

# *Fordham International Law Journal*

---

*Volume 23, Issue 3*

1999

*Article 2*

---

## The Maturation of Italy's Response to European Community Law: Electric and Telecommunication Sector Institutional Innovations

Patrick Del Duca\*

Duccio Mortillaro†

\*

†

Copyright ©1999 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# The Maturation of Italy's Response to European Community Law: Electric and Telecommunication Sector Institutional Innovations

Patrick Del Duca and Duccio Mortillaro

## Abstract

After briefly describing the essential mandates of the relevant EC directives, this Article discusses the novel-for-Italy independent regulatory commissions that are critical to the developing competitive frameworks for electricity and telecommunication. It then reviews applicable substantive law for each of the electricity and telecommunication sectors, and offers examples of how the independent regulatory commissions are working to shape competitive markets. Italy's independent regulatory commissions have resulted in a reorganization of its electric and telecommunication sectors quite different than that contemplated as recently as the early 1990s. Italy's creation of its new independent regulatory commissions, as well as the mixed experience of its Law No. 9 of 1991 experiment with non-ENEL power plants have shaped: the initiatives that ENEL's own management has taken to restructure and reposition ENEL; recent regulation relative to restructuring of the electric sector as a whole; and the terms of the mandated break up of ENEL. As for telecommunications, the acquisition of Telecom Italia - Italy's former State-held monopoly, via a hostile, bank-funded takeover - and the entrance of new players in the exploding fields of cellular and fixed line telephony provide evidence that the new institutional arrangements are beginning to produce the desired competitive markets.

## ARTICLES

# THE MATURATION OF ITALY'S RESPONSE TO EUROPEAN COMMUNITY LAW: ELECTRIC AND TELECOMMUNICATION SECTOR INSTITUTIONAL INNOVATIONS

*Patrick Del Duca\**

*Duccio Mortillaro\*\**

### I. CONTRAST OF CURRENT IMPLEMENTATION AND PAST DISMISSAL OF COMMUNITY LAW

In 1964, Italy's Constitutional Court summarily dismissed European Community ("EC" or "Community") law. Today, Italy's independent regulatory authorities energetically are embracing Community initiatives to favor competitive electricity and telecommunication markets. This Article recounts the history of this reversal of position and illustrates its importance in Italian economic and political life.

Alternative explanations of why Italy has come to embrace Community law can be offered. One such explanation is that Italy's lack of rooted identity as a nation state motivates its apparent enthusiasm for all things European.<sup>1</sup> The European Union ("EU") and Community law and institutions provide necessary reinforcement of Italy's governmental institutions, while at the same time nurturing the opportunities for regional diversity.<sup>2</sup> This Article's presentation of the evolution of Community law in

---

\* Partner, Kelley Drye & Warren LLP. Mr. Del Duca is a graduate of Harvard Law School, Université de Lyon (DEA), European University Institute (Ph.D), and the Università di Bologna, Facoltà di Giurisprudenza (*laurea*). Mr. Del Duca serves as adjunct professor at UCLA School of Law.

\*\* Senior Associate, Kelley Drye & Warren LLP. Mr. Mortillaro is a graduate of the University of Miami School of Law, UCLA School of Law (LLM) and the Università di Milano, Facoltà di Giurisprudenza (*laurea*).

The authors thank the following for comments on the manuscript: Louis De Duca (Dickinson School of Law—Pennsylvania State University); Yves Miedzianogora (Kelley Drye & Warren LLP); and Arthur Rosett (UCLA School of Law).

1. G. Frederico Mancini, *The Italians in Europe*, FOREIGN AFF., Mar./Apr. 2000, at 122.

2. *Id.*

Italy both confirms and contradicts this view. As confirmation, it is unlikely that the innovation of independent regulatory authorities in Italy's electricity and telecommunication sectors would have been actualized without the stimulus of Community policy initiatives in favor of competitive markets. As contradiction, the Italian judicial accommodation to Community law and the Italian adoption of the independent regulatory authority model, evidence the capacity of Italian state institutions to innovate and adapt to new realities and challenges.

The leadership of the Constitutional Court in successive phases, and more recently the leadership of Italian regulatory authorities, partly explains why Italy now largely embraces Community law. Another factor is the very success of the Common Market. As Community barriers to trade have diminished, the volume of the Community's internal market has grown, and hence the pressures either to adhere to Community mandates or be left behind has increased commensurately. The political and economic achievements of the Community's single market initiative, the expansion of the Community to include additional Member States, and the launch of the European Monetary Union, among other factors, have built momentum toward the Italian embrace of Community law. The Cold War and the only-recently broken political deadlock in Italy, which permanently excluded a significant fraction of the electorate from participation in the national government, also contributed to Italy's receptiveness to Community initiatives. The evolution of these events, and the progress of the Common Market, correspond broadly to the transitions described in this Article on the focus of the Community law—Italian law relationship in Italy. Initially, the Constitutional Court arrogated all say relative to the relationship of Community and Italian law to itself (and strictly limited the role of Community law). In a subsequent phase, the Constitutional Court allowed all Italian courts to address the relationship within the framework of the general acceptance of Community law established by the Constitutional Court. Thereafter, Italy's Parliament, via the La Pergola law and the creation of the independent regulatory authorities with responsibility for implementing Community mandates for competitive markets, made a significant contribution. The independent regulatory authorities are now the leading edge for the application of Community law in Italy.

Italy's current embrace of Community mandates for competition in the electricity and telecommunication sectors contrasts sharply with its dismissal of Community law in connection with the early 1960s creation of the national electric monopoly, Ente nazionale per l'energia elettrica ("ENEL"). In 1964, decisions associated with *Costa v. ENEL*, Italy's Constitutional Court<sup>3</sup> and the European Court of Justice (or "ECJ")<sup>4</sup> addressed questions arising from the expropriations that created ENEL. The practical effect of the opinion of each court in *Costa v. ENEL* was to allow the expropriations to proceed without disturbance from Community law. The opinions of these two high courts, however, squarely contradicted each other on the important issue of how Italian and Community law relate to each other.

At that time, Italy's Constitutional Court dismissed the relevance of Community law while the European Court of Justice asserted its supremacy. What happened was two high courts talking past each other. There was no mechanism for one court to impose its holding on the other and no superior authority to which to appeal. The Italian Constitutional Court's watershed 1984 *Granital* opinion<sup>5</sup> reconciled the direct judicial conflict. It did so by acknowledging the supremacy of Community over Italian law so long as Community law is consistent with "the fundamental principles of the [Italian] constitutional order and the inalienable rights of the human being."<sup>6</sup>

*Granital* is a milestone in how the Italian approach to Community law has changed. But, the evolution of the relations between Italian and Community law extends beyond judicial reconciliation. The atmosphere of diffidence and confrontation has receded from a much broader range of national institutions than just the courts. Indeed, with respect to the restructuring of the Italian electricity and telecommunication sectors, the institutions at the forefront of the relationship have changed. No longer are they defensive of their fundamental charters; rather, they are independent regulatory commissions, known as "Authorities." Their express mission is to implement Community

---

3. *Costa v. ENEL*, Corte cost., Mar. 9, 1964, n.14, 19 Racc. uff. corte cost. 131 (1964), 1964 Giur. Cost. 129.

4. *Flaminio Costa v. ENEL*, Case 6/64, [1964] E.C.R. 592, [1964] C.M.L.R. 425.

5. *Granital S.p.A. v. Amministrazione finanziaria*, Corte Cost., June 8, 1984, n.170, 66 Racc. uff. corte cost. 367 (1984), 1984 Giur. Cost. 1988.

6. *Granital S.p.A.*, 1984 Giur. Cost. at 1116.

mandates in favor of competitive markets. In the combative days of the *Costa* decisions, such institutions as the Authorities simply did not exist.

EC directives<sup>7</sup> are driving the restructuring now to create competitive markets in Italy's electricity and telecommunication sectors. The Italian response to the present Community mandates for competitive markets in these sectors demonstrates institutional innovation and maturation relative to the situation a generation ago. In contrast to the peripheral role of Community law during the period of ENEL's formation, Italy has created new institutions—independent regulatory commissions—specifically to effect the reorganization of its electric and telecommunication sectors as required by current Community directives in order to facilitate competition. These independent regulatory commissions have the independence and resources required to embrace and implement effectively the Community requirements for creation of competitive markets in these sectors. This Article describes Italy's independent regulatory commissions as relevant institutional innovations that go beyond the 1984 Italian judicial accommodation to Community law, and offers them as an illustration of the maturation of Italy's in relation to EC law.

A brief description of the early 1960s clash of Italian and European courts associated with ENEL's creation as the national electricity monopoly will serve as a baseline for assessing how far Italy's relationship with Community law has evolved. This Article then describes the Law No. 9 of 1991 framework,<sup>8</sup> which required ENEL to purchase the electricity produced from qualified new, non-ENEL plants in Italy at favorable prices. This law established a dent in ENEL's integrated national electric monopoly, although it did not create a competitive framework for the supply of electricity. Rather, it promoted the development of a limited number of new power plants based on State concessions that, in conformity with a thinly veiled mercantilist philosophy,

---

7. Electricity: European Parliament and Council Directive No. 92/96, O.J. L 27/70 (Jan. 30, 1997). Telecommunications: Commission Directive No. 301/88 O.J. L 131/73 (1988); Council Directive No. 387/90, O.J. L 192/1 (1990); Commission Directive No. 90/388, O.J. L 192/10 (1990); Commission Directive No. 46/94, O.J. L 268/15 (1994); Commission Directive No. 95/51, O.J. L 256/49 (1995); Commission Directive No. 19/96, O.J. L 74/13 (1996).

8. Law No. 9 of January 9, 1991 (It.), *supp. ord. to Gazz. Uff. No. 13* (Jan. 16, 1991) (containing rules for implementation of new national energy plan, including institutional aspects, and hydroelectric, geothermal, self production, and tax provisions).

assured returns without market risk to the new plants' owners. Nonetheless, it opened the generation of electricity to a new field of market operators. The regulatory framework for realizing a power plant based on Law No. 9 of 1991 has been in constant evolution. The Byzantine detail of this evolution provides added perspective on how radically the new independent regulatory commissions effected cultural reform through maintenance of market principles. The framework of Law No. 9 of 1991 was far from a competitive model. It, nevertheless, helped to prepare the way for acceptance in Italy of the current Community mandate to restructure the electric sector and to allow a substantial measure of true competition.

The EC directives of the last decade on liberalization of the electricity and telecommunication sectors specify in some detail both the permissible structures of national electric and telecommunication markets and the principles to be respected in their operation. This Article reviews Italy's substantial initiative to implement the mandates of these directives.<sup>9</sup>

After briefly describing the essential mandates of the relevant EC directives, this Article discusses the novel-for-Italy independent regulatory commissions that are critical to the developing competitive frameworks for electricity and telecommunication. It then reviews applicable substantive law for each of the electricity and telecommunication sectors, and offers examples of how the independent regulatory commissions are working to shape competitive markets. Italy's independent regulatory commissions have resulted in a reorganization of its electric and telecommunication sectors quite different than that contemplated as recently as the early 1990s. Italy's creation of its new independent regulatory commissions, as well as the mixed experience of its Law No. 9 of 1991 experiment with non-ENEL power plants have shaped:

---

9. For an overview of European Community ("EC or Community") liberalization initiatives relative to electricity, energy, telecommunications, and other fields such as railroads, air transport, and airports by the director of the research department of Italy's Antitrust Authority, see Alberto Heimler, *Competition and Regulation in Public Utilities*, Paper Delivered Before the Twelfth Plenary Session of the Organization for Economic Cooperation and Development ("OECD") Advisory Group on Privatization, (Sept. 17, 1998), <<http://www.oecd.org//daf/corporate-affairs/privatisation/competition/heimler.pdf>> (on file with the *Fordham International Law Journal*).

- the initiatives that ENEL's own management has taken to restructure and reposition ENEL;
- recent regulation relative to restructuring of the electric sector as a whole; and
- the terms of the mandated break up of ENEL.

As for telecommunications, the acquisition of Telecom Italia—Italy's former State-held monopoly, via a hostile, bank-funded takeover—and the entrance of new players in the exploding fields of cellular and fixed line telephony provide evidence that the new institutional arrangements are beginning to produce the desired competitive markets.

## II. EVOLVING INSTITUTIONAL RESPONSE TO COMMUNITY LAW

### A. *Birth of Italy's National Electric Monopoly (ENEL): Clash Between the Italian Constitutional Court and the European Court of Justice*

Current developments in both the electric and telecommunication sectors illustrate the maturation of Italy's response to Community law.<sup>10</sup> As to both sectors, Community law had no significant affirmative application in the Community's early years.

When the Treaty of Rome took effect in 1957, Italy's telecommunication system existed as a government enterprise associated with the postal service. It therefore fell within the Treaty of Rome Article 90(2) (Treaty of Amsterdam, Article 86(2)) exemption for State monopolies.<sup>11</sup> Accordingly, it was not a focus

---

10. For highlights of various aspects of Italy's current posture relative to EC law, as well as a review of the fundamental elements of EC law, see PAOLO MENGOCZI, *EUROPEAN COMMUNITY LAW: FROM THE TREATY OF ROME TO THE TREATY OF AMSTERDAM* (Patrick Del Duca trans., Kluwer, 1999). Note that Mr. Mengozzi is now an Italian member of European Court of First Instance. For an overview of the Italian legal system, see Louis Del Duca & Patrick Del Duca, *The Italian Legal System: Adapting to the Needs of a Dynamic Society*, 3 NAT'L IT. AM. L.J. 1 (1995).

11. Treaty establishing the European Economic Community, art. 90(2), Mar. 25, 1957, 298 U.N.T.S. 11, 50 [hereinafter EEC Treaty]; Consolidated version of the Treaty establishing the European Community, art. 86(2), O.J. C 340/3, at 210 (1997), 37 I.L.M. 79, 94 [hereinafter Consolidated EC Treaty], incorporating changes made by Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1, (1997) [hereinafter Treaty of Amsterdam] (amending Treaty on European Union ("TEU"),



of Community law attention until the recent telecommunication sector liberalization directives.

Italy's electric sector has a very different history. This history contrasts dramatically with the current collaborative approach to Community law. As of the late 1950s, a plethora of small and medium size electric companies, with sometimes overlapping service territories and operating at a variety of frequencies and voltages, generated and distributed Italy's electricity.<sup>12</sup> ENEL's creation, in the early 1960s through the nationalization of the mosaic of public and private electric companies that previously existed in Italy,<sup>13</sup> was meant to achieve economies of scale.

---

Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty). Article 86(2) of the Consolidated version of the Treaty establishing the European Community ("Consolidated EC Treaty"), following the spirit of Article 90(2) of the Treaty establishing the European Economic Community ("EEC Treaty"), provides:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

In Italy, until the early 1990s, the Mails and Telecommunications Ministry controlled telecommunications as a monopoly. *See* GUIDO CERVIGNI, ET AL., *MONOPOLIO E CONCORRENZA NELLE TELECOMUNICAZIONI—IL CASO OMNITEL (Il Sole 24 Ore S.p.A. 1998)*. It did so through Società Italiana per i Servizi Telefonici ("SIP"), a corporation controlled by the Italian Treasury Ministry through the government industrial holding company Istituto per la Ricostruzione Industriale ("IRI"). CERVIGNI *supra*, at 54. Law No. 71 of January 29, 1994 (It.), Gazz. Uff. No. 24 (Jan. 31, 1994) created the framework for the privatization of Telecom Italia.

12. AMENDMENT NO. 3 TO FORM F-1 REGISTRATION STATEMENT UNDER THE U.S. SECURITIES EXCHANGE ACT OF 1933, filed by ENEL S.P.A. WITH THE U.S. SECURITIES AND EXCHANGE COMMISSION, Registration No. 333-10944, 52 (Oct. 28, 1999) [hereinafter ENEL PROSPECTUS].

13. *See* *Italie, in ENERGY SURVEY—KEY INDICATORS BY COUNTRY 61*, OECD, (visited on Feb. 12, 2000) <<http://www.oecd.org>> (on file with the *Fordham International Law Journal*) [translation from French by authors]. This states that:

On the eve of the 1962 nationalization, the electric energy market was characterized by the presence of four categories of operators: national or regional industrial and financial groups (such as Edison, SIP, Adriatica, Centrale, SME, Società Elettrica Sicilia, and Società Elettrica Sardegna), industrial enterprises who produced for their own needs ('auto-producers'), 'small' enterprises (with a production of less than 15 million Kwh per year) and electric enterprises of local governments ('municipal enterprises')."

*Id.*

Since then, ENEL has been Italy's national electric utility and until recently was wholly owned by the Italian Treasury Ministry.<sup>14</sup> It has been responsible for the bulk of generation, transmission, and retail distribution of electricity in Italy.<sup>15</sup>

A 1962 law<sup>16</sup> mandated the expropriation of approximately 1250 companies,<sup>17</sup> which were collapsed into one entity to create ENEL. The law declared that:

for purposes of general utility the national Entity [ENEL] will provide for the coordinated utilization and the upgrading of the installations, for purposes of assuring with minimum costs of management an availability of electric energy adequate in quantity and price to the requirements of a balanced economic development of the Country.<sup>18</sup>

The law provided compensation at market rates for the enterprises expropriated, payable in installments over a decade, with the opportunity for expropriated parties to make first an administrative appeal to a specially created commission, and then recourse to the ordinary civil and administrative courts.<sup>19</sup>

The litigation of lasting significance<sup>20</sup> triggered by the wide-ranging expropriation arose from an Italian court of quite modest jurisdiction and questioned its constitutionality. The issues of Italian constitutional law related to the consistency of the expropriation with provisions of the Italian constitution, however, were readily resolved by the Italian Constitutional Court in favor of the expropriations. The European Court of Justice's declaration as to the significance of EC law was the element of the litigation that has had lasting resonance beyond the specific instance of ENEL's creation.

Among the many individuals affected by the expropriations,

14. Law No. 333 of July 11, 1992, art. 15 (It.) (concerning transformation of ENEL into joint stock private law company and converted into law with modifications by Law No. 359 of August 8, 1992 (It.), *Gazz. Uff. No. 190* (July 13, 1992)).

15. In 1998 ENEL generated 73% of the electricity produced in Italy and distributed 93% of the electricity sold to final consumers. ENEL PROSPECTUS, *supra* note 12, at 5. ENEL's 1998 revenues were approximately US\$21.3 billion, with a net income of approximately US\$2.3 billion. *Id.*

16. Law No. 1643 of December 6, 1962 (It.), *Gazz. Uff. No. 316* (Dec. 12, 1962).

17. ENEL PROSPECTUS *supra* note 12, at 50.

18. Law No. 1643 of 1962, art. 1, ¶ 3.

19. *Id.* arts. 5, 6.

20. For a full, current discussion of the exchange between the European Court of Justice and the Italian Constitutional Court and the present status of the Constitutional Court's relevant jurisprudence, see MINGOZZI, *supra* note 10, at 93-112.

one Milan lawyer,<sup>21</sup> Flaminio Costa, took legal action. He initiated proceedings before a justice of the peace (or "*giudice conciliatore*") in Milan in his capacities as a shareholder of an expropriated company and as an electricity consumer.<sup>22</sup> The *giudice conciliatore's* jurisdiction can be thought of as similar to that of a justice of the peace, *i.e.*, the *giudice conciliatore* had jurisdiction over small matters and was not required to have extensive legal training. Mr. Costa initiated the proceeding to claim that he was not obligated to pay an invoice from ENEL in the minimal amount of 1925 lire (at that time less than US\$5).<sup>23</sup> The *giudice conciliatore* stayed the initial proceeding so as to refer questions of Italian constitutional law to Italy's Constitutional Court for a determination as to whether the 1962 law creating ENEL and related measures was consistent with the Italian constitution.<sup>24</sup> Thereafter, Mr. Costa appears to have initiated a second proceeding that raised substantially the same issues, and in that proceeding the *giudice conciliatore* referred questions of EC law to the ECJ.<sup>25</sup> The Italian Constitutional Court rendered its opinion on the questions posed to it first, and then the ECJ responded to its own referral from the *giudice conciliatore* with a necessarily indirect, but strong and politically astute message to Italian authorities, including the Italian Constitutional Court.

