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GLOBAL COMPETITION REVIEW

Italy: Cartels

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Anti-competitive behaviours such as price fixing, sharing markets and horizontal agreements between undertakings aiming to agree commercial strategies and policies are considered the most harmful infringements of competition law and for this reason they are usually at the top of the agenda of competition authorities.

However, in 2012 the ICA opened seven new investigation proceedings related to horizontal agreements,¹ whereas in the first six months of 2013 (up until 17 June) it opened only three² and reopened a case³ that had been closed by a commitments decision in 2009. Most of them are not related to cartels but concern less harmful infringements such as mere exchange of information, inter-professional agreements (four of the 2012 cases are related to professional associations of notaries) and public procurement.

The few real (alleged) cartel cases over the past five years are the following four:

- *I722 Logistica Internazionale*;⁴
- *I723 Intesa nel mercato delle barriere stradali*;⁵
- *I736 Re-Power prezzo dispacciamento energia elettrica centro-sud*;⁶ and
- *I743 Tariffe traghetti da/per la Sardegna*.⁷

A hasty analysis of the Authority's activities in the recent past reveals that the domestic watchdog devoted its effort mainly to other infringements, such as abuse of dominant position, and to its new and extensive competences.

This cautious approach to cartels is largely due to the apparent failure of the leniency programme. Indeed, only *I722 Logistica Internazionale* was started following a leniency application and even that was part of multiple applications within the European territory.

In this scenario, the absence of reductions of the fines for the companies that can demonstrate that they have implemented effective compliance programmes, which are not simply performed in a 'formalistic' and standardised manner, also undermines the leniency programme. The internal audits carried out in implementation of compliance programmes are an important tool for detecting potential cartel infringements. The detection of a potential antitrust infringement is the first step to applying for leniency.

The proposal for a new approach to the leniency programme, explained here below, may certainly represent a good opportunity to improve cartel enforcement.

Legislation: overview

Similarly to article 101 (1) of the Treaty on the Functioning of the European Union (TFEU), article 2 (2) of Law No 287 of 10 October 1990 (Competition Act) prohibits agreements that directly or indirectly fix purchase or selling prices or any other trading conditions, share markets or sources of supply. Pursuant to article 1, paragraph 4, of the Competition Act, Italian competition rules must be interpreted in accordance with the principles of European Community competition law.

The ICA and national Civil Courts are responsible for the enforcement of the cartel prohibition in Italy. In January 2012, special sections were established within the Italian Civil Courts for the enforcement of national and European competition law. The jurisdiction enjoyed by the ICA and the Courts is determined by the 'effect rule'. Article 2 of the Competition Act applies to cartels that have anti-competitive effects; in particular, this may include the prevention, restriction or distortion of competition on the Italian market. Article 2 applies irrespective of whether the conduct occurred abroad or is put in place by undertakings that are not based in Italy. Article 101 TFEU applies when the cartel may affect trade between member states (most recently, the ICA applied article 101 in the case *I743 Tariffe traghetti da/per la Sardegna*).

Cartels in breach of article 2 of the Competition Act and 101 TFEU are void and unenforceable; administrative fines are applicable and damages actions can be pursued by third parties.

Pursuant to article 15 of the Competition Act, the ICA may decide, depending on the gravity and duration of the infringement, to impose on each undertaking a fine of up to 10 per cent of the undertaking's turnover from the previous financial year.

The ICA's decisions may be challenged before the Administrative Court of Latium (TAR Lazio), whose own decisions may be appealed before the Supreme Administrative Court (Consiglio di Stato).

Third parties that have suffered a prejudice as a result of the unlawful behaviour can bring private actions before Civil Courts to be indemnified for the loss they have suffered. Private actions for damages can either be based on the ICA's decision (as a follow-on action) or independent from it (as a stand-alone action). In any event, the Civil Courts are not bound by the ICA's decisions, as any presumption that they are correct can be rebutted by evidence. Italian law does not provide for punitive damages; instead it only provides for compensatory damages.

Both the Civil Courts and the ICA are also granted the power to order interim measures.

