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Italian Competition Law

Newsletter

Highlights

- The ICA conditionally clears a major acquisition in the Italian road and highway fuel distribution sectors

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On August 1, 2023, the Italian Competition Authority (“ICA”) approved the acquisition by Italiana Petroli S.p.A. (“IP”) of the fuel distribution business of Esso Italiana S.r.l. (“Esso”) (together with IP, the “Parties”) (the “Transaction”), subject to the implementation of certain remedies.¹

Background

On May 10, 2023, the Parties notified the Transaction to the ICA, which consisted in the acquisition by IP *inter alia* of: (i) all of Esso’s oil distribution activities in Italy, with the exception of the lubricants and chemicals business; (ii) Esso’s shareholdings in companies that operate refineries and own fuel depots; and (iii) all of Esso’s contracts for the supply of bitumen, gasoline and diesel that were linked to its oil distribution activities.

On June 19, 2023, the ICA opened an in-depth investigation into the Transaction.

The ICA Decision

The relevant markets and the parties’ position in those markets

According to the ICA, the Transaction would affect the structure of competition in the following markets: (i) the markets for the wholesale and retail sale of petroleum products so-called “off-network”, *i.e.*, outside the Italian road and highway networks; and (ii) the markets for the retail sale of fuels in the Italian road and highway networks.

With regard to the “off-network” wholesale and retail sales of petroleum products, the ICA defined the relevant markets on the basis of catchment areas with a radius of

¹ ICA, Decision No. 30745 of August 1, 2023, Case C12535 – IP Italiana Petroli /Esso Italiana.

150 km around the fuel stations. A similar definition of the relevant markets was adopted for the markets for the retail sale of fuels in the road and highway networks, which the ICA defined as being limited to a 15-minute driving radius from the first-choice fuel station and a 60-kilometre catchment area, respectively.

On this basis, the ICA concluded that, after the Transaction, the Parties would hold, in the “off-network” wholesale and retail markets for petroleum products, a combined market share of more than 40%, after an increase of at least 3%. In the highway fuel distribution market, the Parties would hold a combined market share: (i) in terms of number of fuel stations, of greater than or equal to 30% in 52 local markets, greater than or equal to 40% in 41 local markets, and greater than or equal to 50% in 15 local markets; and (ii) in terms of volumes supplied, of greater than or equal to 30% in 43 local markets, greater than or equal to 40% in 31 local markets, and greater than or equal to 50% in 17 local markets.

In the road fuel distribution market, the Parties would have a combined market share: (i) in terms of number of fuel stations, of greater than or equal to 30% in 2,342 local markets, greater than or equal to 40% in 935 local markets, and greater than or equal to 50% in 191 local markets; and (ii) in terms of volumes supplied, of greater than or equal to 30% in 1,132 local markets, greater than or equal to 40% in 419 local markets, and greater than or equal to 50% in 99 local markets.

The ICA’s analysis

The ICA found that the Transaction would significantly restrict competition, because it would:

- (i) strengthen the position, at all levels of the supply chain, of a vertically integrated operator, which would control two of the most important refineries in Italy and an extensive logistics network and would also be a major supplier of independent service stations, so-called “*white label stations*” (*pompe bianche*);²
- (ii) allow the post-merger entity simultaneously to control two important “*historical*” brands in the fuel distribution market in Italy, so as to become the leading operator in terms of network size (with approximately 29% of the fuel stations, compared to 18% of the second largest operator in the market) and volume (with a share of almost 25%), with widespread operations throughout Italy; and
- (iii) lead to a deterioration in the economic conditions of IP customers (whether retailers or final consumers) and increase prices of oil products.

The remedies proposed by the Parties

In order to address the competition issues identified by the ICA, IP offered a number of remedies, including:

- (i) a commitment to make available to non-vertically integrated third-party operators the possibility to use storage and transit capacity of its major integrated system in Italy, for 15 years;
- (ii) a commitment to provide 12,000 tons of gasoline and 12,000 tons of liquefied petroleum gas (LPG) to third-party operators and at a cost-oriented price, for 5 years; and

² White pumps are independent service stations that are not part of the network of the major fuel distribution companies (such as IP and Esso), and can therefore decide how much product to purchase, from whom, and what price to apply to customers.

