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Comments on the Italian Antitrust Law of October 10, 1990

I. National and Supranational Antitrust Law

On October 10, 1990, Italy joined the other members of the European Community (EC) by enacting its first antitrust legislation, entitled Norms for the Protection of Competition and the Market.[1] Both the activity of European unification and the existing division of jurisdiction between the antitrust law of the European Economic Community (Community or EEC) and that of its Member States could cause this new legislation to see most action in the area of mergers and acquisitions. The Treaty of Rome provides that Community antitrust law applies to activities that "affect trade between the Member States," leaving national law to regulate purely intrastate activity.[2] However, just as the United States has developed a broad interpretation of the commerce clause of the United States Constitution,[3] this provision of the Treaty of Rome is understood to include "virtually any practice which brings about some noticeable effect on market conditions or

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1. Italian Antitrust Law of Oct. 10, 1990, n.287, Norms for the Protection of Competition and the Market [Norme per la tutela della concorrenza e del mercato], 240 Gazzetta Ufficiale della Repubblica Italiana [Gazz. Uff.] 3 (Oct. 13, 1990) [hereinafter Italian Antitrust Law]. Page references are to the Italian Official Gazette with each citation. All quotations from this law are in English as translated by the author and M. Emanuela Galanti. The Senate report accompanying the proposal for this law pointed out that "Italy is still today, together with Turkey, the only member of the [Organization for Economic Cooperation and Development—OECD] in which competition is not protected by law." Relazione Della 10a Commissione Permanente nn. 1240 e 1012-A, at 3 (1989).

2. Treaty Establishing the European Community, March 25, 1957, arts. 85(1), 298 U.N.T.S. 11, 48 [hereinafter Treaty of Rome].

3. "The Congress shall have [the] Power . . . to regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cls. 1, 3. For a discussion of the powers of United States Congress under the commerce clause, see Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

structures and involves undertakings of a size above the level affected by the current Notice'' of the European Commission on competition policy.[4]

This broad jurisdiction is not found in the Community's Merger Regulation, enacted on December 21, 1989, which strictly limits the scope of Community law by setting a high, minimum size for the undertakings conducting transactions to which it applies.[5] If the companies involved fall under this very high limit, national law will control the merger, even if the merger brings together companies from different Member States. Thus, the antitrust law of each Member State can be expected to evaluate, prohibit, or permit a large share of the mergers leading the European market gradually to overcome the effects of national borders. This makes the introduction of an antitrust law into a country like Italy—which has never had antitrust legislation outside of very limited areas—both interesting and challenging.[6]

In most cases, national and supranational laws should regulate merger activities on two separate levels according to the size of the transaction. These levels will have three points of possible, shared jurisdiction. Any transaction will thus be initially located on the regulatory level of either Community or national law, but contain the possibility of being affected by the other. A merger will come under national jurisdiction if worldwide turnover of all the companies involved is less than five billion ECU, no two companies in the transaction have an EC-wide turnover of more than 250 million ECU each, or each of the companies involved earns two-thirds of its Community-wide turnover within a single Mem-

4. D. G GOYDER, EEC COMPETITION LAW 105 (1988) (referring to article 85(1) of the Treaty of Rome). On article 86 cases, the European Court of Justice said:

> When an undertaking in a dominant position within the Common Market is likely to be eliminated, it does not matter whether the conflict relates to the latter's exports or its trade within the Common Market, once it has been established that this elimination will have repercussions on the competitive structure within the Common Market.

IVA VAN BAEL & JEAN FRANCOIS BELLAS, COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY 4-10 (1990 ed.) (quoting Joined Cases 6 & 7/73, Instituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corp. v. Comm'n, 1974 E.C.R. 223, 252-53, [1974 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8209 (1974)).

5. The Regulation applies only to concentrations with a ''Community dimension,'' which is defined as:

> a. the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5[,]000 million, and
> b. the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million,
> unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, art. 1(2), 32 O.J. (L 395) 1, 3 (1989) [hereinafter Merger Regulation].

6. As one authority states:

> 1. Except in the area of newspaper publishing, Italy has no anti-trust laws and therefore mergers having no effect on trade among the Member States are generally not subject to any direct anti-trust scrutiny in Italy.
> 2. On the other hand, even leaving aside corporate law controls, there are several Italian law provisions affecting mergers: the major regulated industries, such as banking and insurance, are a notable example thereof.
> 3. Furthermore, one should consider that large segments of the Italian economy are owned or controlled by the state and mergers involving state owned or controlled companies are variously subject to governmental control and approval.

