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Highlights

— The ICA imposes on the TicketOne Group and five promoters a fine of approximately €10 million for an abuse of dominance in the market for ticketing services for pop music concerts

— The Court of Milan rejects a request for an expert's preliminary assessment of damages based on the 2017 Google Search (Shopping) decision of the European Commission

The ICA imposes on the TicketOne Group and five promoters a fine of approximately €10 million for an abuse of dominance in the market for ticketing services for pop music concerts

On December 22, 2020, the Italian Competition Authority (the "**ICA**") jointly and severally fined – in a total amount of approximately €10 million – the corporate entities belonging to the Eventim-TicketOne Group ("**TicketOne Group**"), namely: CTS Eventim AG & Co. KGaA ("**CTS Eventim**"), its subsidiary TicketOne S.p.A. ("**TicketOne**"), as well as five promoters of pop music live events in Italy, namely, Di and Gi S.r.l. ("**Di&Gi**"), F&P Group S.r.l. in liquidazione ("**F&P Group**"), Friends & Partners S.p.A. ("**Friends&Partners**"), Vertigo S.r.l. ("**Vertigo**") and Vivo Concerti S.r.l. ("**Vivo Concerti**", together, the "**Promoters**"), which CTS Eventim indirectly acquired between September 2017 and April 2018.[1] The ICA decision found that the TicketOne Group and the Promoters violated Article 102 TFEU by engaging since 2013 in a single and complex abusive strategy in the market for the provision of ticketing services for live pop music concerts (the "Decision").

Background

The Panischi agreements

In 2017, the ICA decided to open an *ex officio* investigation into the competitive landscape in the sale of tickets for live pop music events, in the wake of the expiration of the so-called "Panischi Agreements" between TicketOne and some of the main organizers of pop music concerts in Italy, which were in force between 2002 and 2017.

The two Panischi Agreements were notified for individual exemption to the ICA in 2001 pursuant to Article 13 of Law No. 287/1990 (the "**Italian**

[1] ICA, Decision of December 22, 2020, No. 28495, A523 – *TicketOne/Condotte escludenti nella vendita di biglietti*.

Competition Act"), and the ICA did not raise any objections to their content.[2]

Under the first one, the promoters granted TicketOne the exclusive right to distribute for 15 years (until July 31, 2017), through its online channel, an increasing percentage of tickets for events organized by them (i.e. 20% for the first two years; 25% for the second two years; and 30% from the fifth to the fifteenth year). Moreover, the online distribution of tickets (even beyond the above pre-established quotas) was entirely reserved to TicketOne. TicketOne was also granted the exclusive right to distribute tickets for each event during the first seven days of sale (within the limits of the above-mentioned quotas). The second agreement provided, on the one hand, for a 15-year non-compete obligation on TicketOne with regard to the organization and production of any kind of live events (except for sports and film events, as well as events concerning opera, classical and symphonic music). On the other hand, the promoters undertook to refrain from distributing tickets online for 15 years.

In September 2018, following its inquiries, the ICA decided to open the Article 102 investigation that led to the adoption of the Decision.[3]

The Decision

The alleged abusive conduct

In the Decision, the ICA found that the TicketOne Group held a dominant position in the market for ticketing services for pop music live events, due to the market dynamics resulting from the entry into force of the Panischi Agreements. In this context, according to the ICA, the TicketOne Group carried out a single and complex abusive strategy, which foreclosed access to the relevant market from both current and potential competing ticketing operators.

In particular, the ICA held that the exclusivity clauses provided for by the Panischi Agreements enabled TicketOne to be the only market player with a full and in-depth knowledge of the Italian market for live music concerts. As a consequence, TicketOne could gather strategic commercial information (e.g., on the number and type of tickets purchased by consumers and, at the same time, on the tickets sold by each artist). This strategic information allegedly provided TicketOne with competitive advantages that could not be replicated by its competitors.

