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Highlights

— Fiber roll-out and abuse of rights: ICA fines TIM over €100 million for abusing its dominant position in the wholesale and retail markets for broadband and ultra-broadband telecommunications services in Italy

— The Council of State annuls an ICA decision imposing interim measures on Taxi Torino in an investigation into an alleged abuse of dominance in the market for the collection and sorting of orders for taxi services in the City of Turin

— The Council of State definitively upholds the 2016 ICA decision to fine Aspen for charging excessive prices for oncological drugs

— The TAR Lazio quashes the ICA decision imposing commitments on Sky after the withdrawal of its notification of the acquisition of R2

Fiber roll-out and abuse of rights: ICA fines TIM over €100 million for abusing its dominant position in the wholesale and retail markets for BB and ultra-BB telecommunications services in Italy

On February 25, 2020, the Italian Competition Authority (the "**ICA**") imposed on Telecom Italia S.p.A. ("**TIM**") a fine of approx. € 116.1 million for abusing the dominant position it held both in the national market for wholesale access services to, and in the national market for retail telecommunications services on, the broadband ("**BB**") and ultra-broadband ("**UBB**") fixed network, in violation of Article 102 of the Treaty on the Functioning of the European Union (the "**TFEU**").[1]

The Italian Strategy for High-Speed BB and Infratel tenders

By way of background, on March 3, 2015, the Italian Government, in line with the Europe 2020 Agenda, approved the Italian Strategy for

[1] ICA Decision No. 28162, Case A514, *Condotte fibra Telecom Italia* (the "**Final Decision**").

High-Speed BB (the "**Strategy**"), intended to cover most of the territory of the country with infrastructure capable of offering services at high-speeds.

To implement the Strategy, the Government decided to intervene directly in the so-called white areas of market failure (i.e. those areas where, in the absence of public subsidies, private investment in innovative infrastructure would not take place). The direct public intervention consisted of building a network of public property to be made available to all operators wishing to activate services for citizens and businesses. In the white areas, it was considered necessary: to correct social and geographic inequalities generated by the absence of private initiatives from businesses; and to encourage investments for the spread of passive infrastructure enabling a next generation network access service.

Infratel Italia S.p.A. ("**Infratel**") – an in-house company of the Italian Ministry of Economic Development, tasked with the implementation of the Strategy – carries out periodically a public consultation in order to: obtain updated information on the available high-speed BB connectivity offered by telecom operators; identify geographical areas where operators have not so far deployed their own infrastructures (or do not have an interest to do so within the next three years); and, thus, identify the areas eligible for public intervention, which will be affected by the aid measures referred to in the Strategy.

In 2015, Infratel carried out the public consultation for the periodic updating of the map related to the available connectivity and, in 2016, it launched the first two tenders for building an UBB network in the white areas using public funds. TIM actively participated in both tenders, at least in the first phase. In the first tender, it also submitted a bid, ranking second to Open Fiber S.p.A. ("**Open Fiber**"), a 50:50 joint venture between Enel S.p.A. ("**Enel**") and Cassa Depositi e Prestiti Equity S.p.A. In the second tender, TIM, after being admitted to participate in the procedure, did not submit an offer. Taking a new strategic approach to infrastructure deployment in the white areas, TIM announced an autonomous coverage plan.

The opening of the investigation

On June 28, 2017, the ICA started its investigation under Article 102 TFEU into TIM's conduct, which it argued was aimed at delaying fiber roll-out. The ICA took action on the basis of several complaints, notably including the following ones.

— Infratel alleged that TIM abused its dominant position, with a view to unlawfully interfering with the tenders launched by Infratel, by: requesting a change, pending the outcome of those tenders, in its investment plan, contrary to what it had stated in the preliminary phase; publicly announcing its decision to withdraw from the subsequent phases and to invest in an autonomous coverage plan; and submitting numerous applications to national and European judicial and administrative authorities to instrumentally delay the Infratel tenders;

— Enel and Open Fiber accused TIM of hindering Open Fiber's investment plan throughout the country, both in and outside the white areas, by means of anticompetitive practices;

— Vodafone Italia S.p.A. complained about TIM's conduct in the market for retail BB and UBB telecom services including, among other things: the launch of commercial offers that competitors could non replicate; the transfer of privileged information from the Wholesale Division to the Retail Division of TIM; and lock-in clauses in the offers to end customers;

— Wind Tre S.p.A. alleged, among other things, that TIM had engaged in the anticompetitive lock-in of its UBB customers.