MAGRONE, GORLA, PASINETTI, BROSIO & CASATI, MERGER CONTROL IN THE EEC 111 (1988).

ber State.[7] This high minimum revenue for the application of the Community's merger regulation might be lowered when the provision is examined for possible revision in 1993.[8] At the present time all transactions below this level come under the sole jurisdiction of national law, with one exception. If a Member State chooses to refer a case to the Commission's review, the Commission may take jurisdiction, provided that the merger "affects trade between the Member States."[9] This provision allows the Member State to place merger analysis back into the broad, Community jurisdiction practiced under articles 85 and 86 of the Treaty of Rome,[10] and is the only case where such jurisdiction can pass from the Member State to the Community.

Jurisdiction can pass in the other direction, from the Community to the Member State, in two circumstances. First, if a merger affects a "distinct market" within a Member State, where the patterns of supply and competition are homogeneous enough to separate that market from other areas, the Member State may inform the Commission, which may decide to retain jurisdiction or refer the case to the Member State.[11] Second, even if the Commission decides to retain jurisdiction, the Member State may, regardless of the Commission's final decision, take "appropriate measures to protect legitimate interests," such as "[p]ublic security, plurality of the media, and prudential rules."[12] The presence of "distinct markets" and Member State actions to protect national interests will therefore create an overlap between the single Community Merger Regulation and the twelve Member State jurisdictions. The space of this overlap will no doubt become more distinct as Commission decisions firm up the margins of the various definitions.

If the revenue of the companies involved in a transaction is below the Merger Regulation's minimum revenue and the Member State does not refer the case to the Commission, it will fall squarely within the jurisdiction of the Member State—even if it does not affect a "distinct market" or "national interests." The following comments discuss the newly enacted Italian antitrust legislation in this context, emphasizing its conformity to Community standards and probing the areas where it differs from those standards. Any lasting differences will create the possibility of divergent treatment for mergers above and below the Merger Regulation's cutoff point, and thus an incentive to place the merger under national or Community law in order to take advantage of those differences.

7. Merger Regulation, *supra* note 5, art. 1, 32 O.J. at 3.
8. *Id.*
9. *Id.* art. 22(3), 32 O.J. at 11.
10. *See supra* note 4 and accompanying text.
11. Merger Regulation, *supra* note 5, art. 9, 32 O.J. at 7.
12. *Id.* art. 21(3), 32 O.J. at 11.

II. The Italian Antitrust Law, "Norms for the Protection of Competition and the Market"

Italy adopted its antitrust legislation, Norms for the Protection of Competition and the Market, on October 10, 1990; the law went into force the following day.[13] This compact law covers agreements that restrict trade,[14] abuses of a dominant or monopoly position,[15] and mergers,[16] as well as providing for the regulation of these activities in the context of credit institutions,[17] insurance companies,[18] publishing, and broadcasting.[19] The Italian law addresses the same types of transactions and activities as the Community's antitrust law and Merger Regulation, but applies only to those transactions and activities "that do not fall under the ambit of application" of Community law.[20] It thus offers a near-mirror image of Community law, but on a lower level of international activity and revenue for the companies involved.

When addressing mergers, the Italian law would thus provide jurisdiction for transactions falling below the Community's floor of a required, minimum turnover, and above its own floor requirement of 500 billion lire for the annual turnover of all of the companies involved in the transaction, or 50 billion lire for the annual turnover of the company to be acquired.[21] If either of these criteria is met, the transaction must be reported to the Authority Guarding Competition and the Market (Authority).[22] Because both the Merger Regulation and the Italian law use as a determining factor the total turnover of all the companies participating in a transaction, the difference between these two figures can give us an idea of the range of the Italian law: the Italian law will apply when the turnover of all of the participating companies is below five billion and above 420 million ECU (assuming a 1,200 lire per ECU rate of exchange). This is a range of 4.58 billion ECU, and at the top of it, the transactions under the Italian law could be substantial. In this large band a new law with a completely new agency to administer it will discipline competition in a market that has never been subjected to antitrust regulation.[23]

