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The Italian draft rulebook on abuse of economic dependence by digital platforms

1. Introduction

The Italian Government has approved the long-awaited annual bill on competition ("**Draft Bill**").[1] The Draft Bill covers a broad spectrum of controversial topics, including local public services, energy and transportation. In the next weeks, the Draft Bill will be submitted to the Italian Parliament for approval.

One of the highlights that will likely give rise to massive debate is the modernization of the Italian rules on abuse of economic dependence so as to catch abusive practices in the digital sphere. Not only do the new rules target digital platforms, but the Draft Bill is going as far as to introduce a (rebuttable) presumption of economic dependence when dealing with digital platforms that play a "*key role*" in reaching end-users and/or suppliers.

More specifically, Article 29 of the Draft Bill provides that the following shall be added to Article 9 of the Italian law no. 192/1998: "*economic dependence is presumed (subject to proof to the contrary) if an undertaking uses intermediation services provided by a digital platform that plays a key role in reaching end users or suppliers, also thanks to network effects or availability of data*".

Italian law no. 192/1998 prohibits the abuse of economic dependence.[2] The prohibition applies regardless of the economic sector. Economic dependence occurs when an undertaking enjoys a position of significant strength *vis-à-vis* its counterparties. More specifically, Article 9, paragraph 1 of the Italian law no. 192/1998 characterizes a relationship of economic dependence as one where an undertaking can impose "*an excessive imbalance between the rights and obligations*" of the parties. The absence of alternative counterparties for the economically dependent undertaking shall be factored into the assessment of economic dependence.

Therefore, the rebuttable presumption provided by the Draft Bill (if confirmed) will make it easier for digital platforms' counterparties to challenge platforms' practices that may amount to an abuse by relying on Article 9 of the Italian law no. 192/1998.

In this respect, Article 9, paragraph 2 provides a non-exhaustive list of relevant practices, *i.e. (i)* refusal to deal, *(ii)* unjustified withdrawal and *(iii)* imposing unfair contractual terms or discriminating conditions.

The Draft Bill is also extending such non-exhaustive list, adding up "*the provision of insufficient data or information concerning the scope or the quality of the service provided* [and] *the request of undue one-sided obligations that are not justified by the nature or the scope of the activity performed*".

2. The rejuvenated abuse of economic dependence. Key takeaways

The reference made by the Draft Bill to the abuse of economic dependance has three main implications.

- From an enforcement perspective, abuse of economic dependence is a matter of concurrent competence in Italy. Both Italian civil courts and the Italian Competition Authority ("**AGCM**") are tasked with the matter. More specifically, the AGCM has competence where the alleged abuse has sufficient magnitude to affect competition on the market. If so, the AGCM can open an investigation (and conduct dawn raids)

1 The press release of the Council of Ministries is available at the following link (Italian language only).

2 Italian law no. 192 of 18 June 1998, entered into force on 10 October 1998.

and issue significantly high fines, up to 10% of the alleged infringer's turnover.[3] The AGCM's competence over abuses of economic dependence dates back to 2001 (See par. 3 below).[4] Yet, the ACGM refrained from enforcing the relevant provisions until very recently. The first investigation was closed in November 2016, *i.e.* approx. 15 years after the AGCM was tasked with the enforcement of the rules on economic dependence.[5] Since that first case, we have been witnessing a U-turn by the AGCM, that has been much more active in the field: in the last couple of years, four new investigations were started against M-Dis,[6] Benetton,[7] Poste Italiane[8] and McDonald's.[9]

Furthermore, as it is the case with competition law, complainants can also seek relief before the Italian courts. Italian judges are familiar with the rules on abuse of economic dependence. In the last few years, we have advised our clients in dozen instances in this type of litigation before the Italian courts across many industries, including the fuel sector and the agricultural/food supply chain.[10]

- When it comes to substance, the concept of economic dependence is fundamentally different from that of dominance under competition law.[11] While economic dependence concerns the position of relative power of an undertaking *vis-à-vis* its counterparty within a specific contractual relationship (*e.g.* in light of lock-in investments and/or difficulties in finding alternative counterparties), the concept of dominance is broader, as it concerns an undertaking's ability to behave independently of competitive constraints on a certain market. Therefore, the legal threshold concerning economic dependence is somehow less strict, as it does not require market definition and proof of dominance. As for digital platforms, we already noted that the Draft Bill introduces a rebuttable presumption of economic dependance for digital platforms playing a "*key role*" in reaching end users or suppliers: the new presumption will thus further help claimants (or the AGCM) to bring forward their actions. The legal battleground will then shift from the economic dependance test to the "*key role*" test. The notion of key role ("*ruolo determinante*") seems to evoke a concept encompassing those platforms (i) that act as gateways for reaching customers or suppliers and (ii) having access to which is crucial to successfully compete on the market.

