Chapter XX

ITALY

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I INTRODUCTION

Abuse of dominance within the Italian market, or in a substantial part of it, is prohibited by Article 3 of Law 10 October 1990, No. 287 (the Competition Act), which closely resembles Article 102 of the Treaty on the Functioning of the European Union (TFEU). Article 3 does not provide a definition of abuse but lists examples of abusive conduct.[2]

In principle, Italian competition rules apply only to practices that do not affect intra-EU trade. As the Italian Competition Authority (ICA) and the Italian courts tend to interpret broadly the notion of effect on intra-EU trade, in most cases they apply EU rules. However, the choice of the applicable rules does not materially affect the outcome of a case, given that, pursuant to Article 1(4) of the Competition Act, Article 3 must be interpreted in accordance with well-established EU principles.

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2 In particular, it is prohibited to:

a directly or indirectly impose unjustifiable burdensome purchase or selling prices or other contractual conditions;

b limit or restrict production, market outlets or market access, investment, technical development or technological progress;

c apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; and

d make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The ICA has not issued formal guidance on abuses of dominance. However, the Commission Guidance on exclusionary abuses (the Guidance) may provide useful indications on the interpretation of Article 3.[3]

Article 3 applies also to public firms and to those in which the state is the majority shareholder. Pursuant to Article 8 of the Competition Act, antitrust rules do not apply to firms entrusted with the supply of services of general economic interest or holding a legal monopoly, insofar as this is indispensable to perform the specific tasks assigned to them.[4]

II YEAR IN REVIEW

In 2015, the ICA closed three investigations regarding abuse of dominance. In one case, it found an infringement and imposed a fine.[5] In the other two cases, the ICA accepted the commitments offered by the dominant firm and closed the proceedings without establishing the alleged infringement.[6] At the beginning of 2016, the ICA issued another commitment decision in *E-Class/Borsa Italiana*.[7]

In May 2015, the Council of State confirmed a 2014 ruling of the Latium Regional Administrative Tribunal (TAR), which had upheld an ICA finding of abuse.[8]

The abuse cases in the period under review concerned, *inter alia*, refusal to deal, margin squeeze, discriminatory and exploitative practices, and misuse of rights and legitimate interests.

The 2015 decision-making practice confirms the ICA's increasing focus on the abusive exercise of rights or legitimate interests arising from contracts, sector-specific regulation or other rules, as shown by the *SEA* and *CONAI* cases.

In March 2015, the ICA imposed a fine on Società per azioni Esercizi Aeroportuali (SEA) for abusive conduct in the markets for the management and provision of airport facilities for commercial and general aviation, and ground-handling services for general aviation at Milan Linate airport.[9] SEA is the sole manager of Milan Linate and Milan Malpensa airports for both aviation activities (i.e., management, development and maintenance of infrastructures and handling services) and non-aviation activities (i.e., commercial and real estate services). According to the ICA, SEA abused its dominant position by preventing access to the market for aviation activities in Milan Linate airport by Cedicor, a Uruguayan company active in the management of airport infrastructures.

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3 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02.

4 Firms holding a legal monopoly must operate through separate companies if they intend to operate on other markets. When firms entrusted with the provision of services of general economic interest or holding a legal monopoly supply their subsidiaries on different markets with products or services over which they have exclusive rights, they must make these products or services available to their direct competitors on equivalent terms and conditions.

5 Decision of 25 March 2015, No. 25387, A474, *SEA/Convenzione ATA*.

6 Decisions of 15 July 2015, No. 25561, A473, *Fornitura acido colico*; 3 September 2015, No. 25035, A476, *Conai-Gestione rifiuti da imballaggi in plastica*.

