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Italian Competition Law Newsletter

Highlights

— The ICA imposes a fine of €1.128 billion on Amazon for allegedly leveraging its dominant position in the market for the provision of marketplace intermediation services into the market for e-commerce logistics services.

— The Italian Supreme Court issues a landmark judgment on the nullity of "*downstream*" agreements entered into pursuant to anti-competitive "*upstream*" agreements

The ICA imposes a fine of €1.128 billion on Amazon for alledgedly leveraging its dominant position in the market for the provision of marketplace intermediation services into the market for e-commerce logistics services

On November 30, 2021, the Italian Competition Authority (the "**ICA**") imposed a fine of €1.128 billion on Amazon Europe Core S.à r.l., Amazon Services Europe S.à r.l., Amazon EU S.à r.l., Amazon Italia Services S.r.l. and Amazon Italia Logistica S.r.l. ("**Amazon**") for an alleged abuse of dominant position in the Italian market for intermediation services on e-commerce marketplaces.[1]

Background

On April 10, 2019, the ICA opened an investigation into whether Amazon had abused its dominant position by allegedly tying a set of exclusive benefits, considered essential by the ICA for gaining visibility and increasing sales on Amazon's Italian marketplace ("**Amazon.it**"), to the use of its own logistics service (Fulfilment by Amazon, or "**FBA**").

FBA is an integrated logistics service that includes: (i) warehousing and management of third-party sellers inventory at Amazon's distribution centers; (ii) fulfillment of orders received on Amazon.it, including packaging and labeling; (iii) shipping, transportation and delivery; (iv) returns' management; and (v) customer service.

[1] ICA, Decision of November 30, 2021, No. 29925, Case A528, *FBA Amazon*.

The Decision

The alleged conduct

The ICA held that Amazon granted third-party sellers using FBA the following exclusive benefits: (i) assignment of the Prime label, which ensures that products are more visible to Prime subscribers; (ii) exclusion from the stringent performance indicators that Amazon applies to monitor non-FBA sellers' performance, which can ultimately lead to the suspension of non-compliant sellers' accounts on Amazon.it; (iii) increased chances of assignment of the Buy Box, i.e. to be presented as the offer that Amazon considers the most suitable to satisfy the search of the consumer; (iv) access to special events, such as Black Friday and Cyber Monday; and (v) preferential access route to non-Prime customers.

The ICA took the view that these benefits, taken together, can be regarded as a single, non-replicable product, providing platform users with "*increased visibility*", which leads to an increase in sales on Amazon.it.

The relevant markets

The ICA identified two relevant markets: (i) the market for intermediation services on e-commerce platforms; and (ii) the market for e-commerce logistics services.

Amazon argued that the relevant market should be defined as the overall market for retail sales, including both online and offline sales channels. However, the Authority held that there is no sufficient substitutability between the two channels, especially from the point of view of third-party sellers.

The theory of harm

Echoing the *Google Shopping* case,[2] the ICA considered that Amazon had abused its alleged dominant position on the market for intermediation services on e-commerce platforms by self-preferencing its own logistics services.

Amazon raised a number of arguments aimed at demonstrating that its conduct did not infringe competition rules. *Inter alia*, Amazon contended that the ICA's investigation did not comply with the principles established by the Court of Justice in the *Intel* case,[3] as the ICA had not adequately assessed whether the contested conduct had foreclosure effects and was capable of excluding an as efficient competitor.

However, the ICA did not accept Amazon's arguments. The Authority argued that Amazon's conduct had anticompetitive effects on both the market for e-commerce logistics services and the market for intermediation services on marketplaces. On one side, the conduct deprived competing providers of logistics services of access to a significant portion of third-party sellers' demand. On the other side, it made selling on multiple platforms (so-called multi-homing) more expensive for third-party sellers active on Amazon.it, thus reducing their offers on competing platforms. Indeed, according to the ICA, third-party sellers using FBA were in fact obliged to duplicate their stocks in case they wished to sell on multiple platforms. In the ICA's view, this induced third-party sellers into single-homing on Amazon.it.

