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OECD Reviews of Regulatory Reform: Italy
Better Regulation to Strengthen Market Dynamics
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Chapter 3

Competition Policy

Italy has made progress implementing the recommendations of the 2001 OECD Report on Regulatory Reform in Italy, *to eliminate unnecessary regulatory constraints on competition about price, entry, and quality. The* Bersani *reforms in 2006 and 2007 removed many constraints, and in a way that showed how reform benefits consumers, shifting the terms of debate about reform priorities. These reforms have vindicated the Antitrust Authority's programme of policy study and advocacy, since the Authority's reports supplied the evidence to justify and explain them. Other recommendations have received less attention. Including competition policy in the legislative quality process remains an aspiration. The issue of competition in local public services remains open. Antitrust enforcement has improved in some of the recommended directions, notably stronger sanctions and more flexibility to permit adopting a formal leniency programme. This chapter discusses timetables for merger review in the light of European practice.*

Background and recent developments

The policy options proposed in the 2001 *OECD Report on Regulatory Reform in Italy* ("2001 Report") dealt with regulatory constraints, public services, direct controls on price and market share, regulatory impact analysis, cartel enforcement, sanctions, merger deadlines and resources. The principal recommendations addressed problems of anti-competitive regulation.

Steps taken since the 2001 Report have moved toward implementation of many of these recommendations. The most dramatic steps were the two packages of reforms introduced in June 2006 and January 2007 by Minister Pier Luigi Bersani, improving transparency, consumer choice and freedom of competition in a wide range of sectors, including bakeries, banking, insurance, retail trade and restaurants, taxis and pharmaceutical products and services.

Some reforms have strengthened enforcement of competition law, authorising stronger sanctions against infringements and broader powers for the Italian Antitrust Authority ("Authority"). The Authority's enforcement tools now include a leniency programme and the powers to order interim relief and to accept commitments governing future conduct. With the termination of the special jurisdiction of the Bank of Italy, power to apply competition law in all sectors rests with the Authority.

Substantive law

Italy's competition law, first enacted in 1990, has always been based on the jurisprudence of the EU. Substantive consistency facilitated Italy's adaptation to the decentralised application of EU competition law since 2004. The Authority's emphasis on economic factors in its application of the common prohibitions against restraints and abuse of dominance and in merger control also facilitated harmonisation, as EU competition policy has moved toward a more economic approach.

Restrictive agreements

Adoption of a formal leniency programme in early 2007 should strengthen enforcement against clandestine horizontal collusion. The first result of Italy's programme was announced in May 2007. Firms in the particle board industry were fined EUR 31 million for fixing prices, setting output quotas and co-ordinating input purchasing. The firm that came in first and co-operated with the investigation was not fined at all, while fines for the others were reduced, by lowering the base amount 30%, for co-operation with the investigation.

Enforcement against agreements reached through associations continues to be hampered by weak sanctions or legislated protection. Agreements reached through associations usually result in low fines because the associations themselves have very little turnover. Restrictions imposed through associations of professionals generally escaped enforcement, until the 2006 *Bersani* Decree, because of authorisation by other rules or

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regulations.[1] Occasionally, the Authority has encountered and sanctioned action by professional associations that exceeded the scope of their legislated protection.

Enforcement actions against information-sharing concerted practices have met mixed responses in court. In insurance, the court upheld the Authority's finding and its very large sanction: EUR 360 million. By contrast, the court rejected a sanction of similar magnitude in another high-profile action, against restraints in the distribution of petroleum products. The court found that the Authority did not prove agreement, and it also questioned assessing high fines against behaviour where ministry officials had some role in setting up the scheme with the industry's trade association.

Parallel conduct and some degree of government involvement also characterised the situation in the infant formula market. The Authority's 2005 decision attacked the use of recommended retail prices and information exchanges. To some extent, the industry's practices followed advice from a ministry. That factor may explain why, despite the long duration of the restraint and the sensitivity of the product for consumers, the fine was relatively modest (EUR 10 million). But later, in approving a merger in this market, the Authority accepted commitments about marketing and price reductions in order to reduce the risks of a stable collusive equilibrium among three roughly equal post-merger firms. The commitments seem to have had an effect: a year later, prices were 25% lower.

The prohibition against horizontal collusion has been applied in aid of regulatory reform. To promote competition in local services and in health care markets, the Authority fined four suppliers EUR 4 million for refusing to submit bids in a competitive tender to a local health authority, which wanted a single supplier for post-operative devices, anticipating lower prices from competitive bidding.[2] Two water supply firms were fined a total of EUR 11.3 million for a strategy of joining for bids in order to discourage or prevent entry by others, just as the water services market was being opened to competition.

The Authority has continued to target industry-wide agreements, including some that look more like simple market division or price agreements. The largest sanction imposed recently – EUR 301 million – was against an "arrangement" that had the effect of dividing the jet fuel market and preventing entry, notably by preventing airlines from operating as their own suppliers. (The Authority's structural relief, to require divestiture of interests in the joint ventures, was rejected by the reviewing courts, though.)

In the "modernised" system of applying EU competition law in effect since 2003, there is no longer a procedure for securing an individual exemption from the prohibition against anti-competitive restrictive agreements. The parallel provision of Italy's competition law remains unrevised, though (Art. 4). The law requires the Authority to respond to an application for exemption within 120 days. This deadline has worked against enforcement; the court rejected the Authority's sanction against an agreement in petroleum distribution on the grounds that the parties' dealings with the Authority could have been construed as an application for exemption that the Authority did not respond to on time.

Abuse of dominance

The prohibition against abuse of dominance continues to be applied principally in the context of network industry reforms. The Authority has made some use of an interesting provision added to the law in 2001 which requires public-service firms to operate through structurally separate entities if they are engaged in operations outside of the public-service area. This is backed up by requirements to notify the Authority when setting up such

Box 3.1. **More enforcement against collusion**

Increase enforcement attention to clandestine collusion

Noting that the Authority had been concentrating much of its attention, appropriately, on promoting competition in major infrastructure sectors, the 2001 Report concluded that anti-competitive collusion called for more attention.

