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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES**

-- Note by Italy --

**17-18 December 2014**

*This document reproduces a written contribution from Italy submitted for Item VIII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm](http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm)*

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## ITALY

### 1. Introduction

1. This contribution will describe the changes gradually introduced in the institutional design of the Italian Competition Authority (ICA) with respect to the two issues addressed by the roundtable: independence and multi-function authorities.

2. The ICA is an independent body and several mechanisms are in place to preserve its independence, including the possibility to rely on stable resources. In this respect the Authority's independence has recently been strengthened with the approval of a provision establishing a new funding system. The new system completely eliminates public funding and substitutes it with a contribution from the market, providing the ICA with its own financial resources.

3. When established, in 1990, the Authority was a "single" function agency, whose tasks were centered on the enforcement of competition law and included the fight against unlawful agreements and abuses of dominance, merger review and advocacy on existing or proposed legislation. Over the years other functions were progressively added and rather than a single change - or merger with other authorities - the Authority experienced several "incremental changes" that broadened its functions making it a "multi-function" agency.

### 2. The Italian Competition Authority as an independent authority

4. The ICA is an independent administrative authority established by Law no. 287 of 10 October 1990 (the "Competition Act"). It has the status of a **public agency** whose decisions are solely taken on the basis of the law. The Government may not interfere with ICA's activity or overrule its decisions. No other public body has supervisory powers or may give instruction or advise on the application of competition rules.

5. Several mechanisms are in place to ensure independence. The ICA is chaired by a Chairman and two Commissioners, who form the Board<sup>1</sup>. They are appointed by the speakers of the two Chambers of the Italian Parliament for a 7-year non-renewable mandate and may not be dismissed. The Competition Act lays down strict requirements for the **appointment of the ICA's Board**. The President shall be a person of well-known independence who has already held high institutional responsibilities. The Commissioners shall be selected among judges serving on the Supreme Administrative Court, the Court of Auditors or the Court of Cassation, or full professors of Economics or Law or respected business executives of particularly high professional reputation. The position of Chairman or Commissioner is incompatible with any other professional activity or office in public or private entities.

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<sup>1</sup> The number of Commissioners – originally four – has been reduced pursuant to Decree Law no. 201/2011 as a cost-saving measure.

6. The Authority is **operationally independent** and may design its internal organization in the shape that best suits the exercise of its functions. The rules governing its internal organization are laid down in an internal regulation<sup>2</sup>.

7. The **decisions-making process** is disciplined by the Competition Act and a Presidential Decree<sup>3</sup>: they both ensure a high degree of discretion and independence, also in terms of separation of functions between the Board and the investigative divisions. In fact, the Board is to be kept informed by the offices of the results of the investigations, but has no power to instruct them nor to impinge on the exercise of their investigative duties. Decisions are adopted by the Board on the basis of unbinding proposals by the investigative divisions. All decisions are published and illustrate the evidence and the reasoning on which they are based.

8. All decisions are also subject to **judicial review** by administrative Courts: the Regional Administrative Tribunal (TAR) of Lazio as the first instance court and the Council of State as the higher court.

9. With regard to **accountability**, the ICA is required to submit to the Prime Minister and the Parliament an Annual Report on the activities carried out in the previous year. Although not required to do so, in the latest Annual Report presented in June 2014 the ICA estimated the impact of its decisions using the OECD Guidance on Impact assessment, with a view to increasing awareness of the benefits that its activity brings about to consumers.

10. The issue of **financial resources** is particularly crucial in ensuring the Authority's operability and sustaining its independence. A new funding system was adopted in 2012 (effective in 2013). Law Decree no. 1 of 24 January 2012 introduced a mandatory contribution for companies incorporated in Italy whose turnover exceeds the threshold of 50 million Euro. This contribution replaces previous financial resources of the ICA, i.e., public budget and merger fees. As a result of the new funding system, the Authority no longer needs to engage in negotiations with the Government every year to secure its financial resources, thus being reinforced in its independence.

11. The ICA compiles its own separate annual budget may freely allocate its resources. Nevertheless, the ICA is subject to some budget constraints, transparency requirements and spending review. In particular, cost saving measures addressed to the public sector also apply to the ICA. In addition, the annual budget and the financial statement are published on the Official Journal and directors' salaries are public. Moreover, the levels of salaries are disciplined by law and the financial statement is subject to scrutiny by the Court of Auditors.

