



COUNTRY STUDIES

Italy – Updated Report 2004

Introduction

This Report examines the state of competition policy in Italy in 2004. It focuses particular attention on developments since the 2000 “Report on the Role of Competition Policy in Regulatory Reform”, prepared as part of a larger OECD study of regulatory reform in Italy.

Overview

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ITALY - REPORT ON COMPETITION LAW AND INSTITUTIONS (2004)

The attached report updates information on the current state of competition policy in Italy. It was edited after the Competition Committee discussion (Item VII) in October 2004, which compared experiences in ten countries. It is circulated FOR INFORMATION.

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UPDATED REPORT ON COMPETITION LAW AND INSTITUTIONS (2004)

ITALY

1. Competition policy in Italy was the subject of a report in the regulatory reform program, which was peer reviewed in the Competition Committee in mid-2000 and published in 2001 ("2001 Report"). A special chapter on product market competition was included in the OECD's *Annual Survey* of Italy published in September 2003.

2. Italy has had more than 10 years of experience with the application of its comprehensive Competition Act. Enforcement by the ambitious agency that this law created, the Italian Antitrust Authority (Authority), has been challenged by long-term patterns of entrenched monopoly, direct control, regulatory protection, and industry co-operation. Sceptical courts have had to be educated about the importance of competition, and the Authority has had to learn how to persuade them effectively. The Parliament has supported strengthening enforcement by authorising stronger sanctions. After amendments to the Competition Act in 2001, the basis for computing financial sanctions is now similar to that applied by the European Commission. The Authority has imposed stiff sanctions, even under the previous law. The courts have been willing to support substantial penalties, but they have demanded that the Authority make its case convincingly.

Substantive law

3. Italy's competition law, adopted in 1990, has always been based on the jurisprudence of the EU. This substantive consistency will make it easy for Italy to adapt to the decentralised application of EU competition law. Application of the common prohibitions against restraints and abuse of dominance and of merger control has been marked by an emphasis on economic factors. Theories supporting *per se* infringement, and thus obviating economic assessment of the circumstances, are usually used judiciously. For example, resale price maintenance does not appear to be treated as *per se* illegal.

4. Many recent enforcement actions against restrictive agreements challenged complex industry-wide practices. These challenges have met mixed responses in court. In insurance, the court upheld the Authority's finding and its very large sanction: ITL 700 billion, or about EUR 360 million. Companies refused to sell a discretionary product, namely insurance against auto fire and theft, separately from mandatory liability insurance. This common strategy and the industry's widespread exchange of sensitive commercial information to enforce it did not amount to explicit market division or a price fixing agreement; indeed, the prices available to consumers varied widely. The court nonetheless supported the high fine. By contrast, the court rejected a sanction of similar magnitude in another high-profile action, against restraints in the distribution of petroleum products. The Authority had challenged a long-standing arrangement about margins and discounts through which a recommended price evidently became a fixed, uniform retail price. But the court found that the Authority did not prove that concerted, parallel pricing could only have been due to agreement. The court also questioned whether it was appropriate to assess high fines against behaviour that appeared to have official sanction or tolerance. Officials from the ministry had some role in setting up the scheme with the industry's trade association, and the Authority had known about the arrangement for a long time before it acted.

5. The Authority has continued to target industry-wide agreements, including some that look more like simple market division or price agreements. Recent actions have imposed fines of EUR 70 million for price-fixing in tobacco sales, of EUR 30.5 million against 5 drug companies for uniform pricing of diabetes testing, of EUR 40 million against a cartel in ready-mix concrete, and of EUR 5 million for agreements on uniform terms and cost pass-through for certain packaging products.

Box 1. Enforcement priorities

Increase enforcement attention to clandestine collusion.

Noting that the Authority had been appropriately concentrating much of its attention on promoting competition in major infrastructure sectors, the 2001 Report concluded that anti-competitive collusion called for more attention. The Authority has been concerned that its obligation to respond to all complaints limits its ability to set enforcement priorities.

Several important decisions have been taken about restrictive agreements. Many of them involve oligopoly information sharing or other formal co-ordination, rather than concealed agreements. The overall level of enforcement activity against restrictive agreements is essentially unchanged over the last several years. The number of cases about restrictive agreements increased 20% from 2002 to 2003 (from 46 to 54, of which 4 resulted in finding a violation). But this increase does not indicate a clear long-term trend yet, for there had been 52 cases about agreements in 2000 and 43 in 2001.

