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Italian Competition Law Newsletter

Highlights

— ICA notice on cooperation agreements between businesses in the Covid-19 emergency.

— The Council of State confirms the annulment of an ICA decision that fined two companies for bid rigging in the market for food catering services in Italian motorway restaurants.

— The Council of State annuls an ICA decision that fined the Italian National Lawyers' Council for failure to comply with a previous infringement decision.

— The Italian Supreme Court rules on a follow-on action regarding Telecom Italia's alleged abuse on the market for wholesale termination services.

ICA notice on cooperation agreements between businesses in the Covid-19 emergency

On April 22, 2020, the Italian Competition Authority (the "**ICA**") issued a notice (the "**Notice**") providing guidelines on the assessment of cooperation agreements in the context of the Covid-19 emergency.[1]

The Notice follows similar initiatives of other EU competition authorities, including the temporary framework issued by the EU Commission on April 8, 2020, for assessing business cooperation in response to situations of urgency stemming from the current Covid-19 outbreak.[2] The Commission's temporary framework was preceded by the publication of a Joint Statement by the European Competition Network (ECN) on March 23, 2020.[3]

The Notice focuses on cooperation agreements aimed at favoring the production and fair distribution of essential services and goods that may be subject to shortages due to a sudden rise in their demand linked to the ongoing Covid-19 crisis (e.g. in the health and agri-food sectors). In this respect, the ICA acknowledges that it may be necessary to reorganize an industry with a view to increasing and optimizing the production of certain essential products. While these initiatives

[1] ICA, Communication of April 22, 2020 – Notice on cooperation agreements between businesses within the framework of the coronavirus emergency. The Notice has been effective since April 24, 2020.

[2] European Commission, Communication of April 8, 2020 – Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak.

[3] European Competition Network, March 23, 2020 – Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis.

inevitably require the exchange of strategic and disaggregated information that "*in 'normal' times would clearly raise competition issues*", the ICA is willing to assess such initiatives with a greater degree of flexibility, provided that they are: (i) necessary to facilitate the production of essential services and goods (such as drugs or medical devices needed to fight Covid-19); (ii) only applied for the time strictly necessary; and (iii) absolutely proportionate. In addition, the Notice stresses the possibility for companies, in the context of vertical agreements, to set maximum resale prices for their products, which may be useful to limit unjustified price increases at the distribution level.

The Notice also clarifies that the ICA is available to assist companies and trade associations in the self-assessment of the above-mentioned cooperation projects, through a dedicated email address. Lastly, the ICA clarifies that, in exceptional circumstances and at its own discretion, it can issue comfort letters on the compliance of certain cooperation projects with competition law, with a view to increasing legal certainty.

In any event, the Notice stresses that the ICA will not tolerate any conduct, whether a cartel or abuse of dominant position, which seeks to leverage on this exceptional situation and to misuse the rules in the Notice.

The Council of State confirms the annulment of an ICA decision that fined two companies for bid rigging in the market for food catering services in Italian motorway restaurants

On April 27, 2020[4] the Council of State upheld two judgments issued by the Regional Administrative Court of Lazio ("**TAR Lazio**") in 2016,[5] which had annulled an ICA decision fining Chef Express S.p.A. ("**Chef Express**") and My Chef Ristorazione Commerciale S.p.A. ("**My Chef"**, and together with Chef Express, the "**Companies**") for alleged bid rigging in the market for food catering services in Italian motorway restaurants (the "**Decision**").[6]

In particular, the Council of State agreed with the TAR Lazio that the ICA had not adequately proved a collusive scheme.

Background

The Decision

In the Decision, the ICA stated that the Companies had entered into a secret anticompetitive horizontal agreement in breach of Article 101 TFEU, aimed at coordinating their conduct in 16 tenders for the sub-licensing of the provision of food catering services on the Italian motorway network managed by Autostrade per l'Italia S.p.A. ("**ASPI**"). As a consequence, the ICA fined Chef Express and My Chef €8.4 million and €4.9 million, respectively.

The opening of the ICA investigation followed a complaint submitted by Roland Berger Strategy Consultants S.r.l. ("**Roland Berger**"), the advisor appointed by ASPI to organize the tender procedures, which reported alleged "*unusual and symmetrical bidding behavior by two participants*" in the procedures launched in 2013 for the provision of catering services in 16 out of 43 motorway restaurants.