According to the ICA, Amazon used its alleged super-dominance in the Italian market for intermediation services on marketplaces to both further strengthen such dominant position and to artificially increase its market share on the vertically connected market for e-commerce logistics services.

Amazon argued that, in any case, the launch of the Seller Fulfilled Prime ("**SFP**") program had removed the ICA's concerns. This program allows third-party sellers that meet certain standards and rely on the delivery services provided by carriers approved by Amazon to enjoy the same benefits as sellers using FBA. However, the ICA rejected this argument, on the basis of two main grounds: (i) the alleged absence of objective requirements to be met by alternative providers of logistics services to benefit from the SFP program; (ii) Amazon's

[2] European Commission, Case AT.39740 of June 27, 2017, *Google Search (Shopping)*.

[3] European Court of Justice, Case C-413/14 of September 6, 2017, *Intel*.

intermediation between third-party sellers and carriers, which allegedly resulted in higher costs for third-party sellers compared to what they could individually negotiate with carriers.

The ICA also rejected Amazon's claim that its consumer-oriented business model was not compatible with the Authority's theory of harm, as Amazon's objective is only to guarantee timely deliveries to offer a better experience to consumers. According to the ICA, the exclusive benefits tied to the FBA program went beyond what would be proportionate to achieve the objective of guaranteeing fast and reliable delivery services to consumers.

Fines and corrective measures imposed

In issuing its record fine of €1.28 billion, the ICA dismissed Amazon's argument that the alleged conduct did not, in fact, have any foreclosure effect. In the ICA's view, Amazon's alleged position of super-dominance in the market for intermediation services on e-commerce platforms, together with its reputation in markets where it operates, allowed it to behave independently of its competitors and consumers. This finding, combined with the ICA's view that Amazon put in place a specific strategy, led to the conclusion that the alleged infringement was very serious.

The ICA also imposed on Amazon a detailed list of measures to be put in place to restore a level playing field and to foster the development of logistics services alternative to FBA. In particular, Amazon must: (i) publish a list of objective and non-discriminatory requirements for third-party sellers to obtain the Prime label; (ii) modify the SFP program so as to allow all third-party sellers meeting such requirements to freely choose their logistics providers; (iii) monitor compliance with Prime standards without discriminating against third-party sellers that do not use FBA; (iv) grant the Prime badge and all other related benefits to all third-party sellers using the SFP program; (v) abstain from any intermediation between third-party sellers and logistics service providers, for one year from the date of the Decision; and (v) properly advertise the new SFP program.

The Italian Supreme Court issues a landmark judgment on the nullity of "*downstream*" agreements entered into pursuant to anti-competitive "*upstream*" agreements

On December 12, 2021, the United Sections of the Italian Supreme Court released a landmark judgment (the "**Judgment**"), and put an end to a long-running debate concerning the validity of general personal guarantee contracts (*contratti di fideiussione omnibus*), based on standard contractual schemes later found in breach of Law No. 287/1990 (the "**Italian Competition Law**").[4]

The Supreme Court held that the clauses of personal guarantee contracts based on standard contractual schemes, which have been declared anticompetitive by the Italian Competition Authority ("**ICA**") in relation to certain clauses incompatible with Article 2(2) of the Italian Competition Law or Article 101 TFEU (concerning anti-competitive agreements), are null and void, pursuant to Article 2(3) of the Italian Competition Law and Article 1419 of the Italian Civil Code.

Such nullity applies only to the clauses reflecting the provisions of the contractual scheme considered anticompetitive, unless it is possible to infer from the contract, or is otherwise proven, that such clauses were an essential element of the overall agreement, taking into account the intent and the interests of the parties.

[4] Supreme Court, Judgment of December 30, 2021, No. 41994.

