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Highlights

— The Italian Supreme Court declares inadmissible as manifestly unfounded an appeal against a judgment on a follow-on claim for damages regarding an alleged abuse of a dominant position on the market for gas distribution

— The Supreme Court fully dismisses the appeals against the Council of State judgment in the *Roche-Novartis* case as inadmissible

The Italian Supreme Court declares inadmissible as manifestly unfounded an appeal against a judgment on a follow-on claim for damages regarding an alleged abuse of a dominant position on the market for gas distribution

On October 4, 2021, the Italian Supreme Court (the "**Supreme Court**")[1] confirmed a judgment of the Florence Court of Appeal, which had upheld the damages claim of Pace Strade s.r.l. ("**Pace Strade**") against Toscana Energia S.p.A. ("**Toscana Energia**").

Background

The ICA Decision

In 2007, the Italian Competition Authority (the "**ICA**") opened proceedings against Toscana Energia for an alleged abuse of a dominant position in the market for gas distribution and the related market for the design and construction of civil and industrial engineering facilities in private subdivided lots.[2]

The investigation was opened following a complaint submitted by Pace Strade, a company active in the construction of civil and industrial engineering facilities. Pace Strade claimed that Toscana Energia was limiting competition in the market for the design and construction of civil and industrial engineering facilities in private subdivided lots, by tying the services it provided as a monopolist (*i.e.*, connecting private gas networks to the existing

[1] Supreme Court, Order of October 4, 2021, No. 26869.

[2] Florence Court of Appeal, Judgment of September 12, 2016, No. 1470.

public grid) to those provided in competition with other operators, such as Pace Strade (namely, the services concerning the laying of natural gas pipelines on private subdivided lots).[3]

In its decision to open proceedings, the ICA asserted that Toscana Energia's alleged conduct could amount to an abuse of dominance. In particular, Toscana Energia was allegedly exploiting its alleged position as a monopolist in the gas distribution market to prevent competition in the adjacent market for the design and construction of civil and industrial engineering facilities in private subdivided lots, with particular reference to the laying of natural gas pipelines.

During the investigation, Toscana Energia submitted a proposal for commitments, comprising: (i) adopting an Employee Orientation Circular, intended to draw the employees' attention to the fact that Toscana Energia did not have any exclusivity for the laying of natural gas pipelines in private subdivided lots, as well as to clarify the rules, conditions and costs for connecting pipelines of newly-urbanized areas to the existing public grid; (ii) adopting and publishing online a Regulation for the Subdivisions, which summarized for the public the same principles and operating rules as the Employee Orientation Circular; (iii) granting operators interested in building gas distribution pipelines in private subdivided lots the right to ask Toscana Energia for a prior technical opinion on the characteristics of the project to be executed, which would be issued free of charge within two months from the request; and (iv) sending to the above-mentioned operators, within the same two-months period, certain useful information, such as a price list of the services provided by Toscana Energia as a monopolist, as well as detailed information on the safety standards to be complied with.

In a commitment decision issued in October 2008 (the "**ICA Decision**"), the ICA found that the commitments were suitable to remedy its initial competitive concerns.[4]

The claim for damages

In 2010, Pace Strade brought claims for damages against Toscana Energia, seeking compensation for the damage caused by the alleged abuse of dominance investigated by the ICA.

Pace Strade argued that the defendant had abused its dominant position in the 2005-2008 period. In particular, Pace Trade asserted that, in a number of private subdivided lots located within several municipalities in the Tuscany region, Toscana Energia had refused to carry out the services it was entrusted with as a monopolist (assistance, connection to the existing public grid and testing activities), unless it had also been appointed to build the entire gas pipeline (*i.e.*, also the natural gas pipelines on the private subdivided lot).

The Florence Court of Appeal, on September 12, 2016, ascertained the contested conduct and the ensuing damage allegedly suffered by Pace Strade, and awarded the plaintiff €389,217.71 in damages.

The judgment of the Supreme Court

On appeal, the Supreme Court fully upheld the Florence Court of Appeal's ruling.

In its appeal, Toscana Energia claimed that the Florence Court of Appeal had erroneously attributed evidentiary value to the ICA's Decision, which had merely accepted Toscana Energia's commitments proposal, without finding any infringement. Accordingly, the Court had wrongly relied on the findings of the ICA Decision to prove the existence of an abuse of dominant position, instead of carrying out a fresh assessment in this regard.

