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Italian Competition Law Newsletter

Highlights

— The ICA accepts the commitments offered by ASPI and AISCAT and closes the abuse of dominance investigation in the Italian electronic road toll collection market

— TAR Lazio ruling in Amazon "Buy Box" case clarifies scope of protection against parallel proceedings

— The Italian Supreme Court clarifies the standard for assessing the causal link between an anticompetitive conduct and the damage claimed by plaintiffs in follow-on proceedings

— The Council of State states that the ICA's new powers in relation to sector inquiries should not be limited to the passenger air transport sector

The ICA accepts the commitments offered by ASPI and AISCAT and closes the abuse of dominance investigation in the Italian electronic road toll collection market

On December 14, 2023, the Italian Competition Authority (the "**ICA**") accepted and made binding the commitments proposed by Autostrade per l'Italia S.p.A. ("**ASPI**") and the Italian Association of Motorway and Tunnel Concessionaires ("**AISCAT**"),[1] and closed the proceedings on abuse of dominant position in the Italian electronic toll collection market initiated in May 2022 (the "**Decision**").[2]

Background

ASPI is the main Italian motorway concessionaire. As found by the ICA, ASPI exercised a significant influence over AISCAT's decision-making power, holding more than 50% of the votes in AISCAT's General Assembly and appointing five out of eleven members of its Board of Directors. Telepass S.p.A. ("**Telepass**") is the incumbent operator in

[1] AISCAT is an association representing 16 motorway concessionaires covering a total of 4,835 out of the 7,000 km of Italian motorways. The Italian network is divided into sections for which concessions are awarded by the Ministry of Infrastructure to various motorway operators. Providers of electronic toll collection services must enter into agreements with concessionaires and provide their respective customers with a device (so-called 'on board unit') that communicates with the detectors installed at the motorway entry and exit booths.

[2] ICA Decision No. 31011 of December 14, 2023, case A553 – *AISCAT e ASPI / Condotte abusive escludenti nel mercato del telepedaggio*.

the Italian electronic toll collection market, and was controlled by ASPI until May 2022.

The Opening of the Proceedings

In May 2022, UnipolTech S.p.A. ("**UnipolT**") filed a complaint to the ICA, claiming that AISCAT and ASPI had significantly delayed its entry into the Italian electronic toll collection market with a service (UnipolMove) competing with Telepass.

The Regulatory Framework

Three types of services, subject to as many regulatory regimes, coexist in the electronic toll collection market.

First, the so-called national electronic toll service (NETS) is available for both light and heavy vehicles, and allows users to pay electronically for all motorway sections within national borders. A user travelling across several countries would then need to use different electronic toll services – and be equipped with the different on board units. However, providers of the NETS may enter into bilateral agreements with service providers located in other countries in order to allow users to travel across different countries using a single device.

There has never been an accreditation procedure for the provision of the NETS in Italy, where Telepass has been operating in a de facto monopoly regime since the launch of the service.

Secondly, the European Electronic Toll System (EETS), provided for by Directives 2004/52/EC and 2019/520/EU, is complementary to the NETS, and is based on the interoperability between EU Member States' toll collection systems. The EETS allows users equipped with a single device to pay motorway tolls in several EU Member States. In contrast to the NETS, operators willing to provide the EETS are required to enter into agreements to provide the service in at least four different EU Member States. AISCAT has established a three-stage accreditation procedure for EETS providers, which involves considerable time and costs.

Thirdly, the Interoperable Electronic Toll System for Heavy Vehicles ("**SIT-MP**") is a service limited to heavy vehicles, which is based on the same technology as the EETS. SIT-MP's providers also have to complete the three-stage accreditation procedure required for EETS. However, since SIT-MP's providers are not required to enter into agreements in at least four different EU Member States, the service can only be used within national borders, unless such providers enter into bilateral agreements with providers located in other States.

Finally, since EETS and SIT-MP are based on technology that is different to that of the NETS, users can only use such services at EETS-enabled tollgates. However, in Italy, EETS-enabled tollgates are not as widespread as Telepass-enabled ones.

