April 2021

Italian Competition Law Newsletter

Highlights

— ICA fully dismisses allegations of abuse of dominance in the market for maintenance of high-tech diagnostic imaging devices

— The ICA fines Google €102 million for an alleged refusal to publish Enel X's app for electric vehicle charging on Android Auto

— The Rome Court of Appeal partially dismisses appeal on a follow-on action for damages against the incumbent in the Italian electronic communications sector, but reduces the amount of the damages

ICA fully dismisses allegations of an abuse of a dominant position in the market for maintenance of high-tech diagnostic imaging devices

On March 30, 2021, the Italian Competition Authority (the "**ICA**") closed an investigation against three equipment manufacturers in the market for maintenance of high-tech diagnostic imaging devices, without finding any abuse of dominant position. The ICA found that the evidence collected during the investigation did not allow to confirm the allegations put forward at the beginning of the investigation.[1]

Background

On January 31, 2018, the ICA initiated proceedings for an alleged abuse of dominant position against GE Medical Systems Italia S.p.A. and its parent companies GE Healthcare Italia S.r.l. and GE Italia Holding S.r.l. ("**GE**"), Siemens Healthcare S.r.l. and its parent company Siemens Healthineers Holding III B.V. ("**Siemens**"), and Philips S.p.A. and its parent companies Philips SAECO S.p.A. and Koninklijke Philips N.V. ("**Philips**", and together with GE and Siemens, the "**Parties**")[2].

The proceedings were initiated following a complaint by Althea Group S.p.A. (formerly Pantheon Healthcare Group), a company active in the provision of integrated medical device management and maintenance services. In the

[1] ICA, Decision of March 30, 2021, No. 28620, Case A517 - *Mercati di manutenzione di dispositivi diagnostici*.

[2] On August 8, 2018, the ICA decided to extend the proceedings also against General Electric Co., GE Medical System S.C.S., Siemens AG and Philips Medical System Nederland B.V.

decision to start the proceedings, the ICA alleged that the three main original equipment manufacturers ("**OEMs**") of high-end diagnostic imaging devices (e.g., computed tomography and magnetic resonance devices; "**DI Devices**"), namely Philips, GE, and Siemens, could have implemented, each with respect to their own brand devices, exclusionary strategies aimed at hindering the provision of maintenance services by parties other than the manufacturers (Independent Service Providers, "**ISOs**"). The contested practices consisted, among other things, in the refusal to provide access to service software and information, and the refusal to supply spare parts.

In September 2020, the Parties received the Statement of Objection ("**SO**"), which confirmed the concerns expressed in the decision to open proceedings.

The Decision

Relevant markets

The ICA identified a primary market for the production and commercialization of DI Devices, on the basis of a number of characteristics deemed to be common to all DI Devices (*e.g.*, technological complexity capable of delivering sophisticated diagnoses, high prices, significant installation and replacement costs which cannot be recovered, etc.).[3]

As for the secondary market for DI Devices maintenance services, the ICA defined three distinct markets, each one related to the OEMs' respective brand ("branded" aftermarkets). According to the ICA, the high complexity of the DI Devices and the lack of standardisation in production technologies had prevented the development of "standard" maintenance services that could be equally used on DI Devices of different brands.

No interdependence between primary market and aftermarkets

The Parties argued for the existence of a "systems market" comprising the primary market for the production and commercialization of DI Devices *and* the secondary markets for maintenance services. In the Parties' view, the primary and secondary markets were interrelated, since, *inter alia*, healthcare providers in the primary market, often faced with severe budgetary constraints, were well aware of the substantial expected costs of maintenance services and, thus, of the overall lifecycle costs, and took them into account when purchasing the devices.

However, the ICA held that DI Devices maintenance services were not part of a single "systems market", since they are mainly purchased much later than the device itself. Therefore, it would be impossible for a healthcare facility to correctly estimate the amount of maintenance costs for the entire lifecycle of the DI Device.

Dominant position

The ICA found that the primary market for the production and commercialization of DI Devices was highly concentrated, with stable market shares over time. Furthermore, each OEM – with a market share of over 90% in the sale of branded maintenance services – was dominant in its branded aftermarket.