13. Italian Antitrust Law art. 34, 240 Gazz. Uff. at 11.
14. *Id.* art. 2, 240 Gazz. Uff. at 3.
15. *Id.* art. 3, 240 Gazz. Uff. at 3.
16. *Id.* arts. 5-6, 240 Gazz. Uff. at 4.
17. *Id.* arts. 20, 27-30, 240 Gazz. Uff. at 8, 9-11.
18. *Id.* art. 20, 240 Gazz. Uff. at 8.
19. *Id.*
20. *Id.* art. 1(1), 240 Gazz. Uff. at 3.
21. *Id.* art. 16(1), 240 Gazz. Uff. at 6-7. Assuming a dollar/lira exchange of 1:1,200, the Italian law would cover transactions where the turnover within Italy for all the interested companies is more than $420 million, or the turnover of the target company is more than $42 million. *See supra* note 5 in order to compare this to the Community floor, which would serve as the Italian law's ceiling.
22. Italian Antitrust Law art. 16, 240 Gazz. Uff. at 6-7. For a discussion of the Authority, see *infra* note 24 and accompanying text.
23. The Senate Report points out the less-than-open structure of the present Italian market: "[I]n thirteen manufacturing sectors, the first four companies hold more than 75 percent gross internal revenue." RELAZIONE DELLA 10A COMMISSIONE PERMANENTE nn. 1240 e 1012-A, at 3 (1989). Active

A. The Administering Authority

The Italian antitrust law has created a new agency, the Authority Guarding Competition and the Market, to administer antitrust supervision.[24] This Authority will have investigative and decision-making autonomy,[25] and be funded through its own provision in the budget for the Ministry of Industry, Commerce, and Craftsmanship.[26] It will consist of a president and four members chosen from among distinguished judges, jurists, and economists,[27] each appointed for a nonrenewable term of seven years.[28] The Authority will have a staff of 150 persons, plus 50 additional persons on a separate, contract basis.[29] All personnel working for the Authority will be barred from taking other positions or performing any consulting or other commercial activity.[30] The Authority's decisions may be appealed to the regional administrative court of Lazio, and will be under the exclusive jurisdiction of an administrative judge.[31]

B. The Authority's Investigative and Judicial Functions

The authority will have a judicial, an investigative, and a consultive capacity. It will hear arguments and decide on whether to permit specific concentrations,[32] investigate the existing law and economy for evidence of possible anticompetitive measures or practices,[33] and remain available as a consultant to the Government on the competition aspects of legislation and regulations under consideration.[34]

When a merger agreement is notified to the Authority, the latter has 120 days to investigate the agreement and reach a decision on the merits.[35] If the Authority issues no decision within 120 days, the agreement is deemed to be approved, unless the initial notification contained false or incomplete information.[36] Once a party or other source has given official notice of a proposed, completed, or ongoing merger, the Authority has 30 days within which to initiate an investigation,[37] and 45 days from the date of this initiation to publish its decision, with

enforcement of the antitrust law would have great impact without even trying to be aggressive, and could result in a substantial reformation of the Italian economy.

24. Italian Antitrust Law art. 10, 240 Gazz. Uff. at 5 (the agency's name in Italian is Autorita garante della concorrenza e del mercato).
25. *Id.* art. 10(2), 240 Gazz. Uff. at 5.
26. *Id.* art. 10(7), 240 Gazz. Uff. at 5.
27. *Id.* art. 10(2), 240 Gazz. Uff. at 5.
28. *Id.* art. 10(3), 240 Gazz. Uff. at 5.
29. *Id.* art. 11(1), (4), 240 Gazz. Uff. at 5.
30. *Id.* art. 11(3), 240 Gazz. Uff. at 5.
31. *Id.* art. 33(1), 240 Gazz. Uff. at 11.
32. *Id.* art. 12(1), 240 Gazz. Uff. at 6.
33. *Id.* art. 21, 240 Gazz. Uff. at 8.
34. *Id.* art. 22, 240 Gazz. Uff. at 8.
35. *Id.* art. 4(1), (3), 240 Gazz. Uff. at 4.
36. *Id.* art. 13, 240 Gazz. Uff. at 6.
37. *Id.* art. 16(4), 240 Gazz. Uff. at 7.

the possibility of extending this period by an additional 30 days if the companies do not fully cooperate in providing information and data.[38] This timetable easily complies with the four-month period within which Member States must publish the results of cases referred to them by the Commission under the Merger Regulation's "distinct market" exception.[39] The Authority has only 15 days to initiate the investigation of a tender offer,[40] and must publish its decision not to investigate a routinely notified merger within 30 days of notification.[41] The Authority may initiate an investigation after these time limits have lapsed if the parties' notification was incomplete or "gravely inexact" [*gravemente inessatte*].[42]