6. The prohibition against abuse of dominance continues to be applied principally in the context of network industry reforms. The Authority has made some use of an interesting provision added to the law in 2001 which requires public-service firms to operate through structurally separate entities if they are engaged in operations outside of the public-service area. This is backed up by requirements to notify the Authority when setting up such operations, and by an obligation to provide access to competitors in those markets with services on non-discriminatory terms. An investigation of Italgas operations outside of its core business in 2003 resulted in a fine (EUR 25 000) for failing to notify.

7. Merger control is the responsibility of the Authority. Ministries play no role, and courts are involved only if a decision is appealed. Decisions are based on competition issues. Other policies are not considered. A never-used provision of the Competition Act (Sec. 25.1) could permit balancing competition considerations against other national interests, but the regulations needed for the Authority to do so have not been promulgated.¹ The Authority has backed up its merger control system with enforcement action that may be unparalleled elsewhere: on finding that Tetra Pak was *de facto* controlling a firm whose acquisition the Authority had prohibited, the Authority imposed a fine of EUR 95 million.

¹ Mergers that could impair competition in the domestic market may be permitted where “major general interests of the national economy are involved in the process of European integration” (Sec. 25.1). The decision is to be made by the Authority, applying general criteria proposed by the Minister for Trade and Industry and promulgated by the Council of Ministers. This “integration” benefit is to be balanced against the concentration’s impact on domestic competition, and the Authority may prescribe measures and set a deadline to restore full competition (Sec. 25.1). This provision appears intended to permit higher concentration among domestic firms, with the long-term goal of creating substantial competitors in an integrated European market.

Box 2. Merger deadlines

Make merger review deadlines consistent with other jurisdictions.

The 2000 Review observed that Italy's merger review timetable is relatively short. The Authority must decide within 30 days of the notification whether the concentration might infringe the statutory standard. If so, a formal investigation may be opened, and it must be concluded within an additional 45 days. (This may be extended by 30 days if the parties fail to provide requested information). The timetable for EU review of a merger that raises issues requiring investigation is substantially longer (from about 4 to 5 months, depending on whether the "clock is stopped" to consider negotiated commitments).

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

This recommendation has not yet been implemented. Italy's merger review timetable remains significantly shorter than the EU's. The EU's adoption of a revised merger regulation and review process in 2004 provides an opportunity for Italy to align its national procedures appropriately. It might also be an occasion to consider whether to make the substantive standard under national law conform to the slightly revised standard of the new EU regulation.

8. The Authority, like some other competition enforcers, combines its antitrust duties with responsibilities about advertising and unfair competition that arise under different legislation. The rules about deceptive and comparative advertising follow from EU directives that have been enacted into Italian law. These matters represent a large part of the Authority's workload, measured by number of actions—several hundred per year—if not by resources employed. The Authority may also become involved in claims about the abuse of economic dependence,² such as refusal to deal, burdensome or discriminatory contract conditions, and termination of trading relations. The Authority opposed adding the principle to the Competition Act, although it was concerned that these claims, which are decided mostly through arbitration or private lawsuits, could be used to impede competition and undermine efficiency. Changes in the law in 2001 now give the Authority some role.³ The Authority may issue warnings and impose the penalties provided by the Competition Act against abuse of economic dependence "which is relevant to the protection of competition and the free market." This change evidently empowers the Authority to apply the basic legal principle, but in the context of its effects on the public interest. The other avenues of relief remain open to private claims that typically lack that dimension. Perhaps with the Authority now involved in applying these rules, the courts will look to it for policy direction when deciding those private disputes.

Institutions

9. The Authority is a separate, expert agency, with unusually broad freedom of action and strong protection of its decision-making independence within the government structure. Unlike in many other countries, Italy's Authority does not share competence with a ministry secretariat for investigation or prosecution, or for policy. The Authority's five members are appointed by the Parliament for non-renewable seven-year terms. It is a full-time commitment; its members are not permitted to hold other positions or perform other professional services. The law provides no avenue for political control or influence, in general or over particular decisions, beyond the appointment process itself.

