

Italian Competition Authority: new competences, new merger control thresholds and new jurisdictional review system

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A recent Law Decree ratified by the Italian Parliament with Law no. 27 of March 24, 2012, so called "*Crescitavia*" or Liberalizations Decree¹, has modified the competences of the Italian Competition Authority ("ICA" or "Authority"), has substantially reformed its funding system and introduced an important novelty in the antitrust jurisdictional review system.

1. Italian merger control review

1.1 A new thresholds system for merger control

The new Law has significantly modified the turnover threshold system for the triggering of merger filing obligations.

Currently, the notification to the ICA of a concentration is required where **even only one** of the following two **alternative** turnover thresholds is met:

- the combined aggregate turnover in Italy of all undertakings concerned exceeds Euro 468 million; **or**
- the aggregate Italian turnover of the Target exceeds Euro 47 million².

Starting from **January 1, 2013**, the above-mentioned thresholds will apply **cumulatively** so that the obligation to notify a concentration will be triggered only where **both** of the said turnover thresholds are satisfied³.

1.2 Abolition of the filing fee and introduction of a compulsory contribution on corporations

Another innovation related to Italian merger control system concerns the **abolition of the filing fee** currently imposed on undertakings notifying a to the ICA a concentration. At present, the filing fee is set at 1.2% of the notified transaction's value, with a minimum and a maximum amount set respectively at Euro 3,000 and 60,000⁴. Such a **fee will be completely abolished starting from January 1, 2013**.

¹ Law Decree of January 24, 2012 no. 1, published in the Italian Official Journal ("O.J.") of March 24, 2012, no. 71.

² Please note that turnover thresholds are adjusted every year according to the increases in the GDP deflator index. ICA's latest update dates to November 16, 2011 (Decision no. 22951, published in Bulletin of November 21, 2011, no. 44/2011) and will apply throughout 2012.

³ Introduced by article 5 of the Decree.

⁴ The compulsory filing fee was introduced in 2006 by State Budget Law as a form of partial self-financing of the Authority, and is now regulated by article 10, paragraph 7-bis, of Law 287/90. The amount of the contribution was lastly updated on December 21, 2011, with ICA's provision no. 23098, published in Bulletin of December 27, 2011, no. 49/2011.

Indeed, article 5-*bis* of the new Law provides that, starting from 2013, the ICA's activities will be financed through a **compulsory contribution charged on corporations**. In practical terms, starting from January 1, 2013 all corporations (*Società di capitale*) with seat in Italy having a total annual income resulting from the last approved balance sheet above Euro 50 million⁵ will have to pay a contribution to finance the ICA. The amount of the said contribution is set at 0.08 per thousand of the last approved turnover, with a maximum amount set at Euro 400,000.

It is provided that **for year 2013 the said contribution shall be paid in advance within October 30, 2012**, according to the instructions that will be set forth by the ICA. In the following years, the contribution will have to be paid within July 31 of each year.

The new Law allows the ICA to amend the amount and the terms of payment of the contribution. Specifically, the ICA will be able to increase such value up to 0.5 per thousand of the turnover resulting from the last balance sheet approved before the adoption of the increase. However, the maximum amount of contribution set at Euro 400,000 shall not be exceeded.

2. ICA's new competences

The new Law has assigned to the ICA the following new competences:

- (a) Introduction - through a new article (37-*bis*) of the Consumers' Code in Law Decree no. 206/2005 - of a further (administrative) safeguard for consumers against **unfair commercial terms** (so-called "*clausole vessatorie*"). Article 5 of the new Law grants new competences to the ICA for declaring "unfair" (*vessatoria*) a commercial clause inserted by an undertaking in a contract addressed to consumers where such contract is concluded through the acceptance by the consumer of general terms and conditions or the signing of a pre-formulated standard contract.

Where the ICA finds that the examined clause could constitute an unfair commercial term, it shall open an investigation on the basis of the same procedural rules and powers applicable to antitrust investigations. During the investigation, the ICA will have the power to address requests for information and those undertakings that refuse to cooperate are exposed to fines between Euro 2,000 and 20,000. Moreover, fines between Euro 4,000 and 40,000 will be applicable to undertakings submitting misleading information or documentation. Finally, shall the ICA declare the unfairness of the examined clause, its decision shall be published on the ICA's website as well as on the sanctioned undertaking's website. Other forms of publicity could also be required by the ICA, to be performed at the sanctioned undertaking's expenses. Failure to comply with the ICA's requests of publicity will be sanctionable with fines between Euro 5,000 and 50,000.

Undertakings will be given the possibility to avoid the ICA's investigation by previously submitting to the ICA the text of the clauses they intend to insert in their commercial relationship with consumers. For this purpose, the ICA shall publish a new regulation providing for the procedure to be followed. In any case, the new Law establishes that, following the receipt of the request, the ICA will have to reply to the undertaking within 120 days. Moreover, should the ICA decide that the notified clause is not unfair, a different outcome could not be reached in the future about the same clause.