  However, the wording is vague and is open to different interpretations that may go as far as drawing inspiration from the competition law notion of essentiality. No doubts the notion of "*key role*" will be vigorously debated before the AGCM and/or the Italian courts.

3 See Article 15 of the Italian law no. 287/1990.

4 See the Italian law no. 57/2001, that supplemented the pre-existing Italian law no. 192/1998.

5 See case RP1 - *Violazione dei termini di pagamento*, investigation started on 9 March 2016. The AGCM has imposed a fine of approx. EUR 800,000.

6 See case A525 - *Mercato distribuzione quotidiani e periodici nell'area di Genova e Tigullio*, started on 19 December 2018 and closed on 20 December 2019. Our firm acted as counsel for the alleged infringer and the decision of the AGCM was ultimately overturned by the Italian Courts.

7 See case A543 - *Rapporti contrattuali tra Benetton e i suoi rivenditori*, started on 17 November 2020, still ongoing.

8 See case A539 - *Poste Italiane/Contratti fornitura servizio recapiti*, started on 17 March 2020 and closed on 20 July 2021. The AGCM has imposed a fine of approx. EUR 11 million.

9 See case A546 - *Franchising di McDonald's*, started on 27 July 2021, still ongoing.

10 Abuse of economic dependence across the agricultural/food supply chain are subject to ad hoc rules under Article 62 of the Italian law decree no. 1/2012. The AGCM has been particularly active in this field too as it started a number of investigations, e.g. AL 22 – Commercializzazione del grano Senatore Cappelli, started on 27 June 2019 and closed on 12 November 2019; AL 15D – Eurospin-GDO/Panificatori, started on 20 September 2018 and closed on 27 June 2019; AL14 – Coop Italia-Centrale Adriatica/Condizioni contrattuali con fornitori, started on 18 June 2015 and closed on 22 December 2015. Our firm has provided assistance to a number of clients involved in these investigations.

11 The notion of abuse of dominance is governed by Article 102 TFEU and its Italian equivalent, i.e. Article 3 of the Italian law no. 287/1990.

- As in the case of abuse of dominance, the list of possible practices caught by Article 9 is not exhaustive. However, the amendments brought by the Draft Bill clarify that the scope of application of the provision is not limited to "*classical*" abuses in the form of refusal to deal or early termination, but also encompasses more nuanced conducts such as the provision of incomplete or partial information, as well as the imposition of unfair obligations. Moreover, the application of Article 9 before Italian civil courts so far shows that discrimination could be another area where economic dependence may turn out to be more effective than competition law provisions on abuse of dominance.

3. The path to the Draft Bill

The Italian rules on economic dependence have been around for quite a long time – as explained, Article 9 dates back to 1998. Yet, it is recently experiencing a glorious *Reinassance*, as the AGCM started several investigations in the last two years concerning alleged abuses of economic dependence (See par. 2 above).

This is spelled out clearly in the AGCM's 2021 Annual Report, which states that the AGCM has been showing an increasing interest in abuse of economic dependence "*which has been recently rediscovered by the Authority* […] *because it is particularly helpful to prosecute undertakings that, although not dominant, hold significant market power*".[12]

The renewed interest into the matter culminated in the proposal concerning the annual bill on competition that the AGCM submitted in March to the Council of Ministries ("**Proposal**", See below), in which the AGCM advocated the modernization of the applicable rules on economic dependence "*in order to make them more appropriate and effective towards the features and the intermediation power of major digital platforms*".[13]

The Draft Bill has also been strongly supported by President Mario Draghi (his entourage includes key individuals that used to be among the ranks of the AGCM) who made it clear since his first speech as Italian Prime Minister that the promotion of competition would be among the priorities of his government. In principle, the bill on competition should be passed annually, taking into account the proposals of the AGCM. Yet, from 2009 (when the annual law was first introduced)[14] to date, the annual bill has been passed only once.[15]

We summarize below the milestones that led to the approval of the Draft Bill.

