

Italy

Short Outline of the New Italian Anti-trust Statute

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Introduction

Italy has recently introduced a national antitrust statute which establishes a five-member anti-trust authority, *Autorità garante della concorrenza e del mercato* (the Authority). The statute, Law No 287 of 10 October 1990 ("Provisions for the protection of competition and of the market"), entered into force on 14 October 1990.

The Law is drawn up in close coordination with EEC competition law, in particular with Council Regulations Nos 17/62 and 19/65, and with the more recent merger Regulation No 4064/89.

Scope of Application – Interrelation with Community Law

The new Law will be applicable to the agreements, abuses of dominant position and to the concentrations of undertakings which do not fall within the scope of the application of Articles 65 and/or 66 of the ECSC Treaty nor of Articles 85 and/or 86 of the EEC Treaty, as well as of any EEC Regulations and other Community acts having equivalent legal force (Art 1, para 1).

The Authority shall inform the EC Commission if a case under its

examination does not fall within the application of the Italian Law (Art 1, para 2).

The Authority shall suspend its action if the case pending before it is already being examined by the EC Commission, except for the aspects which are of exclusive national relevance (Art 1, para 3).

The interpretation of Articles 1 to 9 shall be based on the principles of European Community competition law (Art 4 para 4).

Articles 1 to 9 are applicable not only to private undertakings, but also to State-owned companies, except for undertakings which provide services of general economic interest or which operate in a regime of monopoly (Art 8).

Prohibited Agreements Which Restrict Competition

The definition of agreements which are prohibited because they restrict the freedom of competition in the national market (Art 2) coincides with the definition of agreements prohibited under Article 85, para 1 of the EEC Treaty as incompatible with the common market, and any agreement which is prohibited shall be automatically void.

The Authority may authorise agreements or categories of agreements prohibited under Article 2, for a limited period and on condition that they contribute to improving the condition of offers on the market, provided such agreements allow a substantial benefit for consumers and ensure the necessary competitiveness at international level and are connected in particular with increased production, or quality improvement of production or distribution of goods, or to promoting technical or technological progress.

The authorisation shall not allow restrictions which are not strictly necessary to the attainment of these objectives nor allow the possibility of eliminating competition in respect of a substantial part of the market (Art 4, para 1).

Abuse of Dominant Position

Similarly the definition of the abuse of a

dominant position (Art 3) coincides with the definition of Article 86 of the EEC Treaty.

Powers of the Authority: Agreements Which Restrict Competition and Abuse of a Dominant Position

The parties concerned do not have a legal duty to notify their agreements to the Authority, and may choose not to notify. If an agreement is notified, the Authority loses the right to initiate investigation proceedings after 120 days from notification (Art 13).

The Authority shall consider information submitted by any interested party, including the public administration and associations of consumers, and may initiate investigation proceedings even *ex officio* with a view to assessing the existence of breaches of Articles 2 and 3 of the Law. (Art 12).

Investigation Procedure and Fines

If the Authority considers that there may be a breach of Articles 2 or 3, it shall inform the parties that it intends to initiate proceedings. The parties have the right to be heard and to submit written pleadings and opinions (Art 14, para 1); the Authority has the right to obtain information and documents and to carry out inspections (Art 14, para 2); all information disclosed to the Authority shall be treated as confidential (Art 14, para 3).

If the Authority concludes that there is a breach of Articles 2 or 3, it shall invite the undertakings concerned to eliminate the breach. Since there is no duty for the parties to notify, no fines may be imposed. However fines may be imposed if the breach is considered *serious*: these fines shall be no less than 1 per cent and no more than 10 per cent of the turnover of each undertaking or entity in the previous fiscal year. Higher fines can be imposed if the undertakings fail to comply with the invitation to eliminate the breach, and if the breach continues, the authority can order that the undertaking's business activity is suspended for up to thirty days (Art 15).

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Concentrations

A "concentration" is defined in terms of merger between two or more undertakings or of independent undertakings coming under common control. A joint venture company is also considered as a concentration operation (Art 5, para 1).