The Supreme Court rejected this ground of appeal. First, it recalled a previous ruling in which the Supreme Court itself had clarified that, when deciding on claims for damages which follow the adoption of commitment decisions by the ICA, civil courts can base their assessment on the findings contained in the statement of objections

[3] ICA, Decision of December 5, 2007, No. 17676, Case A397, *Pace Strade/Toscana Gas*.

[4] ICA, Decision of October 30, 2008, No. 19046, Case A397, *Pace Strade/Toscana Gas*.

issued by the ICA during the proceedings, as well as on the evidence collected during the investigation. This is without prejudice to the fact that the ICA's findings do not constitute privileged evidence and can always be rebutted by the parties.[5]

In addition, while noting that an ICA commitment decision does not ascertain whether there has been (or continues to be) an antitrust infringement, the Supreme Court noted that, according to the recent ruling of the Court of Justice of the European Union (the "**CJEU**") in *Gasorba*,[6] both the principle of sincere cooperation laid down in Article 4(3) of the Treaty on the European Union and the objective of applying EU competition law effectively and uniformly require national courts to take into account the preliminary assessment carried out by the European Commission and regard it as an indication, if not *prima facie* evidence, of the anticompetitive nature of the conduct at stake.

In light of the above, the Supreme Court concluded that, in the case of follow-on actions for damages, when the proceedings before the ICA have been closed with a commitment decision, civil courts must take into account the evidence acquired during the ICA's investigation, as well as the ICA's preliminary assessment, with regard to the market position of the firm concerned and its alleged unlawful conduct. This information may be used as an indication, if not *prima facie* evidence, of the anticompetitive nature of the conduct concerned.

The Supreme Court fully dismisses the appeals against the Council of State judgment in the *Roche-Novartis* case as inadmissible

In a judgment delivered on October 5, 2021 (the "**Judgment**"),[7] the Italian Supreme Court held that the appeals filed by F. Hoffmann-La Roche Ltd. and Roche S.p.A. ("**Roche**"), as well as Novartis Farma S.p.A. and Novartis AG ("**Novartis**" and, together with Roche, the "**Parties**"), against a ruling issued in 2019 by the Council of State,[8] were inadmissible. The ruling of the Council of State upheld the findings of the Regional Administrative Tribunal for Latium (the "**TAR Lazio**"),[9] which, in turn, had entirely confirmed the 2014 ICA decision fining the Parties approximately €180 million overall for an alleged violation of Article 101 TFEU (the "**ICA Decision**"),[10] in connection with the commercialization of the Avastin and Lucentis drugs.

Factual background

The ICA Decision

Avastin and Lucentis are drugs developed by Genentech, a company belonging to the Roche group. Genentech licensed Avastin and Lucentis to Novartis and Roche, respectively.

In 2005, the Italian Medicines Agency ("**AIFA**") authorized the marketing of Avastin for the treatment of tumors. Shortly thereafter, in 2007, AIFA authorized Lucentis for the treatment of certain eye diseases. In the timeframe in which Lucentis was waiting to be put on the market, some physicians noticed that Avastin could also be used off-license for the treatment of age-related macular degeneration and other eye diseases,

[5] Supreme Court, Judgment of February 27, 2020, No. 5381. On this judgment, see Cleary Gottlieb, Italian Competition Law Newsletter, February 2020, available at: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-february-2020-pdf.pdf.

[6] CJEU, Judgment of November 23, 2017, Case C-547/16, *Gasorba and Others*.

[7] Supreme Court, Judgment of October, 5, 2021, No 26920.

[8] Council of State, Judgment of July 15, 2019, No. 4990.

[9] TAR Lazio, Judgment of December 2, 2014, No. 12168.

[10] ICA, Decision of February 27, 2014, No. 24823, Case I760, *Roche-Novartis/Farmaci Avastin e Lucentis*.

although it was authorized only in oncology. Since Avastin was less expensive than Lucentis, it started to be widely used as an off-label medicine for the treatment of eye diseases, although Genentech and Roche (as market authorization holders) never sought Avastin's registration for ophthalmologic use.

The ICA Decision declared the Parties liable for putting in place an alleged anticompetitive strategy aimed at artificially differentiating the two drugs, with a view to reducing the use of Avastin in ophthalmology and increasing the sales of Lucentis, thus significantly raising the costs borne by the Italian health service.[11]

In the ICA's view, this objective was *inter alia* pursued through the dissemination of information designed to create doubts over the safety of the use of Avastin for the treatment of eye diseases, despite the lack of clear scientific evidence supporting such doubts. Accordingly, the ICA found that the Parties' conduct amounted to a market-sharing agreement, which constituted a by-object restriction of Article 101 TFEU, and imposed on each of the Parties a fine of approximately €90 million.