In the ICA's view, the Companies implemented symmetrical bidding behavior aimed at rigging the competitive dynamics of the 16 tenders. As a result, the tenders were awarded equally to the

[4] Council of State, Judgments Nos. 2673 and 2674 of April 27, 2020.

[5] TAR Lazio, Judgments Nos. 3982 and 3983 of April 1, 2016.

[6] ICA, Decision of April 22, 2015, No. 25435, Case I775 – Procedure di affidamento dei servizi di ristoro su rete autostradale ASPI.

Companies. According to the ICA, the tender awarding could not be the natural result of rational business choices independently made by each of the Companies, but was due to an anticompetitive scheme, which allowed the Companies to get the sub-licensing contracts on more advantageous conditions.

As allegedly proved by numerous documents (including tables containing simulations of the bidding scenarios, found at the Companies' premises), the Companies planned to implement a complex bidding mechanism to support each other's offers, taking into account the mathematical formula used by Roland Berger to assess the quality of bids. In particular, where a party offered economic terms much better than the starting economic conditions provided for by tender rules, the difference between the scores attributed to other financial bids were less marked; therefore, in these cases, competition among bidders was based almost entirely on the technical aspects of the offers. Accordingly, the ICA found that where one of the Companies was interested in getting a particular lot, it submitted a strong offer from a technical viewpoint, coupled with a weaker financial offer; by contrast, the other Company submitted for the same lot an offer with weaker technical aspects and a stronger financial component.

The judgments issued by the TAR Lazio

The Companies challenged the Decision before the TAR Lazio. They argued among other things that the ICA's findings were based on an incomplete and inadequate investigation, as well as conflicting documents, which were misinterpreted by the ICA to support its finding that the Companies' behavior was "*intrinsically anomalous*". According to the Companies, the ICA breached their rights of defense and to a fair trial.

In April 2016, the TAR Lazio quashed the Decision, on the ground that the ICA had failed to provide sufficient evidence of the alleged collusive scheme between My Chef and Chef Express.

In particular, the TAR Lazio held that: (i) the Decision did not adequately explain the legal reasoning leading the ICA to conclude that the Companies' bidding behavior could not be explained by alternative (and lawful) justifications; (ii) the ICA did not base its findings on objective elements, but merely relied on average data provided by Roland Berger; (iii) the Decision did not take into account the evidence provided by the Companies during the investigation to demonstrate that their bidding behavior was economically rational; (iv) finally, the ICA did not prove specific contacts between the Companies that could have allowed them to devise the alleged anticompetitive scheme.

The Council of State's ruling

Following the ICA's appeal against the first instance judgments, the Council of State fully confirmed the conclusion reached by the TAR Lazio.

At the outset, the Council of State restated the well-established principle that mere similarity between the bidding behavior of independent operators (particularly in the context of oligopolistic markets, which have fewer players and may naturally be more inclined to align their conduct and strategies) cannot, in itself, prove the existence of an anticompetitive agreement or practice, unless there is no alternative rational explanation for such parallelism. Accordingly, the ICA is required to prove that the parallel conduct may not be the result of plausible and independent business choices. However, where there is evidence of contacts or exchanges of information between the market players, the burden of proof is reversed, and it is up to the investigated companies to show that their conduct is not the result of anticompetitive coordination.

In light of these principles, the Council of State held that the Decision was not based on sufficient evidence.

First, the Council of State criticized the fact that the ICA merely relied on average data provided by Roland Berger, instead of analyzing the offers submitted by the Companies in all of the 48 tenders in which they participated.

Second, the Council of State noted that the ICA completely ignored the evidence submitted by the

Companies during the proceedings. In particular, the Decision did not make any reference to the economic reports presented by the Companies to demonstrate that their offers could not result in the rigging of the tenders at issue. According to the Council of State, this conclusion was supported by the statements made by Roland Berger during the investigation, according to which, even absent the alleged "supporting" offers submitted by each of the Companies, the outcome of the tenders would have remained the same, i.e. they would have been awarded to the same players.

Third, the Council of State held that the documentary evidence gathered by the ICA to support its findings, which mainly consisted of papers found at the Companies' premises, was not convincing, particularly because it was unclear whether these analyses of the possible bidding scenarios had been drafted before or after the awarding of the tenders (when the offers submitted by the other bidders were publicly known).

