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Italian Competition Law Newsletter

Highlights

- The Supreme Court dismisses an appeal on a follow-on action for damages and confirms the judgment of the Rome Court of Appeal that had ordered the incumbent in the Italian electronic communications sector to pay approximately €6 million in damages
- The Supreme Court upholds an appeal against a judgment of the Milan Court of Appeal that had declared inadmissible the appeal against a first instance ruling dismissing a follow-on damages action against the Italian electronic communications sector's incumbent

The Supreme Court dismisses an appeal on a follow-on action for damages and confirms the judgment of the Rome Court of Appeal that had ordered the incumbent in the Italian electronic communications sector to pay approximately €6 million in damages

In a judgment dated January 28, 2025 (the “Judgment”),¹ the Supreme Court rejected the appeal brought by Telecom Italia S.p.A. (“**TIM**”) against a judgment of the Rome Court of Appeal in a follow-on action for damages. The Rome Court of Appeal ordered TIM to pay COMM 3000 S.p.A. (formerly KPNQwest S.p.A., “**COMM 3000**”) approximately €6 million in damages for alleged abuse of dominant position in the market for the provision of wholesale access services. The ICA had imposed a fine for the alleged abuse in 2013.²

Background

At the time of the relevant facts, in order to provide electronic communications services to final customers, the other licensed operators (“**OLOs**”) needed access to TIM’s fixed network. When the OLOs acquired new customers, they sent TIM a request to activate the wholesale access services needed to provide users with retail electronic communications services. This process could either have a positive outcome for

¹ Supreme Court, Judgment No. 1923 of January 28, 2025.

² Rome Court of Appeal, Judgment No. 2650 of April 13, 2021, discussed in the April 2021 issue of this newsletter: <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--april-2021-pdf.pdf>.

the OLOs, leading to the provision of the retail service to final customers, or a negative outcome, when TIM communicated the presence of one of the circumstances provided for by sector-specific regulation, which prevented the activation of wholesale access services.

In a decision dated May 9, 2013, in the A428 case (the “**A428 Decision**”),³ the ICA stated that, in the period 2009-2011, TIM had allegedly abused its dominant position by communicating an unjustifiably high number of refusals to activate wholesale access services (“**KOs**”), thus hindering the expansion of competitors in the markets for voice telephony services and broadband internet access. In particular, the ICA found that the procedures for the provision of wholesale access services to competitors and to TIM’s commercial divisions did not coincide. In the ICA’s view, the differences between external and internal procedures were not unlawful *per se*, but they had resulted in higher percentages of KOs for competitors compared to TIM’s commercial divisions, which allegedly amounted to abusive discriminatory treatment.

In the civil proceedings, COMM 3000 claimed that, in the period 2009-2011, it had been harmed by the conduct contested by the A428 Decision, as it had allegedly received percentages of refusals to activate higher than those received by TIM’s retail divisions, due to a more complex and less efficient delivery process. COMM 3000 therefore asked the Court of Rome to award approximately €37 million in damages. The Court of Rome appointed an expert to (i) verify the percentages of KOs received by COMM 3000 in the period 2009-2011; (ii) compare them with the percentages of KOs received by TIM’s internal divisions; (iii) verify and quantify the damages allegedly suffered by COMM 3000 (in terms of higher costs and loss of customers) and their causal link with the conduct found by the ICA in the A428 case.

Following the submission of the expert opinion, on April 30, 2019, the Court of Rome found that TIM had abused its dominant position, and ordered TIM to: (i) refrain from reiterating the contested conduct; and (ii) pay COMM 3000 approximately €8.4 million in damages (€377,000 for higher costs and €8 million for loss of profit).⁴

TIM challenged the judgment before the Rome Court of Appeal, on the grounds that, *inter alia*, the court of first instance had wrongly assessed the alleged discriminatory treatment, and there was no evidence of the damage supposedly suffered, the causal link between such damage and the alleged conduct, and the fault requirement. Moreover, TIM contested the quantification of damages.

The judgment of the Rome Court of Appeal

In judgment No. 9115 of April 13, 2021, the Rome Court of Appeal partially dismissed TIM’s appeal, but reduced the damages for loss of profit from €8 million to approximately €5 million.

The Rome Court of Appeal stated that, according to settled case law, the final decision of a competition authority amounts to “*privileged evidence*” of the existence, nature and scope of the infringement. However, the claimant bears the burden of proving, *inter alia*, that: (i) it was actually affected by the contested conduct; (ii) it suffered damage; and (iii) there was a causal link between the conduct and the alleged damage, on the basis of ordinary rules on burden of proof.

