ENFORCEMENT OF COMPETITION RULES IN THE FIELD OF LIBERAL PROFESSIONS BY THE ITALIAN COMPETITION AUTHORITY

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1. INTRODUCTION

Following the initial liberalization of professional services introduced by Decree-Law n. 223/2006 (the so-called “Riforma Bersani”)¹, the Italian Competition Authority (ICA) intensified its advocacy and enforcement of competition rules in the field of liberal professions.

Notably such enforcement activity increased following the inquiry on this sector by the ICA in 2009² and the second wave of liberalization reforms of professional services enacted by Decree-Law n. 138/2011³ and Decree-Law n. 1/2012⁴. These reforms were adopted in the midst of the economic crisis with the aim of promoting growth and stimulating economic recovery.

After briefly presenting the most relevant changes in the legislative framework regulating liberal professions in Italy, this article examines the most recent antitrust proceedings carried out by the ICA against notaries, physicians, architects and lawyers. These proceedings resulted in the issue of fines against professional associations for restrictive pricing practices and advertising activities by their members⁵.

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² AGCM, Indagine conoscitiva sul settore degli ordini professionali (IC34), in Boll. 9/2009.


⁵ The article will not deal with the arguments put forward by professional orders to deny their qualification as “undertakings” under competition law, based on the public functions they exercise. As is well known, according to the

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2. THE PROGRESSIVE LIBERALIZATION OF PROFESSIONAL SERVICES IN ITALY

In the last decade professional services in Italy underwent a series of reforms which liberalized the sector and introduced more competition amongst professionals with the aim of increasing consumer choice and welfare.

Following the European Commission communication on professional services and in the wake of the transposition of the Services Directive, in 2006 the Riforma Bersani (Decree-Law n. 223/2006) opened up the market for professional services. This reform removed legislative barriers, some of which dated back to the beginning of the 20th century, which limited access to, and the provision of, professional services. In particular, as far as it is relevant for this article, minimum fees for professional services, although not abolished, were declared no longer mandatory, thus allowing professionals to lawfully price their services below such levels. Moreover, the advertising of professional services was allowed with regard to the qualifications and specialization of the professional as well as the characteristics and price of the services.

The 2006 reform was subsequently extended by the liberalization measures introduced in 2011 and 2012 via Decree-Laws n. 138/2011 and n. 1/2012. In particular, art. 9 of Decree-Law n.1/2012 abolished professional fee schedules for all regulated professions and art. 3 of Decree-Law n. 138/2011 affirmed the freedom to advertise professional services by any means, provided that the information communicated to consumers is transparent, truthful, correct, unequivocal, not misleading, nor defamatory.

consolidated European and national case law, that professional associations, when acting as the regulatory body of a profession carrying out an economic activity, are to be considered “undertakings” for the purpose of competition rules, thus falling within the material scope of application of such rules.


8 The reform expressly aimed, in line with EU law principles, at “fostering competition and free movement in liberal professions” (art. 2 D.L. 223/2006).

9 Art. 2(1) lett. a) and b) D.L. 223/2006.

10 See also art. 4 of D.P.R. 137/2012 (in G.U.R.I. n. 189 of 14 August 2012), laying down the general regulatory framework for advertising applicable to all regulated professions, except lawyers for whom see art. 10 of Law 31 December 2012, n. 247 (in G.U.R.I. n. 15 of 18 January 2013).
3. **The ICA’s Proceedings Against Professional Associations Restricting Their Members’ Pricing Freedom**

Professional associations have experienced difficulties in internalizing the changes in the legislative framework with regard to the abolition, as a first step, of mandatory minimum fees and, at a subsequent stage, of fee schedules.

Indeed, most of the proceedings initiated by the ICA following the coming into force of the liberalization measures of 2006 and 2012 concerned decisions by associations of undertakings limiting the freedom of their members to autonomously determine the price for their professional services.

In particular, several local chambers of notaries were fined under art. 2 of the national competition law (Law n. 287/90) for directly or indirectly reintroducing mandatory (minimum) fees which their members should have complied with. Additionally, it should be pointed out that in all of these cases the chambers leveraged their disciplinary powers in order to enforce their anticompetitive decisions, notably, by threatening to sanction members, should they not comply with the decisions adopted by the notarial chamber.

In Consiglio Notarile di Lucca (CNL)\(^\text{11}\), the ICA found that the chamber of notaries had issued four professional fee schedules dealing with the key notarial transactions, establishing, moreover, a general monitoring mechanism and targeted enforcement against non-compliant members\(^\text{12}\).

