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Italian Competition Law Newsletter

Highlights

— The TAR Lazio overturns ICA decision to fine Amazon and Apple for allegedly restricting competition in the sales of Apple and Beats products on Amazon Marketplace.

— The Council of State confirms the annulment of an ICA decision on an abuse of dominance in the market for ticketing services for live pop music concerts.

The TAR Lazio overturns ICA decision to fine Amazon and Apple for allegedly restricting competition in the sales of Apple and Beats products on Amazon Marketplace.

On October 3, 2022, the Regional Administrative Court for Latium (the "**TAR Lazio**") annulled the decision of the Italian Competition Authority (the "**ICA**") of November 16, 2021 (the "**ICA Decision**"),[1] by which a fine of €134.5 million was imposed on Apple Inc. and certain of its subsidiaries ("**Apple**") and a fine of €68.7 million on Amazon.com Inc. and certain of its subsidiaries ("**Amazon**"; together with Apple, the "**Parties**").[2] The ICA Decision had found that the Parties infringed Article 101(1)(b) and (d) TFEU by restricting competition by certain resellers of Apple products, including those of the Apple-owned brand Beats, which operated on the online marketplace of Amazon(the "**Amazon Marketplace**"). The ICA found Amazon Marketplace to be a leading online marketplace in Italy for consumer electronics products.[3]

The complaint

In February 2019, Digitech, a distributor of electronic products, filed a complaint before the ICA, concerning online sales of Apple and Beats branded products (the "**Products**") on the Amazon Marketplace. The complainant claimed that, following an alleged agreement between

[1] See ICA Decision No. 29889 of November 16, 2021, Case I842 – *Vendita prodotti Apple e Beats su Amazon Marketplace* (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). By Decision of December 14, 2021, No. 29947, the ICA re-determined the amount of the fines imposed on the Parties as it found that it had committed clerical errors in its calculation. As a result, the final amount of the said fines was €114,681,657 for Apple and €58,592,754 for Amazon.

[2] See TAR Lazio Judgment No. 12507 of October 3, 2022.

[3] ICA Decision, § 57.

the Parties, Amazon removed from Amazon Marketplace certain retail distributors, which had previously regularly and lawfully offered the Products.

The ICA Decision

The ICA's investigation focused on the agreement entered into by the Parties on October 31, 2018 (the "**Agreement**"). According to the ICA, under certain clauses of the Agreement, access to the Amazon Marketplace for the purpose of resale of the Products were limited to retailers specifically identified in the agreement as satisfying the highest standards in terms of investments and quality (the "**Apple Premium Resellers**").

The ICA assessed whether, against the background of the evidence in the casefile, the Agreement empowered the Parties to foreclose the resellers excluded from the Amazon Marketplace. It found that they aimed at putting in place a distribution system based on a purely quantitative restriction (*i.e.* once the maximum level of resellers set in the Agreement had been reached, no other resellers were admitted regardless of their qualities). The ICA concluded that the Agreement was discriminatory in nature because it favoured Amazon and some official resellers, while it prevented a substantial number of resellers of the Products having the same qualities from accessing a very important distribution channel for online sales, and therefore it constituted a violation of Article 101(1) TFUE.

Additionally, according to the ICA, the Agreement restricted cross-border sales, as it prohibited sales of the Products to resellers established outside a select number of EU Member States.

Lastly, in the ICA's view, the Agreement affected the discounts available for the Products sold on Amazon Marketplace by restricting the number of resellers allowed to use Amazon Marketplace.

The TAR Lazio's Ruling

Without assessing the substantive grounds raised by the Parties, the TAR Lazio upheld their pleas relating to the violation of (i) the time limit for opening the investigation, and (ii) the time limit to reply to the statement of objections (the "**SO**").

The violation of the time limit for opening the investigation

The Parties claimed that the ICA violated Article 14 of Law No. 689/1981.[4] The TAR Lazio took the view that the case law is inconsistent as to whether Article 14 of Law No. 689/1981 applies to antitrust proceedings. Under the two interpretations put forward to date: (i) Article 14 is a general provision that does not apply when a specific provision applies (such as under the Italian competition statute);[5] alternatively, (ii) Article 14 is a general rule that applies to any proceeding that may lead to an administrative pecuniary penalty, including in antitrust matters.