The ICA found that TicketOne's alleged exclusionary strategy consisted of: (i) entering into agreements containing exclusivity clauses with promoters from 2013 to 2018; (ii) the acquisition of the companies Di&Gi, Friends&Partners, Vertigo and Vivo Concerti; (iii) the imposition of exclusivity clauses on local promoters; (iv) the signing of commercial agreements containing exclusivity clauses with smaller or local ticketing operators; and (v) boycott and retaliatory measures carried out against a number of operators (such as Zed Entertainment's World S.r.l. ("**Zed**"), Sol Eventi S.r.l. and Ticketmaster Italia S.r.l. ("**Ticketmaster**").

(i) TicketOne's agreements with promoters

In the Decision, the ICA took issue with the following clauses in favor of TicketOne: (i) quantitative exclusivity concerning almost all tickets for pop music concerts produced and/or organized by nearly all the promoters active in Italy (including the Promoters); (ii) temporal exclusivity, on the basis of which TicketOne had the absolute and exclusive right to sell tickets for a certain number of days at the beginning of the pre-sale period for each event, exclusively online; and (iii) full exclusivity for online distribution of the tickets. Moreover, some agreements included specific non-compete clauses, by virtue of which the tickets for the events organized by the promoters (also through related companies) fell within the scope of the exclusivity clauses in favor of TicketOne.

[2] ICA, Decision of March 14, 2002, No. 10504, I505 – *TicketOne/Promotori*. Under Article 13 of the Italian Competition Act, companies may apply for an individual exemption from the prohibition of anticompetitive agreements by notifying agreements to the ICA on a voluntary basis. This provision, albeit formally still in place, is in practice no longer applied since the abolition of the system of voluntary notification at EU level by Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[3] ICA, Decision of September 20, 2018, No. 27331, A523 – *TicketOne/Condotte escludenti nella vendita di biglietti*.

The ICA found that the temporal exclusivity clauses were capable of entirely suppressing competition between ticketing operators during a key moment of the pre-sale phase. Tickets for events of major artists are usually sold out already during the pre-sale phase. As a consequence, the ICA found that such clauses were likely to strengthen the exclusivity granted to TicketOne, as they prevented competing ticketing operators from competing against the incumbent during the pre-sale phase. Likewise, the online exclusivity clauses agreed upon with the promoters allegedly enabled the TicketOne Group to retain the competitive advantage towards competing ticketing operators achieved in the past due to the Panischi Agreements, as they prevented competing ticketing operators from putting together a database and an online sales platform capable of competing with those of the incumbent.

Furthermore, according to the ICA, the anticompetitive effect of the contracts at stake could also be inferred from their duration (which exceeded two years). In this regard, the ICA relied on both the European Commission's Guidance on the application of Article 102 TFEU to exclusionary abuses[4] and on EU case law.[5]

(ii) Acquisition of the Promoters

Over the years, the TicketOne Group acquired Di&Gi, Friends&Partners, Vertigo and Vivo Concerti. Following these acquisitions, all tickets for events produced and/or organized by the Promoters were no longer made available to competing ticketing operators.

According to the ICA, these acquisitions allowed the TicketOne Group to strengthen the impact of its exclusionary strategy. In particular, by vertically integrating upstream with the Promoters (i.e., four of the main national promoters active in the market for the production of pop music concerts in Italy), the TicketOne Group established "*captive relationships*" with these operators. It thus consolidated its dominant position in the market for the sale of tickets for pop music concerts. In addition, the ICA found that the TicketOne Group subsequently concluded agreements with these "*captive*" Promoters, with a view to forcing them to apply exclusivity clauses in favor of TicketOne also in the context of their downstream relationships with local promoters (see below).

(iii) Imposition of exclusivity clauses on local promoters

In the ICA's view, a further key aspect of the TicketOne Group's exclusionary conduct was that it forced national promoters (by virtue of structural or contractual links) to impose exclusivity clauses in favor of the TicketOne Group also downstream on local promoters, whenever the latter acquired from national promoters the rights to organize specific music events.