On February 14, 2018, following the filing of further complaints by third parties, the ICA extended its investigation to conduct regarding TIM's pricing strategy in the wholesale market for BB and UBB access services, and the use of privileged information regarding customers of alternative operators in the retail market for BB and UBB telecom services.

The ICA's findings

In the Final Decision, the ICA established that TIM engaged in a single and complex exclusionary strategy qualifying as an abuse of rights, comprising several types of abusive conduct aimed at distorting competition in the wholesale and retail markets for BB and UBB telecom services in Italy. In the ICA's view, TIM's strategy, although it was carried out through conduct that was legitimate in principle, pursued an aim not worthy of protection, that is, to restrict and distort competition in a particularly strategic market for the development of the country, by attempting to hinder the entry of new operators into those markets and unjustifiably preserving its market power. Based on the premise that competition in the telecom sector no longer takes place only in terms of prices, but also in terms of service quality, investment and innovation, the ICA held that the goal of TIM's strategy was to prevent both infrastructure-based competition and competition in the market for retail services.

TIM's conduct in the wholesale market

According to the Final Decision, TIM's anticompetitive conduct in the wholesale market included: raising obstacles to the Infratel tenders for coverage of the white areas with FTTH (Fiber-To-The-Home) networks, and initiating obstructive legal actions to preserve the historical monopoly of TIM in these territories and to prevent the entry of new competitors, like Open Fiber; and in non-white areas – throughout the rest of the country – repricing its wholesale offer, so as to pre-empt the contestable customer base.

Regulatory gaming and sham litigation against Infratel and Open Fiber

TIM's strategy consisted of: informing Infratel of changes in the scope and mapping of its investments; withdrawing from the subsequent phases of the tenders and starting the unilateral implementation of its investment plan, pending the outcome of the Infratel tenders in the same areas; and, at the same time, initiating groundless and abusive legal proceedings with the aim of hindering the process of the Infratel tenders.

In the ICA's view, TIM's conduct created a situation of uncertainty surrounding the competitive procedures, which put the prospective investments in UBB networks in the white areas at serious risk. This raised serious doubts about the sustainability of the investments planned by its competitors, such as Open Fiber, which planned to build more innovative networks than those of TIM.

As a result, TIM's strategy prevented the development of infrastructure-based competition in Italy, thereby preserving technologically inferior solutions. In fact, the change in TIM's investments plan and the abusive legal proceedings brought by the company delayed the award of the Infratel tenders, whereas TIM achieved in a few months an alternative coverage of the white areas with technologically sub-optimal investments.

Repricing of TIM's wholesale offer

TIM's strategy in the wholesale market extended also to the non-white areas through a repricing policy concerning its wholesale offer, aimed at securing the maximum share of fixed lines to TIM's network before the FTTH coverage announced by Open Fiber could become available.

In the ICA's view, such conduct represented the other pillar of TIM's exclusionary strategy in the wholesale market: TIM's conduct aimed at causing the failure of the Infratel tenders, so as to prevent Open Fiber from entering the white areas dominated by TIM. Moreover, in the non-white areas TIM completely reformulated the terms of its wholesale offer to pre-empt the contestable customer base. In particular, TIM significantly reduced the FTTH Virtual Unbundled Local Access (VULA) prices, and started marketing a new version of its Easy Fiber offer, which notably included lock-in clauses.

TIM's conduct in the retail market

As established in the Final Decision, TIM also engaged in abusive conduct aimed at securing new customers in the new UBB telecom services retail segment.

Lock-in clauses and retail prices non-replicable by competitors
In the ICA's view, TIM launched retail offers aimed at pre-empting the relevant market's contestable demand and, therefore, at unduly preserving its market share. In particular, by increasing switching costs, TIM secured the maximum share of contestable customers, in order to strengthen the pre-emption of and lock-in effects for customers that the company had already pursued in the wholesale market. To this end, TIM also set terms and conditions binding customers for an excessively long period of time.

