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The Milan Court of Appeal dismisses an appeal in an action for damages for alleged abuse of dominant position and abuse of economic dependence in the audiovisual sector

On September 21, 2021, the Milan Court of Appeal dismissed an appeal filed by Digital World Television ("**DWT**" or "**Appellant**"),[1] a company active in the distribution of audiovisual programs for adults, against the judgment delivered in 2019 by the lower court, which had also dismissed DWT's claims for damages against Sky Italia ("**Sky**" or the "**Defendant**") for an alleged abuse of dominant position and/or abuse of economic dependence.[2]

Background

Between 2006 and 2011, DWT and Sky entered into four contracts regarding the supply by the latter of technical pay-perview services, in exchange for the payment by DWT of a monthly fee of € 10,000. The fourth contract, which was entered into on December 22, 2011, had a duration of three years and, differently from the first three, did not

[1] Milan Court of Appeal, Judgment of September 21, 2021, No. 2701.

[2] Court of Milan, Judgment of September 17, 2019, No. 8276.

provide for a tacit renewal clause. It expired on December 31, 2014.

DWT later brought interim proceedings against Sky, alleging breach of contract, bad faith in negotiating the contract and an abuse of dominant position deriving from Sky's interruption of the provision of technical services after the expiry of the contract. On March 3, 2015, the Court of Milan rejected DWT's application for lack of connection between the requested *interim* measures and the plaintiff's claim for damages. The Court further highlighted DWT's failure to prove the alleged breach of the principle of good faith.[3]

DWT challenged the Order. The Court dismissed DWT's challenge on the basis, *inter alia*, of the absence of a *prima facie* case regarding the alleged abuse of dominant position.[4]

The judgment of the Court of Milan

Following the *interim* proceedings, DWT filed a lawsuit against Sky before the Court of Milan alleging wrongful conduct by Sky and requesting to be granted access to Sky's satellite broadcasting platform, to be returned the entry fee paid to Sky and to be awarded damages. In particular, DWT claimed that Sky had abused its dominant position on the relevant markets, which in its view were the (upstream) market for the satellite broadcasting of adult contents and the (downstream) market for pay-TV broadcasts via satellite platforms in the entire Italian territory.

DWT further claimed that Sky had breached Article 102 TFEU: first, by arbitrarily refusing to renew the fourth contract, consequently preventing DWT from having access to the only satellite platform existing in Italy; secondly, by imposing on DWT a disproportionate entry fee, compared to the value of the technical services offered by Sky. DTW also claimed that Sky's conduct amounted to an abuse of economic dependence.

Sky requested that the Court of Milan dismiss DWT's claim on the ground that: (i) the restitution of the entry fee was time-barred, and, in any event, DTW had amortized the expenses during the duration of the contracts. Moreover, the cost of the entry fee was very low compared to the fee required for digital terrestrial services; (ii) Sky was not in a dominant position, since the relevant geographic market was not limited to a national dimension, and adult content could be transmitted not only on a satellite platform, but also through other means, such as digital terrestrial services and the Internet. Sky also highlighted that DWT had continued operating on the same satellite platform through a dedicated decoder.

On September 17, 2019, the Court of Milan dismissed DWT's claims. It held that DWT had not provided sufficient evidence in support of its definition of the relevant market, and that, even taking into consideration the relevant market indicated by DWT, there would have been no abuse of dominant position because, among others: (a) the 2011 contract did not provide for any automatic renewal clause and (ii) DWT's passive behavior had been coherent with the natural expiration of the contract. Moreover, the Court of Milan deemed that the abuse of economic dependence claim was groundless, since Sky's contractual behavior was in line with the principle of good faith.

Appeal proceedings

DWT appealed to the Milan Court of Appeal against the lower court's ruling, claiming that the Court of Milan had: (i) wrongly excluded that Sky had an obligation to negotiate; (ii) erroneously assumed that DWT had access to a satellite platform; (iii) failed to take into consideration the Italian Competition Authority ("**ICA**")'s decision-making practice when defining the downstream market; and (iv) erroneously held that "*the parties simply had a fixed-term contractual relationship, which naturally expired*". On the contrary, according to DTW, the parties' long-term business relationship had been regulated by fixed-term contracts by

[3] Court of Milan, Order of March 3, 2015.

[4] Court of Milan, Order of May 7, 2015.

Sky's unilateral decision. DWT also challenged the amount of the costs awarded by the Court of Milan to the defendant.