The ICA found that under Italian law the exclusivity clauses agreed upon between the TicketOne Group and the national promoters would not, as such, automatically bind local promoters. As a consequence, the TicketOne Group would have in principle been exposed to the risk that local promoters could entrust competing ticketing operators with the sale of tickets for the events.

In particular, the ICA found evidence that the TicketOne Group forced national promoters to apply to local promoters the same economic conditions agreed upon with the TicketOne Group, e.g., service fees for the sale of tickets. Furthermore, national promoters systematically sent notices to local promoters to obtain their express consent to comply with the exclusivity clause in favor of TicketOne.

[4] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, (2009/ C 45/02), § 36.

[5] See, among other things, Court of Justice, Judgment of September 6, 2017, C-413/14 P, *Intel Corporation Inc. v. Commission*, ECLI:EU:C:2017:632, § 137; Court of Justice, Judgment of February 13, 1979, C-85/76, *Hoffmann-La Roche v. Commission*, ECLI:EU:C:1979:36, § 89.

(iv) Commercial agreements with smaller or local ticketing operators

As established in the Decision, TicketOne also entered into commercial agreements with smaller or local ticketing operators, making them intermediaries of TicketOne. In particular, these agreements provided that local ticketing operators entrusted TicketOne with the exclusive mandate to distribute tickets for all their events. They also committed to exclusively use TicketOne's ticketing office in their physical points of sale. In the ICA's view, the online ticket stores operated by these smaller or local ticketing operators merely acted as a "storefront" for promoting events, but then redirected consumers to purchase tickets directly on TicketOne's online store.

As a consequence, the smaller or local ticketing operators were entirely prevented from autonomously selling online the tickets for their events. Moreover, the TicketOne Group could further extend its distribution network throughout Italy, thus hindering the possibility for competing ticketing operators (particularly those active on a local basis) to use local physical networks of sale.

(v) Retaliatory and boycott measures

Finally, the ICA found that the TicketOne Group carried out boycott and/or retaliatory actions, through national promoters, against local promoters who refused to comply with the terms and conditions imposed by TicketOne, for example, when competing local promoters expressed their willingness to distribute part of the tickets for certain music events through other ticketing operators, thus refusing to grant TicketOne exclusivity for the whole of the tickets.

In particular, the ICA found that the TicketOne Group carried out boycott and retaliatory conduct against Zed, the only market player that had actually tried to oppose the TicketOne Group's exclusionary strategy. Among other things, the TicketOne Group: (i) refused to pay for services already provided by Zed (unless Zed abided by TicketOne's exclusivity rights); (ii) promoted events for which an agreement had not yet been reached with Zed; and (iii) unilaterally cancelled a number of events to be organized at venues run by Zed.

The foreclosure effects on the market

According to the ICA, in light of the evidence collected, the overall exclusionary strategy implemented by the TicketOne Group resulted in the foreclosure of approximately 60% of the relevant market (taking into account the value of the tickets which could be exclusively sold by the TicketOne Group by virtue of the agreements providing for exclusivity clauses).

The ICA concluded that the TicketOne Group's exclusionary strategy had detrimental effects on end-users, as it deprived them of the potential benefits of so-called *multi-homing* (i.e., the use of more than one platform simultaneously). In particular, end-users could not benefit from a greater variety and quality of ticketing services when purchasing tickets for pop music concerts. Nor could they enjoy the potential reduction in the overall price of these tickets resulting from the availability of the tickets on different platforms. Furthermore, evidence showed that fees levied by TicketOne in the context of the sale of tickets were the highest on the market.

Regarding the duration of the alleged abusive conduct, the ICA held that it started in June 2013, when TicketOne entered into an agreement (providing for exclusivity in favor of TicketOne) with Di&Gi, which was not part of the Panischi Agreements and at the time was already a major national promoter. The ICA also found that the abuse was still ongoing at the time of the adoption of the Decision.

Fine and behavioral measures

The TicketOne Group and the Promoters were jointly and severally fined in the amount of €10,868,472. In setting the fine, pursuant to

Article 34 of the ICA Guidelines on the method of setting pecuniary administrative fines,[6] the ICA took into account the current Covid-19 pandemic crisis and the serious economic crisis affecting the relevant industry, and reduced its amount by 70%.