² Law no. 192, 18 June 1998, art. 9.

³ Law no. 57, 5 March 2001, sec. 11.

10. The budget is a separate line item in the law, approved by Parliament and subject to inflation adjustment, so ministries cannot exert indirect pressure by that means. Funding has been adequate, although the budget has gotten tighter as the once-young staff gains seniority. There has been some consideration of imposing merger filing fees to support the merger review operation, but this has not been done yet. After vigorous increases in staff and budget while the Authority was becoming established, its resources have levelled off in the last few years. The authorised staff complement, originally 150 positions (plus up to 50 on fixed term contracts), was increased by 20 positions to handle advertising matters. There is about 190 staff actually in place. The ceiling could impair the Authority's ability to handle the responsibilities that follow from the EU's modernisation program.

Box 3. Staff levels

Raise the statutory caps on the Authority's staff levels.

The 2001 Report observed that the Authority confronts some resource limitations, principally the inability to hire as many staff as it needs. Because of ceilings on positions, it cannot hire more people, even though it has enough funds to pay them. Particularly as the Authority's attention is focused increasingly on the resource-intensive task of uncovering cartels, and its responsibilities are enlarged to include important roles in the process of ensuring regulatory quality, it should be freed of constraints that prevent it from applying its budget resources to support the personnel it needs.

The ceiling remains in place; in effect, the Authority's staff is capped at 220. Merger matters have declined in number somewhat, and some disputes about infrastructure access may be handled now by new sectoral regulators. But the Authority remains somewhat smaller than enforcement bodies with similar jurisdictions in many similar-sized Member countries.

11. The number of distinct matters pending at the Authority appears to be generally stable or even slightly declining, except for mergers and order compliance cases. Fewer cases might reflect an increase in the level of compliance, at least with the obvious requirements of the law, or a reduction in the number of frivolous complaints as firms have learned what the Authority will and will not do for them. But the stable caseload does not necessarily mean the Authority needs no more resources. An equal or smaller number of tougher and more important matters could require as many or more staff to handle.

Enforcement process

12. To enforce compliance and deter violations, the principal sanction under the Competition Act is a financial penalty imposed by the Authority on infringing enterprises. There is no provision for criminal penalties or for sanctions against individuals, even in the case of repeated violation, resistance to the Authority's orders, or individual active participation in a violation. (By contrast, for advertising matters, refusal to follow the Authority's order can, in theory, be punished by imprisonment (up to 3 months) and a fine (EUR 2600). The Authority does have a powerful weapon in reserve, though. It can punish repeated violations by requiring the enterprise to cease operations for up to 30 days. This deterrent has never actually been used. Sanctions are not automatic. The Authority sometimes concludes ordinary matters with an order setting a deadline for correcting the restraint or abuse. In serious cases, the Authority may impose a fine, which can vary depending on the gravity and duration of the violation. The Authority's willingness to impose substantial penalties in recent cases shows that it has overcome its initial caution about fines.

Box 4. Sanctions

Improve sanctions, to make enforcement more effective.

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

In February 2001, as the 2001 Report was being completed, the Parliament approved a bill that anticipated some of those recommendations. The basis for computing the fine is no longer the relevant market affected by the restraint or abuse; instead, it is now the undertaking's total turnover. The Authority may set the fine up to 10% of that figure. Basing the sanction on total enterprise turnover could get the attention of top management, which might otherwise pay too little attention to misconduct by its obscure products or divisions. Italy's basic sanctions system is now generally comparable to the systems used by the EU and many other European jurisdictions. Under the previous system, the fines that were affirmed in the insurance case were set at from 1% to 3.8% of companies' relevant turnover, depending on their culpability. The fines that were rejected in the petroleum distribution case were set at 3.5% of relevant turnover. In a case of bid rigging for medical supplies, the Authority set the fine at 5.5% of relevant turnover. All of these are well short of the cap of 10%.

In the recent cartel cases the Authority has been able to apply the 2001 law. Responding to the courts' demand for transparent justification for the amounts assessed, the Authority has relied on the criteria and guidelines issued by the European Commission for setting fines under its similar powers. That is, the Authority considers the seriousness of the offence, the impact on competition, the economic circumstances of the violators and aggravating or extenuating circumstances such as repeat offences or co-operation with the Authority's investigation.