Although there are no criminal sanctions in the Competition Act, certain cartel activities may be caught by Italian criminal law provisions. In particular, article 501 of the Italian Criminal Code provides criminal sanctions (including imprisonment for up to three years) for 'market manipulation through the misuse of price sensitive information'. According to article 501 bis of the Italian Criminal Code, individuals can be convicted (and liable to imprisonment from six months to three years and fined up to €25,822) for 'speculations on prices and quantities of raw materials and basic food products'. Article 507 of the Italian Criminal Code provides imprisonment (of up to three years) for individuals involved in 'boycotts'. Finally, under article 353 of the Italian Criminal Code, bid rigging attracts criminal sanctions (including imprisonment from six months to five years).

The ICA has the power to terminate proceedings if, within three months from the start of the investigation, the companies under investigation offer commitments to correct the anti-competitive conduct. In this situation, according to article 14 ter of the Competition

Act, the ICA can make the commitments binding and close the proceedings without making an infringement finding.

Recent changes and proposals for change

In September 2012, the ICA adopted the new guidelines on the commitments procedure. The main changes introduced by the new guidelines include the following:

- The power of the ICA to allow the parties to offer the commitments even after the three months deadline from the start of the investigation – an extension of the time period can be granted only in exceptional circumstances and in response to a party's application.
- Alignment with the European guidelines on the criteria to assess the suitability of a commitment decision as a means of disposing of the case. Commitment decisions are held to be not appropriate in cases where the ICA considers that the nature of the infringement calls for the imposition of a fine.
- The opportunity for the parties to make only one round of amendments to the commitments that they have offered. This is to avoid a repeated reassessments of the commitments that may cause delays in the proceeding.
- A deadline on the ICA to end the commitment procedure. The ICA must either accept or reject the commitments proposed within three months from the publishing of the commitments on its website. An extension of this deadline is allowed only for the purposes of further investigation.

The regulation of cartels was also the subject of a proposal of reform by the ICA, dated 2 October 2012.⁸ This proposal was made to the Italian parliament with reference to the Annual Law on Competition. It was aimed to promote free market and competition.

In this perspective, in order to promote private enforcement, with reference to leniency procedure, the ICA proposed to grant criminal immunity to individuals whenever the collusive conduct is qualified as a criminal offence. However, in the ICA's view, this protection should be granted only to the first applicant, whereas an attenuating circumstance should be acknowledged to the other applicants who have obtained a reduction of the fine.

It also envisaged the possibility to protect the immunity applicant before a Court from joint and several liability towards a party that decides to launch a follow-on action. The immunity applicant would be liable only for the portion of the damage directly caused by him.

Finally, the ICA requested the introduction of a provision preventing the third parties from having access to leniency statements. This proposal would exclude also the power of the Court to order their disclosure in an action for damages.

The Italian leniency programme in the light of recent case law

In accordance with article 15 of the Competition Act, in 2007 the ICA adopted Guidelines on the non-imposition and reduction of fines in leniency applications, which have since been amended in 2013. The Italian leniency programme mainly follows the European Competition Network (ECN) model and differs in certain aspects from the leniency treatment granted by the European Commission (EU Commission).

Although the leniency programme is generally intended to cover secret horizontal agreements, such as price fixing and market sharing, in its Guideline the ICA does not exclude in principle the application of the leniency programme to cartels with vertical elements.

The first company to inform the ICA of the existence of a secret cartel and provide decisive evidence to enable the ICA to carry out targeted inspections can obtain full immunity from fines. Other undertakings that subsequently provide information and evidence relating to the cartel may qualify for a reduction in the fines that would otherwise be imposed. Generally, the reduction will not exceed 50 per cent of the fine. This differs from the EU Commission's leniency programme regime, which provides for a range of discounts based on the order in which the applications are made. In Italy although timeliness is a relevant factor, there is no such incentive to 'race for the court'.

For example, in the *Cosmetics* cartel (see below, *I701 Vendita al dettaglio di prodotti cosmetici*)⁹, Procter & Gamble qualified as the third leniency applicant and was granted a 40 per cent discount in the sanction awarded; whereas, in the *International Freight Forwarders* cartel, DHL also qualified as the third leniency applicant but was granted a 49 per cent reduction.

