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Italian Competition Law Newsletter

Highlights

— The TAR Lazio confirms ICA decision to fine Leadiant for abusing its dominant position in the Italian market for the life-saving drugs used to treat a rare disease

— The ICA ends an abuse of dominance investigation into Google by accepting commitments relating to data portability

— The Council of State confirms on appeal the ICA decision fining Unilever for an abuse in the wholesale supply of impulse ice cream in Italy

The TAR Lazio confirms ICA decision to fine Leadiant for abusing its dominant position in the Italian market for the life-saving drugs used to treat a rare disease

On July 20, 2023,[1] the Regional Administrative Court for Latium (the "**TAR Lazio**") upheld a decision of the Italian Competition Authority (the "**ICA**") dated May 17, 2022 (the "**Decision**")[2] imposing a €3,501,020 fine on Leadiant Biosciences Ltd. and Essetfin S.p.A. (jointly "**Leadiant**") for charging excessive prices under Article 102 TFEU for the sale to the Italian National Health System (the *Sistema Sanitario Nazionale* or "**SSN**") of a drug used for the treatment of cerebrotendinous xanthomatosis ("**CTX**"), a rare condition that affects the human body's ability to metabolize cholesterols.

In particular, after a four-year investigation, the ICA found that (i) Leadiant was dominant in the Italian market for the drugs used to treat CTX with its Chenodeoxycholic Acid (the "**Leadiant CDCA**"), and (ii) from June 2017, it engaged in a complex strategy aimed at creating the most adequate conditions for charging very high prices.

Factual Background

In 2008, Leadiant acquired the dossier and rights relating to Chenofalk®,[3] a CDCA-based drug, from Dr. Falk Pharma GmbH, a German

[1] TAR Lazio, Judgment of July 20, 2023, No. 12230.

[2] ICA, Decision of May 17, 2022 No. 30156, A524 – *Leadiant Biosciences/Farmaco per la cura della Xantomatosi cerebrotendinea* (the Decision is discussed in the May 2022 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---may-2022.pdf).

[3] In particular, the dossier relating to Chenofalk included the marketing authorisation for Germany, know-how, technology, production data, registration dossiers, clinical and pre-clinical data and any trade secrets relating to the production, development, registration, marketing and exploitation of the drug.

pharmaceutical company. This drug had initially been registered for the treatment of gallstones, but had later been used almost exclusively off-label for the treatment of CTX.

Leadiant changed the name of the drug from *Chenofalk®* to *Xenbilox®* ("**Xenbilox**"). Xenbilox was distributed in Germany, where Leadiant held the marketing authorization, and was exported from Germany to other Member States, namely The Netherlands, France and Belgium.

The acquisition made Leadiant the only credible active player at the European level in the commercialization of CDCA based drugs. In 2008, Leadiant also entered into an exclusive supply agreement with Prodotti Chimici Alimentari S.p.A. ("**PCA**"), the only European supplier of Xenbilox's active ingredient (the "**Agreement**"). In 2014, Leadiant decided to apply for an orphan drug designation[4] and marketing authorization for Leadiant CDCA, a CDCA-based drug for the treatment of CTX. Leadiant CDCA is an hybrid drug of the reference drug Xenbilox, as the two products are chemically and pharmaceutically identical, but differ for the therapeutic indication. Following the application concerning Leadiant CDCA, Leadiant started to significantly increase the price of Xenbilox (from €660 to €2,900 per pack).

In 2016, Leadiant also entered the Italian market. Until then, the supply of CDCA-based drugs in Italy had been guaranteed by hospital oncology pharmacies (in particular, the pharmacy of Azienda ospedaliero-universitaria Senese), which had been producing the product themselves in a galenic form in order to provide it free of charge to all patients suffering from CTX. In the same year, Leadiant renewed the Agreement with PCA for an initial duration of 7 years. Exclusive supply under the Agreement allowed Leadiant to prevent Italian hospital pharmacies from acquiring the active ingredient needed to produce the drug in a galenic form.[5] This caused CTX patients considerable inconvenience and forced hospitals to purchase Xenbilox, the only CDCA-based drug available on the market. As a result, Leadiant could extend its monopoly position into the Italian CDCA-based drug market.