The Court then assessed whether the facts alleged and the evidence submitted by COMM 3000 satisfied the legal standard. The Court seemed to consider that, as COMM 3000 was active in the market affected by TIM’s alleged anticompetitive conduct, it was likely harmed by the conduct. In the Court’s view, since the activation of wholesale access services was a standardized process affecting all players in the relevant market, COMM 3000 would have been negatively impacted by it.

³ ICA Decision of December 21, 2016, No. 26310, Case A428C, *Wind-Fastweb/Condotte Telecom Italia*.

⁴ Court of Rome, Judgment No. 9115 of April 30, 2019.

The Court came to this conclusion notwithstanding the fact that, based on available evidence, COMM 3000 had actually activated, in percentage terms, a higher number of lines than TIM's commercial divisions. In this respect, the Court seemed to acknowledge that the Tribunal of Rome had erroneously estimated the percentage of lines activated by COMM 3000 in comparison with those activated by TIM's commercial divisions. However, this error of assessment did not change the conclusions of the Court of Appeals on the alleged discrimination suffered by COMM 3000.

With regard to the causal link between TIM's conduct and the alleged damage, the Court found that it could be inferred from the following elements: (i) the ICA's finding of infringement; (ii) the fact that COMM3000 purchased wholesale access services from TIM and competed with it in the retail market; and (iii) the higher percentages of KOs allegedly received by COMM 3000 compared to those received by TIM's internal division.

As to the fault requirement, the Court asserted that TIM's subjective element could be inferred from the findings in the ICA's decision. In this regard, the Court held that the burden of proof shifted onto TIM, which would have had to prove the absence of the fault requirement. In the Court's view, TIM had failed to demonstrate that the anticompetitive conduct was the outcome of an excusable error, i.e. that, despite adopting an adequate standard of control, it could not have been aware that the differences between the external and internal supply processes could have an anticompetitive effect.

As to the quantification of damages, the Court confirmed the approach adopted by the expert, based on the comparison between the market shares of competitors in Italy in the 2009-2011 period and the market shares of alternative operators in the United Kingdom in another period (2003-2006). However, the Court reduced the amount of the alleged damages for loss of customers. COMM3000 claimed that the alleged abuse had caused it damages even in the years following the termination of the

contested conduct, but the Court noted that, in the A428C case (concerning the compliance with the A428 Decision), the ICA had ascertained a clear discontinuity between TIM's conduct in the 2009-2011 period and its conduct following the A428 Decision (adopted in 2013), as TIM had implemented a number of initiatives aimed at improving the provision of wholesale access services and the guarantees of equal treatment. Accordingly, the Court considered it appropriate to at least reduce the amount of damages for loss of profits allegedly suffered by COMM 3000 in the period 2013-2015 from €8,000,000 to €5,621,494.80.

The judgment of the Supreme Court

On January 28, 2025, the Supreme Court upheld the judgment of the Rome Court of Appeal.

The Supreme Court rejected the first three grounds of appeal filed by TIM, according to which the Rome Court of Appeal had: (i) failed to consider the impact of the misrepresentation of the data by the expert on the assessment of the alleged damages and the causal link; (ii) erroneously held that the finding of discriminatory conduct against a competitor led to a presumption of a causal link, irrespective of the type of damage, i.e. loss of customers or increased costs; and (iii) failed to address COMM 3000's inability to identify the allegedly unlawful KOs.

The Supreme Court recalled that, based on established case law, it is not possible to challenge the existence of the alleged infringement established in the administrative proceedings by the ICA, nor the underlying factual elements, namely TIM's dominant position and the abuse of such position in the relevant market, on the basis of evidence or grounds already assessed by the ICA and administrative courts.

Then, the Court held that, in the presence of discriminatory conduct, the existence of the damage and of the causal link can be established on a presumptive basis. In the case at hand, the Rome Court of Appeal considered that the discriminatory conduct had led to "*an aggravation*

of activation conditions”, which had in turn *“resulted in the loss of market share”* that COMM 3000 could have otherwise acquired.

The Supreme Court added that the assessment of the probabilistic or presumptive evidence used to demonstrate the existence of a causal link between the conduct and the damage is, in principle, reserved for the courts of first and second instance.

The Supreme Court then found inadmissible the fourth ground of appeal, concerning the failure by the Rome Court of Appeal to examine the factual elements presented by TIM to exclude the damage and causal link. The Supreme Court held that, based on the principle of autonomy of the appeal, TIM had not only to illustrate *“how”* and *“when”* the facts were discussed during the proceedings, but also to reproduce the *“content”* or *“essential parts”* of the documents that demonstrated such facts, and to specify *“in which procedural seat such documents had been produced”*. In the Court’s view, the fourth ground of appeal did not fully comply with such formal requirements. The Supreme Court added that, pursuant to Article 348-ter(5) of the Code of Civil Procedure, the ground of appeal based on the failure to examine decisive facts cannot be raised when the decisions of the first and second instance courts are based on the same factual grounds.

