THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Twelfth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

TWELFTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in May 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Aidan Synnott

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Tommy Lawson

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Martin Roach

SUBEDITOR
Helen Smith

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-493-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

© 2020 Law Business Research Ltd

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAET GRETTE AS

ALUKO & OYEBODE

ANJIE LAW FIRM

ASSEGAF HAMZAH AND PARTNERS

BAKER & MCKENZIE (GAIKOKUHO JOINT ENTERPRISE)

BREDIN PRAT

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ

DELOITTE LEGAL

DRYLLERAKIS & ASSOCIATES

GOODMANS LLP

HANNES SNELLMAN ATTORNEYS LTD

KHAITAN & CO

LEE AND LI, ATTORNEYS-AT-LAW

LEGA ABOGADOS

LINKLATERS C WIŚNIEWSKI I WSPÓLNICY SP K

LLOREDA CAMACHO & CO

L PAPAPHILIPPOU & CO LLC

MARVAL, O'FARRELL & MAIRAL

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

URÍA MENÉNDEZ PROENÇA DE CARVALHO

VEIRANO ADVOGADOS

WHITE & CASE LLP

CONTENTS

PREFACE

In the reports from around the world collected in this volume, we continue to see international overlap among the issues and industries attracting government enforcement attention. This year, we read with particular interest the discussions of activity in many jurisdictions regarding digital platform competition issues.

We also continue to see the evolution and refinement of general approaches to competition law enforcement in several jurisdictions. For example, The International Competition Network, which is a group of national and multinational competition authorities, adopted a Framework on Competition Agency Procedures, and 62 agencies have signed on. Mexico adopted 'regulations related to client–attorney privilege protection in the context of antitrust investigations'. Japan has also introduced an 'attorney–client privilege [which] will apply to administrative investigation procedures against' cartels, and the discussion in that chapter of how this privilege will be applied will be of interest to many. The chapter from Belgium discusses that country's newly modified competition law, and in this edition we welcome to the *Review* a new chapter from Nigeria, which provides an informative overview of that country's new competition law. Before this law was enacted, our authors write, 'Nigeria had no comprehensive competition legislation that dealt with antitrust, abuse of dominant position and merger control issues'.

In the past year, antitrust compliance featured prominently on several enforcers' agendas. In 2019, the US Department of Justice (DOJ) notably focused on encouraging compliance efforts: the agency announced a new policy allowing, under certain conditions, companies to receive credit for antitrust compliance programmes when the DOJ considers criminal charges. Elsewhere, the Taiwan Fair Trade Commission has made efforts in the past year to assist Taiwanese business organisations in their antitrust compliance efforts. Poland implemented an online whistle-blower platform and Brazilian authorities issued a whistle-blower protection ordinance.

The policing of cartels remains a focus of competition agencies around the globe. The chapter from Greece notes an increase in cartel enforcement activity in 2019. Authorities there conducted their largest dawn raid yet, and they have also updated the manner in which they prioritise particular cases. The authors of that chapter note that 'it appears that the [Hellenic Competition Commission] has taken a turn toward more pre-emptive action against cartels, by emphasising dawn raids and *ex officio* investigations and by acting swiftly on complaints and news publications about price increases in specific sectors'. Portuguese authorities are reported to have imposed their largest fines to date. The contribution from Japan notes an aggregate level of penalties that is higher than in recent years, which, the authors note, is partly attributable 'to the record-breaking surcharge imposed in the asphalt cartel case' there.

That country is implementing a revised leniency programme. Meanwhile, the chapter from Mexico notes a decline in the number of leniency applications there.

As noted above, online platforms – and the 'digital economy' more generally – continue to be the subject of regulatory scrutiny, including in Brazil, France, India, Japan, Mexico, Poland and the United States. For example, both United States competition enforcement agencies are investigating large platforms, and the UK Competition and Markets Authority (CMA) has launched a market study of online platforms and digital advertising. Taiwan has also begun to prioritise this area. In addition to platform issues, there have been several other notable developments in the areas of restrictive agreements and dominance. Authorities in Canada concluded an inquiry into several pharmaceutical companies without taking action but 'confirmed that healthcare remains a top enforcement priority'. The United States authorities remained active in this area. In addition, Belgian authorities conducted a dawn raid in the pharmaceutical sector. Several jurisdictions took enforcement actions against resale price maintenance (RPM) practices: the UK's action involved guitars; an action in Poland involved online sales of printers and was the result of a whistle-blower complaint; and Japanese authorities took action against manufacturers of various baby products. China concluded four RPM matters.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many sectors. The chapter from Argentina discusses the Antitrust Commission's new merger control guidelines and the chapters from France and India report on streamlined merger control procedures there.

Once again this year, the chapter from the United Kingdom is particularly informative. In addition to describing a busy year of merger and conduct enforcement activity for the CMA, the chapter discusses the effect of Brexit on the competition enforcement regime there, including the transition period and how competition law may factor into the negotiation of a trade agreement between the UK and the EU. Our contributors discuss the future of the CMA and potential consequences of various possible future scenarios. We will continue to watch with interest to see how competition enforcement in the United Kingdom evolves in the year to come.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2020

Chapter 13

ITALY

Giuseppe Scassellati-Sforzolini, Marco D'Ostuni, Luciana Bellia, Michael Tagliavini and Francesco Trombetta[1]

I OVERVIEW

The Italian Competition Authority (ICA) enforces EU and national competition rules in Italy.

