the general rules to ensure a reduction in fees charged to merchants in relation to transactions made through payment cards, taking into account the need to ensure transparency and clarity of costs, as well as to promote economic efficiency in compliance with competition rules."

<sup>70</sup> Specifically, according to Article 8(2) of law 287/90, the competition law, states that the antitrust provisions, "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 in so far as this is indispensable to perform the specific tasks assigned to them".

<sup>71</sup> For instance, the incumbent Ferrorie dello Stato (FS) has been investigated several times for having extend its dominant position into adjacent but competitive markets (e.g., combined container transport), or had discriminated in favour of companies that it controlled.

<sup>72</sup> See 2003 Electronic Communications Code. On the interplay with the sector regulator AGCOM, the Council of State made it clear that the competence in the field of the protection of competition law always lies with Authority, even when the relevant initiatives affect the telecommunication sector see Council of State Decision No. 1271/2006 and Council of State plenary advice N.11/2012.

<sup>73</sup> See the Regulatory Framework for Electronic Communications (RFEC) is identified in Recital 5 of Directive 2002/21/EC (the Framework Directive) as consisting of the Framework Directive itself and the four Specific Directives. The 2014 Commission recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation, by reducing the number of markets identified in the recommendation, the Commission has narrowed the scope of regulatory intervention in the e-communications sector.

by Authority, AGCOM and the Data Protection Authority, aiming at exploiting possible synergies among the three Authorities with respect to big data market issues, and identifying the most suitable tools for future enforcement.<sup>74</sup>

41. The Authority signed Memoranda of understanding both with the Energy and the Transport regulators.

### 3.2. Authority enforcement and advocacy priorities

42. Outside these institutional mechanisms, the Authority's enforcement and advocacy interventions have not ignored possible instances of economic and industrial policy. These considerations stem from the economic framework, the evolution of the relevant markets, and the development of new economic phenomena and commercial practices.

43. In line with one of the strategic pillars of the NRRP, "*competition and social values*", the Authority highlighted the need for public policies to accompany liberalisation or structural reforms for declining sectors in order to absorb their costs, including social costs (e.g. active labour policies, economic activities in crisis act, social shock absorbers).<sup>75</sup>

44. To address the calls to intervene to mitigate inflationary tensions during "*exceptional time*", which were beyond anticompetitive individual cases, the Authority conducted a survey on motor fuels prices (2023).<sup>76</sup>

45. The Authority indirectly supported industrial and economic policies aimed at achieving objectives of public interest, such as the green economy, the environmental protection and sustainability, local public services and consumer protection<sup>77</sup>, through a selection of cases or areas of intervention that has taken into account the longer-term effects and the dynamic component of the competitive process.

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<sup>74</sup> See <https://en.agcm.it/en/media/press-releases/2020/3/Big-Data-Agcom-Agcm-and-Data-Protection-Authority-survey-published>

<sup>75</sup> According to the Authority, the implementation of social welfare measures to counteract the negative effects of a crisis would ensure that the exit of inefficient firms is socially accepted and the allocation of resources is oriented towards long-term objectives rather than the short-term view of the markets. To this end, the Authority suggested to enhance the possibility of access to the various state measures in support of house-holds and micro-enterprises (such as the suspension of loan and loan instalments and access to the fund of solidarity first home loans and/or new financing to micro enterprises), took actions against the main banks and financial companies in order for them to remove information obstacle for accessing those financial measures set in several Decree-Law (e.g. the "Cura Italia" and "Liquidity"; Annual Report 2021). The Authority express views also to mitigate the social negative impact of the exiting from the market of unproductive companies, advocating the need to implement social safety nets, active labour policies, training of employed or unemployed jobs and regulation of the business crisis more sensitive to competition principles. See Authority contribution to the 2019 OECD Roundtable on Barriers to Exit, available at: [https://one.oecd.org/document/DAF/COMP/WD\(2019\)99/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)99/en/pdf).

<sup>76</sup>. See IC54 (2023).

<sup>77</sup> The emergence of new forms of vulnerability, affecting the generality of consumers across market segments, has called for the modernisation of the consumer law content and the introduction of wider and stronger digital reforms with Directive n. 2019/2161/EU (c.d. Omnibus Directive) and the Digital Service Act (DSA). The reform of the EU includes Directive 2019/770/EU (c.d. Digital Content) and Directive 2019/771/EU (c.d. Goods) already transposed in Italy, respectively, with the Legislative Decrees No. 173/2012 and No. 170/2021 and Law no. 127/2022 entrusting the Authority not only in terms of substance, but also in terms of the effectiveness of enforcement.

46. In particular, some recent Authority's enforcement initiatives intended to either promote national plans or repress anticompetitive conducts that would put at risk the fulfilment of industrial policy objectives (see key examples in Box 2).