Between 2016 and 2017, Leadiant withdrew Xenbilox from the market, and substituted it across Europe with Leadiant CDCA. In particular, in June 2017, Leadiant launched Leadiant CDCA in the Italian market, which was in fact identical to Xenbilox in chemical and pharmaceutical terms, but had a different therapeutic indication. Leadiant started negotiating the price of Leadiant CDCA with the Italian Medicines Agency (the *Agenzia italiana del farmaco* or "**AIFA**"), and proposed a price of €15,000 per pack. AIFA did not consider this price to be justified, in light of: (i) the costs incurred by Leadiant (which did not provide details when so requested by AIFA); (ii) the activities carried out to obtain registration of the orphan drug; and (iii) the absence of any added therapeutic value of the drug.

At the same time, Leadiant engaged in delaying tactics and obstructive behavior, such as failing to meet the deadlines set for the submission of economic proposals for the drug, despite AIFA's repeated reminders. As a result, the length of the negotiating procedure was extended by two and a half years. This worsened AIFA's negotiating position, which was already weak because of the need for the SSN to provide patients with an essential, irreplaceable and life-saving drug within a reasonable timeframe and at an economically sustainable price.

As a result, Leadiant was able to obtain a price for its orphan drug of over €6,200 per pack.

The ICA's Findings

The Decision found that Leadiant had implemented a complex abusive strategy by: (i) increasing the price of Xenbilox (its cheaper drug with the same active ingredient used off-label to treat CTX) even before obtaining the marketing authorization

[4] Orphan drugs are medicines used for the diagnosis, prevention and treatment of rare diseases. Given their importance and the costs incurred to produce them, companies that hold a marketing authorization for an orphan drug enjoy 10 years of commercial exclusivity.

[5] In 2014, a consultancy firm advised Leadiant that the renewal of the exclusivity agreement with PCA was essential for the success of its pricing strategy in Italy, since this was the only way to stop the production of CDCA based drugs in a galenic form by hospital oncology pharmacies and to substitute it with Xenbilox.

for Leadiant CDCA, as a means of preparing the market for the future sale of the orphan drug at higher prices; and (ii) artificially differentiating between Xenbilox and Leadiant CDCA, with a view to preventing AIFA from gathering information regarding the investments in R&D that could support its price proposals, and justify the price difference between Leadiant CDCA and Xenbilox. To this end, Leadiant increased the price of Xenbilox and then withdrew it from the market when Leadiant CDCA was introduced. Moreover, it assigned the ownership of Leadiant CDCA to a German company specifically set up for the only purpose of being the owner of the off-label drug (which was owned by a British subsidiary of the group), so that the owners of CDCA Leadiant and Xenbilox were apparently different.

In the ICA's view, Leadiant's abusive strategy allowed it to charge excessively high prices that bore no reasonable relationship to the economic value of Leadiant CDCA. In particular, the ICA concluded that the price agreed with AIFA at the end of the negotiation was (i) disproportionate compared to the overall costs incurred by Leadiant, and (ii) not justified by the investment made in research and development, as well as the risk faced in the registration process.

The ICA found that the infringement was ongoing at the time of the adoption of the Decision, and therefore ordered Leadiant to take all necessary measures to set prices that were not unjustifiably high and to refrain in the future from engaging in similar conduct.

Regarding the seriousness of the infringement, the ICA categorized Leadiant's abuse as "extremely serious" and imposed a fine exceeding the revenues from the sales of Leadiant CDCA in Italy in 2021.

The TAR Lazio Judgment

Leadiant submitted several pleas of appeal against the Decision, all of which were dismissed by the TAR Lazio on July 20, 2023.

First, the TAR Lazio rejected Leadiant's arguments that the ICA violated the legal framework for the marketing of orphan drugs, and that Leadiant did not unduly emphasize the characteristics of the Leadiant CDCA, as this drug should not be considered a generic version of Xenbilox, but rather a new pharmaceutical product in terms of quality, efficacy and safety. The TAR Lazio agreed with the ICA's findings that Leadiant obtained a marketing authorization through an abbreviated procedure because of the chemical and pharmaceutical identity of the drug with its predecessor Xenbilox, and that the only real difference between the two drugs was the therapeutic indication. Therefore, the investment required to change the therapeutic indication did not justify the price increase charged by Leadiant.

Second, the TAR Lazio confirmed the ICA's findings that, since 2016, Leadiant has held a dominant position in the Italian market for the production and sale of CDCA-based drugs for the treatment of CTX due to significant entry barriers, such as:

i. the exclusive supply Agreement entered with the only European supplier of Xenbilox's active ingredient;

ii. (the orphan drug marketing authorisation obtained in 2017, which gave Leadiant a 10-year legal monopoly on CDCA-based drugs, enforceable against both industrial and galenic manufacturers.

