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Italian Competition Law Newsletter

Highlights

— The ICA Fines Amazon and Apple for Restricting Competition in the Sales of Apple and Beats Products on Amazon Marketplace

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The ICA Fines Amazon and Apple for Restricting Competition in the Sales of Apple and Beats Products on Amazon Marketplace

On November 16, 2021, the Italian Competition Authority (the "**ICA**" or the "**Authority**") imposed a fine of €134.5 million on Apple Inc. and certain of its subsidiaries ("**Apple**") and a fine of €68.7 million on Amazon.com Inc. and certain of its subsidiaries ("**Amazon**"; together with Apple, the "**Parties**") for restricting certain resellers of Apple products, including those of the Apple-owned brand Beats, from accessing the online marketplace of Amazon ("**Amazon Marketplace**").[1]

The Complaint

In February 2019 the ICA received a complaint by Digitech, a company active in the marketing of electronic products. The said complaint concerned the online sales system for Apple and Beats branded products through Amazon Marketplace, which is not only the most important marketplace in Italy but also the most widespread platform for Italian consumers to purchase consumer electronics products online.

The complainant asserted that, following an alleged agreement between the Parties, Amazon removed from Amazon Marketplace certain

[1] ICA Decision No. 29889, Case I842 – *Vendita prodotti Apple e Beats su Amazon Marketplace*. By Decision of December 14, 2021, No. 29947, the ICA re-determined the amount of the fines imposed on the Parties as it found that it had committed clerical errors in its calculation. As a result, the final fines amounted to €114,681,657 for Apple and €58,592,754 for Amazon.

resellers of Apple, which had until then regularly and lawfully offered Apple and Beats products.

The Infringement

The ICA's investigation focused on certain clauses of an agreement entered into on October 31, 2018 between the Parties, establishing that Amazon could not allow resellers other than those specifically identified in such agreement to use Amazon Marketplace in order to sell Apple and Beats products (the "**Agreement**").

The ICA assessed whether, on the basis of the evidence in the casefile, the Agreement actually empowered the Parties to foreclose the resellers excluded from Amazon Marketplace.

It found that, despite the Agreement's wording and the precautions taken by the Parties to conceal their real intentions (*e.g.*, when drafting internal documents and official correspondence), they planned to introduce via the Agreement a purely quantitative restriction on the number of resellers operating on Amazon Marketplace. The Agreement prevented a substantial number of resellers of Apple and Beats branded products, identified in a discriminatory manner, from accessing a very important distribution channel for online sales, especially for small and medium-sized enterprises. The Agreement therefore had significantly negative effects on competition.

Moreover, the Agreement restricted cross-border sales, as it prevented sales of Apple and Beats products to resellers established outside a select number of EU Member States. These resellers were also discriminated against because of their geographical origin.

Finally, according to the ICA, the Agreement affected the discounts available for Amazon and Beats products sold on Amazon Marketplace. In particular, by restricting the number of resellers allowed to use Amazon Marketplace, the general level of discounts decreased to the detriment of consumers.

In light of the above, the ICA concluded that the Agreement infringed Article 101(1)(b) and (d) TFEU.

The TAR Lazio Upholds a Fine Imposed on COREPLA for Abusing its Dominant Position in the Market for Plastic Waste Recycling Services

On November 22, 2021, the Regional Administrative Court of Latium (the "**TAR Lazio**") rejected the application for annulment, lodged by the Italian Consortium for the Collection, Recycling and Recovery of Plastic Packaging ("**COREPLA**"), against the decision by which the ICA fined COREPLA in an amount in excess of €27 million, under Article 102 TFEU, for abusing its dominance in the Italian market for plastic waste recycling services (the "**Decision**").[2]

Background

Article 221 of the Italian Environment Act[3] established the principle of extended producer responsibility, under which manufacturers of plastic packaging are subject to significant financial penalties in case of non-compliance with their obligations of treatment and disposal of post-consumer products. Plastic packaging manufacturers may comply with their statutory obligations by participating in consortia that treat and recycle plastic waste.

[2] TAR Lazio, Judgment No. 11997/2021, and ICA Decision of October 27, 2020, No. 28430, Case A531 – *Riciclo imballaggi primari /condotte abusive COREPLA* (as discussed in the November 2020 issue of this Newsletter, https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-november-2020.pdf).

