COMPETITION LAWS OUTSIDE THE UNITED STATES

FIRST SUPPLEMENT

CHAPTER 8: ITALY

Mario Siragusa
Matteo Berretta
Saverio Valentino
Principal Co-authors

Matteo Bay
Principal Reviewer
ITALY-3

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I. Introduction

A. Overview of Applicable Statutes and Landmark Cases

On March 5, 2001, the Italian Parliament enacted Law No. 57/2001, which introduced a number of amendments to the Competition Law.

In particular, Law No. 57/2001 modified Section 8 of the Competition Law, introducing a new set of rules aimed at preventing the unlawful exploitation of the advantages enjoyed by companies in regulated markets who seek to strengthen their position in neighboring markets. Section 8 of the Competition Law, as amended, provides that: (i) firms entrusted with the operation of services of general economic interest and legal monopolists can operate in other markets only through a separate entity; (ii) the formation of the separate entity (as well as the acquisition of control of an entity active in a different market) must be communicated to the Competition Authority; and (iii) if the firm performing services of general interest or a legal monopolist provides its subsidiaries or the companies in which it has an interest with goods or services, it must make such goods and services available to its subsidiaries’ direct competitors on equivalent terms. The Competition Authority was given the power to impose fines for violations of the new rules. In particular, it may impose a fine of up to ITL 100 million (€ 51,645) for a violation of the above-mentioned obligation to notify the Competition Authority of the creation of a new entity.

Law No. 57/2001 also modified Section 15(1) of the Competition Law, which sets the limits for the fines that can be imposed for violations of the Competition Law’s substantive provisions (i.e., cartels, abuses of dominant position, etc.). Until April 3, 2001, the maximum fine provided for in Section 15(1) was 10 percent of each company’s turnover in the market affected by the infringement. As a result of the 2001 reform, the maximum fine has been significantly increased and is now set at 10 percent of the \textit{total} turnover of each company.

1. See Law No. 57 of March 5, 2001, § 11 (reproduced in an Annex to this chapter).
2. Law No. 287/1990, The Competition Law (\textit{Norme per la tutela della concorrenza e del mercato}), was initially enacted on October 10, 1990, and introduced Italy’s first competition rules.
3. On September 28, 2003, the Competition Authority published a notice detailing how to comply with this notification requirement. The notice covers not only future separations or acquisitions, but also requires that notice be given to the Authority under the new procedures of separations and acquisitions completed before issuance of the notice (namely, those completed between April 4, 2001 and September 28, 2003). Notice of previous separations had to be given by November 28, 2003, even if they had already been completed, and regardless of whether notice was already given under merger control rules or through other means (for example, by means of a letter that did not contain all of the information required by the new notice).
5. Based on a recent judgment by the regional administrative court of first instance of Latium (Trib. ammin. reg. or TAR), the notion of \textit{total} turnover must be interpreted as referring to total \textit{worldwide} turnover. See Philip Morris & ETI v. Autorità Garante della Concorrenza e del Mercato, 29 Oct. 2003, n. 9203/2003 (Trib. ammin. reg.). This interpretation is consistent with the Community Courts’ interpretation of an equivalent provision, Article 23(2) of Council Regulation 1/2003 of 16 December 2002 on the implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the EC Treaty, 2003 O.J. (L1) 1, 17.
Clearly, the Competition Authority now enjoys more discretion in calculating fines. It can set them at a level that ensures they will have an actual deterrent effect. In addition, the 2001 reform suppressed the legal minimum of 1 percent. In the absence of a leniency program, with the suppression of the legal minimum, the Parliament enabled the Competition Authority to impose merely symbolic fines in order to encourage whistle-blowing.

Finally, Law No. 57/2001 introduced a new rule providing that any agreement resulting in an abuse of “economic dependence” is void. The Competition Authority is entrusted with the power to investigate any alleged violation of the rules on abuses of economic dependence and, where necessary, to impose the fines set forth in Section 15 of the Competition Law. As of September 2004, the Authority has not applied the new rules on abuses of economic dependence.

B. Overview of Enforcement Agencies and Their Jurisdiction

As of September 2004, eight decisions applying EC competition rules have been adopted by the Competition Authority.  


7. “Economic dependence” is defined by Section 9 of Law No. 192 of June 18, 1998, as “the situation in which an undertaking has the power to determine, in its commercial relationship with another undertaking, an excessive imbalance in the parties’ rights and obligations. In assessing the economic dependence, the possibility for the party subjected to the abuse to actually find on the market satisfactory alternatives must also be taken into account.” Furthermore, in the context of this provision, “abuse” expressly includes a refusal to sell or purchase. Id.

8. However, domestic courts have already applied this provision several times, as the application of Section 9 of Law No. 192 of June 18, 1998, is also attributed to civil courts. Such courts have generally considered this provision in the context of traditional civil law — more specifically, contract law. In this regard, the courts have emphasized that conduct that is incompatible with Section 9 need not have a negative effect on competition. In fact, the Authority has made the same point, in an opinion addressed to the Parliament on the bill introducing the new abuse. See Disciplina della subfornitura nelle attività produttive, 10 Feb. 1998, Bulletin n. 5/1998. Moreover, the civil courts have noted that Section 9 introduces a broader notion of abuse, under which a dominant position in the relevant market is not required for the prohibition to apply. Finally, the civil courts have noted that although the language of Section 9 emphasizes the “excessive imbalance in the parties’ rights and obligations,” a situation of “economic dependence” (or “hold up” situation) exists, primarily, when an undertaking is the “mandatory” partner of another undertaking — that is, when the latter is forced to deal with the former where no satisfactory alternative commercial partner is available. See, e.g., Medical Sys. v. Eastman Chemical Italia, 5 Jan. 2004 (Court of Catania), available at www.ilFallimento.it/giurisprudenza/117.htm. See also Petrosino v. Marini Bobini, Danno e Responsabilità, 6 May 2002 (Court of Bari).


10. See UNAPACE/Enel, 9 Apr. 1999, n. A263, Bulletin n. 13–14/1999 (holding that a three-year exclusive delivery agreement containing an “English clause” was contrary to Article 82 of the EC Treaty since it limited access by foreign Community suppliers to the Italian electricity market and thus affected significantly the trade flows among Member States); Stream/Telepiù, 14 June 2000, n. A274, Bulletin n. 23/2000 (holding that three activities undertaken by Telepiù — specifically, (i) the acquisition by Telepiù of exclusive rights for the encrypted broadcasting of the bulk of the Italian first- and second-division soccer championship matches for a six-year period, (ii) the inclusion of several anticompetitive clauses in a contract for cable distribution of soccer packages and programs signed with Stream, and (iii) the imposition upon Stream of an obligation to agree only to broadcast via cable the soccer championship matches over which it had already acquired the
The structure and the scope of Sections 2 and 3 of the Competition Law (prohibiting, respectively, agreements and practices in restraint of competition, and abuses of market power) are strictly modeled on Articles 81(1) and 82 of the EC Treaty, except for the “effect on trade between Member States” jurisdictional broadcasting rights — constituted violations of Article 82 of the EC Treaty since the activities were not objectively justified, resulted in an unfair limitation of the residual competition between Telepiù and Stream in the Italian pay-TV market, and made new entries in such market, including by foreign Community competitors, more difficult and expensive; Consorzio Industrie Fiammiferi, 13 July 2000, n. 1318, Bulletin n. 28/2000 (holding that various decisions by the Italian match manufacturers’ consortium (C.I.F.), as well as various agreements among its members aimed at establishing a system to grant fidelity discounts and to allocate production quotas, were contrary to Article 81 of the EC Treaty); Assoviaggi v. Alitalia, 27 June 2001, n. A291, Bulletin n. 26/2001 (noting that the application of exclusionary incentive schemes to air travel agencies resulted in discriminatory treatment of travel agents and in foreclosure of competing air carriers, including foreign Community carriers, from the Italian air transport market); Aeroporti di Roma–Tariffe del groundhandling, 20 Sept. 2000, n. A247, Bulletin n. 38/2000 (holding that conduct by the exclusive operator of the Fiumicino airport, including the operator’s provision of ground-handling services, was aimed at preventing air carrier Meridiana from obtaining supervision and aircraft balancing services from its own subsidiary company, and was thus contrary to Article 82 of the EC Treaty because it could likely affect the quality and costs of intra-Community air transport services from/to the Rome airport, and thus the direction of traffic flows within the EC territory); International Mail Express Italy v. Poste Italiane, 23 May 2002, n. A299, Bulletin n. 21/2002 (holding that Poste Italiane abused its market power, in violation of Article 82 of the EC Treaty, by imposing excessive prices for its forwarding and delivery services of normal cross-border mail arbitrarily classified as “ABA remailing,” refusing to provide forwarding and delivery services of incoming mail to foreign senders and/or to public postal operators, and holding back and destroying correspondence without prior notice to the sender); Blugas/Snam, 21 Nov. 2002, n. A329, Bulletin n. 47/2002 (holding that Eni, a former vertically-integrated monopolist in the Italian gas sector, infringed Article 82 of the EC Treaty by entering into several gas supply agreements with Italian importers, thereby indirectly satisfying with its own gas most of the Italian demand and circumventing the quotas set out by the liberalization process); Enel Trade-Clien®iti Idonei, 27 Nov. 2003, n. A333, Bulletin n. 48/2003 (holding that Enel abused its dominant position in the market for supply of electric energy to eligible clients — i.e., clients who are free to choose their supplier — in violation of Article 82 of the EC Treaty by including certain clauses in its standard supply contracts which had the effect of preventing customers from switching to competing suppliers).

Of particular interest is Consorzio Industrie Fiammiferi, in which the complainant, a German competitor, filed submissions with both the Commission and the Competition Authority, the latter of which eventually took charge of the case due to the essentially domestic effect of the practices in question. The Competition Authority held that the Italian legislation on the establishment and the activities of C.I.F. was incompatible with Articles 3(g), 10, and 81 of the EC Treaty, and thus concluded that the domestic courts and public administration were under a duty not to apply it. This issue has also been brought to the attention of the European Court of Justice (E.C.J.) by the TAR of Latium, before which the C.I.F. had lodged an appeal seeking the annulment of the Competition Authority’s decision, in the context of preliminary ruling proceedings initiated under Article 234 of the EC Treaty. On September 9, 2003, the E.C.J. ruled that when undertakings engage in conduct contrary to Article 81(1) of the EC Treaty and when that conduct is required or facilitated by national legislation that legitimizes or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority: (i) has a duty not to apply the national legislation; (ii) may not impose penalties with respect to past conduct on the undertakings concerned when the conduct was required by the national legislation; (iii) may impose penalties on the undertakings concerned with respect to conduct subsequent to the decision not to apply the national legislation, once the decision has become definitive in their regard; and (iv) may impose penalties on the undertakings concerned with respect to conduct subsequent to the decision not to apply the national legislation, once the decision has become definitive in their regard; and (iv) may impose penalties on the undertakings concerned with respect to past conduct when the conduct was merely facilitated or promoted by the national legislation. See Case C-198/01, Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concovrenza e del Mercato, 2003 E.C.R. I-8055.
standard in the EC Treaty, which defines the boundary between conduct that is subject to EC law and conduct that is governed solely by domestic law. Moreover, pursuant to Section 1(4) of the Competition Law, its provisions must be interpreted in accordance with the principles of EC competition law. Nevertheless, the Competition Authority may, in certain cases, have a strong incentive to apply Articles 81(1) and 82 of the EC Treaty as opposed to the equivalent national substantive rules. The power to directly apply EC competition rules represents, in the Competition Authority’s view, an effective weapon against anticompetitive market conduct that, according to the undertaking(s) involved, complies with state legislative or administrative measures.

In light of the principles of direct effect and supremacy of Community law over national law, as well as Member States’ obligation to “abstain from any measure which could jeopardize the attainment of the objectives of” the Treaty, any state measure undermining the effectiveness of EC competition rules may be unenforceable in the national courts; similarly, any anticompetitive conduct that is required of undertakings by national legislation, and which would otherwise be shielded from the Competition Authority’s scrutiny, is subject to direct enforcement under the EC provisions.

In Consorzio Industrie Fiammiferi, the Competition Authority made clear that its power to apply Articles 81(1) and 82 of the EC Treaty necessarily includes the duty to investigate whether the conditions of the limited derogation provided in Article 90(2) of the former EC Treaty are satisfied with respect to undertakings invoking the latter provision as a defense. The Competition Authority concluded that these conditions were not satisfied, considering that the national legislation that established the Consorzio Industrie Fiammiferi in 1923 did not entrust it with any services of general economic interest.

The “modernization” of the EC competition rules went into effect on May 1, 2004, and as a result, the Competition Authority expects to apply Articles 81 and 82 of the EC Treaty more frequently. Based on the new rules, national courts and national competition authorities may apply Article 81 of the EC Treaty in its entirety and are actually obliged to apply this provision to conduct capable of affecting inter-state trade.

C. Existence and Practical Availability of Private Rights of Action

Antitrust litigation before civil courts is increasingly frequent. This increase may be explained by the fact that appellate courts (Corti d’Appello) can grant interim relief measures while the Competition Authority does not have such power.

Under Section 33(2) of the Competition Law, only appellate courts are empowered to impose interim measures, annul anticompetitive agreements, or award

11. See EC Treaty art. 10.
damages in response to antitrust allegations brought by private parties. In a landmark ruling interpreting this provision, the Supreme Court (Corte di Cassazione) held that remedies under Section 33(2) of the Competition Law are available only to undertakings.\textsuperscript{16} If brought by consumers, claims for violations of the Competition Law are to be treated as ordinary actions and, as such, are subject to the normal rules of civil procedure on jurisdiction (i.e., the action will be initially heard by a court of first instance). As a result of the Supreme Court’s ruling, court proceedings brought by consumers under the Competition Law are now subject to the same procedural rules as the proceedings brought by any party (natural or legal persons) under the EC competition rules.

II. Overview

A. Application of Relevant Economic Doctrines

1. Use of Specific Economic Analyses

In Sai/La Fondiaria, the Competition Authority used, for the first time, a PCAIDS (Proportionality Calibrated Almost Ideal Demand System) simulation model for assessing the existence of a dominant position.\textsuperscript{17} The PCAIDS measures how the growth in market concentration created by a merger increases the parties’ ability to fix prices independently from competitors. In Sai/La Fondiaria, such simulation showed that the parties would have been able to charge substantial premium increases averaging more than 10 percent above pre-transaction market levels.\textsuperscript{18}

In Compagnie Aeree-Fuel Charge, the Competition Authority used, for the first time, the Multimarket Competition theory.\textsuperscript{19} According to this theory, when certain conditions are satisfied (e.g., price transparency and relatively high product homogeneity), undertakings simultaneously active in various geographic markets (e.g., the routes operated by air carriers) define their respective business strategies for each market by taking into account the whole of the markets in which they operate. Applying this theory, the Competition Authority assessed the concerted practice between air carriers of imposing identical surcharges for domestic flights, taking into account the whole series of the domestic routes.\textsuperscript{20}

\begin{footnotesize}
\begin{itemize}
\item[18.] Id. ¶ 125.
\item[20.] Id. ¶ 25.
\end{itemize}
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III. Substantive Law

A. Horizontal Agreements and Practices

1. Concept of Undertaking

In an important 2003 decision concerning a cartel among tobacco manufacturers, the Competition Authority addressed the issue of the attribution of liability and fines for infringements of the Competition Law. The Authority found that the two leading tobacco companies operating on the Italian cigarette market — Philip Morris (PM) and Amministrazione Autonoma dei Monopoli di Stato (AAMS), a public authority in charge of managing the state tobacco monopoly — had entered into and implemented a restrictive agreement between 1993 and 2001. In 1999, AAMS became a state-owned private company under the name of ETI S.p.A. (ETI).

Considering the serious nature of the offenses, the Authority imposed total fines of € 50 million on five companies within the PM group that were parties to the agreement, as well as total fines of € 20 million on ETI. However, on July 14, 2003, the TAR annulled the portion of the Competition Authority’s decision finding ETI responsible for infringements that occurred prior to its formation. The Competition Authority had maintained that, after ETI was created, AAMS had ceased to carry out any economic activities, and thus, in order to preserve the effectiveness of competition law, any fines relating to AAMS’s previous commercial behavior had to be imposed on its economic successor ETI. The TAR rejected this approach and concluded that, to achieve consistency with the case law of the European Court of Justice, ETI could not be held liable for infringements committed by a different legal entity which still existed at the time the fine was issued. Therefore, the TAR remanded the case to the Competition Authority to reassess the amount of the fine.

