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Italian Competition Law Newsletter

Highlights

— The Italian Competition Authority fines ferry operator for alleged excessive pricing

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

The Italian Competition Authority fines ferry operator for alleged excessive pricing

The Italian Competition Authority (the "**ICA**") fined ferry operator Caronte & Tourist ("**C&T**") €3.7 million for charging allegedly excessive prices on a ferry transportation route between Sicily and Calabria between 2017 and 2019 (the "**Decision**").[1]

The investigation

In July 2020, the ICA opened proceedings[2] to establish whether C&T's prices had infringed Italian competition rules,[3] after its preliminary investigation revealed that C&T had charged the highest fees compared to rivals operating on the same route.

C&T is one of the three ferry companies providing passenger, vehicle and commercial transport services across five routes on the Strait of Messina. C&T is the only company that offers passenger and vehicle transport on the Messina-Rada San Francesco/Villa San Giovanni route, which is used by the majority of motorists wishing to travel from Sicily to Calabria, due to its direct connection to main roads without crossing Calabria's city center. In the decision to open proceedings, the ICA alleged that, besides holding a monopoly over that route, C&T held, in general, a very strong position in the provision of ferry transportation services to passengers crossing the Strait of Messina, also due to the fact that C&T's services ran much more frequently than those of its rivals and carried the largest number of passengers.

The ICA alleged that C&T prices did not appear to be in line with the costs incurred for the provision of the service, and seems to be unreasonably high when compared to those of other operators. In the ICA's view, such conduct harmed consumers, with

[1] ICA, Decision of March 29, 2022 No. 30086, A541 – Servizi traghettamento veicoli Stretto di Messina.

[2] ICA, Decision of July 28, 2020, No. 29913, A541 – *Servizi traghettamento veicoli Stretto di Messina* ("**Decision to open proceedings**"). The investigation was triggered by an anonymous complaint regarding the price of the company's tickets.

[3] In Italy, exploitative price abuses fall within the scope of Article 3(1)(a) of Law 287/90 (the Competition Law), on abuses of dominant position, and Article 102(a) of the Treaty on the Functioning of the European Union ("**TFEU**") if they may affect trade between Member States of the European Union.

prices up to almost three times higher than those of similar services provided by other operators.

In December 2021, the ICA sent its Statement of Objections ("**SO**") to C&T.

The Decision

The ICA's assessment of the alleged unfair practice was based on the *United Brands* two-part test used by the European Commission when investigating excessive prices, namely: (i) "*whether the difference between the costs actually incurred and the price actually charged is excessive*" (excessiveness part); and (ii) if the difference is excessive, "*whether a price has been imposed which is either unfair in itself or when compared to competing products*" (unfairness part).[4]

The relevant market

In the proceedings, C&T noted that the decision-making practice and case law are relatively limited in terms of findings of excessive prices. Most cases reflect predominant concerns other than excessive pricing, including: (i) legal monopolies;[5] (ii) cumulative abuses, where excessive prices are often only a consequence of exclusionary conduct;[6] or (iii) issues of parallel trade or market integration.[7]

According to C&T, these concerns did not occur in the case at issue. In particular, C&T argued that the relevant market for ferry services across the Strait of Messina is a contestable market with no significant barriers to entry or expansion. More specifically, according to C&T, there were:

— no structural barriers to entry, given that the docks were not used to such an extent as to prevent the entrance of new operators or the increase in services by actual competitors;

— no administrative and legal barriers to entry or expansion, as a number of docks were still available and C&T, as a port operator, had an obligation to ensure the use of the marine terminal by any carriers who requested it;

— no economic barriers, taking into account that, if the prices charged by C&T were above the competitive level, as alleged by the ICA, they would attract entry to the market for ferry services, by allowing potential competitors to recover the up-front capital need and the fixed costs sustained in a satisfactory timeframe.

Therefore, C&T argued that it did not have a dominant position on the routes crossing the Strait and, in any event, potential competition had a disciplining effect on its pricing policy.

