ALERT MEMORANDUM

ECN+ Directive Transposed Into Italian Law

December 7, 2021

On November 30, 2021, Italian Legislative Decree No. 185/2021 was adopted (the "**Decree**"), transposing Directive (EU) 2019/1 (the "**ECN+ Directive**"),[1] which aims to achieve a more effective application of EU competition rules by the National Competition Authorities (the "**NCAs**"). To that end, the ECN+ Directive provides for minimum standards to ensure that NCAs have the instruments, resources and sanctioning powers to apply Articles 101 and 102 TFEU effectively.

The Decree, which enters into force on December 14, 2021, amends the Italian Competition Law (Law No. 287/90) by codifying a series of investigative tools and powers that had already been developed in practice by the Italian Competition Authority ("**ICA**"). The Decree also provides the ICA with new instruments especially intended to strengthen its investigative and sanctioning powers.

This development comes at a momentous point in the evolution of the Italian competition law framework, which will be further enhanced by the planned adoption of the Annual Competition Law, which includes far-reaching reforms in the ICA's enforcement powers as regards both antitrust and merger control.

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[1] Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, PE/42/2018/REV/1. OJ L 11, 1.14.2019, p. 3–33.

1. The ICA will prioritize cases it considers more important

The Decree reinforces the principle of discretionary action, giving the ICA the possibility to set its priorities and focus on matters it considers to be of major importance and to reject complaints which are not deemed to be a priority. This new prerogative will allow the ICA to better allocate its resources, which can be fully devoted to the assessment of the most important cases.

2. Strengthening the independence of the ICA

The Decree comprises a series of measures to reinforce the independence of ICA members and staff, including the necessary resources for effectively performing the ICA's institutional duties. The current national regulatory framework is already largely aligned with the standards of operational independence required by the ECN+ Directive.[2] Therefore, the Decree merely specifies in more detail the guarantees of the ICA's independence with regard to the following aspects:

- ICA members cannot be dismissed for reasons related to the proper performance of their duties or exercise of their powers;
- ICA members and staff carry out their duties and exercise their powers – concerning the application of both the Italian Competition Law and Articles 101 and 102 TFEU – independently from political interference and other external influences, neither seeking nor accepting instructions from the Government or other public or private entities, and refraining from taking any action incompatible with the performance of their duties and powers;
- ICA members and staff must refrain – for a three-year cooling-off period after leaving the ICA – from dealing with enforcement proceedings that could give rise to conflicts of interest;
- the ICA is granted independence in the spending of the allocated budget for the purpose of carrying out its duties.[3]

3. Wide-ranging powers of investigation

The Decree provides the ICA with a number of investigative tools, some of which are already used in practice. In particular, the ICA may:

- order inspections and have access to all premises, land and means of transport of the company. Acknowledging the increased use of more flexible working arrangements,[4] dawn raids are now also possible at "*private premises*", such as the homes of managers and other employees;
- interview any representative of a company or any individual who may possess information relevant for the investigation;[5]
- accept all types of evidence in the framework of an investigation, irrespective of the medium on which the evidence is

2 Article 1 of the Italian Competition Law already provides for a series of grounds of incompatibility to guarantee the full independence of judgments and assessments of the ICA.

3 Since January 1, 2013, the ICA no longer relies on the State budget, and its own expenses are covered by resources deriving from the contribution imposed on companies with total proceeds in excess of €50 million (Article 10, paragraph 7-*ter*, Italian Competition Law).