Each of the ICA's five directorates deals with mergers, abuses and restrictive practices in their assigned business sectors. The ICA also has advocacy powers. It reports to the parliament and the government on any laws, regulations and general administrative acts that give rise to competition concerns and are not justified by general interest considerations. The ICA is also entitled to challenge before the administrative court secondary legislation, acts and decisions of public administrations that it considers incompatible with competition law. Furthermore, the ICA is empowered to address abuses of economic dependence, unfair commercial practices and conflicts of interest of government officials. Finally, since 2012, the ICA also manages the system of legality rating, an indicator of companies' compliance with high standards of legality.[2]

Case teams in each directorate conduct the investigations, while the opening and final decisions, as well as the decisions to notify the statements of objections, are taken by a college of three members appointed by the presidents of the two branches of the parliament.

As confirmed by the Constitutional Court, the ICA is not an impartial judicial body.[3] Its decisions are subject to judicial review by administrative courts (i.e., the Regional Administrative Tribunal (TAR) of Rome and, on second and final appeal, the Council of State).

In 2019,[4] the ICA closed nine proceedings concerning restrictive agreements or practices, eight of which were closed with an infringement decision.[5] Five cases of abuse of

1 Giuseppe Scassellati-Sforzolini and Marco D'Ostuni are partners, Luciana Bellia is a senior attorney, Michael Tagliavini is a lawyer and Francesco Trombetta is a trainee lawyer at Cleary Gottlieb Steen & Hamilton LLP.

2 Undertakings that obtain a sufficient score of compliance can have easier access to public funding and bank credit.

3 Constitutional Court, judgment No. 13 of 31 January 2019.

4 A table summarizing the ICA's activities from 2011 to 2019 is available at https://www.agcm.it/dotcmsdoc/come-funziona/e27_file_2019.pdf

5 Case I805, *Prezzi del cartone ondulato*; case I806, *Affidamento appalti per attività antincendio boschivo*; case I808, *Gara Consip FM4*; case I814, *Diritti internazionali*; case I816, *Gara SO.RE.SA. rifiuti sanitari regione Campania*; case I821, *Affidamenti vari di servizi di vigilanza privata*; case I822, *Consip/gara sicurezza e salute 4*; case I803, *Condotte restrittive del Consiglio Notarile di Milano* (this has been the only decision issued by the ICA solely under Article 2 of the Italian Competition Act and not also under Article 101 TFEU); and case I831, *Gare AMA servizio smaltimento rifiuti* (no finding of an infringement).

dominance were investigated, two of which were found to infringe competition law,[6] while one was closed with commitments.[7] The ICA also closed 79 investigations concerning alleged unfair commercial practices, 60 of which were found to infringe consumer rights. Finally, regarding mergers, the ICA reviewed 65 transactions and opened six indepth investigations.[8]

II CARTELS

i Significant cases

The 2014 ICA decision that fined Novartis and Roche for an anticompetitive agreement was upheld by a final ruling of the Council of State

On 15 July 2019, the Council of State[9] rejected Roche's and Novartis's appeals against the 2014 judgment of the TAR Lazio confirming the ICA 2014 decision, which imposed fines on the companies of around €180 million for an infringement of Article 101 TFEU.[10] Roche and Novartis respectively supplied Lucentis and Avastin, two monoclonal antibodies developed by the company Genentech (a subsidiary of Roche). Lucentis was developed to cure age-related macular degeneration, while Avastin was dedicated to the treatment of colon cancer. Nonetheless, Italian medical practitioners had often been using 'off-label' doses of Avastin to treat macular degeneration as a substitute for the similar, but much more expensive, Lucentis. According to the ICA decision, Roche and Novartis colluded to create an artificial differentiation between the two drugs in their communications to the medicinal authorities and medical practitioners, in order to boost the sales of the most profitable drug, Lucentis.

The judgment of the Council of State focused on three main issues. First, the Court confirmed that the ICA was right in defining the relevant product market as comprising both drugs, irrespective of their marketing authorisation and therapeutic indications. Second, the judgment upheld the conclusion that an agreement to disseminate misleading information cannot be considered ancillary to a licensing agreement. Last, the parties did not provide alternative explanations that could offset the evidence the ICA brought showing that Roche and Novartis artificially differentiated the two products. Accordingly, the Council of State confirmed the TAR findings that such conduct amounted to a by object restriction of competition law, aimed at unlawfully partitioning the relevant market.

The ICA fines four operators and a facilitator for collusive behavior in the waste collection sector

On 30 January 2019, the ICA imposed a fine of almost €1.4 million on four operators and a facilitator for collusive behavior in the waste collection sector.[11]

6 Case A516, *Gara affidamento servizi TPL Bolzano*; and case A519, *Affidamento diretto del servizio di trasporto pubblico ferroviario nel Veneto*.

7 Case A505, *Monte Titoli/servizi di post-trading*.

8 Case C12258, *Ascopiave/rami di azienda di Acegasapsamga*; case C12246, *Fratelli Arena/rami di azienda di SMA – distribuzione Cambria-Roberto Abate*; case C12231, *BPER Banca/UNIPOL Banca*; case C12247, *BDC Italia-CONAD/AUCHAN*; case C12245, *F2I S.G.R./Persidera*; and case C12207, *Sky Italia/R2*.

9 Council of State, judgment of 15 July 2019, *Roche-Novartis* (judgment No. 4990).

10 Case I760, *Roche-Novartis/Farmaci Avastin e Lucentis*.

11 Case I816, *Gara SO.RE.SA. rifiuti sanitari Regione Campania.*

The ICA found that four companies rigged a public tender for regional waste collection and disposal. According to the ICA, a third-party consulting firm facilitated collusion, coordinating the parties' collusive behavior.

The ICA concluded that the companies' conduct constituted a restriction by object, which warranted fining irrespective of any analysis of its actual effects on the market.

The ICA imposed the highest possible fine provided by the Law[12] (i.e., 10 per cent of each undertaking's worldwide turnover in the last (entire) business year of the infringement).

In line with the EU case law relating to infringement facilitators,[13] the ICA imposed a fine on the consultancy firm that coordinated the anticompetitive practice among the four operators, even if the firm was not competing in the same market as those operators.