The Complaint

UnipolT alleged that ASPI, the other concessionaires and AISCAT abused their dominance by reserving the accreditation and certification procedures for the provision of the NETS to Telepass, without any legal basis. Moreover, through a number of anticompetitive practices, ASPI and AISCAT diverted its potential entry in the NETS market to the EETS one, for which accreditation and operating conditions are more costly and time-consuming than the for the former one.

In particular, UnipolT complained about the following conduct by ASPI and AISCAT: (i) establishment of a burdensome accreditation procedure for new EETS and SIT-MP service providers; (ii) failure to adapt tollgates to the EETS technology; (iii) failure to provide signs at tollgates indicating that tolling was allowed also with devices other than Telepass; (iv) failure to extend to the new operators' customers the same tariff benefits available for Telepass users; (v) application of onerous and discriminatory contractual conditions between electronic toll operators other than Telepass and concessionaires, compared to those applied to Telepass; and (vi) mismanagement of errors in the detection of transits at entry and exit tollgates by UnipolT's customers (compared to Telepass' customers).

Moreover, with regard to the standard EETS contract drawn up by AISCAT, UnipolT complained of the following provisions: (i) the obligation to offer a bank guarantee; (ii) the possibility – in the event that at least one concessionaire would withdraw from the contract – for all the remaining concessionaires to also withdraw from the contract; (iii) the obligation for the service provider to apply equal conditions to all concessionaires, without a similar obligation being imposed on concessionaires *vis-à-vis* different service providers; and (iv) the absolute prohibition on transferring the contract to third parties. According to UnipolT, none of the above obligations was provided for in the contracts between Telepass and the various motorway concessionaires.

The Relevant Markets

According to the ICA, the relevant markets are: (i) the market for motorway management; and (ii) the related market for the provision of electronic toll collection services for motorway users.

The electronic toll collection market is connected to the market for motorway management in that motorway concessionaires are also toll collectors with whom service providers are required to enter into agreements in order to provide the electronic toll collection service for each motorway section. In other words, motorway concessionaires are the only entities that, for their own sections, make the provision of electronic toll services possible, by adapting tollgates and signs and managing the associated data flow.

With regard to the motorway management market, each concessionaire holds a dominant position in the management of its own section of the interconnected infrastructure.

Moreover, ASPI held a dominant position in the electronic toll collection market until May 2022, when it ceased controlling Telepass..

The Commitments Offered by ASPI and AISCAT

Having initiated its Article 102 investigation only into the conduct of ASPI and AISCAT, in February 2023, the ICA was submitted two sets of commitments, which were later amended by the parties to reflect the comments received in the course of the market test.

Among other things, ASPI and AISCAT proposed to: (i) extend the same accreditation procedure currently applicable to EETS and SIT-MP also to any new devices used in the provision of the NETS; (ii) extend the SIT-MP service, currently available only for heavy vehicles, also to light vehicles; (iii) encourage concessionaires affiliated to AISCAT to adapt their tollgates and signs to EETS devices; (iv) extend the tariff benefits available to Telepass also to other operators; (v) modify the standard contract between EETS operators and concessionaires; and (vi) implement the necessary technological solutions in order to minimize management problems related to the invoicing of erroneous transits.

The Decision

In its Decision, the ICA found that the commitments offered by ASPI and AISCAT were sufficient to overcome the concerns raised in its decision to open proceedings.

In particular, the ICA approved the measures adopted by AISCAT to encourage its members to implement the proposed commitments. The ICA rejected the claim made by competitors of Telepass that the commitments offered were ineffective as they were not binding on the motorway concessionaires. The ICA was satisfied that all the AISCAT members had approved AISCAT's commitments and committed in turn *vis-à-vis* the association to implement those measures.

TAR Lazio ruling in Amazon "Buy Box" case clarifies scope of protection against parallel proceedings

On January 29, 2024,[3] the Regional Administrative Court for Latium (the "TAR Lazio") rejected the request of the Italian Competition Authority (the "ICA") to revoke interim measures adopted by the TAR Lazio on March 10, 2022 in relation to Amazon.[4] This matter is part of a broader case in which the ICA imposed a fine of €1.128 billion on Amazon, along with several behavioral measures, for an alleged abuse of dominant position in the Italian market for intermediation services on e-commerce platforms.

