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Overview

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The Italian Competition Authority (ICA) is the independent agency tasked with enforcing the Competition Act (Law No 287 of 10 October 1990). The chairman and the commissioners are jointly appointed by the presidents of the Chambers of Parliament. Section 23 (1) of the Competition Act, as recently amended by the "Save-Italy" Law Decree No. 201 of 6 December 2011, brought into effect by Law No. 214 of 22 December 2011, reduced the number of members of the Authority's Board from five to three, including the chairman (the change will be effective from the next term).

Sections 2 and 3 of the Competition Act prohibit anti-competitive agreements and abuses of dominant positions, respectively, substantially mirroring articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Sections 5 and 6 of the Competition Act are about merger control.

The ICA is also entrusted to deal with abuses of economic dependence (Law. No 192/1998), unfair commercial practices and unfair terms (Legislative Decree No. 206/2005), as well as conflicts of interest (under Law No. 215/2004).

Following a recent change to the Competition Act (section 21 bis), the ICA may challenge before the TAR Lazio general administrative acts, regulations or decisions by any public or local administration (including companies acting as public concessionaries), if such acts are deemed to be contrary to competition law principles.

Also, the ICA may assign "legality ratings" that should be accounted for when a company requests to be granted government or bank loans.

The ICA may provide its views to the parliament, government and other institutions in a number of economic matters. Since 2009, the government must submit a draft law to the parliament every year – the annual law on competition – incorporating the ICA's indications as to the pro-competitive measures that should be adopted.

Recently, the ICA has been entrusted (article 62 of the "Cresci Italia" Legislative Decree No. 1 of 24 January 2012, converted into Law No. 27 of 24 March 2012) with surveillance and fining powers regarding trade relations in the sale of food and agricultural products, with particular reference to the form and content of contracts between operators in the food industry not involving final consumers. The new provision identifies a number of prohibited conducts in trade relations between operators, such as the imposition of unfair, retroactive and discriminatory contractual conditions, as well as special rules for fees and terms of payments (ie, they must be written and defined in advance).

In matters concerning their respective sectors, the ICA is often required to coordinate with the Bank of Italy, the Autorità per le garanzie nelle comunicazioni (AGCOM, the Italian regulator for communications), the Istituto per la Vigilanza sulle Assicurazioni (IVASS, the regulator which supervises insurance companies) and the Autorità per l'energia elettrica e il gas (AEEG, the Italian regulator for electricity and gas).

In the banking sector, following the Investment Protection Act (Law No. 262 of 28 December 2005), the ICA has gained full and exclusive powers in relation to agreements and abuses of dominant position, whereas, in the context of concentrations, the Bank of Italy retains its supervisory and prudential powers. The Bank of Italy may still request the ICA to authorise a concentration for stability reasons, even if the transaction creates or strengthens a dominant position; or authorise, for a limited period of time, agreements that would be prohibited under the Competition Act, if that is necessary to ensure the proper functioning of the payments system.

In the communications sector, AGCOM may provide non-binding opinions to the ICA on agreements, abuses of dominant position and concentrations. Conversely, AGCOM shall request the ICA's opinion on a number of issues relevant to sector regulation issues (such as the definition of significant market power, or the adequacy of interconnection offers).

Finally, IVASS may provide non-binding opinions to the ICA concerning transactions involving insurance companies.

With regard to private enforcement, so far, Italian case law has tended to distinguish between EU competition law disputes (reserved to civil courts) and

Italian competition law disputes (specifically reserved by section 33 of the Competition Act to the Courts of appeal). Such distinction was an obvious source of uncertainty and favored delaying tactics. Under the amended section 33 of the Competition Act, newly created company law sections within the civil courts have jurisdiction on any private enforcement actions stemming from any breaches of competition law. Decisions by the company law sections can then be appealed to the Courts of appeal as well as the Court of Cassation.

