MAIN TRENDS OF THE ITALIAN COMPETITION AUTHORITY’S ACTIVITY: A LAW AND ECONOMICS PERSPECTIVE†

1 INTRODUCTION

In the last lustrum, the European economies knew a considerable slowdown; in this scenario, Italy represented an anomaly within the anomaly, since its economy grew by a lower rate than the European average. Among the explanatory factors, several scholars attributed this trend to the scarce degree of competition in the main Italian economic sectors¹: according to these positions, the slow pace of the liberalization process in

† Although this paper expresses the common ideas of the authors, Andrea Nuzzi wrote § 2, 5 and 7, while Giovanni B. Nuzzi wrote § 3, 4 and 6. “Introduction” (§ 1) and “Concluding remarks” (§ 8) were written by both authors.

¹ On these issues, see Masera-Maino, Impresa, finanza, mercato (La gestione integrata del rischio) (EGEA, Milano, 2005), M. Monti, Le nuove sfide per l’antitrust in Europa, in the collective volume Concorrenza e Autorità Antitrust – Un bilancio a dieci anni dalla legge (Presidenza del Consiglio dei Ministri, Roma, 2001), p. 153 et seq., Autorità Garante della Concorrenza e del Mercato, Annual Report on 2003 activities, Address read by the Chairman (G. Tesauro), Rome, 22 June 2004 and Centro Studi di Confindustria, La concorrenza e le Autorità (Ricerche per l’Economia e la Finanza - Progetto Concorrenza di Confindustria, coordinated by Cipolletta-Micossi-Nardozzi), 2005, available at www.confindustria.it; Torchia-Bassanini (eds.), Sviluppo o declino. Il ruolo delle Istituzioni per la competitività del Paese (Passigli, Firenze, 2005); De Vincenti-Vigneri (eds.), Le virtù della concorrenza (Regolazione e mercato nei servizi di pubblica utilità) (Il Mulino, Bologna, 2006); Pammolli-Cambini-Giannaccari (eds.), Politiche di liberalizzazione e
telecom, electricity, railways, gas and professional services markets pushed up the costs of “intermediate goods” (i.e. the goods used as inputs in the production of other goods), thus weakening the ability of Italian undertakings to compete on the international markets. While in the past the Italian economic system was able to prosper by reason of the intense State support and the numerous currency devaluations - which protected national undertakings from the competition of the foreign ones - once the level of the competition switched from a national to a global level, Italian undertakings had to face a competitive pressure they were not trained for.

The strategies worked out and the decisions taken by the Italian Competition Authority as well as its competition advocacy activity are, therefore, very important to the competitiveness and the growth of the Italian industrial system. However, it is not the purpose of this paper to provide an exhaustive analysis of the main Italian competition cases, but rather to identify the rationale inspiring the Authority strategies and activities, its likely future lines of action, the main trends it followed in the application and enforcement of the antitrust law and the most problematic economic issues it has faced so far. This also to give a contribution to the process of mutual knowledge established by competition Authorities of the EU Member States after the enactment of the “Modernization” Regulation that "inter alia" aims to develop a common competition culture at the European level (see, below, section n. 7).

The paper is structured as follows: after an introductive paragraph, section 2 deepens the issue of the general role and the aims of competition; this reasoning is functional to section 3, which reviews the most influential Italian case-law on abuses of dominant position and cartels; section 4 evaluates the extent of the Italian Competition Authority powers; in section 5 the main economic issues emerging in the first years of Authority activity are analyzed; section 6 deals with the possible constraints on the Authority’s ability to pursue its objectives, while section 7 deepens the potential impact of the recent European modernization reform on the activity of Italian Competition Authority; the last section (8) is devoted to the concluding remarks.
2 ON THE ROLE AND THE AIDS OF COMPETITION: IMPLICATIONS FOR COMPETITION AUTHORITIES

2.1 Competition and efficiency

In a book about the genetic code of antitrust and its mutations, Giuliano Amato, who was Chairman of the Italian Competition Authority, points out that at the outset in Europe “antitrust law was desired by politicians and … scholars attentive to the pillars of the democratic system who saw it as an answer to the crucial problem for democracy […] private power”. Then, he adds, the context changed and today antitrust law is mainly concerned with economic efficiency\(^4\). Nevertheless, since there is no single concept of economic efficiency, the various antitrust systems may adopt different perspectives. Therefore, in order to figure out the rationale inspiring the activities of a Competition Authority it is crucial to understand the idea of efficiency it refers to. If, under a theoretical point of view, there is no doubt that competition ensures the best market outcome in terms of allocative efficiency\(^5\), several additional specifications should be supplemented with regard to technical and dynamic efficiencies.

As known, the allocative efficiency does not represent a necessary condition for the achievement of the technical one. On the contrary, it can be noted that technical efficiency and allocative inefficiency (or vice versa) are not mutually exclusive: in principle, a monopolist able to exploit economies of scale may produce efficiently under a technical point of view. Therefore, in order to evaluate the opportunity to introduce competition in a monopolistic market, the benefits deriving from the achievement of scale economies should be compared with the disadvantages imputable to the allocative inefficiency\(^6\).

If the above mentioned relationship (between technical and allocative efficiency) seems to be problematic, a more complicated interaction characterizes the one concerning allocative and dynamic efficiency because of the connection existing between market structure and incentive to innovation\(^7\). In particular, a conspicuous stream of literature underlined that the perfect competitive markets\(^8\) are not the most appropriate configurations to stimulate innovation and, more generally, long-term investments (such as those aimed at developing infrastructure). Indeed, a monopolistic position may provide for a remarkable incentive to innovate and carry out long-term investments: in fact, the monopolistic firm is protected from the competitive pressure and, hence, may appropriate the economic results of these activities. In addition, “large firms can engage in research more cheaply than small firms because the larger firms can distribute the costs of research and development over a larger volume of production”. On the contrary, in a competitive market, the intensity of this pressure is so high that a firm may be discouraged to invest


\(^6\) In respect to this, several theoretical contributions tried to quantify the inefficiencies deriving by a scarce attention to the cost reduction activities: *inter alia* see Siegfried-Wheeler, *Cost Efficiency and Monopoly Power: a Survey* (*Quarterly Review of Economics and Business*, n. 21, 1981).


since it may not have the chance to achieve enough profits in order to self-fund these activities.

This synthetic survey about the different meanings given to the idea of efficiency and the disagreement about whether monopoly encourages or discourages research and development show that before opening a market coûte que coûte, it is very important to take into account the possible negative implications of a competitive régime. A dichotomy between efficiency and competition could therefore arise because of a conceptual misunderstanding, namely a confusion between tools and aims. In effect, if efficiency is the objective, the introduction of competition must be considered a tool to obtain such a purpose. More explicitly: the opening of a market to competition constitutes only one of the numerous rival formulas and must be compared with its substitutes. This line of reasoning is consistent with a functional interpretation of competition, which is very different from a constitutive perspective, this latter implying that the competition is a value that must be aprioristically defended.

The comprehension of this critical issue is complicated by two additional remarks. First of all, despite the confidence characterizing the use of the term competition in economic jargon, a deep investigation of the economic theory suggests that there is not a widespread consensus about what is its exact meaning. Secondly, the Competition Authorities are in general reluctant to define precisely this concept, even if its defense represents the hard core of their activities. This state of semantic indeterminateness contributes to generate confusion about the objectives pursued with the introduction of competition as well as the necessary tools, making the activity of Competition Authorities less accountable.

2.2 The meaning of competition

A good starting point to frame the evolution of a term in the economic theory is the following quotation by Moore: “economic terms seem to pass in their historical development through a series of stages which, without pretension to rigidity, may be described as follows: first, no definition is given, but it is assumed that every one has a sufficient clear idea of the subject to make a formal definition unnecessary; second, a definition is attempted and a number of exceptional forms are noted; third, with the further increase of data, the relative importance of the various forms changes, confusion in discussion is introduced, logomachy takes the place of constructive investigation; forth, a complete classification of the forms embraced under the original term is made, and the problems are investigated with reference to these classes. The bewildering vagueness of economic theory is largely due to the fact that the terms used are in all of these stages of development.”

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9 A. Graffi, È sempre vero che una maggiore concorrenza è economicamente e socialmente desiderabile? (Economia e Politica Industriale, n. 98, 1998).
11 Part of this paragraph is the result of a discussion started in the Industrial and Financial Research Group (Gruppo di ricerche industriali e finanziarie – GRIF, Roma) directed by Professor Fabio Gobbo; on this topic, see Gobbo-Pozzi, Liberalizzazione e politica industriale (Economia e politica industriale, n. 2, 2005).
Moreover, the words by Mill – “only through the principle of competition has political economy any pretension to the character of a science” – and Jevons\textsuperscript{13} – “if there is no longer competition among men and among employers (a problem) has little or nothing to do with economics. It is not a question of science” – give an idea of the fascination suffered by the economists – since the origins – with regard to the concept of competition. It seems that competition has sometimes been considered a \textit{condicio sine qua non} for the attribution of the character of science to economics. However, it does not appear hazardous to state that competition is one of the most used and – meanwhile – of the least clearly defined notions in the economic thought.

The commonly used approach has consisted in a \textit{e-contrariis} definition, according to which competition would be interpretable as the diametrically opposite configuration of monopoly under the structural profile. This point of view is shared by Stigler who stated: “if we were free to redefine competition at this late date, a persuasive case could be made that it should be restricted to meaning the absence of monopoly power on a market. This is an important concept that deserves a name, and ‘competition’ would be the appropriate name. But it would be idle to propose such a restricted signification for a word which has so long been used in a wide sense, and at best we may hope to denote the narrower concept by a suggestive phrase. I propose that we call this narrower concept ‘market competition’”\textsuperscript{14}.

Yet, this approach overlooks the behavioral dimension of the problem. As correctly pointed out “there is a striking contrast in economic literature between the analytical rigor and precision of competition when it is described as a market structure and the ambiguity surrounding the idea of competition whenever it is discussed in behavioral terms”\textsuperscript{15}.

The concept of competition the economists generally refers to is a (utopian) situation where the number of market operators is extremely high: the amount of firms reaches such a level that prevents anybody to influence the behavior of others: this approach – known as “perfect competition”\textsuperscript{16} – is defined only in structural terms by the economic theory, since the behavioral foundation of the firms’ actions is assumed by hypothesis (neoclassical paradigm). All the rival operators conduct is aprioristically excluded by the model assumptions. In this perspective, Knight stated that the fittest term for this market layout should be atomism and “the critical reader of general economic literature must be struck by the absence of any attempt accurately to define that competition which is the principal subject under discussion”\textsuperscript{17}. This approach, requiring the satisfaction of several structural conditions in order to reach the equilibrium between price and marginal costs and the highest allocative efficiency, opposed the classical conception of competition: a dynamic process where the operators employed rival strategies in complete independence.


\textsuperscript{16} On this point see Prosperetti-Siragusa-Beretta-Merini, \textit{Economia e diritto antitrust} (Carocci, Roma, 2006), p. 25, with further references, as well as R. Whish, cited in n. 5, at p. 6 \textit{et seq.}.

\textsuperscript{17} F. Knight, \textit{The Ethics of Competition} (Harper, NY, 1935).
The dissatisfaction towards the scarce heuristic value of the neoclassical paradigm, which implied that an increase of the number of operators would have generated a positive result in terms of social welfare, represented the central reason of the criticisms the Austrian school addressed to marginalism in the 1940s’ and 1950s’3. In respect to this, von Hayek noted that the key characteristic of neoclassical paradigm supporters was their intolerance against imperfections and the silence against the obstacles to competition. The evident difficulty to use the neoclassical paradigm in practice in order to analyze antitrust problems induced several scholars18 to provide for a “normative” approach to the topic: even if the structural conditions related to perfect competition are not repeatable in the reality, the positive effects of this market configuration in terms of social welfare induced to direct the industry towards the respect of certain minimal prerequisites. In other words, considering the impossibility to reply all the assumptions of the neoclassical paradigm, the solution recommended by the “workable competition” approach was to replicate the structural conditions at least19. This perspective – known as “Harvard approach” – has deeply affected the activity of Competition Authorities and, despite the hard criticism received (mainly from Chicago School), has influenced their visions and decision-making routines.

If the U.S. Agencies overcame gradually this modus operandi20, the same cannot be stated for the European ones – above all, the Commission and the European Court of Justice – which used the concept of workable competition as “a blueprint for competition policy”21. The strict approach of the European Agencies towards predatory pricing, their reluctance to adopt an efficiency perspective in the vertical agreements cases and the absence of any reference to efficiency defence in mergers stemmed from this concept.