Background

The Italian proceedings

In April 2019, the ICA opened an investigation into whether Amazon had abused its dominant position by reserving a set of exclusive benefits, essential for gaining visibility and increasing sales on its Italian marketplace ("Amazon.it"), to sellers that used Amazon's logistics service[5] (Fulfilment by Amazon, or "FBA").[6]

The investigation continued until November 2021, when the ICA found that Amazon had engaged in a form of self-preferencing, as it had used its dominant position on the market for intermediation services on e-commerce platforms to favor its own logistics services (the "ICA Decision").[7] In addition to issuing a record fine of €1.28 billion, the ICA imposed a detailed list of measures on Amazon to restore a level playing field and to foster the development of logistics services alternative to FBA (the "Measures").[8]

Amazon challenged the ICA Decision before the TAR Lazio. In October 2022, Amazon requested and obtained a suspension of the proceedings pending the outcome of its separate action before the European Court of Justice against the decision of the European Commission (the "Commission") to open a parallel investigation.[9]

The parallel EU investigation

In November 2020, the Commission launched an abuse of dominance investigation into whether Amazon had artificially favored its own retail offers and those of third party sellers that use Amazon's logistics and delivery services,[10] by granting them preferential access to the "Buy Box"

[3] TAR Lazio, Order of January 29, 2024, No. 399.

[4] The legal entities concerned were Amazon Europe Core S.à r.l., Amazon Services Europe S.à r.l., Amazon EU S.à r.l., Amazon Italia Services S.r.l. and Amazon Italia Logistica S.r.l. See ICA Decision of November 30, 2021, No. 29925, Case A528, *FBA Amazon* (the decision is discussed in the December 2021 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---december-2021.pdf).

[5] ICA Decision No. 28294 in Case I842 – *Vendita prodotti Apple e Beats su Amazon Marketplace*.

[6] FBA is an integrated logistics service that includes: (i) warehousing and management of retailers' inventory at Amazon's distribution centers; (ii) fulfillment of orders received on Amazon.it, including packaging and labeling; (iii) shipping, transportation and delivery; (iv) returns' management; and (v) customer service.

[7] ICA Decision No. 29889 in Case I842 – *Vendita prodotti Apple e Beats su Amazon Marketplace* (the decision is discussed in the November 2021 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---november-2021.pdf).

[8] In particular, the ICA required Amazon to: (i) publish a list of objective and non-discriminatory requirements for retailers to obtain the Prime label; (ii) modify the Seller Fulfilled Prime program so as to allow all retailers meeting such requirements to freely choose their logistics providers; (iii) monitor compliance with Prime standards without discriminating against retailers that do not use FBA; (iv) grant the Prime badge and all other related benefits to all retailers using the Seller Fulfilled Prime program; (v) abstain from any intermediation between retailers and logistics service providers, for one year from the date of the decision; and (vi) properly advertise the new SFP program.

[9] TAR Lazio, Order of October 28, 2022, No. 13945.

[10] Commission Press Release IP/20/2077, "*Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices*," November 10, 2020. See also our November 2020 Alert Memorandum, "*The Commission Opens a Formal Probe and Second Investigation Into Amazon*": https://www.clearyantitrustwatch.com/2020/11/the-commission-opens-a-formal-probe-and-second-investigation-into-amazon/.

and Prime users.[11] The EU investigation covered the entire EEA with the exception of Italy, as the ICA was already investigating similar conduct in the Italian market.

Amazon brought an action against the decision to initiate proceedings, in so far as it excluded Italy from the scope of the investigation, thus subjecting Amazon to parallel proceedings before the Commission and the ICA. However, both the General Court,[12] in October 2021, and the European Court of Justice,[13] in April 2023, rejected Amazon's appeal. The EU Courts stated that the protection against parallel proceedings provided for by Article 11(6) of Regulation No. 1/2003 only applies in the event of parallel proceedings brought by the Commission and national competition authorities against the same undertaking in respect of the same allegedly anticompetitive conduct occurring in the same product and geographical market and over the same period. If the Commission has not initiated proceedings in respect of a given territory, the undertakings concerned cannot avail themselves of the protection granted by Article 11(6) of Regulation No. 1/2003.