Third, the TAR Lazio found that Leadiant deliberately protracted the negotiation phase with AIFA because it was not able to justify the proposed price in the light of the costs incurred. This negotiation strategy aimed at maintaining the very price initially charged for Leadiant's new product.

Fourth, the TAR Lazio applied the *United Brands* test to verify whether the prices charged by Leadiant were abusive. The first part of the *United Brands* test asks whether there is an excessive difference between the costs actually incurred and the price actually charged. The TAR Lazio found that the ICA had correctly demonstrated the excessiveness requirement on the basis of two different methodologies: (i) the internal rate

of return methodology, which takes into account the profitability of the product throughout its life cycle, and (ii) the cost-plus methodology, which compares the costs plus a reasonable profit margin with the price actually charged. The TAR was satisfied with the two methodologies applied by the ICA, both of which showed that Leadiant CDCA sales generated excessive profits.

The TAR Lazio then turned to the second part of the *United Brands* test, aimed at verifying whether the prices were unfair. In this respect, the administrative court noted that the ICA correctly opted for the criterion of unfairness in itself, as it was impossible to assess the unfairness in comparison with competing products in the absence of substitutable drugs. The TAR Lazio concluded that the ICA rightly found the contested price to be unfair in itself, considering in particular the nature of the drug (whose active ingredient was already on the market), the limited investment undertook in R&D activities, as well as the absence of added therapeutic value of the orphan drug compared to pre-existing therapies.

Finally, Leadiant argued that the ICA had unlawfully rejected a series of commitments proposed by the company, but the TAR Lazio also rejected this ground of appeal, taking into account the ICA's wide margin of discretion in assessing the suitability of proposed commitments.

As a result, the TAR Lazio entirely dismissed the appeal brought by the Leadiant and upheld the Decision.

The ICA ends an abuse of dominance investigation into Google by accepting commitments relating to data portability

On July 31, 2023, the ICA accepted commitments offered by Alphabet Inc., Google Ireland Limited and Google Italy S.r.l. (together, "**Google**") to address the competition concerns raised by Google's practices related to data portability, which allegedly infringed Article 102 TFEU (the "**Decision**").[6]

The proceedings

The ICA opened the investigation in July 2022, on the grounds that Google could have hindered the ability of alternative operators to develop data-based services and compress the right to portability of personal data, as established by Article 20 of the EU General Data Protection Regulation ("**GDPR**").

The investigation was prompted by a complaint filed by Hoda S.r.l. ("**Hoda**"), an Italian company owning an app (called Weople) that allows consumers to monetise their personal data. This app encourages users to link third-party accounts to port personal data into a "digital vault", where it can be used to target them with personalized offers. Weople therefore monetises users' data on behalf of the users by selling it to third parties. Hoda complained that Google's data portability offer, also known as Takeout, was overly complicated and discouraged users from transferring their data to other services (the "**Opening Decision**").[7]

Google has historically offered data portability to end users through Takeout, which allows end users to access and download a copy of data generated through the use of Google's products and services, free of charge. End users may choose which data they want to download in a machine readable format and how they want to receive that data, including through a download link via email, or direct download to online storage locations

[6] ICA, Decision of July 31, 2023, No. 30736, A552 - *Google-ostacoli alla portabilità dei dati*.

[7] ICA, Decision of July 5, 2022, No. 30215, A552 - *Google-ostacoli alla portabilità dei dati*.

such as Google Drive, Microsoft OneDrive, Box.com, and Dropbox.

Considering the Google ecosystem in the aggregate and the activities that allow it to track, collect, store, and process personal data, the ICA identified the following relevant markets: (i) the nationwide market for general online search services; (ii) the markets for PC web browsers and mobile web browsers, both of which are worldwide in scope (excluding China); (iii) the market for apps sales portals (App Stores) for the Android mobile operating system, also considered worldwide (excluding China); (iv) the market for payment services through mobile devices, considered at least nationwide; (v) the market for navigation apps that provide step-by-step directions, which is at least European-wide; (vi) the market for virtual assistants, which is at least nationwide; (vii) the market for digital music distribution services, which is at least nationwide; (viii) the market for digital translation services, which is at least national, but potentially European-wide if not worldwide; and (ix) the market for wearable devices, which is at least Europe-wide.