### 1. Italian Constitutional Court's *Costa* Decision—A Dualist View of Community and Italian Legal Systems

In its opinion, the Italian Constitutional Court summarily disposed of the Italian constitutional questions related to the conformity with the Italian constitution of the 1962 law that mandated the expropriations to create ENEL as a national mo-

21. Opinion of Advocate LaGrange, *Flaminio Costa v. ENEL*, [1964] E.C.R. 585, 600, [1964] C.M.L.R. 425, 436.

22. *Id.* at 588, [1964] C.M.L.R. at 426.

23. *Id.* at 600, [1964] C.M.L.R. at 436.

24. *See* COST. art. 134 (It.). Article 134 of the Italian Constitution provides, in relevant part, that "[t]he Constitutional Court shall decide: disputes concerning the constitutional legitimacy of laws and acts having the force of law, adopted by the State and the Regions . . ." Constitutional Law No. 1 of February 9, 1948 (It.), *Gazz. Uff.* No. 43 (Feb. 20, 1948), and Law No. 87 of March 11, 1953, *Gazz. Uff.* No. 62 (Mar. 14, 1953) provide the mechanism for referral by any judge of a relevant question of constitutionality to the Constitutional Court and the suspension of the underlying proceeding pending the Constitutional Court's answer.

25. *Costa v. ENEL*, 1964 *Giur. cost.* 129, 150; Opinion of Advocate LaGrange, *Flaminio Costa*, [1964] E.C.R. at 601, [1964] C.M.L.R. at 437.

nopoly. The Italian Constitutional Court held that the asserted claim of party influence over legislators who enacted the law did not violate the constitutional mandate for their freedom from undue influence.<sup>26</sup> As to the claim that the expropriation was not duly founded on grounds of "general utility" as the Constitution required, the court deferred to Parliament as having the ability to make the appropriate judgment.<sup>27</sup> The court found that in connection with the government's adoption of decrees to implement the 1962 law, there was no improper delegation of lawmaking authority by Parliament.<sup>28</sup> The court dodged on procedural grounds the disparity of treatment claim relative to the exemption of various categories of enterprises from the expropriations.<sup>29</sup>

In the face of the Italian Constitutional Court's blunt rejection of the EC law claims, the ECJ made strong statement as to the significance of Community law. The Italian Constitutional Court determined that it had no need to consider any issue of Community law, observing that:

because there must remain firm the rule of laws subsequent to [the Italian law of execution of the treaty], according to principles of succession of laws in time, it derives that every hypothesis of conflict between the one [the law of execution of the treaty] and the others [subsequent national laws] cannot give rise to questions of constitutionality.<sup>30</sup>

The Italian Constitutional Court's analysis behind this conclusion is that Italy adhered to the Treaty of Rome by adopting an ordinary law in reliance upon its constitutional provision in Article 11 for its membership in international organizations.<sup>31</sup> The court specifically observed that the signing of a treaty by which

26. *Costa*, 1964 Giur. Cost. at 156 (referencing Article 67 of Italian Constitution).

27. *Id.* at 159 (concerning Article 43 of Italian Constitution).

28. *Id.* (concerning Articles 4 and 41 of Italian Constitution).

29. *Id.* Article 3 of the Italian Constitution provides for equality of treatment.

30. *Id.* at 160.

31. *Cost.* art. 11 (It.). Article 11 of the Italian Constitution provides:

Italy repudiates war as an instrument of aggression against the liberties of other people and as a means for settling international disputes; it agrees, on conditions of equality with other states, to such limitation of sovereignty as may be necessary for a system calculated to ensure peace and justice between nations; it shall promote and encourage international organizations having such ends in view.

limitations of sovereignty were assumed: "does not imply any deviation from the rules in force concerning the effectiveness in internal law of the obligations assumed by the State in the relations with other States."<sup>32</sup>

These observations represent a dualist conception of the relation between Community and national law, whereby national law permits Community law to have effect only to the extent consistent with national law, in contrast to a monist notion of Community law supremacy over national law.

## 2. European Court of Justice's *Costa* Decision—A Monist View of the Community/Italian Legal System

Consistent with standard practice, the ECJ's published decision of July 15, 1964 was accompanied by the court's summary of the underlying facts and of the parties' arguments, plus a preliminary opinion by its Advocate General, which the court largely followed. The case reached the ECJ through a Treaty of Rome Article 177 (Treaty of Amsterdam, Article 234)<sup>33</sup> referral of a question of European Community law to the Court by the Milan *giudice conciliatore*. The *giudice conciliatore's* questioned whether the 1962 law providing for the creation of ENEL was consistent with various articles of the Treaty of Rome, discussed below. The Italian Constitutional Court had determined that it did not need to reach this issue because of the supremacy of Italian law.

The ECJ followed a practice characteristic of many of its opinions. It made a strong statement on matters that required limited immediate national response.<sup>34</sup> In the instant case, it used a procedural question to enunciate a strong declaration of the supremacy of Community law. At the same time, it ruled on substantive matters in such a way as to declare the self-executing nature of several Treaty of Rome provisions, without actually having to impose any specific obligation on the judge or the parties in the national legal proceeding that gave rise to the proceeding before the European Court of Justice. This political approach by the ECJ is part of why Community law had such little direct impact on the formation of ENEL, even though the litiga-

32. *Costa*, 1964 Giur. Cost. at 160.

33. EEC Treaty, *supra* note 11, art. 177, 298 U.N.T.S. at 76-77; Consolidated EC Treaty, *supra* note 11, art. 234, O.J. C 340/3, at 273-74 (1997), 37 I.L.M. at 126 (ex Article 177).

34. See MENGOZZI, *supra* note 10, at 115.

tion associated with ENEL's creation articulated the fundamental principle of Community law supremacy.

As a preliminary matter, the Italian government argued on several grounds that the *giudice conciliatore* had improperly posed the question to the ECJ. These grounds included the following: (1) the ECJ had been asked to declare national law invalid, an act beyond its jurisdiction; (2) the question raised was not necessary to resolution of the case before the *giudice conciliatore*; and (3) the *giudice conciliatore* was restricted to application of Italian law.

The ECJ dismissed each of these grounds, and relative to the last one, made a strong statement on the supremacy of Community law. It stated:

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.<sup>35</sup>

The court went on to state that “[t]he transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.”<sup>36</sup>

The balance of the opinion following these substantive affirmations was anticlimactic relative to the fundamental point of Community law supremacy. The ECJ found that three of the four treaty provisions cited in the referring question could not be invoked by the plaintiff in the underlying action and that the judge referring the question needed to undertake factual analysis relative to the application of the remaining provisions, as follows:

- Treaty of Rome Article 102 (Treaty of Amsterdam, Article 97) required a Member State to consult with the Eu-

---

35. *Flaminio Costa v. ENEL*, [1964] E.C.R. 585, 593, [1964] C.M.L.R. 425, 455.

36. *Id.* at 594, [1964] C.M.L.R. at 456.

ropean Economic Community Commission when “there is reason to fear” “distortion of competition” from a Member State action. The ECJ found that this obligation gave rise to no individual right of action;

- Treaty of Rome Article 93 (Treaty of Amsterdam, Article 88) concerned the requirement of advance notice to the Commission of state aid to national industry and the prohibition on new state aid. The ECJ found in the instant case that there was no obligation giving rise to an individual right of action;<sup>37</sup>
- Treaty of Rome Article 53 (Treaty of Amsterdam, Article 44) prohibited introducing restrictions on rights of establishment of nationals of other Member States. The ECJ found that this Treaty provision created individual rights that national courts were required to protect. It found, however, that the prohibition was satisfied because the same prohibitions on establishment of business activity in the electric sector applied equally to nationals of other Member States as to those of Italy;
- Treaty of Rome Articles 37(1) and (2) (Treaty of Amsterdam, Articles 31(1) and (2)) concerned the requirements, respectively, of adjustment of “State monopolies of a commercial character” to avoid discrimination in the terms of procurement and marketing among nationals of various Member States, and prohibition against introducing any new measure incompatible with Article 37(1). In each instance relative to Articles 37(1) and (2) (Treaty of Amsterdam, Articles 31(1) and (2)), the ECJ found that these provisions created individuals rights that national courts must protect, while leaving their factual assessment to the referring judge.

---

37. More recent case law and EC texts are favorable to private actor challenges of state aids. See *Syndicat Français de l'Express International (SFEI) and Others v. La Poste and Others*, Case C-39/94, [1996] E.C.R. I-3547, [1996] 3 C.M.L.R. 369 (affirming that acceptance by economic operator of unlawful assistance could damage other economic operators and create cause of action under national law); Council Regulation No. 659/99, O.J. L 83/1 (1999); Commission Communication, O.J. C 318/3 (1983). In the Communication, the Commission stated:

### 3. Judicial Accommodation via the Italian Constitutional Court's *Granital* Decision—A Moderated Dualist View

In 1984, the Italian Constitutional Court enunciated an accommodation of Italian and EC law.<sup>38</sup> As previously mentioned, in its *Granital* decision the Italian Constitutional Court accepted the supremacy of Community law insofar as fundamental principles of the Italian constitutional system and human rights are concerned. The evolution of the court's view on this topic to one more accepting of Community law is of great significance in relation to the Member State and Community law. This decision ended the direct clash of the monist and dualist views which, respectively, the ECJ and the Italian Constitutional Court first expressed in the litigation arising from the nationalizations that created ENEL, and which remained largely unreconciled for some two decades.<sup>39</sup>

Both the ECJ's 1964 declaration of the principle of Community law supremacy and the Italian Constitutional Court's acceptance, albeit with the noted limitations, of this principle in 1984 are important elements of the current Italian response to Community law. The legal principles litigated in those matters were fundamental to the relationship between Community and Member State law. However, the underlying fact of the 1960s expropriation of the myriad of local electric companies in Italy and their fusion into a national monopoly was accomplished with only the most peripheral attention by Italian authorities to Com-

---

The Commission therefore wishes to inform potential recipients of State aid of the risk attaching to any aid granted them illegally, in that any recipient of an aid granted illegally, i.e. without the Commission having reached a final decision, may have to refund the aid. Whenever it becomes aware that aid measures have been adopted by a Member State without the obligations under Article 93(3) having been fulfilled, the Commission will publish a specific notice in the Official Journal warning potential aid recipients of the risk involved. The Commission also wishes to point out that the Court stated in its judgment of 19 June 1973 in Case 77/72 that 'in respect of plans to grant new aids or alter existing aids, the last sentence of Article 93(3) lays down procedural criteria amenable to assessments by the national courts'.

38. *Granital S.p.A. v. Amministrazione finanziaria*, Corte cost., June 8, 1984, n.170, 66 Racc. uff. corte cost. 367 (1984), 1984 Giur. Cost. 1988.

39. Antonio La Pergola & Patrick Del Duca, *New International Law in National Systems: Community Law, International Law and the Italian Constitution*, 79 AM. J. INT'L L. 598 (1985). The monist view is that Community law rests at the apex of one's legal system and subsumes national law. The dualist view is that Community and national law coexist as separate legal systems and that national law controls the extent where Community law is applicable.



munity law concerns. During the 1960s expropriations and creation of the national electric monopoly, the relationship between Italian and EC actors was limited to separate Italian and EC court proceedings and led to conflicting rules of law. The Italian Constitutional Court's *Granital* decision, however, allows all Italian courts to recognize the supremacy of Community law. It has not been a substitute for the further legal innovation associated with Italy's creation of independent regulatory commissions. Having autonomous regulators with resources and expertise represents an institutional innovation that implements Community law further than judicial action alone.

B. *La Pergola Law—Systematic Legislative Update of Community Law Compliance*

Subsequent to *Granital*, attention turned to the challenge of Italy's chronic failure to implement EC directives through national legislative action.<sup>40</sup> The so-called La Pergola law, Law No. 86 of 1989,<sup>41</sup> institutionalized a practice pursuant to which the government proposed to Parliament each year approval of a law that delegates to the government cabinet power to implement by decree the requirements of EC law. Institutionalization of this practice removed Italy from the bottom of the rankings relative to adoption of national measures to implement Community requirements.<sup>42</sup>

Nonetheless, delay certainly remains possible. The Bersani Decree<sup>43</sup> concerning the current reorganization of Italy's electric sector was adopted pursuant to this practice, specifically pur-

---

40. Sixth Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law, 1988, COM (89) 411 Final (Dec. 1989). Between 1981 and 1988, Italy was the object of 142 references by the Commission to the ECJ for infringement of Community law obligations. Belgium and France were in second and third places with 80 and 79 referrals respectively during the same period. *Id.* at 29, tbl. 1.

41. Law No. 86 of March 9, 1989, (It.), Gazz. Uff. No. 58 (Mar. 10, 1989). See MINGOZZI, *supra* note 10, at 143, 145.

42. As of November 29, 1999, the leading Member State target of Community proceedings for infringement of Community requirements was France, with 274 proceedings pending against it. Italy was in second place, with 202 proceedings. Denmark, with 53 proceedings pending against it, appeared the most compliant. See XVIth Report on Monitoring the Application of Community Law, COM (99) 301 Final (July 1999) [hereinafter XVIth Community Law Report].

43. Legislative Decree No. 79 of March 16, 1999 (It.), Gazz. Uff. No. 79 (Mar. 31, 1999) [hereinafter Bersani Decree].

suant to the legislative delegation of Italian Law No. 128 of 1998.<sup>44</sup> Law No. 128 of 1998 was the annual delegation of power to Italy's government to implement EC directives. Even with the benefit of this procedure, Italy breached for about two months the February 19, 1999 deadline set by the relevant Community directive for adoption of national implementation measures.<sup>45</sup> This period, however, was short enough that no eligible party made recourse to the procedures to seek condemnation of Italy in the ECJ.<sup>46</sup>

It is also noteworthy that the fundamental text for restructuring Italy's electric sector, the Bersani Decree, was adopted pursuant to an annual legislative delegation to update national compliance with Community law and not via regulatory action on the part of Italy's independent regulatory commissions, specifically the Authority for Electric Energy and Gas. This fact underlines that the institutional innovation of independent regulatory commissions does not by itself generate the fundamental structural reform in favor of competition. As the Bersani Decree's adoption demonstrates relative to the electric sector, the independent regulatory commissions are part of a broader evolution that favors Community law over national institutions.

### *C. Non-ENEL Power Plants as Precursors to Competition: The Law No. 9 of 1991 Experiment*

At the same time that the now outmoded concept of a simple sale of ENEL's shares dominated the thinking of electric sector reform, Italy copied an element of the U.S. regulatory framework to promote the creation of power plants not owned by ENEL. The U.S. Public Utility Regulatory Policies Act of 1978<sup>47</sup> ("PURPA") established that: (1) U.S. electric utilities must purchase electricity from so-called independent power plants, *i.e.*, power plants not owned by electric utilities, and (2) such electric utilities must pay the marginal avoided cost of such electricity, *i.e.*, the marginal cost that the electric utilities avoided by

---

44. Law No. 128 of April 24, 1998 (It.), *Gazz. Uff.* No. 104 (May 7, 1998).

45. European Parliament and Council Directive No. 92/96, O.J. L 27/70-79 (1997).

46. Consolidated EC Treaty, *supra* note 11, art. 230, O.J. C 340/3, at 272, 37 I.L.M. at 125 (ex Article 173).

47. Public Utilities Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 (1978).

not having to provide their own power plants to generate the electricity. Italy's Law No. 9 of 1991 embraced these two concepts.<sup>48</sup> Just as in the United States, it took several years for the regulatory issues posed by PURPA to be resolved to the point that financing and construction of PURPA power plants could begin, so too in Italy it was several years before a first wave of independent power projects began to come to fruition.

Italian regulation locked in the marginal avoided cost not incurred by ENEL for the electric energy generated by such plants at a time when oil prices and ENEL's generating costs were high.<sup>49</sup> Both values have since declined. Local governments in Italy, however, have applied high prices for purchase of the electricity from waste fired, qualifying Law No. 9 of 1991 projects as an important component of the local solution to the urban waste disposal "emergencies" declared in several Italian regions.<sup>50</sup> Notwithstanding the specific achievements of the Law No. 9 of 1991 regulatory framework, the lasting importance of what the Italian experience of these years of complex and often less than transparent rulemaking achieved was the creation of a consciousness of the possibilities for electric power development independent of the national electric monopoly, ENEL.

Law No. 9 of 1991 sets forth the general legal framework under which privately owned, renewable source plants can obtain long term contracts to sell electricity to ENEL. A series of decrees by the Minister of Industry and other statutory and regulatory measures elaborated this framework.<sup>51</sup> This framework

---

48. Law No. 9 of January 9, 1991, art. 22(5), (It.), *supp. ord. to Gazz. Uff. No. 13* (Jan. 16, 1991).

49. Interministerial Price Committee Measure No. 6 of April 29, 1992, *tit. II, art. 1*, (It.), *Gazz. Uff. No. 109* (May 2, 1992) (containing prices of electrical energy for transfer, wheeling and production on behalf of ENEL, parameters of exchange, and general technical conditions for assimilation to renewable sources).

50. Interior Ministry Ordinance No. 2560 of May 2, 1997 (It.) (creating further additions and modifications to previous ordinances concerning intervention to address emergency situation in waste disposal sector in Campania Region) [text on file with authors]; Interior Ministry Ordinance No. 2776 of March 31, 1998 (It.), *Gazz. Uff. No. 80* (Apr. 6, 1998) (creating further regulations to combat state of socio-economic and environmental emergency in Puglia Region); Interior Ministry Ordinance No. 2983 of May 31, 1999 (It.), *Gazz. Uff. No. 132* (June 8, 1999) (ordering immediate action to combat emergency situation in urban waste disposal sector in Sicily Region); Interior Ministry Ordinance No. 2992 of June 23, 1999 (It.), *Gazz. Uff. No. 152* (July 1, 1999) (ordering immediate actions to combat social, environmental, and civil defense emergency situation in waste disposal sector in Rome and its province).

51. Law No. 9 of January 9, 1991 (It.), *supp. ord. to Gazz. Uff. No. 13* (Jan. 16,

was meant to facilitate private ownership of independent power plants. It, however, remained a mercantilist exercise alien to any embrace of competitive market risk. Three aspects of the framework support this assertion. They are: (1) its merely concessionary nature, (2) its provision for subsidization by all electric users of the Law No. 9 of 1991 initiative, and (3) its reliance exclusively on State credit. The EC competition law review of Law No. 9 of 1991 projects and the EC mandate for competitive public bidding of contracts to build and operate them will be described as further confirmation of these points.

The Law No. 9 of 1991 adventure is nevertheless relevant to the creation of institutions and reorganization of ENEL necessary for the introduction of true competition in the Italian electric sector, but not because it introduced competition, which indeed it did not. Rather, the Law No. 9 of 1991 adventure accomplished a rehearsal and training of market actors so that they could press forward to exploit the beginning of competition now occurring in the sector. In addition, it demonstrated that significant new power generation capacity could be provided outside ENEL.

### 1. Legislative and Regulatory Framework

The Law No. 9 framework established two fundamental elements:

- the right to enter into a long term power contract with

---

1991) (containing rules for implementation of new national energy plan; institutional aspects, hydroelectric and geothermal, self production, and tax provisions); Law No. 10 of January 9, 1991 (It.), Gazz. Uff. No. 13 (Jan. 16, 1991) (containing rules for implementation of new national energy plan concerning reasonable energy use and conservation of renewable energy resources); Interministerial Price Committee Measure No. 6 of April 29, 1992, Gazz. Uff. No. 109 (May 2, 1992) (containing prices of electrical energy for sale, carriage, and production on behalf of ENEL, exchange parameters and general technical conditions for assimilation to renewable sources); Ministry of Industry Decree of August 4, 1994, Gazz. Uff. No. 186 (Aug. 10, 1994) (containing modifications and completions of Interministerial Price Committee Measure No. 6/1992 in matter of electric energy transfer prices); Law No. 481 of November 14, 1995, *supp. ord. to Gazz. Uff. No. 270* (Nov. 18, 1995) (containing rules for competition and regulation of public utilities services, and establishment of authority for regulation of public utilities services); Ministry of Industry Decree of January 24, 1997, Gazz. Uff. No. 44 (Feb. 22, 1997) (dealing with transfer of electric energy of new production from renewable and assimilated sources); Authority for Electric Energy and Gas Deliberation No. 70 of June 26, 1997, Gazz. Uff. No. 150 (June 30, 1997) (concerning rationalization and incorporation in electric tariff of surcharges not directed to income of State).

