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STANDARD SETTING

-- Itlay --

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Please contact Mr. Sean Ennis if you have any questions regarding this document [phone number: +33 1 45 24 96 55 -- E-mail address: sean.ennis@oecd.org].

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1. Introduction

1. Standard setting activities are becoming international in nature as national economies are more interconnected with each other and interoperability is now often a requirement in most network industries. This contribution briefly explores the Italian institutional framework for standard setting and presents some interventions in this area by the Italian Competition Authority.

2. The institutional framework of standard setting in Italy

2. The process of standard setting in Italy, like in other industrialized countries, originates from the government, industry collaborations, as well as spontaneous processes arising from the market (“*unilateral or marketplace standards*”¹). The two main standard setting organizations (SSOs) are UNI (Italian Organization for Standardization) and CEI (Italian Electrotechnical Committee). Both organizations are formally recognized by the Government since their by-laws were approved and included in specific ministerial decrees.

UNI is a private non-profit association with more than 7000 members which include companies, freelance professionals, associations, scientific and academic institutions, and bodies connected to the public administration. UNI carries out standardization activities in all industrial, commercial and tertiary sectors, with the exception of the electrical and electrotechnical sectors which are the responsibility of CEI.

CEI is a non-profit scientific and technical association, formally recognized by the Government and by the European Union in charge of standardization and unification in the electrical, electronic and telecommunications fields in Italy.

Although both UNI and CEI are private organizations, the government plays a significant role in their governance structure. Representatives from the Economic Development Ministry and other Ministries, the National Research Council sit in UNI’s steering committee together with representatives from the Italian Railways Company, CEI’s President, Presidents of sectoral SSOs.

CEI’s steering committee is made of representatives from the Economic Development and University Ministries, the National Research Council, but also the Italian Railways Company (Trenitalia) and the National Electricity Utility (ENEL).

3. There is also a significant activity of standard setting by private organizations such as professional and trade associations, producers consortia (particularly in the food industry), but also local authorities, particularly when setting standards in relation to public tenders. Sometimes, the standard setting activities of these organizations tend to limit competition under the assumption that specific qualitative standards would be negatively affected should competition be fully allowed.

2.1 Railway industry

4. A typical instance where standard setting were significantly limiting the full development of a competitive environment is in the railway transportation service.

In July 2003, the Authority issued a report on tenders for regional rail services. The relevant regulations stated that, in order to choose the provider of local railway transportation services, non-discriminatory public competitive tenders had to be organized, and by the end of 2003 local administrations were supposed to arrange all the preliminary administrative, financial and technical requirements.

The Authority found that most Regions did not even meet the preliminary conditions necessary for organizing the competitive tender procedures, since neither the local administrations nor the rail transport companies took action during the transition period in order to acquire the rolling stock necessary for providing services. Almost all the

¹ ABA, “Handbook on the Antitrust Aspects of Standards Setting”, Chicago, 2004.

material that had been used was in fact the exclusive property of Trenitalia Spa, part of the Ferrovie dello Stato group, holder of a legal monopoly until liberalization. Furthermore, the Authority observed that Trenitalia's competitors would have found it difficult to participate in the tenders because of the long time required to produce new rolling stock and the fact that a secondary market for rolling stock did not exist. Such difficulties were also magnified by specific technical standards concerning rolling stock. Only two other European countries (Belgium and the Czech Republic) had the same technical standards and were theoretically able to provide the necessary rolling stock to Trenitalia's competitors. These difficulties threaten the liberalization of local rail transportation, both by interfering with the preparation of calls for tender and hindering the participation in competitive tenders by railways other than Trenitalia.

The Authority underlined the importance of speeding up the liberalization process in the sector as much as possible, carrying out all calls for tender by the legal deadline of 31 December 2003 in a way that does not discriminate against competing companies. To achieve this goal, when rolling stock is in the possession of Regional Administrations, the license should be assigned to the company able to guarantee the most efficient service. Where the local administration does not have any rolling stock, whether a potential provider of rail services owns or not the necessary rolling stocks at the time of the bid should not be a discriminating factor in awarding the concession. The Authority noted that the concession should be awarded to the bidder with the most advantageous economic conditions, allowing the winner to start service in the shortest possible time (24-36 months).