7 Decision of 3 February 2016, No. 25859, A482, *E-Class/Borsa Italiana*.

8 Council of State, May 2015, No. 2479.

9 Decision of 25 March 2015, No. 25387, A474, *SEA/Convenzione ATA*.

In 1961, SEA had granted ATA Trasporti (ATA) an exclusive subconcession to manage certain general aviation facilities. In 2013, ATA's main shareholder, a company then in liquidation, held a tender procedure to sell its 98.3 per cent stake in ATA, which Cedicor made a bid to acquire. The ICA contested that SEA had adopted three initiatives to hinder access to the market by Cedicor through the acquisition of ATA: firstly, SEA had tried to obstruct the procedure for the sale of ATA shares by contesting inefficiencies and lack of information by the adviser and the seller; secondly, it had terminated the subconcession agreement with ATA after it found out that Cedicor's offer for ATA shares was higher than its own; and thirdly, it had submitted a second bid, higher than the first, to win the tender. According to the ICA, SEA's conduct intentionally and irremediably altered competition for the market by preventing the entry of an efficient competitor, which was capable of offering a high quality service. The ICA dismissed the defence based on SEA's right to terminate the subconcession agreement, on the ground that, regardless of whether the termination was legitimate, the dominant firm had strategically exercised its alleged right of termination with the sole purpose of preventing Cedicor's entry (through ATA) in the market for general aviation services at Milan Linate airport. The ICA also rejected SEA's efficiency defence based on alleged synergies in the integrated management of general and commercial aviation activities by a single firm, because the alleged efficiencies were not considered sufficient to compensate the serious anticompetitive effects of the contested conduct.

In September 2015, the ICA accepted commitments offered by CONAI and COREPLA, two consortia active in the management of packaging special waste (i.e., waste produced by non-domestic users),[10] in proceedings concerning, *inter alia*, an alleged abuse by the dominant firm of its role in an administrative procedure necessary for allowing a competitor to enter the market. CONAI is a mandatory consortium that brings together packaging manufacturers and users, with a view to financing and organising the collection and recycling of packaging waste. In the plastic packaging segment, CONAI is active through COREPLA, a consortium representing plastic packaging manufacturers and users. Aliplast, a company specialising in the collection, recycling and recovery of plastic packaging, had created an autonomous system for managing packaging waste, except for a small portion that still needed to be processed through CONAI's infrastructure. Autonomous systems need to be duly authorised by the Ministry of the Environment in an administrative procedure featuring CONAI as an adviser.

The ICA contested that CONAI had implemented an exclusionary strategy by: abusing its advisory position through a number of objections with the exclusive purpose of hindering the authorisation of the new Aliplast system; refusing to quantify the fee owed to CONAI by Aliplast for the residual recycling activities, thus preventing the conclusion of an agreement that was an essential condition for authorisation; and disseminating disparaging remarks concerning Aliplast's system, which could negatively influence consumers.

In order to remove the ICA's concerns, the consortia offered a number of commitments. *Inter alia*, they undertook to: appoint an independent monitoring trustee to advise the Ministry of Environment in the recognition procedure; negotiate with autonomous systems

10 Decision of 3 September 2015, No. 25035, A476, *Conai-Gestione rifiuti da imballaggi in plastica*.

to determine the fee for the portion of their packaging activities that continued to be handled by CONAI; publish on CONAI's website detailed information regarding the autonomous systems; and avoid influencing users on the legitimacy of such systems.

In July 2015, the ICA accepted the commitments offered by Industria Chimica Emiliana (ICE) in the context of an investigation concerning a more traditional type of abuse (i.e., a price-squeeze strategy implemented by a vertically integrated firm).[11] ICE was found to be dominant in the production and sale of cholic acid, an input used to manufacture pharmaceutical products. The ICA contested that this firm had implemented a price-squeeze strategy aimed at excluding downstream competitors by increasing the price of the intermediate product and offering selective price cuts to customers of a competitor in the downstream market. In order to remove the ICA's concerns, ICE undertook to sell the raw material used for the production of cholic acid at a price equal to the average price paid by ICE for the purchase of the raw material plus a given margin. The ICA held that this commitment would limit ICE's capability of engaging in exclusionary pricing policies because, in case of increase in the price of cholic acid, competitors could purchase the raw material at a competitive price to produce cholic acid directly or through another firm.