The Council of State Judgment

On July 15, 2019, the Council of State fully rejected the Parties' appeals against the TAR Lazio's ruling, which had entirely upheld the ICA Decision.

The Council of State judgment made reference to the guidance provided in January 2018 by the CJEU, in the preliminary ruling delivered following a referral by the Council of State.[12]

In its judgment, the Council of State held that:

— insofar as sector regulation did not forbid the off-label use of Avastin, nor its repackaging for such off-label use, the ICA was right in defining the relevant product market as comprising both drugs typically used for the treatment of eye diseases following a specific marketing authorization and drugs used off-label to treat the same diseases;

— the arrangement between the Parties could not be considered ancillary to their licensing agreement (and thus permitted under competition rules) since it was not aimed at restricting the Parties' commercial autonomy with respect to Lucentis (which was the product covered by the licensing agreement), but rather the conduct of third parties (in particular healthcare professionals) with a view to reducing the prescription of Avastin in ophthalmology, in order to maximize the economic return on the sales of Lucentis.

— the ICA correctly found that the Parties had colluded "*to manipulate the public's risk perception*" relating to the off-label use of Avastin, as well as to "*artificially*" differentiate two medicinal products which were allegedly equivalent (and, as such, substitutable) from the point of view of safety and effectiveness in the treatment of eye diseases.

In 2019, the Parties asked the Council of State to revoke its judgment, on the ground that it was vitiated by errors of fact,[13] and to send again the case to the CJEU for a preliminary ruling. The Council of State referred the matter to the CJEU in March 2021.[14] More specifically, the Council of State asked the CJEU to rule on whether: (i) the July 2019 Council of State judgment was in violation of the previous CJEU preliminary ruling; (ii) the Italian legal system is incompatible with EU law principles to the extent that it does not allow for a judicial remedy against a judgment issued by an Italian last instance court that clearly violates EU law. The CJEU has not issued its preliminary ruling yet.[15]

[11] On this Decision, see Cleary Gottlieb, Italian Competition Law Newsletter, July 2019, available at: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjuly2019pd-pdf.pdf

[12] CJEU, Judgment of January 23, 2018, C-179/16, *F. Hoffmann-La Roche and Others*, ECLI:EU:C:2018:25.

[13] Under Italian law, revocation is an extraordinary judicial remedy against judgments of last instance courts that involves convincing a different composition of the same court that the previous judgment was based on a blatant error of fact and, as such, has rather limited chances of success.

[14] Council of State, Order of March 18, 2021, No. 2327.

[15] CJEU, *F. Hoffmann-La Roche and Others*, C-261/21, pending.

The judgment of the Supreme Court

In parallel, Roche and Novartis brought an action before the Supreme Court,[16] arguing that the Council of State failed to carry out the factual verification that the CJEU had expressly required it to do in the 2018 preliminary ruling with regard to various facts on which the ICA based its Decision, and namely: (a) the possible unlawfulness of the conditions under which Avastin was repackaged and prescribed; (b) the misleading nature of the information disseminated by the Parties.

In the Parties' view, in doing so the Council of State declined to fully exercise its jurisdictional power. According to the Parties, this was among the reasons of 'jurisdiction' on the basis of which, according to Article 111(8) of the Italian Constitution, appeals in cassation against decisions of the Council of State are permitted.

On October 5, 2021, the Supreme Court fully dismissed the appeals as inadmissible,[17] finding that (i) the Council of State fully carried out the factual verification requested by the CJEU; (ii) the Parties were actually asking the Supreme Court to carry out a novel assessment of the facts. According to the Supreme Court, what the Parties identified as a denial of jurisdiction was, at the most, an error in the assessment of the facts. As such, it did not constitute a 'reason of jurisdiction' and therefore could not be challenged by way of an appeal in cassation for reasons of jurisdiction.[18] In particular, the Supreme Court held that:

— based on the established case law, the Supreme Court lacks competence to review decisions of the Council of State in the event of a violation of EU law;

— in its 2019 judgment, the Council of State had not departed from the CJEU's preliminary ruling. According to the Supreme Court, the Council of State had carried out the factual verifications required by the CJEU, by investigating the possible unlawfulness of the conditions under which Avastin was repackaged and prescribed, as well as the misleading nature of the allegations of the lesser safety of one medicinal product compared to another;

— the appeals aimed at questioning how the factual verifications were carried out by the Council of State, which is an aspect falling outside the Supreme Court's competence;

— there was no violation of EU law, as the judgment of the Council of State had taken a clear position on the factual verifications required by the CJEU. As a result, the Court did not consider it necessary to refer the case to the Italian Constitutional Court for a constitutionality review, nor to make a preliminary reference to the CJEU, as requested by the Parties;

— finally, in case a last instance court violates the principles established by a preliminary ruling of the CJEU, alternative remedies are available for individuals under EU law, such as actions for damages against national authorities.