Legal background

The invalidity of downstream guarantee contracts has been the subject of debate since 2005, when the Bank of Italy, in its capacity as competition authority in relation to credit institutions under Articles 14 and 20 of the Italian Competition Law, ruled that the standard contractual scheme (the "**Scheme**") issued by the Italian Bank Association (Associazione Bancaria Italiana; "**ABI**")was incompatible with Article 2(2)(a) of the Italian Competition Law.[5] In particular, the Bank of Italy considered that Articles 2, 6 and 8 of the Scheme would have resulted in a restriction of competition if they were applied uniformly by Italian banks, as they would have contributed to coordinating the behavior of competing undertakings.

On this matter, various conflicting judgments have been issued in recent years. According to some judgments, in the case of anti-competitive agreements, the only remedy available to individuals who did not partake in the anti-competitive agreement (i.e., consumers) is an action for damages.[6] In contrast, other judgments stated that a general personal guarantee contract based on an anti-competitive standard form is null and void in its entirety, pursuant to Article 1418 of the Italian Civil Code.[7] Finally, in other cases, the Supreme Court held that nullity should only be partial and limited to the terms incompatible with competition law, pursuant to Article 1419 of the Italian Civil Code.[8]

Facts of the case

Albatel I.C.T Solution S.p.A. ("**Albatel**") entered into current account and loan agreements with Sanpaolo IMI S.p.A. bank ("**Sanpaolo**"). In relation to these agreements, the bank requested two separate general personal guarantees, which were signed by a shareholder of Albatel, acting as guarantor ("**Guarantor**"). The general personal guarantee contracts were drafted in line with the Scheme, which had been declared anti-competitive by the Bank of Italy.

Following the termination of the agreements, Sanpaolo requested the payment of certain sums on the basis of the two general personal guarantee contracts.

The Guarantor opposed the requests before the Court of Appeal of Rome, claiming that the general personal guarantee contracts should be declared null and void in full as they were in breach of Article 2(2)(a) of the Italian Competition Law. In June 2016, the Court of Appeal of Rome upheld the Guarantor's appeal and declared, among other things, that the general personal guarantee contracts were null and void.[9]

Sanpaolo challenged the judgment before the Supreme Court. The First Section of the Supreme Court noted that there was no consensus in the case-law and the legal literature as to the protection available to the guarantor when general personal guarantee contracts are based on a standard contractual scheme incompatible with competition law.

Accordingly, the First Section referred the matter to the United Sections, which were called upon to clarify, in particular: (i) whether the total or partial coincidence between the provisions of an anticompetitive upstream agreement and those included in a downstream contract implies that the guarantor is entitled to a declaration of nullity of the downstream contract, or only to damages; and (ii) in case the guarantor is entitled to a declaration of nullity, whether the downstream contract should be declared null and void in full, or only in relation to the anti-competitive clauses.

The Judgment

According to the Supreme Court's United Sections, EU law simply grants a right to compensation to

[5] Bank of Italy, Decision of May 2, 2005, No. 55.

[6] Supreme Court, Judgments of December 9, 2002, No. 17475 and June 11, 2003, No. 9384.

[7] Supreme Court, Judgments of December 12, 2017, No. 29810 and March 3, 2021, No. 6523.

[8] Supreme Court, Judgment of September 26, 2019, No. 24044.

[9] Court of Appeal of Rome, Judgment of June 11, 2016, No. 3746.

those harmed by a downstream contract based on an anticompetitive upstream agreement, given that downstream contracts do not fall within the notion of anti-competitive agreements under Article 101 TFEU. Consequently, each Member State is responsible for defining the effects of a downstream contract concluded on the basis of an anticompetitive upstream agreement, according to its own legal system.

According to the United Sections, under Italian law, partial nullity under Article 1419 of the Italian Civil Code may be the most appropriate solution, taking into account the objectives pursued by antitrust law and the interests involved (namely, the interest of the credit institution in keeping the general personal guarantee contracts). Based on civil law principles, the nullity of individual contractual clauses extends to the entire contract only insofar as the party concerned proves that the part of the contract affected by invalidity is inseparably connected with the rest of the agreement.