In order to determine the appropriate level of fine reduction, the ICA takes into account the time at which the evidence was submitted, having regard to the phase of the proceedings and the level of cooperation provided by other undertakings, and the evidentiary value of the information and documents which are submitted. This means that providing evidence at an early stage of the proceedings will nonetheless be better rewarded, at least in principle.

Leniency applicants can not simply report unlawful behaviour. Instead, they have to confess their participation in the secret cartel and support their statements with evidence (see, for example, TAR Lazio 8945, 17 November 2011, *Vendita al dettaglio di prodotti cosmetici*).

In its recent judgement in the case *I733 Agenti Marittimi*,¹⁰ the Administrative Court of Latium¹¹ annulled the decision through which the ICA had ascertained a price-fixing cartel involving 15 maritime agencies and two trade associations, notwithstanding the fact that the investigations were driven and supported by statements and documents provided by two leniency applicants. However, in principle the Court did not challenge the reliability of the leniency applications, it simply disputed the legal characterisation of the conduct described by the leniency applications underlining the ICA's burden of proof that an infringement of competition law occurred.

Useful indications on the priority of leniency applications simultaneously filed with the Commission and the ICA have been provided by the Administrative Court of Latium within the appeals against the ICA's decision in *I722 Logistica Internazionale*, 19 freight forwarders and a trade association.

The main point made by the Administrative Court of Latium originated from the appeal of DHL, which first applied for leniency with the EU Commission and then with the ICA. The Court ruled that a leniency applicant with the EU Commission does not automatically qualify for leniency in other European member states.

The ruling stresses a very important point for companies wishing to fix their priority in multi-jurisdictional requests for leniency: that leniency applicants should file applications with all the national competition authorities possibly involved.

The sanctions

The Competition Act awards the ICA the power to impose sanctions in cases of antitrust infringements. Pursuant to article 15, where the ICA ascertains that there has been an antitrust infringement, it shall order the undertakings concerned to terminate the infringement and 'in the most serious cases it may decide, depending on the gravity and the duration of the infringement, to impose a fine of up to 10 per cent of the turnover of each undertaking or entity during the prior financial year'.

The Competition Act also provides for sanctions when there is a lack of cooperation with the investigation. Article 14 states that the ICA may impose a sanction up to €25,822 on anyone who refuses or fails to provide the information or exhibit the documents in response to a request made during an investigation. The sanction is increased up to €51,645 where the information or the documents supplied are untruthful.

Pursuant to article 31 of the Competition Act, the general regulation of the administrative sanctions contained in Law No. 689/1981 applies to fines imposed by the ICA in so far as it is compatible with the Act. The case law¹² has clarified that rules in Law No. 689/1981 set the general criteria to calculate the amount of the fine, while the Competition Act and Regulation No. 217/1998 regulate the procedure by which the fines are imposed.

In accordance with the obligation to apply Italian competition rules in accordance with the principles of European Community competition law, the ICA has refined its methods to calculate the amount of fines by applying the EU Commission Guidelines. Like the EU Commission, the ICA first determines the basic amount of the fine in proportion to the value of the sales relating to the infringement. After that it multiplies this number by reference to the number of years the infringement lasted. Finally, it applies an adjustment for aggravating or mitigating circumstances.

However, the ICA has maintained a certain degree of autonomy in setting the fines. It deviates from the Guidelines in the application of the reduction in the fines for financial hardship. It has done so by granting the reduction even though the company only made losses in the previous fiscal year, whereas under EU law there must have been three consecutive years of losses.¹³

In *I743 Tariffe traghetti da/per la Sardegna*, the ICA reduced the fines on the involved undertakings by 30 per cent because of the losses suffered by these companies.

In addition to the mitigating circumstances provided for in the Guidelines, the ICA may reduce fines for commitments offered by the parties in accordance with article 11 of Law 689/1981, when these are aimed at eliminating or reducing the effects of infringements.

Delays in the payment of the fines imposed by the ICA result in additional fines. Pursuant to article 27.6 Law No. 689/1981, the original fine is increased by 10 per cent for every six months of delay after the deadline to pay the original fine.