The Authority can ask all interested parties to furnish relevant information, and to make their files available to officials for inspecting and copying of documents.[43] All information and documents that are released or copied are protected by "official secrecy" [*segreto d'ufficio*].[44] The Authority is required to give all interested parties a chance to be heard at "every stage of the inquiry," including the inquiry's close.[45]

C. Italian Competition Law Is Based on Community Standards

The questions investigated and the standards applied to decide whether an agreement or concentration will be approved are nearly identical to those applied by the Commission under Community law. The list of agreements between undertakings that are prohibited by article 2 of the Italian law differs from the definition given in article 85(1) of the Treaty of Rome only in that it does not include concerted practices.[46] The standard against which these agreements are measured—whether they have "as their object or effect the prevention, restriction or distortion, in a consistent manner, within the national market or in a relevant part of it"—differs from article 85(1) of the Treaty of Rome only by including the requirement of a "consistent manner."[47] At this point it would be

38. *Id.* art. 16(8), 240 Gazz. Uff. at 7.
39. Merger Regulation, *supra* note 5, art. 9(6), 32 O.J. at 7 (1990).
40. Italian Antitrust Law art. 16(5), 240 Gazz. Uff. at 7.
41. *Id.* art. 16(4), 240 Gazz. Uff. at 7.
42. *Id.* art. 16(7), 240 Gazz. Uff. at 7.
43. *Id.* art. 14(2), 240 Gazz. Uff. at 6.
44. *Id.* art. 14(3), 240 Gazz. Uff. at 6.
45. *Id.* art. 14(1), 240 Gazz. Uff. at 6.
46. The Italian law defines "agreements" as "accords and/or practical arrangements between enterprises, as well as the deliberations of consortiums, trade associations, and other such organizations, even if adopted in accordance with the provision of statute or regulation." *Id.* art. 2, 240 Gazz. Uff. at 3.

The Treaty of Rome includes "agreements" and "decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States . . . ." Treaty of Rome, *supra* note 2, art. 85(1), 298 U.N.T.S. at 47-48.

47. The following presents the relevant section of the Italian law. (Wording not included in the Treaty has been italicized. Treaty wording not included in the Italian Law has been inserted in brackets. Insubstantial differences in phrasing have not been indicated.)

difficult to estimate what length of time would sufficiently establish a "consistent manner," but, if the Authority found it to require a steady trend of substantial duration, this could present an incentive to have an agreement reviewed under the Italian rather than the Community law.

The Italian law defines "abuse of a dominant position" with a near-verbatim transcription of article 86 of the Treaty of Rome,[48] and makes only one significant deviation from the Merger Regulation in the criteria used to evaluate whether a merger "constitute[s] or strengthen[s] a dominant position."[49] The Italian law differs by not including consideration of "the interests of the intermediate and ultimate consumers" in evaluating the effects of market dominance.[50] This consideration could at least partially be covered by the inclusion of the interests of "users" in the Italian law,[51] but may also indicate a desire to keep antitrust issues at the level of industrial policy and away from the economic touchstone of the "consumer good." This, and the criterion of "international

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> Agreements between enterprises are prohibited if they have as their object or effect the prevention, restriction or distortion, *in a consistent manner,* of the play of competition within the [Common] *national market or in a relevant part of it,* and also through activities that:
> a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> b) limit or control production, *openings or access* to the market, investments, technical development or *technological progress;*
> c) share markets or sources of supply;
> d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Italian Antitrust Law art. 2(2), 240 Gazz. Uff. at 3; Treaty of Rome, *supra* note 2, art. 85(1), 298 U.N.T.S. at 47-48.

48. According to the relevant provisions of the Italian Antitrust Law and the Treaty of Rome, it is a prohibited abuse of a dominant position to:

> a) directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions;
> b) *impede* or limit production, *opening or access* to the market, technical development or *technological progress* to the prejudice of consumers;
> c) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> d) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Italian Antitrust Law art. 3, 240 Gazz. Uff. at 3; Treaty of Rome, *supra* note 2, art. 86, 298 U.N.T.S. at 48-49. (Wording not included in the Treaty of Rome has been italicized. Treaty wording not included in the Italian law has been inserted in brackets. Insubstantial differences in phrasing have not been indicated.)