The question of assessment of antitrust liability against a successor undertaking has also been addressed by the Competition Authority in situations in which the undertaking was a legal entity at the time of the infringement but subsequently lost its separate legal personality when it was absorbed by a larger corporate entity. This situation was analyzed by the Competition Authority in RC Auto. This case establishes the principle that when the economic and functional successor of an

22. See, e.g., Case T-6/89, Enichem ANIC S.p.A. v. Commission (Polypropilene), 1991 E.C.R. II-1623; Case T-327/94, SCA Holding Ltd. v. Commission, 1998 E.C.R. II-1373, aff’d 2000 E.C.R. I-10101. According to these cases, when an undertaking is identified as a participant in the infringement, it cannot escape fines (or avoid being the addressee of an infringement decision) by selling or otherwise disposing of the infringing assets.
23. Philip Morris & ETI v. Autorità Garante della Concorrenza e del Mercato, 29 Oct. 2003, n. 9203/2003 (Trib. ammin. reg.). For examples of the Competition Authority’s previous practice, see Tubi Dalmine Ilva/General Sider Italiana/Arvedi Tubi Acciaio, 14 Dec. 1995, n. II35, Bulletin n. 50/1995, and Byk Gulden Italia/Istituto Gentili, 25 Feb. 1999, n. I332, Bulletin n. 8/1999. In particular, in Byk Gulden, Istituto Gentili (IG) had divested in 1997 all of its assets in the relevant market to Abiogen. IG claimed that responsibility for the infringement should not have been attributed to IG but rather to Abiogen. However, the Competition Authority rejected this argument, holding that IG was responsible for operating the undertaking involved in the infringement (i.e., the divested business) at the time the infringement took place. Since IG was still in existence, it could be held liable even though it had disposed of the assets in the market concerned.
undertaking continues the same basic activities, and also assumes the assets and liabilities of the undertaking, that successor may be held liable for the actions of its predecessor. In this context, there is no need to prove that the economic successor was involved in, or carried on, the unlawful activities. This solution is justified by the possibility that if no liability were imposed on the economic successor, liabilities and fines would be circumvented altogether.25

2. AGREEMENTS, DECISIONS, AND CONCERTED PRACTICES

(a) Concerted Practices

In three important rulings, the Supreme Administrative Court has clarified the Competition Authority’s burden of proof in concerted practice cases, and has also set fairly high evidentiary standards that are more along the lines of well-established principles of EC competition law.

In TIM/Omnitel, the Supreme Administrative Court partially annulled a decision of the Competition Authority which held that the two leading Italian mobile telecommunication service providers, Telecom Italia Mobile (TIM) and Omnitel Pronto Italia (Omnitel), had violated the Competition Law by agreeing to fix the prices for (i) fixed-mobile communications in 1998-99 and (ii) interconnection to their mobile networks.26

TIM/Omnitel represents the first instance in which the Supreme Administrative Court has outlined, in clear and detailed terms, the burden of proof the Competition Authority must satisfy in order to show the existence of a concerted practice under the Competition Law. In particular, the Court, relying on Court of Justice case law, stated that conscious parallelism among competitors cannot be the only evidence of an agreement or a concerted practice. Rather, the Competition Authority must rely on strong and consistent evidence that shows: (i) the absence of alternative plausible explanations for the parallel behavior, or (ii) actual contacts or exchanges of information between the parties.

The burden is on the Competition Authority to prove the absence of alternative explanations for the conduct in question. But the parties must prove the lawful purpose of any demonstrated contacts or exchanges of information. In TIM/Omnitel, the Competition Authority’s decision was partially annulled because (i) there were several plausible explanations for TIM and Omnitel charging the same tariffs in 1998, and (ii) the parties produced sufficient evidence that their meetings had purposes other than the discussion of the prices for 1998.

The second judgment in which the Supreme Administrative Court addressed the issue of the evidentiary standards required for a finding of concerted practice is Insurance Cartel.27 There, the Court partially annulled a decision of the Competition Authority, finding that the main Italian insurance companies had violated Section 2


of the Competition Law through, among other things, concerted tying of the sale of
theft and fire insurance policies to the sale of third-party liability insurance policies.

The Court annulled the Competition Authority’s sanction for this infringement,
finding that the Authority had not proven the absence of plausible alternative
explanations for the parallel conduct. The existence of parallel behavior was
reflected in internal company documents and was not contested by the parties. The
parties argued that this behavior was the result of individual decision-making, not
collusion. The Court accepted this argument, noting further that the parallel behavior
concerned companies representing only 58 percent of the relevant market and that the
Authority had failed to investigate the conduct of the other firms. In short, *Insurance
Cartel* sets a high standard for investigation in future cases by the Competition
Authority.

Finally, *Petrol Cartel* provides the third instance in which the Supreme
Administrative Court has evaluated the existence of a concerted practice. In this
case, the Supreme Administrative Court reversed a decision of the Competition
Authority condemning an alleged concerted practice among Italian oil companies and
their trade association.\(^{28}\) The Competition Authority’s decision was annulled on
procedural grounds.\(^{29}\) However, in a long passage of *obiter dictum*, the Supreme
Administrative Court noted the Authority had not considered several plausible
alternative explanations for the oil companies’ parallel behavior, including the fact
that the still heavily-regulated Italian market led to an artificial transparency
facilitating the convergence of the competitors’ pricing policies.\(^{30}\)

### 3. PROHIBITED AGREEMENTS

#### (a) Fixing of Prices or Other Contractual Conditions

In September 2000, the Competition Authority found that an agreement between
the Italian Association of Physicians, Surgeons, and Dentists and supplementary
health care service providers (which offer the services of medical professionals to
their clients) violated Section 2 of the Competition Law by fixing the terms and
conditions to be applied in contractual relationships between the service providers
and all members of the Association.\(^{31}\) In particular, the Association imposed a so-
called “open list” principle, pursuant to which the health care service providers were
obliged to enter into contracts with only those professionals whose names were
supplied by the Association.\(^ {32}\) As a result, health care service providers were
restricted from freely selecting physicians to be part of their networks on the basis of
the quality or price of their medical services. Following its investigation, the
Competition Authority found that (i) physicians had no incentive to compete with
each other to enter the network of a given health care provider, and (ii) the
bargaining power of the health care providers in their relations with individual

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(Cons. stato).
29. See infra Part IV.A.
32. Id. ¶¶ 24, 69.
physicians was significantly diminished.\textsuperscript{33} The Competition Authority concluded that the Association’s actions were expressly designed to prevent competition among its members in their relations with supplementary health care providers, and that this was a violation of the Competition Law.\textsuperscript{34}

\textit{(b) Market Allocation}

In \textit{Consorzio Industrie Fiammiferi}, the Competition Authority held that a consortium and its members infringed Article 81 of the EC Treaty (i) by allocating production quotas among the consortium members; (ii) by agreeing with Swedish Match, a leading company in the European match market, to allocate a percentage of the Italian match consumption to Swedish Match in exchange for a commitment by Swedish Match not to directly enter the Italian market; and (iii) by entering into an exclusive purchase agreement with another consortium of match distributors to establish fidelity discounts for distributors, thereby making entry into the Italian market extremely difficult for other European manufacturers.\textsuperscript{35}

\textbf{1) Output Restrictions}

The Competition Authority found that the Italian national pharmacy association, as well as the pharmacy associations of several Italian cities and regions, violated the Competition Law by prohibiting members from advertising through the media (or even simply reporting their existence) and from making deliveries to their customers’ homes.\textsuperscript{36} These prohibitions amounted to output restrictions and, as a result, limited the pharmacies’ ability and incentive to compete against each other.\textsuperscript{37}

More recently, in \textit{Consorzio Grana Padano}, the Authority concluded that two resolutions adopted by a consortium of approximately 200 producers of Grana Padano cheese violated Section 2 of the Competition Law because the resolutions were aimed at reducing the consortium members’ output.\textsuperscript{38} The resolutions provided for the assignment of economic incentives to those members of the consortium that utilized or sold their milk for purposes other than to manufacture Grana Padano cheese. The Authority observed that the consortium’s measures amounted to the creation of production quotas, and that, as a result of the decreased production of cheese, wholesale prices increased artificially.\textsuperscript{39} In light of the serious nature of the infringement, a € 120,000 fine was levied against the consortium.

\textbf{(c) Information Agreements}

With approximately 40 insurance companies involved, representing roughly 80 percent of the Italian car insurance market, the Competition Authority had an

\begin{itemize}
\item \textsuperscript{33} Id. ¶ 70.
\item \textsuperscript{34} Id. ¶ 74.
\item \textsuperscript{35} 13 July 2000, n. I318, Bulletin n. 28/2000.
\item \textsuperscript{37} Id. ¶¶ 191-193.
\item \textsuperscript{39} Id. ¶ 110.
\end{itemize}
opportunity to deal with an extremely large “information agreement” in RC Auto. The Competition Authority held that the companies violated the Competition Law by exchanging sensitive commercial information, thereby rejecting the parties’ arguments that the exchange of information was legal because: (i) the information was collected by a third company completely independent from the insurance companies; (ii) the data was publicly available or historical in nature; and (iii) some of the companies would have been able to calculate the prices charged by the others on their own, without using external information.

The Supreme Administrative Court affirmed the Competition Authority’s ruling, holding that the determination whether information exchanges are unlawful depends on (i) the nature of the information exchanged and (ii) the exchange’s potential anticompetitive effects. The parties countered that the E.C.J.’s UK Tractors judgments held that it was also necessary to consider the structure of the relevant market and, in particular, its degree of concentration. However, the Supreme Administrative Court rejected this argument, holding that exchange of highly confidential and sensitive information (e.g., prices charged to customers) is unlawful not only in oligopolistic markets, but also in more heterogeneous and competitive markets.

4. EXEMPTION FROM PROHIBITION

At present, the Competition Authority has not utilized its power to adopt block exemptions, as provided under Section 4 of the Competition Law. By contrast, between January 2001 and September 2004, the Competition Authority used its power to grant individual exemptions (also provided under Section 4 of the Competition Law) on nine occasions.

43. See Axa Assicurazioni, n. 2199/2002, at ¶ 7.2.2. This decision seems consistent with UK Tractors. In that case, the information exchange did not directly concern prices. Rather, it concerned only the exchange of statistics providing information on sales and market shares of individual firms. The Commission held that, given the oligopolistic nature of the UK tractors market, exchange of this commercial information was unlawful since it created a transparency that allowed the parties to predict competitors’ actions earlier than would otherwise be the case. Deere, [1998] E.C.R. at ¶¶ 87-90. This fact could facilitate the alignment of prices or other conditions of sale by eliminating the incentive temporally to undercut competitors’ prices. The rationale behind this finding is that, in highly concentrated markets that are prone to conscious parallel behavior, uncertainty and secrecy between suppliers are vital elements of “hidden” competition, and information exchanges (also those not strictly related to price) eliminate even this narrow margin for competition.
The exemption granted to Nokia Italia and Marconi Mobile for their formation of a cooperative joint venture, Securcomm, provides an interesting example of a Section 4 decision. The joint venture was formed to develop a new mobile radio communication system based on the digital technology TETRA, which is intended for use by the Italian civil, financial, and military police forces. Under this agreement, Securcomm would participate in only one-third of the invitations to tender issued by police forces, while Marconi and Nokia would compete against each other for the remaining bids.

The Competition Authority found that the agreement restricted competition because Marconi, as the incumbent operator that traditionally served police forces in Italy, and Nokia, which had already created infrastructures for the police forces of other European countries, were among the few players active in the digital mobile radio communication sector. Furthermore, if Securcomm won the first bids with police forces, it would become the first to install this new generation of mobile radio communication systems in Italy. Under such circumstances, the contracting authorities would presumably require that the participants in subsequent bids use technological standards compatible with the existing infrastructure. Since Securcomm and its two parent companies would be the only players holding the intellectual property rights related to such standards, a situation would arise in which Nokia and Marconi would be the only companies able to satisfy the police forces’ requirements.

Nevertheless, the Competition Authority held that the agreement qualified for a one-year individual exemption (to be determined from the date of the decision) under Section 4 of the Competition Law because: (i) it was limited in scope and duration; (ii) Nokia and Marconi undertook to make available to their competitors the resulting product of their joint R&D under fair and non-discriminatory conditions; and (iii) a fair share of the benefits of the R&D would be passed on to consumers (in this case, the relevant police forces).

A joint venture involving two grocery store consortia was also allowed by the Competition Authority. The joint venture was to negotiate with suppliers of food and other commodities the terms and conditions of purchase for the member companies. The Competition Authority considered the agreement to be restrictive of competition because it would reduce the autonomy of the parties in defining their respective commercial policies. Nonetheless, the Competition Authority granted an individual exemption for a period of 45 months because the joint venture would enhance the efficiency of the parties and ultimately allow a transfer of their savings to consumers.

In Alitalia/Volare, the Competition Authority also partially exempted a code-sharing agreement under which two air carriers were allowed to sell tickets on certain of each other’s flights, at their own tariffs and under their own code and flight numbers. Following an in-depth investigation, the Authority concluded that the

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46. Id. ¶¶ 125-139.
47. 156-159-160, 165.
49. Id. ¶ 130-139.
50. Id. ¶ 129-139.
agreement substantially restricted competition, and granted an individual exemption in relation to only a few national routes.

The decision was subsequently struck down by the TAR, which found that the Authority did not provide adequate and conclusive evidence supporting its definition of the relevant markets and the restrictive nature of the notified agreement. Nonetheless, the Authority’s decision remains interesting in that it shows how the Authority applies the four conditions provided for in Section 4 of the Competition Law to agreements affecting the air transport industry. In the Authority’s view: (i) the first condition for exemption (improvement in the conditions of supply) would be met if the parties could show an increase in the number of seats or frequencies offered and/or an increase in load factor; (ii) the second condition (fair share of benefit to consumers) would be satisfied by showing an increase in the number of seats/frequencies, or an increased load factor on routes where at least one additional career was active; (iii) the third condition (indispensability and proportionality of the restrictions) would be met where the volume of traffic on the relevant route was low (thus making it economically unprofitable for each party to operate the route outside a code-share agreement) and all of the parties’ frequencies were covered by the agreement; and (iv) the fourth condition (no substantial elimination of competition) would be met where the parties had a combined market share not exceeding 35-45 percent (or higher for particularly low-traffic routes). Following a route-by-route analysis, the Authority concluded that these four conditions were met only with respect to five of the domestic routes originally covered by the agreement.

In July 2004, the Competition Authority and the Bank of Italy granted an individual exemption to the agreement for the formation by American Express and CartaSi of a cooperative joint venture (Iconcard), active in the issuance and distribution through Italian banks of American Express cards aimed at affluent individuals and small and medium enterprises. CartaSi, a company whose share capital is owned by approximately 130 Italian banks, is the main Visa and MasterCard Italian licensee and the leader in the Italian credit card market. On the one hand, the Authority and the Bank of Italy found that the agreement restricted competition because it reduced the incentives of two of the main market players to develop autonomous commercial initiatives, and also because it made it more difficult for competitors to enter the higher end of the market. On the other hand, the Authority and the Bank of Italy recognized that the agreement nonetheless satisfied the four requirements for granting an individual exemption: (i) it allows for significant cost savings, as banks bear lower costs to distribute cards; (ii) users will benefit from the agreement, as they will have easier access to American Express cards, which may be sold at a lower price; (iii) the agreement is indispensable, as demonstrated by several fruitless attempts by American Express to distribute its

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53. See CartaSi-American Express, 28 July 2004, n. 1566, Bulletin n. 31/2004 (decision of the Competition Authority); CartaSi-American Express, 30 July 2004, n. 1566, Bulletin n. 31/2004 (decision of the Bank of Italy). For further discussion of the concurrent jurisdiction of the Competition Authority and the Bank of Italy concerning the enforcement of the Competition Law with respect to banks or other financial institutions, see infra Part V.A.