In the assessment of the OEMs' dominant position, the ICA emphasized the lack of interdependence between decisions to purchase DI Devices and maintenance over their entire lifecycle, as well as the fact that healthcare facilities were likely to be locked-in, as they could not react promptly to a possible exploitation of downstream market power by the dominant OEM by replacing the upstream DI Device with another.

[3] It is noteworthy that the SO's conclusions on market definition contrast with past EU and national decisional practice, which have defined the primary markets as those for the production and commercialization of *each* DI Device. Commission Decision of January 21, 2004, Case COMP/M.3304, *GE/Amersham*; Commission Decision of March 2, 2001, Case COMP/M.2256, *Philips/Agilent Health Care Solutions*; Commission Decision of October 17, 2001, Case COMP/M.2537, *Philips/Marconi Medical Systems*; and Commission Decision of September 2, 2003, Case COMP/M.3083, *GE/Instrumentarium*.

The lack of sufficient evidence

In the analysis of the contested conduct, the ICA concluded that the evidence collected during the proceedings was insufficient to demonstrate an abuse of dominance under Article 102 TFEU.

First, the ICA excluded the existence of an abusive conduct consisting in the refusal to grant access to the maintenance software of the so-called "minimum set" and the supply of spare parts.

Second, the ICA held that the OEMs' policy of reserving access to the maintenance software of the so-called advanced set (software and service manuals) to their technicians and business partners was compatible with antitrust rules, as the "advanced set" software was covered by intellectual property ("**IP**") and, in any case, was not indispensable for third parties to carry out maintenance activities on the OEM's DI Devices.

The ICA reasoned that, where a conflict between the protection of IP rights and the safeguard of competition arises, the latter can only prevail when it is proven that the good or service protected by an exclusive right is not in any way replicable by potential competitors because of objective reasons related to technical, legal or economic obstacles. If this was not the case, in the ICA's view, there would be no incentive to develop alternatives based on innovation, but merely "competition by imitation" without investments in R&D.

In addition, the OEMs' refusal to license the "advanced set" software and information did not constitute an abuse of dominant position, as the refusal was connected with the exercise of an exclusive right, in a sector in which investments are essential for technological innovation. The ICA reasoned that, in light of established EU case-law on refusal to supply, the OEMs' refusal to license the "advanced set" software and information was justified by the need to promote development and innovation in disease prevention and medical treatment. The ICA concluded that the protection of health is guaranteed through the protection of the incentive to invest, which is necessary for the development of advanced software and, therefore, through the protection of intellectual property rights, thus fostering competition based on innovation, rather than competition by imitation.

The ICA fines Google €102 million for an alleged refusal to publish Enel X's app for electric vehicle charging on Android Auto

On April 27, 2021, the Italian Competition Authority (the "**ICA**") imposed a fine of €102 million on Alphabet Inc., Google LLC and Google Italy S.r.l. (together, "**Google**") for an alleged refusal to allow an electric vehicle ("**EV**") charging app developed by Enel X (named "**JuicePass**") to be published on Google's Android Auto platform.[4]

The complaint

In May 2019, following a complaint submitted by Enel Italia S.r.l. (together with the other companies belonging to the Enel group, "**Enel**"), the ICA opened an investigation into Google's conduct.

In its complaint, Enel argued that Google was violating Article 102 TFEU by refusing with no objective justification to render Enel's JuicePass app interoperable with the Android Auto platform. JuicePass is an app that provides services related to EV charging, such as: searching for charging stations; navigating to the charging station of choice; and booking, managing, and paying for charging sessions. The Android Auto platform is Google's application that allows drivers to display some apps on their Android-based smartphone on their vehicle's embedded screen, in order to safely use those apps while driving.

[4] ICA Decision of April 27, 2021, No. 29645, Case A529, *Google/compatibilità app Enel X Italia con sistema Android Auto.*

After an investigation lasting almost two years, on April 27, 2021, the ICA found that Google had abused its dominant position on the markets for the licensing of smart mobile operating systems ("**OS's**") and for Android app stores, in violation of Article 102 TFEU (the "**Decision**").