The Supreme Court also rejected the fifth ground of appeal, concerning the errors committed by the Court of Appeal in the assessment of the subjective element. The Court noted that, while proving an anti-competitive intent is not required to establish an abuse of dominant position, such intent does matter when it comes to establishing the existence of damages. However, according to the Supreme Court, the Court of Appeal correctly held that TIM’s conduct was negligent, taking into account that TIM had some degree of discretion in structuring the activation procedure.

The Supreme Court also rejected the sixth ground of appeal, concerning several errors in the estimate of the alleged damages, and the last two grounds of appeal raised by TIM, regarding the limitation period. In this respect, the Court noted that the assessment of when the limitation period begins must be conducted case by case. When the alleged victim is a competitor, the limitation period does not necessarily start after the decision to open the investigation. It is necessary to assess when such undertaking had a clear perception of the damage suffered as a result of the competitor’s unlawful conduct. According to the Supreme Court, in the case at hand, the Court of Appeal could consider that, before the ICA’s fining decision, COMM 3000 did not have complete knowledge of certain essential facts, such as the results of the delivery process for TIM’s commercial divisions.

The Supreme Court upholds an appeal against a judgment of the Milan Court of Appeal that had declared inadmissible the appeal against a first instance ruling dismissing a follow-on damages action against the Italian electronic communications sector's incumbent

In a parallel judgment dated January 22, 2025 (the “Judgment”),⁵ concerning another follow-on action for damages based on the A428 case, the Supreme Court upheld the appeal brought by Irideos S.p.A. (“**Irideos**”; formerly, Enter S.r.l., “**Enter**”) against a judgment of the Court of Milan that had entirely dismissed a follow-on damages action against TIM for the alleged abuse of dominance in the provision of wholesale access services found by the ICA in 2013, and an order of the Milan Court of Appeal that had declared inadmissible the appeal brought by Irideos against the first instance ruling, on the ground that the appeal did not have a reasonable chance of being upheld, pursuant to Articles 348-*bis* and *ter* of the Code of Civil Procedure.⁶

Background

As mentioned in the analysis of the previous case, in order to provide electronic communications services to final customers, the OLOs needed access to TIM's fixed network. When the OLOs acquired new customers, they sent TIM a request to activate the wholesale access services needed to provide users with retail electronic communications services. This process could either have a positive outcome for the OLOs, leading to the provision of the retail service to final customers, or a negative outcome, when TIM communicated the presence of one of the circumstances provided for by sector-specific regulation, which prevented the activation of wholesale access services.

In the A428 Decision,⁷ the ICA stated that, in the period 2009-2011, TIM had communicated an unjustifiably high number of refusals to activate wholesale access services (“**KOs**”), thus hindering the expansion of competitors in the markets for voice telephony services and broadband internet access. In the ICA's view, the differences between external and internal procedures for the provision of wholesale access services were not unlawful *per se*, but they had resulted in higher percentages of KOs for competitors compared to TIM's commercial divisions, which allegedly amounted to abusive discriminatory treatment.

In 2017, Enter brought a follow-on action against TIM, claiming that it had been harmed by the above-mentioned conduct. Enter alleged that TIM had communicated to it an excessively high number of KOs, and asked the Court of Milan to award damages amounting to around €1.9 million. In particular, Enter maintained that the excessively high number of KOs communicated by TIM had resulted in a loss of customers and an increase in the costs sustained by the OLO to submit the requests for activation.

TIM argued, *inter alia*, that the statistical analysis of the activation requests, on which Enter's action was based, did not demonstrate a negative impact of the contested conduct on the OLO concerned, as Enter had actually activated, in percentage terms, more customers than TIM's internal commercial divisions. TIM also argued that Enter had not alleged and proved any specific refusals

⁵ Supreme Court, Judgment No. 1593 of January 22, 2025.

⁶ Milan Court of Appeal, Order No. 1880 of June 7, 2021, discussed in the June 2021 issue of this newsletter: <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjune2021-pdf.pdf>.

⁷ ICA Decision of December 21, 2016, No. 26310, Case A428C, *Wind-Fastweb/Condotte Telecom Italia*.

to activate wholesale access services that were not justified by the circumstances provided for by sector-specific regulation. Accordingly, there was no evidence of the damage allegedly suffered and a causal link between such damage and the alleged conduct.