54. See CartaSi-American Express, Bulletin n. 31/2004, ¶¶ 212-227 (decision of the Competition Authority); ¶¶ 103-110 (decision of the Bank of Italy)
cards through the banking channel; and (iv) the joint venture Iconcard will have a limited share in the overall credit card market.\footnote{Id. \¶¶ 246-260 (decision of the Competition Authority); \¶ 111-115 (decision of the Bank of Italy).}

**B. Monopolization/Abuse of Dominant Position**

1. **THE RELEVANT MARKET**

   (a) **The Relevant Product Market**

   In *Veraldi/Alitalia*,\footnote{15 Nov. 2001, n. A306, Bulletin n. 46/2001.} the Competition Authority set forth a detailed assessment of the relevant market for air transport services. This assessment was consistent with the European Commission’s well-established practice, as well as with the Community Courts’ case law.

   The Competition Authority distinguished the supply of airline seats to tour operators for incorporation into package tours (charter flights) from sales to individuals (scheduled flights) on the ground that the provision of these services is not substitutable, as prices and purchase conditions are different.\footnote{Id. \¶ 7.}

   For scheduled flights, the Competition Authority stressed that a further distinction must be made according to routes because the service to a certain destination cannot be substituted with service to a different destination. More specifically, the substitutability between routes depends on a number of factors, such as the distance between the point of origin and destination, the distance between the different airports situated on each end of the route, and the frequency of flights available on each route.\footnote{Id. \¶ 9.}

   Based on these factors, the Competition Authority concluded that each point-of-origin/point-of-destination pair constitutes a relevant market, and that such markets include a route or bundle of routes comprising: (i) the non-stop flights between the two airports concerned; (ii) non-stop flights between the airports whose respective catchment areas (geographical service area) significantly overlap with the catchment area of the airports concerned; and (iii) indirect flights between the airports concerned to the extent that these flights are substitutable for the non-stop flight.\footnote{Substitutability as between direct routes and indirect routes depends on a number of factors such as the flight time or the frequency and schedule of the routes.}

2. **DOMINANT POSITION**

   (a) **Factors Indicating Dominance**

   When a vendor cannot decline to offer a company’s product without inflicting significant harm to its own business, this circumstance indicates that the supplier is in a dominant position. In *Assoviaggi/Alitalia*, the Competition Authority found that Alitalia’s important position in the air transport services market made it an indispensable business partner for travel agents.\footnote{27 June 2001, n. A291, Bulletin n. 26/2001.} Because sales of Alitalia tickets
accounted for a very large proportion of Italian travel agencies’ total turnover, no travel agent could decline to offer Alitalia tickets to its customers without incurring major damage to its business. Alitalia was therefore found to be in a dominant position as a purchaser in the Italian market for air travel agency services.61

3. TYPES OF ABUSES

(a) Excessive Pricing

_Veraldi/Alitalia_ illustrates the methodology that the Competition Authority uses in evaluating whether the prices charged by a company holding a dominant position may be considered excessive.62 In this case, the Authority’s investigation began in response to numerous complaints from passengers, consumers’ associations, and local authorities that fares on the Milan–Lamezia Terme route were unjustifiably higher than those charged on the comparable Milan–Reggio Calabria route.

The Competition Authority conducted a two-stage analysis. First, it compared the conditions offered by Alitalia on the relevant route with those available on a comparable route where Alitalia was subject to competitive constraints (i.e., Milan–Reggio Calabria).63 This comparison showed that Alitalia’s revenue per passenger on the Milan–Lamezia Terme route was more than 50 percent higher than the revenue per passenger on the comparable route.64 The Competition Authority noted, however, that Alitalia always reported significant losses on the Milan–Reggio Calabria route and, thus, the fares charged on this route did not constitute a valid benchmark to assess the fairness of the prices on the dominated market.65

In the second stage of the analysis, the Competition Authority compared Alitalia’s return per passenger on the relevant route with the cost of offering the service. The Competition Authority determined that Alitalia’s 32 percent profit margin on the route in 1999 and 31 percent profit margin in 2000 “did not unequivocally show any unreasonable disproportion between the price and the commercial value of the service provided.”66 In conclusion, the Competition Authority held that the evidence was not sufficient to demonstrate that Alitalia’s pricing policies on the Milan–Lamezia Terme route constituted an abuse of a dominant position.67 This decision suggests that it is particularly difficult to establish the existence of excessive pricing.

(b) Price Discrimination

In _Assoviaaggi/Alitalia_, the Authority found that Alitalia’s incentive schemes for travel agents were discriminatory because in some cases, different commissions were granted to travel agents for reaching similar sales targets.68 Thus, the agreements

61.  _Id._
63.  _Id._ ¶¶ 129, 149-163.
64.  _Id._ ¶ 131, 155.
65.  _Id._ ¶¶ 132, 163.
66.  _Id._ ¶¶ 177-178.
67.  _Id._ ¶ 180.
placed some travel agents at a competitive disadvantage relative to the others, without an acceptable justification.

(c) Rebates

(1) Loyalty Rebates

The Competition Authority held that Aeroporti di Roma (AR) operated a system of discounts on its ground-handling services that was likely to hinder competitors’ access to the recently liberalized market for these services. The Authority found AR’s discount system objectionable in two areas. First, the discounts were based on the total sales of all of AR’s ground-handling services to an air carrier. As a result, an air carrier would have an incentive to retain AR to handle the entire range of its needs for ground handling services in order to obtain the best discount rate. Second, AR offered discounts in multi-year contracts that were linked to the length of the contract, with the discount rate increasing for each additional year. Thus, even though such contracts would give air carriers the right to withdraw, the discount system would give them an incentive to stay with AR in order to obtain the higher discounts.

(2) Target Rebates

In Assoviaggi/Alitalia, Alitalia was found to abuse its dominant position as a purchaser in the Italian market for air travel agency services by virtue of its practice of tying commissions to travel agents for sales targets at a level equal to or higher than their sales of Alitalia tickets in the previous year. Consistent with established EC case law, this rebate scheme was considered abusive because it gave travel agents a strong incentive to sell Alitalia tickets instead of those of other airlines, thus creating an artificial barrier-to-entry in the air transport market for Alitalia’s competitors.

(d) Predatory Pricing

In Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana — a landmark decision concerning ferry boat services — the Competition Authority modified its approach for assessing predatory pricing by dominant firms by applying recent American economic theories. Instead of relying on average

70. Id. ¶¶ 117-119.
71. Id. ¶¶ 124-128.
74. 17 Apr. 2002, n. A267, Bulletin n. 16/2002. The Competition Authority found that Tourist Ferry Boat and Caronte abused their dominant position on the ferry boat routes between Calabria and Messina (Sicily) by charging predatory prices in order to hinder access to the market by their competitor Diano, which had just entered that market.
variable costs, as it did in cases such as Tekal, the Competition Authority focused on long-run and short-run average incremental costs.

More precisely, Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana provides the following principles: (i) a price is predatory if it is lower than the short-run average incremental cost; (ii) a price is not predatory if it is higher than the long-run average incremental cost; and (iii) if a price falls between the two costs, assessment of whether it is predatory will include the competitive context of the dominant firm’s behavior, and, in particular, evidence of the intent to eliminate a competitor. Ultimately, the Competition Authority found that the dominant firms charged prices below both their short-run and long-run incremental costs, and that the prices were therefore predatory.

(e) Refusal to Deal

(1) Refusal to Supply

By annulling a decision in which the Competition Authority held that Otis/Ceam, Kone, and Schindler had abused their dominant positions in the markets for original spare parts for their respective elevators, the TAR held that the Competition Authority had applied the incorrect evidentiary standard by failing to establish a “solid and convincing” body of evidence. According to the TAR, evidence of a single refusal to supply by a subsidiary of one of the three groups involved in the investigation was insufficient, because a refusal to supply by a dominant firm is abusive only if such conduct is repeated and generalized and is thus capable of clearly proving the anticompetitive intent of the undertaking concerned.

4. MISCELLANEOUS ABUSES

(a) Exclusionary Practices

In September 2000, in Aeroporti di Roma/Tariffe del Groundhandling, the Competition Authority issued a decision applying the infrequently-used Section 9 of the Competition Law. This provision establishes an exception to the exclusive rights of legal monopolists by providing that a statutory monopoly cannot prevent third parties from producing the goods or services covered by the monopoly for their own internal use (so-called “captive production”). Applying this provision, the Competition Authority found that Aeroporti di Roma (AR) violated Article 82 of the EC Treaty by preventing the air carrier Meridiana from providing ramp supervision and aircraft balancing services on its own aircrafts through its subsidiary Aviation Services. AR claimed that these services fell within its statutory monopoly because they had not yet been liberalized. But the Competition Authority held that, irrespective of the implementation of any liberalization directive, Section 9 of the

Competition Law gave Meridiana the right to independently engage in any service used exclusively within its group.

**C. Mergers and Acquisitions**

1. **THE CONCEPT OF CONCENTRATION**

(a) **Acquisition of Control**

Following established principles of EC law, the Competition Authority held that the acquisition of brands and/or licenses to which market turnover can be clearly attributed amounts to an “operation of concentration” within the meaning of merger control rules. Specifically, in *Fater/Procter & Gamble*, the Competition Authority held that the grant for an undetermined period of an exclusive license of a trademark was a “concentration.”


80. Whereas joint control is exercised when *two or more* undertakings have the ability to exercise decisive influence over another undertaking (in particular, when a party has the ability to prevent the adoption of decisions that would significantly influence the commercial activities of the controlled undertaking, including, for example, through the exercise of a veto right), sole control is characterized by the fact that the decisive influence is exercised, directly or indirectly, only by *one* undertaking.

81. For an identical solution under EC law, see Commission Notice on the Concept of Concentration Under Council Regulation No. 4064/89, 1998 O.J. (C 66) 5 [hereinafter Commission Notice on the Concept of Concentration].


83. *Id.* ¶ 76.
shareholder of Fondiaria, structured the transaction, and acted as Premafin’s financing bank; (ii) the strong common interests of Mediobanca and Premafin in the acquisition of Fondiaria; (iii) the substantial indebtedness of Premafin toward Mediobanca; and (iv) the tight personal links between the management personnel of the two companies.  

In addition, the Authority’s investigation showed that Mediobanca held de facto control over Assicurazioni Generali (Generali), the main competitor of Fondiaria-Sai in several markets for damage insurance. Mediobanca held a 13.8 percent stake in Generali, which would be combined with the 2.4 percent held by Fondiaria-Sai. But Generali’s remaining shares were dispersed among so many shareholders that the analysis of participation in its shareholders’ meetings in the last four years showed that the combined shares of Mediobanca and Fondiaria were sufficient to attain a voting majority.

In Emilcarta/Agrifood Machinery, the Competition Authority found de facto control even in the absence of a minority stake in the controlled company. The Authority held that, despite its previous rejection of Tetra Pak’s proposed acquisition of Italpack S.r.l. (Italpack), and despite the fact that Italpack was formally acquired by Eaglepack Italia (a third independent company) in 1995, Tetra Pak had nonetheless exercised control over Italpack for approximately ten years. This conclusion was supported by the following elements: (i) the substantially exclusive, stable, and integrated commercial relationships between the companies, which intensified over time and which culminated in Italpack acting almost exclusively (i.e., approximately 90% dedicated) to satisfy orders from Tetra Pak; (ii) Italpack’s use of machinery leased free of charge from Tetra Pak; (iii) Tetra Pak’s influence in appointing some of Italpack’s senior management (a number of whom originated from Tetra Pak or were trained by Tetra Pak); and (iv) the joint management of supplies, as well as the sharing of an IT system which ensured Tetra Pak’s access to important commercial information on Italpack’s activities.

“Control” can also result from a series of contractual arrangements, as was found by the Competition Authority in Fiat/W.L.T. The Competition Authority qualified the acquisition by Fiat of 51 percent of the shares of Worknet Lavoro Temporaneo (W.L.T.), a company active in the provision of temporary employment, as an acquisition of sole control, despite the fact that approval of the budget and business plan also required the agreement of the minority shareholders. The share purchase agreement, however, provided that after three years Fiat would have acquired all the shares of W.L.T., and that, in the event of a continuing deadlock in the board of directors, the transfer of shares to Fiat would be accelerated.
The likely exercise of an option to purchase shares can be taken into account as an element which, in conjunction with others, may lead to a finding of sole control. In Autogrill/Ristop, the Competition Authority concluded that the acquisition of 45 percent of a company’s shares, coupled with a call option for the remaining 55 percent of its shares, resulted in an acquisition of sole control.\(^{90}\) The finding was based on (i) the acquirer’s significant shareholding interest, (ii) the short exercise period of the call option (expiring two years later), and (iii) the fact that the high purchase price paid for the call option could be deducted from the purchase price of the shares that were the subject of the call option (which made it likely that the purchaser would exercise the option).\(^{91}\)

2. CONCENTRATIONS THAT MUST BE REPORTED

Transactions that do not fall under the European Merger Control Regulation must be reported to the Competition Authority if the combined aggregate Italian turnover of all the undertakings concerned exceeds € 411 million in the preceding fiscal year, or if the aggregate Italian turnover of the target undertaking exceeds € 41 million in the preceding fiscal year.\(^{92}\) Under Section 16 of the Competition Law, the Competition Authority adjusts such turnover thresholds annually by an amount equal to the increase in the gross national product price deflator index.

3. TRANSACTIONS THAT DO NOT NEED TO BE REPORTED

In Eni/Italgas,\(^{93}\) the Competition Authority implicitly modified the conditions, set out in its 1995 guidelines\(^{94}\) (published with the form for the notification of concentrations), that, if met, classify a transaction as “intra-group” and, as such, as not giving rise to the obligation to notify. “Intra-group” transactions are those taking place between two undertakings that are not independent from each other. In 1995, the Competition Authority gave a somewhat formalistic definition of such transactions, stating that they include operations between a natural or legal person and one or more companies in which such person holds the absolute majority of the share capital or the voting rights.\(^{95}\) In Eni/Italgas, the notified transaction consisted of the tender offer launched by Eni for Italgas, 44 percent of which was already owned by Eni. The Competition Authority concluded that since Eni’s minority participation was sufficient to confer de facto control over Italgas, any further acquisition by Eni of Italgas’s share capital did not amount to a “concentration” and, therefore, was not reportable.\(^{96}\)

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81. ¶ 38 (indicating that “where an operation leads to joint control for a starting-up period [not exceeding three years] but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders, the whole operation will normally be considered to be an acquisition of sole control”).
81. The Competition Authority’s treatment of the call option is in line with European Commission practice. See, e.g., Commission Notice on the Concept of Concentration, supra note 81, ¶ 15.
85. Id.
4. APPRAISAL OF CONCENTRATIONS

(a) The Test of Dominance

For the first time, in Granarolo/Centrale del Latte di Vicenza, the Competition Authority prohibited a concentration because it would have created a collective dominant position capable of significantly impeding competition on a lasting basis.97 The transaction consisted of Granarolo’s attempted acquisition of Centrale del Latte di Vicenza, one of its strongest remaining competitors in the market for milk and milk products in the Veneto region.

Following the transaction, Granarolo would have increased its market share from 15-18 percent to 25-28 percent, similar to that of its main competitor Parmalat (30-33 percent). Consequently, the combined market shares of the two main players on the Veneto fresh milk market would have been nearly 60 percent. In addition to market share, the Authority took into account the level of concentration in the market, as shown by an HHI test. The Competition Authority held that a 326-point increase in the HHI was excessive.98

The Competition Authority further noted that the market was characterized by the following features, the combination of which indicated that the market was conducive to oligopolistic behavior: (i) stagnating milk consumption and a low likelihood of market growth; (ii) product homogeneity; (iii) technology not subject to significant improvements; (iv) producers’ homogeneous cost structures; (v) high barriers to entry and a low probability of new market entrants; and (vi) transparent prices.99

By reducing the asymmetry of market shares held by Granarolo and Parmalat, the transaction was likely to increase the risk of tacit convergence in the market conduct of the two firms, allowing them to act independently of their competitors and consumers.100 According to the Competition Authority, the likelihood of future parallel anticompetitive behavior was enhanced by the fact that Granarolo and Parmalat followed similar acquisition strategies throughout Italy.101 The resulting economic interdependence between the two players in several geographic markets created a strong disincentive for the adoption of aggressive pricing policies in single markets, since an action by either company aimed at gaining market share in one market could have been “punished” through retaliatory measures in another market.102

98. See Granarolo, Bulletin n. 21/2001, ¶ 66. In this respect, the Competition Authority referred to the U.S. Merger Guidelines, under which an increase by more than 100 points in similar situations is likely to produce restrictive effects on competition.
99. Id. ¶¶ 70-74.
100. Id. Local milk producers in Veneto would have been too weak to compete effectively with Granarolo and Parmalat, and thus been forced to accept their pricing policies.
101. Id. ¶¶ 84-85.
102. Id. ¶ 92.
British American Tobacco/Ente Tabacchi Italiani provides the second instance in which the Competition Authority concluded that a notified concentration resulted in the creation of collective dominance. The Authority conditionally authorized the acquisition of sole control of the state-owned Italian tobacco manufacturer and distributor ETI S.p.A. (ETI) by British American Tobacco plc (BAT).