The ICA fines bid-rigging practices in facility maintenance services in Italy

On 17 April 2019, the ICA found that 19 undertakings allegedly participated in a cartel affecting the 'facility management' tender procedure, the biggest public tender for cleaning and maintenance services for public offices ever launched in Italy (with a total value of approximately €2.7 billion).[14]

The ICA found that the companies shared their respective bidding strategies for this tender and tried to allocate its eighteen lots among themselves. Indeed the participants to the tender submitted bids that never overlapped, according to a 'chessboard' pattern. The ICA found a restriction 'by object' of Article 101 TFEU and it issued a fine of €235 million in total. The leniency applicant benefited from a 50 per cent reduction in its fine.

This case is an example of successful cooperation between the ICA and the Italian public prosecutors. Indeed, the ICA's decision relied on several pieces of evidence gathered by prosecutors in Rome and Milan, who had launched criminal investigations into the same conduct. The ICA also relied on the leniency application provided by one of the cartel members.

The ICA fines participants in a cartel for the assignment of broadcasting rights for football matches in countries other than Italy

On 24 April 2019, the ICA found that, from 2009 to 2015, the MP Silva Group, the IMG Group, and the B4 Capital Group coordinated their bids in the procedures for the assignment of broadcasting rights, in countries other than Italy (i.e., international rights). The broadcasting rights concerned football matches in tournaments organized by the Lega Nazionale Professionisti Serie A (the Italian football league).[15]

According to the ICA, prior to the submission of the bids, the parties allocated the respective bids and agreed on sharing the revenues arising from the resale of TV rights. This conduct reduced the value of the broadcasting rights.

The ICA categorized the anticompetitive conduct as a restriction by object, and it fined the participants €67 million overall.

Similarly to *Gara Consip FM4*, the antitrust investigation included strong coordination between the Milan public prosecutor and the ICA.

12 Law No. 287 of 10 October 1990, Article 15(1).

13 Court of Justice, case C-194/14 P, *AC-Treuhand*, judgment of 22 October 2015.

14 Case I808, *Gara Consip FM4*.

15 Case I814, *Diritti internazionali*.

On 16 March 2020, the TAR Lazio rejected the parties' claim that the ICA had infringed their right of defense. The claim was based on the following: in a first statement of objections, the ICA contested two separate anticompetitive agreements, while after the replies to the statement of objections, it issued a second statement of objections, where it alleged that the same conduct was a single overall agreement. The TAR Lazio 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 a new piece of evidence, through a mere reappraisal of the evidentiary elements that it had previously gathered. Moreover, according to the TAR Lazio, the parties' claim could not be upheld given that the ICA had not infringed their right of defense, having issued a second statement of objections before the decision, to which the parties could reply.

Only for the appeals lodged by companies of the B4 Capital Group, the TAR Lazio partially upheld the plea of the applicants concerning the quantification of the fine. The TAR Lazio thus granted a 15 per cent reduction in the fine as the ICA should not have imposed an entry fee, whose purpose is to increase the deterrent effect of antitrust fines.

ii Trends, developments and strategies

The Council of State set aside a 2016 judgment concerning an unlawful concerted practice in the railways sector among suppliers of goods and electromechanical services

On 11 July 2019, the Council of State[16] set aside a judgment issued by the TAR Lazio[17] in 2016, which had annulled an ICA decision[18] against Firema. The ICA had fined Firema for its participation, together with 12 other undertakings, in a cartel covering 24 tender procedures for the provision of electric components and maintenance services to the public railway operator Trenitalia.

The TAR Lazio agreed with Firema that the ICA was wrong in not extending the antitrust liability also to its parent company, which at the time of the infringement held its entire share capital. Indeed, according to the TAR Lazio, no evidence of involvement of the parent company in the concerted practice is required in case of conduct carried out by wholly owned subsidiaries. Furthermore, the TAR Lazio upheld Firema's claim according to which, given that the undertaking had been admitted to extraordinary administration, the ICA could not have held the new administration liable for the conduct of the previous one. This extension could have been possible only in case of identity between the current and the previous management. This is the case when the members of the two managements are the same and pursue identical goals.

The Council of State reversed the ruling, and it assessed some important principles concerning the allocation of corporate liability for antitrust infringements.

First, the Council of State held that the TAR Lazio should not have annulled the ICA's decision because the ICA did not extend Firema's direct antitrust liability – whose liability was supported by strong evidence – also to its parent company. Indeed, the Council of State specified that the ICA was under no obligation to apply the parental liability presumption, which is intended to relieve the ICA's burden of proof. Therefore, if the ICA decided not to rely on it, its decision could not be considered unlawful.

16 Council of State, judgment of 11 July 2019, *Firema* (judgment No. 4874).

17 TAR Lazio, judgment of 10 March 2016, *Firema* (judgment No. 3077).

18 Case I759, *Forniture Trenitalia.*

Second, the Council of State held that a formal change in the management of the company might not in itself be sufficient to discontinue the infringement of antitrust rules. Indeed, an actual change in the management is needed for this purpose and it does not take place when a new administration is formally appointed, but when the new management actually controls the activity of the undertaking. An actual change in the management did not occur in the case of Firema, given that the undertaking was still engaging – under the supervision and direction of the new administration – in the unlawful conduct found by the ICA. For these reasons, the Council of State set aside the judgment of the lower Court.

The ICA imposed fines of €287 million on the main manufacturers of corrugated cardboard sheets and boxes for two separate cartels

On 17 July 2019, the ICA imposed fines of over €287 million on 23 companies for two distinct cartels implemented in two vertically related markets, namely the upstream market for corrugated cardboard sheets (the *Sheets Cartel*) and the downstream market for corrugated cardboard boxes (the *Boxes Cartel*).[19] The infringements also involved the trade association Gruppo Italiano Fabbricanti Cartone Ondulato (GIFCO).

