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Italian Competition Law Newsletter

Highlights

- The TAR Lazio upholds an ICA decision that fined water meter suppliers €10.4 million for bid-rigging
- Council of State reinstates Vodafone's €5.8 million bulk SMS fine for abuse of dominance.
- TAR Lazio dismisses Open Fiber's application for annulment of the *FiberCop*

The TAR Lazio upholds an ICA decision that fined water meter suppliers €10.4 million for bid-rigging

On March 8, 2023 the Regional Administrative Court of Lazio (the “**TAR Lazio**”) rejected an appeal brought by Sensus Italia S.r.l. (“**Sensus**”) against a decision of the Italian Competition Authority (the “**ICA**”) that had imposed a fine of approximately €10 million on several water meter suppliers for allegedly engaging in an agreement restricting competition.

Background

The ICA Decision

On February 1, 2022, the ICA adopted a decision imposing a fine of approximately €10 million on G2 Misuratori S.r.l., Maddalena S.p.A., Itron Italia S.p.A., Sensus Italia S.r.l. and WaterTech S.p.A. (the “**Undertakings**”) for allegedly having participated, between December 2011 and September 2019, in an agreement restricting competition in at least 161 public tenders launched

by national integrated water service operators for the procurement of meters to measure water consumption (the “**Decision**”).¹

According to the ICA, the Undertakings engaged in a single and continuous collusive strategy, which allowed them to determine, for each tender: (i) which of the Undertakings was to be awarded the tender; and (ii) how the Undertakings other than the intended awardee were to behave in the context of the tender.

The Undertakings' parent companies were also held liable and fined by the ICA.

The appeal before the TAR Lazio

Sensus challenged the Decision before the TAR Lazio, on the grounds that, *inter alia*: (i) the ICA had initiated the proceedings beyond the statutory time limit; (ii) evidence gathered by the ICA was

¹ ICA Decision No. 29981 of February 1, 2022, Case I835 – *Mercato dei contatori d'acqua* (as discussed in the February-March 2022 issue of this Newsletter, <https://www.clearygottlieb.com/cclp/italian-competition-law-newsletter>)

insufficient to demonstrate Sensus' engagement in a single and continuous collusive strategy; (iii) the ICA had failed to consider that Sensus MS – the parent company – was not an operating company, but a mere holding company, which did not interfere in Sensus' business and did not influence its conduct; (iv) the ICA had wrongly quantified the fine.

The judgment of the TAR Lazio

On March 8, 2023, the TAR Lazio delivered a ruling upholding the Decision and rejecting the appeal.²

First, the Court held that the ICA had promptly launched the investigation, on the ground that: (i) the duration of the pre-investigative phase cannot be rigidly fixed and (ii) the “*dies a quo*” for calculating the time limit for the exercise of the sanctioning power coincides with the moment in which the ICA becomes “*fully aware*” of the unlawful act.

Second, the TAR Lazio observed that the ICA had based its Decision on various pieces of evidence, which included an anonymous complaint filed by an employee of one of the Undertakings, as well

as an anonymous document received shortly after opening the investigation, comprising several faxes exchanged between the Undertakings before submitting the bids.

The TAR Lazio held that anonymous documents can be produced as evidence in antitrust proceedings. Moreover, the Court noted that the companies indicated as winners in the faxes generally coincided with those that were actually awarded the tender.

The TAR Lazio concluded that the ICA had correctly inferred the existence of anti-competitive conduct on the basis of the evidence collected and, in particular, the frequent exchanges of faxes between the Undertakings.

The Court also confirmed that Sensus and its parent company – Sensus MS – were correctly considered as a *single economic unit*, since the parent company actually controlled Sensus and exercised a decisive influence over it.

Finally, the TAR Lazio fully upheld the fine quantified by the ICA.

Council of State reinstates Vodafone's €5.8 million bulk SMS fine for abuse of dominance

On April 14, 2023, the Council of State granted the Italian Competition Authority's (the “ICA”) appeal against the judgment of the Regional Administrative Court for Latium (the “TAR Lazio”), which had annulled a 2017 ICA decision finding that telecom operator Vodafone Italia S.p.A. (“Vodafone”) abused its dominant position in the market for Short Message Service (“SMS”) termination (the “ICA Decision”).³

Background – The ICA Decision

The ICA had opened separate proceedings for alleged abuse of dominance by Vodafone and Telecom Italia S.p.A. (“Telecom”) following a complaint filed in April 2016 by Ubiquity S.r.l. (“Ubiquity”), a company active in the provision of telecom services and, in particular, in the sale and origination of bulk SMS services.⁴ Ubiquity

² TAR Lazio, judgment No. 3851 of March 3, 2023.

