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The Italian EC law for the year 1999

Last December 16th the so-called *"EC Law"* for the year 1999 (Law 526/1999) was passed by the Italian Parliament. As everybody knows, the *EC Law* is the legislative act whereby the Italian Parliament yearly takes the measures required in order to conform the national legal system to the European Union regulations[1]. The mechanism of *EC Law* was introduced by the so called *"La Pergola Law"* of 9 March 1989, No 86, further to several European Communities Court of Justice judgements rendered against Italy for default in implementing the European Directives[2].

The enactment of the community Directives may be attained: a) directly, when the same *EC Law* contains *self-executing* provisions; b) through a Government delegation, whereby the provisions are enacted by means of legislative decrees, issued in strict compliance with the criteria set forth by the Italian legislator in the delegation; c) by Government authorisation to give effect to the EC Directives, by means of *authorised regulations*, in compliance with Article 17, sub-section 2, law 400/1998.

The 1999 *EC Law* prescribes rules for the implementation of 42 community Directives. The following pages represent a brief note to the most remarkable provisions (please note that the reference made hereunder to Article numbers is to be referred to the *EC Law* caption numbering, unless otherwise specified).

1. Consumer contracts

Article 25 amended section XIV-*bis* of Italian Civil Code, that provides for regulations concerning consumer contracts, under three aspects.

a) *Ineffectiveness extended to any unfair term.*
Within the text of Article 1469-*quinquies*, the word "*articolo*" (*Article*) has been replaced by the word "*capo*" (*Section*). Therefore, the ineffectiveness provision now applies not only to the specific clauses provided for by Article 1469-*quinquies* but, instead, to any contractual clause that, by establishing the law of a non-EC member Country

[1] On the nature and the content of the Law 9 March 1989, No 86, see: A. SANTA MARIA, *EC Commercial Law,* London – The Hague – Boston, 1996, p. 135 *et seq*.

[2] See, for instance: ECJ, Judgment of October 15, 1986, case No. 168/65, *Commission v. Italian Republic*, 1986, *Riv.*, p. 3521 *et seq*.

as the law applicable to the legal relationship, would deprive the consumer of the protection guaranteed by the Section under examination, *i.e.*, by Articles 1469-*bis* through 1469-*sexies*.

b) *Extension of the concept of contract with the consumers.*
The provision set forth in the first sub-section of Article 1469-*bis*, aiming at identifying from the objective point of view the "contracts of the consumers" as those concerning the *sale of goods or the supply of services*, has been repealed. The regulation provided for by Section XIV-*bis* of the Italian Civil Code is now identified solely from the *subjective* point of view, *i.e.*, with regard to the parties of the contractual relationship: on one side, the "consumer", that is to say, according to the definition provided for by the Italian Civil Code, the natural person acting for purposes not related to any professional and entrepreneurial activities; and, on the other side, the "professional", that is to say, the natural or legal, public or private, person, who uses the contract within the context of his entrepreneurial or professional activity.

Furthermore, the expression removed by the recent amendment was included in some passages of the Directive No. 13/93 EC, which defined the "contracts of the consumers" concerned with the sale of goods or to the supply of services, by relating the valuation on the abusive or non abusive character of the clauses to the nature of the goods or of the services object of the contract. A similar expression can also be found in the Directive no. 577/85/EEC and in the Italian Legislative Decree no. 50/1992, implementing said European Directive, which concerned contracts stipulated outside the commercial premises; moreover, an equivalent expression is to be found in the Directive no. 7/97/EC, implemented by the Legislative Decree no. 185 of 1999, on contracts executed *via* internet.

Accordingly, on one hand, it would be possible to state that *the purchase and the use of goods and services*, notwithstanding the formal removal of the said expression from the text of Article 1469*bis* of the Italian Civil Code, still remain the activities whereby the consumer is identified, in addition to the private and domestic purpose of the purchase and use. On the other hand, the language is so over-inclusive, that it would be hard to conceive a contract not concerned with the purchase or use of goods or services.

c) *Construction principles*.
The last amendment regards Article 1469-*quarter* of the Italian Civil Code which, in the second sub-Section, provides that in case of doubts about the meaning of a clause, the interpretation more favourable to the consumer must prevail (on the basis of Article 1370 of Civil Code, that provides for a same rule for clauses included in general conditions of contract or in forms prepared by one of the contracting parties). The new language of Article 1469-*quater*, third sub-Section of the Italian Civil Code provides that the rule of the *interpretatio contra proferentem* cannot be applied to in case of injunctive action brought under Article 1469-*sexies* of the Italian Civil Code. Therefore, in such cases, it would be

necessary to refer to the usual construction rules (*i.e.*, Articles 1362 and f. of the Italian Civil Code).