Several important decisions have been taken about restrictive agreements. Many of them involve oligopoly information sharing or other formal co-ordination, rather than concealed agreements. The number of cases about restrictive agreements increased 20% from 2002 to 2003 (from 46 to 54, of which 4 resulted in finding a violation), and increased further to 60 in 2004. These increases did not constitute a clear long-term trend, for there had been 52 cases about agreements in 2000 and 43 in 2001. The number dropped sharply in 2005, to only 14. The low level continued in 2006, with 16; the Authority found a violation and took some remedial action in 3 of these. The number increased somewhat in 2007, though.

More effective tools for undoing explicit agreements may reduce the proportion of cases based principally on less direct evidence, of parallel behaviour and exchange of information.

operations, and by an obligation to provide access to competitors in those markets with services on non-discriminatory terms.

Discouraging monopolists from using affiliates to distort other markets was also the principle for several Authority enforcement actions in the gas industry. ENI was found to have violated Art. 82 by discontinuing work on a pipeline upgrade and hence denying this capacity to potential competitors. In another case involving ENI, in early 2007 the Authority accepted commitments to make gas available at below-market prices to conclude an investigation into whether ENI had hindered competitor access to regasification facilities.

In telecommunications, strong enforcement action has met some judicial scepticism about setting appropriate fines. A 2004 decision by the Authority fined Telecom Italia EUR 152 million for a variety of strategies to prevent fixed-line competition, principally for business customers. The fine was reduced on appeal, though, on the grounds that some of the violations were only “serious”, rather than “very serious”.

The Authority’s power to adopt decisions embodying commitments has proven useful in opening up the electricity market. The energy regulator called attention to irregularities in determination of prices and tried to address the problems under the energy legislation, but delays due to litigation over whether the regulator had the power to impose a structural remedy made that remedy impracticable. So the Authority launched an investigation of whether the historic monopolist’s strategies amounted to an abuse of its dominant position. The Authority’s investigation concluded in December 2006 with the acceptance of commitments to reduce its pivotal price-setting role in the relevant zonal markets by offering virtual power plants, that is, financial hedging contracts for capacity.

Postal services, a sector for which Italy has not yet formally established a regulatory body, have been the object of several cases about abuse of dominance. The incumbent was fined EUR 1.6 million in 2006 for shutting out competitors in “hybrid” e-mail, to favour its own operation. The Authority’s remedy acknowledged, and supported, other reform efforts to open up the market, including freezing *Poste Italiane’s* prices for a 6 month transition

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period. One element of the case was finding that *Poste Italiane* had not separated this operation from its monopoly services. The Authority has looked into whether the subcontract arrangements could prevent competition, and in February, 2008 it accepted commitments from *Poste Italiane* to tender for concessions in 70 urban areas and to maintain contract relationships in order to preserve potentially viable post-liberalisation competitors.

As reforms seek to stimulate competition and reduce costs for health care, enforcement has sought to increase competition from generic pharmaceuticals. The Authority accepted commitments to issue royalty-free licences leading to production of generic versions.

In the politically sensitive area of broadcasting, the Authority found that Mediaset violated Art. 82 of the EU Treaty by monopolising the market for advertising on football broadcasts. As a result of the enforcement action, Mediaset reduced its long-term contracts to two years plus a one year option, gave up the contracts' pre-emption rights and sold its satellite broadcast rights. The Authority issued its decision in June 2006; an appeal is pending.

Concentrations

Merger control is the sole responsibility of the Authority. No sectoral regulators apply the competition law, now that the Bank of Italy is no longer responsible for applying the competition law in the banking sector. The Authority's decisions are based on the competition issues involved in the transaction, and other policies are not considered. Since the end of the special regime about banking, the Authority's most important merger decisions have involved financial markets. The Authority has permitted bank combinations subject to conditions, typically the divestiture of retail branches and other measures to maintain retail-level competition for deposit services, small-business lending, asset management and insurance in local markets where post-merger concentration would otherwise have been too high. Reports of the decisions suggest that the Authority is applying a structural rule-of-thumb, seeking remedies where the share of the post-merger firm in the relevant service and geographic market would exceed 25-30%, and would be substantially higher than any other firm in that market.

The substantive standard in Italian law emphasises dominance: a merger is prohibited if it would create or strengthen a dominant position, with the effect of eliminating competition appreciably on a lasting basis. Italy has not changed its statutory standard to conform to the revised standard of the EU merger regulation. A provision of the Competition Act could permit balancing competition considerations against other national interests, but it has never been used and the regulations needed for the Authority to do so have not been promulgated. (When the government determined to rescue Alitalia in 2008, it added special treatment provisions to bankruptcy procedures rather than resort to this part of the Competition Act). Mergers that could impair competition in the domestic market may be permitted where "major general interests of the national economy are involved in the process of European integration" (Sec. 25.1). The decision is to be made by the Authority, applying general criteria proposed by the Minister for Trade and Industry and promulgated by the Council of Ministers. This "integration" benefit is to be balanced against the concentration's impact on domestic competition, and the Authority may prescribe measures and set a deadline to restore full competition. This provision appears intended to permit higher concentration among domestic firms, with the long-term goal of

creating substantial competitors in an integrated European market. This provision empowering the Authority to consider other national interests was not invoked, though, when the national airline, Alitalia, proposed a combination with a principal competitor; instead, the government enacted special legislation to remove from Competition Act jurisdiction certain transactions involving firms in financial difficulty. Because the Authority will not consider such transactions, it will have no opportunity in these cases to apply related competition policy doctrines about the treatment of transactions involving failing firms, such as inquiry about the possibility of less anti-competitive alternatives.

The process of merger review now involves a filing fee. The system for calculating the basis of the fee has been modified to make it proportional to the merger's potential impact on the Italian market. The notification threshold is adjusted annually to account for inflation. An "advance notice" procedure is available to facilitate compliance. Experience with advance notice of larger transactions since June 2005 showed that it simplifies administration and speeds up findings. Compliance with the merger review system is encouraged through vigilant enforcement. On finding that Tetra Pak was *de facto* controlling a firm whose acquisition the Authority had prohibited, the Authority imposed a fine of EUR 95 million.