Despite its influence on the work of Competition and Regulation Authorities, the “workable competition” approach shows several inconsistencies under the methodological point of view. Firstly, it seems not taking into account that the expected results of a theory are not repeatable if the same basic theoretical assumptions are not respected. Secondly, it implicitly recognizes the superiority of the perfect competition régime in comparison with other market configurations, without considering appropriately the peculiarity of the market. In this way, it provides for a theoretical argumentation justifying an inversion between tools and purposes of competition policy. According to the “workable competition” approach, the mission of a Competition Authority would not consist in an increase of social welfare but, rather, in the promotion and protection of the competition as it was a per se value. Thirdly, and most importantly, the lack of any explicit definition of (workable) competition provides the Agencies with an excessive level of discretionary power with a potential negative impact in terms of legal certainty.

18 Inter alia see J.M. Clark, Toward a Concept of Workable Competition (The American Economic Review, 1940, n. 30) and S.H Sosnick, A Critique of Concepts of Workable Competition (The Quarterly Journal of Economics, 1958, n. 72).
20 On this point see G. Amato, cited in n. 4 at p. 29 et seq., H. Hovenkamp, cited in n. 8, p. 58 et seq, who recounts the evolution of the relationship between antitrust and economics in U.S. and Amendola-Parcu, L’antitrust italiano (Le sfide della tutela della concorrenza) (Uet, Torino, 2003), p. 19 et seq.
In brief, competition cannot be given a thaumaturgical power. In this perspective, the rationale of the quotations by Mill and Jevons could be completely reversed: the value of competition has been too often filled with an importance which implied a scarce consideration for the limited applicability of the theoretical paradigm. In addition, recent developments of the economic theory show that, sometimes, competition is not socially desirable and, quite the reverse, may produce detrimental effects in terms of collective welfare.

The foregoing specifications may help to understand better the approach so far followed by the Italian Competition Authority and provide a conceptual framework to more accurately carry out a critical analysis of its activity.

3 THE MAIN OBJECTIVES PURSUED BY THE ITALIAN COMPETITION AUTHORITY IN ITS FIRST YEARS OF ACTIVITY

3.1 General goals of Competition Authorities

As known, some statutes explicitly declare the perspective the national Authority follows, in particular by stating the objectives that come within the Authority’s strategy. In other cases, the antitrust perspective supporting the law enforcement is declared by the enforcing Agency, which discloses its strategy through guidelines and statements of enforcement policy priorities.

As far as Italy is concerned, neither the Italian Competition and Fair Trading Act (hereinafter referred to as the “Competition Act”)\(^{22}\), nor the Italian Competition Authority (hereinafter referred to as the “Authority”) state explicitly the objectives and the priorities pursued in the application and enforcement of the law. Consequently, whoever wants to understand the strategy, as well as the antitrust perspective followed by the Authority, should look, \textit{inter alia}, at the historical background where the Authority was formed, the structure and contents of the Italian antitrust law and its relationship with E.U. legislation\(^{23}\), the nature and functions of the Authority, the case-law and the advocacy activity carried out, the extent of its jurisdiction and, above all, the objectives attained by the Authority both in its enforcement and advocacy activity\(^{24}\).

Broadly speaking, as already indicated, each antitrust system has its underlying set of values that strongly affects national Authorities’ activities\(^{25}\). As mentioned, competition policy may be associated with many different goals and competition authorities worldwide may give priority to different objectives: consumer welfare, economic


\(^{23}\) Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 51 \textit{et seq}

\(^{24}\) On this point see M. Libertini, \textit{La prospettiva giuridica: caratteristiche della normativa antitrust e sistema giuridico italiano}, in the collective volume \textit{Concorrenza e Autorità Antitrust – Un bilancio a dieci anni dalla legge} (Presidenza del Consiglio dei Ministri, Roma, 2001), p. 83. See also Capobianco-Creatini, \textit{Antitrust - Lezioni e casi dall'esperienza italiana} (Rubettino, 2007).

\(^{25}\) See R. Whish, \textit{Competition Law} (Oxford University Press, Oxford, 2005) p. 17, who notes that “[c]ompetition law does not exist in a vacuum: it is an expression of the current values and aims of society and it is susceptible to change as political thinking generally”.

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efficiency, innovation, fairness, competitive industry structure, growth, and protection of small and medium sized enterprises."26.

For example, in the U.S. the first defenses against attempts to monopolize were aimed at protecting market pluralism by safeguarding “consumers” and “small businessmen” against companies which, having power over markets and prices, were able to exclude them. Then, as already said, the Chicago School made inroads in the antitrust domain and therefore efficiency became one of the main objectives of antitrust policy.27

Conversely, from the outset, the European competition policy has been multipurpose, taking on tasks that did not belong to antitrust (above all, the objective of market integration) and objectives that were often determined by policies other than those on competition (for example, industrial policy as well as regional and social policy).28 Such an approach has gradually changed: over the last few years, European antitrust appears to be more autonomous whereas its strategy seems to have been focusing primarily on competition.29

3.2 The rationale inspiring the activities of the Italian Competition Authority

As far as Italy is concerned, the purposes for which the Competition Authority was formed and the economic environment in which the Authority started to operate are partially different.30 What has that meant in terms of objectives and strategy? What have been the objectives for competition policy in Italy? What has the Authority accomplished in its more than fifteen years of activity?31


27 We here summarize the main passages of G. Amato, cited in n. 4 at p. 17 et seq. who rightly notes – at p. 22 – that “[w]hat it is to be understood as efficient and hence consistent with consumer welfare is any conduct or situation that transfer to the consumer’s benefit qualitative improvements in manufacture or in cost reduction, without giving anyone room to restrict the market”. The American antitrust (r)evolution is recounted by G. Rossi, cited above at p. 3 et seq. where further references may also be found. See, also, H. Hovenkamp, Un esame dell’antitrust del dopo Chicago (Merc. concorr. e regole, n. 1/2001), at p. 11, Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 39 et seq and P.A. London, cited in n. 1.

28 The path towards the autonomy of the European antitrust from other common policies is well summarized by G. Amato, cited in n. 4 at p. 113 et seq. See also R. Pardolesi, Modernization: the “new mantra” of transatlantic competition law (February 2005, Harvard University, available at www.law-economics.net), at p. 4 et seq. and R. Whish, cited in n. 5, at p. 20.

29 Among the many contributions on the history and objectives of European antitrust, see G. Bernini, Un secolo di filosofia antitrust (Clueb, Bologna, 1991).

30 Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 49 et seq.

As already commented upon, the Competition Act law appears not to identify specific objectives for competition policy. The sole “legislative” reference to an “objective” can be found in article 1, paragraph 1, of the Competition Act. According to this provision, the Act implements Article 41 of the Constitution “protecting and guaranteeing the right of free enterprise”32. That is why – it has been pointed out – the main purpose of the Italian Competition Authority has been, from the outset, to modify public regulations and private behaviors that jeopardize the functioning of a competitive market33. More generally, most of the scholars argue that the Authority mainly aims at safeguarding competitive industry structure, economic efficiency and, in general, social and consumer welfare34.

It must none the less be noted that the strategy worked out by the Italian Competition Authority and the objectives it pursues are significantly influenced by European competition policy. That mainly stems from the fact that Italy has adopted a competition law that faithfully mirrors Community law. As far as agreements are concerned, article 2 of the Competition Act even reflects the wording of article 81, paragraph 1, of the E.C. Treaty (hereinafter referred to as the “Treaty”), while article 4 introduces a system for exempting restrictive agreements analogous to that of article 81, paragraph 3, of the Treaty. Like article 82 of the Treaty, the very similar article 3 of the Act prohibits the abuse of a dominant position35.

To allow the choice between the two legislative systems the Competition Act (article 1, paragraph 2 and 3) provides for an explicit coordination criterion: a case may be considered under national law only to the extent that it is not of “community relevance”. Accordingly, the Authority should assess whether the practice affects or not trade between member States: E.U. law will cover cases that have a trans-border effect, while domestic law will be applied to practices that produce an appreciable effect within the national borders36.

However, the Commission’s fifty years of practice shows that the standards, which have been used to assess the effects on trade of a given practice have been very broad. In fact, in an integrated market with no barriers to trade, every restrictive practice could influence, at least potentially, trade flows. Therefore, a broad area of overlapping between the domestic and the E.U. law can be identified. Looking at the practice of the Authority, one may notice that “community relevance” is in general inferred whenever the

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33 See F. Silva, cited in n. 31 at p. 33.
34 See Fattori-Todino, La disciplina della concorrenza in Italia (Il Mulino, Bologna, 2004), p. 13 and Buzzzone-Fattori-Heimler, Politiche per la concorrenza e benefici per il consumatore (Concorrenza e mercato, 5/1997), p. 369. On top of this, it may be worth reporting that (i) Law no. 215/2004 has expanded the jurisdiction of the Authority providing her with the power to control “conflict of interest” of public administrators and that (ii) Law no. 192/1998 (on “sub-distribution”) prohibits an undertaking to abuse the “economic dependence” of other undertakings (article 9); this rule – applying to the unilateral conduct of non-dominant firm – appears to include the protection of small and medium enterprises among the objectives of the Italian Competition Authority (see Salonico-Zampa, Italy in the collective volume Dominance (The regulation of dominant firm conduct in 38 jurisdictions worldwide) (Global Competition Review, London, 2007), p. 100.
36 Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 66 et seq
Commission opens a formal procedure (in this case, pursuant to article 1, paragraph 3, of the Competition Act the Authority suspends any proceeding that it may have begun under the Act). Consequently, in Italy domestic law has been applied in a number of cases in which a larger than national market was concerned, as long as the Commission did not initiate a proceeding.

The similarity between the substantive rules of the Italian law and the E.C. legislation is strengthened by the fact that article 1, paragraph 4 of the Competition Act requires the Authority to interpret these rules according to the principles of E.U. competition law. The reference to E.U. principles includes not only secondary legislation, but also European Court of Justice case-law and Commission decisions. This provision has proved to be the most influential on the strategies worked out by the Authority. First and foremost, it has widened the “potential object of antitrust scrutiny”. E.U. competition law has full validity in all economic sectors. Accordingly, in Italy, the Authority has overviewed all economic sectors intervening in the “wide realm of public regulations affecting national and local services including but not limited to the sensitive fields of supply of goods and services, public offers, competitive bidding works and so on”.

In addition, article 1, paragraph 4, of the Competition Act has been extremely important for getting the enforcement activity of the Authority started. In fact, the Authority has been enabled to apply some important rules (for example, the primacy of E.U. law on national antitrust law) and to use some important concepts already well developed at the Community level (for example, the notion of relevant market, the notion of enterprise and the notion of dominant position among others). Moreover, article 1, paragraph 4, by aligning national law with consolidated E.U. principles, has enhanced the independence of the Authority’s decision-making, providing a very powerful argument for resisting the influence of outside pressure (such as that carried out by pressure groups and by ministerial bureaucracies).

Besides the European influence, the Authority’s strategy and its objectives are also a consequence of the historical, economical and institutional framework where the Authority has made inroads as of 1990, when the competition law was introduced.

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37 See Fattori-Todino, cited above at n. 34, p. 15. This allows the Italian Competition Authority not to be bound to the interpretation of the Competition Act given by national courts, should this be in contrast with E.U. case law.
40 M. Libertini, cited in n. 24 at p. 74 et seq recalls in details some of these rules and concepts.
41 On the evolution of Italian legislation in the last decade see M. Libertini, cited in n. 24 at p. 92 et seq. About the regulatory environment faced by the Authority in its first years of activity see Autorità Garante della Concorrenza e del Mercato, Annual Report on 1996 activities, Address read by the Chairman (G. Amato), Rome, 8 May 1997, in the collective volume Dieci anni di Antitrust – Testi letti per la presentazione delle relazioni annuali, (Presidenza del Consiglio dei Ministri, Roma, 2000), p. 97 et seq.
42 The competition law was introduced in our system mainly because of a number of community wide developments: the starting of the liberalization directives, the approval of EU merger control and the internal market project. All these developments led to approving the Competition Act, the first “EU-oriented” competition law among member countries. The reasons why it took so much time in order to introduce a
In particular, the main trends in the enforcement of the competition law were determined by two combined factors. First, the existence of a large number of public monopolies (holders of exclusive rights granted by a public authority)\textsuperscript{43} and of firms operating in markets characterized by rules, regulations and general administrative provisions restricting competition (often for the sole benefit of companies already present in the market) and secondly, the “liberalizing wind” that started blowing in Europe. As a consequence, the Authority took upon itself the responsibility to support the liberalization process, which started at the European level with regards to public utilities as well as to push for a change in “corporative” rules present in the service sectors in Italy.

