



Italian experience in enforcing consumer protection law: recent challenges. Synergies between competition and consumer protection

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SUMMARY

- 1) **Evolution of consumer protection legislation: competence and powers of AGCM: Italian Competition Authority (ICA);**
- 2) **Synergies between competition and consumer protection: practical examples;**
- 3) **Challenges of the internet economy and on line trade;**
- 4) **Case studies of cross border and anti-competitive unfair commercial practices from ICA enforcement experience;**
- 5) **Conclusions.**



AGCM (competition and consumer protection)

AGCM: The Italian Competition Authority (ICA)

- is an administrative independent Authority (the institutional law was held at the end of 1990). Our experience is similar if compared with the Hungarian GVH Authority (we celebrated in Rome the 20th “anniversary” about 5 years ago!).
- ICA is responsible not only for the enforcement of competition legislation and policy but also for consumer protection issues (especially under the following EU legislations: **UCPD, UCTD, CRD**).



EVOLUTION OF ICA COMPETENCE AND POWERS

- At the beginning of our competence in consumer protection field in 1992 the ICA had only weak and limited powers against “misleading advertising” and “comparative advertising” in a framework of a restricted and not relevant national and community legislation on consumer protection (considered not as an effective and specific “priority”). For example, the misleading advs. Directive was based on a “minimum harmonization” regime;
- The “breaking point” for a “new era” in consumer protection field started in Italy (and in other M.S.) around the beginning of 2008 with the wide and extensive enforcement activity under UCP discipline (“full harmonization” directive) and with the very effective powers of ICA coming from the new legislation.



The implementation of UCPD in Italy

- Italy was one of the first Member States to implement the Directive 29/2005/EC on “Unfair Commercial Practices” also before the deadline for its transposition (12th December 2007).
- This Directive has been defined in the 2009 European Parliament Resolution as a “**mile stone**” in the field of “Consumer Protection” for the huge potentiality of its enforcement and for this new perspective and “priority” of consumer protection.
- The Italian Government adopted two different decrees, which were transposed into a CENTRAL SECTION (artt. 18-27) of the **ITALIAN CONSUMER CODE / ICC**: a “codified” collection -issued in 2005- of the most relevant legislations on consumer protection: example of best legislative practice.



Italian “enforcement system” (I)

- ICA is entitled to investigate UCPs; UCTs, CRD violations not only upon reception of consumers’ complaints, but also on its own initiative (*Ex Officio investigation powers*).
- We have the same powers if compared with the competence in competition field. For example:
- INTERIM MEASURES for grave infringements;
- CEASE AND DESIST powers (without the need to go to the Court and relay on long, complex and sometimes different Court decisions): adoptions of ICA final decisions “all published” that can be appealed (Italian Adm. Tribunal in 2 steps: TAR and finally Consiglio di Stato);



Italian “enforcement system” (II)

- BIG SANCTIONS (up to € 5 mill. euro for each UCPs);
- INSPECTIONS (in cooperation with Financial Police);
- Possibility to accept COMMITMENTS;
- Possibility to adopt “MORAL SUASION” procedures.
- FOR UNFAIR “CONTRACT TERMS”: Italy represents an unique example of a “fully administrative competence” (once again no need to go to the Court!).
- Very recently a new legislation in Poland introduced a similar regime entrusting the UOKiK (Office of Competition and Consumer Protection) to issue “administrative decisions” regarding abusive clauses in consumer contracts.



ICA ENFORCEMENT ACTIVITY AGAINST UCPs (2008-2015)

The balance of the last 7 years enforcement experience of ICA:

- adopted about **1500 OFFICIAL DECISIONS** (for both misleading and aggressive commercial practices) in all sectors and **ALL PUBLISHED** on the institutional web site www.agcm.it and on the Agcm OFFICIAL Bullettin;
- imposed **fin**es for a total amount of about **160 MILLION euro** (partially used also to finance Consumer Associations and educational projects);
- adopted about **400 MORAL SUASION DECISIONS** (usually not published or with a simple indication of the sector and the profile involved in the Agcm “Annual Report”);
- joined just from the beginning the UE “**Consumer Scoreboard**” project (common standard of consumers complaints classification).



UCP enforcement activity in «regulated sectors»

After the UE 2013 infringement procedure against Italy, in a recent Italian law in 2014 (transposition of the consumer rights Directive n. 83/2011) it has been finally clarified the “full and exclusive ICA competence against UCPs” in all regulated sectors.

The only exception is based on the existence of a “conflict” between the UCP general / horizontal Directive and the sectorial Directives with specific consumer protection aims (art. 27, c. 1bis of the Italian Consumer Code).



ICA competence in regulated sectors

The new art. 27, c. 1bis of the Italian Consumer Code has set the obligation for the ICA -at the end of each investigation against a practice with impact in a regulated sector- to ask a “non binding opinion” to the Regulatory Authority;

ICA adopted several agreements of cooperation with the most important Italian Regulatory Authorities in order to exchange information and try to find the best solutions for an effective and high standard of consumer protection (especially in the preliminary stage of investigations and in order to avoid duplication of proceedings).