The Decision

(i) The upstream relevant markets

In the Decision, the ICA identified two upstream relevant markets, in line with the position adopted by the European Commission (the "**Commission**") in Case AT.40099 – *Google Android:*[5] (1) the worldwide market (excluding China) for the licensing of smart mobile OSs, where Google is active through Android; and (2) the worldwide market (excluding China) for Android app stores, where Google is active through Google Play. In the ICA's view, Android and Google Play constitute the necessary prerequisites for the operation and development of Android Auto (as well as for the distribution of the apps available on Android Auto). According to the ICA, Android Auto is Android's extension for the car environment, intended to allow apps (developed according to templates defined by Google) to be used through a car's infotainment system with a simplified and limited user experience, with a view to reducing driver distraction and ensuring the safe use of supported apps while driving.

In addition, the ICA emphasized that, in light of the importance of Google's products for app distribution, Google allegedly holds a "*gatekeeper*" position, as it is a "*gateway*" for app developers to reach end users. The ICA based its allegation on the fact that, in order to be published on Android Auto, an app must be developed on the basis of specific programming tools exclusively defined and made available by Google (*i.e.*, templates).

(ii) The downstream competitive space and the alleged competitive relationship between EV charging apps and navigation apps

The ICA also referred – at the downstream level – to a "*competitive space*" including both EV charging apps (such as JuicePass) and navigation apps (such as Google's proprietary navigation app, Google Maps, which – unlike JuicePass – is available on Android Auto). In the ICA's view, both types of apps offer services used for EV charging (although EV charging apps are specialized, while navigation apps have a generalist approach), thereby competing with each other. In particular, the ICA held that there is a competitive relationship between the above-mentioned apps in light of the following findings:

a. actual competition, because both types of apps have search and navigation functions related to EV charging stations;

b. potential competition, because navigation apps could potentially expand their functions related to EV charging, with the possibility to completely replace EV charging apps. In this regard, the ICA held that it was reasonable to assume that Google would in the near future integrate booking and payment functions into the Android Auto-compatible version of Google Maps, based on evidence of Google's increased interest in the EV services sector; and

c. competition for the relationship with users of EV charging services and, ultimately, for the data generated by such users. In the ICA's view, in the case of both intermediation and complete substitution of EV charging apps by navigation apps, mobility service providers and charging point operators (such as Enel, which is active in both capacities) would depend on navigation apps to access fundamental data for the purposes of their business activities.

[5] Commission Decision of July 18, 2018, No. 4761, Case AT.40099, *Google Android*.

(iii) The refusal to deal

The ICA found that Google had abused its dominant position by failing to implement appropriate technical solutions to allow interoperability of JuicePass with Android Auto, despite Enel's repeated requests and Android Auto's indispensability to conveniently reach end users.

In this regard, the ICA held that Google should have alternatively:

— developed a template to accommodate Enel's request (while, at the time of such request, the only templates for Android Auto-compatible apps were for media and messaging apps);

— developed a custom app especially for Enel; or

— allowed Enel to publish a version of JuicePass based on voice commands (and, accordingly, safe to use while driving).

In light of the competitive relationship between JuicePass and Google Maps, the ICA held that Google's refusal had an exclusionary intent, as it was allegedly aimed at hindering and delaying JuicePass's availability on Android Auto to favor Google's own proprietary navigation app.

In addition, the ICA maintained that there was no objective justification for Google's refusal to publish JuicePass on Android Auto, as the contested conduct was based on Google's discretionary business choices regarding its publishing policy for Android Auto.

Finally, according to the ICA, the fact that, during the proceedings, Google had developed templates for Android Auto-compatible navigation and EV charging apps, which allowed developers to publish beta versions of their apps on Android Auto, was irrelevant for the purposes of its assessment, as beta versions are intended for a limited group of users (willing to participate in this form of testing). Accordingly, the ICA held that Google's abusive conduct started from its first rejection of Enel X's request (in September 2018) and was still ongoing.

(iv) The exclusionary effects

Taking into account the presence of network effects and the risk of winner-takes-all phenomena, the ICA held that Google's refusal to allow JuicePass to be published on Android Auto could lead to the definitive exclusion of Enel X from the EV charging sector. This was particularly the case, in the ICA's view, due to the fact that the EV market in Italy is on the verge of significant growth, which is a crucial period for JuicePass to build its user base.