2. *Agency – "Del Credere" Guarantee*

Article 28 of the *EC Law* for the year 1999 adds a sub-Section to Article 1746 of the Italian Civil Code as regard to the agent's obligations. According to said article:

"Any agreement that provides for the liability, even if only partial, to the charge of the agent for default of third-party shall be forbidden. On the other hand, the parties are allowed each time to agree upon a granting of a proper guarantee by the agent, provided that: such guarantee is granted with reference to single business, with specified nature and amount, severally agreed upon; the amount corresponding to the obligation to guarantee, undertaken by the agent, shall not exceed the amount corresponding to the commission the agent himself would be entitled to for that business; it shall be provided for the agent a proper consideration".

The amendment made by the *EC Law* consists in the ban of the *"Del Credere Guarantee"* agreement, whereby the agent used: to guarantee, in addition to the fraud or fault, the payment obligation of the third contracting party; to take the responsibility for part of the business risk, bearing part of the losses suffered by the principal in case of third party's default. The amended provision now allows the agent to guarantee the third party's default only in the following cases:

i) if such guarantee is granted "*as an exception*", pursuant to agreements regarding single business, each time indicated and referred as to the "*particular nature and amount*" (incidentally, it is to be noted that the exact meaning of particular nature and amount it is not sufficiently clear; in fact, there still exists possibility that, also for business of considerable amount and doubtful advantage, the agent will be held liable for the default and such a result would contradict the *ratio* of the regulation, aiming at protecting the weaker party);

ii) if a *limit to the agent's liability* is set in the agreement. Such a limit shall no longer consists, as in the preceding provisions, in a *maximum* amount, equal to 15% of the loss suffered by the principal, but, rather, to the amount of the agreed commission in favour of the agent: should such limit be exceeded, the agreement is to be consequently declared null and void;

iii) if an *additional consideration* is provided for in favour of the agent, subject to the same tax treatment provided for his commission.

The new provisions do not dispel some doubts concerning the agent's obligations and, in particular, the information duties of the agent towards the principal. Indeed, it is not clear:

- whether the agent: shall merely transmit any information gathered to the principal or, in addition, he shall verify the truthfulness thereof and – therefore - be accountable for their accurateness;

- whether, among the agent's obligations: there may be included the specific information concerning third contracting party's solvency capacity, or if such

information has the same nature as the *"del credere"* agreement and, therefore, it should be banned.

3. *Powers of the Antitrust Authority*

Article 29 replaces the second sub-Section of Article 54 of Law 52/1996 (*i.e.*, the *EC Law* for the year 1996) which regulated the conditions for the intervention of the *Guardia di Finanza* (*i.e.*, the Tax and Anti-Smuggling Police) within the limits of the inquiries carried out by the Italian Antitrust Authority, upon request of the European Commission (sub-Section 2) or *motu proprio* (sub-Section 4).

In compliance with the regulations of the Council No. 17/62, 1017/68, 4056/86F, 93975/87 and 4064/89, the Antitrust Authority is empowered: *(i)* to ensure the enforcement of the inspection activities required by the European Community Commission; *(ii)* to provide assistance to the Commission's Officers (where requested and within the limits indicated in the request), with regard to the performance of the Commission's Officers duties and the enforcement of the inspections to be carried out within the territory of the State.

According to the new regulation, the Antitrust Authority exercises its powers as per Title II of the Law 10th October 1990, No. 287, that is to say, it is entrusted with the powers of inquiry, not only with reference to the hypothesis of restrictive agreements or abuse of dominant position, but also with reference to operations involving mergers and acquisitions; however, the Antitrust Authority is under the obligation to comply with the specific requests formulated by the European Commission, and to offer the assistance needed by the Commission's officers.

In any case, the Antitrust Authority may, at any moment, ask for the intervention of the *Guardia di Finanza*, should both the followings occur: *i)* express request by the Commission; and *ii)* opposition (non-collaboration) by the enterprise concerned.

The previous references to the Presidential Decrees No. 633/1972 concerning assessment of VAT and No. 600/1973 concerning assessment of income tax, have been repealed and replaced by a general reference to the inquiry powers aiming at assessing the aforesaid taxes.