The Competition Authority found that the acquisition would have created a collective dominant position on the Italian cigarette market for both the combined BAT/ETI entity and the Italian market leader Philip Morris. Besides the resulting high combined market shares of the two competitors (between 85 percent and 90 percent), the Authority identified the presence of three elements indicating the existence of a collective dominant position: (i) market transparency (prices of cigarettes are published in the Official Journal); (ii) internal stability (BAT/ETI and Philip Morris have an incentive to tacitly coordinate their conduct on the market, with tacit coordination being sustainable over time); and (iii) external stability (customers and competitors are not able to destabilize the parties’ dominant position). The Authority focused its analysis on the internal stability of the collective dominant position: it noted that the two companies would be discouraged from applying aggressive pricing policies because each would fear retaliatory measures from the other. Philip Morris would have the ability to terminate the existing agreement under which ETI manufactures a significant part of Philip Morris’s cigarettes in Italy, thereby inflicting substantial damage on BAT/ETI by depriving it of its main client. Also, according to the Authority, BAT/ETI would have the ability to use ETI’s wholesale distribution network for tobacco products (the only such Italian network) to the detriment of Philip Morris (e.g., by delaying market access of Philip Morris’s products).

To eliminate the interdependence between the two players, the Authority approved the acquisition subject to BAT’s agreement not to renew its production agreement with Philip Morris after its expiration at the end of 2005. Once the risk of Philip Morris’s retaliation was removed, the Authority concluded that the collective dominant position was no longer created (because each of the three above-mentioned requirements must be satisfied).

(b) The Appreciable and Long-Lasting Elimination or Restriction of Competition

In Enel-France Telecom/New Wind, the Competition Authority held that the acquisition of a company active in a market other than the market in which the acquiring party enjoys a dominant position (“conglomerate merger”) may be prohibited or subject to conditions.104

In this case, the Competition Authority determined that the acquisition by Enel and France Télécom of joint control of the Italian telecommunications operator Infostar would have strengthened Enel’s dominant position in the markets for electricity generation and electricity sale. In particular, the Competition Authority held that the acquisition of Infostar would have enabled Enel to become a multi-utility company and, as a result, to capture the loyalty of electricity customers by

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virtue of its ability to bundle telecommunications services with electricity.105 Therefore, to promote competition on the electricity market, the Authority initially made the acquisition subject to the divestiture of at least 5,500 Mw of Enel’s generating capacity (an amount equal to the aggregate generating capacity of Enel’s competitors at that time).106

This decision was first annulled by the TAR, which found that Enel did not enjoy a dominant position in the electricity sale market.107 Later, the Supreme Administrative Court struck down the TAR’s judgment and referred the case back to the Competition Authority since the Competition Authority had not assessed whether the undertaking imposed was proportionate to the advantage held by the merged parties in the market for the sale of electricity.108 In rejecting Enel’s claim that conglomerate mergers are not technically “concentrations” and, as such, are not subject to the merger control rules, the Supreme Administrative Court confirmed that, consistent with European Commission decisions under Council Regulation (EEC) No. 4064/89,109 Italian merger control rules apply to conglomerate mergers.110 In the same judgment, the Court also upheld the principle that undertakings may be imposed on the parties concerned with respect to a market other than the relevant market “when this is strictly necessary to ensure the effectiveness and adequacy of the undertakings.”111

In Groupe Canal+/Stream, the Competition Authority held that the proposed merger between the two major Italian pay-TV operators could have led to the strengthening of a dominant position in the Italian pay-TV market and related activities.112 The Competition Authority found that the “failing firm” defense, advocated by the parties, was not sufficiently corroborated by the evidence.113 In particular, the Competition Authority found that the three conditions outlined by the European Commission for such a defense to be relevant were not satisfied: (i) the target (Stream) would not otherwise be forced to exit the market due to an irreversible crisis situation if not acquired by Canal+, because it was controlled by two significant financial groups (News Corporation and Telecom Italia) and its initial losses had been forecast in its business plan; (ii) the parties did not prove that, should Stream exit the market, Canal+ would capture Stream’s market share without acquiring it; and (iii) the parties did not produce sufficient evidence that there was no alternative to the acquisition that was less restrictive of competition in the pay-TV

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105. Id. ¶¶ 201-202.
106. Id. ¶ 241.
109. See, e.g., Case COMP/M.2220, General Electric/Honeywell.
111. Id. ¶ 25.
113. It could be argued that in this case, the proffered “failing firm” defense deserved more careful consideration.
market. Nevertheless, the Competition Authority recognized that the Italian pay-TV market was characterized by a “clear element of critical nature” and that, in these circumstances, it was possible to remove the durable anticompetitive effects of the transaction through an adequate set of undertakings.

5. MERGER CONTROL IN SPECIAL SECTORS

(a) Communications Sector

When considering the acquisition by Seat Pagine Gialle, a subsidiary of Telecom Italia (TI), of sole control of Cecchi Gori Communications (an Italian free-to-air broadcaster), the Competition Authority and the Italian Communication Authority adopted diverging decisions for the first time since the adoption of Law No. 249/1997, which regulates the Italian communication sector. The Competition Authority conditionally authorized the transaction, but the Italian Communications Authority declared it incompatible with applicable regulations of the telecommunication, radio, and television sectors. Section 4(8) of Law No. 249/1997 prohibits an “exclusive licensee” providing public telecommunication services from also being active in the broadcast of radio or television programs. According to the Italian Communication Authority, although TI is no longer an “exclusive licensee” following the liberalization of the telecommunications market, it still enjoys a quasi-monopolistic position, and the prohibition should therefore continue to apply.

On appeal, the TAR annulled the Italian Communication Authority’s decision, holding that, as a result of the liberalization introduced in the 1990s, TI could no longer be considered an “exclusive licensee,” and that the prohibition contained in Section 4(8) no longer applied to TI.

IV. Enforcement Procedure

A. Administrative or Other Procedures

In a landmark ruling vacating a decision of the Competition Authority, the Supreme Administrative Court held that when there is doubt as to the compatibility of an agreement with the competition rules, the Competition Authority must act within 120 days of its receipt of notice of an agreement, regardless of the form in which the agreement is transmitted.
In July 1997, an agreement was signed between the Italian association of oil companies (Unione Petrolifera) and the gas station managers’ association regarding a common method of calculating fuel price discounts for gas station managers. The agreement was then communicated to the Competition Authority, accompanied by a simple cover letter. Following an in-depth investigation initiated ex officio years after that letter was sent, the Authority concluded that this agreement was one of the main instruments used to carry out a concerted practice aimed at securing uniform application (by gas station managers) of the oil companies’ recommended prices. Consequently, the oil companies were subjected to heavy fines.\footnote{121}

The Supreme Administrative Court annulled the Competition Authority’s decision, finding that the Authority had not acted by the mandatory 120-day deadline (provided for in Section 13 of the Competition Law) because the 1997 communication amounted to a formal notification of an agreement.\footnote{122} Therefore, the Competition Authority’s inaction justified the oil companies’ legitimate expectation that their agreement was not anticompetitive. Ultimately, according to the Court, the Competition Authority could not legitimately declare the agreement in violation of the Competition Law three years after its “notification.”\footnote{123}

Following this judgment, the Competition Authority appears understandably reluctant to receive pre-notification memoranda or other documents that might be deemed to amount to a communication equivalent of a formal notification under Sections 13 or 16 of the Competition Law, because the submission of such documents may trigger the mandatory deadlines provided under the Competition Law.

1. **The Rights of the Parties in the Proceedings**

Under Section 17 of Decree 217/1998, which contains the procedural rules for the application of the Competition Law, undertakings have no right of access to information or documents gathered by the Competition Authority in the context of a general fact-finding investigation (or “survey”) of a certain market or industry under Section 12(2) of the Competition Law. The TAR, however, has recognized that parties to an antitrust investigation in a market that had previously been the subject of a Section 12(2) survey have a limited right of access to the documents gathered, in that context, by the Competition Authority.\footnote{124}

The TAR held that a request for access to the file with respect to documents previously gathered in a survey can only be satisfied with respect to documents (i) mentioned in the Competition Authority’s decision opening the antitrust investigation; (ii) referred to in a document under (i); or (iii) specifically identified in the request.\footnote{125} As for documents under (iii), the applicant must demonstrate why such documents will be of assistance in illustrating its position, and must also

\footnote{121. Accordi per la fornitura di carburanti, 8 June 2000, n. 1165, Bulletin n. 22/2000.}
\footnote{122. See Esso Italiana, n. 4053/2001.}
\footnote{123. \textit{Id.} ¶¶ 11-12.}
\footnote{125. \textit{Id.} ¶ 7.}
demonstrate that the communication of such documents will not result in the disclosure of confidential information or business secrets.\textsuperscript{126}

2. \textbf{THE COMPETITION AUTHORITY’S POWERS OF INVESTIGATION}

\textit{(a) Request for Information and Documentation}

In \textit{Axa Assicurazioni v. Autorità Garante della Concorrenza e del Mercato},\textsuperscript{127} the Supreme Administrative Court referred explicitly to EC case law in holding that, under the Italian antitrust regime, an undertaking under investigation has no right to evade the investigation on the ground that the results thereof might provide evidence of an infringement of the competition rules.\textsuperscript{128}

The Supreme Administrative Court also stressed that the Competition Authority may compel an undertaking to provide all necessary information that may be known to it, and may also compel an undertaking to disclose relevant documents in its possession (even if such documents may be used to establish the existence of anticompetitive conduct).\textsuperscript{129} But the Authority may not, by means of a decision calling for information, undermine the defense rights of the undertaking concerned. Thus, the Competition Authority may not compel an undertaking to provide answers that might involve an admission on the latter’s part of the existence of an infringement — the very thing the Competition Authority is attempting to prove.\textsuperscript{130}

\textit{(b) Inspections}

The Supreme Administrative Court also held in \textit{Axa Assicurazioni} that the Competition Authority is entitled to take copies of documents that refer to matters falling outside the scope of decision to open the investigation.\textsuperscript{131} Moreover, in reliance on the case law of the European Court of Justice, the Court held that the Competition Authority can, as a basis for a new investigation, make use of the evidence it has seized in the context of a different investigation.\textsuperscript{132}

Illustrative of these powers is \textit{Sagit-Contratti di Vendita e Distribuzione del Gelato}, in which the Competition Authority, following its receipt of notification of new distribution agreements by ice cream producers, broadened the scope of an ongoing investigation to include each main ice cream producer (due to the similarity of the various contractual arrangements).\textsuperscript{133} Those arrangements gave rise to concerns of a “network” or “cumulative” effect. As a result, the Authority also conducted dawn-raids at the premises of other producers who had neither prompted the investigation by the initial filing nor were party to the agreement forming the subject matter of the initial filing.

\textsuperscript{126} Id.
\textsuperscript{129} See id. ¶ 3.6.
\textsuperscript{130} Id. ¶ 3.5.
\textsuperscript{131} Id. ¶ 3.6.
\textsuperscript{132} See id. (citing Case 85/87, Dow Benelux v. Commission, 1989 E.C.R. 3137).
Additionally, two recent cases indicate that the Competition Authority has started to conduct inspections in merger cases following the decision to open a phase II investigation.\(^\text{134}\)

\(c\) Procedural Steps

The Competition Authority must inform the parties of the results of its investigation in a “statement of objections” (*Comunicazione delle risultanze istruttorie*). The parties are then granted a reasonable period to submit their response. In *BMG Ricordi*,\(^\text{135}\) the TAR held that a forty-five-day period is sufficient time to effectively prepare such a response.

3. MERGER PROCEDURE

\(a\) The Notification

The Competition Authority’s approach has deviated from the Commission’s previous practice of requesting the submission of a “legally binding agreement” between the parties as a pre-condition to the notification of the related concentration. In *Ondeo Nalco/Castagnetti-Accadueo*, for example, the Competition Authority analyzed a transaction that was notified on the basis of a simple memorandum of understanding outlining the essential elements of the transaction.\(^\text{136}\) In its decision, the Authority explicitly noted that the submitted agreement was “non-binding.”

\(b\) Phase II

Under the Competition Law there is no “standstill” obligation placed upon the notifying parties. The parties are therefore free to implement the transaction at any time after the merger filing, without waiting for the Competition Authority’s approval. However, in 2002, for the first time since its establishment, the Competition Authority ordered merging parties not to implement their notified concentration until the Authority’s final determination (if positive). It did so in two cases in which the suspension order was adopted together with the decisions to open a phase II in-depth investigation.\(^\text{137}\)


In each case, the Competition Authority justified the suspension order on the ground that consummation of the transaction would have had restrictive effects and would have irreparably altered the competitive relationships between the companies concerned.

(c) The Decision

Between January 2001 and September 2004, the Competition Authority has adopted five prohibitive decisions. During the same period, six concentrations were authorized subject to remedies.

These latter precedents confirm the centrality of the role of remedies in the context of transactions that raise serious anticompetitive concerns. In assessing whether a remedy will restore effective competition, the Competition Authority considers all relevant factors relating to the remedy itself, including, inter alia, the type, scale, and scope of the remedy proposed, together with the likelihood of its successful, complete, and timely implementation by the parties. Moreover, these factors are judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other players on the market. It follows that it is incumbent upon the parties, from the outset, to remove any uncertainties as to any of the factors that might cause the Commission to reject the proposed remedy.

Groupe Canal+/Stream is a good illustration of the variety of remedies that the Competition Authority might consider in a borderline case. The notified merger between Canal+/Telepiù and Stream could have led to the strengthening of a dominant position in Italian pay-TV market activities. Nevertheless, as mentioned above, the Competition Authority recognized the peculiarities of the Italian pay-TV market and concluded that it was possible to remove the anticompetitive effects of the operation through an adequate set of remedies. Among others, these remedies included requirements that Canal+/Telepiù: (i) not enter into certain premium pay-TV contracts exceeding a specified duration; (ii) relinquish and not re-acquire certain rights on non-satellite transmission platforms; (iii) permit termination of certain license agreements with major Italian soccer teams and U.S. Majors; (iv) divest all assets relating to terrestrial broadcasting; (v) allow competitors to distribute their pay-TV offers through the new DTH platform; and (vi) grant to any interested party, operating on non-DTH platforms, Telepiù’s premium pay-TV offer, at “retail minus” conditions.

141. Id. ¶¶ 87-94.
This overall set of remedies, subjected to extensive market tests involving a wide range of operators active at different levels in the Italian marketplace, was considered adequate to reduce the merged entity’s market power and to restore conditions necessary for effective competition. In particular, in the Competition Authority’s view, the remedies caused a significant reduction in the barriers to access to the satellite platform, and also created conditions conducive to the growth of competitors operating alternative means of transmission (including cable and terrestrial transmission) by granting them access to the merging parties’ content.

The Competition Authority’s practice with respect to remedies is consistent with that of the European Commission. But the Commission only has the power to assess the adequacy of remedies “offered” by the parties. By contrast, the Competition Authority has the power, under Section 6(2) of the Competition Law, to “impose” additional remedies as a condition of clearance. The Competition Authority has often used this power. Since January 2001, the Competition Authority has imposed additional remedies in four of six conditionally-authorized concentrations. These additional remedies often place a substantial burden on the parties. Remedies imposed by the Competition Authority include a cap on the number of businesses to be owned, an obligation to grant competitors access to relevant infrastructures, and a limitation of voting rights in shareholders’ meetings.

Moreover, following a substantial modification of the factual findings, the Competition Authority revoked, for the first time, the remedies imposed as a condition to a clearance decision. With the finding altered, the measures originally imposed would have been unjustified.

Finally, the Supreme Administrative Court indicated that under the Competition Law, if a merger decision taken within the applicable time limits is annulled, the Competition Authority is entitled to reopen the administrative procedure and adopt a new decision.

**B. Appeal from Agency Decisions**

Law No. 205/2000, enacted on July 21, 2000, introduced significant changes to the procedural rules applicable to court proceedings brought before the TAR and the Supreme Administrative Court with respect to decisions of all Italian independent agencies, including the Competition Authority. Such changes were aimed, inter alia,
at reducing the length of proceedings and widening the scope of the administrative judges’ fact-finding powers.

