

New mechanisms for financing the Italian Competition Authority: the annual contribution on capital companies. The Authority has published instructions on how to determine and pay the contribution: payments to be made by 30 October 2012

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1. The new mechanism for financing the ICA: the annual compulsory contribution

Until the current year, the financing of the Italian Competition Authority (“ICA”) was based on four different sources: (a) disbursement from the State; (b) “solidarity fund” from the other independent authorities; (c) contributions by companies subject to a pre-merger notification requirement¹; (d) a share of the sanctions imposed by the ICA on the basis of consumer protection rules.

The so-called “*Cresci Italia*” decree² has introduced a new mechanism for financing the ICA (**that starting from 2013 will replace the above mentioned sources**): it establishes an annual compulsory contribution on capital companies with significant economic dimension (*i.e.* with revenues higher than Euro 50 million).

Thus, until 31 December 2012, the current mechanisms for financing the ICA will remain in force, including contributions by companies subject to a pre-merger notification requirement.

In particular, the new Article 10, paragraph 7-*ter*, of Law No. 287, issued on 10 October 1990, provides that the financial burden arising from the functioning of the Italian competition authority “*is to be met through a contribution of a sum of 0,08 per thousand of the turnover of [...] capital companies with revenues higher than 50 million Euro [...]. The maximum contribution to be paid by a company cannot exceed hundred times the minimum fee*”: accordingly, for the first year of collection the contribution to be paid by a company ranges from a minimum of Euro 4.000 to a maximum of Euro 400.000.

The next paragraph of the same Article clarifies that “*for the year 2013, the contribution [...] is to be paid directly to the Authority, in compliance with the criteria established by the same Authority by its own deliberation, 30 October 2012. For the next years, starting from the year 2014, the contribution shall be paid within July 31 of each year [...]*”.

¹ The contribution obligation is established by Article 16, Law No. 287/90.

² Cf. Article 5 *bis*, paragraph 1, Legislative Decree No. 1, 24 January 2012, converted into Law No. 27, issued on 24 March 2012.

The new provision³ poses some interpretative problems as regards the exact definition of economic operators subject to the contribution and the identification of the relevant turnover.

On 27 August 2012, the ICA has published two documents setting respectively “*Criteria for the contribution to the functioning of the Italian competition authority for the year 2013*” and “*Instructions concerning the payment of the contribution to the functioning of the Italian competition authority for the year 2013*”, which include information and operating instructions concerning the new contribution obligation⁴.

The above mentioned documents substantially mirror the law and provide only a formal interpretation, in particular as regards the relevant turnover and companies’ group. The solutions adopted by the ICA, especially for what concerns companies’ group, may result more burdensome for those economic operators.

2. Operators obliged to the contribution: capital companies with revenues exceeding Euro 50 million

The new provision defines as operators obliged to the contribution those “capital companies” that, according to the last budget approved before 18 July 2012, achieved total revenues exceeding Euro 50 million.

The use of the expression “capital companies” (in Italian “*società di capitale*”), recalling companies in which capital contributions has a prevalent character, seems to limit the range of economic operators obliged to the contribution to stock company, limited-liability company and to partnership limited by shares. Other economic entities such as consortia, cooperatives, foundations etc., although subject to competition rules and to the ICA supervisory and control powers, seem to be exempted from the contribution. It is thus not clear whether cooperative companies with limited liability or cooperative stock companies are included within the operators subject to the contribution. The ICA has not provided any indication in this respect and it cannot be excluded that an additional act of interpretation will be issued to clarify this uncertainty.

In addition, although the law and the recent ICA’s documents remain silent about it, it is reasonable that “*capital companies*” obliged to the contribution are only Italian companies. This seems to be confirmed by a technical document issued by the Chamber of Deputies on 14 March concerning the law under examination which makes explicit reference to “*Italian capital companies with a total turnover exceeding Euro 50 million*”⁵.

As regards **group of companies**, the ICA clarified that if the companies concerned are linked by relationship of control or affiliation within the meaning of Article 2359 of the Civil Code, or where such companies are under the authority of or coordination of other companies, even through commercial relationships within the same group, **each company has to pay a separate contribution on the basis of the revenues resulting from its balance sheets**. Accordingly, the contribution has to be paid with regard to turnover arising also from intra-group transactions.

³ The new wording of Article 10, paragraph 7-ter and quater of Law No. 287/90 provides that:

“7-ter. The financial burden arising from the functioning of the Italian competition authority is to be met through a contribution of a sum of 0,08 per thousand of the turnover of the last budget approved by capital companies with revenues higher than 50 million Euro, without prejudice to the criteria set by Article 16, paragraph 2, of this Law. The maximum contribution to be paid by a company cannot exceed hundred times the minimum fee. 7-quarter. Without prejudice, for the year 2012, of the current financing mechanisms, including the application of Article 2, paragraph 241, of Law No. 191, 23 December 2009 for the first time of application in the year 2013, the contribution set by paragraph 7-ter shall be paid directly to the Authority in compliance with the criteria established by the same Authority by its own deliberation, within 30 October 2012. For the next years, starting from the year 2014, the contribution shall be paid, within 31 July of each year, directly to Authority, in compliance with the criteria established by the same Authority by its own deliberation. Any changes in the amounts and criteria of the contribution shall be adopted by the same Authority by its own deliberation, within the maximum limit of 0,5 per thousand of the turnover of the last budget approved before the adoption of the deliberation, without prejudice to the maximum threshold set by paragraph 7-ter”.

