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Highlights

— Council of State quashes TAR Lazio judgment that overturned the ICA decision imposing commitments on Sky after the withdrawal of its notification of the acquisition of R2

— The Council of State overturns the TAR Lazio judgments that quashed an infringement decision by the ICA regarding an alleged parallel network of anticompetitive vertical agreements between radio taxi companies and drivers active in Milan

Council of State quashes TAR Lazio judgment that overturned the ICA decision imposing commitments on Sky after the withdrawal of its notification of the acquisition of R2

In a judgment issued in a simplified form on June 4, 2020,[1] the Council of State quashed the TAR Lazio judgment that had overturned the ICA decision of May 20, 2019, concerning the acquisition of sole control of R2 S.r.l. ("**R2**") by Sky Italia S.r.l. ("**Sky**").[2] The judgment was given on the merits of the case although it was adopted within the interim phase of the proceedings, pursuant to Article 60 of the Italian Administrative Proceedings Code. The parties were not previously informed of the Council of State's decision to provide its final judgment in this phase, based on a temporary rule introduced during the Covid-19 emergency that enables the court to omit any advanced notice of this decision.

Background

The Decision

Sky is a provider of pay-TV services, offered both via satellite and via digital terrestrial television ("**DTT**"). Mediaset Premium ("**MP**") produces content, which is generally transmitted by pay-TV operators. MP wholly owns R2, a company providing technical and administrative platform services for broadcasting through DTT.

In November 2018, Sky notified the ICA of its acquisition of sole control over R2. As Italian law does not provide for the automatic suspension

[1] Council of State, judgment No. 3534/2020.

[2] TAR Lazio, judgment No. 2932/2020; ICA decision of May 20, 2019, No. 27784, C12207, *Sky Italia/R2*.

of a concentration pending antitrust review, the parties completed the transaction before the ICA's clearance. In February 2019, the ICA opened an in-depth investigation and one month later issued a statement of objections alleging that the transaction was capable of lessening competition in the market for retail pay-TV services. As a result, the parties withdrew the notification and tried to restore the previous competitive conditions: R2 was partially demerged from Sky and returned under MP's control, apart from some 'ancillary activities' (i.e., two going concerns of R2 that Mediaset transferred back to Sky following the restitution of R2) and other residual assets.

However, the ICA took the view that the demerger did not fully restore the situation existing before the transaction. Accordingly, in its decision, the ICA authorized the concentration between Sky and R2, but imposed on Sky a set of behavioral remedies lasting for three years, which were aimed at effectively restoring competition in the market. These remedies included the obligations to: (i) grant third parties access on a fair, reasonable, non-discriminatory and cost-oriented basis to any new proprietary DTT platform that Sky might set up; and (ii) abstain from using the information and the assets acquired from R2 in connection with Sky's pay-TV offers.

In its decision, the ICA adopted a broad definition of 'concentration' subject to its scrutiny: its assessment was not limited to Sky's acquisition of R2, but also covered a set of agreements signed in 2018 between Sky and MP, by which MP assigned to Sky some DTT transmission capacity for its pay-TV services (the "**DTT sub-license**"), and granted a license allowing Sky to include MP's channels and TV shows in its pay-TV offers via satellite, DTT and online. According to the ICA, these contractual arrangements would continue to be effective even after the abandonment of the notified transaction, and had already had the effect of causing MP's exit from the market and a significant increase in Sky's customer base.

The TAR Lazio judgment

The TAR Lazio annulled the ICA decision on both procedural and substantive grounds.

Regarding the procedural grounds, the TAR Lazio upheld Sky's argument that the ICA had violated its rights of defense by issuing a decision based on facts and documents gathered after the closing of the investigation phase, and with regard to which Sky could not exercise its rights of defense. In particular, the TAR Lazio found that there was a substantial difference between the transaction on which the statement of objections was based and the one assessed in the decision. According to the Court, the statement of objections' brief assessment of the potential, residual effects in case the acquisition of R2 was undone did not change this conclusion. Moreover, the ICA was not under time constraints, and should have opened of its own motion a new procedure to notify Sky of the new objections on which the decision was based.

Regarding Sky's substantive grounds of appeal, the TAR Lazio accepted Sky's argument that – after R2 was given back to Mediaset – there was no longer a concentration between Sky and Mediaset that could be subject to the ICA's authorization. According to the Court, the DTT sub-license did not grant Sky any exclusivity, considering that Mediaset continued its *Infinity* offer.[3] Moreover, the DTT sub-license's term was too short to result in a lasting change in control of the undertakings concerned and in the structure of the market. Also, the ICA did not show that the 'ancillary activities' were an undertaking to which a turnover could be attributed and failed to verify the turnover that could be attributed to the other residual assets mentioned in the ICA decision. Finally, the TAR Lazio held that the ICA did not demonstrate that the individual agreements allegedly forming part of the overall transaction were conditionally linked to each other, and that each of them had a concentrative nature.