Finally, the ICA did not adequately demonstrated the absence of alternative explanations to the alleged coordinated outcomes, as it limited itself to referring to "*the total symmetry between the bidding behavior of the Companies, [...] as well as the total symmetry of the outcomes of such tenders*". According to the Council of State, the Decision lacked robust and convincing reasoning regarding the existence of the alleged collusive scheme.

The Council of State annuls an ICA decision that fined the Italian National Lawyers' Council for failure to comply with a previous infringement decision

On April 30, 2020,[7] the Council of State confirmed the annulment of a decision issued by the ICA in 2016,[8] which had fined the Italian National Lawyers' Council (*Consiglio Nazionale Forense*, the "**CNF**") for failure to comply with a 2014 infringement decision.[9]

The Judgment sheds light on the procedural rules the ICA should follow in proceedings regarding alleged failure to comply with previous infringement decisions.

Background

The 2014 infringement decision

In October 2014, the ICA imposed a fine of almost €1 million on the CNF, for having limited its members' freedom to set fees and economic terms for their legal services, by means of two decisions of association of undertakings under Article 101 TFEU.

The first decision was a memorandum (the "**Memorandum**") issued by the CNF in 2006 on its website and database (which was managed by IPSOA and accessible from the CNF's homepage). The Memorandum provided that the application of legal fees below the minimum fee plan, even if lawful under civil law, was contrary to the Code of Conduct for Lawyers and subject to disciplinary measures by competent bodies. Following a sector inquiry opened by the ICA in 2007 into professional organizations,[10] in which the ICA found *inter alia* possible antitrust concerns raised by the Memorandum, the CNF removed it from its website. However, in 2012, the ICA found that the Memorandum was still available on the CNF's website and the IPSOA database. According to the ICA, the Memorandum was anticompetitive by object, since it *de facto* reintroduced the obligation to set minimum fees, abolished as a result of the "Bersani reform" in 2006 and Law Decree No. 1/2012 (subsequently converted into Law No. 27/2012), which had fully repealed professional fees.

[7] Council of State, Judgment No. 2764 of April 30, 2020.

[8] ICA, Decision of February 10, 2016, No. 25868, Case I748B – *Condotte restrittive del CNF – Inottemperanza*.

[9] ICA, Decision of October 22, 2014, No. 25154, Case I748 – *Condotte restrittive del CNF*.

[10] ICA, Decision of January 15, 2009, IC34 – Sectoral inquiry on the professional organizations sector.

The second allegedly anticompetitive decision was a resolution issued by the CNF in 2012 (the "**Resolution**"), in reply to a request from the Verbania Bar Association on the interpretation of Article 19 of the Code of Conduct for Lawyers. In the Resolution, the CNF declared that offering professional services at discounted prices through third-party platforms did not pursue a mere promotional aim but was rather a means to acquire new clients through agencies or intermediaries, which was not consistent with Article 19 of the Code of Conduct for Lawyers. In the ICA's view, the Resolution hindered lawyers' freedom to advertise their legal services on digital platforms, thus limiting competition among them.

In addition to imposing a fine, the ICA ordered the CNF to: (i) adopt appropriate measures to stop the infringements; (ii) give due notice to its members; and (iii) submit a written report on these initiatives by the end of February 2015.

The judicial review of the 2014 decision

Following an appeal filed by the CNF, in 2015 the TAR Lazio annulled the part of the decision finding that the publication of the Memorandum amounted to a restriction of competition, and ordered the ICA to re-determine the fine accordingly.[11] In the TAR's view, the fact that the Memorandum remained available on the IPSOA database (and, as a consequence, on the CNF's website) following the 2007 ICA investigation could not be considered evidence "*of anticompetitive intent by the CNF*". Actually, the CNF neither wanted nor commissioned the republishing of the Memorandum.[12]

On appeal, however, the Council of State confirmed the ICA decision, stating that the Memorandum had a "*clear anticompetitive content*" and, thus, amounted to a restriction by object.[13] Differently from the TAR Lazio, the Council of State held that, in this context, the parties' intent is not a necessary factor in determining whether an agreement is restrictive, and the fact that the database was managed by a third party was irrelevant.

The ICA's non-compliance decision

In September 2015, pending the proceedings before the TAR Lazio, the ICA opened a new investigation against the CNF to ascertain possible non-compliance with its 2014 decision, pursuant to Article 15(2) of Law No. 287 of October 10, 1990.