(v) Fine and obligations imposed on Google

With regard to the calculation of the fine, the ICA held that the turnover figures provided by Google (according to which its open source OS Android did not generate any revenue) did not adequately reflect Android's contribution to Google's overall turnover. As a consequence, the ICA decided to set the amount of the fine on the basis of an estimate of the relevant turnover, pursuant to paragraph 9 of the ICA's guidelines on the method for setting antitrust fines.

In addition, the ICA imposed on Google behavioral obligations aimed at restoring a level playing field in Android Auto with regard to EV charging apps. To this end, the ICA ordered Google to release without delay the final version of the template for EV charging apps, after having possibly completed it to include all the features considered essential by Enel X (namely, booking and starting charging sessions). The ICA also requested to appoint a monitoring trustee to supervise Google's activities and report to the ICA.

Rome Court of Appeal dismisses appeal on a follow-on action for damages and orders the incumbent in the Italian electronic communications sector to pay approximately €5 million in damages

On April 13, 2021, the Rome Court of Appeal rejected the appeal brought by Telecom Italia S.p.A. ("**TIM**") against a judgment of the Court of Rome in a follow-on action for damages.[6] The Court of Rome had ordered TIM to pay COMM 3000 S.p.A. (formerly KPNQwest S.p.A., "**COMM 3000**") approximately €8 million in damages for alleged abuse of dominant position in the market for the provision of wholesale access services. The ICA had imposed a fine for the alleged abuse in 2013.[7]

Background

In order to provide electronic communications services to final customers, the other licensed operators ("**OLOs**") normally need access to TIM's fixed network. When the OLOs acquire new customers, they send TIM a request to activate the wholesale access services needed to provide users with retail electronic communications services. This process can either have a positive outcome for the OLOs, leading to the provision of the retail service to final customers, or a negative outcome, when TIM communicates the presence of one of the circumstances provided for by sector-specific regulation, which prevent the activation of wholesale access services.

In a decision dated May 9, 2013, in the A428 case (the "**A428 Decision**"),[8] the ICA stated that, in the period 2009-2011, TIM had allegedly abused its dominant position by communicating an unjustifiably high number of refusals to activate wholesale access services ("**KOs**"), in order to hinder the expansion of competitors in the markets for voice telephony services and broadband internet access. In particular, the ICA found that the procedures for the provision of wholesale access services to competitors and to TIM's commercial divisions did not coincide. In the ICA's view, the differences between external and internal procedures were not unlawful *per se*, but they had resulted in higher percentages of KOs for competitors compared to TIM's commercial divisions, which allegedly amounted to abusive discriminatory treatment.

In the civil proceedings, COMM 3000 claimed that it had been harmed by the above-mentioned conduct. The claimant argued that, in the period 2009-2011, it had been harmed by the conduct contested by the A428 Decision, as it had allegedly received percentages of refusals to activate higher than those received by TIM's retail divisions, due to a more complex and less efficient delivery process. COMM 3000 also claimed that the effects of the contested conduct lasted from 2009 to 2012 and dragged on from 2013 to 2015. COMM 3000 therefore asked the Court of Rome to award approximately €37 million in damages. The Court of Rome appointed an expert to (i) assess whether COMM 3000 had actually suffered a discriminatory treatment, (ii) verify whether there was a causal link between the contested conduct and the alleged damage and, if that was the case, (iii) quantify the damage. Following the submission of the expert opinion, the Court of Rome found that TIM had abused its dominant position, and ordered TIM to: (i) refrain from reiterating the contested conduct; and (ii) pay COMM 3000 approximately €8 million in damages.

TIM challenged the judgment before the Rome Court of Appeal, on the grounds that, *inter alia*,

[6] Court of Rome, Judgment No. 9115 of April 30, 2019.

[7] Rome Court of Appeal, Judgment No. 2650 of April 13, 2021.