In addition, the ICA ordered the TicketOne Group and the Promoters: (i) to allow other ticketing operators to sell, by any means and through any channel, under fair and non-discriminatory terms, at least 20% of the total number of tickets for events produced or distributed by the Promoters or by ticketing operators tied to the TicketOne Group by way of exclusivity clauses; and (ii) to refrain from imposing exclusivity clauses on local promoters that had acquired from national promoters the right to organize specific events.

The Court of Milan rejects a request for an expert's preliminary assessment of damages based on the 2017 Google Search (*Shopping*) decision of the European Commission

On January 4, 2021, the *Tribunale di Milano* (the "**Court of Milan**") rejected a request for an expert's preliminary assessment of damages in a civil action brought by 7 Pixel s.r.l. ("**7 Pixel**") against Google LLC ("**Google**", together with 7 Pixel, the "**Parties**").[7] The Court of Milan rejected Pixel's attempt to use a swift settlement-like procedure on the basis of Article 696-*bis* of the Italian Code of Civil Procedure, which allows the judge to order an expert's report providing an upfront assessment of the damages.

7 Pixel's claim was brought as a follow-on action to the decision of the European Commission (the "**Commission**") in the *Google Search (Shopping)* case (the "**Decision**").[8]

The Decision

On June 27, 2017, after almost seven years of investigation, the Commission fined Google a record-breaking €2.42 billion for an alleged abusing its dominance in violation of Article 102 TFEU since May 2011 through June 2017. In particular, the Commission found that Google leveraged its dominance in the market for general internet search into the market for comparison shopping services ("**CSSs**")[9] by favoring its own shopping comparison service, Google Shopping, in general search results, to the detriment of third-party comparison shopping services. In particular, it found that Google systematically positioned and displayed its CSSs at or near the top of its general search results, with a view to promoting its own CSSs in Google Search results, whilst demoting those of rivals.

According to the Commission, because Google's competitors in the CSS market are subject to its generic search algorithms, Google's conduct may potentially foreclose CSSs and may lead to anticompetitive effects by enabling Google to raise prices and diminish innovation[10].

[6] ICA Resolution No. 25152 of October 22, 2014 – Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15(1) of Law No. 287/90.

[7] Court of Milan, Order of January 4, 2021, Case No. 59172/2019, *7 Pixel/Google*.

[8] Commission decision of June 27, 2017, Case COMP/AT.39740 *Google Search (Shopping)*.

[9] CSSs are online search services that allow users to search for products and compare their prices and characteristics across offers from different merchants. In the Decision the Commission concluded that CSSs constitute a distinct product market that excludes merchant platforms (e.g., Amazon and eBay).

[10] On September 11, 2017, Google filed with the General Court of the European Union (the "**General Court**") an application for annulment of the Decision (OJ 2017, C 369/51).

The proceeding started by 7 Pixel

(i) Background and Parties' arguments

Under the Damages Directive,[11] as implemented into the Italian legal system in 2017,[12] any individual who has suffered harm caused by an infringement of competition law can effectively exercise the right to claim full compensation for that harm. The Directive includes both substantial and procedural provisions and offers a comprehensive legal framework for actions commenced by anyone damaged by an infringement of competition law.

7 Pixel is active in the Italian market for online CSSs through several websites. Considering itself to be an injured party as a result of Google's conduct alleged in the Decision, 7 Pixel brought an action for damages before the Court of Milan, claiming compensation for the harm allegedly suffered. The claimant estimated its damages to amount to between €811 and €906 million.

However, 7 Pixel did not request the Court of Milan to carry out a substantive assessment of the alleged anticompetitive conduct. It claimed that the Commission in the *Google Search (Shopping)* case had already established the existence of the infringement of competition law as well as the causation link between the alleged harm to CSS providers and Google's unlawful conduct. As a result, 7 Pixel argued that the only requirement left to be established by the Court of Milan was the amount of damage actually suffered.