The ICA found that the two infringements were separate, because they affected two different product markets, they involved different parties (although nine companies participated in both infringements), and had a different scope and internal functioning.

This decision covers certain important aspects of cartel enforcement, such as definition of the relevant market when two (or more) levels of the supply chain are affected by simultaneous cartels.

The ICA reaffirmed that undertakings that are part of a trade association must be particularly alert to the information exchanged during trade association meetings.

When calculating the fine, the ICA adopted a flexible approach and even departed from the explicit provisions of its own guidelines:[20] companies that played a minor role in the infringements were granted a 20 per cent fine reduction, exceeding the 15 per cent cap provided for in the guidelines.

iii Outlook

First of all, on 28 January 2020, the ICA closed with an infringement decision the investigation concerning alleged coordination in the commercial strategies of the four main telecommunications operators in Italy which, in the ICA's view, agreed to coordinate their behavior with regard to repricing conduct in the context of the return to monthly billing.[21] Moreover, in the coming months, the ICA will pursue several investigations launched in 2019. In 2019 an investigation was opened into four taxi companies in Naples concerning alleged collusion to prevent competing platforms from entering the market.[22] The ICA will

19 Case I805, *Prezzi del cartone ondulato*.

20 AGCM Resolution No. 25152 of 22 October 2014, *Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15, paragraph 1, of Law No. 287/90*, §34.

21 Case I820, *Fatturazione mensile con rimodulazione tariffaria*.

22 Case I832, *Naples Radiotaxi*. In 2018, the ICA closed two investigations concerning similar practices in Rome and Milan (Cases I801A-I801B, *Rome and Milan Radiotaxi*).

also continue to focus on public tenders, with investigations into the public procurement of desktop PCs[23] and the supply of water meters.[24] Finally, the ICA has launched an investigation into an alleged cartel affecting the spent vehicle and industrial batteries recovery sector.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

The TAR Lazio quashes two ICA decisions concerning an alleged parallel network of anticompetitive vertical agreements between taxi companies and drivers active in Rome and Milan

In a judgment of 29 April 2019, the TAR Lazio upheld[25] the appeals of five taxi companies against the ICA's decisions on alleged vertical restraints.[26]

The ICA had found that the presence of non-compete obligations in the companies' bylaws and contracts with affiliated drivers amounted to a vertical restriction. However, the ICA did not prove that taxi companies and drivers shared a 'common interest', which, in the TAR Lazio's view, is a key element in the assessment of vertical agreements.

The TAR Lazio also pointed out some shortcomings in the ICA's market definition. First, the ICA did not engage in any empirical analysis before concluding that services provided by taxi companies were substitutable with those offered by mobile apps. Moreover, the ICA did not take into due account that the market for taxi management services is characterised by a double source of demand, from both passengers and taxi drivers.

Finally, the ICA acknowledged that the agreements did not amount to by object restrictions of competition and failed to assess the actual anticompetitive effects on competition of the relevant contractual clauses.

The TAR Lazio found that the ICA's decisions were inconsistent. This is because, on the one hand, the ICA found that taxi drivers participated in the infringement, while on the other hand they were also harmed by it. In this respect, the judgments of the TAR Lazio seem difficult to reconcile with a well-established principle of EU case-law, according to which a company that participated in an anticompetitive agreement might well be harmed by that same agreement too.[27]

23 Case I833*, PCs public tender.*

24 Case I835, *Supply of water meters.*

25 TAR Lazio, judgments of 29 April 2019*, Radiotaxi 3570, Yellow Taxi, Samarcanda, Autoradiotassì, Taxiblu and ICA* (judgments No. 5358, 5359, 5417, 5418 and 5419).

26 Case I801A, *Servizio di prenotazione del trasporto mediante taxi – Roma*; and case I801B, *Servizio di prenotazione del trasporto mediante taxi – Milano*.

27 Court of Justice, case C-453/99, *Courage v. Crehan*, judgment of 20 September 2001.

The TAR Lazio reviews the ICA's decisions on alleged abuses of dominant position in the retail supply of electricity

On 17 October 2019, the TAR Lazio annulled the ICA's decisions[28] that had fined Enel and Acea for abuse of dominant position in the local markets for retail electricity supply.[29] The two undertakings are active both in the enhanced protection service (EPS, a regulated tariff regime reserved for domestic clients and small businesses) and in the supply of electricity at market prices (or 'deregulated market').

In the ICA's view, Enel and Acea leveraged their position in EPS to foreclose competitors active in the deregulated market. In particular, Enel and Acea collected EPS customers' consent to be contacted for commercial purposes, and then used the lists of these customers to advertise their services in the deregulated segment of the market.[30] According to the ICA, the contested practices aimed at cross-selling deregulated services to Acea and Enel's EPS customers, in order to retain those customers after the imminent abolition of the EPS regime. The strategy would in turn foreclose electricity suppliers competing in the deregulated market with no customer base in the EPS segment.

With reference to Acea's appeal, the TAR Lazio overturned the ICA's assessment. The judges noted that Acea made no significant use of its lists of EPS customers in promoting its offering in the deregulated market.[31] The ICA's reasoning was based on mere presumptions and did not adequately demonstrate the existence of a causal link between the conduct and the alleged infringement.

Regarding Enel's appeal, the TAR Lazio overturned the ICA's calculation of the fine, particularly with respect to the duration of the infringement and the quantification of the relevant turnover. However, the TAR Lazio rejected the grounds of appeal concerning the alleged abuse.

ii Trends, developments and strategies

ICA imposes symbolic fine on a railway operator for an abuse of dominance leading to an improvement in the network in terms of technological innovation

On 31 July 2019, the ICA closed its investigation into Ferrovie dello Stato SpA (FS), Rete Ferroviaria Italiana SpA (RFI) and Trenitalia SpA (Trenitalia) for an alleged abuse in the markets of rail infrastructure management and regional rail passenger transportation services in the Veneto region.[32]

In the ICA's view, the parties leveraged their monopoly in the upstream market for the management, maintenance and development of the rail network to obtain from the Veneto region an exclusive contract for the downstream provision of regional rail services without any public tender.