ENEL after timely completion of required formalities;  
and

- a methodology for determining the prices to be paid by ENEL pursuant to the long-term power contract.

The Law No. 9 of 1991 regulatory framework required the following steps to be taken in order to be entitled to enter into a power purchase contract with ENEL. The project proponents were required to give notice of intent to develop a power project to the Ministry of Industry, ENEL, and the relevant local tax office. The notice was to be accompanied by a report stating:

- general technical characteristics of the installation, including type, quantity and quality of production, a utilization plan, and primary fuel source and availability;
- location;
- date of contemplated start of operation; and
- status of authorization procedures.<sup>52</sup>

If ENEL accepted the notice as satisfactory, then it would include the proposed project in a list to be published and transmitted to the Ministry of Industry within ninety days of each June 30 and December 31.<sup>53</sup> Upon inclusion in one of the six month listings (a so-called *graduatoria*), the project proponents became eligible to enter into a "preliminary power contract" with ENEL. The preliminary power contract would contractually bind ENEL to purchase the project's power at the prices established pursuant to the Law No. 9 of 1991 legal framework.<sup>54</sup> When the project would be ready to start operation, the Law No. 9 of 1991 regulatory framework required ENEL to enter into a definitive power contract, whose form is prescribed by the regulatory framework.<sup>55</sup>

Price terms were provided pursuant to regulation and were therefore not enumerated in either the preliminary or definitive contracts. Law No. 9 of 1991 charged the Interministerial Price

52. Law No. 9 of January 9, 1991 (It.), arts. 22(1), (2), supp. ord. to Gazz. Uff. No. 13 (Jan. 16, 1991).

53. Ministry of Industry Decree of September 25, 1992, Gazz. Uff. No. 235 (Oct. 6, 1992).

54. Law No. 9 of 1991 (It.), art. 22(5).

55. *Id.* art. 22(4).

Committee, composed of the Minister of Industry and other ministers, with the specification of pricing.<sup>56</sup> In 1992, the Interministerial Price Committee issued the price setting methodology and set the initial prices by its so-called CIP 6/92 Measure (or "CIP6").<sup>57</sup> The functions of the Interministerial Price Committee were subsequently transferred to the Ministry of Industry<sup>58</sup> and then to the newly created Authority for Electric Energy and Gas,<sup>59</sup> but the initial pricing methodology remains valid.<sup>60</sup>

For new Law No. 9 of 1991 power plants, the CIP 6/92 Measure established sub-prices which, added together, formed a total price for delivered electricity.<sup>61</sup> The sub-prices were set to reflect avoided costs and include elements for the recovery of capital and operating costs, such as the costs of installation, operation and maintenance, and fuel expense.<sup>62</sup> For the various kinds of projects, a supplementary component was added for the first eight years of operation, reflecting a preferred price.<sup>63</sup> For years subsequent to the eight-year preferred incentive term, prices were about one-third of the initial preferred pricing tariff.<sup>64</sup> The sub-prices were updated annually to reflect infla-

56. *Id.* art. 22(5).

57. Interministerial Price Committee Measure No. 6 of April 27, 1992, Gazz. Uff. No. 109 (May 2, 1992) [hereinafter CIP 6/92 Measure].

58. Presidential Decree No. 373 of April 20, 1994, art. 5, (It.) Gazz. Uff. No. 138 (June 15, 1994); Law No. 537 of December 24, 1993 (It.), Gazz. Uff. No. 303 (Dec. 28, 1993) (abolishing Interministerial Price Committee ("CIP")).

59. Law No. 481 of November 14, 1995, art. 3(7), (It.), *supp. ord.* to Gazz. Uff. No. 270 (Nov. 18, 1995).

60. *Id.* art. 2(28). An argument that the Law No. 9 of 1991 framework falls outside of Article 87(1) of the EEC Treaty's (Article 83(1) of the Consolidated EC Treaty) prescription against state aids relies upon the initial setting of Law No. 9 of 1991 prices in relation to market realities and real costs at the time the prices were locked in place. Other arguments include: CIP 6/92 (or "CIP6") pricing for renewable resource power plants involves a sector too limited to distort or threaten to distort, within the meaning of Treaty Article 87(1) of the EEC Treaty, competition by affecting trade between Member States; CIP 6/92 pricing falls within the Article 87(3)(c) definition of aid compatible with the common market, because it is aid to facilitate the development of renewable resource energy, a goal compatible with Community policies, and does not "adversely affect trading conditions to an extent contrary to the common interest;" and, the protection of legitimate expectations is a fundamental principle of Community law, and the passage of time without Community action since the adoption of the Italian Law No. 9 of 1991 framework bars any interference with application of CIP 6/92 pricing.

61. CIP 6/92 Measure, *supra* note 57, *pmbl.*

62. *Id.* tit. II.3.

63. *Id.* tbl. I.

64. *Id.*

tion.<sup>65</sup>

## 2. Mere Government Concession

The Law No. 9 of 1991 framework is a classic State concession arrangement for the provision of regulated public utility services. It provided no market risk for the entities that claimed entitlement under it. All that a project proponent was required to do to claim the benefit of an entitlement was to make a number of informational filings in timely fashion. The only risk allocated to the project proponent was the risk of failing to complete the process of obtaining the clearances necessary actually to build and operate the project, and to conclude the contracts to build, operate, fund, and finance the project in timely fashion. The risks of failing to obtain a building permit from the local mayor,<sup>66</sup> an air quality permit from the Ministry of Industry,<sup>67</sup> an environmental clearance,<sup>68</sup> and an appropriate fuel supply were and remain substantial as evidenced by how few Law No. 9 of 1991 projects have yet been built.<sup>69</sup> Nonetheless, under the Law No. 9 of 1991 framework, project proponents knew in advance with certainty the price at which the electric output of their project would be sold. Also, as a practical matter the risk

65. *Id.* tit. II.7.

66. Law No. 10 of January 18, 1977 (It.), Gazz. Uff. No. 27 (Jan. 29, 1977).

67. Presidential Decree Law No. 203 of May 24, 1988 (It.), *supp. ord.* to Gazz. Uff. No. 140 (June 16, 1988) (implementing EEC Directives Nos. 779 of 1980, 884 of 1982, 360 of 1984, and 203 of 1985 concerning rules in the matter of air quality relative to specific polluting agents and pollution produced by industrial installations, pursuant to Article 15 of Law No. 183 of April 16, 1987).

68. Presidential Decree of April 12, 1996 (It.), Gazz. Uff. No. 210 (Sept. 7, 1996) (stating act of address and coordination for implementation of Article 40, first paragraph, of Law No. 146 of February 22, 1994, concerning provisions in matter of environmental impact evaluation); Decree of the President of the Council of Ministers No. 377 of August 10, 1988 (It.), Gazz. Uff. No. 204 (Aug. 31, 1988) (regulations on determinations of environmental compatibility pursuant to Article 6 of Law No. 349 of July 8, 1986, establishing Ministry of Environment and rules on environmental damage); Council Directive No. 85/337, O.J. L 175/40 (July 5, 1985) (assessing effects of certain public and private projects on environment).

69. Large Law No. 9 of 1991 projects under construction include Saarlux (551 MW heavy oil refinery residue plant located in refinery near Cagliari, Sardinia), ISAB (513 megawatt (or "MW") high sulfur residual oil plant located in refinery near Siracusa, Sicily), and API Energia (284 MW heavy oil plant located in refinery at Falconara on Adriatic coast). A large completed project is Rosen (380 MW combined cycle gas turbine plant located at Rosignano, Tuscany, chemical plant). For information on these and a handful of other more modest projects, see *Italy*, INT'L PRIVATE POWER Q., July 1999, at 205-06.

that they bore was limited to their out-of-pocket costs. The prospect of a meaningful claim against the proponents of a Law No. 9 of 1991 project for damages as a result of failure to build a contemplated power plant was remote,<sup>70</sup> particularly if the project proponents obtained the Law No. 9 of 1991 entitlements through a limited liability company without other assets.

### 3. Funding Transfer Mechanism: No Burden on ENEL; No Accountability

Understanding the financing of a Law No. 9 of 1991 project company furthers appreciation of the extent to which the Law No. 9 of 1991 framework reflects the concept of State allocation of resources and limited assumption of market risk. As a basic proposition, ENEL, now succeeded by the National Transmission Manager, Ente Gestore della Rete di Trasmissione Nazionale, S.p.A., pays the full purchase price, including the premium pursuant to the power purchase agreement. Two significant components of the price, however, are covered by resources provided through the Cassa Conguaglio per il Settore Elettrico ("CCSE") accounts. The two components covered through CCSE resources are: (1) the fuel cost component of the "avoided cost" component, and (2) the "greater cost of the specific kind of plant," which is the substantial eight year incentive

---

70. Article 15(4) of Legislative Decree No. 79 ("Bersani Decree") allows the holders of qualified CIP 6/92 contracts to surrender without sanction their CIP 6/92 contract rights within six months of the Bersani Decree's effective date. Article 16 of the standard form contract mandated by the 1992 Ministry of Industry Decree provides a force majeure clause as follows: "The periods of unavailability of capacity to ENEL or periods of non-acceptance by ENEL due to cause of force majeure not imputable, directly or indirectly, to the seller producer or to ENEL, respectively, are exempt from any penalty." The preliminary power conventions signed by ENEL typically included a further clause providing for ENEL reliance damages only if project delay seriously affects ENEL, as follows:

Nonperformance of the obligations . . . not due to causes of force majeure, will be regulated according to the rules of ordinary law in the matter of contractual responsibility. In case of serious delay in the execution of works imputable to Producer, understanding for such serious delay that greater than one year, so as to imply the necessity of a revision of the investment programs of ENEL S.p.A., this latter will have the option of requesting the rescission of the present convention, without prejudice to except the right of reimbursement of the eventual damage.

*Id.* This is an unlikely scenario given the large scale of ENEL and, with a handful of exceptions, the generally small scale of CIP 6/92 projects.



provided pursuant to Law No. 9 of 1991.<sup>71</sup> The funds collected through the CCSE accounts cover substantially all of the incentive component of the price mandated by Law No. 9 of 1991, *i.e.*, about two-thirds of the favorable CIP6 pricing during the eight-year incentive period.

The Authority for Electric Energy and Gas' Deliberation No. 70 of 1997,<sup>72</sup> one of the authority's first official acts, established a CCSE account for new plants from "renewable and assimilated sources." This account is used to collect a surcharge on final electric users to cover the "fuel cost" and "greater cost of the specific kind of plant" components mentioned above as reimbursed through CCSE resources. The general purpose of Deliberation No. 70 of 1997 was to "rationalize" Italian electric tariffs for final users. As part of simplifying and resetting the rates paid by final users, it also updated the long-standing CCSE arrangements.<sup>73</sup> In essence, through Deliberation No. 70 and its subsequent deliberations,<sup>74</sup> the Authority for Electric Energy and Gas maintained the preexisting status quo pursuant to

71. Law No. 9 of January 9, 1991 (It.), art. 22(5), *supp. ord. to Gazz. Uff. No. 13* (Jan. 16, 1991).

72. Authority for Electric Energy and Gas Deliberation No. 70 of June 26, 1997, *Gazz. Uff. No. 150* (June 30, 1997).

73. *Id.* The principal surcharges on final users that continue to exist pursuant to Deliberation No. 70 are: "A2" surcharge for abandonment of nuclear plants; "A3" surcharge to fund the account for new plants fueled by renewable and assimilated sources; and "B" surcharge, consisting principally of the "thermal surcharge" and some other variable components. *Id.* art. 3. For 1999, the total CIP 6/92 price to be paid by ENEL for renewable resource projects was 273.8, not 289.8 lire/kWh. Deliberation No. 81 of June 8, 1999, art. 3. The four regulatorily established components of this price are: (1) avoided cost of installation; (2) avoided cost of operation, maintenance, and general related expenses; (3) avoided cost of fuel; and (4) avoided cost for particular type of plant. Deliberation No. 81 of June 8, 1999, art. 2, *tbl.* Of the four components of the CIP 6/92 price, the surcharge A3 would cover elements (3) and (4); namely, the regulatorily established 58.4 lire/kWh for avoided fuel costs, and 187.8 lire/kWh for avoided cost for particular type of plant. Hence, more than two thirds of the price to be paid for a kilowatt-hour of electricity from a CIP 6/92 renewable source project (246.2 out of 289.8 lire in 1997) is covered through the CCSE surcharge mechanism.

74. Authority for Electric Energy and Gas Deliberation No. 70 of June 26, 1997, *Gazz. Uff. No. 150* (June 30, 1997). Deliberation No. 81 of June 8, 1999 updates the avoided cost components of the prices on the sale of power to ENEL under the CIP 6/92 by lowering them slightly. Most recently, Deliberation No. 160 of October 25, 1999 reset the A3 surcharge at the amount of 11.6 lire/kWh, down from its value of 13.0 lire/kWh under Deliberation No. 70 of 1997, presumably because of delay in start-up of Law No. 9 of 1991 projects. The A3 surcharge is of limited impact relative to other surcharges. Under Deliberation No. 24, the total "A" and "B" surcharges for residential users are 40.1 lire/kWh, of which the A3 element, as mentioned, is 11.6 lire/kWh.

which final users as a class cover most of the CIP6 renewable resource electricity purchase costs.

The CCSE system of surcharging all electric consumers to "equalize" ENEL's and other power distributors' costs has existed for many years.<sup>75</sup> The surcharge system began to assume its present form as far back as the oil price shocks of the 1970s. At that time, a thermal burden surcharge was used to buffer the increase in the price of fuel used by ENEL and other Italian power producers, such as the municipal electric companies. The purpose of the thermal burden surcharge was to ensure a uniform national price of electricity and to buffer rapid fluctuations in fuel prices. The CCSE was responsible for the payment of the proceeds of the thermal surcharge to the various power producers according to specified criteria related to the impact on such producers of the price of fossil fuel. Pursuant to these criteria, a power producer, such as a municipal electric company, whose power generation facilities are largely hydroelectric, would receive less than another producer whose generation facilities were entirely thermal. In addition to the thermal burden surcharge, surcharges were created in connection with Italy's abandonment of its nuclear power program,<sup>76</sup> as well as in connection with the Law No. 9 of 1991 independent power sector.

Interestingly, the Authority for Electric Energy and Gas recommended to the Industry and Treasury ministries that they not consider obligations to pay for Law No. 9 of 1991 power as stranded costs in connection with provision for payment to ENEL of liabilities assumed prior to the opening of electricity markets to competition.<sup>77</sup> This recommendation is consistent with the CCSE transfer mechanism. That is, the CCSE transfer mechanism assures that the cost of Law No. 9 of 1991 power is spread over a substantial base of electricity consumers, rather than imposed on one electric company.

#### 4. ENEL's Credit as the State's Credit

The credit rating that has counted in the financing of Law No. 9 of 1991 projects is that of the Italian State. Moody's Inves-

---

75. Gazz. Uff. No. 181 (July 11, 1974).

76. Following a 1987 national referendum, Italy legislated the retirement of the then existing nuclear power plants in 1988. ENEL PROSPECTUS, *supra* note 12, at 61.

77. *Id.* at 108.

tors Service has rated Italian sovereign debt as Aa3.<sup>78</sup> Italy's sovereign debt rating matters because pursuant to Italian Civil Code Section 2362,<sup>79</sup> the Italian State, as the sole shareholder of ENEL at the time of ENEL's signature of the preliminary power contracts, is liable for the power payments in the event of any subsequent insolvency of ENEL, or of its successors in the event of privatization or other reorganization of ENEL.<sup>80</sup>

Moody's Investors Service rated ENEL's senior unsecured lira denominated Eurobonds as Aa3,<sup>81</sup> the same rating Moody's assigns Italy's sovereign debt. Moody's analysis of ENEL's credit profile is based primarily on a sovereign analysis of the Italian State, rather than specific analysis of ENEL. This is consistent with the foregoing observation of the significance of Italian Civil Code Section 2362. What this illustrates is that Law No. 9 of 1991 projects have not faced real competitive market risks. The Italian outcome is approximately equivalent to that for a U.S. project proponent under PURPA. There, the project proponent looks to the credit ratings of an electric utility with a territorial monopoly that earns a return on its asset fixed by the state public utility commission. Although a regulated U.S. utility is not a sovereign, the credit risks in each instance reflect isolation from competitive market discipline.

##### 5. EC Competition Clearance as Exception to Prohibition on Anti-Competitive Agreements

That Law No. 9 of 1991 projects potentially fall within the scope of Community antitrust law is a further confirmation of how the Law No. 9 of 1991 regime falls outside a system of true competitive risk. The Law No. 9 of 1991 power purchase agreements require the project company to sell, and ENEL to purchase, all of the electric energy produced by the relevant project for the term established by the power purchase agreement. The exclusive purchase arrangement could be argued to violate

---

78. Moody's Investors Service, Analyst Toolbox: ENEL (Dec. 1, 1999) (on file with the *Fordham International Law Journal*).

79. CODICE CIVILE, § 2362 (It.). Section 2362 states: "[i]n the case of insolvency of a company, for company obligations which arose in the time when the shares have been owned by a sole person, the latter has unlimited liability." *Id.*

80. Article 3(2) of the Bersani Decree provides that ENEL's rights and obligations to the Law No. 9 of 1991 contracts are transferred to the new national transmission manager, Ente Gestore della Rete di Trasmissione Nazionale, S.p.A., discussed below.

81. Moody's Investors Service, *supra* note 78.

Treaty of Rome Article 85 (Treaty of Amsterdam Article 81)<sup>82</sup> prohibition on agreements that restrict competition. Likewise, the "cumulative effect" of various Law No. 9 of 1991 power purchase contracts on competition in electric power markets could be argued to violate the same prohibition.<sup>83</sup> The consequence of violating the prohibition on competition restriction is the nullity of the offending contract.<sup>84</sup> Not surprisingly, it has been the practice of lenders to Law No. 9 of 1991 projects to request some comfort from the Commission.

One of the earliest of the EC regulations, Regulation No. 17 of 1962, establishes the procedure for formally requesting the Commission to determine that the Treaty of Rome Article 85 (Treaty of Amsterdam Article 81) prohibition does not apply or that the benefits of the agreement justify the granting of an exemption.<sup>85</sup> In essence, this is a request that the Commission find either that

- (1) the power contract is not an "agreement between undertakings which may affect trade between Member States and which [has] as [its] object or effect the prevention, restriction or distortion of competition within the common market" (a determination that Article 85(1) is not breached); or
- (2) the power contract is an agreement between undertakings that contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, without imposing undue restrictions or eliminating competition with respect to a

---

82. EEC Treaty, *supra* note 11, art. 85, 298 U.N.T.S. at 47-48; Consolidated EC Treaty, *supra* note 11, art. 81, O.J. C 340/3, at 208-09 (1997), 37 I.L.M. at 93-94 (ex Article 85).

83. *Brasserie De Haecht S.A. v. Wilkin and Another*, Case 23/67, [1967] E.C.R. 407, [1968] C.M.L.R. 26 (discussing first "network effect" of cumulation of similar contracts); *Stergios Delimitis v. Henninger Bräu AG*, Case C-234/89, [1991] E.C.R. I-935, [1992] 5 C.M.L.R. 210 (holding that bundles of similar contracts do not *per se* impermissibly restrict market access); *Schöeller Lebensmittel GmbH & Co. KG v. Commission*, Case T-9/93, [1995] E.C.R. II-1611 (holding *Brasserie De Haecht* and *Delimitis* not limited to beer distribution).

84. EEC Treaty, *supra* note 11, art. 85(2), 298 U.N.T.S. at 48; Consolidated EC Treaty, *supra* note 11, art. 81(2), O.J. C 340/3, at 208 (1997), 37 I.L.M. at 93 (ex Article 85).

85. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87, *amended by* Commission Regulation No. 3385/94, O.J. L 377/28 (1994).

substantial part of the products in question (the grant of an exemption based on the Article 85(3) criteria for exemption from the Article 85(1) prohibition).

In one of the first projects under Law No. 9 of 1991, the 507 megawatt (or "MW") ISAB project located in Priolo Gargallo, near Syracuse, Sicily,<sup>86</sup> the Commission declined to make a formal ruling. Rather, it issued an informal and private comfort letter by the Commission staff.<sup>87</sup> Notwithstanding the increased transparency of Community law generally, the Commission's comfort letters remain unpublished, confidential documents.<sup>88</sup> The ISAB project benefited from a twenty-year power contract to transfer its electric output to ENEL S.p.A.<sup>89</sup> In its public notice pursuant to Council Regulation No. 17 of 1962, the Commission invited comment on its intention to take "a favourable position valid for 15 years in respect of the power purchase agreement."<sup>90</sup> Presumably the favorable position was that for fifteen years the power purchase agreement fell within the Treaty of Rome Article 85(3) (Treaty of Amsterdam Article 81(3)) exemption. The comfort letter of the Commission staff has not been officially published, but the project's financing is a confirmation that it was issued by the Commission and relied upon by project proponents and their lenders.

#### 6. Community Law Mandate for Competitive Bidding of Construction Contracts by Virtue of Dependence on Public Monopoly

Community law requires Member States to mandate competitive public bidding for government contracts.<sup>91</sup> The Italian

---

86. Commission Decision No. IV/E-3/35.698, O.J. C 138/3 (May 9, 1996) (Isab Energy).

87. *Id.*; see also Commission Decision No. IV/E-3/35.455, O.J. C 118/7 (Apr. 23, 1996) (REN/Turbogás) (stating that Commission solicited comment on its intention to issue comfort letter providing approval of 15 year exclusive purchase and sale contract between independent 990 MW power plant project company in Portugal and Portuguese national utility).

88. See MENGOZZI, *supra* note 10, at 114-19 (discussing Community acts, such as comfort letters, not contemplated by Community treaties).

89. Isab Energy, O.J. C 138/3, at 3.

90. *Id.* at 5.

91. Council Directive No. 531 of September 17, 1990, O.J. L 297/1 (1990); Council Directive No. 38 of June 14, 1993, O.J. L 199/84 (1993).

implementing measure,<sup>92</sup> consistent with the Community requirement, requires public bidding of the construction and operation contracts for Law No. 9 of 1991 projects because they benefited from the public monopoly and fixed price for the projects' output.<sup>93</sup> This is a further recognition of the public, non-competitive nature of the Law No. 9 of 1991 framework.

### 7. A Pseudo-Market: Practice for the Real Thing

The publication of the so called *graduatoria* lists of projects that achieved the entitlement provided by the Law No. 9 of 1991 process occurred seven times from 1992 through 1995.<sup>94</sup> Because of the ease of entitlement to sign a potentially valuable preliminary contract with ENEL, many parties, including many with no prior electric sector experience, qualified. Similar to PURPA, ENEL and others in the Italian government sought ways to extinguish the entitlements obtained pursuant to Law No. 9 of 1991. A first approach was to determine that projects admitted to *graduatoria* after the sixth *graduatoria* would not benefit from the favorable CIP6 pricing.<sup>95</sup> A second approach was to declare that projects listed in the *graduatoria* for which preliminary contracts remained unsigned by the end of 1996 would lose all rights.<sup>96</sup>

Law No. 481 of 1995, the law that provided for creation of

92. Legislative Decree No. 158 of March 17, 1995 (It.), Gazz. Uff. No. 104 (May 6, 1995).

93. *Id.* art. 2(b). Relative to telecommunications, Italy now benefits from an exemption to the analogous requirement by virtue of a finding of its telecommunication sector's openness to competition. See Simap Public Procurement News, Commission Communication of May 12, 1999, (visited on Feb. 12, 2000) <<http://www.simap.eu.int>> (on file with the *Fordham International Law Journal*) (listing services deemed excluded from competitive bidding requirements pursuant to Article 8, Directive No. 38 of June 14, 1993, coordinating procurement procedures of entities operating in the water, energy, transportation, and telecommunications sectors).

94. The seven *graduatorie* corresponding to the six month period from the second half of 1992 through the second half of 1995 were published in the *Staffetta Quotidiana* from 1994-1996, see <<http://www.staffettaonline.it>> (on file with the *Fordham International Law Journal*).

95. Ministry of Industry Decree of July 19, 1996, Gazz. Uff. No. 172 (July 24, 1996).

96. Ministry of Industry Decree of November 25, 1996 (regarding suspension of July 19, 1996 Decree) [text on file with authors]; Decree Law No. 473 of September 13, 1996 (concerning urgent rulings on transparency of electricity fees), Gazz. Uff. No. 216 (Sept. 14, 1996); Ministry of Industry Decree of July 19, 1996, Gazz. Uff. No. 172 (July 24, 1996) (stating changes to rules governing pricing in connection with power plants using renewable sources).

the Authority for Electric Energy and Gas, grandfathered the preferred pricing for the CIP6 projects through language that emerged from an intensely lobbied legislative effort,<sup>97</sup> but efforts to limit the Law No. 9 of 1991 incentives continued. A further restrictive approach was to mandate acceptance of ENEL interconnection estimates and down payments of interconnection costs within a short period after the preliminary contract signature.<sup>98</sup> In 1996, ENEL announced that it would not sign consents to assignment for security purposes.<sup>99</sup> The various efforts to avoid payment of the preferred Law No. 9 of 1991 pricing led to administrative litigation<sup>100</sup> as well as the legislative battles in

---

97. Law No. 481 of November 14, 1995, art. 3(7), (It.), *supp. ord. to Gazz. Uff. No. 270* (Nov. 18, 1995). Law No. 481 of 1985 states, in relevant part:

The CIP 6 measure of April 29, 1992 . . . as supplemented and modified . . . is applicable for all the duration of the contract, to the initiatives pre-selected at the effective date of this law [meaning initiatives listed in *graduatorie* through the sixth *graduatoria* for the first six months of 1995], for purposes of entering into the contracts, including preliminary contracts, contemplated by the Decree of the Ministry of Industry, Commerce and Crafts of September 25, 1992 . . . as well as proposals of transfer of electric power produced from renewable sources specifically said, presented to ENEL S.p.A. by December 31, 1994. For the other initiatives the existing rules in effect, including the cited CIP 6 measure of 1992 and the relative updates contemplated . . . by article 22, paragraph 5, of law January 9, 1991 No. 9 which will take into account the principles of article 1 of this law, continue to apply.

*Gazz. Uff. No. 270* at 11.

98. Ministry of Industry Decree of January 24, 1992, *Gazz. Uff. No. 44* of February 22, 1997.

99. See Letter from Giuseppe Zadra, Director General, Italian Banking Association, to ENEL S.p.A. and Independent Power Industry Trade Association ("UNAPACE") (Feb. 17, 1997) (concerning production of electric energy from renewable and assimilated sources pursuant to Article 22 of Law No. 9 of 1991). In this letter, the Italian Banking Association asserted to ENEL the importance of ENEL's signature of consents to assignment for security purposes. Nonetheless, absent a direct contractual undertaking of ENEL in favor of lenders, lender step in rights could be provided on the basis of a pledge with right to vote of the shares of the project company signatory of the power contract with ENEL. See also CODICE CIVILE § 2786 (It.) (concerning pledge of movables); CODICE CIVILE § 2342 (It.) (stating that voting rights of pledged shares are held by pledging creditors). Another elaboration would be an option to lease a going concern, exercisable upon an event of default under the power contract. CODICE CIVILE §§ 2561-62 (It.). ENEL subsequently adopted a cooperative posture relative to granting its consent to assignment in favor of lenders for security purposes.

100. See, e.g., complaints filed with Lazio regional administrative tribunal:

- E.A.T.-Energia Toscana S.r.l. v. Ministry of Industry, Sept. 20, 1996;
- Ecor Energy S.r.l. v. Ministry of Industry, Sept. 20, 1996;
- E.P. Sistemi S.r.l. v. Ministry of Industry, Sept. 20, 1996;
- Laterificio Lucano S.r.l. v. Ministry of Industry, Sept. 20, 1996;
- PFM S.r.l. v. Ministry of Industry, Nov. 6, 1996;

connection with Law No. 481 of 1995.<sup>101</sup> A 1997 Ministry of Industry decree fixed abbreviated time requirements for the payment of interconnection costs.<sup>102</sup> In 1999, the Authority for Electric Energy and Gas commenced evaluation of its authority to reset the prices at lower values.<sup>103</sup> Most recently, the Bersani Decree, discussed below, established that CIP6 entitlements would expire for projects for which construction clearances are not obtained by April 1, 2000.<sup>104</sup>

- 
- Pordenone Ambiente Energia S.r.l. v. Ministry of Industry, Nov. 6, 1996;
  - Sicob Energia S.r.l. v. Ministry of Industry, Sept. 20, 1996.

101. See Law No. 481 of November 14, 1995, art. 3(7), (It.), *supp. ord. to Gazz. Uff. No. 270* (Nov. 18, 1995).

102. See Ministry of Industry Decree of January 24, 1997, *Gazz. Uff. No. 44* (Feb. 22, 1997) (concerning transfer of electric energy of new production from renewable and assimilated sources).

103. After issuing its invitation for comment on a proposal to reset downward the Law No. 9 of 1991 prices, AUTHORITY FOR ELECTRIC ENERGY AND GAS, GUIDELINES AND PROPOSALS FOR UPDATING THE PRICES OF ELECTRIC POWER FOR TRANSFER TO ENEL S.P.A. AND CONTRIBUTIONS ACCORDED TO PRODUCERS AND DISTRIBUTORS FOR NEW ENERGY FROM PLANTS UTILIZING RENEWABLE AND ASSIMILATED SOURCES, (Milan, Feb. 4, 1999) [hereinafter *AUTHORITY GUIDELINES*], the Authority did in fact modestly diminish them for two limited categories of project, namely the initiatives that were not listed as approved for Law No. 9 of 1991 entitlements as of June 30, 1995 (date of the sixth *graduatoria*) for renewable sources, and all initiatives using conventional fuel sources. Authority Deliberation No. 81 of June 8, 1999 (It.), *Gazz. Uff. No. 158* (July 8, 1999). It then asked the advisory section of the Council of State for a ruling as to whether it has the power to reset the prices for Law No. 9 of 1991 initiatives approved for Law No. 9 of 1991 entitlements by listing on *graduatoria* through the sixth *graduatoria* and hence grandfathered pursuant to Article 3(7) of Law No. 481 of 1995. The Council of State responded that the statutory protection of the pricing for such projects left the Authority for Electric Energy and Gas without such power. *Italy: CIP 6 Clears*, PROJECT FIN. INT'L, Jan. 12, 2000, at 31.

104. Bersani Decree, *supra* note 43, art. 15. The Carpi Commission, whose work led to the Bersani Decree, believed that the Law No. 9 of 1991 incentives should be limited. In its final report, it stated:

The incentive for the utilization of renewable and assimilated sources . . . is justified both by the contribution that these give to the improving of local and global environmental impact, as well as by the guarantees in the matter of supply, and through employment: the actual body of rules, however, should be reconsidered but maintaining unchanged the acquired rights, to correct certain limits which have emerged in the approximately four years of application. In particular it does not seem acceptable that the overall amount of the incentives to be paid is known only after the fact: according to calculations of the Commission, the approximately 9000 MW admitted to enjoy the incentive (of which 1200 MW are ENEL's), if effectively completed, would imply an expenditure of about 25,000 billion (in 1996 lira) to be paid, for the most part, over a period of 10-12 years, with an annual expense greater, for certain years, than 3000 billion. Among the holders of the acquired rights do not enter those who have presented applications after the sixth *graduatoria* (June 30,



The opportunity to realize further Law No. 9 of 1991 projects is diminishing. The Bersani Decree favors Law No. 9 of 1991 projects by providing certain answers to a number of questions that threatens the further viability of unbuilt projects.<sup>105</sup> At the same time, it establishes deadlines, notably the above mentioned deadline that authorizations necessary to construct a project be obtained by April 1, 2000, which is a difficult deadline to meet.<sup>106</sup>

Italy's experience with Law No. 9 of 1991 helps explain how

---

1995), considered that ENEL has declared its own unavailability to acquire new energy not requested by the market.

CARPI COMMISSION, MINISTRY OF INDUSTRY, CONSULTATIVE COMMISSION FOR IDENTIFICATION OF THE METHODS, PROCEDURES, AND PRIORITIES TO PROMOTE LIBERALIZATION OF THE ITALIAN ENERGY MARKET: PROGRESSIVE COMPETITION AMONG PRODUCERS, THE BEST GUARANTEES IN FAVOR OF USERS AND ENVIRONMENTAL PROTECTION (Jan. 28, 1997).

105. Although not resolving all issues relative to CIP 6/92 power contracts, the Bersani Decree's Article 15 clarifies a number of points. The points are:

- the terms on which a CIP 6/92 contract may be relocated;
- the terms on which the fuel contemplated for a CIP 6/92 contract may be changed;
- the dates that must be satisfied for continued validity of a CIP 6/92 contract;
- the terms on which a CIP 6/92 contract may be aggregated with others; and
- the identity of the decision-makers and the procedures relative to the foregoing.

In brief, the answers to each of the foregoing points are:

- If a CIP 6/92 project renounces "public incentives" and receives the favorable opinion of the competent local entities, then the Ministry of Industry must approve its relocation. With the benefit of a reasoned request and the favorable opinion of the competent local entities, the Ministry of Industry may approve the relocation. With the benefit of the favorable opinion of the competent local authorities and a simple notice to the Ministry of Industry, waste recovery projects may be relocated.
- ENEL, and now its successor Ente Gestore della Rete di Trasmissione Nazionale S.p.A., retains discretion to approve changes in fuel.
- CIP 6/92 entitlement holders must meet the start up date established by the relevant preliminary contract, subject to the one year grace period written into most preliminary contracts. The Industry Ministry may grant an up to two year extension for "justified" delay, but the extension does not extend the contractually established period for the running of the CIP 6/92 incentive-based prices. Failure to obtain the authorizations necessary to construct a plant by April 1, 2000 voids the CIP 6/92 incentives.
- With favorable opinion of the competent local authorities, notice to the Industry Ministry, and "documented technical reasons," capacity can be transferred to other locations.
- In all cases, approval of the competent local authorities is necessary. ENEL, and now its successor Ente Gestore della Rete di Trasmissione Nazionale S.p.A., decides on fuel changes. The Industry Ministry decides on other matters.

106. Bersani Decree, *supra* note 43, art. 15.

novel and important it is for Italy to embrace the policies of competition by providing institutional independent regulatory commissions, as well as an initial opening for new actors to undertake activity formerly within ENEL's monopoly. Although judicial recourse is available under Law No. 9 of 1991, the true Law No. 9 of 1991 story demonstrates a political and institutional inertia that judicial intervention alone can not address. The subsequent innovation of the new Authorities was necessary for real progress to occur.

#### D. Changing Political Culture

Italy, like the rest of the Community Member States, has now largely accepted the supremacy of EC law. In addition, significant elements of Italy's political culture have changed since the early 1960s. Italy's economy, as confirmed by its participation in the European Monetary Union, has become more open to the rest of Europe. Perhaps most importantly, the Italian legal and political system has matured.<sup>107</sup> The *mani pulite*, or clean hands, corruption prosecutions are widely regarded as evidence of a change in how Italian public life is conducted, including the state agencies within government control. Indeed, in one of the leading *mani pulite* cases in which former Prime Minister Benito Craxi was convicted of corruption by a Milan court, the former president of ENEL was also convicted of participation in the corruption.<sup>108</sup>

The Italian legal and political system has begun to accept the logic of economic competition.<sup>109</sup> This concept is antithetical to ENEL's creation as a national monopoly intended to reap the benefits of State economic planning, to achieve economies of scale, and to offer national electric service with uniform price conditions. The acceptance of economic competition is manifested in the legislative creation of the framework to satisfy Community competition mandates relative to the electric power and telecommunication sectors, both previously dominated by the

---

107. For a sustained discussion of its growing pains from an active participant, see FELICE MORTILLARO, *LA VIA ITALIANA AL CAPITALISMO: SCRITTI 1970-1995* (1997).

108. Milan Tribunale, order of May 19, 1999, sentencing, among others, former Prime Minister Bettino Craxi, former president of state holding company IRI Franco Nobili, and Franco Viezzoli, the former president of ENEL.

109. See, e.g., Franco De Benedetti, *Tlc, spezzare il monopolio*, *IL SOLE-24 ORE*, May 23, 1995.

State. In the early 1960s, there were no Italian governmental institutions whose express purpose was to implement Community policy, so as to achieve competitive markets. Currently, the four independent regulatory commissions discussed below actively embrace the values of Community policy initiatives to establish competitive markets.

### *E. Independent Regulatory Commissions*

Rather than dismiss the significance of Community law as—was the case in 1964—Italy's legislature in more recent years has created independent regulatory commissions to embrace Community competition mandates. These commissions, known as the Authorities, are energetically working to implement their mandate. Italy's independent regulatory commissions model after the U.S. New Deal agencies, such as the Federal Trade Commission and the Securities and Exchange Commission. The first Italian independent regulatory commission was the Commissione Nazionale per le Società e la Borsa, or National Commission for Companies and the Stock Exchange ("CONSOB"), which began in 1974<sup>110</sup> to regulate Italy's securities markets. In 1994, Italy's Antitrust Authority commenced operation.<sup>111</sup> Most recently, the Authority for Electric Energy and Gas and the Authority for Guarantees in Communications (or "AGC") began to function, respectively, in 1997<sup>112</sup> and 1998.<sup>113</sup>

CONSOB and the Antitrust Authority were created under the general pressure to keep up with Europe's growing internal market integration. The Authorities for Electric Energy and Gas and for Guarantees in Communications were created specifically to meet the mandates of Community directives to establish competition in the electric and telecommunication sectors. The electric energy and telecommunications Authorities' creation illustrates an Italian consideration of, and response to, Community law and policy initiatives qualitatively different than what occurred relative to ENEL's creation forty years ago. The current

110. Law No. 216 of June 7, 1974 (It.), Gazz. Uff. No. 149 (June 8, 1974).

111. Antitrust Authority Homepage (visited on Feb. 12, 2000) <<http://www.acm.it>> (on file with the *Fordham International Law Journal*).

112. Authority for Electric Energy and Gas Homepage (visited on Feb. 12, 2000) <<http://www.autorita.energia.it>> (on file with the *Fordham International Law Journal*).

113. Communications Ministry Deliberation No. 17 of June 16, 1998 (It.), supp. ord. No. 128 to Gazz. Uff. No. 169 (July 21, 1998).

relationship of Italian and Community law is not one of apocalyptic clash. Rather, in the electric power and telecommunication sectors, Community law provides impulse to accomplish reform aimed at the creation of competitive markets, and the new Italian institutional actors embrace this mandate. To appreciate what the Authorities are accomplishing, it is helpful to first understand the Community directives that they implement.

### III. COMMUNITY DIRECTIVES

#### A. *Community Directive No. 92 of 1996 on Liberalization of Electric Power Markets*

At the beginning of the 1990s, the Community was focused on achievement of a single "internal market," as contemplated by the Single European Act,<sup>114</sup> the 1987 amendment to the treaties instituting the three European Communities. As part of this effort, the Council adopted Directive No. 547 of October 29, 1990<sup>115</sup> on transmission of electricity through transmission grids and Directive No. 377 of June 29, 1990<sup>116</sup> establishing a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users. These Directives prepared the way for the more far-reaching Council Directive No. 92 of December 19, 1996,<sup>117</sup> which mandates restructuring national electricity markets in order to open them to competition, starting with an emphasis on larger consumers of electricity. Directive No. 92 of 1996 "establishes common rules for the generation, transmission and distribution of electricity. It lays down the rules relating to the organization and functioning of the electricity sector, access to the market, the criteria and procedures applicable to calls for tender and the granting of authorizations and the operation of systems."<sup>118</sup>

Directive No. 92 of 1996 furthers policies that the Commu-

---

114. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending EEC Treaty, *supra* note 11).

