MICROENTERPRISES PROTECTION IN THE LIGHT OF THE ICA’S RECENT ENFORCEMENT APPROACH AGAINST UNFAIR BUSINESS DIRECTORY SCHEMES

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1 INTRODUCTION

Unfair business directory scheme (hereinafter also the “scheme”) typically consists in forcing companies, in particular small and medium enterprises (SMEs) and microenterprises (MEs), as well as professionals and non-profit entities, to be listed in a business directory apparently free of charge. In order to achieve this goal, the directory companies send out forms inviting companies to complete or update their preregistered data, to sign the form, and to send it back. If the contacted companies accept this proposal, they automatically sign a contract which lasts at least three years on the basis of which they have to pay a significant amount of money (EUR 1,000 or more).

The implementation of such a scheme causes not only a financial loss for the involved companies, but also a significant harm for the whole EU Internal Market, since the type of companies contacted are a key driver for both economic and social growth in Europe. In this respect, it is necessary to consider that sustainable and inclusive growth of the EU Internal Market is the target of the 2020 Europe strategy. In fact, all the EU policies are geared towards helping European businesses emerge from the economic crisis and create new job opportunities.

The need to remedy the distortions created by the scheme via public enforcement mechanisms arises from the fact that, in the last decade, its implementation has been continuing to be a serious issue within the EU Internal Market, due to the high level of companies affected, as shown by the number of complaints received by public bodies of several Member States. Also Italian companies have been heavily affected by such scheme, as it can be observed by analyzing the ICA’s recent enforcement efforts.

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2 **THE UNFAIR BUSINESS DIRECTORIES SCHEME**

In principle, the promotion and the implementation of a business directory are lawful economic activities. A business directory is a database containing information regarding registered companies, organized in different categories, published on a website or printed. For instance, the traditional phone book is a type of business directory, which nowadays has been upgraded to websites because of the internet technology.

The details provided in a business directory may include business name, addresses, telephone numbers, location, types of services or products provided, number of employees, and so forth. Moreover, although business directories are not search engines, they often have an internal search facility. Finally, it should be remarked that the inclusion of companies’ data in such directories has become a key factor of their commercial strategies, as shown by the fact that the main geographic search engines, such as Google and Yahoo, make heavy use of these databases.

Nevertheless, the effective ways in which schemes are promoted by directory companies, as well as subsequent, related behaviors, may take on an unfair feature. Hence, in order to simplify the analysis, such unfair scheme could be logically partitioned into three consecutive and interrelated stages: i) unsolicited preregistration of companies’ data; ii) dispatch of the business proposal; iii) intimidating debt collection tactics.

The first stage starts with the activity of data collection of SMEs and MEs active in a specific geographic area, and their unsolicited preregistration within an online business directory. Data-entry activity is an essential condition for the functioning of the whole scheme, being the cornerstone of the further directory companies’ behaviors. In fact, this kind of activity plays a central role in the implementation of the unfair scheme due to the aforementioned companies’ need for an online platform to approach targeted companies, and so materially distort their economic behavior by forcing them to enter into a contract of three or more years. During this stage, targeted companies do not know anything about the preregistration of their data, because the directory company does not provide them with any information. This leads to the creation of a contrived information asymmetry that the directory company uses at its own economic advantage.

The second stage consists in sending unsolicited commercial proposals to targeted companies, leveraging on the aforementioned information asymmetry. The proposal consists of two parts: a cover letter and a form. The cover letter is a standard form letter, with certain specifics printed at the top tailored to the recipient company, such as the company name, its address, and an expiry deadline. The aim of the cover letter is to induce targeted companies to make a commercial decision that they would not have made otherwise, that is, to enter into a contract for a term of several years.

In order to fully understand the role of the cover letter in the functioning of the scheme as a whole, it is necessary to consider both the nature of the business directory and the features of the affected
companies. In fact, directory companies either leverage on the participation of SMEs and MEs in a trade show or exploit the recent enrollment of such companies in a public register, tailoring the cover letter as if it hailed from either a trade show organizer or a National Registration Authority, or a domestic Chamber of Commerce.

