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# Italian Competition Law Newsletter

## Highlights

- The ICA ends FiberCop network proceedings with commitments
- The TAR Lazio upholds ICA Decision to fine TIM over €100 million for abusing its dominant position in the wholesale and retail markets for broadband and ultra-broadband telecommunications services in Italy
- The TAR Lazio annuls ICA decision on alleged abuse of dominance and rules that concentrations cannot be considered as part of an abusive strategy

## The ICA ends FiberCop network proceedings with commitments

On February 15, 2022, the Italian Competition Authority (the “ICA”) accepted the commitments proposed by Telecom Italia S.p.A. (“TIM”), Fastweb S.p.A. (“Fastweb”), FiberCop S.p.A. (“FiberCop”), Tiscali Italia S.p.A. (“Tiscali”), Teemo Bidco S.r.l. (“Teemo”) and KKR & Co. Inc. (“KKR”) and, together with TIM, Fastweb, FiberCop, Tiscali and Teemo, the “Parties”) with respect to certain agreements concerning the creation of FiberCop and access to its infrastructure (the “Decision”).<sup>1</sup>

### Factual Background

FiberCop is a joint venture set up by TIM, Fastweb and KKR in 2020 to develop an ultra-broadband secondary fiber-to-the-home (FTTH) network in Italy. The set of agreements establishing FiberCop

envisaged, *inter alia*: (i) the transfer from TIM to FiberCop of the business unit relating to its secondary passive access network and its 80% shareholding in Flash Fiber S.r.l. (“Flash Fiber”); (ii) the purchase by Teemo of a 37.5% stake in the share capital of FiberCop; and (iii) the signing of a *Master Service Agreement*, which defined the terms and conditions of the long-term relationship of mutual service provision between TIM and FiberCop. Furthermore, in a commitment letter signed on September 1, 2020, TIM, Teemo and Fastweb agreed that the remaining 20% stake in Flash Fiber held by Fastweb would be transferred to FiberCop.

TIM, Fastweb and KKR created FiberCop to deploy an ultra-broadband network in Italy by 2025, through the use of optical technologies with GPON-FTTH

<sup>1</sup> ICA Decision No. 30002 of February 15, 2022, case I850 – *Accordi FiberCop*.

architecture.<sup>2</sup> FiberCop is active exclusively on the wholesale markets for the provision of passive access services of the secondary network. TIM and Fastweb committed to purchase from FiberCop certain volumes of passive access services, which will be used by the two shareholders to provide ultra-broadband services to their customers at the wholesale and retail levels. FiberCop is also the vehicle to implement a co-investment project open to other operators that intend to invest in ultra-broadband networks, in accordance with Article 76 of Directive (EU) 2018/1972, establishing the European Electronic Communications Code (the “EECC”).

FiberCop’s infrastructures cover the final portion of the telecommunications network. The local telecommunications network can be subdivided in primary network, constituted by the section connecting the central office to the street cabinet (CRO), and secondary network, which is the section connecting the street cabinet to user premises. FiberCop’s perimeter includes only the secondary network. Consequently, in order to connect the networks of alternative operators (*other authorized operators*, “OAOs”) to FiberCop’s network, it is necessary to associate a primary network section that reaches the street cabinet.

Access to the network can be passive or active. Passive access can be realized when the OAO owns or, in any case, has at its disposal (for instance, through indefeasible rights of use) primary network infrastructures up to the street cabinet. Passive wholesale access services allow the OAO to manage communication with its final customers in total autonomy, and to control all the qualitative aspects of the network. By contrast, OAOs that want to reach final customers, but do not have primary network infrastructures, have to purchase active wholesale access services (such as the VULA H and Bitstream NGA services)<sup>3</sup> from TIM or other operators holding a primary network connected to FiberCop’s secondary network. In this case, the OAO does not manage

communication from the collection point (located, for instance, at local exchange or macro-area level) to user premises, and does not control all the qualitative aspects of the network.

The co-investment project allowed the OAOs to participate in the co-investment by purchasing from TIM active wholesale access services (VULA H and Bitstream NGA), based on both primary and secondary network elements.