115. Council Directive No. 90/547, O.J. L 313/30 (1990).

116. Council Directive No. 90/377, O.J. L 185/16 (1990).

117. Council Directive No. 96/92, O.J. L 27/20 (1996). For a discussion of the negotiations leading to the adoption of the directive, see Angus Johnston, *Maintaining the Balance of Power: Liberalisation, Reciprocity and Electricity in the European Community*, 17 J. ENERGY & NATURAL RESOURCES L. 121 (1999).

118. *Id.* art. 1, O.J. L 27/20, at 22 (1996).

nity's 1995 White Paper on Energy<sup>119</sup> identified, namely:

- competition to integrate formerly divided national energy markets;
- sustainable development; and
- secure power delivery.

As a first step towards achieving these goals, Directive No. 92 of 1996's mandate to increase competition between larger electricity users implies the opening to competition, initially of about a fourth, growing to a third over a six-year period, of national electric power markets.<sup>120</sup>

Directive No. 92 of 1996 leaves room for national discretion and thereby potentially invites Community litigation, via: (1) Commission competition law decisions appealed to the European Court of First Instance and the ECJ,<sup>121</sup> (2) actions to condemn a Member State before the ECJ for failure to implement a directive,<sup>122</sup> or (3) reference of questions of Community law to the ECJ by national courts.<sup>123</sup> It invites such litigation by tempering the mandate of a competitive structure for national electricity markets with a recognition that a Member State "in the general economic interest"<sup>124</sup> may impose limits on competition through "public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and to environmental protection."<sup>125</sup> Likewise, it permits the Member States to refuse some of the Directive's key structural requirements, but only "insofar as the development of trade would not be affected to such an extent as would be con-

119. Commission of the European Communities, *An Energy Policy For the European Union: White Paper from the Commission to the European Parliament*, COM (95) 682 Final (Dec. 1995) [hereinafter *White Paper*].

120. Commission of the European Communities, *Communication from the Commission: An Overall View of Energy Policy and Actions*, COM (97) Draft, at 14.

121. EEC Treaty, *supra* note 11, arts. 173, 184, 298 U.N.T.S. at 75-76, 78; Consolidated EC Treaty, *supra* note 11, arts. 230, 241, O.J. C 340/3, at 272, 275 (1997), 37 I.L.M. at 125, 127 (ex Articles 173 and 184).

122. EEC Treaty, *supra* note 11, art. 169, 298 U.N.T.S. at 75; Consolidated EC Treaty, *supra* note 11, art. 226, O.J. C 340/3, at 271 (1997), 37 I.L.M. at 125 (ex Article 169).

123. EEC Treaty, *supra* note 11, art. 177, 298 U.N.T.S. at 76-77; Consolidated EC Treaty, *supra* note 11, art. 234, O.J. C 340/3, at 273-74 (1997), 37 I.L.M. at 126 (ex Article 177 )

124. Council Directive No. 96/92, art. 3(2), O.J. L 27/20, at 23 (1996).

125. *Id.*

trary to the interests of the Community."<sup>126</sup>

Each of these standards raises questions, which a judicial determination relative to specific facts can easily be envisaged if a Member State fails to embrace the Directive's goal of competitive markets. Although litigation of these points has not yet arisen, it is easy to contemplate, for example, a low marginal cost French nuclear utility such as EDF complaining of how a neighboring Member State's less-than-full implementation of the relevant Directive provisions frustrates its ability to sell to large users. Given Italy's embrace of the Directive's mandates in the Bersani Decree, it is unlikely that Italy would be a significant source of such litigation.

The Directive offers two alternative approaches to system access and leaves the choice to the Member States, with the proviso that each approach "lead to equivalent economic results and hence to a directly comparable level of opening up of markets and to a directly comparable degree of access to the electricity markets."<sup>127</sup> Member States may provide for negotiated<sup>128</sup> or regulated<sup>129</sup> terms of access to the transmission system, or they may provide for a single buyer,<sup>130</sup> *i.e.*, a legal person "responsible for the unified management of the transmission system and/or for centralized electricity purchasing and selling."<sup>131</sup> As discussed below, the Bersani Decree adopted the latter choice for Italy.

As for new generation capacity construction, Member States may opt for a pure authorization procedure or for a bidding procedure—which allows auto producers and independent producers to obtain authorization—always subject to "objective, transparent and non-discriminatory" criteria.<sup>132</sup> As discussed below, the Bersani Decree maintained the authorization procedure for Italy.

Member States must designate or require the undertakings that own transmission systems to designate an independently managed operator to run the system in a neutral fashion, taking

126. *Id.* art. 3(3), O.J. L 27/20, at 23 (1996).

127. *Id.* arts. 3(1), (16), O.J. L 27/20, at 23 (1996).

128. *Id.* art. 17(1), O.J. L 27/20, at 26 (1996).

129. *Id.* art. 17(4), O.J. L 27/20, at 26 (1996).

130. *Id.* art. 18, O.J. L 27/20, at 26-27 (1996).

131. *Id.* art. 2(22), O.J. L 27/20, at 23 (1996).

132. *Id.* art. 4, O.J. L 27/20, at 23 (1996).

into account efficiency, economic balance, and security of supply.<sup>133</sup> Member States may impose on distribution companies an obligation to supply customers in a given area.<sup>134</sup> Accounts of generation, transmission, and distribution activities are to be kept separately.<sup>135</sup>

The Directive requires over time that Member States define an increasing percentage of final users of electricity as "eligible customers" able to contract freely with generators of electricity for the supply of electric energy through the transmission system to be operated by the system operator.<sup>136</sup> Initially the market open to competition is supposed to correspond to customers consuming more than 40 gigawatt hours (or "GWh") per year on a consumption site basis.<sup>137</sup> The threshold is reduced to 20 GWh after three years and six years later to 9 GWh.<sup>138</sup> Member States are required annually to publish their criteria for eligibility to participate in the competitive market, and the Commission may request, and if unsatisfied, impose modifications.<sup>139</sup>

#### B. *Community Directives on Liberalization of Telecommunications*

Six Community Directives mandate Member States to introduce competition to telecommunications markets:<sup>140</sup>

- Commission Directive No. 301 of May 16, 1988 mandating competition in the supply of telecommunications terminal equipment;<sup>141</sup>
- Council Directive No. 387 of June 28, 1990 mandating opening of access to public communications networks;<sup>142</sup>

133. *Id.* arts. 7, 8, 9, O.J. L 27/20, at 24-25 (1996).

134. *Id.* art. 10, O.J. L 27/20, at 25 (1996).

135. *Id.* art. 13, 14, 15, O.J. L 27/20, at 25-26 (1996).

136. *Id.* art. 19, O.J. L 27/20, at 27 (1996).

137. *Id.* art. 19(1), O.J. L 27/20, at 27 (1996).

138. *Id.* art. 19(2), O.J. L 27/20, at 27 (1996).

139. *Id.* art. 19(4), O.J. L 27/20, at 27 (1996).

140. For confirmation that the Treaty of Rome provides a basis for Community initiatives to institute competition in the telecommunications sector, see *France v. Commission*, Case C-202/88, [1991] E.C.R. I-1223, [1992] 5 C.M.L.R. 552 (responding to challenge by Belgium, France, Germany, Greece, and Italy of foundation of Directive No. 301 of 1988 in Treaty of Rome Article 90 (Consolidated EC Treaty Article 86)).

141. Commission Directive No. 88/301, O.J. L 131/73 (1988).

142. Council Directive No. 90/387, O.J. L 192/1 (1990).

- Commission Directive No. 388 of June 28, 1990 mandating competition in telecommunications services other than general voice telephony,<sup>143</sup> but requiring that competitive provision of voice telephony be allowed to closed groups;<sup>144</sup>
- Commission Directive No. 46 of October 18, 1994 mandating competition for earth station satellite equipment and satellite communication services;<sup>145</sup>
- Commission Directive No. 51 of October 18, 1995 mandating provision for competitive cable television networks and imposing accounting separation requirements for telecommunications and cable television networks operators;<sup>146</sup> and
- Commission Directive No. 19 of March 13, 1996, which amended Directive No. 388 of 1990 to mandate competition in voice telephony effective January 1, 1998.<sup>147</sup>

These Directives represent the first serious Community attempt to challenge the existence of national telecommunication monopolies previously allowed under Treaty of Rome Article 90(2) (Treaty of Amsterdam Article 86(2)).<sup>148</sup> From 1988 to 1996, these directives progressively mandated a growing degree of competition. They broadly coincide with the opening of the international telecommunications markets to competition sought in the Uruguay Round of trade negotiations, and culminated in the 1997 Group on Basic Telecommunications Agreement<sup>149</sup> under the auspices of the World Trade Organization. By this agreement, sixty-eight countries, including the EU, which ac-

---

143. Commission Directive No. 90/388, O.J. L 192/10 (1990).

144. *Id.* art. 2, O.J. L 192/10, at 15.

145. Commission Directive No. 94/46, O.J. L 268/15 (1994) (amending Directive No. 88/301 and 90/388 with regard to satellite communications).

146. Commission Directive No. 95/51, O.J. L 256/49 (1995) (amending directive No. 388 of 1990 with regard to abolition of restrictions on the use of cable television networks for provision of previously liberalized telecommunication services).

147. Commission Directive No. 96/19, O.J. L 74/13 (1996).

148. EEC Treaty, *supra* note 11, art. 90(2), 298 U.N.T.S. at 50; Consolidated EC Treaty, *supra* note 11, art. 86(2), O.J. C 340/3, at 210 (1997), 37 I.L.M. at 94 (ex Article 90).

149. World Trade Organization Group on Basic Telecommunications Report, Feb. 15, 1997, WTO Doc. No. S/GBT/4 (visited on Mar. 1, 2000) <<http://www.wto.org/services/tel15.htm>> (on file with the *Fordham International Law Journal*).



count for the vast majority of international telecommunication activity, agreed to open their national markets to competition.<sup>150</sup>

The 1988 and 1990 Directives restricted Member State regulation to the minimum necessary to assure security and integrity of network operations, and inter-operability of services and data protection.<sup>151</sup> They required Member States to separate regulatory and operational functions concerning the provision of service.<sup>152</sup> Perhaps the largest incremental opening to competition was the leap to contemplating competition in voice telephony, previously excluded from competition on the ground that the revenues derived from it were necessary to build national telecommunication networks and to subsidize the universal service and other public welfare aspects of the State telecommunication monopolies protected under Treaty of Rome Article 90(2) (Treaty of Amsterdam, Article 86(2)).

Directive No. 387 of 1990 mandated Member State action to liberalize public networks, defined as the telecommunication infrastructure that permits the conveyance of signals between defined network termination points by wires, microwave, optical means, or other electromagnetic means.<sup>153</sup> This Directive mandated access to public networks by other operators pursuant to objective, non-discriminatory, and transparent criteria.<sup>154</sup> Directive No. 19 of 1996 required:

- removal of all restrictions relative to access public voice telephony telecommunication networks as of January 1, 1998, with an additional five-year transition period for Greece, Ireland, Portugal, and Spain, and a two-year transition period for Luxembourg;<sup>155</sup>
- establishment of a universal service fund financed by all

---

150. Phillip L. Spector, *The World Trade Organization Agreement on Telecommunications*, 32 INT'L LAW. 217, 217 (1998); Federal Communications Commissioner ("FCC") Susan Ness, *International Telecommunications: An Opportunity for U.S. and EU Joint Leadership*, Remarks Before the European Institute (Jan. 12, 1999) <<http://www.fcc.gov/Speeches/Ness/spsn902.txt>> (on file with the *Fordham International Law Journal*).

151. Commission Directive No. 90/388, art. 3, O.J. L 192/10, at 15 (1990).

152. Council Directive No. 88/301, art. 6, O.J. L 131/73, at 76 (1988).

153. Council Directive No. 90/387, art. 1, O.J. L 192/1, at 2 (1990).

154. *Id.* Article 1 of Directive No. 387 of 1990 defines "[o]pen network provisions conditions" as the conditions, harmonized according to the directive, which concern open and efficient access to public telecommunication networks. *Id.*

155. Commission Directive No. 96/19, O.J. L 74/13 (1996).

markets;<sup>156</sup> and

- limitation of national licensing requirements to authorization or declaration procedures, with compulsory third party interconnection access based on principles of objectivity, non-discrimination, proportionality, and transparency, together with suitable procedures to appeal any denial.<sup>157</sup>

Directive No. 19 of 1996 also requires entities that provide both voice telephony and other services to maintain separate accounting for such services.<sup>158</sup>

#### IV. ITALY'S INDEPENDENT REGULATORY COMMISSIONS

Against the background of Community Directives on electricity and telecommunications for the creation of market structures to allow competition, Italy has created and relied upon a series of independent regulatory commissions novel for its legal system. These so-called Authorities share common characteristics. Their governing boards are named for relatively long terms by a process designed to prevent them from becoming part of the Italian system of political patronage.<sup>159</sup> They are intended to have independent expertise.<sup>160</sup> They have independent rulemaking and enforcement authority,<sup>161</sup> and are subject to at

156. *Id.* art. 1(3), O.J. L 74/13, at 22 (1996).

157. *Id.*

158. *Id.* art. 1(8), O.J. L 74/13, at 24 (1996).

159. *See* Law No. 216 of June 7, 1974, (It.), Gazz. Uff. No. 149 (June 8, 1974) (stating Commissione Nazionale per le Società e la Borsa (National Commission for Companies and the Stock Exchange ("CONSOB") members have five year terms); Law No. 287 of October 10, 1990, art. 10(2), (It.), Gazz. Uff. No. 240 (Oct. 13, 1990) (stating that Antitrust Authority members have seven year terms); Law No. 481 of November 14, 1995, art. 2(8), (It.), supp. ord. No. 136 to Gazz. Uff. No. 270 (Nov. 18, 1995) (stating that Authority for Electric Energy and Gas members have seven year terms); Law No. 249 of July 31, 1997, arts. 1, pt. 3, 1.5, (It.), supp. ord. No. 154/L to Gazz. Uff. No. 177 (July 31, 1997) (noting that AGC members have seven year terms).

160. Law No. 216 of June 7, 1974, art. 1, pt. 3 (CONSOB); Law No. 287 of October 10, 1990, art. 10 (Antitrust Authority); Law No. 481 of November 14, 1995, art. 2(8) (Authority for Electric Energy and Gas); Law No. 249 of July 31, 1997, art. 1(3) (AGC).

161. Law No. 216 of June 7, 1974, art. 1, pt. 9 (defining rulemaking power of CONSOB); Law No. 287 of October 10, 1990, art. 14-19 (defining rulemaking power of Antitrust Authority); Law No. 481 of 1995, art. 2(5), (12) (defining rulemaking power of Authority for Electric Energy and Gas); Law No. 249 of July 31, 1997, art. 1(6)(a) (defining rulemaking power of Authority for Guarantees in Telecommunications (or "AGC")).

most limited control by the executive.<sup>162</sup> Their actions are generally appealable only to the administrative courts,<sup>163</sup> unlike actions of the traditional parts of the Italian public administration, against which appeal to a higher administrative authority is typically available. A few words about each of the relevant Authorities follow.

#### A. CONSOB—*Securities Regulatory Commission*

A 1974 Italian law<sup>164</sup> provided for the creation of CONSOB to “return the trust of the public to stock investment.”<sup>165</sup> Prior to CONSOB’s creation, the relevant Civil Code provisions had left the burden of investigation of corporate financial status on the prospective shareholder.<sup>166</sup> CONSOB is the first institution in Italy designed to assure corporate disclosure of information material to shareholder investment decisions. From an initial focus on disclosure requirements for stock exchange listed companies,<sup>167</sup> CONSOB’s activity has been legislatively broadened to

162. See Law No. 216 of 1974, art. 1, pt. 9 (explaining that orders of CONSOB become executory if not contested by executive within 20 days from their submission by CONSOB to prime minister); Law No. 287 of 1990, art. 16 (describing Antitrust Authority investigation and mandatory orders against concentrations); Law No. 481 of 1995, art. 1(12),(13) (explaining how electricity prices set by Authority for Electric Energy and Gas can be overturned by Cabinet only for “serious and relevant reasons for the public good”); Law No. 249 of July 31, 1997, art. 1(27) (stating that AGC orders are subject only to administrative judicial review).

163. II FRANCESCO GALGANO, *DIRITTO COMMERCIALE* 376 (4th ed. 1993) (CONSOB administrative court appeals); Law No. 287 of October 10, 1990, art. 33 (Antitrust Authority administrative court appeals); Law No. 481 of November 14, 1995, Art. 25 (creating Authority for Electric Energy and Gas administrative court appeals); Law No. 249 of 1997, art. 1(26) (creating Authority for Guarantees in Communications administrative court appeals).

164. Law No. 216 of June 7, 1974, (It.), Gazz. Uff. No. 149 (June 8, 1974). See Giuseppe Sbisà, *I Controlli della Consob*, in *COMMENTARIO AL CODICE CIVILE SCIALOJA-BRANCA, LIBRO QUINTO, LAVORO, TITOLO V, CAPO V: DELLA SOCIETÀ PER AZIONI* 5 (Supp. 1998). CONSOB’s website is <<http://www.consob.it>>.

165. GOVERNMENT REPORT TO THE CHAMBER OF DEPUTIES FOR CONVERSION OF LEGISLATIVE DECREE NO. 95 OF APRIL 8, 1974 INTO LAW.

166. CODICE CIVILE §§ 2363–2409 (It.).

167. Legislative Decree No. 136 of March 31, 1975 (It.), Gazz. Uff. No. 119 (May 7, 1975) (containing accounting and balance sheet certification requirements for companies listed on stock exchange); Legislative Decree No. 137 of March 31, 1975 (It.), Gazz. Uff. No. 119 (May 7, 1975) (containing rules regarding profit and loss statements of credit companies and regulation of insurance companies and financial institutions); Legislative Decree No. 138 of March 31, 1975 (It.), Gazz. Uff. No. 119 (May 7, 1975) (containing CONSOB rulemaking power relative to requirements for companies listed on stock exchange).

include regulation of trading in unlisted securities,<sup>168</sup> insurance companies,<sup>169</sup> regulation of the characteristics of securities themselves<sup>170</sup> as well as of the disclosure of information by issuers, mutual funds,<sup>171</sup> and in 1991 when insider trading first became specifically illegal in Italy, insider trading.<sup>172</sup> Of relevance to the Telecom Italia takeover battle discussed below, CONSOB regulates takeover bids<sup>173</sup> and holdings of large blocks of stock.<sup>174</sup>

CONSOB was the first Italian independent regulatory commission. Its governance has been legislatively re-tuned from its creation,<sup>175</sup> but remains faithful to the premise that CONSOB is an autonomous, expert regulatory body. The Antitrust Authority, the Authority for Electric Energy and Gas, and the Authority for Guarantees in Telecommunications are generally modeled on the structure of CONSOB.

CONSOB is headquartered in Rome and has an operating post office in Milan. Its four members and president are chosen among experts in their field and appointed by the President of the Republic based on proposal by the Prime Minister after cabinet deliberation.<sup>176</sup> The selection process is meant to insure the political independence of the members. The members hold of-

168. Law No. 49 of February 23, 1977 (It.), Gazz. Uff. No. 60 (Mar. 3, 1977) (stating that unlisted securities—*mercato ristretto*—are subject to CONSOB jurisdiction).

169. See Law No. 576 of August 12, 1982 (It.), Gazz. Uff. No. 229 (Aug. 20, 1982) (stating that insurance companies are subject to CONSOB jurisdiction).

170. See Law No. 102 of June 19, 1991 (It.), Gazz. Uff. No. 75 (Mar. 29, 1991) (concerning sales of securities).

171. Law No. 77 of March 23, 1983 (It.), Gazz. Uff. No. 85 (Mar. 28, 1983).

172. See Law No. 57 of February 26, 1991 (It.), Gazz. Uff. No. 51 (Mar. 1, 1991) (concerning insider trading).

173. See Legislative Decree No. 9 of January 27, 1992 (It.), Gazz. Uff. No. 37 (Feb. 14, 1992) (implementing Council Directive No. 88/627, O.J. L 348/62 (1998) relative to disclosure requirements for purchase and sale of significant corporate ownership interests).

