ANNUAL REPORT

2006

I. ENFORCEMENT OF COMPETITION LAWS AND POLICIES

ACTIVITIES CARRIED OUT ACCORDING TO LAW NO. 287/1990: OVERVIEW

In 2006, the Authority assessed 717 concentrations, 16 agreements and 5 possible abuses of dominant position.

The Authority's activity			
	2005	**2006**	**January-March 2007**
Agreements	14	16	5
Abuses of dominant position	4	5	2
Concentrations	596	717	210
Fact-finding inquiries	2	2	1
Non-compliance with orders	1	1	-
Opinions submitted to the Bank of Italy	20	1	-
Football rights	-	-	-

Three investigations of agreements were concluded in 2006. *[Disinfectant products; Airport fuel supplies; Sapio producer of hydrogen/oxygen – Rivoira – Società italiana acetilene e derivati – S.I.A.D. – Società ossigeno napoli – S.O.N. – Linde gas italia – Air liquide italia – Sol.]* In all of these cases, the proceedings ended with the finding of a violation of the law (Article 81 of the EC Treaty *[Disinfectant products; Airport fuel supplies.]* or Article 2 of Law no. 287/1990 *[Sapio produzione di idrogeno ossigeno – Rivoira – Società italiana acetilene e derivati – S.I.A.D. – Società ossigeno napoli – S.O.N. – Linde gas italia – Air liquide italia – Sol.]*). Fines were imposed totalling about €361 million. The Authority also conducted an investigation into a case of alleged non-compliance with an injunction verified and imposed a fine of about €100 million. *[CO.GE.BAN.-Multibank]*

Two investigations of agreements were concluded in the first quarter of 2007. In the first case, the proceedings ended with the finding of a violation of Article 81 of the EC Treaty and fines were imposed totalling about €4 million. *[Manufacturers of marine coaters]* In the second case, the proceedings ended without the finding of an infringement, since the Authority adopted a decision under Article 14-*ter*, paragraph 1, of Law no. 287/1990, whereby it made binding the commitments offered by the parties. *[Order of veterinarians of turin* In the third case, following an investigation launched in September 2005 into an alleged violation of Article 81 of the EC Treaty, the Authority declared binding the commitments of one of the two undertakings concerned in accordance with the provisions of Article 14-*ter*, paragraph 1 of Law no. 287/1990. The investigation into the other company is still under way. *[A.D.S. audit bureau of (press) circulation– Audipress.]*

Five investigations of cases of suspected abuse of a dominant position were concluded in 2006. *[ENI-TransTunisian Pipeline; Glaxo-Active ingredients; Hybrid electronic mail; Football rights; Restrictive practices on the electricity exchange. The ENI-TransTunisian pipeline; Glaxo-Active ingredients and Hybrid electonic mail cases, the investigations of which ended in the first quarter of 2006, were described in last year's Report.]* In two cases, practices were found to be in violation of Article 82 of the EC Treaty and fines were imposed totalling about €292 million. *[ENI-TransTunisian Pipeline; Hybrid electronic mail]* In two other cases the Authority found violations of Article 82 of the EC Treaty but did not impose fines, since the undertakings

concerned. Had already adopted in the course of proceedings adequate measures to prevent the anticompetitive effects, which would otherwise have occurred in the relevant markets. *[Football rights; Glaxo-Active ingredients]* Finally, in the fifth case the investigation ended without the finding of an infringement , since the Authority adopted a decision under Article 14-ter, paragraph 1 of Law no. 287/1990. *[Restrictive practices on the electricity exchange]* In the first quarter of 2007 the Authority concluded two investigations under Article 82 of the EC Treaty. *[Management and use of regassification capacity; Merck-Active principles.]* In both cases the Authority adopted a decision under Article 14-ter, paragraph 1 of Law no. 287/1990, making the proposed commitments binding upon the undertakings concerned and closing the proceedings without a finding of an infringement. .

Of the 717 concentrations examined last year 692 led to the adoption of formal decisions under Article 6 of Law no. 287/1990. In 18 cases the Authority concluded that the notified concentration fell outside the scope of application of the relevant legislative provisions. In five cases, the Authority conducted an investigation under Article 16 of Law no. 287/1990 and subsequently authorised the concentration. *[Assicurazioni generali-Toro assicurazioni; Banca Intesa-San Paolo IMI; The Coca Cola Company– Coca Cola Hellenic Bottling-Fonti del Vulture; Alitalia-Volare; R.T.I.-Reti Televisive Italiane-Branch of Europa TV.]* In four of these five cases the Authority made the granting of authorisation subject to conditions. *[Assicurazioni generali-Toro assicurazioni; Bancaintesa-San paolo imi; Alitalia-Volare; R.T.I.–Reti televisive italiane-Branch of Europa tv.]* The Authority also concluded an investigation under Article 21 of Law no. 241/1990 and reviewed the conditions attached to the authorisation of a merger, finding that they were no longer necessary in the light of the changed EU regulatory framework.. *[Società esercizi commerciali industriale S.E.C.I.-CO.PRO.B.-Finbieticola/Eridania]* Lastly, the Authority concluded investigations into sixteen cases of non-compliance with the obligation to give prior notification of concentrations. *[Black Oils Europetrol; Casaverde-Branch of Icos; Casaverde-Branch orchidea; Casaverde-Residence ducale; Holding sanità e servizi-La Margherita; Holding sanità e servizi-Redancia; Holding sanità e servizi-La Margherita; Redancia-Centro studi risorse; Redancia-Cima; Rehab-Branch of medicom; natural gas–Municipality of francavilla al mare-Alento gas; Italcogim sales-Asm vigevano and lomellina–Azienda servizi mortara-Asm energia; Italcogim sales-Asm vigevano and lomellina-Asm energia; Ing Rppse Holding-8 gallery immobiliare; Italease gestione beni-Essegibi service; Mondi packaging paper-Paper factory stambolijski. The Black Oils Europetrol case, the investigation of which ended in the first quarter of 2006, was described in last year's Report.]* In all of the cases examined the Authority found a violation of Article 19.2 of Law no. 287/1990 and imposed fines totalling around €90 thousand. In the first quarter of 2007, a further 210 concentrations were examined. In the same period, the Authority investigated two cases of non-compliance with the obligation to give prior notification of concentrations, concluding in both instances that there were no grounds for further action. *[Kuwait petroleum italia-Branch of a.t.i.v.a. autostrada Torino–Ivrea–Valle d'Aosta; Kuwait petroleum italia-Branch of società autostrada Torino–Alessandria– Piacenza.]*

In 2006 the Authority submitted 47 advocacy reports under Articles 21 and 22 of Law no. 287/1990 regarding restrictions of competition deriving from current laws, regulations and proposed legislation. A further 8 reports were issued in the first three months of 2007. The Authority also concluded two general fact-finding investigations in 2006, *[Prices of mobile phone credit top-ups; Professional football sector]* while a further investigation was concluded during the first three months of 2007. *[Customer charges for banking services]* As at 31 March 2007, there are 8 general fact-finding investigations underway.*[Status of the liberalization of the electricity and natural gas sectors; Market in packaging waste; Investigation into the distribution of food and agricultural products; Local public transport; Hospital services; Trading and post-trading services; Fact-finding investigation into professional registers; Fact-finding investigation into daily, periodical and multi-media publications.]*

AGRICULTURE AND MANUFACTURING ACTIVITIES

Società esercizi commerciali industriali S.e.c.i-Co.pro.b.- Finbieticola-/Eridania

In May 2006 Authority concluded an investigation under Article 21-*quinquies* of Law no. 241/1990 and withdrew, following a request by the company Finbieticola Spa, its previous ruling 14477 of 6 July 2005, which in turn had been issued to redefine the measures prescribed in ruling 11040 of 1 August 2002, aimed at preventing Finbieticola's interference in the running of Italia Zuccheri and averting the risk of an anticompetitive vertical integration.

In August 2002 the Authority authorised, subject to the parties' compliance with some measures, the purchase of 100% of Eridania Spa, then the leading operator in the Italian sugar market, by Finbieticola, Coprob and Seci-Sadam. The operation was to be made via the joint venture Sacofin, prior to this being split into two companies: namely Eridania Sadam, owned by Seci and Italia Zuccheri, owned by Coprob and Finbieticola. The Authority deemed that the operation as originally notified would have led to the creation of a collective dominant position of the two post-concentration entities, resulting in a substantial and lasting reduction in competition, and accordingly authorised the concentration subject to several conditions. In March 2005, the Council of State – upon request of a competitor of the merging entities - annulled the Authority's decision, "*exclusively in respect of the inadequacy of the measures imposed to avoid interference by Finbieticola in the management of Italia Zuccheri and avert the risk of an anticompetitive vertical integration*" and ordered the Authority to review its previous decision. Subsequently, in accordance with the judgement, in July 2005 the Authority identified new corrective measures aimed at ensuring Finbieticola would not interfere in the running of Italia Zuccheri. In particular, the measures envisaged: *i*) the obligation to alter the statute of Italia Zuccheri to ensure that during the deliberations of the corporate bodies, irrespective of what was being discussed, there would no longer be any qualified majorities giving Finbieticola's representatives a veto power; *ii*) the obligation of Finbieticola to sell, within eighteen months, part of its stake in Italia Zuccheri so as to retain a quota of ordinary shares, not exceeding 30%.

In March 2006, the Authority launched a new investigation to ascertain whether the reform of EU sectoral regulation approved in February 2006 had entailed changes in the conditions of the Italian sugar market of a kind necessitating the review of these corrective measures. In particular, the new rules had led to a sharp decline in protectionist measures that were previously in force. *[Council Regulations (EC) Nos 318-319-320 of 20 February 2006.]* This in turn resulted in a drop of over 50% in the share of national production, which also affected the two post-concentration entities examined by the Authority. The share of national production, which previously met 88% of consumption requirements, now met no more than 40-45% of domestic demand. Accordingly, nowadays national consumption is being supplemented by imports of up to 55-60%, both for structural reasons and out of necessity. Regarding the two post-concentration entities, the Authority pointed out that their cumulative share of production now covered barely 30% of the overall market, compared with 65% of domestic consumption in the past.

The Authority concluded that the new Community regulatory context had significantly altered the premises on which the rulings of 1 August 2002 and 6 July 2005 were based. In particular, the drop in national output capacity linked to the halving of the productive quota assigned to Italy meant that the flow of imports, equalling 44% on average in the past three years, was not only a lasting and structural phenomenon, needed to supplement available production levels to satisfy internal demand, but also a growing one. Faced with these new developments the importance of imports to meet domestic demand tended to enlarge the relevant geographical market, and accordingly, to significantly curb the market power of national producers. The Authority accordingly revoked the corrective measures it ordered in August 2002, as modified in July 2005.

Coca -Cola Hellenic bottling - Fonti del Vulture

In June 2006 the Authority concluded its investigation and authorised the joint takeover of Fonti del Vulture Srl (hereinafter 'Traficante') by The Coca-Cola Company (TCCC) and Coca-Cola Hellenic Bottling Company SA (CCHBC), having first verified that it neither created nor strengthened CCHBC's dominant position in the Italian mineral water and carbonated soft drinks markets. TCCC, a company belonging to the Coca-Cola group, owns the Coca-Cola brands and all the related industrial property rights. CCHBC, a subsidiary of TCCC, is the bottling company that distributes Coca-Cola Company beverages in Europe, Africa and Eurasia. Traficante, lastly, extracts, bottles and markets mineral waters.

As regards the market for the production and sale of mineral waters (in which Traficante operated), supply was split between a relatively high number of operators, which prior to the joint takeover did not include TCCC and CCHBC. These entered the market following the purchase of Traficante, which in 2004 held a 3.4% market share. Accordingly, the Authority concluded that the operation would not generate anticompetitive effects in the mineral waters market.

It also ruled out that the purchase of Traficante would reinforce CCHBC's dominant position in the carbonated soft drinks market. In particular, the investigation found that as regards the distribution channel for domestic consumption, retail outlets sell a broad range of brands for each beverage, and the broadening of CCHBC's product range to include mineral waters would not change the structure of incentives guiding the stocking decisions of retailers nor would it increase the market power of CCHBC. As regards the distribution channel for non-domestic consumption, despite finding that commercial businesses have a much more limited product range than retail distributors, the Authority ruled that the purchase of Traficante would not lead to the strengthening of CCHBC's dominant position, also in view of the commitments imposed by the European Commission aimed at avoiding exclusionary abusive practices. *[The European Commission decision of 22 June 2005, based on Article 9.1 of Council Regulation (EC) No 1/2003, made some of the commitments by companies belonging to the Coca Cola Group legally binding, including CCHBC, regarding the business strategies of these same companies, and of the respective bottlers, in the carbonated soft drinks markets (both in the Take Home channel and in the Away from Home channel) of various European countries, including Italy.]*

Marine coating manufacturers

In January 2007 the Authority concluded an investigation under Article 81 of the EC Treaty, establishing the existence of an anticompetitive agreement by Boat Boero Marine and Protective Coatings Genova Spa (Boat), Hempel Italy Srl (Hempel), International Paint Italia Spa (IP), Jotun Italia Spa (Jotun) and Sigma Coatings Srl (Sigma), all companies that are active in the manufacture and sale of coatings for naval and industrial use. The investigation was launched on the basis of a complaint pointing at the existence of a cartel between the main companies operating in the marine coatings sector, concerning bids for the supply of large quantities of coatings to the companies' clients in the form of shipping companies and shipyards.

From a product analysis perspective, the Authority deemed that the supply of marine coatings, used by large cargo ships and passenger liners, constitutes the relevant market. This market is characterised by the presence of a low number of operators on the supply side, the substantial uniformity of the products and a high degree of transparency. This last trait, in particular, is due to: the ways in which the largest transactions are carried out i.e. infrequent bulk supplies, which make it easy to verify consistency or deviation from previously agreed practices; and the activities of the sector association, AVISA, comprising the five aforementioned companies, which used to gather market information periodically and then ensure its timely redistribution to the companies concerned.

In the course of the investigation the Authority found that during the period 1999-2003, the companies Boat, Hempel, International Paint, Jotun and Sigma had entered into a single and complex agreement aimed at market sharing. More particularly, the collusive system revolved around a distribution criterion based on historical customers, according to which each paint manufacturer agreed to supply, during the maintenance phase, their own customers without being subject to any competitive pressure by the other parties to the agreement. The agreement involved an intensive programme of meetings and detailed exchange of information on contracts which had been lost in violation of the established criteria, in order to monitor compliance and, where necessary, compensate companies to restore previously held positions and maintain near stability in each company's market share.

The Authority also found that on several occasions the five companies had acted in a coordinated manner to artificially change the result of tenders for the supply of paints, in particular in the case of two tenders announced by Snam Gas for the supply of varnishes for craft going to Elba and Lerici and in the Zacchello tender, by exchanging sensitive information. Lastly, the same companies had agreed to fix the prices of several products, for individual customers and for specific tenders, and more generally for several categories of products. In view of the gravity and duration of the infringements, the Authority imposed the following fines: Boat €1,080,000; IP €1,080,000; Hempel €324,000; Sigma €756,000 and Jotun €1,134,000.

