

NEWSLETTER

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ICA's Whistleblowing platform: a new tool for the detection of anticompetitive practices

Legance

Introduction

On 27 February 2023, the Italian Competition Authority (“**ICA**” or the “**Authority**”) introduced a Whistleblowing platform (“**the platform**”), which allows any individual employed by an undertaking, or who has a commercial relationship with it, to report anticompetitive practices anonymously, without disclosing his/her identity.

In line with the best practice of the European Commission and other national competition authorities, the platform represents a tool through which the ICA aims to strengthen its fight against secret cartels, which are increasingly difficult to detect. The platform promotes cooperation with those individuals who wish to keep their identity anonymous (so-called “**whistleblowers**”), due to their proximity to the concerned undertakings (e.g., because they are employees or customers of the concerned undertakings).

To this end, the ICA has identified, in its internal organization, a unit dedicated to the fight against cartels, leniency and the management of whistleblowing (the “Cartel, Leniency and Whistleblowing” Unit).

The ICA’s platform is part of the broader regulatory framework outlined by the EU Whistleblowing Directive¹. To set common minimum standards for the protection of whistleblowers, the Directive provides for the creation of internal reporting channels within legal entities in the private and public sector, as well as the designation of competent authorities to handle external reporting concerning breaches of EU law.

Coherently with such European standards, the ICA has established its whistleblower platform.

01. The platform

Whistleblower reports may concern collusive conduct (*i.e.*, cartels) or abusive conduct by a dominant firm; the factual circumstances, time and place in which such conduct took place or is about to take place; the affected products or services; the involved parties, as well as the parties affected by such conduct.

The ICA has taken a number of measures to protect whistleblowers’ anonymity, which is the core of the platform’s functioning.² Specifically:

- the whistleblower’s anonymous message is received in an encrypted form by an intermediary company specialized in protecting anonymity of whistleblowers, which sends an “alert” message to the Authority;
- it is possible to opt for “bi-directional” communication; this allows the Authority to communicate – always on an anonymous basis – with the whistleblower and request additional information, therefore enhancing the effectiveness of the whistleblower’s report and the chances it will result in an investigation.

¹ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

² See the ICA’s website : <https://www.agcm.it/servizi/whistleblowing>

02. Investigations opened by the ICA following a whistleblower's report

Since the platform's establishment less than a year ago, the ICA has already started three investigations following anonymous whistleblower reports, including by conducting dawn raids at the premises of the companies. In particular, the ICA opened the following proceedings:

- *1864 – Price of motor fuel bio component*: investigation opened on 11 July 2023, concerning a potential agreement between the main oil companies in the motor fuel sector, with regard to the cost component resulting from biofuel blending obligation;
- *1866 – Agreements between foundries*: investigation opened on 12 September 2023, concerning a potential agreement between some of the main foundries that are active in Italy in the production of cast iron used in the automotive, industrial vehicle, earthmoving machinery and agricultural sectors. The whistleblower is an employee of a customer; and
- *1867 – Price increases in the hollow glass sector*: investigation opened on 31 October 2023, concerning an alleged coordination between companies active in the hollow glass sector to decide the price increases of glass bottles. The investigation was opened following reports from an anonymous whistleblower and some companies.

The rapid exploitation of the platform is evident; especially if one considers that the three investigations opened to date are the result of whistleblower reports received in just the first month and a half since the establishment of the platform (27 March, 3 April, and 17 April 2023). Therefore, it is reasonable to expect that the whistleblower platform will continue being used and bringing to the ICA's attention anticompetitive conducts that could lead the ICA to take action, strengthening the importance of companies having effective antitrust compliance programs in place to prevent their involvement in anticompetitive breaches.

03. Whistleblowing and leniency

The whistleblowing program is a toll in addition to, and different from, the leniency program.

The leniency program allows undertakings to report their participation in a cartel in order to obtain immunity from or a reduction of the fines. The leniency program directly involves the undertaking that participated in the cartel, which agrees to cooperate with the Authority.

By contrast, the whistleblowing program allows any persons, for instance customers' employees, to report a breach of competition law; provided that they have information about the alleged collusive or abusive conduct by virtue of their commercial relationship with the undertaking/s concerned. The whistleblower may also be an employee of the company involved in the anticompetitive practice. Unlike leniency, however, in this case the whistleblower's report will bring the potentially unlawful conduct to the attention of the Authority, but will not provide the company with a reduction of the fine that might be imposed. Moreover, whistleblower reports are not subject to the stringent evidentiary requirements of leniency and may relate to conduct other than secret cartels, such as abuses of dominant position.

Due to these characteristics, the whistleblowing platform is expected to become a more effective tool than the leniency program for detecting anti-competitive behaviour that could lead to investigations by the Authority.

EU, Antitrust and Regulation Department

The EU, Antitrust and Regulation Department of Legance is available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

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