The amendment also increased the Authority's sanctioning flexibility in the other direction by permitting it to impose a fine of 0 even in the case of a serious violation. That flexibility could support a leniency program to encourage conspirators to come forward with evidence. The Authority has not set up a formal leniency program, though. The Authority evidently believes that clearer legislative authorisation is needed before it can issue what will look and act like regulations, that is, commitments and rules of general application for the future. So far, the Authority is also not concerned that deterrence is weakened by the lack of penal or individual sanctions.

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

13. The Authority does not have the power to order interim relief pending its final decision. This power is particularly significant in cases alleging abuse of dominance through denial of access to a network facility. The Authority can order access after finding a violation. Giving it the power to order access provisionally, pending the final decision, could speed up the development of competitive markets. Proceedings at the Authority are reasonably fast. But in some cases, competitive harm is immediate and a remedy six months later is entirely inadequate. Interim relief can be ordered by a court, but that process entails another decision-maker with its own problems of delay. The revised EU competition enforcement regulation (Art. 8) gives the EU competition enforcer, the European Commission, interim relief power. As the EU system moves toward decentralised application of common rules through national processes, consistency would support extending this power in parallel, to the national competition enforcement body.

Box 5. Corrective advertising orders

More powers may also be appropriate for dealing with deceptive advertising.

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

A presidential decree of July 11, 2003 setting out procedures for enforcing the law about misleading and comparative advertising now empowers the Authority to order corrective advertising, including setting the medium and formalities of the corrections to be sure they are effective. The Authority cannot assess other sanctions against these violations, though, nor can it investigate advertising claims *ex officio*.

Private initiatives

14. Perhaps because the Authority is so autonomous and its powers are so wide, the courts in Italy have been unusually important and active, both in reviewing and correcting the Authority and in providing an alternative outlet for complaints. The extent of court involvement in Competition Act matters appears comparable to Germany, where the enforcer is also unusually autonomous. Appeals from the Authority's competition enforcement actions must be taken to the Lazio Administrative Court. A further appeal is possible, to the Supreme Administrative Court (the Council of State). Cases tend to go to judges in those courts who have developed particular experience and interest in competition matters. But there is no formal specialised chamber or court. The Authority's actions were often rejected at first, but the Authority's record on appeal has improved as the courts and the Authority have become more familiar with each other. Reviewing courts had looked beyond issues of law to matters of fact and judgement such as market definition. The Authority responded by trying to present better evidence. The higher courts have stressed the limitations on the scope of review. The administrative court is to limit its review to matters of law and process, and it should not substitute its own judgement for the Authority's decisions about technical matters such as market definition. As the courts and the Authority have gained more experience, the Authority's record on appeal has improved substantially.

15. Delays in the review process have been corrected now. After an important reform in the process introduced by legislation in 2000, both stages of appeal can now be completed within about a year and a half after the Authority's decision. Parties may, and usually do, request suspension of fines pending appeal. The court's ruling on the request for suspension, in a summary proceeding, could be an occasion to indicate the likely direction of the final decision. When appeals took years, the decision on the *sospensiva* could be outcome-determinative, if the parties did not want to sink the resources into further proceedings. Now that appeals can be finally decided much more quickly, distortion of the *sospensiva* process should be less of a concern.

16. Another kind of summary proceeding, in other courts, is still important, though. A private party can bring an independent suit in the civil courts (the Courts of Appeal with local jurisdiction). A principal objective of private suits is interim relief to protect the party's interest in situations where the lapse of time may cause irreparable damage. A private suit may also seek an order to annul practices that the Competition Act prohibits or recover damages caused by violations. Filing a private civil action does not depend on any prior action or decision by the Authority. Dozens of private cases have been filed, mostly in Milan and Rome. The civil courts there, like the administrative court in Lazio, are probably developing

some familiarity and expertise in competition law matters as a result of this litigation. Most of the unsuccessful early actions arose in ordinary commercial relationships, and the courts were probably leery of extending the new legal principles to such everyday contract matters. The judges may have been deferring, in a general sense, to the Authority's expertise and powers. That is, they may have been reluctant to apply the Competition Act if it appeared that the Authority did not think the problem important enough to deserve enforcement attention. One prominent exception to this pattern involved a private exchange telephone company complaining that the historic monopolist was impeding entry by delaying installation of necessary circuits; in 1995, the Court of Appeal of Milan awarded damages of ITL 3.5 billion. With increasing experience, the courts are considering more esoteric issues. They have rejected antitrust complaints against joint actions to influence public officials (for example, local merchants lobbying to deny zoning permission to a hypermarket), reasoning that this activity constitutes protected free expression. On the other hand, they have suggested that an antitrust complaint might be brought against efforts to browbeat public officials through commercial threats.