Sapio manufacturer of hydrogen/oxygen – Rivoira – Società italiana acetilene e derivati – S.I.A.D. – Società ossigeno napoli – S.O.N. – Linde gas italia – Air liquide italia - Sol

In April 2006, an investigation under Article 2 of Law no. 287/1990, ended with the finding of an anticompetitive agreement put in place by the following companies that manufacture and sell technical gases: Air Liquide Italia Spa (Air Liquide); Linde Gas Italia Srl

(Linde); Erma Srl (Erma); Rivoira Spa (Rivoria); Società Italiana Acetilene e Derivati – S.I.A.D. Spa (Siad); Sapio Produzione Idrogeno Ossigeno Srl (Sapio); SICO Società Italiana Carburo Ossigeno Spa (Sico); SOL Spa (Sol) and Società Ossigeno Napoli – S.O.N. Spa (Son).

From a product analysis viewpoint, the technical gases category comprises numerous gases used in the alimentary, electronics, metallurgy, mechanics and health sectors. While pointing out that each of these gases could represent a separate product market, the Authority deemed that the competitive area in which the companies operated corresponded to the whole range of technical gases. Indeed, companies defined their sales strategies and organised distribution taking into account the entire range of products sold rather than any individual product category. From a geographical standpoint, in view of variations in technical standards, the sales organisation of the operators and the high costs of transport that restrict competition across national borders, the market was considered as being of a national dimension.

In the course of the investigation the Authority found that the companies Rivoira, Siad, Air Liquide, Sapio, Son, Sol, Sico, Linde and Erma had adopted a series of practices, which, taken together, constituted a single, complex and lasting agreement aimed at sharing markets and customers. The coordination of the respective commercial practices originated in the application of a particular method of client-sharing formalised in what was known as the "PR80" document, which identified a series of parameters for the allocation of customers to chosen suppliers, for offsets among the participating companies and for the settlement of any conflicts.

The findings also highlighted the occurrence of a high number of conferences, meetings and primarily bilateral contacts among all the companies aimed at: re-establishing the status quo, which from time to time was found to have been upset; coordinating general conduct in relation to any new developments (for example the entry of new products) which, by changing previously existing market conditions, made it necessary to adapt pre-existing equilibrio to the new situation; and lastly, coordinating practices among the competitors in tenders for the award of contracts, by selecting in advance the firm that would win, in accordance with the more general client-sharing scheme.

The Authority considered these practices to be demonstrations of a single anticompetitive agreement applied uninterruptedly from 1991 to 2004; an agreement of a substantial nature, given that together the companies involved held a total share of almost 90% in the technical gases market. In view of the gravity and duration of the infringements, the Authority imposed the following fines: Air Liquide €23,100,000; Sapio and Siad €8,400,000; Sol €6,800,000; Rivoira €5,600,000; Linde €3,600,000; Son €600,000; and Sico €400,000.

OIL PRODUCTS

Airport fuel supplies

In June 2006, the Authority concluded an investigation under Article 81 of the EC Treaty into the following oil companies: ENI Spa, Esso Italiana Srl, Kuwait Petroleum Italia Spa, Shell Italia Spa, Shell Italia Aviazione Srl, Tamoil Italia Spa and Total Italia Spa. The investigation confirmed the existence of a complex anticompetitive agreement, maintained also via several joint ventures established among the same companies (Disma Srl, Seram Srl, Hub Srl, Rifornimenti Aeroporti Italiani Srl and Par Srl), in the markets for jet fuels and storage and on-board refuelling services.

Regarding the first market, jet fuel is used by almost all commercial airlines that transport passengers and goods and cannot be substituted with any other type of fuel. As to the procedures for buying jet fuel adopted by airlines, for the most part these organise annual tenders for the purchase of the product in various airport terminals. Oil companies are not necessarily obliged to make an offer for all terminals nor for all the quantities requested. At the end of the tender, the airline awards the supply contract to the best bidders, which can also vary from terminal to terminal and can cover only a part of the requested supply; this happens most frequently in the major terminals, where very large volumes of jet fuel are requested and supply contracts are granted to several suppliers ('shared client'). From a geographical viewpoint, the Authority deemed this market to be of a national size, having taken into account the conditions of access to supply in individual airports, the widespread practice of product exchange between oil companies and the presence of the same joint ventures in all major domestic airports.

From a product analysis perspective, the Authority also reviewed the markets for storage and on-board refuelling services, geographically confined to individual airport terminals. Typical characteristics of this market include the presence of high barriers to access due to the low duplication of infrastructures, the need to obtain special permits and operational authorisations and the presence of oil companies, which through their own structures or jointly-held companies, provide storage and on-board refuelling services. In this sense the airports affected by the practices of oil companies were: Rome Fiumicino, Milan Malpensa, Milan Linate, Naples Capodichino and Palermo Punta Raisi, where the jointly-held companies Disma, Seram, Hub, Rifornimenti Aeroporti Italiani and Par operated.

During the investigation, the Authority first noted that jointly-held companies for storage and refuelling activities generated a particularly ample flow of sensitive information between the jointly-held companies themselves, and between them and the oil companies, which was vital for the coordination of their respective practices in the jet fuel market. This organised system of information exchange meant that the refuelling companies knew in advance the outcomes of the tenders for the adjudication of supplies, both when there was only one winner and when market shares were assigned to various suppliers, and were even able to monitor deliveries made on behalf of individual oil companies to ordinary and shared clients.

The Authority also confirmed the existence of a cartel aimed at sharing the market between operators and maintaining this arrangement over time, as well as preventing the entry

of new operators, including of airlines intending to take care of their own supplies. The activities of the jointly-held companies provided an important basis for the implementation of this market sharing strategy, guaranteeing, for the most critical variables, the transparency needed to organise the cartel and for monitoring compliance. On the basis of the evidence gathered, the Authority concluded that the companies ENI, Esso, Kuwait, Shell, Shell Italia Aviazione, Tamoil and Total had violated Article 81 of the EC Treaty by entering into a complex and lasting agreement whose purpose and effect was the sharing of the market for jet fuel supplies with a view to maintaining stable market shares and impeding access by new operators. It also found that the companies had engaged in an intensive and ongoing exchange of information to meet these objectives. In view of the gravity and duration of the infringement, the Authority imposed the following fines: ENI €117,000,000; Esso €66,690,000; Kuwait €46,800,000; Shell €53,320,000; Shell IAV €3,140,000; Tamoil €19,620,000; and Total €8,860,000. The fines imposed on Shell, Shell IAV and Total were subsequently recalculated (€35,500,000, €2,090,000 and €13,280,000 respectively).

Legislation on bio fuels and changes envisaged in the 2007 financial act

In November 2006 the Authority sent a report to Parliament and the Government on the possible anticompetitive effects of current legislation to promote the production of bio fuels and of the changes ushered in by the 2007 Financial Act. In particular, as regards promoting the use of bio fuels, Article 2-*quater*, paragraph 2, of Law 81 of 11 March 2006 made it obligatory, from 1 July 2006 onwards, for diesel and petrol suppliers *"to achieve, within the total amount of diesel and petrol they placed on the market in the previous year, a 1% share of bio fuel from agricultural resources deriving from a sector agreement, a framework contract, or an agro-energy programme, stipulated under the present Article"*.

The Authority, while sharing the agricultural policy objectives underpinning the new legislation, considered that the provisions of Article 2-*quater* of Law no. 81/2006 were not strictly necessary for the pursuit of said aims and, therefore, failed the test of proportionality with antitrust legislation. Despite the fact that the quantities of fuels involved were limited compared with the overall volume of fuels sold on the market, the Authority highlighted the anticompetitive thrust of the law and ruled that neither the *erga omnes* nature of the sector agreements, nor the subsequent setting of quantities and prices agreed on among all the sector operators, were essential to ensuring the effective reconversion of the agricultural sector and the fulfilment of the obligation to introduce bio fuels into the market.

Legislation on fuel distribution

In January 2007, in exercising its reporting and advisory powers under Articles 21 and 22 of Law no. 287/1990, the Authority submitted several observations to Parliament, the Government and the Presidents of the Regions and the Autonomous Provinces of Trento and Bolsano regarding restrictions of competition contained in national and regional rules on fuel distribution, suggesting at the same time possible remedies and reforms, intended to promote competition in the sector. In particular, having first described the main characteristics and problems associated with the fuel distribution network in Italy, the report highlighted the continued existence of numerous legislative and administrative barriers, which place unfair

limits on sector-wide competition and ought to be removed, including, specifically: *i*) limits on access to the market (for example, imposing a maximum number of new plants, minimum distances and/or minimum surface areas) by companies that are not vertically integrated, and in particular by operators active in major distribution channels; *ii*) limits on activities, such as maximum hours of service and obligatory closing periods; *iii*) the potentially anticompetitive daily publication, by the Ministry of Economic Development, of recommended prices by individual oil companies.

PHARMACEUTICAL PRODUCTS

Disinfectant products

In April 2006 the Authority concluded an investigation under Article 81 of the EC Treaty into the following companies that make and sell prescription drugs and antiseptic and disinfectant products: AstraZeneca Spa, Bergamon Srl, B. Braun Milano Spa, Esoform Spa, Esoform Srl, Farmec Srl, Nuova Farmec Srl, Germo Spa, International Medical Service Srl, Società Italo-Britannica L. Manetti-H. Roberts & C. Spa, P. Farmaceutici Spa, Sanitas Srl and Meda Pharma Spa). The investigation revealed an anticompetitive agreement for the supply of antiseptic and disinfectant products to public health units.

In particular, the Authority found that the above-mentioned companies had entered into a complex anti-competitive agreement aimed at coordinating the bids in tenders for the supply of antiseptic and disinfectant products to Italy's national health service units. A pivotal role in the establishment of this collusive arrangement was played by the services company Pan Service Scrl, which, through a sophisticated information gathering mechanism, had produced charts for all the Italian regions with reference to twenty-five active ingredients, designating the company to be awarded the contract for the various products requested by the Local Health Units. It also drew up lists containing indications, for each active principle, of minimum prices and maximum price brackets within which the bids had to be made. The Authority found that the agreement had the effect of crystallising market positions by artificially maintaining historical clients and sharing new customers in proportion to established market shares.

In light of the gravity and duration of the violation, which lasted at least until the end of 2001, the Authority imposed the following fines: Farmec €500,000; Nuova Farmec €150,000; AstraSeneca €975,000; Braun €780,000; Esoform €390,000; IMS €390,000; P Farmaceutici €185,000; Meda Pharma €225,000; and Sanitas €65,000.

Merck-Active ingredients

In March 2007 the Authority concluded an investigation under Article 82 of the EC Treaty into the company Merck & CO. Inc. and its subsidiary Merck Sharp & Dohme (Italia) Spa, accepting the company's commitments under Article 14-*ter*, paragraph 1 of Law no. 287/1990, and closing the proceedings without establishing an infringement. The investigation was launched to examine alleged abusive practices consisting in refusals to grant licenses requested by chemical-pharmaceutical firms for the manufacture of two active ingredients, *Imipenem Cilastatina* and *Finasteride*, both covered by a Supplementary Protection Certificate (SPC) *[In addition to the patent itself, the law on patents for specialist medicinal products awards the inventor of the drug a Supplementary Protection Certificate (SPC) aimed at extending the period in which exclusive rights to the invention are exercised. This is in view of the fact that authorisation to put these products on the market is not concomitant with the issue of the patent.]*, to be sold in other European countries in which Merck was no longer enjoying intellectual property rights.

With a view to ensuring that, pending the outcome of the investigation, Merck's behaviour would not continue to cause serious and irreparable harm in the markets concerned, in June 2005 the Authority adopted interim measures obliging the company to issue without delay – and at least for stockpiling purposes – licences authorising the production in Italy of *Imipenem Cilastatina*. In accordance with this ruling, in August 2005 Merck issued a license to the chemical firm Dobfar to manufacture this active ingredient, whose Supplementary Protection Certificate expired in January 2006.

In November 2006 Merck presented a commitment under Article 14-*ter* of Law no. 287/1990, (later to be amended), offering free licenses to manufacture and sell the active ingredient *Finasteride* and related generic drugs, even though the Supplementary Protection Certificate does not expire until 2009. The Authority deemed that this commitment was likely to result in the permanent removal of any anticompetitive effects flowing from Merck's former refusals to grant licences. More specifically, the Authority considered that this commitment would remove an obstacle to the manufacturing of *Finasteride* in Italy and increase its sales and that of the related generic drug, both in Italy and in various European countries, generating a reduction in prices to the benefit of consumers and the National Health Service.

Restrictions on opening hours of pharmacies

In January 2007 the Authority submitted a report to Parliament, the Government and the Regions in accordance with the provisions of Article 21 of Law no. 287/1990, concerning the anti-competitive effects of restrictions placed on pharmacy opening hours by several regional laws. These limits regard, in particular, the maximum daily or weekly opening hours of each pharmacy; the minimum number of days closed for annual vacations; obligatory closure on Sundays or for public holidays; and the uniformity of opening hours.

The Authority pointed out that while minimum opening hours and shifts appear justified insofar as they aim to fulfil the public interest objective of full availability of pharmaceuticals, the limits prohibiting pharmacists from providing services outside these minimum hours and shifts appear unjustifiably to restrict competition among pharmacies, and prevent the broadening of supply to the benefit of customers. The removal of these barriers is even more necessary in the light of the sector's liberalisation under Law no. 248/2006, which allows the sale of non-prescription pharmaceuticals by retail outlets other than pharmacies. Such limits therefore appear somewhat discriminatory, since they prevent pharmacies from competing on an equal footing with newly authorised operators and risk jeopardising the continued market presence of the pharmacies most affected by the new competition, ultimately jeopardising the nationwide presence of the pharmacies themselves.

ELECTRICITY AND NATURAL GAS

Electricity

Restrictive practices on the electricity exchange

In December 2006 the Authority completed an investigation under Article 82 of the EC Treaty into ENEL Spa and its subsidiary Enel Produzione Spa in relation to several allegedly abusive practices in the wholesale electricity markets. Having accepted the commitments presented by the companies under Article 14-*ter*, paragraph 1, of Law no. 287/1990, the investigation ended without establishing an infringement. The proceedings were opened following receipt of a report sent by the Electricity and Gas Authority regarding several anomalies that had come to light in June 2004 and January 2005, both in the single national price of electricity (*Prezzo unico nazionale* or PUN) in the day-ahead market, and in the various zonal prices agreed on with producers or wholesalers for the injection of power into the national transmission grid. Due to these irregular trends in the PUN and the geographical volatility of the equilibrium prices on the supply side, anomalies had been created in the prices associated with the use of transport capacity.