Cartels and anti-competitive agreements

Section 2 of the Competition Act prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition in the national market or in a relevant part of it. Section 2 covers restrictions, such as price fixing, market sharing or output restrictions, as well as the exchange of commercially sensitive information.

The prohibition of restrictive agreements, enshrined in section 2 of the Competition Act, follows the basic EU law principles. Whenever restrictive agreements are likely to prejudice trade between member states, the ICA must apply article 101 TFEU instead of section 2 of the Competition Act.

The ICA can investigate and prosecute restrictive agreements falling within the scope of the Competition Act, which have been implemented, at least in part, within the Italian territory, regardless of where the undertakings concerned are based. For instance, last February 2013, the ICA launched a cartel investigation against Swiss-based pharmaceutical companies Roche, Novartis and US-based Genentech, as well as their respective Italian subsidiaries. In September 2011, the ICA fined, among others, HDI-Gerling Industrie Versicherung AG in the Campania Insurance Tenders For Healthcare Units And Hospitals cartel case. In November 2010, the ICA fined MasterCard International Incorporated, a US-based company, in the credit card fees case.

An agreement falling within the scope of the Competition Act may be individually exempted by the ICA from the prohibition in section 2 for a limited period of time, provided that such agreement promotes technical progress, allows consumers a fair share of the achieved benefits, entails only indispensable restrictions and does not eliminate competition in the market. Section 13 of the Competition Act still allows undertakings to voluntarily submit restrictive agreements to the ICA, similarly to what undertakings used to do under the old EU notification system, which was abolished following the entry into force of Regulation (EC) 1/2003. However, the ICA recently asked parliament to repeal section 13 in order to align the Competition Act with the European rules.

If the ICA finds an infringement of section 2 or article 101 TFEU, it mandates the undertakings concerned to end the infringement (during the investigation, the ICA can also impose interim measures if there is an imminent, serious and irreparable risk to competition) and may impose a fine up to 10 per cent of the undertaking's turnover in the financial year preceding the decision. The determination of the fine by the ICA is based on the European Commission's Guidelines on the method for setting fines.

Companies under investigation have the possibility to submit commitments to the ICA. The ICA may accept commitments (except in case of hard-core infringements, such as price fixing) and make them binding on the undertakings with decision, without ascertaining whether a violation has occurred.

Leniency programme

The ICA adopted a Leniency Notice on 15 February 2007 (recently modified in 2010). The leniency programme largely mirrors the system of the European Commission and the Model Leniency Programme adopted by the European Competition Network.

Potential applicants may contact the relevant office within the ICA, also on a no-name basis. In essence, the first undertaking to make a decisive contribution to the opening of an investigation or to the discovery of an infringement may be granted full immunity from fines, provided a number of requirements are fulfilled. If an undertaking is not eligible for full immunity, but its cooperation considerably strengthens the value of the evidence in the ICA's file, the ICA may grant a fine reduction, normally not exceeding 50 per cent. The Italian leniency system allows undertakings to apply for a marker in order to protect their place in the queue, albeit for a limited period that is set by the ICA. Within such time frame, the undertaking shall provide the ICA with the necessary information and evidence, failing which it would lose the place in the queue.

There is no standard form for leniency applications. Leniency applications may be filed either in writing or orally. Oral statements are taped and transcribed by the ICA officials. Access to leniency applications can only be granted after the statement of objections is served on the parties. Access to corporate statements is only granted to the addressees of a statement of objections.

In 2012, the ICA identified bid rigging (which is already a criminal violation in Italy) as being an area

of special concerns for its pernicious effects on the Italian economy, and therefore the ICA suggested the government introduce a provision in the Competition Act granting the first applicant under the leniency programme full immunity from criminal actions and partial immunity in follow-on damages actions, notably the abolition of joint liability with the other participants to the cartel. However, owing to the early termination of the legislature, the government could not submit the draft law to parliament.