In February 2016, the ICA accepted commitments offered by the London Stock Exchange Holdings Italia and its subsidiaries Borsa Italiana, the Italian stock exchange, and BIt Market Services (BIMS), a company vertically integrated with Borsa Italiana, which is active in the provision of financial information.[12] Borsa Italiana supplies financial data to intermediaries and information providers (including BIMS) active in the downstream market for the provision of financial information. The ICA contested that Borsa Italiana had abused its dominant position by forcing BIMS's competitors to provide a detailed list of their customers and the type of data sold to them. This information enabled BIMS to learn the identity and needs of competitors' clients and to specifically target them, including through selective price cuts.

The parties offered both structural and behavioural remedies. In particular, they undertook to divest BIMS's business division in charge of supplying financial information services in the downstream market. In addition, the parties undertook to implement a set of behavioural remedies during the time needed for the divestiture of the financial information division, with a view to ensuring a certain degree of separation between the financial information division and Borsa Italiana, preventing possible discriminatory practices and limiting the possible exchange of sensitive information.

In May 2015, the Council of State upheld the TAR ruling of 8 May 2014, which had confirmed an ICA decision imposing a fine of approximately €103.8 million on Telecom Italia, the incumbent in the electronic communications sector.[13] In 2013, in *Wind-Fastweb/Condotte Telecom Italia*, the ICA fined Telecom Italia for having restricted other operators' access to its fixed network by rejecting an unjustifiably high number of competitors' requests for activation of wholesale services and treating them in a discriminatory fashion compared with those coming from its own internal divisions, as well as for having adopted an anticompetitive discounting policy for large business clients in the market for retail access

11 Decision of 15 July 2015, No. 25561, A473, *Fornitura acido colico*.

12 Decision of 3 February 2016, No. 25859, A482, *E-Class/Borsa Italiana*.

13 Council of State, 15 May 2015, No. 2479; TAR, 8 May 2014, No. 4801.

to the fixed-telephone network, thereby squeezing competitors' margins.[14] In the assessment of the alleged margin squeeze, the ICA used as a benchmark not the average prices actually charged at the retail level, nor the individual offers made to different customers, but the prices resulting from a hypothetical simultaneous application of the maximum discounts provided for by Telecom Italia's price lists for the various types of narrowband access services.

On appeal, the incumbent argued, *inter alia*, that it had complied with the pervasive access regulation adopted by the Italian Telecommunications Authority (AGCom), and that the data on rejections of requests did not support the ICA's claims. Furthermore, Telecom Italia maintained that it had not actually implemented the contested discount policy, which in any event had not led to any margin squeeze. The administrative court held that the ICA decision did not conflict with the regulatory framework. It noted that Telecom Italia owns an essential facility and, thus, it is under an obligation to grant access to its fixed network on fair, reasonable and non-discriminatory terms. According to the TAR, the evidence collected by the ICA showed that Telecom Italia had treated competitors' requests for activation of wholesale access services in a discriminatory manner compared with requests originating from its own commercial divisions. Furthermore, the TAR upheld the ICA's view that Telecom Italia had implemented a discount policy capable of preventing equally efficient competitors from operating at a profit.

The incumbent challenged the TAR ruling before the Council of State, but the latter upheld the findings of the lower court. According to the Council of State, Telecom Italia's constructive refusal to supply consisted in the specific procedures set out for the activation of services to its competitors, which were structurally different from those applicable to the requests submitted by Telecom Italia retail division. External requests were, *inter alia*, managed by an intermediary wholesale division and subject to preliminary formal verification. By contrast, internal requests were directly submitted to Open Access, the functionally separated division in charge of supplying access services, were not subject to the same formal verification and were based on more updated databases. In addition, competitors' requests that could not be satisfied were rejected, and had to be submitted again, while Telecom Italia's internal requests were simply suspended. According to the court, the differences in activation procedures resulted in more complexity and higher costs for competitors and, thus, amounted to discriminatory treatment. The Council of State rejected Telecom Italia's defence based on the compatibility of its procedures with the telecommunications regulatory framework, on the ground that sector-specific *ex ante* regulation and *ex post* antitrust enforcement are complementary tools and play different roles. As to margin squeeze, the Council of State upheld the ICA's view that Telecom Italia's discount policy for large business clients could not be replicated by as efficient competitors. The court also rejected Telecom Italia's claim that the discount policy had not been actually implemented. In this respect, the Council of State maintained that, based on EU case law, a discount policy does not need to have actual foreclosure effects, as the mere possibility of anticompetitive effects is sufficient for a finding of abuse.

