Chapter 10

ITALY

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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 secondary legislation, acts and decisions of public administrations that it considers incompatible with competition law, before the administrative courts. Furthermore, the ICA is empowered to address abuses of economic dependence, unfair commercial practices and conflicts of interest of government officials. 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.

In 2020,[3] the ICA closed four investigations concerning restrictive agreements or practices, three of which were closed with an infringement decision.[4] Four cases of abuse of dominance were investigated, in three of which an infringement was actually found,[5] while the other was closed with commitments.[6] The ICA also closed 80 investigations concerning

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

3 A table summarising the ICA's activities from 2011 to 2020 is available at https://www.agcm.it/dotcmsdoc/come-funziona/e27_file_2020.pdf

4 Case I820 – *Fatturazione Mensile con Rimodulazione Tariffaria;* Case I832 - *Servizi di prenotazione del trasporto Taxi- Napoli; and Case I836 - Tariffe autoscuole nella provincia di Cosenza.*.

5 Case A514 – *Condotte Fibra Telecom Italia;* Case A531 - *Riciclo imballaggi primari/condotte abusive Corepla;* and Case A523 - *Ticketone/condotte escludenti nella vendita di biglietti.*

6 Case A527 – *Comune di Genova/Distribuzione Gas Naturale*.

alleged unfair commercial practices, 51 of which were found to infringe consumer rights. Finally, regarding merger control, the ICA reviewed 71 transactions and opened six in-depth investigations.[7]

II CARTELS

i Significant cases

Council of State rules on appeals concerning ICA's decision to fine the 'Big Four' for bid rigging in the context of a public tender

On 6 October 2020,[8] the Council of State upheld the appeals filed by the ICA against judgments issued by the Regional Administrative Court of Lazio (TAR Lazio or TAR) in 2018 and rejected the cross-appeals lodged by Ernst & Young, Deloitte & Touche, PricewaterhouseCoopers, PricewaterhouseCoopers Advisory and KPMG (the Big Four).[9] The Council of State's rulings concern a decision delivered by the ICA in 2017, which fined the Big Four and the consulting companies belonging to the Big Four networks for allegedly rigging a tender for the provision of technical assistance services to public authorities.[10]

In referring to the Big Four, the Council of State concurred with the TAR Lazio that the parallelism of the companies' conduct could not be justified in the light of the explanations submitted by the parties. The lack of overlap in the most competitive bids, the fact that the most competitive bids included similar discounts (up to 30–35 per cent), while all of the non-competitive bids provided discounts only up to 10–15 per cent, the evidence of the meetings and the emails retrieved by the ICA were all elements that, considered as a whole, were sufficient in the judges' opinion to prove the existence of an anticompetitive purpose for the parallel behaviour and to shift the burden of proof to the companies. According to the Council of State the companies did not provide credible alternative explanations for their conduct.

With regard to the providers of consultancy services belonging to the Big Four networks, the Council of State agreed with the ICA that – although not having directly participated in the tender – these companies were to be held liable for the infringement. In particular, in the Council of State's view, the ICA correctly found that also the non-bidding companies were nonetheless parties to the anticompetitive practice, since they had the opportunity to understand and follow the anticompetitive strategy pursued by the parties. Accordingly, the

7 Case C12247B – *Bdc Italia-Conad/Auchan*; Case C12274 – *Emmeeffe Libri/Centro Libri*; Case C12287 - *Intesa Sanpaolo/Ubi Banca - Unione di Banche Italiane*; Case C11205B - *Elettronica Industriale/Digital Multimedia Technologies - Revisione misure*; Case C12279 - *Diperdì/Rami di Azienda di Sma e Società Generale Distribuzione*; and Case C12294 - *A2A/Ambiente Energia Brianza*.

8 Council of State, judgments of 6 October 2020, *ICA v. Kpmg Advisory S.p.A.*; *ICA v. Kpmg S.p.A.*; *ICA v. Deloitte & Touche S.p.A.*; *ICA v. Pricewaterhousecoopers S.p.A. and Pricewaterhousecoopers Advisory S.p.A.*; *ICA v. Ernst & Young Financial Business Advisors S.p.A.*; *ICA v. Ernst & Young S.p.A.*; and *ICA v. Deloitte Consulting S.r.l.* (judgments 5883, 5884, 5885, 5897, 5898, 5899 and 5900).

9 TAR Lazio, judgments of 14 November 2018, *KPMG S.p.A. v. ICA*; *Pricewaterhousecoopers S.p.A. and Pricewaterhousecoopers Advisory S.p.A. v. ICA*; *Deloitte & Touche S.p.A. v. ICA*; *Kpmg Advisory S.p.A. v, ICA*; *Deloitte & Consulting S.r.l. v. ICA*; *Ernst & Young Financial Business Advisors S.p.A. v. ICA*; and *Ernst & Young S.p.A. v. ICA* (judgments 10996, 10997, 10999, 11000, 11002, 11003 and 1004).

10 Case I796 – *Servizi di Supporto e Assistenza Tecnica alla PA nei Programmi Cofinanziati dall'UE.*

Court held that the TAR Lazio's findings on the concepts of 'group' and 'single economic entity' were unfounded, since each undertaking was individually and directly liable for the infringement.

The Council of State upholds TAR Lazio judgments that set aside ICA decision on Serie A Championship TV Broadcasting Rights

In four judgments issued between 28 and 30 December 2020,[11] the Council of State upheld four rulings of the TAR Lazio,[12] which had set aside an infringement decision issued by the ICA against the Italian top-tier football league (Lega Nazionale Professionisti Serie A, Lega), its adviser Infront, and TV broadcasters SKY, RTI and its subsidiary Mediaset Premium, regarding an alleged anticompetitive agreement to alter the award of TV broadcasting rights for Lega's 2015–2018 seasons.[13]

The Council of State rejected the appeal brought by the ICA and upheld the TAR Lazio judgments, setting aside the ICA decision mainly for: (1) failure to prove a restriction of competition 'by object' under Article 101(1) of the TFEU; and (2) delay in initiating proceedings.