However there shall be no control of an undertaking when a bank or a financial institution acquires, at the time of setting up an undertaking or in the case of a capital increase, shareholdings in the said undertaking for the purpose of reselling them on the market, on condition that during the period when such shareholdings are held, which shall not exceed 24 months, the bank or the financial institution does not exercise its voting rights (Art 5, para 2). Furthermore, operations which have as their main object or effect the coordination of the behaviour of independent undertakings shall not constitute a concentration within the meaning of the Law (Art 5, para 3).

Powers of the Authority: Concentrations

In assessing whether a dominant position in the national market is created or strengthened, the Authority shall take into account the opportunities available to suppliers and users, the market position of the interested undertakings, their access to supplies or markets, the structure of the markets, the competitive situation of the national industry, any barriers to entry on the market by competing undertakings, and supply and demand trends for the relevant goods and services (Art 6, para 1).

The Authority has the power to prohibit the concentration or to authorise it subject to certain limitations in order to avoid the consequences listed above (Art 6, para 2).

Pre-notification of Concentrations – Thresholds

The Law requires the pre-notification to the Authority of concentrations when the aggregate national turnover of all the undertakings concerned is more than

L500 billion (some £230 million or US\$440 million, or when the total national turnover of the target company is more than L50 billion (some £23 million or \$44 million). These thresholds are increased each year in the amount equal to the official depreciation index (Art 16, para 1).

It follows that a large undertaking on the national market may acquire one competitor after another so long as each target's turnover does not exceed the above maximum.

The turnover of a bank and of a financial institution is considered equal to one tenth of its assets, whilst the turnover of an insurance company is equal to the premiums collected (Art 16, para 2).

Investigation Procedure and Fines

If the Authority considers that the proposed concentration may be prohibited, it must commence the investigation procedure within 30 days (Art 16, para 4) and may order the interested parties to suspend the concentration until the investigation is concluded (Art 17, para 1).

Nevertheless a public bid may be implemented if it was notified and the acquirer does not exercise its voting rights (Art 17, para 2).

Within 45 days from the date when investigation proceedings are initiated, the Authority shall inform the undertakings concerned (and the Italian Ministry for Industry and Trade) of its conclusions on the merits; this deadline may however be increased by 30 days for failure of the undertakings concerned to supply information in their possession (Art 16, para 8).

If the Authority eventually concludes that the concentration falls under Article 6, it shall prohibit its implementation (Art 18, para 1). If it concludes that the concentration is not incompatible with the Law, it shall so declare (Art 18, para 2). If the concentration operation has already been performed, the Authority may lay down the measures which are necessary to re-establish the conditions for effective competition, eliminating the distortions (Art 18, para 3).

The Authority may impose fines not exceeding ten per cent of the aggregate turnover of the undertakings concerned for failing to comply with the obligation

to suspend or abrogate the concentration (Art 19, para 1).

In exceptional circumstances, concentration operations which would fall under the prohibition of Article 6 of the Law may be authorised by the Authority, on the basis of general guidelines issued directly by the Italian Government, in the general interest of the national economy within the limits of European integration (Art 25, para 1).

Participation in Share Capital of Banks

Special detailed provisions (Art 27–30) are laid down in respect of participation in the share capital of banks, which is subject to the prior authorisation of the Bank of Italy when it is in excess of 5 per cent of the bank's capital; authorisation is also necessary for the acquisition of the control of a company which in turn holds in excess of 5 per cent of the share capital of a bank.

The exercise of voting rights is conditional upon the authorisation of the Bank of Italy.

In any case undertakings other than banks or financial institutions shall not be allowed to hold, either directly or indirectly, shareholdings in excess of 15 per cent of a bank's capital.

The parties concerned are required to notify the Bank of Italy of any existing direct or indirect participation in the share capital of a bank in excess of 1 per cent, as well as any future acquisition or sale of shares in excess of 1 per cent of the bank's capital.

Jurisdiction for Appeals

All the decisions of the Authority are subject to appeal before the Administrative Tribunal of the Region of Lazio, whilst the Courts of Appeal, having competence by territory, shall have jurisdiction for actions for damages and applications for interlocutory measures in respect of the breach of Articles 1 to 24 (Art 33).