174. See Law No. 216 of June 7, 1974, art. 5 (as modified by Law No. 281 of June 4, 1985, art. 1) (reporting obligations for ownership of more than 2% of listed company or 10% of unlisted company); *Id.* art. 5 (reporting obligations of participation at thresholds of 10, 20, 33, 50, or 75% of listed company); Law No. 216 of June 7, 1974, art. 18-18 septies (It.) (as modified by law No. 474 of July 30, 1994), Gazz. Uff. No. 177 (July 30, 1994) (containing reporting and prospectus obligations for tender and initial public offerings).

175. Law No. 281 of June 4, 1985 (It.), supp. ord. to Gazz. Uff. No. 142 (June 18, 1985) (regarding CONSOB governance).

176. Law No. 216 of 1974, art. 1, pt. 3.

fice for one five-year term, with possibility of one renewal.<sup>177</sup> CONSOB's four members and president adopt rules and enforcement measures collegially.<sup>178</sup> The CONSOB president is responsible for oversight of its investigation and enforcement activity. CONSOB's final decisions are appealable to the Lombardia regional administrative tribunal for decisions issued in Milan, and Lazio for decisions issued in Rome—with final appeal to the Council of State.<sup>179</sup>

Although the Treasury Ministry oversees CONSOB,<sup>180</sup> CONSOB is an independent, autonomous agency.<sup>181</sup> Executive branch control over CONSOB's actions is limited to:

- appointment of members and determination of their compensation;<sup>182</sup>
- dissolution of CONSOB in case of deadlock;<sup>183</sup> and
- procedural control of how CONSOB manages its internal resources.<sup>184</sup>

### B. *Antitrust Authority*

Until adoption of the 1990 law providing for creation of the Antitrust Authority,<sup>185</sup> Italy had no antitrust law other than through Treaty of Rome Articles 85 and 86 (Treaty of Amsterdam, Articles 81 and 82). Italy's antitrust law closely follows the Treaty of Rome and the Community's so-called Merger Regulation regarding to concentrations of enterprises.<sup>186</sup> Indeed, Italy's antitrust law adopts Community antitrust law principles to resolve Italian issues even when the Italian issues do not meet the size thresholds that Community antitrust law sets for its own application.<sup>187</sup>

177. *Id.*

178. *Id.* art. 1, pt. 6.

179. GALGANO, *supra* note 163, at 376.

180. Law No. 216 of 1974, art. 1, pt. 6.

181. *Id.* art. 1(1), pt. 2.

182. *Id.* art. 1, pts. 3, 4.

183. *Id.* art. 1, pt. 14.

184. *Id.* art. 1, pts. 8, 9.

185. Law No. 287 of October 10, 1990 (It.), Gazz. Uff. No. 240 (Oct. 13, 1990).

186. Council Regulation No. 4064/89, O.J. L 395/1 (1989) *amended by* Council Regulation No. 1310/97, O.J. L 180/1 (1997).

187. Law No. 287 of October 10, 1990, arts. 3, 4, 5, 6, (It.) Gazz. Uff. No. 240 (Oct. 13, 1990).

The Antitrust Authority (Autorità Garante della Concorrenza e del Mercato),<sup>188</sup> headquartered in Rome, regulates:

- agreements that restrict or may restrict competition;
- abuses of dominant position;
- concentrations of enterprises restricting competition;<sup>189</sup> and
- misleading advertising.<sup>190</sup>

The Antitrust Authority is "independent and autonomous from the executive power."<sup>191</sup> The Antitrust Authority is comprised of one president and four members appointed jointly by the presidents of the Italian Chamber of Deputies and of the Senate. The Antitrust Authority president is appointed by persons of well-known independence, and who have already held high office with broadly based institutional responsibilities.<sup>192</sup> The members are chosen among judges of the Council of State, Court of Accounts, Court of Cassation, full professors of economics or law, and business executives of particularly high professional repute.<sup>193</sup> The president and members are appointed for a non-renewable term of seven years. They may not exercise any professional or consulting activities or be employed or act as members of any board of directors or hold public office during their term.<sup>194</sup> The Antitrust Authority is also subject to internal ethics rules concerning gifts and conflicts of interest.<sup>195</sup>

The Antitrust Authority may, in case of agreements, concentrations, and abuses of dominant position that restrict competition:

- assess fines;

188. The Antitrust Authority's website is <<http://www.agcm.it>>.

189. Law No. 287 of October 10, 1990 (It.), *Gazz. Uff. No. 240* (Oct. 13, 1990).

190. Legislative Decree No. 74 of January 25, 1992 (It.), *Gazz. Uff. No. 36* (Feb. 13, 1992).

191. Law No. 287 of October 10, 1990, art. 10.

192. *Id.*

193. *Id.* art. 10(2).

194. *Id.* art. 10(3).

195. PRESIDENCY OF THE COUNCIL OF MINISTERS, DEPARTMENT OF INFORMATION AND PUBLICATIONS, ANTITRUST A PORTATA DI MANO 8 (1999) (visited on Feb. 11, 2000) <[http://www.agcm.it/AGCM\\_ENG/OPUSCOL/E\\_FUNZ.NSF/mainview](http://www.agcm.it/AGCM_ENG/OPUSCOL/E_FUNZ.NSF/mainview)> (on file with the *Fordham International Law Journal*).

- issue orders enjoining anti-competitive activity;<sup>196</sup> and
- in case of failure to make a required notification of a concentration, order the suspension of all of its activities, prohibit the concentration or order the parties involved to remove its effects.<sup>197</sup>

Antitrust Authority decisions are appealable to the administrative courts, specifically the Lazio regional administrative tribunal,<sup>198</sup> with final appeal to the Council of State.<sup>199</sup>

*C. The Twin Law No. 481 of 1995 Authorities: Electricity and Natural Gas (alive); Telecommunications (never born, but Reincarnated as the AGC)*

With the benefit of the CONSOB and Antitrust Authority experiences, Law No. 481 of November 14, 1995,<sup>200</sup> entitled "rules for competition and regulation of services of public utility; institution of the authorities for public utility regulation," provided for establishment of the Authority for Electric Energy and Gas and of a Telecommunications Authority. It provided that "the Authorities operate in full autonomy and with independence of judgment and evaluation; they are dedicated to regulation and control of the sector of their competence."<sup>201</sup>

The Authority for Electric Energy and Gas, with headquarters in Milan, in fact exists.<sup>202</sup> It began operation in spring 1997, a year and a half after the time fixed for its constitution by Law No. 481 of 1995. The Telecommunications Authority was not created. As discussed below, in 1998 the Authority for Guarantees in Communications began operation pursuant to a 1997 law that builds upon the concepts of Law No. 481 of 1995.

A principal responsibility of each of the two Authorities was to set rates,<sup>203</sup> subject in the case of the Authority for Electric Energy and Gas to the significant constraint that tariffs in the

196. Law No. 287 of October 10, 1990, arts. 17, 18.

197. *Id.*

198. *Id.* art. 33.

199. *Id.*

200. Law No. 481 of November 14, 1995 (It.), supp. ord. no. 136 to Gazz. Uff. No. 270 (Nov. 18, 1995).

201. *Id.* art. 2(5).

202. The Authority for Electric Energy and Gas website is <<http://www.autorita.energia.it>>.

203. Law No. 481 of November 14, 1995, art. 2(10)(e).

supply of electricity be categorically uniform throughout the national territory.<sup>204</sup> Each Authority was also to propose to the competent ministry how to handle changes in concessions, authorizations, contracts, and programmatic agreements, both individually and collectively.<sup>205</sup> If the competent minister rejected such a proposal, then the Authority could re-propose. To overrule the re-proposal, the law provides that the competent minister may propose to the Prime Minister that the Council of Ministers decide otherwise, but only for "serious and relevant reasons of general utility."<sup>206</sup> As to competition issues, each Authority was to refer competition law matters to the Antitrust Authority, which had to respond with its opinion within thirty days.<sup>207</sup>

The mechanism for nomination of Antitrust Authority members was designed to produce a broad consensus as to their suitability for the office. The Antitrust Authority was to have a president and two members, nominated by decree of the President of the Republic following deliberation of the Council of Ministers on proposal of the competent Minister.<sup>208</sup> A further requirement for nomination is that the candidate receive approval of the competent Parliamentary Commission.<sup>209</sup> Hearings on nominees before the Parliamentary Commissions are contemplated.<sup>210</sup> The term of office of the authority's president and members is seven years, which is not non-renewable.<sup>211</sup> They may not have other employment during their term. Conflict of interest rules exist during the member's term in office to avoid former members from having any ability to profit from their term of office.<sup>212</sup> For four years after leaving office, employment by regulated entities is prohibited.<sup>213</sup> Penalties include fines ensuring forfeit of compensation.<sup>214</sup> For the entre-

204. *Id.* art. 3(2).

205. *Id.* arts. 2(12)(b), (d), (o).

206. *Id.* art. 2(13).

207. *Id.* art. 2(34).

208. *Id.* art. 2(7).

209. *Id.* art. 2(7). The Senate Commission to oversee public works and communications is composed of 28 members proportionally representing 10 parties present in the Senate. Members' names and party affiliations are available on the Italian Senate's website at <<http://www.senato.it/leg/13/Bgt/Schede/Commissioni/0-00008.htm>>.

210. Law No. 481 of November 14, 1995, art. 2(7).

211. *Id.* art. 2(8).

212. *Id.* art. 2(9).

213. *Id.*

214. *Id.*



preneur engaging a former Authority member, contemplated penalties include administrative fines equal to 0.5% of revenues, but not less than 300 million lira or more than 200 billion lira, and in the most serious repeated cases, revocation of the authorization or act granted.<sup>215</sup> The monetary amounts mentioned are indexed to inflation.<sup>216</sup>

Further guarantees exist relating to the autonomy of each Authority's operation and staffing. Each Authority was to have organizational, accounting, and administrative autonomy.<sup>217</sup> The staff of each Authority was to come in part from a competitive public examination<sup>218</sup> and in part through the engagement of a limited number of external consultants.<sup>219</sup> This staffing mechanism was to isolate the Authority staff from the traditional State bureaucracy and strike a balance between the competing concerns of avoiding patronage, while having access to the economic and legal analysis skills required for the Authorities' missions. Appeals of Authority for Electric Energy and Gas decisions are made to the Lombardia regional administrative tribunal, subject to further appeal to the Council of State.<sup>220</sup>

#### D. *Authority for Guarantees in Communications*

The Authority for Guarantees in Communications, *Autorità per le Garanzie nelle Comunicazioni*, was established by Law No. 249 of 1997<sup>221</sup> as the independent regulator of telecommunications and broadcasting, and became operational in mid-1998. It substitutes the never instituted Authority for Telecommunications contemplated by Law No. 481 of 1995. Law No. 249 of 1997 reworks the concept of the Authority for Telecommunications to include both telecommunication and broadcast regulatory responsibilities. The focus here is on the structure of the AGC and its telecommunication regulatory responsibilities as illustrations of Italy's maturing response to Community law.<sup>222</sup>

215. *Id.*

216. *Id.*

217. *Id.* art. 2(27).

218. *Id.* art. 2(28).

219. *Id.* art. 2(30).

220. *Id.* art. 25.

221. Law No. 249 of July 31, 1997 (It.), *supp. ord. no. 154/L to Gazz. Uff. No. 177* (July 31, 1997). The AGC's website is <<http://www.agcom.it>>.

222. For a fuller perspective on the AGC and its broadcast regulatory role, see

The AGC's telecommunication regulatory responsibilities addressed here include resetting of tariffs, issuance of licenses and authorizations relative to telecommunication infrastructure and services, and regulation of interconnections to telecommunication networks.

Law No. 249 of 1997 adopts many of the provisions of Law No. 481 of 1995 by express reference or by restating its concepts.<sup>223</sup> Examples include the adoption of the Law No. 481 of 1995 approach to conflicts of interest for the members of the Authority for Electric Energy and Gas and provision for staffing so as to maintain independence, both from the regulated industry and from the traditional civil service.<sup>224</sup>

The AGC is based in Naples, with a representative office in Rome. Since its first year of operation, the AGC has addressed several important regulatory topics,<sup>225</sup> including the re-balancing of tariffs for voice services between national and international calls, business and residential customers, and local and long distance calls;<sup>226</sup> interconnection arrangements,<sup>227</sup> and licensing procedures.<sup>228</sup>

Like the Authority for Electric Energy and Gas, the AGC is to operate in full autonomy and with independence of judgment and evaluation.<sup>229</sup> Unlike the Authority for Electric Energy and Gas, the law that creates the AGC contemplates some internal structure,<sup>230</sup> namely,

- a president;
- a commission for infrastructures and networks;
- a commission for services and products; and

---

Fabio Bassan, *La Riforma Italiana delle Telecomunicazioni: Profili Generali*, 12 DIRITTO DEL COMMERCIO INTERNAZIONALE 3 (1998).

223. See, e.g., Law No. 249 of July 31, 1997, art. 1(6)(c)(14). The Council of the AGC "exercises all the other functions and powers contemplated in law No. 481 of November 14, 1995, as well as all the other functions of the AGC not expressly attributed to the commission for infrastructures and grids and to the commission for services and products." *Id.*

224. *Id.* art. 1(3), (5).

225. The AGC's website offers current summaries of its achievements.

226. Law No. 249 of July 31, 1997, art. 4.

227. *Id.* art. 5.

228. *Id.* art. 4(3).

229. *Id.* art. 1(1).

230. *Id.* art. 1(3).

- a plenary council.

The president presides over each commission, which is comprised of four commissioners. The plenary council is comprised of the president and all the commissioners.

Although the mechanism for selecting AGC members is mildly different than that of the selection of members of the other Authorities, its purpose nonetheless is to limit the politicization of the nomination process.<sup>231</sup> The Senate and the Chamber of Deputies each elect four members of the AGC. Each senator and each deputy are to vote for one member of the infrastructures and networks commission and one member of the commission for services and products. The President of the Republic names the president of the AGC on proposal from the Prime Minister, in agreement with the Minister of Communications.

Among its responsibilities, the commission for infrastructures and networks defines "objective and transparent criteria, including with reference to maximum tariffs, for interconnection and for access to telecommunication infrastructures according to criteria of nondiscrimination,"<sup>232</sup> and resolves interconnection controversies within ninety days of notification.<sup>233</sup> Among the responsibilities of the commission for services and products are the maintenance of quality, service standards, and matters related to advertising and marketing.<sup>234</sup>

The council is responsible for the adoption of regulations, including license grants and authorizations for both telecommunications and broadcasting. The Ministry of Communications retains authority for granting broadcasting concessions and authorizations.<sup>235</sup> The AGC must express its opinion within thirty days of receipt of measures adopted by the Antitrust Authority concerning communication sector operators, without which the measures then take effect.<sup>236</sup>

To a greater degree than the laws instituting the other Authorities, the AGC's instituting law addresses public participation

231. *Id.*

232. *Id.* art. 1(a)(7).

233. *Id.* art. 1(a)(9).

234. *Id.* art. 1(b).

235. *Id.* art. 1(c).

236. *Id.* art. 1(5).

and dispute resolution issues. Any bearer of public or private interests, as well as holders of diffuse interests constituted in associations or committees who might be damaged by an AGC measure, may intervene in AGC proceedings to challenge the measure.<sup>237</sup> Moreover, the AGC is to offer non-judicial dispute resolution procedures for disputes between users or categories of users and a license or authorization holder, as well as disputes among license and authorization holders. In any event, legal action is prohibited until failure of a mandatory conciliation attempt during the thirty days following notice to the AGC.<sup>238</sup>

Challenges to AGC measures are made to the Lazio administrative regional tribunal, notwithstanding the AGC's Naples headquarters location.<sup>239</sup> Further appeals are made to the Council of State. Before both of the Lazio regional administrative tribunal and the Council of State, accelerated procedures apply for AGC challenges.<sup>240</sup>

The law creating the AGC contains a substantive antitrust standard: "In the sectors of sound and television communications, including in evolved forms, realized with any technical means, multimedia, publishing, including electronic publishing and the related sources of financing, any act or behavior having as object or effect the constitution or maintenance of a dominant position is prohibited."<sup>241</sup> The consequence of violating this prohibition is the nullity of the offending acts and agreements.<sup>242</sup> Actors operating in the referenced subject areas must communicate to the AGC and the Antitrust Authority concentration "agreements and transactions" to which they are party.

## V. ELECTRIC SECTOR

The Authority for Electric Energy and Gas, the Antitrust Authority, and, to a lesser degree, CONSOB, have been instrumental in how the liberalization of Italy's electricity markets has unfolded. At the beginning of the 1990s, there was much discussion of the "privatization" of ENEL and other State-held

---

237. *Id.* art. 1(10).

238. *Id.* art. 1(11).

239. *Id.* art. 1(26).

240. *Id.* art. 1(27).

241. *Id.* art. 2(1).

242. *Id.* art. 2(2).

enterprises.<sup>243</sup> These enterprises at the time represented a substantial portion of Italy's economy.<sup>244</sup> The prevailing thought appeared to be that the shares of ENEL would be sold in whole or in part to the private sector, possibly with retention by the public sector of some form of so-called "golden share" providing continued government control rights in areas such as approval of other shareholders, major corporate transactions, and the like. Indeed, Italian law gives the government the option to maintain ongoing rights in formerly State-held enterprises so as to veto further transfers of ownership of the privatized enterprise even after the government no longer holds a majority interest.<sup>245</sup> These lingering rights are known as "golden share rights."

---

243. See Decree No. 333 of July 11, 1992 (It.), *Gazz. Uff.* No. 162 (July 11, 1992), converted into law with modifications by Law No. 359 of August 8, 1992, *Gazz. Uff.* No. 190 (Aug. 13, 1992) (transforming principal state held entities, including ENEL, oil and gas conglomerate ENI, and government holding company IRI, into private law corporations owned by Treasury Ministry in anticipation of their sale); see also Law No. 537 of December 24, 1993 (It.), *supp. ord. to Gazz. Uff.* No. 303 (Dec. 28, 1993) (delegating to Italian government power to issue decrees to establish regulatory authorities to oversee privatized entities formerly controlled by government ministries, but no such decrees were issued); Law No. 474 of July 30, 1994 (It.), *Gazz. Uff.* No. 177 (July 30, 1994) (conditioning sale of state interests in public utility companies on creation of independent authorities to regulate relevant sector). Law No. 481 of November 14, 1995, discussed below, provided for the creation of the Authorities for Electric Energy and Gas and for Telecommunications, and Law No. 249 of 1997, also discussed below, created the Authority for Guarantees in Communications. The multi-year course of the preparations for action reflects the coalition character of Italy's government during the relevant period. Nonetheless, Italy's privatization efforts have built to a crescendo. OECD in Figures (visited on Feb. 11, 2000) <[http://oecd.org/publications/figures/e\\_87\\_oif-graph\\_privatisation.pdf](http://oecd.org/publications/figures/e_87_oif-graph_privatisation.pdf)> (on file with the *Fordham International Law Journal*) [hereinafter OECD in Figures]. In 1998, Italy raised more gross revenue from privatization, US\$13.6 billion, than any other OECD member state. OECD in Figures, *supra*. Significant privatizations included IMI S.p.A. (securities), INA S.p.A. (insurance), ENI S.p.A. (oil), Telecom Italia S.p.A., Banca Nazionale del Lavoro S.p.A. (bank), and recently, in one of the largest public offerings ever, a minority stake in ENEL, S.p.A. As of November 2, 1999, 34.6% of ENEL was sold to the public, and ENEL is listed on both the Italian and New York Stock Exchanges. *ENEL, 3.8 Million di Azionisti*, LA REPUBBLICA, Nov. 1, 1999, at 2; *World Record ENEL IPO*, PRIVATISATION INT'L, Dec. 1999.

