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Italian Competition Law Newsletter

Highlights

— Milan Court of Appeal declares inadmissible as manifestly unfounded appeal against Court of Milan judgment on follow-on action for damages brought against Italian electronic communications sector incumbent

— TAR Lazio annuls ICA Decision on agreement on remuneration for SEDA service

The Milan Court of Appeal declares inadmissible as manifestly unfounded an appeal against a judgment by the Court of Milan that dismissed a follow-on damages action brought against the Italian electronic communications sector's incumbent

On June 7, 2021,[1] the Milan Court of Appeal (the "**Court of Appeal**") declared inadmissible an appeal brought by Irideos S.p.A. ("**Irideos**"; formerly, Enter S.r.l., "**Enter**") against a Court of Milan judgment that had entirely dismissed a follow-on damages action against Telecom Italia S.p.A. ("**TIM**") for alleged abuse of dominance in the provision of wholesale access services[2] found by the Italian Competition Authority (the "**ICA**") in 2013, on the ground that the appeal did not have a reasonable chance of being upheld, pursuant to Articles 348-*bis* and *ter* of the Italian Code of Civil Procedure (the "**CCP**").

Background

In order to provide electronic communications services to final customers, other authorized operators ("**OAOs**") normally need access to TIM's fixed network. When OAOs acquire new customers, they send TIM a request to activate the wholesale access services needed to provide users with retail electronic communications services. This process can either have: (a) a positive outcome, leading to the provision of the retail service to final customers; or (b) a negative outcome, when TIM communicates the presence of one of the circumstances provided for by sector-specific regulation, which prevent the activation of wholesale access services.

[1] Milan Court of Appeal, Judgment No. 1880 of June 7, 2021.

[2] Court of Milan, Judgment No. 11772 of December 18, 2019.

In a decision dated May 9, 2013, in the A428 case (the "**A428 Decision**"), the ICA stated that, in the period 2009-2011, TIM had abused its dominant position by communicating an unjustifiably high number of refusals to activate wholesale access services ("**KOs**"), in order to hinder the expansion of competitors in the markets for voice telephony services and broadband internet access.[3] In particular, the ICA found that the procedures for the provision of wholesale access services to competitors and to TIM's commercial divisions were different. In the ICA's view, the differences between external and internal procedures were not as such unlawful, but they had resulted, *de facto*, in higher percentages of KOs for competitors compared to TIM's commercial divisions.

In 2017, Enter brought a follow-on action against TIM, claiming that it had been harmed by the above-mentioned conduct. The OAO alleged that TIM had communicated to it an unjustifiably high number of KOs, and asked the Court of Milan to award damages amounting to around €1.9 million. In particular, Enter maintained that the excessively high number of KOs communicated by TIM had resulted in a loss of customers and an increase in the costs sustained by the OAO to submit the requests for activation.

TIM argued, *inter alia*, that a statistical analysis did not demonstrate a negative impact of the contested conduct on the OAO concerned, as Enter had actually activated, in percentage terms, more customers than TIM's internal commercial divisions. TIM also argued that Enter had not adequately alleged and proved any refusals to activate wholesale access services that was not justified by the circumstances provided for by sector-specific regulation. Accordingly, there was no evidence of the damage allegedly suffered and a causal link between such damage and the alleged conduct.

In a judgment dated December 18, 2019,[4] the Court of Milan rejected Enter's request and ordered it to reimburse the costs of the proceedings.

In the Court's view, the claimant had not adequately established that: (a) it was actually harmed by the conduct fined by the A428 Decision; and (b) there was a causal link between such conduct and the alleged harm. The Court found that, in civil proceedings, the statistical analysis of the percentage of refusals to activate communicated to Enter – which in any case did not provide clear evidence of discriminatory treatment – is not sufficient to demonstrate the alleged wrongdoing, as it can only constitute circumstantial evidence or reinforce and confirm further evidence. In the case at hand, the available evidence showed that Enter regularly checked whether the refusals to activate communicated by TIM were actually justified by the circumstances provided for by sector-specific regulation. As the claimant had not alleged which KOs, or groups of KOs, were in its view unlawful or unjustified, the Court held that Enter had not met its burden of alleging and proving to have suffered damages as a result of the contested conduct.