In a recent case,¹⁴ the Supreme Administrative Court established that in cases where the original fine has been annulled by the first instance judgment and is later restored by the appeal judgment, the fine for the delay is charged even for the period during which the original fine was annulled. According to the Court, if the annulment judgment is overturned it should be deemed as never having occurred. Therefore, the fined party cannot oppose the annulment as a justification for the delay in the payment.

In a more recent judgment,¹⁵ the Administrative Court of Latium diverged from the above case law. The lower court stated that only through the publication of the decision of the Supreme Administrative Court that restores the sanction, the sanction becomes payable so that the additional fine under discussion also becomes payable. The period before the restoration of the original fine cannot be taken into account to calculate the delay in the payment of the antitrust fine. This conflict between the Supreme Administrative Court and the Administrative Court of Latium could give the opportunity to the Supreme Administrative Court itself to reconsider its case law on the point.

In 2012, the ICA concluded four proceedings regarding potential infringements of article 2 of the Italian Competition Act and article

101 TFEU, while as many as seven have been concluded in the first six months of 2013 (up until 17 June). In 10 of these 11 cases, it ascertained that there had been an infringement and imposed fines on the undertakings involved. The fines imposed on a single undertaking ranged from between €1,000 to €11.8 million.

In *I745 Consigli degli ordini degli avvocati/diniego all'esercizio di avvocato*,¹⁶ the bar associations of several Italian cities were fined only €1,000 each when they imposed further conditions for the registration of lawyers qualified in other member states in addition to the ones provided for by EU law. The ICA imposed a nominal fine because the Bar Associations did not enforce the stricter regime and as soon as the proceeding was opened they revoked the additional requirements. The ICA also took into account that there were no relevant precedents.

The highest fine in 2012 and in the first five months of 2013 was €11.8 million, which was imposed in *I723 Intesa nel mercato delle barriere stradali*.

The highest percentage to calculate the basic amount of the fine was imposed in *I740 Comune Di Casalmaggiore-gara per l'affidamento del servizio di distribuzione del gas*,¹⁷ where it was set at a level of 15 per cent of the value of the sales relating to the infringement. In this case, the ICA held the parent companies of the infringers jointly liable with their subsidiaries because they had decisive influence over them and were kept informed about the unlawful plans. While the liability of the parent company is quite established in the European case law, this was a novelty for Italian case law, as in Italy parent companies are seldom involved in the proceedings and the ceiling of 10 per cent for the maximum fine is usually calculated against the turnover of the infringing subsidiary and not against the higher turnover of the group. Again in this case, the ICA imposed on all the undertakings an increase of 20 per cent of the fine for deterrence, because the groups of the infringers had a particularly large turnover beyond the sales of goods and services to which the infringement related.

In accordance with article 261 TFEU, article 134 of the Italian code of Administrative procedure states that the sanctions imposed by the ICA are subject to full judicial review by the administrative courts. The administrative courts may cancel, reduce or increase the fine. To this end, the administrative courts have invited the ICA in several cases¹⁸ to point out in its decisions the factors used to set the fines. The ICA's decisions should express the percentage of the value of the sales used to determine the basic amount of the fines and the percentages applied for the aggravating circumstances and mitigating circumstances.

The administrative courts are usually very careful to check whether the Authority has properly identified the aggravating circumstances. In the appeal against the ICA's decision *I731 Gare assicurative ASL e aziende ospedaliere campane*,¹⁹ the Administrative Court of Latium found that the ICA failed to provide sufficient and clear reasoning for the imposition of an adjustment for aggravating circumstances.²⁰

Private enforcement

The year 2012 and the first part of 2013 followed the trend of previous years. Indeed, as far as we know,²¹ the number of civil actions related to anti-competitive agreements in Italy continued to be very limited.

Between 2007 and 2013, the ICA ascertained 70 cases of anti-competitive agreements. However, with the exception of some rare cases, no significant follow-on actions were launched before the Italian Courts. Among these exceptions,²² it deserves to be mentioned the action for damages which, according to the press, was brought by Alitalia against some oil companies in early 2013, claiming estimated

damages for nearly €900 million, following the infringement decision issued by the ICA in 2006.²³

In the past year and in the first part of 2013, there have not been significant changes to the regime for private enforcement.