As to the duration of the proceedings, the 2000 reform has been a clear success. By contrast to the procedural rules for proceedings held before the Community Courts, all annulment proceedings concerning the Competition Authority’s decisions are now automatically and effectively conducted under a “fast-track” procedure. Generally, appeals before the Italian Courts (TAR of Latium and the Supreme Administrative Court) now have a total duration not exceeding two years, and the procedure before the TAR usually lasts for only a few months.

In a number of recent judgments, the Supreme Administrative Court addressed the scope of judicial review over the Competition Authority’s decisions. In particular, the Supreme Administrative Court stated that the scope of the TAR’s review of substantive findings (such as a finding of a dominant position) is limited to an assessment of whether the Competition Authority based its conclusions on accurately-stated facts and supported its decision on adequate and coherent grounds.

For example, in one case the Competition Authority found that Enel enjoyed a dominant position in the recently-liberalized market for the sale of electricity. In annulling the decision, the TAR held that the loss of market share suffered by Enel excluded the possibility of a dominant position. Finally, the Supreme Administrative Court criticized the TAR because it had substituted its own appraisal of the facts for that of the Competition Authority, and thus exceeded its powers of judicial review. The Court stated that such an assessment implies a complex and technical appraisal, on the basis of “non-scientific” and disputable rules (such as economic rules), of the relevant circumstances of each case. Therefore, according to the Court, such assessment is within the discretionary powers vested in the Competition Authority, and the TAR is not entitled to substitute its own appraisal for that of the Competition Authority.

In a landmark judgment — *Motorola v. Autorità Garante della Concorrenza e del Mercato* — the Supreme Administrative Court finally overturned the traditional position of the Italian administrative courts, under which only the

149. Such improvement has now been confirmed by the Competition Authority. See *Competition Authority, Annual Report* 2002, at 33 (2003).


151. By contrast, the Supreme Administrative Court held that the TAR has the power of full judicial review with respect to the imposition of fines and cease and desist orders.


addressees of the Competition Authority’s decisions had locus standi to seek the decisions’ annulment. In *Motorola*, the Court clearly stated that a rule precluding persons other than those to whom a decision is addressed from appealing would infringe the fundamental constitutional principle of the effectiveness of judicial protection.\textsuperscript{156} Therefore, persons other than addressees may be entitled to appeal a decision, provided that such persons are directly and individually prejudiced by it. This is typically (but not exclusively) the case for competitors, as implicitly confirmed by the fact that the Competition Law and Decree No. 217/1998 provide specific procedural rights\textsuperscript{157} to all interested third parties in connection with Authority proceedings that may directly and immediately prejudice them.

The Court also noted that its conclusion is in line with Court of Justice case law interpreting Article 230(4) of the EC Treaty.\textsuperscript{158} Indeed, the Authority is entitled to apply Articles 81 and 82 of the EC Treaty and, pursuant to well-established EC jurisprudence, persons other than those to whom a decision is addressed may, under certain circumstances,\textsuperscript{159} lodge an appeal. The *Motorola* judgment — even though adopted in relation to a decision exempting a restrictive agreement under Section 4 of the Competition Law — affirms principles, and is supported by arguments, that could also apply to decisions clearing a proposed concentration.\textsuperscript{160}

### C. Penalties

#### 1. Infringement of Sections 2 and 3

During the last few years, the Competition Authority’s fining policy has clearly become more severe, resulting in the imposition of increasingly large fines. These policy changes do not reflect an isolated development. In order to ensure that penalties have sufficient deterrent effect, the European Commission and several other competition authorities have also increased penalties for antitrust violations over the

\textsuperscript{156} Id. ¶ 4.2.

\textsuperscript{157} These third-party procedural rights include: (i) the right to participate in the proceedings; (ii) the right to be notified of the Authority’s decision to open an investigation; and (iii) the right to participate in the final hearing before the Authority’s Board. See Presidential Decree No. 217/1998, §§ 6(4), 7, 14(5).

\textsuperscript{158} Pursuant to Article 230(4) of the EC Treaty, “[a]ny natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision [of a European institution, including Commission decisions in the areas of antitrust and merger control] which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.”

\textsuperscript{159} Such appellate rights exist if a decision affects third parties by reason of certain peculiar attributes, or if a decision differentiates them from all other persons, and by virtue of these factors distinguishes them individually (as is the case with the person to whom the decision is actually addressed).

\textsuperscript{160} For example, in *Società Ambrosiana Gelati S.a.s. and others v. Autorità Garante della Concorrenza e del Mercato*, 24 Feb. 2004, n. 1715/2004 (Trib. ammin. reg.) (appeal to Supreme Administrative Court pending), the TAR held that persons other than the addressees may be entitled to appeal a decision adopted by the Authority pursuant to Article 81 of the EC Treaty (and its Italian equivalent, Section 2 of the Competition Law), provided that such persons can show that the activity “illegitimately authorized” by the decision is unfairly prejudicial to them, as well as to free competition, in the relevant market. In some passages, the TAR’s reasoning also explicitly refers to merger control decision. See id. ¶¶ 2.4.-2.6.
past few years. The Competition Authority’s fining policy now relies on, and is reflected in, two developments designed to permit and encourage the imposition of higher fines.

First, the higher legal limits set out in Section 15(1) of the Competition Law, as modified in 2001, now allow the Competition Authority to impose larger fines. The Competition Authority has already made use of its new powers and imposed substantial fines. Moreover, it has done so with respect to anticompetitive conduct that, for the most part, took place before April 4, 2001, when the reform entered into force.

Second, in calculating fines, the Competition Authority has recently begun to refer explicitly to the European Commission’s 1998 fining guidelines. The Authority’s reliance on the guidelines marks a significant change in its fining policy, as such reliance increases the amount of fines, and thus promotes their deterrent effect.

To apply the new “regime” to pre-2001 conduct, the Competition Authority has consistently found that the challenged conduct was continuous in nature and did not terminate until after April 4, 2001. To prove that a cartel continued beyond that date, the Competition Authority has looked to the date on which the last meeting, or positive action implementing the agreement, took place, and on which there is evidence of a “concurrence of wills.” Such “concurrence of wills” may take the form of the continued application of agreed prices. Alternatively, in the absence of clear evidence that the parties to an illegal agreement have put an end to their collusive behavior, the Competition Authority has also considered whether the agreement, even if no longer in force, continues to produce anticompetitive effects after the effective date of the 2001 reform.


evidence of the continuation of the infringement. But this broad interpretation was not upheld by the TAR, which annulled the Competition Authority’s decision on fines, holding that the Competition Authority’s approach violated the principle of non-retroactivity of statutes establishing sanctions. Accordingly, the TAR referred the case back to the Competition Authority to recalculate the fines according to the previous method.\(^\text{168}\)

As briefly discussed \textit{supra} Part I.A, the 2001 reform also amended the previous regime by giving the Competition Authority the power to impose merely symbolic fines. The Competition Authority applied this rule in \textit{Blugas/Snam}, when it imposed for the first time a symbolic fine of € 1,000.\(^\text{169}\)

At present, Italian legislation does not allow full application of the leniency programs adopted by the European Commission and, in particular, the practice of granting total or partial immunity from fines for undertakings that cooperate and provide evidence of an infringement. In his official presentation of the 2001 Annual Report, the President of the Competition Authority seemed to welcome the adoption of a similar approach at the national level.\(^\text{170}\) Similarly, the Competition Authority stressed the opportunity to introduce a specific provision for the calculation of fines, applicable to associations of undertakings, that would be in line with the new EC system.\(^\text{171}\) In fact, in the Competition Authority’s view, the current practice of imposing a fine based on the association’s revenue or membership fees (rather than on the members’ turnover, as allowed at the EC level under Article 23(4) of Regulation No. 1/2003), does not result in an adequate deterrent effect.\(^\text{172}\)

Finally, even though violations of Sections 2 and 3 do not result in per se criminal sanctions, in certain instances antitrust infringements may constitute criminal behavior as well, and therefore result in sanctions provided for under criminal law.\(^\text{173}\)

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\footnotesize
168. Ristomat v. Autorità Garante della concorrenza e del Mercato, 10 Mar. 2003, n. 1790/2003 (Trib. ammin. reg.). The TAR also rejected the Competition Authority’s finding that the contracts between the cartel members and the public administration, as a consequence of the illegal bidding process, were automatically void. According to the TAR, the Authority’s approach would significantly undermine the principle of certainty of contractual relationships, by nullifying the existing agreements of the public administration that was a stranger to, and unaware of, the unlawful agreement.


172. \textit{See}, e.g., Accordo Distributori ed Esercenti Cinema, 26 July 2001, n. I363, Bulletin n. 30/2001. In this case, the Competition Authority found that the association of movie theatre owners (ANEIC) and the associations representing movie distributors (UNIDIM and FIDAM) had violated the Competition Law by entering into an agreement (i) to fix the fees for the hire of movies shown in theatres and (ii) to coordinate the ticket pricing policies of theatres. The Competition Authority did not impose any fines on the individual members of the trade associations, but rather imposed fines on the three associations amounting to a small percentage (1-2 percent) of their respective annual membership fees.

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2. **INFRINGEMENT OF SECTIONS 16 AND 18**

In *Henkel v. Autorità Garante della Concorrenza e del Mercato*, the TAR clarified the scope of the prohibition provided for in Section 19(1) of the Competition Law. In this ruling, the TAR held that a fine may result from non-compliance with a remedy upon which the Competition Authority has conditionally cleared a concentration.

The TAR reached this judgment after rejecting Henkel’s claim that the Authority does not have the power to impose fines for the violation of an undertaking. Relying on the principle of legality, under which no penalty can be imposed for any form of conduct unless explicitly provided for by the law, Henkel argued that Section 19(1) explicitly contemplates the power to impose fines only (i) if a company implements a concentration despite a prohibition, or (ii) if a company fails to comply with the measures required by the Competition Authority once a concentration has already been completed.

In Henkel’s view, the Competition Authority has the power to take measures to restore competition, and *only if such additional* measures are not complied with may the Competition Authority impose fines. In rejecting this argument, the TAR interpreted the term “prohibited concentrations,” as it is contained in Section 19(1) of the Competition Law, as including not only those concentrations that are explicitly prohibited by the Competition Authority, but also concentrations that are conditionally authorized but for which the prescribed conditions are not fully respected. The TAR made it clear that, in determining the amount of the fine, the relevant turnover is the turnover realized in the market affected by the notified concentration.

A few months after *Henkel* was decided, the Competition Authority imposed a significant fine (€ 15.8 million) on Edizione Holding for its failure to comply with an undertaking given in connection with the 2000 conditional clearance of the Autostrade acquisition.

Most recently, the Competition Authority imposed the highest fine ever (over € 95 million) on Tetra Pak International SA (Tetra Pak) for its failure to comply with

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175. With respect to administrative violations, Section 19(1) of the Competition Law is codified in Section 1(1) of Law No. 689/1981. For more background, see Article 25 of the Italian Constitution.


177. In *Henkel*, the TAR annulled the part of the decision concerning how to determine the amount of the fine because the Authority (i) had included in the relevant turnover the revenues derived from the sale of sealing compounds (i.e., products that were not the subject of the Authority’s concerns when it imposed its undertakings), and (ii) had not given sufficient weight to the modest market effects caused by Henkel’s violation. *See id.* ¶ 3. Based on the above, the TAR concluded that the appropriate level of the fine would have been 1 percent of the turnover of the affected market (i.e., the whole adhesives business). Interestingly enough, the TAR found that the Competition Authority correctly included in the relevant turnover the sales of industrial sealing compounds, even if the undertaking breached by Henkel was not likely to have an impact on this specific segment of the relevant market. *Id.* ¶ 3.

a prohibition decision.\textsuperscript{179} The Authority concluded that Tetra Pak, by exercising de facto control over the target company, breached a 1993 decision prohibiting Tetra Park’s proposed acquisition of Italpack S.r.l. (Italpack). In determining the amount of the fine, the Authority took into account not only the fact that Tetra Pak’s behavior led to the same anticompetitive effects that the Authority intended to prevent by its 1993 decision, but also the particularly long period of time (almost ten years) during which the breach had been effectuated.

The Competition Authority also clarified that failure to comply with the obligation to submit a pre-merger filing, as required under Section 16(1) of the Competition Law, is a permanent infringement.\textsuperscript{180} The five-year statute of limitations applicable to violations of the Competition Law,\textsuperscript{181} therefore, only starts to run from the day on which the parties actually cease to violate the law by submitting the merger filing. As a result, several years after a merger has been implemented without any prior merger filing, the Competition Authority may still impose a fine as provided for under Section 19(2) of the Competition Law.

Finally, Section 8 of the Competition Law, as amended by the 2001 reform, now provides that the Competition Authority may impose a fine of up to ITL 100 million (approximately € 50,000) if undertakings — either in a monopoly position or which provide services of general economic interest — fail to communicate (i) the incorporation of, and/or (ii) the acquisition of controlling interests in, undertakings trading on markets other than those markets in which the undertakings operate in a monopoly situation or provide services of general economic interest.\textsuperscript{182}

\section*{D. Private Actions}

Pursuant to Section 33 of the Competition Law, private parties that have suffered antitrust injury can file an action for damages in civil court. Jurisdiction over these damage claims is exercised by the court of appeals. To obtain standing to sue, a party must demonstrate that it has suffered damage as a result of the anticompetitive behavior. If a party is successful, the judge can order the wrongdoer to cease its infringement and to pay damages.

It is also possible for a private party to petition for interim measures by invoking Section 700 of the Italian Civil Procedure Code, provided that the party shows, inter alia, that it may suffer irreparable damage were the conduct to continue pending a formal judgment.

\section*{V. Jurisdiction}

\subsection*{A. Internal Jurisdiction Rules}

In Autorità Garante della Concorrenza e del Mercato v. Assicurazioni Generali, the Supreme Administrative Court clarified the meaning of Section 20 of the

\textsuperscript{181} See Law No. 689/81, § 28(1).
\textsuperscript{182} The Competition Authority has already utilized its power to impose fines for violations of Section 8.

In Italgas, 12 Feb. 2004, n. SP1, Bulletin n. 7/2004, Italgas was fined € 25,000.
Competition Law. This section provides that when credit institutions are involved, competition rules are enforced by the Bank of Italy. Previously, the provision had given rise to jurisdictional conflicts between the Bank of Italy, a sector-specific regulatory body, and the Competition Authority as to the exact scope of the Bank of Italy’s powers in competition matters. The Supreme Administrative Court found that, since the Bank of Italy’s powers in such matters constitute an exception to the Authority’s general enforcement powers, Section 20 must be interpreted narrowly. The Court laid down the following rules: (i) when a case involves a market in which both banks and other entities are active, the Competition Authority has sole jurisdiction as to the antitrust assessment; and (ii) when only banks are involved in a case, the Bank of Italy has jurisdiction as to the activities reserved to banks (i.e., receiving deposits and granting loans), while the Competition Authority retains exclusive jurisdiction to assess the effects on the non-banking markets.

Meanwhile, in two other judgments, the Supreme Administrative Court confirmed that the Competition Authority and the Italian Communications Authority are entrusted with different yet complementary responsibilities — respectively, protecting competition and safeguarding pluralism of information. These judgments clarify the ambiguous language of Law No. 249/1997 — specifically, its reference to the notion of “dominant position” — and confirm that the difference between the pluralism and competition goals justifies the existence of two separate bodies of rules, each with distinct and specific evaluative criteria and each enforced by different authorities.

B. Concurrent Jurisdiction with Other Authorities

For the first time, the Competition Authority applied Article 22(3) of the EC Merger Regulation and, in tandem with the competition authorities of Germany, Spain, and the United Kingdom, jointly requested that the European Commission assess the impact on competition of Promatech’s proposed acquisition of Sulzer’s textile business.

