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Italian Competition Law Newsletter

Highlights

— ICA publishes final report on big data sector inquiry

— Italian Supreme Court rules on statute of limitations and evidentiary value of commitment decisions

— Court of Rome asks for ICA's assistance with quantification of damages in follow-on case

ICA publishes final report on big data sector inquiry

On February 10, 2020, the Italian Competition Authority (the "**ICA**") published its final report in the big data sector inquiry carried out jointly with the Italian Data Protection Authority (the "**IDPA**") and the Italian Communications and Media Authority (the "**ICMA**").[1]

The joint sector inquiry

On May 30, 2017, the three authorities launched a joint sector inquiry into the effects of big data and its consequences in relation to the current economic, political and social context and the regulatory framework in force.[2]

Between November 2017 and November 2018, the three authorities sent out requests for information to market participants and held hearings with representatives of firms active in the telecommunications, media, over-the-top, information technology, insurance and banking sectors, as well as with experts in the field.

In June 2018, the ICA and the ICMA published interim reports with their preliminary findings.[3] Moreover, on July 10, 2019, the three authorities published guidelines and policy recommendations, anticipating the findings of the final report.[4]

Finally, on February 10, 2020, the three authorities issued the final report. In the report, the three authorities separately give their take on big data and its competitive value.

[1] *Indagine conoscitiva sui Big Data*, Case IC53.

[2] ICMA Decision No. 217/17/CONS; ICA Decision No. 2660 of May 30, 2017, Case IC53; IDPA Decision of May 11, 2017.

[3] See ICA, *Indagine conoscitiva sui Big Data. Analisi della propensione degli utenti online a consentire l'uso dei propri dati a fronte dell'erogazione di servizi* published on June 8, 2019; ICMA, *Big data Interim report nell'ambito dell'indagine conoscitiva di cui alla delibera n. 217/17/CONS*, published on June 8, 2018.

[4] *Linee guida e raccomandazioni di policy*, published on July 10, 2019.

The ICMA's and the IDPA's findings

The ICMA noted, *inter alia*, that the concentration of big data in the hands of a few online platforms could lead to the creation of dominant positions in the media sector.

In this respect, the ICMA mentioned that, on July 18, 2019, it opened proceedings to investigate the possible existence of dominant positions or, in any case, positions capable of harming pluralism of information in the online advertising sector.[5] The proceedings stem also from the data collected during the joint sector inquiry and represent the first market investigation directly involving online platforms. The proceedings are currently ongoing and could lead to the imposition of remedies, if necessary to regulate possible dominant positions.

The ICMA found that OTT companies offer services that very often are in direct competition with traditional electronic communications services. This convergence brought traditional telecommunications service providers to ask for a regulatory level playing field, which includes consolidated rules on access rights and interconnection services.

The ICMA also noted that Directive 2018/1808/EU, on media services, and the new European Electronic Communications Code (Directive 2018/1972/EU) extend to online platforms and operators some obligations that so far have been imposed only on traditional media and telecommunications service providers. As a consequence, for example, national regulators can impose regulatory measures on certain online platforms to allow for the interoperability of their services.

The IDPA stressed, *inter alia*, the importance of providing users with transparent information when asking for their permission to use their data. Companies must always specify for which purposes they are asking data, and must be taken accountable for any misuse. According to the IDPA, this preliminary information has a competitive value, as it can influence consumers' commercial choices, just like preliminary information on products. In particular, in the case of goods provided for free, the IDPA stated that it is crucial that the owner of the data is able to: (i) monitor the use that companies will make of their data; and (ii) check whether this use is compliant with the purposes that were initially declared.

The ICA's findings

According to the ICA, big data can play a crucial role in the assessment of the competitiveness of data-driven economies, as it is one of the factors that may increase concentration and barriers to entry in digital markets.

For instance, in two-sided markets big data can increase network effects, scale and scope economies, as well as switching costs, by creating lock-in effects. In addition, big data can act as a barrier to entry in those markets where firms are able to exploit machine learning algorithms and mechanisms to gain a significant competitive advantage.

According to the ICA, in some transactions data can be seen as the price consumers pay to have a certain service. In other cases, the treatment of data by online operators can be compared to the features affecting the quality of the service offered on the market. So, for example, a service that protects consumers' privacy is comparable to a higher quality service, and *vice versa*.

In the big data sector, conduct falling under the scrutiny of antitrust authorities may take place at all stages of the industrial chain, including data collection, management and processing for the provision of services and their customization.