The form enclosed with the cover letter, instead, is designed to make targeted enterprises believe that it is necessary to complete, correct, or update the information supposedly included in the directory, for instance related to the companies’ participation in a specific trade show. Moreover, the form is not labeled as a contract or a purchase order, and it appears to be sent for the purpose of correcting a previously created account related to the participation in a specific trade show or to a status of the company in a public register. In fact, the form is pre-filled with the company’s contact information, and it instructs them to confirm the accuracy of their data by checking a series of boxes or by making suitable corrections.

This stage comes to a conclusion when the companies sign and send back the form, that is, when they enter into a several years contract requiring an annual payment of about EUR 1,000, which is automatically renewed at its expiry unless a written termination is submitted to the directory company before an established deadline.

In the final stage of the scheme, companies implement a strategy of intimidating debt collection toward those companies that, after receiving the first invoice, choose not to pay. This is the most aggressive stage of the scheme, since directory companies try to get the expected gains related to the creation of the database. In particular, an intimidating debt collection tactic consists in sending to targeted companies, either directly or by hiring a debt collection company, many payment requests and settlement proposals at a reduced rate. Moreover, in both cases targeted companies are threatened with the imposition of additional fees, interest charges and lawsuits, with the aim of convincing them to pay as soon as possible. These threats are generally effective in convincing targeted companies to pay, since they usually do not want to hire a lawyer and do not want to have a lower credit rating.

3  THE ICA’S RECENT ENFORCEMENT APPROACH AGAINST UNFAIR BUSINESS DIRECTORY SCHEME

Under its previous enforcement approach, the ICA focused its efforts on the deceptiveness of the business directory scheme. In fact, the distortion of targeted companies’ economic behavior was generally linked to the lack of clarity and transparency of the business proposal, which would lead to misunderstand its real meaning and scope. This approach was consistent with the European view considering business directory schemes as a subcategory of misleading advertisement.
Nevertheless, the abovementioned approach posed two problematic issues. On the one hand, the deterrence effect of the fines imposed by the ICA was limited, due to the scanty degree of severity of the domestic fining regime and, on the other hand, the enforcement efforts were not able to affect the scheme as a whole, because the normative boundaries of the legal rules disciplining misleading advertisement did not allow to take into account also the other stages of the scheme: the unilateral data-entry and the intimidating debt collection tactic.

The opportunity for changing such approach, with the aim to improve enforcement against business directory scheme, arose when the Italian legislator, at the beginning of 2012, extended to microenterprises the scope of application of the unfair commercial practices prohibition. As a consequence, the ICA revised its enforcement approach in the field of business directories on the basis of the following three conditions: i) the business directory scheme affects SMEs and MEs to a great extent, so after the amendment of the domestic legislation it would be feasible to apply the unfair commercial practices regime; ii) in order to react to the ICA’s previous enforcement trend, the directory companies partially modified their behavior, by switching the misleading feature of the second stage into an aggressive one; iii) the unfairness assessment of a commercial practice, being wider than the misleading one, would allow to take into account the scheme as a whole.

Therefore, in the light of such considerations, the ICA began to implement unfair commercial practices regime to assess the business directory schemes. In fact, by analyzing the ICA’s recent resolutions it is possible to note that the enforcement focuses not only on the business proposal appearance, but also on the unilateral data-entry activity, by ending up in encompassing also the debt collection stage. In particular, the ICA considered the whole business directory scheme unfair due to the infringement of Articles 20, 24, 25 and 26.1 (f) of the Italian Consumer Code.

The aforementioned approach is characterized by the fact that the ICA considers the data-entry stage essential for the directory companies to achieve their purpose. In fact, directory companies need to pre-register SMEs data within an online database, since such activity is what allows them to have an artificial position of power in relation to the microenterprises, so as to exert pressure in a way which materially limits the targeted companies' ability to make a well-aware decision. The unilateral pre-registration has no other purpose than to provide the directory companies with this position, since they create the database without informing the data owners until the business proposal is received.