In particular, the investigation aimed to establish whether ENEL, though its subsidiary Enel Produzione, had used its position of absolute indispensability in the South to direct import flows from or export flows to other macrozones, in a way that exploited its role of active or passive potential in these areas and extended its ability to fix prices in the various zones. Such a strategy would have had the effect of penalising ENEL's competitors in two ways: directly, by fixing zonal prices with particularly high variations, ENEL would have lowered the profits made by rivals that sold energy on the day-ahead market in low-priced zones compared with those in other areas (in which ENEL had a much stronger presence); and indirectly, by ensuring high costs for transport capacity, ENEL would have increased its competitors' costs in the relevant markets and made it more difficult for them to adopt aggressive policies towards end customers.

During the investigation the Authority first highlighted how, in 2004, the four zonal markets into which the wholesale electricity market is divided – corresponding to the macrozones North, "Macrosouth" (mainland Italy except for the North and Calabria), "Macrosicily" (Sicily and Calabria) and Sardinia – were highly concentrated and very nearly monopoly situations, with the exception of the North. Moreover, in each of these macrozones ENEL, through Enel Produzione, wielded significant market power, due to: i) its indispensability, in absolute and relative terms, in setting the equilibrium prices for each area, where frequency indexes showed that the number of hours during which it was pivotal in setting prices in the various macrozones were never less than 80-90%; ii) the market share of the offers accepted on the exchange, which was permanently superior (as much as double) that of the main competitors in all the macrozones; iii) the availability, unlike all the other operators in the relevant markets, of generating capacity that was evenly distributed across the country and included all the various types of plant, which together define the technological "merit-order" (using the plant that is available to supply power at the least cost); and lastly, iv) the market's

perception of the role of Enel Produzione as dominant operator and specifically, as being able to influence the formation of equilibrium prices on the exchange. In 2004 these were the elements characterising the *leader-followers* model of competition on the electricity exchange, in which Enel Produzione played the role of marginal operator (the one that sets the price) for almost all of the hours in all the macroareas, thus helping to make permanent the asymmetry between ENEL and its competitors and its situation of economic power.

In response to the competition issues that emerged during the investigation, ENEL and Enel Produzione presented commitments consisting primarily in an offer to sell virtual capacity for the two years from 2007 to 2008 in the Macrosouth in the form of financial hedging contracts. In particular, ENEL undertook to sell virtual capacity totalling 1,000 MW in 2007 and 700 MW in 2008, subject to verifying its pivotal role in the relevant markets, held individually and jointly, in the North and South macrozones. The Authority deemed that the commitments made by ENEL for 2007 would considerably reduce its pivotal importance in the relevant markets and accordingly, in the short term, its incentive to unilaterally exercise its price-fixing power in the market at higher levels than those established in contracts, thereby eliminating the anticompetitive elements that were the subject of the investigation. The Authority further considered that, with regard to 2008, the commitment to sell 700 MW of virtual capacity would have to take account of the actual structural and competitive conditions in the relevant markets and especially of the effective admission of generation and transport capacity and of the extent of ENEL's pivotal role.

Methods for divesting Enel's shareholdings in Eurogen, Elettrogen and Interpower

In July 2006 the Authority sent a report to the Government, the Chamber of Deputies and the Senate under Articles 21 and 22 of Law no. 287/1990, containing a number of comments on the anticompetitive effects of the current wording of the Prime Ministerial Decree of 8 November 2000 regarding "*Methods for divesting ENEL Spa's shareholdings in Eurogen Spa, Elettrogen Spa and Interpower Spa*". The Decree put a 30% ceiling on the stake that could be held in these companies by public entities or undertakings, be they Italian or foreign, for a period of at least five years. The 30% limit was introduced in accordance with the spirit of Legislative Decree 79 of 16 March 1999, to enable market liberalisation in the electricity sector to be accompanied by effective privatisation of the firms involved, thereby enabling new private operators to enter a market traditionally dominated by publicly-owned firms. The acquisition of joint control by Electricité de France (EDF) and AEM of Edison, however, resulted in this limit being exceeded. In fact, following ENEL's divestment of the so-called GenCos, Edison acquired 100% ownership of EdiPower, formerly Eurogen. Therefore Edipower is indirectly controlled by AEM, which is controlled by the Municipality of Milan, and by EDF, wholly owned by the French state.

The Authority pointed out that the surpassing of the 30% limit may be prejudicial to the competitive development of a free market, in so far as it gave unfair advantages to AEM and

EDF, while other publicly-owned firms that have abided by to the provisions of the Decree have not been able to expand through mergers and acquisitions. The current situation came about in part because no corrective mechanism is envisaged in the event of the limit being exceeded. In light of this, the Authority called on the parties to take immediate steps to adopt all measures suited to ending this violation of the law and restore market conditions able to guarantee fair competition amongst operators.

Natural gas

Operation and use of regasification capacity

Last year the Authority investigated a series of practices adopted by ENI Spa and its subsidiaries GNL Italia Spa and Snam Rete Gas Spa in the market for the operation and use of regasification facilities for liquefied natural gas (LNG) at Italy's Panigaglia terminal. In March 2007, after having accepted the commitments presented by ENI in accordance with the provisions of Article 14-*ter*, paragraph 1 of Law no. 287/1990, the investigation concluded without a finding of an infringement. The proceedings were opened following receipt of a report by the Electricity and Gas Authority according to which, in the years 2002-2003 and 2003-2004, despite having ample non-utilised capacity at the Panigaglia terminal, GNL Italia had not made this available to competitors.

The regasification service consists in the receipt, discharge, storage and reconversion of LNG into natural gas, which is then delivered outside the terminal for injection into the national grid. On the demand side, there are the entities that want to import liquid natural gas into the national market and which, for its reconversion into natural gas, require access to the regasification facilities. On the supply side, GNL Italia is the sole operator of the only regasification terminal in Italy. ENI, which owns GNL Italia, is vertically integrated in the downstream market for the wholesale supply of gas to the Italian market, in which it holds a dominant position.

The investigation concerned, in particular, GNL Italia's unjustified refusal to grant access to the regasification capacity at the Panigaglia terminal to third parties that had made this request for the years 2003-2004 and the buying-up by ENI of the terminal's entire regasification capacity for the thermal years 2002-2003 and 2003-2004, equal to 5.5 million cubic metres of NLG, despite the planned and actual use of the terminal for significantly inferior volumes. The Authority deemed that, taken together and from the standpoint of group logic, these practices may have constituted a complex exclusionary strategy, devised by ENI and its subsidiary GNL Italia in the market for access to the regasification capacity of the Panigaglia terminal, with the overall aim of preventing third parties, in competition with ENI in the downstream market for the wholesale supply of natural gas, from supplying NLG to the national gas system.

During the proceedings ENI presented a series of commitments to the Authority pursuant to Article 14-*ter* of Law no. 287/1990, which were subsequently supplemented, committing in particular to provide gas on a pro-quota basis for two years, beginning on 1 October 2007, for a volume equal to 4 billion m^3 at 26.45 eurocents/m^3. The Authority deemed that these commitments remedied the anticompetitive effects examined by the investigation and issued a ruling making them obligatory.

International transport of gas through the TTPC pipeline

In October 2006 the Authority submitted an opinion in accordance with Article 22 of Law no. 287/1990 to the Ministry of Foreign Affairs and the Ministry of Economic Development, on the international transport of gas through the Tunisian pipeline. In particular, the Authority wished to highlight a number of important implications stemming from an agreement reached in March 1991 between Snam Spa, ENI Spa and Tunisia and approved under Law 91-38 of the Tunisian Parliament. The Law stated that ENI was to be the exclusive concessionary of the trans-Tunisian pipeline, through its subsidiary Trans Tunisian Pipeline Company (TTPC), until 30 September 2019. Under the agreement the Tunisian state reserved the right to express its "approval" of any contracts for transporting gas via the pipeline stipulated between TTPC and shippers of gas, other than Snam (now ENI Spa) and ENEL Spa. Under the terms of the same agreement, TTPC made the entry into effect of transport contracts for assigning additional capacity following the upgrade of the pipeline conditional on authorisation by the Tunisian state to transit its territory. If such authorisation is withheld, shippers that in the initial phase of the procedure were provisionally allocated transport capacity will be excluded from the process and definitively lose all transport capacity previously assigned. The deadline fixed by TTPC for fulfilling all the conditions in the transport contract and justified by the need to safeguard the company's significant financial investments – for the procedure for assigning capacity in the second phase of the pipeline's upgrade is 11 January 2007.

The Authority learnt from several shippers that the Tunisian state has made the granting of this authorisation subject to the stipulation of a supply agreement with the Algerian gas supplier Sonatrach. The Authority pointed out that this requirement, which has no grounds whatsoever in Tunisian law, is liable to introduce significant anticompetitive effects into the gas supply market for Italy, insofar as it prevents operators interested in the assignment of transport capacity only, from stipulating a transport contract for the Tunisian pipeline with TTPC, obliging them instead to also act as importers. This condition imposed on importers other than ENI and ENEL has the effect of making the procedure even more burdensome and effectively gives Sonatrach the option of deciding who can and who cannot stipulate a transport contract with TTPC.

At the same time, the Authority became aware of a generalised difficulty for operators to conclude supply agreements with Sonatrach. In fact, in respect of the procedure for allocating capacity relative to the first upgrade phase for the TTPC pipeline concluded in 2005, numerous operators, despite having been provisionally assigned transport capacity on the TTPC pipeline, were unable to reach an agreement with the Algerian supplier and accordingly lost the chance to conclude their purchase of transport capacity. The Authority pointed out that, on the one hand, the resulting situation *de facto* prevented those wishing to operate as shippers from doing so, forcing them to conduct to act on importers; on the other, it bolstered the bargaining power of the Algerian gas supplier, which was called on to intervene through the stipulation of a supply contract, at a point in which operators requesting the supply of gas had only provisionally obtained transport capacity.

The potential for Sonatrach to influence undertakings that had been allocated transport capacity resulted in a barrier to entry and strengthened the already significant bargaining power of the supplier. This was accompanied by a general worsening of economic conditions for

imports, due to a fall-off in operators which, during the phase of international transport of gas bound for Italy, could ultimately have allowed gas to be supplied independently of the former monopoly ENI at advantageous economic conditions. The Authority accordingly suggested that the Government contact the competent Tunisian authorities and seek the removal of the requirement, which has anticompetitive effects on the market, to secure a gas supply contract with the Algerian supplier Sonatrach, which is imposed on shippers requesting authorisation to transport gas on the TTPC pipeline.

TRANSPORT

Alitalia - Volare

In July 2006 the Authority gave its conditional approval for the acquisition by Alitalia Linee Aeree Italiane Spa, through Volare Spa, of Volare Group Spa. At the time of the merger, in addition to several companies operating in sectors related to air transport, Volare Group Spa owned two carriers, Volare Airlines Spa and Air Europe Spa, which provided domestic and international passenger transport services by means of scheduled and chartered flights.

The concentration regarded the air transport sector for both scheduled flights and chartered flights. With respect to the routes served by Volare, the relevant markets in which ovelaps between merging parties were expected, included: Linate-Bari, Linate-Brindisi, Linate-Naples, Linate-Lamezia-Terme, Linate-Catania, Linate-Palermo and Linate-Paris. Conversely, in intercontinental scheduled flights and for the chartered flights market, characterised by the lack of significant barriers to entry, the transaction was not expected to alter competitive dynamics, in part due to the marginal market shares held by Volare.

During the investigation the Authority first highlighted the congestion at Linate airport, the consequent rationing of slots, and the impossibility for new operators to access the market. This situation is aggravated by the regulations governing the assignment of slots, that benefit air transport companies organised into corporate groups, whereby the number of slots are assigned on the basis of licences held. This means that air carriers with the most licenses receive multiple slots on the same route. In this regard, Alitalia held, at the moment of the concentration's notification, about 46% of the available slots at the Linate airport, and following the acquisition of Volare (which had twelve pairs of slots), Alitalia was set to acquire access to 54% of the total number of available slots.

In assessing the impact of the transaction, the Authority took account both of the horizontal effects on individual routes where there would have been an overlap, and further perspective anticompetitive effects deriving from the increase in market power exercised by Alitalia at Linate airport, a strategic airport that is essentially closed to new operators, following the acquisition of the slots assigned to Volare. In particular, the Authority established that Alitalia's acquisition of Volare would have led to strengthening or constitution of a dominant position on domestic routes on which Volare also operated (Linate-Bari, Linate-Brindisi, Linate-Naples, Linate-Lamezia Terme, Linate-Palermo and Linate-Catania), as well as on the Linate-Paris route.

The Authority authorised the concentration subject to the fulfilment of several conditions aimed at preventing the establishment or strengthening of a dominant position by Alitalia. In particular, the Authority ordered that two pairs of slots on the Linate-Paris route be given to airlines other than Alitalia or associated companies or companies belonging to the *Sky Team* alliance, already operating on the route in question, with the deadline for receipt of requests set at 11 November 2007. The slots released by Alitalia may be used exclusively for the Milan-Paris route for a period of six IATA seasons. The Authority also ruled that Alitalia must give up two pairs of domestic slots on the Linate-Bari and Linate-Lamezia Terme routes to

requesting airlines other than Alitalia or associated companies or companies belonging to the *Sky Team* Alliance. These pairs of slots will be released based on the chronological sequence of requests received and may be used only for the same routes (Linate-Bari and Linate-Lamezia Terme) for a period of four IATA seasons. These measures, which should have come into effect in 2006/2007, have been delayed by ongoing litigation regarding the sale of Volare.

System for imposing public service obligations on scheduled air services to and from Sardinia

In August 2006 the Authority sent a report under Article 21 of Law no. 287/1990 to the Ministry of Transport, containing several comments on the system for imposing public service obligations on scheduled air services to and from Sardinia pursuant to Article 4(1)(a) of Council Regulation (EEC) No 2482/92, implemented by Article 36 of Law no. 144 of 17 May 1999 and various other implementing decrees. In particular, the Authority highlighted how the conditions governing public service obligations on the services in question, published in the Official Journal of the European Union on 24 March and 21 April 2006, were liable to limit competition in various ways.

The first problem identified regarded the non-proportionality of the restriction on competition generated by the imposition of public service obligations compared with the objectives to be safeguarded. With specific reference to connections with Sardinia, while it is possible to identify the first two conditions required under Community Law for the imposition of these obligations (a disadvantaged insular region with low traffic intensity, albeit only during off-peak tourist seasons), the Authority raised some doubts as to the actual essentiality of all sixteen routes identified by the Ministry of Economic Development in the region. Aside from the Milan/Rome connections, in fact, routes to and from other regional capitals (Turin, Florence and Bologna) and major cities (Verona) are strongly influenced by seasonal trends and tourist flows. For these routes the obligation to continue providing services, which prevents supply from adapting to peaks in demand during the summer months by allowing rival airlines access on a seasonal basis, appeared disproportionate.