In addition, C&T remarked that most excessive pricing cases involved a sudden and exponential increase in prices, without economic justification. By contrast, in the case at hand, C&T's prices had remained stable over the years, similar to those of competitors active in the same market.

The ICA rejected C&T's arguments and contested that C&T operates in a non-competitive market where it enjoys a very strong position (close to a *de facto* monopoly), due to alleged:

— structural and administrative barriers, including the reduced availability of docks, and the nature of C&T as a vertically integrated operator, in its capacity as a shipping carrier and simultaneously a port terminal operator;

— strategic barriers arising from the frequency of the routes and the size of C&T's fleet, which enabled it to meet traffic demand in the Strait, thus inhibiting both the entry of new operators and a significant expansion of the carriers currently present.

Moreover, the ICA asserted that C&T's main competitor, Bluferries (which was active in the same market, but almost exclusively in the

[4] Court of Justice of the European Union ("**CJEU**"), Case 27/76, *United Brands and United Brands Continentaal v Commission*, [1978], ECR 207, para. 252.

[5] CJEU, Case 395/87, *Ministère Public v Tournier* [1989] ECR 2521 and Joined Cases 110/88, 241/88 and 242/88 *Lucazeau v SACEM* [1989] ECR 2811.

[6] CJEU, Case 27/76, *United Brands Company v Commission* [1978] ECR 207.

[7] CJEU, Case 226/84, *British Leyland Plc. v Commission* [1986] ECR 3263 and Case 26/75, *General Motors Continental NV v Commission* [1975] ECR 1367.

summer months, and was wholly owned by Rete Ferroviaria Italiana ("**RFI**"), the Italian railway infrastructure management company), was not in a position to exert a significant competitive pressure on C&T. The ICA reasoned that C&T had been able to keep its prices stable over time and that Bluferries had acted as a mere follower, by adopting a commercial strategy reflecting C&T's pricing policy as the incumbent operator.

Excessive prices: the price-cost comparison, cost-plus approach and alternative benchmarks

The ICA then applied the *United Brands* test to verify whether the prices charged by C&T were abusive.

The first part of the *United Brands* test asks whether there is an excessive difference between the costs actually incurred and the price actually charged.[8]

In general terms, the relevant costs should include those directly incurred in supplying the good or service and an appropriate apportionment of the indirect costs that are reasonably attributable to the good or service concerned.

In the case at hand, C&T disputed the "*cost-plus approach*" adopted by the ICA on different grounds:

— first, C&T argued that the ICA did not take into account the correct costs and revenues, as it focused only on the passenger segment with vehicles on one specific route. Conversely, C&T operated as a single unitary business on all relevant routes in the Strait and offered services for both passengers (with and without cars) and freight;

— second, C&T argued that the ICA should have adopted different methods to establish whether its prices were excessive, such as:

  • comparing the prices charged by C&T with those charged in the same market by non-dominant undertakings ("*comparison across competitors*"); or

  • comparing the prices charged by C&T at different points in time ("*comparison across time*").

  According to C&T, these methodologies confirmed that there was no excessive pricing, given that (a) C&T's prices were similar to Bluferries', the most appropriate benchmark for determining whether C&T's prices were excessive, and (b) C&T's prices had remained stable over time;

— lastly, C&T disputed the ICA's view that an 8% Return on Investment ("**ROI**") was an appropriate benchmark to determine a reasonable profitability level. According to C&T, the ICA did not consider the age of the fleet when calculating the reasonable ROI level. C&T remarked that carriers with older fleets tend to have a higher ROI than carriers with more modern fleets. Thus, the increase in ROI as the assets age is not an indication of any extra profitability of the company, but simply the result of an accounting distortion which prevents the use of ROI as a performance indicator.

The ICA decided not to use the "*comparison across time*" approach proposed by C&T, on the ground that the stability of its prices was allegedly a direct consequence of the market power enjoyed for decades by the company in the Strait area. The Authority also decided against using a "*comparison across competitors*" approach, namely a comparison with Bluferries' prices. According to the ICA, Bluferries' prices could not be considered a competitive benchmark, given that its pricing policy merely reflected C&T's. Finally, the ICA maintained that an 8% ROI was a reasonable indicator.

