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Italian Competition Law Newsletter

Highlights

- The Council of State partially upholds the TAR Lazio judgment confirming an ICA decision to fine TIM over €100 million for abusing its dominant position in the wholesale and retail markets for broadband and ultra-broadband telecommunications services in Italy
- The Council of State upholds the TAR Lazio judgment confirming the ICA decision to fine IMG for a cartel concerning the assignment of broadcasting rights for football matches in countries other than Italy

The Council of State partially upholds the TAR Lazio judgment confirming an ICA decision to fine TIM over €100 million for abusing its dominant position in the wholesale and retail markets for broadband and ultra-broadband telecommunications services in Italy

On November 13, 2024, the Council of State upheld the judgment of the Regional Administrative Court for Latium (the “**TAR Lazio**”) rejecting the appeal filed by Telecom Italia S.p.A. (“**TIM**”) against the decision of the Italian Competition Authority (“**ICA**”) to fine TIM over €116 million for abusing its dominant position under Article 102 of the Treaty on the Functioning of the European Union (“**TFEU**”) in

the wholesale and retail markets for broadband and ultra-broadband telecommunications services in Italy.¹ Nonetheless, the Council of State deemed it appropriate to grant a reduction of the fine.²

The ICA’s finding

In a decision dated February 25, 2020 (the “**Decision**”),³ the ICA held that TIM had engaged

¹ TAR Lazio, Judgment No. 2334 of February 28, 2022 (discussed in the February-March 2022 issue of this Newsletter: <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---feb-march-2022.pdf>).

² Council of State, Judgment No. 9138 of November 13, 2024.

³ ICA Decision No. 28162 of February 25, 2020, case A514, *Condotta fibra Telecom Italia* (discussed in the March 2020 issue of this Newsletter: <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewslettermarch2020pd-pdf.pdf>).

in a single and complex exclusionary strategy comprising different anticompetitive practices. *First*, the ICA contested that there had been a change in TIM's investment plans with regard to market failure areas,⁴ allegedly aimed at making it more difficult for the new operator Open Fiber S.p.A. ("**Open Fiber**") to enter the market. *Second*, the ICA held that TIM had implemented a regulatory gaming and sham litigation strategy against Open Fiber and Infratel Italia S.p.A. ("**Infratel**", a public company tasked with the implementation of the Italian Strategy for High-Speed Broadband), by initiating groundless and abusive legal proceedings aimed at hindering tendering processes for market failure areas. *Third*, the ICA argued that TIM had implemented anticompetitive pricing policies for its wholesale and retail services, in order to secure a large share of ultra-broadband fixed lines, before the fiber-to-the-home (FTTH) coverage announced by Open Fiber was available.

In the ICA's view, TIM's conduct allegedly hindered the investments in ultra-broadband networks in areas of market failure.

The judgment of the TAR Lazio

On February 28, 2022, the TAR Lazio rejected TIM's appeal. In particular, the TAR Lazio:

- i. held that the ICA had carried out a thorough analysis and its conclusions regarding the definition of the relevant markets and the finding of dominance were consistent with the available evidence;
- ii. confirmed the ICA's view that TIM had abused its dominant position because it had decided to invest in market failure areas, notwithstanding that its internal profitability analyses suggested that the investment was not economically viable. In this respect, the TAR Lazio agreed with the ICA's view that the change in TIM's investment plans was allegedly aimed at preserving its position and hindering the entry of other operators willing

to build their own FTTH network;

- iii. endorsed the ICA's view that TIM had offered below-cost prices for its virtual unbundling local access (VULA) FTTH service and a wholesale offer capable of tying customers in order to secure a significant portion of the contestable demand at the wholesale level. In this respect, the fact that the contested offers were under assessment by the Italian Communications Authority ("**AGCom**"), and were discontinued by TIM after the AGCom's decision not to approve them, was not considered relevant by the TAR Lazio. The Court also confirmed the ICA's view that TIM had offered promotional conditions in the retail market allegedly capable of creating switching costs for customers, thus limiting access to the contestable demand also at the downstream level.
- iv. stated that the ICA is not required to prove the actual effects of the contested practice, insofar as it provides evidence that the conduct could alter competition.