The Court endorsed the first approach, and assessed the compatibility of the ICA's behavior in the light of the general principles set out in Article 6 of the European Convention on Human Rights and Article 41 of the EU Charter of Fundamental Rights (concerning the fundamental right to good administration). It held that the time limit established by Article 14 of Law No. 689/1981 is not applicable in antitrust proceedings in relation to the preliminary investigation stage. Nonetheless, according to the TAR Lazio, the non-applicability of the said time limit could not justify an unreasonably prolonged duration of the pre-investigation, given that, as a general rule, "*administrative proceedings*" – including the antitrust investigations conducted by the ICA – are subject to the general principle of good administration.[6] Therefore, the ICA has an obligation to open formal investigations within a reasonable period of time.

[4] Which reads: *"the infringement, to the extent possible, must be contested immediately vis-à-vis both the alleged infringer and the person which is jointly and severally liable for the payment of the penalty, if any. If immediate notification has not been made to all or some of such persons, the details of the infringement must be notified to the persons concerned [...] within 90 days [...]."*

[5] See Law No. 287 of October 10, 1990 (which, however, contains no provision setting out a time limit for the opening of an investigation by the ICA).

[6] See Article 97 of the Italian Constitution, as well as Law No. 241 of August 6, 1990, laying down New rules on administrative procedures and the right of access to administrative documents.

Against this background, the TAR Lazio found that the ICA violated the time limit for opening the investigation since the ICA received Digitech's complaint on February 22, 2019, but formally decided to initiate the proceedings only approx. one and a half year after, on July 21, 2020. According to the Court, this time lapse could not be justified by the complexity of the case since the ICA failed to carry out any pre-investigation activity, except for the acquisition of the company profiles of some distributors and some statistics on e-commerce that it located on the Internet, starting in June 2020 (*i.e.*, 16 months after the receipt of the complaint). Other than that, the ICA remained idle and abstained from acquiring all the information necessary to define the basic elements of the offence and, therefore, decide whether or not to initiate the investigation in a much shorter time.

The violation of the time limit to reply to the SO

The TAR Lazio also found that the ICA violated the Parties' rights of defense by granting Apple and Amazon a time limit for submitting their defenses in reply to the SO equal to the statutory minimum (*i.e.*, 30 days),[7] eventually extended to 45 days, whilst in similar proceedings the ICA gave more than 100 days.

The TAR Lazio concluded that the 30-day time limit appeared all the more insufficient given the length of the SO in the case in question (more than 100 pages) and considering that the time for preparing the response included the month of August, when, although no holiday recess is provided for in the procedural rules, it is undoubtedly more difficult to gather the relevant documents and information, and in general for companies and their legal counsel to interact for the preparation of the defenses.

Furthermore, access to the economic data gathered by the ICA during its investigation was granted to the Parties only after 24 days from the beginning of the time limit. In the Court's opinion, the limited amount of time left to analyze the data, prepare and submit the defenses was not only in breach of the Parties' rights of defense, but also disproportionate given the complexity of the case and unjustified compared to the overall duration of the proceedings.

The Council of State confirms the annulment of an ICA decision on an abuse of dominance in the market for ticketing services for live pop music concerts.

On October 24, 2022, the Council of State[8] confirmed on appeal the annulment of a 2020 decision, by which the ICA had imposed a fine on CTS Eventim-TicketOne Group ("**TicketOne**") for allegedly abusing its dominant position in the Italian market for the provision of ticketing services for pop music concerts.[9]

[7] See Presidential Decree No. 217 of April 30, 1998, Art. 14 (which actually sets out a 25-day time limit within which the parties to the investigation and the other persons that are admitted to participate in it may file written briefs and documents).

[8] See Council of State Judgment No. 9035 of October 24, 2022.

[9] See TAR Lazio Judgment No. 3334 of March 24, 2022 and ICA Decision No. 28495 of December 22, 2020, Case A523 – *TicketOne/Condotte escludenti nella vendita di biglietti* (discussed respectively in the March 2022 and January 2021 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---feb-march-2022.pdf; https://www.clearygottlieb.com/-/media/files/alert-memos-2021/italian-competition-law-newsletter-january--2021.pdf).