Article 22 of the EC Merger Regulation allows Member States to refer a merger proposal to the Commission, even if the proposal does not meet the thresholds of the EC Merger Regulation. As a result, the European Commission can carry out a

184. Despite this judgment, the Bank of Italy continues to assert its jurisdiction over non-banking markets, such as the financial services markets. In Banca Popolare Commercio e Industria/Banca Popolare di Bergamo, for example, the Bank of Italy assessed all of the markets affected by a concentration, including two banking markets (the markets for deposits in the Bergamo and Varese provinces) and two non-banking markets (the markets for asset management and investment funds). Instead of limiting itself to the latter two, the Bank of Italy explicitly vetted all of these markets, ultimately opening a second-phase investigation only with respect to the two banking markets. See Banca Popolare Commercio e Industria/Banca Popolare di Bergamo, 9 Aug. 2003, n. C5982, Bulletin n. 33-34/2003. Meanwhile, with regard to the two non-banking markets, the Authority also intervened, by clearing the concentration in parallel with the Bank of Italy. See Banca Popolare Commercio e Industria/Banca Popolare di Bergamo, 7 Aug. 2003, n. C5982B, Bulletin n. 32/2003.
single, coordinated investigation of the transaction’s impact on trade between Member States and on competition within one or more Member States. In the case of Promatech, recent improvements in communications between the national competition authorities enabled the necessary coordination to take place within the deadlines set out in Article 22.

VI. Applicable Treaties or International Agreements

The Competition Authority was one of the founding members of the International Competition Network (ICN), an international body comprised of national and multinational competition authorities. The ICN seeks to provide antitrust authorities with a specialized, yet informal, venue for maintaining regular contacts and addressing practical competition issues. The focus is on improving world-wide cooperation and on enhancing convergence through focused dialogue. The ICN does not exercise any rule-making function. Rather, it is a competition authority forum supported by participating authorities themselves. Membership is voluntary and open to any national or multinational antitrust authority.

The ICN initiative is project-oriented. Annual conferences\(^{187}\) and meetings provide opportunities to discuss ongoing projects and their implications for enforcement. Annual conferences bring together leaders of antitrust agencies to commission new projects and to review the progress and recommendations of current projects. The ICN's recommendations are not binding and it is left to the individual antitrust agencies to decide whether and how to implement them. This can be accomplished through unilateral, bilateral, or multilateral arrangement.

\(^{187}\) Italy hosted the first ICN annual conference in September 2002.
VII. Statutory and Regulatory Texts

A. Law No. 57 of March 5, 2001 (Section 11)

1. Section 9(3) of Law No. 192 of June 18, 1998, is replaced by the following:

“3. Any agreement resulting in an abuse of economic dependence is null and void. The ordinary courts have jurisdiction over cases of abuse of economic dependence, and may grant restraining orders and award compensation for damages.”

2. The following is added after Section 9(3) of Law No. 192 of June 18, 1998:

“3-bis. Notwithstanding the possible application of Section 3 of Law No. 287 of October 10, 1990, the Competition Authority may, also following a complaint from third parties and after opening an investigation, issue restraining orders and impose fines pursuant to Section 15 of Law No. 287 of October 10, 1990 against any company found liable for an abuse of economic dependence which is relevant to the protection of competition and of the free market.”

3. The following is added after Section 8(2) of Law No. 287 of October 10, 1990:

“2-bis. The undertakings referred to in sub-section (2) shall operate through separate companies if they intend to trade on markets other than those in which they are active within the meaning of the same sub-section (2).

2-ter. The incorporation of companies and the acquisition of controlling interests in companies active in different markets as referred to in sub-section (2-bis) must be notified in advance to the Competition Authority.

2-quater. In order to guarantee equal business opportunities, when the undertakings referred to in sub-section (2) supply their subsidiaries or companies under their control on the different markets referred to in sub-section (2-bis) with goods or services, including information services over which they have exclusive rights by virtue of the activities they perform within the meaning of sub-section 2, they shall make these same goods and services available to their direct competitors on equivalent terms and conditions.

2-quinquies. In the cases referred to in sub-sections (2-bis), (2-ter) and (2-quater), the Competition Authority shall exercise its powers under Section 14. In the event of infringements of Sections 2 and 3, the restraining measures and fines provided by Section 15 shall be applied.

2-sexies. In the event of failure to comply with the notification obligation referred to in sub-section (2-ter), the Competition Authority shall impose a fine of up to ITL 100 million.”

4. At the end of the second sentence of Section 15 of Law No. 287 of October 10, 1990, the words “of no less than one per cent and no more than ten per cent” are replaced by “up to 10 percent”, and the words “from the products making up the subject-matter of the agreement or the abuse of a dominant position” are deleted.

1. For conversion purposes, ITL 100 million = approximately EUR 51,645.
B. Form for the Notification of a Concentration

Pursuant to Law No. 287 dated October 10, 1990:

FOREWORD

Pursuant to Section 16(1) of the Competition Law, all concentrations between undertakings must be notified to the Competition Authority prior to completion if the aggregate turnover generated in Italy by all the undertakings concerned exceeds € 411 million (as adjusted under Section 16) or the total turnover generated in Italy by the acquired undertaking exceeds € 41 million (as adjusted). 2

Moreover, pursuant to Section 13(1) of Law No. 153 dated March 1, 1994, the Competition Authority must receive prior notification of concentrations where one of the parties will “hold, directly or indirectly, more than 25 percent of (1) the total sales deriving from film distribution in any of the twelve main cities for film distribution (Rome, Milan, Turin, Genoa, Padua, Bologna, Florence, Naples, Bari, Catania, Cagliari and Ancona); and (2) the number of movie theatres active in any such city.”

Presidential Decree No. 461/1991 3 provides that the “prior notification of concentrations pursuant to Section 16(1) of the Competition Law, must contain the information and have the necessary attachments indicated in a form drafted by the Competition Authority and published in the Bulletin [foreseen under Section 26 of the Competition Law], together with all further elements necessary for an evaluation of the transactions.”

In May 1991, the Competition Authority adopted the “Formulario per la comunicazione di un'operazione di concentrazione a norma della legge del 10 ottobre 1990, n. 287,” which sets out the information required and the notification formalities with which parties must comply. Based on experience gained over the previous five years, the Competition Authority has made a number of modifications concerning both the form and contents of notification. The most recent Form should always be used.

CHAPTER I - GENERAL CONDITIONS OF APPLICABILITY, DEFINITIONS AND PROCEDURAL MATTERS

A. CONCENTRATIONS BETWEEN UNDERTAKINGS

Pursuant to Section 5 of the Competition Law, a “concentration” is any operation changing the structure of the participating undertakings, whether it be as a result of a merger between undertakings, the acquisition of control over the whole or parts of an undertaking, or the creation of a joint venture.

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2. As of May 24, 2004. These turnover thresholds are amended each year by an amount equal to the increase in the gross national product deflator index, and the amendment is published in the Competition Authority’s Bulletin as soon as the new index is officially made public.

3. This decree was replaced by Presidential Decree No. 217/1998, which contains the procedural rules governing the Competition Authority’s investigations. References to provisions of Presidential Decree No. 461/1991 have been replaced in the text by the equivalent provisions contained in Presidential Decree No. 217/1998.
1. Types of Transactions

(a) Merger between two or more undertakings (Section 5(1)(a))

A merger between two or more undertakings constitutes a concentration when several undertakings merge into a new entity and cease to exist as separate legal entities (fusione in senso stretto) or when one or more undertakings are merged into another undertaking, which continues to exist as the surviving entity (fusione per incorporazione).

These transactions are regulated by Section 2501 of the Civil Code.

(b) Acquisition of control over the whole or parts of one or more undertakings (Section 5(1)(b)).

Control over a target company is defined in Section 7 of the Competition Law. Whenever one or more persons/entities exercise decisive influence over the whole or parts of an undertaking, the Competition Authority considers the person(s)/entity(ies) as having acquired control over that undertaking. The acquisition of control does not depend only on legal/formal elements, but can also occur whenever a person/entity acquires the possibility of exercising decisive influence over the commercial policy of an undertaking on the basis of rights, contracts, or by other means.

The Competition Authority has found that several types of contracts (e.g., lease contracts, shareholder voting agreements, or other shareholder agreements) give rise to the possibility of one entity exercising decisive influence over the activities of another.

A control relationship is not only relevant when it is exercised directly, but also when the persons or undertakings with effective control exercise that control over the undertaking through the direct holder of a controlling interest in an undertaking (indirect control).

The acquisition of control can be in the form of sole or joint control. Joint control is exercised where two or more undertakings have the ability of exercising decisive influence over another undertaking through the interests they hold, or through other agreements. In particular, joint control may exist if a party has the ability to prevent the adoption of decisions which significantly influence the commercial activities of the controlled undertaking, including, for example, through the exercise of a veto right.

The Competition Authority also considers that a significant change in the control of a company may amount to a concentration, as, for example, in the case of a change from joint to sole control or vice-versa.

(c) Creation of a joint venture through the setting up of a new company (Section 5(1)(c))

The creation by two or more undertakings of a new company jointly controlled by the parents is deemed to be a concentration if the joint venture is not a cooperative joint venture.

2. Transactions Not Constituting A Concentration

(a) The acquisition of pure financial interests (Section 5(2))

An acquisition involving a bank or a financial institution acquiring shares in an undertaking upon the formation of that undertaking, or upon the increase of the share
capital of that undertaking, with a view to reselling those shares on the market, does not constitute a concentration. However, the acquiring undertaking can not exercise any voting rights vested in those shares while it holds them, and it must dispose of the shares within 24 months.

(b) Cooperative joint ventures (Section 5(3))

The transactions leading to the creation of a joint venture (see Section 5(1)(b) and (c), supra) may have as their object or effect the coordination of the competitive behavior of the parents. Where such coordination outweighs the structural effects of the transaction for the undertakings concerned, the transaction shall be assessed under Section 2 of the Competition Law.

A transaction leading to the creation of a joint venture not carrying out all of the functions of an autonomous economic entity is not regarded as a concentration.

To assess the cooperative or concentrative nature of a joint venture, the Competition Authority generally applies the criteria set forth in the European Commission’s Notice on the Distinction between Concentrative and Cooperative Joint Ventures.4

Conversion of notification.

Where a notification concerns a joint venture, the parties may expressly request that the transaction be assessed under Section 13 of the Competition Law in the event that the Competition Authority finds the joint venture not to be concentrative.

(c) Transactions between undertakings that are not independent (intra-group transactions)

Intra-group transactions include the following:

1. Transactions between an entity (natural person/company) and one or more companies in which it holds, directly or indirectly, an absolute majority of the share capital or voting rights at the general shareholders’ meeting;

2. Transactions between companies in which the one and the same entity holds, directly or indirectly, an absolute majority of the share capital or voting rights at the general shareholders’ meeting.

Such transactions are deemed to be concentrations and must be reported whenever (because of legal or statutory provisions, company by-laws or decisions, or the exclusively financial nature of the interest) the parties described above in parts in 1 and 2 are independent undertakings.

(d) Transactions involving companies not carrying out economic activities

These are transactions concerning an acquisition or merger by absorption (fusione per incorporazione) of companies that neither carry out economic activities nor hold directly or indirectly a controlling interest in other undertakings. An example would be the acquisition of a real estate company not carrying out any other economic activity (unless the parties to the acquisition are active in the real estate market).

4. 1994 O.J. (C 385) 1. At the EC level, the 1994 Notice was replaced in 1998 with the Notice on the Concept of Full-Function Joint Ventures, 1998 O.J. (C 66) 1. As the Competition Law has not been amended to reflect changes in Regulation No. 4064/89, which was introduced by Regulation No. 1310/97, the 1994 Notice seems to remain applicable to Italian merger control rules.
An acquisition or merger by absorption (fusione per incorporazione) involving (1) undertakings holding licenses, authorizations, concessions, or other permissions for carrying out economic activity, or involving (2) undertakings, directly or indirectly, controlling other undertakings that are holders of such permissions, does not fall into the category of transactions described above.

Acquisitions by natural persons/entities neither carrying out economic activities nor controlling at least one other undertaking are regarded as concentrations.

3. TRANSACTIONS THAT DO NOT REQUIRE NOTIFICATION

(a) Transactions without economic effects on the Italian market

The Competition Authority requires that acquisitions or mergers by absorption (fusione per incorporazione) of foreign undertakings that did not generate any turnover in Italy (directly or through subsidiaries), either at the time of the acquisition or in the preceding three years, do not need to be reported. However, these transactions must be reported if the foreign undertaking will start generating turnover in Italy after completion.

The creation of joint ventures or mergers resulting in the formation of a new company (fusione in senso stretto) involving at least one foreign undertaking do not need to be reported if the foreign undertaking has not generated any turnover in Italy either at the time of the transaction or in the preceding three years. However, these transactions must be reported if the new undertaking will start carrying out economic activities on the Italian market after completion.

B. NOTIFICATION OBLIGATION, TURNOVER CALCULATION, UNDERTAKINGS CONCERNED AND ANCILLARY RESTRICTIONS

Pursuant to Section 16(1) of the Competition Law, all concentrations between undertakings must be reported prior to completion under the following circumstances:

- the combined aggregate turnover generated in Italy by all the undertakings concerned exceeds €411 million (as adjusted under Section 16); or
- the aggregate turnover generated in Italy by the undertaking being acquired exceeds €41 million (as adjusted).\(^5\)

Aggregate Italian turnover means the revenues from sales of products and services performed in the last fiscal year in the Italian market, minus returns, rebates, and taxes directly related to the sale of products or the performance of services. In the case of companies located outside Italy, the turnover expressed in foreign currency shall be converted into Euro by using the average exchange rate for the fiscal year to which the turnover is attributed.

The criteria for the calculation of the turnover of banks and financial institutions are set forth in Section 6(2) of the Competition Law.

With regard to the selling party, only the turnover of the undertakings or parts of undertaking(s) being acquired shall be taken into account.

Where the concentration consists of the acquisition of parts of one or more undertakings, with two or more transactions taking place within a two-year period

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5. These turnover thresholds are effective as of May 24, 2004.
between the same persons or undertakings, it shall be treated as the same concentration arising on the date of the last transaction.

In general, the Competition Authority applies the principles set forth in the European Commission Notice on Calculation of Turnover\(^6\) and the Notice on the Concept of Undertakings Concerned.\(^7\)

Moreover, pursuant to Section 13(1) of Law No. 153 of March 1, 1994, concentrations resulting in one of the parties “hold[ing], directly or indirectly, more than 25 percent of (1) the total sales deriving from film distribution, in any of the twelve main cities for film distribution (Rome, Milan, Turin, Genoa, Padua, Bologna, Florence, Naples, Bari, Catania, Cagliari and Ancona), and (2) the number of movie theatres active in any such city” require notification to the Competition Authority prior to their completion.

In the context of a concentration, the parties often sign other agreements aside from the concentration agreement itself. These agreements must also be reported to the Competition Authority, which will then assess whether they are ancillary to the concentration. To this end, the Competition Authority typically applies the criteria set forth in the European Commission notice regarding restrictions ancillary to concentrations.\(^8\)

C. DEFINITION OF THE MARKETS AFFECTED BY THE CONCENTRATION

Taking into account the following definitions, the notifying parties must provide the information as described on the Form.

1. MARKET AFFECTED BY THE CONCENTRATION

For the purposes of the information outlined on the Form, the markets affected by the concentration are the relevant product and geographic markets in which:

- two or more of the participants to the concentration are simultaneously active and, following the concentration, will hold a combined market share of at least 15 percent;
- one participant to the concentration will, following the transaction, hold a market share of at least 25 percent, where at least one other participant is active in a market that is upstream or downstream of the aforementioned market (the latter is also deemed to be an affected market);
- an undertaking being acquired or merged holds a market share of at least 25 percent where the other participants to the transaction are active in different markets, and are not upstream or downstream of the aforesaid market.

2. RELEVANT MARKETS

The relevant product and geographic markets determine the scope within which the market power of the undertaking resulting from the concentration must be assessed. These markets represent, respectively, the smallest group of products and

6. 1994 O.J. (C 385). This Notice has since been replaced by the Notice on Calculation of Turnover, 1998 O.J. (C 66) 25
7. 1994 O.J. (C 385) 12. This notice has since been replaced by the Notice on the Concept of Undertakings Concerned, 1998 O.J. (C 66) 14.
8. 1990 O.J. (C 203) 5. This notice has since been replaced by the Notice on Restrictions Directly Related and Necessary to Concentrations, 2001 O.J. (C 188) 5.
the smallest geographical area in which, given existing substitution possibilities, a dominant position is likely to be created or strengthened.

3. RELEVANT PRODUCT MARKETS
   A relevant product market comprises all those products and services a consumer regards as interchangeable or substitutable, by reason of their characteristics, prices, and intended use.
   
   Factors relevant to the assessment of the relevant product market include all elements explaining why certain products or services are included in such market and why others are excluded from it. Also useful to the definition of the product market are product characteristics, price, use, and the other relevant factors.
   
