Antitrust bites - Newsletter

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The Annual Law for the Market and Competition comes into force: new developments for the Italian Competition Authority enforcement

On 27 August 2022 the Annual Law for the Market and Competition 2021 (Law No. 118 of 5 August 2022) came into force. It was published in the Official Journal on 12 August 2022.

The Market and Competition Law strengthens the enforcement instruments of the Italian Competition Authority (ICA). Its aim is to promote the development of competition, remove regulatory obstacles to the opening of markets and guarantee consumer protection. The law reflects, to a large extent, the proposals the ICA submitted to the government in its report AS1730 last March.

The innovations introduced by the law, affecting the ICA's powers, mainly concern:

- Notification of concentrations: the law empowers the ICA to require undertakings concerned to notify a concentration below the thresholds, where: (i) only one of the two turnover thresholds is exceeded (the cumulative occurrence of which triggers, as a rule, the obligation to notify) or the aggregate worldwide turnover of the undertakings involved exceeds EUR 5 billion; (ii) there are concrete risks for competition in the national market, or in a relevant part thereof; (iii) the concentration has been completed from no more than six months. In addition, new criteria have been introduced for calculating the relevant turnover for the purpose of the notification obligation of merger operations of credit and other financial institutions and insurance companies, in line with the EU provisions;
- Joint ventures regulation: the law integrates and amends the Italian law applicable to joint ventures, in line with EU provisions, by subjecting all full-function joint ventures to merger control, regardless of their cooperative or concentrative nature;
- Abuse of economic dependence: the law amends Law No. 192/1998, introducing a presumption of economic dependence if a company uses intermediation services provided by a digital platform that plays a decisive role in reaching end users or suppliers, also in terms of network effects or data availability, and an illustrative list of abusive practices that can be carried out by digital platforms. These provisions will come into force on 31 October 2022;
- Introduction of the settlement procedure: with regard to investigations initiated by the ICA for alleged anti-competitive agreements or abuse of a dominant position, the possibility of settlement of the proceedings with a reduction of the fines has been introduced;
- Extension of ICA's investigative powers: it is now provided for the ICA's power to make "at any time" and therefore also outside investigative proceedings, mandatory requests to undertakings and entities for acquiring information and documents useful for the purposes of the application of national and European law prohibiting anticompetitive agreements and abuses of dominant positions and related to merger control.

Probative value of final decisions of antitrust authorities in civil proceedings to which Directive 2014/104/EU does not apply: AG Pitruzzella opinion

On 8 September 2022 Advocate General (AG) Pitruzzella delivered his opinion in case C-25/21, regarding a request for preliminary ruling from the *Juzgado de lo Mercantil* of Madrid.

The main proceedings concerned an action seeking a declaration of nullity for certain contracts providing for resale price fixing clauses – in respect of which the Spanish competition authority had ascertained a violation of Article 101 TFEU, and the respective Spanish national provision, art. 1, para. 1, of the *Ley de Defensa de la Competencia* – and compensation for the damages allegedly caused by

that infringement.

The AG emphasized that Directive 2014/104/EU on "antitrust damages" actions pursuant to Article 1 of the Directive, does not apply to civil actions seeking a declaration of nullity for contracts, pursuant to Article 101, para. 2, TFEU.

As regards the application *ratione temporis,* recalling the ECJ judgement in case C-267/20, the AG reaffirmed that the substantive provisions of the Directive, such as Article 9 governing the binding effect of the decisions of antitrust authorities, are not retroactively applicable with reference to the time limit for the transposition of the Directive.

Therefore, Article 9 of the Directive would not be applicable *ratione temporis* to an action for damages allegedly suffered before the expiration of the time limit for the transposition of the Directive, in case of an infringement deriving from restrictions on competition provided in contracts whose effects ceased before the time limit for transposition. This is regardless of the fact that the action is brought after the entry into force of the national provisions (belatedly) transposing the Directive.

As regards the evidential value of final decisions of national antitrust authorities, in civil actions to claim compensation or declare nullity to which the Directive is not applicable, the AG asserted that it is for Member States to regulate this aspect, in accordance with the principles of equivalence and effectiveness.

In particular, it cannot be imposed on Member States to grant an irrefutable presumption, such as the one provided for by Article 9 of the Directive. Nonetheless, where there is a coincidence between the infringement of Article 101 TFEU, established by a final decision of the antitrust authority, and the alleged infringement on which the civil action is based, the decision should be granted, at least, the value of *prima facie* evidence of the existence of the infringement. This is required by the principle of effectiveness and the requirement to ensure the full effectiveness of Article 101 TFEU. The coincidence must result in the nature of the violation and its material, personal, temporal and territorial scope.

In that regard, the AG seems to equate the notion of *prima facie* evidence to a relative presumption.

If the "conditions" mentioned above do not occur, the principle of effectiveness and the requirement to ensure the full effectiveness of Article 101 TFEU require the final finding of an infringement to be afforded at least the value of an "indication" or "of some evidence." According to the AG, if a civil judge denied any value to a decision of an antitrust authority, this would be contrary to EU law.