In 2015, Italian civil courts also dealt with different cases concerning alleged abuses of dominance. Compared to the ICA, civil courts dealt with more traditional and established types of abuse, such as excessive and discriminatory prices, price squeezing and refusal to grant access to an essential facility.

14 See decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*.

In January 2015, the Court of Milan ruled that SEA had abused its dominant position by charging excessive and discriminatory prices for rent of premises for office use in Malpensa Airport.[15] As sole manager of Milan Malpensa airport, SEA rents airport premises in accordance with the rules set by the Italian Civil Aviation Authority. The latter determined, *inter alia*, the maximum rent applicable to providers of ground handling services for air carriers. Beta Trans, a company active in the provision of ground handling services for cargo air carriers, rented airport premises for ground handling activities as well as for office use. However, the prices charged by the dominant firm for the rent of premises for office use were higher than those set by the Italian Civil Aviation Authority. Beta Trans brought a civil action for damages caused by alleged excessive and discriminatory prices charged by SEA for the rent of premises for office use. SEA argued, *inter alia*, that the rent of airport premises for office use was not necessary for Beta Trans' activities, as confirmed by the fact that other ground handling providers located their offices in alternative premises near the airport. The Court of Milan rejected SEA's defence. According to the Court, substitutability should only be taken into account in the definition of the relevant market and the assessment of dominance. It is not for the dominant firm to decide whether providers of ground handling services should locate their offices inside the airport or in other locations.

In June 2015, the Italian Supreme Court annulled a ruling of the Rome Court of Appeal concerning the stand-alone civil action for damages initiated by 52 food wholesalers against Cargest, the sole manager of the Rome wholesale food market.[16] The claimants argued that Cargest, the only company allowed to lease the Rome food market commercial lots, imposed unfair and discriminatory conditions on its clients. According to wholesalers, there was no viable alternative market, as the others were characterised by higher transport costs and inadequate facilities. In March 2010, the Court of Appeal of Rome rejected the claim because there was insufficient evidence.[17] In particular, according to the Court of Appeal, the claimants had failed to prove the size of the relevant geographic market, which is a necessary preliminary step to establish an abuse of dominance.

The Supreme Court held that the lower court's ruling was based on a mechanical interpretation of the burden of proof principle. In stand-alone private enforcement cases, such a strict application of the burden of proof principle could hinder the effective exercise of the right to compensation. According to the Court, judges should take into account the information asymmetry between claimants and defendants in stand-alone civil actions. Competition law claims often require complex factual and economic analysis based on data in possession of third parties or the counterparty. The Court also made reference to the Damages Directive,[18] which provides for a set of rules aimed at facilitating private antitrust actions, but was not yet implemented at the time of the judgment. In light of the above, the Supreme Court concluded that civil courts should adopt a flexible interpretation of national procedural rules, with a view to ensuring an effective application of competition rules in private actions for damages. In particular, civil courts should effectively use the tools available

15 Court of Milan, 14 January 2015, No. 429.

16 Court of Cassation, 4 June 2015, No. 11564.

17 Court of Appeal of Rome, 8 March 2010, No. 991.

18 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014.

under Italian law (including orders to submit documents, requests for information from administrative authorities and expert opinions) to acquire and evaluate data and information useful to reconstruct the allegedly anticompetitive conduct.

In July 2015, the Court of Milan ruled that Vodafone had abused its dominant position in the fixed-to-mobile call termination market by implementing a margin-squeeze strategy to the detriment of BT Italia.[19] The action for damages was based on the statement of objections issued by the ICA on 28 July 2006 in case A357, concerning alleged anticompetitive practices implemented by Telecom, Vodafone and Wind. In that case, the ICA closed the proceedings against Vodafone by accepting the latter's commitments, while it continued the investigation against the other investigated undertakings. As a consequence, BT Italia's civil action against Vodafone was not, strictly speaking, a follow-on action. Nonetheless, the Court stated that the conclusions reached by the ICA in the statement of objections and the infringement decision with regard to the other parties for similar practices should not be neglected, as they were at least capable of providing useful circumstantial evidence. Furthermore, a commitment decision implies at least that the contested conduct is considered likely. Based on the above, the Court made extensive reference to the ICA's findings to define the relevant market and establish the infringement. The Court also requested an expert opinion, which confirmed the ICA's findings.