Following a merger by acquisition with Enter, Irideos challenged the judgment on multiple grounds, which essentially focused on errors allegedly committed by the Court of Milan in the interpretation and application of the principles on standard of proof. TIM contested that the appeal was inadmissible pursuant to Article 348-*bis* of the CCP, as it did not have a reasonable chance of being upheld, and in any case should have been dismissed on the merits. In particular, TIM argued, *inter alia*, that (i) none of Irideos's grounds of appeal was capable of overturning the judgment of first instance, insofar as they merely focused on the burden of proof, while the Milan Court had found that the action was also vitiated by serious shortcomings in the allegation of the facts upon which the claim was based; (ii) in any case, the Milan Court had correctly interpreted and applied the principles on the burden of proof.

[3] ICA Decision No. 24339 of May 9, 2013, Case A428, *Wind-Fastweb/Condotte Telecom Italia*. The decision was subsequently upheld by the TAR Lazio (Judgment No. 4801/2014) and the Council of State (Judgment No. 2479/2015).

[4] Court of Milan, Judgment No. 11772.

The decision of the Milan Court of Appeal

In decision No. 1880 of June 7, 2021, the Court of Appeal stated that Irideos's appeal was inadmissible under Articles 348-*bis* and *ter* of the CCP, because it did not have a reasonable chance of being upheld, and ordered the appellant to reimburse the costs of the proceedings.

The Court of Appeal stated that, in order to obtain a compensation for the damages allegedly suffered, the plaintiff has to allege and prove an anticompetitive conduct (at least characterized by negligence) and a causal nexus between the contested conduct and the alleged damage.

The Court acknowledged that, in private antitrust actions, the burden of proof on the plaintiff may be relieved to ensure an effective protection of the victims, when there is information asymmetry between the parties in their access to evidence.

However, in the case at hand, the Court of Appeal held that Enter had not satisfied the burden of alleging the elements of non-contractual liability.

The Court noted that there was no asymmetry in access to evidence capable of justifying a derogation from the general principles on the burden of allegation and proof. Enter itself had acknowledged that it had access to the relevant information, as it could verify whether the KOs communicated by TIM were justified (including by contacting final customers, in case of problems relating to them). Therefore, Enter could have provided the court with circumstantial evidence of allegedly unlawful KOs communicated by TIM, by identifying the KOs it considered not justified by the circumstances provided for by sector-specific regulation, or by indicating the criteria to identify such KOs.

Thus, the Court of Appeal confirmed that a mere statistical analysis of the percentage of KOs communicated by TIM to Enter was not sufficient to satisfy the burden of allegation and proof on the plaintiff. Furthermore, the Court held that the decision of the Court of Milan to dismiss Enter's request for an expert report was correct, as the request was exploratory and aimed at curing the deficiencies in the allegation of the relevant facts through the use of alleged statistical evidence.

For the abovementioned reasons, the court concluded that the appeal did not have any reasonable likelihood of being upheld, and declared it inadmissible pursuant to Articles 348-*bis* and *ter* of the CCP.

The case at hand is part of a series of follow-on actions based on the A428 Decision. The findings of the Court in this case could have important implications for the other ongoing cases based on the A428 Decision as well as, more generally, for the assessment of antitrust damages claims in follow-on actions.

TAR Lazio annuls ICA Decision on agreement on remuneration for SEDA service

In six judgments dated June 30 to July 1, 2021,[5] the Lazio Regional Administrative Court (the "**TAR Lazio**") set aside an infringement decision issued by the Italian Competition Authority ("**ICA**") against eleven Italian banks[6] and the Italian Banking Association (the "**ABI**"). The ICA decision concerned an alleged anticompetitive agreement aimed at coordinating business strategies in order to determine the remuneration model for the *Sepa Compliant Electronic Database Alignment* ("**SEDA**") service.[7]

[5] TAR Lazio Judgment Nos. 7708, 7709, 7710, 7713 and 7714 of June 30, 2021, and No. 7795 of July 1, 2021.

[6] Banca del Piemonte S.p.a., Banca Monte dei Paschi di Siena S.p.A., Banca Nazionale del Lavoro S.p.A. ("**BNL**"), Cassa di risparmio di Parma e Piacenza S.p.A., Banca Piccolo Credito Valtellinese S.p.A., Istituto Centrale delle Banche Popolari Italiane S.p.A., ICCREA Banca, Intesa SanPaolo S.p.A., Banca Sella S.p.A., UBI Banca S.p.A., Unicredit S.p.A.