49. To evaluate whether a concentration constitutes or strengthens a dominant position, the Authority will examine:

> [t]he possible choices available to suppliers and users, the market position of the interested undertakings [and their economic and financial power], their access to sources of supplies or to the openings in the market, the structure of the market, the competitive situation of national industry [actual or potential competition from undertakings located either within or without the Community], [legal or other] barriers to entering the market for competing enterprises, as well as the course of supply and demand of the products or services in question.

Italian Antitrust Law art. 6(1), 240 Gazz. Uff. at 4; Merger Regulation, *supra* note 5, art. 2(1), 32 O.J. at 3. (Wording not included in the Merger Regulation has been italicized. Regulation wording not included in the Italian law has been inserted in brackets. Insubstantial differences in phrasing have not been indicated.) The Italian law also fails the include "the interests of intermediate and ultimate consumers." *See infra* note 50 and accompanying text.

50. "In making this appraisal [of concentrations], the Commission shall take into account . . . . the interests of the intermediate and ultimate consumers . . . ." Merger Regulation, *supra* note 5, art. 2(1), 32 O.J. at 3.

51. *See supra* note 49 and accompanying text.

competitiveness'' discussed below,[52] could be a result of the Italian law's being introduced into an economy where, in thirteen industrial sectors, the largest four firms control 75 percent of output,[53] and of the Italian Government's desire to avoid shocking its economy with a flurry of consumer-oriented antitrust activity.

The control of another company requisite for establishing a concentration is defined using the Community standard of ''decisive influence'' [*influenza determinante*] over the controlled company.[54] Neither law counts shares purchased by a bank or other financial institution for resale as controlling holdings in the company from which they are purchased.[55] However, the Merger Regulation allows these shares to be voted in preparation for their resale, which must take place within one year of purchase, and the Italian law prohibits their voting, but allows the financial institution to hold them for two years before resale.[56]

While the Italian law grants exemptions from the prohibitions of agreements restricting trade or pricing according to criteria very similar to those provided by article 85(3) of the Treaty of Rome,[57] it also includes the criterion of interna-

52. *See infra* note 58 and accompanying text.

53. *See supra* note 23 and accompanying text.

54. 1. For the purposes of the present article, one has control in those *cases contemplated by Article 2359 of the Civil Code*, or else through rights, contracts or other legal relationships that confer, either alone or together, when taking into account the legal and factual circumstances, the possibility of exercising a decisive influence on *the activity of* an enterprise, also by:

> a) Ownership or the right to use all or part of the assets of an undertaking,
>
> b) Rights, contracts, *or other legal relationships* that confer decisive influence on the composition, *deliberations* [voting], or decisions of the organs of an enterprise.
>
> 2. Control is acquired by the person or enterprise *or by the group of persons or enterprises:*
>
> a) who are the holders of rights or the beneficiaries of the contracts or parties to other legal relationships listed above,
>
> b) who, while not being holders of such rights, beneficiaries of such contracts, or parties to such legal relationships have the power to exercise the rights deriving therefrom.

Italian Antitrust Law art. 7, 240 Gazz. Uff. at 4; Merger Regulation, *supra* note 5, art. 3(3)-(4). (Wording not included in the Merger Regulation has been italicized. Regulation wording not included in the Italian law has been inserted in brackets. Insubstantial differences in phrasing have not been indicated.) Article 2359 of the Italian Civil Code defines a ''controlled corporation'' as one over which another corporation has control by virtue of either (a) a majority shareholding, (b) a dominant shareholding or other tie giving the same effect, or (c) through a controlled subsidiary that controls the corporation in question.

55. Italian Antitrust Law art. 5(2), 240 Gazz. Uff. at 4; Merger Regulation, *supra* note 5, art. 3(5)(a), 32 O.J. at 4.

56. The Merger Regulation provides:

> A concentration shall not be deemed to arise where . . . credit institutions or other financial institutions or insurance companies . . . hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to *determining the competitive behaviour* of that undertaking or provided that they exercise such voting rights only with a view to *preparing the sale of* all or part of *that undertaking* or of *its assets* or the sale of *those securities* and that any such sale takes place within *one year* . . . . (emphasis added).

Merger Regulation, *supra* note 5, art. 3(5)(a), 32 O.J. at 4. The Italian law provides that:

> The acquisition of control by a bank or a financial institution at the time of constitution of an enterprise or at the time of an increase in the latter's capital will not give rise to a concentration, provided the shares were *purchased with a view to their resale* on the market, and that during the period *they are held, not to exceed two years*, the shares are *not voted*. (emphasis added)

Italian Antitrust Law art. 5(2), 240 Gazz. Uff. at 4.

