THE NEW ANTITRUST COMPLIANCE AND THE SYSTEMS AND CONTROLS PURSUANT TO LEGISLATIVE DECREE 231/2001: WHAT ARE THE POINTS OF CONTACT?

The Italian Competition Authority ("**ICA**") adopted new compliance antitrust guidelines on **25 September 2018** ("**Guidelines**").

Based on the ICA's considerable experience with antitrust compliance matters, the Guidelines significantly modify, both in form and in substance, the provisions set out in the 2014 ICA guidelines on the criteria to be used to quantify fines.

The new Guidelines will apply in all proceedings commenced by the ICA after **8 October 2018,** date of publication of the Guidelines in the Official Bulletin, number 37/2018.

Key issues

- The Guidelines define, in line with best international practice, the typical components of an Antitrust Compliance Programme
- If an Antitrust compliance Programme has been adopted before the ICA starts proceedings, the fine may be reduced by up to 15%
- Programmes as defined in the Guidelines have many evident similarities with Systems and Controls pursuant to Legislative Decree 231/2001
- A valuation is necessary to determine whether the two

THE NEW ANTITRUST COMPLIANCE GUIDELINES

The new Guidelines: (i) describe in more detail the contents required for a compliance programme ("**Antitrust Compliance Programme"**) to be evaluated positively by the ICA; (ii) create a specific procedure to recognise an Antitrust Compliance Programme as a mitigating factor; and (iii) clearly define the criteria that the ICA will adopt to assess whether to recognise the Antitrust Compliance Programme as a mitigant, and set out more detailed information as to the potential reduction of the fine if such mitigant is recognised.

- Following the principles underlying Legislative Decree 231/2001, the Guidelines describe in detail how the company must act to ensure compliance, expressly requiring[that a company:
  - Recognise the value of competition as an integral part of its corporate culture and policy. The Guidelines proposes innovative methods by which a company can recognise this value, such as by:
    - ✓ Developing a strong compliance programme that is expressly supported by top management, which must be actively and personally involved in implementing and monitoring the programme;
    - ✓ Identifying a person responsible for the programme, chosen from the managers of other business functions of the company, whose role will be independent and autonomous and who will report directly to top management (the "**Antritrust Compliance Officer**"); and

  - ✓ Allocating sufficient corporate resources to implement the programme;
- Identify and assess antitrust risk, taking into account factors such as the size of the company and its market position, the nature of the company's activities or the goods/services offered, the competitive environment, the internal organisational structure and the decision-making processes, as well as the applicable legislative and regulatory framework;
- Develop management processes suitable to reduce the risk that conduct may be put in place in breach of competition law, and identify any antitrust violations. The suitable instruments to achieve this objective include internal reporting processes (for example, a whistle-blowing mechanism), periodic due diligence, internal audits, services by independent legal consultants and periodic, in-depth focus on specific business areas;
- Set-out an adequate disciplinary and incentive system in connection with the programme. The Guidelines deem very important, in a management by objectives context, that the Antritrust Compliance Officer be attributed incentives in relation to the compliance programme;
- Perform periodic monitoring and update of the programme, by systematically assessing the efficacy of the programme's various components;
- Train and educate its employees and staff, in a manner adequate for the size and type of company, especially calibrated for the antitrust risk to which the company is exposed. Typically, these educational activities involve the organisation of training courses and the preparation of *ad hoc* manuals and guidelines.

- A new concept under the Guidelines is the procedure to recognise an Antritrust Compliance Programme as a mitigating factor. The Guidelines provide that when a company subject to proceedings wishes to use its Antritrust Compliance Programme as a mitigant, it must file an appropriate request with the ICA, along with a **report that explains**:
  - the reasons why the programme can be deemed adequate to prevent antitrust violations; and
  - the initiatives the company has put in place to achieve the effective and efficient implementation of the programme.
- Another stark change under the Guidelines is that the ICA, in its assessment as to whether (or not) to deem the programme a mitigant, will no longer evaluate all programmes it receives on or before the date when it sends its Statement of Objections ("**SO**"), but only those programmes that the company had adopted, actually implemented and submitted within six months from the notification of the opening of the proceedings.
- The Guidelines establish that the criteria to be used by the ICA to assess the Antritrust Compliance Programme, for the purposes of recognising it as a mitigant, must take into account:
  - how suitable the programme is to actually reduce the company's antitrust risk;

- the company's effective and efficient implementation of the programme; and
- whether the programme meets and reflects the company's specific characteristics (type, size, market position) and the market in which the company operates (number and size of competitors, frequency of contact among competitors, organisation of the production structure etc.).

In its report, the company will have the burden of proving that the above requirements are met.