   The definition of the relevant product market is generally based on the possibility of demand-side substitution. However, to determine the competitive conditions of the market, the Competition Authority may also evaluate the possibility of supply-side substitution — for example, the possibility of other producers easily converting their production capacity to provide the same goods or services offered by the participants to the concentration. To this end, the Competition Authority will take into account the information provided in the sections of the Form that relate to the supply structure in the affected markets and to market entry.

4. RELEVANT GEOGRAPHIC MARKETS
   A relevant geographic market comprises the area in which the undertakings participating in the concentration provide relevant products and services, and which can be distinguished from neighboring geographic areas due to a lack of significant possibilities of geographical substitution.
   
   Among the factors relevant for the assessment of the relevant geographic market are the nature and characteristics of the products and services concerned, the impact of transport costs, the existence of other entry barriers, consumer preferences, appreciable differences of the undertakings’ market shares in neighboring geographic areas, and significant price differences.

D. NOTIFICATION FORMALITIES

1. PERSONS/ENTITIES UNDER AN OBLIGATION TO NOTIFY
   Notification of a concentration shall be submitted by the undertaking acquiring control.
   
   In the case of the acquisition of control by more undertakings, or in the case of the establishment of a joint venture, notification shall be submitted by all undertakings acquiring control. In the case of a merger, notification shall be filed by all participants. In all cases, notification can be submitted jointly by the merging parties, or by the persons/entities acquiring joint control.
   
   In the case of a public tender offer, Section 16(5) of the Competition Law requires that notification be submitted by the bidder.
   
   The aforementioned notifications may also be submitted by the person/entity controlling, directly or indirectly, the undertaking acquiring control.

2. TIME LIMITS FOR PRIOR NOTIFICATION
   In general, a concentration is deemed to be completed upon the acquisition of the ability to substantially influence the target’s economic behavior. The concentration
must be reported prior to its completion but after the parties have agreed on all essential elements of the concentration, so as to enable the Competition Authority to make a full assessment of the concentration.

Specifically:
- In cases of a merger between undertakings, notice of the transaction must be given before the merger deed is completed;
- In cases of the acquisition of control of an undertaking under Section 5(1)(b), if the transaction consists of the purchase of shares of a company, prior notice of the transaction is deemed given if the effectiveness of the instruments bringing about the acquisition is conditional upon the Competition Authority’s prior approval;
- In cases of the creation of a joint venture through the establishment of a new company, notice of the transaction must be given before registering the Sections of Association of the joint venture in the Companies’ Register.

3. **Types of Notification**

(a) **Long Form Notification**

The Competition Authority requires that long-form notification be submitted for concentrations between independent undertakings falling within the scope of Section 16(1) of the Competition Law if:

- two or more participants to the concentration are simultaneously active in an affected market and will, following the concentration, have a market share of at least 25 percent; and/or
- one participant in the concentration will, following the transaction, have a market share of at least 40 percent where at least one other participant is active in a market upstream or downstream to the aforementioned market.

However, long-form notification is not required if the market share of the undertaking being acquired or merged is below 1 percent.

The long form notification addresses all affected markets for which at least one of the two conditions mentioned above is met, and, if the second condition is met, all upstream or downstream markets.

The information requested in a long form notification is set out in Part II of this publication (Notification Form).

(b) **Short Form Notification**

A short form notification is required for concentrations between undertakings that must be reported prior to completion pursuant to Section 16(1) of the Competition Law but for which a long form notification is not required. The information requested in a short form notification is set out in Part II of this publication (Notification Form).

The Competition Authority, however, reserves the right to request any information that is required for long form notification where, in its opinion, the information supplied in the short form notification does not permit an adequate evaluation of the transaction. In these cases, the time period set forth in Section 4(4) of the Competition Law will commence from the date of the Competition Authority’s receipt of a long form notification.
4. **INCOMPLETENESS OF THE NOTIFICATION AND INTERRUPTION OF TIME LIMITS**

   (a) **Incompleteness of the notification**

   Pursuant to Section 5(3) of Presidential Decree No. 217/1998, the Competition Authority will inform the notifying parties if it finds that the information provided in a notification (including the documents and attachments) is incomplete. In such event, the clock will start again from the date of the Competition Authority's receipt of a complete notification.

   A notification may be regarded as incomplete if, *inter alia*, the undertakings — without justification — do not provide information requested in the Form, or if they provide inaccurate or misleading information.

   Short form notification is regarded as incomplete where, in the Competition Authority's opinion, it falls within the categories for which a long form notification is required. When in doubt, the parties obligated to notify are invited to contact the Competition Authority's offices before submitting the notification.

   (b) **Changes in the facts**

   Any material change in the facts contained in the notification (of which the notifying parties are aware) must be communicated to the Competition Authority without delay. When these changes significantly affect the completeness of the notification, the time periods foreseen under Section 16, paragraphs 4 and 6, will start on the date on which the Competition Authority receives the updated information reflecting the changes.

5. **CONFIDENTIAL INFORMATION**

   Information collected by the Competition Authority is treated as confidential, pursuant to Section 14(3) of the Competition Law and Sections 12 and 13 of Presidential Decree No. 217/1998. The notifying parties may indicate which documents, or extracts thereof, are to be treated as private and confidential, specifying the reasons why the information contained in these documents should not be disclosed or published.

**CHAPTER II - NOTIFICATION FORM**

**GENERAL GUIDELINES**

The Notification Form consists of different Parts (each marked with a letter A, B, C, etc.). The Parts are further subdivided into various Sections (I, II, III, etc.), Paragraphs (A1, A2, B1, B2, etc.) and Points ((a), (b), (c), etc.).

The notifying parties are required to provide all of the requested information, using copies of the Parts or separate sheets that expressly refer to the relevant Points in the Parts. Each Part contains all the pages necessary to provide the requested information. It is strongly advised, when possible, to follow the model proposed below in providing the information.

The information requested in the Parts, and the documents to be attached thereto, must be provided to the Competition Authority in accordance with the procedures indicated below. The documents requested in Part F must be provided along with any other documents relevant to the information requested. Detailed reference for each attachment, including the number of pages of each, must be reported in Part F.
Each sheet of the notification, with the exception of the attachments, must show the name of the notifying party, the date of the notification, and the page number. Page numbering must be consecutive throughout the entire notification.

An “Index of Parts and Sections,” based on the attached model, must accompany the notification. In this index, the page numbers of the Sections of each Part must be provided.

If the requested information, or any part thereof, has been provided to the Competition Authority in the context of a previous notification, the notifying party may expressly refer to this information in the new notification, indicating, as the case may be, any changes that may have occurred since the information was initially supplied.

The notifying party may refer to the definitions set forth in Part I (“General Conditions etc.”). Other definitions useful in completing this Form are set out below:

- **Notifying parties**: in cases in which notification can be submitted by one of the undertakings party to a transaction, the term "notifying parties" refers only to the undertakings actually submitting the notification.
- **Participants to the concentration**: this term relates to both the acquiring and acquired undertakings, or to the merging parties, including all undertakings in which a controlling interest is being acquired or which are the subject of a public offer.
- **Year**: unless otherwise stated, a “year” is the calendar year. All information requested in the Form must be provided, unless otherwise stated, for the year preceding that in which the notification is submitted.

For any clarification concerning the obligation to notify a transaction or concerning the notification formalities, the parties may contact the Competition Authority by telephone on +39.06.48162.1, by fax on +39.06.48162.256 or by electronic mail at antitrust@agcm.it.

Where notification concerns a joint venture, should the Competition Authority find that the joint venture is not concentrative in nature, the parties may expressly request that the transaction be assessed under Section 13 of the Competition Law.

The notification must be signed by the legal representatives of the undertakings, or by a person who has been granted a power of attorney, and must contain the following statement: “The undersigned declares that the information contained herein is complete and truthful and that the attached documents are complete and true copies of the originals”.

Two copies of the Form and the attached documents shall be sent by registered mail, or delivered by hand to the Secretary General, or his deputy, who shall issue a receipt, between 9 a.m. and 5 p.m., Mondays to Fridays, at the following address:

**Autorità Garante della Concorrenza e del Mercato**  
Via Liguria, 26  
I - 00187 Rome
PARTS OF NOTIFICATION

The long or short form may be used for transaction notification. The requirements to qualify for one or the other form are described in the first part of this publication (GENERAL CONDITIONS), paragraph D.3 (TYPES OF NOTIFICATION).

The short form notification includes Parts A, B, C, D, E and F, which cover the following categories of information:

- Part A - GENERAL INFORMATION
- Part B - DETAILS OF THE CONCENTRATION
- Part C - PARTICIPANTS TO THE CONCENTRATION
- Part D - FINANCIAL AND PERSONAL LINKS
- Part E - AFFECTED MARKETS
- Part F - SUPPORTING DOCUMENTATION

The long form notification includes the same Parts as the short form notification, with the following modifications and additions:

- Part E - Section III - Main brands: this Section must be used instead of the Section III - Market Characteristics, provided in the short form notification.
- Part G - GENERAL conditions OF THE AFFECTED MARKETS: this Part must be added to the Parts required in the short form notification.

PARTS OF THE SHORT FORM NOTIFICATION

PART A - GENERAL INFORMATION

SECTION I - NOTIFYING PARTIES AND OTHER PARTICIPANTS (The information requested in this section must be provided for each of the notifying parties and for each participant to the concentration).

A1. PARTICIPANT - Attribute an identification code with sequential numbering (PO1, PO2, etc.) to each undertaking (or to the natural person), by which it will be referred to in the other Parts.

A2. GENERAL INFORMATION
   (a) CORPORATE NAME - Indicate the corporate name of the undertaking (first and last name, for natural persons) as well as the abbreviated form of this name, if any.
   (b) LEGAL FORM - Indicate the legal form of the undertaking (joint stock company, limited liability company, etc.).
   (c) FISCAL NUMBER - Indicate fiscal numbers for undertakings incorporated in Italy and natural persons of Italian nationality.
   (d) C.C.I.A.A. - Indicate, only for the undertakings incorporated in Italy, references of their registration with the Company Register, the province and number of their registration with the Chamber of Commerce, and the identification of their Tribunal of origin.
   (e) REGISTERED OFFICE - For natural persons, provide their fiscal domicile. For undertakings with a registered office outside Italy, provide the address of the registered office as well as all information necessary for their identification.
   (f) ADMINISTRATIVE OFFICE — Provide the de facto address for the place of business and location of the management/administrative headquarters.
PART A - GENERAL INFORMATION

SECTION II — REPRESENTATIVES (The information requested in this Section must be provided where the notification is signed by a representative of the undertakings having specific authorization for that purpose. The representatives are required to provide written evidence of such authorization).

A3. REPRESENTATIVES
   (a) Representative - Indicate if a joint representative has been appointed in the case of a joint notification; otherwise specify the corporate name of the undertaking (as reported in A2(a) above).
   (b) Name of Representative - Provide the name, position held within undertaking, address, telephone, and fax or telex numbers of the representative.
   (c) Contact Person - Provide the name, position held within the undertaking, address, telephone, and fax or telex numbers of a contact person, if different from the person identified in (b).

PART B - DETAILS OF THE CONCENTRATION

SECTION I - NOTIFICATION OBLIGATION (This section must be completed for each operation of concentration).

B1. CONCENTRATION OPERATION - Attribute an identification code with sequential numbering to each operation of concentration (O01, O02, O03, etc.), by which it must be referred to in the other Parts.

B2. NOTIFICATION OBLIGATION:
   (a) FORM OF TRANSACTION - Indicate the way in which the notified concentration will take place.
   (b) VERIFICATION OF THE NOTIFICATION OBLIGATION
      i. Indicate which of the turnover thresholds has been exceeded; provide the relevant turnover figure; and indicate the reference year that has been used for the determination of the relevant turnover(s). For the purpose of calculating the turnover, refer to the first part of this document ("General Conditions"), Section B ("Notification Obligation"). Specifically, the turnover may include one or more of the following elements:
          - revenues from sales of goods manufactured by the undertaking: for undertakings carrying out projects realized over a period of several years, and which are paid by the customers on the basis of their progress, the turnover is calculated on the basis of the revenues relating to the invoices issued during the relevant fiscal year; for building contractors, the turnover is calculated on the basis of the
revenues relating to the buildings (or parts of buildings) sold in the relevant fiscal year, even if they were built and terminated in previous fiscal years; for undertakings whose principal activity is the rental of real estate properties, the turnover is calculated on the basis of the rent payments received;
- revenues from activities performed on behalf of third parties on raw materials or semi-finished products belonging to third parties;
- revenues from industrial works performed and industrial services provided on the basis of a third party’s request;
- revenues from the sales of goods acquired in the undertaking’s own name and resold without transformation. This includes revenues from commercial activities, as well as revenues generated by undertakings that occasionally resell raw materials and various goods without subjecting them to any transformation;
- revenues from charges, commissions, or other dues generated from sales: this amount includes commissions, charges, and other percentage compensations generated from the sale of goods on behalf of a third party; the charges and other dues paid to travel agencies for the sale of train tickets, of boat and air passages, and of package tours organized by third parties; in the case of the commission agents, the net income (excluding costs and expenses) excluding the purchase or sale invoices;
- revenues from transportation activities, including any portion of the shipping agents’ revenues related to an ancillary transport activity;
- revenues from the provision of services to third parties: this amount includes revenues from the rental of machines and other objects, from the provision of consulting services, designing services, and any other professional services; the revenues of advertising agencies, of travel agencies for the trips and stays which they organize; the gross revenues of hotels, restaurants, bars, and similar establishments (including the percentages charged for the service); and revenues derived from the repair of vehicles and other consumer goods.

ii. Moreover, the Competition Authority must be notified of concentrations prior to their completion in which one of the parties will “hold, directly or indirectly, more than 25 percent of (1) the total sales deriving from film distribution in any of the twelve main cities for film distribution (Rome, Milan, Turin, Genoa, Padua, Bologna, Florence, Naples, Bari, Catania, Cagliari and Ancona), and (2) the number of movie theatres active in any such city” (Section 13 of Law No. 153 of March 1, 1994).

(c) PUBLIC TENDER OFFER- Indicate if a public tender offer is being launched.
(d) NOTIFICATIONS TO OTHER FOREIGN OR INTERNATIONAL REGULATORY AUTHORITIES - Indicate to which other foreign or international regulatory authorities the operation has been notified or will be notified, and provide the actual or anticipated date(s) of notification.
(e) **Verification of Community Dimension** - The concentrations have Community dimension when the requirements relating to the turnover of the undertakings concerned are met (Regulation No. 4064/89, as amended by Regulation No. 1310/97, which has been in force since 1 March 1998). Indicate the threshold(s) not exceeded, specifying the year in which the turnover was generated. If at least one of the thresholds is exceeded, indicate that the “two-thirds rule” applies — i.e., that each of the undertakings concerned realizes more than two-thirds of its total Community turnover within a single Member State.

**PART B - Details of the Concentration**

**SECTION II - Other Information** (*This Section must be completed for each operation of the concentration*)

**B3. Description of the transaction** - Provide a detailed description of the transaction.

**B4. Other Characteristics of the Transaction:**

(a) **Total Value of the Transaction** - Provide the approximate or estimated value of all assets subject to the transaction (land, stock, production facilities, trademarks, patents, outlets, etc.) and, where relevant, the value of the purchased shares.

(b) **Economic Rationale for the Transaction** - Indicate briefly the economic rationale for the transaction for each participant to the concentration.

(c) **Future Ownership and Control**

(d) **Conditions Precedent for the Transaction** — Specify whether the transaction is conditional upon the authorization by public authorities and the status of the relevant procedures.

(e) **Ancillary Restraints** - Indicate the ancillary restraints contained in the agreements submitted with the notification which the parties request to be examined at the same time as the transaction, explaining why they are directly linked to, and necessary for, the realization of the concentration.

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9. Transactions having Community dimension must be notified to the European Commission rather than the Competition Authority.