Box 3.2. **Merger deadlines**

Make merger review deadlines consistent with other jurisdictions

The 2001 Report observed that Italy's merger review timetable is relatively short. The Authority must decide within 30 days of the notification whether the concentration might infringe the statutory standard. If so, a formal investigation may be opened, and it must be concluded within an additional 45 days. (This may be extended by 30 days if the parties fail to provide requested information). The timetable for EU review of a merger that raises issues requiring investigation can be substantially longer, ranging from about 4 to 5 months depending on whether the "clock is stopped" to consider negotiated commitments.

The increasing co-ordination of national and EU-level administration of competition policy would argue in favour of generally consistent processes, and thus of extending the Italian review timetable. Conforming with the Authority's deadlines in merger review to those used by the EU will simplify processes by eliminating a potential source of confusion. It will also give the Authority more time for complete investigation in the small handful of matters that require it.

This recommendation has not yet been implemented. Italy's merger review timetable remains significantly shorter than the EU's.

Unfair competition and consumer protection

The Authority combines its antitrust duties with responsibilities about advertising and unfair competition that arise under different legislation. The rules about deceptive and comparative advertising follow from EU directives that have been enacted into Italian law. These matters represent a large part of the Authority's workload, measured by number of actions – several hundred per year – if not by resources employed. Legislative decrees about consumer protection have empowered the Authority to extend its activities here. Three sectors were most at risk for misrepresentation: telecommunications, tourism and "pseudo-pharmaceutical" diet products.

The consumer code, enacted in 2005, unifies the treatment of consumer issues. The code recognises the dual importance of ensuring that advertising is not misleading, to protect the interests of consumers and to protect the public interest in fair competition among enterprises. Since 2005, the Authority has had the power to impose fines against misleading advertising. European Community directives on unfair practices were transposed into Italian law in 2007. These measures bring Italian rules into line with the European model about misleading advertising addressed to consumers and businesses. They also give the Authority greater enforcement powers, such as the authority to act *ex officio* rather than only in response to a specific complaint.

The Authority has declined to become involved in claims about the abuse of economic dependence, such as refusal to deal, burdensome or discriminatory contract conditions and termination of trading relations. The Authority opposed adding the principle to the Competition Act, because these claims, which are decided mostly through arbitration or private lawsuits, could be used to impede competition and undermine efficiency. The Authority may issue warnings and impose penalties against abuse of economic dependence "which is relevant to the protection of competition and the free market".

Conflicts of interest

The goal of the legislation on conflicts of interest is to ensure that holders of government office act solely in the public interest. It characterises conflicts of interest in a technical sense, and it defines four types or aspects of abuse, also in somewhat technical terms. The role of the Authority is to determine the existence of "incompatibility" or conflict of interest and report its findings to the presidents of the Senate and the Chambers of Deputies, which have the constitutional capacity to impose remedies on the member of the government. The Authority has the power to fine firms that have gained economic advantages from a government act that was adopted in a conflict of interest situation. The Authority has handled several hundred preliminary inquiries under this law, but these have resulted in only a handful of formal proceedings.

Institutions and enforcement processes

The Authority is a separate, expert agency, with unusually broad freedom of action and strong protection of its decision-making independence within the government structure. The Authority's five members are appointed by the Parliament for non-renewable seven-year terms. The members are not permitted to hold other positions or perform other professional services. The law provides no avenue for political control or influence, in general or over particular decisions, beyond the appointment process itself. No other agency is involved in applying the competition law, since the new law about financial market regulation ended the power of the Bank of Italy to apply the law in that sector. The terms of the members were originally simultaneous, so all five members were replaced at the same time. A proposal for a general reform of independent agencies would have created a formal system of staggered terms and thus a stronger basis for continuity, but it was not adopted before the government resigned.

The Authority's budget is a separate line item, approved by Parliament and subject to inflation adjustment. Funding has been adequate. Filing fees now support the merger review operation; indeed, they may support more than that. Self-financing has made it possible for the Treasury's contribution to the Authority to drop 34% between 2005 and 2007. The Authority's personnel levels have been generally stable for several years.

Additional positions were authorised when the Authority was given powers to deal with conflicts of interest and banking.

Box 3.3. **Staff levels**

Raise the statutory caps on the Authority's staff levels

The 2001 Report observed that the Authority confronts some resource limitations, principally the inability to hire staff. If, as the 2001 Report recommended, the Authority's attention is focused increasingly on the resource-intensive task of uncovering cartels, it should be freed of constraints that prevent it from applying its budget resources to support the personnel it needs.

The ceiling has been raised, but only to cover some new responsibilities for comparative advertising (20 additional positions), conflicts of interest (15) and banking (8). With an authorised ceiling of 193 positions, plus contract employees, the Authority remains smaller than the enforcement bodies with similar jurisdictions in similar-sized member countries. The staff complements for the DGCCRF in France and for OFT in the UK are much larger; moreover, each of those two countries also has a separate adjudicating council or commission, with its own staff.

The number of distinct matters pending at the Authority dropped for several years, most sharply in 2005 when there was a substantial turnover in membership. Since then, the level of activity has increased again. But a consistent caseload level does not necessarily mean the Authority needs no more resources. An equal or smaller number of tougher and more important matters could require as many or more staff to handle.

The principal sanction under the Competition Act to enforce compliance and deter violations is a financial penalty imposed by the Authority on infringing enterprises. There is no provision for criminal penalties or for sanctions against individuals, even in the case of repeated violation, resistance to the Authority's orders or individual active participation in a violation. The Authority does have a powerful weapon in reserve, though. It can punish repeated violations by requiring the enterprise to cease operations for up to 30 days. This deterrent has never actually been used. Upon determining that the law has been violated, the Authority is not required to assess a fine. The Authority sometimes concludes ordinary matters with an order setting a deadline for correcting the restraint or abuse. In serious cases, the Authority may impose a fine, which can vary depending on the gravity and duration of the violation.