[3] The *Infinity* offer is provided by MP on its over-the-top platform and is a natural continuation of MP's offer, given that it includes the same content. It was found to compete with Sky's offer on the market for retail pay-TV services.

The Council of State's judgment

Procedural grounds

Unlike the TAR Lazio, the Council of State examined very briefly the procedural grounds of appeal submitted by Sky.

In particular, the Council of State held that the ICA decision was compliant with Article 18(3) of Law No. 287 of October 10, 1990, according to which, if the concentration has already been implemented before the decision, the ICA can impose the measures that are necessary to restore effective competition, by eliminating the distortive effects that the transaction has had on the market. In this case, the ICA had expressly stated in the decision that the commitments were imposed on the basis of this provision.

According to the Council of State, as the relevant rule clearly states that the ICA can impose commitments under certain conditions, when Sky received the statement of objections, it was in the position to know that the ICA could impose the necessary measures to restore effective competition in its final decision, if the relevant conditions were met. Accordingly, in the Council of State's view, there was no violation of Sky's rights of defense.

Substantive grounds

The judgment of the Council of State focuses on the substantive issues. The supreme administrative court rejected the TAR Lazio's findings under different respects.

First, the Council of State held that the TAR Lazio erred in finding that: (i) the DTT sub-license did not grant Sky any exclusivity because Mediaset could continue its *Infinity* offer; and (ii) the duration of that sub-license was too short to result in a lasting change in the companies' control and in the structure of the market. Regarding the first point, the Council of State held that the *Infinity* offer's market share was too low (below 1% according to the ICA decision) to compensate for the effects of the concentration. Regarding the second point, the Council of State held that, even when a competitive force is driven out of the market for a short period, irreversible effects on competition in the market can arise.

Second, according to the Council of State, the TAR Lazio erred in finding a lack of evidence that the 'ancillary activities' were undertakings to which a turnover could be attributed in accordance with the *European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings* (2008/C 95/01 – "**Commission Notice**"). In the Council of State's view, the ICA correctly held that the 'ancillary activities' were an undertaking to which a turnover could be attributed, because they were complementary to the activity of the undertaking concerned.

Third, the Council of State disagreed with the finding of the TAR Lazio that the ICA failed to verify the turnover attributable to the other residual assets mentioned in the ICA decision. Indeed, according to the Council of State, a number of sections of the ICA decision show that the ICA considered the turnover of all the interested parties.

Fourth, according to the Council of State, the TAR Lazio erred in finding a lack of evidence that the individual agreements allegedly forming part of the overall transaction were conditionally linked to each other, and that each of them had a concentrative nature. According to the Council of State, the ICA assessment was in line with the Commission Notice, according to which similar and interdependent transactions that take place between the same parties in a short period of time must be considered as a single concentration for the purposes of applying merger control rules.

Finally, the Council of State agreed with the ICA's finding that, even though the parties had withdrawn the notification of the transaction, they had failed to show the re-establishment of the previous *status quo*. The court reasoned that the grant of the DTT sub-license and the acquisition of control over R2 (even though for a limited period of time) had irreversibly altered the

competitive dynamics in the affected market, also in light of fact that the acquisition of control over R2 allowed Sky to request a technological change to R2 smart card reader settings to remove the so-called "pairing", which prevented them from being used with smart cards other than R2's. The Council of State concluded that this allowed Sky to strengthen its dominant position in the market for pay-TV services.

Council of State overturns TAR Lazio judgments that quashed an ICA infringement decision regarding an alleged parallel network of anticompetitive vertical agreements between radio taxi companies and drivers active in Milan

On June 4, 2020,[4] the Council of State overturned TAR Lazio judgments that had upheld the appeals submitted by three radio taxi companies against an infringement decision issued by the ICA, regarding an alleged parallel network of anticompetitive vertical agreements between radio taxi companies and drivers active in Milan (the "**Decision**").[5]

Background

The Decision

On June 27, 2018, the ICA found that the major companies managing radio taxi services in Milan had infringed Article 101 TFEU by imposing on the taxi drivers affiliated to their networks certain exclusivity and non-compete obligations, provided for by the companies' by-laws or in the contracts entered into with the drivers.