³ ICA, Decision of December 13, 2017, No. 26901, Case A550A, *Vodafone-SMS informativi aziendali*, TAR Lazio, Judgment of September 15, 2021, No. 9803 (discussed in the September 2021 newsletter available here: <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---september-2021.pdf>) and Council of State, Judgment of April 14, 2023, No. 3793.

⁴ Bulk SMS services consist of packages of messages that are delivered on the entire networks of three Italian mobile operators (“MNOs”) – Vodafone, Telecom and Wind Tre S.p.A. (“Wind Tre”) – and sold to companies that want to send large amounts of messages to their customers. The retail services for sending SMS bulk allow business customers to send text messages – containing advertisements and/or general information – to users identified by the customers themselves. In the retail service market for sending SMS bulk, the origination of the text message that is routed is carried out, and then reaches the destination mobile operator that delivers it (termination). Only the destination operator can deliver SMSs to users of its own network. Accordingly, Vodafone and Telecom are the only entities able to deliver text messages to their respective customers, so that they have the ability to unilaterally impose prices and technical conditions of interconnection and to act independently.

claimed that Vodafone and Telecom were applying on their respective networks excessive tariffs in the upstream market for SMS termination, thus hindering the ability of rivals to provide services in the downstream market for bulk SMS services.

In December 2017, the ICA decided that Telecom and Vodafone abused their dominant position in the upstream market for SMS termination on their respective networks, in violation of Article 102 TFEU, and fined them in the amounts of €3,717,988⁵ and €5,843,814, respectively.⁶

According to the ICA, Vodafone abused its market power by putting in place internal-external technical and economic discrimination, resulting in “margin squeezing” its as-efficient competitors in the related market for bulk SMS services. Furthermore, the allegedly abusive practice at stake concerned the whole national territory, limiting production and foreclosing or limiting access to the national market for any players wishing to enter and/or operate on the said market.

The companies filed separate applications for annulment of the ICA decisions before the TAR Lazio.⁷ Vodafone challenged, *inter alia*, the ICA’s assessment of the competition dynamics in the downstream market, with particular reference to the final retail price that could be charged by a competitor that was as efficient as the dominant undertaking.

The TAR Lazio Judgement

In its ruling, the TAR Lazio took the view that, in order to establish whether Vodafone had committed a margin squeeze, it had to take into account that the cost of the final product on the downstream market had been determined by the cost for SMS termination on all three networks. Moreover, the TAR Lazio acknowledged that the companies that buy the termination services to sell bulk SMS packages (so-called “*aggregators*”) are intermediaries that do not purchase SMS

termination in the same downstream market as the final customers.

The TAR Lazio ruled that the ICA wrongly determined the reference price by taking into account only the cost incurred by the operators that, being equipped with a numbering infrastructure, purchased from Vodafone only the right to terminate on the network (so-called “*D43 operators*”), excluding the costs faced by aggregators. In this regard, the TAR Lazio ruled that aggregators do not qualify as users of the bulk SMS service, but rather act as intermediaries, which take on the task of acquiring SMS services from various operators in order to combine them into a bundle suited to the needs of end users. For this reason, aggregators cannot be treated as end users in the downstream market, where they act as resellers and not as final buyers. As a consequence, determining the threshold price before assessing the existence of a margin squeeze was considered as an error.

The TAR Lazio then found the alleged margin squeeze to be incompatible with the dominant players’ intent to harm only part of their competitors by implementing differentiated and discriminatory strategies. According to the TAR Lazio, such conduct could have theoretically been challenged as external-external discrimination, *i.e.*, according to a different approach. In particular, the ICA failed to demonstrate that the cost of terminating text messages on Vodafone’s networks had affected the price of bulk SMS services to such an extent as to lead to the exclusion of the D43 operators from the downstream market, since no assessment of the detrimental effects, if any, of the conduct at issue was made in the ICA decision. In addition, according to the TAR Lazio, the fact that rival companies had been harmed by the alleged margin squeeze implemented by a vertically integrated operator – even if such margin squeeze had been proved to the required legal standard, which was not the case – would not necessarily require the ICA to intervene. Indeed,

⁵ ICA, Decision of December 13, 2017, No. 26902, A500B, *Telecom Italia-SMS informativi aziendali*.