A leniency programme has been in place since February 2007. It follows the ECN model and the European Commission's leniency program. The Authority can now reduce fines or exempt a firm from sanctions completely. Clemency is limited to companies that inform the Authority of the existence of secret cartels. Reductions follow a sliding scale, according to the usefulness of the collaboration offered. Full co-operation with the Authority is an essential prerequisite; thus, the company must present all the relevant information it has and must not reveal its participation in the programme to third parties. A simplified application to the Authority is permissible, where the European Commission is in a better position to investigate.

The Authority now has the power to order interim relief pending its final decision. Interim relief power could be particularly significant in cases alleging abuse of dominance through denial of access to a network facility. So far, the Authority has applied this power

Box 3.4. **Sanctions**

Improve sanctions, to make enforcement more effective

To take effective action against horizontal collusion, the 2001 Report called for strengthening the Authority's hand, by authorising larger fines, enough flexibility in setting fines to support an effective leniency program and means for assessing substantial fines against violations accomplished through associations.

In February 2001, as the 2001 Report was being completed, the Parliament approved a bill that anticipated some of those recommendations. The reference for determining the level of fines is no longer the relevant market affected by the restraint or abuse; instead, it is now the undertaking's total turnover. The Authority may impose a fine of up to 10% of that figure. Italy's basic sanctions system is now generally comparable to the systems used by the EU and many other European jurisdictions.

Responding to the courts' demand for transparent justification for the amounts assessed, the Authority has relied on the criteria and guidelines issued by the European Commission for setting fines under its similar powers. That is, the Authority considers the seriousness of the offence, the impact on competition, the economic circumstances of the violators and aggravating or extenuating circumstances such repeat offences or co-operation with the Authority's investigation.

The amendment also increased the Authority's sanctioning flexibility in the other direction by permitting it to impose a fine of 0 even in the case of a serious violation. The Authority did not set up a formal leniency program, though, until 2007, after the first round of *Bersani* reforms supplied the necessary legislative authorisation to issue such a rule of general, prospective application.

The Authority still does not have the tools to levy substantial fines on associations or to fine the members directly where their associations have violated the law. An association typically has little or no turnover on which to base a fine, so a sanction based on its own turnover would necessarily be small. Basing sanctions on the turnover of the associations' individual members, and making the members liable for the fines, would make the sanction fit the offence. This broader sanction is possible now in some other jurisdictions that use the EU model.

against a trade association circular that could have dampened reforms in financial markets and against an alleged collective boycott that would have undermined reforms in pharmacy retailing.

Commitments about future behaviour can now be accepted to close investigations. Parties to an investigation can propose such commitments, and the Authority can issue a decision that makes the conditions obligatory and then end the investigation without a finding of infringement. The Authority's procedures for commitment decisions provide an opportunity for comment by third parties. The new capacity for commitment decisions was first used at the end of 2006, when the Authority accepted commitments from ENEL to sell "virtual" capacity and then closed its investigation of alleged abuse of dominance. The Authority has been resorting to commitments increasingly.

The Authority's record on appeals has improved as the courts and the Authority have become familiar with each other. Justification for the computation of fines has been the principal topic of judicial attention recently, as the courts have sometimes

Box 3.5. **Corrective advertising orders**

More powers may also be appropriate for dealing with deceptive advertising

The sanctions available appeared inadequate to undo the harm that a deceptive advertising campaign has done to the competitive process. Ordering the violator to publicise the fact that the previous advertisements were deceptive may have much less impact than the original advertisements did. The 2001 Report recommended giving the Authority the power to ensure that corrective advertising accomplishes that goal, of correcting the mistaken impressions that the deceptive advertisements had conveyed. And consideration might be given to treating violations the same way as violations of the Competition Act, in that fines could be imposed for original violations, not just for violations of the Authority's orders.

A presidential decree of 11 July 2003 setting out procedures for enforcing the law about misleading and comparative advertising now empowers the Authority to order corrective advertising, including setting the medium and formalities of the corrections to be sure they are effective. Other legislation has now given the Authority the power to impose fines against misleading advertising, to investigate advertising claims *ex officio* and to issue commitment decisions in advertising matters.

disagreed with the Authority's characterisation of the seriousness of the respondents' misconduct.

Delay in the review process has been largely corrected. After an important reform introduced by legislation in 2000, both stages of appeal can now be completed within about a year and a half after the Authority's decision.

Class actions on behalf of consumers may become more important. An amendment to the Consumer Code, effective in mid-2008, introduced into Italian law a procedure for awarding damages to a large group of individual consumers in a single action. Grounds for suit could include unfair trade practices (such as false advertising) and anticompetitive practices affecting consumers, as well as torts and "standard form" contracts of adhesion. This revision expands the relief available in consumer class suits, but the means for determining and awarding damages remain to be worked out.

Coverage and special sectoral regimes and regulation

The Competition Act covers the entire economy. There are virtually no explicit exemptions or special enforcement regimes. But other legislation creates some immunities or market distortions. The most important problems arise from local-level regulation constraining competitive entry.

The special regime for applying competition law in banking ended in 2006. Before, the Bank of Italy, rather than the Authority, enforced the Competition Act in this sector, including review of mergers and application of the prohibitions against restrictive agreements and abuse of dominance. The change, made by the new law regulating financial markets, was part of a package of reforms prompted in part by controversy over the treatment of bank takeovers. The Bank may ask the Authority to authorise otherwise prohibited agreements for a limited period in order to ensure the correct functioning of the payment system, or to authorise otherwise anticompetitive bank mergers, where necessary to preserve the stability of the banks concerned. For mergers involving banks,

the decision by the Bank of Italy about prudential regulation is separate from the Authority's decision about competition effects. The Antitrust Authority's review of a bank merger must be completed within sixty days from the notification. Setting a different deadline for action on bank mergers, even shorter than the 75 days for others, could create problems of administration where a merger involves both banking and non-banking entities.

Since the shift in jurisdiction, several bank mergers have been authorised, some of them subject to conditions. The Authority launched a fact-finding investigation in June 2007, to examine corporate links between banks and insurance companies. The Authority is concerned that, in Italy's bank-centred economy, patterns of effective control traced to this level could facilitate co-ordination or discourage competition in other markets. Some banks are under investigation for bidding collusion, while the Authority accepted commitments to conclude its investigation of collusion over fees for interbank commission rates on transfers and ATM transactions. The first time the Authority used its interim relief authority, in September 2006, was in the banking sector. The banking association had issued a circular about how to respond to one of the Bersani reforms, requiring no-fee transfers of mortgages. The Authority was concerned that the circular could lead to co-ordination about banks' market strategies. The association ultimately withdrew the circular and disbanded the working group that had been set up to develop strategies for responding to regulations.