Background

The Panischi Agreements

In 2001, TicketOne notified the ICA of two agreements it had entered into with some of the leading organizers of live music events (the "**Panischi Agreements**"), requesting confirmation that they fulfilled the requirements for exemption from the ban on anticompetitive practices. The Panischi Agreements, whose term was 15 years, comprised: (i) a concession agreement, under which TicketOne had the exclusive right to distribute online an increasing percentage of tickets for events organized by promoters, for a fixed fee of 15% of the ticket price; and (ii) a non-compete agreement between the parties. In 2002, the ICA took the view that the Panischi Agreements did not significantly restrict competition in the relevant markets.

In October 2017, following the expiry of the Panischi Agreements, the ICA sent a request for information to TicketOne, concerning (i) its current relationships with promoters that had been parties to the Panischi Agreements, and (ii) its relationships with its biggest 20 customers (i.e., concert organizers and promoters). In particular, the ICA asked TicketOne to set out whether it had entered into any exclusivity agreements with them. In September 2018, the ICA opened an investigation into TicketOne's potential abuse of dominance.

The ICA Decision

On December 22, 2020, the ICA adopted a decision finding that TicketOne had engaged since 2013 in a complex exclusionary abusive strategy aimed at significantly restricting sales of tickets for live pop music events by competing ticketing operators. The ICA imposed a fine of approximately €10.8 million on TicketOne.

In the ICA's view, TicketOne's unlawful strategy comprised the following conduct: (i) entering into exclusivity agreements with producers and organizers of live music events; (ii) acquiring, between September 2017 and April 2018, four of the major national promoters (the "**Acquisitions**"); (iii) imposing exclusivity clauses on local promoters; (iv) entering into commercial agreements with smaller ticketing operators, so as to prevent its competitors from dealing with them; as well as (v) retaliation and boycott measures against certain concert organizers to punish them for entering into agreements with Live Nation/TicketMaster ("**TicketMaster**"), a competitor that TicketOne allegedly sought to exclude from the market.

In its defense in the course of the investigation, TicketOne argued that the Acquisitions and the exclusivity agreements with producers and organizers of live music events, far from being abusive, were necessary in order for it to compete against the entry on the market of the strong competitor Ticketmaster, but the ICA was not persuaded by this argument.

The TAR Lazio Judgment

In March 2022, the TAR Lazio quashed the ICA's decision, finding that the ICA had failed to prove to the requisite legal standard the existence of a single exclusionary strategy against competing ticketing operators.

In particular, the TAR Lazio disagreed with the ICA's finding that the Acquisitions represented a key element of the abusive conduct.

The TAR Lazio held, in this respect, that concentrations should only be assessed under the framework provided for by Regulation (EC) No. 139/2004 on control of concentrations between undertakings ("**Regulation 139/2004**") or under the corresponding domestic legal framework, depending on the applicable rules. The TAR Lazio reasoned that, if competition authorities were allowed to apply Article 102 TFEU, or the corresponding domestic law provisions, to operations of concentration already completed, the risk would arise that the effects of such transactions may be challenged years after their clearance, in violation of the principles of legal certainty and the interested companies' freedom of economic initiative.

Interestingly, in the case at stake, the Acquisitions had not been notified to the European Commission (the "**Commission**") or to the ICA (as they did not meet the turnover thresholds for notification), and the ICA became aware of their existence only on the basis of TicketOne's reply to a request for information.

The Council of State Judgment

On appeal, the Council of State upheld the TAR Lazio's conclusions. It concurred with the lower court that the ICA found that the Acquisitions were abusive without sufficiently investigating first the alternative explanations provided by TicketOne.[10]

However, the Council of State disagreed with the TAR Lazio's statement concerning the ICA's lack of a legal basis and competence to assess mergers falling below the domestic notification thresholds pursuant to antitrust rules. The TAR Lazio had based its finding, among other things, on Article 21(1) of the EU Merger Regulation (No. 139/2004), which in its view expressly rules out the applicability to concentrations of Articles 101 and 102 TFEU. In this regard, the Council of State referred to the case law of the EU Court of Justice,11 which in its view establishes that, where a merger is below the turnover thresholds set out in Regulation No. 139/2004, it may still be appraised pursuant to traditional tools. Nevertheless, the Council of State added that, due to the nature and effects of concentrations, it is still preferable to carry out an ex ante review, as made possible by Article 22 of Regulation 139/2004, which provides for a tool to refer mergers below thresholds to the Commission.

