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Italian Competition Authority takes on digital players

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Setting the scene

The Italian Competition Authority ("**ICA**"), recently published a set of Guidelines and Policy recommendations relating to the Digital Sector ("**Guidelines**"), focusing on antitrust, privacy regulation and consumer protection, the development of the digital economy, and, more broadly, on big data.[1] The publication of the Guidelines forms part of the initiatives adopted by the ICA following the inquiry into the digital sector launched on 30 May 2017, in collaboration with the Italian Communications Industries Authority and the Italian Data Protection Authority.

The present Guidelines anticipate the joint report, which will set out the main guidelines of cooperation on the issues ahead, as well as the policy recommendations agreed upon by all three authorities. The joint report, which will group the completed reports of all three Authorities on the inquiry, will be published in the near future, but no specific date has been set.

The Guidelines' findings

Whereas the first five pages describe the state of the digital sector and provide indications as to why policy changes may be necessary, the publication then proceeds to describe and suggest actual legislation or modifications to current law, which the agencies believe ought to be adopted. The crux of the Guidelines, which may be described as three-fold, is set out below.

Suggested modifications to the Italian Merger Control regime

In light of a perceived concern about so-called "killer acquisitions", which are believed to be made by large players in the digital sector towards smaller, innovative start-up entities, the agencies recommend a revisiting of the law. Accordingly, the Guidelines suggest that modifications to Article 6 of law no. 287/90,[2] changing the standard through which concentrations are evaluated, should be enacted. In particular, it is suggested that a new approach to merger control ought to be adopted into law, allowing the authority to focus on the substantial impediment to effective competition test (SIEC). Such an approach would enable the review of transactions which may have the effect of restricting potential competition. Moreover, the Guidelines suggest the possibility of including an additional value-based threshold which would allow the authority to review smaller transactions which occur in the digital sector and which are not captured by the current thresholds. This concept is not entirely new. Indeed such "value" thresholds have already been implemented by the German and the Austrian competition authorities, and are being considered by the European Commission as well.[3]

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1 See https://www.agcm.it/dotcmsdoc/allegati-news/Big_Data_Lineeguida_Raccomandazioni_di_policy.pdf (available only in Italian).

2 Legge 10 ottobre 1990, n.287 – Norme per la tutela della concorrenza e del mercato.

3 "Vestager: EU is considering value-based thresholds", *Global Competition Review*, 19 June 2019, available at: https://globalcompetitionreview.com/article/1194225/vestager-eu-is-considering-value-based-thresholds

Reinforcement of the investigative powers of the agencies and increasing the level of fines

The Guidelines suggest that because of the increasingly high market power held by certain players in the digital sector (due to the collection of personal and other data and network effects), agencies should be given investigative powers without having to open formal proceedings. In addition, the upper limit of the fines that can be imposed should be increased. In relation to the former, introducing the power for the agencies to obtain information, regardless of whether a formal investigation has been launched, would also translate to the authorities being able to impose administrative fines for failure to provide information on time or providing incorrect information.

Enhanced coordination amongst the Authorities

The Guidelines also suggest that beyond their more traditional role as enforcers, the three Authorities ought to start playing a joint advocacy role. The goal of such a novel function would be that of: (i) identifying regulations which help and protect "mature" market players as opposed to ensuring the development of the innovation usually fostered by the digital sector; (ii) creating a "*level playing field*" through the removal of unjustified fiscal and other advantages which benefit the protagonists of the digital revolution; and (iii) increasing awareness of both the risks and benefits associated with the digitalization of the economy.

The paper suggests that in relation to access to data, coordination between agencies (on both the antitrust as well as the regulatory side) will be particularly useful. From an antitrust perspective, the Guidelines set forth the idea of imposing, on dominant firms, the obligation to provide access to indispensable[4] data, which is not easily duplicable. The Guidelines point to the fact that access to data is of particular relevance for parties active in the online advertising markets.

In addition, the Guidelines hint at a possible change in the way that the relevant markets are defined. The digital sector, ripe with players operating on several markets, would require new elements to be taken into account (presumably going beyond the SSNIP test – which is based on a dominant firm's ability to profitably increase its prices). This is not unprecedented, as authorities have previously used other tools, such as a so-called SSNDQ test, which is based on a dominant's firm's ability to profitably degrade its product's quality.[5] It must be noted, however, that such a new approach has not been received without skepticism, the European Commission itself having recognized in the past the difficulties in accurately quantifying a quality degradation.[6]

On the regulatory side, the Guidelines suggest that sectoral regulation may be necessary to provide for access to data on public interest grounds, relating to reasons of public health, environment, security, mobility, etc.

Conclusions

The Guidelines have to be seen in the broader context of antitrust and other regulatory authorities' concerns about digital markets. They follow the recent publication of a number of reports in the EU, Germany, France, Australia, the UK and other jurisdictions. Some of the ideas appear to be more concrete than others (such as the proposal for merger control reforms). What is also clear is that the ICA, in coordination with other agencies, is expected to take a more pro-active enforcement stance in the digital sector. It is, however, important to be aware that these guidelines are in no way conclusive or binding. In fact, the upcoming publication of the final report made by all three agencies will likely shed more light on how the measures will unfold.

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4 The Guidelines do not define what would qualify as "indispensable".

5 OECD, *The Role and measurement of Quality in Competition Analysis*, 2013, available at: http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf.

6 Directorate for Financial and Enterprise Affairs Competition Committee, *Roundtable on the Role and Measurement of Quality in Competition Analysis*, 13 June 2013, available at: http://ec.europa.eu/competition/international/multilateral/2013_june_roundtable_quality_en.pdf.

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