Media firms are subject to several special rules. Regulations prohibit acquisitions by media companies that would result in control of over 20% of the total circulation of daily newspapers in Italy or 50% of inter-regional copies. The Authority has generally objected to using market shares as *priori* restrictions on companies' prospects; however, in media settings the Authority has concurred that limits may be justified to preserve pluralism. In a July 2007 report on media issues, the Authority noted that indirect aid via a lower postal rate for publications enriches the postal system more than it increases subscriptions. In publishing, Italy like many other jurisdictions sets special rules about retail pricing. The numerous exceptions to this general rule still limit price competition for school texts.

Reform in road transport is coming slowly. Compulsory trucking rates were finally abolished in 2005. The Authority has been calling for this basic, obvious reform since at least 1993. Entry is still not determined by market forces. The number of trucking licences is regulated, and in issuing the licences, the Minister of Transport is to ensure that supply matches demand. The Minister of Transport also retains potentially anti-competitive discretion over entry into long-distance bus service, despite some reform of this sector in 2005, to replace the old method of issuing concessions with five-year authorisations based on criteria of safety and service quality.

Advocacy and policy studies

Output of advocacy opinions and reports by the Authority has sharply increased. In 2005, the Authority issued some 40 advocacy papers, followed by 47 in 2006 and 65 in 2007; by contrast, in 2004 there were only 12.

The Authority's renewed advocacy activity began as part of the shift in strategy by the newly constituted Authority in 2005. The new government in 2006 issued decrees implementing several long-awaited liberalisation measures, and some of the Authority's

comments since then target local regulations that undermine the pro-competitive intention of these reforms. The two packages of *Bersani* reforms are major steps toward implementing the most important recommendation of the 2001 Report. The first package liberalised aspects of professional services, retail trade, restaurants, bakeries, car insurance, distribution of pharmaceuticals and taxicabs. The second addressed access to services, including barbers, hairdressing, tour guides and driving schools, while extending the prohibition of exclusive dealing to insurance products.

Showing that liberalisation would directly benefit consumers was one of the motivations behind the Bersani measures. The Ministry of Economic Development has

Box 3.6. **Entry constraints**

Eliminate all unnecessary regulatory constraints on competition about price, entry, and quality, which cannot be justified as the best way to serve public interests

Concessions, licences, and other rules impaired competition in many sectors. Examples were cited in the treatment of local services, retail distribution and local transport. Many are imposed by local and regional governments. The Authority produced a report in December 2001 about services subject to regulatory constraints on entry, pricing, product and service quality at the local and the national levels. This was an effort to focus the reform effort, by demonstrating the need for principled action to correct the general problem. The 2001 Report observed that broad action based on a general principle might be more effective than trying to deal with such restraints one by one, for the latter strategy might stimulate strong resistance from the producer interests without enlisting countervailing support from consumer interests.

The Authority continued to issue reports and opinions to try to correct these problems. Authority advocacy reports since 2001 addressed topics such as:

- Controls on locations of phone centres in Lombardy, supposedly based on health and safety reasons; the Authority argued that it simply froze the status quo and prevented new competition.
- Restraints on who can provide “professional training” for retailers and restaurateurs in Lazio and Puglia.
- Rules set by regional governments about names, signs and store designs and operation of outlets selling non-prescription pharmaceuticals. For example, Lombardy and Umbria require walls separating spaces where OTC drugs are sold, as well as separate cash registers and fax machines,
- Limits on trading hours for pharmacies: the Authority agreed that prescribing minimum hours could serve a public purpose in assuring availability, but prescribing maximum, uniform hours, though rules set by bodies composed of the pharmacists themselves, is discriminatory and anti-competitive.

The effort paid off. Nearly 400 sector studies and advocacy filings by the Italian Competition Authority, over a period of 15 years, laid the foundation for the wide-ranging *Bersani* reforms of 2006 and 2007. The reforms mirror recommendations from the Authority’s repeated findings about issues arising from sector regulation. The Ministry’s announcements of these measures cited about 30 of the Authority’s advocacy reports and studies. The changes made by the two package of reforms include:

- **Professional services:** Rules setting minimum fees and banning advertising are repealed, and controls on multi-disciplinary practices are relaxed. In 1997, a sector inquiry by the Competition Authority called attention to these constraints, and in 2005 the latest in a series of advocacy reports on liberalisation of professional services analysed potential measures in detail.
- **Retail distribution:** Limits on promotional sales are dropped, and approval of new store locations should not impose requirements about minimum distance from others or range of products supplied. These steps bolster a 1998 reform that made it easier for small shops to open up. In 1993, one of the Competition Authority’s first reports, in response to a specific instruction in the then-new Competition.

Box 3.6. **Entry constraints** *(cont.)*

Act, was about issues in retail distribution. Later advocacy reports backed up the 1998 reforms and called attention to how regional governments were implementing those reforms.

- **Bakeries:** Bakeries no longer need special authorisation to relocate, and they may sell other food products for immediate consumption. In 2002, an advocacy filing by the Authority called for such reforms.
- **Pharmaceutical products:** Pharmacies no longer have a monopoly on selling "over the counter" products, retailers may discount the prices of those products and a wholesale distributor may now run a pharmacy. In 1997, a sector inquiry by the Competition Authority questioned restraints on pricing and on entry by wholesalers, and more recent advocacy filings dealt with other aspects of these regulations.
- **Taxicabs:** Limits on the number of taxi licences are lifted, and other aspects of regulation by municipalities are made more flexible, to promote new entry. In 1995, the Competition Authority issued an advocacy filing about competition problems in this sector, and it returned to the topic with a filing in 2004.
- **Insurance:** Exclusive distribution arrangements and mandatory minimum prices are prohibited. In 2003, a sector inquiry by the Competition Authority showed that exclusive contracts raised entry barriers.
- **Notary services:** Notary certification is no longer needed for transactions in used cars.
- **Financial services:** To make it easier to change service providers, customers can close bank accounts (and change banks) with no charge if their bank changes its contract terms, prepayment fees for mortgages are abolished and mortgage contracts can be transferred between banks, and liability insurance is no longer subject to long-term contract commitments. The government recent package, mortgage renegotiation will be facilitated (Law 126, July 2008).
- **Personal services:** Licensing hurdles for tour guides, driving schools and real estate sales are lowered, and hairdressers and barber shops can stay open longer.