⁶ ICA, Decision of December 13, 2017, No. 26901, A550A, *Vodafone-SMS informativi aziendali*.

⁷ On April 11, 2022, the TAR Lazio also annulled the ICA’s decision fining Telecom (Judgment 4333/2021, discussed in the April 2022 newsletter available here: <https://www.clearlygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---april-2022.pdf>). The appeal brought by the ICA against the TAR Lazio’s decision has not been decided yet by the Council of State.

before taking action on the basis of Article 102 TFEU, the ICA was bound to verify what effects on competition, if any, had affected the final product market.

In conclusion, the TAR Lazio stated that the allegation of a potential anticompetitive effect of the conduct at issue had not been supported by at least a market analysis, explaining and demonstrating why non-vertical and integrated competitors run the risk of being excluded from the market as a result of the alleged margin squeeze. In light of the above, the TAR Lazio granted Vodafone's application and annulled the ICA Decision.

The Council of State Judgment

On appeal the Council of State found that the ICA had correctly identified the potential anticompetitive effects of Vodafone's conduct.

1. First, the Council of State accepted the ICA's ground of appeal concerning the TAR Lazio's incorrect analysis of the threshold price.

The Council of State found aggregators to be a special category of "wholesale" players with a lower level of infrastructure than D43 operators and MNOs. Aggregators merely purchase an aggregated service for any network from MNOs and D43 operators, and, unlike the latter: (i) lack the functional infrastructure which is necessary in order to compete both technically and economically with MNOs, and (ii) do not require a ministerial authorization to operate. The Council of State found that these essential structural differences required distinguishing the role of aggregators in the relevant markets.

On the basis of these facts, the Council of State agreed with the ICA that:

- aggregators should be compared to end users, since aggregators only resell what they buy from MNOs and D43 operators; and

- aggregators should be considered as competitors of Vodafone in the downstream market for bulk SMS services.

2. Secondly, the Council of State found that the TAR Lazio was wrong to find that the ICA had not sufficiently demonstrated that the cost of termination on Vodafone's network amounted to a margin squeeze.

The Council of State referred to EU case law according to which a margin squeeze can occur even if the wholesale product is not indispensable, provided that the conduct of the dominant undertaking is likely to have anticompetitive effects on the relevant markets. The Court added that, in any event, termination on Vodafone's network must be considered indispensable or even essential in the present case, given that bulk SMS services are valuable and useful only to the extent that they ensure that SMSs sent by end users are actually received by their recipients, regardless of the network operator used by the latter.

The Council of State concluded that Vodafone's conduct amounted to a margin squeeze, since the wholesale conditions imposed by Vodafone on D43 operators and the prices applied to Vodafone's internal divisions in the downstream market resulted in negative margins for as-efficient competitors.

3. Lastly, the Court disagreed with the TAR Lazio's finding that the ICA had wrongfully failed to assess the effects of Vodafone's conduct. It held that, according to EU law, it is not necessary to prove that the conduct of a dominant undertaking has anticompetitive effects; it is sufficient to prove that the conduct is capable of restricting competition. The Council of State found that in any event the ICA had proven the potential anticompetitive effects of Vodafone's conduct as the company's offers were margin squeezing as-efficient competitors, with the potential effect of foreclosing D43 operators in the downstream market for bulk SMS services.

For these reasons, the Council of State overturned the ruling of the TAR Lazio and upheld the ICA's finding of infringement and the amount of the fine.⁸

TAR Lazio dismisses Open Fiber's application for annulment of the *FiberCop* commitment decision

The TAR Lazio rejected the application brought by Open Fiber S.p.A. ("**Open Fiber**")⁹ for annulment of the 2022 decision by which the ICA made binding the commitments offered by Telecom Italia S.p.A. ("**TIM**"), Fastweb S.p.A. ("**Fastweb**"), FiberCop S.p.A. ("**FiberCop**"), Tiscali Italia S.p.A. ("**Tiscali**"), Teemo Bidco S.r.l. ("**Teemo**") and KKR & Co. Inc. ("**KKR**"; together with TIM, Fastweb, FiberCop, Tiscali and Teemo, the "**Parties**") with respect to certain agreements concerning the creation of FiberCop and access to its infrastructure (the "**Decision**").¹⁰