Tiscali joined the co-investment project in the initial stages of its implementation. In particular, in November 2020, TIM and Tiscali entered into (i) a rationalization agreement, providing for the dismissal of certain network infrastructures and the purchase of wholesale access services (bitstream) by Tiscali, and (ii) a co-investment agreement, according to which Tiscali would have participated in the co-investment project by purchasing from TIM a minimum guaranteed volume of active wholesale access services.

### **The ICA’s Concerns, the Initiation of Proceedings by AGCM and the Publication of the Co-investment Offer by TIM**

On December 15, 2020, the ICA launched antitrust proceedings to establish whether the agreements entered into by the Parties, relating to the creation of FiberCop and the provision of access services based on its secondary network (the “Agreements”), could reduce competition in the markets for (i) wholesale broadband and ultra-broadband access services, and (ii) retail broadband and ultra-broadband telecommunications services, in breach of Article 101 of the Treaty on the Functioning of the European Union (the “TFEU”).<sup>4</sup>

In particular, the ICA was concerned that:

- i. the agreements entered into with Fastweb and Tiscali could have reduced the contestable

<sup>2</sup> A gigabit-capable passive optical network is a technology commonly used to build FTTH networks, whereby a home’s Internet connection is made by bringing fiber optics all the way into the home.

<sup>3</sup> With the VULA H service, the owner of the primary network retains control of the segment of the connection that goes from the customer’s premises to the central office or local exchange where the OAO’s collection point is located. In case of Bitstream NGA services, the connection point between the network of the wholesale service provider and that of the OAO is located further downstream.

<sup>4</sup> ICA Decision No. 28488 of December 12, 2020.

portion of the demand for wholesale broadband and ultra-broadband access services, as they provided for the purchase of minimum guaranteed volumes, which seemed to cover a large portion of Fastweb's and Tiscali's requirements;

- ii. the conditions for access to the co-investment could have reduced the OAOs' incentive to build primary network infrastructures. In particular, according to the ICA, the possibility to participate in the co-investment project by purchasing, at lower prices, active wholesale access services (VULA H and Bitstream NGA) based on both primary and secondary network elements, instead of passive wholesale access services based only on secondary network elements, would have reduced the OAOs' incentive to invest in the development of alternative primary infrastructures;
- iii. the agreements entered into with Fastweb could have limited competition by Fastweb in the provision of active wholesale broadband and ultra-broadband access services (VULA and bitstream NGA), due to the fact that the prices charged by FiberCop for access to its FTTH network increased above certain volume thresholds. Moreover, by transferring its stake in Flash Fiber to FiberCop, Fastweb would have renounced to develop its own independent access network;
- iv. certain contractual provisions could have also limited competition in the market for retail broadband and ultra-broadband telecommunications services. In particular, in the ICA's view, the structure of the prices for wholesale access services provided by FiberCop (which increased above a given threshold) and the purchase of active wholesale access services by the OAOs could have reduced their incentive to compete to acquire new customers in the retail market, and could have limited

dynamic competition based on innovation and the improvement of electronic communications services.

In the meantime, TIM continued to pursue its co-investment project, which was amended also in light of the concerns expressed by the ICA in the decision to open proceedings. In particular, on January 29, 2021, TIM submitted to the Italian Communications Authority ("AGCOM"), and simultaneously published, a co-investment offer pursuant to Article 76 of the EECC. The co-investment project envisaged the deployment of a very high capacity fiber infrastructure in 1,610 Italian municipalities, with a FTTH secondary access network, and a residual fiber-to-the-building (FTTB) network. On April 22, 2021, AGCOM launched a market consultation on TIM's co-investment offer,<sup>5</sup> which ended on June 7, 2021.<sup>6</sup>

### The Commitments offered by the Parties and the Decision

Between August 4 and 9, 2021, the Parties submitted to the ICA a number of commitments, which were subject to public consultation and then partially amended.

The commitments offered by the Parties aimed at removing all concerns raised by the ICA in its decision to open proceedings. *Inter alia*, the Parties offered the following commitments:

- in order to ensure that the co-investment project will accelerate the development of new ultra-broadband infrastructures, TIM committed to realize FiberCop's infrastructures in the areas covered by the project according to a stringent timetable in the period 2021-2026;
- in order to remove the ICA's concerns related to the alleged reduction of the contestable portion of the demand for wholesale broadband and ultra-broadband access services, TIM and

<sup>5</sup> AGCOM Resolution No. 110/21/CONS of March 31, 2021.