In this respect, the ICA asserted that: (i) the analysis carried out by C&T's economists, showing an increase in the ROI as the fleet ages, relied on partial data and provided an unreliable forecast value; and (ii) in any case, the relationship between the ROI and fleet age lacked statistical significance.

[8] CJEU, Case 27/76, *United Brands Company v Commission* [1978] ECR 207, para. 252.

Price unfairness

The ICA then applied the second part of the *United Brands* test, aimed at verifying whether the prices were unfair. In this respect, the Authority ruled out that C&T's pricing policy could be considered "*unfair in itself*", but proceeded to assess whether the contested prices could be considered unfair when compared to those of competing products.

C&T argued that, in the SO, the ICA had compared the services of dissimilar companies. As a consequence, the activities considered in the benchmark and those carried out by C&T were not comparable. In particular, C&T argued that:

— Bluferries had been erroneously excluded from the comparison, while it should be taken into account, as it constituted an actual competitor, which exerted considerable competitive pressure on C&T;

— the comparison with comparable routes should be made on a "*price per mile*" basis, which is the most economically-sound metric and, moreover, the one used by the ICA itself in the decision to open proceedings;

— the ICA should not have relied on customer reviews on the TripAdvisor portal in relation to service quality to demonstrate that C&T's tariffs were allegedly unfair, as such reviews were in no way representative nor relevant.[9]

— the ICA should have also taken into account that C&T had put in place several initiatives and made investments to improve the quality of its services.

However, the ICA rejected C&T's arguments and maintained that C&T's prices were unfair, for the following reasons:

— first, the ICA noted that C&T's rates were at least 80% higher than those charged by carriers operating on the benchmark routes. In the ICA's view, the services offered by Bluferries could not be considered "*competing products*",[10] as Bluferries operated in a fringe market on a seasonal basis, with a number of ships and a frequency of sailings not comparable with that offered by C&T, and served only the residual demand not met by C&T;

— second, with reference to the use of "*price per mile*", the ICA held that prices depend on numerous variables, such as the frequency of daily trips, seasonality, fleet age, vessel characteristics, quality of services on board and at embarkation, etc. In the ICA's view, an assessment of the mere "*price per mile*" failed to take into account the large number of qualitative variables involved in setting prices. As a consequence, the ICA argued that the "*ticket price*" was the best variable for making objective price comparisons between comparable routes in terms of service quality;

— third, the ICA alleged that C&T's investments had not been sufficient to significantly improve users' experience and satisfaction.

The fine

The ICA imposed a fine of €3.7 million for the alleged abuse committed by C&T**.** The initial amount of the fine reached the maximum statutory penalty of 10% of the company's annual turnover, but the ICA reduced it by 50%, taking into account the "*special circumstances*" created by the Covid-19 pandemic and the government's restrictions on travel during the health crisis.

Additionally, the ICA ordered C&T to: (i) implement a fair pricing policy and refrain from engaging in the contested conduct; and (ii) communicate annually to the ICA the actions taken to implement fair prices up to 2025, by providing specific written reports.

[9] Interestingly, the ICA had already fined TripAdvisor for the unreliability of the reviews displayed on its platform (see ICA, Decision of December 19, 2014, No. 25237, Case PS9345 – *TripAdvisor-False online reviews*).

[10] CJEU, Case 27/76, *United Brands Company v Commission* [1978] ECR 207, para. 252.

The Decision in context

The European Union and many other jurisdictions have long considered excessive and unfair pricing an abuse of dominance. However, the number of cases is relatively limited, at least at the EU level. The most prominent cases are *United Brands*,[11] *General Motors*,[12] *British Leyland*,[13] *Port of Helsingborg*[14], *Aspen*,[15] and a series of cases involving copyright collecting societies.[16]

At the Italian level, the ICA has generally been reluctant to take action against allegedly excessive prices. The relatively few cases in which the ICA has adopted decisions concern mainly the transport[17] and pharmaceutical sectors.[18] Interestingly, the decision in the *C&T* case differs from the ICA's earlier excessive pricing cases because the affected sector is not highly regulated.