28 Case A511, *Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*; and case A513 *Acea/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*.

29 TAR Lazio, judgments of 17 October 2019, *Acea, Acea Energia, Areti and ICA* (judgments No. 11960 and 11976) (the *Acea Judgment*). TAR Lazio, judgments of 17 October 2019, *Enel, Green Network, Enel Energia, SEN and ICA* (judgments No. 11954, 11955, 11957 and 11958) (the *Enel Judgment*).

30 In addition, Acea's commercial strategy was based on confidential information on competitors' positions obtained through its subsidiary active in the downstream market of electricity distribution.

31 Moreover, the ICA failed to explain how confidential information gathered by Acea in the distribution market could be used to retain customers in the upstream regulated market.

32 Case A519, *Affidamento del servizio di trasporto pubblico ferroviario nel Veneto*.

The ICA found out that the direct award was the result of RFI's obligation to carry out an electrification of the network that RFI would not have otherwise carried out.

However, the ICA only imposed a symbolic fine of €1,000 on the parties because it concluded that the conduct would, 'in any case, lead to an improvement in the network in terms of technological innovation'.

iii Outlook

In 2019, the ICA initiated proceedings for alleged infringements of Article 102 TFEU affecting the sectors of recycling of plastic packaging and pharmaceuticals.[33] The ICA has also opened proceedings against Amazon for allegedly discriminating between sellers using Amazon's own logistics services and those relying on third-party services.[34]

Furthermore, the ICA is investigating Google for allegedly refusing to integrate certain apps into Android Auto (a function of Android smartphones allowing the use of apps on a vehicle's embedded screen).[35]

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

The ICA, the Italian Communications Authority and the Italian Data Protection Authority publish the final results of the market investigation into big data and issue a set of joint guidelines and policy recommendations

On 10 February 2020, the ICA, the Italian Communications Authority and the Italian Data Protection Authority published the report containing the final results of the market investigation into the digital sector, and specifically on big data. On 2 July 2019, the authorities had issued guidelines and policy recommendations on the same matter (the Guidelines), which are now annexed to the Report.[36]

The Report is the result of a sector inquiry jointly launched by the authorities in May 2017 and aimed at assessing the potential implications of a digital and data-driven economy in relation to privacy, data protection, competition and consumer protection.

The Report analyses the various competition issues that could arise from big data. First, the ICA investigated whether big data can be considered a barrier to entry in certain markets, or whether ownership of large amounts of data can result in the establishment of a dominant position. Second, the ICA explored the intersections between personal data (and data protection) and competition law. Finally, the Report analysed the different types of data-driven conduct that undertakings can put in place and the possible competition law concerns that can arise from them.

The Guidelines also recommend a reform of the current merger control system to ensure the effective review of concentrations in the digital sector. In particular, notification thresholds should not be based only on turnover, but should also take into account the transaction price. Also, the standard of review should be based on the risk of a significant

33 Case A531, *Riciclo Imballaggi Primari/Condotte Abusive Corepla;* and case A524, *Leadiant Bioscences/ Farmaco per la Cura della Xantomatosi Cerebrotendinea.*

34 Case A528, *Fba Amazon*.

35 Case A529, *Google/Compatibilità App Enel X Italia con Sistema Android Auto*.

36 Market investigation IC53, *Big Data*.

impediment to the effective competition, and not just focus on the possible establishment of the strengthening of a dominant position. In particular, the ICA should be entitled to review acquisitions by major digital firms of innovative start-ups (i.e., 'killer acquisitions').

ii Trends, developments and strategies

The ICA enforces national legislation on unfair practices. These are commercial, promotional and communication strategies that, while not amounting to antitrust infringements, result in an unfair prejudice to the consumers' rights.

On 25 March 2019, the ICA imposed fines on DAZN for unfair commercial practices in the broadcasting of football matches. DAZN omitted to clearly disclose some technical limitations to the use of its streaming services on portable devices and had also provided misleading information on the automatic transition from the free trial period to the paid subscription.[37]

In the previous months, the ICA had already fined Sky Italia (Sky) for other alleged unfair commercial practices concerning the broadcasting of A series (the top Italian professional league competition for football clubs) matches.[38]

On 28 June 2019, the ICA imposed a fine of €2 million on Costa Crociere, an Italian cruise line. The company did not promptly inform the passengers of the possible cancellation of certain ports of call initially planned in Madagascar. The ICA emphasised the company's duties to provide full, effective and prompt information to consumers to allow them to effectively exercise their rights pursuant to consumer protection laws.[39]

On 29 October 2019, the TAR Lazio upheld[40] the appeals of airlines Ryanair and Wizz Air against the ICA's decision fining them for applying an extra charge for the transport of one large cabin bag.[41] The TAR Lazio concluded that the passengers' right to take on board their personal belongings was not infringed by the airlines' new policy, because one small cabin bag was still allowed on board free of charge.

iii Outlook

On 3 May 2019, a new law entrusted the ICA with the supervision of the application of European Regulation No. 2018/302, aimed at preventing geo-blocking and other forms of discrimination based on the nationality, place of residence or place of establishment of the customers.[42] This new competence will be exercised through the same investigative powers conferred upon the ICA for the enforcement of the national laws on unfair practices.