- The Guidelines also set out an innovative solution, compared to prior provisions, for the ICA to allow a reduction of the otherwise applicable fine on the basis of the above criteria, as follows:
  - In relation to compliance programmes adopted before the opening of any proceedings, the reduction may be of up to:
    - ✓ 15%, where an adequate programme has been effective and has led to the timely discovery, and interruption, of the violation before any proceedings are commenced. In leniency cases, this mitigating factor can be recognised only if a request is submitted together with the application for leniency. The intent is to reward only those programmes that have actually achieved a real result, i.e, that have led the company to change its conduct, or even to self-report;
    - ✓ 10%, where a programme is not manifestly inadequate, on condition that the company adequately supplements the programme and begins implementation after the commencement of the proceedings; and
    - ✓ 5%, where a programme is manifestly inadequate, if the company proposes material amendments to the programme after the start of the proceedings;
  - In relation to compliance programmes adopted *ex novo* after the start of the proceedings, the reduction may be of up to 5% of the fine.

SIMILARITIES AND DIFFERENCES WITH THE SYSTEMS AND CONTROLS PURSUANT TO LEGISLATIVE DECREE 231/2001

An Antritrust Compliance Programme, as described in the new Guidelines, has many similarities with, and certain same peculiarities of, the systems and controls envisaged pursuant to Legislative Decree 231/2001 ("**Systems and Controls**").

A difference that should be immediately highlighted is the "reward" that may be achieved by adopting the two compliance systems:

- In case an offence included in the exhaustive list of relevant crimes set out in Legislative Decree 231/2001 is committed, the prior adoption of Systems and Controls – recognised by the Court as effectively implemented and suitable to prevent the risk that such offence be committed – has the effect of exonerating, and thus of releasing, the

company from liability, on the terms and conditions under Articles 6 and 7 of Legislative Decree 231/2001;

- Differently, in case an offence in breach of competition law is committed, the adoption of an Antritrust Compliance Programme only acts as a mitigating factor, and leads to a reduction of the applicable fine, commensurate to the programme's suitability to achieve the pre-defined compliance objectives and to when the programme is adopted and implemented.

And what are the similarities?

- Companies are not required mandatory to adopt neither the Antitrust Compliance Programm nor Systems and Controls; if implemented, however, each must be specifically tailored to the company (taking into account, for example, the nature of the company's activities, company size, the complexity of the corporate organisational structure, market position etc.).
- The procedures to prepare each of Systems and Controls and the Antritrust Compliance Programme are similar:
  - both procedures start from an analysis of the company's activities, existing internal processes and organisational structure;
  - the above analysis is followed by a mapping of the activities that present a risk of unlawful conduct, i.e., the "**Risk Assessment**";
  - after the Risk Assessment, the effectiveness of the systems and controls already in place is evaluated and, if necessary, protocols to manage and to reduce the risk of unlawful conduct are created and adopted, i.e., the "**Gap Analysis**."
- Implementation of each of Systems and Controls and the Antritrust Compliance Programme is also similar, and in both cases requires:
  - Continued monitoring and constant update, to ensure adequacy and effectiveness;
  - Preparation of a system to govern the flow of information;
  - The structuring of an internal whistle-blowing process;
  - The creation of a system of incentives and penalties applicable to company employees and personnel;
  - Training courses and continuous education and update for company employees and personnel.
- The Survelliance Committee, created pursuant to Legislative Decree 231/2001, and the Antitrust Compliance Officer (who can work with a team) created pursuant to the Guidelines, exercise similar mandates: the responsibilities of each include monitoring and ensuring the implementation of the Systems and Controls and of the Antitrust Compliance Programme respectively, planning the internal audits and due diligence, organising employee training and ensuring that compliance programmes are updated.
- With regard to the assessment whether the compliance systems are adequate, companies bear the burden of proving they have created and

implemented adequate Systems and Controls and Antitrust Compliance Programme; there is no pre-certified or certifiable model for either mechanism.

FINES MAY BE CONCURRENT

Initially, the Systems and Controls and the Antitrust Compliance Programme may appear to work on different levels: the former aiming to prevent commission of the relevant criminal offences exhaustively listed in Legislative Decree 231/2001, and the latter aiming to prevent anti-competitive conduct, which would give rise to administrative liability, but would not be punishable under criminal law.

However, the two compliance systems must necessarily interface, if we consider that anti-competitive conduct could possibly include, or contribute to, conduct that is punishable under criminal law, also pursuant to Legislative Decree 231/2001, such as criminal associations (Art. 416 of the Italian Penal Code), bribery between individuals or undertakings (Art. 2635 of the Italian Civil Code), fraud to detriment of the State or other public entities (Art. 640(2) of the Italian Penal Code) or obstruction of regulators (Art. 2638 of the Italian Civil Code).