The pre-emption of the most profitable demand segment, in the ICA's view, pursued a twofold anticompetitive objective: to drain the residual demand available to Open Fiber, by maximizing the share of captive demand, compared to alternative wholesale access service providers; and to strengthen TIM's dominant position also in the market for retail services, to the detriment of the alternative operators' commercial offers.

Misuse of privileged information
The ICA also scrutinized the alleged abuse by TIM of the privileged information concerning the management of the network activities that was available to it, which was aimed at gaining customers of alternative operators in the retail market.

However, at the end of the investigation, the ICA held that, although the evidence in the casefile revealed a widespread use, for commercial purposes, of sensitive information concerning the network's management activities, no elements proved TIM's deliberately anticompetitive intent. On the contrary, TIM took several initiatives to counter these occurrences. In particular, it adopted specific measures to ensure the separation of the information systems, with the aim of limiting the risk of misuse of privileged information. According to the ICA, therefore, TIM could not be held liable even on the basis of its inaction.

The amount of the fine

The ICA imposed a fine of €116.1 million on TIM. In calculating the amount of the fine, the ICA considered the value of its sales in the wholesale and retail markets.

The basic amount
To determine the basic amount of the fine, the ICA, having characterized TIM's conduct as a serious violation, applied a percentage in the 1-5% range to the relevant value of sales. Nevertheless, the ICA acknowledged that TIM, after the opening of the procedure, did not complete the implementation of its autonomous coverage plan drawn up for the white areas, and froze the marketing of the network infrastructure already in place before the investigation started.

Mitigating factors
After setting the basic amount of the fine, the ICA reduced by 5% the fine imposed on TIM in view of the fact that it had amended its already existing antitrust compliance program in the course of the investigation. In this respect, according to the ICA, the pre-existing programs did not serve their intended purpose (that is, preventing antitrust infringements), since top-level figures in TIM's corporate management were involved in setting up the abusive strategy.

The ICA also reduced by 15% the fine imposed on TIM considering that, pending the investigation, it only marketed the new wholesale offer to a small number of lines, which were sold to a few small operators.

Specific circumstances of the case pursuant to paragraph 34 of the ICA's Fining Guidelines
Finally, the ICA reduced by 70% the fine imposed on TIM pursuant to paragraph 34 of its Fining Guidelines, according to which the specific circumstances of the case or the need to achieve

a particular deterrent effect may allow justified exceptions from application of the Guidelines, which must be expressly referred to in the statement of reasons of the decision finding the infringement being punished.

In this respect, the Final Decision took into account the initiatives undertaken by TIM to reduce the impact of its conduct in the retail market. In particular, TIM ensured that its promotional offers, in spite of the lock-in clauses, could be replicated by its competitors, and changed the terms and conditions of the offers that, in the ICA's view, were affected by the most serious lock-in elements.

The Council of State annuls an ICA decision imposing interim measures on Taxi Torino in an investigation into an alleged abuse of dominance in the market for the collection and sorting of orders for taxi services in the City of Turin

On March 3, 2020, the Council of State granted the appeal filed by Società Cooperativa Taxi Torino ("**Taxi Torino**") against the judgment issued by the Regional Administrative Tribunal for Latium (the "**TAR Lazio**") on June 7, 2019.[2] The TAR Lazio had upheld the ICA decision of November 29, 2018, which imposed interim measures in an investigation concerning an alleged abuse in the market for the collection and sorting of orders for taxi services in Turin.[3]

Factual Background

By a decision adopted on November 29, 2018, the ICA imposed interim measures on Taxi Torino, a cooperative of taxi operators, found to hold a dominant position in the market – which is upstream for the taxi service market – for the collection and sorting of orders for taxi services in the City of Turin (the "**Decision**"). In particular, the ICA's investigation focused on a clause of Taxi Torino's by-laws, which imposed a non-compete obligation on taxi drivers participating in Taxi Torino's network. According to the ICA, the said clause hindered entry by open platforms (such as the MyTaxi app) on the relevant market, and was neither indispensable for the smooth functioning of Taxi Torino's network nor proportionate to this aim. Given that, in the ICA's view, the conditions for the adoption of interim measures were met, it ordered Taxi Torino to cease the application of the non-compete clause pending a final decision on the alleged abuse.