<sup>6</sup> The proceedings for the approval of TIM's co-investment commitments are currently pending. On January 3, 2022, AGCOM initiated a second public consultation, concerning the draft decision on the assessment of the co-investment offer, as amended by TIM in light of the market test and AGCOM's indications (see AGCOM's Resolution No. 1/22/CONS of January 3, 2022). The draft decision, published under Annex B to Resolution No. 1/22/CONS, acknowledged that the co-investment offer "is, in principle, compliant with the requirements laid down in Article 76(1) EECC". Finally, on April 7, 2022, AGCOM issued a press release communicating that, following the conclusion of the second market test, it had completed its assessment of the offer and, accordingly, it had initiated the process for notifying the EU Commission of the draft decision, with a view to obtaining its opinion.

- Tiscali undertook, *inter alia*, to reduce the minimum guaranteed volume provided for by the rationalization agreement and to terminate the co-investment agreement. Tiscali also committed to limit the minimum guaranteed volumes in the event of future participation in the project through a new co-investment agreement. In addition, Fastweb committed to participate in the co-investment project in a broader set of areas, and to redefine the minimum guaranteed volumes accordingly;
- in order to remove the ICA's concerns related to the alleged decrease in OAOs' incentive to build primary network infrastructures, TIM undertook that the co-investment offer will only provide for the purchase of passive wholesale access services based on FiberCop's secondary network. TIM also committed to offer passive primary network fiber to co-investors at favorable conditions for 20 years, so as to facilitate the development of new infrastructures by co-investors. In addition, Fastweb committed to own, or acquire through indefeasible rights of use, primary network infrastructures covering a given percentage of its overall areas of activity by January 2027;
  - as to the structure of the prices for wholesale access services, which increased above a given threshold, TIM explained that this pricing structure was essential to ensure effective sharing of the risks relating to the development of the new FTTH network, as it guaranteed that the OAOs could benefit from the lower prices reserved to co-investors only for the volumes they committed to purchase, with a reasonable margin of flexibility (equal to a given percentage of the minimum guaranteed volumes). In any event, in order to remove the ICA's concerns, TIM and Fastweb undertook to increase the margins of flexibility for Fastweb and other co-investors;
  - in order to strengthen co-investors' ability to compete in the retail markets, TIM
- undertook to grant the OAOs the possibility of independently managing the activation and maintenance of lines;
- in order to prevent any risk of restriction of competition caused by the structural link between TIM and Fastweb through FiberCop, TIM, KKR, Teemo and FiberCop undertook that the latter will adopt appropriate measures to prevent any transfer of sensitive information between its shareholders, as well as an antitrust compliance manual and an internal regulation for FiberCop's board of directors.
- In addition, FiberCop, TIM, KKR and Teemo offered a number of commitments aimed at improving the co-investment project, also by increasing the options and margins of flexibility for co-investors, as well as their participation in the project.
- In the Decision, the ICA found that the commitments proposed by the Parties, as amended, were capable of (i) enhancing the efficiency aspects of the co-investment project, including the potential improvement in infrastructure competition in fixed electronic communications markets, and (ii) removing the competition concerns identified by the ICA.
- In particular, in the ICA's view, the commitments removed the competition risks initially identified by the Authority, by providing adequate guarantees in relation to the development of new infrastructures by FiberCop and the OAOs, in line with the ladder of investments principle, also in light of the evolution of the market scenario over the last few years, characterized by increasing competitive pressure from Open Fiber, which offers wholesale ultra-broadband access services based on alternative infrastructures.
- In light of the above, the ICA decided to make the proposed commitments, as amended, binding on the Parties and to close the proceedings without finding any infringement.