### Box 2. Some examples of Authority's enforcement interventions in key areas for industrial policy

The Authority antitrust investigations in the waste management and recycling sector, demonstrate that antitrust and environmental goals are not necessarily at odds<sup>78</sup>; instead, they can be aligned to facilitate the green transition, more sustainable systems, as outlined in the EU 2030 Agenda for Sustainable Development. The Authority believes that the rigorous application of competition rules is crucial in such markets to spur innovation and achieve the objectives set forth in Italy's National Strategy for the Circular Economy and the National Waste Management Program.<sup>79</sup> Furthermore, the Authority has recommended that the government consider a coordinated set of interventions to support business models that promote a more resource-efficient and circular economy<sup>80</sup>. Several of these proposed reforms have been adopted by the government in the NRRP, highlighting a proactive approach to integrating competition policies with environmental sustainability. This strategic alignment underscores the potential for competition policy to play a pivotal role in fostering economic practices that are both competitive and environmentally sustainable.

In the sustainable public transport and e-mobility, the Authority has recently issued opinions to ensure competitive tenders and competition for the market in awarding sustainable public mobility services. These measures aim to enhance the efficiency of services and encourage citizens to use of sustainable transport modes.<sup>81</sup> Additionally, the Authority has addressed obstructive behaviour of the outgoing concessionaire aimed at delaying the takeover of public transport services to new operators.<sup>82</sup> Such actions ensure that transitions in service provision do not hinder the competitiveness or quality of public transport. Similarly, the Authority has scrutinized Google's conduct regarding its Maps App, which was seen as potentially stifling the development of e-mobility during its critical launch phase.<sup>83</sup> This was particularly concerning because the app's dominant position could negatively influence competition in e-mobility services. These interventions align with the broader goal of promoting a transition to more environmentally sustainable mobility solutions, emphasizing 'clean' energy as a viable

<sup>78</sup> See: case n. A531 - Riciclo Imballaggi Primari/Condotte Abusive Corepla, final decision available at: [https://www.agcm.it/dotcmsdoc/allegati-news/A531\\_chiusura%20istrutt%20+%20sanzione.pdf](https://www.agcm.it/dotcmsdoc/allegati-news/A531_chiusura%20istrutt%20+%20sanzione.pdf). See also press release of 10 November 2020, available at: <https://www.agcm.it/media/comunicati-stampa/2020/11/A531>. In November 2020 the Authority sanctioned Corepla, a recycling consortium, €27 million for preventing a rival from recovering and recycling plastic bottles from nearly all of the country's municipalities.

<sup>79</sup> See [https://one.oecd.org/document/DAF/COMP/WD\(2023\)37/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2023)37/en/pdf)

<sup>80</sup> See namely § 14-16 of the [https://one.oecd.org/document/DAF/COMP/WD\(2023\)37/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2023)37/en/pdf)

<sup>81</sup> See AS1761 (2021) Autonomous Province of Bolzano tender for TPL.

<sup>82</sup> See Gara affidamento servizi TPL Bolzano, A536 Regione Toscana/gara per l'affidamento del servizio di

trasporto pubblico locale.

<sup>83</sup> See A529 Google/compatibility app Enel X Italia with Android Auto.

alternative to fossil fuels. This approach not only supports environmental goals but also enhances consumer choices and market competitiveness in the sector<sup>84</sup>.

To support the government's initiatives to digitalize the country, the Authority has examined a co-investment agreement among major telecommunications operators for the expansion of TIM's ultrafast broadband network using Fiber to the Home (FTTH) technology, managed by the ad hoc vehicle FiberCop. The authority issued a commitment decision designed to balance the benefits of this joint investment against potential risks to competition in the wholesale fixed telecommunications markets.<sup>85</sup> The measures introduced aimed to tackle potential market barriers by ensuring sufficient contestability of demand and promoting infrastructure and investment-based competition. This was facilitated by reducing associated costs and establishing strict deadlines and coverage targets. The successful implementation of these commitments is expected to align with the rollout of high-speed broadband infrastructure and could potentially mitigate the uneven distribution of digital technologies among businesses, thereby boosting productivity across various sectors, not just those that are highly skilled. The Authority also intervened to prevent that TIM's anticompetitive practices could hinder the achievement of the national broadband strategy by obstructing infrastructure competition.<sup>86</sup> Similarly, the Authority launched an investigation against Enel for possible abuse of a dominant position in the e-mobility sector. The concern was that Enel's conduct could potentially distort the efficient competitive functioning of markets for electric car recharging.<sup>87</sup> The Authority emphasized that the development of charging infrastructures for electric cars is a crucial prerequisite for enabling the growth of electric mobility, which carries significant potential for economic growth and sustainability.<sup>88</sup>

47. Finally, in a number of its advocacy interventions, the Authority did not hesitate to address one of the key factors behind the insufficient dynamics of Italian productivity: the inadequate size of firms. This issue is related to a low degree of innovation and technology dissemination and transfer across various sectors.

48. With regard to the agri-food industry, the Authority noted that consolidation within the agricultural supply structure should be encouraged, to shorten the supply chain and strengthen the bargaining power of agricultural suppliers vis-à-vis large-scale retailers.<sup>89</sup> However, the Authority also cautioned against resorting to "shortcuts" that might involve reintroducing, explicitly or implicitly, a system of administered prices or restrictive price-

<sup>84</sup> See Annual Report (2021).

