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LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest. We would welcome any comment you might have.

COMPETITION LAW REGULATIONS: A LEGISLATIVE OVERVIEW AND THE ENFORCEMENT OF EU REGULATION Nr. 1/2003 IN ITALY

EC Treaty, Articles 81 and 82
Law nr. 52/96
Law 10.10.90 nr. 287
D.P.R. 30.4.98 nr. 217
Law 18.6.98 nr. 192

INTRODUCTION

One year has elapsed since EU Regulation nr. 1/2003 entered into effect on May 1st 2004.

The implemented Legislation determined substantive changes on the domestic competition law rules, specifically of the procedural provisions regulating enforcement of Article 81 & 82 of the EC Treaty, which prohibit anti-competitive behaviours and abuse of position of market dominance.

National Courts and the domestic Anti-trust Authority - IAA actually enjoy a greater role in the enforcement of competition law rules and in the prosecution of anti-competitive conducts.

The switch from a EU centralised system of enforcement to the current system where much of the enforcement has been devolved to national authorities, makes it more important for business to acknowledge the legislative local environment and to be aware of domestic approach to enforcement of competition law rules and regulations.

SOURCES OF STATUTORY LAW & THE ROLE OF THE ITALIAN ANTITRUST AUTHORITY - IAA

The national statutory regulations providing for enforcement of Articles 81 and 82 of the EC Treaty may be summarized as follows.

Law nr. 52/96 confers to the *Autorità Garante della Concorrenza e del Mercato* - IAA the powers to ensure enforcement of Articles 81 and 82 of the EC Treaty.

The enforcement of the said provisions of the EU Treaty is to be exercised within the provisions that Title II, Chapter II of Law nr. 287/90 sets forth.

This latter statutory regulation is commonly referred to as the National Competition Law and includes provisions (mainly Articles 2 and 3) substantially identical to those of Article 81 and 82 of the EC Treaty, and provisions regulating the IAA enforcement activity and its fining powers.

In addition, interpretation of domestic rules must follow EU legal principles of law.

D.P.R. 217/98 provides further procedural rules aimed at enforcement of the provisions of Law nr. 287/90.

In order to ensure compliance with the goals of Articles 81 and 82 of the EC Treaty, IAA has the power to take action in any business sector or industry, with the exception of the banking sector, where *Banca d'Italia* has exclusive jurisdiction.

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This latter provision does not mean that IAA has no enforcement powers whenever the business of a bank is concerned.

The exclusive jurisdiction of Banca d'Italia is related to cases involving typical banking markets, like saving and lending, while IAA has jurisdiction on the other markets.

In some instances however, its jurisdiction may even be concurrent with the jurisdiction of Banca d'Italia whenever both the banking and the other market are concerned.

Finally, Article 3bis of Law nr. 192/98 entrusts IAA with the task of prosecuting cases of economical dependence, which may be of relevance to the protection of competition within the national market.

PROHIBITED CONDUCTS UNDER NATIONAL AND E.U. RULES OF LAW

Law nr. 287/90, Article 2 prohibition outlaws agreements between businesses and decisions by groups of businesses which may affect domestic trade and which have either the aim or effect of preventing, restricting or distorting competition within domestic market.

Article 81 of the EC Treaty outlaws agreements between businesses and decisions by groups of businesses, which have either the aim or effect of preventing, restricting or distorting competition within the common market and which may affect trade between EU Member States.

Anti-competitive agreements can be written or verbal, formal or informal. Examples might include:

- agreements between competitors on the prices to be charged for goods or services
- agreements between competitors on which customers or areas to supply
- agreements between competitors to limit output.

Cartels are indeed a category of anti-competitive agreement. Put simply, cartels are agreements between businesses not to compete with each other, whether on price,

discount levels, credit terms, which customers or areas to supply, who should win a contract in a bidding process or on some other trading condition. These agreements are usually verbal.

Agreements are prohibited by the Article 2 prohibition only if they have an appreciable effect on competition in Italy and may affect trade within the domestic market and are not otherwise excluded or do not satisfy the criteria in Article 4 of the Law.

Agreements are prohibited under Article 81(1) only if they have what is known as an appreciable effect on competition as well as an appreciable effect on trade between EU Member States and that do not satisfy the criteria under Article 81(3) of the EC Treaty or that are not exempted by an EU regulation.