5. Over the past years this has been the situation in most European countries where different technical standards concerning electricity voltage for motor units were adopted. More recently, the market is opening up as new production lines are manufacturing multi-voltage motor units that can be used all over Europe.

2.2 Food industry

6. Standard setting often occurs in the food industry where producers' consortia define certain common sets of rules and quality requirements for products that will eventually bear specific denominations. In theory such standards are meant to protect the quality of certain products by requiring the selection of special ingredients, the use of specific production processes and storage facilities. Some other times, standard setting is also used to limit access to the market, define market shares for consortium members, to hinder significantly competition among producers.

2.2.1 Agreement in the "denomination of protected origin" Grana Padano cheese industry

In June 2004 the Competition Authority completed an investigation into the Consortium for the Protection of Grana Padano cheese (established on a voluntary basis by roughly 200 producers of the cheese located in the traditional production area). The investigation followed the notification of an agreement among Consortium's members regarding the repositioning of the Grana Padano D.O.P. (Denomination of Protected Origin).

The Authority concluded that these resolutions constituted anticompetitive agreements, insofar as they were likely to limit the production of Grana Padano and keep wholesale prices at artificially high levels. In view of the gravity of the offence, the Authority imposed a fine of €120,000 on the Consortium.

As regards the agreement notified in 2003, containing measures aimed at guaranteeing output of higher quality and increasing the investment in advertising to reposition the product on the market, to be financed through a progressive contribution mechanism, the Authority concluded that: i) the measures aimed at promoting higher quality standards were not in and of themselves liable to restrict competition; and ii) the measures concerning the contribution mechanism were anticompetitive since they were likely to discourage increases in production by Consortium members with respect to their historical production levels. However, in view of the improvement in the conditions of supply subsequent to the repositioning of the product, the Authority granted an exemption from the prohibition of restrictive agreements for a period of six months, up to December 2004.

2.2.2 *Agreements in the “denomination of protected origin” ham industry*

7. In June 1996, the Authority completed its investigation on the voluntary Consortia among producers of San Daniele and Parma ham, which supervise and control the quality standard of their respective products.

Each Consortium had adopted a production plan for 1995, setting a ceiling on total production and dividing it among the member companies on the basis of their "historical" market shares. The Authority considered that the definition of production ceilings and quotas were agreements that restricted competition under section 2 of the Act. The fact that the law instituting the system for protecting denominations of origin empowered the Consortia to draw up production plans and that the plans were later approved by the relevant Ministries did not appear relevant facts for excluding the restrictive behaviour from the application of the antitrust law. In fact the ministerial approval was merely a subsequent control of the plan, in no way altering their nature of contractual agreements concluded freely and independently by the members of the Consortia themselves.

8. However, at the request of the Consortia, the Authority granted for a period of a year a waiver for the agreements under section 4 of the Competition Act. It was pointed out that since other less restrictive instruments for controlling production quality standard provided by the denomination protection legislation had not yet become operational, quantitative controls over production could be used for another year until other less restrictive instruments for quality control would become operational.

2.2.3 *Agreements in the “denomination of protected origin” Parmesan cheese industry*

9. In November 1996 the Authority concluded its investigation into the two Consortia protecting Parmigiano Reggiano and Grana Padano cheese. The two voluntary Consortia have the statutory function of promoting the products they oversee and protect, and also of planning and control production and marketing according to strict quality and production standards. The Consortia planned production quantities by establishing production plans indicating the maximum total production target for each specific year, and the individual production quotas for each member.

10. The Authority concluded its competitive assessment stating that competition legislation applies whenever there is autonomy in the decision making of the Consortia. Since production plans were freely established by the Consortia, the agreements were deemed as restricting competition.

In the wake of the remarks made by the Authority regarding the system of quality control, the Consortia decided to change the regulations to bring them into line with competition law. These changes were designed to convert the planning system based on quantities into one under which the Consortia would retain the right to ascertain whether the cheese would meet the required quality standards.

11. These example shows that sometimes standard setting conceals a limitation to competition by supposedly promoting quality standards but in fact undermining a company's ability to efficiently compete in the market.

