

Recent developments in the Italian legal system

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1. Energy: the Fifth *Conto Energia* (Draft Decree)

Italy has a large amount of available potential natural resources to be exploited for the generation of renewable energy (such as wind, solar, biogas, biomass, gas and hydro-electric sources). Moreover, the Italian government has introduced mechanisms to promote the use and development of renewable sources. These mechanisms consist of: (i) public incentives granted to the production of electricity aimed at ensuring the fair remuneration of investment and repayment of operational costs; (ii) deductions from taxes of a certain % of total cost of the interventions devoted to the increase of efficiency or to installation of renewable energy equipments; (iii) reduced taxation (such as VAT); and (iv) rationalization of administrative procedures. The two main public incentives are: (i) the "Green Certificates" scheme, applied to all renewable energy sources, except for solar source; and (ii) the "Feed-in-tariff" scheme, applied only to the production of electricity by solar source.

Photovoltaic generation plants benefit from an incentive feed-in-tariff scheme entitled "energy account" ("*Conto Energia*"). The current photovoltaic incentive scheme set forth under fourth *Conto Energia* (Ministerial Decree May 5, 2011) will soon cease to apply because in the next few months the targets set out by the fourth *Conto Energia* will be reached: *i.e.*, Euro 6 billion as yearly cumulated cost of the incentives under the *Conto Energia* regime.

The Italian Ministry for the Economic Development has therefore already published the draft of the new Decree ("**Draft Decree**") that will substitute the fourth *Conto Energia* with a new one ("**Fifth Conto Energia**") and has already sent it to the State-Region Committee (*Conferenza Unificata*) for final approval.

In particular, according to the Draft Decree, the new regime and the incentive tariffs provided under the Fifth *Conto Energia* will apply after the achievement of the threshold of yearly cost of the incentive tariffs provided in the Fourth *Conto Energia* (*i.e.* Euro 6 billion). The Italian gas and power Authority will issue a resolution confirming such achievement and the Fifth *Conto Energia* will start applying 30 days after the publication of said resolution. This, unless the Euro 6 billion threshold is achieved before June 1, 2012; in such a case, the Fifth *Conto Energia* will apply starting from July 1, 2012.

Starting from its enactment, the Fifth *Conto Energia* will apply to the following plants entering into operation for the following 5 periods of six months:

- (a) photovoltaic plants;
- (b) integrated PV Plants with innovative features; and
- (c) concentration PV Plants.

2. Italian Competition Authority: new merger control thresholds and new jurisdictional review system

A recent Law Decree ratified by the Italian Parliament with Law no. 27 of March 24, 2012, so called "*Crescitalia*" or Liberalizations Decree¹, has modified the competences of the Italian Competition Authority ("**ICA**" or "**Authority**"), has substantially reformed its funding system and introduced an important novelty in the antitrust jurisdictional review system.

¹ Law Decree of January 24, 2012 no. 1, published in the Italian Official Journal ("O.J.") of March 24, 2012, no. 71.

1.1 Italian merger control review

A new thresholds system for merger control

The new Law has significantly modified the turnover threshold system for the triggering of merger filing obligations.

Currently, the notification to the ICA of a concentration is required where even only one of the following two alternative turnover thresholds is met:

- the combined aggregate turnover in Italy of all undertakings concerned exceeds Euro 468 million; or
- the aggregate Italian turnover of the Target exceeds Euro 47 million².

Starting from January 1, 2013, the above-mentioned thresholds will apply cumulatively so that the obligation to notify a concentration will be triggered only where both of the said turnover thresholds are satisfied³.

Abolition of the filing fee and introduction of a compulsory contribution on corporations

Another innovation related to Italian merger control system concerns the abolition of the filing fee currently imposed on undertakings notifying a concentration to the ICA. At present, the filing fee is set at 1.2% of the notified transaction's value, with a minimum and a maximum amount set respectively at Euro 3,000 and 60,000⁴. Such a fee will be completely abolished starting from January 1, 2013.

Indeed, article 5-*bis* of the new Law provides that, starting from 2013, the ICA's activities will be financed through a compulsory contribution charged on corporations. In practical terms, starting from January 1, 2013 all corporations (*società di capitale*) with seat in Italy having a total annual income resulting from the last approved balance sheet above Euro 50 million⁵ will have to pay a contribution to finance the ICA. The amount of the said contribution is set at 0.08 per thousand of the last approved turnover, with a maximum amount set at Euro 400,000.

It is provided that for year 2013 the said contribution shall be paid in advance within October 30, 2012, according to the instructions that will be set forth by the ICA. In the following years, the contribution will have to be paid within July 31 of each year.

The new Law allows the ICA to amend the amount and the terms of payment of the contribution. Specifically, the ICA will be able to increase such value up to 0.5 per thousand of the turnover resulting from the last balance sheet approved before the adoption of the increase. However, the maximum amount of contribution set at Euro 400,000 shall not be exceeded.