The investigation was opened following a complaint submitted by a competitor, Mytaxi (now Free Now), which operated a mobile app aimed at connecting taxi drivers and consumers. Free Now claimed that the exclusivity and non-compete clauses (which governed the contractual relationship between the radio taxi companies and the affiliated taxi drivers) hindered the development of new innovative tools for the management of taxi demand (such as the Free Now app), thus preventing new competitors from entering the market for taxi demand management services.

The ICA found that the clauses at issue, forcing each taxi driver affiliated to the radio taxi companies to allocate all his or her capacity solely to one radio taxi company, resulted in a parallel network of anticompetitive vertical agreements between each radio taxi company and the affiliated drivers. It found that this had a cumulative foreclosure effect vis-à-vis open platforms (such as the Free Now app), thereby hindering entry by actual and potential competitors on the local markets for taxi demand management services. This harmed both taxi drivers and consumers.

However, the ICA found that the anticompetitive conduct did not amount to a "serious" infringement of competition law, and therefore did not impose any fine on the radio taxi companies.

The TAR Lazio judgments

On appeal, the TAR Lazio held that the Decision was wrong on a number of grounds, including: (i) failure by the ICA to meet the standard of proof required to find an infringement of Article 101 TFEU; (ii) errors in the definition of the relevant product market; (iii) failure to establish the anticompetitive effects of the alleged vertical

[4] Council of State, judgment Nos. 3501, 3502 and 3503/2020.

[5] TAR Lazio, judgment Nos. 5359, 5418 and 5419/2019.

restraints; and, overall, (iv) internal logical inconsistencies, lack of proper investigation and failure to state reasons. As a consequence, the TAR Lazio upheld the appeals lodged by the radio taxi companies and annulled the Decision.

First, the TAR Lazio upheld the radio taxi companies' argument that the ICA failed to meet the required standard of proof for establishing the existence of a parallel network of anticompetitive vertical agreements. This was so because the ICA had inferred the existence of such parallel agreements on the mere basis of the presence of non-compete obligations in the radio taxi companies' by-laws and contracts entered into with the affiliated drivers, without carrying out any analysis regarding the actual existence of a parallel network of agreements, limiting itself to "*describing it rather than investigating it*". In this respect, the TAR Lazio noted that the ICA did not prove that the radio taxi companies and the taxi drivers shared a "*common interest*", which is, in its view, a key element in any findings of anticompetitive agreements between companies operating at different levels of the production and supply chain.

The TAR Lazio also upheld the companies' argument that the ICA had erred in defining the relevant product market. According to the TAR Lazio, the ICA alleged that there was substitutability between the services provided by radio taxi companies and those offered by mobile apps without engaging in any empirical analysis, in particular with respect to the (cumulative or alternative) nature of the demand for the respective services. Also, the TAR Lazio held that, in defining the relevant product market, the ICA had not adequately taken into account the fact that the market for taxi management services is characterized by a double source of demand (i.e., passengers and taxi drivers), and that the demand from passengers has an impact on the demand from taxi drivers.

Finally, the TAR Lazio upheld the companies' claims that the ICA had failed to state reasons regarding the anticompetitive effects of the alleged vertical restraints. While acknowledging that the agreements did not amount to "by object" restrictions of competition, the ICA had not analyzed the actual anticompetitive effects of the relevant clauses. Moreover, according to the TAR Lazio, the ICA based its findings almost exclusively on data put forward by the parties (and, particularly, on the complainant's allegations), especially regarding the possible anticompetitive harm allegedly caused by the functioning of the "closed" platforms (as opposed to open platforms, such as Free Now) and the causal link between the companies' behavior and the foreclosure of the relevant market.

The Council of State judgment

The Council of State analyzed the general claim raised by the ICA and Free Now concerning the alleged lack of investigation that, according to the TAR Lazio, affected the whole Decision. After recalling the principles on the allocation of the burden of proof in antitrust investigations, the Council of State found that the Decision could not be considered based on insufficient investigation. It found that the ICA had analyzed all the elements necessary to find the existence of an anticompetitive agreement and had substantiated its findings with a complete body of evidence, coming not only from the parties to the investigation and the complainant involved in the administrative proceedings before the ICA, but also from other reliable sources, such as a legal opinion of the Italian Transport Authority, information from the Municipality of Milan and a report published by consulting company KPMG.

After that, the Council of State addressed the various grounds of appeal concerning specific aspects of the TAR Lazio's judgment on the alleged parallel network of anticompetitive vertical agreements, which are analyzed below.