At the end of the investigation, the ICA imposed a fine on the CNF of almost €1 million, equal to the first fine imposed in 2014.[14] In the ICA's view, the CNF failed to comply with its 2014 infringement decision because: (i) it did not delete the Resolution containing the alleged restriction from its servers and database within the deadline set by the 2014 decision; and (ii) on October 23, 2015, the CNF issued an opinion on how the Resolution should be interpreted, which in substance reaffirmed the alleged restriction. Accordingly, the ICA found that the CNF did not put an end to the restriction resulting from the Resolution.

The Judgment

The CNF challenged the ICA's non-compliance decision before the TAR Lazio, which annulled it in 2016.[15] In April 2020 the Council of State confirmed the annulment of the decision.

First, the Council of State argued that the 2014 infringement decision and the 2016 non-compliance decision fined the CNF essentially for the same facts, i.e., the failure by the CNF "*to cease the anticompetitive infringement*" stemming from the issuance of the Resolution, by removing it from its servers and website.

[11] TAR Lazio, Judgment No. 8778 of July 1, 2015.

[12] Following the TAR Lazio's ruling, in 2015 the ICA re-determined the fine imposed on the CNF as €513,914.17. See ICA, Decision of November 11, 2015, No. 25705, Case I748C – *Condotte restrittive del CNF-Rideterminazione sanzione*.

[13] Council of State, Judgment No. 1164 of March 22, 2016.

[14] Fines for non-compliance with a previous fining decision must not be lower than twice the fine already imposed, within the limit of 10% of the overall annual turnover of the firm concerned. In the case at issue, the fine imposed in 2014 was already equal to the 10% statutory ceiling.

[15] TAR Lazio, Judgment No. 11169 of November 11, 2016.

The Council of State also noted that the ICA non-compliance decision was issued in February 2016, i.e., before the Council of State's final judgment that in March 2016 confirmed the CNF's anticompetitive behavior. The CNF revoked the Resolution during the first CNF meeting scheduled after the judgment, in April 2016.

As a result, in the Council of State's view, the CNF complied with the 2016 ICA decision without undue delay, in light of the fact that only the ruling issued by the Council of State had definitively confirmed the obligation to remove the Resolution.

Second, based on established EU case law, the Council of State held that the ICA breached the *ne bis in idem* principle. The administrative court applied, *mutatis mutandis*, the principles established by the recent judgment of the Court of Justice of the European Union in case C-617/17,[16] according to which national competition authorities may impose simultaneous fines for the infringement of EU and national competition rules, but must ensure that they are proportionate to the nature of the violation. In the case at hand, according to the Council of State, the ICA failed to ensure that the two fines imposed on the CNF were proportionate to the nature of the infringements. Indeed, while the 2014 decision fined the CNF for *two* different anticompetitive decisions (i.e., the Memorandum and the Resolution), the 2016 non-compliance decision only focused on the Resolution. And yet, the two fines were identical amounts.

Lastly, the Council of State agreed with the TAR Lazio that the ICA had breached the CNF's rights of defense. This was so because the ICA did not issue a statement of objections and the representatives of the CNF were heard only by the ICA's officials charged with the investigation, instead of being given the chance to be heard during a final hearing before the Board of the ICA.

In this respect, the Council of State held that proceedings for failure to comply with infringement decisions constitute, in essence, proceedings to ascertain the existence of antitrust infringements. Accordingly, they require the same enhanced procedural protection and guarantees necessary in ordinary infringement proceedings. Indeed, "*in the context of antitrust proceedings, as it is in the present case, it is necessary to guarantee safeguards equal to those applicable in criminal proceedings*". In the Council of State's view, by applying the so-called *Engel* criteria set out in the case law of the European Court of Human Rights, the fine imposed on the CNF did not have a merely compensatory nature, but an "*evidently punitive*" nature.

The Italian Supreme Court rules on a follow-on action regarding Telecom Italia's alleged abuse on the market for wholesale termination services

On April 3, 2020, the Italian Supreme Court confirmed a judgment of the Milan Court of Appeal, which had upheld the damages claim of Brennercom S.p.A. ("**Brennercom**") against Telecom Italia S.p.A. ("**Tim**").[17]

Background

In 2005, the ICA opened proceedings against Tim, Wind Telecomunicazioni S.p.A. ("**Wind**") and Vodafone Omnitel N.V. ("**Vodafone**") for alleged abuses of dominance in the market for the supply of wholesale termination services in their

[16] Court of Justice of the European Union, Judgment of April 3, 2019, C-617/17, *Powszechny Zakład Ubezpieczeń na Życie*, ECLI:EU:C:2019:283.

