

Law Decree on Liberalizations: regulatory developments in antitrust and consumer protection and new powers of the Competition Authority

The Law Decree of January 24, 2012, no. 1., converted into law by law of March 24, 2012, no. 27 published in the *Gazzetta Ufficiale* no. 71 of March 24, 2012 ("Liberalizations Decree"), introduces several changes to competition law and consumer protection by granting new supervisory, warning and advisory powers to the *Autorità Garante della Concorrenza e del Mercato* (Competition Authority, "AGCM").

This client briefing summarizes the regulatory developments which can be considered cross disciplinary and affect most companies operating in Italy. It does not provide a detailed examination of the changes in specific sectors, such as banking/insurance, fuel distribution and retail sale of pharmaceuticals.

Mandatory fee of 0.08 per thousand for companies with revenues exceeding Euro 50 million

With effect from 2013 the AGCM will be fully funded by companies. In particular, corporations ("*società di capitali*" under the Italian law) with total revenues exceeding Euro 50 million will be charged an annual fee amounting to 0.08 per thousand sales in the latest approved annual report. The minimum fee by each company will be Euro 4,000 and the maximum threshold will be Euro 400,000.

In 2013 only, the fee must be paid directly to the AGCM by 30 October 2012 in the manner that it will determine. From 2014, the fee must be paid by 31 July each year.

Under this new system of funding, from January 2013 the filing fees for the notification of mergers will be abolished and a part of the sanctions for unfair commercial practices will no longer be allocated for the funding of the AGCM.

Cumulative turnover thresholds for notification of mergers

From 1 January 2013, the two turnover thresholds provided for the notification of the mergers (until now the aggregate national turnover of the companies concerned exceeding Euro 468 million or national turnover of the acquired company exceeding Euro 47 million, thresholds updated annually), which are currently alternative conditions triggering the notification obligation, will become cumulative conditions.

Our contacts in Italy

Please contact our experts in Antitrust to discuss the issues presented in this Client Briefing:

Prof. Avv. Cristoforo Osti
Antitrust Partner

Avv. Alessandra Prastaro
Antitrust Counsel

Clifford Chance Studio Legale Associato

Piazzetta Bossi, 3
201121 Milano
Tel: +39 02806341

Via di Villa Sacchetti, 11
00197 Roma
Tel: +39 06422911

The number of mergers subject to notification in Italy will therefore decrease considerably.

Rating the legality of companies

The new provisions introduce a rating of the legality of companies and assigns the AGCM the task of (i) reporting to Parliament the necessary legislative changes in order to "*promote the introduction of ethical behavior in business*" and (ii) drawing up, in coordination with the Ministries of Justice and the Interior, the rating of the legality of companies in Italy. The rating assigned will be taken into account *when public funding is being provided and when credit is being sought from banks*.

Creation of Company Courts

Specialized sections will be set up to hear cases relating to companies at first instance courts ("*tribunali*") and appeal courts ("*corti d'appello*") in the capital of each region (except Valle d'Aosta; in Lombardia there will also be a section in Brescia and in Sicilia there will be one in Palermo and one in Catania).

Specialized sections in matters concerning companies will still have jurisdiction over cases regarding intellectual and industrial property law, unfair competition and copyright law (already assigned to existing specialized sections for industrial and intellectual property law). Antitrust litigation will now be added and there will therefore be two levels of jurisdiction for violations of national antitrust law and the current problems arising from the bifurcation of jurisdiction of courts of appeal (competent for national antitrust law as first and only level of jurisdiction) and jurisdiction of the first instance courts (competent for European antitrust law) will be resolved. The specialized sections will have jurisdiction over disputes relating to corporations (in particular corporate relationships; liability actions; oppositions by creditors to certain transactions; shareholders' agreements; control, direction and coordination) and those related to public works contracts, public supply contracts and public service contracts of European Community relevance over which the ordinary courts have jurisdiction when companies are involved.

New powers of the AGCM in marketing of agricultural and food farming products

Specific rules are introduced on the regulation of trade relations relating to the sale of food farming and agricultural products, with particular reference to the form and content of contracts between stakeholders in the food chain, the final consumer being excluded.

The Law sets out a number of prohibited conducts in trade relations between operators (on the basis of the list of prohibited by set out under art. 3 of Law no. 287/1990 on abuse of dominant position), such as the imposition of conditions on the purchase, sale or other contractual conditions unjustifiably burdensome, as well as extra-contractual and retroactive conditions; the application of dissimilar conditions for equivalent performances; the subordination of the conclusion and performance of the contractual obligations and the continuity and regularity of the same trade relations to the performance by the contractual parties who, by their nature or according to commercial practices, have no connection with the subject matter of either. Finally, special rules are laid down for payments of fees and payment delays.