3.3 The Authority approach towards monopolies

In Italy a large number of cases on restrictive behavior under article 2 of the Competition Act as well as on abuse of dominant position (by far more frequent) has been concerned with former legal monopolies or \textit{de facto} monopolistic positions in markets characterized by essential infrastructures such as telecom, electricity, postal service, railways and gas\textsuperscript{44}.

As far as abuses of dominant position are concerned, the case law shows that two are the main streams of the Authority’s activity: the interventions against public entities and those in regulated sectors\textsuperscript{45}. In particular, the Authority appears to have taken a twofold

\textsuperscript{43} On the attitude of the European Commission and the Court of Justice towards public monopolies, see G. Amato, cited in n. 4 at p. 88 et seq.

\textsuperscript{44} In the period between 1990-2005, proceedings against public utilities accounted for about two thirds of the formal proceedings concerning abuse of dominant position. See Amendola-Parcu, cited in n. 20 at p. 150 and A. Pera, \textit{La politica della concorrenza e l’Autorità antitrust in Italia} (il Mulino, n. 2, marzo-aprile 1999), p. 333 et seq. In any case, M. Libertini, cited in n. 24 at p. 79, notes that the Authority is changing its paradigm and in the last years has dealt more than before with cases of abuse of dominant position from private firms (he recalls, for example the cases Coca Cola [Amendola-Parcu, cited in n. 20 at p. 199] and Fiat Ferroviaria).

\textsuperscript{45} See, in this respect, Autorità Garante della Concorrenza e del Mercato, \textit{Annual Report on 1999 activities}, \textit{Address read by the Chairman} (G. Tesauro), Rome, 30 may 2000, in the collective volume \textit{Dieci anni di Antitrust – Testi letti per la presentazione delle relazioni annuali}, (Presidenza del Consiglio dei Ministri, Roma, 2000), p. 3 et seq. and the \textit{Annual Report on 1994 activities}, \textit{Address read by the Chairman} (G. Amato), Rome, 11 May 1995, \textit{ibidem}; M. Libertini, cited in n. 24 at p. 69 et seq; F. Silva, cited in n. 31 at p. 34 et seq.
First, it seems to have pursued the objective of making the markets where public utilities operate more competitive, by fostering the liberalization process of the Italian economics. Secondly, the Authority has attempted to urge public, as well as private firms to refrain from using their market power to prevent competitors from entering the market (exclusionary practices). Indeed, most of the Authority’s investigations started in relation to discrimination or attempted extension of the dominant position from a market protected by a legal reserve to a liberalized one (leverage theory)

48 Sometimes, the incumbent firm was found to deter competitors’ entry by impeding access to essential facilities (for example, the cases Alitalia, Snam, Albacom v. Telecom Italia-dedicated circuits, Infostrada v. Telecom Italia-ADSL)


46 See F. Silva, cited in n. 31 at p. 58 et seq.; see also P. Fattori, Liberalizzazione dei mercati: il ruolo dell’Autorità garante della concorrenza e del mercato, paper presented at the IBC Conference in Rome, 30-31 March 2000.

47 In most of these cases, public utilities invoked article 8.2 of the Competition Act, i.e. the exclusion from the application of competition rules, alleging they were entrusted with the operation of services of general economic interest, such exclusion being indispensable to perform the specific tasks assigned to them. Yet, the Authority has often rebutted such argument, since it has always interpreted art. 8.2 in a restrictive way, in order to restrain the scope for the reserved area. See G. Tesauro, Conclusioni, in the collective volume Concorrenza e Autorità Antitrust – Un bilancio a dieci anni dalla legge (Presidenza del Consiglio dei Ministri, Roma, 2001), p. 224. On this point, A. Pera, cited in n. 44 at p. 334 et seq., notes that in order to restrain the scope for the reserved area, the Authority has generally used different tools; among them, it enforced the EU liberalizing directives, as well as article 9 of the Competition Act which provides for the “internal production” right (for example in the case I BAR v. Aeroporti di Roma, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 6, 1993 reported also by Amendola-Parcu, cited in n. 20 at p. 157 [in this case the Authority ascertained an abusive form of tying] or in IBAR v. SEA, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 11, 1994). Some scholars maintain that the powers granted to the Authority by article 8 of Law no. 287/90 must be considered as “regulatory powers”: that means that through these powers the Authority can eliminate or alter the rules hampering competition. Further (soft) “regulatory powers” derive from the norms of articles 21 and 22 of the Competition Act, which provide for the advocacy powers of the Authority (see F. Silva, cited in n. 31 at p. 44).

48 See in this respect, Autorità Garante della Concorrenza e del Mercato, Annual Report on 2002 activities, Rome, 30 April 2003, p. 11 and Fattori-Todino, cited above at n. 34, p. 152 et seq.. The Authority has chiefly (but not exclusively; see for example the cases Compagnia Portuale di Brindisi [decision No. 4062, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 28, 1996] and Associazione nazionale impiantisti e manutentori vs ITALGAS, both recalled by Salonico-Zampa, cited in n. 34 at p. 102) considered cases in which the anti-competitive effects have occurred in a downstream or upstream markets.

49 Amendola-Parcu, cited in n. 20 at p. 155. On the topic, see also Durante-Moglia-Nicita, La Nozione di Essential Facility tra Regolamentazione e Antitrust. La Costruzione di un Test (Mercato, Concorrenza e Regole, 2000), Nicita-Castaldo, Essential Facility and Efficiency in European Antitrust. Some Lessons from GVG/FS in the Railway Sector, SIMPLE Working Papers, n. 38/05 and Fattori-Todino, cited above at n. 34, p. 177-178. See also below section 5.

50 Alitalia was alleged to make a discriminatory use of its power to allocate takeoff and landing slots so as to harm competitors’ strategies. Furthermore Alitalia had been sending notices to some travel agents to persuade them not to issue tickets from competing airlines (Associazione Consumatori Utenti/Alitalia, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 45, 1996; see Amendola-Parcu, cited in n. 20 at p. 161).

51 The abuses of which Snam was accused concerned in particular: i) Snam’s refusal to grant Assomineraria (the natural gas producers’ association) access to its national network; ii) Snam’s refusal to accept Assomineraria’s request to revise a previous agreement with regard to the transmission of natural gas produced in Italy; and iii) Snam’s practice of monitoring the final destination of the gas carried on behalf of Edison Gas its main competitor (Snam-Tariffe di Vettoriaimento, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 8, 1999; see Amendola-Parcu, cited in n. 20 at p. 191).

52 The Authority ascertained an abuse of dominant position in the provision of dedicated circuits (or leased lines). In particular, according to the Authority, Telecom Italia (i) did not differentiate the tariff of intermediate speed transmission circuits according to capacity demanded by its competitors, strongly
technology\textsuperscript{53}, Consorzio Risposta v. Ente Poste Italiane\textsuperscript{54}, 3C Communications\textsuperscript{55} or, more recently, Aviapartner v. Società Aeroporto Guglielmo Marconi di Bologna\textsuperscript{56}) or exclusive information (for example, the above mentioned case Cerved\textsuperscript{57}).

In other cases, the incumbent was found (i) to carry out pre-emptive strategies by imposing lock-in contractual clauses to captive customers (for example, in the cases Tim/GSM Dealers\textsuperscript{58} or Unapace/Enel\textsuperscript{59}) or adopting exclusive agreements with actual and increasing the cost of entry for competitors demanding medium capacity circuits; (ii) supplied high capacity lines only to its own final customers without publicizing this option, de facto preventing competitors from gaining access to this service; (iii) used a cheaper system of transmission, alternative to dedicated lines, without informing competitors of this possibility (Albacom v. Telecom Italia-Circuiti Dedicati, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 44, 1997).

See Decision n. 9472, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 16/17, 2001: this case concerned an abuse of dominant position of Telecom Italia in the upstream market for the supply of local loop services; such abuse was functional to the strengthening (i) of the above mentioned dominant position, at a time when the supply of infrastructure was being liberalized and (ii) of Telecom Italia position in the markets for data transmission and Internet access services.

The Authority found that Poste Italiane Spa (formerly Ente Poste Italiane) carried out certain activities aimed at impeding competitors’ supply of hybrid mail services. In particular, Poste Italiane made suppliers of hybrid mail services pay a price for delivery alone that was equal to the price charged by Poste Italiane to its customers for sending an ordinary letter and significantly and unjustifiably higher than both its costs and the price applied by Poste to its subsidiary company Postel for hybrid mail delivery services (Consorzio Risposta/Ente Poste Italiane, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 51, 1998).

According to the Authority, Sip spa, the Italian telecom operator, had abused its dominant position by refusing to grant 3C Communications the use of telephone lines, and hence prevented it from providing services to its customers (3c Communications, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 51, 1992).

In this case (see Autorità Garante della Concorrenza e del Mercato, Bulletin, 22, 2003), Aviapartner complained that Guglielmo Marconi Airport of Bologna Spa (SAB, the exclusive licensee of the Bologna airport and its main handling operator) took advantage of its dominant position in the markets of airport infrastructure management and in that of supply of ground handling services, causing an unjustified delay in allowing entry of Aviapartner and, after the entry took place, hindering its activity (strategic obstructive conduct). In particular, SAB did not allow Aviapartner to use several infrastructures essential for the handling service provision. Successively, Aviapartner tried to delay SAB entry in the market by means of procedural obstacles. The last attempt to monopolize the market consisted in the exercise of a remarkable pressure on SAB customers (airline companies) not to sign or to cancel ground handling services contracts entered into with Aviapartner (see Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 245).

See Denunce Infocamer e v. Cerved, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 45, 1997, regarding an abuse of a dominant position on the market for services providing on-line access to the data banks owned by the Chambers of Commerce (see Amendola-Parcu, cited in n. 20 at p. 184).

Such case (in Autorità Garante della Concorrenza e del Mercato, Bulletin, 18, 1996 reported also by Amendola-Parcu, cited in n. 20 at p. 91) is an example of the fact that in Italy vertical agreements have sometimes been addressed under abuse of dominance provisions; in connection to that it can also be recalled the case Ducati v. Sip (in Autorità Garante della Concorrenza e del Mercato, Bulletin, 6, 1993), where Sip was a firm in an dominant position on the market for the commercialization of mobile telephones. Sip decided to put in the franchising contracts entered into with affiliated retailers a number of anti-competitive clauses which aimed to oblige the affiliated retailers to take their supplies exclusively from Sip and to retail exclusively cellular telephones bearing the well known Sip brand-name, with the obligation to charge the prices and allow the discounts fixed by Sip. These practices were condemned as “abuses” of dominant position, because they were designed to prevent other distributors from gaining access to the retail channels for cellular telephones, putting them at an unjustified competitive disadvantage (leveraging). Conversely, in the GSM Dealers case, regarding the cellular telephone market, the Authority decided that Telecom Italian Mobile (TIM) had abused of its dominant position in the market for GSM distribution. In particular, the Authority deemed anti-competitive the contractual agreements entered into by TIM with its dealers, envisaging exclusive rights and other loyalty clauses in favor of TIM. The Authority condemned TIM since it deemed these agreements likely to prevent access by TIM’s competitors to the distribution channels (see Amendola-Parcu, cited in n. 20 at p. 91 et seq.).
potential competitors (for example, in the case Posta elettronica ibrida\(^{(60)}\)); (ii) to offer discriminatory contractual conditions to undertakings operating in downstream markets, so as to favour its subsidiaries (for example, in the cases Cesare Fremura – Assologistica/Ferrovie dello Stato\(^{(61)}\) and Posta elettronica ibrida\(^{(62)}\)); (iii) to implement a vertical price squeeze (for example in the case Albacom-Tiscali v. Telecom Italia\(^{(63)}\)); (iv) to limit production, markets or technical development (for example, in the case ENI – Trans Tunisianian Pipeline\(^{(64)}\)).