Abuses of dominant position in the air transport sector and imposition of behavioural measures: *Bundeskartellamt* prohibits the termination of contractual agreements

With decision of 1 September 2022, the *Bundeskartellamt* closed a proceeding for abuse of dominant position against an undertaking in the air transport sector (a dominant undertaking in the market for the supply of feeder flights, flights which carry passengers from "small" airports to big hubs to connect passengers on long-haul flights).

According to the *Bundeskartellamt* the unilateral termination of long-standing cooperation agreements constituted exclusionary abuse, in violation of articles 102 TFEU and Sections 19 and 20 of the German Competition Act (GWB; referring to the German national provisions on abuse of dominant position and abuse of economic dependency).

The proceeding originated from the competitor's complaint that, following the termination of the cooperation agreements, it could no longer use feeder flights operated by the dominant undertaking for its long-haul routes. Consequently, the competitor could not ensure seamless long-haul connections (e.g., with through-checked baggage and full travel protection in case of delays or flights cancellations).

The *Bundeskartellamt* prohibited the dominant undertaking from unilaterally terminating the cooperation agreements in force (the original termination was spontaneously, temporarily suspended at the moment the *Bundeskartellamt* opened a proceeding to impose interim measures). Furthermore, the German authority imposed other modifications on the contractual obligations already present in the agreement, which, supposedly, could have hindered the effective access to feeder flights. The *Bundeskartellamt* also provided access to more booking classes to the competitor.

The *Bundeskartellamt* assessment considered that in case of termination of the agreements, the competitor could not have offered its long-haul passengers similar journeys by using, for instance, trains or buses to reach big hubs. Likewise, the competitor could not have set up its own feeder flight network, because most of the necessary airport slots, in German hubs, would have been available to the dominant undertaking (the only one able to offer a comprehensive network of feeder flights from Europe to the major German hubs).

The *Bundeskartellamt* specified that if the market and competition conditions change, the suitability of the measures adopted can be examined, upon request.

Data protection and antitrust authority powers: AG Rantos' conclusions

On 20 September 2022, Advocate General (AG) Rantos delivered his opinion in Case C-252/21, which concerned a reference for a preliminary ruling from the Higher Regional Court, Düsseldorf. The case relates to a dispute between certain companies of the Meta Platforms group and the German Federal Competition Authority (*Bundeskartellamt*).

The main proceeding arises from an action brought before the referring court by Meta Platforms against a decision of the German Federal Competition Authority prohibiting the processing of users' personal data in accordance with the terms of use of Facebook, a social network owned by Meta Platforms. The conditions allow Meta Platforms to collect data from other services of the group, and websites and applications belonging to third parties, by means of interfaces integrated into them or cookies stored on the user's devices, to use them for advertising purposes.

In the contested decision, the Authority order Facebook to cease the activities, on the assumption that the data processing did not adhere to the General Data Protection Regulation (GDPR) and constituted an abuse of Meta Platforms' dominant position on the market for social networks for private users in Germany.

In his conclusions, AG Rantos clarified, first of all, that although national competition authorities do not have the power to ascertain infringement of the GDPR, in the exercise of their competences, they may take into account the compatibility of a business practice with the GDPR. Non-compliance of a business practice with the GDPR may be an important indication as to whether or not it constitutes an infringement of the competition rules.

Secondly, according to the AG, the mere fact that the undertaking enjoys a dominant position on the national market for online social networks for private users, while not calling into question the validity of the user's consent, is relevant to the assessment of the freedom of the consent given.

Finally, according to AG Rantos, the practice implemented by Meta may fall within the justifications provided for by the GDPR for the processing of data without the consent of the data subject, provided that this practice is functional to the provision of services linked to the Facebook account.

Market study of the European Commission on hotels' distribution practices

On 26 August 2022, the European Commission published the findings of a market study conducted in 2021 on the distribution practices of hotels in the EU. The report covers the period between 2017 and 2021.

In the market study, which took into consideration a representative sample of six Member States (Austria, Belgium, Cyprus, Poland, Spain and Sweden), the European Commission has analysed the phenomenon of the "parity clauses" (also known as Most Favoured Nation clauses or MFNs) applied by online travel agencies (OTA).

The report found that two types of parity clauses are usually applied to hotels by OTAs: "wide" and "narrow" parity clauses. The former restricts hotels from offering better prices through any other sales channel than the one of the contracting OTA (i.e., the online travel agency which introduced the clause), while the latter parity clause prevents the hotel from offering lower prices on its own website but not on other competing OTAs.

Approximately 30% of independent hotels (i.e., those not part of chains) interviewed for the market study confirmed they were subject to parity clauses. The report also found that sometimes OTAs, even though not providing for actual parity clauses, implement other mechanisms that discourage hotels from offering less favourable prices to those applied on their own websites.

The Commission's study also highlights that the characteristics of hotels' distribution practices, including the role performed by OTAs, do not show specific anomalies nor trends even in the analysed countries (Austria and Belgium) where parity clauses for OTAs have been prohibited.

The Commission stated that the results of the market study will be taken into consideration by other national competition authorities in their monitoring and enforcement work in the hotel distribution sector.

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