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Highlights

— The Council of State upholds the TAR Lazio judgments that annulled an ICA Decision concerning a car financing cartel

— The Council of State confirms the lower court's annulment of an ICA decision concerning an alleged abuse of dominance in the newspaper sector

The Council of State upholds the TAR Lazio judgments that annulled an ICA Decision concerning a car financing cartel

In a series of rulings delivered between January 25 and February 8, 2022,[1] the Council of State upheld the judgments of the Regional Administrative Court of Lazio (the "**TAR Lazio**"),[2] which in 2020 annulled the decision of the Italian Competition Authority ("**ICA**") concerning a car financing cartel (the "**Decision**").[3] In the Decision, the ICA had imposed total fines of approximately €670 million on nine "captive banks",[4] two financial institutions holding equity stakes in as many captive banks, seven automotive groups and two trade associations (jointly the "**Parties**") for their participation in a cartel concerning the sale of car vehicles through the provision of financial products

Background

The ICA Decision

According to the Decision – which the ICA issued on December 20, 2018 – the cartel in which the Parties took place consisted of parallel exchanges of information, comprising: (i) direct bilateral and multilateral information exchanges among captive banks, and (ii) indirect multilateral information exchanges among captive banks through trade associations. The ICA defined the relevant market as the market for the sale of cars through loans (including leasing) granted by captive banks.

[1] Council of State, Judgments of: January 25 and 26, 2022, Nos. 500 and 552; February 1, 2022, Nos. 685 and 687; February 2, 2022, Nos. 726-728; February 3, 2022, Nos. 748-753; February 7, 2022, Nos. 823 and 834; and February 8, 2022, No. 878.

[2] TAR Lazio, Judgments of November 24, 2020, Nos. 12529-12545 (see Cleary Gottlieb, Italian Competition Law Newsletter, November 2020, available at: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-november-2020.pdf).

[3] Decision of December 20, 2018, No. 27497, Case I811 – *Finanziamenti Auto* (see Cleary Gottlieb, Italian Competition Law Newsletter, January-February 2019, available at https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjanuaryfebruary2019pd-pdf.pdf).

[4] A "captive bank/finance company" is a wholly-owned subsidiary of a car vehicle manufacturer that provides loans and other financial services to the customers of its parent company.

The ICA took the view that captive banks compete with each other in this market because the cost of financing is a relevant part of a car's price and influences consumer choice. Therefore, captive banks actively participated in the competition among car manufacturers of their respective industrial groups as a fundamental marketing tool to support car sales

The TAR Lazio judgments

On November 24, 2020, the TAR Lazio granted the applications lodged by the Parties for annulment of the Decision.

The TAR Lazio accepted two of the pleas raised by the applicants, finding it unnecessary to analyze also the remaining ones.

(i) Late opening of the investigation

The TAR Lazio found that the ICA, despite receiving the first leniency application by a car vehicle manufacturer reporting the unlawful conduct in March 2014, only opened the formal investigation in April 2017, and that no reasonable justification was advanced in the Decision to explain why the ICA's preliminary investigation lasted about 3 years.

In the course of the judicial proceedings, the ICA claimed that such delay was due to the fact that the leniency applicant had submitted a full application to the European Commission ("**EC**"), and summary applications (in 2014 and 2016) to the ICA. Therefore, according to the ICA, the opening of the formal investigation at national level was prevented by the lack of a decision by the EC regarding whether directly to pursue the case or leave it to the ICA. The ICA added that it had contacted the EC a number of times in this regard and that, as soon as it was clear that the EC would not deal with the case, the ICA promptly opened the investigation. The TAR Lazio, however, rejected these claims as they were not corroborated by the evidence in the case file.

The TAR Lazio then referred to the general principles governing administrative penalties, including in antitrust proceedings (in particular, to Article 14 of Law No. 689/1981),[5] under which the ICA is bound to initiate an investigation into a possible infringement within a (not further defined) "reasonable period of time". It added that such obligation also stems from the principle of good administration enshrined in Law No. 241/1990[6] as well as in Article 41 of the EU Charter of Fundamental Rights. The Court clarified that such reasonable period of time runs from the moment when the ICA has full knowledge of the possible infringement. Having regard to the case under review, the Court considered that a preliminary investigation lasting over 3 years from the first leniency application was unreasonably long and incompatible with these general principles.