On June 7, 2019, the TAR Lazio rejected the appeal filed by Taxi Torino and upheld the interim measures adopted by the ICA, holding that: (i) the service of collecting and sorting orders for taxi services provided through apps, by phone or radio constitutes a distinct relevant market; (ii) the non-compete clause at issue was binding on taxi drivers participating in Taxi Torino's network, and thus aimed at limiting competition; and (iii) the interim measures issued by the ICA were reasonable and well grounded.

[2] Council of State, Judgment No. 1547/2020 (setting aside TAR Lazio judgment No. 7463/2019).

[3] ICA decision of November 29, 2018, No. 27434, A521, *Attività di intermediazione della domanda di servizi taxi nel comune di Torino*.

The Council of State's ruling

As mentioned, the Council of State set aside the TAR Lazio Judgment and annulled the Decision.

The legal standard for the adoption of interim measures

First, the Council of State clarified the legal standard that must be met by the ICA when it adopts interim measures. According to the Council of State, Article 14-*bis* of Law No. 287/1990 – which governs the ICA's power to adopt interim measures, and must be interpreted in compliance with Article 8 of Regulation 1/2003 – requires that the ICA adopt interim measures only where its theory of harm is clear. Indeed, according to the Council of State, one of the conditions for the ICA to adopt interim measures is that there be an actual risk of lessening of competition, not only the need to reach a decision as a matter of urgency. Moreover, the ICA interim order must take into account all the economic interests concerned, especially because the measures adopted may permanently shape competitive dynamics in the relevant market.

The Court added that the interim measures adopted by the ICA, differently from those adopted by courts, should be understood as prudential measures, aimed at making the markets more efficient, protecting consumers and making competitive markets more stable. Finally, according to the Council of State, the likelihood that the ICA adopt a final decision differing substantially from the interim measures should be low (the opposite outcome reflecting the fact that the final decision would be already affected by the effects of the interim measures that were previously adopted).

The ICA's relevant market definition

Secondly, the Council of State considered whether the relevant market definition in the ICA decision complied with the said legal standard for the adoption of interim measures. It ruled that this was not the case on the ground that the ICA, instead of accurately defining the relevant market, postponed the complete market definition exercise to the final decision. According to the Court, especially in abuse of dominance cases, the ICA's failure to define the relevant market entails uncertainty over which market it is protecting by the interim measures being adopted, and the very existence of competition concerns.

In particular, the Council of State took issue with the ICA's failure to provide empirical data showing that the market for the collection and sorting of orders for taxi services offered through apps in the City of Turin were clearly substitutable, from the standpoint of consumers, with the similar services concerning orders by phone or radio. The Court agreed with Taxi Torino that such substitutability, albeit theoretically possible, was and still is unlikely at present, and that its demonstration would have required further investigative efforts on the part of the ICA. In particular, such demand-side substitutability could not be inferred from the fact that the means used to book taxi services has no relevance for taxi drivers, given that the only relevant aspect from their perspective is the provision of the transport service to the end user, regardless of how the taxi is booked and paid (supply-side substitutability).

Taxi Torino had argued that the apps that allow users to book taxis have features (such as geo-localization and the possibility to pay through the app) that make them irreplaceable by the more traditional means of booking taxis, such as phone and radio. In this respect, the Council of State disagreed with the TAR Lazio that these features merely improve consumer convenience, as they are actually capable of influencing the user experience.

Last, as to the relevant geographic market, the Council of State held that it is true that MyTaxi and Taxi Torino compete at the local level, but – in the context of the proceedings on the merits – the ICA should also consider that MyTaxi operates at a national level.

The necessity and proportionality of the interim measures

Thirdly, in assessing the ICA's interim order to Taxi Torino to cease the application of the

non-compete clause pending the final decision on its alleged abuse, the Council of State first noted that this measure was not consistent with a *prima facie* assessment of the case. According to the Court, far from constituting an abuse of dominance on the part of Taxi Torino, this clause was just an application of the duty of loyalty of the cooperative members towards their cooperative, as envisaged in Article 2527(2) of the Italian Civil Code. This provision does not allow cooperative members to exercise an economic activity that is in competition with that of the cooperative.