57. The Authority may authorize, with the proper precautions and for a limited period, agreements or categories of agreements prohibited by Article 2 if these agreements create an improvement in the conditions of [production or] market supply and have the effect of substantially benefiting consumers, and if the exemptions are granted *taking*

tional competitiveness that is playing an important role in the Commission's administration of the Merger Regulation.[58] The criterion of international competitiveness could play a significant role in the administration of the statute. As Areeda and Turner point out, "One cannot judge the possible consequences of a merger of two competitors without knowing their respective importance in their market."[59] The test for international competitiveness turns what would otherwise be a study of market power within Italy or a part of Italy into an investigation of worldwide market power. If a merged firm dominates the Italian market and yet is small when viewed from an international perspective, the argument can be made that the merger must be permitted to create a viable "national champion" in Italy. If Italy, and the Community as a whole, change market definition to create such champions, it could spur something like a "race to the bottom"[60] of antitrust law in which each country would act to match the corporate size in the country with the laxest enforcement.

Questions of jurisdiction and police power between the Community and the Member States are thus not the only problems created by this two-tiered system of law. Its attempt to overcome the legal and economic obstacles of national borders makes it increasingly difficult to define markets through the use of such borders. The development and possible expansion of this doctrine of "international competitiveness" in Italy could work to undermine the regulatory strength of the new antitrust law. At its worst, the widespread application of this exception could lead to a definition of the relevant market as that including all international competition, perhaps admitting and ignoring abusive dominance at home for the sake of combating larger industrial blocks abroad.[61]

> *into account the need for guaranteeing that enterprises are competitive at the international level, especially regarding qualitative and quantitative increases in production, improvements in distribution, and technical and technological progress.* However, exemptions may not be granted for restrictions that are not strictly necessary to achieve the goals listed in this paragraph or that result in eliminating competition in a substantial part of the market.

Italian Antitrust Law art. 4(1), 240 Gazz. Uff. at 3-4; Treaty of Rome, *supra* note 2, art. 85(3), 298 U.N.T.S. at 48. (Wording not included in the Treaty of Rome has been underlined. Treaty wording not included in the Italian law has been inserted in brackets. Insubstantial differences in phrasing have not been indicated.)

58. The Director of the Commission's Merger Task force, H. Colin Overbury, has said that the Commission is making international competitiveness a consideration, and that the merger of the Volvo and Renault truck and bus divisions took into account the competitiveness of the resulting firm when weighing the large market concentrations that would result from the merger, and approved the concentration. 1992—THE EXTERNAL IMPACT OF EUR. UNIFICATION, Apr. 19, 1991, at 10 (BNA).

59. 2 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW 346 (1978).

60. The reference is to Professor Cary's argument that American corporations gravitate to the state where management has the most freedom, and thus the various states race to loosen their laws even more than their neighbors, in order to entice corporate investment. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 705 (1974).

61. In the context of antidumping investigations United States International Trade Commissioner Ronald Cass has made the argument that such an ability to control prices at home is a characteristic of corporations that are able to dump, or sell at a lower price abroad than at home, because of their home market power. U.S. INT'L TRADE COMM'N, 3.5" MICRODISKS AND MEDIA THEREFOR FROM JAPAN 77-78 (1988) (distributed to libraries in microfiche) (Commission determination in investigation no. 731-TA-389 (preliminary) under Tariff Act of 1930). The "international competitiveness" exception to the enforcement of antitrust law would help create such "national champion" corporations

On the whole, however, because the Italian law duplicates so many of the relevant standards developed and applied by the Commission, it can be expected to track and develop with Community antitrust doctrine. This could make its application much more regular and dependable than might otherwise occur. Differences, like Italy's exclusion of "concerted practices" from its definition of competition-restricting agreements, will certainly make the range of application somewhat different. The criterion of international competitiveness may also be applied with more zeal in Rome than in Brussels. On the whole, however, a merger in Italy could be expected to take place under standards very similar to those that would control if the transaction had a "Community dimension," and was monitored by the Commission.