The judgment of the Council of State

On appeal, after obtaining technical advice from a court-appointed expert, the Council of State confirmed the TAR Lazio's ruling, but reduced the fine imposed on TIM.

With regard to TIM's alleged sham litigation strategy against Open Fiber and Infratel, the Council of State observed that none of TIM's actions had been successful until that moment, and held that this behavior was part of an alleged broader strategy aimed at obstructing tender processes in market failure areas.

With regard to the alleged exclusionary pricing, the Council of State pointed out that TIM's significant price reduction for its VULA FTTH service took place less than seven months after it had asked AGCom to approve a 30% price increase. According to the Court, this confirmed that the price reduction was aimed at securing

⁴ Market failure areas (so-called "white areas") are those where, in the absence of public subsidies, private investment in innovative infrastructure would not take place.

a significant part of the contestable demand at the wholesale level. In addition, the Court held that the supply contracts, based on long-term obligations, were structured in such a way that customers could obtain real benefits only at the end of the contract period, thus making it disadvantageous to switch to other providers during this period.

The Court also upheld the ICA's view that the promotional conditions offered by TIM on the retail market could create switching costs for customers. These conditions included: (i) the provision of TIM-specific modems and support services; and (ii) a contractual clause requiring customers to pay the remaining costs of the

devices if they terminated the contract early. According to the Council of State, these practices limited the contestable demand also at the downstream level.

The Council of State deemed it appropriate to reduce the amount of the fine, taking into account the specific circumstances of the case and the limited impact of the alleged infringements. According to the Council of State, these violations did not prevent the completion of tenders or prevented Open Fiber from operating in the market, but possibly delayed its entry into the market. Consequently, the Council of State reduced the fine imposed on TIM by 25%.

The Council of State upholds the TAR Lazio judgment confirming the ICA decision to fine IMG for a cartel concerning the assignment of broadcasting rights for football matches in countries other than Italy

On November 13, 2024, the Council of State upheld the judgment of the Regional Administrative Court For Latium (the “**TAR Lazio**”) rejecting the appeal filed by IMG Media UK Limited and IMG Worldwide LLC (jointly “**IMG**”) against the decision of the Italian Competition Authority (“**ICA**”) to impose a fine of €343,645 on IMG for participating in a cartel concerning the assignment of broadcasting rights for football matches in countries other than Italy, in violation of Article 101 of the Treaty on the Functioning of the European Union (“**TFEU**”).⁵

The ICA's findings

In April 2019, the ICA fined IMG, Media Partners & Silva Limited and MP Silva S.r.l. (jointly, “**MP Silva**”), and B4 Capital SA and B4 Italia S.r.l. (jointly “**B4 Capital**”, and jointly with the

other undertakings, the “**Parties**”) for violating Article 101 TFEU (the “**Decision**”).⁶

The ICA issued a first statement of objections concerning two separate alleged cartel agreements, and subsequently issued a second statement of objections (“**Second SO**”), alleging that the parties had instead participated in a single and continuous infringement.

In the Decision, the ICA held that the Parties colluded on tenders for the assignment of broadcasting rights for football matches in tournaments organized by the top Italian football league, *Lega Nazionale Professionisti Serie A* (“**LNPA**”), in countries other than Italy (so-called “international rights”). In particular, the ICA concluded that, prior to submitting the bids, the Parties had allocated the respective

⁵ Council of State, Judgment of November 13, 2024, No. 9104.

⁶ ICA, Decision of April 24, 2019, No. 27656, I814, Diritti internazionali (discussed in the June 2022 issue of this Newsletter: <https://www.clearlygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---june-2022.pdf>).

bids and agreed on sharing the revenues arising from the resale of TV rights. The ICA asserted that the anticompetitive conduct was a restriction by object, and imposed fines amounting to €67 million overall on the participants.

The ICA based its findings on evidence provided by the Milan Public Prosecutor, included in the file of a criminal investigation into the same matter, and on additional evidence provided by the cartel member IMG, which obtained a 40% fine reduction.

The judgment of the TAR Lazio

On May 15, 2023, the TAR Lazio entirely rejected the appeal brought by IMG against the Decision.