On these grounds, 7 Pixel asked the Court of Milan – pursuant to Article 696-*bis* of the Italian Code of Civil Procedure – to appoint an expert who would carry out a preliminary assessment of the damages incurred by the claimant due to Google's abusive conduct.

The rationale for requesting this early quantification was to increase the chances of reaching a successful out-of-court settlement with Google, thereby avoiding a lengthier litigation.

Google, however, countered that 7 Pixel's action was inadmissible and unfounded. It argued that:

— in the Decision the Commission did not establish the existence of a causal link between Google's conduct and the alleged damage suffered by 7 Pixel or any other undertaking. The Commission only found that Google's conduct could "*theoretically and potentially be susceptible*" to causing harm;

— in any event, 7 Pixel's revenues generated through the Google Search browser had increased from €89 million to €143 million during the six-year period considered in the Decision;

— Google's action for annulment of the Decision is pending before the General Court. Therefore, the anticompetitive character of Google's behavior, the occurrence of the damage and the causal link between the infringement and the damage have not been definitively established;

— finally, 7 Pixel, despite characterizing its claim as a follow-on action to the Decision, alleged it would suffer damages until 2023, i.e., well beyond the timeframe that was considered in the Decision, therefore departing from the Commission's findings.

(ii) The Court of Milan's decision

By reference to its recent case-law,[13] the Court of Milan stated that a preliminary assessment

[11] Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[12] Legislative Decree No. 3 of January 19, 2017.

[13] Court of Milan, order of May 10, 2019.

by a technical expert pursuant to Article 696-*bis* of the Italian Code of Civil Procedure may be considered admissible only when the case does not require the prior resolution of complex legal issues or the appreciation of facts that are outside the scope of the court's technical appraisal. Once the expert's assessment has been provided, the parties should be able to reach a settlement without other issues remaining unresolved or controversial.

The Court of Milan found that these conditions were not met in the case at issue. In particular:

— the Commission's Decision was not final and the required elements for damage claims had not been ascertained yet. Therefore, its decision on the case would still require an in-depth and complex analysis in relation to the existence of the infringement, the occurrence of damages, and the causation link;

— in addition, the Court of Milan referred to Article 16(1) of Regulation 1/2003, pursuant to which national courts, where they rule on anticompetitive conduct under Article 101 or 102 TFEU that is already the subject of a Commission decision, cannot take decisions running counter to the decision already adopted by the Commission, and must avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated, as applicable. A national court may therefore opt to stay proceedings brought in reliance on a Commission decision where that decision is subject to judicial review proceedings before the EU courts, so as not to reach a judgment that is irreconcilable with the outcome of those proceedings. The Court of Milan referred to a judgment by the Italian Supreme Court of Cassation according to which a national court, in deciding whether or not to suspend the proceedings pending before it, must be particularly cautious, so as to avoid even the mere possibility that its decision might interfere with that to be taken by the EU courts, thus rendering such decision contrary to EU law.[14]

— The Court of Milan – while envisaging the possibility of staying the proceedings – also stressed that the non-final nature of the Decision and the pleas that Google raised in its action for annulment before the General Court directly impinged on the potential finding of liability for antitrust harm as well as on the causation requirement. Since such complex questions can only be adequately ascertained in an adversarial proceeding on the merits of the case, the Court held that7 Pixel's request for a preliminary assessment of the damages to be carried out by an expert, far from facilitating a settlement between the Parties, would only make the matter more complex;

— the Court added that the Commission's Decision, which is not final, cannot be relied on to establish the occurrence of damages and the liability for anticompetitive conduct that took place after the timeframe considered in the Decision. Indeed, the Court found that the case before it should be characterized as a stand-alone action (as opposed to a follow-on one) and, therefore, 7 Pixel should discharge the evidential burden with regard to, at least, the existence of the unlawful conduct and its consequences in terms of damages.

In light of all the above considerations, the Court of Milan rejected 7 Pixel's request as inadmissible.

[14] Italian Supreme Court of Cassation, Order No. 10880, May 25, 2016.

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