The Milan Court of Appeal deemed that the Appeal was inadmissible because of its absolute vagueness. Despite this, the Court went on to analyze the merits of DWT's case.

The Court concurred with the Court of Milan and affirmed that, in light of the evolution of the market, Sky was under no obligation to contract with DWT. It held that DWT's access to a satellite platform was confirmed by the available evidence and, in any case, had never been previously disputed. The Court also ruled that, according to ICA's precedents, the retail market for pay-TV services was one and the same for all distribution platforms. It upheld the judgment under appeal also with regard to the lack of evidence of an abusive conduct or contractual bad faith by Sky. Moreover, the analysis of DWT's several claims for damages was precluded by: (i) the groundlessness of the appellant's allegations with regard to damages; and (ii) the general lack of evidence supporting DWT's claims.

Having dismissed DWT's ground of appeal concerning the amount of costs awarded to Sky, the Milan Court of Appeal rejected DWT's appeal in full

The ICA accepts commitments by ANIA in relation to an "*anti-fraud project*" in life and non-life insurance

On September 21, 2021, the ICA accepted and made binding the commitments offered by the Italian National Association of Insurance Companies (the *Associazione Nazionale fra le Imprese Assicuratrici* or "**ANIA**") regarding the implementation of its "*anti-fraud project*" in life and non-life insurance (the "**Project**").[5]

The proceedings

In November 2020, the ICA launched an investigation into the Project, following its notification by ANIA to the ICA, to verify whether it complied with Article 101 TFEU.[6] The Project involves the creation of databases and the development of common algorithms to establish fraud risk indicators that insurance companies may use in both the underwriting and compensation phases. In particular, the Project includes setting up: (i) a platform for the exchange of information on fraudulent activities, which allows information to be gathered on the trends observed by insurance companies during their anti-fraud activities, with the aim of pooling data on the most frequent fraud events (the "**Platform**"); and (ii) a portal providing insurance companies with useful information to understand if claims they are about to settle are at risk of fraud (the "**Portal**").

Despite acknowledging the cost that fraud may cause to the industry and to policyholders, the ICA asserted that the Project could raise certain competitive concerns, which were assessed during the proceedings in order to find solutions in line with the principles of competition law.

In the ICA's view, the Project, as originally notified, posed three main concerns. In particular, since the Project was developed by an association representing the interests of the Italian insurance industry, there were insufficient guarantees of impartiality to ensure that the fraud detection activity, despite being worthy of support, was actually carried out for the benefit of all stakeholders.

Moreover, the ICA considered whether and to what extent the exchange of information inherent in the Project and beneficial to its success could

[5] ICA, Decision of September 21, 2021, No. 29826, Case I844, *Progetto antifrode* ANIA.

[6] ICA, Decision of November 3, 2020, No. 28435, Case I844, *Progetto antifrode* ANIA.

lead to an artificial increase in transparency in the affected markets, thereby facilitating collusion among competitors.

Furthermore, according to the ICA, the development of common algorithms and the sharing of large amounts of data could influence and standardize company choices at important stages of the insurance business.

On March 18, 2021, ANIA submitted a proposal for commitments for market testing. According to ANIA, these commitments would eliminate the ICA's concerns, since the Project would be significantly restructured compared to its first version. Moreover, ANIA asserted that approving the commitments would enable it to launch a Project that would have beneficial effects for the entire market, primarily for consumers.

Later, in June, following the market test reviews and comments from the National Association of Insurance Agents (the *Sindacato Nazionale degli Agenti di Assicurazioni* or the SNA), the Italian Data Protection Authority and the Institute for the Supervision of Insurance (the *Istituto per la vigilanza sulle assicurazioni* or **IVASS**), ANIA presented a consolidated version of its commitments.

The relevant markets

In its decision, the ICA pointed out that, given the scope of the Project, the product markets are the markets for the production and distribution of life and non-life insurance.

According to the ICA, from a geographical point of view, the markets concerned are national in scope, due to the fact that the premiums that policyholders must pay for the insurance services requested are determined by suppliers at the national level. In contrast, the markets for the distribution of insurance products are local or provincial.

The commitments

Following various amendments, ANIA submitted to the ICA a proposal for eight commitments, which the ICA found suitable to remedy the preliminary antitrust concerns.

In particular, ANIA undertook to guarantee access to the Platform and the Portal to all interested insurance companies, regardless of their membership of ANIA. It also committed to allow the use of the Portal exclusively in relation to the compensation phase, and not also – as originally envisaged – to the underwriting phase. This commitment will be applicable until the moment when the use of databases in the underwriting phase will start being allowed.