Secondly, the Authority pointed out that the system for imposing public service obligations (PSOs) was based on a tariff differentiation system entailing a cross-subsidy between users entitled to concessionary fares (people resident or born in Sardinia) and everyone else who paid higher non-concessionary fares. The system meant that the carriers concerned did not request any compensation for the PSO borne on numerous routes. Aside from considerations of a redistributive nature, the Authority stressed how a system of subsidies like this one is particularly opaque, preventing the limits of the public service obligations imposed from being properly identified, while also preventing the minimisation of costs for the community at large.

In conclusion the Authority urged the adoption of alternative mechanisms capable of guaranteeing connections to and from all parts of Sardinia, while minimising the impact on competitive dynamics. The Authority suggested first of all that there be a precise definition of public service obligations, in order to establish with precision the routes and periods in which the market mechanism fails to guarantee certain connections at sufficiently low prices. In the case of secondary routes, it was agreed that Government compensation for the PSOs complied with was necessary in certain periods of the year but only to the degree that it was strictly indispensable. For other routes, for which a compensation system is not required (from and to

Rome and Milan), the Authority deemed that it would nevertheless be useful to identify the actual public service obligation, as this would help minimise the cost of the non-transparent cross-subsidies borne by the general public.

TELECOMMUNICATIONS

Opinion on the retail leased lines market

In May 2006 the Authority submitted an opinion to the Communications Regulatory Authority under Article 19.1 of Legislative Decree 259 of 1 August 2003, concerning proposed legislation on *"The retail leased lines market"*. The relevant product market, as defined by AGCOM, is the retail market for dedicated low and high speed lines, with low speed connections comprising analogical and digital circuits with a capacity of up to 2 Mbit inclusive (minimum set), and high speed connections comprising lines with a capacity of from 2 to 155 Mbit. Meanwhile, there is no retail market for extremely high speed circuits. Moreover, only the supply of low speed dedicated lines was deemed appropriate for retroactive regulation under the proposed legislation, since for the higher speed connections, despite the lack of a competitive context, the obligations imposed in the corresponding wholesale markets could guarantee effective competition.

On this subject, the Authority first considered the strong ongoing asymmetry between the provision of dedicated lines by Telecom Italia, which holds a market share of over 80%, and that of competing operators and advocated for the adoption of regulatory remedies in the wholesale circuits market, to avoid possible restrictions on competition in the markets for dedicated retail lines or in those for downstream services. The Authority agreed with the AGCOM's decision to consider the dedicated low speed lines market as being of a domestic dimension, in view of the uniformity of conditions of competition existing throughout Italy.

Regarding the exchangeability of leased lines and packet-based network connection services, the Authority urged the inclusion in the same market of connection services which, due to the advanced technology available, were effectively substitutes with the supply of retail leased lines. The exclusion from the relevant market of connection services, envisaged under the proposed legislation, might have entailed the risk that the dominant operator in the wholesale and retail leased lines markets fail to meet the transparency, non-discrimination and price control obligations applied in these markets, offering its own final clients integrated data transmission solutions on packet-based networks, at conditions that could not be matched by competitors. Finally, commenting on the definition of competitive conditions, the Authority stressed how, along with general obligations to respect competition rules, it was advisable that the proposed legislation establish the actual practices the dominant operator is allowed to adopt.

Opinion on the wholesale domestic market for international roaming services for public mobile telephone networks

In June 2006 the Authority submitted an opinion to the Communications Regulatory Authority under Article 19.1 of Legislative Decree 259/2003 concerning proposed legislation on *"The wholesale domestic market for international roaming services for public mobile telephone networks"*, making some comments on the analysis of the relevant markets.

The Authority agreed with the definition of the wholesale market in international roaming as the market for traffic that originates at a domestic level, including for voice and text messaging services.

One particularly important aspect identified was the inclusion in the market by AGCOM of all the operators that provide international roaming services. In this respect, the Authority stressed that, while from the perspective of the type of services provided all domestic operator networks could be seen as substitutes, the same could not be said of the costs and coverage of these networks. More precisely, H3G is the only domestic operator to own just a UMTS technology network, whose coverage, in Italy and in terms of population, is much less extensive than that of TIM, Vodafone and Wind. Moreover, although H3G has a roaming agreement with another mobile phone operator to cover the rest of the population and territory (for the provision of mobile services to its users in Italy), this operator is able to provide international roaming services only to foreign users that own third generation terminals. It follows that the H3G network cannot be considered equivalent to that of other network operators in terms of international roaming services nor, therefore, is H3G capable of exerting any real competitive pressure on them.

As regards the degree to which operators of networks with similar characteristics are interchangeable for the purposes of their inclusion in the same market, this depends on the real possibility of operators from the originating country to introduce tariff routing technologies. When this happens, domestic operators have an incentive to negotiate discounts to encourage the routing of traffic towards their own mobile networks. If, instead, these technologies are ineffective or not used, then the originating network will be obliged to draw up roaming agreements with all or with the main national operators in order to guarantee their customers access to mobile communication services when abroad, and these customers will be randomly divided between the various networks. In this scenario, each operator would exercise independent market power over its own network.

Based on the information provided, the Authority deemed that technological developments will increasingly promote the application of traffic routing technology and therefore the TIM, Vodafone and Wind networks must be considered interchangeable in terms of the provision of wholesale international roaming services.

Fact-finding investigation into top-up charges for prepaid mobile phone services

In November 2006 the Authority concluded a fact-finding investigation carried out jointly with the Communications Regulatory Authority, into prepaid mobile phone services. The investigation was launched to examine, by analysing the role played by credit top-up charges, the economic conditions applied to the service, the reasons underlying the additional charge and the impact of this on consumers and on the sector's competitive dynamics.

The Authority noted the great variety of credit top-up services in relation to the number of possible credit amounts available overall to the public (twenty-six approximately). Over the years customers have had significantly more choice, above all with regard to smaller top-up amounts that initially were not supplied. The Authority also highlighted how the top-up charge was proportionately more burdensome in respect of smaller credit amounts; in fact, while

in absolute terms the value of the top-up charge was directly proportional to the credit amount, in relative terms the higher the credit amount in question, the lower the impact of the top-up charge. It followed that the "weakest" customers were paying higher prices per unit than more affluent customers.

From an international perspective, Italy is characterised by an extremely high level of pre-paid mobile service users compared with subscriptions. There is a substantial difference both in the role and nature of the subscription fee and the top-up charge: the first represents an expense that is determined externally, independently of the spending habits of users, while the impact of the top-up charge depends on the credit amount purchased and how frequently users top up their credit. As a result, on average pre-paid mobile phone users top up their phones less frequently meaning their top-up charges are lower per month than subscription fees. Indeed, the quite modest level of average monthly expenditure in telephone traffic means that top-up charges have less of an impact on the overall price of the service, for all operators, than subscription fees.

However, this lower incidence of fixed costs does not entail any corresponding reduction in profits for operators. In fact, because subscription services are taxed differently, the great benefit for operators who sell pre-paid mobile services is the exemption from paying the government concessionary tax applicable only to subscriptions. In other words, the existence of the government concession for telephone subscriptions has acted as a point of reference for determining mobile telephone tariffs and for operators the top-up charges have represented a kind of competition free zone.

The rise in unitary costs of the service determined by the top-up charge was judged particularly significant in light of the unusual price structure of mobile telephone services, calculated on the basis of calling times, the operator contacted by the user, and additional elements such as call connection fees and VAT. Moreover, the investigation revealed that most users choose operators based on price per minute, while other price components, especially the top-up charge, are seen as being less relevant and often considered invariables.

As a result, while the prices per minute of mobile phone services have been gradually reduced, the top-up charge amount has remained the same. The complete invariance over time of the amount of top-up charges is particularly anomalous if one considers that this charge exists independently of the underlying cost structures of businesses, representing instead a purely commercial choice on the part of operators. In particular, the Authority deemed that by isolating a price component from competitive pressure, the operators had explicitly reduced the degree of prevailing competition, to their sole advantage.

From the point of view of demand, the investigation highlighted the various benefits associated with the scrapping of the top-up charge. First and foremost, by restoring this price component currently excluded from competitive dynamics, to a context of competition among businesses, consumers would benefit from significant reductions in the overall price of the service. Furthermore, a "regressive" component of the service price would be eliminated, linked to the greater weight of top-up charges on smaller credit amounts, which places a groundless and discriminatory burden on "weaker" less well-off customers.

In conclusion, the investigation outlined the legal/regulatory procedures through which AGCOM could intervene to eliminate or reduce top-up charges. However, following the conclusion of the fact-finding investigation, the provisions of Decree Law No. 7 of 31 January 2007 on "*Urgent measures to safeguard consumers, promote competition, develop economic activities and establish new enterprises*" eliminated credit top-up charges, thereby incorporating the conclusions of the Authority.

RADIO AND TELEVISION RIGHTS, PUBLISHING AND ADVERTISING SERVICES

A.D.S. Accertamenti Diffusione Stampa-Audipress

Following an investigation pursuant to Article 81 EC regarding several practices of the press associations ADS-Accertamenti Diffusione Stampa and Audipress in the market for newspaper and periodical readership surveys and in the advertising sales market, the Authority accepted the commitments presented under Article 14-*ter*, paragraph 1 of Law no. 287/1990 by Audipress, and closed the proceedings without establishing an infringement. The investigation was launched after the Authority received a complaint by the company Edizioni Metro Srl, regarding the refusal by both associations to include in their surveys circulation and readership data of the free daily Metro, published by the complainant .

ADS provides certification services and surveys circulation and readership data for the daily and periodical press while Audipress carries out quantitative and qualitative sample surveys of publications that have received ADS certification. When it comes to purchasing advertising space in daily newspapers and periodicals, operators base their dealings on the data supplied by these associations. In particular, the surveys carried out by Audipress are necessary to assess the market share carved out by the various publications in diverse social and economic environments, and accordingly, to assign a value to the related advertising space (rating).

In the Authority's view the refusal by ADS and Audipress to include the free daily paper Metro in their respective certification and survey systems could result from an anti-competitive aimed at restricting access by the publishers of free daily papers to the services provided by them, resulting in an unjustified discrimination against the free press and benefiting publishers of for-sale newspapers and periodicals. In response to the anticompetitive elements that emerged during the investigation, Audipress presented several undertakings in August 2006 pursuant to Article 14-*ter* of Law no. 287/1990, consisting in the definitive approval of an amendment to its own "Survey Regulations", and formally admitting free newspapers to its six-monthly surveys. The new measures also do away with the requirement that newspapers first receive ADS certification, thus removing all obstacles to the participation of free newspapers and periodicals in the survey system run by Audipress. Audipress guaranteed that the method and quality of future surveys will be identical for both categories of press, and that in order to remove any potential form of discrimination all the data and information gathered on the free press will be presented together with the data and information on the for-sale press, via the various means used to publish survey results. The Authority held that these undertakings resolved the issue of the free press's exclusion from the system of readership index surveys run by Audipress in Italy, thereby removing the concerns regarding competition that originally gave rise to the proceedings.

Football rights

In June 2006 the Authority concluded an investigation into the companies Fininvest Spa, Mediaset Spa and Reti Televisive Italiane (the Mediaset group), establishing an abuse of dominance in violation of Article 82 in the TV advertising sales market. The

investigation examined the impact on the competitive dynamics of the television market of a series of long-term license contracts and private agreements featuring exclusivity clauses, drawn up by the Mediaset group for the purchase of broadcasting rights for football matches. More specifically, during the Summer of 2004 RTI had stipulated with the football clubs A.C. Milan Spa, F.C. Internazionale Spa, U.C. Sampdoria Spa, AS Livorno Calcio Srl, F.C. Messina Peloro Srl, A.S. ROMA Spa, Atalanta Bergamasca Calcio and Juventus Football Club Spa (and, in February 2005, with the Associazione Calcio Siena Spa), license agreements for broadcasting rights on various transmission platforms for the home games of each club in the national A and B series football championships (license contracts) for the seasons 2004/2005, 2005/2006 and 2006/2007. RTI went on to acquire, through separate private agreements, first negotiation and pre-emption rights for the future purchase of licenses to broadcast the same championships of almost all the above-mentioned football clubs (private agreements), for nine consecutive seasons beginning in 2007/2008.

During the investigation, the Authority confirmed that the license agreements and private contracts originally concluded by the Mediaset group were liable to produce a significant exclusionary effect between 2007, the year in which the first negotiation rights could be exercised, and 2016, the last sports season governed by the contract subscribed to. In the same period, similar agreements would hinder potential competitors from acquiring broadcasting rights to key matches in order to secure an attractive commercial package on all the broadcasting platforms. A further effect of the pre-emption and first negotiation rights would be to allow the Mediaset group to know in advance of potential rival offers, enabling it to adapt its own bids for the acquisition of football rights to those made by third parties to the various football clubs, resulting in a kind of “English clause”, which, if exercised by an operator holding a dominant position, might constitute an abusive practice.

Despite having verified the abusive nature of the practice, the Authority did not impose a fine in light of the practices adopted by the group during the investigation, aimed at making available, from 2007 onwards, the football matches acquired in a way that would not compromise the competitive dynamics of the sector. In particular, in exercising its right of first negotiation ahead of time, the company concluded agreements with Juventus, Inter, Milan, Roma, Lazio and Livorno in which the duration of the acquired rights from 2007 onwards was significantly reduced to a maximum of two years, with the inclusion of an option on one additional sporting season. Accordingly, the duration of the licence agreements, which were originally to be valid until 2016, was limited to 2009 (unless Mediaset exercises its pre-emption right). The company also sold to Sky Italia Srl the TV broadcasting rights of home football games featuring Juventus, Inter, Roma and Lazio, which were previously bound by the agreements entered into in 2004, while explicitly stating that the commitment to sell the related rights to third parties would remain valid for all the teams mentioned in the original private agreements, with the exception of matches broadcast on a digital platform. These rights were sold to Sky on an exclusive basis for satellite broadcasting, and on a non-exclusive basis for other platforms, in particular broadband internet and IPTV (*Internet Protocol Television*). This was also to enable other operators to acquire content, which was crucial to being sufficiently attractive to advertisers and thereby competing in the TV advertising sales market. Finally, the Mediaset group entered into similar agreements with mobile phone operators TIM, H3G and Vodafone, enabling the development of new broadcasting technologies and the inclusion of diverse actors on alternative platforms.

R.T.I. - Reti Televisive Italiane - Branch of Europa TV

In April 2006 the Authority authorised the purchase by Reti Televisive Italiane RTI, the TV concessionary of three domestic terrestrial networks using analogue technology (Canale 5, Italia 1 and Rete 4) controlled by Mediaset, of a division owned by Europa TV consisting of the companies broadcasting network. Europa TV holds a license for private TV-radio broadcasting and has conditional access to over-the-air frequencies within Italy, in addition to being authorised to experiment in television broadcasts using terrestrial digital technology. The purchase was aimed at the development by RTI of DVB-H (*Digital Video Broadcasting-Handheld*) technology for the provision of audio-visual content on mobile terminals throughout Italy. From a product analysis perspective, the Authority deemed the relevant markets to be the infrastructure market for TV signal broadcasting and the digital networks market for transmitting the terrestrial TV signal (so-called digital broadcasting). In view of the specific regulatory regimes, the localisation of the relevant network infrastructures and the extent of coverage of the population, the Authority judged both these markets to be nationwide. Given that the Europa TV infrastructure was located on sites owned by Mediaset, the operation would not have affected competition in the infrastructure market for the TV broadcasting signal. With reference, instead, to the digital networks market for broadcasting over-the-air TV signals, at end 2005 the transmission capacity (infrastructure and frequencies) earmarked for digital technology was just under 6% of the total of existing frequencies, while by end-2008 (as provided for under Decree Law no. 273/2005), analogue transmissions must cease and all frequencies will be made available for digital transmission.