- 17 February 2021. President Draghi delivers his first speech as Italian Prime Minister, pointing out that he will request the AGCM to submit its proposals concerning the annual law "shortly".
- 8 March. The AGCM is formally requested to submit its proposals.
- 22 March. The AGCM follows up with a 61-pages Proposal.[16]
- 4 May. President Draghi submits to the Italian Parliament the National Recovery and Resilience Plan ("**NRRP**").[17] The NRRP reads as follows: "*safeguarding and promoting competition* […] *is key to foster efficiency and economic growth as well as to ensure prompt recovery from the pandemic* […] *a first set of measures concerning competition will be included in the* [Draft Bill]".[18]

12 Further details available at the following link, page 20 (Italian language only).

13 Further details available at the following link, page 56 and following (Italian language only).

14 By the Italian law no. 99/2009.

15 In 2017, through law no. 124/2017.

16 See decision AS1730 of 22 March 2021 - *Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021*.

17 Further details available at the following link (Italian language only).

18 See page 75 and following.

- 4 November 2020/2021. The Italian Council of Ministries approves the Draft Bill, that will now be submitted to the Italian Parliament for discussion, amendments and final approval.

The Draft Bill ultimately drops quite a few reforms advocated in the Proposal.[19] Yet, the Draft Bill relies almost verbatim on the Proposal when it comes to abuse of economic dependence. The only (slight) differences concern the non-exhaustive list of possibly abusive practices of paragraph 2. For instance, the Proposal suggested to include "*the refusal to grant interoperability of products and services or data portability, thus limiting competition*", which has not found its way in the Draft Bill. However, at this stage the discrepancies do not seem to be utterly meaningful. On the one hand, the refusal to grant interoperability or data portability could well end up being covered by the broad wording concerning other practices like discrimination. On the other hand, the list is non-exhaustive, hence additional practices may be caught.

4. What next?

The new draft rules on abuse of economic dependence provide much food for thought.

First, the Italian lawmakers confirmed that they don't want to be left behind in the enforcement race in the digital sector, although the Draft Bill will be further discussed at Parliament level.

To do so, they have set up a powerful tool to prosecute allegedly abusive conducts in the digital sphere. As discussed, economic dependence does not require (the often burdensome and tricky) proof of dominance.

At the same time, the Italian Communication Authority is relying on the so-called P2B Regulation[20] to significantly increase the scope of information that digital platforms are requested to share for monitoring purposes, even beyond the requirements of the regulation.

Furthermore, the enforcement of the new rules (if finally adopted) can enjoy favorable momentum at the EU level, where the European Commission recently considered that "*dependence and imbalanced bargaining power characterize business relations with all platforms including small ones*".[21]

In addition to the above, the new amendments fit the mold of the ongoing trend at the EU and other member States level concerning digital platforms. On the one hand, the European Commission is sharpening its regulator tools through the Digital Services Act and the Digital Markets Act. On the other hand, member States are stepping up their efforts to regulating digital markets either by *ad hoc* regulatory tools and / or by tweaking the applicable rules on economic dependence.[22]

More to come on the issue, as the AGCM will certainly be willing to rely on such new tool after having recently tested the rules on abuse of economic dependence. Meanwhile, market players (both digital platforms and their counterparties) shall prepare to ensure compliance with the upcoming regulation.

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19 For instance, the Proposal suggested to expand the scope of the Italian rules on abuse of dominance and to empower the AGCM to qualify certain undertakings as having "primary importance for competition in multiple markets" in order to tackle more effectively allegedly anticompetitive practices in the digital sector, including e.g. self-preferencing. This Proposal has been completely dropped in the Bill.

20 See Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

21 See Commission staff working document – Impact Assessment Report accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final, SEC(2020) 437 final, SWD(2020) 264 final, parr. 85-88. Based on the latest news, EU governments are due to agree a common position on regulating digital gatekeepers as early as this month.

22 For instance, Belgium recently introduced a prohibition of abuse of economic dependence under Article IV.2/1 of the Belgian Code of Economic Law. The rules on economic dependence have recently been amended in Germany, through the 10th amendment to the German Act against Restraints of Competition. France recently dusted off this tool too, as the national competition authority fined Apple (also) for an abused of economic dependence towards its APRs.

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