The CNL argued that such measures were necessary in order to protect consumers from low quality services which would allegedly follow as a result of the freedom granted to each notary to autonomously establish the professional fee for his service.

After qualifying the CNL’s practice as having as its objective the restriction of competition, namely a price fixing agreement, under art. 2 of Law n. 287/90, the ICA rejected the justification put forward by the CNL. In line with its previous decisions and its advocacy policy, the ICA reaffirmed that minimum fees do not guarantee quality because they do not prevent professionals from delivering low quality services to customers; on the contrary, by shielding professionals from competition, minimum fees allow the creation of unjustified income for professionals offering low quality services\(^\text{13}\). The ICA’s decision was upheld by the Administrative Tribunal for Latium\(^\text{14}\).

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\(^\text{11}\) See case I/747 – Consiglio Notarile di Lucca/Controlli sull’applicazione della tariffa (provv. n. 24275), in Boll. 12/2013.

\(^\text{12}\) It is worth noting that the ICA started proceedings against the national association of apartment block administrators (Confiac), a non-regulated profession, after the association notified, according to art. 13 of Law n. 287/90, a fee schedule, asking the ICA to authorize it, see case I/774 – Tariffario minimo per gli amministratori professionisti di condominio (provv. n. 24836), in Boll. 14/2014.

\(^\text{13}\) This position has been recently endorsed by the Italian Supreme Court as well, see Corte di Cassazione, sent. n. 3715 of 14 February 2013, sent. n. 9358 of 17 April 2013 and sent. n. 10042 of 24 April 2013.

Similarly, in the cases against Consiglio Notarile di Milano, Verona and Bari, three notarial chambers were fined for adopting decisions through which they re-established minimum professional fees, notwithstanding the abolition of professional fee schedules by art. 9 of Decree-Law n. 1/2012. Moreover, the boards reinforced the binding effects of their decisions by threatening disciplinary sanctions against non-compliant members. In particular, the notarial chambers, after affirming the importance of professional fee schedules to guarantee the quality of professional services, introduced mechanisms to monitor the economic activities of their members. These consisted of measures such as requesting the invoices issued for providing professional services in a given period, in order to identify non-complying members and sanction them according to the law on the profession and the code of ethics.

The ICA found such conduct to breach art. 2 of Law n. 287/90, as it reintroduced *de facto* minimum mandatory fees through reaffirming the role of the abolished professional fee schedules in determining the price of professional services and by threatening disciplinary action against members pricing below such levels.

The decisions against the notarial chambers of Milan and Verona were upheld by the Administrative Tribunal for Latium, whereas the same court quashed the ICA’s decision against the board of notaries of Bari.

More recently the ICA started proceedings under art. 2 of Law n. 287/90, against the associations of architects of Turin, Florence and Rome to investigate the adoption and the publication on the official website of these associations of a software programme to calculate the price for their professional services. In fact, this mechanism could introduce uniform prices for professional services provided by architects, thereby circumventing the full liberalization of professional fees (art. 9 Decree-Law n. 1/2012). In particular, the price for the professional services calculated by the software programme is based on the abolished fee schedules; moreover, the programme provides identical results for identical services, thus aligning the prices that individual architects would otherwise charge for a given service to their clients. The values generated by the software program for a given professional service are therefore likely to act as a focal point for architects in determining the prices for their professional services and thus limit price competition amongst architects to the detriment of consumers.

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17 See TAR Lazio, sez. I, sent. n. 8347 of 30 July 2014. In particular, the administrative judges considered that a letter sent by the President of the notary board to all notaries operating in the district, informing them about initiatives to be adopted by the board with regard to price competition in the district did not constitute a decision of an association of undertakings as it was taken unilaterally by the President without any formal record in the notary board’s books.

18 See case I/781 CNAPP – Pubblicazione dei metodi e strumenti di calcolo dei compensi professionali degli architetti (provv. n. 24920), in Boll. 23/2014.
Occasionally the professional associations resistance vis-à-vis the liberalization of professional fees has taken different forms other than the blatant approval of new fee schedules or their indirect reintroduction coupled with the use of disciplinary powers in order to discourage autonomous pricing practices of their members.