2.2 The new antitrust jurisdictional review system: setting up business law specialised Courts' sections

Article 2 of the Decree replaces all the existing Courts' sections specialised in industrial and intellectual property rights currently operating in some Courts of First Instance and Courts of Appeal with new sections specialised in corporate law⁶. Moreover, such new sections will also be set up in all the remaining Courts of First Instance and Courts of Appeal residing in the Regional capitals (excluding the Courts of the Valle d'Aosta Region) and in the city of Brescia.

² Please note that turnover thresholds are adjusted every year according to the increases in the GDP deflator index. ICA's latest update dates to November 16, 2011 (Decision no. 22951, published in Bulletin of November 21, 2011, no. 44/2011) and will apply throughout 2012.

³ Introduced by article 5 of the Decree.

⁴ The compulsory filing fee was introduced in 2006 by State Budget Law as a form of partial self-financing of the Authority, and is now regulated by article 10, paragraph 7-bis, of Law 287/90. The amount of the contribution was lastly updated on December 21, 2011, with ICA's provision no. 23098, published in Bulletin of December 27, 2011, no. 49/2011.

⁵ For banking and financial institution the special rule on turnover calculation provided for article 16, paragraph 2, of Law 287/1990 will apply. According to such rule, the relevant turnover shall refer to one-tenth of the value of the institution's total assets, with the exclusion of memorandum accounts and, in the case of insurance companies, to the value of the collected premiums.

⁶ Industrial and intellectual property rights sections have been established by Law Decree of June 27, 2003, no. 168, in the Courts of First Instance and Courts of Appeal of the following regional capitals: Bari, Bologna,

New sections specialised in corporate law will have jurisdiction, among others, on issues concerning violation of Italian and EU competition rules. Therefore, article 2, paragraph 2, of the Decree amends article 33 of the Italian Antitrust Law (Law 287/90), which attributed to the exclusive jurisdiction of the Courts of Appeal all the disputes amongst privates concerning the violation of Italian competition legislation, and, as a consequence, allowed the concerned parties to receive only a single degree of substantial judgment over their dispute.

The new discipline resolves, at last, the different treatment currently existing between Court proceedings dealing with violations of EU competition rules on one side and Court proceedings dealing with violations of Italian national competition rules on the other side. Indeed, according to the abovementioned article 33 of Law 287/90, Courts of Appeal had exclusive jurisdiction as judges of first (and last) instance over alleged infringements of Italian competition legislation. Alleged infringements of EU competition rules were, instead, subject to the ordinary jurisdiction of the Courts of First Instance with the possibility of a second degree judgment before the competent Court of Appeal. However, because the two legislations have almost identical contents, the different treatment was hardly justifiable and created significant uncertainties as to the competent judge.

3. Capital markets: the new prospectus regulation

The European Commission has recently published a draft regulation (“**Amending Regulation**”)⁷ in order to amend Regulation (EC) No. 809 of 29 April 2004. The Amending Regulation is largely based on the recommendations provided by the European Securities Market Authority (“**ESMA**”) in its technical advice published on October 4, 2011 whereby ESMA, *inter alia*, suggested several far-reaching amendments to the form and content of base prospectuses, summaries and final terms.

The Amending Regulation aims at enhancing legal certainty, consumer confidence and investor protection by improving the quality and effectiveness of disclosure to be provided by the issuers and facilitating an effective comparison between different products throughout Europe. Once finalized, the Amending Regulation is due to become effective from July 1, 2012.

4. Capital markets: the issue of project bonds pursuant to the Liberalisation Decree, as amended during the process of conversion into law

Article 41 of Decree no. 1 of January 24, 2012 setting out “urgent provisions for competition, infrastructure development and competitiveness” (so called “**Liberalisation Decree**”) has replaced article 157 of Legislative Decree no. 163 of April 12, 2006 regarding the issuance of bonds by project companies (“**Project Bonds**”).

The new provisions allow project companies to issue bonds and other debt securities – disapplying the limits on bond issuance by Italian companies imposed under the Italian Civil Code – for the purposes of creating an individual infrastructure or a new service of public interest, provided that such securities are in registered form and are subscribed for by qualified investors, as defined under the rules implementing Legislative Decree no. 58 of February 24, 1998. The securities may not be transferred to anyone other than professional investors and both the instrument representing the securities, as well as the offering documentation, must highlight the high level of risk involved in the transaction.

The provisions expressly allow for Project Bonds to be guaranteed by the banking system, foundations or private funds up to the date of commencement by the concession holder of the operation of the completed infrastructure. The details of the giving of the guarantee are to be set out in subsequent regulations by the Ministry of the Economy and Finance, in agreement with the Ministry of Infrastructure and Transport.

Catania, Florence, Genoa, Milan, Naples, Palermo, Rome, Turin, Trieste and Venice.

⁷ Commission delegated regulation March 30, 2012 amending Regulation (EC) No 809/2004 on the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements.

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The amendments to article 41 allow for the issuance of Project Bonds by certain entities that were not covered by the previous wording of the decree (mainly those operating in the energy sector) and, at the same time, clarify some interpretative aspects which would have represented an obstacle to the issue of these securities to the market.

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