The interim measures

Against this background, on March 10, 2022, the TAR Lazio decided to grant the interim relief requested by Amazon and suspended the Measures. The TAR Lazio held that the Measures were "*extensive*", and acknowledged "*the risk of divergences in implementing different measures*", given the ongoing investigation at the EU level.[14]

In January 2024, the ICA petitioned the TAR Lazio to revoke the interim relief, on the grounds that: (i) there was no risk of diverging outcomes anymore, as the Commission had in the meantime closed its parallel investigation, by accepting the commitments offered by Amazon; (ii) the Measures largely overlap with those commitments. According to the ICA, if the TAR Lazio was to keep the suspension of the Measures, then it would actually end up imposing different obligations on Amazon than those imposed at the EU level, thus leading to diverging outcomes (which is precisely what the interim relief was intended to avoid).

However, on January 29, 2024, the TAR Lazio rejected the ICA's request.[15] In line with the ruling of the European Court of Justice, the TAR Lazio noted that the protection against parallel proceedings does not imply any right for an undertaking to have a case dealt with entirely by the Commission. According to the TAR Lazio, the Commission maintains discretion in setting out the geographical scope of its investigation, and there is no right to a "*one-stop-shop*" investigation at EU level. As a consequence, the proceedings at the national and EU levels remain independent. According to the administrative court, the possibility of different outcomes must be considered "*natural*" in a system that allows for the enforcement of antitrust rules by both the Commission and national competition authorities in relation to the same practice in different territories.

[11] The Buy Box is displayed prominently on Amazon's websites and allows customers to add items from the "winning" retailer directly into their shopping carts. The possibility to effectively reach Prime users was also considered important to sellers, as the number of Prime users was continuously growing and they tended to generate more sales on Amazon's marketplaces than non-Prime users.

[12] Case T-19/21 *Amazon v Commission*, EU:T:2021:730.

[13] Case C-815/21 P *Amazon v Commission*, EU:C:2023:308.

[14] TAR Lazio, Order of March 10, 2022, No. 1530.

[15] TAR Lazio, Order of January 29, 2024, No. 399.

The Italian Supreme Court clarifies the standard for assessing the causal link between an anticompetitive conduct and the damage claimed by plaintiffs in follow-on proceedings

In a judgment dated January 2, 2024,[16] the Supreme Court confirmed a ruling of the Rome Court of Appeal on the causal link between anticompetitive conduct established in an ICA decision and the damage arising from such conduct.[17] The Supreme Court confirmed that in civil proceedings the causal link between the anticompetitive conduct and the alleged damage can be inferred on the basis of the "*more likely than not*" criterion. The Rome Court of Appeal had upheld an appeal by the Italian Ministry of Health and the Italian Ministry of Economy and Finance against a first instance judgment that had rejected their claim for damages against Pfizer Italia S.r.l. ("Pfizer") for alleged abuse of dominance.[18] The Supreme Court's judgment put an end to a long and complex follow-on case, and provided important indications on the burden of proof for plaintiffs seeking compensation for damages suffered as a result of anticompetitive conduct.

Background

The ICA's Decision

In 2012, the ICA found that Pfizer had engaged in exclusionary conduct against manufacturers of generic prostaglandin analogue glaucoma treatment drugs ("Generic Drugs") to protect the sales of its own prostaglandin analogue glaucoma treatment drug, Xalatan (the "Decision").[19]

In the Decision, the ICA held that the market for glaucoma treatment drugs based on prostaglandin analogues is distinct from the market for other glaucoma treatment drugs, due to the specific features of prostaglandin analogue drugs compared to other glaucoma treatment drugs. In particular, glaucoma treatment drugs based on prostaglandin analogues require fewer daily instillations, have higher hypotonic efficacy, have fewer local side effects and contraindications, lack relevant systemic side effects, and are sold at a significantly higher price than other glaucoma treatment drugs. The ICA also found that, at the time of the infringement, Pfizer held a 60% share in the relevant market for glaucoma treatment drugs based on prostaglandin analogues.