The alleged parallel network of anticompetitive vertical agreements

In referring to the grounds of appeal concerning the existence of a parallel network of anticompetitive vertical agreements, the Council of State overturned the TAR Lazio's

finding that the ICA had failed to prove to the requisite legal standard the existence of parallel vertical agreements between the companies managing radio taxi services and taxi drivers.

According to the Council of State, the TAR Lazio had erred in holding that it was not possible to find such an infringement because of the lack of a "*common interest*" between taxi drivers and the companies managing radio taxi services. The Council of State held that the condition for finding a restriction of competition by effect - such as the one at stake - is not a "*common interest*" of the parties in foreclosing competitors from the market, but only a joint intention to behave on the market in a certain way. This condition is met even when there is a non-compete clause that has some negative effects on one party (in the case at stake the taxi drivers, because the clause limited the possibility to utilize their full capacity), in so far as the relevant provision is accepted by all parties to the agreement. Indeed the agreement had to be assessed in the broader context of the involvement of taxi drivers in the companies managing radio taxi services, which allowed the former to enjoy also a number of benefits, including the possibility to render their services in favor of an established customer base.

Moreover, the Council of State disagreed with the TAR Lazio's view that the non-compete clause at stake should have been addressed in the context of an abuse of dominance investigation, because it could have only been imposed by the companies managing radio taxi services on taxi drivers, who were actually harmed by a provision preventing them from buying the service from third parties. According to the Council of State, parties to an anticompetitive agreement can also be harmed by that same agreement, as also confirmed by EU case-law.[6]

The definition of the relevant product market

With reference to the definition of the relevant market, the Council of State overturned the TAR Lazio's judgment and held that taxi demand management services offered through apps, phone or radio constitute a single local market.

The Council of State first analyzed the supply-side substitutability of taxi demand management services offered through different means. In this respect, the main argument put forward by the Council of State to decide that the different means to book a taxi constitute a single market was their irrelevance for taxi drivers, given that the only relevant aspect from taxi drivers' perspective is the provision of the service to the end user, regardless of how the taxi is booked and paid.

More importantly, the Council of State held that taxi demand management services offered through apps, phone or radio constitute a single local market also from consumers' perspective, as they perceive the different devices as substitutes. In particular, the court considered that almost all customers now perceive the more modern means to book taxis as substitutes for the more traditional ones, because the technology needed to use them is available to almost everyone. Moreover, according to the Council of State, while some features of the apps could actually be relevant in the user's experience, this did not justify a finding that the market for taxi demand management services offered through apps, phone or radio constitute separate markets.

Finally, the Council of State noted that the substitutability between taxi demand management services offered through apps, phone and radio was confirmed by the very same case at stake, because the effects of the non-compete clause were assessed with reference not only to other companies providing taxi demand management services through phone or radio, but also to digital platforms.

The anticompetitive effects of the agreements

As to the anticompetitive effects, the Council of State first assessed whether the ICA had rightly considered the anticompetitive harm allegedly caused by the agreements at stake. In this respect,

[6] *Courage v. Crehan,* Case C-453/99, EU:C:2001:465, § 36

unlike the TAR Lazio, the Council of State held that the ICA was right in considering that these agreements were capable of preventing entry in the market for taxi demand management services and could have led to a decrease in output and quality of services, with a corresponding increase in prices.

Further, according to the Council of State, the TAR Lazio was wrong to conclude that the ICA had acknowledged that the agreements did not amount to "by object" restrictions of competition law, but had failed to analyze the actual anticompetitive effects of the relevant clauses. Indeed, the Council of State noted that the ICA had carried out a full-blown analysis of the potential anticompetitive effects of the agreements having regard to the economic and legal context, in line with relevant rules and case law. In particular, the ICA had taken into account aspects such as the share of the market covered by the non-compete clause, the duration of the agreement, its binding effects and the fact that the anticompetitive effects could not be offset by the right of withdrawal (which did not represent a feasible alternative from an economic point of view).

Finally, the Council of State assessed whether the non-compete clause could be justified as a mere implementation of Article 2527(2) of the Italian Civil Code, according to which the members of a cooperative enterprise cannot carry out an economic activity in competition with the cooperative enterprise itself. In this respect, the Council of State stated that the content of the non-compete clause at stake did not correspond to Article 2527(2) of the Italian Civil Code, in so far as this article prevents competition between members of the cooperative enterprise (the taxi drivers) and the cooperative enterprise itself (the company offering taxi demand management services), while the non-compete clause prevents the taxi drivers from purchasing taxi demand management services from third party providers of such services.

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