Italy: New Powers for Competition Authority in the Field of Competition Law and Consumer Protection

Following the Italian Competition Authority’s (ICA) report of 5 January 2012 regarding pro-competitive measures to increase the competitiveness of the main sectors of the Italian economy (See ECN Brief 1/2012), the Italian Government adopted on 22 December 2011 Decree Law no. 214 /2011 (“Salva Italia” Decree) and on 24 January 2012, Decree law no. 1/2012 (“Cresci Italia” Decree). Those Decrees attribute new powers to the ICA in the field of competition and consumer protection such as new surveillance, reporting and advisory powers and modifying merger notification thresholds and have entered into force respectively on 27 December 2011 and on 24 January 2012.

New advisory duties and powers to legally challenge administrative provisions

The ICA is now entrusted with a number of advisory powers in two main areas.

First, the “Salva Italia” Decree repeals all legislative and administrative constraints which can restrict the exercise of economic activities. In order to guarantee the effectiveness of the principle of liberalization of economic activities, this decree has entrusted the ICA with the duty of delivering a binding opinion “on the principle of proportionality” on government bills and regulations introducing access restrictions to economic activities.

Secondly, the “Cresci Italia” Decree requires that the ICA delivers an opinion on resolutions of local public administrations with more than 10,000 inhabitants indicating the existence of suitable and sufficient reasons (sustained by a market analysis) to grant exclusive rights on local public services. Contrary to the first mentioned opinion, it is compulsory for local public administration to obtain the ICA’s opinion in such cases but these opinions are not binding.

In order to strengthen the effectiveness of the described measures, the “Salva Italia” Decree calls on the ICA to oversee the possible reintroduction by the government of competition constraints and resolutions of local public administration which are deemed contrary to competition rules. Accordingly this Decree provides the ICA with the power to challenge acts that give rise to competition concerns before the Administrative Courts of Lazio (Articles 34 and 35 “Salva Italia” Decree).

Cumulative turnover thresholds for merger notification

From 1 January 2013, the two turnover thresholds taken into account in order to decide whether a merger must be notified (the national turnover of the companies involved exceeds € 468 000 000 or the national turnover of the acquired company exceeds € 47 000 000; these thresholds are updated annually), which are currently alternative conditions, have now become cumulative conditions. This is intended to reduce the number of mergers subject to notification in Italy.

Prohibition of interlocking directorates

The “Salva Italia” Decree prohibits “office holders in the management bodies, monitoring and control and top officials of companies or groups of undertakings operating in the credit markets, insurance and financial services to assume or exercise any similar positions in companies or groups of competitors” (Article 36, paragraph 1, “Salva Italia” Decree): this applies to companies or groups of enterprises in which there is not a relationship of control under antitrust law. According to the provisions of Article 36, paragraph 2 bis, individuals who hold positions that are incompatible under the first paragraph may exercise an option within 90 days from their appointment. The rule, while not giving new powers to the ICA, responds to its repeated warnings. Indeed in several opinions delivered in recent years, the ICA expressed concerns about the governance structure of banks and insurers stating that it was largely unsatisfactory in terms of competition, inter alia, because of the widespread use of personal and equity links between competitors which reduces their incentives to compete.

The ICA’s new powers in the field of marketing of agro-food products

The new provisions introduce specific discipline 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. These provisions also identify a number of prohibited conducts in trade relations between operators, such as the imposition of unfair, retroactive and discriminatory
contractual conditions. Finally, special rules for fees and terms of payments were established (i.e. they must be written and defined in advance). The ICA has been entrusted with surveillance and fining powers in this regard (Article 62 “Cresci Italia” Decree).

Innovations relating to Consumer protection

a) The “Salva Italia” Decree extends the protection provided by the Consumer Code (for which the ICA has already jurisdiction) to unfair trade practices implemented by “traders” against micro enterprises (which are defined as “entities, companies or associations, which exercise an economic activity employing less than 10 people with a turnover not exceeding two million euros”).

b) The Consumer Code is changed by adding to the list of unfair trade practices, mortgage contracts made conditional on the signing of an insurance policy or on the opening of a bank account.

c) The ICA is vested with new powers in relation to unfair commercial terms (so-called “vexatious clauses”). Indeed, administrative protection is established against unfair terms in so-called “standard contracts” between businesses and consumers. The ICA may declare such terms to be unfair and order its assessment to be published on the ICA’s website in order to fully inform consumers. It is also possible for companies to consult the ICA in advance about the fairness of the commercial terms that they intend to use in its standard contracts with consumers.

Legality Rating

The “Salva Italia” Decree introduces the so-called legality rating (based on indicators of legal conduct in view of attributing a score) for companies operating Italy and entrusts the ICA with the task of: (i) reporting to Parliament on the rules necessary in order to “promote the introduction of ethical behavior in business” and (ii) developing, in connection with the Ministries of Justice and Interior, the legality ratings of the firms, that will be relevant “in the granting of public funds by public administrations and in access to bank credit”.

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