[16] Under the Italian legal system, and specifically pursuant to Article 111(8) of the Italian Constitution, "*Appeals to the Court of Cassation against decisions of the Council of State and the Court of Accounts are permitted only for reasons of jurisdiction*" *(i.e.*, regarding the division of competences between ordinary and administrative judges). Official English translation available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, accessed December 12, 2021. Accordingly, all conflicts between ordinary and administrative tribunals (conflicts on 'jurisdiction') are solved by the Supreme Court. As a result, the mechanism of judicial review is dual, but not symmetrical. One of the two highest courts, the Supreme Court, has, to some extent, primacy over the Council of State, as it has the power to decide over issues of 'jurisdiction'.

[17] Supreme Court, Judgment of October, 5, 2021, No 26920.

[18] In particular pursuant to Article 111(8) of the Italian Constitution, Article 360(1) and Article 362(1) of the Italian Code of Civil Procedure, and Article 110 of the Italian Code of Administrative Procedure.

Other developments

The ICA closes investigation into Google's conduct in the digital advertising sector following the opening of proceedings by the European Commission

On October 12, 2021, the ICA closed an investigation against Google, due to the fact that, in June 2021, the European Commission (the "**Commission**") opened an investigation having the same scope.[19]

On October 20, 2020, following a complaint filed by the main Italian trade association active in the digital advertising industry (Interactive Advertising Bureau Italia), the ICA opened an investigation into Google for an alleged abuse of dominant position in the Italian market for display advertising. The complainant claimed that Google engaged in a set of exclusionary practices depriving advertisers and publishers of the possibility of choosing their business partners and the parties with whom they wished to enter into contractual relationships. In particular, the complaint focused on user profiling for advertising purposes, and alleged that over the previous few years Google had carried out several types of conducts aimed at undermining its competitors' ability to effectively target users for the purposes of display advertising activities.

In the decision to initiate the investigation, the ICA stated that Google may have engaged in internal and external discriminatory conduct by: (i) on the one hand, refusing to provide its competitors with the keys to decrypt Google users' IDs and excluding the possibility of tracking third-party pixels; and (ii) on the other hand, using those same tracking tools within its internal divisions, thus enabling its own advertising intermediation services to achieve a targeting capability that other equally efficient competitors cannot replicate.

In addition, the ICA noted that the data relied upon by Google for the purposes of its advertising intermediation services was gathered through tools and services (*e.g.,* the Android mobile operating system, the Chrome mobile and PC browser, the mapping and navigation services, as well as the services provided through Google ID) offered by Google on dominated markets, which are unrelated to the supply of web content and the sale and purchase of advertising space.

Despite the relevance of the case, on October 12, 2021, the ICA closed its investigation against Google pursuant to Article 11(6) of Regulation No. (EC) 1/2003,[20] because on June 22, 2021, the Commission had initiated proceedings having the same scope.[21]

The ICA fines a Milan radio taxi company for non-compliance with a previous infringement decision

In a decision issued on September 21, 2021,[22] the ICA fined Yellow Tax Multiservice S.r.l. ("**Yellow Tax**") for non-compliance with a previous decision finding an infringement of Article 101 TFEU.

Background

On June 27, 2018, the ICA found that the major companies managing radio taxi services in Milan (Taxiblu Consorzio Radiotaxi Satellitare Società Cooperativa, Yellow Tax and Autoradiotassì Società Cooperativa, jointly "**the Parties**") had infringed Article 101 TFEU by imposing on the taxi drivers affiliated to their networks certain exclusivity and non-compete obligations, provided for by the Parties' by-laws or in the contracts entered into with the drivers (the "**Decision**").[23]

[19] ICA, Decision of October 20, 2021, No. 28398, Case A542, *Google nel mercato italiano del display advertising*.

[20] European Commission, Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[21] European Commission, Decision of June 22, 2021, Case AT.40670, *Adtech and Data-related practices*.