This mechanism enables directory companies to display the business proposal as if it was strictly related either to their participation in a trade show or to their recent enrollment in a public register. Moreover, through the business proposal, directory companies are able to threaten negative consequences to the targeted enterprises if they do not update or correct their pre-registered data pointed out in the form.
The negative consequences threatened by directory companies - such as the cancellation of their pre-registered data - are likely to significantly affect the targeted companies’ behavior, due to the economic interest related to the permanence within the database of the trade show organizer or that of a public entity. In fact, the threat of deleting data from the database leads targeted companies to believe either that they may incur in an investment-loss or that they may be fined for law infringement.

Therefore, in the ICA’s view, both the unilateral pre-registration of companies’ data and the dispatch of a proposal containing the threat of negative consequences underlie an unfair mechanism aimed at forcing microenterprises to fill in, sign and send back the form. This leads them to make a commercial decision that they would not have made otherwise, that is, subscribe to a not requested service. Such behavior engenders an undue influence that significantly impairs the MEs conduct concerning the abovementioned service. In the light of the ICA’s recent approach, such feature makes business directory scheme aggressive and therefore contrary to Article 24 of the Italian Consumer Code.

Nevertheless, the application of the paradigm of aggressiveness to business directory schemes triggers the issue of the development of a defensible standard of exploitation, beyond the idea of deception. Such concern may be overcome by considering the aggressive feature as predominant within the scheme. Moreover, it should be observed that the alternative approach, based on a supposed misleading character of the business proposal, provides only a partial view of the commercial practice, since it does not take into account the fact that the alleged deceitfulness hails from a previous, unfair, lack of disclosure of relevant information. Moreover, wondering how far directory companies can go to persuade targeted enterprises to act in the way they want, it is possible to say that due to the functioning of the scheme, they always overstep the mark by going beyond the protection of their interests and exploiting MEs.

The ICA’s recent enforcement approach also embraces the stage of intimidating debt collection tactics. This stage of commercial practice is particularly aggressive, because directory companies try to get the expected gains and threaten contacted enterprises with the imposition of additional fees, interest charges and lawsuits, with the aim of convincing them to pay as soon as possible. The intimidating debt collection tactic is a conduct prohibited in all circumstances by Article 26.1 (f) of the Italian Consumer Code, when it is related to the payment of an unsolicited product or service. Moreover, from the side of directory companies, such strategy could amount to an aggressive commercial practice contrary to Article 24 of the Italian Consumer Code. In particular, the debt collection tactic would be able to put undue pressure on the alleged debtor by threatening to refer the debt to a third party debt collection company, or by forcing it to pay within an unreasonably short notice, for instance by threatening legal actions (i.e. charging orders or orders for sale).

Finally, the intimidating collection tactic may also be attributed to debt collection companies hired by promoters of the directory scheme. In fact, although the debt collection activity is the core business of
such companies, they lack of diligence when they take on the responsibility to recover debts of undertakings affected by an unfair business directory scheme.

4 CONCLUSIONS

The ICA’s recent enforcement approach against unfair business directory scheme has been increasing microenterprises’ protection, by sanctioning three directory companies and two debt collection companies with fines for over one million and a half Euros and by imposing cease-and-desist orders. Such effort is very welcome because, on one hand, it affects the scheme as a whole and allows to put remedy *medio tempore* to the unfair commercial practice through an interim basis, and on the other hand, it provides the best solution, within the national system, to the concerns arising from the implementation of such scheme. In fact, by virtue of the cross-border nature of the directory scheme, a higher standard of protection may be achieved only improving the mechanisms of cooperation among member States.²

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² Biffaro L., *Microenterprises protection in the light of the ICA’s recent enforcement approach against unfair business directory schemes*. DOI: 10.12870/iar-10202