For instance, in Unione Mutualistica Notai del Veneto\textsuperscript{19}, the ICA was notified, under art. 13 Law n. 287/90, of a revenue-sharing scheme which ostensibly was aimed at helping newly-appointed notaries in a certain district to establish themselves by integrating their income via an association principally funded by those notaries already established in the district. However, upon closer inspection, the scheme revealed distinctive anticompetitive features. In particular, by subsidizing newcomers, established notaries could soften price and quality competition originating from the entrance of new competitors. The scheme reduced the incentives for the latter to lower prices or offer new and innovative services in order to gain market shares and attract clients away from established notaries to the benefit of final consumers. Indeed, the bylaws of the association expressly justified the existence of the scheme by reference to the necessity of avoiding, in a period of economic crisis, that young notaries might be tempted to use instruments contrary to legitimate competition and rules of ethics such as advertising, etc.

Ultimately no fine was imposed on the association as the agreement had been voluntarily notified to the ICA and the association had not implemented it until the ICA’s final decision to prohibit this agreement.

Finally, in October 2014 the ICA fined the Consiglio Nazionale Forense, the Italian Bar Association, (hereinafter referred as “CNF”) for breaching art. 101 TFEU by adopting two decisions restricting directly and indirectly lawyers’ freedom to determine their professional fees\textsuperscript{20}. In particular, the ICA found that the CNF committed a single and continuous infringement having as its object the restriction of competition. The infringement started with the publication of a note (n. 22-C/2006, hereinafter referred as “the note”) in which it affirmed that, notwithstanding the liberalization of professional fees, any fee below those that were provided for in the minimum schedules shall be considered “inappropriate” and thus sanctionable according to the rules of the professional code of ethics. Subsequently, the CNF issued an opinion (n. 48/2012; hereinafter referred as “the opinion”) declaring the use by lawyers of an online platform (AmicaCard) to advertise their professional services in another platform (AmicaCard) to advertise their professional services incompatible with the provision of the code of ethics prohibiting the unfair acquisition of clients from other lawyers. AmicaCard provides advertising space to lawyers for promoting their services to customers affiliated to the AmicaCard circuit, to whom lawyers also promise a discount on their fees.

With regard to the note, the CNF adopted this decision immediately after the coming into force of the “Riforma Bersani” in 2006 with the aim of curbing price competition which might otherwise have emerged from the liberalization of minimum fees (these no longer being mandatory after the reform).

\textsuperscript{19} See Case I/762 – Unione Mutualistica tra notai del Veneto (provv. n. 25406) in Boll. 33/2014.

\textsuperscript{20} See case I/748 – Condotte restrittive del CNF (provv. 25154) in Boll. 44/2014.
The ICA signaled to the CNF the anticompetitive nature of this decision in the course of its sector inquiry on professional services and in 2007 the CNF revoked the note. However, a few months later the document reappeared in the CNF institutional web page and in its professional database together with the text of the 2004 Decree-Law fixing lawyers’ fee schedules. Such documents were still present on the CNF’s website and database after the 2012 reform which abolished professional fee schedules for all liberal professions.

The ICA found that the practice was incompatible with art. 101 TFUE as it de facto reintroduced the mandatory minimum fees for lawyers by threatening disciplinary sanctions for those pricing below such thresholds, thus favoring the maintenance of supra-competitive prices for professional services to the detriment of consumers.

Once again the ICA rejected the argument that professional fees are necessary and proportionate means to guarantee the quality of the services provided. Moreover, the ICA specified that in the present case the Cipolla and Arduino case law is not applicable, as the note is an autonomous decision of an association of undertakings and not a State measure, as it was in the cases examined by the Court of Justice.

As to the opinion, the ICA found that the CNF restricted price competition amongst professionals, by preventing lawyers from advertising their services and prices using digital platforms.

In particular, the ICA pointed out that digital platforms such as AmicaCard can prove extremely effective in helping lawyers to penetrate new markets and attract new customers. In fact, such platforms allow professionals to disseminate information about their services to potential customers living far away from them, thus enhancing competition amongst lawyers located in different areas in terms of both price and characteristics of the services, to the benefit of consumers.

Moreover, the ICA rejected the justifications put forward by the CNF, in particular, that the opinion aimed at protecting consumers from misleading advertising and, more generally, at safeguarding the administration of justice. Notably, the ICA pointed out that consumer protection can be adequately guaranteed via less restrictive means of competition than a total ban on the use of digital platforms for advertising. In fact, rules on unfair commercial practices as well as professional rules, specifically targeting professionals whose commercial messages are misleading for consumers, represent more appropriate instruments to address the issue. With regard to the risks for the administration of justice stemming from online advertising, the ICA observed that the advertising of professional services, including their economic conditions, has been liberalized since 2006 and has been confirmed by

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21 Joined cases C-94/04 and 202/04, Cipolla et al., [2006] ECR, p. I-11421 and case C-35/99, Arduino, [2002] ECR, p. I-1529. In those judgments, the Court of Justice affirmed that “Articles 10 EC and 81 EC are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere”. More recently see Joined cases, C-184/13 to 187/13, C-195/13 and C-208/13, API (Osservatorio sulle attività di trasporto), not yet reported.
subsequent liberalization measures. Thus the legislator himself weighed these concerns and considered that advertising would not endanger the correct administration of justice.