D. Italian Remedies and Enforcement

The Authority has a number of powers with which it can enforce decisions and facilitate investigations. It has been given ample powers of discovery for fact-finding during its judicial inquiry: If interested parties fail to supply requested information, they are subject to a fine of up to 50 million lire, and if they falsify such information, they are subject to a fine of up to 100 million lire.[62] In the case of application for a holding in a credit entity, if the application for authorization omits or falsifies information, the officers, directors and partners of the applying company can be punished by imprisonment of between one and five years and a fine of between four and 20 million lire.[63]

If, upon investigation, the Authority finds that an agreement restricts competition, the latter is "completely void"[64] unless an exemption is granted.[65] This exemption may be revoked if it is abused, or the facts upon which it is based change.[66] If, when the Authority receives notice of a proposed merger, it finds the merger "susceptible of being prohibited" as anticompetitive, it can suspend the merger for the duration of the investigation.[67] If the merger has already taken place, the Authority may take steps that probably include an ordered divestiture, to "restore the conditions of effective competition to the market."[68] If a properly notified merger is found to create a dominant position that eliminates or reduces competition on the national market, the Authority may block the transaction or prescribe alterations to eliminate the anticompetitive effects.[69] If the interested

which would then be capable of using high prices at home to subsidize losses abroad as they work to gain market share. Thus, this exception, while helping the country's international competitiveness, could have the latent effect of encouraging dumping.

62. Italian Antitrust Law art. 14(5), 240 Gazz. Uff. at 6.
63. *Id.* art. 29(3), 240 Gazz. Uff. at 11.
64. *Id.* art. 2(3), 240 Gazz. Uff. at 3.
65. *Id.* art. 4, 240 Gazz. Uff. at 3-4.
66. *Id.* art. 4(2), 240 Gazz. Uff. at 4.
67. *Id.* arts. 16(4), 17(1), 240 Gazz. Uff. at 7.
68. *Id.* art. 18(3), 240 Gazz. Uff. at 7.
69. *Id.* art. 6, 240 Gazz. Uff. at 4.

parties do not comply with orders or sanctions imposed by the Authority, the law provides for further monetary sanctions and even gives the Authority the power to close a disobedient party's company for a period of thirty days.[70]

E. Special Provisions for Financial Institutions and the Media

The law also provides for specific sectors already under the supervision of a specialized government agency. For the insurance sector, the Authority retains its control over antitrust and merger supervision, but is required to consult and receive the opinion of the Institute for the Supervision of Private Insurance and Collective Interests before taking action.[71] In the areas of broadcasting and publishing, the Authority cedes its control over agreements, monopolies, and mergers to the agencies charged with regulating those sectors, and these agencies administer the antitrust law in their limited area just as if they were the Authority.[72] The Authority retains the power to alert these regulatory agencies of any agreements, dominant positions, and mergers that might violate the law,[73] and each agency retains power over those sectors "belonging to its competence."[74]

In the area of credit institutions and companies the law provides a more complex treatment. First, it grants the agencies charged with regulating the financial sector full power over antitrust matters, to be executed under the provisions of the antitrust law.[75] Then it adds special provisions that supplement and amend previous sections as they apply to holdings in credit institutions. Any holding of more than 5 percent or that gives control of the credit entity must be reported to the Bank of Italy.[76] Control is assumed from a holding of more than 25 percent of a privately held and more than 10 percent of a publicly held institution unless another shareholder has a larger block.[77] Any holding between 1 and 5 percent of the stock of a credit entity must be reported by mail to the Bank of Italy,[78] and if a shareholder has over 5 percent of the company's stock, any increase or decrease of 2 percent in his or her holding must be reported.[79] If a party plans to transfer control of an entity, the Bank of Italy must be notified before the transfer takes place.[80] A credit entity may not hold more than 15

70. *Id.* arts. 15, 19, 240 Gazz. Uff. at 6-7.
71. *Id.* art. 20(4), 240 Gazz. Uff. at 8.
72. *Id.* art. 20(1), 240 Gazz. Uff. at 8.
73. *Id.* art. 20(6), 240 Gazz. Uff. at 8.
74. *Id.* art. 20(7), 240 Gazz. Uff. at 8. This last provision could cause jurisdictional difficulties until interpreted by the reviewing court. It reads:

> Regardless of the measures in the preceding paragraphs, when the agreement, the abuse of a dominant position, or the concentration regards companies operating in sectors subjected to the supervision of more than one authority, each one may adopt the measures belonging to its competence.