Regarding the existence of a restriction of competition 'by object' under Article 101(1) of the TFEU, the Council of State held that the TAR Lazio correctly ruled out the existence of an anticompetitive agreement by object, in light of the relevant legal framework and factual background, based on the parties' conduct. In particular, the Council of State noted that the relevant legal provision concerning the award of TV broadcasting rights (i.e., the Melandri Decree) forbids one broadcaster from being awarded all the rights to Serie A matches (i.e., the no single buyer rule). In its view, the Lega did not act in an anticompetitive manner, but it corrected the outcome of the tender accordingly, in order to comply with the Melandri Decree and avoid giving one broadcaster a dominant position. With this judgment, the Council of State therefore restated that the ICA is required to follow a more rigorous approach in the assessment of restrictions by object.

In referring to the delay in initiating the proceedings, the Council of State confirmed that the delay of the ICA in initiating proceedings against the parties violated Article 14 of Law 24 November 1981, No. 689, also in light of the principles established by Article 6 of the European Convention on Human Rights and Article 41 of EU Charter of Fundamental Rights.

11 Council of State, judgments of 28 December 2020, *ICA v. Infront Italy S.p.A.*, *Mediaset Premium S.p.A.*, *Sky Italia S.r.l.* (judgment No. 8358); Council of State, judgment of 30 December 2020, *ICA v. Sky Italia S.r.l* (judgment No. 8535); and Council of State, judgment of 30 December 2020, *ICA v. Omissis* (judgments 8533 and 8534).

12 TAR Lazio, judgments of 23 December 2016, *Infront Italy S.r.l. v. ICA*; *RTI - Televisive Italiane S.p.a. and Mediaset Premium S.p.a. v. ICA*; *Sky Italia S.r.l. v. ICA*; *Lega Nazionale Professionisti Serie A v. ICA* (judgments 12811, 12812, 12814 and 12816).

13 Case I790, *Vendita diritti televisivi serie A 2015-2018.*

ii Trends, developments and strategies

The ICA issues a notice on cooperation agreements to tackle covid-19

On 24 April 2020, the ICA issued a notice providing guidelines on the assessment of cooperation agreements in the context of the covid-19 emergency.[14] The notice focuses on cooperation agreements aimed at favouring the production and fair distribution of essential goods and services that might be subject to shortages due to a sudden rise in demand linked to the covid-19 emergency.

When these cooperation agreements required the exchange of strategic information that in normal times could raise competition issues, the ICA explains that it is willing to assess such initiatives with flexibility, provided that they are: (1) necessary to facilitate the production of essential services and goods; (2) only applied for the time that is strictly necessary; and (3) absolutely proportionate.

The notice also clarifies that the ICA is available to assist companies and trade associations in the self-assessment of the above-mentioned cooperation projects, potentially also through the use of comfort letters.

In May 2020 the ICA applied the notice in two cases:[15] (1) an agreement in the pharmaceutical sector for joint purchasing and distribution of surgical masks; and (2) an agreement reached within ASSOFIN (an association of the main banking and financial operators that are active in the consumer credit sector) in order to adopt a common moratorium scheme for consumer credit provided by its members. This moratorium scheme was promoted by ASSOFIN in order to support the categories of individuals who did not receive any support under the Italian government's measures. In both cases the ICA found the agreements to be temporarily justified under the notice.

The Council of State confirms the annulment of an ICA decision that fined two companies for bid rigging in the market for food catering services in Italian motorway restaurants

On 27 April 2020[16] the Council of State upheld two judgments issued by the TAR Lazio in 2016,[17] which had annulled an ICA decision fining Chef Express and My Chef for alleged bid rigging in the market for food catering services in Italian motorway restaurants.[18] In particular, the Council of State agreed with the TAR Lazio that the ICA had not adequately proved a collusive scheme, because the decision was not based on sufficient evidence.

First, the Council of State criticised the fact that the ICA merely relied on average data provided by the complainant, instead of analysing the offers submitted by the companies in all of the 48 tenders in which they participated. Second, the Council of State noted that the ICA completely ignored the evidence submitted by the investigated companies during the proceedings. In particular, the ICA's decision did not make any reference to the economic reports presented by the companies to demonstrate that their offers could not result in the

14 ICA, *Notice on cooperation agreements in the context of the covid-19 emergency dated 24 April 2020.*

15 Case COV1-DC9901 - *Accordi di cooperazione tra imprese per distribuzione mascherine e schema di moratoria per credito al consumo predisposto da Assofin.*

16 Council of State, judgments of 27 April 2020, *ICA v. Chef Express S.p.a.;* and *ICA v. MyChef Ristorazione Commerciale S.p.a.* (judgments 2673 and 2674).

17 TAR Lazio, judgments of 1 April 2016, *Chef Express Spa v. ICA*; and *MyChef Ristorazione Commerciale S.p.a. v. ICA* (judgments 3982 and 3983).