In 2019 the ICA opened two investigations concerning the alleged provision of misleading information. This confirms the ICA's commitment to fine undertakings that provide misleading information to requests of the competition authority during the investigation, pursuant to Article 14(5) of the Italian antitrust legislation.[43]

37 Case PS11233, *Dazn-Pacchetti Calcio Serie A*.

38 Case PS11232, *Sky-Pacchetti Calcio Serie A.*

39 Case PS11336, *Costa Crociere-Pacchetto Madagascar*.

40 TAR Lazio, judgments of 29 October 2016, *Ryanair, Wizz Air and ICA* (judgments No. 12455 and 12456).

41 Case PS11272 and PS11237, *Modifica policy bagagli*.

42 Law No. 37 of 3 May 2019.

43 Case A523B, *Ticketone/condotte escludenti nella prevendita di biglietti* and case A523C*, Ticketone/condotte escludenti nella prevendita di biglietti-vivo concerti*.

V STATE AID

i Significant cases

The General Court annuls the Commission's decision on the measure granted to Tercas

On 19 March 2019,[44] the General Court annulled the Commission decision issued at the end of the investigation in the Tercas case.[45]

Banca Tercas is an Italian bank which was placed under special administration in 2012 due to mismanagement practices identified by the Bank of Italy. In 2013, another Italian bank, Banca Popolare di Bari (BPB), stepped in to subscribe a capital increase in Banca Tercas.

The transaction was conditional upon the Fondo Interbancario di Tutela dei Depositi (FITD) providing a guarantee for Tercas' deficit. The FITD is a consortium of Italian banks whose purpose is to provide help to its members facing financial difficulties.

In February 2015, the Commission started a formal investigation into FITD's guarantee in favor of Tercas and concluded that this measure constituted State aid incompatible with the internal market. However, the decision was appealed by FITD, BPB and the Italian government, and eventually overturned by the General Court.

First, the Court noted that FITD's decision to grant a guarantee to Tercas was not imputable to the State. FITD is a private company, and its board is appointed pursuant to its statutes and with no intervention of the Italian State. Although FITD has a specific mandate under Italian law to intervene in support of banks under certain circumstances, the guarantee in support of Tercas was FITD's autonomous decision and was not granted in execution of that legal mandate. Finally, although the Bank of Italy eventually authorised the guarantee provided by FITD, it did not influence FITD's initial decision to intervene in support of Tercas.

Second, the General Court found that the resources used by FITD to support Tercas did not belong to the Italian State, as these funds were provided by the private banks belonging to the FITD consortium.

The Commission's appeal against this judgment is currently pending before the Court of Justice.

ii Trends, developments and strategies

The Court of Justice issued its preliminary ruling on the Italian case concerning the aid granted to Tirrenia di Navigazione SpA

On 23 January 2019, the Court of Justice issued its preliminary ruling on the questions raised by the Italian Supreme Court of Cassation in the case concerning the unlawful state aid granted to Tirrenia di Navigazione SpA as public service compensation for the period 1976-1980.[46]

The ruling clarifies that the allocation of money to a public undertaking facing financial difficulties may be classified as state aid. The same is true for the transfer of the state's shareholding in that undertaking to another public entity.

44 General Court, joined cases T-98/16, T-196/16 and T-198/16, *Tercas*, judgment of 19 March 2019.

45 Case SA.39451, *Tercas*.

46 Court of Justice, C-387/17, *Presidenza del Consiglio dei Ministri v. Fallimento Traghetti del Mediterraneo SpA*, judgment of 23 January 2019.

Furthermore, the Court of Justice provided some guidelines on the notion of existing aid[47] and market liberalization. Indeed, it stated that subsidies granted before the date of liberalisation of the market concerned cannot be qualified as existing aid solely because, at the time of its granting, that market was not formally liberalised.

The Italian Court of Cassation is expected to issue its final judgment in this case in the coming months.

iii Outlook

In 2019, the European Commission opened only one new investigation in the State aid sector concerning Italy.[48]

The Commission focused on the tax exemption granted by Member States to certain companies. In particular, this investigation concerns the Italian and Spanish laws exempting port authorities from the payment of corporate income tax.

In January 2019, the Commission invited Spain and Italy to change their legislation in order to comply with EU State aid rules.[49] While Spain complied with the Commission's request, the Italian authorities did not agree with the Commission's assessment of the contested provisions. The Commission therefore opened an in-depth investigation into the Italian regime. However, if the Commission concludes that the Italian provisions are incompatible with EU State aid rules, it cannot order the Italian government to recover any aid already granted. This is because these provisions existed prior to the entry into force of the EU Treaty.

VI MERGER REVIEW

i Significant cases

The ICA approves the acquisition of Persidera by F2i after the acceptance of the commitments

On 12 November 2019, the ICA approved the acquisition of Persidera, a network operator active in the market for digital terrestrial television, by F2i, a private equity firm.[50]

The transaction consisted of the demerger of Persidera (formerly controlled by Telecom Italia) into two separate companies. MuxCo, the new company holding Persidera's activities relating to the management of digital terrestrial frequencies, was directly acquired by F2i. NetCo, Persidera's branch managing Persidera's network infrastructure, was acquired by EI Towers, whose share capital is owned by F2i and Mediaset.

The ICA concluded that the acquisition of Persidera by F2i would have strengthened the dominant position of the merged entity both in the upstream market for television broadcasting networks and in the downstream markets of: (1) digital broadcasting; (2) free-to-air television; (3) pay-TV; and (4) advertising.

The ICA first noted that the transaction would result in significant concentration in the market of television broadcasting hosting services, where only two companies (EI Towers and Ray Way) would be able to provide customers with the full range of network monitoring

47 An existing aid is an aid which has been previously authorized by the Commission or by the Council, or a measure which became aid after its granting (*i.e.* due to changes in the market conditions).