In a judgment dated December 18, 2019,⁸ the Court of Milan rejected Enter's claims and ordered it to reimburse the costs of the proceedings.

In the Court's view, the claimant had not adequately established that: (a) it was actually harmed by the conduct fined by the A428 Decision; and (b) there was a causal link between such conduct and the alleged harm. The Court held that, in civil proceedings, the statistical analysis of the percentage of refusals to activate communicated to Enter – which in any case did not provide clear evidence of discriminatory treatment – is not sufficient to demonstrate the alleged wrongdoing, as it can only constitute circumstantial evidence or reinforce and confirm further evidence. In the case at hand, the available evidence showed that Enter regularly checked whether the refusals to activate communicated by TIM were actually justified by the circumstances provided for by sector-specific regulation. As the claimant had not alleged which KOs, or groups of KOs, were in its view unlawful or unjustified, the Court held that Enter had not met its burden of alleging and proving to have suffered damages as a result of the contested conduct.

Following a merger by acquisition with Enter, Irideos challenged the judgment on multiple grounds, which essentially focused on errors allegedly committed by the Court of Milan in the interpretation and application of the principles on standard of proof. TIM contested that the appeal was inadmissible pursuant to Article 348-*bis* of the Code of Civil Procedure, as it did not have a reasonable chance of being upheld, and in any case should have been dismissed on the merits. In particular, TIM argued, *inter alia*, that (i) none of Irideos's grounds of appeal was capable of overturning the judgment of first instance, insofar as they merely focused on the burden of

proof, while the Milan Court had found that the action was also vitiated by serious shortcomings in the allegation of the facts upon which the claim was based; (ii) in any case, the Milan Court had correctly interpreted and applied the principles on the burden of proof.

The order of the Milan Court of Appeal

In its order No. 1880 of June 7, 2021, the Court of Appeal stated that Irideos's appeal was inadmissible under Articles 348-*bis* and *ter* of the Code of Civil Procedure, because it did not have a reasonable chance of being upheld, and ordered the appellant to reimburse the costs of the proceedings.

The Court of Appeal confirmed that Irideos had not satisfied the burden of alleging a causal nexus between the contested conduct and the alleged damage.

The Court acknowledged that, in private antitrust actions, the burden of proof on the plaintiff may be relieved to ensure effective protection of victims when there is information asymmetry between the parties in their access to evidence. However, in the case at hand, there was no asymmetry in access to evidence capable of justifying a derogation from the general principles on the burden of allegation and proof. Enter itself had acknowledged that it had access to the relevant information, as it verified whether the KOs communicated by TIM were justified (including by contacting final customers, in case of problems relating to them). Therefore, Enter could provide the court with circumstantial evidence of allegedly unjustified KOs communicated by TIM, by identifying the KOs it considered not justified by the circumstances provided for by sector-specific regulation, or by indicating the criteria to identify such KOs.

As a consequence, the Court of Appeal confirmed that a mere statistical analysis of the percentage of KOs communicated by TIM to Enter was not sufficient to satisfy the burden of allegation and proof on the plaintiff.

⁸ Court of Milan, Judgment No. 11772 of December 18, 2019.

For the abovementioned reasons, the court concluded that the appeal did not have any reasonable likelihood of being upheld, and declared it inadmissible pursuant to Articles 348-*bis* and *ter* of the Code of Civil Procedure.

The judgment of the Supreme Court

On January 22, 2025, the Supreme Court upheld the appeal brought by Irideos against the judgment of the Milan Court and the order of the Milan Court of Appeal.

In particular, the Supreme Court upheld Irideos's first ground of appeal, according to which the Court of Milan had ruled *ultra petita*, as it had identified a different type of abuse from the overall anticompetitive conduct ascertained by the ICA in the A428 Decision, on which the action was based.

According to the Supreme Court, the Milan Court had erroneously assumed that the abuse ascertained in the A428 Decision consisted in the individual KOs not justified by the circumstances provided for by sector-specific regulation, whereas it consisted "*in the structural differences in the management of the two activation services between OLOs and its commercial divisions*", which had resulted in an excessively high numbers of KOs for the OLOs.

Consequently, in the view of the Supreme Court, the Court of Milan should not have attributed decisive importance to Irideos's failure to allege and prove unjustified KOs for the purposes of ascertaining the damage and the causal link, but should have verified the impact of the overall anticompetitive conduct contested by the A428 Decision on the OLO concerned, also in light of the statistical evidence.

On this basis, the Supreme Court referred the case back to the Milan Court of Appeal to re-examine the case and rule on costs.

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