All the pillars of competition law may be concerned when dealing with big data and privacy issues: restrictive agreements, abuses of dominant positions and merger control. For instance:

i. horizontal agreements aimed at lowering privacy standards can be treated as agreements aimed at raising prices. Moreover, agreements

[5] Decision No. 356/19/CONS.

between firms that have as their object the sharing of personal data of their users may raise critical issues where they could facilitate coordination of the commercial policies of these companies;

ii. conduct of firms having "*too much*" data (resulting in strong market power) may be assessed under Article 102 TFEU as exploitative or exclusionary abuses.

Conduct aimed at using big data to draw accurate profiles of consumer preferences and engage in price discrimination between customers may potentially constitute a form of imposition of unfair trading conditions under Article 102(a) TFEU. However, in order to assess whether price discrimination at a retail level can be considered lawful or not, it is important to build up a test that factors in both the utility for the consumers that end up paying a lower price than the market price, and the disutility for those who end up paying a higher price.

In the ICA's view, big data can also facilitate forms of refusal to deal. However, a refusal to grant access to data may constitute an obstacle to competition and result in abusive conduct, in the form of a refusal to contract, only in exceptional circumstances, *i.e.* where, taking into account the specificity, quantity and quality of the data concerned, the latter incorporates the stringent requirements of an essential facility for the provision of a particular service.

Data analysis and processing activities (analytics, cloud computing and data storage) can facilitate the implementation of other exclusionary practices. In particular, possible abuses of dominant position may take place where a dominant firm (i) uses data collected in a market to unduly extend its market power through anticompetitive conduct such as tying (leveraging), or (ii) provides services to a third party against which it competes at a different level of the supply chain (discriminatory practices);

iii. finally, in merger control, competition authorities may also start assessing the effects of a concentration on privacy in a similar way to how they look at the effects on prices.

Guidelines and policy recommendations

Among various policy recommendations, in the *Guidelines and policy recommendations* attached to the final report on big data, the authorities:

— stressed the importance of antitrust enforcement and, in particular, tackling abusive conduct and restrictive agreements in the digital economy, which may be facilitated by the development of new software and sophisticated algorithms (point 7).

To safeguard consumer welfare, they suggested not to limit the antitrust analysis to the traditional parameters linked to prices and quantities, but to extend it to quality, innovation and fairness;

— asked the competent authorities to reform national and international merger control rules (point 8).

In their view, competition authorities should be entrusted with the power to assess mergers that fall under statutory thresholds, in order to avoid so-called "*killer acquisitions*", which may negatively affect the competitive pressure exercised by small and innovative start-ups.

In addition, the authorities asked the Parliament to introduce the EU merger control test (namely, the so-called *substantial impediment to effective competition*, or "*SIEC*", standard) into Article 6(1) of Law No. 287/90, as this test would better serve the competitive challenges of the digital era.

The Italian Supreme Court rules on limitation periods and evidentiary value of commitment decisions in follow-on actions

On February 27, 2020, the Italian Supreme Court fully upheld a judgment of the Milan Court of Appeals, which had dismissed the damages claim of Uno Communications S.p.A. ("**UNO**") against Vodafone Italia S.p.A. ("**Vodafone**").[6]

Background

In 2005, the ICA opened a proceedings against Telecom Italia Mobile S.p.A., Wind Telecomunicazioni S.p.A. and Vodafone for alleged abuse of dominant position in the market for fixed-to-mobile calls.[7] The alleged abuse consisted in refusing to negotiate access to their mobile network with potential competitors willing to operate as MVNOs (Mobile Virtual Network Operators), ESPs (Enhanced Service Providers), or ATRs (Air Time Resellers). In May 2007, the ICA closed the proceedings with a commitment decision with respect to Vodafone.[8] By contrast, in August 2007, the ICA fined both Telecom Italia Mobile S.p.A. and Wind Telecomunicazioni S.p.A.[9]

In February 2012, UNO brought an action for damages against Vodafone, seeking compensation for the damages caused by alleged abuse of dominance and unfair competition acts, in connection with the facts investigated in the ICA's proceedings. However, the Court of Milan ruled that UNO's claim was time-barred, due to the expiry of the five-year limitation period.[10]

The Milan Court of Appeals upheld the lower court's judgment. In particular, the Court stated that: (i) UNO is "*a professional operator in the market*" and, as such, should have known the ICA's proceedings into Vodafone's conduct since its opening; (ii) Directive 2014/104/EU does not apply retroactively, therefore the limitation period started running when the damage became "*objectively recognizable*", and it was not suspended pending the ICA's proceedings. As a consequence, the limitation period started running in 2005, when the ICA opened the proceedings or, at the latest, in August 2007, when the ICA adopted a commitment decision with respect to Vodafone.

The Judgment

The Supreme Court analyzed the case based on the legal framework that was applicable before the entry into force of Legislative Decree No. 3/2017, implementing Directive 2014/104/EU.