- (iii) a commitment to renegotiate the contracts with so-called “*branded wholesalers*” (*i.e.*, independent operators who have signed an exclusive contract with Esso and obtained a sub-license for the use of the brand), so as to provide for a reduction of the minimum purchase quantities and the possibility for such wholesalers to release 20% of the demand from exclusivity.

The ICA’s assessment of the proposed remedies and the additional measures imposed on IP

The ICA found that the above remedies were suitable to address the competition issues it had identified, subject to certain improvements. Indeed, unlike the European Commission, the ICA is empowered to

authorize a concentration subject to remedies that may differ from those offered by the notifying parties.

In particular, regarding the commitment under (i) above, the ICA held that the transit and storage capacity to be made available to third-party operators should be clearly set out in advance, taking as a reference IP’s sales in 2022.

As regards the commitment under (ii) above, the ICA found that it should be extended to kerosene, in the volume of 6,333 tons.

Regarding the commitment under (iii) above, the ICA found that the percentage of 20% proposed by the Parties was not sufficient to remove its competition concerns and should therefore be increased to 30%.

Other developments

The Council of State confirms its approach to margin squeeze cases

On August 7, 2023,³ the Council of State granted the ICA’s appeal and set aside a judgment of the TAR Lazio that had previously annulled an ICA decision of 2017, imposing a fine of approximately €3.7 million on Telecom Italia S.p.A. (“TIM”).⁴ In that decision, the ICA found that TIM, together with its subsidiary Telecom Italia Sparkle S.p.A. (jointly, “**Telecom Italia**”), abused its dominant position on the wholesale market for SMS termination on its own network, leading to

a restriction of competition through a margin squeeze on the downstream retail market for bulk SMS services.

The Council of State explicitly referred to its recent ruling on Vodafone’s appeal (see note 12 above), from which it saw “*no reason to depart and to which [it] refer[red] for an extensive and analytical reconstruction of the system and its main features*”.⁵

The Court endorsed again the ICA’s approach in carrying out the so-called “*as-*

³ Council of State, Judgment No. 7608 of August 7, 2023.

⁴ ICA, Decision No. 26902 of December 13, 2017, Case A550B– *Telecom Italia-SMS informativi aziendali*. On the same day, the ICA closed a parallel investigation into similar margin squeeze conduct by Vodafone Italia. As in the Telecom Italia case, the TAR Lazio annulled the ICA decision concerning Vodafone, but its decision was later set aside by the Council of State (Judgment No. 3793 of April 14, 2023, discussed in the March-April 2023 newsletter available at <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-march-april.pdf>).

⁵ Council of State, Judgment No. 7608 of August 7, 2023, §10.

efficient competitor test".⁶ The Court also stated that "*the abusive nature of the margin squeeze practice being scrutinized as well as its anti-competitive effect on the market, must be real, but need not be tangible: it is sufficient [for the ICA] to show a potential anti-competitive effect*".⁷

Having confirmed the ICA's findings that Telecom Italia was dominant and engaged in abusive practices, the Council of State upheld also the amount of the fine.

⁶ The ICA decision had determined the threshold price for the "*as-efficient competitor test*" by taking into account only the wholesale price charged by the dominant operator to the undertakings active on the downstream market (in this case, respectively, Telecom Italia and the undertakings providing the bulk SMS service). The ICA rightly did not take into account the price imposed by other operators, such as the intermediary aggregators (which purchase SMS termination services from the upstream market in order to resell them to the bulk SMS providers) since, "*even if there are entities involved in the resale of SMS (secondary market, transit, intermediation, and SMS HUBs), these entities will still purchase SMS from Telecom Italia; it follows that an increase in the SMS termination rate will be passed on to the resellers downstream*" (ICA, Decision No. 26902 of December 13, 2017, Case A/550B – *Telecom Italia-SMS informativi aziendali*, §§227 onwards).

⁷ Council of State, Judgment No. 7608 of August 7, 2023, §16.2.

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