

November 2020

# Italian Competition Law Newsletter

## Highlights

- TAR Lazio annuls ICA decision concerning car financing cartel
- ICA imposes €27 million fine on COREPLA for abusing its dominant position in the market for management of plastic waste recycling services

## TAR Lazio annuls ICA decision concerning car financing cartel

On October 24, 2020, the Regional Administrative Court of Lazio (the “**TAR Lazio**”) upheld the applications lodged by nine leading captive banks,<sup>1</sup> two further financial institutions holding equity stakes in two of the applicant captive banks, seven automotive groups as well as trade associations Assilea and Assofin, for annulment of the 2018 decision by which the Italian Competition Authority (the “**ICA**”) imposed on the applicants<sup>2</sup> total fines of approximately €670 million for their participation in a cartel concerning the sale of car vehicles through the provision of financial products.<sup>3</sup>

### The ICA decision

According to the ICA, the infringement consisted of parallel exchanges of information, which included (i) direct bilateral and multilateral information exchanges among captive banks, and (ii) indirect multilateral information exchanges among captive banks through trade associations.

The ICA identified the relevant market affected by the infringement as the market for the “*sale of cars through loans granted by captive banks (both financing activities in the strict sense and leasing).*”

The ICA maintained that captive banks compete with each other in this market, because the cost of financing is a relevant part of a car’s price and influences consumer choice. Therefore, captive banks actively participated in the competition among car manufacturers as a fundamental marketing arm to support car sales.

### The TAR Lazio judgment

The TAR Lazio accepted two of the pleas raised by the applicants and held that the ICA decision was unlawful, finding it unnecessary to analyze also their remaining pleas.

<sup>1</sup> A captive finance company is a wholly-owned subsidiary of a car vehicle manufacturer that provides loans and other financial services to the customers of its parent company.

<sup>2</sup> TAR Lazio, Judgment Nos. 12529-12545 of October 24, 2020.

<sup>3</sup> ICA, decision of December 20, 2018, No. 27497, Case I811 – *Finanziamenti Auto* (see description in the January-February 2019 Newsletter, available at <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjanuaryfebruary2019pd.pdf>).

**(i) Late opening of the investigation**

As the TAR Lazio highlights, the first leniency application by a car vehicle producer reporting the unlawful conduct was received in March 2014, but the ICA only opened the formal investigation in April 2017. From the procedural standpoint, the TAR Lazio found that the ICA carried out a preliminary investigation lasting about 3 years, without any reasonable justification explaining such delay in the opening of the formal investigation.

In the course of the procedure, the ICA claimed that such delay was due to the fact that the leniency applicant submitted a full-fledged application to the European Commission (“EC”), but mere summary applications (in 2014 and 2016) to the ICA. Therefore, according to the ICA, the opening of the investigation at national level was prevented by the EC’s indecision whether to directly pursue the case or to allocate it to the ICA. The ICA also submitted that it contacted the EC a number of times in this regard and that, as soon as it was clear that the EC was not going to deal with the case, the ICA promptly opened its investigation.

The TAR Lazio rejected the ICA’s claims and held that there was no evidence in the case file to support them. Moreover, the TAR Lazio highlighted that the ICA, in the course of the preliminary investigation, stated twice its willingness to grant the leniency applicant immunity from fines. The TAR Lazio noted that such behavior did not fit with the treatment that the ICA normally reserves for summary leniency applications, which are indeed only aimed at obtaining a marker from the ICA, but rather suggested that the ICA treated the applications as full leniency applications.

The TAR Lazio then referred to Article 14 of Law No. 689/1981.<sup>4</sup> Although the said provision is not directly applicable to antitrust proceedings (*i.e.*, to either the preliminary investigation phase or the formal investigation procedure), the ICA is bound to initiate the investigation within a reasonable period of time, pursuant to the general principles of efficient and good administration of justice that are enshrined in Law No. 241/1990<sup>5</sup> as well as in Article 6 of the ECHR and Article 41 of the EU Charter of Fundamental Rights. The Court clarified that this time period runs from the moment when the ICA has full knowledge of the possible infringement. Having regard to the case under review, the TAR Lazio considered that a preliminary investigation lasting over 3 years from the first leniency application was unreasonably long and incompatible with these general principles. However, the maximum duration that the ICA’s preliminary investigation could possibly reach for it to be considered reasonable remains unclear. As a result, for future cases, the analysis will still need to be carried out on a case-by-case basis, taking into account in particular the complexity of the case and the initial evidence collected by the ICA.

