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# Italian Competition Law Newsletter

## Highlights

- On March 7 the ICA closed its investigation into the alleged margin squeeze on custody services providers by Monte Titoli S.p.A., the dominant undertaking in the post-trade settlement market, by accepting the commitments offered by the company.

## The ICA accepts commitments for an alleged abuse of dominance in the post-trading sector: the *Monte Titoli* case

On March 7, 2019, the Italian Competition Authority (the “ICA”) made legally binding the commitments offered by Monte Titoli S.p.A. (“Monte Titoli”), a subsidiary of Borsa Italiana (which belongs to the London Stock Exchange), active in the post-trading sector.<sup>1</sup> Monte Titoli’s commitments were found to address adequately the ICA’s concerns that the company may have infringed Article 102 TFEU by abusing its dominant position on the securities trading settlement market in order to squeeze competitors’ margins in the custody services market.

### Case Summary

Monte Titoli holds a statutory monopoly in Italy’s post-trade settlement market. In its capacity as the Central Security Depository (“CSD”) issuer – *i.e.*,

the entity where all the securities in Italy are stored – it is the only company that is allowed to complete the settlement of the securities.<sup>2</sup> Therefore, companies that are active on the auxiliary market for custody services of securities must purchase settlement services from Monte Titoli.

According to the ICA, Monte Titoli had charged its customers €0.50 per transaction for its settlement and custody services combined, while it charged competing custody providers €0.47 to 0.48 for access to its settlement services. This conduct might have amounted to margin squeeze on the ground that it left competitors with an insufficient margin to be able to replicate Monte Titoli’s retail offers. The aspects of the case deserving a more thorough analysis are discussed below.

<sup>1</sup> ICA Decision of March 7, 2019, No. 27582, in Case A505 – *Monte Titoli/Servizi di post-trading*, *Weekly Bull.* No. 12/2019, p. 27.

<sup>2</sup> Decision of the Bank of Italy, adopted jointly with the Italian Securities Regulatory Commission (CONSOB), on October 30, 2000. Following the set-up of the European platform T2S, Monte Titoli is the only entity allowed to provide settlement services on such platform and to operate as CSD also in light of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012. The CSD Regulation lays down uniform requirements for the settlement of financial instruments in the EU and rules on the organization and conduct of CSDs to promote safe, efficient and smooth settlement. In its capacity as national CSD, Monte Titoli applied for re-authorization to operate as CSD pursuant to the CSD Regulation.

## Definition of the relevant markets

The sector affected by the alleged abuse of dominance relates to the organization and management of the platforms for the exchange of financial instruments (the stock exchanges). In particular, the ICA focused on post-trade services, which include primary settlement services and auxiliary services, such as secondary settlement and custody services.

Primary settlement services comprise the delivery and transfer of ownership of the securities after a trade has been completed. The transfer of ownership is registered by the CSD issuer. In addition to the primary settlement services provided by the CSD issuer, the so called custodians offer secondary settlement services. These services are provided downstream from the primary settlement services and, where the custodians cannot internalize the transfer of securities, their provision depends on the primary settlement services offered by the CSD. Similarly, the provision of other value added services provided by the custodians, such as custody services, depends on CSD issuers such as Monte Titoli.

According to the ICA, the relevant geographic market for the securities trading settlement and the auxiliary services is national given that national securities (shares, bonds and government bonds) are stored in the national CSD.

## Monte Titoli's dominant position

Monte Titoli is the dominant undertaking in the (upstream) market for primary settlement services, given that the CSD issuer is the only player in Italy licensed to provide primary settlement services on the European platform T2S. In particular, since all the financial instruments issued in Italy are stored at Monte Titoli, the company can register all the transfers of ownership of such instruments.

Monte Titoli is also active in the (downstream) market for secondary settlement services and other auxiliary services, in competition with the custodians.

Therefore, Monte Titoli has a dual role in the markets for securities trading settlement and auxiliary services, such as custody services: (i) it

provides the market infrastructure in the market for primary settlement services, where it holds a monopoly; and (ii) in the market for the provision of secondary settlement services and other auxiliary services, it competes with the so-called Directly Connected Parties (the "DCPs"), *i.e.*, the custodians, which can also use directly the T2S platform.

## The allegedly abusive conduct

Monte Titoli's suspected abuse of market power allegedly took place through: (i) margin squeeze against competing custodians providing secondary settlement services and custody services; and (ii) the application of more favorable settlement commissions to foreign CSDs than those applied to national custodians.

In referring to the margin squeeze conduct, the ICA found that Monte Titoli charged different prices for settlement services to competing custodians, and for its bundled settlement and custody services.