4 See ECN+ Directive, Recital 34.

5 Article 14 of Law No. 287/1990 only established the right to be heard of the companies and entities concerned in the opening of the investigation, not a right of the ICA to summon them. The implementing regulation (Decree of the President of the Republic No. 217/1998) was also ambiguous on this point, as it only established the ICA's right to pose questions orally during hearings (Article 9(4)) and the ICA's right to hear, in order to integrate the investigation, any other person, company or body, other than the parties interested in the investigation (Article 8(2)).

stored, thus broadening the scope of admissible evidence;[6] and

- inspect and take documents, "*on whatever medium*", which also entails wider access to companies' virtual data during dawn raids.[7]

Finally, the Decree includes the possibility for the ICA to extend the duration, for a specific time period, of interim measures that it may decide to adopt in urgent cases where there is a risk of serious, irreparable damage to competition and where a cursory examination reveals the existence of an infringement.[8]

4. Guarantees for companies under investigation

The ICA's new investigative powers are counterbalanced by limits aimed at guaranteeing the rights of the parties under investigation. In particular, the Decree provides that:

- requests for information should be proportionate and appropriate in scope, must indicate a reasonable time limit for providing feedback and may not compel the addressees to admit they have committed an infringement of antitrust law;

- dawn raids at private premises can only take place with prior authorization of the judicial authority, which can only be provided if there are reasonable grounds for suspecting that evidence which may be relevant to prove an infringement is kept at such premises.

5. Fines

Reinforced sanctioning powers. The Decree introduces a number of amendments aimed at encouraging companies involved in the investigations to cooperate with the ICA, while granting the ICA significant additional sanctioning powers. The ICA may impose:

- a fine of up to 1% of the company's total worldwide turnover for failure to: cooperate during an inspection, provide information, appear at an interview;

- periodic penalty payments of up to 5% of the company's daily turnover for each day of delay in complying with the ICA's requests. This represents a significant step as the previous regime did not provide for periodic penalty payments, but only for lump sum fines of negligible amounts.

The Decree also introduces a new system of pecuniary penalties for *individuals*. Under the Decree, the ICA can now impose administrative fines and periodic penalty payments directly on individuals who, intentionally or negligently: (i) obstruct the inspection; (ii) provide incorrect, incomplete or misleading information in response to a request for information; or (iii) fail to appear at an interview.

Finally, aligning the powers of the ICA with those of the European Commission, the Decree now explicitly provides the ICA with the power to impose behavioral as well as structural (*e.g.*, the divestiture of a subsidiary or business) remedies necessary to bring an infringement to an end, in cases of established infringement of Articles 101 and 102 TFEU.[9] When choosing between equally effective remedies, the least

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6 Although this provision was not expressly provided for under the previous regime, the ICA has routinely relied on a wide range of evidence, including WhatsApp conversations (see Decision No. 27849, July 17, 2019, Case I805 – *Corrugated cardboard sheets and packaging materials*) and wiretapping used in criminal proceedings (Decision No. 27646, April 14, 2019, Case I808 – *Consip tender FM4)*.

7 This provision largely codifies a power already exercised by the ICA.

8 Article 14-bis(2) of the Italian Competition Law expressly prohibited the extension of interim measure decisions.

9 These remedies were not expressly provided by the Italian Competition Law. Nevertheless, the ICA has already imposed remedies of this nature in a number of decisions.

burdensome one for the company prevails, in line with the principle of proportionality.

Limitation periods for the imposition of fines. The previous regime did not expressly provide for limitation periods for the imposition of antitrust fines.[10] To fill that gap, the Decree imposes a 10-year absolute limitation period.[11]

The limitation period is interrupted for the duration of enforcement proceedings before the NCAs of other Member States or the European Commission. As a result of the interruption, a new limitation period begins.

The limitation period is suspended for as long as the decision of the ICA is the subject of proceedings pending before a review court. Arguably, this may deprive companies of protection against lengthy proceedings and could be problematic with respect to fair trial safeguards.

Higher fines for associations of companies and liability of members. Under the previous regime, fines imposed by the ICA on associations of undertakings (*e.g.*, trade associations and professional bodies) were based on the total value of the membership contributions paid by their members,[12] with the consequence that, usually, the amount of the fines was very limited.

The Decree provides for a significant increase in the calculation of fines. In particular, it provides that, if the infringement committed by an association of companies concerns the activities of its members (which is almost always the case), the amount of the fine is up to 10% of the sum of the global yearly turnover of each member (even those that did not participate in the infringement) active on the market affected by the infringement.[13] This will inevitably increase the level of fines for associations of companies.

