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# Italian Competition Law Newsletter

## Highlights

— The ICA fines TIM and DAZN for entering into an exclusive distribution agreement concerning the broadcasting rights for three seasons of the Italian Serie A football matches

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On June 28, 2023, the Italian Competition Authority (the “**ICA**”) imposed fines of approximately €760,000 on Telecom Italia S.p.A (“**TIM**”) and €7.2 million on DAZN Limited and DAZN Media Services S.r.l (“**DAZN**” and, together with TIM, the “**Parties**”) for entering into an exclusive distribution agreement concerning the broadcasting rights for the Italian Serie A football championship for the 2021-2022 to 2023-2024 seasons (the “**Final Decision**”)<sup>1</sup>

### Factual Background

#### *The agreement between TIM and DAZN*

On March 26, 2021, the Italian Serie A Football League awarded to DAZN the two main broadcasting right packages of the Serie A matches for the next three seasons.

Before the award, on January 27, 2021, DAZN entered into a three-year partnership agreement with TIM – renewable for a further three years – for the distribution and technological support in relation to the broadcasting of the Serie A matches (the “**Agreement**”).

The Agreement’s rationale was both financial and technical. TIM, Italy’s main telecom operator and audiovisual service provider (through the TimVision platform service, covering TIM’s own editorial content and third-party audiovisual services, such as Netflix, Disney+, and DAZN), has a high level of technical expertise. For its part, the Agreement would enable DAZN to reduce its financial exposure by optimizing its investment, and to bid for the two main packages for the broadcasting of the Serie A matches, securing distribution through Internet, consistently with its business model.

<sup>1</sup> ICA Decision No. 30699 of June 28, 2023, Case I857 – *Accordo TIM-DAZN Serie A 2021/2024*.

### ***The initiation of proceedings***

Following complaints by several telecom operators,<sup>2</sup> on July 6, 2021 the ICA opened an investigation against the Parties in order to establish whether certain clauses of the Agreement could have a restrictive effect on competition.<sup>3</sup>

In particular, the ICA considered that certain clauses of the Agreement: (i) could reduce DAZN's ability to grant discounts to final users and to choose additional means of transmission, other than those proposed by TIM; (ii) could restrict DAZN's incentives to invest in interconnection with fixed and mobile telecommunications operators, and to upgrade its content distribution network; and could (iii) hinder TIM's competitors from undertaking commercial initiatives.

### ***The interim proceedings***

On July 6, 2021, the ICA also initiated proceedings for the adoption of interim measures. In the course of the interim proceedings, the Parties offered a set of voluntary measures to overcome the ICA's concerns.

In particular, the Parties committed to: (i) make DAZN's content available to all users, irrespective of their Internet access provider; (ii) not bundle content and access services – including DAZN's content – in product and geographical markets where TIM held a dominant position; (iii) offer the TimVision platform service – which bundles, *inter alia*, TIM and DAZN's content services – at non-discriminatory prices, irrespective of the users' Internet access provider; (iv) set up a transmission back-up solution for users located in areas with limited access to broadband and ultra-broadband networks; and (v) negotiate with other telecom operators the adoption of multicast solutions (*i.e.*, Internet transmission solutions that minimize the use of network resources), and make available to them a number of different technical solutions for transporting the multicast signal.

The ICA found that the voluntary measures offered by the Parties were likely to fully address its concerns. Hence, on July 27, 2021, the ICA closed the interim proceedings without adopting any measures.<sup>4</sup>

On October 31, 2021, the Parties offered formal commitments in the context of the main proceedings, but the ICA found them to be insufficient to overcome its initial concerns.

## **The Final Decision**

### ***The relevant market***

In the ICA's view, the Agreement affected competition in the following relevant markets of national geographic dimension: (i) the market for retail sales of pay-TV services; (ii) the market for wholesale fixed broadband and ultra-broadband access services; and (iii) the market for retail fixed broadband and ultra-broadband telecom services.

### ***The ICA's analysis***

The ICA's proceedings focused on the exclusionary clauses of the Agreement that: (i) designated TIM as the sole telecom and media operator allowed to offer DAZN's services, prohibiting DAZN from entering into partnership agreements with any of TIM's competitors of TIM, which were listed by name; (ii) prevented DAZN from offering its services through any platform other than Internet, or from making its app and TV channel available on any of Sky's devices or services; (iii) prevented DAZN from renewing a non-exclusive distribution agreement that it had entered into with another telecom and media player; (iv) prevented DAZN from launching on Amazon TV promotions involving discounted rates and/or introductory offers in the 30 days immediately preceding or at the very start of any relevant Serie A Season; and (vi) provided for the integration of DAZN with TIM's Content Delivery Network (*i.e.*, transmission networks and servers, geared at preventing network congestion).