2.3 *Professional activities*

12. Professional activities are heavily regulated in Italy and one of the purposes of professional associations is to set specific standards for its members concerning access, competitive behaviour and advertising. Very often the establishment of new professional associations is meant to create standards that supposedly protect the quality of the services and products provided, but in fact tend to constrain the economic behaviour of its members. This has an inevitable and negative impact on competition in the relevant market.

13. In 2005 the Authority exercised its advocacy powers on several occasions with regard to professional activities, calling the legislator's attention to the benefits that greater competition can bring to the sector. In particular, the Authority made several observations on a series of draft bills concerning a) the establishment of the register of pharmaceutical products promoters; b) the establishment of the Order of Accountants and Accounting Experts; c) framework legislation on professional activities; d) condominium managers; and e) the rules governing the requirements for admission to the State exam for a significant number of professions.

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

The Authority considered that the establishment of a new Professional Association is justified only when this satisfies needs of a general nature and is necessary to resolve significant imperfections in markets (such as information asymmetries and externalities). Otherwise it is likely to produce unfair and inefficient results. Given that pharmaceutical companies that use the services of trained professionals to promote their drugs among doctors are all qualified interlocutors who do not require any particular safeguards, the Authority concluded that the activity in question does not meet these exceptional criteria.

15. Again in April 2005, in exercising its advocacy powers under Article 22 of Law 287/1990, the Authority formulated an opinion on the possible anticompetitive effects of the adoption of a bill creating the Association of Accountants and Accounting Experts.

16. The Authority stressed the unjustified distortions of competition that would derive from the attribution of areas of exclusive competence to accountants and accounting experts. Assigning specific functions on an exclusive basis can only be justified in the case of professions whose exercise is strictly linked to protecting public interests under the meaning of the Italian Constitution. Also such reserves must be strictly necessary to guarantee minimum quality standards of service. These conditions were not met in the case of accountants and accounting experts.

The Authority also used its advocacy powers regarding the draft legislative decree on professional activities, in relation to the following aspects: the composition of exam committees for access to professions; the establishment of new professional registers; the fixing of professional fee scales; and bans on advertising. Strict standard setting in these areas by professional associations would have significantly impacted on the development of a competitive environment.

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

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

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

20. In addressing the issue of advertising, the Authority clarified that advertising per se does not tarnish the image of the profession nor lowers the required quality standard. Moreover, the total ban on advertising is not justifiable on the grounds of the general interest. On the contrary, advertising that refers both to the characteristics and prices of the services offered by professionals is an important factor in overcoming information asymmetries.

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

22. The Authority stressed that condominium managers should not be obliged to compulsory membership to a professional association since this would have unjustifiably restricted competition without assuring a minimum quality and technical standard.. The Authority confirmed the principle that the exercise of a profession is, in general, free, and accordingly limitations set by the legislator on its exercise must be exceptional and justified by the particular importance of the activity in question. The creation of a public list of condominium administrators was not meant to safeguard general interests, nor was it proportional with the aim of correcting significant market failures. Indeed, enrolment in the list would not guarantee customers of the quality standards by registered administrators.

Finally, in March 2006, the Authority made some observations on a draft decree on the rules governing the requirements for admission to the State exam for a substantial number of professionals (including land and forest experts, agronomists, architects, social workers, actuaries, biologists, chemists, work consultants, pharmacists, geologists, surveyors, journalists, engineers, land surveyors, industrial engineers and psychologists). The State exam was considered a necessary requirement to guarantee the quality standard of the prospective professional.
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23. The Authority underlined once more that the qualitative standard requirements for access to professions must not subtly introduce quantitative restrictions. This means that the requirements for admission to the State exam, including an obligatory period of professional training, must be proportional to the professional practices it authorizes, and must not be unjustly restrictive. To this end the Authority felt that the introduction of a compulsory training period or its excessive duration were unjustified. The limits placed by the legislator on the exercise of a profession must be of an exceptional nature, proportional to the required qualitative and technical standards and justified by the particular importance of the activity in question, and therefore only when the protection of general interests is at stake.