In addition, the Decree also provides for joint and several financial liability of the members of the association as follows:

- when the ICA uses the turnover of the members as a basis for calculating the fine and the association is insolvent, the ICA can order the association to request its members to provide the funds to pay the fine;
- if these funds are not provided to the association in a timely manner, the ICA can then directly request the companies whose representatives were members of the decision-making bodies of the association to pay the fine; and
- ultimately, if necessary to ensure the full payment of the fine, the ICA may also require any members of the association active on the market affected to pay the unpaid amount of the fine, unless the member concerned demonstrates that it did not take part in the anticompetitive decision of the association or was not aware of this decision or actively disassociated itself from it before the launch of the ICA proceeding.

These changes enable the ICA to demand payment of fines even from companies whose involvement in the infringement has not been proven by the ICA. Therefore, the Decree creates new risks for members of business associations.

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10 Previous case law held that the ICA's sanctioning power was time-barred after five years of the day on which the infringement was committed, according to Article 28 of Law No. 689/81.

11 However, no limitation period has been envisaged for the ICA's power to assess antitrust infringements, pursuant to Article 15 of the Italian Competition Law.

12 See point 10 of ICA Resolution No. 25152, October 22, 2014, *Guidelines on the quantification of pecuniary administrative fines imposed by the Italian Competition Authority pursuant to Article 15, paragraph 1, of Law No. 287/90.*

13 However, the financial liability of each member is limited in terms of payment to its own individual maximum fine (*i.e.*, 10% of its global turnover in the previous fiscal year).

6. Enhancing cooperation between NCAs

The Decree introduces a number of amendments aimed at strengthening cooperation between NCAs and the ICA within the framework of the European Competition Network.

The Decree provides the ICA with a right under certain circumstances to carry out dawn raids and investigations at the request of NCAs of other EU Member States. Moreover, officials of NCAs of other Member States can be permitted to attend and actively assist the ICA's staff in inspections and hearings conducted by the ICA.

The Decree also provides for mutual assistance to ensure cross-border notification of key procedural acts and, after the decision is adopted, assistance to execute the decisions cross-border.

7. Streamlining leniency programs for secret cartels

The Decree includes a set of detailed provisions on leniency applications leading to total immunity from fines and applications leading to a reduction in fines (*e.g.*, where the company applying is not the first applicant). These new provisions largely mirror those set out in the ICA's notice on the national leniency program[14] and harmonize this procedure at the European level.

These provisions are particularly important since effective leniency programs considerably increase incentives for companies to disclose cartels and thereby contribute to ending cartels.

The Decree:

- calls for the ICA to adopt, in accordance with EU law, a leniency program that defines the cases in which the administrative fine may be waived or reduced for companies that disclose their participation in secret cartels, on the basis of the cooperation provided by the companies themselves in the investigation of infringements;
- identifies the conditions for granting the reduction in fines;
- indicates that leniency statements can be written or oral;
- allows leniency applicants to request a place in the queue for leniency (a so-called "*marker*"), that preserves its position, while being able to provide evidence of the infringement later on; and
- enables a leniency applicant before the European Commission to submit to the ICA a simplified leniency application in relation to the same cartel, provided that it covers more than three EU Member States as affected territories.

Access to leniency statements. The Decree, in an effort to secure confidentiality of leniency statements (and consequently ensure the continuous viability of leniency programs), expressly provides that leniency statements will only be accessible by the parties to the proceedings concerned in the leniency application.[15]

The Decree introduces a limitation in relation to the use of the information contained in leniency applications. The information may only be used either in the context of the infringement proceedings to respond to the allegations put forward by the ICA or in appeals before the national courts.

Leniency statements may be exchanged between the NCAs of the Member States, only (i) with the consent of the leniency applicant; or

[14] See ICA, *Notice on the non-imposition and reduction of fines under Article 15 of Law No. 287 of October 10, 1990*, Article 16.

[15] Along the same lines, the Decree also provides that settlements between companies and the ICA may only be accessed by the party that has signed the settlement.