48 Case SA.38399, *Italian port tax exemption.*

49 Press Release of 8 January 2019, IP/19/241, *State aid: Commission adopts two decisions recommending taxation of ports in Italy and Spain.*

50 Case C12245, *F2I S.G.R./Persidera*.

and maintenance services required for their operations. Given that EI Towers is vertically integrated, the ICA concluded that the transaction would also allow the merged entity to foreclose rivals in the downstream market for the provision of the transmission capacity to content providers.

The merger was approved subject to several remedies including, among others, EI Towers' obligations to provide non-discriminatory access to its infrastructure, to provide its hosting services under equal and cost-oriented terms, and to prepare separate balance sheets for its vertically integrated activities.

ii Trends, developments and strategies

The TAR Lazio quashed the ICA's decision imposing commitments on Sky after the withdrawal of the notification

On 20 May 2019, the ICA issued its decision on the acquisition of the sole control of R2 Srl (R2) by Sky.[51]

Sky is a television operator active in the provision of pay-TV services, offered both via satellite and via digital terrestrial television (DTT). Mediaset Premium (MP) is an undertaking active in the market for the production of content, which is generally transmitted in the pay-TV market. MP wholly owns R2, a company that provides technical and administrative platform services for broadcasting by means of 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, in March 2019, issued a statement of objections, where the ICA raised concerns that the concentration was capable of lessening competition in the market for retail pay-TV services.

Because of the concerns raised by the ICA, the parties withdrew the notification and tried to restore the previous competitive conditions. R2 was demerged from Sky and returned under the control of MP.

Nonetheless, the ICA took the view that the demerger did not fully restore the situation existing before the transaction. To effectively restore competition in the market, the ICA therefore imposed on Sky a set of behavioural remedies for the duration of three years. These remedies include an obligation to grant third parties access on a fair, reasonable, nondiscriminatory and cost-oriented basis to any new proprietary DTT platform that Sky may set up, as well as an obligation not to use information and 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 the acquisition of R2 by Sky, but also covered a set of agreements signed in 2018 between Sky and MP. With these agreements, MP assigned to Sky some DTT transmission capacity for its pay-TV services and provided a license allowing Sky to include MP's channels and TV shows in its pay-TV offerings via satellite, DTT and internet. According to the ICA, these contractual arrangements would have survived the abandonment of the notified transaction and had already had the effect of causing MP's exit from the market and a significant increase in Sky's customers.

51 Case C12207, *Sky Italia/R2.*

On 5 March 2020, the TAR Lazio annulled the ICA's decision[52] and, consequently, the measures imposed on Sky. The ruling is based both on procedural and substantive grounds. In referring to the procedural grounds of appeal, the TAR Lazio found that the ICA violated Sky's right of defense, given that there was a substantial difference between the transaction to which the statement of objections was referring and the transaction on which the decision was based. As a result, Sky could not duly exercise its right of defense in full against the allegations on which the Decision is based. Moreover, the ICA was not under time constraints, as it could (and should) have opened new proceedings to raise the new objections on which the Decision is based. As regards the substantive grounds, the TAR Lazio upheld Sky's pleas according to which – after R2 was demerged from Sky and returned under the control of MP – the ICA could not have found that there was a reportable concentration between Sky and MP. According to the TAR Lazio, the ICA proved neither that the DTT sub-licence granted Sky any exclusivity, nor that the individual agreements allegedly forming part of the overall transaction were linked by conditionality and that each of them had a concentrative nature.

The ICA authorises an acquisition in the gas sector with conditions

On 19 November 2019, the ICA cleared with conditions the acquisition of AcegasApsAmga by Ascopiave, both active in the operation of natural gas distribution networks.[53]

The ICA raised concerns that the transaction would lead to the creation of a dominant position in certain territorial districts thereby jeopardizing competitors' chances of success in future tenders for the concession of distribution networks in the north-east of Italy.

In order to address the ICA's concerns, Ascopiave submitted four sets of remedies. First, the successful tenderer, when different from Ascopiave, will enjoy a deferral of the payment of the portion of the incremental residual industrial value for a maximum period of eighteen months. Furthermore, the outgoing operator will have to allow the awarding participant to hire some of its employees in order to offset differences in the know-how between the incumbent operator and the new entrant. Third, Ascopiave will provide all the information at its only disposal needed by the other participants. Finally, the incumbent operator will have to sign a Transitional Service Agreement up to twelve months if requested by the awarded participant and on the conditions set by the Italian Regulatory Authority for Energy, Networks and Environment.

iii Outlook

On 23 March 2020, the ICA updated the filing thresholds for the Italian merger control regime, which remain extraordinarily high. Currently, a filing is not required unless (1) the aggregate Italian turnover of all involved undertakings exceeds €504 million and (2) the Italian turnover of each of at least two of those undertakings exceeds €31 million.

Since the two thresholds are cumulative—and the first threshold is very rarely met—the ICA's ability to review proposed transactions continues to be very limited. Only 65 concentrations were notified in 2019, and the ICA carried out an in-depth review in just six cases. By comparison, more than 400 transactions a year were notified before 2013, when a filing was required for any transaction meeting either of the two turnover thresholds.

52 TAR Lazio, judgment of 5 March 2019, *Sky Italia and ICA* (judgment No. 2932).

53 Case C12258, *Ascopiave/rami di azienda di Acegasapsamga*.

VII CONCLUSIONS

The ICA has continued to pursue its approach in terms of both advocacy and enforcement, particularly in regulated sectors. Its investigations remain focused on infringements affecting the public finances, such as bid-rigging in public tenders for waste management and railway sectors. Merger control is the area in which amendments continue to be most desirable, both in terms of filing thresholds and substantive test analysis (moving away from the dominance test to the significant impediment to effective competition test). Moreover, in line with EU rules, efficiencies should formally become part of the ICA's assessment.