[7] ICA Decision No. 26565 of April 28, 2017, Case I794, *ABI/SEDA*.

Background

The ICA decision

On April 28, 2017, following the investigation carried out in case I794, the ICA found that the ABI and eleven banks (together with the ABI, the "**Parties**") had put in place a single agreement aimed at coordinating their commercial strategies in relation to the remuneration model for the SEDA service.

The SEDA service was set up in the context of the Single European Payments Area ("**SEPA**"), which progressively replaced, in Italy, the previous direct debit system for bills, called RID, with the SEPA Direct Debt ("**SEPA DD**") service. The system allows consumers to pay periodic charges (for example for household bills) directly through a withdrawal from their bank account.

Currently the system includes the actual payment (the SEPA DD service) and an information service addressed to, and paid for, by billers (the SEDA service). In particular, the purpose of the SEDA service is to exchange the mandate-related information between the bank of the creditor and the bank of the debtor prior to the first debit collection, thus ensuring the same information fields previously included in the RID payment service, but not in the SEPA DD.

However, while the RID system provided for a single commission to be paid by the creditor, the SEPA service provides for three: (i) a so-called "*collection fee*", which remunerates exclusively the SEPA DD service and is paid to the payment service provider ("**PSP**") of the beneficiary; (ii) a SEDA service's subscription fee, which is paid to the PSP of the payer; and (iii) a fee remunerating the alignment services included in the SEDA and paid to the PSP of the beneficiary.

According to the ICA, the parties entered into a restrictive agreement having as its object the definition of a system of remuneration for the SEDA service, aimed at increasing the price of such service. In particular, according to the ICA, the Parties agreed that:

i. the price of the SEDA would be defined freely by each bank and set, in its maximum value, through publication on the SEPA website;

ii. in the absence of a specific negotiation, the beneficiary would pay the maximum fee to the debtor's bank directly, through the adoption of a so-called "*1 to many*" mechanism;

iii. they would coordinate the methods of application of the SEDA commission fees to the old RID mandates before the entry into force of the SEPA.

Also taking into account that, as a result of ABI Circular No. 14/2013, this model was transformed into an interbank agreement, to which more than 500 members of the ABI were party, the ICA held that the agreement had had a broad impact on the market, by leading to a general increase in prices.

However, taking into the circumstances of the case at hand, the ICA decided not to impose financial penalties, given the non-seriousness of the infringement, also in light of the regulatory and economic context in which the conduct took place, as well as of the fact that, during the proceedings, the parties had proposed a new system of remuneration capable of reducing the overall cost of the SEDA service, to the benefit of firms using it and, ultimately, final customers.

The TAR Lazio judgments

In June and July 2021, the TAR Lazio upheld the appeals brought by the Parties and annulled the ICA decision.

First, the Parties – except BNL, which did not raise this issue – successfully challenged the ICA's delay in initiating proceedings. The ICA opened the proceedings on January 21, 2016, but the Parties proved that it was aware of the conduct since the end of 2012.

The TAR Lazio held that, although the 90-day term provided for by Article 14 of Law No. 689 of November 24, 1981, does not directly apply to the duration of the preliminary investigation phase, this phase cannot be extended for an indefinite

period of time. The ICA must commence proceedings within a reasonable timeframe (i.e., a period not exceeding some months) from the complaints filed with it, also in light of the due process right protected by Article 6 of the European Convention on Human Rights and the right to good administration established by Article 41 of the EU Charter of Fundamental Rights. The starting date to calculate such timeframe coincides with the acquisition of full knowledge of the alleged anticompetitive conduct.

Having noted that the ICA was aware of all the details of the conduct in December 2013, the TAR Lazio concluded that the ICA's decision to start the investigation two years later was contrary to the principles of good management and efficiency of administrative action.

Second, the Parties successfully challenged the ICA's conclusion that they had intended to alter the competitive dynamics for the setting of remuneration prices for the SEDA service, with a view to keeping prices artificially high. In this respect, the TAR Lazio held that, in light of available evidence in the file of the proceedings, it was clear that the Parties' intention was to identify an appropriate remuneration mechanism for the new service, in order to ensure the remuneration allowed the PSP of the payer to apply a profitable consideration, while remaining autonomously decided by each service provider, in compliance with antitrust rules.

In light of the above, the TAR Lazio annulled the ICA Decision.

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