An example of this would be an agreement among competitors in the context of which two or more undertakings agree to charge prices higher than those that would prevail in absence of the agreement – and thus artificiously increase their own market power: if the agreement were to harm a public entity, then this would constitute the offence of fraud to detriment of the State, which is listed as a relevant crime for the purposes of Legislative Decree 231/2001.

This could give rise to overlapping roles and survellaince bodies in a company, as well as to duplicate, concurrently applicable penalties, both on the administrative side and on the criminal side.

THE SUGGESTED APPROACH

Given the growing internal control systems that companies are required to implement in compliance with the various applicable regulations (such as privacy, environmental protection, health and safety at work, antitrust legislation, etc.), and the resulting risk of duplicate and overlapping surveillance bodies and penalties, it is increasingly becoming useful to adopt an integrated approach.

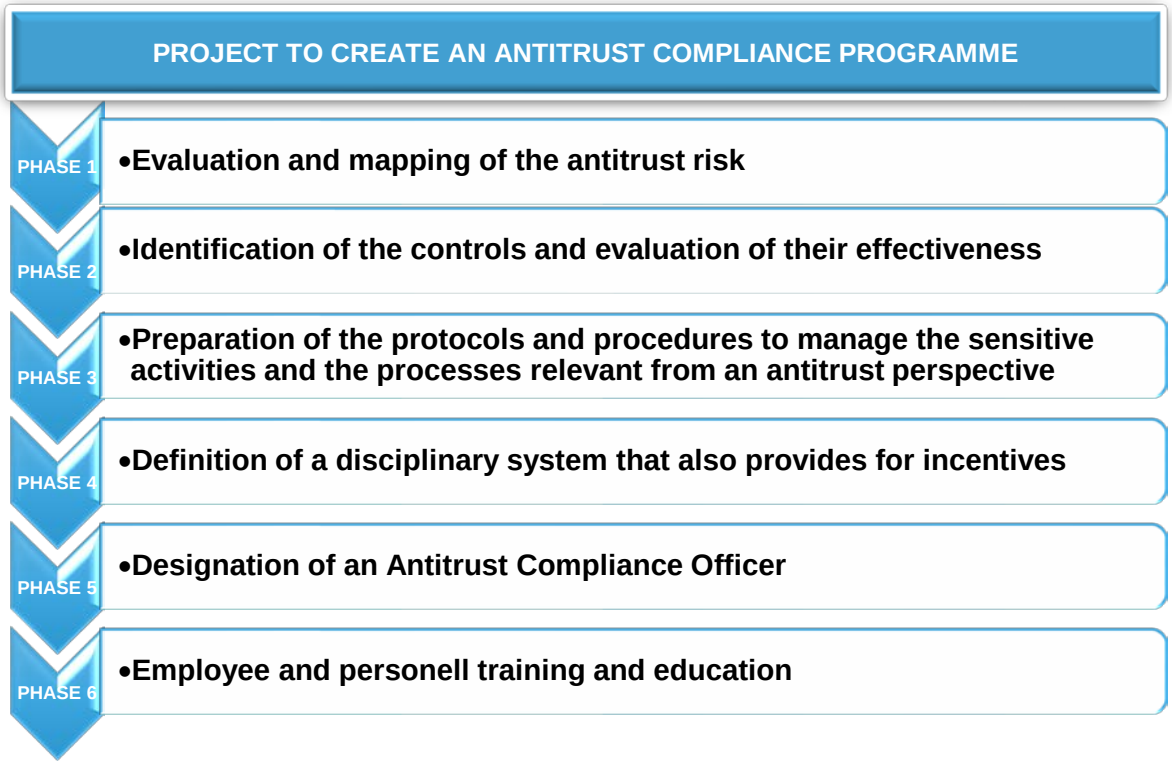
An integrated approach to address both the Systems and Controls and the Antitrust Compliance Programme could be developed by:

- during Risk Assessment and Gap Analysis, taking into account not only those activities and areas that give rise to the risk of a relevant criminal offence for the purposes of Legislative Decree 231/2001 but also those areas that potentially give rise to unlawful, anti-competitive conduct;
- including in the company's Code of Ethics and Code of Conduct principles aiming to develop a corporate culture that protects competition and to implement suitable procedures and systems to minimise the risk of antitrust violations;

- providing, as part of the Systems and Controls, specific protocols or procedures with the objective to prevent the occurrence of anti-competitive conduct;
- ensuring that the Antitrust Compliance Officer becomes a preferred interlocutor for the Survellaince Committee, creating specific information flows and *ad hoc* supervision mechanisms.

A PROJECT TO CREATE AN ANTITRUST COMPLIANCE *PROGRAMME*

Development of an Antitrust Compliance Programme should include and focus on each of the separate phases of activities described in the table below.



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