In light of the European Commission's findings in previous proceedings,[8] the ICA reached a preliminary assessment that Google could hold a dominant position in the identified relevant markets.

Based on a preliminary assessment, the ICA was also concerned that Google's Takeout user data portability solution was too complicated and discouraged users from exercising their right to portability. The ICA cited findings of its Big Data sector inquiry,[9] according to which the main competitive leverage for digital services providers is the availability of a large volume of data about the commercial behavior of consumers. The ICA's preliminary concern was that the challenged practices could unfairly exploit consumers by limiting their ability to transfer their data to an alternative aggregator that may be able to extract more value from the same data. The ICA also argued that the conduct was likely to restrict competition in the wider market for the provision of innovative services for extracting value from personal data, by hindering the ability of an alternative provider to offer such services in competition with Google.

Google's commitment proposal

To address the ICA's concerns, Google proposed three sets of commitments under Article 14-ter of Law No. 287/1990, designed to further simplify the sharing of user data through Takeout and accelerate the adoption of a new direct service-to-service data portability solution (the "**Commitments**").

— First, Google developed and made available a uniform resource locator (URL) that third-party operators can embed in their applications or websites to facilitate end users' selection and export of their data from Takeout for sharing with third-party operators. Once a user clicks on the embedded link, they will be directed to their Takeout profile, where certain pre-selected categories of data will be available for download and export as a single file to one of the Takeout-enabled cloud storage services (i.e., Dropbox, OneDrive, Box, or Drive). The end user can then provide the file directly to a third-party operator by email or other means;

— Second, Google made publicly available detailed documentation and information about the Search, Chrome browsing history, and YouTube data fields within the "My Activity" data;

— Third, Google committed to make available an "early adopter program" to allow third-party operators to begin testing a new service-to-service data portability solution in advance of its official release. This program will allow third-party operators to begin developing their own tools based on Google's new solution. As part of the program, Google plans to offer third-party operators technical support.

[8] In particular, Commission decisions of June 27, 2017, Case AT.39740, *Google Shopping*; July 18, 2019, Case AT.40099, *Google Android*; and December 17, 2020, Case M.9660, *Google/Fitbit*.

[9] ICA, Resolution No. 28051 of December 20, 2019.

The market test and the amendments to the Commitments

On March 21, 2023, the ICA initiated a market test on the Commitments.[10] Overall, market test participants provided positive feedback on the Commitments, which were considered capable of enhancing data portability for users, protecting user data security, and addressing concerns of third-party market players.

Google further improved the Commitments by taking into account, insofar as possible, improvement requests received during the market test. Among other things, Google amended Commitment 3 to ensure that the early adopter program would also include tools and testing related to user data from the YouTube category. This increased the number of data categories for which third-party operators can start testing and developing their own tools necessary to communicate with the new service-to-service data portability solution in advance of its actual release.

The ICA found that the Commitments are suitable to resolve the competition concerns expressed in the Opening Decision, by enhancing users to effectively exercise their right to data portability under article 20 of the GDPR.

In light of the above, the ICA decided to make the Commitments, as amended, binding on the Parties and to close the proceedings without finding any infringement.

The Council of State confirms on appeal the ICA decision fining Unilever for an abuse in the wholesale supply of impulse ice cream in Italy

In a judgment delivered on July 11, 2023,[11] following a preliminary ruling issued by the Court of Justice of the European Union ("**CJEU**") on January 19, 2023,[12] the Council of State rejected the appeal brought by Unilever Italia Mkt. Operations S.r.l. ("**Unilever**") against a judgment of the TAR Lazio,[13] which had upheld the 2017 decision of the ICA imposing on Unilever a fine of €60.7 million for an abuse of dominance in the wholesale supply of impulse ice cream in Italy.[14]

Background – The ICA Decision

On October 31, 2017, the ICA found that Unilever had infringed Article 102 TFEU by adopting an exclusionary strategy aimed at durably maintaining an exclusive supply relationship with its distributors.

In particular, in the ICA's view, Unilever's conduct consisted in: (i) providing retailers with freezer cabinets without any charge, on the condition that distributors would not stock competitors' products in the freezer; (ii) granting retailers retroactive and incremental rebates, conditional upon meeting certain sale targets; and (iii) implementing additional initiatives aimed at strengthening its relationship with distributors, such as strictly monitoring retailers, penalizing those who breached exclusivity clauses, pressuring them into buying its least successful products alongside its most successful ones, and paying trade associations to monitor their members' compliance with Unilever loyalty-inducing strategy.