10. (a) The thresholds foreseen under Section 1(2) of Regulation 4064/89, as amended by Regulation 1310/97, are:
- the combined aggregate worldwide turnover of all the undertakings concerned is more than € 5,000 million; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than € 250 million;

(b) The thresholds foreseen under Section 1(3) of Regulation 4064/89, as amended by Regulation 1310/97, are:
- the combined aggregate worldwide turnover of all the undertakings concerned is more than € 2.5 billion;
- the combined aggregate turnover of all the undertakings concerned is more than € 100 million;
- in each of at least three Member States included for the purposes of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than € 25 million; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than € 100 million.
PART C - PARTICIPANTS

SECTION I - PERSONS AND ENTITIES WITH CONTROL OVER THE PARTICIPANT (This section must be completed for each undertaking participating in the concentration)

C1. PARTICIPANT TO THE CONCENTRATION - Indicate the identification code (as attributed in A1) and the corporate name of each undertaking (as indicated in A2(a)).

C2. PERSONS OR ENTITIES DIRECTLY OR INDIRECTLY CONTROLLING THE PARTICIPANT - Identify each person/entity that exercises control over a participant (as reported in C1), following the hierarchy of control to the ultimate parent level. Where there is no person/entity exercising a decisive influence, alone or jointly, over the undertaking concerned, provide a list of the ten largest shareholders of such undertaking, or of those shareholders who, directly or indirectly (including through trust companies) hold more than 10 percent of the company stock, indicating the percentage held. For each of the persons/entities identified in this section, provide:
(a) CORPORATE NAME (first and last name for individuals) and REGISTERED OFFICE
(b) FISCAL NUMBER (only for Italian companies and Italian individuals).

PART C - PARTICIPANTS

SECTION II - NATURE AND TURNOVER OF THE PARTIES' BUSINESS (This Section must be completed for each undertaking participating in the concentration. For participants in the role of acquirer or surviving entity in a merger, or for the participants to a joint venture, the information requested in Paragraph C3 (Business Activities and Consolidated Turnover) must be provided for the persons/entities referred to paragraph C2 (Persons/Entities, directly or indirectly, controlling the Participant) and under Paragraph C4 (controlled undertakings). Where the control is exercised jointly by two or more persons/entities (as indicated in C2), provide information separately for each parent company. For participants in the role of the acquired entity, or merged entity, or joint venture, the information requested in paragraph C3 (Business Activities and Consolidated Turnover) must be provided for the entities mentioned in paragraph C1 (the participant to the concentration) and in paragraph C4 (Controlled Undertakings))

C3. NATURE AND TURNOVER OF THE PARTIES' BUSINESS
(a) PRINCIPAL BUSINESS ACTIVITIES - Indicate the principal business activities of the above-mentioned persons/entities.
(b) TURNOVER - Provide the turnover generated by the above-mentioned persons/entities for the preceding three years. For calculation of the turnover, see point B2(b)), specifying:
   i. the total worldwide turnover;
   ii. the turnover generated in Italy;
   iii. the turnover generated in the European Union;
   iv. the turnover generated from sales to undertakings controlled by the person/entity and to undertakings controlling it.
For the turnover data requested under Points i., ii. and iii., specify whether the figures provided represent the consolidated turnover.
PART C — PARTICIPANTS

SECTION III - OWNERSHIP AND CONTROL OF ASSETS (This Section must be completed for each undertaking participating in the concentration. For participants in the role of acquirer or surviving entity in a merger, or for the participants to a joint venture, the information requested in paragraph C4 (Controlled Undertakings) must be provided for the entities referred to under Paragraph C2 (Persons/Entities directly or indirectly controlling the Participant). Where control is exercised jointly by two or more persons/entities (as indicated in C2), provide information separately for each controlling parent. For participants in the role of acquired entity or merged entity, or for a joint venture, the information requested in paragraph C4 (Controlled Undertakings) must be provided for the entities mentioned in paragraph C1 (the Participant in the Concentration)).

C4. CONTROLLED UNDERTAKINGS

(a) NAME OR CORPORATE NAME, REGISTERED OFFICE, FISCAL NUMBER
(b) PRINCIPAL BUSINESS ACTIVITY - Describe the principal business activity engaged in, specifying the relevant level of the production process (production, wholesale distribution, and so on) and the related economic activity code.
(c) PRESENCE IN THE AFFECTED MARKETS - Indicate whether the undertaking referred to in (a) is active in one or more of the markets affected by the concentration; if so, state the identification code of the market in question as indicated in Part E at Paragraph E1.
(d) CONTROL
- indicate the equity stake (direct or indirect) in the undertaking named in (a);
- indicate whether control is exercised directly (D) or indirectly (I);
- where control is indirect, indicate the person/entity exercising direct control;
- indicate the date of acquisition of control.
(e) STOCK EXCHANGE LISTING - Indicate whether the shares of the undertakings reported in (a) are quoted on the Italian Stock Exchange. Provide information on the acquisitions of any undertakings active in the markets affected by the concentration, as defined in Part E, within the last three years. The information requested in this Part may be supplemented by diagrams, if advisable, to improve the understanding of the structure of control.

PART D - PERSONAL AND FINANCIAL LINKS

SECTION I - FINANCIAL LINKS (This section must be completed for each of the persons/entities identified in response to Part C holding, individually or jointly, 10 percent or more of the capital stock or voting rights (5 percent for undertakings listed on the Stock Exchange) in undertakings (other than those identified in response to Paragraph C4 - Controlled Undertakings) that operate in the markets affected by the concentration (as defined in Part E) or that control undertakings operating in these markets)

D1. PERSONS AND/OR ENTITIES INDICATED IN PART C - Report the name or corporate name of the undertaking or of the individual as provided in Part C.
D2. FINANCIAL SHARE - Identify all undertakings operating in the affected markets in which the person/entity identified in response to D1 holds, alone or jointly,
directly or indirectly, 10 percent or more of the capital stock or of the shares with voting rights (5 percent for undertakings listed on the Stock Exchange). For each such undertaking, specify: (a) the affected market in which it operates, using the progressive code attributed to the affected market in E1; (b) its name or corporate name, registered office and, for Italian undertakings, the fiscal number; and (c) the percentage held.

SECTION II - PERSONAL LINKS (This section must be completed for each of the persons/entities identified in response to Part C if some of the members of their management boards are also simultaneously members of the boards of other undertakings (other than the undertakings already identified in response to paragraph C4 - Controlled Undertakings) that are active in the markets affected by the concentration (as defined in Part E) or that control undertakings active in these markets)

D3. PERSONS AND ENTITIES INDICATED IN PART C - Report the name or corporate name of the undertaking or of the individual as indicated in Part C.

D4. PERSONAL LINKS - List all undertakings active in the affected markets that have persons on their management boards who are also members of the boards of other undertakings listed in paragraph D3 (other than the undertakings already identified in response to paragraph C4 - Controlled Undertakings).

For each undertaking specify:
(a) the affected market in which it operates, using the identification code attributed to the affected market in E1;
(b) its name or corporate name, registered office, and, for Italian undertakings, the fiscal number;
(c) the name of the relevant member of the management boards; and
(d) the position held by that person in the undertaking operating in the affected market.

PART E - AFFECTED MARKETS

SECTION I - DEFINITION OF THE RELEVANT MARKET (This section must be completed for each market relevant for the purposes of the concentration)

E1. RELEVANT MARKET - Attribute an identification code with sequential numbering (M01, M02, M03, etc.) that will be used for each relevant market for purposes of reference in the other Parts.

E2. DEFINITION OF THE RELEVANT MARKET:
(a) RELEVANT PRODUCT MARKET - Describe the relevant product market, referring to the definitions set forth in Part I (General Conditions) in Paragraph C3.
(b) RELEVANT GEOGRAPHIC MARKET - Describe the relevant geographic market, referring to the definitions set forth in Part I (General Conditions) in Paragraph C4.

SECTION II - SIZE OF THE MARKET (This section must be completed for each of the markets affected by the concentration, taking into account the definitions set forth in Part I (General Conditions) in Paragraph C1)

E3. TOTAL SIZE OF THE PRODUCT MARKET
Provide the information requested in (a) and, if possible, in (b).
(a) **VALUE OF SALES** - Provide, for the last three financial years, an estimate of the total value of sales of the products included in the relevant product market (as defined in E2(a)) and realized:
   i. in the relevant geographic market; and
   ii. in Italy (if different from i.);

(b) **VOLUME OF SALES** - Provide, for the last three financial years, an estimate of the total volume of sales of the products included in the relevant product market (as defined in E2(a)) and realized:
   i. in the relevant geographic market; and
   ii. in Italy (if different from i.).

**SECTION III - CHARACTERISTICS OF THE MARKET** *(This section must be completed for each of the markets affected by the concentration)*

**E4. OTHER INFORMATION**

(a) **STAGE OF DEVELOPMENT OF THE MARKET** - Describe the current development state of the market (start up, expanding, mature, declining).

(b) **PRINCIPAL ENTRY BARRIERS** - Describe briefly the major barriers to entry into the relevant market that would be encountered by new competitors, examining the possibility of entry from both geographic and product perspectives, and provide estimates of the time required for new undertakings to enter the market or to convert existing production capacity currently used for other products.

(c) **IMPORTS** - Provide the total value and volume of imports in the relevant markets and indicate the major countries of origin of such imports; also, provide the percentage of these imports attributable to undertakings that are foreign affiliates of the undertakings participating in the concentration.

**SECTION IV - MARKET SHARES OF THE PARTICIPANTS** *(This section must be completed for each of the markets affected by the concentration and for each undertaking participating in the concentration that operates in such market. For participants in the role of acquirer or surviving entity in a merger, or for the participants to a joint venture, the market shares must be provided for the persons/entities referred to in C2 (Persons/Entities directly or indirectly controlling the Participant) and for the undertakings they control (indicated in C4). For participants in the role of acquired entity or merged entity, or for a joint venture, market shares must be provided for the entities mentioned in C1 (The Participants) and the undertakings that they control (indicated in C4). In each case, the market shares provided may be aggregated for the entire group or provided separately for each entity within the group).*

**E5. MARKET SHARES OF THE PARTICIPANTS**

Provide the information requested in (a) and, if possible, in (b):

(a) **VALUE OF SALES** - Provide, for the last three fiscal years, the total value of sales of the products included in the relevant product market (as defined in E2(a)) and generated:
   i. in the relevant geographic market; and
   ii. in Italy (if different from i.);
(b) **VOLUME OF SALES** - Provide, for the last three fiscal years, the total volume of sales of the products included in the relevant product market (as defined in E2(a)) and generated:
  i. in the relevant geographic market; and
  ii. in Italy (if different from i.).

**SECTION V - PRINCIPAL COMPETITORS** *(This section must be completed for each of the markets affected by the concentration)*

**E6. PRINCIPAL COMPETITORS**

Provide the information requested below for the five largest competitors (including importers) and all competitors that hold a market share of 10 percent or more:

(a) **NAME OR CORPORATE NAME AND REGISTERED OFFICE**

(b) **GROUP OF PERSONS OR UNDERTAKINGS THAT EXERCISE CONTROL** - Indicate briefly, if known, the name of the persons/entities directly or indirectly controlling the undertakings identified in response to (a);

(c) **MARKET SHARES** - Provide the value and, if possible, the volume of sales and the competitors’ respective market shares in the relevant market for the last three fiscal years.

**PART F - SUPPORTING DOCUMENTATION**

The notifying parties must attach to the notification the following documentation, attributing to each document an identification code with sequential numbering (the first part of the code is already printed on the schedule, so that only the sequential number must be added). Provide for each document a description of its content and indicate its total number of pages:

**F1. DOCUMENTS RELATING TO THE TRANSACTION** - A copy of the final or most recent version of all documents pertaining to the transaction.

**F2. OFFER DOCUMENT FOR PUBLIC TENDER OFFER** - In the case of a public tender offer, a copy of the offer document; if this document is not available at the time of the notification, it must be submitted as soon as possible and, in any event, no later than the date of its submission to the shareholders.

**F3. ANNUAL REPORTS AND BALANCE SHEETS** - Copies of the last three annual reports and financial statements of all the participants to the concentration.

**F4. OTHER DOCUMENTS** - Where an affected market is identified, attach, if regarded as useful for the evaluation of the notified transaction, copies of reports, analysis, studies, and surveys submitted to or prepared for any member of the board of directors or submitted at the shareholders’ meeting for the purpose of assessing and analyzing the transaction with regard to competitive market conditions, competitors (actual and potential) or market conditions.

**PARTS OF THE LONG FORM NOTIFICATION**

The long form notification requires the same Parts as the short form notification with the following modifications or additions:

- **Part E - Section III - MAIN BRANDS:** this section must be used instead of Section III - **MARKET CHARACTERISTICS** contained in the short form version.
Part G - General Conditions of the Affected Markets: this Part must be added to the Parts required in the short form notification.

Part E - Affected Markets

Section III - Main Brands (This section must be completed for each market affected by the concentration)

E4. Principal Brands - List the principal brands for the products offered in the relevant market, specifying:
(a) the brand name;
(b) the owner or licensee of the brand; and
(c) the share of sales attributable to the brand.

Part G - General Conditions of the Affected Markets

Section I — Supply Structure

G1. Structure of Supply in the Affected Markets - Explain the distribution channels and service networks in the affected markets, taking into consideration, where appropriate, the following elements:
(a) the distribution systems existing in the markets and their importance; and
(b) the service networks (e.g., maintenance and repair) and their importance.

Provide an estimate of the total production capacity for the relevant products for the last three years. Indicate the share of this production capacity attributable, over the three-year period, to each of the participants to the concentration and provide their respective rates of capacity utilization.

Provide the total value and volume of imports in the relevant markets, the main countries of origin of such imports, and the percentage of these imports that are derived from foreign undertakings affiliated to the participants to the concentration.

Identify the five largest suppliers (of raw materials or other goods used for the purposes of producing the relevant products) of the notifying parties and each party's share of total purchases from each of these suppliers.

Part G - General Conditions of the Affected Markets

Section II - Demand Structure

G2. Demand Structure in the Affected Markets - Identify the five largest customers of the notifying parties in each of the affected markets and the share of total sales for the products accounted for by each of those customers.

Describe the stage of development of each market (start up, expanding, mature, declining).

Explain the structure of demand, indicating:
(a) a forecast of the growth of demand;
(b) the degree of concentration or dispersion of customers;
(c) the segmentation of customers into groups, providing, for each group, a description of its relative size and of the "typical customer" and indicating the factors that permit price discrimination between the groups;
(d) the existence of exclusive distribution contracts or other types of long-term contracts; and
(e) the extent to which public authorities, government offices, state enterprises, and other similar bodies are important participants as a source of demand.
PART G - GENERAL CONDITIONS OF THE AFFECTED MARKETS
SECTION III - MARKET ENTRY
G3. MARKET ENTRY - Indicate whether, over the last five years, there has been any significant new entry into any of the affected markets. Indicate if, following a small but significant price increase in the affected market following the concentration, currently unused production capacity or capacity used for the production of other products could be diverted to produce the relevant products and how long this could take. Describe the different factors that influence entry into the markets affected by the concentration, examining entry from the geographic and the product points of view. Where relevant, analyze the following factors:
(a) the total costs (R&D, establishment of distribution networks, advertising, promotion, servicing) for entry into the market on a scale equivalent to that of a significant viable competitor, indicating the market share of such a competitor; indicate also the impact of sunk costs in the event of exit from the market shortly after entry;
(b) any regulatory barrier to entry, such as the need to obtain administrative authorization or the obligation to comply with any type of technical regulations;
(c) the restrictions resulting from the existence of patents, trade secrets, or other intellectual property rights in the affected markets licensed or acquired by each participants;
(d) the relevant licenses for patents, trade secrets, or other intellectual property rights that each participant to the concentration has granted or been granted in the affected markets;
(e) the importance of economies of scale and/or full product ranges for the production of the relevant products in the affected markets;
(f) access to sources of supply, e.g., availability of raw materials; and
(g) consumer preferences in terms of brand loyalty and product differentiation.

PART G - GENERAL CONDITIONS OF THE AFFECTED MARKETS
SECTION IV - OTHER INFORMATION
G4. RESEARCH AND DEVELOPMENT — Set out the importance of R&D in determining the ability of an undertaking operating in the relevant markets to maintain a significant competitive capability in the long term.

G5. COOPERATIVE AGREEMENTS - Indicate whether, and if so, to what extent, cooperative agreements exist in the affected markets (horizontal or vertical agreements). Provide information about the most important cooperative agreements entered into by the participants to the concentration — for example, regarding R&D, licensing, joint production, specialization, distribution, long-term supply, and/or information exchange.

G6. TRADE ASSOCIATIONS - Indicate the trade associations active in the affected markets, in particular:
(a) those of which the participants are members; and
(b) the most important associations of which suppliers and customers of the participants are members.