3.4 The Authority activity against companies’ anticompetitive conduct fostered by restrictive rules, regulations and general administrative provisions

The Italian economic environment is characterized by a number of rules, regulations and general administrative provisions whose direct effect consists in placing quantitative restrictions on the exercise of an activity or access to markets or in imposing general

\(^{59}\) The Authority found that Enel Spa impeded competitors’ supply in the electricity market by imposing on its customers lock-in contractual clauses (Unapace v. Enel, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 13-14, 1999). In particular two contractual clauses were evaluated as inducing a market pre-emption: the time length of electricity provision and the so-called ‘English clause’. Enel extended the contractual length of exclusive contracts in order to impede to a specific category of large customers (‘idonei’) to choose freely their electricity suppliers. Furthermore, according to the ‘English clause’, Enel had the right to make a competitive offer to its customers, who were obliged to accept in the case of a proposal advanced by a competitor. Following the remarks made by the Authority, Enel agreed to modify the contractual clauses in order to remove the anti-competitive effect induced against competitors. On this topic see Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 159.

\(^{60}\) The Authority held that through such exclusive agreements Poste Italiane prevented its actual and potential competitors from directly penetrating the Italian market for the delivery of hybrid electronic mail (see Decision n. 15310, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 13, 2006 and Salonico-Zampa, cited in n. 34 at p. 103).

\(^{61}\) The Authority held that the rebate schemes offered by Ferrovie dello Stato (the Italian railways holding company: a vertically integrated company) to its controlled companies - and not to other competitors - active on downstream markets were not related to efficiencies and therefore not justified by objective business reasons; consequently, the application of discounts to its subsidiaries higher than those applied to their competitors had to be considered an abusive discrimination (see Autorità Garante della Concorrenza e del Mercato, Bulletin, 8, 2000). In general, on the main antitrust issues concerning the railways sector, see Macchiati-Cesarini-Mallus-Massimiano, Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive (Mercato Concorrenza Regole, 1, April 2007).


\(^{63}\) The Authority ascertained that Telecom Italia, the Italian vertically integrated telecommunication incumbent, controlling an essential wholesale input to the retail service, had abused its dominant position by reducing its downstreams prices, while maintaining high interconnection tariffs (in excess of its costs) for its retail competitors (see decision n. 8481, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 28, 2000 and M. Polo, Price Squeeze: lezioni dal caso Telecom Italia (Mercato, Concorrenza, Regole, n. 2, 2005).

\(^{64}\) The Authority (see decision No. 15174, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 5, 2006), in application of article 82 of the Treaty, held that ENI, by discontinuing work on upgrades to the trans-Tunisianian pipeline - which makes available gas from Tunisia to Italy and is destined to be used by third parties - had abused of its dominant position in the market for the wholesale supply of natural gas (on this case of “exclusionary abuse”, see Siragusa-Faella, The Implementation of Competition Rules in the Two Years since Modernization, paper presented at the VII Conference on “Antitrust between EC Law and National Law”, held in Treviso, 2006).
pricing practices or conditions of sale\textsuperscript{65}. By and large, antitrust laws of Member States are only concerned with companies’ behavior: they have no significant powers over regulations that favor companies’ anti-competitive conduct. According to the European Commission’s practice, the Authority has tried to address such restrictive regulations using its powers to apply articles 81, paragraph 1, and 82 of the Treaty\textsuperscript{66}; the key element in this perspective is represented by the extent of the discretionary power granted to the undertakings. In the Consorzio Industrie Fiammiferi (CIF) case, the European Commission stated very clearly that if there may be proved that the undertakings behaviors entail some form of autonomy (even though very narrow), the competition law applies and the anti-competitive conduct must be ascribed to them\textsuperscript{67}.

As far as Italy is concerned, the above mentioned rules and regulations stem out of a number of different sources. To begin with, in Italy a number of consortia and associations of undertakings are granted the power to issue private regulations\textsuperscript{68}. Such private regulatory activities have often undergone the scrutiny of the Authority which deemed a number of them anti-competitive.

As for consortia, an analysis of the investigations conducted by the Authority, shows that their activities sometimes resulted in anti-competitive practices such as market-sharing, price/tariff-fixing and output-sharing\textsuperscript{69}. Among the others, it is worth remembering the Assirevi\textsuperscript{70} case and the cases related to agricultural consortia\textsuperscript{71}.

\textsuperscript{65} On this point see G. Bruzzone, Le restrizioni normative e amministrative alla concorrenza nei servizi privati: una prospettiva orizzontale (Progetto Concorrenza di Confindustria, coordinated by Cipolletta-Micossi-Nardozzi 2005, available at www.confindustria.it), at p. 10 et seq. According to the analysis of P.A. London, cited in n. 1 (see, in particular, Chapter 4, “The Demise of Government Supported Oligopolies”) in the 1970s a variety of U.S. industries too were characterized by government-sanctioned restrictions on competition (that, in general, went back to the Great Depression period). In the 1990s the approach of politics changed and the once highly regulated industries were – as a result of a bipartisan political effort – opened up to competition and became one of the key drivers of the American economic growth and prosperity.


\textsuperscript{67} ECJ, C-198/01. In this respect, see Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 142 et seq., Fattori-Todino, cited above at n. 34, p. 195 et seq. and G. Faella, Incompatibilità tra normativa interna e disciplina antitrust comunitaria: gli incerti equilibri della Corte di Giustizia nel caso Cif (2004, available at www.law-economics.net) with further references.

\textsuperscript{69} See, for example, the case Farmindustria - Self-regulatory code of conduct (in Autorità Garante della Concorrenza e del Mercato, Bullettin, 49, 1999). In this respect, see below section 5, Fattori-Todino, cited above at n. 34, p. 67 et seq. and G. Amato, cited in n. 4 at p. 40, who notes that in Italy “State protectionism, publicly owned firms, exclusive rights for public, and private, firms and consortia among private firms were common ingredients in the guidance of the economy” and that “the cartel was one of the positive manifestations of private associationism and of the freedom of trade: all the more positive if the cartel was operating with an eye to definitive objectives of public interest and approved by public organs”.

\textsuperscript{70} The Authority claimed that the national auditors association, i.e. “Associazione Nazionale Revisori Contabili” and the major “six” auditing companies had violated article 2 of the Law (Assirevi, in Autorità Garante della Concorrenza e del Mercato, Bullettin, 4, 2000). In particular, the auditing companies were
With regard to associations of undertakings, it may be noted that the Authority has devoted a lot of time and energy in investigating those associations operating in markets subjected to administrative regulations and provided with self-regulation powers. In particular, a great number of investigations concerned agreements restricting competition carried out by professional service associations. That attitude again shows the particular

accused to coordinate tariffs and hourly rates, not to compete for clients’ already served by other companies, to coordinate their participation in tendering procedures. The auditing companies motivated their coordination as aiming at guaranteeing high quality services. Conversely, the Authority argued that pricing coordination and no compete clauses were completely irrelevant as quality improving devices and could only be considered as collusive.

In Italy, a number of consortia regulations impose production quotas (mainly on the basis of “historical” market shares) for agricultural products protected by denominations of origin and by geographical indications. These “voluntary” consortia are instruments established by the Law for the purpose of enhancing and promoting the quality of agricultural products. However the Authority decided all the same to apply the Competition Act to them (see below section 6) since it considered that the system for protecting the denomination of origin and geographical indication, although approved by the Law, derived from private parties decisions; in particular, the Authority reckoned that the members of the consortia had freely and independently entered into contractual agreements. Accordingly, in 1996 two decisions have been taken regarding provisions of consortia in the production of Parmesan cheese and Grana Padano cheese, whereas in 1998 the Authority completed an investigation into the consortium for the protection of Gorgonzola cheese. In 1999 the Authority rejected the application by the Parma and San Daniele ham consortia for an extension of the authorization of production agreements they had been granted until 31 December 1998 under Article 4 of Law no. 287/1990. In particular, the Consorzia for the production of Parmesan and Grana Padano cheese (in Autorità Garante della Concorrenza e del Mercato, Bulletin, 43, 1996) plans and regulations fixed the maximum quantity of production for the reference year and the annual production share each cheesemaker had not to exceed. In addition, the voluntary consortia among producers of San Daniele and Parma ham supervised and controlled the quality of their respective products (see Agreements in the 'protected denomination of origin' ham industry, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 25, 1996) by adopting a production schedule 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 there were agreements that restricted competition under article 2 of the Act. The fact that the law instituting the system for protecting denominations of origin empowered the consortia to draw up production schedules and that the schedules were later approved by the relevant Ministries were evaluated as non-relevant facts for excluding the restrictive behavior from the application of the antitrust law. In fact the ministerial approval was appraised as a mere subsequent control of the schedules, in no way altering their nature of contractual agreements concluded freely and independently by the members of the consortia themselves (see also the cases Agreements in the 'protected denomination of origin' Parmesan cheese industry, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 43, 1996 and Consortium for the production of Gorgonzola Cheese, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 46, 1998).

Among them, the following cases are worth being recalled: (a) Fixing fees for apartment building management services (1994); (b) Driving Schools (1996); (c) Consigli nazionali dei ragionieri e periti commerciali e dei dottori commercialisti (1998); (d) Code of conduct of the Italian Federation of Professional Real Estate Agents (2004). In the case Fixing fees for apartment building management services (in Autorità Garante della Concorrenza e del Mercato, Bulletin, 1994) the Authority addressed the issue of agreements restricting competition for the provision of the professional services supplied by managers of apartment buildings, since a number of professional associations of managers of apartment buildings had laid down tables with fees for the provision of different services. Such recommendations, which were issued before any statutory approval by the Ministry had been given, was deemed to be likely to direct and coordinate the conduct of the members in the matter of fixing the prices of the service, and was therefore considered to be a restrictive agreement. In its decision the Authority stressed that the fixing of minimum prices was a restriction on competition and could not be justified on the grounds that it was necessary to guarantee an adequate quality of service. It was considered implausible to think that a firm which was not subject to price competition, and was therefore able to charge the guaranteed minimum remuneration, would in some way be encouraged to improve the quality of the service provided or at least guarantee an acceptable level of the service. In addition, in 1996, the Authority completed an investigation into a number of driving school organizations (Autoscuole, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 12, 1996).
attention the Authority devoted to anti-competitive practices fostered by restrictive administrative regulations\textsuperscript{75}.

More generally, as for agreements, it may be added that in Italy the Competition Act\textsuperscript{74} has been applied mainly with reference to concerted practices\textsuperscript{23}, cartels and other agreements among competitors\textsuperscript{26} (horizontal agreements), rather than to vertical agreements among competitors.

According to the Authority’s investigation, such organizations had not only invited the driving school members to align their prices to the level indicated, but they had also urged them to try to keep down the number of candidates taking the test privately without attending lessons given by the schools. Besides the agreements relating to the services provided to private candidates, it emerged that in some areas the organizations investigated had also introduced provincial price lists for the various services offered by driving schools to their trainees. Moreover, in 1998, the Authority completed an investigation aimed at verifying possible violations of the prohibition on agreements restricting competition by the Consiglio Nazionale dei Dottori Commercialisti (CNDC) and the Consiglio Nazionale dei Ragionieri e Periti Commerciali (CNRPC) (in Autorità Garante della Concorrenza e del Mercato, \textit{Bullettin}, 48, 1998). The investigation primarily concerned: a) the active role played by the two bodies in determining professional fees, which went well beyond the advisory function attributed to them under current law; b) the invitation by the CNRPC to its members to apply the fee schedule it had approved before it was authorized by the Ministry of Justice; and c) the joint determination of fees by the two bodies in order to align the pricing policies of the two professions. The Authority concluded that the resolutions adopted by the two bodies regarding the reformulation of the schedules for the various professional services, the invitation by the CNRPC to its members to apply fees in the absence of ministerial approval and the coordination practiced by the two bodies to harmonize the fees applied by the two professions violated the prohibition on anti-competitive agreements. Finally, in 2004, the Authority imposed a fine on the three main trade associations for businesses operating in the market for residential real estate services (\textit{Guardia di Finanza/Federazione Italiana Agenti Immobiliari Professionali}, in Autorità Garante della Concorrenza e del Mercato, \textit{Bullettin}, 13, 2004) for adopting practices to horizontally fix practices. In particular, the codes of conduct of FIAIP, FIMAA and ANAMA contained \textit{inter alia} a specification of minimum commissions charged when providing real estate intermediation services, a non-competition clause among associates and a ban on advertising free real estate intermediation services.


\textsuperscript{74} See Autorità Garante della Concorrenza e del Mercato, \textit{Annual Report on 2002 activities}, cit., p. 5-6, Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 174 \textit{et seq}, Fattori-Todino, cited in n. 31, at p. 41 and Amendola-Parcu, cited in n. 20 at p. 73 \textit{et seq}.