Further, according to the Court, the clause at stake was introduced by Taxi Torino with a view to limiting potentially unfair competition once it had entered the market for the collection and sorting of orders for taxi services in the City of Turin offered through apps and, indeed, following the signing of an exclusivity agreement for Taxi Torino's acquisition of the Wetaxi app. The Council of State also emphasized – contrary to what the ICA had done in its interim decision – that the low number of taxi drivers that activated the MyTaxi platform was due to the commercial policy of that company, rather than to the non-compete clause introduced by Taxi Torino.

The Council of State definitively upholds the 2016 ICA decision to fine Aspen for charging excessive prices for oncological drugs

On March 13, 2020, the Council of State rejected the appeal lodged by Aspen Pharma Trading Ltd., Aspen Italia s.r.l., Aspen Pharma Ireland Ltd., and Aspen Pharmacare Holdings Ltd. (together "**Aspen**") against the judgment issued by the TAR Lazio on July 26, 2017,[4] which upheld the 2016 ICA decision to fine Aspen in an amount in excess of € 5 million for charging excessive prices in violation of Article 102(a) TFEU.[5]

Factual background

On September 29, 2016, the ICA fined Aspen for abuse of dominance in the markets for drugs containing the active substances melphalan, chlorambucil, thioguanine, and mercaptopurine. The ICA held that, by adopting an extremely aggressive negotiation strategy when renegotiating prices with the Italian Medicines Agency (the "**AIFA**"), Aspen obtained an excessive and unjustified price increase of between 300% and 1500% for the oncological drugs Leukeran, Alkeran, Purinethol, and Thioguanine (the "**Cosmos Drugs**"), considered essential to treat some types of cancer.[6]

One year later the TAR Lazio rejected Aspen's application for annulment of the ICA decision.

The Council of State's judgment

Market definition and Aspen's dominance

Before the Council of State, Aspen took issue with the definition of the relevant product markets by the ICA. It contested the TAR Lazio's finding that the ICA did not manifestly err in defining separate relevant product markets for each active ingredient of the Cosmos Drugs. According to Aspen, the ICA wrongfully departed from the Anatomical Therapeutic Chemical ("**ATC**") classification system, an approach to market definition commonly used by the EU competition authorities.[7]

[4] Council of State, judgment No. 1832/2020; TAR Lazio, judgment No. 12806/2017.

[5] ICA Decision of September 29, 2016, No. 26185, Case No. A480, *Incremento prezzo farmaci Aspen*.

[6] Because of their classification in the Italian healthcare system, the prices of Cosmos Drugs are regulated by agreement between the right-holder and the AIFA, their costs being borne by the national health service. Aspen was the only pharmaceutical supplier holding the rights to market these drugs in Italy, having acquired the relevant business from GlaxoSmithKline ("GSK") in 2009.

[7] In the ATC classification system, drugs are divided into different groups according to the organ or system on which they act and their chemical, pharmacological, and therapeutic properties.

According to the Council of State, even though the traditional ATC classification system provides a useful indication of the possible markets, the ICA is not legally bound to use it. It agreed with the TAR Lazio that, in the case under review, specific circumstances existed that allowed the ICA to depart from this criterion. In the Council of State's view, particular attention should have been paid to drug substitutability with regard to the patients affected: because of their special features, Cosmos Drugs could not be substituted with other drugs for the treatment of certain diseases, especially those that need to be treated at home, and for some categories of patients (children and elderly people). They therefore constituted four separate relevant markets.

Furthermore, the Council of State agreed with the TAR Lazio that the ICA's assessment of Aspen's dominance was correct. Aspen virtually held a monopoly and there was no effective and potential competition in the relevant markets, also in the light of the different types of barriers to entry that characterized them.

Aspen's negotiation strategy

Aspen also took issue with the ICA's finding that Aspen's complex negotiation strategy constituted an abuse of its renegotiation rights, which according to Aspen was a misrepresentation of the facts. Contrary to what the ICA decision established, Aspen had the right to request the AIFA to approve a new classification for the same drugs and to withdraw the drugs from the market, although only for a limited period, pursuant to the sectoral regulation. Moreover, Aspen never acted in an intimidating manner towards the AIFA or left the Italian patients without supplies of the Cosmos Drugs.