# The TAR Lazio upholds ICA Decision to fine TIM over €100 million for abusing its dominant position in the wholesale and retail markets for broadband and ultra-broadband telecommunications services in Italy

On February 28, 2022, the Regional Administrative Court for Latium (the “**TAR Lazio**”) rejected the appeal filed by TIM against the ICA’s decision that had imposed a fine of over €116 million imposed by the ICA in 2020 for an alleged abuse of dominant position in the wholesale and retail markets for broadband and ultra-broadband telecommunications services in Italy (the “**Judgment**”).<sup>7</sup>

## The ICA’s Findings

In a decision of February 25, 2020 (the “**Decision**”),<sup>8</sup> the ICA held that TIM had engaged in a single and complex exclusionary strategy, comprising different practices allegedly aimed at restricting competition in a market considered strategic for the development of the country. First, the ICA contested that there had been a change in TIM’s investment plans with regard to areas characterized by market failure,<sup>9</sup> allegedly aimed at making it more difficult for the new operator Open Fiber S.p.A. (“**Open Fiber**”) to enter the market. Second, the ICA held that TIM had implemented a regulatory gaming and sham litigation strategy against Open Fiber and Infratel Italia S.p.A. (a public company tasked with the implementation of the Italian Strategy for High-Speed Broadband), by initiating groundless and abusive legal proceedings ultimately aimed at hindering the tendering processes for the areas of market failure. Third, the ICA argued that TIM had implemented anticompetitive pricing policies for its wholesale and retail services, in order to secure a large share of ultra-broadband fixed lines, before the FTTH coverage announced by Open Fiber was available.

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

## The Judgment

TIM filed an appeal against the Decision. *Inter alia*, TIM claimed that the ICA had: (i) incorrectly defined the relevant markets for wholesale fixed broadband and ultra-broadband access services and fixed broadband and ultra-broadband retail telecommunications, which were considered national in scope, while there are distinct smaller geographic markets, characterized by differing competitive and regulatory conditions; (ii) erroneously found an unitary anticompetitive strategy; (iii) failed to prove that TIM’s conduct was capable of having foreclosure effects; (iv) erroneously considered that TIM’s investments in new infrastructure were not profitable; (v) committed a number of errors in the assessment of the alleged sham litigation; (vi) failed to prove that TIM’s wholesale and retail pricing policies had anticompetitive effects; (vii) erroneously considered the alleged infringement was serious and, thus, it was appropriate to impose a fine on TIM; (viii) set the amount of the fine on the basis of erroneous assumptions, as the ICA had incorrectly determined the value of the sales made, as well as the gravity and duration of TIM’s alleged infringement.

The TAR Lazio rejected TIM’s appeal, by making extensive reference to the reasoning of the Decision.

In particular, with regard to the definition of the relevant markets and the finding of dominance,

<sup>7</sup> TAR Lazio, Judgment No. 2334 of February 28, 2022.

<sup>8</sup> ICA Decision No. 28162 of February 25, 2020, case A514, *Condotta fibra Telecom Italia* (discussed in the March 2020 issue of this Newsletter: <https://www.clearlygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewslettermarch2020pd.pdf>).

<sup>9</sup> Market failure areas (so-called “*white areas*”) are those where, in the absence of public subsidies, private investment in innovative infrastructure would not take place.

the TAR Lazio held that the ICA had carried out a thorough analysis and its conclusions were consistent with the available evidence.

As to the change in TIM's investment plans, the TAR Lazio confirmed the ICA's view that TIM had abused its dominant position, because it had decided to invest in areas of market failure, notwithstanding that its internal profitability analyses suggested that the investment was not economically viable. In this respect, the TAR Lazio agreed with the ICA's view that the change in TIM's investment plans was allegedly aimed at preserving its position and preventing the entry of other operators willing to build their own FTTH network.

With regard to the alleged exclusionary prices, the TAR Lazio reiterated the ICA's view that TIM had offered below-cost prices for its VULA FTTH service and a wholesale offer capable of tying customers, in order to secure a significant portion of the contestable demand at the wholesale

level. In this respect, the fact that the contested offers were under assessment by AGCOM, and were discontinued by TIM after the regulatory authority's decision not to approve them, was not considered relevant by the TAR Lazio. The TAR Lazio also confirmed the ICA's view that TIM had offered, in the retail market, promotional conditions allegedly capable of creating switching costs for customers, thus limiting access to the contestable demand also at the downstream level.

As to the effects of the conduct, the TAR Lazio stated that the ICA is not required to prove the actual effects of the contested practice, insofar as it provides evidence that the conduct could alter competition. In any event, in the TAR's view, the ICA had allegedly ascertained the existence of negative effects, as: (i) TIM's market share in the ultra-broadband segment had grown from 42.4% in December 2016 to 48% in December 2017; and (ii) the share of customers who had subscribed to TIM's ultra-broadband offers in 2017 had significantly increased.