ANIA also committed to adopting regulations for the use of the Portal, which, in addition to clarifying the possibility for companies not associated with ANIA to adhere to the Project, will, among other things: (i) clarify the purpose for which access to the database is allowed, namely, to assess the fraud risk of individual claims, in order to proceed with further anti-fraud investigations; (ii) provide the list of entities entitled to consult the database (e.g. the sector authorities and the police); and (iii) provide the list of obligations that users are required to comply with.

In addition, ANIA undertook to define in advance and promptly communicate to the ICA input data that is considered necessary to ensure the operation of the Portal.

ANIA also undertook to develop so-called "*expert rules*", which are the parameters drawn from experience in the sector and on the basis of which the possible anomalous character of a given claim event is assessed (by means of the Expert Index), in particular, by considering elements such as: the characteristics of the insured asset; the date of occurrence of the claim with respect to the coverage period; and network analysis. Furthermore, for the purposes of defining the so-called Anomaly Index, ANIA undertook not to use a self-learning algorithm (i.e. algorithms capable of learning from the outcome of previously processed information). Moreover, ANIA undertook

to adopt all the necessary security measures to ensure secure that access to the Portal is limited to those entitled and to prevent the improper use of the database.

Finally, ANIA undertook to set up a committee which any policyholders or other interested parties complaining of problems relating to the use of the Portal by the company responsible for handling the claim, can contact.

Council of State upholds a TAR Lazio judgment annulling the ICA decision concerning the helicopter transport services cartel

On September 6, 2021, the Council of State dismissed an appeal brought by the ICA[7] against a TAR Lazio judgment[8] that annulled an ICA decision[9] concerning the parent company – AIRI S.r.l.(the "Parent") and its subsidiary Air Company S.r.l. (the "Subsidiary", together, the "Parties") – accused of participating in a cartel regarding helicopter transport services.

Background

The ICA Decision

In 2019 the ICA found that the Parties, together with seven other undertakings and the Italian Helicopter Association (IHA) (the "**Investigated Parties**"), had engaged in a price-fixing agreement.

According to the ICA, the Investigated Parties had entered into a price-fixing agreement within the IHA, which they were all members of from 2001 to 2017. In particular, the ICA asserted that the companies had agreed on a price list for aerial work services and passenger transport, divided by helicopter type.

The TAR Lazio judgment

The Parties applied for the annulment of the ICA decision. The Parent claimed that the ICA wrongly applied the parental liability presumption (the "**PLP**")[10], whereas the Subsidiary pointed out that it essentially carried out passenger transport services on behalf of private customers (for 95% of its revenues) and that, in general, it had never participated in public tenders for the provision of helicopter services.

Moreover, in its view, the ICA had wrongly considered "*air work services*" and "*passenger transport*" as part of the same relevant market, but had proved the existence of anticompetitive effects only for air work services. The Subsidiary therefore asserted that its activities were completely unrelated to the anticompetitive conduct of the alleged cartel.

The TAR Lazio granted the Parties' application and pointed out that the ICA had failed to establish whether the price list concerned the activity carried out by the Subsidiary, and the actual existence of a competitive relationship between the Subsidiary and the other members of the IHA. In other words, the TAR Lazio ruled that the Parties' anticompetitive conduct did not concern passenger transport, and that, therefore, no competitive relationship could be established between the Subsidiary and the other members of the IHA.

[7] Council of State, Judgment of September 6, 2021, No. 6214.

[8] TAR Lazio Judgment of May 18, 2020, No. 5275.

[9] ICA, Decision of February 13, 2019, No. 27563, Case I806, *Affidamento appalti per attività antincendio boschivo*.

[10] According to the parental liability doctrine, if a parent company exercises a decisive influence over its subsidiary, it can be held liable for the infringement of competition rules committed by its subsidiary. See, e.g., Court of Justice, Judgment of January 27, 2021, C-595/18, *Goldman Sachs v. Commission*, EU:C:2021:73.

In light of the above, the TAR Lazio considered absorbed the other pleas brought by the Parent, concerning the correct application of the PLP by the ICA.

The Council of State judgment

The ICA appealed against the TAR Lazio's ruling, but on September 6, 2021, its application was rejected.

