THE ADMINISTRATIVE PROTECTION AGAINST UNFAIR CONTRACT TERMS IN ITALY: FIRST-YEAR-ENFORCEMENT ACTIVITY

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The year 2013 was the first year in which the Italian Competition Authority (ICA) implemented its new enforcement powers in the ambit of consumer protection, with regard to the measures concerning unfair contract terms (UT). This paper aims at describing the scope and the main features of the new rules and regulations, as well as the first UT cases carried out by the ICA.

1. THE SCOPE AND MAIN FEATURES OF THE ICA’S PUBLIC ENFORCEMENT OF UT RULES

In March 2012 (Law No. 27), the ICA was definitively entrusted with the public enforcement of the rules on unfair terms (articles 33 and following of the Consumer Code, stemming from the Directive 93/13/EEC). In particular, according to the newly-introduced article 37bis of the Consumer Code, the ICA “…ex officio or in response to complaints, and for the sole purpose of the subsequent paragraphs, declares the unfair nature of terms that are included in contracts between professionals and consumers through the acceptance of general contract conditions or the signing of forms, models or templates.” The relevant rules of the procedure were adopted by the ICA through a new Regulation entered into force in September 2012.

From an organizational viewpoint, in May 2012, the ICA created a new Directorate for Unfair Terms within the Directorate General for Consumer Protection.

As far as the scope of the new competence is concerned, UT provisions apply only to terms inserted in general contracts, standard-contracts, forms (not in a single contract), as well as business to consumers contracts (BtoC, not business to business contracts).

It is important to note that although unfair terms are null and void according to the law (see article 36 of the Consumer Code), this kind of evaluation is left to civil courts that are also competent to grant damages.

2. PUBLIC ENFORCEMENT TOOLKIT AGAINST UT

In the UT ambit, the ICA can act, when appropriate, by means of:

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1 Italian Competition Authority.
2 According to the Italian Supreme Court case-law, a condominium among consumers is considered a “consumer”. 
- Moral suasion (warning letter), unless in case of particularly severe terms;
- Inquiries/investigations for the declaration of the unfairness of contract terms;
- Opinions upon the interested undertaking’s request («interpello»);
- Advocacy.

3. **THE UT INQUIRIES / INVESTIGATIONS**

UT inquiries/investigations can be launched by the ICA *ex officio* or following a complaint (web form or certified e-mail), as well as by consumers’ associations and Chambers of Commerce.

Within 30 days from the launching of the investigation, a mandatory on-line consultation is carried out through the ICA’s website for 30 days: Chambers of Commerce, as well as main professionals’ and consumers’ associations at national level can participate by sending their written comments on the contract terms examined, through a specially provided email.

It is important to note that although the ICA cannot adopt interim measures to suspend the use of the UT, nor can it impose fines on the professionals that used the unfair terms, nor can it order the professionals to cease the use of such UT, the law provides a particular instrument in order to make the consumers aware of the ICA’s findings. In fact, the ICA’s final decision (or a summary of it) concerning which contract terms are deemed unfair must be published (for a certain period) on the seller’s/supplier’s website; the ICA can also impose the use of other tailor-made means of publicity (newspapers, other mass-media etc.), if appropriate, to fully inform the consumers. This instrument seems to be particularly effective. In addition, the complete text of the final decision is published in the ICA’s official journal, as well as in a UT dedicated section of the ICA’s website.

Fines can be imposed by the ICA, if the professional: i) does not provide the information requested by the ICA (up to 20,000.00 Euros) or provides incorrect information (up to 40,000.00 Euros); ii) does not comply with the mandatory publication of the ICA’s resolution on its website (up to 50,000.00 Euros).

During the enquiries, the ICA can ask for advice from regulatory or supervisory agencies active in the economic sectors involved or from the Chambers of Commerce.

4. **UT OPINION («INTERPELLO»)**

Professionals can ask the ICA – via a specific form – to verify *ex ante* whether one or more terms they “intend to use” in standard-contracts with consumers are unfair.

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3 At [http://www.agcm.it/consumatoreclausole-vessatorie/provvedimenti.html](http://www.agcm.it/consumatoreclausole-vessatorie/provvedimenti.html).
The ICA’s mandatory deadline in providing its opinion is 120 days (unless the information provided is seriously incorrect, incomplete or untruthful).

The ICA can carry out an on-line consultation concerning the terms submitted through the “interpello” (this was carried out in two cases). Normally, the opinion rendered is communicated only to the applicant professional; however, the ICA can deem appropriate to publish said opinion, mainly for reasons of public interest (as in the case CV13 – Vittoria Assicurazioni).

Before giving its opinion, the ICA can ask for advice from regulatory or supervisory agencies active in the professional’s sectors and/or from the Chambers of Commerce.