[22] ICA, Decision of September 21, 2021, Case I801BB, *Servizi di prenotazione del trasporto taxi – Milano – Inottemperanza*.

[23] ICA, Decision of June 27, 2018, Case I801B, *Servizi di prenotazione del trasporto mediante taxi – Milano*.

In particular, according to the Decision, the clauses at issue forced each affiliated taxi driver to allocate all of his or her capacity solely to one radio taxi company. Such provisions resulted in a parallel network of anticompetitive vertical agreements, having a cumulative foreclosure effect on the complainant Mytaxi, the new entrant in the market for taxi demand management services, which operated a mobile app aimed at connecting taxi drivers and consumers.

The ICA concluded that the alleged anticompetitive conduct did not amount to a "*serious*" infringement of competition law and, thus, did not impose any fine on the Parties. However, the ICA ordered them: (i) to adopt, within 120 days from the notification of the Decision, appropriate measures to eliminate the infringement and to refrain from similar conduct in the future; and (ii) to submit, within the same deadline, a written report on the measures adopted in this regard.

In 2019, the TAR Lazio annulled the Decision on appeal, on the grounds of insufficient reasoning and inadequate demonstration of the causal link between the exclusivity clauses and Mytaxi's inability to operate based on its different business model.[24]

However, in June 2020, the Council of State overturned the TAR Lazio's judgments.[25] In particular, the Council of State found that the ICA had properly analyzed all the elements required to establish the existence of an anticompetitive agreement. It also held that the ICA had substantiated its findings with a wide range of evidence, coming not only from the Parties and Mytaxi, but also from other reliable sources, such as a legal opinion of the Italian Transport Authority, information from the Municipalities of Rome and Milan and a report published by consulting company KPMG. Furthermore, the Council of State held that the ICA was right in considering that the non-compete and exclusivity clauses were capable of preventing entry into the market for taxi demand management services and could have led to a decrease in output and quality of services, as well as an increase in prices.

The non-compliance decision

On September 21, 2021, the ICA fined Yellow Tax €5,000 for non-compliance with the Decision, pursuant to Article 15(2) of Law No. 287/1990.

In particular, the ICA referred to the contractual clause that allegedly prohibited Yellow Tax affiliated taxi drivers from using services offered by competing operators. The ICA found that instead of eliminating or reducing the scope of this clause, Yellow Tax had merely decided, in June 2020, to temporarily suspend its application, and had communicated its decision to taxi drivers almost one year later. According to the ICA, Yellow Tax amended the existing agreements with taxi drivers, by eliminating the clause concerned, only after the ICA issued a statement of objections in the non-compliance proceeding, in June 2021.

In the ICA's view, the fact that Yellow Tax had submitted an application for the revision of the Council of State's judgments, which was still pending, could not call into question the definitive nature of these judgments, nor the enforceability of the Decision.

The ICA fully dismisses allegations of abuse of dominance in the market for the production of PET pre-forms

On October 29, 2021, the ICA decided to close the investigation into an alleged abuse of dominant position by Husky Injection Molding Systems ("**Husky**"), without finding any infringement.[26] The ICA found that the evidence collected during the investigation did not allow it to confirm the allegations put forward at the beginning of the proceedings (the "**Decision**").

On January 28, 2020, after having received a complaint, the ICA decided to open an investigation under Article 102 TFEU into Husky,

[24] TAR Lazio, Judgments of 29 April, 2019, Nos. 5359, 5418 and 5419. On these judgments, see Cleary Gottlieb, Italian Competition Law Newsletter, April 2019, available at: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterapril19pd-pdf.pdf

[25] Council of State, Judgments of 4 June, 2020, Nos. 3501, 3502 and 3503. On these judgments, see Cleary Gottlieb, Italian Competition Law Newsletter, June 2020, available at: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-news-letter-june-2020.pdf

[26] ICA, Decision of October 29, 2021, Case A537, *Mercato della produzione di contenitori in PET*.

which is active in the sale of both machinery and molds for the production of PET pre-forms. According to the complaint, Husky had installed a system on its new generation high pressure processing machinery to make it work at full speed only when the original Husky molds were installed. In addition, Husky had allegedly threatened to refuse to provide technical assistance to customers using competitor molds on their machines.

In its Decision, the ICA found that there was insufficient evidence to demonstrate that Husky's conduct significantly restricted competition.