Whether there is an appreciable effect on competition will depend upon a number of factors, including the combined market share of the businesses involved in the agreement.

Cartel agreements are likely to have an appreciable effect on competition (though not necessarily an appreciable effect on trade between EU Member States) regardless of how small the businesses involved are.

If certain conditions are met, Article 4 of the Law nr. 287/90 gives the IAA the authority to grant individual exemptions for specific periods of time.

Any of such agreements must improve conditions of supply and determine a substantial benefit to consumers.

On the basis of the above standard, in 1992 the IAA resolved to close an investigation, which was involving an exclusive agreement of distribution (*AG n. 402, Vevy Europe/Res Pharma, Boll. 4/92*). In 1993, another exemption was granted on the basis that there were no alternatives, which might have

a minor impact on restriction of competition (*AG n. 1206, Manzoni/ SPI/ SPE/ Publikompass, Boll. 12/1993*).

Prohibition of Law nr. 287/90, Article 3 prevents businesses with a dominant position in the marketplace in Italy from abusing that position if it may affect trade within the domestic market.

Article 82 of the EC Treaty prevents businesses with a dominant position in the marketplace from abusing that position where such an abuse may affect trade between EU Member States.

There is a two-stage test to assess the alleged infringing conduct: first, whether the business is in a dominant position, and secondly, whether there is an abuse of that position.

For the purposes of Article 82, there will be an additional assessment on whether that abuse may have an effect on trade between EU Member States.

There is no hard and fast rule about what constitutes a 'dominant position'.

A key factor will be the market share of a business. As a general rule, a business is unlikely to have a dominant position when its share of the market is below 40 per cent, but other factors are also relevant.

These include the number and size of competitors and customers and whether new businesses could easily set up in competition.

Examples of abuse of a dominant position might include:

- charging unfair prices (for example: excessively high or low prices) or imposing other unfair trading conditions
- refusing to supply an existing customer without good reason
- limiting production, markets or technical development
- applying different conditions to similar transactions including charging different prices to different customers where there is no difference in quantity, quality or other characteristics of the products, thereby placing certain parties at a competitive disadvantage
- making a contract conditional on factors that have nothing to do with the subject of the contract.

Law nr. 287/90, Article 5 and 6 prohibit those mergers, consolidations or positions of control among business undertakings, whenever they constitute or determine the strength of a dominant position, which may have as a consequence either the elimination or a substantial and durable restriction of the competition within the market.

Conduct may be prohibited under both Law nr. 287/90, Article 3 and EC Treaty, Article 82.

In accordance with provision of Article 16 of Law nr. 287/90, previous notice must be given to the Antitrust Authority on any operation of merger or consolidation, whenever:

- Total national turnover of the undertakings involved overrides an amount equivalent to Euros 250 million
- Total national turnover of the firm, which is the target of the acquisition overrides an amount equivalent to Euros 25 million.

An interesting provision is that of Article 13, which states that the undertakings concerned may always give notice to the Antitrust Authority of any agreement among them.

Save for incomplete or untrue filings, if the Authority does not carry on an investigation within 120 days from filing, the Authority itself is afterward prevented from opening an investigation on the agreement. In this connection it may be said that after the expiration of that 120 days period of time,

there is a sort of constructive consent on the agreement by the Antitrust Authority.

RULES OF PROCEDURE
Standard rules of civil procedure apply to lawsuits based on infringement of EU competition rules of law.

The Courts of first instance have jurisdiction over private antitrust claims, while judicial review of judgements rendered by the Courts of first instance lies with the competent Court of appeal and ultimately with the Supreme Court.

On the other hand, whenever the violation of a domestic competition rule of law is concerned, the Court of Appeal has exclusive jurisdiction over the matter and its decisions may be appealed before the Supreme Court.

The IAA has no authority to issue provisional remedies and any application for such measures must be addressed to the competent Court as the case may be.

DOMESTIC ENFORCEMENT BASED ON ARTICLES 81 & 82 OF THE E.C. TREATY
If IAA has suspicion that an anti competitive behaviour is afoot, they may always make their assessment based on information available and determine if carrying on an investigation *ex officio*, that means on their own, without need that a complaint has been lodged.