Abuse of dominant position

Section 3 of the Competition Act prohibits any abuse by one or more undertakings of a dominant position in the national market or in a substantial part of it. In essence, section 3 also follows the basic EU law (ie, article 102 TFEU) with a few minor differences of phrasing and detail. The Competition Act includes restrictions on market access, and in the subsection about discrimination among trading partners, it requires that the dissimilarity of conditions be "objective" and that the resulting competitive disadvantage be "unjustifiable." These minor differences of detail do not imply any difference in basic approach from the EU legislation. In particular, under section 3, an undertaking may abuse a dominant position by:

- directly or indirectly imposing unfair purchase or selling prices or other unfair contractual conditions;
- limiting or restricting production, access to the market or market output, technical development or technological progress to the detriment of consumers;
- applying objectively dissimilar conditions for equivalent transactions to other trading partners, thereby placing them at an unjustifiable competitive disadvantage; and
- making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The concept of dominance under Italian competition law is entirely consistent with EU law, as it consists in a position of economic strength enjoyed by an undertaking that enables it to prevent competition being maintained in the relevant market by giving it the power to behave, to an appreciable extent, independently of its competitors, its customers and ultimately its consumers.

As in the case of anti-competitive agreements, the ICA may impose a fine of up to 10 per cent of the undertaking's turnover in the financial year preceding the decision.

Mergers

Section 5 of the Competition Act provides that a concentration is deemed to arise when:

- two or more undertakings merge;
- one or more subjects controlling at least one undertaking acquire direct or indirect, total or partial control of one or more undertakings, whether through the acquisition of shares or assets or by contract or any other means; and
- two or more undertakings create a joint venture by setting up a new company.

The notion of control under the Competition Act mirrors that at EU level (the key question being whether decisive influence can be exercised in relation to strategic commercial behaviour of an entity). The ICA applies the principles set out in the European Commission's Consolidated Jurisdictional Notice.

As of January 2013, a concentration shall be notified when both the thresholds provided by section 16 of the Competition Act are met (ie, the turnover thresholds shall no longer be considered alternative, but cumulative). Accordingly, a concentration is reportable to the ICA if:

- the combined turnover in Italy of all the undertakings concerned exceeds €482 million; and
- the turnover in Italy of the target company exceeds €48 million.

These thresholds are subject to annual adjustment to reflect inflation. There are specific criteria when calculating the turnover of banks, credit institutions and insurance companies. Concentrations involving foreign companies as targets that have not generated any turnover in Italy at the time of the concentration and in the three preceding years, and that will not generate turnover as a consequence of the concentration, do not need to be notified to the ICA. The filing fee has been abolished as of January 2013.

In 2012, the ICA proposed to the government the introduction of a provision in the Competition Act to replace the current "dominance test" with the significant impediment of effective competition (SIEC) test, so as to assess the impact of the merger on effective competition and to take into account efficiencies (and therefore to align the Italian merger control rules to the EU rules). As for the review of joint ventures, the ICA also proposed a change that would allow it to assess a

joint venture under the merger control rules, irrespective of its concentrative or cooperative nature.

In the context of merger control, aims other than competition can also be considered when major general interests of the national economy are involved. So far, the government has exercised this option only once, notably, in the context of the CAI-Alitalia-AirOne merger in 2008. The Italian Constitutional Court has ruled (judgment No. 270 of 23 June 2010) on the limits of this exception.

With regards to the procedure, a concentration that triggers the relevant thresholds must be notified to the ICA prior to its implementation. Failure to do so may attract a fine of up to 1 per cent of the party's turnover in the previous financial year. The concentration can be implemented before clearance is obtained, but the parties bear the risk of having to take all measures necessary to restore effective competition and remove any distorting effects, should the ICA ultimately prohibit the transaction.

A pre-notification procedure similar to that made available by the European Commission was recently introduced with respect to transactions where the aggregate domestic turnover of the target company exceeds €48million.

Normally, the ICA has 30 calendar days (15 calendar days in the case of a public bid) from receiving a complete notification to decide whether the concentration raises antitrust concerns and therefore open a formal investigation. In such case, the ICA has 45 calendar days (extendable by 30 calendar days) to reach a final decision.