18 Case I775 – *Procedure di affidamento dei servizi di ristoro su rete autostradale ASPI.*

rigging of the tenders at issue. Third, the Council of State held that the documentary evidence gathered by the ICA to support its findings, which mainly consisted of papers found at the companies' premises, was not convincing, particularly because it was unclear whether these analyses of the possible bidding scenarios had been drafted before or after the awarding of the tenders (when the offers submitted by the other bidders were publicly known). Finally, the ICA did not adequately demonstrate the absence of alternative explanations to the alleged coordinated outcomes, as it limited itself to referring to 'the total symmetry between the bidding behaviour of the companies, […] as well as the total symmetry of the outcomes of such tenders'. According to the Council of State, the ICA's decision lacked robust and convincing reasoning regarding the existence of the alleged collusive scheme.

iii Outlook

In the coming months, the ICA will pursue several important investigations launched in 2020. For example, on 14 July 2020, the ICA opened an investigation into the Apple and Amazon groups in order to ascertain whether Apple and Amazon agreed to impose a ban on electronic retailers that are not members of Apple's official programme on selling Apple and Beats-branded products, infringing Article 101 of the TFEU.[19] According to the ICA, this agreement might reduce competition between retailers and might decrease the incentives to effectively compete on the prices of Apple and Beats products.

Furthermore, on 1 December 2020, the ICA launched an investigation into an agreement in the banking sector that was communicated to the ICA by Bancomat S.p.A.[20] The main aspects of the agreement are the abolition of the interchange fee and payment of the fee on withdrawals made by the customers directly to the bank where the ATM is located. Since the project entails an agreement between competing banks, the ICA will assess whether it infringes Article 101 TFEU and whether it can be justified under Article 101(3) of the TFEU, in the light of its benefits to consumers.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Fibre roll-out and abuse of rights: the 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

On 25 February 2020, the ICA imposed a fine of over €100 million on the incumbent in the electronic communications sector, Telecom Italia (TIM), for allegedly abusing its dominant position in the wholesale and retail markets for broadband and ultra-broadband electronic communications services in Italy.[21]

The case revolves around public funding initiatives undertaken in Italy to promote the development of ultra-broadband networks. The implementation of these initiatives was entrusted to Infratel Italia, a company owned by the Italian Ministry of Economic Development. Infratel was in charge of periodically carrying out a public consultation to:

19 Case I842 - *Vendita prodotti Apple e Beats su Amazon Marketplace*.

20 Case I849 - *Bancomat - Prelievi Contanti*.

21 Case A514 - *Condotte fibra Telecom Italia*.

a update the map of available high-speed broadband connectivity offered by telecommunications operators;

b identify geographical areas not covered by the private operators' infrastructure roll out plans over the following three years; and

c determine the most disadvantaged areas of the national territory, eligible for public intervention through aid measures (i.e., 'market failure' or 'white' areas, in which, in the absence of public subsidies, private investment in innovative infrastructure would not take place).

In 2016, Infratel launched the first two tenders for the construction of an ultra-broadband network in the white areas, based on fibre-to-the-home (FTTH) technology. In the first tender, TIM submitted a bid, but ranked second to Open Fiber, a joint venture established by Enel and Cassa Depositi e Prestiti Equity to build fibre infrastructure in white areas with the support of public subsidies. TIM was also admitted to participate in the second tender, but did not submit any offer. Indeed, in the meantime TIM had changed its investment policy in white areas and announced an autonomous coverage plan, based on a less costly (but lower performance) technology (fibre-to-the-cabinet).

In June 2017, following complaints by Infratel, Enel and Open Fiber, the ICA started an investigation into TIM's behaviour, alleging that it was aimed at delaying fibre roll-out by other operators. The investigation was subsequently extended to TIM's offers in the wholesale market for broadband and ultra-broadband access services, as well as to the alleged use of privileged network information regarding other operators' customers to contact them and increase sales in the retail market for broadband and ultra-broadband communication services.

In the final decision, the ICA stated that TIM had engaged in different anticompetitive practices, which were allegedly parts of a complex exclusionary strategy. In particular, in the ICA's view, TIM obstructed the implementation of the tenders launched by Infratel to promote the entry of new infrastructure operators in the most disadvantageous areas. To this end, TIM allegedly decided to make an unprofitable change to its investment plans during the tender procedure, in order to cover white areas with its own ultra-broadband network. At the same time, TIM started a series of legal actions and initiatives aimed at delaying the tenders. Moreover, according to the ICA, TIM offered exclusionary prices for ultra-broadband access services, with a view to pre-empting demand at the wholesale level in the entire national territory. Finally, in the retail market for electronic communications services, TIM allegedly offered conditions capable of tying-in customers for a long period.

In the ICA's view, TIM's allegedly exclusionary strategy was implemented through initiatives that were legitimate in principle (such as infrastructure investments and legal actions to defend its interests), but pursued an aim not worthy of protection, i.e., limiting the development of competition in a market considered strategic for the country.

On the other hand, the ICA found no evidence that TIM had used privileged network information concerning other operators' customers to contact them through call centres and increase its sales in the retail market. Moreover, TIM had implemented a series of initiatives to prevent any inappropriate use of network information.

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

On 13 March 2020, the Council of State rejected the appeal lodged by Aspen against a judgment issued by the TAR in July 2017,[22] which had confirmed the ICA's decision to fine Aspen over €5 million for excessive prices under Article 102(a) of the TFEU.[23] In the decision, adopted in September 2016, the ICA found that, through an aggressive negotiation strategy in relation to the Italian Medicines Agency (AIFA), Aspen had obtained price increases of between 300 per cent and 1,500 per cent for certain oncological drugs (known as 'Cosmos'). Both the TAR and the Council of State upheld the ICA's findings.

With regard to market definition, the Council of State clarified that, even though the Anatomical Therapeutic Chemical (ATC) classification system provides a useful benchmark and is commonly used by antitrust authorities to define relevant markets in the pharmaceutical sector, the ICA is not bound to use it. In the case at hand, departing from the ATC classification system was justified because, due to their specific features, Cosmos drugs could not be substituted with other drugs for the treatment of certain diseases and some categories of patients (children and elderly people). Accordingly, they could be considered separate relevant markets for antitrust purposes. Moreover, the Council of State confirmed the ICA's finding of dominance, on the grounds that Aspen virtually holds a 100 per cent market share and does not face any effective actual or potential competition, also due to the barriers to entry that characterise the relevant markets.