The limited number of precedents may be due to different reasons:

— it is difficult to measure cost levels, and there is no reliable economic criterion to determine when the margin between price and cost becomes excessive;

— in case of intervention to prohibit excessive prices, there is a risk that antitrust authorities and courts may act as regulators;

— there is wide consensus that intervening in such matters may distort market signals, especially in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct;

— in cases of excessive prices, as with other forms of abuse, the boundary between lawful rewards of market power, as a result of successful investment, innovation or efficiency, and unlawful use of such power may be hard to identify with any precision;

— the relatively few precedents are extremely context and fact-dependent. As a consequence, the extent to which the treatment of excessive pricing set out therein may be of wider or general application is uncertain.

Despite the difficulties involved in establishing unlawful excessive prices, in recent years there has been a resurgence of interest in these cases at both EU and national levels. In line with increased political calls for fairness for consumers, the rules on abuse of dominance have been invoked to tackle high prices in a range of markets, especially in case of sudden and substantial increase in prices without economic justification. The *C&T* case is another example of this revival in tackling excessive pricing in competition law enforcement. The case also suggests that the fact that the prices have remained stable over the years and there has been no substantial increase in the price level does not exclude the risk of antitrust intervention.

[11] CJEU, Case 27/76, *United Brands Company v Commission* [1978] ECR 207.

[12] CJEU, Case 26/75, *General Motors Continental NV v Commission* [1975] ECR 1367.

[13] CJEU, Case 226/84, *British Leyland Plc. v Commission* [1986] ECR 3263.

[14] CJEU, Case COMP/A.36.568/D3, *Scandlines Sverige AB v Port of Helsingborg*, Commission Decision of July 23, 2004, para. 102. See also Case COMP/A.36.568/D3, *Sundbusserne v Port of Helsingborg*, Commission Decision of July 23, 2004, para. 85.

[15] See European Commission, Decision of February 10, 2021, Case AT.40394 – *Aspen*, C(2021) 724.

[16] CJEU, Case 395/87, *Ministère Public v Tournier* [1989] ECR 2521; CJEU, Joined Cases 110/88, 241/88 and 242/88, *Lucazeau v SACEM* [1989] ECR 2811.

[17] See ICA, Decision of November 14, 2001, No. 10115, A306 – *Veraldi/Alitali*; ICA, Decision of October 23, 2008, No. 19020, Case A376 – *Aeroporto di Roma-Tariffe aeroportuali*; and ICA, Decision of November 26, 2008, No. 19189, Case A377 – *SEA/Tariffe aeroportuali*.

[18] In September 2016, the ICA imposed a €5.2 million fine on Aspen for setting excessive prices for life-saving and irreplaceable drugs for the treatment of onco-hematological patients. See ICA, Decision of September 29, 2016, No. 26185, Case A480 – *Incremento prezzi farmaci/Aspen*. In October 2019, the ICA opened a proceeding against pharmaceutical group Leadiant Biosciences for allegedly charging excessive prices for an "*orphan drug*" and preventing rivals from accessing the market. The case is ongoing. See ICA, Decision of October 8, 2019, No. 27940, Case – A524, *Leadiant Biosciences/Farmaco per la cura della xantomatosi cerebrotendinea*.

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

On April 26, 2022, the Italian Supreme Court confirmed a judgment of the Milan Court of Appeal, which had upheld the damages claim brought by Teleunit S.p.A. ("**Teleunit**") against Telecom Italia S.p.A. ("**Tim**")[19].