244. This amounts to 12.9% of Italian gross domestic investment, as compared to 6.4% for the United Kingdom, and 2.1% for the United States, each for 1985-1990. See World Bank, *World Economic Indicators for the Period 1985-1990*, at 299, (visited on Feb. 13, 2000) <<http://www.worldbank.org>> (on file with the *Fordham International Law Journal*).

245. Decree Law No. 332 of May 31, 1994, art. 1(3) (It.), *Gazz. Uff.* No. 332 (May 31, 1994), converted into law by Law No. 474 of July 30, 1994, *Gazz. Uff.* No. 177 (July 30, 1994).

With the 1999 adoption of the Bersani Decree<sup>246</sup> concerning the restructuring of ENEL and of Italian electric markets to implement the relevant Community Directive on the liberalization of the electric power sector,<sup>247</sup> it is clear that this elementary trading of government-for-private ownership of a national electric monopoly will not occur. What the Bersani Decree contemplates is a structure for:

- a competitive market in the generation and supply of electricity;
- an essentially national transmission monopoly; and
- local monopolies in distribution.

Although the Italian State, for the moment, continues<sup>248</sup> to control ENEL, the ENEL that now exists and that will emerge from the implementation of the Bersani Decree over a period of years is an ENEL quite different in substance and structure from that which existed when the Italian privatization debates began.

#### A. Bersani Decree: The New Rules

The Bersani Decree became effective April 1, 1999 as Italian Legislative Decree No. 79 of March 16, 1999.<sup>249</sup> The Bersani Decree mandates:

- dismantling ENEL S.p.A.'s integrated electric monopoly;
- division of ENEL into several companies; and
- sale of 15,000 MW of ENEL capacity to third parties.

246. Legislative Decree No. 79 of Mar. 16, 1999 (It.), Gazz. Uff. No. 79 (Mar. 31, 1999).

247. Council Directive No. 96/92, O.J. L 27/20 (1997).

248. As to ENEL S.p.A., the Italian state maintains a so-called "golden share" in addition to its present majority ownership. ENEL PROSPECTUS, *supra* note 12, at 117. ENEL's bylaws give the Treasury Ministry approval power over material ownership interests in ENEL, defined as more than three percent. The Treasury Ministry also has approval rights over shareholder agreements involving more than five percent of share capital, as well as the right to veto significant changes in the business. *Id.* at 125. David Lane, *Setback for Investors as ENEL Share Price Drops*, PRIVATISATION INT'L, Feb. 2000, at 27.

249. Bersani Decree, *supra* note 43. For practitioner essays in English on these developments see Patrick Del Duca & Duccio Mortillaro, *Electric Sector Opportunities in Italy*, PROJ. FIN. MTHLY, Jan. 1999, at 3; Silvia Pariente-David & Denis Depoux, *Italy: A Land of Opportunity*, POWER ECON., Mar. 31, 1999, at 20; David Lane, *Italy Plans Sales of Power Firms*, PRIVATISATION INT'L, Sept. 1999, at 12; *Italian Power Shakeup Approved*, PROJ. FIN. INT'L, Mar. 10, 1999, at 34; Marco Denes, *Italian Power: Happy Hangover*, PROJ. FIN., Nov. 1999, at 24.

The Ministry of Industry, by a decree of September 24, 1996, constituted a "Consultative Commission for the identification of methods, procedures, priorities and of choices most suitable for the purposes of promoting the liberalization in the Italian energy market, the progressive competition among producers, the best guarantees in favor of users and environmental protection." The Commission, chaired by Umberto Carpi, an Italian senator and undersecretary of the Ministry of Industry, adopted its report January 28, 1997. Its work included guidelines on how to implement Directive No. 92 of 1996 in Italy, which the Bersani Decree in large measure followed. It endorsed not only the eventual separation of ENEL into generation, transmission, and distribution companies, but also the creation of a number of generation companies. Further, it asserted that a multiplicity of companies eventually would favor greater competition and allow incremental, and therefore more rapid, privatizations.

Broadly, the Bersani Decree follows the California model of an independent system operator and a power exchange.<sup>250</sup> But, it does so through the lenses of parallel restricted and competitive markets, as permitted by Directive No. 92 of 1996.

Pursuant to the Bersani Decree, the activities of production, import, export, purchase, and sale of electric energy no longer require special authorization.<sup>251</sup> Transmission and dispatching are reserved to the state and attributed in concession to the newly created manager of the national transmission grid.<sup>252</sup> Distribution is pursuant to concession granted by the Minister of Industry.<sup>253</sup>

### 1. Two Markets: Restricted and Competitive

The Bersani Decree contemplates parallel restricted and competitive markets as follows:

- sales to consumers whose requirements are below 30 GWh per year, reduced to 20 GWh January 1, 2000, and 9 GWh in 2002, known as so-called "restricted custom-

---

250. For an assessment of California's experience, see Robert L. Earle, et al., *Lessons from the First Year of Competition in the California Electricity Markets*, *ELECTRICITY J.*, Oct. 1999, at 57.

251. See Bersani Decree, *supra* note 43, art. 1(1).

252. *Id.* art. 1(1).

253. *Id.*

ers;"<sup>254</sup> and

- other sales, to so-called "qualified customers."<sup>255</sup>

For restricted customers, the Bersani Decree creates a new "Single Purchaser" company.<sup>256</sup> The Single Purchaser is owned by the National Transmission Manager and hence is under government ownership.<sup>257</sup> The Single Purchaser entity buys all power intended for consumption in Italy, except the power to be consumed in the competitive market. The Single Purchaser, through distributors, is the only source of power for restricted customers. It sells its power to distribution companies at a price such that the end users perceive only the uniform national price for electricity set by the Authority for Electric Energy and Gas.<sup>258</sup> Deregulation does not directly affect restricted customers. The tariffs that the Authority for Electric Energy and Gas allow to be charged to restricted consumers constrain what the Single Purchaser can pay to producers and importers of electricity.

Qualified customers are:<sup>259</sup>

- distributors;
- wholesalers;
- extraterritorial consumers or suppliers; and
- companies and consortia that consume at least 30 GWh per year, with at least 2 GWh in the same municipality on the Bersani Decree's effective date, reduced to 20 GWh per year and 1 GWh consumption in the same municipality on January 1, 2000, and 9 GWh per year and 1 GWh consumption, on January 1, 2002.

Generators of electricity may contract directly with qualified customers.<sup>260</sup> Although the terms of such contracts must conform with the Authority for Electric Energy and Gas requirements imposed for the "correct functioning of the entire electric system," there is a presumption in favor of Authority authorization of

254. *Id.* art. 2(7).

255. *Id.* art. 2(6).

256. *Id.* art. 4 (constituted as *Acquirente Unico*, S.p.A).

257. *Id.* art. 4(1). Minority interests consistent with the maintenance of state ownership control may be sold to distribution companies. *Id.*

258. *Id.* arts. 1(7), 4(6).

259. *Id.* arts. 14(1), (2), (3), (4).

260. *Id.* art. 6.



such contracts.<sup>261</sup> The Authority for Electric Energy and Gas will oversee such contracts. The Minister of Industry may expand the universe of qualified customers if the following thresholds for open market shares are not met: thirty percent on February 19, 1999, thirty-five percent on January 1, 2000, and forty percent on January 1, 2002.<sup>262</sup>

## 2. ENEL Reorganization

The Bersani Decree has mandated reorganization of ENEL into a holding company. The initial subsidiary companies, subsequently to be sold, are:

- a generation company, which may own generation facilities outright or through special purpose companies, perhaps partly owned with other investors. Among its initial tasks, the company will be to sell 15,000 MW of ENEL's aging generating capacity in the next five years;
- a distribution company, which like the generation company may own distribution assets outright or through special purpose companies, perhaps partly owned with other investors;
- a company for sales to qualified customers, which like the generation company, may also act through special purpose companies, perhaps owned with others; and
- a transmission company, to own the transmission network.<sup>263</sup>

## 3. Generation, Transmission, and Distribution

The Bersani Decree mandates, that by January 1, 2003 no entity may produce or import, directly or indirectly, more than fifty percent of Italy's total electric power.<sup>264</sup> The Authority for Electric Energy and Gas may grant a one year extension of this deadline.<sup>265</sup> By January 1, 2003, ENEL must also have sold at least 15,000 MW of its production capacity.<sup>266</sup>

261. *Id.* art. 6(2).

262. *Id.* art. 14(5).

263. *Id.* art. 13.

264. *Id.* art. 8(1).

265. *Id.* art. 8(2).

266. *Id.* art. 8(1).

The Bersani Decree contemplates establishment of a National Transmission Manager, Ente Gestore della Rete di Trasmissione Nazionale S.p.A., responsible for transmission.<sup>267</sup> This entity, a state owned private law corporation,<sup>268</sup> is to provide universal service.<sup>269</sup> The Authority for Electric Energy and Gas is to oversee the National Transmission Manager's activities. Private parties may manage the limited portions of the transmission network not functional to the transmission network as a whole.<sup>270</sup> The National Transmission Manager may engage third parties to work under its direction to maintain the network.<sup>271</sup>

The Bersani Decree contemplates that distribution concessions in effect prior to its effective date of April 1, 1999 continue through December 31, 2030.<sup>272</sup> ENEL received a concession in 1995 that included distribution to almost all of Italy, except for parts of some major urban areas served by municipal companies and some remote areas.<sup>273</sup> That concession was originally to expire in 2032, but would appear to be modified by the Bersani Decree to run through the December 31, 2030 date. The distribution company to be spun off from ENEL will inherit ENEL's distribution concession. For concessions issued after December 31, 2030, the Bersani Decree contemplates that the Ministry of Industry will establish bidding regulations that: (1) provide compensation of investments made by the previous concession holder; (2) mandate that coverage of a concession be no less than the territory of a municipality and no more than one-fourth of final consumers nationally; (3) establish bid qualification requirements; and (4) require that only one concession per municipality be issued.<sup>274</sup> The Bersani Decree contemplates mechanisms in the near future for Italy's limited number of municipal and other non-ENEL electricity distributors to take full control of distribution in the municipalities in which they predominate, as well as to raise capital for such purposes.<sup>275</sup>

---

267. *Id.* art. 3(1).

268. *Id.* art. 3(4).

269. *Id.* art. 3(1).

270. *Id.* art. 3(7).

271. *Id.* art. 3(8).

272. *Id.* art. 9.

273. Ministry of Industry Decree of December 28, 1995 (It.), supp. ord. No. 41 to Gazz. Uff. No. 39 (Feb. 16, 1996) (awarding ENEL 40 year concession).

274. *See* Bersani Decree, *supra* note 43, art. 9(2).

275. *Id.* arts. 9(3), (4), (7).

The Market Operator is to be a corporation independent of power producers and distributors, so as to ensure its neutrality.<sup>276</sup> The National Transmission Manager will be its initial owner.<sup>277</sup> The Market Operator will make a market for electricity in the competitive part of the Italian electric sector. Ultimately, only purchases and sales by the Single Purchaser for the restricted market and direct sales from a producer to a final qualified purchaser will fall outside the Market Operator's activity.

Until January 1, 2001, the National Transmission Manager is to handle dispatching, based only on technical and network requirements, *i.e.*, independent of market considerations.<sup>278</sup> After January 1, 2001, the Market Operator will assume responsibility for dispatching based on economic criteria.<sup>279</sup>

The Bersani Decree promotes renewable power sources, namely solar energy, wind, hydroelectricity, geothermal power, tides, waves, and waste.<sup>280</sup> To further renewable power sources, entities responsible for plants that produce more than 100 GWh annually must, as of the year following January 1, 2001, generate at least two percent<sup>281</sup> of the additional power produced following the Bersani Decree's effective date (April 1, 1999) from renewable sources or acquire the shortfall from renewable source producers.<sup>282</sup> The National Transmission Manager is to assure that up to fifteen of the primary energy conduits necessary to generate Italy's electricity, for electric energy produced by plants that utilize, in order, renewable energy sources, cogeneration, and national fuel resources.<sup>283</sup> The Ministry of Industry may propose incentives for renewable power, which Italy's regions are then to distribute through appropriate bidding mecha-

276. *Id.* art. 5.

277. *Id.*

278. *Id.* art. 5(2).

279. *Id.*

280. *Id.* art. 11.

281. *Id.* art. 11(5).

282. *Id.* arts. 11(1), (2). The Bersani Decree assigns ENEL's rights and obligations pursuant to Law No. 9 of 1991 power contracts to the National Transmission Manager, Bersani Decree art. 11(3), and provides that the National Transmission Manager may sell credits for their power output to the large generators who would otherwise fail to meet their own requirement to provide renewable resource power proportional to their incremental increase in renewable power generation. *Id.*

283. *Id.*

nisms.<sup>284</sup>

The Bersani Decree facilitates development of conventionally fueled power plants as follows:

- *One stop permitting.* It contemplates that the Ministry of Industry will issue a decree at least coordinating the numerous existing applicable permit procedures.<sup>285</sup>
- *Re-powering.* Rebuilding and modernization of existing plants within existing plant bounds will not require further land use approval.<sup>286</sup>
- *Denials.* Project rejections are to be communicated to the European Commission for scrutiny.<sup>287</sup>

#### B. *Independent Regulatory Commissions and the Electric Sector*

The market structure, which the Bersani Decree imposes, could not have been conceived without the existence of the Authority for Electric Energy and Gas. Specifically, the authority oversight of the independence of accounting information to justify tariffs and the setting of tariffs for so-called restricted customers are functions that the Italian political system would entrust only to an autonomous body. Without such a body, the Italian political system would not allow privatization or liberalization to proceed.<sup>288</sup>

Competition is brewing in the electric sector. The leading municipal companies and some of the larger independent power generators are availing themselves of the new regulatory framework overseen by the Authorities. The large municipal companies, which to this day have survived the 1962 creation of ENEL, are the Milan, Rome, and Turin electric utilities. Each of them has been the object of partial privatization efforts that include listing on the stock exchange.<sup>289</sup> Pursuant to the Bersani Decree, each will consolidate its responsibility for distribution within its municipal territory.<sup>290</sup> Furthermore, each has contem-

---

284. *Id.* art. 11(6).

285. *Id.* art. 8(4)(a).

286. *Id.*

287. *Id.* art. 8(5).

288. Law No. 474 of July 30, 1994 (It.), Gazz. Uff. No. 177 (July 30, 1994).

289. *See Italy, supra* note 69, at 203.

290. Bersani Decree, *supra* note 43, art. 9(3).

plated diversification into telecommunications.<sup>291</sup> Recently, the three companies have contemplated the development of joint business activity relative to the competitive, unrestricted market.<sup>292</sup> Sondel and Edison, two players in the Italian independent power market, are also emerging as competitors in the unrestricted market.

Nonetheless, ENEL remains a formidable market actor, even if subject to the Bersani Decree-mandated reorganization and break up. Well in advance of the Bersani Decree, ENEL's management took action to prepare for a competitive market. Its current management, appointed in 1996, reduced ENEL employment seventeen percent from December 1995 through June 1999<sup>293</sup> and diversified into telecommunications through its joint venture with Deutsche Telekom and France Telecom, known as WIND.<sup>294</sup> ENEL's management went beyond the initiatives of increased internal productivity and diversification to commence restructuring its core activity of electricity generation.

The Authority for Electric Energy and Gas and the Antitrust Authority had important roles in assuring that ENEL's restructuring of its core electric business remained consistent with objectives of competition, that is, that it represented a step towards increased competition rather than mere preservation of the national electricity monopoly. When ENEL's management in 1997 preemptively acted to commit 2500 MW of its approximately 55,000 MW generating capacity to a joint venture with Italian national oil company ENI, the Antitrust Authority imposed the requirement that ENEL ultimately sell its interest in the joint venture entity.<sup>295</sup>

On May 5, 1997, ENI and ENEL signed a memorandum of understanding directed to the creation of the joint venture.<sup>296</sup>

291. See e.g., AEM Press Release No. 28, Nov. 9, 1999 (visited on Feb. 13, 2000) <<http://www.aem.it>> (on file with the *Fordham International Law Journal*).

292. *Italy, supra* note 69, at 203; *Intesa AEM, ACEA e AEM Torino; Nasce il polo energia anti-Enel*, *CORRIERE DELLA SERA*, Nov. 16, 1999, at 23.

293. ENEL PROSPECTUS, *supra* note 12, at 5.

294. *Id.* at 6.

295. An additional 5000 MW commitment to another joint venture with U.S. independent power developer ENRON was contemplated and later dropped. *Italy, supra* note 69, at 203.

296. ENI and ENEL subsequently parted company. Stefano Tamburello, *Eni Scende in Campo Contro il Colosso Enel*, *LA REPUBBLICA*, Nov. 18, 1999.

ENI would contribute the cogeneration power plants in its refineries, and ENEL would contribute a number of its power plants. The memorandum of understanding contemplated that each party would contribute about 2500 MW of power facilities, which after re-powering as modern combined cycle gas fired power plants, might total 8000 to 10,000 MW. The joint venture would allow ENEL a means to serve about a third of the then contemplated future free market for large industrial users. The Authority for Electric Energy and Gas asked the Antitrust Authority on May 29, 1997 for a formal opinion related to the ENI-ENEL venture.<sup>297</sup> Its president responded July 29, 1997.<sup>298</sup>

The principal concerns related to dominance by ENI and ENEL is about the nascent competitive market for electricity, *i.e.*, the market to supply "eligible" customers within the meanings of the Community Directive No. 92 of 1996 and the Bersani Decree, and then in the course of elaboration. The Authority for Electric Energy and Gas had warned ENEL against the expectation that any retention of high cost installations would be covered by tariffs set by the Authority for Electric Energy and Gas, and it had urged ENI and ENEL to contemplate an auction sale of their ownership of the joint venture.<sup>299</sup> The Antitrust Authority's president looked favorably upon the transfer of existing ENEL plants to other entities, particularly in view of the time required for construction of new, independently owned power plants. Antitrust clearance, however, was conditioned on ENEL's undertaking to divest its interest with reasonable promptness.

The Authorities thus channeled ENEL's initial effort to prepare for the coming competitive market. This channeling constituted a first confirmation that the Authorities would work in a meaningful way to achieve competitive markets.

---

297. Authority for Electric Energy and Gas Deliberation No. 54 of May 28, 1997 on the Outcome of the Investigation of the Agreement between ENEL and ENI for the Constitution of a Joint Company in the Electric Sector (visited on Feb. 12, 2000) <<http://www.autorita.energia.it>> (on file with the *Fordham International Law Journal*).

298. Antitrust Authority File No. 2590 (visited on Feb. 13, 2000) <<http://www.agcm.it>> (on file with the *Fordham International Law Journal*).

299. Authority for Electric Energy and Gas Deliberation No. 54 of May 28, 1997, art. 3(c).

VI. *TELECOM SECTOR*

The AGC, CONSOB, and the Antitrust Authority have interacted to create the foundation of a competitive market for telecommunications in Italy. As for electricity, the position of the historically dominant government monopoly has been a significant factor to address. Different from the case of ENEL, where the solution is to break it up, the approach to Telecom Italia's dominant position has been to afford greater reliance on the entry of new participants and technologies, combined with the opening of its national network to competitive market actors. Whereas in ENEL's case, the Bersani Decree provided for the neutral organization of the national transmission system by an independent system operator, the approach to Telecom Italia's dominance has been its privatization combined with the licensing of new market actors and the regulatory imposition of neutral terms of interconnection. A further difference of the electric sector is of course that the State ownership of the national telecommunication monopoly was surrendered without breaking up the monopoly entity. The subsequent hostile takeover by new ownership in conformity with CONSOB rules has further distanced Telecom Italia from its State-controlled past. In contrast and notwithstanding the late 1999 public offering of a substantial minority of ENEL's shares, State ownership of ENEL is being surrendered in conjunction with a legislatively mandated break-up of ENEL.

A. *The AGC's Role in Licensing and Interconnection*

To satisfy the mandates of Italy's antitrust and implementation laws, as well as the overarching mandate of Community law, the AGC has moved promptly on the measures required to confront Telecom Italia's *de facto* monopoly.<sup>300</sup> In 1998, Telecom Italia had over ninety percent of the Italian fixed-line voice telephony services market.<sup>301</sup> One important first step was simply to authorize a significant number of new market actors.