\textsuperscript{73} In respect to this, the cases \textit{Byk-Gulden Italia-Istituto Gentili} (Autorità Garante della Concorrenza e del Mercato, \textit{Bullettin}, 8, 1999 and Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 126 \textit{et seq}) and \textit{Istituto Gentili-Merck Sharp & Dohme-Neopharma-Sigma Tau Industrie Farmaceutiche Rianite-Mediliumum Farmaceutici} (Autorità Garante della Concorrenza e del Mercato, \textit{Bullettin}, 8, 1999 and Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 126 \textit{et seq}) may be recalled.


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agreements. With reference to cartels, the Authority has ordinarily deemed illegal per se agreements between undertakings even only potentially reducing competition substantially within the national market or in a substantial part of it.

It may also be observed that, in the treatment of vertical restraints the Authority was able to make greater use of economic analysis than the Commission. In particular, while in Europe (at least until Commission Regulation (EC) No 2790/1999) the assessment of vertical restraints in general focused mainly on formal analysis of contractual clauses, in Italy, since its first decisions, the Authority applied the rule of reason, mainly assessing the economic impact of vertical restraints on the relevant market, in terms of the market power of the undertakings concerned. Accordingly, the exemption possibilities of article 4 of the Competition Act have been very seldom adopted, since most of the economic analysis has been performed at the stage of article 2 of the Act (which, as already mentioned, is equivalent to article 81, paragraph 1, of the Treaty).


79 In connection to this G. Amato, cited in n. 4 at p. 115 notes that in Europe agreements have often been defined as restrictive “from the legal and contractual viewpoint alone, with no economic analysis of their actual competitive restrictiveness”. Such approach is now changing as witnessed inter alia by Commission Regulation (EC) No 2790/1999 of 22 December 1999 on “the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices” (in OJ L, 366, 29 December 1999, p. 21) and by the “Guidelines on the applicability of Article 81 to horizontal co-operation agreements” (in OJ C, 3, 6 January 2001, p. 2). As known, EC Regulation no. 2790/99 establishes the new block exemption regulation concerning vertical agreements, while the mentioned guidelines cover agreements on R&D (those not covered by the new block exemptions regulations entered into force on 1 January 2001 and concerning horizontal cooperation: (i) Regulation 2658/2000 on specialization agreements, and (ii) Regulation 2659/2000 on research and development agreements which replace Regulations 417/85 and 418/85, respectively), production, marketing (e.g. joint commercialization), purchasing (e.g. joint purchasing), as well as standardization and environmental agreements. As noted in the EC press release which announced the new rules (IP/00/1376 of 29 November 2000), the guidelines “embody a shift from the formalistic regulatory approach underlying the current legislation towards a more economic approach in the assessment of horizontal co-operation agreements. The basic aim of this new approach is to allow competitor collaboration where it contributes to economic welfare without creating a risk for competition”. On that “paradigm shift” see also R. Whish, cited in n. 5, at p. 583 et seq., Bruzzone-Todino, Modernization from a NCA perspective, Interpretation of Substantive Rules and Impact of the Reform on Decentralised Application of EC Competition Law, paper presented at the IBC Conference in Rome, 30-31 March 2000, Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 162 et seq., and R. Pardolesi, cited in n. 28, at p. 8.

80 For example, in the already mentioned case Sagit (cited above in note n. 77) the Authority, pursuant to the economic approach laid down in articles 2 and 3 of Regulation no. 2790/99 (see above note n. 78) established that because the market share of the undertakings concerned was above the 30 per cent threshold, it was necessary to assess whether the vertical agreement at issue was illegal under article 2 of the Competition Act (R. Caiazzo, cited in n. 24 at p. 83).

81 M. Libertini, cited in n. 74 at p. 83 criticizes such too “moderate” use of the exemption powers. On this topic see Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 144 et seq., Fattori-Todino, cited in n. 31 at p. 80 et seq. and Amendola-Parcu, cited in n. 20 at. p. 80 et seq. who recall the case Consorzio Capri (in Autorità Garante della Concorrenza e del Mercato, Bulletin, 40-41, 2003) as an example of Authority refusal to grant an exemption according to article 4 of the Competition Act.
4 THE OBJECTIVES OF COMPETITION ADVOCACY IN ITALY: THE AUTHORITY’S ROLE IN ADMINISTRATIVE OR LEGISLATIVE PROCESSES

According to law no. 287 of 1990, besides the responsibility for controlling (a) agreements that impede competition, (b) abuses of dominant position, (c) mergers and acquisitions which create or strengthen a dominant position with the effect of eliminating or restricting competition, the Authority is also required to exercise competition advocacy. In a nutshell, competition advocacy means to promote competition principles in policy-making and regulatory processes throughout the administration. It includes (i) urging pro-competitive restructuring of regulated firms or those about to be privatized; (ii) identifying and promoting elimination of economic regulations that reduce consumer welfare without offsetting benefits and (iii) suggesting reforms to enhance the efficiency of beneficial regulations.

In respect to this, the Authority has the power to notify Parliament, Government, Ministers or local authorities, cases of “particular relevance” in which the provisions of law or regulations or of general administrative provisions may create distortions to competition or to the sound operation of the market which are not justified by considerations of general interest (see article 21 and 22 of the Act). In particular, the Authority can issue opinions (i) on measures which would remove or prevent distortions stemming out from regulation; (ii) on legislation/regulations and on problems relating to competition and the market (whenever it deems this appropriate or whenever requested to do so by government departments and agencies concerned).

82 See R. Whish, cited in n. 5, at p. 23.
83 It has proved difficult to interpret this concept of “relevance”, because whenever there is a bill that restricts competition, someone will always be hurt. This has implied that the Authority has intervened quite frequently and on items characterized by very different degrees of importance for the economy as a whole (covering a very widespread range of economic activities).
84 “Article 21 (Powers to notify Parliament and the Government) reads as follows: (1) […] the Authority shall identify cases of particular relevance in which the provisions of law or regulations or general administrative provisions are creating distortions to competition or to the sound operation of the market which are not justified by the requirements of general interest. (2) The Authority shall notify Parliament and the Prime Minister of any distortions arising as a result of legislative measures, and the Prime Minister, other relevant ministers, and the relevant local authorities of distortions arising in any other cases. (3) At its discretion, the Authority shall issue an opinion on any measures needed to remove or prevent distortions, and it may also publish the cases notified and the opinions as appropriate according to the nature and the importance of the distortions. Article 22 (Consultation activities) reads as follows: (1) The Authority may express opinions on legislation or regulations and on problems relating to competition and the market whenever it deems this appropriate or whenever requested to do so by the government departments and agencies concerned. […]”.
85 The Prime Minister may also request the opinion of the Authority in relation to legislation or regulations whose direct effect is to place quantitative restrictions on the exercise of an activity or access to markets, to lay down exclusive rights in certain business areas or to impose general pricing practices or conditions of sale (article 22 of the Competition Law). In general, in Italy, most of advocacy interventions has taken the form of short reports tackling specific aspects of laws and regulations. However, larger studies (general fact-finding reports), providing overall analyses of economic sectors from the standpoint of competition policy, have also been common. These general reports mainly aimed at identifying restrictions stemming from private behavior and public regulations. The Authority’s intervention may follow or anticipate the enactment of the provisions and can be in writing, such as advocacy reports and general fact-finding reports, or oral, such as in parliamentary hearings. As to law proposal, the Authority has generally followed the policy to intervene, using the advisory power conferred to it by the Competition Act, when it has become aware of the possible enactment of new provisions in contrast with competition principles.
In competition advocacy the Authority is certainly freer to pursue pre-established strategies and objectives as opposed to those of general competition enforcement. The analysis of competition advocacy work shows that the intervention of the Authority has been more successful when it has played the role of “spokesman” of the European Commission. By and large, the Authority has so far used its powers especially in cases where legislation, regulation or proposal of law unduly restricted competition. In particular, the Authority has deemed very important to urge the reform of those regulations whereby (i) access to a market was subject to quantitative restrictions; (ii) exclusive rights over certain areas were granted; in this case the Authority has, in particular, advocated for “the effective, timely and adequate implementation of E.U. liberalization and harmonization Directives”, identifying “the adequate criteria in order to adapt the principles set out in the mentioned Directives to the Italian markets”, or (iii) general price-fixing practices were imposed.

Moreover, as specifically required by the Competition Act, the Authority submitted three major reports to the Prime Minister regarding actions to be taken in order to bring Italian legislation on public tenders, commercial distribution and public utility

86 See F. Silva, cited in n. 31 at p. 45 with further references, Centro Studi di Confindustria, cited in n. 1, at p. 54 et seq and Fattori-Todino, cited in n. 31 at p. 444.
87 See AS226 Riforma della regolazione e promozione della concorrenza, in Autorità Garante della Concorrenza e del Mercato, Bullettin, 1-2/2002
88 An example of the first type is a report on travel agencies, where the Authority objected to regulations aimed at restraining, without any justification, the total number of operating travel agencies in the region. (Agenzie di viaggio e turismo, in Autorità Garante della Concorrenza e del Mercato, Bullettin, 25, 1995).
89 Most of the advocacy work has been done in markets characterized by liberalization reforms such as (i) postal services; (ii) telecommunications; (iii) electricity industry (in this industry, starting from 1995, the Authority has repeatedly advocated horizontal and vertical separation for Enel, with the objective of promoting a competitive electricity markets: in respect to this it may be worth recalling that, in February, 2005 the Authority and the Electricity and Gas Authority issued a general fact-finding investigation into the degree of liberalization of the electricity sector underlining that the measures taken in order to make the electricity market more competitive - mainly the sale of generation companies - were insufficient to this end; see Autorità Garante della Concorrenza e del Mercato, Bullettin, 6, 2005); (iv) gas industry and (v) transport industry. On top of this, the Authority has devoted a great amount of time and energy to public utilities and the markets of professional services (see inter alia Riordino delle professioni intellettuali, in Autorità Garante della Concorrenza e del Mercato, Bullettin, 4, 1999).
90 Antitrust enforcement activity by the Authority in these sectors has often complemented advocacy reports. See A. Pera, cited in n. 42 at p. 333 and 341 who notes for example that, as far as the telecommunication markets are concerned, the Authority urged the Italian Parliament to implement Community Directive 90/388 concerned with telecommunication services and, at the same time, started a number of investigations into incumbent behavior in such markets. See also G. Rossi, cited in n. 25 at p. 175 who notes that the Authority has often played, in connection with a specific sector (for example, electricity or gas) and at the same time, a double role: enforcement and advocacy.
91 See G. Bernini, cited in n. 38 at p. 582. As regards the markets not yet opened up to competition, the Authority has often “stressed the need to introduce all possible measures to increase competitiveness in the mechanisms of selection of the enterprises in charge of a service of general interest (public tenders, yardstick competition, contracting out and other mechanisms of competition “for” the market)” (G. Bernini, cited in n. 38 at p. 582). With respect to this, see, for example, a report issued by the Authority, in 2003, on tenders for regional rail services (Reperimento del materiale rotabile ferroviario necessario per l’espletamento delle gare per l’aggiudicazione dei servizi ferroviari di competenza regionale, in Autorità Garante della Concorrenza e del Mercato, Bullettin, 26, 2003).
92 This situation reflects the extensive use of licensing in the Italian economy, which creates administrative barriers to entry and price distortions.
services\(^5\) into line with the principles of competition. These three reports have been extremely influential in affecting new legislation.

5 THE AUTHORITY’S INTERVENTION: LESSONS FROM ECONOMICS

A careful reading of the Authority’s intervention suggests that there are several elements that are worthy of an economic deepening. In particular, an analysis from an economist’s eye of the lines of reasoning followed by the Authority leads to the identification of the following theoretical issues: (i) the relationship between the application of the essential facilities doctrine and the incentive to invest in network development; (ii) the critical balance between the anti-competitive effects and the economic efficiencies stemming from the activity of a consortium or an association of undertakings; (iii) the negative effects of a (potentially) biased approach towards the “public hand” (above all in the network industries); (iv) the impact of the activity carried out by the Authority to foster the creation of competitive conditions by means of the support of the ownership separation between network and operations in the legal monopolized industries.