5. STATISTICS CONCERNING THE ICA’S FIRST-YEAR-ACTIVITIES IN THE UT PUBLIC ENFORCEMENT

Advocacy (No. AS988) October 2, 2012: proposal to the Government to integrate art. 35 of the Consumer Code (Art. 5 Directive EEC/93/13) with the aim to increase the transparency of contracts and general conditions used with consumers, through the integration of art. 35 of the Consumer Code, according to which all terms “must always be drafted in plain, intelligible language”.

Formal investigations: No. 14 cases closed in 2013 (sectors involved: e-publishing/digital content; car rental; water services, elevators).

Between January and February 2014, the ICA launched n.8 investigations in the real estate agency services sector and No. 3 investigations in the private security services sector.

Request for opinion («interpello»): No.5 requests (sectors: second-hand cars; professional courses; car insurance; professional services). No.4 cases resolved; n.1 request withdrawn.

Moral suasion s: No. 3 cases closed in 2013; n.2 cases concluded up to February 2014. At present, No. 6 moral suasion procedures are still pending.

A brief description of the investigations carried out is provided as follows.

Digital contents sold on-line (March 2013): the ICA closed No. 2 investigations (within the EU Sweep 2012 on “Digital products”) concerning online sale conditions of digital contents (e.g. games, music, video and e-books). Main issues: terms and conditions available on Feltrinelli.com’s and MediaWorld’s websites which excluded or limited the sellers’ liabilities.

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1 An additional “interpello” was decided in December 2012.
2 Cases CV28 – Feltrinelli.com; CV29 – Compra on-line media world.it
Water supply services (June 2013): the ICA closed No. 1 investigation concerning the water supply contract-form of REGES, public company of the Municipality of Reggio Calabria\(^6\). Main issue: a term indicating that the new subscriber was to pay the unpaid bills left by the previous customer.

Short-term car rental (June 2013): the ICA closed No. 3 investigations concerning standard-contracts and general contract conditions for short-term car rental\(^7\). The terms found unfair (even partially) were those: (i) excluding or limiting the supplier’s liability also in case of consumers’ death or personal injury; (ii) binding the consumers to the agreement, whereas the supplier’s provision of services is subject to a condition whose realization depends on the latter’s own will enabling the supplier to alter unilaterally any characteristics of the service to be provided without a valid reason (e.g. non/late delivery of booked car; delivery of a different type of car etc.); (iii) establishing, in case of dispute, a jurisdiction other than the place where the consumer is resident or domiciled; (iv) concerning the customer's liability in case of theft, fire, damage to the vehicle or any third party arising out of circulation, which implied the customer's liability for such events.

Supply and maintenance of elevators October 2013: the ICA closed No. 8 investigations concerning standard-contracts and general contract conditions for the supply and maintenance of elevators towards consumers and condominium of consumers\(^8\). The terms found unfair (even partially) were those: (i) excluding or limiting the consumers’ actions or legal rights in case of the professional’s non-performance o inadequate performance, even as regards the legal conformity guarantee; (ii) establishing, in case of dispute, a jurisdiction other than the place where the consumer is resident or domiciled; (iii) tacitly renewing a contract (so-called roll-over) of maintenance services, with an unreasonable early deadline established for the consumer/condominium to notify its intention to terminate the contract (60 days or more depending on the duration of the contracts: one-year/multi-year contracts); (iv) requiring the consumer terminating the contract or failing to fulfill obligations to pay (as “penalty”) the full amount of the price for the whole natural duration of the contract.

6. **The main achievements in the areas of UT moral suasions and investigations**

With reference to the moral suasions carried out through the ICA’s *warning letters*, the professionals involved usually cooperated (and are cooperating in those cases still pending), by amending the contract terms examined.

With reference to the investigations, the following results are worth mentioning:

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\(^6\) Case CV32 - REGES-Morosità progresse servizi idrici.

\(^7\) Cases CV27-Maggiore, CV33-Europecar, CV34-Sicily by car.

\(^8\) CV/44 Monti, CV/45 Schindler, CV/46 M.I.A., CV/47 KONE, CV/48 CEAM, CV/49 THYSSENKRUPP, CV/50 OTIS, CV/6 Capozza
i) consumers’ associations always participated in the on-line mandatory consultations on the terms examined by sending written comments. In addition, whenever the investigation originated from a complaint submitted by a consumers’ association, the latter became party in the procedure.

ii) during the investigations, professionals submitted to the ICA amendments to the contract terms examined. The ICA decided to evaluate (within the same procedure) also the new terms submitted in order to avoid that the professionals involved could find themselves in a situation of legal uncertainty in their future contractual relationships with the consumers.

iii) all the investigations ended with the ICA’s formal resolutions ascertaining that the terms examined were unfair and ordering the professionals to publish on their websites a summary of the decisions (in one case, it was ordered to publish the ICA’s resolution in a local newspaper);

iv) professionals always fulfilled the ICA’s abovementioned orders;

v) the professionals involved never challenged the ICA’s resolutions before the administrative review court at the end of the investigations.

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