It is noteworthy that the *Austria Asphalt* judgment, which the Council of State referred to, did not concern a merger below thresholds (unlike the Acquisitions), but conduct falling outside of the scope of Article 3 EUMR, thus not constituting a concentration within the meaning of Regulation No 139/2004.[12] It is, therefore, questionable whether the *Austria Asphalt* judgment was relevant to the case at hand, which fell outside the scope of merger control rules only because the relevant transactions did not meet the turnover thresholds at the Italian level.

Other developments

The ICA ends an abuse of dominance investigation into Mastercard's conduct by accepting and making binding the company's commitments relating to contactless payments

On October 11, 2022, the ICA closed an Article 102 TFEU investigation into Mastercard Europe SA ("**Mastercard**")'s conduct by accepting the commitments offered by Mastercard relating to its double-tap mandate for contactless payments with co-badged payment cards (*i.e.*, cards that can be used on more than one payment network) (the "Decision"),[13] which precluded retailers operating point-of-sale ("**POS**") terminals from accepting single-tap payments from co-badged cards.

In its 2021 decision to open the investigation, based upon a complaint filed by Bancomat S.p.A. ("**Bancomat**"),[14] the ICA reached the preliminary view that Mastercard's double-tap procedure raised several competition issues:

— first, the ICA held that Mastercard's decision to exclude the single-tap procedure for co-badged card payments negatively affected Bancomat, whose cards are 99% co-badged. In contrast, the double-tap mandate indirectly benefitted Mastercard, whose cards represent 85-90% of the single-brand cards in Italy, and therefore could continue to be used by single-tapping them;

[10] In the course of the investigation, TicketOne explained that the Acquisitions had been carried out to implement a (legitimate) business strategy aimed at creating a vertically integrated entity, capable of directly managing the whole organization of live music events (including not only the sale of tickets, but also the promotion of concerts). This strategy was aimed at allowing TicketOne to compete more effectively with TicketMaster, which was already vertically integrated in the markets for promotion and ticketing, and whose global turnover in 2019 exceeded by approximately seven times TicketOne's turnover. For this reason, in the previous years, TicketOne had also carried out similar acquisitions in several other countries.

[11] See C- 248/16, *Austria Asphalt*, EU:C:2017:643.

[12] *Id.*, paras. 32-33.

[13] See ICA Decision No. 30334 of October 11, 2022, Case A548, *Bancomat/Mandato Mastercard*.

[14] See ICA Decision No. 29928 of December 3, 2021, Case A548, *Bancomat/Mandato Mastercard*.

— second, the ICA noted that the double-tap mandate was also aimed at hindering or excluding Bancomat from access to the digital wallets of certain smartphone manufacturers where single-tap mode is considered a key feature to ensure an immediate and uniform payment experience;

— third, the ICA found that the asymmetry brought about by the double-tap mandate likely affected the competitive dynamics of the market and could undermine, in the long run, the position of Bancomat;

— lastly, the ICA held that the current regulatory framework did not justify the double-tap mandate. In fact, the single-tap mode is fully aligned with relevant EU regulations since it guarantees the cardholder's choice of circuit, given that the user can always express his or her preference to the merchant before each payment so that the POS is set up to proceed with the circuit thus chosen.

In light of these considerations, the ICA alleged that the Mastercard double-tap mandate could constitute an abuse of dominant position.

On April 27, 2022, Mastercard offered a set of commitments, including the following ones:

— to define the technical indications of the double-tap mandate as market "*guidelines*" (*i.e.*, having therefore no binding effect) and to refrain from imposing penalties or fines in case of non-compliance with these guidelines, so as to leave the market free to decide how to set up POS terminals (either in single-tap or double-tap mode), based solely on competitive dynamics;

— not to include a review clause in the commitments;[15]

— to apply to acquirers operating in Italy a 50% discount for six months (*i.e.*, from October 1, 2022, to March 31, 2023) on the "*Chip & Contactless Enablement Acquirer Fee*."[16] The ICA agreed that this discount would generate immediate positive effects in terms of increased resources available to acquirers to modernize their payments infrastructure.