In particular, when providing settlement services to custodians operating as DCPs, Monte Titoli charges them €0.47 to 0.48 per transaction, whereas customers purchasing Monte Titoli's settlement and custody services together (so-called Indirectly Connected Parties, the "ICPs") are charged €0.50 per transaction.

According to the ICA's decision to open the investigation in Case A505, in light of the very small difference in the prices paid by DCPs and ICPs, Monte Titoli's integrated retail offers could likely not be replicated by its competitors as no room was left for custodians to compete with Monte Titoli for the provision of custody services. Moreover, the effects of this exclusionary strategy were allegedly strengthened by Monte Titoli's policy of offering rebates to its new customers.

The ICA suspected that Monte Titoli engaged also in price discrimination conduct, noting that, according to its price list, foreign CSDs operating on the T2S platform were charged €0.10 per settlement transaction, *i.e.*, €0.09 per transaction less than the price charged to Italian custodians. According to the ICA, since foreign CSDs (acting

as investor CSDs) could provide custody services in Italy, Monte Titoli's conduct creates the potential for distorting competition with Italian custodians in the supply of settlement services.

### **The commitments**

In order to address the ICA's concerns, Monte Titoli committed to:

1. Using the same pricing structure for ICPs and DCPs, separating, for both categories of operators, the costs of the T2S platform settlement services offered directly by the ECB (which Monte Titoli merely passes on to DCPs and ICPs as a component of its final tariff) and those of the services offered by Monte Titoli;
2. Providing CONSOB and the Bank of Italy with the details of the total costs for the provision of services to DCPs, ICPs and investor CSDs;
3. Discontinuing the offer of rebates to its new customers; and
4. Setting up, within one month of the acceptance of Monte Titoli's commitments, the Users Committee envisaged in the CSD Regulation – i.e. an advisory body composed by issuers and participants in the securities settlement system of a CSD, which can issue non-binding reasoned opinions to the CSD management body concerning its payment structure. Accordingly, the Users Committee will be established earlier than required by the CSD Regulation, under which the Users' Committee must be established after obtaining the regulatory license to operate as national CSD.

Commitments 1 and 3 have a five-year duration, while commitments 2 and 4 were offered for as long as Monte Titoli is authorized by the CONSOB and the Bank of Italy to operate as the national CSD.

In assessing the said commitments, after they were clarified by the company in light of the results of the market test, the ICA focused on the provision of settlement services through the T2S platform and the relevant regulatory framework.

In particular, the ICA noted that the T2S platform was created in order to allow the CSDs to operate

on a single platform to provide settlement services for (national and cross-border) transfers of securities. With the creation of the T2S platform, the rules, functioning and (partially) the tariffs for settlement services have been harmonized and are applicable at the international level, according to the ECB's requirements. Therefore, the national CSD issuers cannot derogate from the rules on the functioning of the T2S platform. The ICA also mentioned the CSD Regulation, which imposes upon CSDs the obligation to use an analytical accounts system for the provision of 'basic services', and envisages the creation of a Users' Committee, which can issue a reasoned opinion on CSD pricing structures.

In referring to Commitment 1, the ICA noted that, as a result thereof, the transparency of Monte Titoli's tariffs will increase significantly, so as to reduce the possibility to charge ICPs prices capable of squeezing DCPs' margins.

With reference to Commitment 2, the ICA noted that it complements the first one and anticipates in time, with more stringent provisions, the application of the obligations introduced by the CSD Regulation.

According to the ICA, Commitment 3 may prevent unlawful discrimination among financial intermediaries.

Finally, the ICA noted that Commitment 4 will make it possible for Monte Titoli and its customers to engage in formal discussion on the strategies and the tariffs to be applied.

In light of the above, the ICA concluded that Monte Titoli's commitments are suitable for remedying the competition concerns that had led it to open the investigation. Indeed, also in the light of the special features of the markets and the relevant regulatory framework, the ICA reasoned that implementation of the commitments in question would render Monte Titoli's tariffs more transparent, significantly reducing the risk that the company engage in margin squeeze conduct. The commitments will also allow Monte Titoli's conduct to be monitored and its discretion to be restricted as far as pricing decisions are concerned, in particular preventing the company

from subsidizing the tariffs charged to a certain category of operators through a higher level of commissions applied to others. The ICA also took the view that Monte Titoli's commitment to discontinue the application of rebates to its new customers will contribute to the equal treatment of financial intermediaries, which moreover, upon of the setting up of the Users' Committee, will be able to interact with Monte Titoli, including by issuing non-binding reasoned opinions concerning the settlement tariffs applied by the CDS issuer.

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