Of course, in view of the extent of the above indicated topics, this paragraph cannot deeply analyze them but, rather, intends to provide an overview of the most critical elements that must be considered under an economic profile in order to avoid the adoption of decisions having a negative impact in terms of overall welfare and efficiency. We will try to achieve this purpose by highlighting the potential undesired effects a too strict application of the rules aimed at protecting competition may have. In any case, the remarks and the considerations that follow intentionally do not refer to specific antitrust cases.

As far as the approach towards essential facilities is concerned, it is well known that the situation of the facility owner is quite delicate because it has the possibility to apply a selective refusal to deal with its (actual and potential) competitors. Traditionally, the competition Authorities have required the dominant firm to deal with competitors and, consequently, to allow them to exploit the facility\(^6\). However, any decision with regard to the conditions of access may have important consequences in terms of efficiency. If the extent of the essential facility concept is expanded too much and the duty to supply is applied almost automatically, the consumers would benefit from the situation only in a short-term perspective, while, in the long-run, this strict application of the duty to deal could imply a decrease of the incentive to invest in terms of infrastructure development. In economic jargon, it could be stated that the ex ante profitability of these investments is reduced by the over-application of the essential facility doctrine. In other words, the static (allocative) advantage under the consumer welfare point of view may be outweighed by the dynamic disadvantage due to the disincentive to invest. Quoting a careful observer: “any competition policy action that focuses exclusively on the immediate short-term

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\(^{94}\) Regolamentazione della distribuzione commerciale e concorrenza (in Autorità Garante della Concorrenza e del Mercato, Bulletin, 1, 1993).


\(^{96}\) On the point, see Durante-Moglia-Nicita, La Nozione di Essential Facility tra Regolamentazione e Antitrust. La Costruzione di un Test (Mercato, Concorrenza e Regole, n. 2, 2001).
impact on consumers, whether in essential facility or other circumstances, stands to do considerable economic damage. Therefore, if the perception of the risk deriving from the obligation to supply the competitors is such that firms are discouraged to invest, an efficiency-oriented approach to competition protection should urge a selective application of this kind of remedy. In addition, a selective application of the essential facility doctrine seems appropriate because of the possibility of a domino-effect in other industries: undertakings operating in other sectors could, in fact, be discouraged to invest if they perceive that the Authority applies too widely this doctrine.

A further area requiring a deep analysis in economic terms, is the approach towards consortia and associations of undertakings: if it is well acknowledged that these organizations have been one of the most favorite tools adopted by the undertakings in order to coordinate their behavior, the balance between the negative effects of the coordination in terms of welfare and the efficiencies achievable with the cooperation must be considered very carefully.

Even if the detailed analysis of the savings obtainable coordinating the behaviors goes beyond the purpose of this paper, it is useful to remember that there exists several sound economic reasons justifying this kind of strategy. In the first place, the cooperation may be aimed at achieving economies of scale and, more generally, savings deriving by size and dimension (economies of massed reserve). The typical case in the consortia is represented by the efficiencies in the purchase of raw materials and semi-finished products. Another area where cooperative strategies may result in beneficial effects in terms of resources rationalization is represented by the economies of scope, according to which the possibility to install complementary activities implies the achievement of important savings. Finally, coordination may deliver improvements in terms of quality enhancing and foster innovative activities (e.g.: research and development) by means of the risk sharing deriving from the agreement.

Cooperative strategies seem important particularly in the Italian industrial system which is characterized by the so-called entrepreneurial dwarfism: the average dimension of the Italian undertakings is, as a matter of fact, quite low and, for this reason, their contractual power and the possibility to obtain savings by large scale production are very limited. Moreover, analyzing the issue under the competitiveness profile, there is the serious risk Italian undertakings face unbearable levels of pressure by foreign investors characterized by larger dimensions. In other words, the critical trade-off between the strictness in application of the competition rules by the Authority to the consortia and associations of undertakings and the possible effects in terms of lower efficiency due to the dismantling of the cooperative agreements must be evaluated very carefully; this reasoning is worthy of attention because a too rigid application of the competition laws may produce undesired effects under the point of view of the overall system competitiveness.

The attention paid towards industries where public undertakings operate has been certainly one of the pivotal trademarks of the Italian Authority’s lines of intervention. In this respect, it is worthwhile to remember that the European system of law is founded on

the neutrality principle. Article 295 of the Treaty establishing the European Community states very clearly: “this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership”.

The appropriateness of this principle has been confirmed by several theoretical contributions, among which it must be remembered the seminal one by Shapiro and Willig where they showed the equivalence between public and private ownership. Theoretically, this approach seems consistent with a pragmatic attitude which does not attribute negative connotations to the persistence of the public hand in the economy. As underlined by Jackson “theory is not unambiguous about the size of the potential efficiency improvements (of privatization) – if they exist at all”. The greater efficiency of the private in comparison with the public hand is a result that may not be taken for granted and is strictly dependent on the different scenario conditions. Under a theoretical point of view, it may be remembered that empirical studies aimed at the measurement of the efficiency gain deriving from the privatization processes have not led to univocal and unambiguous results.

Another theoretical issue (from an economic point of view) that stems from the Authority’s activity is that of the ownership vertical separation in the public utilities. The issue is quite complex since its beneficial effects are far from being self-evident: as known, the rationale of the intervention aimed at separating the up-stream from the down-stream “segment” is to isolate those productive stages characterized by an absence – rectius: scarce relevance – of sunk costs. The separation seems particularly useful in one-way networks “à la Armstrong”. Such definition derives from the fact that the vertical integrated firm holds monopolistic power over an infrastructure that is indispensable for the provision of the services by down-stream competitors. In these types of networks, a conflict of interest with regard to the vertical integrated operator may be observed because it plays the twofold role of network manager and service provider. The economic problem linked to the separation issue derives from the presence of networks; consequently, public utilities sectors are capital intensive industries where the incentive to invest in the asset development, technological improvement and maintenance is a crucial aspect; in this sense, it is possible that a disintegrated structure provides for inadequate incentives to carry out these activities. The network manager could be discouraged to invest resources since the improvements would be exploited by down-stream (free-rider) firms too, which, in one-way networks, compete against it. On the contrary, the integration facilitates a long-term investment strategy.

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since it reduces the degree of uncertainty and allows the investor to benefit from the economic results deriving from its efforts\textsuperscript{104}.

Adopting the terminology coined by Williamson\textsuperscript{105}, the investment in network development is characterized by high level of asset specificity and uncertainty; moreover, the time horizon for the economic returns is quite long and the very nature of networks may imply (according to the different types) the presence of scope, size, density and coordination economies. The compound of all these elements has been evaluated by the economists as the theoretical justification of adopting vertical integrated structures in the network industries. Therefore, in line of principle, any intervention of ownership separation should not be the result of a mechanistic approach towards the network sectors. In fact, in such sectors there is a serious risk that the defence of the competitive process in itself may produce undesired effects in terms of capillarity of the network: in the long term, this may lead to potential damage under the general interest profile.

This synthetic survey of the main economic issues that emerge from the Italian Competition Authority’s activity suggests the necessity for the Authority itself to make any possible effort to analyze carefully all the implications of its decisions not only under a competitive profile but also with regard to the effects on the system efficiency as a whole. In brief, a genuine rule of reason approach rather than a strict protection of the competition as a value in itself seems most appropriate to catch all the shadings of the complex economic issues considered.

6 POSSIBLE CONSTRAINTS ON THE AUTHORITY’S ABILITY TO PURSUE AUTONOMOUSLY AND EFFECTIVELY SPECIFIC OBJECTIVES OR STREAMS OF ACTIVITY

Let us move on to deal with the issue of the possibility for the Authority to pursue autonomously and effectively specific objectives or streams of activity. One point should be noted immediately: the capacity to pursue specific objectives, to carry out pre-definite strategies or to follow a particular perspective are partly determined by the extent of general exemptions or special treatment for types of enterprises or actions, which are often subject to other regulatory controls\textsuperscript{106}. In fact, the competition authorities’ operations may be constrained by “limitations” and “exclusions”. “Limitations” may be applied either to substantive coverage or Authority jurisdiction and may be defined in terms of particular business sectors (for example, banking), types of relationship or conduct, or types of legal person (for instance, public undertakings). “Exclusions” represent decisions by legislature or government to remove the subject from the general competition law or the competition Authority’s jurisdiction. Where there is exclusion, there may be another law or enforcement institution concerned with competition for that sector, relationship, or person. In other terms, when providing

\textsuperscript{104} On this point see G.B. Nuzzi, Concorrenza e servizi pubblici locali: principi comunitari e spunti problematici nella prospettiva della riforma del capo VII della legge 8 giugno 1990, n. 142 (Dir. Comm. Internaz., n. 3, 2000) with further references.


\textsuperscript{106} On the “state action” exemption in U.S., see H. Hovenkamp cited in n. 8 at p. 724 \textit{et seq}. 
for exclusion, the law searches to exclude some activities or sectors from the application of competition law.

Clearly, the capacity of the Authority of pursuing autonomously and effectively specific objectives or streams of activity is affected by the existence of other sectoral regulatory bodies or other organizations in the government that share responsibility for developing and applying competition policy. Sectors commonly subject to one or the other include electricity, gas, and water utilities, transport (rail, truck, bus, air, ship and barge), communications, broadcast, agriculture, professions, services, banking, and insurance.

In general, the Italian legislator has decided to apply the competition law to all enterprises and in any sector or industry (article 8, paragraph 1, of the Competition Act). In particular, the provisions of the Competition Act apply to both private and public undertakings and to those in which the State is the major shareholder. However, the competition rules do not apply to undertakings that are entrusted by law with the operation of services of general economic interest or operate on the market in a monopoly situation (public utility services)\(^{107}\). The exclusion applies only in so far as it is indispensable to perform the specific tasks assigned to these undertakings (article 8, paragraph 2, of the Act, which reflects article 86, paragraph 2, of the E.U. Treaty)\(^{108}\). Therefore, the provision refers only to those activities indispensable for achieving the goals entrusted by law to these enterprises. Accordingly, Competition Law has also been enforced against public utilities with respect to the activities they carried out in liberalized markets\(^{109}\). Finally, the mechanism set forth by article 8 of the Competition Act, by envisaging the power to assess the behavior of public undertakings operating on the market in a monopolistic situation, has also granted the Authority the power to assess the reasonableness of the restrictions provided for by the law\(^{110}\).

With regard to limitations, it must be noted that in Italy block exemptions are not provided for by the Law and that the Competition Act has full validity for all economic sectors: the regulatory Authorities presiding over specific economic sectors (gas, electricity, telecommunications and broadcasting) have not been given the task of enforcing the competition law. As a consequence, even with reference to regulated sectors, the Authority maintains its general jurisdiction over issues involving restrictions of competition, abuses of dominant positions and mergers in regulated sectors\(^{111}\).

As to the relationship with other regulatory bodies (apart from general informal consultation), specific forms of co-operation have been institutionalized by the provision of prior non-binding opinions, delivered by regulatory authorities to the Authority, and

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\(^{107}\) See Fattori-Todino, Fattori-Todino, cited in n. 31 at p. 202 et seq.


\(^{111}\) G. Bernini, cited in n. 38 at p. 583 and Fattori-Todino, cited in n. 31 at p. 316 et seq. Salonico-Zampa, cited in n. 34 at p. 101, observe that the power entrusted to the Communications Regulatory Authority to monitor, investigate and control dominance in the telecommunication sector as well as the regulatory powers of the independent regulatory agency for the energy sector (regarding the access to essential infrastructures) are not aimed at preventing the abuse of dominance but rather to ensure the correct functioning of the industries they regulate.
vice versa. In particular, the Authority is required to issue prior non-binding opinions to the Communications Regulatory Authority and to the competent public administrations, on the definition of public franchises and other means which regulate the exercise of public utility services. Moreover, the Energy and Communications Regulatory Authorities are required by law to notify the Authority of any alleged violation of the competition rules they may be aware of (article 2, paragraph 33, Law no. 481/95). On the other hand, the Authority is required to ask for a non-binding opinion on all antitrust proceedings to the Communications Regulatory Authority, when a proceeding regards the fields regulated by this body.