The results of the inspections carried out by the Antitrust Authority, through the *Guardia di Finanza*, in compliance with the Commission's requests, can be utilised only by Authority and, *under no circumstances, for any other purpose*.

In the hypothesis provided for by the fourth sub-Section of Article 54 Law 52/1996, when the Authority acts *motu proprio*, it can still avails itself of the inquiry activities of the *Guardia di Finanza*, which shall act pursuant to the said powers, using already existing structures and personnel, in such a way as not to determine additional charges to the budget.

4. *Branded pharmaceuticals*

Article 27 amended the Legislative Decree 29th May 1991, No. 178. The Legislative Decree 178/91, in turn, implements some community Directives concerning branded pharmaceuticals and it was already amended by the Legislative Decree 18th February 1997, No. 44.

The European Union aims at setting strict general rules for the production and

the commercialisation of pharmaceuticals. The amendments of said decree aim at making the control activity more accurate and binding and offering better guarantees to the consumer. In particular:

i) the production of branded pharmaceuticals is subject to an authorisation of the Ministry of Health, issued upon prior appraisal of the conformity of the personnel and technical-industrial means of the production plant;

ii) the technical manager of the production plant, in compliance with the new provisions, shall possess the degree certificates required and he must register in the respective professional roll: in case of non-compliance with his obligations, he may be suspended by decree of Ministry of Health;

iii) in case of medicinal products assigned only to the exportation and of medicinal products prepared on written request and not on doctor's request (to which the provisions on the authorisation to the commercialisation provided for by Article 8 of Legislative Decree 178/91 shall not be applied) the producer is bound to immediately inform the Ministry of Health of the preparations effected.

5. Genetically modified micro-organisms

Article 23 the EC Law set forth the principles and criteria the Government shall comply with in the implementation of the Directive 98/81/EC, concerning the restrictions on use of genetically modified micro-organisms.

According to the aforesaid Directive, genetically modified micro-organisms refers to the cellular entities, such as viruses and bacteria, the animal and vegetal cells in culture whose genetic material has been unnaturally modified through natural recombination or multiplication.

For such micro-organisms, mainly used in agriculture for the creation of new vegetal species, the regulations intends to issue specific restrictive measures in order to limit the contact of said micro-organisms with the population and the environment.

Accordingly the Government is bound to take appropriate measures in order to avoid the injurious effects the use of genetically modified micro-organisms may have on the human health and on the environment. The principles which the Government shall comply with, acting in its capacity as delegated legislator, are:

i) to draw up a classification of the uses of genetically modified micro-organisms with interventions on the cells to be carried out with reference to the possible consequential risks;

ii) to prepare an information and control system to be carried out through a complete notices and authorisations system;

iii) to elaborate emergency plans in order to face any possible accidental release in the environment of biological agents and genetically modified micro-organisms;

iv) to arrange proper measures for the control of the disposal of the material

deriving from the use of genetically modified micro-organisms.

6. Insurance

Article 26 of the EC Law contains the provisions which the Government shall comply with in the implementation of the Directive 98/78/EC concerning *additional* supervision of the insurance enterprises belonging to an insurance group. The following enterprises shall be subject to additional supervision: (i) associated companies of insurance enterprises; (ii) stakeholders in insurance enterprises; (iii) associated companies of a stakeholder in the insurance enterprises.

Those enterprises having their respective registered offices in a non-European Union member Country, where there exist juridical obstacles to the transfer of the required information for the effective exercise of the supervision, may be exempted from the additional supervision, even if belonging to an insurance group. However, in this case, no latent capital gains associated to said shareholding shall be accepted as element admitted to constitute the correct solvency margin.

Accordingly, the Government may exempt from the additional supervision the enterprises having a negligible role with respect to the checking on the insurance group or whose consideration would be misleading or improper for such purposes.

As a consequence of the wide definition of the parties subject to the additional supervision, ISVAP ("*Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo*" - Supervisory institute of private and public-interest insurance companies) is entitled to have access to the necessary information for the exercise of the additional supervision also at non-insurance enterprises of the group.

Reference parameter of the additional supervision is the definition of a situation of correct solvency for the enterprises belonging to an insurance group. The Directive provides three methods for such calculation, which are considered, on the whole, equivalent from the prudential point of view: the method of deduction and aggregation; the method of the deduction of the solvency requirement; the method based on the consolidated accounts.