<sup>85</sup> Caso I850 – FiberCop / TIM / Fastweb / Tiscali / KKR (2022).

<sup>86</sup> See for instance, A514 - Condotte Fibra Telecom Italia.

<sup>87</sup> See A557 - Investigation initiated against Enel for possible abuse of a dominant position in the field of electric mobility company Enel X Way S.r.l., Enel X Way Italia S.r.l. and Ewiva S.r.l. for having implemented exclusionary actions against non-integrated competitors active in the provision of electric charging services.

<sup>88</sup> The Authority praise the provision requiring the motorways concession holder to award public areas for the electricity re-charge through transparent and not discriminatory public procedures. The Authority deems, on the other hand, desirable to opt out any provision aimed at regulating the price of electric recharges.

<sup>89</sup> See IC28 () and IC43 () surveys on organized distribution.

fixing agreements that exceed the limits set by EU Sector Regulation<sup>90</sup>, with the aim of pursuing redistribution within the food value chain.<sup>91</sup> The Authority endeavours to closely scrutinize sustainability agreements in agriculture, to ensure that they align with EU guidelines on antitrust exclusion.<sup>92</sup> The Authority may require modifications to, or the termination of, any sustainability agreements that potentially eliminate competition or undermine the objectives set out in Article 39(1) TFEU. This vigilant approach underscores the Authority's commitment to fostering a competitive and innovative market environment while ensuring that industry practices contribute positively to broader economic and sustainability goals.

#### 4. Concluding remarks

49. Effective coordination and integration between different policy areas within an holistic approach to public intervention is particularly topical in Italy, where industrial policy is playing a key role in the country's recovery, in the face of serious economic challenges. Notably, the interplay between competition and industrial policies is key for the implementation of the NRRP, which is part of the Next Generation EU (NGEU) programme. The objectives of the NRRP go beyond the traditional supply-side sectoral transformation and support to firms, to include measures to boost growth along three main lines of actions: digitalisation and innovation, environmental transition and social inclusion.

50. The Italian Competition Authority believes that competition policy can strongly support public intervention to address the structural problems of the national economy, through a vigorous application of competition law and principles and a careful prioritisation of enforcement actions. In the Authority's view, the pursuit of competitive markets is in the public interest and is key to a robust and sustainable long-term development path. The Authority's decision-making practice consistently aims to create and maintain a "competition culture" in Italy, ensuring that competition principles are respected and that industrial policy avoids undue market distortions. Impediments to competition resulting from poorly designed regulation may prevent the achievement of policy objectives.

51. The Authority is committed to continue to assist policymakers in making full and well-informed policy choices. Unnecessary regulatory burdens or discriminatory industrial policy that picks inefficient national champions can prevent the functioning of competitive markets and ultimately hamper industrial competitiveness, innovation and growth. In such cases, the Authority calls for proportionality, informing the legislator about alternative and less restrictive measures, which can still achieve the policy objectives attained.

52. In recent times, the virtuous circle between competition and industrial policy has become clearer. The key role of competition in enhancing efficiency, economic growth and

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<sup>90</sup> See EU Regulation 1308/2023.

<sup>91</sup> AS1730 (2021). To promote an appropriate competitive comparison within the relevant markets, rules requiring to apply to agricultural products purchasing prices (automatically) indexed to average production costs should be avoided as those inevitably refer to undertakings with different production structures and levels of efficiency.

<sup>92</sup> In February 2024, the Authority launched a public consultation on the Communication on the application of Article 210 bis, paragraph 7, of the EU Regulation No. 1308/2013 on sustainability agreements for agricultural producers". The communication regards procedural rules governing the assessment of the sustainability agreements of agricultural producers for which the conditions laid down in Article 210a, paragraph 7, of the EU Regulation are fulfilled.

social cohesion underpins the implementation of the NRRP's multi-year economic reforms. To this end, an annual review of the existing laws and regulations is due to remove restrictions to competition and barriers to market entry, in order to promote competitiveness, innovation and a sustainable development.

53. The Authority will continue to play a proactive key role in conveying that the compression of competition rules is not effective in achieving legitimate public interests. Instead, the Authority's experience shows that addressing well-defined market failures, while avoiding unnecessary distortions of competition, leads to improvements in the design of industrial policies, making long-term policy objectives more feasible. While industrial policies that award rents tend to be ineffective—for example, by picking sub-optimal winners or encouraging rent-seeking behaviour—efficiency-enhancing policies can boost industrial competitiveness and supporting the policy objective of a more inclusive economic transition.

54. The protection of public interests other than competition is not considered in the assessment carried out by the Authority in its enforcement activity. However, the Authority has taken industrial policy considerations into account when setting its priorities and choosing the most appropriate competition tools. The Authority has consistently prioritised issues of public interest, such as the green economy, the environmental protection and sustainability and the digital sector. Its initiatives, which enabled to prevent anticompetitive measures that would jeopardise the achievement of policy objectives, show that traditional competition policy can be used to promote new industrial objectives, without creating particular tensions between them.