⁴ Cf. Deliberation No. 23787, published in the ICA Bulletin No. 32/2012. The Deliberation was also published in the Official journal No. 195, 22 August 2012.

⁵ Cf. Senate technical report on this rule cited by the Chamber of Deputies documents No. 386 of 14 March 2012.

In order to define “total revenues” that should be taken into account to identify companies subject to the contribution, the ICA has clarified that it should be taken into account:

- **for capital companies** (safe for banks and financial institutions and insurance companies), voice “A1” of the profit and loss account entitled “revenues from sales and services”, set out in Article 2425 of the Civil Code. The non-consolidated profit and loss accounts should thus be considered;
- **for banks and financial institutions**, one tenth of total assets with the exclusion of memorandum accounts;
- **for insurance companies**, the value of the premiums collected.

The reference to voice A1 of the profit and loss account suggests that it should be considered the companies’ total turnover (*i.e.* revenues from sales and ordinary services) in order to establish the contribution, including the turnover achieved both in Italy and abroad. This is consistent with the new provision under Article 10, paragraph 7-*ter*, of Law No. 287, 10 October 1990, that refers to the company’s “total revenues”. However, it should be noted that such choice, which exactly mirrors the legislator’s indication, is not in line with the antitrust rules governing merger control, according to which ICA’s jurisdiction is determined on the basis of the turnover achieved in Italy⁶.

3. Contribution rate for 2013: 0,08 per thousand of the turnover

Contribution rate for the year 2013 is set at 0,08 per thousand of the turnover, as defined under point 2 above, resulting from the last budget approved before 18 July 2012.

Thus, in order to define the amount of the contribution that each company has to pay, the contribution rate should be applied to the following voices:

- **for capital companies** (safe for banks and financial institutions and insurance companies), to voice “A1” of the profit and loss account entitled “revenues from sales and services”;
- **for banks and financial institutions**, to one tenth of total assets, with the exclusion of memorandum accounts;
- **for insurance companies**, to the value of the premiums collected.

After the first year of application, the contribution rate may be changed (even reduced) by the ICA: in fact, the Law entrusts the latter with the power to modify the amount and the criteria of the contribution, without exceeding the maximum limit of 0,5 per thousand of the relevant turnover.

As said, for the year 2013 the contribution to be paid by each company ranges from a minimum of Euro 4.000 to a maximum of Euro 400.000 with respect to companies with a turnover equal to or higher than Euro 5 billion.

4. Date of payment: contribution to be paid by 30 October 2012, but not before 1 October 2012

The contribution for the year 2013 shall be paid to the ICA by **30 October 2012** (payments may be made as from 1 October 2012) directly to the ICA.

After the first year of application, as from 2014, the contribution shall be paid by 31 July of each year directly to the ICA.

⁶ Cf. Article 16, Law No. 287/90.

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5. How to pay the contribution: bank transfer to the ICA account

The contribution shall be paid to the ICA by bank transfer to c/c n. 000781 in favour of "Autorità garante della concorrenza e del mercato, Piazza G. Verdi, 6/a, 00198 Roma", through "Banca Nazionale del Lavoro, Via San Nicola da Tolentino, 67, 00187 Roma" IBAN - T25 V010 0503 2390 0000 0000 781; BIC/SWIFT code: BNLITRR.

The company must report the Tax Code (*codice fiscale*), its full name and the purpose of payment (e.g. 2013 CONTRIBUTION).

6. The communication of payment: to be send by 30 November 2012 by certified E-mail

After payment, companies must send to ICA the "proof of payment form" (that will be available from 1 October 2012 in the ICA web page) together with receipt of payment.

This communication shall be send by **30 November 2012** by certified E-mail to the following address: contributo.agcm@pec.agcm.it.

7. Failure to pay and controls

The ICA will control the accuracy of the payment of the contribution and, in case of partial payment and/or non-payment, the ICA will proceed to compulsory recovery of the any sums due.

The new mechanism for financing the ICA is an important change for the public antitrust system in Italy and, according to the legislator, it will allow consistent savings for public finances, exceeding Euro 20 million per year⁷. This will also imply more incomes for the authority: according to some estimations made by the Senate technical report, the new contribution will allow the ICA to obtain, already in the first year of collection, almost Euro 80 million. Thus, such amount is significantly higher than the actual ICA's incomes of about Euro 58 million for the year 2012⁸.

The new contribution, although inspired by mechanisms already adopted, with different methods and solutions, for financing other competition authorities, still signifies an important, and not negligible, economic burden on companies.

In addition, as said, the provisions on companies' compulsory contribution still poses some interpretative problems and it cannot be excluded that the ICA might intervene in the next weeks providing further clarifications.

Please do not hesitate to contact us for any further information.

⁷ Cf. Senate technical report, *supra*.

⁸ Source: ICA.