As far as the relationship with “financial” institutions is concerned, Law no. 262/05 has deeply reformed the system previously in force that afforded The Bank of Italy the power to apply antitrust laws with respect to banks. Now the principle has been introduced that also in the banking sector the antitrust rules are enforced by the Competition Authority. In addition, the law envisages that The Bank of Italy, The Stock Exchange Supervisory Authority (CONSOB), the Insurance Supervisory Authority (Istituto per la Vigilanza sulle Assicurazioni Private e di interesse collettivo, ISVAP), the Pension Funds Supervisory Commission (COVIP) and the Competition Authority have to “identify forms of coordination for the exercise of the powers vested in them, which may take the form of protocols of understanding or the institution of coordination committees, provided that this does not place an extra burden on public finances” (article 20 of Law no. 262/05). Moreover, according to article 21 of Law no. 262/05, the above-mentioned Authorities have to “work together, also by exchanging information, to facilitate the exercise of their respective functions” and “may not refuse to exchange information on the grounds of confidentiality”.

The Competition Authority has, therefore, full jurisdiction over all companies’ behavior that is not strictly mandated by another (restrictive) law or regulation. In any case, these legal restrictions have never led to a full exclusion from the application of the antitrust law. Of course, as already said, there are many laws and regulations (legal restrictions) that require companies to adopt restrictive behavior (that is to say to behave in ways that may be contrary to the antitrust provisions), such as in agriculture, professions and private services etc. However, there is no exception to the application of the antitrust law and, in fact, the Authority has intervened a number of times in those sectors applying the antitrust law. In particular, as mentioned above, the Authority has

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112 Law no. 481 of 1995, article 2, paragraph 34.
113 More specifically, the Competition Authority is required by law to ask a prior non binding advice to the communications regulatory authority on decisions concerning agreements, abuses of dominant position or mergers which involve undertakings operating in the communication industry (law no. 249/97, article 1, paragraph 6, letter c), point 11).
114 “Measures for the protection of investors and the regulation of financial markets”, as amended by sec. 2 of Legislative Decree no. 303/06.
115 It may be worth mentioning that on February 2nd, 2007, the Italian Government approved a draft bill (“Disposizioni in materia di regolazione e vigilanza sui mercati e di funzionamento delle Autorità indipendenti preposte ai medesimi”) - whose aim is to reform both the economic regulation and the independent regulators in Italy - that envisages the suppression of ISVAP, COVIP and UIC (The Italian Exchange Bureau).
116 The Authority, points out G. Bernini, cited in n. 38 at p. 579: “has been vigilant in enforcing the principle that the public administration as well as the agencies and the enterprises owned and/or controlled by the State are mandatorily requested not to apply domestic laws conflicting with the basic principles of European competition rules”. See also Fattori-Todino, cited in n. 31 at p. 202.
been very active in enforcing the competition law with respect to public entities such as public utilities or professional guilds, agricultural consortia etc.\textsuperscript{117}

In this framework, it is also worth noting that the competition agency’s place within the government structure – its degree of independence and relation to other agencies – can affect its ability to take effective and independent action in its enforcement and advocacy roles, as well as in its ability to pursue autonomously its objectives. With respect to this, it must be remembered that in Italy the Authority is an independent administrative commission. That is the choice made by the Legislator in 1990, after a lively debate in Parliament in which the position of people who wanted a “typical” administrative commission opposed that of those who wanted the creation of an independent administrative Authority.\textsuperscript{118}

In particular, the independence of the Authority has been ensured by a number of characteristics: (1) the Authority’s decision making is subject only to jurisdictional control of the administrative judiciary (the Administrative Court of Lazio [TAR Lazio], whose judgment may be challenged before the Supreme Administrative Court [(the "Council of State")]) on the grounds of legality (thus making a review of the merits of the case which are instrumental to the control of legality\textsuperscript{119}); that means that there is no political control; the Authority is only required to transmit its annual report to Government and to Parliament; (2) the Chairman and the Members of the Commission are appointed jointly by the Speakers of the Chamber of Deputies and the Senate and they may not be re-appointed after their seven-year term\textsuperscript{120}. The Chairman is chosen among people who are well known for their “political” independence, and who have already held high public office. The four Members are people who are well-known for their independent position, who are judges of the Supreme Administrative Court, the Court of Auditors, or the Supreme Court of Cassation, full professors or representatives of business who are of recognized professional standing; (3) the Authority, as already mentioned, should interpret the law according to the principles of the European Community competition law; (4) the Authority has full responsibility for its administration, however it receives its annual budget from the Government. The status of independent administrative commission has meant that the Authority has not been constrained by its institutional position in the choice of its objectives. The only exception seems to be that envisaged by article 25 of the Competition Act which allows the Government to provide the Authority with guidelines for approving mergers that otherwise would have been prohibited according to article 6 of the Act.

\textsuperscript{117} See above sections 3.3 and 3.4..
\textsuperscript{118} G. Bernini, cited in n. 38 at p. 585 rightly notes that “the independent status of an administrative commission is rather new in our tradition and does not easily fit into the Italian constitutional framework. Yet the effectiveness of the antitrust enforcement is strictly connected with the recognition and acceptance of the Authority’s independence from the executive and from the Parliament. Which in turn signifies the granting to the Authority a fair amount of freedom and discretion”.
\textsuperscript{119} G. Bernini, cited in n. 38 at p. 575.
\textsuperscript{120} The above mentioned (in note n. 114) Government draft bill (“Disposizioni in materia di regolazione e vigilanza sui mercati e di funzionamento delle Autorità indipendenti preposte ai medesimi”) envisages a deep reform of the appointment procedures for the members of regulatory Authorities in Italy.
In the next few years, the activities of the Authority are likely to be heavily influenced by the “modernization” process\footnote{On this topic see Prosperetti-Siragusa-Beretta-Merini, cited in n. 16 at p. 72 et seq., Fattori-Todino, cited in n. 31 at p. 323 et seq. with further references and R. Pardolesi, cited in n. 28, at p. 1.} laid down by (EC) Regulation no. 1/2003 of 16 December 2002 setting out new procedures for the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

The need for a "modernization" Regulation was linked to the difficulties encountered in the application of Regulation no. 17/1962, whose\footnote{See R. Pardolesi, cited in n. 28, at p. 32 and R. Whish, cited in n. 5, at p. 246 et seq...} main idea was a strict centralization, at European Commission level, of antitrust enforcement throughout Europe. The rationale for a centralized system – known as Commission monopoly – may be traced back to the understandable attempt to establish, since the first years of the Rome Treaty application, a clear set of competition law principles and to stimulate the achievement of full market integration.

As known, such an approach led to a dramatic rise of the Commission workload. That also because of structural factors such as the steady increase of the number of (i) Member States; (ii) languages to be considered; (iii) inhabitants and (iv) competition cases. Furthermore, companies often had recourse to Regulation no. 17/1962 in order to stop private suits brought before the national competition systems: in fact, as a general rule, a request to the Commission for an authorization according to article 81, paragraph 3, of the Treaty induced the national judge/Authority to suspend the suit.

Therefore, in order to cut its workload in attempting to improve the quality of its intervention, the Commission decided it was time to concentrate on new priorities, namely the hard core violations and the activities aimed at making the European market structure more competitive. In respect to this, it can be noted that the Commission decision to reorganize its competences allocating more powers regarding the enforcement and promotion of Treaty competition rules on Member States\footnote{Without entering into the very interesting debate on the allocation of powers between Commission and National Authorities, suffice it to say here that, according to the Tiebout’s theory (C. M. Tiebout, \textit{A Pure Theory of Local Expenditure} [Journal of Political Economy, n. 64, 1956], p. 416), a decentralized solution may fit better to the application of the rules.} can be mainly ascribed to the shortage of human and organizational resources of the Competition Directorate General.

This new approach, indeed more consistent with the subsidiarity principle, was fostered by the end of the “distrust period” that characterized the relationships between Member States and Commission. For a long time, in fact, the latter considered the former ones unable to apply effectively the European competition rules, if not liable for their infringements by national undertakings. The end of such “distrust” period was, in turn, possible since, as of the first years of the last decade, the European Commission and National Competition Authorities met more frequently and exchanged more often opinions on respective strategies, antitrust perspectives and enforcement activities.
Since most of its workload was created by the notification and authorization process pursuant to article 81, paragraph 3, at the beginning the European Commission worked out a system made up of block exemptions, notices on the interpretation of the Treaty and comfort letters. After having observed their ineffectiveness in terms of workload reduction, the Commission opted for a radical change. In particular, it decided to repeal the notification system envisaged for cartels, relinquishing its monopoly in the granting of the exemption provided for by article 81, paragraph 3, thus moving towards a “directly applicable” system. As a result, the national competition authorities and national courts can now apply directly the whole article 81 (the so-called exception légale régime). In particular, after having assessed the existence of harm to trade between Member States, a national authority may examine an agreement under article 81, paragraph 1, and pursuant to article 81, paragraph 3, it may exempt it.

In a nutshell, the idea followed by the Commission has been to move from an ex ante to an ex post system of monitoring agreements, in coherence with its general approach aiming at pushing undertakings towards a more and more conscious modus operandi based on the possibility to self-assess in advance their conduct. This direction seems mainly inspired by the principle of legal certainty that in U.S. is put into practice through the production of documents containing clear-cut principles that may support the companies in self assessing decisions potentially harmful in terms of competition.

In sum, the “modernization” main purposes have been (i) the increase of the incisiveness of the Commission action towards the most worrying competition rule violations and the trans-boundary cases; (ii) the reduction of the transaction costs to be borne by undertakings; (iii) the development of homogeneous principles in the application of European competition rules (mainly by means of the so-called European Competition Network). Nevertheless, on these points two questions arise. Are the tools contained in Regulation 1/2003 consistent with the mentioned objectives? How the new system, based on decentralization of the power to exempt restrictive agreements from the prohibition sanctioned by article 81, paragraph 1 (i.e. on the fact that article 81, paragraph 3, must be directly applied by national competition authorities and national courts), will influence the Italian Competition Authority activities?

124 A self assessment in view of an ex post scrutiny (see R. Pardolesi, cited in n. 28, at p. 3).
125 The European Competition Network (ECN) consists of the European Commission and the National Competition Authorities of the 25 Member States. It was established during the modernization reform of the EC antitrust rules as a forum for discussion and cooperation of Member States Competition Authorities in cases where Articles 81 and 82 of the EC Treaty are applied. The ECN aims at ensuring an efficient division of work and an effective and consistent application of EC competition rules (see http://ec.europa.eu/competition/antitrust/ecn/ecn_home.html). M. D’Alberti, La “Rete Europea di Concorrenza” e la costruzione del diritto Antitrust (VI° Convegno Antitrust tra Diritto Comunitario e Diritto Italiano, Treviso, May 2004) and Bruzzone-Boccaccio, “Modernization after the start-up: taking care of details for the effective operation of the system”, paper presented at the Assonime Conference “Powers and safeguards in antitrust law: the Italian experience in the modernization system” held in Rome, July 23, 2007, p. 18.
126 R. Caiazzo, cited in n. 70 at p. 111 recalls that “since the new rules came into force, the Authority has opened most investigations on cartels under article 81 of the EC Treaty, rather than article 2 of the Competition Act”. In respect to this, he cites the following decisions: n. 13350, Prezzi del latte per l'infanzia, in Autorità Garante della Concorrenza e del Mercato, Bulletin, 28, 2004, n. 14926, Tariffe dei periti assicurativi (ANIA), in Autorità Garante della Concorrenza e del Mercato, Bulletin, 48, 2005; n. 15393
The first element to underline is the presence of a potential inequality in the assessment of the Italian and Community cases. In fact, as far as the former ones are concerned, parties may still submit a preventive voluntary request for an authorization according to article 4 of the Competition Act (that, as already mentioned, provides for a system to exempt restrictive agreements or categories of agreements analogous to that of article 81, paragraph 3, of the Treaty). On the contrary, since the Community cases are governed by EC Regulation no. 1/2003, they are no longer subject to the notification system: this situation could, therefore, stimulate a sort of arbitrage between cases located in the grey area. In addition, the non-alignment in the application of the rules could generate negative effects in terms of legal certainty: this drawback seems to be very critical since one of the main objectives of the modernization process is the improvement of law enforcement in terms of uniformity.

In this framework, it must also be noted that the hoped workload reduction might be lower than the expected one as a result of the new tasks the reform afforded to the European Commission. In fact, today the Commission is, in first place, responsible to manage the European Competition Networks, whose burden is unsurprisingly increasing because of the enlargement process. On top of this, the Commission is called to assess the compliance of the National Authorities decisions with the principles stemming from the Community case-law and the Notices the Commission itself issues. Lastly, the Commission must provide guidelines concerning the application of the competition rules (definition of competition policy)\textsuperscript{127}. It is, therefore, evident that the new workload might be higher than the past one: in this perspective, the remedy could be worse than the problem.