Factual Background

FiberCop is a joint venture that was set up by TIM, Fastweb and KKR in 2020 to develop an ultra-broadband secondary fiber-to-the-home (FTTH) network in Italy. The set of agreements establishing FiberCop envisaged, *inter alia*: (i) the transfer from TIM to FiberCop of the business unit relating to its secondary passive access network and its 80% shareholding in Flash Fiber S.r.l. ("**Flash Fiber**"); (ii) the purchase by Teemo of a 37.5% stake in the share capital of FiberCop; and (iii) the signing of a *Master Service Agreement*, which defined the terms and conditions of the long-term relationship of mutual service provision between TIM and FiberCop. Furthermore, in a commitment letter signed on September 1, 2020, TIM, Teemo and Fastweb agreed that the remaining 20% stake in Flash Fiber held by Fastweb would be transferred to FiberCop.

FiberCop is active only in the wholesale markets for the provision of passive access services of the secondary network. FiberCop is also the vehicle to implement a co-investment project open to other operators that intend to invest in ultra-broadband networks, in accordance with Article 76 of Directive (EU) 2018/1972, establishing the European Electronic Communications Code (the "**EECC**").

FiberCop's infrastructure covers the final portion of the telecommunications network. The local telecommunications network can be subdivided into the primary network, which is the section connecting the central office to the street cabinet (CRO), and the secondary network, which is the section connecting the street cabinet to user premises. FiberCop's perimeter includes only the secondary network. Consequently, in order to connect the networks of alternative operators (*other authorized operators*, "**OAOs**") to FiberCop's network, it is necessary to associate a primary network section that reaches the street cabinet.

Access to the network can be passive or active. Passive access can be realized when the OAO owns or, in any case, has at its disposal (for instance, through indefeasible rights of use) primary network infrastructure up to the street cabinet. Passive wholesale access services allow the OAO to manage communication with its final customers in total autonomy, and to control all the qualitative aspects of the network. By contrast, OAOs that want to reach final customers, but do not have primary network infrastructure, have to

⁸ The Council of State also dismissed Vodafone's cross-appeal. In particular, on the basis of the facts and evidence submitted by the ICA, it rejected Vodafone's arguments concerning (i) the erroneous findings of the ICA with regard to internal-external technical and economic discrimination and (ii) the replicability of some of Vodafone's offers in the downstream market for bulk SMS services.

⁹ TAR Lazio, Judgment of April 14, 2023, No. 6456.

¹⁰ ICA Decision of February 15, 2022, No. 30002, Case I850, *Accordi FiberCop* (discussed in the February-March 2022 newsletter available here: <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---feb-march-2022.pdf>).

purchase active wholesale access services (such as the VULA H and Bitstream NGA services)¹¹ from TIM or other operators holding a primary network connected to FiberCop's secondary network. The co-investment project allowed the OAOs to participate in the co-investment by purchasing from TIM active wholesale access services (VULA H and Bitstream NGA), based on both primary and secondary network elements.

The ICA's commitment decision

On December 15, 2020, the ICA opened an investigation to establish whether the agreements entered into by the Parties, relating to the creation of FiberCop and the provision of access services based on its secondary network (the "**Agreements**"), could reduce competition in the markets for (i) wholesale broadband and ultra-broadband access services, and (ii) retail broadband and ultra-broadband telecommunications services, in violation of Article 101 of the TFEU (the "**Investigation**").¹²

The ICA was concerned, *inter alia*, that the contractual provisions of the Agreements could have reduced the contestable portion of the demand for wholesale broadband and ultra-broadband access services, as they required OAOs to purchase from FiberCop particularly high volumes of minimum guaranteed volumes. In addition, the ICA feared that TIM's participation in FiberCop could have reduced the OAOs' incentive to invest in the development of alternative primary infrastructure (with negative consequences also for competition in the market for retail broadband and ultra-broadband telecommunications services), especially considering that TIM held a 90% market share in the market for wholesale broadband and ultra-broadband access services and a 40% stake in the market for retail broadband and ultra-broadband telecommunications services.

Nonetheless, during the Investigation TIM continued to pursue its co-investment project, which was amended also in light of the concerns expressed by the ICA in the decision to open the Investigation. In particular, on January 29, 2021, TIM submitted to the Italian Communications Authority ("**AGCOM**"), and simultaneously published, a co-investment offer pursuant to Article 76 EECC.