In September 2015, the Court of Appeal of Milan partially annulled a ruling of the Court of Milan,[20] concerning an alleged abuse committed by Ryanair.[21] In 2013, the Court of Milan stated that Ryanair had abused its dominant position by refusing to grant an online travel agency (OTA) access to updated information on its flight tickets and by hindering its intermediation activity. The Court found that Ryanair was dominant in the upstream market for air transportation services, given its *de facto* monopoly in 49 intra-EU routes and its share exceeding 50 per cent in 19 other routes. In light of the very strong market position on several routes, the Court of Milan concluded that information on Ryanair tickets should ultimately be considered an essential facility, access to which was necessary for OTAs seeking to offer their services. The Court of Appeal stated that the first instance judge had not adequately proved that Ryanair was dominant and that its conduct was capable of restricting competition. The appellate court focused on the downstream market for travel agency services and noted that, as Ryanair held only a 10 per cent share of EU flights, there was no proof that it was capable of significantly restricting competition by retaining the right to directly sell its tickets to final customers.

19 Tribunal of Milan, 28 July 2015, No. 9109.

20 Tribunal of Milan, 11 June 2013, No. 3603.

21 Court of Appeal of Milan, 17 September 2015, No. 3390.

III MARKET DEFINITION AND MARKET POWER

The first step in abuse of dominance cases is the definition of the relevant product and geographical market. The ICA's general approach to market definition is consistent with the Commission's practice (in particular, the ICA typically focuses on demand-side[22] and supply-side substitutability[23]). Similarly, the ICA follows the EU notion of dominance.[24]

Market shares are a key factor in the assessment of dominance.[25] Market shares exceeding 40 per cent are normally considered an indication of dominance. However, firms holding market shares lower than 40 per cent may also be dominant if the remaining part of the market is composed of small competitors.[26] The stability of market shares is also important,[27] but the fact that the market share is decreasing does not necessarily preclude a finding of dominance.[28] In the assessment of dominance, the ICA and national courts may consider a number of additional factors, which give the firm concerned a competitive advantage or raise barriers to entry.

A dominant position may be held by one or more firms. In accordance with EU case law, collective dominance may be based not only on structural or contractual links between the companies concerned, but also on the economic interdependence among firms active in an oligopolistic market.[29]

Abuse of economic dependence in the contractual relationship with a single customer or supplier (relative dominance) is prohibited by Article 9 of Law No. 192/1998. This provision aims at protecting the interests of weak parties in contractual relationships. When the contested conduct affects competition on the market, the ICA may exercise its investigative and fining powers under the Competition Act, and it may apply both Article 9 of Law No. 192/1998 and Article 3 of the Competition Act.

IV ABUSE

i Overview

A dominant firm violates Article 3 only if it commits an abuse. Dominance itself is not an offence.

22 See, e.g., decision of 28 June 2011, No. 22558, A415, *Sapec Agro/Bayer-Helm*.

23 See, e.g., decision of 17 December 1998, No. 6697, A 209, *Goriziane/Fiat Ferroviaria*.

24 See, e.g., decisions of 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*; 14 June 2000, No. 8386, A274, *Stream/Telepiù*; and 10 April 1992, No. 453, A13, *Marinzulich/Tirrenia*.

25 See, for example, decision of 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*; TAR, 23 September 2008, No. 8481.