The Supreme Court's ruling also sheds light on how the nullity of the upstream act, whose anti-competitive nature has been ascertained by the competent competition authority, affects downstream agreements. In this regard, the court stated that the notion of "*agreement*" under competition law may include both contractual and non-contractual acts and is intended to prevent certain "*economic results*", namely the distortion of competition on the market. Therefore, even the combination of several acts of a different nature can constitute an anti-competitive agreement, if these acts are "*functionally*" linked together, so as to create a mechanism breaching competition rules.

This functional connection can be detected when a downstream contract reflects the provisions of an anticompetitive upstream agreement in full or in part, thus constituting a vehicle for implementing the upstream agreement. Accordingly, contracts resulting from a prohibited agreement, to the extent that they constitute the result of the anticompetitive agreement and are essential to realize its effects, are of the same anti-competitive nature as the upstream agreement and, thus, are also invalid.

The Supreme Court also stated that, without an action for nullity, actions for damages would be an insufficient measure. It considered that the nullity action is the most suitable instrument to safeguard transparency and fairness on the market, and may also act as a deterrent for companies entering into anti-competitive agreements.

Based on the above, the Supreme Court ruled that the general personal guarantee contracts were null and void only in relation to the provisions reflecting the anti-competitive clauses of the Scheme issued by the ABI. Indeed, according to the Court, the guarantor would have entered into the contract in any event, even without the terms considered anticompetitive, as it was linked to the principal debtor and, thus, had an economic interest in obtaining bank funds.

Other Developments

The ICA accepts commitments offered by the parties to alleged anticompetitive agreement in educational publishing sector

On November 16, 2021, the ICA adopted a decision making legally binding the commitments offered by Associazione Italiana Editori ("**AIE**"), Associazione Nazionale Agenti Rappresentanti Promotori Editoriali ("**ANARPE**"), De Agostini Scuola S.p.A., Mondadori Education S.p.A., Rizzoli Education S.p.A. and Pearson Italia S.p.A. (together, the **"Parties**"), in the context of an investigation regarding an alleged agreement between educational publishers and their promoters.[10]

On December 1, 2020, the ICA opened an investigation under Article 101 TFEU, following

[10] ICA, Decision of November 16, 2021, No. 29894, Case I848, *Problematiche concernenti l'attività di promozione nel mercato dell'editoria scolastica*.

a complaint filed against the Parties, regarding some contractual clauses (so-called "*approval clauses*") included in contracts between publishers and promoters. Under these clauses, a promoter would not be able to take on a new mandate from a different publisher without prior authorization from the publisher that it was already promoting.

According to the ICA, the approval clauses represented a vertical restriction capable of limiting the activity of promoters, with exclusionary effects in the national market for educational publishing. This conduct could have significant effects on competition, since the four publishers involved represented 75% of the offer in the concerned market.

During the proceedings, the Parties submitted to the ICA two sets of commitments under Article 14(3) of Law No. 287/1990.

In particular, the associations AIE and ANARPE committed to: (i) amending the collective agreement stipulated in 2017, by removing the approval clauses; and (ii) not reintroducing a similar prohibition in the event of a new collective agreement, replacing the 2017 one and regulating the educational promotion activity.

In addition, the four publishing companies submitted two behavioral commitments, according to which they would have: (i) waived, until June 30, 2026, the approval clauses included in the contracts in force with all the promoters of the respective networks, as well as the exclusivity clause (if envisaged); and (ii) voted, within the associations, in favor of removing the non-compete clause from the 2017 collective agreement.

The commitments were found to adequately address the ICA's competition concerns.

The ICA accepts commitments offered by parties to alleged anticompetitive agreement in audiovisual sector

On November 25, 2021, the ICA made legally binding the commitments offered by Società Italiana degli Autori ed Editori ("**SIAE**") - the Italian copyright collecting society - and the trade associations ANICA, APA and Univideo.[11] The commitments were found to adequately address the ICA's concern regarding an alleged anticompetitive agreement aimed at: (i) preventing access to the market by alternative collecting societies wishing to manage, on behalf of their members, private copying remuneration ("**PCR**"); as well as (ii) hindering the freedom of the right holders to choose the entity to which to entrust the management of PCR on video.