In line with its precedents, pursuant to Articles 2935 and 2947 of the Italian Civil Code, the Supreme Court held that, in tort cases, the 5-year limitation period starts to run when "*the damage is manifested externally*" and becomes "*objectively perceivable and recognizable, by using ordinary diligence*", by the person that suffered the damage.[11]

The Supreme Court argued that it is reasonable to assume that consumers may discover the existence of a cartel only when the ICA publishes an infringement decision, thus publicly revealing an agreement that is typically secret. On the contrary, in exclusionary abuse of dominance cases, where claimants are usually competitors, market participants may become aware of the anticompetitive conduct even before the ICA

[6] Italian Supreme Court, Judgment No. 5381 of February 27, 2020; Court of Appeals, Judgment No. 3052 of July 20, 2016.

[7] ICA's Decision No. 14045 of February 23, 2005.

[8] ICA's Decision No. 16871 of May 24, 2007.

[9] ICA's Decision No. 11731 of August 3, 2007, Case A357 – *Tele 2/TIM-Vodafone-Wind*.

[10] Judgment No. 4587 of April 3, 2014.

[11] Italian Supreme Court, Judgment Nos. 5913/2000; 9927/2000; 2645/2003; 12666/2003; 10493/2006; 576/2008; 27337/2008; 11119/2013; and 21255/2013.

publishes an infringement decision. In this scenario, the court has to carry out a case-by-case assessment aimed at evaluating the degree of competence and actual awareness of the person that suffered the alleged damage.

In the case at hand, the Supreme Court emphasized that UNO was a competitor of Vodafone, operating in the same sector, and should have known about the alleged anticompetitive conduct since 2005, when the ICA opened the proceedings (and there was consequent wide media coverage of it) or, at the latest, since August 2007, when the ICA adopted the commitment decision with respect to Vodafone.

In the Supreme Court's view, in the case at hand the application of a 5-year limitation period starting from the day the ICA opened the proceedings did not infringe the EU principle of effective judicial protection, according to which national procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law.

Moreover, the Supreme Court ruled on the evidentiary value of commitment decisions in follow-on cases. According to the Supreme Court, commitment decisions cannot have the same evidentiary value as infringement decisions (namely, they do not constitute "*privileged evidence*", based on principles applicable *ratione temporis*). However, such commitment decisions cannot also have the same evidentiary value as decisions finding no infringement because they are usually adopted to remove the preliminary competition concerns raised by the ICA in the decision to open the proceedings. Moreover, in the specific case, the ICA accepted Vodafone's commitments after having issued a statement of objections. In the Court's view, this showed that, up to a very advanced stage in the proceedings, the ICA believed that Vodafone's conduct was unlawful. Therefore, the Supreme Court held that, in these cases, commitment decisions may give rise to a rebuttable presumption of unlawfulness of the contested conduct.

Also in light of the judgment of the European Court of Justice in *Gasorba v. Repsol*,[12] the Supreme Court concluded that "*civil courts can base their decisions on what the ICA has established in the statement of objections, even though the ICA's findings do not constitute privileged evidence and can always be rebutted by the parties*."

The Court of Rome asks for ICA's assistance with quantification of damages in follow-on case

On February 26, 2020, the Court of Rome issued a non-final judgment in an action for damages brought by Siportal S.r.l. ("**Siportal**") against Telecom Italia S.p.A. ("**TIM**") in follow-on litigation for an alleged abuse of dominance in the provision of wholesale access services,[13] which had been found and fined by ICA in 2013. The Court rejected TIM's claim that the limitation period had expired, found that TIM had committed an abuse against Siportal, and asked the ICA to assist the Court with respect to the determination of the quantum of damages pursuant to Article 14(3) of Legislative Decree No. 3/2017.[14]

Background

In order to provide electronic communications services to final customers, the other authorized operators ("**OAOs**") normally need access to TIM's fixed network. When the OAOs 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, leading to the provision of the retail service to final customers, or a negative outcome, when TIM communicates the presence of one of

[12] Judgment of November 23, 2017, Case C-547/16.

[13] Court of Rome, Judgment No. 4222 of February 26, 2020.

[14] Which implements Article 17(3) of Directive 2014/104/EU.

the circumstances provided for by sector-specific regulation, which prevent the activation of wholesale access services.

In a decision delivered on May 9, 2013, in the A428 case (the "**A428 Decision**"), 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.[15] In particular, the ICA found that the procedures for the provision of wholesale access services to competitors, on the hand, and TIM's commercial divisions, on the other, did not coincide. In the ICA's view, the differences between external and internal procedures were not as such unlawful, but they had resulted, *de facto*, in higher percentages of KOs for competitors compared to TIM's commercial divisions.