[3] Italian Legislative Decree of April 3, 2006, No. 152.

COREPLA was the sole consortium operating in Italy for a number of years, until certain plastic manufacturers decided to establish another consortium, the *Consorzio volontario per riciclo del PET* ("**CORIPET**"). In 2018, the Italian Ministry of Environment granted CORIPET a temporary license subject to the achievement of certain targets in terms of effectiveness, efficiency and self-sufficiency necessary for the granting of a permanent authorization within two years' time. Shortly thereafter, CORIPET complained to the ICA that COREPLA had engaged in practices aimed at making it impossible for CORIPET to meet the above-mentioned targets.

In 2019, the ICA opened an investigation into COREPLA's alleged exclusionary practices. Eventually, the ICA found that: (i) COREPLA held a quasi-monopoly position in the relevant market even after CORIPET's entrance; and (ii) COREPLA abused its significant market power, including by: enforcing exclusivity clauses in its contracts with local authorities and sorting plants; inducing the sorting plants to boycott an auction organized by CORIPET; continuing to manage the plastic waste of some of its members even if they had stopped paying their membership fees to COREPLA; and refusing to enter into an agreement with CORIPET that would have allowed CORIPET to manage part of the plastic waste in lieu of COREPLA. For these practices, the ICA imposed a €27,400,477 fine on COREPLA.

The TAR Lazio's Ruling

The TAR Lazio entirely dismissed COREPLA's application for annulment of the Decision.

COREPLA argued that the ICA's conclusions were ill-founded because the applicable regulatory framework did not allow operators other than COREPLA to treat and recycle plastic waste without the consent of the local authority in charge of waste collection. The Court, however, disagreed with COREPLA's interpretation of the regulatory framework. According to the TAR Lazio, the rules in force did not prevent consortia other than COREPLA from operating on the market. Nor could COREPLA's conduct be justified on grounds that the regulatory framework was unclear.

Moreover, the TAR Lazio took the view that each of the practices sanctioned by the ICA was part of the same exclusionary strategy by which COREPLA sought to delay CORIPET's market entry as long as possible, including by signaling to any potential competitors that COREPLA would vigorously fight any such entry attempt (by CORIPET or others).

Finally, the TAR Lazio also upheld the ICA's calculation of COREPLA's fine, which in its view complied with the ICA's fining guidelines, in particular taking into account that COREPLA's conduct was aimed at shielding a quasi-monopolistic position from competition and produced anticompetitive effects by delaying CORIPET's entry in the market. Because of this, the TAR Lazio confirmed the ICA's qualification of COREPLA's conduct as a "very serious" infringement of competition law.

The Court of Naples Again Awards Antitrust Damages Quantified on an Equitable Basis in Follow-on Litigation Stemming from the EU "*Trucks*" Case

On October 20, 2021, the Court of Naples upheld a claim for damages filed by an Italian logistics company (the "**Applicant**"), on the basis of a European Commission decision of July 2016,[4] against truck manufacturer Iveco S.p.A. ("**Iveco**"), in connection with the plaintiff's purchase of numerous trucks from the defendant. According to the European Commission decision, Iveco and four other truck manufacturers colluded for over 13 years on truck pricing and on the costs of compliance with emission rules (the "**EC Decision**").[5]

This is the second known follow-on case stemming from the EC Decision in which an Italian court has awarded damages quantified solely on an equitable basis (*i.e.*, 15% of the trucks' net purchase prices). In July 2021, the Court of Naples already took the same approach, and followed the same analytical framework, in a similar case.[6]

However, the previous judgment accepted a claim for damages in connection with the purchase of one truck only, for which the defendant was eventually ordered to pay €11,550, whereas the new ruling of the Court involved the purchase of more than 30 trucks and resulted in an order on the defendant to pay damages in a much higher amount (approximately €380,000).

[4] Court of Naples, Judgment of October 20, 2021, No. 8570.

[5] European Commission, Decision of July 19, 2016, Case AT.39824 – *Trucks*.

[6] Court of Naples, Judgment of July 19, 2021, No. 6319 (as discussed in the August 2021 issue of this Newsletter, https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--august-2021-pdf).

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