**(ii) Definition of the relevant market**

As to the substance of the case, the TAR Lazio held that the ICA’s statement of reasons contained several errors concerning the definition of the relevant market and the analysis of conduct with anticompetitive effects on the market.

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

<sup>4</sup> Article 14 of Law No. 689 of November 24, 1981 (modifying the criminal law system, which regulates *inter alia* administrative sanctions applicable in case of antitrust violations): “*the details of the infringement must be notified to the persons concerned residing in the Italian territory within a period of ninety days ...*”. Pursuant to Section 31 of the Italian Competition Statute, the general principles governing administrative sanctions set forth under the first two sections of Law No. 689/1981 apply, as far as compatible, to fines levied by the ICA.

<sup>5</sup> Law No. 241/1990 (providing rules on administrative procedure and right of access to administrative documents)

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

evidence that car prices were not linked to the competitive dynamics of financing services.

Finally, the Court noted that the ICA's insufficient analysis of the relevant market was further highlighted by the fact that it left out of the scope of the investigation one important car manufacturer, even though its captive bank was eventually found to have participated in the infringement.

## ICA imposes €27 million fine on COREPLA for abusing its dominant position in the market for management of plastic waste recycling services

On October 27, 2020, the ICA issued a decision (the "**Decision**")<sup>6</sup> fining the Italian Consortium for the Collection, Recycling and Recovery of Plastic Packaging ("**COREPLA**") € 27,400,477 for allegedly abusing its dominant position in the market for management of plastic waste recycling services.

### Factual and legal background

Article 221 of the Consolidated Act on Environment<sup>7</sup> establishes the principle of Extended Producer Responsibility ("**EPR**"), under which manufacturers of plastic packaging are subject to significant financial responsibility penalties in case of non-compliance with their obligations of treatment and disposal of post-consumer products. Plastic packaging manufacturers can comply with their statutory obligations, including those of waste management and physical collection, by participating in consortia that treat and recycle plastic waste.

The recycling chain of household plastic waste is organized into the following segments: first, local authorities collect household plastic waste and take it to so-called sorting plants. In these plants, the waste is processed and allocated to the consortia of plastic manufacturers according to

quotas that reflect manufacturers' participation in each consortium. The consortia then pay the local authorities and the sorting plants for their activity and auction off the plastic waste to start its treatment and disposal process.

COREPLA had been the only such consortium in Italy for a number of years, until certain plastic manufacturers decided to constitute another consortium called CORIPET. In April 2018, the Italian Ministry of Environment (the "**Ministry**") granted CORIPET a temporary license subject to the achievement of the objectives of effectiveness, efficiency and self-sufficiency necessary for the granting of permanent authorization within two years' time. The temporary license was due to expire on April 24, 2020 and was extended until June 30, 2021.

### The opening of the investigation and the interim measures

On April 30, 2019, following a complaint by CORIPET, the ICA opened an investigation into COREPLA's alleged exclusionary practices, including its claiming of exclusive rights on all the household plastic waste, as well as enforcing exclusive clauses in the agreements in force with the local authorities and the sorting plants.

<sup>6</sup> ICA Decision of October 27, 2020, No.28430, Case A531, *Riciclo imballaggi primari/Condotte abusive COREPLA*.

<sup>7</sup> Legislative Decree No. 152/06.

At the same time, the ICA opened interim proceedings to assess whether urgent remedial measures were required in order to prevent COREPLA's conduct from excluding its only competitor, CORIPET, from the market.

On October 29, 2019, the ICA ordered COREPLA to: (i) modify the contracts with local authorities so as to allow the allocation of plastic waste to consortia other than COREPLA; (ii) modify the contracts with sorting plants so as to allow the allocation of plastic waste to consortia other than COREPLA; (iii) cease auctioning plastic waste that should have been allocated to CORIPET; (iv) cooperate with CORIPET in order to reach agreements on preliminary management issues, such as the determination of quotas; (v) assign to CORIPET, by April 24, 2020, the portion of plastic waste to which it was entitled; and (vi) assign to CORIPET all the plastic waste that should have been allocated to it from January 1<sup>st</sup>, 2019, until the date of implementation of these measures.<sup>8</sup>

## **The Decision**

### ***The relevant market and COREPLA's dominant position***

The ICA found a significant difference in the management of household as opposed to industrial plastic packaging. The latter is collected directly from the private facilities where it is turned into waste, while the first needs to be collected from households in urban areas through specific services provided by local authorities. For this reason, the ICA defined the relevant product market as the provision of EPR compliance services for household plastic packaging, which is part of EPR compliance services for all plastic packaging. The geographic market was found to be national in scope.