26 See, for example, decision of 27 November 2003, No. 12634, A333, *Enel Trade-Clienti Idonei*.

27 See, e.g., decision of 30 June 2010, No. 21297, A383, *Mercato del cartongesso*.

28 See, for example, decision of 9 February 1995, No. 2793, A76, *Tekal/Italcementi*.

29 See decision of 3 August 2007, No. 17131, A357, *Tele2/Tim-Vodafone-Wind*.

Dominant firms have a special responsibility not to impair undistorted competition in the relevant market.[30] As a consequence, conduct that would normally be lawful may be considered anticompetitive if engaged in by a dominant firm.

Article 3 applies to both anticompetitive conduct aimed at excluding competitors (exclusionary abuses) and the exploitation of dominant firms' market power (exploitative abuses).

The list of abuses provided in Article 3 of the Competition Act is not exhaustive and the ICA has often fined sui generis anticompetitive practices. The crucial challenge is to identify the practices that pose unacceptable competitive dangers. In this respect, the ICA has traditionally adopted a case-by-case approach, which does not seem to reflect a coherent theoretical framework.

Behaviour is considered unlawful if it may hinder the (limited) level of competition still existing in the market or the development of that competition. To establish an abuse, it is sufficient to demonstrate a potential prejudice to competition. It is not necessary to prove that the conduct had actual anticompetitive effects.[31]

Abuse is an objective concept. An anticompetitive intent is not a prerequisite for a finding of abuse.[32] However, the existence of an exclusionary intent may play an important role in the assessment of an alleged abuse, in particular when the contested conduct is part of a plan aimed at eliminating competitors.[33] An exclusionary intent may also justify a finding of abuse when the dominant firm exercises a right in an objectionable manner to pursue an objective different from that for which the right was granted in the first place.[34]

A conduct does not infringe Article 3 if it is objectively justified. This may be the case, in particular, if the conduct is objectively necessary to protect the dominant firm's or third parties' legitimate interests or leads to a cost reduction.[35]

ii Exclusionary abuses

Exclusionary pricing

The ICA issued its first decision on predatory pricing in 1995 in *Tekal/Italcementi*.[36] In accordance with EU case law,[37] the ICA held that prices below average variable cost (AVC)

30 See, e.g., Council of State, 19 July 2002, No. 4001; TAR, 14 April 2008, No. 3163; decision of 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; Council of State, 15 May 2015, No. 2479.

31 See, e.g., Council of State, 15 May 2015, No. 2479; TAR, 30 August 2006, No. 7807; 20 October 2006, No. 10678.

32 See, e.g., Council of State, 19 July 2002, No. 4001.

33 See, for example, decisions of 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*; 9 February 1995, No. 2793, A76, *Tekal/Italcementi*.

34 See Council of State, 12 February 2014, No. 693; 8 April 2014, No. 1673; TAR, 27 March 2014, No. 3398.

35 See, for example, decisions of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*, Bulletin 8/1999; 23 July 1993, No. 1312, A35, *Cesare Fremura/Ferrovie dello Stato*.

36 Decision of 9 February 1995, No. 2793, A76, *Tekal/Italcementi*.

37 Case C-62/86, *AKZO/Commission*, 1991 ECR I-3359.

must be presumed unlawful, while prices between AVC and average total cost (ATC) are unlawful if they are part of an anticompetitive plan. The contested conduct was considered abusive even though it was not proven that the dominant firm was able to recoup the losses incurred by selling at below-cost prices. The ICA's view is consistent with the principles established by the ECJ,[38] and contrasts with US case law, which requires the proof of a reasonable likelihood of recouping the losses suffered by selling below cost.[39]

In Caronte,[40] the ICA used different cost benchmarks. Instead of relying on AVC and ATC, the ICA focused on short-run average incremental cost (SRAIC) and LRAIC. According to the decision, prices below SRAIC must be presumed exclusionary, while prices at least equal to SRAIC, but below LRAIC, are unlawful if they are part of an anticompetitive plan. However, a few years later, in *Mercato del calcestruzzo cellulare autoclavato*, the ICA made reference to average avoidable cost (which was considered equal to AVC) and ATC.[41]

More recently, in *TNT/Poste Italiane*,[42] the ICA used the LRAIC benchmark in the analysis of the pricing policies of the incumbent in the postal sector. However, the ICA adopted a strict approach in calculating LRAIC. The latter was considered essentially equal to average operating cost reported by regulatory accounts, which typically also include a share of common costs. The decision was annulled by the TAR,[43] whose judgment was upheld by the Council of State.[44]