(ii) Definition of the relevant market

The TAR Lazio observed that, although the ICA defined the market affected by the infringement as the "*sale of cars through loans granted by captive banks*", it failed to investigate the dynamics of that market, instead focusing exclusively on the financial services related to the purchase of vehicles.

According to the Court, the ICA failed to explain how the exchange of information between the captive banks could affect the commercial decisions of car manufacturers and amount to a restriction of competition with respect to car pricing strategies. Furthermore, the ICA did not analyze whether the exchange of information concerning the financial services provided by certain members of the alleged cartel could influence car prices. In this respect, the TAR Lazio found that the applicant captive banks provided evidence that car prices were not linked to the competitive dynamics of financing services.

Finally, the Court noted that the ICA's insufficient analysis of the relevant market was exacerbated

[5] Pursuant to Section 31 of the Italian Competition Law, the general principles governing administrative penalties in the first two sections of Law No. 689/1981 apply, as far as compatible, to fines imposed by the ICA.

[6] Law No. 241/1990 (providing rules on administrative procedure and right of access to administrative documents).

by the fact that it left out of the scope of the investigation one important car manufacturer, even though its captive bank was eventually found to have participated in the infringement.

The Council of State judgments

In its recent rulings, the Council of State confirmed the annulment of the ICA Decision.

In particular, the Court rejected the ICA's argument, pursuant to which, given that the leniency applicant had submitted a simplified leniency application to the ICA and a full leniency application to the EC in 2014, the ICA could intervene only if and after the EC decided not to proceed. On this basis, the ICA claimed that, since the EC resolved not to pursue the case in December 2016, the opening of its investigation in April 2017 was timely.

The Council of State took the view that this argument not only lacked evidential support, but also had no legal basis since no rule prevented the ICA from taking action before the EC had decided not to proceed with the case. As pointed out by the Council of State, Article 22 of (ECN+) Directive 2019/1, which provides for such a rule, was not applicable at the time of the facts of the case.

The Council of State concluded that the ICA's Decision was unlawful also on the ground that there was no formal coordination between the EC and the ICA in the course of the three-year period that ran from the receipt of the applications for leniency to the opening of the ICA investigation.

The Council of State confirms the lower court's annulment of an ICA decision concerning an alleged abuse of dominance in the newspaper sector

On January 26, 2022, the Council of State confirmed on appeal the annulment by the TAR Lazio[7] of a decision in which the ICA found that Società Iniziative Editoriali S.p.A. ("**SIE**"), the publisher of *L'Adige*, the main daily newspaper in the area of Trento, abused its dominant position in the daily newspaper market in that geographic area (the "**Decision**").[8] As already held by the lower court, the Council of State took the view that the ICA failed to meet the standard of proof required for establishing that a dominant undertaking's refusal to license its intellectual property rights ("**IPRs**") may amount to a violation of Article 102 TFEU.[9]

The Decision

The ICA's investigation followed a complaint filed by Euregio S.r.l. GmbH ("**Euregio**"), a company active in the downstream local market for daily media monitoring services, which provided customers with a customized press review of selected news. Euregio reported that SIE was abusing its dominant position by refusing to license the editorial content of *L'Adige* to companies providing daily press reviews in the area of Trento. In the course of the proceedings, the ICA adopted two decisions imposing interim measures: initially, ordering SIE to issue the requested licenses on fair, reasonable and non-discriminatory ("**FRAND**") conditions to any operator requesting the use of the content of *L'Adige*;[10] and, subsequently, (due to SIE's and Euregio's failure to reach such an agreement) directly setting those conditions.[11] At the end of the investigation, the ICA found that SIE had abused its dominant position, and imposed on the company a fine of approximately €1,000. It

[7] TAR Lazio, Judgment of January 16, 2020, No. 503 (see Cleary Gottlieb, Italian Competition Law Newsletter, January 2020, available at: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjanuary2020pd-pdf.pdf).

[8] Decision of December 12, 2017, No. 26907, Case A503 – *Società iniziative editoriali/Servizi di rassegna stampa nella provincia di Trento*.

[9] Council of State, Judgment of January 26, 2022, No. 528.

[10] Decision of February 7, 2017, No. 26412.