Pursuant to Law No. 27 of 24 March 2012,²⁴ competition damages actions (and related actions) based on either Italian (article 2 of Law No. 287 of 10 October 1990)²⁵ or EU competition law lodged after 20 September 2012 are to be brought before the new Tribunale delle imprese (specialised chamber for matters concerning enterprises). The purpose of the Law Decree was to restrict the legal disputes to a reduced number of courts (12 tribunals instead of 164),²⁶ with the object of reducing the time taken to conclude proceedings involving undertakings and improving their competitiveness on the market.

Competition damages actions can also be brought in the form of class actions. Pursuant to article 140 bis of Legislative Decree No. 206 of 6 September 2005 (Italian Consumer Code) class actions may be brought by any consumer or user seeking damages or declaratory relief for a violation of rights that is homogeneous with those suffered by other consumers or users that arise from certain actionable breaches of contract or torts, including anti-competitive activities.

As of today, the only antitrust class action of which we have news was launched against some ferry companies involved in an investigation for alleged anti-competitive agreement launched by the ICA.²⁷ However, according to the publicly available information, the action was stayed pending the ICA's final decision, which was recently issued on 11 June 2013.

Finally, it is worth mentioning a relevant decision concerning the right of access. As known, the claimant may request that the ICA produce documents, which in its view are necessary to support its action. However, the ICA is usually reluctant to grant such request. In 2012, the TAR Latium (the Italian first instance administrative court) rejected the application filed by Alitalia – which had intervened in the proceeding before the ICA concerning the cartel for jet fuel – against the refusal the ICA to give access under Italian Law No. 241/1990 to the jet fuel cartel file.²⁸ According to the administrative court, the ICA's refusal was legitimate since the concerned documents contained confidential information that was not strictly necessary to support the related action for damages.