An AGC license is required to install telecommunication

---

300. For essays on various aspects of Italian telecommunications law, see *LA DISCIPLINA GIURIDICA DELLE TELECOMUNICAZIONI* (Franco Bonelli & Sabino Cassese, eds. 1999) [hereinafter *LA DISCIPLINA GIURIDICA*].

301. Law No. 249 of July 31, 1997, art. 4(7), (It.), supp. ord. no. 154/L to Gazz. Uff. No. 177 (July 31, 1997).

networks that use ground lines or terrestrial frequencies.<sup>302</sup> Operating telecommunication networks and supplying telecommunication services are subject to AGC licenses and authorizations.<sup>303</sup> The installation of telecommunication networks on public assets, such as city streets, is subject to the issuance of municipal concessions for the use of public land, and is awarded on a nondiscriminatory basis among the various applicants. Municipalities are allowed to impose obligations of a civic nature in connection with award of such concessions in conformity with the AGC's rules. The installation of backbone networks is subject exclusively to AGC licensing.<sup>304</sup>

In its brief existence, the AGC has sequentially issued four competitively-bid licenses for mobile telephony (held by Telecom Italia Mobile, Omnitel Pronto Italia, WIND, and Blutel, a joint venture principally of Autostrade S.p.A., and British Telecom) and has authorized on the order of seventy operators for fixed-line voice telephony.<sup>305</sup> For these new entrants, a premium was placed on interconnection terms and, to a lesser degree, on the use of the limited long distance networks not held by Telecom Italia.<sup>306</sup>

Community law requires that national authorities implement its principle of assuring the appropriate terms of interconnection between telecommunication operators.<sup>307</sup> Italian law

302. *Id.* art. 4(1).

303. *Id.* art. 4(2).

304. *Id.* art. 4(3).

305. A list of licenses, updated on November 24, 1999, is available on the AGC website, which is <<http://www.agcm.it>>.

306. Telecom Italia's main competitors in the fixed-line market are Albacom, Colt, Infostrada, MCI Worldcom, WIND, and Tiscali. ENEL PROSPECTUS, *supra* note 12, at 79. Several of these competitors were established as consortia of majority Italian interests with non-Italian telecom companies, which were formed to attempt to exploit for purposes of building ground based telephone networks the limited number of existing restricted use networks. The consortia include:

- INFOSTRADA (established by Olivetti and Mannesmann, but now exclusively owned by Mannesmann) starting with the state railroad's long distance network.
- WIND (established by ENEL as a 51% holder with France Telecom and Deutsche Telecom) starting with ENEL's long distance network.
- ALBACOM (established among among British Telecom, Mediaset and Banca Nazionale del Lavoro with an Italian majority), starting with oil company ENI's long distance network.

307. Parliament and Council Directive No. 97/33, art. 9(3), O.J. L 199/32, at 40 (1997).



implements this principle through a combination of statute, decree, and AGC action.<sup>308</sup> The essential concept is that the networks of every operator be open on demand to all others. An operator who wishes to interconnect with another must attempt to negotiate the terms of interconnection, and the counterparty is obligated to reach an agreement to provide the interconnection within regulatorily specified parameters.<sup>309</sup> Should the parties be unable to agree promptly on the terms of interconnection, the AGC, in conformity with Community law, has the power to intervene to mandate the terms of interconnection.<sup>310</sup>

In the early days of Italy's competitive framework, Telecom Italia felt strongly enough about these matters to challenge,<sup>311</sup> without ultimate success, the Communications Ministry Decree of April 23, 1998 that contemplated the implementation of mandatory interconnection negotiation.<sup>312</sup> As an operator with dominant market power, Telecom Italia is required to develop a "reference interconnection offer" even prior to any specific request from another market actor to negotiate interconnection terms.<sup>313</sup>

By mandating that Italian voice telephone operators, particularly Telecom Italia, provide interconnection on a nondiscriminatory basis, including individual services,<sup>314</sup> Decree No. 318 of 1997 opened the Italian voice telephony market to new entrants.

308. Presidential Decree No. 318 of September 19, 1997 (It.), arts. 4(1), (5), *supp. ord. to Gazz. Uff. No. 221* (Sept. 22, 1997); Communications Ministry Decree of April 23, 1998, art. 3, *Gazz. Uff. No. 133* (June 6, 1998), in *LA DISCIPLINA GIURIDICA*, *supra* note 300, at 931.

309. Law No. 249 of 1997 (It.), arts. 1(6)(a)(7), (8), (9), *supp. ord. No. 154/L to Gazz. Uff. No. 177* (July 31, 1997), further confirmed by, Presidential Decree No. 318 of 1997, arts. 4, 5.

310. Principles which interconnection is to respect include:

- promotion of competition among the networks and services,
- guarantee of interconnection to serve local, national, and European Union markets,
- guarantee of communication among user terminals where compatible,
- non discrimination, and
- proportionality of rights and obligations among operators and suppliers.

Law No. 249 of 1997, art. 5(1).

311. Elisabetta Diamanti, *Accesso e Interconnessione alle Reti di Telecomunicazioni*, in *LA DISCIPLINA GIURIDICA*, *supra* note 300, at 181, 192-93.

312. Communications Ministry Decree of April 23, 1998 (It.), *Gazz. Uff. No. 133* (June 6, 1998), *LA DISCIPLINA GIURIDICA*, *supra* note 300, at 931.

313. Presidential Decree No. 318 of 1997, art. 4(9).

314. *Id.* art. 6,

The only limitations to a new market participant's abilities to force Telecom Italia to provide interconnection are if "practicable alternatives" from the technical/commercial standpoint to the requested interconnection exist, and if the new participant lacks adequate resources to exploit the interconnection.<sup>315</sup> AGC's temporary discretion to disallow interconnection based on these narrow limitations is unlikely to be exercised on partisan political terms in view of the mechanisms to isolate the AGC from political concerns.<sup>316</sup> All interconnection agreements are to be notified to the AGC.<sup>317</sup> Among the significant points related to interconnection—which remain subject to further evolution—is the accounting methodology to be used to set the price of interconnection. The ultimate goal is to move from a methodology based on historical cost of the relevant infrastructure to a methodology based on prospective incremental costs arising from the provision of interconnection.<sup>318</sup>

In an eighteen month period following the AGC's institution, Telecom Italia issued three reference interconnection offers, which progressively approached an acceptable foundation for a competitive market. Actions of the Antitrust Authority and of the AGC's Commission for Infrastructures and Networks shaped this progress. Relative to the first offer made July 1, 1997,<sup>319</sup> the Antitrust Authority issued a broadly critical decision February 3, 1998.<sup>320</sup> Relative to the second offer made July 25, 1998,<sup>321</sup> the AGC's Commission on Infrastructures and Networks issued a strongly critical decision on November 25, 1998.<sup>322</sup> Telecom Italia sought an injunction against this decision from the Lazio regional administrative tribunal, which denied relief December 16, 1998.<sup>323</sup> Telecom Italia then issued a revised offer

315. *Id.* art. 4(4).

316. *Id.* art. 41(4), 19(3),

317. *Id.* art. 4(17).

318. *Id.* art. 7(3) (effectively postponing question until year 2000).

319. See AGCM, *Segnalazione del 13 Febbraio 1998 sull'offerta di Interconnessione di Riferimento della Società Telecom Italia*, in *LA DISCIPLINA GIURIDICA*, *supra* note 300, at 1023.

320. See Gazz. Uff. No. 133 (June 10, 1998).

321. See AGC Deliberation No. 1/CIR/98 (visited on Feb. 12, 2000) <<http://www.agcm.it>> (on file with the *Fordham International Law Journal*).

322. *Id.*

323. See Lazio Regional Administrative Tribunal Order Denying Telecom Italia S.p.A.'s Request for Suspension, Dec. 16, 1998 in *LA DISCIPLINA GIURIDICA*, *supra* note 300, at 1087.

December 31, 1998.<sup>324</sup>

### B. Olivetti's Takeover of Telecom Italia

Olivetti's successful hostile takeover of Telecom Italia is a landmark event that the framework of Authorities described in this Article facilitated. Olivetti was a much smaller company than Telecom Italia, and it used borrowed money to back its bid. In addition to sweeping aside Telecom Italia's management, the takeover had some significant tangential impact on the composition of the players in Italy's telecommunication market. Namely, Olivetti sold its stake in Infostrada to its German partner Mannesman. Also, Telecom Italia's collaboration with Deutsche Telekom in an unsuccessful attempt to frustrate the takeover has meant that Deutsche Telekom's partners in the WIND consortium, ENEL and France Telecom, are engaged in litigation with Deutsche Telekom. The thrust of this litigation is that Deutsche Telekom breached its obligations to its WIND partners.<sup>325</sup> Behind these developments, three elements of the new environment in Italy were particularly germane to the Telecom Italia takeover battle. CONSOB enforced a philosophy of one share, one vote. The Treasury Ministry forbore from exercising its golden share rights. Further, the AGC had provided a market framework by sufficient licensing and authorization activity and by mandating interconnection terms so that the AGC and the Antitrust Authority could look benignly on the corporate control battle.

The acquisition battle by Olivetti for Telecom Italia formally began February 26, 1999 with a public notice pursuant to CONSOB rules.<sup>326</sup> This communication stated Olivetti's offer to buy all of the ordinary shares of Telecom Italia with a combination of

---

324. Davide d'Angelo, *La Disaggregazione delle Condizioni Economiche nei Servizi di Interconnessione*, in *LA DISCIPLINA GIURIDICA*, *supra* note 300, at 205, n.23, 212, n.36.

325. ENEL PROSPECTUS, *supra* note 12, at 5, 14, 79. In July 1999, ENEL and France Telecom commenced an ICC arbitration proceeding in Geneva against Deutsche Telekom seeking the right to buy out Deutsche Telekom's interest in WIND and Lit 1 for 1700 billion lire in damages on the ground that Deutsche Telekom had violated exclusivity, confidentiality, and non-competition provisions of the WIND shareholder agreement by signing a business combination agreement with Telecom Italia. Litigation is also pending in the Italian courts relative to the termination by the WIND shareholders, other than Deutsche Telekom, of the Deutsche Telekom WIND directors.

326. Legislative Decree No. 58 of February 24, 1998, art. 102 (It.), *supp. ord.* No. 52/L to Gazz. Uff. No. 71 (Mar. 26, 1998).

cash and securities issued by an Olivetti shell company, Tecnost International, B.V.<sup>327</sup> That the offer was highly leveraged with debt was criticized as contrary to the spirit of Italian law.<sup>328</sup> As expected, on April 27, 1999, the board of Telecom Italia rejected the offer as too low and too risky because of its leveraged nature.<sup>329</sup> Telecom Italia's management sought shareholder approval for a defensive merger with Deutsche Telecom as a white knight.

But the market, and Telecom Italia's 3.9% shareholder, the Italian Treasury, reacted otherwise. On May 30, 1999, Telecom Italia's shareholders accepted a sweetened Olivetti offer, and the Italian Treasury Ministry, as holder of a golden share in Telecom, abstained from exercising its veto power. The Olivetti takeover demonstrates a significant increase in the level of market discipline to which publicly traded Italian companies are now subject.

In September 1999, a transaction was proposed whereby Telecom Italia would be merged into the Tecnost shell holding company, with the result that the merged company could be put into play as a merger or acquisition candidate beyond the applicability of CONSOB rules. The proposal provoked fierce opposition, and the Italian Treasury Ministry threatened to use its golden share to torpedo the restructuring.<sup>330</sup> Eventually, it was the market that rejected the proposed merger of Telecom and Tecnost. When the Tecnost and Telecom stock prices fell sharply, the restructuring was abandoned.<sup>331</sup> Most significantly, the Treasury did not exercise its golden share rights and the

---

327. Official communication under Article 102 of Legislative Decree No. 58 published in Data Bank of *Il Sole 24 Ore* February 26, 1999; ID No. SS990226002FAA ("CONSOB Notice"). CONSOB Notice, part 2.

328. See Riccardo Sabbatini, *Quella di Olivetti è un'offerta Anomala*, *IL SOLE 24 ORE*, Mar. 11, 1999, at 3. Civil Code Section 2358 states in relevant part: "A company cannot make loans or provide guarantees for the purchase or subscription of its shares. A company cannot, including by way of a fiduciary, or through third party intermediaries, accept its shares as a guarantee." Tecnost's borrowing to fund its hostile tender offer and pledging its own stock as collateral does not fall squarely within the prohibition.

329. For a brief review of the Telecom board reaction to Olivetti's offer, see Orazio Carabini, *Telecom: Fumata Nera Sulla Fusione*, *IL SOLE 24 ORE*, Apr. 20, 1999, at 3.

330. Rossella Bocciairelli, *Amato a Telecom: Tutto da rifare—Una settimana sempre nella bufera*, *IL SOLE 24 ORE*, Feb. 10, 1999, at 25.

331. See *Telecom: Retromarcia di Colaninno*, *CORRIERE DELLA SERA*, Nov. 22, 1999, at 9. More recently, Telecom Italia turned its attention to the Internet. See, e.g., *Seat—Tin. It, insieme entre luglio*, *CORRIERE DELLA SERA*, Feb. 18, 2000, at 26.

markets created within the framework of the Authorities were confirmed as Telecom's ultimate regulators.

VII. ITALY'S INDEPENDENT REGULATORY COMMISSIONS' JOINING THE COURTS AS LEADING INSTITUTIONS FOR THE IMPLEMENTATION OF COMMUNITY LAW

Italy, unified in 1861, is a young country. Its constitution, adopted in 1948, is even younger. At the same time, Italy's ancient and heterogeneous cultural roots continue to influence its public life.<sup>332</sup> Several strands of Italy's political history combined to produce the initial confrontational approach of its Constitutional Court to Community law and the subsequent evolution of Italy's response to include the creation of its new independent regulatory commissions and their embrace of Community initiatives to promote competitive markets.

Italy's 1948 constitution reflects a determination never to repeat the experience of fascism, which led to war, repression, and defeat. That constitution's emphasis on proportionality in elections<sup>333</sup> led to coalition governments. Individually, these governments were short lived, but their basic structure was extraordinarily stable over decades. With time, they became associated with the infiltration of party patronage into all facets of national life. The party patronage associated with the State control of ENEL and Telecom Italia, and other State-held entities, for an extended period made contemplation of their privatization, and even their management on principles of economic efficiency, difficult to contemplate. It ultimately, however, led to a crescendo of misconduct, which helped to create willingness to reform.

Italy's unification was accomplished under the leadership of the Piemontese who brought with them principles of French administrative law and organization.<sup>334</sup> Unlike France, Italy, however, did not develop a culture of prestigious *grandes écoles* for the formation of national elites of civil servants.<sup>335</sup> Although Italy has many dedicated and competent civil servants, its public

---

332. ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 17-62 (1993).

333. COST. art. 56 (It.).

334. SABINO CASSESE, LE AMMINISTRAZIONI PUBBLICHE IN EUROPA: PER UNO STUDIO STORICO COMPARATO DEL DIRITTO AMMINISTRATIVO (1994).

335. PIERRE BIRNBAUM, THE HEIGHTS OF POWER: AN ESSAY ON THE POWER ELITE IN

administration has not had the reputation of *dynamisme* or efficiency, which the French public administration claims. As European Community initiatives in favor of Community-wide competitive markets became more pressing on Italy, this factor militated against reliance upon the traditional public administrative structures as the regulators of newly competitive markets.

Italy's government structure, comprised of Council of Ministers and its president, also popularly known as the Prime Minister, depends on the confidence of the two houses of parliament for its tenure in office.<sup>336</sup> The ministers responsible for the various portfolios, including the Minister of Industry responsible for electricity and the Minister of Communications responsible for telecommunications, are politically responsible as part of the government. Should the government to which they belong lose the confidence of parliament, they lose office. Notwithstanding the amazing long term post-war stability of the Italian political class, the constant changing of actual governments and hence of responsible ministers contributed to creating a basis for seeking stability through some alternative institutional mechanism, such as the Authorities.

The Authorities discussed here that regulate securities, anti-trust, electric power, and telecommunications are novel institutions for Italy. They fall outside the models of Italy's French influenced public administration and its parliamentary governmental structure. What they perhaps most resemble is Italy's Austrian-inspired Constitutional Court.<sup>337</sup> Italy's Constitutional Court is conceived as simultaneously a judicial and a legislative body. Its membership is accordingly selected in equal thirds by parliament, the judiciary, and the president.<sup>338</sup> The Constitutional Court's status as the sole body that undertakes constitutional review is further confirmation of this point.<sup>339</sup> Like the

---

FRANCE (1982); EZRA N. SULEIMAN, *POLITICS, POWER AND BUREAUCRACY IN FRANCE: THE ADMINISTRATIVE ELITE* (1974).

336. COST. art. 94 (It.).

337. See HANS Kelsen, *LAW AND PEACE IN INTERNATIONAL RELATIONS; THE OLIVER WENDELL HOLMES LECTURES 1940-41* (1942); MARTIN M. SHAPIRO, *COURTS, A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

338. COST. art. 135 (It.).

339. *Id.* art. 134. Individual litigants do not have direct access to the Constitutional Court. Questions of constitutionality are referred to the Constitutional Court by any Italian court which believes such a question is raised in pending litigation. Recently, the European Court for Human Rights confirmed that a litigant seeking redress

Constitutional Court, the Authorities have both legislative and judicial attributes. The Authorities are certainly insulated from direct political accountability, but they are subject to administrative judicial review of their application of the legislatively mandated criteria for their action. Like Italian magistrates, the members of the Authorities are required to be impartial, but unlike magistrates, the members of the Authorities are directed to make and implement policy within the mandate of the governing legislation, reminiscent of the Constitutional Court's subjection to the constitution.

A cozy world of State ownership, monopolies, government regulated and allocated credit, and foreign exchange controls coincided with an assertion that EC law only mattered in Italy if Italy found it convenient to recognize such law. This early 1960s sketch maintains little resonance today. Today, the liberalizing economic principles of EC law are embraced as consistent with the fundamental principles of the Italian constitutional system. And, the institutions to implement them have been invented in ways intended to isolate them from whatever remnants of the past continue to persist. In each of the electric power and telecommunication sectors in Italy, the weight of past monopolies continues to influence heavily the evolution of the relevant markets. Neither ENEL nor Telecom Italia is likely to disappear. Just as AT&T has evolved in the U.S. markets into something—or indeed a multiplicity of somethings—hard to have imagined in the old days, each of ENEL and Telecom Italia has already begun to mutate in ways that a decade ago would have been quite unforeseeable.

The creation of new Italian enterprises, and the entry of competing foreign enterprises and foreign resources of money and human capital will doubtlessly proceed with many bumps along the way. Already the discipline of market competition is changing the behavior of all players in ways consistent with the

---

of a breach of its fundamental rights was left without recourse under Italian law when the ordinary Italian courts declined to recognize its claim and to pose any question to the Italian Constitutional Court. The litigant was a corporate owner of many rental properties who complained that Italian authorities violated its property rights by giving precedence to small property owners in completing eviction proceedings. *Immobiliare Saffi v. Italy*, Application No. 22774/93, July 28, 1999 (not yet published in *Reports of Judgments & Decisions*) (visited on Feb. 15, 2000) <<http://www.echr.coe.int/eng/Judgments.htm>> (on file with the *Fordham International Law Journal*).

demand for greater efficiency and service.<sup>340</sup> The Authorities guard market order and, as such, are the institutions that allow the reform of these sectors to proceed. The Authorities exist with their present mandate because of the stimulus of the EC Directives mandating liberalization and the pressure for economic efficiency generated by the European Community's single internal market policies as a whole. The opening of Italy to competitive forces from the rest of the Community reinforces the basis for the Authorities' work toward achieving greater competitive efficiency. In the context of this environment, the Authorities have joined the judiciary as key agents for implementing and assuring the benefits of Community law and policies in favor of competitive markets. The institution of the Authorities has ushered into being a new dimension in how Italian and Community law relate to each other.

---

340. See Thomas Kamm, *Continental Drift: Europe Marks a Year of Serious Flirtation with the Free Market*, WALL ST. J., Dec. 30, 1999, at A1.