Coverage of competition law and policy

17. The Competition Act's wide coverage, with virtually no explicit exemptions, promotes competition as a general, horizontal principle. That claim is countered, though, by other legislation that creates some immunities or distortions. The most important problems arise from local-level regulation constraining competitive entry.

18. At the national level, there are few sectoral special situations. The most interesting is in banking, where the Bank of Italy, rather than the Authority, enforces the Competition Act, applying the same substantive law and process that the Authority does in other sectors. After the fraud scandals at Parmalat, there was debate about shifting responsibility to the Authority. The president of the Authority was quoted in 2003 as supporting this move. The government's bill for financial sector reforms proposed that the Authority, as well as the Bank of Italy, would approve mergers in the banking sector; to date, though, there has been no change in the assignment of jurisdiction. As a general matter, the Authority has the power to offer views about the Bank of Italy's enforcement initiatives, and the Authority has enforcement power about other financial products such as insurance. The Bank of Italy has been a comparatively active competition enforcer. By contrast, the insurance regulator, ISVAP, has been less enthusiastic. In the Authority's recent industry-wide case, ISVAP evidently supported the industry's positions. ISVAP only has the right to comment, though; it cannot block the Authority's enforcement action.

19. In publishing, Italy follows many other jurisdictions in setting special rules about retail pricing. Legislation under consideration in late 2000 would have required publishers to set retail prices and limited how much retailers could discount them. The numerous exceptions to this general rule still limit price competition for school texts.

Official authorisation: the Fiammiferi case

20. An important test case, which the Authority brought under European law, limits how much firms can use national legislation as a shield against enforcement. The Authority argued for an extension of EU treaty principles about competition to counter anti-competitive regulations. The Authority had made this argument several times in advocacy papers before testing it through enforcement. The key to the argument is the EU treaty requirement that Member States "take all appropriate measures ... to ensure fulfilment of the obligations" arising out of the treaty, and notably to "abstain from any measure which could jeopardise the attainment of the objectives" Among those objectives is "a system ensuring that competition in the internal market is not distorted."

21. In the *Fiammiferi* case where the Authority applied this argument, a German match manufacturer complained about a market-division arrangement between the Italian makers and their long-time distribution consortium and Swedish Match. The Italian industry had been co-ordinating production, with government blessing and even authorisation, since 1923. Imports had been prohibited until 1994, and the Italian makers had been required by law to join a consortium that marketed matches and collected the taxes for the state. A special Commission, chaired by a representative of a state-owned entity controlled and appointed by the Finance Ministry, allocated production for domestic consumption among the consortium members. Italian law changed in 1994 so membership was no longer compulsory and the members no longer had a legal monopoly. But they continued to co-ordinate, arranging exclusive-supply terms for wholesale distribution through the most effective channel and adjusting their own quotas in proportion to accommodate the entry of Swedish Match. The Authority readily concluded that the consortium's market division and exclusive supply arrangements after 1994 violated Art. 81. The Authority also found that the consortium's conduct was not excused by the state's involvement and authorisation, even in the period before 1994.

22. The Authority argued that the EC treaty does not permit parties to avoid liability by hiding behind national legislation that requires, sponsors, or facilitates agreements that would violate Art. 81. The Authority argued that the government's requirement of an exclusionary, market-dividing cartel, and its continued support for it by participating in the commission to allocate production even after the monopoly officially ended, is just such an official action that facilitates an anticompetitive agreement and reinforces its effect. In summary, the Authority contended that the system that the national law required (before 1994) or supported (after 1994) rendered Art. 81 ineffective. The Authority's decision came in July 2000; an appeal was taken, and the Italian court referred the legal question to the European Court of Justice, which affirmed the Authority's position in a landmark ruling in late 2003.