According to the ICA, exclusivity obligations imposed by a dominant firm are by definition anticompetitive, especially when they have a long

[10] *ICA, Decision of March 21, 2023, No. 30508, A552 - Google-ostacoli alla portabilità dei dati.*

[11] Council of State, Judgment No. 6806 of July 11, 2023.

[12] *Unilever Italia Mkt. Operations* (Case C-680/20), ECLI:EU:C:2023:33.

[13] TAR Lazio, Judgment No. 6080 of May 31, 2018.

[14] ICA, Decision No. 26822 of October 31, 2017, Case A484 – *Unilever/Distribuzione gelati*.

duration and are reinforced by switching costs created by rebate schemes. In this respect, the ICA considered that the results of the "as-efficient competitor" test (the "**AEC test**"), provided by Unilever to rebut the presumption of unlawfulness of its conduct, was not sufficient to exclude an abuse. According to the ICA, the discounts offered by Unilever were abusive irrespective of whether they forced as-efficient competitors to sell below cost, because they were part of a complex exclusionary strategy.

From a subjective point of view, the ICA imputed the alleged abusive conduct solely to Unilever (albeit it being carried out also by its distributors), on the ground that, in light of the contractual links between the parties, Unilever and its distributors could be considered a "single economic unit".

Unilever challenged the ICA decision before the TAR Lazio. In particular, Unilever argued, *inter alia*, that the contested conduct: (i) should not be imputed only to Unilever, as it was carried out by distributors with no capital links to Unilever; and (ii) was not capable of distorting competition, as demonstrated by Unilever's economic analyses, which the ICA dismissed, stating that it was not required to take such evidence into account.

The TAR Lazio Judgment

On May 31, 2018, the TAR Lazio rejected the appeal brought by Unilever for the annulment of the ICA decision, mainly on the following grounds: (i) the ICA correctly defined the relevant market; (ii) the conduct of the distributors was correctly attributed to Unilever, as the distributors simply implemented its policy; (iii) the principles established by the *Intel* judgment,[15] concerning the offer of loyalty rebates by dominant firms, were not applicable to the case at hand, as the exclusionary effects were linked to the overall policy (including exclusivity clauses) and not only to the loyalty rebates schemes; and (iv) the conducts could be considered as typical cases of an exclusionary abuse and, in any event, the alleged replicability of loyalty rebates by an as-efficient competitor would have been irrelevant in practice, due to consumers' strong preference for Unilever's products.

Unilever challenged the TAR Lazio judgment before the Council of State, which referred two questions for preliminary ruling to the CJEU on December 15, 2020.

First, the Council of State asked guidance on the relevant criteria for establishing whether contractual coordination among formally autonomous and independent economic operators results in the creation of a single economic entity for the purposes of Articles 101 and 102 TFEU.

Second, the Council of State asked whether the competition authority is required to examine the economic analyses produced by a party concerning the actual ability of the alleged conduct to exclude equally-efficient competitors from the market, and has a legal obligation to base its finding of infringement on the equally-efficient competitor criterion, in the case of exclusivity clauses in distribution contracts, or conduct characterized by a multiplicity of abusive practices (i.e., loyalty discounts and exclusivity clauses).

The CJEU preliminary ruling

On January 19, 2023, the CJEU issued its judgment addressing the Council of State's questions.

First, the CJEU confirmed that nothing precludes the possibility of finding a dominant company liable under Article 102 TFEU for the conduct of its independent distributors, "*if it transpires that [the conduct] was adopted in accordance with the specific instructions given by that undertaking and therefore as part of the implementation of a policy that was decided unilaterally [...] and with which the relevant distributors were required to comply*".[16]

Second, the CJEU confirmed that the *Intel* effects-based approach applies also to exclusive dealing practices, or conduct characterized by a multiplicity of abusive practices. The CJEU

[15] *Intel Corporation Inc v. European Commission* (Case C-413/14 P), EU:C:2017:632.