In a few cases, the ICA and national courts have held that even above-cost prices offered to strategic customers (selective discounts) may be abusive. This may be the case, in particular, if they are part of a broader exclusionary strategy, implemented through different abusive practices,[45] or the dominant firm uses privileged information, which it holds because of its status of incumbent and vertically integrated operator, but is not available to rivals, to implement win-back or retention policies.[46] Furthermore, according to the ICA and the

38 Case C-334/96, *Tetra Pak/Commission*, 1996 ECR I-5951.

39 *Brook Group v. Brown & Williamson Tobacco*, 509 US 940 (1993).

40 Decision of 17 April 2002, No. 10650, A267, *Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana*.

41 Decision of 24 October 2007, No. 17522, A372, *Mercato del calcestruzzo cellulare autoclavato*.

42 Decision of 14 December 2011, No. 23065, A413, *TNT Post Italia/Poste Italiane*.

43 TAR, 25 June 2012, No. 5769.

44 Council of State, 6 May 2014, No. 2302. The Council of State held that the analysis of LRAIC was erroneous in several respects: (1) the predation analysis should have been carried out *ex ante*, on the basis of data and information available when the firm set its prices, and not *ex post*, on the basis of regulatory costs; (2) the ICA had not taken into account the increase in regulatory costs because of universal service obligations; (3) the ICA had assessed the profitability of the service over the first year-and-a-half of activity, without considering that initial losses in the launch of a new product may be inevitable; and (4) the ICA had wrongfully identified the incremental costs borne for the supply of the services concerned by allocating to these services resources used mainly for other services.

45 Decision of 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*; Court of Appeal of Milan, 16 May 2006.

46 Decision of 12 November 2008, No. 19249, A375, *Sfruttamento di informazioni commerciali privilegiate*; Court of Appeal of Milan, 16 May 2006.

TAR, a discount may be *per se* abusive, regardless of the relationship between price and cost, if it is the result of a privilege exclusively conferred on the dominant firm by sector-specific rules incompatible with EU rules.[47]

A vertically integrated firm, active in the supply of an input and a final product, may infringe competition rules if it sets its upstream or downstream prices so as to squeeze competitors' margins. For instance, in *Telecom*, the ICA held that the Italian incumbent in the electronic communications sector abused its dominant position by charging competitors more than it charged its commercial divisions for the relevant inputs, thus reducing rivals' margins and excluding equally efficient firms.[48] A price squeeze may also be the result of discounts offered to retail customers.[49]

Exclusive dealing

Exclusive dealing obligations may constitute an abuse under Article 3 when the conduct may significantly foreclose access to the market. In *Diritti calcistici*,[50] the ICA found that Mediaset, the main Italian TV operator, violated Article 102 of the TFEU on the market for the sale of TV advertising lots. In 2004, Mediaset concluded with the major Italian soccer clubs various contracts concerning the broadcasting rights of their home matches for the 2004 to 2007 seasons. Moreover, Mediaset negotiated with the same clubs exclusive pre-emption rights for the broadcasting of their matches through all platforms from 2007 to 2016. Through exclusivity, 'English clauses' and pre-emption rights, Mediaset rendered the relevant TV content *de facto* unavailable for a long period for its competitors.

The ICA has also held that loyalty discounts and rebates, conditioned upon the customer obtaining all or most of its requirements from a dominant supplier, or reaching a given target, may infringe competition rules, because they tend to eliminate or restrict the

47 Decision of 27 March 2013, No. 24293, Case A441, *Applicazione dell'IVA sui servizi postali*, Bulletin No. 16/2013; TAR, 7 February 2014, No. 1525.

48 Decision of 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; see also decision of 23 October 2008, No. 19020, A376, *Aeroporti di Roma-Tariffe aeroportuali*.

49 See, e.g., decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by the TAR, 8 May 2014, No. 4801, which was upheld by Council of State, 15 May 2015, No. 2479. See also decision of 15 July 2015, No. 25561, A473, *Fornitura acido colico*, concerning both an increase in the upstream price and selective discounts in the downstream market. On the above cases, see Section II, *supra*.