Competition and UCPs

- There are important elements of convergence between the enforcement of competition rules and consumer protection, since unfair commercial practices are often used as an important “COMPETITION TOOL”.
- Indeed, commercial practices are a powerful tool for the newcomers and a way to lead consumers to choose the best options for them, in terms of prices and quality, by means of more conscious, rational and informed decisions.
- In my opinion, the consumer protection legislation could be enforced in a more wide and effective way especially in countries where the Competition Authorities are competent also for consumer protection matters (just for this beneficial “synergic” approach).
- For example like in Hungary, in Italy, U.K., Poland, Malta, Czech Rep., etc. and outside EU first of all from the experience of FTC in U.S.



COMPETITION AND CONSUMER WELFARE (synergies I)

- More in general, the evolution of antitrust policies seems to be actually more linked to an «effect based approach» with economical analysis and a concrete attention to «consumer welfare» profiles (not like an «indirect and eventual» effect but like a crucial priority);
- instruments to try to measure «ex ante and ex post» effects of antitrust decisions on consumer welfare and market efficiency (especially in terms of economic conditions, quality of products/ services, concrete opportunities to develop correct and efficient business models, spaces for new comers, innovation, quality research, etc.).
- Very interesting the results of the recent GVH «improved methodology» to quantify the benefits of competition surveillance activities: in the period 2009-2014 (six years) estimation of about 307 million euro saved by consumers in Hungary deriving from GVH competition proceedings (based on price constraining effects first of all).

COMPETITION AND CONSUMER PROTECTION (synergies II)

COMPETITION POLICY: effects especially on the «supply side» of the market in terms of an open and efficient system to promote consumer welfare, innovation, economic equilibrium, adequate prices / quality/ quantity, offers, etc.

CONSUMER PROTECTION POLICY: effects especially on the «demand side» of the market in terms of transparency of information for more rationale consumers' choices, fairness of commercial behaviours (to improve economic meritocracy), consumers' confidence, availability to buy, etc.



PRIVATE ENFORCEMENT DIRECTIVE

- New opportunities to develop synergies between competition and consumer protection will be linked to the next transposition into national legislations of the Directive on «private enforcement».
- Systematic instruments for consumers and traders to have access to documents and elements of proof collected during antitrust investigations with the final aim to obtain a compensation for damages coming from antitrust violation;
- ICA decisions are used also to support judicial «class actions» of Consumer Associations;
- Complementarity between «public» and «private» enforcement.



Evolution of consumer protection and cross border trade

- In 1990 (25 years ago) when ICA was created there was very little consumer legislation at EU and at national level (more related to a pre-contractual stage and especially for misleading and comparative advertising).

- The fragmentation of different national legislation created obstacles for cross border trade and consumer confidence.

- Since then, in Eu law we noted: a) unfair terms legislation with a specific protection for the contractual stage; b) rules for distance and doorstep selling; c) definition and instruments to block “unfair commercial practices” (maybe the most wide, complex and comprehensive tool); d) finally regulation about consumer rights (CRD) for distance contracts especially in the internet economy.

- The full harmonization approach of these last directives was based on the aim: a) to avoid national law fragmentation; b) to define rules for cross border trade; c) to destroy national frameworks of protection for some traders categories.

Consumer protection in the «internet economy»

- The enforcement of consumer legislation (especially extensive UCPD and CRD rules) is crucial in the internet economy and for the aim of an effective and efficient «SINGLE» DIGITAL MARKET (EU Commission priority).
- New enforcement challenges come from the growth of online and mobile commerce, including new platforms, the app economy, the sharing economy, web advertising, platforms, intermediation, comparison tools (also with related problems of consumer and personal data protection).
- In the wide and «extensive» UCP enforcement activity, ICA anticipated the evaluation of several practices considered illegal under CRD legislation (for ex.: opt-out systems for optional/ancillary services, credit surcharges, obstacles to consumers' rights, unsolicited supplies, etc.).



EU PROJECTS AND INTERNET ECONOMY

- The EU «SWEEPS» (starting from 2007) confirmed the priority and beneficial effects of this simultaneous investigations, coordinated by the E.C., on some web sites conducted by the National Competent Authorities (CA) on a pre-defined sector or type of infringement.
- Our Authority took part in all the EU sweeps and started very often formal investigations (or sometimes moral suasion procedures) against the web sites considered not compliant with the UCP discipline.
- Also the EU «joint actions» could represent useful and fruitful instruments towards big multinational companies for intra-community infringements of on line trade (see, in particular, the positive experience in car rental sector) .



RECENT ICA DECISIONS (cross border relevance)

- APPLE** (legal warranty / misleading info and practice about the necessity to buy the «Apple protection plan» to gain the «two years» extension, confusion between legal warranty and commercial warranty; obstacles to consumer's rights for after selling assistance);
- TRIP ADVISOR** (misleading claim about systems and procedure to check and block «fake reviews», platform responsibility, etc.);
- IN-APP purchases** (app games for mobile devices - apparently «free», need to protect «vulnerable consumers» like adolescents): national Italian case closed with commitments in parallel with the EU «joint action»;
- AIRLINES WEB TICKETS** (transparency of the final prices; credit surcharges; optional insurance products pre-selected with unfair opt-out systems; etc.)