[8] ICA Decision of December 21, 2016, No. 26310, Case A428C, *Wind-Fastweb/Condotte Telecom Italia*.

the court of first instance had wrongly assessed the discriminatory treatment alleged by COMM 3000, and there was no sufficient evidence of: the damage supposedly suffered; the causal link between such damage and the alleged conduct; and the fault requirement. Moreover, TIM contested the quantification of damages.

The Judgment

In judgment No. 9115 of April 13, 2021, the Rome Court of Appeal partially dismissed TIM's appeal. However, the Court reduced the awarded damages to approximately €5 million.

The Rome Court of Appeal first considered the evidentiary value of the A428 Decision (upheld by the Lazio Regional Administrative Court in judgment No. 4801/2014 and by the Council of State in judgment No. 2479/2015). The Court stated that, according to settled case law, the final decision of a competition authority amounts to "*privileged evidence*" of the existence, nature and scope of the infringement. However, the claimant bears the burden of proving, *inter alia*, that: (i) it was actually affected by the contested conduct; (ii) it suffered damage; and (iii) there was a causal link between the conduct and the alleged damage, on the basis of ordinary rules on burden of proof.

The Court remarked that the "*privileged evidence*" value of the final antitrust decision can also be invoked by undertakings that did not take part in the proceedings (before the ICA or the European Commission), provided that: (i) their position is identical or at least comparable to that of the undertakings that actually took part in the proceedings; and (ii) the undertakings concerned had actually been harmed by the unlawful conduct.

The Court then assessed whether the facts alleged and the evidence submitted by COMM 3000 satisfied the legal standard. The Court seemed to consider that, as COMM 3000 was active in the market affected by TIM's alleged anticompetitive conduct, it was as such harmed by the conduct. In the Court's view, since the activation of wholesale access services was a standardized process affecting all players in the relevant market, COMM 3000 would have been negatively impacted by it.

The Court came to this conclusion notwithstanding the fact that, based on available evidence, COMM 3000 had actually activated, in percentage terms, a higher number of lines than TIM's commercial divisions. In this respect, the Court seemed to acknowledge that the Tribunal of Rome had erroneously estimated the percentage of lines activated by COMM 3000 in comparison with those activated by TIM's commercial divisions. However, this error of assessment did not change the conclusions of the Court of Appeals on the alleged discrimination suffered by COMM 3000.

With regard to the causal link between TIM's conduct and the alleged damage, the Court found that it could be inferred from the following elements: (i) the ICA's finding that TIM's behavior was discriminatory; (ii) the fact that COMM3000 purchased wholesale access services from TIM and competed with it in the retail market; and (iii) the higher number of KOs allegedly received by COMM 3000 compared to those received by TIM's internal division.

As to the fault requirement, the Court asserted that TIM's subjective element could be inferred from the findings in the ICA's decision. In this regard, the Court held that the burden of proof shifted onto TIM, which would have had to prove the absence of the fault requirement. In the Court's view, TIM had not been able to provide such evidence. In particular, the Court held that TIM had failed to demonstrate that the anticompetitive conduct was the outcome of an excusable error (*i.e.*, that it could not realize that the differences between the external and internal supply processes adopted could have anticompetitive effects). According to the Court, TIM had failed to demonstrate that, despite adopting an adequate standard of control, it could not have been aware that the differences between the external and internal supply processes could have an anticompetitive effect, at least by increasing competitors' costs in the downstream market and delaying the erosion of the incumbent's market position.

The Court also dismissed TIM's argument that the adoption of different external and internal supply processes was in compliance with the

"equivalence of output" principle adopted by the applicable regulatory framework (according to which the services offered by the incumbent to alternative operators and to its own retail divisions must be comparable in terms of functionality and price, but can be provided through different systems and processes). The Court held that the need to comply with this regulatory principle did not justify the contested conduct.

As to the quantification of damages, the Court confirmed the approach adopted by the expert, based on the comparison between the market shares of competitors in Italy in the 2009-2011 period and the market shares of alternative operators in the United Kingdom in another period (2003-2006). However, the Court reduced the damages allegedly suffered by COMM 3000. The latter claimed that the alleged abuse had caused it damages even in the years following the termination of the contested conduct. However, the Court noted that, in the A428C case, the ICA had ascertained a clear discontinuity between TIM's conduct in the 2009-2011 period and its conduct following the A428 Decision (adopted in 2013), as TIM had implemented a number of initiatives aimed at improving the provision of wholesale access services and the guarantees of equal treatment. Accordingly, the Court considered it appropriate to at least reduce the amount of damages for the loss of profits allegedly suffered by COMM 3000 in the period 2013-2015. The final damages were therefore reduced to approximately €5 million.The proceedings before the Rome Court of Appeal are part of a series of follow-on actions based on the A428 Decision.