75. *Id.* art. 20(2), 240 Gazz. Uff. at 8.
76. *Id.* art. 27(1), 240 Gazz. Uff. at 9.
77. *Id.* art. 27(2), 240 Gazz. Uff. at 9.
78. *Id.* art. 27(3), 240 Gazz. Uff. at 9.
79. *Id.* art. 27(4), 240 Gazz. Uff. at 9.
80. *Id.* art. 27(5), 240 Gazz. Uff. at 9.

percent of another credit entity unless this is achieved through a voting trust and it does not constitute a majority in the second entity.[81] All previously existing holdings of more than 1 percent of a credit entity must be reported when the law goes into effect, and all holdings of more than 5 percent will be approved if the Bank of Italy does not respond within 180 days of notice.[82] The Bank of Italy may also block Member State entities from gaining control of a credit institution unless adequate safeguards are made to ensure the latter's independence.[83]

Authorization of a purchase of control is granted if the Bank of Italy does not respond within 90 days,[84] and may always be suspended, revoked, or reinforced to carry out previous agreements on the granting, ceding, or modification of control.[85] The Interministerial Committee for Credit and Savings will promulgate rules for the concession, suspension, and revocation of authorization, on the constitution of a voting trust, on a definition of "dominant position" as it applies to credit entities, and on the formalities of a "protocol of autonomy" to be signed by all applications for authorization.[86] The Interministerial Committee for Credit and Savings will also issue instructions for the elimination of conflicts of interest between credit entities and their relevant shareholders.[87]

Purchased shares may not be voted until the transaction or activity is approved, although they may be used to hold the regular shareholders' meeting.[88] If credit entities do not alienate any controlling or 15 percent holdings they have in other credit entities within six months of the Bank of Italy's review, the court will order their sale by a public agent.[89] Appeals from administrative regulations issued under this law will be taken to the regional administrative court of Lazio, and will be under the exclusive jurisdiction of an administrative judge.[90]

Because at least four different agencies, including the Authority and the agencies regulating credit institutions, broadcasting, and publishing, will have jurisdiction over antitrust cases, the antitrust law could become subject to different meanings, or at least differences in procedure, within the Italian Government. Because each of these agencies will retain an indeterminate portion of its jurisdiction, conflicts may also arise during a single case. It is difficult to predict the extent of these intragovernmental differences. However, the agencies' reviewing court should eventually be able to iron out any differences that prevent effective administration of the statute.

81. *Id.* art. 27(6), 240 Gazz. Uff. at 9.
82. *Id.* art. 27(7), 240 Gazz. Uff. at 10.
83. *Id.* art. 27(8), 240 Gazz. Uff. at 10.
84. *Id.* art. 28(1), 240 Gazz. Uff. at 10.
85. *Id.* art. 28(2), 240 Gazz. Uff. at 10.
86. *Id.* art. 28(4), 240 Gazz. Uff. at 10.
87. *Id.* art. 30(3), 240 Gazz. Uff. at 11.
88. *Id.* art. 29(1), 240 Gazz. Uff. at 11.
89. *Id.* art. 29(2), 240 Gazz. Uff. at 11.
90. *Id.* art. 33(1), 240 Gazz. Uff. at 11.

III. Conclusion

The Italian antitrust law will remain closely tied to the law of the European Community, but will also differ from the latter. First, Italy will use "international competitiveness" as a factor in weighing whether an exemption should be granted for an agreement that restricts competition. Although this factor is also considered in the Commission's analyses of mergers, its specific inclusion in Italy's principal antitrust law ensures that international competition will have significant weight in the Authority's decision making, and may possibly move market definition from the national toward the international. Second, unlike the Treaty of Rome, the Italian law does not list "concerted practices" as a type of agreement that could restrict competition, and also requires that all agreements affecting competition do so in a "consistent manner." This not only excludes from regulation informal market control, but could mean that, also in practice, the Authority will not investigate temporary restraints, even if their impact on competition is significant. Third, the Merger Regulation allows shares held by financial institutions to be voted (for limited purposes) although they will not be counted toward constituting control. Because the Italian law does not allow such shares to be voted, only companies large enough to invoke Community jurisdiction will be able to vote shares in this situation.

Each of these differences is significant, and each could determine the outcome of a given case, but the majority of the Italian law is essentially constructed with European Community principles. For this reason, the introduction of this new law to what could be an unruly Italian economy will have the advantage of a detailed and well-crafted body of law and precedent to help administrators, management, and attorneys through the early years of its application.