## The TAR Lazio annuls ICA decision on alleged abuse of dominance and rules that concentrations cannot be considered as part of an abusive strategy

The TAR Lazio, annulled a decision by which in 2020 the ICA had imposed a fine on CTS Eventim-TicketOne Group ("**TicketOne**") for allegedly abusing its dominant position in the Italian market for the sale of tickets for pop and rock music concerts.<sup>10</sup>

### Background

In 2001 TicketOne notified the ICA with two agreements it had entered into with some of the leading organizers of live music events (the "**Panischi Agreements**"), requesting confirmation that they fulfilled the requirements for exemption from the ban on anticompetitive practices. The Panischi Agreements, whose term

was 15 years, comprised a concession agreement, under which TicketOne had the exclusive right to distribute online an increasing percentage of tickets for events organized by promoters, in consideration for a fixed fee of 15% of the ticket price; and a non-compete agreement between the parties. In 2002 the ICA took the view that the Panischi Agreements did not significantly restrict competition in the relevant markets.

In October 2017, in the wake of the expiry of the Panischi Agreements, the ICA sent a request for information to TicketOne, concerning its current relationships with promoters which had been parties to the Panischi Agreements; as well as with its biggest 20 customers (i.e., concert organizers

<sup>10</sup> See TAR Lazio Judgment No. 3334 of March 24, 2022 and ICA Decision No. 28495 of December 22, 2020, Case A523 – *TicketOne/Condotte escludenti nella vendita di biglietti*.

and promoters), in particular, the existence of any exclusivity agreements. In September 2018, the ICA opened an investigation into TicketOne's potential abuse of dominance.

## The ICA Decision

On December 22, 2020, the ICA addressed to TicketOne a decision finding that it implemented a complex exclusionary abusive strategy aimed at significantly restricting sales of tickets for live pop and rock music events by competing ticketing operators.<sup>11</sup>

The ICA defined the relevant market as the national market for the sale, through any distribution channel, of tickets for pop and rock music concerts, which in its view was distinct from, but connected to, the upstream market for the organization, production and promotion of such concerts. TicketOne was found to hold a dominant position due to its large market share<sup>12</sup> compared to its competitors, and to the fact that it allegedly represented an unavoidable trading partner for producers, promoters and organizers of such concerts.

In the ICA's view, TicketOne's unlawful strategy comprised the following conduct: (i) entering into exclusivity agreements with producers and organizers of live music events; (ii) acquiring, between September 2017 and April 2018, four of the major national promoters;<sup>13</sup> (iii) imposing exclusivity clauses on local promoters; (iv) entering into commercial agreements with smaller ticketing operators, so as to prevent its competitors from dealing with them; as well as (v) taking retaliation and boycott measures against concert organizers Zed Entertainment's World S.r.l. and Sol Eventi S.r.l. to punish them from entering into agreements with Ticketmaster, a competitor that TicketOne sought to exclude from the market.

In its defense in the course of the investigation, TicketOne argued that its acquisitions of certain

promoters and its exclusivity agreements with producers and organizers of live music events, far from being abusive, were necessary in order for it to compete against the entry on the market of strong competitor Ticketmaster, but the ICA was not persuaded by this argument.

The ICA also established that TicketOne was allegedly able to charge higher ticket fees than its competitors, and its conduct limited consumers' choice among various ticketing operators, so as to harm consumers.

In its decision, the ICA imposed on TicketOne a fine of approx. €10.8 million and ordered it to grant competing operators the possibility to sell – based on fair, reasonable and non-discriminatory conditions, by any means and through any channel – at least 20% of the total number of tickets for live music events produced or distributed by each promoter or ticketing operator tied to TicketOne by exclusivity agreements.

## The Applications to the TAR Lazio

A number of companies belonging to the TicketOne Group<sup>14</sup> filed with the TAR Lazio seven separate applications for annulment of the ICA decision, claiming, *inter alia*, that: (i) the duration of the ICA's preliminary investigation was excessively long; (ii) the ICA wrongfully established that TicketOne implemented a single exclusionary strategy, of which the actions referred to above were the individual components; and (iii) in particular, the ICA erroneously analyzed TicketOne's acquisitions of the four major national promoters in the framework of that abusive strategy.