Against this background, the ICA found that COREPLA had been the sole consortium authorized to provide EPR compliance services for household plastic waste until CORIPET entered the market in 2018. COREPLA kept operating in a quasi-monopoly position even after CORIPET's

entrance, as it continued managing the vast majority of household plastic waste produced in Italy. Therefore, COREPLA was found to hold a dominant position in the relevant market.

### ***The conduct***

In the ICA's view, COREPLA engaged in four practices aimed at making it impossible for CORIPET to meet the objectives of effectiveness, efficiency and self-sufficiency required by the Ministry to grant it a permanent authorization.

First, the ICA found that COREPLA enforced exclusivity clauses in its contracts with local authorities and sorting plants to prevent CORIPET from entering into an agreement with them.

Secondly, the ICA held that CORIPET organized an auction to try to sell at least part of the plastic waste it was entitled to manage. However, COREPLA allegedly warned sorting plants not to deliver the plastic waste to the auction winners, thus forcing CORIPET to annul the auction.

Thirdly, the ICA found evidence that the members of CORIPET stopped paying their membership fees to COREPLA when they joined the new consortium. This led to lower revenues for COREPLA, which stopped receiving payment for the management of the plastic waste corresponding to the quota produced by CORIPET members. Notwithstanding such loss of revenues, COREPLA allegedly refused to let go the quota of plastic waste produced by CORIPET members and kept managing the totality of plastic waste even if the payment received from its members was no longer sufficient to cover total costs. The ICA believed that this was part of a predatory strategy conceived and put into effect by COREPLA, which the dominant player deemed to be sustainable in the short term based on the expectation that CORIPET's market exit would allow it to later recover all the lost profit.

Lastly, COREPLA allegedly refused to reach an agreement with CORIPET that would allow the latter to manage a quota of the plastic waste.

<sup>8</sup> ICA Decision of October 29, 2019, No. 27961.

Therefore, the ICA concluded that COREPLA abused its dominant position in the relevant market.

### ***The fine***

The ICA imposed on COREPLA a fine amounting to € 27,400,477. In the ICA's view, COREPLA's breach of Article 102 TFEU was particularly serious because it was aimed at hindering its only competitor's entrance in the market. COREPLA's abuse was found to have started on April 24, 2018 — when CORIPET was granted a temporary authorization — until December 31<sup>st</sup>, 2019 — when COREPLA complied with the ICA's interim measures.

---

**AUTHORS**

**Alessandro Comino**  
+39 02 7260 8264  
[acomino@cgsh.com](mailto:acomino@cgsh.com)



**Natalia Latronico**  
+39 02 7260 8666  
[nlatronico@cgsh.com](mailto:nlatronico@cgsh.com)



**Chiara Militello**  
+39 06 6952 2613  
[cmilitello@cgsh.com](mailto:cmilitello@cgsh.com)



**Chiara Neirotti**  
+39 02 7260 8644  
[cneirotti@cgsh.com](mailto:cneirotti@cgsh.com)



**Michael Tagliavini**  
+39 06 6952 2824  
[mtagliavini@cgsh.com](mailto:mtagliavini@cgsh.com)



**Ilaria Tucci**  
+39 06 6952 2674  
[itucci@cgsh.com](mailto:itucci@cgsh.com)

---

**EDITORS**

**Giulio Cesare Rizza**  
+39 06 6952 2237  
[crizza@cgsh.com](mailto:crizza@cgsh.com)

**Gianluca Faella**  
+39 06 6952 2690  
[gfaella@cgsh.com](mailto:gfaella@cgsh.com)

---

**SENIOR COUNSEL, PARTNERS, COUNSEL AND SENIOR ATTORNEYS, ITALY**

**Mario Siragusa**  
[msiragusa@cgsh.com](mailto:msiragusa@cgsh.com)

**Matteo Beretta**  
[mberetta@cgsh.com](mailto:mberetta@cgsh.com)

**Marco D'Ostuni**  
[mdostuni@cgsh.com](mailto:mdostuni@cgsh.com)

**Gianluca Faella**  
[gfaella@cgsh.com](mailto:gfaella@cgsh.com)

**Giulio Cesare Rizza**  
[crizza@cgsh.com](mailto:crizza@cgsh.com)

**Fausto Caronna**  
[fcaronna@cgsh.com](mailto:fcaronna@cgsh.com)

**Saverio Valentino**  
[svalentino@cgsh.com](mailto:svalentino@cgsh.com)

**Marco Zotta**  
[mzotta@cgsh.com](mailto:mzotta@cgsh.com)

**Luciana Bellia**  
[lbellia@cgsh.com](mailto:lbellia@cgsh.com)