<sup>2</sup> Namely, Vodafone Italia S.p.A., Wind Tre S.p.A., Fastweb S.p.A. and Sky Italia S.r.l. Further telecom players – such as Open Fiber S.p.A., Colt Technology Services S.p.A., Irideos S.p.A., Iliad Italia S.p.A. and Linkem S.p.A. – were also admitted to participate in the investigation.

<sup>3</sup> ICA Decision No. 29778 of July 6, 2021.

<sup>4</sup> ICA Decision No. 29778 of July 27, 2021.

Moreover, the ICA considered that the fact that certain of the above clauses were addressed to competitors of TIM in the telecom service market that were specifically identified by name revealed the Parties' exclusionary intent, making it unnecessary "*to identify whether the agreement had a restrictive object or effect*".<sup>5</sup>

The Parties claimed that the Agreement benefited from the block exemption provided by the EU Verticals Regulation<sup>6</sup>.

However, the ICA rejected this claim. It held that the Agreement restricted competition both at the vertical and at the horizontal level: in its view, the Parties were (not only potential competitors in the tenders for the TV rights for Serie A matches, but also) directly competing on the markets for the purchase of premium sports audiovisual content and for the retail sale of audiovisual content.

Moreover, the ICA, however, took the view that the Agreement's restrictive clauses were disproportionate to achieve the procompetitive objectives allegedly pursued by TIM and DAZN.

Finally, the ICA considered that the Agreement could not benefit from the legal exception under the VBER because TIM's market share in the retail market for broadband and ultra-broadband access services was higher than 30%.

Referring to previous European Commission decisions on football broadcasting rights,<sup>7</sup> the ICA considered that TV rights for sports content constitute an asset that provides significant competitiveness in the offering of pay-TV services. The Final Decision noted that the availability of the Serie A matches represents a key driver of consumers' choice, thus representing an asset capable of granting a competitive advantage compared to other TV broadcasting rights.

In this context, the Agreement was found capable of depriving TIM's competitors of the possibility of associating their connectivity services with a competitively valuable content, and of limiting DAZN's commercial options in relation to the offer of audiovisual contents through other technological platforms.

In particular, the ICA considered that the Agreement allowed only TIM to bundle connectivity services and Serie A matches, and that final customers were precluded from subscribing TimVision without simultaneously subscribing to TIM's connectivity services. Moreover, TIM was the only operator allowed to grant discounts on DAZN's service. The ICA also considered that, as a result of the Agreement, DAZN was limited in choosing the best individual means of economic and technical commercialization of its services.

In examining the effects of the Agreement, the ICA noted that they had remained mostly potential in nature, as any material impact of the restrictive clauses was neutralized by the opening of the proceedings and by the adoption of voluntary measures during the interim proceedings.

This notwithstanding, the ICA considered that the Agreement brought about a serious restriction of competition.

However, in quantifying the fines imposed on TIM and DAZN, the ICA took into account the fact that the Agreement's duration was very short (only 32 days) since the Parties swiftly adopted voluntary measures in the context of the interim proceedings.

<sup>5</sup> Decision, § 282.

<sup>6</sup> Commission Regulations (EU) No 330/2010 of April 20, 2010 or No. 2022/720 of May 10, 2022 – as applicable *ratione temporis* – on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (the "**VBER**").

<sup>7</sup> European Commission decision of January 19, 2005, COMP/C-2/37-214, *Joint selling of the media rights to the German Bundesliga*; and European Commission decision of July 23, 2003, COMP/C.2-37398, *Joint selling of the commercial rights of the UEFA Champions League*.

Moreover, the ICA took into account the fact that, on August 4, 2022, TIM and DAZN entered into a new non-exclusive agreement for the distribution of DAZN's content on the TimVision platform, to which the competitive concerns raised by the ICA vis-à-vis the 2021 Agreement did not apply. Moreover, the Parties agreed that the agreement should not be renewed before the next award of the Serie A broadcasting rights. In light of that, the ICA recognized the existence of a mitigating circumstance, and applied a 30% reduction in the amount of the fines.

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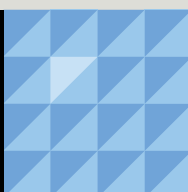
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