The Council of State stated at the outset that the ICA had mistakenly applied the PLP by applying it as if it were an irrebuttable presumption. It noted, in this respect, that, where the parent company offers some evidence of the fact that it and its subsidiary do not constitute a single economic unit, the ICA can no longer rely on the PLP and is bound to discharge its burden of proof by showing that the parent actually exercised its influence over the subsidiary in the specific context of the contested anticompetitive behavior.

Accordingly, the finding of a situation of mere financial control by one undertaking over another, like the one that the Parent exercised on the Subsidiary, was not sufficient for considering the two undertakings as a single economic unit.

Furthermore, the Council of State rejected the ICA's grounds of appeal. In particular, it did not share the view that the TAR Lazio had proposed its own definition of the relevant market. Indeed, in the Court's view, the TAR Lazio merely noticed a logical fallacy in the description of the relevant market offered by the ICA, as it concerned services that were not at all offered by the Parties.

The TAR Lazio upholds an ICA *interim* cease and desist order against national associations in the cinema sector

On September 7, 2021, the TAR Lazio rejected the applications brought by associations of undertakings Anica, Anec and Anec Lazio (jointly the "**Applicants**"),[11] representing the Italian film and audiovisual industry, for the annulment of a decision in which the ICA imposed an *interim* cease and desist order in proceedings concerning an alleged anticompetitive conduct in relation to free outdoor film screenings.[12]

Background

On June 17, 2020, the ICA opened proceedings against Anica, Anec and Anec Lazio, on the basis of various complaints filed by companies and associations organizing free outdoor film screenings in the summer season in Italy. The complainants claimed that the Applicants had engaged in a boycott and obstructive conduct, aimed at preventing them from obtaining the authorizations necessary for the outdoor display of movies.

According to the ICA, the Applicants adopted several decisions through which they oriented the business strategy of their members. Their conduct was allegedly aimed at preventing outdoor cinemas from obtaining films to be screened during the 2020 summer season. In this context, the ICA took the view that the Applicants should restore without delay the full freedom of the distribution companies and intermediaries to define their marketing strategy for providing films to free outdoor cinemas.

To this end, on July 8, 2020, the ICA adopted *interim* measures, ordering the Parties: (i) to immediately cease implementing the alleged boycott decision or agreement; and (ii) to revoke all communications and indications containing

[11] TAR Lazio, Judgment of September 7, 2021, No. 9524.

[12] ICA Decision of July 8, 2020, No. 28286, Case I840, *Ostacoli alle arene a titolo gratuito*.

any form of influence and/or guidance on business strategy on films for their members.

The judgment of the TAR Lazio

The Applicants brought three separate actions seeking the annulment of the ICA decision, on the following grounds: (i) the lack of a proper definition of the relevant market; (ii) the wrong characterization of the Applicants as undertakings within the meaning of competition law; (iii) the wrongful analysis of their conduct; and (iv) the lack of clarity in the *interim* measures.

The TAR Lazio considered the three applications together and declared them unfounded.

The Court found, first, that the ICA had correctly defined the relevant market, including free cinemas in the film screening market, even though they belong to a particular segment thereof. Indeed, free cinemas offer the same product to the public, satisfying the same demand as the other undertakings in the film screening market, independently of the fact that they charge no prices to viewers.

Secondly, the TAR Lazio held that there was no doubt that free cinemas carry out an economic activity, albeit inspired by a different strategy compared to traditional paying cinemas, and are therefore undertakings.

Thirdly, the TAR Lazio held that the ICA's assessment of the Applicants' conduct was correct, since, even if their decisions were not binding, they had distorted competition in the film screening market by restricting the activity of free cinemas.

Finally, the Court noted that the ICA's order being challenged was not indefinite in terms of duration, since it would remain effective only until the end of the ICA proceeding, and was not disproportionate in terms of what was required of the Applicants, i.e., that the distribution companies and intermediaries stop following the guidance they were given by the Applicants.