### 3. The Italian Competition Authority as a multi-function authority

#### 3.1 Consumer protection

12. Over the years, the ICA has been entrusted with additional duties and powers on top of competition enforcement and competition advocacy. The major development in this respect has been the competence on consumer protection.

13. In 1992, only two years after its establishment, the ICA was entrusted with the power to protect consumers from **misleading advertising** by the Legislative Decree no. 74 of 25 January 1992. In 2000

<sup>2</sup> Decision no. 25153 del 28 October 2014, available on the ICA's website at [http://www.agcm.it/trasp-statistiche/doc\\_download/4500-es42-14.html](http://www.agcm.it/trasp-statistiche/doc_download/4500-es42-14.html).

<sup>3</sup> Presidential Decree no. 217 of 30 April 1998.

advertising control was expanded to also include the assessment of comparative advertising. The ICA's sphere of competence on consumer protection has been further enlarged in scope and effectiveness over time until very recently.

14. As from 2007, following to the transposition of the EC Directive no. 29/2005 into the Italian law system (through the Consumer Code), the ICA's has also been assigned powers pertaining to **unfair commercial practices** by undertakings to the detriment of consumers. If an undertaking tries to distort consumers' economic choices by disseminating untruthful information, omitting relevant information or using undue forms of influence, the ICA may act and impose fines. In 2012, the ICA's protection against unfair commercial practices was also extended to the so-called "micro-firms" (i.e., entities, companies or associations with less than 10 employees and an annual turnover that does not exceed 2 million Euro). Moreover, ICA has been entrusted with the enforcement of rules against unfair contract terms with reference to contractual forms or general contractual conditions proposed by sellers or suppliers to consumers.

15. The Legislative Decree no. 21 of 21 February 2014, which transposed the Directive on **consumer rights** (2011/83/EU), represents the latest step of the legislative process that has led to a substantial strengthening of the Authority's competences on consumer protection. On one hand, the Decree introduces novelties in consumer contracts regulation, mostly regarding distance contracts, stipulated online or by telephone, but also in traditional contracts signed inside business premises. On the other hand, the Decree states some important provisions in relation to administrative protection conferring an exclusive competence to the Authority to enforce the new rules.

### 3.2 *Contractual relations*

16. Other functions progressively assigned to the Authority are more heterogeneous in nature.

17. In 1998, Art. 9 of Law no. 192 of 18 June 1998 charged the ICA with the enforcement of rules on subcontracting in manufacturing activities that forbid the abuse of customers' or suppliers' state of **economic dependence**. The latter occurs in case of excessive imbalance in the rights and obligations pertaining to two undertakings involved in a commercial relation. An abuse may consist in refusal to sell or buy, imposition of unjustified or discriminatory contract conditions or arbitrary interruption of established commercial relations.

18. Art. 62 of Law no. 27 of 24 March 2012 specifically concerns vertical relationships within the agricultural food chain and is designed to prevent unfair conducts in case of significant **imbalance of contractual power**. The provision entrusts the ICA with surveillance and fining powers. For the provision to be applicable, a dominant position is not required: it suffices that an asymmetrical contractual power exists.

19. These provisions have been interpreted by the ICA in the framework of antitrust enforcement, which aims at promoting level-playing field and effective competition rather than protecting weaker market players. This may also imply protecting weaker players, as long as they risk being eliminated from the market although they are as efficient as their stronger competitors. The provision regarding economic dependence has not been applied so far, while the first case concerning significant imbalance of contractual power has been opened in December 2014<sup>4</sup>.

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<sup>4</sup> See <http://www.agcm.it/stampa/news/7326-istruttoria-e-ispezioni-dellantitrust-nei-confronti-di-eurospin-per-violazione-dellart-62-del-dl-12012-nel-mercato-agro-alimentare.html>.

### 3.3 *Other functions*

20. While the areas of competence illustrated so far relate to the assessment of conducts by undertakings, there are other duties carried out by the ICA that are not immediately linked to the task traditionally assigned to competition authorities.