[16] *Unilever Italia Mkt. Operations* (Case C-680/20), ECLI:EU:C:2023:33, §29.

recalled the EU case law according to which exclusivity clauses constitute, "*by their very nature, an exploitation of a dominant position*".[17] However, the Court held that it was necessary to clarify the case law on exclusivity clauses in light of the *Intel* ruling, because "*their ability to exclude competitors is not automatic*",[18] and they may also give rise to positive effects. This requires their exclusionary capacity to be assessed in light of all relevant circumstances, including any economic analysis produced by the dominant firm to demonstrate that the practice is not capable of excluding an equally-efficient competitor. Moreover, the duty to take into account possible analyses produced by the dominant firm finds further justification in the need to guarantee the right of defense.

In the specific case of exclusivity clauses, the equally-efficient competitor test (intended as a price-cost test) "*may theoretically serve to determine*" whether an equally-efficient competitor would be able to profitably offer its products or services to distributors "*if it had to bear the compensation which the distributors would have to pay in order to switch supplier, or the losses which they would suffer after such a change following the withdrawal of previously agreed discounts*".[19] In line with *Intel*, the Court clarified that the use of the equally-efficient competitor test is not mandatory for competition authorities, as such test is an "*optional*" tool at their disposal. However, if the results of an equally-efficient competitor test are submitted by the firm concerned during the administrative procedure, the competition authority is "*required to assess the probative value of those results*".

The Council of State Judgment

On July 11, 2023, after having resumed national proceedings, the Council of State rejected in its entirety the appeal lodged by Unilever on the basis of the indications provided by the CJEU's preliminary ruling.

According to the Council of State, in the case at hand, the ICA correctly considered that the abusive conduct shall be attributed to Unilever since its distributors' network merely implemented Unilever's unilaterally defined abusive plan, having no commercial freedom.

In addition, the Council of State held that the ICA had correctly assessed the alleged abusive conduct. According to the Council of State, the ICA did not fail to evaluate the appellant's defense based on the AEC test. It simply held – based on its technical-discretionary assessment, subject only to extrinsic judicial review – that the defense was not relevant to the facts of the case and the nature of the contested conduct. In particular, the ICA considered that the subject of the investigation was Unilever's overall commercial strategy, which included not only an effective rebate policy, but also extensive use of exclusivity clauses, and other stringent contractual conditions aimed at maintaining an exclusive relationship with distributors. The AEC test endorsed by the CJEU in *Intel* would be useful when the alleged anticompetitive effect is caused by the offer of discounts or rebates, but would not be decisive, or even useful, in the presence of broader anticompetitive policies. Thus, the results of the AEC test could at most partially reduce the abusive relevance of the contested conduct, as also submitted by the ICA.

Moreover, the Council of State noted that the application of the AEC test to discount and rebate policies is based on the assumption that a given share of customers' demand is not contestable. In this scenario, a dominant firm can use the offer of discounts or rebates on the non-contestable share of demand as a leverage to prevent other operators from capturing the contestable share. In the presence of a non-contestable share of demand, the AEC test is used to verify whether an as efficient competitor would be able to offer a sufficiently high discount to induce customers to purchase the contestable units of their demand from the competitor. In the case at hand, the competitive harm caused by Unilever's conduct was not based on the existence of a

[17] Id., §46.

[18] Id., §51.

[19] Id., §59.

non-contestable share of demand, which was not even alleged by the ICA. Competitors were able to offer a full range of alternative products, which had similar commercial success and could satisfy the entire demand of distributors.

In sum, according to the Council of State, the ICA did not contest that Unilever engaged in a discount and rebate policy that could not be replicated by competitors due to the existence of a non-contestable share of distributors' demand. The entire demand of distributors was contestable. Therefore, the AEC test was not relevant.

The reasoning of the judgment does not seem to be entirely convincing and consistent with the indications provided by the CJEU's preliminary ruling. The absence of a non-contestable share of demand demonstrated that the discounts and rebates offered by Unilever were not capable of excluding an equally-efficient competitor. Although the contested practice was broader, the replicability of the discounts and rebates could still reduce the overall relevance and the alleged exclusionary impact of Unilever's conduct, as also noted by the Council of State and the ICA. This should be taken into account in assessing, among other things, the scope and gravity of the infringement and in setting the amount of the fine. In addition, the Council of State does not seem to have considered the possible relevance of the AEC test in assessing non-price conduct, despite the fact that, according to the preliminary ruling of the CJEU, the AEC test may be also relevant in evaluating exclusivity agreements.