[11] Decision of March 22, 2017, No. 26498.

also reiterated its order on SIE to license on FRAND terms, to any operator requesting it, the right to use the content of its newspaper.

The Tar Lazio judgment

The TAR Lazio found that SIE's application for annulment was well-founded.

First, the Court referred to the established principle under which – when assessing the abusive nature of a refusal to grant a license for IPRs – it is necessary to carry out a careful balancing exercise between the need to protect competition and the opposing need to safeguard IPRs, in order to avoid undermining undertakings' incentives to invest and innovate.[12]

The TAR Lazio referred to the "essential facilities doctrine" ("**EFD**") developed over time by the EC and the EU Court of Justice.[13] The Court held that the Decision did not adequately establish the first two conditions vis-à-vis SIE's refusal, *i.e.*, the essential nature of the input refused and the innovative nature of the product that Euregio wanted to offer.

In relation to the first condition, the TAR Lazio took the view that the ICA only established the "*usefulness*" of the content of *L'Adige* for the production of a local press review. However, the ICA should have established instead that that input was absolutely indispensable and objectively non-duplicable, which in the Court's view were ruled out in practice by the fact that – following the refusal – some public tenders for press review services were awarded to undertakings whose offer did not include the content of *L'Adige*, even if certain unsuccessful bidders would have offered access to that content. Furthermore, the TAR Lazio objected to the fact that the ICA failed to investigate into the views of providers of local press review services other than the complainant.

In relation to the second condition, the TAR Lazio found that the ICA also failed to adequately demonstrate that Euregio's press review qualified as a "*new*" product, since it was not clear from the Decision to what extent the press review would differ from other similar products already available on the market.

As a consequence, the TAR Lazio concluded that the Decision did not comply with the EFD and annulled it.

The Council of State judgment

On appeal, the Council of State fully confirmed the lower court's ruling. While generally upholding the TAR Lazio's statement of reasons, the Council of State noted that the survey carried out by the ICA among the customers of another local press review publisher, with a view to assessing the indispensable nature of *L'Adige*'s content, was based on suggestive questions (*i.e.*, whether the presence in the press review of *L'Adige*'s content was seen as essential, and why) and thus unreliable. In addition, the Council of State, like the TAR Lazio, criticized the ICA's failure to carry out a survey among the other providers of local press reviews, given that those operators would in principle be affected by SIE's refusal and, thus, their point of view was relevant to establish whether *L'Adige*'s content was indispensable.

[12] In this regard, the Court quoted European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, in OJ C 45 of February 24, 2009, pp. 7-20.

[13] Under the EFD, the following cumulative conditions must be met for a refusal to license IPRs by a dominant undertaking to be characterized as abusive: (i) the refusal must relate to a product that is indispensable to carry out a business activity on a secondary market; (ii) the refusal must prevent the entry on the market of a new product or service not offered by the IPRs owner, and for which there is a potential consumer demand; (iii) the refusal must not be justified; and (iv) the refusal must be such as to exclude any competition on a secondary market (see, e.g., Case C-418/01, *IMS Health*, EU:C:2004:257, § 52, quoted by the TAR Lazio).

Other developments

The Italian Supreme Court of Cassation rules on limitation periods in a follow-on action

On January 4, 2022,[14] the Supreme Court of Cassation fully upheld a judgment of the Milan Court of Appeals,[15] which had dismissed the damage action brought by Fastweb S.p.A. ("**Fastweb**") against Vodafone Italia S.p.A. ("**Vodafone**").

In February 2005 the ICA opened an investigation into the allegedly abusive conduct of Telecom Italia Mobile S.p.A. ("**TIM**"), Wind Telecomunicazioni S.p.A. ("**Wind**") and Vodafone in the market for fixed-to-mobile calls.[16] The alleged violation of Article 102 TFEU concerned the parties' refusal to negotiate access to their respective mobile networks 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 decision to accept the commitments offered by Vodafone and make them binding on that company.[17] In contrast, in August 2007 the ICA closed its investigation by declaring TIM's and Wind's conduct unlawful and imposing fines on the two companies.[18]

In December 2010, Fastweb brought an action against Vodafone before the Court of Milan, seeking compensation for the damages suffered as a result of the defendant's alleged abuse of dominance and unfair competition, in connection with the facts investigated into by the ICA. However, the Court ruled that Fastweb's claim was time-barred, due to the expiry of the five-year limitation period.[19] The Milan Court of Appeals later upheld the lower court's judgment.