## The TAR Lazio Judgment

The TAR Lazio upheld the applicants' plea that the ICA failed to prove to the requisite legal standard the existence of a single exclusionary strategy against competing ticketing operators.

<sup>11</sup> Such as VivaTicket S.p.A., Ticketmaster Italia S.r.l. ("Ticketmaster"), PGMR Italia S.r.l. and CiaoTickets S.r.l.

<sup>12</sup> Which, according to the ICA, equaled 60-65% by volume and 70-75% by value.

<sup>13</sup> Namely: Vertigo S.r.l., Friends & Partners S.p.A., Di and Gi S.r.l., and Vivo Concerti S.r.l.

<sup>14</sup> Namely: Vivo concerti S.r.l., Di and Gi S.r.l., Friends & Partners S.p.A., TicketOne Sp.A., F&P Group s.r.l., Vertigo S.r.l., and CTS Eventim AG & Co. KGaA.

In particular, the TAR Lazio disagreed with the ICA's finding that the four acquisitions represented a key element of the abusive conduct. The Court held, in this respect, that concentrations can only be assessed on the basis of the EU or the domestic legal framework for merger control and, therefore, cannot be deemed to be the key element of an abusive strategy. The TAR Lazio reasoned that, if competition authorities were allowed to apply Article 102 TFEU, or the corresponding domestic law provisions, to operations of concentration already completed, the risk would arise that the effects of such transactions may be challenged years after their clearance, in violation of the principles of legal certainty and the interested companies' freedom of economic initiative.

However, the Court failed to consider that the four acquisitions carried out by TicketOne had not been notified to the European Commission or the ICA, as they did not meet the minimum thresholds for notification under Italian law, and the ICA became aware of their existence only on the basis of TicketOne's reply to a request for information. Therefore, in the circumstances, the statement of reasons provided by the Court in support of its conclusion that the ICA lacked jurisdiction to include those transactions in its assessment of TicketOne's exclusionary strategy under Article 102 TFEU, seems all but compelling.

## Other developments

### The ICA fines water meter suppliers €10.4 million for bid-rigging

On February 1, 2022, the ICA imposed a fine of approximately €10 million on G2 Misuratori S.r.l., Maddalena S.p.A., Itron Italia S.p.A., Sensus Italia S.r.l. and WaterTech S.p.A. (the "**Companies**") for having participated, between December 2011 and September 2019, in an agreement restricting competition in at least 161 public tenders launched by national integrated water service operators for the procurement of meters for the legal measurement of water consumption. Because of their direct involvement in the approval of participation in tenders of particular importance, the Companies' parent companies were also held liable and fined by the ICA (the "**Decision**").<sup>15</sup>

In particular, the ICA found that the Companies had engaged in a single and continuous collusive strategy, which had allowed them to determine, for each tender: (i) which of the Companies was to be awarded the tender; and (ii) how the Companies other than the intended awardee were to behave in the context of the tender (*e.g.*, by setting the minimum price or maximum discounts, or giving indications not to participate with a specific justification). As a result of the infringement, the

Companies won more than 90% of the lots in the relevant period.

In the Decision, the ICA relied on a complex set of evidence, which included an anonymous complaint filed by an employee of one of the Companies, as well as an anonymous document sent to the ICA shortly after the opening of the investigation, comprising seventy faxes that the Companies had exchanged among themselves before the submission of certain bids. According to the ICA, the findings of the investigation demonstrated that the Companies coordinated their conduct ahead of the corresponding tenders and also set up informal meetings between the their representatives.

In the course of the proceedings, the Companies challenged the probative value of the anonymous document sent to the ICA, on which the whole Decision was based, as it consisted just of a number of sheets that did not even allow to identify the sender or recipient of the faxes. In their view, it could not be ruled out that the document was created artificially, for example by a former employee or a dissatisfied co-worker. However, the ICA held that the elements emerged during the investigation confirmed the reliability of the

<sup>15</sup> ICA Decision No. 29981 of February 1, 2022, Case 1835 - *Mercato dei contatori d'acqua*.



document, and asserted that the Companies' attempt to diminish its significance was based on "a superficial and incomplete reading."