The proceedings

In February 2020, the ICA opened a formal investigation against the above-mentioned collecting society and trade associations, on the basis of complaints submitted by Videorights and Delta TV. In particular, the ICA investigated whether there had been a violation of Article 101 TFEU with regard to the management of Video PCR governed by Articles 71(6), 71(7) and 71(8) of Law No. 633 of April 22, 1941 (the "**Copyright Law**").[12]

The ICA defined two relevant markets:

i. the national market for primary distribution of PCR to producers of videograms and audiovisual works by SIAE, on the basis of percentages established by the Copyright Law, through the associations ANICA, APA and Univideo, and

ii. the national market for secondary distribution, in which these associations pay the PCR due to the collecting societies concerned.

[11] See ICA Decision of November 25, 2021, No. 29916, Case I853, (the "Decision").

[12] During the proceedings, Law Decree No. 73 of May 25, 2021 substantially modified the Copyright Law, by establishing a demarcation between the audio and video sectors. The role of "*the most representative trade associations*" for the distribution of the Video PCR was not amended (Article 71(8)(3)).

The PCR are paid to SIAE by producers and importers of devices intended for the analogical or digital recording of phonograms and videograms. SIAE then redistributes the PCR between the authors, the producers and the performers. Producers and performers are represented in such redistribution process by trade associations.

Thus, the primary distribution of the video PCR to the producers of videograms and audiovisual works mainly has a redistributive function, since it is a binding transfer of resources from SIAE to the relevant associations. On the other hand, the secondary distribution of the video PCR to the producers of videograms and audiovisual works is profitable insofar as it potentially generates margins in favor of the associations in charge of paying the fees to those entitled to them.

In the ICA's view, SIAE and the trade associations ANICA, APA and Univideo, also through their subsidiaries, hindered the activities of other collecting societies, including Videorights, which intended to manage Video PCR on behalf of their members. On the basis of agreements undertook between SIAE and the trade associations, SIAE was only allowed to transfer the PCR to the trade associations. In this way, they also hindered the freedom of right holders, such as the complainant Delta TV, to choose the entity to which to entrust the management of Video PCR.[13]

The ICA found that SIAE, ANICA (also through ANICA Servizi), APA (also through APA Servizi), and Univideo (also through ASEA) allegedly divided the markets relating to the primary and secondary distribution of PCR in the video sector, so that each association would manage entirely the PCR attributable to the category of producers it represented, and also the share relating to the producers represented by other collecting societies, such as Videorights .

The commitments proposed by the parties

With regard to the phase of the "*primary distribution*" of the PCR, SIAE and the trade associations undertook to terminate the agreements still in force and to involve the collecting societies in the definition of the distribution criteria.

Regarding "*secondary distribution*", SIAE undertook to take action with the associations in order to enable the other collecting societies to participate to the redistribution process. The trade associations undertook to provide clearer and more transparent distribution procedures, with the increased involvement of the collecting societies, to which corresponds also a proportional reduction in the fees applied.

The Council of State rejects COREPLA's appeal against interim measures imposed by the ICA in abuse of dominance proceedings

On December 16, 2021, the Council of State rejected an appeal filed by the Italian Consortium for the Collection, Recycling and Recovery of Plastic Packaging ("**COREPLA**") against a judgment of the Regional Administrative Court of Lazio ("**TAR Lazio**"), which had upheld the interim measures imposed by the ICA in the context of abuse of dominance proceedings (the "**Proceedings**").[14]

On April 30, 2019, the ICA opened an investigation into whether COREPLA had obstructed the operation of CORIPET, a consortium established to offer an innovative plastic collection system.[15] At the same time, the ICA opened interim proceedings to assess whether urgent measures were required to prevent COREPLA's alleged conduct from excluding CORIPET, its only competitor, from the market.