In August 2021, the Parties submitted to the ICA a number of commitments.¹³ In particular, the Parties offered a set of highly technical behavioral remedies aimed at (i) enhancing the efficiency aspects of the co-investment project, including the potential improvement in infrastructure competition in fixed electronic communications markets, and (ii) removing the competition risks initially envisaged by the ICA, by providing guarantees with regard to the development of new infrastructure by FiberCop and the OAOs, in line with the ladder of investments principle, and also in light of the evolution of the market scenario over the last few years, characterized by increasing competitive pressure from Open Fiber, which offers wholesale ultra-broadband access services based on alternative infrastructure (the "**Commitments**").

Following a market test, on February 15, 2022 the ICA decided to make the Commitments, as amended, binding on the Parties and to close the proceedings without finding any violation.

Open Fiber's application for annulment

On April 15, 2022, Open Fiber applied to the TAR Lazio for annulment of the Decision, raising the following pleas: (i) the Commitments were offered after the expiration of the three-month time limit from the date of initiation of the Investigation; (ii) full implementation of the Commitments was impossible, since the co-investment project

¹¹ With the VULA H service, the owner of the primary network retains control of the segment of the connection that goes from the customer's premises to the central office or local exchange where the OAO's collection point is located. In case of Bitstream NGA services, the connection point between the network of the wholesale service provider and that of the OAO is located further downstream.

¹² ICA Decision of December 12, 2020, No. 28488, Case I850, *Accordi FiberCop*.

¹³ For an in-depth analysis of the commitments offered by FiberCop see our February-March competition newsletter, mentioned above and available here: <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---feb-march-2022.pdf>.

had not yet been approved by AGCOM and was therefore not final; (iii) the Commitments were unsuitable to overcome the competitive concerns identified by the ICA in the decision to open the Investigation; and (iv) the Decision was inconsistent with certain commitments that TIM and Fastweb had previously undertaken in the context of a previous ICA investigation.¹⁴

The TAR Lazio judgment

On April 14, 2023, the TAR Lazio dismissed Open Fiber's application.

The Court focused on the different nature of ICA infringement and commitment decisions. While infringement decisions focus on conduct that has occurred in the past, commitment decisions are prospective in nature. This gives the ICA a wider margin of discretion when assessing the suitability of commitments offered by the undertakings concerned. However, if the commitments do not overcome the ICA's initial anticompetitive concerns, the ICA can always decide to reopen the investigation.¹⁵

With regard to OpenFiber's claim that the ICA violated the three-month time limit set by Article 14-ter of Law No. 287/1990, since the commitments were offered 8 months after the decision to open the Investigation,¹⁶ the TAR Lazio held, in line with the case-law, that Article 14-ter does not set a mandatory time limit.¹⁷ Having considered the complexity of the case, the TAR Lazio found that the ICA lawfully postponed the deadline for the Parties to offer the Commitments.

The TAR Lazio also rejected the second plea, finding that the circumstance that the co-investment project had not yet been approved by AGCOM (and was therefore not final) was irrelevant for the ICA's assessment of the Commitments. The TAR

Lazio explained that the analyses carried out by AGCOM and the ICA are inherently different: when assessing the suitability of a commitment proposal, the ICA carries out a comprehensive analysis that takes into account all the market conditions and the competition within the relevant market, while AGCOM only analyses the specific investment project submitted by an undertaking. Accordingly, the TAR Lazio noted that a co-investment project may be approved by AGCOM but blocked by the ICA as being in violation of competition law. In any case, the TAR Lazio also emphasized that AGCOM, at the ICA's request, provided a positive preliminary response with regard to the project, finding the Commitments to be "*capable of improving the efficiency components of the co-investment agreement*".

With regard to the third plea, the TAR Lazio rejected Open Fiber's allegation that the ICA was required to carry out a counterfactual analysis when analyzing the commitments offered by the parties to the proceedings. In addition, the TAR Lazio rejected Open Fiber's argument that, given the existence of the conditions for infrastructure-based competition, TIM's co-investment project would have had anticompetitive effects, reducing demand contestability, and disincentivizing investments from Open Fiber. The TAR Lazio acknowledged that the sector inquiry performed by the ICA and AGCOM in 2014 actually found that efficient infrastructure-based competition should be preferred over co-investment projects.¹⁸ However, it also recognized that no legal or regulatory provision establishes that co-investment is lawful only where it is impossible to develop other infrastructures. On the contrary, it is a mode of operation commonly available to operators, which must be incentivized for its ability to improve the conditions of competition, including infrastructure-based one, by reducing the costs and risks of investments for individual

¹⁴ ICA Decision of March 28, 2018, No. 27102, Case 1799, *Tim-Fastweb-Realizzazione rete in fibra*.