According to the ICA, Pfizer abusively extended the term of patent protection for Xalatan in Italy (which was due to expire in September 2009) in order to delay the commercialization of Generic Drugs. In particular, in June 2002, Pfizer filed an application with the European Patent Office ("EPO") for a divisional patent and a related supplementary protection certificate for Xalatan. In January 2009, the EPO granted the divisional patent and the supplementary protection certificate requested by Pfizer, thus extending the patent term of Xalatan until July 2011. Pfizer subsequently sent Generic Drugs manufacturers notices warning them that, if the they marketed Generic Drugs before July 2011, it would seek compensation for patent infringement. A number of pharmaceutical companies challenged Pfizer's divisional patent before the EPO, on the ground that the divisional patent application submitted by Pfizer contained elements not included in the description of the invention in the main patent application. The EPO upheld the appeal in October 2010. In the Decision, also in light of the EPO's 2010 ruling,

[16] Italian Supreme Court, Judgment No. 9, January 2, 2024.

[17] Court of Appeal of Rome, Judgment No. 6387, September 27, 2021.

[18] Court of Rome, Judgment No. 15020, July 24, 2017.

[19] ICA, Decision No. 23194 in Case A431 - *Ratiopharm / Pfizer*, January 11, 2012.

the ICA held that Pfizer had exploited the state of legal uncertainty about its patent expiration date to deter Generic Drugs manufacturers from starting to market their products during the seven-month period between the original patent expiry date and May 2010, when Generic Drugs manufacturers decided to enter the relevant market notwithstanding Pfizer's divisional patent.

Interestingly, in May 2012, the Technical Board of Appeal of the EPO reversed the decision adopted in October 2010, thus confirming the validity of Pfizer's divisional patent and supplementary protection certificate for Xalatan (the "EPO Decision").[20]

In November 2014, the Italian Ministry of Health and the Italian Ministry of Economy and Finance (the "Plaintiffs") sued Pfizer for damages before the Rome Court. The Plaintiffs claimed that, due to the delay in the marketing of Generic Drugs that allegedly resulted from Pfizer's conduct, they had to reimburse glaucoma patients for the cost of Xalatan, which was significantly higher. In the context of the Decision, the ICA had estimated that the difference between the total costs incurred by the Plaintiffs to purchase Xalatan and those they would have incurred had they purchased Generic Drugs was approximately € 14 million.

The First Instance Judgment

In 2017, the Rome Court dismissed the Plaintiffs' claim for damages on two main grounds.[21]

First, the Court held that the EPO Decision had undermined one of the fundamental assumptions of the ICA's assessment of the alleged abusiveness of Pfizer's conduct, as it implied that the divisional patent application was in itself valid, and not merely intended to exclude Generic Drugs manufacturers from the relevant market. Moreover, in the Court's view, the fact that the divisional patent was valid meant that the legal actions taken by Pfizer to prevent the marketing of Generic Drugs could not constitute an abuse, because they were aimed at protecting a property right.

Secondly, the Court ruled that the ICA Decision had special evidentiary value in relation to the existence of the anticompetitive conduct found by the ICA, but not in relation to the causal link between such conduct and the damage allegedly suffered by the Plaintiffs. The Court considered that the Plaintiffs had provided no further evidence besides the findings contained in the Decision and, therefore, had not met the required burden of proof.

The Court of Appeal Judgment

In 2021, the Rome Court of Appeal overturned the first instance decision and awarded the Plaintiffs over € 13 million in damages.[22]

First, the Court of Appeal ruled that the EPO Decision was not in itself sufficient to exclude the anticompetitive nature of Pfizer's conduct. In particular, the Court considered that the Council of State ruling that had rejected Pfizer's appeal against the ICA's Decision had already taken into account the fact that the divisional patent's validity had been confirmed by the EPO Decision.[23] Consequently, Pfizer could not challenge in civil proceedings the abusive nature of its conduct on the ground that the divisional patent was valid, as this issue had already been addressed by the ruling of the Council of State.

In addition, the Court of Appeal held that the evidence referred to in the ICA's Decision was sufficient to establish the causal link between Pfizer's conduct and the alleged damage suffered by the Plaintiffs.

The Supreme Court Judgment

In its judgment of January 2, 2024, the Supreme Court confirmed that, based on the principles in force before the implementation of the EU

[20] EPO, Decision No. T 2402/10, *Prostaglandin derivatives / Pfizer*, May 10, 2012.

[21] Court of Rome, Judgment No. 15020, July 24, 2017.

[22] Court of Appeal of Rome, Judgment No. 6387, September 27, 2021.