(ii) if the NCA receiving the leniency statement has already received a leniency application concerning the same infringement, submitted by the same leniency applicant, provided that the applicant does not have the possibility of withdrawing the information it has previously provided to the receiving authority.

Immunity for individuals under the leniency program. The Decree introduces new provisions intended to bridge the gap between the leniency program and the penalties, including criminal ones, that may be imposed on individuals involved in the anticompetitive conduct (in cases where the anticompetitive infringement may also involve a crime, *e.g.*, bid rigging and insider trading). So far, the absence of coordination between the two regimes has had a chilling effect on companies' incentives to submit leniency applications, as a leniency application could still expose staff to individual penalties. The new rules now extend the effects of the leniency application to individuals, establishing the conditions under which they are no longer punishable under criminal law, including if they actively collaborate with the ICA and the public prosecutor (*i.e.*, reply to any questions, etc.).

8. Further changes ahead: draft of the Annual Competition Law

The wide-ranging changes introduced by the Decree will be further supported by the soon-to-be-approved Annual Competition Law, the first draft of which was adopted by the Italian Government on November 4, 2021 and is now undergoing the legislative process for formal adoption.

The draft Annual Competition Law follows the ICA's proposal for pro-competitive legislative reform submitted in March 2021 and concerns a number of economic sectors, such as local public services and transport, energy, waste management systems, health protection, and electronic communications networks.

Additionally, it introduces substantive changes to the Italian Competition Law with a view to ensuring greater consistency with the EU regulatory framework. In particular, the draft includes the following:

- widening of the ICA's powers to obtain information and documents, even outside formal investigation proceedings, by giving it the power to impose administrative penalties in case of refusal to provide or delay in providing the requested information or documents;

- widening of the ICA's merger control jurisdiction by giving it the power, to be exercised within six months of closing, to request companies to notify transactions which meet only one of the two cumulative merger control thresholds or where the total worldwide turnover of the companies that are parties to the concentration exceeds €5 billion, provided that *prima facie* anticompetitive risks exist. In that case, the ICA may request the companies to notify within 30 days;

- a finding of dominance will no longer be necessary in order to prohibit the concentration, although dominance will still be considered the main form of anticompetitive behavior. The current substantive test for review of mergers, consisting of the "*creation or strengthening of a dominant position on the national market*", will be replaced with the "*significant impediment to effective competition*" (SIEC) test, adopted at the EU level;

- alignment of the Italian merger control system to EU standards, with cooperative and full-function joint ventures now also being reportable;

- the criteria for the calculation of the relevant turnover in the case of banks and financial institutions adopted at the EU level will apply also in Italy;

- a rebuttable presumption of economic dependence in respect of digital platforms, particularly in cases where digital platforms act as gatekeepers for businesses to reach their customers or suppliers; and

- a settlement procedure in administrative proceedings conducted by the ICA.

The draft Annual Law on Competition has yet to be approved by Parliament and may be subject to changes in the course of parliamentary debates. While it remains to be seen which of these provisions will ultimately be adopted, new rules are expected to enter into force soon, as reforming competition law is one of the top priorities of Italian President Mario Draghi's agenda as well as being of paramount importance in the National Recovery and Resilience Plan (PNRR), which sets out criteria of how the EU COVID-19 recovery funds will be spent in forthcoming years.

9. Conclusions

The Decree concerns several areas of the Italian competition law regime and introduces substantial changes, stemming from the ECN+ Directive as well as from the evolution of decision-making practice and case-law over the past years, both at Italian and European levels.

Overall, the Decree, together with the draft Annual Competition Law and the recent approach of the European Commission concerning merger referrals under Article 22 of the EU Merger Regulation,[16] creates important new tools for the ICA to deal with upcoming challenges.

It also contributes to the convergence in the application of competition law at the national level and will have a major impact on the ICA's enforcement practice.

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16 European Commission, *Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*, 2021/C 113/01 C/2021/1959. OJ C 113, 3.31.2021, p. 1-6.