RECENT ICA DECISIONS (competitive relevance)

- **WEB COMPARISON TOOLS** and intermediaries responsibility (Agcm recent cases closed in 2015 in the CAR INSURANCE SECTOR):
 - 1) Lack of clarity about the real «nature» (not «neutral» comparison platforms but specific «business platforms» with related potential conflicts of interest);
 - 2) Omissions about the actual function of commercial «broker» of this comparison web sites and the «fee gained» not displayed in the total insurance price;
 - 3) selection of compared insurance web sites depends on commercial agreements (not the total market benchmark!) and «ranking criteria» might be distorted;
 - 4) additional insurance covers selected with opt-out mechanism (instead of the most virtuous opt-in system); etc.



RECENT ICA DECISIONS (international relevance)

- **COLLECTIVE BUYING - E/COUPONING:** (Agcm cases Groupon and Grouponia) closed with specific commitments especially about: 1) transparency of discount calculation; 2) limitation and condition of offers; 3) after sale assistance and responsibility of couponing web site for the effects of commercial partners' behaviour on consumers' rights, etc.
- **ONGOING INVESTIGATION into VOLKSWAGEN AG** (and its distribution network in Italy) under UCPD for a specific Italian consumer protection from an administrative and economic side: misleading/omissive info about class of emission standards in both its advertising campaigns and the brochures distributed by dealers for several car models marketed by the Volkswagen group in Italy under the brands Volkswagen, Audi, Seat, Skoda, etc (see press release on "www.agcm.it")



AGGRESSIVE PRACTICES (case studies)

- From an Italian standpoint, the main innovation of the UCPD is represented by the “*aggressive practices*”.
- Misleading commercial practices and omissions can be considered as an evolution of misleading and comparative advertising discipline. In this field, ICA has a long-standing and extensive experience, as well as a wide decisional practice. Many cases dealt with the previous discipline (since 1992) about misleading advs. concerned practices actually “black listed” under the UCP legislation.
- On the other hand, it is more difficult to deal with purely aggressive practices, which are more typically related to actual commercial behaviour and, therefore, are more difficult to detect, control and interrupt.



Preliminary findings from the ICA decisional practice (case studies)

From the enforcement experience of ICA under UCP discipline it can be inferred that:

- 1) aggressive practices seem to be most common in sectors like: TLC, Energy, Financial services, Transport, etc.
- 2) misleading/omissive practices seem to be most frequent in sectors like: Foodstuff, Services, Industry, Tourism, etc.

But very often some commercial practices can be considered both misleading and aggressive...



Examples of aggressive/misleading practices with “anti-competitive” effects

The ICA considered that some practices were both: misleading (especially for ambiguous/omissive information on market conditions to push consumers to “choose less favorable options”) and AGGRESSIVE.

The most common aggressive practices more relevant for “anti-competitive” effects seem to belong to the following categories: obstacles to consumer rights (especially during “switching procedures”); retention activity; after selling assistance; tele-selling; unsolicited supplies; intermediaries responsibility; platforms; joint offers/tie-in; etc.



Examples of UCPs with anti-competitive effects (joint offers of financial services and insurance products)

Recent 2015 ICA proceeding in the connection between the financial sector and the insurance industry concerned the following commercial practices: “tie-in” practices between mortgages and insurance products:

- Mortgages offered only jointly with insurance products;
- Transparency of information concerning insurance policies (compulsory or not, offered directly by the credit traders and without leaving to the consumers the possibility to find alternative and less expensive solutions on the insurance market);
- Conflict of interest of the traders involved (insurance companies belonging to the same banking group or to get the “very high” intermediation fees).



Conclusions: synergies between competition and consumer protection and enforcement activity (I).

- It is very important to define “benchmarks” of “professional diligence” in different economic sectors through specific enforcement decisions (possibly with fines or commitments procedures) regularly “published” in order to set legal principle for consumer protection standards and rules for traders.
- Moral suasion and other informal procedures should be limited to the less relevant and not grave infringements.
- Educational activity (for both consumers and traders) is crucial.

There are important elements of convergence between the enforcement of competition rules and consumer protection, due to the fact that commercial practices are an important “COMPETITION TOOL”.



Conclusions: synergies between competition and consumer protection and enforcement activity (II).

- COMPETITION AND CONSUMER PROTECTION: two faces of the same medal to promote the fundamental rights of «economic freedom», economic democracy and collective sovereignty (ICA Annual Report, Consiglio di Stato n. 2479/2015).

-Finally, investigations against UCPs, especially if aggressive (like the examples described before) could be considered not only as instruments of consumer protection but also as market tools of: EFFICIENCY and FAIR COMPETITION.



THANK YOU V.M. FOR YOUR KIND ATTENTION !



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