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 on their respective networks.[20] In May 2007, the ICA closed the proceedings in relation to Vodafone with a commitments decision.[21] Conversely, in August 2007, the ICA fined Tim and Wind for alleged abuse of dominance.[22]

In particular, regarding Tim, the ICA held that, between 1999 and 2007, Tim had engaged in 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. 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 2008, Teleunit brought an action against Tim, seeking compensation for the damage allegedly caused by conduct contested by the ICA. In 2016, the Court of Milan upheld Teleunit's claims.[23] The ICA's infringement decision constituted "*privileged evidence*" of the contested conduct. However, Teleunit still had the burden of proving the causal link between such conduct and the damage it allegedly suffered, as well as the damage and its amount.

The Court of Milan found that the damage suffered by Teleunit did not result from a diversion of clientele caused by non-replicable retail offers, nor from excessive prices allegedly charged by Tim for its wholesale services. In this respect, the Court noted that the prices were based on standard conditions approved by the Italian Communications Authority. Instead, the Court considered that the damage was caused by an alleged decrease in the margins obtained by the plaintiff in the downstream market for the supply of fixed-to-mobile services. Indeed, according to the Court, the conditions applied by Tim to Teleunit 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 Teleunit to operate in the downstream market with profit margins lower than those that could have otherwise been obtained, had Tim applied to Teleunit the same conditions allegedly reserved to the dominant firm's commercial divisions.

The Court of Milan concluded that Teleunit had suffered damages equal to €1,531,894. This amount was determined 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 directly estimate the

[19] Italian Supreme Court, Judgment of April 26, 2022, No. 13073; and Milan Court of Appeal, Judgment of March 8, 2018, No. 1200.

[20] ICA, Decision of February 23, 2005, No. 14045, Case A357 – *Tele 2/TIM-Vodafone-Wind*.

[21] ICA, Decision of May 24, 2007, No. 16871, Case A357 – *Tele 2/TIM-Vodafone-Wind*.

[22] ICA, Decision of August 3, 2007, No. 17131, Case A357 – *Tele 2/TIM-Vodafone-Wind*.

[23] Court of Milan, Judgment of June 27, 2016, No. 8008.

difference between the prices charged to Teleunit and those applied to Tim's commercial divisions.[24]

The Milan Court of Appeal rejected the appeals filed by both parties and entirely confirmed the findings of the first instance court.

The judgment of the Supreme Court

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

In relation 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, this alleged discriminatory practice reduced Teleunit's profit margins.

The Supreme Court confirmed that the damage arising from the alleged discriminatory practice had to be ascertained through an analysis of the counterfactual scenario, i.e., the economic situation in the absence of the contested conduct. In the Court's view, without the contested conduct, Teleunit would have paid lower wholesale prices or, if Tim's internal divisions were to bear the same costs as those charged to Teleunit, Tim's offers would have been higher, and Teleunit consequently could have been able to increase its retail prices, thus avoiding the decrease in its profits. The Supreme Court noted that a loss of profit for competitors can be caused not only by reduced revenues, but also by increased costs, as in the case at issue. The profits that would have been obtained in a non-infringement scenario (counterfactual profits) can be determined by deducting the estimated costs in such scenario (counterfactual costs) from the revenues expected in the absence of the infringement (counterfactual revenues). The lost profit is the difference between counterfactual and actual profits.

In the case at hand, according to the Supreme Court, the lower Courts had correctly calculated the profit that Teleunit would have achieved if the termination costs were not discriminatory, by assuming that, in the counterfactual scenario, Teleunit would have sustained lower costs for the purchase of wholesale services, without changing its retail prices.

Secondly, the Supreme Court rejected Tim's argument that Teleunit had passed on the higher costs to its customers and, therefore, it had not incurred any damages. In this respect, the Supreme Court confirmed the Court of Appeal's view that the higher costs allegedly sustained by Teleunit had not been passed on to its customers, because: (i) the demand elasticity in the market concerned was particularly low; and (ii) Teleunit's marginal market position did not allow it to appreciably influence price levels.

Thirdly, the Supreme Court agreed with the Court of Appeal that the first-instance judgment had not wrongly reversed the burden of proof, but had correctly taken into account the high evidentiary value of ICA decisions in follow-on actions.

