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Italy adopts new rules on abuse of economic dependence

Introduction

The most recent annual Italian competition law (Law No. 118/2022) has – among other things – amended Article 9 of Law 192/1998 by introducing new provisions concerning abuse of economic dependence by digital platforms.

The new rules introduce a rebuttable presumption of economic dependence for digital platforms that are meeting specific requirements and a non-exhaustive list of abusive practices. An interesting novelty concerns the jurisdiction of the court's division specialized in business matters and intellectual property for compensation claims relating to abuse of economic dependence.

The brand-new provisions entered into force on 31 October 2022.

The existing framework

The already existing legislation, dating back to 1998, prevents companies from abusing the state of economic dependence of a supplier. Economic dependence is defined as the situation of excessive imbalance of rights and obligations in economic relations.

The prohibition of abuse of economic dependence aims to protect the weaker party against business partners taking unfair advantage of any asymmetry in the bargaining power.

A rebuttable presumption of economic dependence for companies using digital platforms

The most relevant novelty introduced by the new legislation is the rebuttable presumption of economic dependence where "*a company uses the intermediation services provided by a digital platform that plays a key role in reaching end users or suppliers, also in terms of network effects or data availability*".

As a result, the burden of proving the absence of economic dependence now lies on the digital platform while, under the previous regime, it was up to the claimant (i.e., the allegedly weaker party) to provide evidence of its existence.

The previous regime remains in force and applies to relations involving traditional operators as well as digital

platforms not meeting the specific requirement of playing a "*key role*" in reaching end users or suppliers.

Although there is no definition of the notion of a "digital platform", it is worth noting that it encompasses a wide range of entities (various transactional platforms, marketplaces, search engines, etc.).

The pivotal criterion is therefore that of the "key role" mentioned by the new rules. Such a "key role" criterion seems to point to the "gatekeepers" under the recently adopted Digital Markets Act (DMA). However, this is just a possible interpretation, provided that the domestic legislation does not refer to the DMA or any other existing definitions. Therefore, the introduction of the new notion is likely to undergo different interpretations.

Non-exhaustive list of abusive practices

The second and most relevant novelty is the provision of a non-exhaustive list of abusive practices conducted by digital platforms, including: "*providing insufficient information or data on the scope or quality of the service provided and requesting undue unilateral services not justified by the nature or content of the activity performed, or adopting practices that inhibit or hinder the use of different providers for the same service, including through the application of unilateral conditions or additional costs not provided for in the contractual agreements or existing licenses*".

The jurisdiction of the court specialized in business matters and intellectual property

A third relevant novelty is the devolution of the exclusive jurisdiction over the related judicial matters to the civil courts' special division for business matters and intellectual property. This new provision brings an end to a long-standing dispute, where the Italian Supreme Court held that for compensation claims relating to abuse of economic dependence, there was no jurisdiction of this particular division, because the related claims were purely contractual and unrelated to the concept of abuse of a dominant position.

Commentary

The new legislation seems to strengthen and clarify under certain aspects (such as jurisdiction) the enforcement against abuse of economic dependence.

However, the application of the new provisions by civil courts and by the Italian Competition Authority (provided that abuses of economic dependence that are also relevant from the competition standpoint may be prosecuted and fined by the Italian Competition Authority) is strongly awaited, in the hope it will provide indications and set

boundaries to both the “key role” criterion (which seems too vague and potentially leading to too wide or different interpretations), and to the list of conducts, in order to understand what an abuse of economic dependence by digital platforms can be expected to look like (at least from the enforcers standpoint).

Of course, instead, clarity is brought by the new provisions on jurisdiction, completely aligning, on this point, abuse of economic dependence and competition-related claims.