[17] Italian Supreme Court, Judgment No. 7678 of April 3, 2020; and Milan Court of Appeal, Judgment No. 1 of January 2, 2017.

respective networks.[18] In May 2007, the ICA closed the proceedings with a commitment decision with respect to Vodafone.[19] In contrast, in August 2007, the ICA fined both Tim and Wind.[20]

In particular, regarding Tim, the ICA held that: (i) between 1999 and 2007, Tim had carried out discriminatory conduct in the market for wholesale termination services, by applying more favorable technical and economic conditions for such services to its own commercial divisions than to its competitors; (ii) the prices that Tim applied to its business customers for the downstream supply of fixed-to-mobile services were lower than the termination costs borne by competitors to offer the same services; and (iii) competitors could not replicate Tim's offers. Accordingly, in the ICA's view, Tim had abused its dominant position with a view to eliminating or restricting competition in the market for the supply of wholesale termination services and in the downstream market for the supply of fixed-to-mobile services to business customers.

In 2010, Brennercom brought an action against Tim, seeking compensation for the damages caused by the alleged abuse of dominance ascertained by the ICA. In 2013, the Court of Milan upheld Brennercom's claims.[21] The Court held that Brennercom's action was follow-on and, thus, it was not required to prove the alleged infringement. However, Brennercom still had the burden of proving the causal link between the abuse and the damage it suffered, as well as the damage and its amount.

In this respect, the Court of Milan found that the damages suffered by Brennercom did not result from a diversion of clientele (which had not been proved by the claimant) nor from excessive prices allegedly charged by Tim for its wholesale services (the prices were based on standard conditions approved by the Italian Communications Authority). Instead, the damages were caused by a margin squeeze, stemming from the fact that the conditions applied by Tim to Brennercom for the supply of wholesale termination services were less favorable than those applied to the incumbent's own commercial divisions. As a consequence, Tim forced Brennercom to operate in the downstream market for the supply of fixed-to-mobile services with profit margins lower than those that could have been obtained without the abuse. The Court of Milan concluded that Brennercom had suffered damages equal to €433,000. The damages were quantified by a court-appointed expert on the basis of a counterfactual analysis, as it was not possible to precisely determine the internal prices charged by Tim to its commercial divisions, in order to estimate the difference with the price charged to Brennercom.[22]

The Milan Court of Appeal confirmed the findings of the first instance court, but it increased the awarded damages to around €516,000.

The judgment of the Supreme Court

The Supreme Court fully upheld the judgment of the Milan Court of Appeal.

First, with respect to the causal link between the alleged abusive conduct and the damage, the Supreme Court held that, based on the ICA's findings, competitors had to pay Tim a higher price for wholesale termination services than the price applied to the incumbent's own commercial divisions. According to the Supreme Court, the circumstantial evidence provided by Brennercom demonstrated that the contested practice squeezed its margins, as it was forced to sell fixed-to-mobile telephony services at prices lower than those that could have been applied without the alleged abuse. The damage stemming from the alleged discriminatory practice had to be ascertained through an analysis

[18] ICA, Decision of February 23, 2005, No. 14045, Case A537 – *Tele 2/TIM-Vodafone-Wind*.

[19] ICA, Decision of May 24, 2007, No. 16871, Case A537 – *Tele 2/TIM-Vodafone-Wind*.

[20] ICA, Decision of August 3, 2007, No. 17131, Case A537 – *Tele 2/TIM-Vodafone-Wind*.

[21] Court of Milan, Judgment No. 16319 of December 27, 2013.

[22] In particular, the expert appointed by the Court assumed a counterfactual scenario in which Tim had to charge to its commercial divisions the same prices charged to Brennercom, with an inevitable increase in the retail prices charged by Tim's commercial divisions. Then, the expert assumed that, following the increase in Tim's retail prices, Brennercom could have increased its retail prices by the same amount, thus obtaining higher profit margins.

of the counterfactual scenario, i.e., the economic situation in the absence of the contested conduct.