¹⁵ Pursuant to Article 14-ter, paragraph 3, Law No. 287/90, "[t]he ICA may reopen the investigation ex officio if (a) there is a material change in the factual situation with respect to an element on which the decision was based; (b) the undertakings concerned infringe the commitments; (c) the decision is based on information submitted by the parties that is incomplete, incorrect or misleading".

¹⁶ Article 14-ter of Law No. 287/1990 provides that undertakings under investigation can offer commitments within three months from the decision to open the investigation.

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

¹⁸ ICA, IC48 - Sector inquiry of November 8, 2014.

participants and allowing smaller OLOs to participate in infrastructure projects that they would not otherwise be able to realize, with clear benefits also for consumers.

With regard to the allegation that the agreements could have reduced the contestable portion of the demand for wholesale broadband and ultra-broadband access services, as they imposed on OAOs the purchase of minimum guaranteed volumes, the TAR Lazio stated that

the ICA correctly found that the Commitments, as amended after the market test, were suitable to overcome this anticompetitive concern. It noted that the guaranteed volumes accounted for less than 8% of the total volumes within the market.

Finally, the TAR Lazio also rejected the fourth plea, stating that the Commitments offered in the I799 proceeding did not conflict with the new agreements.

Other developments

The Council of State further confirmed an ICA decision concerning two cartels in the corrugated cardboard sector

In six judgments delivered on March 1, 20 and 22, 2023,¹⁹ the Council of State rejected the appeal filed by Ondulati Santerno S.p.A., and partially rejected the appeals filed by Grimaldi S.p.A., Imballaggi Piemontesi S.r.l., International Paper Italia S.r.l., Pro-Gest S.p.A., and Innova Group S.p.A. against the judgments of the TAR Lazio that had confirmed an ICA decision imposing fines of approximately €287 million on over 20 undertakings for two anticompetitive agreements in the corrugated cardboard sector (the “**Decision**”).²⁰

The Judgments follow several previous rulings of the Council of State with a similar outcome (*i.e.*, upholding the relevant appeal only with respect to the quantification of the fine).²¹

In particular, in all those previous rulings, the Council of State sided with the ICA insofar as procedural and substantive issues were concerned. *Inter alia*, the Council of State confirmed that:

- the timing for the opening or extension of the investigation was not excessive;
- the undertakings had enough time to prepare and present their defense;
- the two anticompetitive agreements found by the ICA were separate (and not the same as argued by some parties);
- the ICA was right in attributing liability for long intermediate periods with little evidence of participation in the infringement if the relevant undertakings had not publicly distanced themselves from the infringement.

However, the Council of State found that the fines imposed by the ICA lacked proportionality because (i) the criteria applied by the ICA limited the possibility to tailor the fine based on the actual gravity of the infringer’s liability, and (ii) for those undertakings that had received a fine for each of the infringements, the ICA had not duly considered the “*interconnection*” between the two cartels at stake (including the fact that they concerned vertically related markets and certain undertakings participated in both of them).

¹⁹ Council of State, judgment Nos. 2117, 2118 and 2122 of March 1, 2023; No. 2823 of March 20, 2023; and Nos. 2906 and 2929 of March 22, 2023.

²⁰ ICA Decision No. 27849 of July 17, 2019, I805 – *Prezzi del cartone ondulato* (the Decision is discussed in the July 2019 issue of this Newsletter: <https://www.clearlygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjuly2019pd-pdf.pdf>).

²¹ These judgments are discussed in the January and February 2023 issues of this Newsletter (see <https://www.clearlygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-jan-2023.pdf>, and <https://www.clearlygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-feb-2023.pdf>).