TAR Lazio annuls ICA decision fining Vodafone in the amount of €5.8 million for abuse of dominance

On September 15, 2021, the TAR Lazio annulled the ICA decision finding telecom operator Vodafone Italia S.p.A. ("**Vodafone**") in breach of Article 102 TFEU for allegedly abusing its dominance in the market for Short Message Service ("**SMS**") termination.[13]

Background – The ICA Decision

The ICA opened separate proceedings for alleged abuse of dominance by Vodafone and Telecom Italia S.p.A. ("**Telecom**"), respectively, following a complaint filed in April 2016 by Ubiquity S.r.l. ("**Ubiquity**"). Ubiquity claimed that Vodafone and Telecom were applying excessive tariffs in the (upstream) market for SMS termination on their respective networks, hindering the ability of rivals to provide services in the (downstream) market for bulk SMS services.[14]

In December 2017, the ICA decided that Telecom and Vodafone had abused their respective dominant position, in violation of Article 102 TFEU.[15]

According to the ICA, Vodafone abused its market power by putting in place internal-external technical and economic discrimination, resulting in margin squeeze for equally efficient competitors

[13] ICA, Decision of December 13, 2017, No. 26901, Case A550A, *Vodafone-SMS informativi aziendali*, and TAR Lazio, Judgment of September 15, 2021, No. 9803.

[14] The retail services of sending SMS bulk allow business customers to send text messages – containing advertisements and/or general information – to receiving users identified by the customers themselves. In the retail service market for sending SMS bulk, the origination of the text message that is routed is carried out, and then reaches the destination mobile operator that delivers it (termination). The destination operator is also the only one able to deliver SMSs to users of its own network. Accordingly, Vodafone and Telecom are the only entities able to deliver text messages to their respective customers, so that they have the ability to unilaterally impose prices and technical conditions of interconnection and to act independently.

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

in the related market for bulk SMS services. Furthermore, the alleged abusive practice in question concerned the whole national territory, limiting production and foreclosing or limiting access to the national market for any economic players wishing to enter and/or operate on the Italian market for bulk SMS services.

The companies filed separate applications for annulment of the ICA decisions to the TAR Lazio[16]. Vodafone challenged, *inter alia*, the ICA's assessment of the downstream market, with particular reference to the final retail price that could be charged by a competitor that was as efficient as the dominant undertaking.

The TAR Lazio Decision

In its ruling, the TAR Lazio recalled that bulk SMS services consist of packages of messages that are delivered on the entire networks of three Italian mobile operators – Vodafone, Telecom and Wind Tre S.p.A. ("**Wind Tre**") – and sold to companies that want to send large amounts of messages to their customers.

The Court took the view that, in order to establish whether Vodafone had committed a margin squeeze, it had to take into account that the cost of the final product on the downstream market had been determined by the cost for SMS termination on all three networks. Moreover, the TAR Lazio acknowledged that the companies that buy the termination services to sell as bulk SMS packages (so-called "*aggregators*") are intermediaries that do not purchase SMS termination in the same downstream market as the final customers.

The TAR Lazio ruled that the ICA wrongly determined the reference price by taking into account only the cost incurred by the operators that, being equipped with a numbering infrastructure, purchase from Vodafone only the right to terminate on the network (so-called "*D43 operators*"), excluding the costs faced by aggregators. In this regard, the TAR Lazio ruled that aggregators do not qualify as users of the bulk SMS service, but rather act as intermediaries, which take on the task of acquiring SMS services from various operators in order to combine them into a bundle suited to the needs of end users. For this reason, aggregators cannot be treated as end users in the downstream market, where they act as resellers and not as buyers. As a consequence, determining the threshold price before assessing the existence of a margin squeeze was considered as an error.

The TAR Lazio then found the alleged abuse of dominant position by margin squeezing incompatible with the dominant players' intent to harm only part of their competitors by implementing differentiated and discriminatory strategies. According to the TAR Lazio, such conduct could have theoretically been challenged as external-external discrimination, *i.e.* according to a different approach. In particular, the ICA failed to demonstrate that the cost of terminating text messages on Vodafone's networks had affected the price of bulk SMS services to such an extent as to lead to the exclusion of the D43 operators from the downstream market, since no assessment of the detrimental effects, if any, of the conduct at issue was made in the ICA decision. In addition, according to the TAR Lazio, the fact that rival companies had been harmed by the margin squeeze implemented by a vertically integrated operator – even if such margin squeeze had been proved to the required legal standard, which was not the case – would not require the ICA to necessarily intervene. Indeed, before taking action on the basis of Article 102 TFEU, the ICA would be bound to verify whether and which favorable or detrimental effects on competition have reverberated on the final product market.

In conclusion, the TAR Lazio stated that the allegation of a potential anticompetitive effect of the conduct at issue must be supported by at least a market analysis, explaining and demonstrating why non-vertical and integrated competitors run the risk of being excluded from the market as a result of an alleged margin squeeze.

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

[16] At this stage, it does not appear that the appeal lodged by Telecom has been settled.

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