monitored marketplace reactions and estimated the impact of some of these changes. Dramatic reductions in prices accompanied the reforms of pharmaceutical sales, mobile phone charges and airline fare advertising. Notary fees for transferring used vehicles dropped simultaneously with reform, perhaps in anticipation of it. Market effects of the other reforms are more difficult to isolate. Based on experience to date from five of the reforms, the Ministry estimates that Italian consumers will save between EUR 2.4 billion and EUR 2.8 billion annually.

Several opinions in 2005 found competition problems in proposals or actions to manage markets for food and agricultural products. A legislative proposal would have empowered producers' organisations to intervene in times of "crisis" by suspending or limiting supply and required posting of producer prices with the final retail price. The Authority warned about a decree giving the Ministry of Agriculture the power to authorise production-planning agreements by producer associations: such agreements would be tantamount to illegal price fixing, and a Ministerial decree could not justify otherwise illegal actions undertaken independently. Another proposal would have mandated minimum retail space for regional products. The Authority said that such a limitation on distributors' choices was contrary to EU and national competition principles, preventing retailer strategies that have lowered consumer prices and raising a barrier to entry.

A 2007 fact-finding report demonstrates how consumer prices for produce are higher because of Italy's inefficient, fragmented multi-level distribution systems, which persist in

Box 3.7. **Public services**

Provide effective competition in, and for, local public services markets

At the time of the 2001 Report, a framework law for local governments was under consideration. The full report pointed out that this law should not delegate powers in such a way that local authorities could undermine national reform goals by preserving unnecessary market power at the local level.

The framework law has given municipalities more flexibility to implement the services for which they are responsible. The Authority continues to be concerned that tendering and contracting for government services do not take sufficient account of competition. The Authority recommends open tendering for public service contracts even below the thresholds at which that is required by EU directives, with terms short enough to avoid long-standing monopolies.

A comment from the Authority in December 2006 set out its views about legislation governing contracting with publicly-owned companies. The Authority's report calls for more precision in defining the exceptional circumstances that might justify letting a contract "in-house", and for setting up independent specialised bodies to oversee cases of conflict of interest. The Authority argued that in-house contracting should be treated as justifiable only when it is impossible to find a better solution in the marketplace, and that public-private partnership should be used only in exceptional cases, because it implies the maintenance of a situation of conflict of interest involving the contracting public entity, the service company and the regulator.

The first package of *Bersani* reforms provided for competitive tendering for local public services and expanded the possibilities for competition from private bus services in cities. New rules and institutions to encourage competition and modernise government purchasing procedures and make them more efficient are set out the *Code for public works, service and supply contracts* (Legislative Decree 163/2006), which transposes European Community Directives 2004/17 and 2004/18. In general, though, there has not been a significant change in the state of competition in and for local public services markets. Local municipalities retain considerable autonomy in choosing how to provide services with social objectives or aimed at promoting economic and social development of local communities. Competition for the market, through bidding, is one option available for them to choose.

part because of regulations and local regulatory decisions that discourage integrated, large-scale operations. (The report also criticises opportunities for obscure but profitable speculation in the numerous micro-markets.)

The Authority has continually called for more competition in petrol retailing, which would likely lead to a reduction in the very large number of small, inefficient service stations. One way would be to permit petrol sales by supermarkets, which tend to sell higher volumes, at lower costs, where that is permitted and common (as in France). A report in January 2007 echoes what the Authority had said in a report in November 2004, decrying the lack of liberalisation and entry and the comparatively high consumer prices that result from the lack of competition in Italy. The discretion given to the regions about regulating entry has been used in a way contrary to the reform proposals, perpetuating existing distribution arrangements and favouring incumbents. Regulation of hours and operation similarly reduces consumer choice while protecting the businesses of incumbents. Because most restraints on retail competition arise from regional regulation, advocacy to correct them

must address regional governments.[3] In August 2008, major legal barriers to entry and reform were removed, through legislation that eliminated minimum distance requirements and abolished restrictions about offering other products and services.

The insurance industry has been a frequent topic. Recent comments analyse proposed reforms, some of which were incorporated in consumer-protection clauses of Italy's new insurance law. Several comments endorsed a shift to so-called "direct compensation", so that a party who is damaged would collect from its own insurance company, which would then recover from the insurance company of the party that had caused the damage.

A sector inquiry report on airline services in April 2005 asked why there is so little competition to provide service despite liberalisation of entry and pricing and the appearance of low-cost airlines. The Authority concluded that the sector in Italy is not yet fully liberalised. Limits on allocating slots were identified as the principal constraint. Historic incumbents are favoured, limiting the opportunities for potential new competitors. The report called for a slot allocation system that promotes contestability of routes, more competition in airport services and management, and more transparency of airfares to help consumers choose.

In June 2004, the Authority and the Electricity and Gas Regulatory Authority released a report taking stock of progress in the deregulation of the natural gas industry, three years after

Box 3.8. **Sectoral legislative interventions**

Avoid anti-competitive direct government interventions in sectoral problems

Another issue that was prominent at the time of the 2001 Report was proposals to resort to controlling prices and market shares by legislation in situations that are not regulated monopolies. The 2001 Report argued that price controls are inevitably less flexible and discriminating than application of general competition policy principles, and they may just reinforce an industry's instincts for co-operation and common behaviour. Rules that limit market shares, perhaps in an effort to rein in monopoly, also prevent competition by segmenting the market. Such legislative "fixes" may be based on misconceived markets, and thus they could distort or prevent competition that would otherwise occur. Both kinds of controls are typically rationalised as transition measures, but they also typically last too long. Market-share ceilings were discussed for electric power, to force the historic national firm to shed generating capacity, and for natural gas. These may be aimed at competition-policy goals, such as eliminating or reducing dominant positions. But the method of doing so is less sensitive to actual contexts and effects than the enforcement of the Competition Act would be. Moreover, fixed ceilings may dampen competition among the firms that remain, by encouraging comfortable duopoly instead of rivalry over the marginal customers.