The Council of State also upheld the assessment of Aspen's negotiation strategy by the ICA. According to the Council of State, Aspen's acts and initiatives had to be analysed not separately, but as a whole. Overall, Aspen's negotiation strategy was aimed at achieving extremely high prices for the Cosmos drugs. Aspen abused its right to renegotiate the prices of the Cosmos drugs, by leveraging on their essential character and engaging in an aggressive negotiation strategy, also through a credible threat to withdraw the products concerned from the market.

Finally, the Council of State considered that the ICA had correctly applied the two limbs of the test elaborated by the Court of Justice in United Brands to assess excessive prices.[24] First, the ICA had carried out a price-cost comparison based on two parameters: the difference between prices and costs, measured through the gross contribution margin; and the difference between revenues and a 'cost plus' benchmark, including direct costs, the share of indirect costs allocated to the products concerned and a profit margin. Both methodologies led to the conclusion that Aspen's prices were well above production costs. Secondly, the ICA had verified whether the prices were unfair, taking into account all relevant circumstances. In particular, the ICA had considered the new prices charged by Aspen and those applied in the past and found that there were no plausible economic or non-economic justifications for the substantial price increases imposed by Aspen. Accordingly, the ICA had correctly concluded that the prices charged by Aspen were unfair.

22 Council of State, judgment of 13 March 2020, *Aspen v. ICA* (judgment No. 1832); and TAR Lazio, judgment of 26 July 2017, *Aspen v. ICA* (judgment No. 8945).

23 Case A480 – *Incremento prezzo farmaci Aspen*.

24 Court of Justice, Case C-27/76, *United Brands*, judgment of 14 February 1978.

ii Trends, developments and strategies

The Council of State annuls an ICA decision that found an alleged abuse of dominance in the gas distribution sector by relying on theories of economic efficiency

On 13 January 2020, the Council of State annulled a decision issued by the ICA in 2012, in a case raising novel and complex issues.[25] The ICA had imposed a fine of €276,132 on Estra for having abused its legal monopoly in the market for gas distribution in the Municipality of Prato, by initially refusing, and then delaying, the provision to the contracting authority of the information required for the launch of a public tender for gas distribution services.[26]

In August 2019, the TAR Lazio partially upheld the appeal lodged by Estra against the ICA decision.[27] The TAR Lazio dismissed Estra's argument that its conduct was lawful in light of a judgment delivered in 2010 by the TAR of Tuscany, which had rejected the appeal brought by the Municipality of Prato against Estra's refusal to provide the requested information. The TAR Lazio relied on the established principle according to which the fact that a conduct is compatible with sector-specific regulation does not necessarily make it lawful under competition law.

On appeal, the Council of State overturned the ICA decision. First, the Council of State recalled that, pursuant to settled case law, abuse of dominance may constitute a form of abuse of right (i.e., distorted use of a right by its holder to pursue objectives that differ from those indicated by law). The Council of State then stated that – in the context of the judicial scrutiny of an antitrust decision – the judicature must not only establish whether the evidence put forward by the ICA is factually accurate, reliable and consistent, but also determine whether that evidence is capable of substantiating the conclusions drawn from it. In this respect, the benefit of doubt must be given to the firm under investigation, particularly when a decision imposes fines, in light of the presumption of innocence established by Article 6(2) of the European Convention on Human Rights (ECHR).[28]

In the case at issue, the Council of State concluded that the ICA's reasoning did not allow it to 'ascertain with reassuring certainty' an abuse of dominance. Estra's conduct could be considered a lawful defence of one's property (as demonstrated by the fact that Estra challenged the municipality's decision to launch a tender before the TAR of Tuscany, but complied with the municipality's request following a final ruling issued on the matter by the Council of State). Moreover, according to the Council of State, the ICA failed to adequately prove that upholding the municipality's right to receive the information required for the tender procedure, regardless of Estra's doubts on the lawfulness of the procedure, would result in greater efficiency to the benefit of consumers.

25 Council of State, judgment of 13 January 2020, *E.S.TR.A. S.p.a. v. ICA* (judgment No. 310); and Council of State, judgment of 13 January 2020, *Estra S.p.a. già Estra Reti Gas S.r.l. v. ICA* (judgment No. 315).

26 Case A435 – *Comune di Prato-Estra Reti Gas*.

27 TAR Lazio, judgment of 1 August, 2019, *E.S.TR.A. S.p.a. v. ICA* (judgment No. 9140); and TAR Lazio, judgment of 1 August, 2019, *Estra S.p.a. già Estra Reti Gas S.r.l. v. ICA* (judgment No. 9141).

28 General Court, Case T-336/07, *Telefónica and Telefónica de España v. Commission*, judgment of 29 March 2012, §§ 72-73.

iii Outlook

In the coming months, the Court of Justice will have to decide on preliminary references submitted by the Italian administrative courts on the concept of abusive conduct within the meaning of Article 102 of the TFEU and on the scope of application of the as efficient competitor test.

On 20 July 2020, the Council of State decided to refer a case to the Court of Justice for a preliminary ruling on the interpretation of the concept of abusive conduct within the meaning of Article 102 of the TFEU.[29] In 2018, the ICA fined Enel more than €93 million for abusive conduct in the market for the retail sale of electricity. The decision of the ICA was partially upheld by the TAR Lazio and Enel filed an appeal against the TAR Lazio's judgment. The Council of State asked the Court of Justice to clarify whether 'abusive exploitation' should be considered as such only on the basis of its potential restrictive effects or whether it should also include an additional element of unlawfulness. It also asked whether or not the abusive conduct should be considered unlawful 'per se' (as is the case for restrictions by object) or if other elements should be taken into account (such as, the intention of the alleged infringer).