In the civil proceedings, Siportal claimed that it had been harmed by the above-mentioned conduct. The claimant argued that, in the period 2009-2011, it had received percentages of refusals to activate higher than those received by TIM's retail division, which caused significant damages, with effects even after 2011. Siportal therefore asked the Court of Rome to award damages amounting to around €48 million.

The Court asked for an expert opinion to quantify the damages allegedly suffered by Siportal. In his report, the expert held that TIM's conduct had harmed Siportal and the damages amounted to around €3 million.

The Judgment

The Court of Rome stated that the A428 Decision did not have full evidentiary value against TIM under Article 7 of Legislative Decree No. 3/2017, as this provision cannot apply retroactively to decisions adopted before its entry into force. Nonetheless, the Court held that, based on prior case-law, ICA's decisions constitute "*privileged evidence*" of the existence, nature and scope of the infringement concerned. In addition, in the Court's view, the available evidence confirmed that Siportal had been harmed by the alleged abuse. Therefore, the Court concluded that "*the existence of the damage alleged by Siportal must be considered causally linked with the anticompetitive conduct of Telecom in the three-year period 2009-2011.*"

The Court of Rome also rejected TIM's objection that the limitation period had expired. According to TIM, the limitation period had started running when the KOs were communicated to the OAO. The Court did not agree with this interpretation. In the Court's view, TIM's infringement consisted in the opposition of excessively high percentages of KOs, which were higher than the percentages of KOs communicated to TIM's commercial divisions. According to the Court, Siportal could not have known that the percentages of KOs it had suffered were higher than those of TIM's internal divisions until the ICA published the A428 Decision. Accordingly, the limitation period had started running only from the publication of the A428 Decision.

The Court of Rome does not seem to have paid much attention to the fact that Siportal was a "*professional operator*", active in the same markets of the incumbent, nor to the fact that the plaintiff had participated in the ICA's proceedings.

[15] ICA Decision of May 9, 2013, No. 24339, Case A428, *Wind-Fastweb/Condotte Telecom Italia*. The decision was subsequently upheld by the TAR Lazio (Judgment No. 4801/2014) and the Council of State (Judgment No. 2479/2015).

Lastly, the Court of Rome ruled that the independent technical expert's opinion on the quantification of damages was not reliable because it had not identified an appropriate temporal and geographical counterfactual scenario to estimate the percentage of KOs that could be considered excessive. The expert had actually assumed that all KOs were not justified, notwithstanding that a refusal to activate may be due to several factors provided for by sector-specific regulation. Accordingly, the Court called for a new technical expert report to determine the amount of the alleged damages.

Moreover, pursuant to Article 14 of Legislative Decree No. 3/2017,[16] the Court asked the ICA to provide its guidance on the appropriate benchmarks to estimate the alleged antitrust damages.

Other developments

TAR Lazio confirms the ICA commitment decision concerning a co-investment agreement for the rollout of Fiber to the Home technology

On March 3, 2020, the TAR Lazio rejected the appeal brought by Open Fiber S.p.A. ("**Open Fiber**", an operator active in the development of optical fiber networks based on the Fiber to the Home technology) for the annulment of the commitment decision adopted by the ICA in proceedings against Telecom Italia S.p.A. ("**TIM**") and Fastweb S.p.A. ("**Fastweb**"), concerning the markets for wholesale access to the fixed network and fixed broadband and ultra-wideband retail telecommunications services.[17]

In February 2017, the ICA opened proceedings against TIM and Fastweb for possible restrictions of competition caused by the co-investment agreement for the rollout of Fiber to the Home technology in a number of cities across Italy, through the joint venture Flash Fiber S.r.l. To address the ICA's concerns, TIM and Fastweb submitted a set of remedies pursuant to Article 14-ter of Law No. 287/1990. In March 2018, the ICA accepted and made binding the commitments offered by the parties.

The TAR Lazio dismissed Open Fiber's appeal. Contrary to the applicant's claims, the court found that the ICA commitment decision was sufficiently reasoned and lacked manifest errors. From a procedural standpoint, in line with its precedents, the Court clarified that the 90-day term for the submission of a commitments proposal under Article 14-ter of Law No. 287/1990 is not mandatory.

[16] According to which "[t]*he judge may seek assistance from the competition authority by making specific requests on guidelines concerning the quantification of damages. Unless the assistance is inappropriate in relation to the need to safeguard the effectiveness of public enforcement of competition law, the competition authority shall provide the assistance requested in the form and manner indicated by the court after consulting the competition authority.*"

[17] TAR Lazio, Judgment No. 2760 of March 3, 2020.

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