To that extent before opening a formal investigation, IAA may ask the undertaking concerned and third parties to provide them with specific information, although at that stage the Antitrust Authority has no compelling or fining powers.

After the official opening of proceedings by IAA, notice of which must be served to the undertaking concerned, IAA has broad powers of investigation that are usually carried out through the involvement of the financial police ("Guardia di Finanza").

Such powers include inspection of business premises, corporate books, records and computers. Any inspection must be authorized through formal decision by IAA.

The undertaking concerned must promptly provide all the required information and documentation to the IAA, otherwise severe administrative fines may be imposed.

Save for the possibility to claim damages directly sustained from an anti-competitive behaviour, third parties have no standing to challenge an eventual IAA decision to close the investigation without further action.

On the other hand, the absolute lack of consideration of a complaint by the IAA, may be challenged before the Administrative Regional Tribunal (T.A.R.).

If an investigation is closed without no further action, the file may be reopen upon showing of either significant new evidence or new findings of facts, except that in case of filing of agreements for negative clearance, IAA gets 120 days from filing to resolve whether to carry on an official investigation or to issue the decision of negative clearance.

Coming to the procedure for lodging a complaint, when a complaint is submitted the case is assigned to the IAA Directorate competent for the specific sector of the market which is allegedly affected by the challenged conduct.

Within thirty days from the date of filing, the name of the designated officer responsible for the case is communicated to the complainant.

Preliminary inquiries are not subject to any time limit.

If the IAA carries on a formal investigation, its decision must mention its expected length, which may be subsequently postponed when specific need arise or it appears necessary in order to ensure proper exercise of the rights of defence.

Generally speaking, investigations last around one year, although in some specific

instances they have lasted no more than six months.

If the investigation involves infringement of Articles 81 or 82 of the EC Treaty, The IAA may decide not to proceed whenever a similar investigation has been filed for the same conduct in another Member State.

SANCTIONS & FINES FOR ANTI-COMPETITIVE PRACTICES

Upon its decision that a specific conduct violates Articles 81 or 82 of the EC Treaty (or its domestic equivalents that Law nr. 287/90 sets forth), the IAA issues a cease-and-desist order towards the undertakings concerned to terminate its behaviour forthwith.

The IAA may also impose fines, which may be in the amount of up 10% of the worldwide turnover of the firm involved in its previous fiscal year.

Contempt or failure to comply with the order by the IAA may result into a second sanction, which is of not less than twice the fine already in place, although its amount may not be greater than the above mentioned 10% of the worldwide turnover of the undertaking.

In the most serious cases and in the event of repeated breach or non compliance, the IAA may even issue an order to cease any business activity for a period of up to thirty days.

Any business firm, domestic or foreign, may be fined in the event of anti-competitive practice, irrespectively as to whether the same firm has its business domicile in Italy or not.

The IAA fining authority is subject to a five-year statute of limitations, running from the date the infringement occurs, or in case of continuing violations from the date the last infringement was committed.

To be noticed is the circumstance that the competition Laws in Italy do not provide for the possibility of applying for “leniency programs”.

Nevertheless, in few specific cases, immunity was granted by the IAA to firms which disclosed of a cartel that the firm was a participant to, and of which IAA was not aware.

It may be said that fines are only applied when the infringement has determined serious consequences for competition, and they are imposed accordingly to the gravity and length of the violation.

Among the factors considered are the nature of the infringement, its effect on the market, the size and the nature of the market affected.
The eventual cooperation of the firm during the IAA investigation is often a factor which is also taken into account to tailoring fines.

From time to time, IAA has ordered structural remedies in order to eliminate consequences of the infringement, although statutory laws do not provide for such specific provisions.

Likewise, in some instances IAA accepted commitments to terminate the infringement and to eliminate its effect, considering in exchange less burdensome fines.

CONCLUSIONS

Further amendments to the domestic Laws are expected in the future in order to fully comply with the goals of EC Regulation 1/2003 and its scope of developing cooperation between the anti-trust authorities of the EU Member States, to the extent of ensuring consistency between the EU and the national rules of Law on competition.

Particularly, the introduction of statutory provisions implementing “leniency programs” constitutes a priority, as it is the enforcement of any additional relevant mean of prevention and dissuasion from anti-competitive business practices.

Indeed, whenever adopted, leniency programs have always proved to be an effective tool, in discovering or proving cartel offences.