The use of such controls has evidently not expanded. But in several areas, mostly involving media and utilities, sectoral laws still set special rules or limits based on market share. There is a 60% ceiling on any one party's acquisition of exclusive encoded broadcasting rights for the League "A" Football Championship matches. Advance notification is required if an acquisition involves direct or indirect control of 25% or more of cinema distribution and movie theatres in at least 1 of the 12 major cities in Italy. A single operator's holdings of broadcast licences is supposed to be limited to a 20% share of channels, under a 1997 law. However, the deadline for applying that ceiling was extended. (The European Court of Justice ruled in January 2008, in a suit by a private broadcaster who had sought and won some of the frequencies that should have been made available, that this intervention in the system of spectrum management did not comply with EU rules on the subject.)

legislation to that purpose was enacted. The agencies concluded that the strongly dominant position of ENI was thwarting efforts to introduce competition and proposed steps to establish real competition through new entrants that were not bound to ENI by take-or-pay contracts.

Electric power reform was the topic of a report in July 2006, addressing the disposition of shares in ENEL's generating assets. According to the decree prescribing their divestiture in November 2000, public entities, domestic or foreign, could not hold more than 30% of the shares for at least five years. But a deal through which EDF (controlled by France) and AEM (controlled by Milan) would join to buy Eurogen would exceed that limit. The Authority was concerned that this would distort competition, since the limitation on public holdings was intended to foster initiative and internal growth in markets traditionally dominated by public firms.

At the request of the telecoms regulator, the Authority issued an opinion on proposed legislation about termination charges on mobile phone networks. The Authority endorsed treating the termination of all kinds of calls, both fixed and mobile, for each domestic network as a single "market" (following the recommendation of the European Commission about relevant markets). Maximum prices should be set in a way that encouraged reductions over time, taking account of expected productivity improvements. Initial levels should be set by reference to long run incremental costs, which should not include the firms' marketing costs. The Authority also issued opinions on calls for tender from the government, for fixed-line services (voice and data) and for IP connection services. These supported measures to anticipate problems due to the historic incumbent's vertically integrated operation and installed-based advantage, and warned about the risk of entry-deterring cross-subsidy strategies, requiring that future price reductions be tied to actual reductions in costs.

Procedures for ensuring regulatory quality continue to develop. The 2005 simplification law gives the government a mandate to simplify bureaucratic formalities.

Box 3.9. **Competition policy and RIA**

Include competition policy in the processes of ensuring legislative quality

The 2001 Report examined means to improve how competition policy is incorporated into the regulatory system. As regulatory impact analysis becomes the established practice in preparing new rules, the Report recommended that competition impact should be made an explicit criterion and that the Authority should participate in the process routinely. In the review and compilation of existing laws and regulations, competition policy should also be a criterion, and the Authority should be involved. By legislative decree, a representative of the Authority was involved directly in the *Observatorio* on simplification of rules and procedures. The guide about regulatory impact analysis that was issued in December 2000 by the regulatory simplification unit of the Ministry of Public Administration supported a market-competition criterion for assessing new regulations.

The legislation on simplification adopted in 2005 moves to make regulatory impact analysis a regular feature of law-making and to undertake a thorough review of laws and regulations on the books. The law itself does not specify in detail how competition issues will be considered in either process, leaving those details to implementing guidelines.

The simplification law moves regulatory impact analysis out of the experimental phase to make it a regular feature of the regulatory process. The law also provides for an overall review to find and eliminate obsolete, duplicative, anomalous and ineffective rules. Aspects of the regulatory quality framework now encourage competition policy goals. Thus, secondary legislation must provide for self-regulation to foster competition, if that would not conflict with essential public interests, as well as for systems of incentives and disincentives, where possible, rather than prescriptive rules. But proponents of legislation are not required to identify means for achieving its objective that are least restrictive of competition, and there is no provision for involving the Authority regularly in evaluating proposals that may have particularly significant marketplace effects.

Assessment

Italy has made substantial progress in implementing the key reform recommendation of the 2001 *OECD Report on Regulatory Reform in Italy*, to eliminate unnecessary regulatory constraints on competition about price, entry and quality. The two packages of the Bersani reforms in 2006 and 2007 removed many of these constraints, and it did so in a way that showed how reform benefits consumers, shifting the terms of debate about reform priorities. The Bersani reforms have also vindicated the Antitrust Authority's long-standing programme of policy study and advocacy, since the Authority's reports supplied the evidentiary basis to justify and explain them. Opinion surveys report that those reforms were very popular, gaining the approval of about 70% of the public. By sharpening public appreciation for the reform impulse, they may have laid a foundation for larger-scale changes. The government's initiative to introduce an annual law about competition and market issues should help sustain the momentum for reform, while the creation of a price monitoring "watchdog" (price guarantor, *Garante per la Sorveglianza dei Prezzi*) should keep consumers' interest in the forefront.

Other recommendations about regulation from the 2001 Report have received less attention. Most importantly, there is still no provision for systematically including the competition policy dimension in the review of proposed and existing regulations, although the system for regulatory impact analysis is now finally getting on track. A short checklist was added to the draft screening protocol, to identify provisions that could raise competition issues that are important enough to call for more careful examination. This addition was inspired in part by the *OECD Competition Toolkit*.