[23] Council of State, Judgment No. 693, February 12, 2014.

directive on private enforcement (Directive 2014/104/UE), when the ICA has established the existence of anticompetitive conduct and imposed a fine on an undertaking, the latter is allowed to provide new evidence to challenge the established facts. However, the undertaking is not allowed to challenge in private enforcement proceedings the facts constituting the anticompetitive conduct on the basis of the same evidentiary material or arguments already addressed by the administrative court before which the ICA's decision was challenged.

As to the proof of the causal link and the damage, the Supreme Court observed that the special evidentiary value of the findings made by the ICA does not extend to the causal link between the anticompetitive conduct and the damage suffered by the plaintiffs. However, it ruled that it is up to trial courts to determine, based on the "*more likely than not*" criterion, whether the ICA's decision, possibly together with other evidence, may be sufficient to prove such a link (as the Court of Appeal held in the case at hand).

In light of the above, the Supreme Court upheld the judgment of the Court of Appeal and the award of damages in favor of the Plaintiffs.

The Council of State states that the ICA's new powers in relation to sector inquiries should not be limited to the passenger air transport sector

On January 29, 2024, the Council of State issued an opinion on the scope of application of the new powers granted to the ICA by Decree Law No. 104/2023 (the "Asset Decree"), converted into law by Law No. 136/2023, in relation to sector inquiries.[24] The Council of State held that the new powers have a general scope and are not limited to a specific sector or industry (namely, the passenger air transport sector).

The ICA's power to conduct sector inquiries

Pursuant to Article 12 of Law No. 287/1990, when a sector has features that indicate the existence of obstacles to effective competition, the ICA may carry out a general sector inquiry. Based on the outcome of the sector inquiry, the ICA may decide to start antitrust investigations or recommend that the Government and the Parliament adopt legislative or regulatory measures to address the competition problems identified.

From 2017 to 2022 the ICA conducted only one sector inquiry, which was a joint sector inquiry carried out with the Italian Data Protection Authority and the Italian Communications Authority into the effects and consequences of the big data phenomenon in relation to the economic, political and social context and the regulatory framework in force at the time.[25] However, in 2023 the ICA conducted four sector inquiries, in relation to pricing algorithms for air passengers on routes to and from Sicily and Sardinia,[26] the taxi sector,[27] the Italian fuel market[28] and the market for hearing aids,[29] respectively.

[24] Council of State, Opinion of January 29, 2024, No. 61.

[25] ICA Sector Inquiry No. 28051 in Case IC53 – *Big Data (*the final report is discussed in our Alert Memorandum available here: https://www.clearyantitrustwatch.com/2020/02/ica-publishes-final-report-on-big-data-sector-inquiry/.

[26] ICA Sector Inquiry No. 30874 in Case IC56 – *Algoritmi di prezzo nel trasporto aereo passeggeri sulle rotte nazionali da e per la Sicilia e la Sardegna*.

[27] ICA Press Release available here: https://en.agcm.it/en/media/press-releases/2023/8/Italian-Competition-Authority-inquiry-launched-in-the-taxi-sector.

[28] ICA Sector Inquiry No. 30456 in Case IC54 – *Prezzi dei carburanti per autotrazione - dinamiche concorrenziali dall'estrazione alla distribuzione*.

[29] ICA Sector Inquiry No. 30771 in Case IC55 – *Mercati degli apparecchi acustici*.

The new powers granted to the ICA

On October 9, 2023, the Italian Parliament adopted Law No. 136/2023, which converted the Asset Decree in law. The Asset Decree contains urgent provisions aimed at protecting users in connection with economic and financial activities and strategic investments. Among other things, it grants new powers to the ICA in conducting sector inquiries (Article 1(5) and (6) of the Law Decree). In particular, in this context, it empowers the ICA to:

— carry out **dawn raids**;

— **impose fines** on undertakings for the provision of incomplete or incorrect information, and for failure to respond to its requests for information;

— **impose any** necessary and proportionate **structural or behavioral measures**, following a market consultation and subject to compliance with EU law principles, if the ICA identifies competition problems that hinder or distort the proper functioning of the market, thus resulting in consumer harm;

— **make commitments submitted by undertakings binding**, following a market consultation, if the ICA finds that these commitments are adequate to address its competition concerns;

— **impose fines** in the case of non-compliance with the commitments made binding, or the measures imposed, by the ICA.