At the time of the merger, seven national broadcasters operated in the market of networks for the transmission of terrestrial TV signals using analogue technology. The main operator was RAI with 30.7% of total broadcasting capacity; the Mediaset group held 26.2%, Telecom Italia Media Broadcasting 7.8%, and finally, Europa TV 2.4%. Accordingly, Mediaset's share was set to rise to 28.6% following the merger a similar competitive scenario would have taking into account the total number of the sole of national frequencies, excluding the stock of broadcasting capacity then available to local TV operators, where after the merger Mediaset stood to obtain 39.9% of the capacity against RAI's 43%.

In its assessment, the Authority considered that in the future the complete switchover to terrestrial digital technology would entail an increase of the frequencies available to new operators, owing to the redundancy of frequencies based on analogue technology. Finally, the Mediaset group pledged not to offer DVB-H services directly to end customers, but rather to provide only broadcasting capacity to mobile telephone operators intending to offer DVB-H TV broadcasting services, leaving them free to choose programme content. This undertaking was deemed crucial by the Authority in order to rule out any anticompetitive effect of the merger.

INSURANCE SERVICES AND PENSION FUNDS

Assicurazioni generali - Toro assicurazioni

In December 2006, following the European Commission's ruling suspending the proposed takeover of Toro Assicurazioni Spa by Assicurazioni Generali Spa, the Authority completed its investigation and authorised the transaction subject to a number of conditions. From a product analysis viewpoint the Authority identified non-life insurance markets as the relevant markets, which are divided into separate administrative branches. These markets tend to be confined to Italy, in view of the existence of linguistic, regulatory and distributional barriers, unlike the branches of insurance for trains, aeroplanes, third party automobile policies and maritime fleets, which given the nature of demand and of competitive procedures, extend across national borders.

The investigation focused primarily on the automobile branch (third-party and vehicle insurance) markets in which the Authority identified several significant elements of rigidity, meaning businesses had no incentive to compete for new clients or offering innovative products. In particular, the Authority noted the high degree of concentration in the market and substantial stability of market shares, determined by inelastic demand; a high level of brand loyalty, confirmed by the low level of customer mobility; and a highly transparent supply mechanism, enabling companies operating in the market to be aware of all eventual price variations adopted by competitors.

The investigation highlighted how, by taking over Italy's fifth largest operator, Generali would become the leading operator in the Italian non-life insurance sector. Generali would gain market shares in almost all the markets concerned, both in those characterised by strong demand by businesses, in which it already held a significant market share, and in those in which the sale of retail services prevailed, especially the automobile insurance markets, in which it stood to achieve market shares comparable with the foremost operator in that market, Fondiaria-Sai. Together, the two insurance groups stood to gain market shares above 40% in all the non-life insurance branches, including automobiles. This growth in market share would be accompanied by the strengthening of Generali's distribution network, especially in view of the strong presence of Toro in the north-west and centre-south of Italy, with joint shares of above 25% in non-life branches in numerous provinces. Finally, following its takeover of rival Toro, Generali would also consolidate its position in the remaining markets for transport, personal accident and illness, and fire insurance.

In assessing the anticompetitive effects of the concentration, the Authority paid special attention to the specific context in which the merger would occur, that already independently facilitated the achievement of anticompetitive equilibria. Indeed, this situation was characterised by the presence of a tightly woven network of both direct and indirect – often cross – shareholdings between Generali and Fondiaria-Sai Spa, a state of affairs that reduced the incentives of these two leading operators to compete in non-life insurance in Italy. At the same time, Generali was subject to *de facto* control by Mediobanca-Banca di Credito Finanziario Spa. This fact was of particular significance insofar as among the various shareholders of Generali there were also Unicredito and Capitalia, in turn the leading shareholders of Mediobanca.

Finally, Fondiaria-Sai also held a significant interest in Generali, and a stake in the share capital of Generali's main shareholders. The existence of passive investments by Fondiaria-Sai in Generali and the cross-shareholdings between the two leading market operators in the non-life insurance markets were considered to be indicators of the high risks of tacit collusion in this sector, which could only be exacerbated following the merger.

Based on the investigation's results, the Authority found that the merger would have led to the creation or strengthening of a collective dominant position between the new Generali-Toro merged entity and Fondiaria-Sai in numerous non-life insurance markets.

In particular, the Authority deemed that a collective dominant position by Generali and Fondiaria-Sai could be said to exist already in the insurance market for maritime fleets, and this would only be further strengthened following the merger. Similar conclusions were reached with regard to the domestic markets for goods transport insurance, insurance against illness and risks relating to property damage. Finally, it emerged that the takeover of Toro would have had especially significant effects in various other markets, in particular the third-party automobile insurance market, enabling the post-merger entity to reach a market share of 40%.

Considering the market shares of the parties, the high degree of concentration in the markets, the inelasticity of demand, the limits on internal growth, the barriers to entry especially of a distributional nature, the lack of innovation and scant mobility of customers, and the existence of cross-shareholdings – the Authority concluded that the merger was likely to lead to the creation or strengthening of a collective dominant position in these non-life insurance markets and in particular, the motor vehicle market.

To eliminate the distortions of competition deriving from the merger, the Authority authorised the concentration subject to a number of conditions . In particular, in order to significantly reduce the increase in market share in non-life insurance , the Authority ruled that Generali must divest a company in favour a third party independent of both Generali and Mediobanca, and with which there are no ties whatsoever, whether of a shareholding, financial or personal nature. Furthermore, to offset the risk of a significant growth in the degree of concentration in the automobile insurance markets where Generali was active (third-party and vehicle insurance), the purchaser as a group should not have 2005 premium income in Italy greater than the Toro Group.

General directives on complementary pension schemes

In June 2006, the Authority submitted its opinion pursuant to Article 22 of Law no. 287/1990 to the Pension Fund Supervision Commission (COVIP) regarding the draft regulation "*General directives on complementary pension schemes*", implementing Article 23.3 of Legislative Decree 282/2005. In particular, the Authority was critical of several provisions contained in the directives, which made it difficult to compare products and hindered the portability of pensions.

Referring to the procedures for calculating the Synthetic Cost Indicator, which should summarise all the costs of contributing to the fund, the Authority observed that the definition of this indicator with reference to a single contribution level (€2,500), could be misleading for consumers in cases where costs are not expressed as a percentage of contributions but are fixed.

In this case, in fact, costs decrease as contributions increase, but the synthetic cost indicator does not take this into account. The Authority has accordingly suggested that global cost variations should also be indicated when contributions vary.

Turning to the rules on *ius variandi*, which differ according to whether financial or insurance products are involved, the Pension Fund Supervision Commission's ruling on pension funds applied the rules for financial products to individual pension plans, characterised by the obligation to give four months advance notice of any variations and the right to withdraw from the plan without incurring costs within three months, without however imposing any obligation to state a reason for the variation. While more favourable than the rules governing banking contracts at the time, these rules nonetheless differ from those envisaged for insurance contracts, which ban any unilateral adhere variation of contracted conditions . The Authority observed that pension funds are characterised by a high level of substitutability, especially with insurance products and in particular with so-called "life policies". Accordingly, the Authority concluded that the disparity in safeguards stemming from the approach taken in the regulation regarding *ius variandi*, appeared to clash with the very nature of a particularly "deserving" asset, such as. Moreover, the complexity of the product reduces consumer mobility between funds, so that it customers could hardly avoid unilateral detrimental amendments. For these reasons, the Authority suggested that operators no longer be allowed to make unilateral *in peius* changes to contractual conditions.

Finally, the Authority suggested that withdrawal costs from the various investment lines within a fund and switch costs from one fund to another be eliminated, to guarantee the mobility of users among different services, the portability of pension plans and therefore, the presence of effective competition between operators.

FINANCIAL SERVICES AND CREDIT

Banca Intesa-San Paolo Imi

In December 2006 the Authority authorised subject to conditions the merger by incorporation of San Paolo IMI Spa and Banca Intesa Spa, following an investigation under Article 6 of Law no. 287/1990.

The Authority found that the merger would have significant anticompetitive effects in the following markets: deposit taking and lending, investment funds, portfolio management and products in the life insurance sector. Prior to the merger, the Intesa banking group operated in several of these markets with Crédit Agricole (the leading shareholder of Banca Intesa) and Generali, both of which were set to become major shareholders in the new bank and could not therefore have been considered as actual competitors.

With reference to the deposit taking market, which is of provincial dimensions, the investigation highlighted how following the merger San Paolo-Banca Intesa would attain a market share of over 30% in numerous Italian provinces, well ahead of the share held by the next largest operator. Moreover, the merger would entail a significant increase of the degree of concentration in the markets concerned. Therefore, the Authority concluded that the transaction was likely to create or strengthen a dominant position in the deposit taking market in the provinces of: Parma, Rovigo, Venice, Vercelli, Pavia, Pordenone, Piacenza, Turin, Rieti, Terni, Imperia, Naples, Padua, Caserta, Como, Gorizia, Cremona, Novara, Udine, Brindisi and Alessandria.

In the investments sector the Authority examined lending to households, SMEs, big business and public entities separately. With reference to the household loans market, also of a provincial dimension, the merger could have created and, in some cases strengthened, a dominant position, in view of the high correlation between bank deposits and consumer credit. The dense network of branches that the post-merger bank would have at its disposal proved crucial to this consideration, since this network constitutes the primary link with clients. The Authority reached a similar conclusion regarding loans to SMEs. In particular, in the provinces of Vercelli, Venice, Pavia, Parma, Padua, Pordenone, Rovigo, Imperia, Piacenza, Cremona, Turin, Naples, Caserta, Como, Novara and Udine, San Paolo-Banca Intesa would attain market shares above 30%, with the second largest operator lagging far behind. The new bank would also hold a dominant position in many regional markets for loans to public bodies, especially in Valle D'Aosta, Piedmont, Puglia, Lazio, Veneto, Campania and Molise.

In the asset management sector, Banca Intesa operated together with Crédit Agricole through the joint venture CAAM SGR Spa, whose products were distributed via the branches of Banca Intesa on the basis of a specific agreement. The investigation revealed that the merger would create a dominant position in the national investment fund management market. The high degree of concentration and the fact that the group was vertically integrated right through the distribution chain, in addition to the high market share it held, were further elements taken into account by the Authority in assessing whether restrictions of competition would arise from the proposed merger in this market.

The Authority also found that the merged entity would hold a share of over 40% in twenty-seven provinces in the provincial market for the distribution of investment funds. In view of the extensive sales network, also comprising tied agents (San Paolo was the leading placer of these products via its network of agents tied to Banca Fideuram), the merger would create or strengthen a dominant position in the market for the distribution of investment funds in all these provinces. The Authority reached similar conclusions with respect to the asset management market for individuals and managed funds.

Finally, turning to the life insurance sector, prior to the merger Generali and Banca Intesa had set up a joint venture, Intesa Vita, while San Paolo IMI distributed Eurizon products. Banca Intesa was also active in the sector through PO Vita Spa. The investigation revealed that the elimination of competitive pressure between Banca Intesa and San Paolo could lead to a significant reduction in competitive pressure between the new bank and Generali, in view of the existing structural and commercial ties between the two groups. In particular the new Bank and Generali would have the power to adopt a common strategy with the consequent creation, especially in the Branch I life insurance market, of a collective dominant position.

The Authority authorised the merger subject to several conditions aimed at maintaining competitive conditions in the provincial markets for deposits and loans (the divestment of around two hundred branches to one or more independent third parties and non-shareholders of the new bank); restoring competitive rivalry with Crédit Agricole in the same markets (the transfer to Crédit Agricole of 551 branches, in compliance with a series of conditions aimed at guaranteeing the requisite independence between Crédit Agricole and the new bank; guaranteeing competitive conditions in the asset management markets (dissolution of the joint venture CAAM and of the related distribution agreement) and in the insurance markets (sale by Banca Intesa of PO Vita to Crédit Agricole, and sale to independent third parties of a division that produces and distributes Branch I, III and V life insurance).

Moreover, with a view to avoiding the creation of a collective dominant position with Generali, the Authority banned the distribution of Branch I, III and V life insurance policies produced by *i*) Intesa Vita and/or Generali through branches headed by the San Paolo group on the date the decision was notified and *ii*) Eurizon Vita through branches headed, on the same date, by the Banca Intesa group. The Authority also prescribed the adoption of a series of measures aimed at ensuring that: *i*) the members of the Supervisory Board and the Management Board of the New Bank expressed by Generali, or in any case having direct or indirect personal ties to Generali, do not participate in discussions or vote on resolutions regarding the business strategy of Eurizon and of its subsidiaries in the production and/or distribution of Branch I, III and V life insurance policies; *ii*) in carrying out their tasks the same members do not influence the business strategies of these companies in any way, and; *iii*) members of the Supervisory Board and the Management Board are given no information on the business strategy of Eurizon and/or its subsidiaries to avoid the exchange of sensitive data on the aforementioned business strategy between Eurizon's directors and those of Generali.

Co.Ge.Ban-Multi-Bank Principles

In July 2006 the Authority concluded an investigation under Article 15.2 of Law no. 287/1990 into Cogeban (the Italian bank consortium-owned payments organisation that operates

the national PagoBancomat debit card and Bancomat ATM card systems). The multi-bank system represents an operational mode of the circuit itself, enabling business outlets to use a single POS (*point of sale*) to channel transactions paid for with the PagoBancomat card to a range of banks, rather than to a single bank. The use of the multi-bank system by retailers increases the number of so-called "on us" transactions (where the same bank issues the debit card and acquires the transaction from the merchant). This reduces transaction costs for the merchant and has a positive impact on retail prices, especially in large-scale distribution.

The Bank of Italy's Decision no. 54 of 30 March 2005 found a violation of Article 2 of Law no. 287/1990 by Cogeban, through its circular no. 2 of 2003, which banned recourse to multi-bank systems in the PagoBancomat circuit. In the same ruling, the Bank of Italy ordered Cogeban to rapidly withdraw the section of the circular relative to "PagoBancomat Transactions in Retail Chains", and to set up, by 1 October 2005, a new system for managing PagoBancomat transactions based on multi-bank principles. Cogeban was also ordered to provide a systems security analysis based on corporate servers and an operational plan of action. Subsequently the Bank of Italy opened non-compliance proceedings for failure to comply with the injunction.