In line with its case law, the Court of Cassation held that, for antitrust damage actions based on tort, including follow-on actions, the five-year limitation period starts running from the date when: (i) the infringement of competition law has ceased; and (ii) the claimant is – or, using reasonable care, should be – aware (a) of the behavior and the fact that it constitutes an infringement of competition law, (b) of the fact that the infringement of competition law caused harm to the claimant, and (c) of the identity of the infringer.

Moreover, the Court of Cassation reasoned that, in those cases where the claimants are undertakings rather than consumers, the starting date for calculating the limitation period is generally considered the date of the publication of the decision launching the investigation, rather than the date of the publication of the decision to close it. The court having jurisdiction then has to carry out a case-by-case assessment aimed at evaluating the degree of actual awareness of the injured party. In the case under review, the Court upheld the lower courts' rulings under which, since Fastweb was a competitor of Vodafone, it should have known about the alleged anticompetitive conduct since 2005, when the ICA launched its investigation.

Italian Supreme Court rejects as inadmissible an application for cassation of a Council of State judgment in a bid rigging case

By an order issued on January 18, 2022,[20] the Italian Supreme Court rejected as inadmissible an application lodged by Kuadra S.r.l. ("**Kuadra**") for cassation of a ruling delivered in 2019 by the

[14] Italian Supreme Court, Judgment No. 112 of January 4, 2022.

[15] Milan Court of Appeals, Judgment No. 887 of March 1, 2017.

[16] Decision No. 14045 of February 23, 2005.

[17] Decision No. 16871 of May 24, 2007

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

[19] Court of Milan, Judgment of October 15, 2014, No. 12043.

[20] Supreme Court of Cassation, Order of January 18, 2022, No 1454.

Council of State,[21] which upheld an ICA decision fining Kuadra for its participation in an alleged anticompetitive agreement aimed at altering the outcome of a public tender for cleaning and maintenance services (the "**Decision**"),[22] after the TAR Lazio had set it aside at first instance.[23]

In the Decision the ICA found that four companies active in the provision of public school cleaning services (including Kuadra) had unlawfully coordinated their offers in the context of a public tender by Consip (Italy's national central purchasing body for the Public Administration). The ICA imposed on Kuadra a fine of almost €6 million (and fines totalling €110 million on the four cartel members).

In 2016 the TAR Lazio annulled the fine imposed on Kuadra, holding that the ICA had failed to provide an adequate statement of reasons for its findings regarding the company's involvement in the unlawful conduct, also in light of the plausible alternative explanations put forward by Kuadra.

However, on appeal, the Council of State reversed the lower court's ruling. It ruled that Kuadra's involvement in the collusive scheme was sufficiently established, in light of the documentary evidence relied upon by the ICA. The Council of State asserted that – since the anticompetitive agreement found by the ICA amounted to an infringement of competition "*by object*" – it was not necessary to prove its anticompetitive effects on the market. In addition, the Council of State held that Kuadra's plea concerning the entity of the fine was inadmissible, on the ground that the company merely referred to arguments put forward in the briefs submitted to the ICA in the course of the latter's investigation, instead of challenging specifically the TAR Lazio's conclusions.

Kuadra then filed an application to the Court of Cassation against the Council of State's judgment by raising certain pleas relating to jurisdiction.[24] First, Kuadra claimed that the Council of State committed an error on the merits by holding that – for the purposes of establishing a "*by object*" infringement of competition law – it is not necessary to assess whether an agreement is capable of restricting competition in concrete terms, in light of the relevant legal and economic context. Secondly, Kuadra claimed that the Council of State committed an error on the procedure by wrongly declaring inadmissible its plea concerning the excessive amount of the fine, and that accordingly it misapplied the rule that requires applicants to "*specifically set out the reasons for*" their grounds of appeal. In both cases, Kuadra claimed that the Council of State violated specific provisions of EU law.

The Supreme Court sitting in Grand Chamber dismissed Kuadra's application, and declared it inadmissible. Referring to the case-law of the Italian Constitutional Court,[25] to its own precedents as well as to the recent *Randstad* judgment of the EU Court of Justice,[26] the Court of cassation clarified that applications lodged against decisions of the Council of State for reasons of jurisdiction cannot raise pleas concerning alleged procedural or substantive violations (such as the ones raised by Kuadra).