The 2001 Report also called for encouraging more competition in local public services. Some provisions have been made for more competition in bus and taxi transport, and bidding procedures are encouraged in order to create competition for the market for other services. It also warned against trying to solve sector problems through anti-competitive direct interventions such as price controls and market-share caps. At the time, the concern was principally about the treatment of network industries and media. In media markets, maintaining viewpoint diversity and other values might justify otherwise arbitrary constraints based on measures such as market share. Now that the regulatory structure for telecoms and energy is better developed, there is less reason for concern about this issue.[4]

Antitrust enforcement measures have improved in some of the directions that the 2001 Report recommended, notably stronger sanctions and more flexibility in sanctioning to permit adopting a formal leniency program. Legislation was adopted early to authorise financial sanctions against misleading advertising and to permit downward flexibility, so

the Authority could assess no fine despite finding an infringement. But a formal leniency program evidently needed a more elaborate legislative foundation, which was finally provided in the first *Bersani* reform package. The formal program was thus launched in 2007. The programme has not produced very much visible enforcement action yet, though.

Clandestine collusion has nonetheless received more enforcement attention, as the 2001 Report recommended. The number of cases dipped when the membership of the Authority turned over; however, major actions that followed, such as the jet fuel decision in 2006, show that this dip did not foreshadow a long-term diminution of enthusiasm. The number of enforcement matters at the Authority against restrictive agreements is returning to the long-term average level, of about 10 per year. And sanctions imposed by the Authority since 2002 against restrictive agreements, mostly for violation of the EU Treaty prohibition, have averaged about EUR 100 million annually.

Policy options

The following recommendations deal with the enforcement and application of competition law, the organisation and resources of the Authority and the process of developing regulation. Several of them are renewed from the 2001 Report.

Enforcement and application

Some aspects of the provisions about sanctions might still be improved. Authorisation of a modern leniency programme was a very important step against horizontal collusion. Two further steps could make enforcement even more effective.

Provide for more effective sanctions against associations

The 2001 Report called for finding a way to impose higher fines on associations that are the vehicle for anti-competitive agreements. The very low fines that the Authority has been able to assess against cartels organised through industry associations shows that this problem still needs to be fixed. Associations typically have little turnover and few assets. Where restraints are imposed through an association, fines could be computed based on the activity of its members or assessed on its members directly. The EU and some other jurisdictions that use the EU model have moved to close this loophole.

Consider strengthening deterrence by imposing sanctions on individuals

The principal sanction to enforce compliance and deter violations of the Competition Act now is a civil financial penalty against an infringing enterprise. There is no provision for sanctions against individuals, even in the case of repeated violation, resistance to the Authority's orders or individual active participation in a violation. The Annual Survey observed that sanctions against individuals would improve enforcement in areas such as professional services; and it suggested considering criminal penalties against hard-core cartels. Several other member jurisdictions have moved recently to adopt individual or criminal penalties against hard-core cartels. One motivation is to make leniency offers more attractive and hence more effective as investigative tools.

Administration of the law could be improved by revising the timetable for reviewing mergers and correcting a confusion that appeared as Italy's law incorporated the procedural innovations of the EU's modernised enforcement regulation.

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Harmonise merger timetables with EU

This recommendation from the 2001 Report has not been addressed. Timetables for merger review have not been modified yet to make them consistent with practice elsewhere in Europe. That change would simplify administration by eliminating a dimension of potential confusion or conflict. Italy's merger review timetable is short. The Authority must decide within 30 days whether to proceed to a formal investigation, which then must be concluded within an additional 45 to 75 days. The timetable for EU review can be as long as 4 to 5 months. Conforming with the Authority's deadlines in merger review to those used by the EU will simplify processes by eliminating a potential source of confusion. It will also give the Authority more time for complete investigation where necessary.

Make merger timetables consistent for all sectors

In eliminating the special sectoral regime for banking, Italy introduced a complication. The deadlines for reviewing mergers involving banking are different from those that apply in other sectors. Although the banking sector deadline is somewhat longer, the schedule still differs from the timetable for review at the EU. It would be sensible and efficient to make the timetable the same for all mergers, including those in the banking sector. The possibility that another regulatory body would be concerned, because it has a responsibility to review the effect of the merger on other policies, should not make a difference. Banking is not the only sector where a merger might also call for attention from some other regulator.

Permit resolutions through commitments at any stage of proceedings

The Authority's power to terminate cases by taking commitments gives it useful flexibility. The law seems to require that proposals for commitments be submitted within three months after an investigation is launched. An early deadline would create pressure for a quick-fix solution. Although the courts have not treated this provision as a bar to entering a settlement later, it would be clearer to remove this oddity from the legislation.

Organisation

In the administration and organisation of the Authority, the limit on resources is still a potential concern. And continuity could be improved by staggering the terms of the Authority's members.

Permit increased Authority resources

The statutory cap on the Authority's personnel level has been raised, but only to accommodate some additional responsibilities. Fifteen of these additional positions, or nearly 10% of the authorised complement, came with the non-germane responsibility to handle cases about conflicts of interest. The Authority still has comparatively few personnel resources to handle its policy and enforcement responsibilities. Funding has been adequate, but more than half of it now comes from filing for mergers, while the Treasury's contribution has dropped substantially. As the Authority turns more attention to resource-intensive enforcement, it should be freed of constraints that prevent it from applying its budget resources to support the personnel it needs. The ceiling on its authorised personnel leaves the Authority smaller than its peers.

Assure continuity in the membership of the Authority

The structure of the terms for members of the Authority interrupts continuity. The Authority has now been in existence long enough to go through two episodes of complete membership turnover. The most recent episode corresponded with a significant change in the Authority's output and enforcement priorities. Abrupt change would be less likely if the terms of the members were staggered, so they did not all end at the same time. A proposal to make such a change in the structure of independent agencies in general was under consideration by the last government. Departure of a few members before the end of their term has created *de facto* some difference between them. But it would be sounder to provide consistently for overlapping, rather than coincident, terms.

Regulatory process

Include competition policy in the processes of ensuring legislative quality

This recommendation from the 2001 Report remains relevant, as Italy continues to improve its processes for reviewing and developing laws and regulations. Those processes should provide systematically for the consideration of effects on competition.

Notes

1. See Chapter 4 for more details on the effect of these reforms in the liberal professions.
2. See Chapter 3 for more details on promoting competition in local services.
3. Regional-government restraints on retail competition are discussed in Chapter 7 on commercial distribution.
4. Other recommendations about regulation from the competition chapter of the 2001 Report will be examined in Chapter 4 on professional services and Chapter 7 on commercial distribution.

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