On 7 December 2020, the Council of State decided to refer another case to the Court of Justice for a preliminary ruling in order to gain some clarifications on the principles established in the *Intel* case.[30] In 2017 the ICA fined Unilever more than €60 million for abusive conduct in the Italian market for the sale of single-wrapped ice cream in the out-of-home channel. In the ICA's view, Unilever carried out an exclusionary strategy to the detriment of its competitors by extensively using exclusivity obligations and fidelity rebates with its distributors, in order to further strengthen its dominant position within the relevant market. The Council of State asked the Court of Justice: (1) whether the principles established in the *Intel* case (and, in particular, known as the 'as efficient competitor test') must apply also to exclusivity provisions or whether they should be limited only to rebates; and (2) whether national competition authorities must always analyse the economic studies submitted by the parties in order to prove that the conduct would not exclude as efficient competitors, or whether this is not necessary in the case of exclusivity obligations or multiple abusive conduct (in other words, when the unlawful conduct does not involve only rebates).

Furthermore, the ICA has shown a particular interest in analysing the behaviour of big tech companies. On 20 October 2020, the ICA opened an investigation into Google for an alleged abuse of dominant position in the Italian market for display advertising.[31] The ICA, in the coming months, will assess whether Google has refused to provide its rivals in the market for digital advertising access to data for the design of display advertising campaigns (i.e., the space that publishers and website owners make available for the display of advertising content).

29 Council of State, order of 20 July 2020, *Enel v. ICA* (order No. 4646).

30 Council of State, order of 7 December 2020, *Unilever Italia Mkt. Operations S.r.l. v. ICA* (order No. 7713).

31 Case A542 – *Google nel mercato italiano del Display Advertising*.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

The ICA fines two companies for providing misleading information in response to a request for information

In two separate decisions dated 17 March 2020, the ICA concluded two sub-proceedings opened against the companies F&P and Vivo Concerti.[32] The ICA, pursuant to Article 14(5) of Law No. 287 of 10 October 1990, fined F&P and Vivo Concerti €51,646 each for providing misleading information regarding the availability of data and documents requested by the ICA during proceeding A523 – Ticketone on exclusionary conduct in ticket sales.[33]

While the parties claimed that they had no access to the information requested, the ICA found the requested documents during a dawn raid at the companies' premises. The ICA established that these documents were already available to the parties when they received the request for information.

Interestingly, the last time that the ICA used its power under Article 14(5) of Law No. 287 of 10 October 1990 to fine the recipients of a request for information who had not answered correctly was in 1993. Moreover, these decisions appear consistent with the approach of the European Commission, which – albeit with reference to mergers – recently imposed heavy fines for failure to provide correct information in the cases *Facebook/Whatsapp*[34] and *General Electric/LM Wind Power*.[35]

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 consumers' rights.

In four decisions dated 16 March 2020, the ICA fined four major Italian banks, namely Unicredit, BNL, Intesa Sanpaolo and UBI Banca more than €20 million overall, for unfair and aggressive commercial practices in the market for insurance policies tied to mortgages or subrogation.[36] The behaviour of the banks was allegedly aimed at inducing consumers that intended to enter into mortgages or subrogation contracts to buy from the same bank also insurance policies of various kinds (for example, fire, credit guarantee and life insurance). Unicredit and BNL were also found to have engaged in unfair commercial practices by making the granting of loans conditional upon the opening of a bank account.

32 Case A523B - *Ticketone/condotte escludenti nella vendita di biglietti-Friends & Partners*; case A523C, *Ticketone/condotte escludenti nella vendita di biglietti-Vivo Concerti*.

33 Case A523 - *Ticketone/condotte escludenti nella vendita di biglietti*. The ICA imposed a fine of over €10 million on TicketOne and its parent company, the German CTS Eventim AG & Co., for having implemented a complex abusive strategy of an exclusionary nature that precluded competing ticketing operators from selling, in any way and through any channel, a particularly high amount of tickets for live pop music events.

34 Case M.8228 – *Facebook/Whatsapp*.

35 Case M.8436 – *General Electric/LM Wind Power*.

36 Cases PS11456 – *Unicredit-vendita abbinata ai mutui*; PS11454 – *BNL-vendita abbinata ai mutui*; PS11453 – *Intesa San Paolo-vendita abbinata ai mutui*; and PS11455 – *UBI Banca-vendita abbinata ai mutui*.

In a decision dated 4 August 2020, the ICA imposed a fine of €4 million on Sixthcontinent, an operator active in the market for online advertising and e-commerce (in particular, in the sale of shopping cards), for misleading and aggressive practices.[37] According to the ICA, Sixthcontinent was providing misleading information to customers on the economic benefits of joining the community and purchasing the various shopping cards offered on the platform. Furthermore, the ICA found that Sixthcontinent carried out several types of aggressive unilateral conduct (such as blocking users' accounts in an unjustified manner, and hindering the issuance of shopping cards by the various merchants and delaying their activation) to the detriment of more than 500 customers.