In line with the ICA guidelines on antitrust compliance,[54] in 2019 the ICA has confirmed its willingness to provide a: (1) 5 per cent discount on the basic amount of the fine whenever the undertaking adopts an efficient compliance program after the beginning of the investigation but before the issuance of the statement of objections;[55] (2) 10 per cent reduction in case of adoption of an inefficient program before the investigation when it is subsequently efficiently amended before the statement of objections;[56] and (3) a 15 per cent reduction when the compliance program has been adopted before the investigation and it allowed an early discovery and termination of the infringement by the undertaking.[57]

Finally, in 2019 the ICA has proved to be particularly careful in monitoring undertakings' compliance with remedies[58] and cease and desist orders,[59] pursuant respectively to Articles 14-ter (2) and 15(2) of the Italian antitrust legislation.

54 ICA, *Antitrust compliance guidelines* of 25 September 2018, No. 27356.

55 See case I814, *Diritti internazionali*; and case I821, *CONSIP/gara sicurezza e salute 4*.

56 See case A511, *Enel/condotte anticoncorrenziali nel mercato della vendita di energia elettrica*, where the 10 per cent reduction was subsequently confirmed by the TAR Lazio, judgment of 17 October 2019, *Enel* (judgment No. 11958), § 11; case I808, *Gara Consip FM4*.

57 See case I805, *Prezzi del cartone ondulato*.

58 Case A378E, *Federitalia/Federazione Italiana Sport Equestri*, where the ICA found Federitalia to be in breach of the commitments that were made mandatory in 2011 in order to avoid an abuse of dominant position aimed at limiting participation in equestrian events and activities and their organization by other associations.

59 Case I792C, *Gare Ossigenoterapia e Ventiloterapia – inottemperanza*; case A493B, *Poste Italiane/prezzi recapito*. In both the investigations the ICA did not find an infringement of the cease-and-desist order.

Appendix 1

ABOUT THE AUTHORS

GIUSEPPE SCASSELLATI-SFORZOLINI

Cleary Gottlieb Steen & Hamilton LLP

Giuseppe Scassellati-Sforzolini is a partner in the Rome office of Cleary Gottlieb Steen & Hamilton LLP. Mr Scassellati-Sforzolini is active in public and private M&A, financial services regulation, EU state aid law and enforcement matters.

Mr. Scassellati-Sforzolini started Cleary's Italian corporate practice in the early 90s. Since then, he has worked on numerous privatisations through equity offers and auctions, debt exchange offers by sovereign issuers, takeover bids, negotiated acquisitions, restructurings, divestitures, joint ventures and private equity investments, particularly in regulated sectors such as financial services, energy, media, telecoms and airlines. He advises on EU state aid law and financial services regulation. He is also active in enforcement and private investigation matters, litigation and arbitrations.

Mr Scassellati-Sforzolini joined the firm in January 1988 and became a partner in 1996. He was initially resident in Cleary's Brussels office, until he transferred to Rome in July 1998 to open the firm's first Italian office.

MARCO D'OSTUNI

Cleary Gottlieb Steen & Hamilton LLP

Marco D'Ostuni is a partner in the Rome office of Cleary Gottlieb Steen & Hamilton LLP. Mr. D'Ostuni's practice focuses on competition law and regulation in the energy, telecommunications and media sectors.

Mr D'Ostuni has represented clients in some of the leading EU and Italian competition law cases, often in liberalised and heavily regulated sectors. He is widely published on antitrust matters and regularly lectures at numerous conferences and universities.

Mr D'Ostuni joined the firm in 2000 and, until June 2001, was based in the New York office. He became partner in 2009. Prior to joining Cleary, Marco was a trainee at an administrative law firm in Naples, from 1996 to 1997. From 1998 to 2000, he was an associate at a major international competition law firm in Brussels.

LUCIANA BELLIA

Cleary Gottlieb Steen & Hamilton LLP

Luciana Bellia is a senior attorney in the Rome office of Cleary Gottlieb Steen & Hamilton LLP. Ms Bellia's practice focuses on antitrust law and energy law.

Ms Bellia joined the firm in 2006 and became a senior attorney in 2015. From 2006 to 2008, she was resident in the Brussels office. She graduated, *summa cum laude*, from the Law School of the University of Rome, Luiss Guido Carli in 2001. While at law school, she was a visiting student at the Georgetown University Law Center for a semester on a scholarship granted by the University of Rome. From 2001 to 2005, Ms Bellia worked in Rome for Italian and international law firms, where she was primarily involved in competition law and energy law matters. In 2006, she received an LLM from the College of Europe, Bruges, in European legal studies with a specialisation in the economic analysis of law.

MICHAEL TAGLIAVINI

Cleary Gottlieb Steen & Hamilton LLP

Michael Tagliavini is a lawyer in the Rome office of Cleary Gottlieb Steen & Hamilton LLP. Mr Tagliavini's practice focuses on Italian and European competition law.

Mr Tagliavini joined the firm in 2016. In 2018, he trained for a five-month period with the Directorate General for Competition of the European Commission, where he worked on complex merger cases in the telecommunications and media sectors and policy projects relating to mergers and acquisitions. He graduated with honours from the University of Bologna and holds an LLM from King's College London.

FRANCESCO TROMBETTA

Cleary Gottlieb Steen & Hamilton LLP

Francesco Trombetta is a trainee lawyer in the Rome office of Cleary Gottlieb Steen & Hamilton LLP. Mr Trombetta's practice focuses on Italian and European competition law.

Mr Trombetta joined the firm in 2019. He graduated with honours from the University of Bologna and holds an LLM with distinction from King's College London.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Piazza di Spagna 15
00187 Rome
Italy
Tel: +39 06 69 52 21
Fax: +39 06 6920 0665
gscassellati@cgsh.com
mdostuni@cgsh.com
lbellia@cgsh.com
mtagliavini@cgsh.com
ftrombetta@cgsh.com
www.clearygottlieb.com

an LBR business

ISBN 978-1-83862-493-4