First, the TAR Lazio dismissed IMG's claim that the ICA had breached Article 14 of Law No. 689/1981⁷ and Article 6(3) of the European Convention on Human Rights (ECHR), due to the delay in the notification of the contested infringement and the excessive duration of the proceedings. The TAR Lazio found that the ICA had contested the infringement in a timely manner and that the overall duration of the investigation was proportionate to the extraordinary complexity of the case, which required the ICA to conduct further investigative inquiries after issuing the first statement of objections.

Second, the TAR Lazio rejected IMG's claim that the ICA had failed to assess the effects of the infringement. According to the TAR Lazio, the ICA was not required to assess the effects of the infringement on competition, since it had categorized the agreement as a restriction by object.

The judgment of the Council of State

On appeal, the Council of State upheld the TAR Lazio judgment in its entirety.

From a procedural standpoint, the Council of State:

- i. dismissed IMG's claim that the ICA had breached Article 6(3) ECHR and the 90-day term set forth in Article 14 of Law No. 689/1981 by issuing the first, proper notification of the infringement through the Second SO, more than one year after the opening of the investigation. According to IMG, neither the decision to open the investigation nor the first statement of objections had adequately contested the infringement, as the former act was not sufficiently detailed and the latter was entirely modified by the Second SO. The Council of State rejected IMG's interpretation and concluded that the ICA had promptly issued a proper notification of the infringement through the decision to open the investigation, only 58 days after receiving evidence of the infringement from the Milan Public Prosecutor;
- ii. confirmed that the prolonged duration of the investigation phase did not infringe (i) Article 6(3) ECHR, as it was necessary to carry out further investigative inquiries, nor (ii) Article 14 of Law No. 689/1981, since this provision applies solely to the notification of the infringement and not to the subsequent "intra-procedural" phase. The Council of State also clarified that the IMG's claim regarding the excessive duration of the investigation could not be upheld, as IMG had failed to provide evidence that its rights of defense were harmed by the prolonged duration of the proceedings, a condition required by the case law of the EU Court of Justice (ECJ) for the annulment of the decision.⁸ Moreover, the Council of State

⁷ Pursuant to Article 14 of Law No. 689/1981, "the infringement, to the extent possible, must be contested immediately vis-à-vis both the alleged infringer and the person which is jointly and severally liable for the payment of the penalty, if any. If immediate notification has not been made to all or some of such persons, the details of the infringement must be notified to the persons concerned [...] within 90 days."

⁸ See ECJ, C-466/19 P, *Qualcomm and Qualcomm Europe v Commission*, ECLI:EU:C:2021:76.

pointed out that the ICA had not infringed Article 6(3) ECHR and Article 14 of Law No. 689/1981 by issuing a second statement of objections containing different allegations from those set out in the first one, as the new allegations resulted from a mere reappraisal of the evidentiary elements previously gathered by the ICA.

In view of these findings, the Council of State rejected IMG's request for a preliminary ruling to the ECJ aimed at finding whether Articles 47, 48 and 52 of the Charter of Fundamental Rights of the European Union, interpreted in light of Article 6(3)(a) ECHR, are compatible with a national legal framework that allows national competition authorities to modify the original allegations of infringements set out in the initial statement of objections, in the absence of any new evidence, based solely on a new legal qualification of the conduct. The Council of State concluded that the decision of the ECJ would have no impact on the proceedings at issue, as IMG had not provided evidence of any harm resulting from the change of allegations made by the ICA with the Second SO.

AUTHORS

Laura Tresoldi
+39 02 7260 8216
ltresoldi@cgsh.com



Pietro Cutaia
+39 06 6952 2590
pcutaia@cgsh.com



Neri Conti
+39 02 7260 8682
nconti@cgsh.com

EDITORS

Giulio Cesare Rizza
+39 06 6952 2237
crizza@cgsh.com

Gianluca Faella
+39 06 6952 2690
gfaella@cgsh.com

SENIOR COUNSEL, PARTNERS, COUNSEL AND SENIOR ATTORNEYS, ITALY

Mario Siragusa
msiragusa@cgsh.com

Matteo Beretta
mberetta@cgsh.com

Giulio Cesare Rizza
crizza@cgsh.com

Gianluca Faella
gfaella@cgsh.com

Fausto Caronna
fcaronna@cgsh.com

Marco Zotta
mzotta@cgsh.com

Alice Setari
asetari@cgsh.com

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