On 22 December 2020, the ICA fined Enel, SEN and Eni €12.5 million for having infringed the national legislation on unfair practices and the 2018 Budget Law (Law No. 205/2017).[38] The 2018 Budget Law established a specific limitation period (two years) during which operators active in the energy sector may claim their credits in cases of customers' late billing of electricity and gas consumption, provided that the delay is not attributable to the consumer itself. The ICA found that, after the entry into force of the provision, Eni, Enel and SEN were systematically not accepting customers' claims not to pay bills because of the two-year limitation period. According to the ICA, the objections raised by the customers were not handled with diligence by the operators. Indeed, Eni, Enel and SEN did not review carefully the objections submitted by customers, and they merely rejected them with vague and standardised communications, through which they explained that the delay in billing was attributable to consumers, even though consumers had provided clear evidence that this was not the case.

iii Outlook

On 18 October 2020, the ICA published a resolution adopting the new regulation on legality rating.[39]

After considering comments sent by stakeholders that participated in the public consultation, the ICA introduced several amendments to the previous regulation. The main ones are:

a the extension of the scope of application of the legality rating, since it is now available not only to companies that qualify as 'undertakings' under the Italian Civil Code, but also to entities that are not 'undertakings' but are nevertheless enrolled in the Italian Administrative Economic Registry;

b additional subjective requirements to obtain the legality rating (e.g., directors of the parent company or of the company or body exercising management and coordination activities over the company applying for the legality rating are now also included in the ICA's assessment);

c the inclusion of usury, fraudulent transfers and fraudulent bankruptcy in the list of offences precluding access to the legality rating; and

d simplification and clarification of the procedure.

Through these amendments the ICA is now able to exercise a broader scrutiny on the undertakings applying for legality rating.

37 Case PS11332 – *Sixthcontinent-mancato riconoscimento crediti*.

38 Case PS11564 – *ENEL/SEN-prescrizione biennale*; and case PS11569 - *ENI-prescrizione biennale*.

39 ICA Resolution No. 28361 of 28 July 2020, *Regolamento attuativo in materia di rating di legalità*.

V STATE AID

i Significant cases

The Court of Justice confirms the existence of state aid in the form of capital increases in a company in charge of ground handling at two Italian airports

On 10 December 2020, the Court of Justice rejected the appeal brought by the Municipality of Milan against the General Court's decision that confirmed the European Commission's finding that capital injections carried out by SEA Handling's state-owned shareholders constituted a state aid in breach of Article 107 of the TFEU.[40]

SEA, the company which manages the airports of Milano Linate and Milano Malpensa, is almost wholly owned by public authorities, and the controlling entity is the Municipality of Milan (which holds 84.56 per cent of the shares). In 2002, in order to comply with EU and national regulations, SEA set up SEA Handling, which was entrusted with ground-handling activities within the airports of Milan. By virtue of an agreement signed in 2002 between the Municipality of Milan, SEA and some trade unions, SEA was required to hold most of the shares and to cover potential losses of SEA Holding for at least five years.

In a decision issued in 2015, the European Commission found that in the period between 2002 and 2010, SEA carried out capital injections into SEA Handling of €359,644,000 in total.[41] These grants were meant to cover SEA Handling's operating losses, which, for that period, amounted to approximately €339,784,000. The European Commission reasoned that because SEA Handling was ultimately controlled by the Municipality of Milan, the measures constituted unlawful state aid, since they were state resources granted by a public authority which did not comply with the market economic operator test (MEO test).

The Municipality of Milan appealed the decision before the General Court, which, on 13 December 2018, stated that the European Commission correctly found that the measures were imputable to the state, constituted state resources, and did not comply with the MEO test.[42]

On 10 December 2020, the Court of Justice dismissed the appeal brought by the Municipality of Milan against the judgment of the General Court. Indeed, according to the Court of Justice the General Court and the European Commission correctly found that the measures were imputable to the state since SEA Handling was mostly publicly owned and since the Municipality of Milan had a crucial role in the decision-making process of the board of directors. For this reason, it was not necessary to provide evidence of actual control over SEA resources. Furthermore, the Court of Justice noted that the General Court had found evidence of the involvement of the Municipality of Milan in the adoption of these measures.

After analysing and confirming the obligation of SEA to compensate for any loss incurred by SEA Handling for the first five years by virtue of the 2002 agreement, the Court of Justice found that no private investor would have entered into this agreement on the same terms. Indeed, a private investor would not have entered into such a commitment without first carrying out an appropriate *ex ante* assessment of the profitability and economic rationality of its investment. Since SEA did not carry out such a preliminary study, and since

40 Court of Justice, case C-160/19, *Comune di Milano v. Commission*, judgment of 10 December 2020.

41 Case SA.21420, *Aid to SEA Handling/Setting-up of Airport Handling*.

42 General Court, case T-167/13, *Comune di Milano v. Commission*, judgment of 13 December 2018.

no other rational explanations were found in order to support the decision to enter into the agreement, the Court of Justice found that the criteria of the MEO test were not satisfied, and that the appeal brought by the Municipality of Milan had to be dismissed.

ii Trends, developments and strategies

The EU Court of Justice confirmed that the intervention by Fondo Interbancario di Tutela dei Depositi in support of Banca Tercas did not constitute state aid

On 2 March 2021, the Court of Justice dismissed the appeal brought by the European Commission against the General Court's judgment in the *Tercas* case.[43]

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 to 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 December 2015 the European Commission concluded that FITD's guarantee in favour of Tercas constituted state aid incompatible with the internal market.[44]

On 19 March 2019, the General Court annulled the European Commission decision on two main grounds: (1) FITD's decision to grant a guarantee to Tercas was not imputable to the state; and (2) 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 European Commission has brought an appeal against this judgment before the Court of Justice.[45]

Dismissing the appeal brought by the Commission, the Court of Justice, sitting as the Grand Chamber, clarified its case law on the imputability to the state of support measures implemented by a private entity.

Contrary to the Commission's view, the Court of Justice held that, in examining the requirement of imputability of an aid measure to the state, the General Court had not imposed a higher standard of proof on the Commission, but had applied settled case law (since the *Stardust* judgment) according to which imputability may be inferred from evidence arising from the circumstances of the case and the context in which the measure was implemented. According to the Court of Justice, the General Court simply: (1) took note of the objective differences between a situation in which the body granting the aid is a public undertaking, and as such subject to state control, and one in which that body is controlled by private individuals; and (2) took into account the consequences of those objective differences when assessing the evidence necessary to establish the imputability of the measure. The Court of Justice observed that the absence of a capital link between the entity concerned and the state is clearly relevant in assessing the imputability of the measure to the state.