⁵ For banking and financial institution the special rule on turnover calculation provided for article 16, paragraph 2, of Law 287/1990 will apply. According to such rule, the relevant turnover shall refer to one-tenth of the value of the institution's total assets, with the exclusion of memorandum accounts and, in the case of insurance companies, to the value of the collected premiums.

On the other hand, the new Law expressly states that the ICA's favourable decision about a certain clause does not exempt the undertaking from the risks connected to civil liability towards its costumers. Indeed, the ICA's new competence has no impact on the validity or enforceability of the clauses considered to constitute an unfair commercial term. For the obtainment of a nullity declaration and for the request of damages remains competent the ordinary civil judge. Thus, the ICA's new competence merely amounts to the power to assess and declare the fair or unfair nature of the examined clause. Publication of the result of such assessment according to the forms of publicity already mentioned aims to make the consumers aware about the (unfair) nature of the examined clause.

It is worth mentioning the role attributed to the undertakings' associations concerned, which have to be consulted by the ICA during the assessment phase but whose opinion is not binding upon the Authority. Indeed, the initial proposal that the ICA's had to take decisions in this field in agreement with the undertakings' associations has not been included in the definitive text of the new Law.

- (b) Another task attributed to the ICA by the new Law concerns the **monitoring of commercial relationships** amongst **professionals** (therefore excluding contracts involving consumers) in the **food sector**. Article 62 of the Decree establishes a number of obligations that parties entering sale and purchase contracts of agricultural and food products (as defined by the Decree itself) will have to respect, including the obligation to use the written form for the contract and to set out explicitly the essential terms of the contract itself, like the duration of the contract, the quantity, price and characteristics of the product exchanged and the terms and conditions of delivery and payment. Moreover, the parties must abide by obligations of transparency, fairness, proportionality and balance of the exchanged good or services. They are also explicitly forbidden from adopting unfair contractual provisions like the imposition of unduly burdensome conditions, the application of substantially different conditions to different counterparties for the provision of comparable goods or services, the request of services not connected to the main object of the contract and the achievement of unfair unilateral advantages. The new discipline also provides for a maximum payment term for perishable (30 days) and non-perishable (60 days) goods. Such payment terms will run from the last day of the month in which the invoice was received, and their unsuccessful expiry will cause the start of interest accrual on arrears. Infringement of the abovementioned obligations can be sanctioned with fines between Euro 516 and 20,000, depending on the value of the transacted goods. Moreover, the introduction in the contract of the unfair clauses explicitly forbidden by the Decree is subject to fines between Euro 516 and 3,000, depending on the undue profit obtained by the infringer. Finally, failure to comply with payment terms and conditions established by the Decree is subject to sanctions between Euro 500 and 500,000, depending on the infringer's turnover and on the frequency and gravity of the payment delays. The ICA will be in charge, also with the assistance of the Financial Police (*Guardia di Finanza*), of monitoring the application of the new discipline and inflicting of the said sanctions. The Authority will be able to act both *ex officio* or upon complaint.

Entry into force of this new discipline shall take place after seven months from the publication of the Law ratifying the Decree (publication took place on March 24, 2012⁶), and it can be easily foreseen that it will have a substantial impact on commercial relationships between producers of the agricultural and food sector and the Large Distribution Chains. The declared goal of the new law provision is to achieve a greater transparency in the vertical distribution relationships in order to stop unfair and speculative behaviours which have been detected in the sector and are mainly due to the substantial imbalance existing between the concerned operators. Indeed, the examined legislation not only provides for the obligation to stipulate a contract in writing but it also introduces precise payment terms which shall be particularly favourable for small distributors and farmers. However, the new discipline is also subject to critics. In particular, complaints have been raised towards the excessive stiffening of commercial relationships and the consequent contraction of freedom to negotiate between the parties. While the Large Distribution Chains complain that the new provision constitutes a restriction of freedom of private economic enterprise, a fundamental right granted by article 41 of the Italian Constitution, small retailers (like restaurants and bars) claim that the new regulation will imply significant burdens even for very small supplies. Therefore, an evaluation of the real pro-competitive effects of this new discipline will be possible only after a reasonable period of time from its entry into force has passed. In particular, it shall be

⁶ See O.J. of March 24, 2012, no. 71.