### **The Council of State revokes medical oxygen cartel rulings and orders a re-assessment of the cases**

In a series of non-final judgments, published between February 15 and 25, 2022 (the "Judgments"),<sup>16</sup> the Council of State upheld the appeals for revocation filed by Medicaire Italia S.r.l., Medigas S.r.l., Linde Medicaire S.r.l., Sapio Life S.r.l. and Vivisol S.r.l. (the "Parties"), as it found a number of material errors in certain previous judgments of the same court.<sup>17</sup>

The Judgments concern a 2016 decision of the ICA to impose on the Parties a total fine of approximately €47 million for having put in place a horizontal agreement aimed at distorting the normal course of tenders for the provision of oxygen therapy and home ventilation therapy services launched by three different contracting authorities, namely SORESA, ASL Milano 1 and ASUR Marche.<sup>18</sup> In particular, with regard to ASL Milano 1, the Parties allegedly agreed to boycott three tenders for the provision of home mechanical ventilation services, in order to get the lots involved in the following tender at a much higher price than the one originally intended by the contracting authority; with regard to ASUR Marche, the Parties allegedly coordinated their strategies so as to affect the outcome of the call for tender launched in 2010 for the provision of home oxygen therapy and home mechanical ventilation services; with regard to SORESA, the Parties allegedly put in place a coordination strategy aimed at, *inter alia*, keeping the price of home mechanical ventilation services in Campania Region artificially high and hindering the launch of a public tender for the award of the service.

In their first appeal, the Parties challenged the ICA's analysis on grounds, *inter alia*, that the Authority had: (i) erroneously concluded that the home mechanical ventilation services offered by the Parties were fully interchangeable; (ii) failed to take into account the importance of logistics in the Parties' decision as to which tenders to participate in; (iii) failed to consider the unprofitability of the unsuccessful tenders, which justified the Parties' decision not to take part in the first three tenders launched by the ASL Milano 1; (iv) erroneously considered that the Parties' ordinary advocacy activities *vis-à-vis* the contracting authority constituted anticompetitive behavior. The TAR Lazio upheld the objections put forward by the Parties and quashed the ICA's decision.<sup>19</sup> However, the TAR Lazio's rulings were subsequently overturned by the Council of State, which confirmed the ICA's decision. In particular, the Council of State found that the documentary evidence collected by the ICA (in particular, a series of communications exchanged between the Parties, showing that they had followed a common strategy) was capable of demonstrating a collusive behavior.

In the Judgments, following the appeals for revocation filed by the Parties, the Council of State acknowledged that it had reached erroneous conclusions with regard to the evidence on the profitability of the award conditions of the tender launched by ASL Milano 1. In particular, despite the objections raised by the Parties, it had wrongly assumed that the award conditions in the tender procedures boycotted by the Parties were equivalent to the auction base in a previous procedure launched by ASL Milano 1, in which the Parties had instead participated. In this respect, the Council of State had merely referred to the ICA's assessment, without verifying that this factual assumption was correct. As a consequence, the court's previous decisions were ultimately based on incorrect factual assumptions. In addition,

<sup>16</sup> Council of State, non-final Judgment Nos. 1089, 1090, 1091, 1094 and 1096 of February 15, 2022; Nos. 1263, 1265, 1267 and 1269 of February 22, 2022; and Nos. 1351, 1353, 1354 and 1355 of February 25, 2022.

<sup>17</sup> Council of State, Judgment Nos. 8583, 8584, 8585, 8586, 8587, 8588, 8589, 8590 and 8591/2019 and Nos. 50, 51, 52 and 53/2020 (discussed in the December 2019 issue of this Newsletter: <https://www.clearygotlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterdecember2019pd-pdf.pdf>).

<sup>18</sup> ICA Decision of December 21, 2016, No. 26316, Case I792 - *Gare ossigenoterapia e ventiloterapia*.

<sup>19</sup> TAR Lazio, Judgment Nos. 4467, 4468, 4471, 4473, 4476, 4481, 4482, 4483, 4484, 4485, 4486, 4487 and 4489/2018.

the Council of State had not considered one document, relating to Medicaire, that would have demonstrated the unprofitability of the prices initially proposed by ASL Milano 1 based on the company's internal costs.

As a result, the Council of State revoked its previous judgments, and stated that the case should be re-assessed without the acknowledged factual errors.

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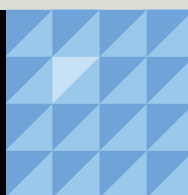
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