The Court of Justice also rejected the Commission's argument that FITD should have been considered an entity emanating from the state. According to the judgment, the case law on the notion of an entity 'emanating from the State' – developed by the Court of Justice in cases concerning the direct effect of directives that have not been transposed or that have

43 Court of Justice C-425/19, *Commission v. Italy*, *Banca Popolare di Bari SCpA, Fondo interbancario di tutela dei depositi, Banca d'Italia*, judgment of 2 March 2021.

44 Case SA.39451 – *Tercas*.

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

been transposed incorrectly in relation to bodies or entities subject to the authority or control of the state – cannot be extended to the question of imputability to the state of aid measures within the meaning of Article 107(1) TFEU.

In addition, the Court of Justice rejected the Commission's argument that the General Court's judgment made it possible to circumvent Article 32 of Directive 2014/59, which provides for the triggering of a resolution procedure when a credit institution needs extraordinary public financial support. The Court of Justice reasoned that it remains possible for the Commission to show that a measure adopted by a deposit-guarantee scheme constitutes state aid, having regard to the characteristics of that scheme and of the measure in question.

Finally, the Court of Justice found that, contrary to the Commission's view, the General Court had not assessed the evidence in isolation, but had correctly based its conclusions on an overall analysis of all the factors taken into account in the contested decision, in context.

The *Tercas* judgment offers important clarifications on the application of state aid rules to private entities entrusted with general interest tasks and has important implications for the management of banking crises in Europe, recognising that, under certain conditions, interventions in support of banks in difficulty financed by deposit guarantee schemes do not constitute state aid.

iii Outlook

In December 2020 the European Commission required Italy to abolish the corporate tax exemptions granted to its ports, in order to comply with EU state aid rules.[46] In Italy, port authorities are exempted from corporate income tax. Nonetheless, according to the European Commission, profits earned by port authorities from economic activities should be taxed under normal national corporate tax laws in order to avoid distortions of competition. For this reason, in January 2019 the European Commission invited Italy to amend its legislation and in November 2019 the European Commission opened an investigation. In December 2020, the European Commission concluded that the corporate tax exemption granted to Italian ports provides them with a selective advantage, in breach of EU state aid rules. The dialogue between the European Commission and the Italian authorities is ongoing, but Italy will need to take the necessary steps to remove the tax exemption not later than 1 January 2022.

VI MERGER REVIEW

i Significant cases

The ICA approves an acquisition in the Italian banking sector with conditions

On 14 July 2020, the ICA approved the acquisition of UBI Banca – Unione di Banche Italiane S.p.A. (UBI) by Intesa SanPaolo S.p.A. (ISP).[47]

On 17 February 2020, ISP announced a voluntary public exchange offer for the entire share capital of UBI. On the same date, ISP entered into two separate agreements, respectively: with BPER bank (BPER), pursuant to which BPER would purchase from ISP a going concern comprising, among other things, more than 500 bank branches previously owned by UBI; and with Unipol, pursuant to which Unipol would purchase from ISP certain assets relating to the insurance sector previously owned by UBI.

46 Case SA.38399 – *Ports taxation in Italy*.

47 Case C12287 – *Intesa Sanpaolo/Ubi Banca-Unione di Banche Italiane*.

On 17 February 2020, ISP notified the concentration to the ICA, which opened an in-depth investigation, since the proposed concentration would significantly undermine competition in certain Italian regions.

The ICA expressed its concerns at a 'general level', noting that in Italy there are two main banking groups: ISP and UniCredit. UBI is a smaller group, which, according to the ICA, has nonetheless the potential to become a 'pooling hub' for smaller banks in the near future, creating a third group that could compete with ISP and UniCredit. For this reason, the ICA held that the proposed concentration could strengthen ISP by disrupting the competitive symmetry between ISP and Unicredit.

Furthermore, during the investigation, UBI and Unicredit claimed that UBI could be defined as a maverick firm, especially because of its decentralised structure, its technological and innovative component, as well as its strong local presence. Nonetheless, the ICA found that UBI could not be considered a new entrant with a strong innovative force and disruptive capacity compared to the existing market structure, since UBI was instead a traditional operator in the banking sector.

After carrying out an in-depth market investigation, the ICA found that the proposed concentration could create or strengthen a dominant position in:

a the markets for consumer deposit and loans to both small and medium-sized households and enterprises;

b the markets for asset management and investment funds; and

c the market for distribution of life insurance products, due to their regional dimension and the lack of competitors.

Nonetheless, the ICA found that the measures proposed by ISP (the sale of 500 bank branches and of certain assets) were appropriate to remove the competitive concerns arising from the merger under review, and for these reasons it approved the concentration, on the condition that ISP would implement the proposed measures.

ii Trends, developments and strategies

The ICA fines several gas operators at national level for failure to notify a concentration

On 15 September 2020, the ICA imposed total fines of approximately €150,000 on Acea, Mediterranea and Alma[48] for failure to notify their acquisition of joint control over Pescara Distribuzione[49] before implementing the transaction, in violation of Article 16(1) of Italian Law No. 287/90.[50]

On 18 May 2020, the parties notified two transactions to the ICA, namely: (1) the acquisition of joint control over Pescara Distribuzione (first acquisition), pursuant to a preliminary purchase and sale agreement signed by the parties on 11 October 2018 and

48 The transaction concerns the natural gas distribution sector. Acea is a multi-utility leader in the water sector and one of the top operators in the electricity distribution, energy and environment sectors. Mediterranea is active in the distribution of methane gas, LPG and propane air. Alma is a leading provider of innovative and sustainable solutions for energy systems, building and infrastructure.