For its anticompetitive behavior, the CNF was fined € 912,536,40, which is the highest fine ever imposed on a liberal profession association in Italy so far.

4. THE ICA’S PROCEEDINGS AGAINST PROFESSIONAL ASSOCIATIONS RESTRICTING THE FREEDOM OF THEIR MEMBERS TO ADVERTISE

As is well known, advertising enables significant commercial leverage for undertakings to penetrate new markets and attract new customers by informing potential clients about the price, quality and characteristics of their products. The same is true for professional services as the EU Commission pointed out in its 2004 Communication on Professional Services and as the ICA has affirmed several times in its advocacy interventions.

The Italian Association of Physicians and Dentists (FNOMCEO) has recently been fined under art. 101 TFEU for adopting rules of conduct and guidelines restricting its members’ freedom to advertise their professional services.

In particular, and in contrast to what has been expressly provided for in the liberalization reforms, the Italian medical code of ethics forbids “promotional” and comparative advertising as well as advertising contrary to the vague notion of “professional decorum”. Moreover, it requires doctors and dentists to submit their advertising messages to the local medical board for a preliminary opinion before communicating them to the public or to self-declare to the board the conformity of the messages with the rules of conduct.

The ICA found that the provisions of the codes of ethics and the accompanying (implementing) guidelines constituted a decision by an association of undertaking restricting competition amongst its members, as they were deemed capable of limiting the use of one of the most important instruments for medical professionals to enter new markets and acquire customers. In particular, as for promotional and comparative advertising the ICA found that the essence of advertising is the promotion of services and that comparative advertising may provide consumers with valuable information about competitive services and providers. With regard to the use of “professional decorum” as a parameter to assess the legitimacy of an advertising message, the ICA noted that the vagueness of the concept leaves enough room for arbitrary decision making by local medical boards to curb legitimate advertising activities carried out by medical professionals, as actually happened in the case. Finally, the obligation imposed on professionals to notify advertising messages to the local board

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22 EU Commission, Report on Competition in Professional Services, cit., para. 43.

23 See ex multis, AGCM, Indagine conoscitiva sul settore degli ordini professionali (IC34), cit., passim.

or to self-declare their compatibility with rules of conduct was found to limit advertising, directly contradicting the objectives of the regulatory framework which does not require medical professionals to obtain any form of prior approval for advertisements.

Furthermore, the ICA rejected the argument that the relevant provisions on conduct were justified as necessary and proportionate measures to protect human health. In particular, the ICA noted that by liberalizing advertising for all professional services, as long as the message fulfills certain requirements, the legislator himself has balanced competition against the protection of human health by legislating so that advertising by medical professionals does not jeopardize human health.

In the course of the investigation FNOMCEO modified its code of ethics which, however, still prevents doctors from using comparative advertising and subjects the lawfulness of the message to more restrictive conditions than established by the current regulatory regime. Moreover, it forbids medical professionals from providing their services for free, thus excluding the possibility of carrying out “first visit free” advertising.

FNOMCEO was fined €831,816 for its anticompetitive conduct.

5. Conclusion

As seen above, in recent years the ICA has carried out both an intense advocacy activity for the liberalization of professional services and a thorough enforcement of national and European competition law against restrictions of competition introduced by liberal professions’ associations to circumvent measures passed by the legislator to open up and enhance competition in markets for professional services. Interestingly, all attempts to forestall the liberalization process have relied directly or indirectly on the misuse of the disciplinary powers primarily entrusted to professional organizations to protect the public interest.

However, many unjustified restrictions of competition in the field of liberal professions still remain in place, in particular with regard to legal professions (such as lawyers and notaries), as pointed out by the ICA in its recent proposal for the “Legge annuale per la concorrenza e il mercato.” A greater effort on both the legislative and the enforcement side is thus necessary in order to further advance competition in terms of access to, and exercise of, liberal professions for the benefit of consumers.

25 AGCM, Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza (AS1137), in Boll. 27/2014.