The Council of State clarified that the lawfulness of Aspen's actions was to be assessed as a whole, rather than separately for each type of conduct. The Court pointed out that Aspen's entire negotiation strategy aimed at achieving excessive prices for the Cosmos Drugs, as proved also by the documents found during the dawn raids. In particular, Aspen exercised its rights to renegotiate the prices for Cosmos Drugs in an abusive manner, leveraging on the essential character of the drugs for cancer treatment and on the credible threat of a shortage of supply.

The assessment of the unfairness of the prices

Aspen also contested the ICA's assessment of whether the prices for Cosmos Drugs that resulted from the renegotiation with the AIFA were excessive. The Council of State approved the ICA's application of the two-limb test established by the EU Court of Justice in *United Brands* (27/76).

The ICA first carried out a price-cost comparison by applying two different methodologies (the cost-plus and the gross margin contribution methodologies). It concluded in both cases that Aspen's prices were well above production costs. The ICA also provided convincing evidence that the prices charged by Aspen were unfair given that the discrepancy between the costs of production and the revenues realized could not be otherwise justified. The ICA considered the new prices charged by Aspen compared with those applied after the renegotiations, and found that there were no plausible justifications for the increase (as the justifications submitted by Aspen were not plausible).

The procedural arguments

Finally, the Council of State rejected also the procedural arguments raised by Aspen (only the two main ones are discussed below). First, Aspen submitted that the ICA had breached its procedural rights by relying on the assistance of Ireland's Competition and Consumer Protection Commission to carry out unauthorized inspections. Secondly, Aspen argued that the ICA violated several principles of administrative law, such as the principle of transparency of administrative action, and also its rights of defense because it issued two different statement of objections.

With reference to the first procedural argument, the Council of State held that the search and seizure operations carried out by Ireland's

Competition and Consumer Protection Commission were in compliance with EU rules governing cooperation between EU competition authorities. Moreover, the relevant provisions of Italian law could not regulate the inspections carried out by foreign competition authorities.

With regard to Aspen's claim that the ICA unlawfully introduced the theory of harm based on excessive pricing only after the issuance of the first statement of objections, the Council of State held that the contested conduct was challenged as an abuse of dominance even before and that, in any event, the ICA had notified Aspen with a second statement of objections. Therefore, in the Court's view, Aspen's procedural rights were not breached.

The TAR Lazio quashes the ICA decision imposing commitments on Sky after its withdrawal of the notification of the R2 acquisition

On March 5, 2020, the TAR Lazio annulled the ICA decision of May 20, 2019, concerning the acquisition of sole control of R2 S.r.l. ("**R2**") by Sky Italia S.r.l. ("**Sky**"), including the measures imposed on Sky.[8]

Factual background

Sky is a provider of pay-TV services, offered both via satellite and via digital terrestrial television ("**DTT**"). Mediaset Premium ("**MP**") produces content, which is generally transmitted by pay-TV operators. MP wholly owns R2, a company providing technical and administrative platform services for broadcasting by DTT.

In November 2018, Sky notified the ICA of its acquisition of sole control over R2. Since Italian law does not provide for the automatic suspension of a concentration pending antitrust review, the parties completed the transaction before the ICA's clearance. In February 2019, the ICA opened an in-depth investigation and one month later issued a statement of objections, raising serious doubts that the transaction was capable of lessening competition in the market for retail pay-TV services. As a result, the parties withdrew the notification and tried to restore the previous competitive conditions: R2 was partially demerged from Sky and returned under MP's control, apart from some 'ancillary activities' (i.e., two going concerns of R2 that Mediaset transferred back to Sky following the restitution of R2) and other residual assets.

Nonetheless, the ICA took the view that the demerger did not fully restore the situation existing before the transaction. In its decision, therefore, the ICA – while authorizing the concentration under review – imposed on Sky a set of behavioral remedies for the duration of three years, aimed at effectively restoring competition in the market. These remedies included the obligations: to grant third parties access on a fair, reasonable, non-discriminatory and cost-oriented basis, to any new proprietary DTT platform that Sky might set up; and to abstain from using the information and the assets acquired from R2 in connection with Sky's pay-TV offers.