Following the entry into force of the Asset Decree, the scope of Article 1(5) and (6) has given rise to significant uncertainty. On the one hand, the fact that the new provision is worded in general terms could suggest that it is meant to have a broad scope of application, encompassing all economic sectors. On the other hand, Article 1 of the Asset Decree expressly concerns air transport (in particular, the transparency of prices on domestic flights), and does not explicitly amend Law No. 287/1990 (the national competition law) and Presidential Decree No. 217/1998 (the ICA's procedural regulation).

The Council of State's opinion

On November 23, 2023, the ICA submitted a request for an opinion from the Council of State on the scope of application of the newly-introduced powers.[30] In the request, the ICA asked the Council of State whether the new powers should be considered limited to a particular sector or product area (in particular, passenger air transport, expressly mentioned in the Asset Decree) or should be applied more broadly to all sectors.

In its opinion, the Council of State carried out an in-depth analysis of Article 1(5) and (6) of the Asset Decree, from a literal, systematic and teleological point of view.

First of all, from a literal standpoint, the Council of State acknowledged that the new powers granted to the ICA seem to be limited to sector inquiries conducted in the air transport sector. However, the Council of State pointed out that, although paragraphs 5 and 6 are included in an Article that "*mainly*" concerns the air transport sector (in particular, paragraphs 1 to 4 of that Article), the first part of paragraph 5 lacks any reference to sectoral or product limitations. The power to impose structural or behavioral measures in the context of sector inquiries is based solely on the presence of "*competitive issues that impede or distort the proper functioning of the market, with consequent harm to consumers*".

Secondly, with regard to the intent of the competent authorities when drafting the Asset Decree, the Council of State clarified that the provision is included in a general regulatory measure aimed at "*protecting users in the field of economic and financial activities and strategic investments*." To this end, it provides for "*urgent intervention*" in various industries. According to the Council of

[30] The Council of State may issue voluntary opinions in order to: (i) examine legislative acts for which a request for an opinion is not mandatory; and (ii) resolve questions concerning the interpretation or application of the law. The purpose of such opinions is to provide technical legal assistance in order to ensure that acts adopted by public authorities are lawful and comply with the principle of good administration.

State, the overall rationale of the Asset Decree is to restore effective competition, particularly where the lack of effective competition and the consequent harm to consumers are not due to concerted strategies or regulatory restrictions, but to the market structure itself, as it can typically occur in oligopolistic markets. In this regard, the Council of State noted that this situation is not confined to the air transport sector, but may occur in a variety of economic contexts.

Thirdly, the Council of State observed that an interpretation limiting the new powers granted to the ICA to only one specific sector would be unreasonable in two respects: (i) it would give rise to unequal treatment between the air transport sector and other sectors; and (ii) it would result in an inconsistency between the content of the measures provided for by the Asset Decree and the rationale of these measures, which is to protect users in the field of economic and financial activities and strategic investments, and not only in the air transport sector.

Finally, the Council of State noted that these findings are confirmed by a comparison with other legal provisions in place throughout the European Union (and elsewhere), in particular those in force in the United Kingdom and Germany, which grant similar powers to their respective national competition authorities without providing for any sectoral limitation.

Based on the above, the Council of State held that the new powers granted to the ICA in connection with sector inquiries have a general scope of application and cannot be interpreted as limited to a specific sector and/or product area.

Conclusion

The Council of State's opinion significantly strengthens and broadens the options and tools available to the ICA to deal with possible competition problems, as it allows the ICA to exercise its new (far-reaching) powers in relation to sector inquiries in any sector or industry.

However, the new provision, especially as interpreted by the Council of State, seems to raise significant issues and doubts, also due to the lack of clear and precise substantive criteria, and the possible interference and overlap with the competences and powers of sector-specific regulatory authorities.

It is also reasonable to expect that the broader use of sector inquiries by the ICA in 2023 will continue in the coming years, also in light of the new possibilities offered by the Asset Decree. In particular, the ICA may be interested in using its new powers to address possible market failures and parallel behavior in oligopolistic markets, as noted by the Council of State.