The Council of State upholds a TAR Lazio judgment finding that an ICA investigation into an alleged abuse of dominance in the retail electricity sector was adequate and sufficient

On January 26, 2022, the Council of State[27] upheld a TAR Lazio judgment rejecting an application brought by Società Green Network S.p.A. ("**GN**")[28]

[21] Council of State, Judgment of July 31, 2019, No. 5401.

[22] Decision of December 22, 2015, No. 25802, Case I785 – *Gara Consip servizi di pulizia nelle scuole*.

[23] TAR Lazio, Judgment of October 14, 2016, No. 10305.

[24] Pursuant to Articles 111(8) of the Italian Constitution and 110 of the Italian Code of Administrative Procedure.

[25] Constitutional Court, Judgment of January 18, 2018, No. 6.

[26] Case C-497/20, *Randstad*, EU:C:2021:1037, § 81 (holding that EU law does not preclude "*a provision of a Member State's domestic law which, according to national case-law, has the effect that individual parties* [...] *cannot challenge the conformity with EU law of a judgment of the highest court in the administrative order of that Member State by means of an appeal before the highest court in that Member State's judicial order*").

[27] Council of State, Judgment of January 26, 2022, No. 538.

[28] TAR Lazio, Judgment of October 17, 2019, No. 11955.

for annulment of an ICA decision concerning an alleged violation of Article 102 TFEU (the "**Decision**").[29]

In 2017 the ICA, after receiving several complaints by electricity retail operators (including GN), decided to investigate into possible abusive conduct by multinational energy group Enel in certain local electricity retail markets. Among other things, the investigation concerned the "win-back" campaigns allegedly carried out by Enel Energia ("**EE**"), Enel's subsidiary active in the retail market, targeting customers who had switched to competitors active on the deregulated market, such as GN.

In the Decision, which it adopted in 2018, the ICA fined Enel over €93 million for allegedly abusing its dominant position. The ICA asserted that – by leveraging on assets owned because of its nature as a vertically-integrated operator (active in both the distribution and the retail supply of electricity) and former monopolist – Enel had engaged in exclusionary conduct against its competitorsin the deregulated retail market, with a view to unlawfully favoring EE. However, the ICA dropped the initial allegations concerning the alleged win-back campaigns, stating that there was no sufficient evidence supporting a finding of violation.

After the TAR Lazio dismissed GN's application for annulment of the Decision, GN appealed to the Council of State, challenging specifically, *inter alia*, the part of the lower court's judgment approving the ICA's decision to drop the initial allegations on EE's win-back conduct. GN, therefore, requested that the Council of State set aside the TAR Lazio's ruling and refer the case back to the ICA, ordering it to re-open the investigation with a view to assessing more thoroughly the evidence put forward by GN and, possibly, acquiring further evidence.

The Council of State, first, held that, in light of the discretionary nature of the ICA's investigative power and the fact that GN's request presupposed that the need for the ICA to carry out further investigation activities had been duly established, there was no basis for issuing an order to the ICA to take action with a view to protecting GN's interests, according to the appellant's claims.

Secondly, the Council of State examined GN's ground of appeal concerning the illegality of the alleged win-back conduct. In this regard, the Court held that the assessment carried out by the ICA was not vitiated by lack of adequate investigation or procedural errors, as shown, in particular, by the long duration of its investigation (two years) and the fact that GN was actively involved in it. In this context, the evidence gathered by the ICA on EE's alleged win-back campaigns (which included a number of requests for information to the relevant operators, some of which were indicated by GN itself) was not sufficient to demonstrate that GN's ground was well-founded, especially in relation to the alleged existence of a strategy pursued by the Enel group against the appellant.

Finally, the Council of State noted that a decision on the need for the ICA to investigate further into the matter, as requested by GN, fell outside the scope of its jurisdiction, since the Court's scrutiny was limited to assessing the proportionate and adequate nature of the investigation already carried out by the ICA.

[29] Decision of December 20, 2018, No. 27494, Case A511 – *Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica* (see Cleary Gottlieb, Italian Competition Law Newsletter, January-February 2019, available at: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjanuaryfebruary2019pd-pdf.pdf).

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