When the authority took over the proceedings, following the entry into force of Law no. 262/2005 (which transferred competence on antitrust matters in the banking sector to it), examined Cogeban's activities after 30 March 2005, and verified that Cogeban had failed to comply with the various requests made by the Bank of Italy, not having presented any analysis of the security of corporate servers, or an operational plan for future actions, or indeed an analysis of the costs of switching to a multi-bank system or of its effects on the interbank commission. Moreover the multi-bank solution presented by Cogeban, in its circular no. 3 of February 2006, revealed technical shortfalls (absence of the so-called retail requirements), unjustified regulatory constraints (the extension of a preferential relationship between the retailer and a single acquiring bank, also in terms of maintenance) and costly conversion fees, making the development of the multi-bank system de facto impracticable. In view of the gravity of the infraction, due to fact that the PagoBancomat is one of the most widely used debit cards in Italy, the Authority imposed an administrative fine of €100,794.

The 'ius variandi' rules in banking contracts

In May 2006 the Authority sent a report to Parliament, the Government, the Interdepartmental Committee for Credit and Savings (CICR) and the Bank of Italy, pursuant to Articles 21 and 22 of Law no. 287/1990, regarding the obstacles to competition deriving from the implementation of the rules on *ius variandi* in banking agreements.

Ius variandi gives one of the parties in a contractual relationship the right to unilaterally modify the original terms and/or financial conditions originally agreed on at the moment of the contract's conclusion. With reference to banking services, Article 118 of Legislative Decree 385/1993 (the Consolidated Law on Banking) deferred the procedures and terms of notice of contractual variations to a ruling by the CICR and set the period within which the client could exercise his or her right of withdrawal at fifteen days from receipt of the communication. In its ruling of 4 March 2003, CICR, in turn, allowed for the possibility of an impersonal communication to clients, made through publication in the *Gazzetta Ufficiale della Repubblica italiana*, including the exercise of the right or withdrawal.

The Authority pointed out that the sector regulations envisaged procedures that were not fully compliant with the Consumer Code, insofar as there was no reference whatsoever to "justified uses" and did not provide for adequate information and suitable notice for clients. On the contrary, it permitted impersonal communication and limited the period within which clients could exercise their right of withdrawal to just fifteen days. Almost all Italian banks made frequent use of the *ius variandi* in relation to numerous contractual clauses, and to introduce new cost items, in some cases going as far as making significant changes to the contract's structure. Moreover, banks did not normally provide any justification for their decisions and relied in almost all cases on impersonal communication via publication in the *Gazzetta Ufficiale*, which marked the beginning of the fifteen day period for withdrawal from the contract. As a result, the number of clients availing of this right in the last two years has been marginal.

These practices tend to further limit the already modest degree of customer mobility, hindering the satisfactory development of competition. In fact, through their reliance on impersonal communication, the banks strategically exploited the difficulties in comparing conditions offered to current account holders, thereby limiting competitive comparison. Based on these considerations, the Authority called for the law to be amended by: limiting unilateral variations to cases where there are justified reasons; scrapping impersonal communication through the *Gazzetta Ufficiale*; and extending the minimum period within which withdrawal rights must be exercised.

Costs of banking services for customers

In January 2007 the Authority concluded a fact-finding investigation into fees paid by customers for banking services, to ascertain whether the prices signalled scant competition among credit institutions. The scope of the review was limited to current accounts and related services, i.e. the set of services that serve the needs of depositors.

The survey revealed numerous structural and/or behavioural elements that helped explain the weak competitive dynamics in the sector. First and foremost, the investigation shed light on the unsatisfactory nature of customer choice, owing in great part to deficiencies in information. Indeed, clients are notified of the economic conditions applying to their current accounts the way which hinders their ability to assess the service and compare it with alternatives. In general, banks do not provide a summary document listing the costs of services normally applicable to current account transactions (deposits and payments).on the contrary each service is generally the subject of a separate informative note. As a result, credit institutions are able to isolate their clients from comparisons with competitors offers and exercise significant market power.

Moreover, there are various obstacles to customers' mobility, including the costs for discontinuing several banking and/or financial services, such as the fees for closing a current or securities account or early mortgage repayment, in addition to the delays and uncertainties faced by the customers if they decide to move elsewhere. Then there are other obstacles to mobility linked to connections between several banking and/or financial services. For example, closing an account might also mean having to request the ending of direct debit authorisations, and the return of Bancomat and credit cards. Finally, the survey revealed the relatively high level of

recourse to binding agreements consisting in making the sale of one service subject to the sale of another, without granting the possibility of acquiring them separately. In the first place, this combined offer makes it difficult, or impossible, to make an accurate analysis of prices of individual services, discouraging businesses that want to provide just one of the two services in question from entering the market. Moreover, practices like these, especially if widespread, can lead to a further reduction in customer mobility.

At the end of the investigation, the Authority formulated several suggestions to help boost the demand-side pressure, with a view to developing stronger competitive dynamics in the market for the supply of banking services to final customers. To achieve greater transparency and make it easier to compare the costs of maintaining current accounts, the Authority suggested that banks: compile brief information leaflets enabling current account holders to immediately grasp information regarding vital decisions, such as the type of services offered and the overall cost per item, with all the different costs grouped into a single total; guarantee, at least for a minimum period of time, stability of costs for current account maintenance and transactions; develop sources of information independent of the banking system, to allow customers to compare current account costs suited to their own client profile (search engines).

In order to reduce obstacles to client mobility, the Authority proposed the following: that current account holders should receive an annual summary of what they have effectively spent to maintain their current account, including an indication of its variation on the previous year; in the event of *ius variandi* being exercised, account holders should be informed of the overall impact on the change in conditions on annual fees, together with specific provisions for the right to discontinue said services free of charge, including for services related to current accounts; the development of procedures for maintaining interim current account services for the time it takes to switch to a new bank, in order to avoid duplications of cost for account holders; the setting of a maximum time limit for changing to another bank; the elimination of all unjustifiable, contractual or other *de facto* links between current account and other services, including for example, loans, savings, securities and policies; and finally, the development of mechanisms enabling customers to keep their old current account numbers when opening a new account.

PROFESSIONAL, ENTREPRENEURIAL ACTIVITIES, EDUCATIONAL, RECREATIONAL

Order of veterinarians of Turin

In February 2006 the authority carried an investigation into the National Federation of Italian Veterinary Orders (FNOVI) and the Order of Veterinarians of the Province of Turin, without the finding of an infringement of Article 81 of the EC Treaty since the Authority accepted the commitments proposed by the two associations in accordance with Article 14-*ter*, paragraph 1 of Law no. 287/1990.

Several provisions contained in the code of ethics adopted by FNOVI could limit the autonomy of vets to set the prices of professional services. Indeed, the minimum fees adopted by the Order of Veterinarians of the Province of Turin, which were obligatory under the code, right result in an adjacent prices of professional services. Moreover, the restrictions on the advertising appeared to restrict competition among professionals, hindering the ability of consumers to make informed decisions.

The parties proposed a number of commitments, pursuant to Article 14-*ter*, paragraph 1, of Law no. 287/1990. In particular, the Order of Veterinarians of the Province of Turin pledged to abolish, beginning on 30 November 2006, minimum fees and the ban on advertising . It also undertook not to adopt minimum fee scales in the future not to launch disciplinary proceedings and to dismiss any proceedings still open for the violation of rules on tariffs or advertising limits. FNOVI committed to amend the code of conduct in order to allow vets to advertise their qualifications and areas of expertise, the characteristics of the services offered, fees and overall costs of services, as well as to introduce a provision whereby professionals could freely agree on fees directly with the client. It also offered to scrap other anticompetitive rules and the provision imposing a minimum distance between veterinary practices; finally, it agreed to submit future revisions of the code of conduct which may affect competition. The Authority deemed that these commitments were sufficient to resolve the limits placed on the autonomy of vets that had formed the basis for the resolution to launch the investigation.

Professional football sector

In December 2006 the Authority concluded a fact-finding investigation into the professional football sector in Italy, aimed at identifying issues that could have a direct effect on competition.

With respect to the economic and financial position of Italy's professional football sector, the investigation pointed out that while total revenue is growing steadily, clubs are also reporting high debt levels, due to the erroneous assessment of the growth potential of revenue from the sale of TV rights and the high salaries of players, which account for about 80% of total costs. With particular reference to the sale of audiovisual rights (the most important revenue stream for the A Series Clubs representing over 40% of their income), the Authority stressed that the individual sale of these rights helped widening the gap in revenue distribution between clubs with greater negotiating power and a wider user base, and smaller clubs. Moreover, the

current mechanism for sharing resources, under which clubs must pool 19% of their total revenue, did not appear to be fully in line with the spirit of sporting solidarity, especially when compared with the situation in other European countries. This unequal distribution of resources has increased the technical disparities between teams, lowering the uncertainty of match results and the quality of games.

In July 2006 the Council of Ministers approved a draft law which envisages the shared ownership of television rights and a centralised system for their sale; it further stipulates that television rights must be sold "via procedures aimed at guaranteeing competition among media operators", in ways that "ensure, when possible, the involvement of several media operators in the distribution of audiovisual products for sporting events", and that sales contracts should have a "reasonable duration". Turning to the provisions on mutual assistance, a part of the proceeds from the sale of rights must be divided in equal parts among all clubs, while the remaining resources be distributed "taking into account the popularity of the clubs and their rankings in terms of results achieved". In this regard, the Authority observed that the share of the proceeds to be distributed to clubs according to their relative rankings in terms of results achieved should be sufficiently high, with the aim of safeguarding the incentive to do well in sport. More generally, the Authority pointed out that the law should allow a certain degree of discretion regarding the rules of redistribution of resources back to the clubs. Rather than to the Leagues, the task of deciding on how to redistrute the proceedings of the collective sale should be given to a third party, able to safeguard the interests of smaller clubs and the entire sector.

Turning to the rules governing relationships between professional players and clubs, Italy's regulatory framework is characterised by several anomalies liable to alter competitive relations between clubs. First of all, the Authority believes it is necessary to ensure some form of contractual stability for players, given that, if no limits are imposed, the pool of players at the diposal of each club could undergo continuous changes during a championship, making competition less equal and most importantly, increasing opportunities for collusion. In particular, the Authority suggested that the pool of players should not be changed during championships unless in exceptional circumstances, and called for the minimum duration of contracts to be at least equal to the duration of the championship. It took a similar view with respect of the rules regarding on player transfers. Currently players can sign up with a new club in two fixed periods (one while the championship is still undergoing and the other after it is over) and, as a result, while the championship is not yet finished a player can already have a contract signed up with the new club. This creates inevitable opportunities for collusion between the teams to the detriment of fair competition. The Authority accordingly suggested a series of amendments to the current rules, including: *i)* establishing the principle whereby the signing period that falls during the playing season (usually in January), is exploited only by teams belonging to different divisions and only on an exceptional basis for transfers between competing clubs (for example to replace injured players); *ii)* limiting the obligation of clubs to give written notice to the club of a player with whom they want to hold transfer talks and whose contract is about to expire, to those cases where the contract actually expires during the season; *iii)* assigning the task of drawing up the model lending agreements to the Italian Football Association (FIGC) and not to the League; and *iv)* strengthening the powers of FIGC's financial regulator, which has the task of ensuring that clubs comply with specific economic-financial parameters (the Revenue/Debt report), and entrusting it with all the economic and financial control activities of clubs. Similar considerations were made with reference to the lending of

players, a common practice of professional football clubs to exchange players during the football season.

Regarding the analysis of the organisation and duties of the FIGC and the League, the investigation highlighted the system's functional shortcoming due to the increasingly important role played by associative bodies, i.e. the Leagues, within the federal structure, which go well beyond what should be their only function of organising sporting events. After having stressed the different nature of the FIGC and the Leagues, the Authority advocated for the Leagues to be relieved of all control functions vis-à-vis football clubs, to be entrusted instead to designated federal bodies (for example Covisoc). The body in charge of drawing up the working rules and monitoring a given sector must, in fact, not only represent the sector's various components, but primarily be in a position of objective third party with respect to all the actors whose activity it is charged with regulating and monitoring. This is true both of the duties of the Leagues for the engagement of players, and obligations related to sharing the proceeds of television rights. In particular, the Authority took the view that it was necessary: *i)* to give FIGC the task of approving contracts between clubs and players and drawing up model transfer agreements, and *ii)* to assign all the clubs' economic and financial control activities to Covisoc, and accordingly to boost the powers of this body. Finally, to enable FIGC to carry out these duties correctly, the Authority said it was necessary to guarantee equal status, in the context of its bodies, to all the components of the sector.

As regards the rules governing the activities of football agents contained in the FIGC's "Regulations for Agents", the Authority stressed that this contains provisions that have no parallel in the FIFA Regulation and are liable to significantly restrict competition in the market. First of all, turning to the rules for access to the profession, the obligation to enroll in the Register of agents clashes with the FIFA Regulation and does not respond to any necessity or proportionality requirement. The Authority also found that the standardisation of contractual relations between the agent and footballer, through the obligation to use the same forms "exclusively", was an obstacle to competition between agents, given that greater contractual freedom would be an incentive to compete also from the point of view of the conditions offered. The Authority also pointed out the restrictive scope of rules that: *i*) oblige players to pay their agents in all cases, even when the engagement obtained was not owe to the agent's own work; *ii*) oblige players to sign up with one agent only; and finally *iii*) forbid contacting footballers to persuade them to change agent. These rules, insofar as they restrict the possibility for players to engage the services of a new agent, reduce the incentives of the agents themselves to diversify their activities and demonstrate their ability to secure better signings. Finally the Authority noted the inadequacy of the rules on conflicts of interest contained in the FIGC's "Regulations" and concluded that the role of agent should be forbidden where the objects or beneficiaries of the negotiations are the agent's relatives or close family.

PUBLIC PROCUREMENT

The assignment of local public services having economic relevance using the in house procedure and several provisions of the law delegating authority for these services

In December 2006 the Authority submitted a report under Article 21 of Law no. 287/1990 to Parliament, the Government, the unified State-Regions-Cities and Local Autonomies Conference, the autonomous province of Valle d'Aosta, the Association of Italian Provinces (UPI), the autonomous provinces of Bolzano and Trento, the National Association of Italian Municipalities (ANCI) and the mayors of the municipalities of Lignano Sabbiadoro, Tarcento and Rubàno, on the assignment of local public services of economic importance using so-called *in-house* procedures and the legal reform initiatives.

In particular, the Authority emphasised that the so-called *in-house* assignment procedures are subject to strict legitimacy requirements, forbidding local authorities from ordinarily assigning local public services on a direct basis and relegating the public tender process to a few exceptional situations. Since these economic services are provided to users under a monopoly regime, competition must be fostered between alternative providers to identify the operator best suited to offering a service having the highest quality and the lowest cost. In practice, however, *in-house* assignment procedures have become widespread in order to help avoid the necessary competitive selection process for the assignment of local public services and to reorganise supply, without guaranteeing the necessary administrative efficiency, over a broader territorial area. For these reasons, the Authority called for a review of the current laws, to enable effective access to the market for local public services and guarantee a more competitive organisation of the sector.