Promotion of corporate ethics
and awarding of company
legality ratings

- assessed whether the legislation has introduced real competitive benefits in the food sector and whether the increased transparency has caused downstream improvements for consumers in terms of a decrease in prices.
- (c) Pursuant to article 5-*ter* of the Decree, the ICA will be entitled to point out to the Parliament the legislative measures to be taken in order to promote the introduction of ethical principles in corporate behaviours, also with respect to the protection of consumers' welfare. To this purpose, the ICA – in coordination with the Ministry of Justice and the Ministry of Internal affairs, shall also proceed to develop a **legality rating** for the undertakings operating on the Italian territory. Such a rating will be relevant in the context of granting public financing and for the access to banking credit.

Despite the introduction of such company rating representing a significant novelty for all the undertakings operating on the Italian territory, the Decrees does not offer any explanation concerning the practical implementation of this new ICA's competence, nor it offers information about the timing of its entry into force. Therefore, it will be necessary to wait for the implementing regulation to be approved to better understand which tools will be applied by the ICA to carry out this task.

Safeguard of microenterprises
against unfair commercial
practices

- (d) Article 7 of the Decree extends to microenterprises the protection against unfair and aggressive commercial practices as defined by Section III of the Consumers' Code, a protection that is currently granted only to consumers.

The new Law also introduces in the Consumers' Code the following definition of microenterprise (Article 18, paragraph 1, letter d-*bis*): "entity, corporation or association that, irrespective of its legal form, carries on an economic activity, even in an individual capacity or as a family activity, employing less than 10 employees and whose annual turnover and/or total annual balance sheet does not exceed Euro 2 million, ex article 2, paragraph 3, of Annex 1 of EU Commission's Recommendation 2003/361/EC of May 6, 2003".

Microenterprises are therefore aligned to consumers for what concerns safeguard against unfair commercial practices. Whilst protection for microenterprises against misleading and illegitimate comparative advertising will still be granted within the framework of Law Decree no. 145/2007.

Further competences

- (e) The new Law introduces a series of new questions where the Authority shall be consulted by other Public Administrations and Institutions concerning acts liable to affect the competitive landscape at local or national level⁷.

⁷ Specifying what was already established by article 34 of Law Decree of December 6, 2011, no. 201 (so called *Decreto SalvaItalia*, ratified by the Parliament with Law of December 22, 2011, no. 214), article 1, paragraph 3, of the Decree requires ICA's compulsory opinion concerning the safeguard of the proportionality principle within the process of adoption of governmental draft laws and regulations liable to restrict the access and the exercise of economic activities. Article 25 of the Decree requires ICA's compulsory opinion concerning the presence of sufficient and appropriate reasons justifying the awarding of exclusive rights or the concession of a plurality of public local services within a single tendering concerning territorial bodies having a population of more than 10,000 residents.

3. The new antitrust jurisdictional review system: setting up business law specialised Courts' sections

Article 2 of the Decree replaces all the existing Courts' sections specialised in industrial and intellectual property rights currently operating in some Courts of First Instance and Courts of Appeal with new sections specialised in corporate law⁸. Moreover, such new sections will also be set up in all the remaining Courts of First Instance and Courts of Appeal residing in the Regional capitals (excluding the Courts of the Valle d'Aosta Region) and in the city of Brescia.

New sections specialised in corporate law will have jurisdiction, among others, on issues concerning violation of Italian and EU competition rules. Therefore, article 2, paragraph 2, of the Decree amends article 33 of the Italian Antitrust Law (Law 287/90), which attributed to the exclusive jurisdiction of the Courts of Appeal all the disputes amongst privates concerning the violation of Italian competition legislation, and, as a consequence, allowed the concerned parties to receive only a single degree of substantial judgment over their dispute.

The new discipline resolves, at last, the different treatment currently existing between Court proceedings dealing with violations of EU competition rules on one side and Court proceedings dealing with violations of Italian National competition rules on the other side. Indeed, according to the abovementioned article 33 of Law 287/90, Courts of Appeal had exclusive jurisdiction as judges of first (and last) instance over alleged infringements of Italian competition legislation. Alleged infringements of EU competition rules were, instead, subject to the ordinary jurisdiction of the Courts of First Instance with the possibility of a second degree judgment before the competent Court of Appeal. However, because the two legislations have almost identical contents, the different treatment was hardly justifiable and created significant uncertainties as to the competent judge.

Jurisdiction of the new corporate law specialised Courts' sections

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For any further clarifications or research please contact:

Rome

Alberto Pera
Tel. +39 06 478751
apera@gop.it

Milan

Eva Cruellas Sada
Tel. +39 02 763741
ecruellas@gop.it

Rome

Milan

Bologna

Padua

Turin

Abu Dhabi

Brussels

London

New York

www.gop.it

⁸ Industrial and intellectual property rights sections have been established by Law Decree of June 27, 2003, no. 168, in the Courts of First Instance and Courts of Appeal of the following regional capitals: Bari, Bologna, Catania, Florence, Genoa, Milan, Naples, Palermo, Rome, Turin, Trieste and Venice.