Other developments

The Council of State annuls the TAR Lazio judgment that annulled an ICA decision fining telecom operators for their participation in alleged "repricing" cartel

With a judgment delivered on July 25, 2023,[20] the Council of State upheld the appeal brought by the ICA against a ruling of the TAR Lazio,[21] which had annulled the 2020 decision of the ICA imposing an overall fine of €228 million on Fastweb S.p.A. ("**Fastweb**"), Telecom Italia S.p.A. ("**TIM**"), Vodafone Italia S.p.A. ("**Vodafone**") and Wind Tre S.p.A. ("**Wind Tre**") (together, the "**Operators**") for an alleged cartel aimed at coordinating pricing strategies in the transition from a 28-day to a monthly billing period (so-called repricing).[22]

Starting in 2015, the Operators informed their customers that the renewal and billing of telephone communication services would be carried out on a four-week basis (i.e., every 28 days), instead of a monthly basis, as before. Reducing the billing period, while keeping the same price per bill, led to an 8.6% annual price increase. This triggered a number of complaints from consumer associations, according to which the new billing system was designed to conceal price increases in phone fees.[23] In March 2017, the Italian Communications Authority ("AGCom") issued a resolution requiring: (i) the billing period for fixed-line telecommunications services to be brought back to one month; and (ii) the billing period for mobile telecommunications services to be no shorter than 28 days. The Operators initially maintained the 28-day invoicing system for mobile phone services. Subsequently, Article 19-quinquiesdecies of Law Decree No. 148/2017 (as converted into Law No. 172/2017) established invoicing periods of one month (or multiples of a month) for television network operators, telecom operators, and providers of services of electronic communications.

[20] Council of State, Judgments Nos. 7270, 7271, 7272 and 7273 of July 25, 2023.

[21] TAR Lazio, Judgments Nos. 8233, 8236, 8239 and 8240 of July 12, 2021 (these judgments are discussed in the July 2021 issues of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--july-2021.pdf).

[22] ICA, Decision No. 28102 of January 28, 2020, Case I820 – F*atturazione mensile con rimodulazione tariffaria* (the Decision is discussed in the January 2020 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjanuary2020pd-pdf.pdf).

[23] See AGCom, Resolution No. 121/17/CONS of March 15, 2017.

Against this background, at the beginning of 2018 the Operators sent simultaneous communications to their customers, informing them that – in compliance with Law No. 172/2017 – their phone services would from then on be invoiced on a 30-day basis instead of a 28-day basis. The consequent transition from 13 to 12 annual invoices would entail an 8.6% increase in monthly fees, although the annual price for the services would remain unchanged.

At the beginning of 2018 the ICA opened an investigation into the Operators' practices. On January 28, 2020, the ICA issued a decision stating that the Operators – also facilitated by the relevant trade association (Asstel) – had allegedly coordinated their conduct in the context of the implementation of Law No. 172/2017. In the ICA's view, the contested conduct allegedly included: (i) the adoption of identical repricing in the transition to monthly billing; and (ii) the simultaneous communications sent by the Operators to their customers to inform them of the upcoming changes in invoicing. According to the ICA, the alleged conduct amounted to a single, complex and continuous secret collusive scheme aimed at preserving the existing price level and preventing customer mobility, thereby freezing the Operators' respective market shares and limiting competition.

In July 2021, the TAR Lazio totally annulled the Decision, on the ground that the ICA had not met the standard of proof required to establish anticompetitive conduct in different respects:

— First, the ICA based its conclusions on unsuitable evidence. Most of the internal documents relied upon by the ICA fell outside the temporal scope of the investigation (dating back to a time prior to the start date of the alleged cartel);

— Secondly, the Decision lacked serious, precise and conclusive elements in support of the ICA's allegations, and failed to prove that the alleged collusion was the only possible explanation for the Operators' behavior;

— Thirdly, in complex regulated markets, such as the electronic communications ones, contacts and interactions among operators may often be necessary, e.g., in the context of technical panels aimed at understanding how to implement regulatory provisions, as also confirmed by AGCom's view;

— Finally, the ICA had considered the contested conduct a restriction by object (and, accordingly, it had deemed it unnecessary to examine its anticompetitive effects), notwithstanding that the opinion provided by AGCom during the investigation had made it clear that the transition to monthly billing did not have any effects on consumers' mobility.

In July 2023, the Council of State upheld the ICA's appeal against the judgment of the TAR Lazio. The Council of State held that: (i) the Operators had adopted an abnormal parallel conduct; (ii) the existence of "exogenous elements", such as emails referring to a common industry position to be adopted by the Operators and detailing each Operator's approach to repricing, suggested the existence of a collusive behavior.