21. In 2004 the Authority was assigned the task to enforce the so called **conflict of interest** law which provides rules against conflicts of interest for Government officials. Law no. 215 of 20 July 2004 seeks to ensure that the decisions of Government officials are exclusively guided by the public interest. As a preventive measure, the law indicates a list of incompatibilities between a public position as the President of the Council and the Ministers and Undersecretaries and other roles. The ICA is also entrusted to monitor whether Government actors omit mandatory actions or shape their decision-making in ways that favor their personal holdings or those of their relatives, to the detriment of the public interest. At the time of its approval, the law prompted a heated debate, especially as regards its effectiveness<sup>5</sup>.

22. Pursuant to Law Decree no. 1 of 24 January 2012, the ICA may attribute to undertakings operating in Italy a **legality rating**, i.e., a score based on indicators of compliance to the law that may be relevant with regard to public procurement, public funding and access to bank credit. The same provision also charged the ICA with the task of reporting to the Parliament on the rules necessary to promote ethical behavior by firms.

### 3.4 *The Italian Competition Authority and the sector regulators*

23. The ICA's multi-functions have not come to the undertaking of responsibilities in sector regulation. On the contrary, independent authorities deal with regulation in crucial industries such as telecommunication, energy, banking and insurance. An authority in charge of transport regulation has been established in 2013.

24. The Government has recently adopted cost-saving measures that might indicate the wish to promote a certain degree of alignment amongst sector regulators and between regulators and the ICA, including the recourse to common services or unified selection procedures for the staff<sup>6</sup>. However, to date it has been widely understood that the ICA and the sector regulators have different functions and that the ICA is competent for competition and consumer protection issues, even in regulated markets<sup>7</sup>.

## 4. **Concluding remarks**

25. In the ICA's experience, independence has proven to be a fundamental pillar that ensures credibility and effectiveness to enforcement and advocacy initiatives. Independence is the result of the interaction of multiple factors, including professional, financial, organizational and operational elements. That said, the ICA is committed to preserve and enhance transparency and accountability.

26. Multi-functions have been beneficial to the ICA, especially insofar competition enforcement and consumer protection are broadly complementary. The increasing role played by the ICA in consumer

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<sup>5</sup> The Parliament is currently examining reform proposals. In October 2014, the Chairman expressed the ICA's view on ways to improve the law in a Parliamentary hearing. See [http://www.agcm.it/trasp-statistiche/doc\\_download/4463-audizione-20141001.html](http://www.agcm.it/trasp-statistiche/doc_download/4463-audizione-20141001.html).

<sup>6</sup> See Art. 22, paragraph 4, of Decree Law no. 90 of 24 June 2014.

<sup>7</sup> Enforcement of competition law in the banking sector, which originally fell within the competence of the Bank of Italy, has been assigned to the ICA by law in December 2005.

protection has interplayed well with competition enforcement. The main challenges have been managing the workload and identifying the organizational design that best enables to benefit from synergies.

27. Other areas of competence acquired eventually, such as contractual relationships, are more distant from the core of the ICA's activity. The ICA has interpreted the relevant provisions in light of its general approach to competition issues, which seeks to protect weaker firms insofar as they risk being eliminated from the market despite being as efficient as their stronger competitors. In this framework, the mentioned provisions might prove to be helpful in addressing specific issues, but they have not been applied yet.

28. The ICA has been called to also deal with other topics, which fall out of the purely economic spheres, i.e., conflict of interest or legality rating. The appointment of the ICA for these delicate tasks might be interpreted as an acknowledgment of ICA's independence and its role in ensuring fairness and compliance to rules.

29. Finally, the ICA believes that a strong and consistent institutional design can be preserved and strengthened by recognizing the intrinsically different nature and role of competition authorities compared to regulators. Competition, which is enshrined in the European Treaty and Italian Constitution, is a value of constitutional rank and general application. The ICA assesses specific conducts as an "adjudicator": it exercises powers similar to the judicial powers and therefore is requested to be neutral and highly independent, like an ordinary judge, both with respect to Government and the parties to the proceedings. Sector specific regulation is typically an *ex-ante* activity that strives to achieve a balance between different objectives. Since regulators are rule-making entities and are responsible for the implementation of policies and strategies set by the Government, they may need to act in close cooperation with Government departments, although in an impartial and non-discriminatory manner.

30. In light of the above, in Italy the separation between the ICA and sector regulators currently in place is proving very effective. By contrast, possible forms of merger between these two different types of institution would raise several complex issues and risk to undermine the effectiveness of the system.