II. COMPETITION POLICY AND REGULATORY REFORM: DEVELOPMENTS IN 2006

INTRODUCTION

In 2006 the regulatory framework governing several economic sectors underwent an intense process of modernisation: market liberalisation, administrative simplification and consumer protection. The reform concerned a wide range of economic activities and addressed obsolete regulatory arrangements, which resisted numerous attempt at modernisation. This effort indicates that competition is perceived today as a priority in the political agenda.

Hereinafter, we discuss the most important regulatory reforms adopted last year. First of all, we will focus is on the amendments of Italian antitrust law, which brought the Authority's into line with Community standards; secondly, we will describe measures aimed at liberalisation and consumer protection; lastly, we will present measures intended to enhance transparency and competition in public tenders.

THE AUTHORITY'S NEW POWERS

Decree Law no. 223/2006, containing "Urgent provisions for economic and social growth and to curb and rationalise public expenditure, and measures concerning revenue and the fight against tax avoidance" confirmed with amendments by Law no. 248/2006 strengthened the Authority's powers of intervention by introducing into Italian law a number of important instruments that were already present at Community level.

The new legislation confers upon the Authority the power to adopt not only interim measures to prevent serious and irreparable harm to competition pending investigations but also leniency programmes granting immunity or reduction of fines to undertakings which discontinue their participation in a secret cartel and inform the Authority thereof, cooperating in the course of the investigation. In addition, the possibility of adopting commitments decisions allows the Authority to enter into a dialogue with firms and marks a shift towards an approach to antitrust activity more oriented to the regular functioning of the markets than merely to ascertaining and repressing violations. Lastly, Legislative Decree 303/2006 providing for the "*Coordination with Law no. 262/2005 of the Consolidated Law on Banking and the Consolidated Law on Finance*" introduced important amendments to Law no. 287/1990, with special reference to proceedings involving insurance companies and banks.

Interim measures

Article 14-*bis* of Law no. 287/1990, introduced by Article 14.1 of Decree Law no. 223/2006, empowers the Authority to adopt interim measures and provides for fines in the event of non-compliance. The provision applies to proceedings pursuant to Articles 2 and 3 of Law no. 287/1990 and Articles 81 and 82 of the EC Treaty.

Paragraph 1 of Article 14-*bis* states that "in case of urgency due to the risk of serious and irreparable harm to competition, the Authority, acting on its own motion where her grounds to suspect an infringement on the basis of a prima facie assessment, may adopt interim measures". Under paragraph 2 of Article 14-*bis*, measures "may not be renewed or extended in any circumstances". Lastly, the provision, establishes sanctions for cases of non-compliance. If firms do not comply with a decision of the Authority imposing interim measures, the Authority may impose administrative fines up to 3% of a firm's turnover.

As regards the procedure for the adoption of interim measures, in December 2006 the Authority adopted a "*Communication concerning the application of Article 14*-bis *of Law no. 287/1990*". The communication lays down procedures for the adoption of interim measures, distinguishing between an ordinary procedure, under which interim measures are adopted, after granting all parties the right to be heard, and a special procedure, to be followed in cases of great urgency: the Authority may then adopt, provisional interim measures, which must be confirmed at a later stage after assessing the arguments of the parties, to be submitted within seven days of notification.

Commitments decisions

The newly introduced Article 14-*ter* of Law no. 287/1990 provides for decisions whereby the Authority may accept the commitments proposed by firms in order to overcome the competitive concerns which are subject of the investigation initiated under Article 2 or 3 of Law no. 287/1990 or Article 81 or 82 of the EC Treaty and rending them binding. In such cases, the investigation is closed without a finding of infringement. Commitments can be offered with three months from the formal opening of the investigation

The "*Communication concerning the procedures for applying Article 14*-ter", adopted by the Authority in October 2006, provides for the publication on the Authority's website of the commitments proposed by firms in order to allow interested third parties to submit written comments. After third parties have submitted their comments, ancillary amendments to the commitments originally submitted can be accepted. Paragraph 2 of Article 14-*ter* states that in the event of non-compliance with commitments the Authority may impose a fine up to 10% of a firm's turnover. In addition, the Authority, acting on its own motion, may reopen proceedings if: *i*) there is a change in the situation on which the decision is based; *ii*) the firms concerned violate the commitments; or *iii*) the decision is based on information transmitted by the parties that is incomplete, inaccurate or misleading.

Leniency programme

Article 14.2 of Decree Law no. 223/2006 allows the Authority to reward the collaboration of firms in the investigation of recent cartels by not applying or reducing the fines that would otherwise be applicable. The article requires the Authority to adopt a leniency programme in accordance with the principles established by Community law.

In September 2006 the European Competition Network (ECN), including all the authorities applying the Community competition rules, approved a model leniency programme, to which the Commission and the national authorities are progressively adapting. In fact the programme adopted by the Authority on 15 February 2007 after a lengthy public consultation is in line, albeit with some variations, with the ECN model. The programme applies to secret horizontal agreements. These are the most serious infringements of competition law and are especially difficult to detect.

The linchpin of the Authority's programme is the non-application of the administrative fines referred to in Article 15 of Law no. 287/1990 on the firm that is the first to spontaneously provide decisive evidence (which is not already available to the Authority) to prove the existence of a secret cartel, possibly though targeted inspection. Restricting total immunity to the first firm to report an agreement considerably reduces the stability of the cartel and increases the uncertainty of the participants as to who is most likely to "betray" it, thus encouraging firms to cooperate. In order to be granted immunity, a firm must provide the Authority with a detailed description of the nature of the agreement, its aims, the markets on which it produces its effects and its duration. The reporting firm must also inform the Authority of the dates and places of any meetings and give the names of those who took part. If total immunity has already been granted to a firm or if the level of evidence necessary to obtain complete immunity has not been reached, firms which otherwise cooperate in ascertaining the infringement may benefit from a reduction of fines, normally not exceeding 50%.

When a firm intending to apply for immunity is unable to produce all the evidence required immediately, but is able to do so in a short time, it may submit an incomplete application and request the Authority to set a time limit within which to complete the application by producing the relevant information and documents. Lastly, on the basis of an adequately motivated request, firms may submit an oral leniency application.

Division of powers between the Authority and the Bank of Italy and new prudential regulation

Legislative Decree no. 303/2006 providing for the "*Coordination with Law no. 262/2005 of the Consolidated Law on Banking and the Consolidated Law on Finance*" completed the regulatory framework on cooperation between the Authority and the Bank of Italy and partially amended the provisions of the law on saving (Law no. 262/2005).

In particular, for the assessment of concentrations involving banks, the decree eliminates the single act provided for by Article 19.13 of Law no. 262/2005 and provides for the proceedings of the two institutions called upon to assess the transaction (the Authority for the aspects concerning competition and the Bank of Italy for those of a prudential nature) to conclude with the adoption of separate decisions. The time limits for the two proceedings nonetheless remain the same (sixty days from the presentation of the complete notification). This solution overcomes the difficulties in applying the earlier rules providing for the adoption of a single decision, deriving from the divergence between the information needed for the assessments for competitive and prudential purposes.

The decree also regulates some details that the law on saving had not covered and in particular the rare circumstances in which there is a conflict between the protection of competition and the need for market stability. In these cases the decree gives the Authority, acting on a reasoned proposal from the Bank of Italy and taking into account the criteria laid down in Article 4.1 of Law no. 287/1990, the power to authorise, with a view to the functioning of the payment system and for a limited period, agreements that would otherwise be forbidden. In addition, the decree states that the Authority, acting on a reasoned proposal from the Bank of Italy, may authorise concentrations involving banks or banking groups that would otherwise be forbidden. The decree lays down that such authorisations granted by way of derogation must never restrict competition in a way that is not strictly necessarily for the purposes specified.

Lastly, Decree Law no. 297/2006 containing "Urgent measures for the transposition of Directives 2006/48/EC and 2006/49/EC and for the adaptation of Italian law to Community decisions concerning ground assistance in airports, the National Agency for Young People and hunting", ratified by Law no. 15/2007, transposed Directives 2006/48/EC and 2006/49/EC, which bring the Italian legal framework into line with the new Community rules on banks' regulatory capital by adopting the criteria established in the capital accord of the Basel Committee on Banking Supervision (Basel 2).

LIBERALISATION, ADMINISTRATIVE SIMPLIFICATION AND CONSUMER PROTECTION

Decree Law no 223/2006 is concerned with liberalising access to a variety of economic activities them, fostering competition, simplifying procedures and protecting consumers. The Decree implements several advocacy reports of the Authority intended to eliminate regulatory constraints that are no longer justified, which have been recognised as providing stimulus and guidance for the reform.

*Insurance companies**[The measures introduced concerning insurance companies are based on the conclusions of the Inquiry into the vehicle insurance sector, 17 April 2003, published (in Italian) in Bollettino, no 13-14/2003.]*

Article 8 of Decree Law no. 223/2006 introduces a series of measures aimed at strengthening competition in the market for third-party motor insurance. It also prohibits contractual clauses granting exclusive distribution rights and those requiring distributors of insurance products to apply minimum prices and maximum discounts to final customers. In addition, the decree makes distributors subject to transparency requirements regarding commissions and premiums. The terms of contracts entered into before 4 July 2006 are grandfathered until they expire and in any case not beyond 1 January 2008.

The ban on exclusive distribution is intended to achieve the objective of eliminating the widespread practice of having recourse to tied agents in the market for the distribution of third-party motor insurance products. The structural difficulties consumers encounter in obtaining information on the qualitative features and prices of alternative products tend to reduce the degree of rivalry and allow prices to be kept artificially high. The scope for competitive comparison increases if the elimination of exclusive distribution arrangements is accompanied by the growth of insurance brokers. This is a development in the market that the decree fosters, but cannot guarantee, by banning exclusive distribution. To prevent agents who distribute the products of several insurance companies from promoting those that ensure they earn the highest profits rather than the cheapest or best suited to meet the needs of their customers, the decree requires them to provide information on the commissions they receive from the companies whose products they distribute.

Lastly, as regards premiums, the new rules prohibit insurance companies from limiting competition between distributors by imposing minimum premiums for the sale of policies or maximum discounts having the same effect.

*Banks**[The measures introduced concerning banking contracts are based on the conclusions of the Inquiry into the prices charged to clients for banking services, 1 February 2006, published (in Italian) in Bollettino, no 5/2006 (together with the Inquiry into the obstacles to customer mobility in the field of financial intermediation services, 16 November 2004, published (in Italian) in Bollettino, no 47/2004) and the Report on the ius variandi rule in banking contracts, 26 May 2006, published (in Italian) in Bollettino, no. 19/2006.]*

Turning to the banking sector, Decree Law no. 223/2006 addresses the provision on unilateral changes to the terms and conditions of contracts (known as the *ius variandi* rule) contained in the Consolidated Law on Banking (Legislative Decree 385/1993). In particular, Article 118 of that decree required unfavourable variations in interest rates, prices or other terms or conditions to be notified to customers in the manner and within the time limits established by

the Credit Committee and for customers to be able to exercise the right of withdrawal within fifteen days of such notification. In a resolution adopted in 2003 the Credit Committee established that such changes could be notified to customers by being published in the *Gazzetta Ufficiale della Repubblica italiana*.

Over the years nearly all Italian banks adopted publication in the *Gazzetta Ufficiale* to notify changes in the numerous elements of their contracts and to introduce new cost items, generally without giving any reasons for their unilateral choices and sometimes altering the very structure of the contract. The impersonal notification procedures adopted were not well suited to informing customers of the effects of the changes introduced, so that the possibility of customers exercising. their withdrawal rights was purely hypothetical.

Article 10 of Decree Law no. 223/2006 amends Article 118 of the Consolidated Law on Banking and lays down that every unilateral change to contractual terms and conditions must be appropriately justified and expressly notified to customers with at least 30 days notice. Customers are deemed to have approved changes if they do not terminate the contract within 60 days. They must be able to terminate the contract at no cost and in its settlement obtain the application of the terms and conditions previously in force. Changes in interest rates consequent on monetary policy decisions must simultaneously affect both borrowing and lending rates and "be applied in a way that is not prejudicial to the customer".

Article 10.2 of the decree law states that "in the case of continuing contracts customers shall always have the right to terminate the contract without a penalty and without any termination expenses". This is an important innovation designed to eliminate unjustified costs associated with the closing of accounts. Such penalties are largely exempt from competition, appearing in the information provided to customers at the opening of accounts, when their attention is focused primarily on the conditions offered during the life of the contract and the closing costs are basically ignored. The inclusion of this provision in a separate paragraph gives it special force. In particular, in view of the variety of services provided by banks, the Authority deems that it must be interpreted broadly in order to encourage customer mobility. Consequently, the prohibition on imposing termination expenses should extend to other services (direct debits, credit cards, securities accounts, etc.), each of which, although based on a separate agreement, is closely and indissolubly linked to the current account agreement.

Professional and intellectual activities *[The measures introduced concerning professional and intellectual activities are based on the conclusions of the Inquiry into the sector of professional orders and associations, 9 October 1997, published (in Italian) in Bollettino, no. 42/1997 and on the following reports: Reorganisation of the intellectual professions, 5 February 1999, published (in Italian) in Bollettino, no. 4/1999; Provisions concerning the professions, published (in Italian) in Bollettino, no. 16/2005; Recognition of the fundamental principles regarding the professions, 27 April 2005, published (in Italian) in Bollettino, no. 26/2005; and Liberal-isation of professional services, 18 November 2005, published (in Italian) in Bollettino, no. 45/2005.]*

In order to promote competition in professional services, Article 2 of Decree Law no. 223/2006 repealed the restrictive legislative and regulatory provisions that made it obligatory to apply fixed or minimum fees. It also eliminated some constraints and the prohibition, both total and partial, on advertising professional qualifications and specialisations, the nature of the service supplied and the price and the total cost of services, in accordance with criteria of

transparency and truthfulness of the message, compliance with which is verified by the competent professional body. In addition, the decree law allows professionals to negotiate performance based fees and to create partnerships and professional associations of an interdisciplinary nature, subject to the requirement that the purpose be exclusive, that the professional not be allowed to participate in more than one partnership and that the service in question be provided by one or more specified partners.

Everything considered, these measures are effective and deserve positive recognition because they remove some of the most unjustified constraints weighing on the activity of professionals and can bring significant benefits to clients. The liberalisation of fees and the elimination of the prohibition on advertising are mutually reinforcing measures. The elimination of minimum fees restores professionals' full control over an important variable of their economic conduct and, by encouraging clients to choose between different alternatives, makes it advantageous for individual professionals to lower their prices and offer services of increasingly high quality. From the same standpoint, advertising, an essential part of the competitive process, fosters greater information on the quality and prices of services in the market thus facilitating the making of informed choices. Advertising also makes it easier for new operators to enter the market and encourages innovation and the differentiation of services.