It is noteworthy that the findings of the Court in this case openly conflict with the approach adopted by the Court of Milan in a judgment delivered in another case concerning the conduct contested by the ICA in the A428 Decision. In that case, the Court of Milan entirely dismissed the claimant's action, on the ground that it was merely based on a statistical analysis of the number of KOs. The Court noted that plaintiff had not alleged, nor demonstrated, any KOs or groups of KOs communicated by TIM in the absence of the circumstances provided for by sector regulation (which impose to communicate a KO). According to the Milan Court, in civil proceedings, a mere statistical analysis of the percentage of KOs communicated to the claimant is not sufficient to demonstrate the causal link and the damage actually suffered by individual operators, as it could only constitute circumstantial evidence or reinforce and confirm further evidence.[9]

Other developments

Council of State definitely quashes ICA's decision imposing a fine on two maritime carriers

On April 1, 2021,[10] the Council of State confirmed a judgment issued by the Regional Administrative Court of Lazio (the "**TAR Lazio**") in 2019,[11] which had partially annulled an ICA decision fining two maritime carriers for an alleged abuse of dominant position.[12]

In 2018, the ICA found that Moby S.p.A. ("**Moby**") and its wholly-owned subsidiary Compagnia Italiana di Navigazione ("**CIN**" and, together with Moby, the "**Parties**") had abused their dominant position on certain maritime freight transport routes connecting Sardinia and North-Central Italy, by engaging in an exclusionary strategy targeting some of their competitors. In particular, according to the ICA, Moby and CIN allegedly boycotted logistics operators that had entered into business relations with rival ferry operators, through the simultaneous application of: (i) retaliatory measures and unfavorable

[9] Court of Milan, Judgment No. 11772 of December 18, 2019. The available evidence showed that the claimant regularly checked whether the refusals to activate communicated by TIM were actually justified by the circumstances provided for by sector-specific regulation. As the claimant had not specified which refusals to activate were in its view unlawful or unjustified, the Court held that it was not necessary to appoint an expert to carry out further investigations in that regard. For an in-depth analysis of the case see the December 2019 issue of the Italian Competition Law Newsletter, available here: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterdecember2019pd-pdf.pdf.

[10] Council of State Judgment No. 2727 of April 1, 2021.

[11] TAR Lazio Judgment No. 7175 of June 4, 2019.

[12] ICA Decision of February 28, 2018, No. 27053, Case A487, *Compagnia Italiana di Navigazione - Trasporto Marittimo delle Merci da/per la Sardegna*. For a detailed analysis of the ICA Decision and TAR Judgment, see our previous Newsletter dated May 2019, available here: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/cleary-gottlieb-italian-competition-law-newsletter--may-2019-pdf.pdf.

economic and commercial conditions to disloyal logistics operators (direct boycott); and (ii) more favorable economic and commercial conditions to other logistics operators (indirect boycott). As a consequence, the ICA imposed on Moby and CIN, jointly and severally, a fine of approximately €29 million.

In confirming in full the TAR Lazio's judgment, the Council of State concurred that the parts of the ICA decision relating to the alleged indirect boycott deserved to be annulled. In particular, the administrative courts held that the practice found by the ICA amounted to the grant of fidelity rebates. For this reason, in line with the principles established by the EU Court of Justice in the *Intel* judgment,[13] both the TAR Lazio and the Council of State stated that the ICA was required to analyze the conditions, duration and amount of the rebates, and to assess the possible existence of a strategy aimed at excluding as efficient competitors from the market. According to the administrative courts, the ICA failed to assess whether the rebates were defensive in nature and could be replicated by rivals, as it merely relied on its own interpretation of certain documents to substantiate its allegations on the indirect boycott.

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

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