Based on the documents acquired during the investigation, Husky's system did not prevent clients from using third-party molds. If they used third-party molds, due to security reasons, the system reduced machinery performance in terms of speed by 10%. However, according to the ICA, there was no evidence that this limited reduction in speed was a decisive factor in a buyer's choice of machinery and molds. Other factors, such as price and interoperability, were also important to the buyers. Therefore, the decrease in production speed did not appear detrimental to competitors (whose turnover had increased over time) nor capable of influencing client choice.

The ICA underlined that, in cases of technological tying (such as the *Google Shopping*[27] and *Google Android*[28] cases handled by the European Commission), substantial evidence is needed to prove that the alleged conduct could potentially restrict competition.

The approach adopted by the ICA in this Decision seems to be consistent with another recent antitrust decision, concerning alleged exclusionary conduct related to machinery interoperability and maintenance services.[29] In both decisions, the ICA concluded that not every difference in treatment by a vertically integrated company between its downstream business units and competitors is capable of distorting competition, thus upholding a stricter standard of proof for findings of discriminatory conduct.

The Council of State confirms the ICA's assessment of the "*value of sales*" and the "*entry fee*" in calculating the fines for a bid rigging case

On May 20, 2021,[30] the Council of State upheld the original amount of the fine imposed by the ICA on Società Estense Servizi Ambientali-Sesa S.p.A. ("**S.E.S.A.**"), which the TAR Lazio had reduced at first instance.[31]

In particular, the ICA found that S.E.S.A., together with Fertitalia S.r.l, Ni.Mar. S.r.l. and Nuova Amit S.r.l., violated Article 101 TFEU by rigging a public tender procedure launched by Ecoambiente S.r.l., a company controlled by the Rovigo Municipality, to award the service of separate collection and recycling of waste in the province of Rovigo, Italy.[32] The ICA fined S.E.S.A. approximately €67,000.

The TAR Lazio concluded that the ICA had erroneously calculated the fine imposed on the applicant and reduced it accordingly. According to the TAR Lazio, the ICA: (i) should have considered as "*value of sales*" the value of the contract awarded (the duration of which was one year), irrespective of its possible one-year extension; and (ii) could not lawfully include in the fine a so-called "*entry fee*" of 15% without sufficiently demonstrating why this additional amount was needed, taking into account that the economic offer by S.E.S.A. was higher than, but "*essentially close*" to, the average market price.

On appeal, the Council of State partially annulled the TAR Lazio's ruling.

[27] European Commission, Decision of June 27, 2017, Case AT39740 – *Google Shopping*.

[28] European Commission, Decision of July 18, 2018, Case AT40099 – *Google Android*.

[29] ICA, Decision of March 30, 2021, Case A517, *Mercati di manutenzione di dispositivi diagnostici*. On this Decision, see Cleary Gottlieb, Italian Competition Law Newsletter, April 2021, available at: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--april-2021-pdf.pdf

[30] Council of State, Judgment of October 20, 2021, No. 7056.

[31] TAR Lazio, Judgment of 5 December, 2017, No. 11987.

[32] ICA, Decision of July 29, 2015, No. 25589, I784, *Ecoambiente-Bando di gara per lo smaltimento dei rifiuti da raccolta differenziata*.

In relation to the value of sales, the Council of State observed that the contract to be awarded by Ecoambiente S.r.l. could be extended, and it was in fact extended. It added that: (i) the possibility of extension was expressly mentioned in the tender documents; (ii) the tenderers should have taken into account the possible extension of the contract when submitting their offers; (iii) contracting authorities are likely to extend the duration of a contract as a matter of practice, when the extension is contemplated in the tender documents. Therefore, the ICA had correctly considered the actual two-year duration of the awarded contract for fining purposes.

In relation to the entry fee, the Council of State found that the ICA had correctly taken into account the circumstances of the case. In particular, the ICA correctly found that the infringement was "*very serious*", took place in the context of a public tender procedure, and effectively resulted in higher economic offers submitted by the parties. Therefore, the Council of State agreed with the ICA that the need to ensure a sufficiently deterrent effect justified the inclusion of the entry fee in the fine imposed on S.E.S.A.

This judgment follows the two rulings delivered on May 20, 2021, in which the Council of State adopted the same approach with regard to fines imposed on Fertitalia S.r.l, and Ni.Mar. S.r.l.[33]

[33] Council of State, Judgments of May 20, 2021, Nos. 3900 and 3901. On these judgments, see Cleary Gottlieb, Italian Competition Law Newsletter, May 2021, available at: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--may-2021-pdf.pdf

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