CHIOMENTI

Newsletter

Newsletter on EU Law and antitrust
Italian guidelines and policy recommendations on big data

Introduction

On July 2nd, 2019, the Italian Competition Authority ("**ICA**"), the Italian Telecommunication Authority ("**ITA**") and the Italian Data Protection Authority have published a set of guidelines and policy recommendations on big data and, more generally, on the digital sector ("**Guidelines**").

The Guidelines have been published in the context of the sector inquiry on big data jointly launched by the Authorities,[1] anticipating the inquiry's final document which will be available by the end of 2019.

Content of the Guidelines

The Guidelines provide a high-level description of the Authorities' future lines of action in the digital sector, as well as a series of recommendations to public stakeholders with a view to adapt the existing legislative framework to be ready to face the challenges posed by big data and online platforms.

(i) Reduction of information asymmetries between digital platforms and users

Among the main policy goals set out in the Guidelines, the Authorities list the reduction of the **information asymmetries between digital operators** and **consumers in the collection of personal data**. To this end, users should be provided with an adequate information notice concerning *(i)* the purpose of the data collection process and of the intended use of the data collected by online platforms, as well as *(ii)* the degree of necessity of such data with respect to

[1] ICA, case No. IC53 – *Big Data*, resolution No. 26620 of May 30th, 2017.

the services provided by the platforms themselves. Similar measures should also be implemented in order to increase information transparency concerning user profiling methods (e.g., with regard to the ways in which digital operators select the information and content users are provided with).

The Authorities also consider that a reduction in information asymmetry is necessary **with respect to the relation between digital platforms and the business users active on them**, with particular reference to the criteria employed by platforms to analyze and process data (e.g., for the purpose of determining the ranking or visibility on the platform). In this regard, it should be noted that the upcoming EU regulation on promoting fairness and transparency for business users of online intermediation services will impose on providers of online intermediation services extensive information and transparency requirements concerning the parameters which determine the ranking of goods and services offered to consumers (on the platforms)[2].

(ii) Data access

Taking into account the increasing importance of data for the purpose of "*optimizing processes and decisions*", the Authorities put forward several recommendations concerning the way in which data should be accessed and made available.

In this respect, it is essential to facilitate **data portability** among different technological platforms, by defining open and inter-operable standards and by going beyond what is already provided – as far as portability is concerned – by Regulation (EU) No. 679 of 2016 (GDPR).

In connection to this point, the Authorities are looking forward to the entry into the market of the so-called **data brokers** which, on behalf of users, could negotiate with digital platforms the commercial use of the users' own data.

From a regulatory point of view, according to the Guidelines, limited regulatory intervention could be envisaged where access to data is to be ensured in the general interest. For example, in order to avoid the duplication of already available resources, the State could be left free to **access databases provided for by private undertakings** which are of general interest (e.g., for public health, environmental or safety reasons).

The Guidelines also highlight, with specific reference to competition law, that a dominant undertaking could be placed under the obligation to grant access to third parties where the data access is sought to are indispensable and not easily duplicable, in order to safeguard competition on those markets which the incumbent is active on.

(iii) Use of big data

The Authorities stress that big data should only be processed *(i)* after an **analysis of the nature of the data to be processed** (i.e., whether or not personal), so as to identify the applicable legislative framework; *(ii)* in case of use of anonymized data, after having assessed whether the individuals could be **identified** (due to the processing operations carried out or the dataset used). Moreover, public sector operators should always use big data in compliance with data protection laws, also with the help of data protection officers.

[2] To date, the Regulation has not been published yet on the Official Journal of the EU.

Moreover, the Guidelines call upon the Government and the Parliament to assess the need to promote an appropriate regulatory framework concerning "*full and effective transparency in the use of personal information*".

(iv) Intervention by the Authorities in the digital sector

According to the Guidelines, the characteristics of the digital sector require adjustments to the Authorities' powers and intervention methods. This would be particularly true with regard to the repression of both abusive conducts by digital operators and anti-competitive agreements, both facilitated by the use of increasingly sophisticated software and algorithms.

In this respect, the Authorities believe that it is necessary to **re-think the way in which relevant markets are defined**, especially because digital operators are usually active in multiple markets. At the same time, the analysis of potentially anti-competitive behaviours should take into account new criteria such as **quality**, **innovation** and **fairness** alongside the usual parameters, such as prices and volumes.

The **merger control system itself** should be adapted so as to allow competition authorities to assess those operations which, albeit below notification thresholds, are capable of eliminating any potential competition – such as the acquisition of particularly innovative start-up companies by bigger undertakings (so-called killer acquisitions). Pursuant to the Guidelines, an amendment to the current merger assessment test, provided for in Article 6(1) of Law No. 287 of 1990 and based on the dominance standard,[3] would be desirable, so as to take into account the broader assessment standard of the substantial impediment to effective competition (so-called SIEC test).[4]

The Guidelines also point out that the actual maximum level of fines imposed for infringements of consumer protection laws (equal to € 5 million) would not be proportionate to the large economic size of operators active in the digital sector, and that it would thus be desirable to increase the maximum amount of said penalties. In addition, the Guidelines emphasize that consumer protection rules are **complementary**, and not alternative, to data protection rules.[5]

In order to better understand how digital markets function, the Guidelines consider it necessary to **strengthen the ICA's and the ITA's powers to obtain information** outside of the context of investigations (e.g., in the pre-investigation phase or through sector inquiries). For example, the two Authorities could impose fines in cases of refusal to (or delay in) provide(ing) information, or in case the information requested was provided in an untruthful or misleading manner. The ITA has emphasized that the current platform self-regulation measures are not suitable to ensure online pluralism and transparency in the content selection process – thus calling for the attribution of adequate audit and inspection powers.

Lastly, the Guidelines enshrine the Authorities' commitment to, on the one hand, carry out advocacy activities in order to foster a proper development of digital markets and, on the other

[3] Pursuant to Article 6(1) of Law No. 287 of 1990, the ICA shall prohibit those concentrations which "*create or strengthen a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis*".
[4] This is the same test applied by the EU Commission when assessing concentrations, as enshrined in Article 2(2) of Regulation No. 139 of 2004: "[a] *concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market*".
[5] On this note, see ICA, case No. PS11112 - *Facebook*, resolution No. 27432 of November 29th, 2018.

hand, to work closely in their enforcement activities on these markets, including through the conclusions of memoranda of understanding.

Conclusions

The Guidelines provide useful indications of what the results of the sector inquiry on big data might be.

Firstly, the importance of access to data is clear not only to foster consumer and market welfare but, also, from a broader social point of view. This can be inferred from the recommendation to extend the scope of the current data portability obligations, as well as from the envisaged possibility for private undertakings to provide the State with access to their own databases. It can thus be expected that the Authorities will scrutinize with increasing attention the big data sector and the behavior of digital operators, which seems to also be confirmed by the ample room dedicated to these issues by the ICA Chairman during the presentation of the ICA 2018 annual report.

Secondly, it appears that the Authorities consider that their intervention tools do not require a makeover but a mere re-adjustment in order to face the challenges posed by digital markets. However, it is true that many of the measures outlined in the Guidelines will require an intervention by the legislator, whose timing may not be in line with the swift changes that characterize the sectors at hand.

Lastly, the Authorities' willingness to cooperate in their enforcement activities in the digital sector is certainly commendable. The combination of *ex-ante* and *ex-post* intervention tools will allow the Authorities to better deal with the complexities of the digital economy, and to avoid conflicting actions and double-jeopardy phenomena (in light of the prohibition of *ne bis in idem*).

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