Second, the Supreme Court agreed with the Court of Appeal that the first-instance judgment had not wrongly reversed the burden of proof, but it had correctly taken into account the high evidentiary value of ICA's decisions in follow-on actions. As the ICA had found that Tim's alleged anticompetitive offers in the downstream market were addressed to its entire business clientele, Tim had the burden of proving that all its retail offers were directed to customers for which there was no actual or potential competition with Brennercom and, thus, no damage could have arisen as a consequence of the alleged discriminatory treatment in the wholesale market. As Tim had not provided such evidence, it was correct to conclude that there was a causal link between the contested conduct and the alleged damage.

Third, the Supreme Court upheld the quantification of damages by the Court of Appeal. In this respect, the Supreme Court confirmed that the criterion based on the reduction of the claimant's profit margins was preferable to the criterion based on the alleged overcharge (i.e., the difference between the price paid to Tim for the wholesale termination services and the lower price Brennercom would have paid if Tim had applied the same conditions granted to its commercial divisions). The Supreme Court confirmed this approach, in light of the fact that: (i) the case did not involve an anticompetitive agreement but a discriminatory practice; (ii) the internal prices applied by Tim to its commercial divisions could not be quantified at first instance; and (iii) it was likely that Brennercom had passed part of the overcharge on to its final customers, given the absence of proof to the contrary.

Accordingly, the damages awarded to Brennercom had correctly been quantified on the basis of the lower profit margins it obtained. In particular, due to the higher prices charged by Tim in the upstream wholesale market, Brennercom had been forced to lower its prices in the downstream market, with a view to remaining competitive and protecting its position on the market. In this respect, the Supreme Court rejected Tim's argument that the damages rewarded Brennercom's mere interest in achieving higher profits, and held that the Court of Appeal rightly protected Brennercom's "*right to fair profit margins in a competitive market, not distorted by discriminatory exclusionary practices*."

Other Developments

The Italian Supreme Court rules again on limitation periods in an A357 follow-on action

On April 3, 2020, the Italian Supreme Court upheld the Milan Court of Appeal's judgment that had dismissed the follow-on damages claim brought by Uno Communications S.p.A. ("**Uno**") against Telecom Italia S.p.A. and TIM Italia S.p.A. ("**Telecom**"), concerning the conduct investigated and fined by the ICA in Case A537.[23]

The Supreme Court's judgment confirms the principles set out in its ruling of February 2020,[24] which had rejected Uno's damages claim against Vodafone Italia S.p.A., in connection with similar facts.[25]

In line with the rulings of the Court of Milan and the Milan Court of Appeal,[26] the Supreme Court rejected Uno's damages claim on the grounds that the five-year limitation period had expired.

[23] Italian Supreme Court, Judgment No. 7677 of April 3, 2020. ICA, Decision of August 3, 2007, No. 17131, Case A537 – *Tele 2/TIM-Vodafone-Wind*.

[24] Italian Supreme Court, Judgment No. 5381 of February 27, 2020.

[25] ICA, Decision of August 3, 2007, No. 17131, Case A537 – *Tele 2/TIM-Vodafone-Wind*.

[26] Court of Milan, Judgment No. 5049 of April 15, 2014; Milan Court of Appeal, Judgment No. 2179 of May 31, 2016.

The case did not fall *ratione temporis* within the scope of application of the rules introduced by Law Decree No. 3/2017, implementing Directive 2014/104/EU.[27] In light of established principles under the previous regime, the Supreme Court held that the five-year limitation period starts to run when the contested conduct, *the damage and the causal link are manifested externally, thus becoming objectively perceivable and recognizable, by using ordinary diligence*, by the person that suffered the damage.

In line with the parallel ruling issued in February, the Supreme Court noted that, in case of cartels, consumers may normally discover the existence of anticompetitive conduct only when the ICA publishes an infringement decision, thereby publicly revealing an agreement that is typically secret. On the contrary, in cases of exclusionary abuses harming competitors, market players may become aware of abusive conduct even before the ICA's infringement decision is published. In practice, the actual awareness of an alleged infringement by possible victims must be assessed on a case-by-case basis. In the case at hand, since Uno was a "*professional operator*", competed with Telecom in the same market and, therefore, presumably was aware of the alleged anticompetitive abuse even before the ICA started proceedings, the Supreme Court declared that the five-year limitation period started to run from the day on which the ICA started its investigation.

The Supreme Court also added that a five-year limitation period running from the day on which the ICA started an investigation does not infringe the right to effective judicial protection under EU law, as it does not make excessively difficult to exercise the right to compensation for damages caused by anticompetitive conduct.

[27] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 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, in OJ [2014] L 349/1.

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