Finally, the Supreme Court held that the lower courts had correctly determined the amount of the damages awarded to the plaintiff on the basis of the lower profit margins allegedly obtained by Teleunit.

[24] 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 Teleunit, 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, Teleunit could have increased its retail prices by the same amount, thus obtaining higher profit margins.

Other developments

ICA fines three associations of undertakings in the Italian cinematographic industry for alleged collective boycott against companies organizing outdoor free film screenings

On March 15, 2022, the ICA imposed fines of over €90 million on the associations of undertakings Anica, Anec and Anec Lazio, representing the Italian film and audiovisual industry as well as companies managing cinemas in Italy (jointly the "**Associations**"), for an alleged collective boycott infringing Article 101 TFEU.[25]

The proceedings were opened in June 2020, on the basis of various complaints filed by companies and associations organizing free outdoor film screenings in summer in Italy. The complainants claimed that the Associations had engaged in a boycott and obstructive conduct, aimed at preventing them from obtaining the authorizations necessary for outdoor film screening.

During its investigation, the ICA found that, since 2018, the Associations had adopted decisions and guidelines capable of influencing the business strategy of their members, allegedly with a view to preventing outdoor cinemas throughout Italy from obtaining films to be screened for free during the summer. According to the ICA, the Associations issued such decisions and guidelines as a result of a joint decision-making process, as confirmed by the exchange of emails and the organization of joint meetings.

During the proceedings, the ICA adopted interim measures (upheld by the TAR Lazio following an application for annulment filed by the Associations), ordering the Associations to: (i) immediately cease implementing the alleged boycott decision or agreement; and (ii) revoke all communications and indications containing any form of influence and/or guidance on business strategy on films for their members.[26]

In the final decision, the ICA rejected the Associations' argument that free outdoor cinemas could not be considered undertakings for the purposes of competition law. In this regard, the ICA recalled that the notion of undertaking is particularly broad and also encompasses entities offering services for free to consumers (such as free outdoor film screening). Furthermore, the ICA asserted that, in any event, what matters is that the entities to which Article 101 TFEU is applied (in this case, the Associations) are undertakings or associations of undertakings, not the status of the targets of the alleged anticompetitive conduct.

In addition, the ICA took the view that the Associations' conduct impaired the ability of Italian consumers to access free outdoor film screenings during the summer, thus compromising the quality of the offering of cinematographic products to end-users and distorting competitive dynamics in the Italian markets for film distribution and screening.

However, taking into account the objective difficulties experienced by the Italian film industry due to the Covid-19 pandemic, the ICA applied a significant reduction in the fines imposed on the Associations, pursuant to Article 34 of its Fining Guidelines (namely, a 60% reduction in the fines imposed on Anec and Anec Lazio, and a 40% reduction in the fine imposed on Anica).[27]

[25] ICA, Decision of March 15, 2022, No. 30065, Case I840 – *Ostacoli alle arene a titolo gratuito*.

[26] ICA, Decision of July 8, 2020, No. 28286, Case I840 – *Ostacoli alle arene a titolo gratuito*, upheld by TAR Lazio, Judgment of September 7, 2021, No. 9524 (see Cleary Gottlieb, Italian Competition Law Newsletter, September 2021, available at: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---september-2021.pdf).

[27] ICA, Decision of October 22, 2014, No. 25152, Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15(1) of Law No. 287/90.

TAR Lazio annuls ICA decision fining Telecom Italia €3.7 million for alleged abuse of dominance

On April 11, 2022,[28] the TAR Lazio annulled an ICA decision finding that Telecom Italia S.p.A. ("**Tim**") had infringed Article 102 TFEU for allegedly abusing its dominant position in the market for Short Message Service ("**SMS**") termination (the "**Decision**").[29] The Court followed the same reasoning as that set out in its September 2021 judgment, in which it overturned the €5.7 million fine imposed by the ICA on Vodafone Italia S.p.A. ("**Vodafone**") in a parallel decision.[30]

Following a complaint filed in April 2016 by Ubiquity S.r.l. ("**Ubiquity**"), the ICA had opened separate proceedings for alleged abuses of dominance by Tim and Vodafone. In particular, Ubiquity (now Kaleyra S.p.A.) claimed that Tim and Vodafone were applying excessive tariffs in the upstream market for SMS termination on their respective networks, thus hindering the ability of rivals to provide services in the downstream market for bulk SMS services (*i.e.*, packages of messages sold to companies that want to send large amounts of messages to their customers). In December 2017, the ICA decided that Tim and Vodafone had abused their respective dominant positions under Article 102 TFEU.