Other developments

The TAR Lazio clarifies the notion of "defensive access"

On January 18, 2024, the TAR Lazio issued a judgment clarifying the notion of "*defensive access*" in antitrust proceedings.[31]

On July 17, 2019, the ICA imposed fines exceeding €287 million on 23 companies for their alleged involvement in two distinct cartel agreements under Article 101 TFEU (the "Decision").[32] According to the ICA, the two cartels were implemented in two different markets, which were vertically related: the first alleged cartel was implemented in the upstream market for corrugated cardboard sheets (the "Sheets Cartel"), while the second took place in the downstream market for corrugated cardboard cases (the "Cases Cartel").

[31] TAR Lazio, Judgment of January 18, 2024, No. 911.

[32] ICA Decision No. 27849 of July 17, 2019 in Case I805 – *Prezzi del cartone ondulato* (the decision is discussed in the July 2019 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjuly2019pd-pdf.pdf).

ICO - Industria Cartone Ondulato S.r.l. ("ICO"), one of the undertakings fined for participating in the Cases Cartel, challenged the Decision before the TAR Lazio. On May 24, 2021, the TAR Lazio upheld the Decision in full.[33] ICO then challenged the TAR Lazio's judgment before the Council of State.

On January 20, 2023, the Council of State confirmed the Decision, but it found that the fines imposed by the ICA, including on ICO, were not proportionate. This was because the criteria applied by the ICA restricted the possibility to tailor the fine based on the actual gravity of the infringer's liability. In addition, in relation to the undertakings fined for each of the infringements, the ICA had not adequately considered the "*interconnection*" between the two cartels, in particular the fact that they concerned vertically related markets and some undertakings participated in both of them.

According to the Council of State, the method for calculating the fines should take into account the interconnection between the cartels in relation to the specific undertaking concerned. To this end, the ICA should: (i) impose a fine up to the 10% statutory cap, and (ii) only add a "*proportionate amount*" to that fine.[34] The Council of State ordered the ICA to redetermine the fines to reflect the respective liability of the various undertakings and to set the level of the "*proportionate amount*" accordingly.

On May 16, 2023, ICO requested access to the ICA's case-file in order to find out the basic amounts of the fines imposed on the undertakings involved in the Cases Cartel. ICO argued that access to the precise numerical values was necessary to assess whether the ICA had correctly applied the fine redetermination criteria outlined by the Council of State.

On June 15, 2023, the ICA refused to grant access to the case-file, on the ground that the disclosure of the value of the basic amounts of the fine imposed would reveal the turnovers generated in 2016 by each of the fined undertakings on the basis of simple arithmetic steps. Furthermore, access to this data was considered unnecessary for ICO to fully exercise its right of defense in the proceedings for the fine redetermination.

ICO challenged the refusal to grant access before the TAR Lazio. On January 18, 2024, the TAR Lazio upheld the ICO's appeal. The administrative court found that ICO had a direct, concrete and actual interest in accessing the case-file, corresponding to a legally protected situation, since the procedure for the redetermination of the fine was still ongoing. According to the TAR, ICO had correctly qualified the access request as "*defensive access*" under Article 24(7) of Law No. 241/1990, expressly motivated by the need to protect its interests regarding the fine redetermination by the ICA. "*Defensive access*" allows to override the ordinary limitations that typically prevent access to certain information and documents, if the applicant demonstrates the "*necessity*" or "*strict indispensability*" of the requested information. In deciding on the request for access, the competent authority must evaluate, on the basis of a prognostic assessment, whether the disclosure of the documents requested is the means of acquiring evidence of the facts forming the basis of the rights at issue and the related claims that may be abstractly brought before a court. This assessment must be based on the abstract relevance of the documents with respect to the subject matter of the case, without any further assessment as to the admissibility, influence or decisiveness of the requested document, except in the case of an obvious, absolute lack of connection between the document and the defence needs. In the case at hand, the TAR Lazio held that the access requested by ICO was indeed necessary to ensure its right of defense. Finally, regarding the need to preserve the confidentiality of the turnover data of the other undertakings involved in the cartel, the TAR Lazio proposed that ICO could only access the requested documents in a data room, without making copies.

[33] TAR Lazio, Judgment of May 24, 2021, No. 6050 (discussed in the May 2021 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--may-2021-pdf.pdf).

[34] Council of State, Judgment of January 20, 2023, No. 689 (discussed in the January 2023 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-jan-2023.pdf).

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