Powers of supervision and assessment of violations (*ex officio* or upon request) and sanctioning powers (sanctions ranging from a minimum of Euro 516 to a maximum of Euro 500,000) are assigned to the AGCM.

The regulation will be effective from 24 October 2012. By 24 June 2012 a decree by the Minister of Agriculture will define how the provisions will be applied.

News relating to unfair commercial practices

a) **Protection of micro-companies from misleading and aggressive commercial practices**

The protection from unfair commercial practices engaged in by "professionals" (provided by the Consumer Code and over which the AGCM already has jurisdiction) is extended to micro-companies.

Micro-companies are defined as *"entities, companies or associations which, regardless of legal status, pursue a business activity, including on an individual or family basis, having less than ten employees and realizing an annual turnover or an annual balance sheet total not exceeding Euro 2 million"*.

b) *Mortgage loan agreements conditional to the underwriting of an insurance policy or the opening of a bank account*

The Liberalizations Decree amends the Consumer Code by adding to the list of unfair commercial practices those practices by banks, a credit institutions or financial intermediaries which, for the purpose of entering into a mortgage loan agreement, require that the customer take out an insurance policy provided by the same bank, institution or intermediary or that the customer open a bank account at the same bank, institution or intermediary.

New powers of the AGCM regarding unfair terms ("clausole vessatorie" under the Italian law)

Administrative protection is granted against unfair terms in so-called standard contracts (*"contracts that are concluded by agreement upon general conditions by signing applications, templates and forms"*) between business entities and consumers.

The supervisory and sanctioning powers are conferred on the AGCM. In particular, the AGCM, *ex officio* or upon request, may declare the unfair nature of such terms and impose pecuniary sanctions for failing to comply with requests for information or documents (sanctions from Euro 2,000 to Euro 20,000) or where the information or documents provided are false (sanctions from Euro 4,000 to Euro 40,000).

The decision of the AGCM that states the unfair nature of one or more terms will be published on the website of the Authority and that of the companies and *"on any other means deemed appropriate in relation to the need to fully inform consumers."* The sanctions are between Euro 5,000 and Euro 50,000 for failure to do so.

It is possible for the companies to consult the AGCM in advance about the unfair nature of the terms they wish to use in their standard contracts with consumers. The Authority must decide within 120 days from the request. For terms not deemed unfair as a result of this preliminary analysis a subsequent action by the AGCM is precluded. In any case, the liability of the company remains.

The administrative court has jurisdiction over the appeals against decisions of the Authority regarding unfair terms. The ordinary court has jurisdiction over the validity of the unfair terms and damages.

New provisions about class actions

The provision about class action in art. 140-*bis* of the Consumer Code is favorably amended as follows: (i) the requirement that situations and rights of stakeholders be identical is replaced by that of "homogeneity"; (ii) the class action protects not only the homogeneous individual rights of consumers and users but also "collective interests" (iii) it is provided that the court grants the parties a period not exceeding 90 days to reach an agreement on the settlement of damages. The record of the agreement, signed by the parties and the judge, is enforceable. If an agreement has not been reached within that period of time, the court, at the request of at least one of the parties, will settle the amounts owed to the individual members of the class.

New advisory powers assigned to the AGCM

The AGCM is granted a number of new advisory and warning powers in various subject matters: (i) binding opinion as to the format of government regulation introducing limits to the access and the exercise of economic activities; (ii) binding opinion about framework resolutions by which local authorities with a population of over 10,000 provide appropriate and sufficient reasons for granting exclusive rights and for any decision to grant a single tender contract for a plurality of local public services; (iii) anticipatory opinion on the identification of the minimum requirements for a rational and proper development of the market of the intermediaries for rights relating to copyright; (iv) opinion on the report of the Ministry of Infrastructure and Transport on the decision not to proceed with a public tender for the performance of automated management services relating to payments due for vehicle licenses and registration.

Moreover, it should be noted that Art. 35 of Law Decree December 6, 2011, no. 201, converted by way of the conversion law of December 22, 2011, no. 214 (so-called "Salvitalia Decree") gave to the AGCM the power of bring an action against *"general administrative acts, regulations and dispositions of any public administration which violate the provisions protecting competition."*

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance Studio Legale, Via di Villa Sacchetti, 11, 00197 Rome, Italy
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