49 Pescara Distribuzione manages the gas distribution service in the municipality of Pescara.

50 Case C12295B – *Acea-Mediterranea-Alma C.I.S./Pescara Distribuzione Gas*.

executed on 18 March 2019; and (2) the acquisition of joint control over Alto Sangro Distribuzione[51] (second acquisition), pursuant to a preliminary agreement signed by the parties on 10 March 10, 2020.

In the parties' view, the two transactions were interdependent within the meaning of Article 5(2) of EU Regulation No. 139/2004 (the EU Merger Regulation)[52] as they were part of Acea's expansion project in the distribution of natural gas in central Italy (and in Abruzzo in particular). Moreover, they did not violate the obligation of prior notification as they notified the first acquisition before the closing of the second acquisition.

The ICA took the opposite view, noting that the first acquisition was an above-threshold transaction and, therefore, should have been notified before its closing, as required by Italian Law No. 287/90. Moreover, even if they had been part of one and the same concentration, they should have been notified before the closing of the first acquisition, rather than the closing of the second acquisition. It reasoned that this conclusion was consistent with Article 5(2) of the EU Merger Regulation, which is aimed at capturing various sub-threshold transactions and parallel agreements that are spread over time by parties with a view to eluding merger control.

The Council of State overturns TAR Lazio judgment that quashed ICA decision that imposed commitments on Sky after withdrawal of notification

In a ruling published on 19 November 2020, the Council of State declared inadmissible an appeal for revocation lodged by Sky,[53] and confirmed its decision dated 4 June 2020[54] (i.e., a judgment curiously issued in a simplified form in which the Council of State overturned a TAR Lazio judgment that had quashed an ICA decision concerning the acquisition of sole control of R2 by Sky).

On 20 May 2019, the ICA issued its decision on the acquisition of sole control of R2 by Sky.[55]

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 and completed the transaction before the ICA's clearance. Because the ICA decided to open an in-depth investigation, 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, and therefore it imposed on Sky a set of behavioural remedies for the duration of three years.

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51 Alto Sangro manages the gas distribution service in the municipalities of Alto Sangro and of Parco Nazionale d'Abruzzo and all related infrastructure activities.

52 According to which 'two or more transactions … which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction'.

53 Council of State, judgment of 11 November 2020, *Sky Italia s.r.l. and Sky Italian Holdings S.p.A v. ICA* (judgment No. 7194).

54 Council of State, judgment of 4 June 2020, *Sky Italia s.r.l. and Sky Italian Holdings S.p.A v. ICA* (judgment No. 3534).

55 Case C12207, *Sky Italia/R2*.

Furthermore, 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. In these agreements, MP assigned to Sky some DTT transmission capacity for its pay-TV services and provided a licence 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.

On 5 March 2020, the TAR Lazio annulled the ICA's decision and, consequently, the measures imposed on Sky.[56] The ruling was 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 defence, given that there was a substantial difference between the transaction to which the statement of objections referred and the transaction on which the decision was based, following the demerger. 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 DTT sub-licence did not grant Sky any exclusivity and its duration was too short to result in a lasting change in control of the undertakings concerned and in the structure of the market.

Unlike the TAR Lazio, with an unprecedented decision issued in simplified form and without warning after the initial hearing on interim measures, the Council of State examined very briefly the procedural grounds of appeal that Sky had previously submitted before the TAR Lazio. In particular, the Council of State held that the ICA decision was compliant with Article 18(3) of Law No. 287 of 10 October 1990, according to which, if the concentration has already been implemented before the decision, the ICA can impose the measures that are necessary to restore effective competition. According to the Council of State, when Sky received the statement of objections, it was in the position to know that the ICA could impose the necessary measures to restore effective competition in its final decision.

The Council of State focused rather on the substantive issues. In particular, the Council of State held that the TAR Lazio erred in finding that: the DTT sub-licence did not grant Sky any exclusivity; and the duration of that sub-licence was too short to result in a lasting change in the companies' control and in the structure of the market.

Furthermore, the Council of State agreed with the ICA's finding that, even though the parties had withdrawn the notification of the transaction, they had failed to show the re-establishment of the previous status quo. The court reasoned that the grant of the DTT sub-licence and the acquisition of control over R2 (even though for a limited period of time) had irreversibly altered the competitive dynamics in the affected market , also in light of fact that the acquisition of control over R2 allowed Sky to request a technological change to R2 smart card reader settings to remove the 'pairing', which prevented them from being used with smart cards other than R2s. The Council of State concluded that this allowed Sky to strengthen its dominant position in the market for pay-TV services.

Finally, on 19 November 2020, the Council of State rejected Sky's application for revision of its decision issued on 4 June 2020. The Council of State stated that an application for revision can be upheld only when an apparent and objective error of fact occurs. In the present case Sky submitted complex pleas that – by their very nature – were considered by the

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

Council of State as incompatible with this kind of error. In addition to that, in the Council of State's opinion, its previous judgment had thoroughly examined all the pleas that were crucial to the decision, while the pleas that were not examined in full were nonetheless expressly acknowledged by the court. Therefore, the Council of State concluded that Sky's application for revision was inadmissible.

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 in the last financial year of all involved undertakings exceeds €504 million and (2) the Italian turnover in the last financial year 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 27 concentrations were notified in the first half of 2020, and the ICA carried out an in-depth review in just two 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.

VII CONCLUSIONS

The ICA has continued to pursue its approach in terms of both advocacy and enforcement, particularly in regulated sectors and in digital markets. Its investigations remain focused on infringements affecting the public finances, such as bid rigging in public tenders, and on abuses of dominance by big tech players. Merger control is the area in which amendments continue to be most desirable, both in terms of filing thresholds (which are now excessively high and might not capture transactions in the digital markets that may give rise to competition concerns) 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.

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