As far as National Competition Authority’s space of manoeuvre is concerned, the new scenario provides for very limited freedom: this choice, which seems conflicting with the decentralization criterion inspiring the reform, emerges from the same wording of article 16 of Regulation 1/2003, reading as follows:

\begin{quote}
“(1) when national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty. (2) When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.”\textsuperscript{128}
\end{quote}

In sum, while the reform removed the Commission monopoly on the application of the entire article 81 of the Treaty, at the same time, it envisaged the Commission


\textsuperscript{128} On this point, see Fattori-Todino, cited in n. 31 at p. 326 \textit{et seq} as well as Bruzzone-Boccaccio, cited in n. 125 at p. 20.
supremacy with reference to the production of the case-law principles: besides the evident limitation of the National Authorities freedom in the application of competition rules, this decision could crystallize the system turning it in a strictly precedent-based one.

Therefore the tools upon which the Commission relies on to achieve the ambitious objectives of modernization seem, sometimes, not fit for purpose. As far as the workload decrease requirement is concerned, the Commission clearly underestimated the burden deriving from the combination of its new tasks: (i) watchdog; (ii) competition policy maker and (iii) European Competition Network manager.

In addition, modernization process is bound to create difficulties also in Member States: in fact, many of them will be obliged to change several internal rules because conflicting against the modernization basic principles. In such a complex scenario, the effort of defining clear-cut competitive principles at European level might turn out to be a heavier burden than the pre-modernization system.

Another potential inconsistency between the targets set by the Commission and tools identified to attain them is represented by the emerging gap between European and national rules.

As regards Italy, a good example of this gap was, until recently, the leniency programs issue: although they were expressly provided for at European level by means of the Commission Notice on Immunity from fines and reduction of fines in cartel cases (and absolutely crucial for the success of the reform framework set up by the Commission), until 2006, with the only exception of a cartel case of 1997, the Italian Competition Authority had not used this kind of tools and many scholars questioned the applicability in Italy of the leniency philosophy proposed by the European Commission and adopted by most of Member States.

More generally, with reference to leniency programs, it may be added that Regulation 1/2003 did not contribute to the creation of a climate of certainty, since it did not provide for a one-stop-shop system. As a result, it is possible that a whistleblower could apply for immunity to different national Authorities running the risk to be evaluated differently depending on the Country involved. In respect to this, a preliminary (even though not yet definitive) solution may come of by the Model Leniency Program recently issued by the European Competition Network (ECN), which tries to improve the handling of parallel

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129 As regards UK Rules, see R. Whish, cited in n. 5, at p. 409 et seq.
130 Revising the 2002 Leniency Notice and setting out a new framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community (see O.J. 2006/C 298/11).
131 In 2006, Decree Law of July 4, ratified by Law no. 248/2006, amended the Competition Act providing the Italian Competition Authority with the power inter alia to reduce or not apply any fines foreseen for anti-competitive arrangements, based on its assessment of the assistance afforded by companies in ascertaining infringements; in addition, on February 15, 2007, the Authority adopted the Comunicazione sulla non imposizione e sulla riduzione delle sanzioni ai sensi dell'articolo 15 della legge 10 ottobre 1990 n. 287. The indicated Law no. 248/2006 also empowered the Authority to adopt interim measures and commitment decisions.
132 In the mine explosive operators case (an horizontal agreement between the nine leading Italian mine explosives manufacturers; see Autorità Garante della Concorrenza e del Mercato, Bulletin, 26, 1997) no fines were imposed on the complainant company since it had voluntarily ceased the law violation before the Authority had taken action and played a decisive role in the discovery of the agreement.
leniency applications in the ECN setting certain milestones to be followed in the harmonization of the different procedures adopted by the various Member States.\[^{133}\]

In conclusion, the main objectives of the modernization process seem very difficult to be achieved following the path chosen by the Commission. Actually, the framework is far from clear and the main drawbacks may be identified in the following ones:

- if the wished aims consisted in creating a decentralized system, several provisions such as the mentioned article 16 of Regulation 1/2003 – appear not consistent with them;
- many grey areas, legislative gaps and conflicts of competences between Commission and National Authorities are likely to arise;
- the new tasks the Commission assigned itself entail a remarkable exploitation of resources and seem to lead to an hidden re-monopolization of the main competition activities.

8 CONCLUDING REMARKS

Very briefly (and thus at some risks of misstatements), the analysis carried out in this paper has shown that so far the Italian Competition Authority’s activity has been inter alia characterized by the ensuing trends: (i) in the enforcement of the provision on abuse of dominant position, the Authority has primarily pursued the objective of making the markets where public utilities operate more competitive; in addition, it has attempted to urge public, as well as private firms to refrain from using their market power to prevent competitors from entering the market; (ii) as far as horizontal agreements are concerned, the Authority has devoted a lot of time and energy to anti-competitive practices carried out by consortia, professional guilds and associations of undertakings fostered by rules, regulations and general administrative provisions unduly restricting competition; (iii) in the treatment of vertical restraints, the Authority has made appropriate use of economic analysis, mostly assessing their economic impact on the relevant market.

When all is said and done, it seems that, in its first years of activity, the Authority has mainly taken upon itself the responsibility to support the liberalization process in Italy (with regards to public utilities), as well as to push for a change in “corporative” rules. That has been possible mainly because of the independence of the Authority’s decision making and its capacity to resist the influence of outside pressure.

To this end two of the choices made by the Legislator in 1990 proved to be particularly effective: first, the creation of an independent - from the Executive and from the Parliament - administrative Authority (instead of a “typical” administrative commission); secondly, the request made to the Authority, by means of article 1, paragraph 4 of the Competition Act, to interpret competition rules in accordance with the principles of E.U. competition law.

Today the Italian Legislator is called to make new choices consistent with the innovations brought by the modernization process. In particular, it should consider the possibility to encourage private enforcement of antitrust infringements (in the form of

private actions before national courts)\textsuperscript{134} that, according to Regulation no. 1/2003, has “an essential part to play in applying the Community competition rules”. Yet, as is widely acknowledged to date in Italy, private antitrust litigation has played a marginal role (even though, in 2005, it has undergone a “notable acceleration\textsuperscript{135}”). That is mainly due to the “fragmentation” of the Italian private enforcement system based on a “double channel” which brings about “a number of practical difficulties and uncertainties”\textsuperscript{136} that hinders the full development of private enforcement: local Courts of Appeals have jurisdiction for infringement of the Competition Act (under article 33 of the Competition Act), while infringements of Community competition rules must be brought before the local ordinary first instance Tribunals (lower courts). That is also due to the fact that, in Italy, the ordinary judiciary system is not endowed with the toolkit necessary for the success of the modernization “philosophy”: in respect to this, one may think of the lack of economic experience and expertise of civil judges as a consequence of the absence of “specialist” courts.

The foregoing analysis has also showed that scholars and analysts are advocating for a wider use of advanced economic tools by the Authority. On top of this, the authoritativeness (real or presumed) of the American Agencies represents an additional source of pressure that urges the Authority to improve the quality of its decisions. The Italian legislator should therefore keep on making any necessary effort in order to arrange an appropriate background for improving the antitrust decision quality and the effectiveness of the antitrust enforcement\textsuperscript{137}. Once this prerequisite is satisfied, it will be up to the Authority to employ its economic toolkit in the most effective way. With respect to this, it is encouraging to know that there is a broad consensus about the capacity of the Authority to use consciously and effectively these tools.

In this perspective, this paper has identified a number of economic issues that need a close examination by the Authority in order to avoid undesired effects in terms of efficiency: the Authority should consider the opportunity of carrying out an additional effort in terms of undertakings behaviour appraisal keeping in mind not only the mere application of the competition rules but also the overall effect of the decision on the system. For this reason, the new strategy worked out by Antonio Catricalà, Chairman of the Italian Competition Authority, aiming at streamlining procedures and encouraging the solution of the antitrust cases by means of informal deals with the undertakings concerned before opening a procedure\textsuperscript{138} may be considered a positive initiative\textsuperscript{139}. This strategy

\textsuperscript{135} Bruzzone-Boccaccio, cited in n. 125 at p. 3
\textsuperscript{136} Bruzzone-Boccaccio, cited in n. 125 at p. 5.
\textsuperscript{137} See inter alia Centro Studi di Confindustria, La concorrenza e le Autorità (Ricerche per l'Economia e la Finanza - Progetto Concorrenza di Confindustria, coordinated by Cipolletta-Micossi-Nardozzi), 2005, available at www.confindustria.it
\textsuperscript{138} In particular, the Authority - carrying out a quasi-regulatory role - is applying more and more often the provisions on “commitments” provided for by the Competition Law. These provisions were introduced in the Italian Competition Law as a consequence of the already mentioned Decree Law no. 223/2006, ratified by Law no. 248/2006: according to art. 14 ter of Law no. 287/1990, within three months of the notification of a decision to initiate an investigation, the undertakings concerned may offer commitments aimed at removing the Authority competition concerns. If the Authority considers such commitments adequate, it may render them binding upon the companies through a formal decision and close the proceedings without reaching a conclusion on the alleged infringement (see Bruzzone-Saija, “Misure cautelari e decisioni con impegni nell’applicazione delle regole antitrust: i presupposti e le garanzie”
seems, in addition, perfectly consistent with the evolution of the European Commission approach, characterized by an extensive application of the “commitments” provision of EC Regulation no. 1/2003. In conclusion, in the next years the Authority is called to take up several very stimulating challenges in order to achieve the above mentioned objectives: these objectives require, in fact, a very mature approach to the competition cases and the necessity to make use of assessment criteria that are compliant with those European principles that the Authority has consolidated in its more than fifteen years of activity.

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(Contratto e impresa/Europa, no. 1/2007) and P. Cassinis “I nuovi poteri dell’Autorità nell’ambito della dialettica tra public e private enforcement (Contratto e Impresa/Europa, no. 2/2006). At the time this paper had been written, the Authority had decided, as a consequence of commitments offered by the undertakings concerned, to close inter alia the following inquiries: A 371 Gestione ed utilizzo della capacità di rigassificazione (decision no. 16530, in Autorità Garante della Concorrenza e del Mercato, Bulletin n. 8/2007): it is worth noticing that in this case – opened by the Authority on an alleged abuse of the dominant position of the oil and gas Italian group ENI on the national liquefied natural gas market (LNG)– the Authority accepted ENI’s commitments only after the company modified its original proposal by offering to double the volumes and to cut the price of gas to be sold on the markets); A 366 Comportamenti restrittivi sulla borsa elettrica (decision no. 16250, in Autorità Garante della Concorrenza e del Mercato, Bulletin n. 49/2006); A364 Merck-principi attivi (decision no. 16597, in Autorità Garante della Concorrenza e del Mercato, Bulletin no. 11/2007); I661 Accordi interbancari "ABI-CO.GE.BAN" (decision no. 16709, in Autorità Garante della Concorrenza e del Mercato, Bulletin no. 14/2007).

See the Address read to the Annual Assembly of Confindustria, Rome, June 8, 2005. In respect to this, a caveat must be taken into account: it is very important to avoid the conversion of the Authority into a bargaining Authority, since, by nature, and in order to preserve its independence, the Authority must keep on deciding solely on technical grounds. In respect to this, G. Bernini , cited in n. 38 at p. 581 has pointed out that “in the framework of antitrust case the bargaining is in principle limited: neither the Authority nor the subjects involved can dispose of the rights and interests which are the object of the legal protection. The Italian law framework does not allow a system like the one existing in the U.S. where the judicial approval sanctifies a consent decree. In actual practice, the tool left to the Authority is ‘moral suasion’ which may influence the future conduct of the parties without cancelling the consequences of prior wrongs. In particular, moral suasion can be used to induce parties to change their course of action before any adverse effect occur on the market (e.g. persuading the parties to an agreement to modify the contents of the contract), thus preventing the opening of a formal investigation”.

Art. 9 of EC Regulation no. 1/2003 reads as follows: “Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may, by decision, make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission”.
of current law and business development, coupled with extensive experience in corporate governance and regulatory issues. From 1998 to 2001, he has been senior officer of the Italian Competition Authority and from 1990 to 1998, practiced law extensively in the fields of antitrust, public procurements, intellectual property, corporate law, international contracts, commercial law, telecommunication and transport law, representing a broad cross-section of clients in international as well as domestic judicial and transactional matters. He is author of numerous essays on antitrust, corporate governance, project financing, telecommunications and transport.