[13] See Article 5 of the Barnier Directive and Article 4(2) of Legislative Decree No. 35/2017.

[14] Council of State, Judgment No. 8402 of December 16, 2021.

[15] ICA Decision of April 30, 2019, No. 27662, Case A531, *Riciclo imballaggi primari/condotte abusive COREPLA*.

On October 29, 2019, the ICA ordered COREPLA to: (i) modify its contracts with local authorities and sorting plants so as to allow the allocation of plastic waste to consortia other than COREPLA; (ii) stop auctioning plastic waste that should have been allocated to CORIPET; (iii) cooperate with CORIPET in order to reach agreements on preliminary management issues; and (iv) assign to CORIPET the portion of plastic waste to which it was entitled based on the activities of its members, as well as all the plastic waste that should have been allocated to it from January 1, 2019, until the date of implementation of these measures (the "**Interim Decision**").[16]

On July 24, 2020, the TAR Lazio rejected the appeal lodged by COREPLA against the Interim Decision, on the grounds that the ICA had fully met the requirements for imposing interim measures.[17]

On October 27, 2020, the ICA issued its final decision in the Proceedings, fining COREPLA over €27 million for abusing its dominant position in the market for management of plastic waste recycling services (the "**Final Decision**").[18]

On November 11, 2021, the TAR Lazio entirely dismissed the application for annulment lodged by COREPLA against the Final Decision. The TAR Lazio agreed with the ICA that the practices concerned were part of a single exclusionary strategy, by which COREPLA sought to delay CORIPET's market entry for as long as possible, including by signaling to any potential competitors that COREPLA would vigorously fight any such entry attempt.[19]

On December 16, 2021, the Council of State confirmed the judgment of the TAR Lazio on the Interim Decision. COREPLA's appeal against the Interim Decision reiterated that the grounds for the ICA's precautionary intervention were not met and that the interim measures were unlawful. To the contrary, the Council of State found that the ICA's assessment was supported by a correct analysis of the legal, economic and factual framework, which suggested that COREPLA had abused its dominant position. Against this background, according to the court, the ICA intervened in time to prevent serious and irreparable damage to competition in the market concerned.

[16] ICA Decision of October 29, 2019, No. 27961.

[17] TAR Lazio, Judgment No. 8731 of July 24, 2020.

[18] ICA Decision of October 27, 2020, No. 28430 (discussed in the November 2020 issue of this Newsletter, https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-november-2020.pdf).

[19] TAR Lazio, Judgment No. 11997 of November 22, 2021 (discussed in the November 2021 issue of this Newsletter, https://client.clearygottlieb.com/72/2039/uploads/italian-competition-law-newsletter---november-2021.pdf).

AUTHORS

Valerio Cosimo Romano
+39 06 6952 2267
vromano@cgsh.com

Alessandro Comino
+39 02 7260 8264
acomino@cgsh.com

Natalia Latronico
+39 02 7260 8666
nlatronico@cgsh.com

Riccardo Tremolada
+39 02 7260 8222
rtremolada@cgsh.com

Riccardo Molè
+39 02 7260 8684
rmole@cgsh.com

Elio Maciariello
+39 06 6952 2228
emaciariello@cgsh.com

Chiara Neirotti
+39 02 7260 8644
cneirotti@cgsh.com

Francesco Trombetta
+39 02 7260 8636
ftrombetta@cgsh.com

Pietro Cutaia
+39 06 6952 2590
pcutaia@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

Marco D'Ostuni
mdostuni@cgsh.com

Giulio Cesare Rizza
crizza@cgsh.com

Gianluca Faella
gfaella@cgsh.com

Fausto Caronna
fcaronna@cgsh.com

Saverio Valentino
svalentino@cgsh.com

Luciana Bellia
lbellia@cgsh.com

Marco Zotta
mzotta@cgsh.com

Alice Setari
asetari@cgsh.com

220228.01_032522