The ICA considered these commitments adequate to address the competition concerns raised in its decision to open the investigation and, as a result, put an end to it with no finding of infringement.

The ICA accepts commitments in relation to alleged abuse by POLIECO in polyethylene recycling

On September 13, 2022, the ICA closed an investigation into an alleged abuse of dominance in the domestic market for the management of the recycling of polyethylene ("**PE**") goods by the POLIECO consortium ("**POLIECO**"), the incumbent operator for end-of-life management of PE goods on behalf of producers and users, by accepting and making binding the commitments offered by POLIECO.[17]

In February 2021, private consortium ECOPOLIETILENE ("**EP**") filed a complaint with the ICA, alleging that POLIECO, had carried out an abusive strategy aimed at foreclosing EP's entry on the relevant market for the management of the recycling of PE goods.

By way of background, Legislative Decree No. 152/2006 (the "**TUA**") requires, among other things, players active in the PE goods supply chain ("**PE Players**") to manage the end-of-life of their own PE waste. The TUA states that PE Players must necessarily choose whether to join the incumbent consortium POLIECO (which was established by the TUA, and, until 2020, was the only operator

[15] In a previous version of the commitments, Mastercard had envisaged a review clause, which would enable it to propose to the ICA a revision of the commitments in case of changes to market conditions in light of the data published annually by the Innovative Payments Observatory of the Polytechnic University of Milan. However, the said clause was dropped after several operators participating in the market test argued that it would likely undermine the legal certainty of the commitments offered by Mastercard.

[16] The "*Chip & Contactless Enablement Acquirer Fee*" is a fee related to POS terminals not yet enabled to the contactless and EMV functionality (EMV stands for Europay, Mastercard and Visa). EMV chips are the small, square computer chips that appear on debit, credit and prepaid cards to help safeguard them against fraud by creating a one-of-a-kind code for each credit transaction.

[17] See ICA Decision No. 30300 of September 13, 2022, Case A 545 - *Consorzio Polieco/Condotte Anticoncorrenziali*.

active in the recycling of PE goods), or to establish another consortium (like it was the case for EP). A newly-established consortium must be authorized by the Italian administration before starting operations. In addition, PE Players are required to pay environmental fees to bear the costs of the activities carried out by their consortium.

The ICA preliminarily found that POLIECO had carried out a number of practices aimed at discouraging the members of EP from leaving the consortium to join POLIECO, *e.g.*, by informing the members that the authorization for EP was still under discussion before the administrative courts, or requiring payment of past contributions in exchange of significant discounts. With regard to potential new customers, POLIECO (i) offered significant discounts and concessions for unpaid past contributions, and/or (i) threatened or started lawsuits for the payment of past contributions.[18]

To remedy the ICA's concerns, POLIECO offered the following commitments:

i. to allow any PE Player to regularize its position regarding past unpaid contributions by submitting a "*compliance proposal*" to any of the operating consortia (i.e., POLIECO or EP). POLIECO also proposed to outline together with EP common ways for carrying out controls and regularizing PE Players' positions; and

ii. to propose to settle any lawsuit it had initiated against PE Players concerning the non-fulfilment of environmental obligations under the TUA, leaving to its counterparties the choice of continuing the lawsuit or regularizing their position alternatively with POLIECO or EP.

The incumbent consortium also proposed to transfer all environmental contributions paid to POLIECO or EP in the past to a trust fund aimed at supporting initiatives in case of environmental emergencies or, in the alternative, for the management of waste of PE-based goods previously placed on the market.

[18] Although the TUA establishes the obligation on PE Players to pay overdue contributions, it does not expressly identify the operator in charge of collecting them. In its decision to open the investigation, the ICA preliminarily found this legal gap to be at the basis of POLIECO's alleged exclusionary conduct, taking the view that the alleged strategy was implemented with regard to both members of EP and to potential new customers, with a view to raising PE's costs. Interestingly, in order to identify the legal basis for offering the discounts for past contributions, POLIECO did not refer to its by-laws, but rather to the Ministerial Decree approving it, thus suggesting that the favorable regime for members of POLIECO was of public nature.

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