Notes

- 1 See ICA 1747 – *Consiglio notarile di Lucca/controlli sull'applicazione della tariffa*, opening decision of 8 February 2012, No. 23284, in *Boll. Uff.* No. 6/2012; ICA 1749 – *Consiglio notarile di Milano/delibera No. 4/2012*, opening decision of 22 May 2012, No. 23606, in *Boll. Uff.* No. 22/2012; ICA 1750 – *Consiglio notarile di Bari/conformità della delibera No. 4/2012*, opening decision of 16 June 2012, No. 23657, in *Boll. Uff.* No. 25/2012; ICA 1753 – *Consiglio notarile di Verona-delibera del 9 febbraio 2012*, opening decision of 25 July 2012, No. 23771, in *Boll. Uff.* No. 32/2012; ICA 1757 – *Ostacoli all'accesso al mercato di un nuovo operatore di telefonia mobile*, opening decision of 12 September 2012, No. 23891, in *Boll. Uff.* No. 37/2012; ICA 1758 – *Accordo strategico Impregilo/Salini*, opening decision of 17 October 2012, No. 23994, in *Boll. Uff.* No. 42/2012; 1744 – *Gare RCA per trasporto pubblico locale*, opening decision of 14 November 2012, No. 24051, in *Boll. Uff.* No. 46/2012.
- 2 See ICA 1760 – *Roche-Novartis/farmaci Avastin e Lucentis*, opening decision of 6 February 2013, No. 24207, in *Boll. Uff.* No. 7/2013; ICA 1761 – *Mercato dei servizi tecnici accessori*, opening decision of 27 March 2013, No. 24295, in *Boll. Uff.* No. 14/2013; Opening decision of 5 June 2013 on vertical agreements between insurance companies and insurance agents, not yet published.
- 3 ICA, 1689 – *Organizzazione servizi marittimi nel Golfo di Napoli*, decision of 30 May 2013, not yet published.
- 4 See ICA, 1722 – *Logistica internazionale*, decision of 16 June 2011, No. 22521, in *Boll. Uff.* No. 24/2011.
- 5 ICA, 1723 – *Intesa nel mercato delle barriere stradali*, decision of 28 September 2012, No. 239318, in *Boll. Uff.* No. 39/2012.
- 6 ICA, 1736 – *Repower Italia-prezzo dispacciamento energia elettrica centro sud*, decision of 30 May 2012, No. 23623, in *Boll. Uff.* No. 22/2012.
- 7 ICA, 1743 – *Tariffe traghetti da/per la Sardegna*, decision of 11 June 2013, not yet published. In this case the ICA fined 4 ferry lines for an infringement of article 101 TFEU. The ICA did not find any direct evidence about the existence of an unlawful agreement among the undertakings, but it held that the parallelism of prices for ferries to and from Sardinia could not be explained other than by the existence of a concerted practice.
- 8 ICA, AS988 *Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2013*, 2 October 2012, in *Boll. Uff.*, No. 38/2012.
- 9 ICA, 1701 – *Vendita al dettaglio di prodotti cosmetici*, decision of 15 December 2010, in *Boll. Uff.*, No. 49/2010.
- 10 ICA, 1733 *Servizi di agenzia marittima*, decision of 22 February 2012, No. 23338, in *Boll. Uff.*, No. 9/2012.
- 11 Administrative Court of Latium No. 363/2013.
- 12 Supreme Administrative Court sez. VI, No. 4181/2001; Supreme Administrative Court sez. I, No. 7451/2001; Supreme Administrative Court sez. VI, No. 4362/2002.
- 13 *Ex multis*, ICA, 1733 *Servizi di agenzia marittima*; ICA, 1731 – *Gare assicurative asl e aziende ospedaliere campane*, decision of 28 September 2011, No. 22838, in *Boll. Uff.* No. 39/2011; ICA 1722 *Logistica internazionale*.
- 14 Supreme Administrative Court sez. VI, No. 3058/2012.
- 15 Administrative Court of Latium, sez. I, n. 5796/2013.
- 16 ICA, 1745 – *Consigli degli ordini degli avvocati/diniogo all'esercizio di avvocato*, decision of 24 April 2013, in *Boll. Uff.*, No. 19/2013.
- 17 ICA, 1740 – *Comune di Casalmaggiore-Gara per l'affidamento del servizio di distribuzione del gas*, decision of 2 August 2012, No. 23794, in *Boll. Uff.*, 31/2012.
- 18 Administrative Court of Latium, sez. I, No. 6044/2012; Administrative Court of Latium, sez. I No. 3268/2012; Supreme Administrative Court sez. VI, No. 3013/2011; Supreme Administrative Court sez. VI, No. 6469/2007.
- 19 ICA, 1731 – *Gare assicurative asl e aziende ospedaliere campane*, decision of 28 September 2011, No. 22838, in *Boll. Uff.* No. 39/2011.
- 20 Administrative Court of Latium, sez. I, n. 6044/2012.
- 21 In Italy there is no legal publicity of the civil actions for damages.
- 22 See the case law following car insurance cartel (ICA, 1377 *RC AUTO*, decision of 28 July 2000, No. 8546, in *Boll. Uff.* 30/2000. See, ex pluribus, M. Carpagnano, *Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04 Manfredi*, in *Competition Law Review*, 2006, Volume 3 Issue 1, pp. 47-72).
- 23 ICA, 1641 – *Rifornimenti aeroportuali*, decision of 14 June 2006, in *Boll. Uff.* No. 23/2006.
- 24 Which introduced the Law Decree No. 1 of 24 January 2012.
- 25 Pursuant to article 33 of the same Law.
- 26 See the Technical Report added to the Law Decree No. 1 of 24 January 2012.
- 27 ICA, 1743 – *Tariffe traghetti da/per la Sardegna*, opening decision of 11 May 2011 No. 22416, in *Boll. Uff.* 19/2011.
- 28 See TAR Latium, Sec. I, 10 February 2012, No. 1344.



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Francesca Sutti is a partner and heads the competition group within the regulatory department at DLA Piper in Italy. With more than 15 years of professional experience, Francesca has always focused only on antitrust law both European and Italian.

Her broad experience ranges from providing consultations on a day-to-day basis on the diverse issues arising from the clients' activities on their dominant position on the market, to dawn raids and investigation proceedings in general.

Francesca regularly defends clients before both the European Competition Commission and the Italian Competition Authority, as well as civil and administrative courts. She also has broad experience in setting up a tailor-made compliance programme designed to train people and limit companies' responsibilities. She is author of some publications about her sector and is a regular speaker at seminars.



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