In its decision, the ICA adopted a broad definition of 'concentration': its assessment was not limited to Sky's acquisition of R2, but also covered a set of agreements signed in 2018 between Sky and MP, by which MP assigned to Sky some DTT transmission capacity for its pay-TV services (the "**DTT sub-license**"), and granted a license allowing Sky to include MP's channels and TV shows in its pay-TV offers via satellite, DTT and online. According to the ICA, these contractual arrangements would continue to be effective even after the abandonment of the notified transaction,

[8] TAR Lazio, judgment No. 2932/2020; ICA decision of May 20, 2019, No. 27784, C12207, *Sky Italia/R2*.

and had already had the effect of causing MP's exit from the market and a significant increase in Sky's customer base.

The TAR Lazio's ruling

The TAR Lazio annulled the decision on both procedural and substantive grounds.

Procedural grounds

Sky pleaded the violation of its rights of defense on the ground that the ICA decision was based on facts and documents gathered after the closing of the investigation phase, and with regard to which Sky could not exercise its rights of defense. The TAR Lazio concurred with Sky's argument, finding that there was a substantial difference between the transaction on which the statement of objections was based and the transaction which was the object of the decision. According to the Court, the statement of objections' brief assessment of the potential, residual effects in case the acquisition of R2 was undone did not change this conclusion. First, at the time of the statement of objections, the abandonment of the transaction was a mere possibility. Secondly, the statement of objections' allegations on the concentrative nature of the transaction and the remedies to be imposed were based on the assessment of the transaction before it was abandoned. In contrast, a very substantial (and decisive) part of the arguments underlying the decision was dedicated to the analysis of the effects of the transaction following the restitution of R2. As a result, Sky was unable to exercise its rights of defense as far as those arguments were concerned. Moreover, the ICA was not under time constraints, and should have opened of its own motion a new procedure to notify Sky of the new objections on which the decision was based.

Substantive grounds

The TAR Lazio also accepted Sky's plea according to which – after R2 was given back to Mediaset – there was no longer a concentration between Sky and Mediaset that could be subject to the ICA's authorization. According to the Court, the DTT sub-license did not grant Sky any exclusivity, considering that Mediaset continued its *Infinity* offer.[9] Moreover, the DTT sub-license's term was too short to result in a lasting change in control of the undertakings concerned and in the structure of the market.

Moreover, the ICA did not show that the 'ancillary activities' were an undertaking to which a turnover could be attributed and failed to verify the turnover that could be attributed to the other residual assets mentioned in the ICA's decision.

Finally, the TAR Lazio held that the ICA did not demonstrate that the individual agreements allegedly forming part of the overall transaction were conditionally linked to each other, and that each of them had concentrative nature.

[9] The *Infinity* offer is provided by MP on its over-the-top platform and is a natural continuation of MP's offer, given that it includes the same contents. It was found to compete with Sky's offer on the market for retail pay-TV services.

Other developments

The TAR Lazio upholds the ICA decision to fine the members of a cartel for the assignment of broadcasting rights for football matches in countries other than Italy

On March 16, 2020, the TAR Lazio delivered its ruling in the judicial review proceedings concerning the 2019 ICA decision finding that, from 2008 to 2015, the MP Silva Group, the IMG Group, and the B4 Capital Group coordinated their bids in the procedures for the assignment of international audiovisual rights for the broadcasting of the matches of the football seasons relating to the Serie A and B, the Italy Cup and the Italian Super Cup, in countries other than Italy.[10]

The TAR Lazio rejected the parties' claim that the ICA had infringed their right of defense, which was based on the following grounds: although in the statement of objections the ICA contested two separate anticompetitive agreements, in the second statement of objections – which it issued after receiving the parties' replies to the first one – it characterized the same conduct as a single overall agreement. The Court clarified that the ICA is not only allowed to change its allegations before imposing a fine, but that it can do so even without finding new evidence, through a mere reappraisal of the proofs previously gathered. Moreover, there was nothing preventing the parties from replying to the second statement of objections. However, with regard to the applications lodged by companies of the B4 Capital Group, the Court partially upheld the plea concerning the quantification of the fine, and granted the applicants a 15 per cent reduction in their fine on the ground that the ICA should not have imposed an entry fee, whose purpose is to increase the deterrent effect of the sanction.

[10] TAR Lazio, judgments Nos. 3260, 3261, 3264/2020; ICA decision of April 24, 2019, No. 27656, I814, *Diritti internazionali*.

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