In particular, the ICA alleged that Tim – together with its subsidiary Telecom Italia Sparkle S.p.A. – had put in place an internal-external technical and economic discrimination, resulting in a margin squeeze for equally efficient competitors in the Italian downstream market for bulk SMS services.

The companies submitted separate applications to the TAR Lazio for annulment of the ICA decisions. Tim challenged, *inter alia*, the ICA's assessment of the contested conduct's effects in the downstream market, with particular reference to the final retail price that could be charged by a competitor that was as efficient as the dominant undertaking.

In its ruling, the TAR Lazio found that the ICA had not adequately demonstrated the existence of a margin squeeze and had incorrectly applied the 'as-efficient competitor test', because it had failed to properly calculate the threshold price for SMS termination services.

The TAR Lazio held that the ICA was wrong in taking into account only the costs incurred by Tim when using its own network. Indeed, as clarified by the CJEU, even if the general approach in margin squeeze cases requires competition authorities to refer to prices and costs of the dominant undertaking in the upstream market, in some cases competition authorities should instead refer to prices and costs borne by the undertakings active in the downstream market in order to verify the existence of a margin squeeze.[31] This alternative approach is needed when the competitive conditions of the market at issue require a different approach than the as efficient competitor test. The TAR Lazio stated that this was the case in the upstream market for SMS termination, where three dominant operators competed with each other, thus requiring the use of an alternative criterion to the as efficient competitor test. Indeed, Tim bears higher costs when buying termination services from its competitors: dominant undertakings charge higher prices to the other dominant players for termination services on their network, while they charge lower prices to operators that, being equipped with a numbering infrastructure, purchase from the dominant operators only the right to terminate on the network (so-called "*D43 operators*"). The higher costs that Tim bears if compared to D43 operators is not due to the fact that Tim is not an as efficient competitor, but it is rather a strategy of the other dominant players aimed at avoiding to provide any advantage to competitors in the upstream market.

Therefore, in order to demonstrate the existence of a margin squeeze, the ICA was required to (i) analyze the wholesale price offered by Tim to D43

[28] TAR Lazio, Judgment of April 11, 2022, No. 4333.

[29] ICA, Decision of December 13, 2017, No. 26902, Case A500B – *Telecom Italia-SMS informativi aziendali*.

[30] ICA, Decision of December 13, 2017, No. 26901, Case A550A – *Vodafone-SMS informativi aziendali*, and TAR Lazio, Judgment of September 15, 2021, No. 9803 (see Cleary Gottlieb, Italian Competition Law Newsletter, September 2021, available at https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---september-2021.pdf).

[31] See CJEU, Case C-52/09, *TeliaSonera Sverige* [2011] ECR 527.

operators; and (ii) take into account the prices offered by companies that buy the termination services in order to sell them as bulk SMS packages (so-called "*aggregators*"). Aggregators are indeed intermediaries that do not purchase SMS termination in the same downstream market as the final customers. Ignoring the prices and costs incurred by aggregators and D43 operators, as well as their role in the market, was considered a methodological error which invalidated the whole test applied by the ICA.

Finally, the TAR Lazio found that the ICA had failed to demonstrate the anticompetitive effects of the conduct, as it had wrongly treated the alleged margin squeeze as a restriction by object, an approach which was not considered coherent with EU and national case-law.

For all these reasons, the TAR Lazio upheld Tim's application and annulled the ICA's decision in its entirety.

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