Advocacy and policy studies

Box 6. Competition policy and RIA

Include competition policy in the processes of ensuring legislative quality.

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

There have been no significant further developments in integrating competition policy in regulatory impact analysis, at the national or the regional levels.

23. Some of the Authority's recent advocacy efforts are tied to its enforcement responsibilities. In April 2003, it issued a report on motor vehicle liability insurance, an industry in which it had found illegal restrictive agreements. This report linked poor performance, with prices (premiums) increasing yet service deteriorating, in part to the industry's adoption of common rather than competitive approaches. In June 2004, the Authority and the Electricity and Gas Regulatory Authority released a report taking stock of progress in the deregulation of the natural gas industry, 3 years after legislation to that purpose was enacted. The agencies concluded that the strongly dominant position of ENI was thwarting efforts to

introduce competition and proposed steps to introduce real competition through new entrants not bound to ENI by take or pay contracts.

Box 7. Entry constraints

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

Concessions, licenses, and other rules impair competition in many sectors. Examples appear in the treatment of local services, retail distribution, and local transport. Many are imposed by local and regional governments. Although the scope of the problem has not been measured completely, it is clearly substantial. The aggregation of such constraints, which primarily impact non-traded services, may be a cause of Italy's persistent inflation differential. The Authority produced a report in December 2001 about services subject to regulatory constraints on entry, pricing, product and service quality at the local and the national levels. This was an effort to focus the reform effort, by demonstrating the need for principled action to correct the general problem. The 2001 Report observed that broad action based on a general principle might be more effective than trying to deal with such restraints one by one, for the latter strategy might stimulate strong resistance from the producer interests without enlisting countervailing support from consumer interests.

The subjects identified in the Authority's report, and in the 2001 Report, continue to present challenging problems. Local authorities still control entry into taxi and bus services, pharmacies, and many other fields in ways that distort competition.

24. Many other policy areas have been the objects of Authority comments or studies. A March 2004 report proposed ways to improve competition in taxi service, notably to overcome the resistance from incumbents who fear the loss of the value they have invested in their operating rights. An August 2004 report criticised quota-based limits on outlets for selling newspapers and magazines. Reports on rail reform in July and August 2003 strongly recommended measures such as access to rolling stock and criticised delays in achieving ownership separation of freight terminals. In June 2003, the Authority announced a fact-finding survey into the TV broadcasting industry, particularly concerning the prospects for achieving a more competitive structure for advertising on over-the-air television when signals become digital by 2006. Television broadcasting is now highly concentrated, as RAI and Mediaset between them account for 90% of Italian viewers and 97% of TV advertising.

Box 8. Public services

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

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

The framework law has given municipalities more flexibility to implement the services for which they are responsible. So far, the exercise of that flexibility has not raised the kinds of problems that the 2001 Report was concerned about.

Box 9. Sectoral legislative interventions

Avoid anti-competitive direct government interventions in sectoral problems.

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

The use of such controls has evidently not expanded. But in several areas, mostly involving media and utilities, sectoral laws still set special rules or limits based on market share. There is a 60% ceiling on any one party's acquisition of exclusive encoded broadcasting rights for the League "A" Football Championship matches. Advance notification is required if an acquisition involves direct or indirect control of 25% or more of cinema distribution and movie theatres in at least 1 of the 12 major cities in Italy.

Further recommendations

25. The EDR review suggested that aspects of the sanctions system should be strengthened. In particular, providing for individual sanctions would improve enforcement in areas such as professional services. Where restraints are imposed *via* an association, the Authority should have the power to assess fines on their members themselves since the associations typically have no turnover to speak of. And a clear and explicit leniency programme should be adopted to strengthen deterrence and enforcement, and criminal penalties against hard-core cartels should be considered. The EDR report also mentioned the usefulness of interim relief, but did not make a recommendation about that power. Now, interim relief pending a final decision can only be ordered by a court. The government is planning to submit legislation that would authorise it to make Italy's enforcement system conform to the new European Union enforcement regulation, under which the Commission can order such remedies as such as interim relief and divestiture. To make its enforcement against misleading advertisements more effective, the Authority should have the power to investigate them *ex officio*, and financial sanctions for first-time advertising infringements should also be considered.