Transfer of ownership of cars, motor vehicles and boats

With reference to transfers of ownership of registered movable goods, Article 7 of Decree Law no. 223/2006 simplifies some of the formal requirements that must be satisfied. The current system (established by Article 2683 of the Civil Code) provides for the contracts for transfers of ownership of registered movable goods to be registered for the purpose of their enforceability against third parties. Pursuant to Article 2657 of the Civil Code, the registration requires a judgment, a public act or a simple contract with an authenticated or legally ascertained signature. Public acts and simple contracts with an authenticated signature are drawn up by a notary public or by another authorised public official.

Article 7 of the decree law introduces a derogation from this general rule for transfers of ownership of motor vehicles, simplifies the transactions and erodes notaries' exclusive powers. In fact the article provides that requests for the authentication of the signing of acts and declarations whose subject is the disposal of registered movable goods and trailers or the establishment of guarantee rights on them may also be made to municipal offices and the owners of motorists' telematic branches, which are required to issue them free of charge, apart from the prescribed secretariat fees, on the same day as the request is made, except in the case of reasoned denial.

Administrative committees for authorising access *[The measures introduced concerning administrative committees are based on the Report on recording tariff uses in the field of securities intermediation, 14 April 2006, published (in Italian) in Bollettino no. 13/2006.]*

Article 11 of Decree Law no. 223/2006 suppressed some collegial bodies market participants belonged to and entrusted with advisory tasks and examinations, especially in connection with access to the market for some activities and professions. In particular, the following bodies were suppressed: the municipal and provincial committees that expressed an opinion on the issue of authorisations for the opening or transfer of premises for the serving of food or beverages; the provincial committees for keeping the register of intermediation agents

and commercial agents and representatives; and the central committees for the examination of the appeals of intermediation agents and commercial agents and representatives. These committees were either potentially harmful, as in the case of the serving of food and beverages, and therefore needed to be suppressed or, insofar as they pursued an objective of general interest (as for the registration of business intermediaries, which also requires verification of candidates' subjective characteristics), it was not desirable for the function to be performed by representatives of the profession but should be entrusted to the competent Government Department (in this case the Ministry for Economic Development).

With the same aim, i.e. to prevent decisions of the committees from being distorted by the pursuit of private interests, Article 11 also prohibits business intermediaries from being members of the committee charged with assessing the ability of candidates to engage in the profession.

Wholesale and retail trade and the serving of food and beverages *[The measures concerning distribution are based on the following reports: Regional measures implementing Legislative Decree 114/1998 concerning distribution, 19 April 1999, published (in Italian) in Bollettino no. 13-14/1999; Regulation of trade by the Sicily region, 9 July 2004, published (in Italian) in Bollettino no. 27/2004; Regulation of petrol distribution, 10 November 2004, published (in Italian) in Bollettino no. 45/2004.]*

Article 3 of Decree Law no. 223/2006 eliminates all the remaining unjustified local and state restrictions on access to the market with reference to commercial activities and the serving of food and beverages.

In particular, the following are declared to be incompatible with the law: a) registration for authorisation purposes and subjective professional requirements to engage in commercial activities and the serving of food and beverages; b) mandatory minimum distances between commercial activities of the same type; c) the establishment of quantitative limits on the assortment of goods offered in shops (with the sole exception of the distinction between the food and non-food sectors); and d) limits to the expansion of businesses in terms of market shares that are predetermined or calculated on the basis of sub-regional volumes of sales. The measures apply above all to the serving of food and beverages, activities that are still subject to unjustifiably restrictive regulation, characterised, among other things, by the need to be included in the register of shopkeepers and by quantitative restrictions on authorisations.

Article 3 also abolishes any provision that forbids promotional sales or requires preliminary authorisations or imposes time or quantity restrictions on promotional sales inside shops. The rules governing sales below cost and end-of-season sales are an exception in this respect. The same article also eliminates any ban on or preliminary authorisation requirement for on-the-spot consumption of gastronomic products at neighborhood stores. The conditions it imposes are that the consumption at the counter of gastronomic products should take place using the premises and furnishings of the business, while waiter-assisted serving of food and beverages continues to be excluded.

Bread-making *[The measures introduced concerning bakeries are based on the Report on the new rules on planning, 8 November 2002, published (in Italian) in Bollettino no. 44/2002.]*

Access to bread-making was until now unjustifiably restricted and subject to authorisation by the chamber of commerce of the province in which the activity was to be

performed. To obtain an authorisation, which was also required for the transfer or enlargement of an existing bakery, it was necessary to show that the new activity was consistent with the expected evolution of supply and demand, after hearing the opinion of a committee whose members included representatives of the bakers association and of the sector's trade unions. The system of authorisation referred to above had a clear protectionist bias in favour of existing bread-makers and did not pursue a general interest of any kind.

Article 4 of the decree law repeals the provisions governing the earlier planning process at provincial level and the related authorisation regime and subjects the opening of a new bakery (and the transfer and transformation of existing ones) to a simple declaration of the start of the activity, to be presented to the territorially competent municipality. Only checks on compliance with the prescriptions concerning health and hygiene are maintained. As laid down by Article 3 for serving food and beverages, the decree law makes it possible for the owners of bakeries to sell their own products for immediate consumption, using the premises and furnishings of the business, with the exclusion of waiter-assisted serving and subject to compliance with the prescriptions concerning health and hygiene.

*Distribution of pharmaceuticals**[The measures adopted concerning the pharmaceutical sector are based on the Inquiry into the pharmaceutical sector, 6 November 1997, published (in Italian) in Bollettino no. 9/1998 and on: the Report on the regulation of pharmacies, 18 June 1998, published (in Italian) in Bollettino no. 23/1998; the Report on urgent measures for the reimbursement of pharmaceuticals not reimbursable by the NHS, 3 June 2005, published (in Italian) in Bollettino no. 22/2005; the Report on the manner of accessing self-medication drugs, 22 September 2005, published (in Italian) in Bollettino no. 36/2005; and the Report on the regulation of the distribution of pharmaceuticals, 10 February 2006, published (in Italian) in Bollettino no. 4/2006]*

The liberalisation measures in Decree Law no. 223/2006 also affect the distribution of pharmaceuticals, and in particular: *i*) the retail distribution of over-the-counter drugs; *ii*) discounts on over-the-counter drugs; *iii*) the wholesale distribution of pharmaceuticals; and *iv*) the ownership of pharmacies and related incompatibilities.

The sale to the public of self-medication drugs and all over-the-counter drugs and products is liberalised by Article 5 of the decree law, which permits their sale in supermarkets (subject to notifying the Ministry of Health and the region in which the outlet is located), provided the following consumer-protection requirements are satisfied: *i*) sales must be made during the store's opening hours and in a special department; and *ii*) they must be made in the presence and with the direct and personal assistance of one or more qualified and registered chemists. In addition, competitions, prices and below-cost sales are forbidden for such pharmaceuticals.

The increase in the number of outlets produces (and indeed has already produced) an increase in competition in the markets for over-the-counter drugs and gives pharmacies a strong incentive to apply discounts. With a view to encouraging these price dynamics, Article 5 of the decree law removes the 20% upper limit on discounts with respect to the list prices of over-the-counter drugs imposed by the earlier legislation (Law no. 149/2005). The provision of the decree law establishes in fact that each retailer is free to determine the discount to be applied to the price indicated by the producer or the distributor on the package, provided it is marked legibly and clearly and is applied to all buyers without discrimination.

As regards access to the wholesale market for pharmaceuticals, exclusively for those not reimbursed by the NHS, the decree law eliminates the obligation for wholesalers to stock at

least 90% of the specialties on sale. This reduces the public service obligations associated with the wholesaling of pharmaceuticals and thus encourages the entry to the market of new operators and the development of more market-oriented methods of supply.

The decree law also makes some changes to the rules on the ownership of pharmacies, which nonetheless remains restricted to registered pharmacists and partnerships and cooperative companies made up exclusively of registered pharmacists satisfying the prescribed suitability requirements. In particular, the running of pharmacies is no longer restricted exclusively to pharmacists registered in the same province as the pharmacy and similar constraints on companies made up of pharmacists have also been removed. In addition, such companies may now own up to four pharmacies located in the province in which the company has its registered office.

Lastly, and in part with the aim of avoiding an adverse judgment by the European Court of Justice in a case brought against Italy by the European Commission, Parliament relaxed the incompatibility regime for participating in companies owning pharmacies. In particular, Article 5 of the decree law explicitly abolishes the incompatibility between the wholesale distribution of pharmaceuticals and the supply of pharmaceuticals to the public in a pharmacy. As a result of these measures, wholesale pharmaceutical companies can enter the retail market, thereby encouraging vertical integration, with positive effects on the efficiency of supply and a consequent reduction in the cost of distributing pharmaceuticals, which in Italy is particularly high.

Taxi services *[The measures adopted concerning taxi services are based on the Report on the competitive distortions in the market for taxi services, 3 March 2004, published (in Italian) in Bollettino no. 8/2004.]*

With a view to strengthening taxi services, Article 6 of the decree law, totally amended during ratification, allows municipalities: *i*) to introduce shifts in addition to those ordinarily scheduled, for which the owners of taxi licenses use substitute drivers satisfying the requirements laid down by law; *ii*) to hold extraordinary exams in compliance with the existing plan for the number of licenses or, if this does not exist or is not considered likely to ensure an adequate level of supply, for the issue at no charge of new licenses to be assigned to persons satisfying the legal requirements; *iii*) to provide for the issue to eligible persons laid down by law of non-transferable temporary or seasonal authorisations to cope with extraordinary events or periods of foreseeable increases in demand in a number proportional to the needs of users; *iv*) to provide, on an experimental basis, for the use of substitute and additional vehicles for services aimed at specific categories of users; *v*) to provide on an experimental basis for innovative forms of customer service with differentiated service and tariff obligations, with the issue of special authorisations for the purpose; and *vi*) to provide for users to be able to benefit from tariffs fixed by the municipality for predetermined journeys. The new rules are without prejudice to the granting of new licences under the existing numerical plans and to the ban on individuals having more than one licence.

Companies participated by Regions or other local authorities

Article 13 of Decree Law no. 223/2006 introduces some restrictions on the activities of companies set up or participated by regions or other local authorities for the production of goods and services instrumental to their activity (with the exclusion of local public services) and, in the cases provided for by law, for the outsourcing of administrative functions for which

they are competent. Mostly, these companies provide the local authorities with market services such as IT, engineering, maintenance, training and consultancy, protected from any form of competition. The European Court of Justice has ruled that a local authority can set up any such companies provided it subjects them to "control comparable to that exercised over its own departments", which implies, among other things, the absence of any "commercial vocation".

Article 13 of the decree law embodies these principles, albeit without intervening on the exercise of control, and lays down that instrumental companies and those set up for the outsourcing of administrative functions must operate exclusively with "the entities that set them up or participate in them or outsource activities"; instead they may not provide any goods and services to other public or private persons, even if the contract is awarded by means of a competitive tender procedure. In addition, the decree law forbids such companies from holding interests in other companies or entities. The only exception consists of companies engaged in financial intermediation referred to in Legislative Decree no. 385/1993, which are excluded from the ban on investing in other companies or entities. This means, for example, that a regional or other local authority holding company can still acquire interests in other companies or entities.

Local transport

In the field of municipal and inter-municipal line transport, Article 12 of Decree Law no. 223/2006 allows municipalities to lay down that the service be provided, throughout the municipality, or over given stretches of routes or periods of time by additional operators. This, "without prejudice to the principles of universality, accessibility and adequacy of public local transport services and with the aim of ensuring a more competitive setup of the related economic activities and fostering the full exercise of citizens' right to mobility".

Although the provision of public transport services over the whole network remains entrusted to operators subject to public service obligations, on profitable stretches municipalities may authorise private operators to provide public line transport services. These operators are not subject to any public service obligation (which means that they are not subject to price regulation or time obligations) and cannot receive any financing from municipalities for performing the service. Exclusively in the case of train stations, ports and airports, Article 12 requires the municipality in which the facility is located to grant access to it by operators authorised by municipalities in the area covered.

The parallel presence, in certain stretches, of public line services and new private services accessible to the public appears capable of leading to a progressive improvement in the quality of the overall service provided and at the same time to a supply more widely diversified according to the needs expressed by the various categories of users. As correctly envisaged by the decree law, a stretch's profitability should be a necessary but not sufficient condition for the service to be opened to competition. In particular, competition must be promoted without constraints if discrimination does not exist between operators, i.e. when the stretch is not included in the definition of public service and is not subject to price regulation. Vice versa, if the stretch is subject to public service burdens and price regulation, the introduction of competition can be coupled with some corrections. In particular, it may be necessary to provide for the new entrant to pay the reduction in the financing of public service burdens deriving from its entrance.

Public contracts

Adopted in Legislative Decree no. 163/2006, the "*Code for public works, service and supply contracts*" transposes Directives 2004/17 and 2004/18 and introduces new legal institutes and methods of organisation in order to ensure a broader competitive confrontation between firms, modernise government purchasing procedures and make them more efficient. The Code, divided into five parts and 257 articles, fits into a broader process of consolidation undertaken by the Italian Parliament in recent years, which has already led to the adoption of, among others, codes for consumers, insurance, industrial property, e-government, television and the environment.

Taking account of the advances in information and communication technology and the simplification they can bring in advertising public contracts and in terms of the effectiveness and transparency of the procedures for awarding them, the Code starts by putting electronic and traditional instruments for disseminating information on an equal footing. In particular, there is now greater scope for using electronic instruments to publish invitations to tender and contract notices, to transmit information and to submit bids. Moreover, a particularly advantageous systemic innovation has brought the introduction of electronic procedures for managing contracts and negotiating offers. In the context of reductions in the cost of procedures and the time required for their performance, contracting authorities can take advantage of new instruments, including dynamic purchasing systems, electronic auctions and competitive dialogue, all of which serve moreover to enhance the functioning of competitive mechanisms. Although different, these mechanisms all contribute to increasing firms' ability to respond to requests from government bodies, while simultaneously guaranteeing the contracting authorities the flexibility needed to satisfy its requirements in the best possible way.

Lastly, with reference to the provisions that most directly concern the performance of tenders, especially noteworthy is the introduction of new rules governing the criteria for selecting participants and evaluating the economically most advantageous bid. In particular firms participating in a competitive tender can now rely on the technical, financial and organisational capacities of other entities, regardless of the legal nature of the links between them. This considerably broadens the scope for meeting the requirements for qualifying to submit bids. Moreover, in the case of evaluations on the basis of the most advantageous bid, contracting authorities are now obliged to specify the weighting and valuation methods in the contract notice so as to reduce the scope for discretion when choosing the winner and simultaneously make the decision-making process more transparent, to the benefit of firms.

These are important innovations that, together with the new standard contracts and award procedures, can make an important contribution to rendering the market for public contracts more efficient, open, integrated and competitive.