

Italy

General

Italian Competition Authority
Recent decisions against
associations—level of fines—
deterrence—consistency with
Regulation 1/2003

May and June 2008

 Anti-competitive practices;
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In two recent cases, the Italian Competition Authority (ICA) imposed very small fines on two associations of undertakings for their anti-competitive conduct. On May 29, 2008, the ICA fined the association of pharmacists of the city of Teramo with respect to a decision indicating to its members (i.e. the pharmacists) the maximum discounts that they could apply on the prices of over-the-counter (OTC) drugs.¹ On June 4, 2008, the ICA imposed a fine on the association of bakers of the city of Rome in connection with a decision indicating to its members (i.e. the bakers) the minimum prices and the minimum price increases for all the types of bread.²

In setting the fine with respect to the first case, the ICA referred to the following elements:

- the infringement qualified as “very serious”; and
- even if it lasted only 13 months, the infringement took place a few months after the enactment of the liberalisation of the market for OTC drugs.

In the second case, the ICA observed that the calculation of the fine should take into account the following factors:

- the infringement qualified as “serious”;
- it lasted several years (i.e. four years and seven months);
- it concerned a fundamental product, i.e. bread; and
- almost every baker in Rome was a member of the association.

1 Decision of the ICA of May 29, 2008, Case No I684, *Federfarma Teramo–Sconti sui prezzi al pubblico*, Bull. No 21/2008, p.12.
2 Decision of the ICA of June 4, 2008, Case No I695, *Listino Prezzi del Pane*, Bull. No 22/2008, p.5.
3 See also the 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2, paras 14 and 33. Under the corresponding pre-existing provision (art.15(4) of Regulation 17):

“[t]he Commission may by decision impose on undertakings or associations of undertakings fines of from 1000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently (a) they infringe Article 85(1) [. . .]”.

4 See *Metsä-Serla Sales Oy v Commission* (C-298/98 P) [2000] E.C.R. I-1057 at [66], where the European Court of Justice confirmed that:

“It must be held in that regard that, as the Commission has stated, when a fine is imposed on an association of undertakings, whose own turnover most often does not reflect its size or power on the market, it is only when the turnover of the member undertakings is taken into account that a fine with deterrent effect can be determined (see, Case 1100/80 to 103/80, *Musique Diffusion Française and Others v Commission* [1983] ECR 1825, paragraphs 120 and 121)”.

As the infringements were considered as “very serious” and “serious”, the ICA imposed a fine corresponding to eight per cent of the turnover of the associations concerned, when the statutory maximum is 10 per cent. As expected, according to the applicable rules on fines, the relevant turnover was considered to be the sum of the membership fees paid to each association by its members. As a result, the total fines imposed on the two associations were very small, i.e. € 11,200 and € 4,430 respectively.

Indeed, for purposes of the calculation of the fine to be imposed on an association of undertakings for an infringement consisting in a decision affecting competition, the ICA’s practice is to take into consideration the association’s turnover, i.e. the sum of the membership fees paid by the members of the association. The Italian Competition Act, namely Art. 15 of Law 287 of October 10, 1990 (“Law 287/1990”), has not been amended to reflect the new rules under EC competition law, namely Art. 23 of Council Regulation 1/2003. Under this provision, which forms part of the modernisation of EC competition law introduced in 2004, the fine imposed on an association of undertakings can be much larger, as it “shall not exceed 10% of the sum of the total turnover of each member”.³

This is of course believed to have beneficial effects from a deterrence point of view in respect of anti-competitive conduct that has potential to harm competition in a market that goes well beyond the size of the turnover of an association itself. Indeed, the rationale of the EC rules is that the influence that decisions of associations may have on the market is not reflected in the size of their turnover, but rather in the turnovers of their members, which can give a more accurate indication of the size and economic power of an association.⁴

Unlike the ICA, the Commission also has other means to fight against anti-competitive behaviour of associations of undertakings. Under Art. 23(4) of Regulation 1/2003, if an association cannot pay a fine that was set, taking into account the turnover of its members, it is obliged to call for contributions from its members to cover the fine. Further, under the same provision:

“[w]here such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may [first] require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association [and subsequently may require payment of the balance from] the members of the association which were active on the market on which the infringement occurred”.

Though Law 287/1990 has been amended in the last few years to introduce new enforcement powers for the ICA in line with some of the new powers of the European Commission under Regulation 1/2003, it has not seen the introduction of amendments that would render the enforcement of competition rules against associations of undertakings more effective.

This is unfortunate, as the introduction of the leniency programme in Italy in 2007 has not yet produced the expected results. As a result, the ICA has to some extent focused its resources on several investigations of anti-competitive conduct of associations of undertakings, which were mostly prompted by complaints lodged by consumer associations (in the case of the Rome bakers, the ICA had indeed commenced its investigation after receiving a complaint from a consumer association).