According to the Council of State, the Operators had failed to provide a convincing explanation for their parallel conduct, also in light of the fact that they could benefit from alternative courses of action, such as avoiding any repricing or modulating the repricing differently from the other Operators.

In addition, the Council of State found that the alleged collusive scheme was correctly qualified as a pricing agreement, as such restricting competition by object, and that therefore it was not necessary to prove the anticompetitive effects of the conduct.

The Council of State also agreed with the ICA's view that the contested agreement was secret, as the use of emails and conference calls did not exclude the secrecy of the alleged cartel, which occurs when the agreement is not knowable from outside.

Finally, the Council of State rejected the arguments put forward by the Operators in relation to the

amount of the fine, with the exception of that relating to the duration of the infringement, which was reduced by a few weeks. The ICA will now have to redetermine the fines imposed on the Operators, taking into account the reduction in the duration of the infringement.

The Council of State rejects Ernst & Young's appeal for revocation of a judgment in the context of the "Big Four" saga

With a decision delivered on July 3, 2023,[24] the Council of State rejected as inadmissible the appeal for revocation filed by Ernst & Young Advisory S.p.A. ("**EY**") against a judgment issued by the same Court in 2020 (the "**Appealed Judgment**"),[25] which had upheld the decision of the ICA fining EY, Deloitte & Touche S.p.A., PricewaterhouseCoopers S.p.A. and KPMG S.p.A. (together, the "**Big Four**")[26] for rigging a tender for the provision of technical assistance services to public authorities (the "**Decision**").[27] The overall fine amounted to €23 million.

In particular, the Decision found that the Italian branches of the Big Four had coordinated their participation in the tender procedure, worth €66.5 million, by exchanging emails and attending meetings before the publication of the call for tender. According to the ICA, as a result of the coordination, the Big Four intentionally avoided any overlaps in the different lots of the tender.

Both the TAR Lazio's first instance ruling and the Appealed Judgment endorsed the Decision's reasoning, on the ground that the Big Four had not provided any alternative explanations capable of justifying their parallel behavior. The Appealed Judgment also confirmed the amount of the fine, in light of the secrecy of the alleged collusive conduct and the seriousness of the infringement.

Following the Appealed Judgment, EY filed an appeal for revocation pursuant to Article 395 No. 4 of the Italian Code of Civil Procedure, claiming that the Council of State had committed several factual errors, as it: (i) failed to properly analyze the defensive briefs and the evidence on file; (ii) wrongly considered that some email exchanges were aimed at coordinating the Big Four's participation in the tender; and (iii) failed to rule on EY's request for referral to the CJEU under Article 267 TFEU.

In its ruling, the Council of State dismissed as inadmissible EY's appeal for revocation. At the outset, the Council of State recalled that an appeal for revocation must concern elements of the proceedings that were not subject to the judge's evaluation. However, according to the Council of State, in the Appealed Judgment, the alleged erroneous analyses of the documents on file represented legal issues that were subject to the Council of State's consideration, evaluation, and interpretation.

As to the alleged failure to rule on EY's request for referral to the CJEU under Article 267 TFEU, the Council of State held that the request concerned a legal issue already largely addressed by the Council of State in previous case-law. Accordingly, there was no need to further assess EY's request for referral or to justify the fact that the Council of State had not submitted a request for a preliminary ruling to the CJEU.

[24] Council of State, Judgment No. 6422 of July 3, 2023.

[25] Council of State, Judgment No. 5898 of October 6, 2020 (this judgment, as well as the other judgments concerning the remaining Big Four, issued on the same date, are discussed in the October 2020 issues of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-october-2020.pdf). For the sake of completeness, this judgment confirmed the first instance ruling issued by the TAR Lazio (TAR Lazio, Judgment No. 11003 of November 14, 2018).

[26] The ICA fined also the consulting companies belonging to the Big Four networks, *i.e.*, Deloitte Consulting S.r.l., KPMG Advisory S.p.A. and PricewaterhouseCoopers Advisory S.p.A..

[27] ICA, Decision No. 26815 of October 18, 2017, Case I796 – *Servizi di Supporto e Assistenza Tecnica alla PA nei Programmi Cofinanziati dall'UE*.

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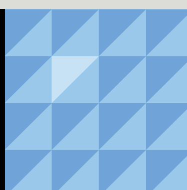

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