Appeals against the ICA's decisions

The decisions adopted by the ICA may be appealed before the TAR Lazio, which is the administrative court of first instance with exclusive jurisdiction on any ICA decisions. The TAR Lazio rulings may be reviewed by the Consiglio di Stato (Italy's Supreme Administrative Court).

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DANDRIA Studio Legale was founded in 2011 in Rome and comprises seven fee earners.

Commercial Agreements & Litigation and Antitrust & Regulation are key areas of practice, with its growing clientele primarily consisting of large and international corporations.

The firm has developed unique skills in supporting the general counsel's efforts towards better management of legal risk and cost control (Legal Management Consulting).

Since its foundation, the team at DANDRIA has been steadily ranked in *Chambers Europe* and *Legal500*, and received the Client Choice 2013 Award for Competition from the International Law Office.

The firm's main strengths are its highly responsive approach and the transparency of its rates. Clients are provided with a dedicated extranet allowing real-time access to matter related information, including deadlines, appointments, documents, up-to-date billing data and even timesheets, as soon as they are created.

DANDRIA boasts a team of four lawyers experienced in all areas of EU and Italian competition law, from merger control to restrictive agreements and abuses of dominant positions. Recent competition work includes assisting easyJet airline in the landmark Italian Competition Authority's investigation into the 2008 merger between Alitalia and AirOne which opened up the Milan Linate – Rome Fiumicino route to competition; assisting an international transport company in the follow-on action against the members of an Italian cartel; defending a leading pharmaceutical group from a claim for cartel damages; assisting a global consumer goods company in the appeal against the Italian cartel decision on cosmetics.

ABOUT THE AUTHORS

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Gabriele Accardo is an Italian qualified lawyer, based in Rome since the beginning of 2012 when he joined DANDRIA, having practiced competition and EU law for almost a decade in Brussels in leading US international law firms. He is an experienced commercial lawyer with a focus on complex issues, such as competition law and IP-related matters, data privacy and regulatory law. He has wide-ranging experience in EU, Italian and international antitrust merger control, cartel enforcement, vertical restraints and dominance.

Gabriele is a graduate of the University of Palermo School of Law, Italy, and holds an MA in Antitrust, Economics and Market Regulation from the Center for International Studies on Economy and Development of the University of Rome "Tor Vergata", Italy. Since 2009, he has been a Research Fellow at the Transatlantic Technology Law Forum at Stanford Law School, California, USA. With the TTLF, Gabriele authored the paper "Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution under EU and US Competition Laws" (2012), and is a contributing editor of the bimonthly *Newsletter on Transatlantic Antitrust and IPR Developments*. He is currently working on a new project focusing on the intersection of data protection and antitrust law issues in the EU and the US.

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Gennaro d'Andria is the chief executive of DANDRIA Studio Legale in Rome. His area of practice has been steadily expanding from antitrust and EU law to cover a broad range of commercial issues.

He has been involved in major antitrust investigations, including an Italian cosmetics cartel; a credit card fee enquiry in the air transport sector; and the merger investigations into Alitalia's acquisitions of Air One and Windjet.

He won the International Law Office Client Choice 2013 Award for Competition based on a survey of senior corporate counsel. Gennaro has also taken the lead on the firm's main transactional and contentious matters, such as the divestiture of a steel mill, the restructuring of the Italian subsidiary of a foreign high-tech conglomerate, and a multimillion-euro dispute relating to certain industrial supplies of electricity.

In 2011, he launched an innovative client extranet designed to allow real-time access to matter-related information, such as deadlines, appointments, documents, billings and even real-time timesheets.

Gennaro is a member of the Italian Bar and is admitted to the high courts.

He obtained an LLM from King's College, London and previously practised with some of the leading law firms in Italy, the US, Germany and Austria. In 2004, he trained at the Competition Directorate of the European Commission in Brussels.

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