The latter is the criterion adopted by the *EC Law*, leaving to the Government the decision on whether the ISVAP may authorise or order the application of one or the other methods provided for by the Directive. In addition, for the insurance or reinsurance enterprises located in a third country, the delegation afford the Government the option concerning the consideration of the elements satisfying the solvency requirements in such country, provided that they are consistent with those provided for by the European Union provisions.

The same rule contains the criteria of the delegation to the Government also with respect to the supervision of particular inter-company operations, in observance of the general principles fixed by the aforesaid Directive.

Said Directive provides that each member Countries shall act in such a way as to allow the competent authorities to exercise the general supervision of the inter-company operations.

The inter-company operations are those

occurring between: a) an insurance enterprise and an associated enterprise of the insurance enterprise, a stakeholder enterprise in the insurance enterprise, an associated enterprise of a stakeholder enterprise in the insurance enterprise; b) an insurance enterprise and a natural person holding a share in the insurance enterprise or in one of its associated enterprises, in a stakeholder enterprise in the insurance enterprise, in an associated enterprise of a stakeholder enterprise in the insurance enterprise.

In order to allow the supervision of the inter-company operations, each member State may dispose that, at least once a year, the insurance enterprises declare to the competent authorities the *relevant operations*, with particular regard to loans, guarantees and off-balance sheet operations, elements allowed to constitute the solvency margin, investments, reinsurance operations, cost allocations agreements.

7. Practice of the legal profession

Article 19 of the *EC Law* 1999 states the principles presiding the implementation of the Directive No. 98/5/EC, concerning the practice of the profession of lawyer. There are two aspects considered by the Directive: the freedom of establishment and the practice of the legal profession in corporate form.

a) Freedom of establishment. As regards the freedom of establishment, the Law Decree 115/92, implementing the Directive 48/89, concerned with the general system of mutual recognition of higher education diplomas, established the following points:

- ❏ the community lawyers are entitled to offer *legal advice* on the law of their country of origin, on international law, on community law and on the law of the host member Country;

- ❏ the community lawyers are also entitled to *represent and appear for* their clients in the host Country where they decide to settle in, if required in concert with a lawyer admitted to the legal representation before the jurisdictional organ. To this purpose, the lawyers practising with their own professional qualification shall be bound to be put on the rolls instituted by the competent authority of the host member Country and to comply with the professional and ethical obligations and regulations applicable to the lawyers of such State.

In addition to the Law Decree 115/92, article 19 of the community law establishes the following principles:

i) the information to the public concerning the qualification and the location of the lawyers practising in Italy with their own qualification of origin must be guaranteed. Such guarantee is deemed as being complied with, if the certificate of registration by the competent authority in the State of origin has been issued within the ninety-days-period preceding the registration filing in Italy;

ii) the lawyers practising in Italy with their own qualification of origin are entitled to have access to the superior jurisdictions;

iii) as to the representation and defence of the clients in proceedings before the Courts, the lawyers practising with their own qualification shall act in connection with Italian lawyers;

iv) the lawyers practising in Italy with their own qualification shall be under the obligation to subscribe a professional liability insurance and, if necessary, the obligation to join a professional guarantee fund;

v) the general practise of the representation and defence activity *must in any case guarantee the choice made by the client regarding his counsel*, the personal liability of the lawyer, his independence and, in case of professional enterprise, its submission to a liability regime and to the professional ethic principles.

b) Lawyers Partnership. The delegation to the Government provides also the introduction of the "*lawyers partnership*". Such partnership status, after the Government has put the received delegation into effect, shall comply with the following principles:

- ❏ it shall belong to the specific typology of the "*partnership of professionals*" (the legislator refers to the "partnership of professionals" without, apparently, considering that such entity, so far, is lacking in Italy of any regulations);

- ❏ it shall be listed the *professional roll* and shall be subject to the same control regime as he one provided for natural persons and associated firms;

- ❏ all the *members* shall be lawyers and the *directors* shall be members (as a matter of fact, the latter provision, excludes big consulting and auditing companies and their affiliates).

8. Professional domicile

As with regard to citizens of the European Union member Countries, article 16 directly equated (*i.e.*, without any further delegated intervention by the national Government) the professional domicile to the residence for purposes of registration or the preservation in the rolls, lists or registers.

Such clarification was necessary, because the current requirements concerning the practice of the professional activities – *i.e.*, Italian citizenship and residence in Italy – are not more lined up with the rules of the European citizenship and the free supply of service introduced by the Maastricht Treaty as amended by the Amsterdam Treaty. The new provisions help the clarification of the issue, by establishing the full equivalence between professional domicile and residence.

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