The Council of State adopted the same approach in the Judgments. In particular, the Council of State entirely rejected the appeal filed by Ondulati Santerno S.p.A. (“**Santerno**”). Santerno does not appear to have challenged the quantification of its fine, which had already been significantly reduced by the ICA due to its situation of financial distress.²²

As to the appeals filed by Grimaldi S.p.A., Imballaggi Piemontesi S.r.l., International Paper Italia S.r.l., Pro-Gest S.p.A., and Innova Group S.p.A, the Council of State only upheld them in relation to the quantification of the fine, on the ground that it was disproportionate, and referred the matter back to the ICA for a new quantification.

The ICA accepts commitments in relation to Trenitalia’s conduct in the markets for regional and medium to long distance passenger rail transport services

On April 18, 2023, the ICA closed its investigation into an alleged abuse of dominance by Trenitalia S.p.A. (“**Trenitalia**”), the Italian statutory monopolist in the markets for regional and medium to long distance passenger rail transport services, without a finding of infringement and by accepting the commitments offered by Trenitalia.²³

In March 2022, Italo - Nuovo Trasporto Viaggiatori S.p.A. (“**NTV**”) filed a complaint with the ICA, alleging that Trenitalia was carrying out an abusive strategy aimed at artificially tying regional (“**RG**”) and Intercity (“**IC**”) transport services (in which Trenitalia holds a statutory monopoly) with the transport services operated on the high-speed (“**HS**”) network, where Trenitalia competes with NTV. In particular, NTV claimed that it had requested several times Trenitalia to allow NTV to market, on its own sales channels, Trenitalia’s RG and IC train tickets in a bundle with NTV’s HS services. At first, Trenitalia allegedly adopted obstructive and delaying tactics. Subsequently, on

June 28, 2022, Trenitalia and NTV reached an agreement for the marketing, on NTV’s sales channels, of train tickets for RG transport services bundled with NTV’s HS tickets (the “**Agreement**”). However, the complainant later took the view that certain specific terms and conditions in the Agreement concerning NTV’s access to and processing of the data relating to the tickets for the RG transport services: (i) were much more restrictive than the similar terms and conditions agreed by Trenitalia with other third parties (such as travel agencies, both physical and online); (ii) were technically questionable in that they *de facto* prevented NTV from actually being able to sell HS and RG tickets as a bundle; and, in any event, (iii) would significantly increase the costs to be borne by NTV.

On July 19, 2022, the ICA decided to open an investigation into Trenitalia’s conduct, alleging that it could amount to a constructive refusal to deal in violation of Article 102 TFEU, to the extent that Trenitalia may have leveraged its dominant position in the markets for IC and RG train services into the market for HS services, to the detriment of its only competitor in the latter market, NTV.²⁴

To remedy the concerns raised by the ICA in the decision, Trenitalia offered commitments to:

- i. provide NTV with full access to anonymous disaggregated and aggregated data on Trenitalia’s tickets for RG transport services sold in combination with its HS services;
- ii. extend the transitional period envisaged by the Agreement, during which the restrictive clauses governing the sale by NTV of Trenitalia’s tickets for RG transport services in combination with its HS services would not apply, in order to allow NTV the time required to adopt the technical measures needed to process the personal data of RG transport passengers;

²² The parts of the Decision related to the quantification of Santerno’s fines are heavily redacted.

²³ ICA, Decision of April 18, 2023, No. 30610, Case A551, *Trasporto ferroviario ad alta velocità e regionale*.

²⁴ ICA, Decision of July 19, 2022, No. 30248, Case A551, *Trasporto ferroviario ad alta velocità e regionale*.

- iii. extend the provisions of the Agreement in order to include also tickets for IC transport services;
- iv. facilitate the conclusion of similar agreements, also by providing the necessary technical support, between NTV and transport service providers Trenitalia Tper S.c.a.r.l. and Trenord S.r.l.; and
- v. display, on the on-board monitors installed in RG trains, the details of the departures of HS trains operated by NTV coinciding with the arrival of the RG train.

Following the market test, Trenitalia revised its commitments to take into account the comments received by third parties, and proposed, among other things, to: (i) bring forward the entry into force of commitment No. 1; (ii) grant NTV, within the framework of commitment No. 2, the status of autonomous controller of the personal data acquired through the sale of combined tickets; and (iii) amend commitment No. 5 to include also loudspeaker announcements.

The ICA found that the commitments, as amended, were suitable to overcome its anticompetitive concerns, and on this basis closed the proceedings by making the commitments binding on Trenitalia.

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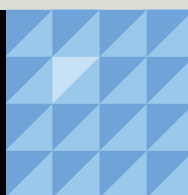
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