50 Decision of 28 June 2006, No. 15632, A362, *Diritti calcistici*.

purchasers' freedom to choose their supply sources, thus hindering rivals' access to the market or development.[51] The loyalty-inducing effect is stronger when loyalty discounts are applied retroactively to all units purchased during a given reference period.[52]

Furthermore, according to the ICA, loyalty discounts may be anticompetitive because they imply discrimination between customers.[53]

The treatment of loyalty discounts is consistent with the traditional formalistic approach of the EU institutions. The ICA does not apply any price-cost test to establish whether a loyalty discount scheme is anticompetitive. It remains to be seen whether the ICA will apply the as-efficient test introduced by the Commission Guidance on exclusionary abuses in the future.

Leveraging

Article 3(d) of the Competition Act prohibits firms in a dominant position in the market for a particular product or service (the tying product or service) from conditioning the sale of that product or service upon the purchase of another (the tied product or service). Tying may also be obtained through price incentives, such as, in particular, bundled discounts and rebates. For instance, in *Albacom Servizio Executive*,[54] the ICA found that the incumbent in the telecommunications sector infringed Article 3 by making certain rebates on the price of a monopolised service conditional upon attaining certain traffic volumes in a liberalised service.

Refusal to deal

Refusal to deal may amount to an abuse when it may substantially weaken competition in the market where the dominant firm operates or in a different market and is not objectively justified. Refusal to deal encompasses a considerable range of practices, including the refusal to supply products or services, to provide information and to grant access to an essential facility. Practices such as refusal to begin negotiations, refusal to renew a contract or unilateral termination of a contract may be considered instances of refusal to deal. The imposition of

51 See, for example, decisions of 27 November 2003, No. 12634, A333, *Enel Trade-Clienti Idonei*; 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; 27 June 2001, No. 9693, A291, *Assoviaggi/Alitalia*; 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*; 19 October 1994, No. 2379, A49, *Pozzuoli Ferries/Gruppo Lauro*; 10 April 1992, No. 453, A13, *Marinzulich/Tirrenia*.

52 In some cases, intent and the existence of an overall exclusionary strategy played an important role in the finding of infringement. See, for example, Council of State, 10 March 2006, No. 1271.

53 See, in particular, decisions of 27 June 2001, No. 9693, A291, *Assoviaggi/Alitalia*; 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*.

54 Decision of 29 May 1997, No. 5034, A156, *Albacom Servizio Executive*; see also decisions of 20 September 2000, No. 8692, A247, *Aeroporti di Roma-Tariffe del Groundhandling*; 10 April 1992, No. 453, A13, *Marinzulich/Tirrenia*.

onerous conditions by a dominant firm,[55] dilatory strategies,[56] and other forms of constructive refusal to deal,[57] might have the same effect as an outright refusal to deal. Differences in the processes for the management of requests for services submitted by internal divisions and by competitors may amount to a constructive refusal to deal if they entail more complexity and, possibly, higher costs for competitors.[58]

The ICA defines the notion of essential facility in accordance with principles established by EU case law.[59] Intellectual property rights may also be considered essential facilities.[60]

The ICA has applied the principles on refusal to deal and essential facilities in a number of cases, especially in liberalised sectors.[61] In its decision practice, the ICA has made extensive reference to EU competition law principles. However, it has often adopted a broad and flexible interpretation of the requirements set by the ECJ's case law.[62]

A refusal to deal is not abusive if it is objectively justified. This may be the case, for instance, when the dominant firm does not have enough capacity to satisfy third parties'

55 See decision of 6 November 1997, No. 5446, A129, *Infocamere/Cerved*. A refusal to deal by a dominant firm is abusive only if it is capable of having a significant impact on the market. Evidence of a single refusal to supply may not be sufficient to find an abuse. See TAR, 21 February 2001, No. 1371.

56 See decision of 25 July 2012, No. 23770, A436, *Arenaways-Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri*. However, the decision was annulled by the TAR, 27 March 2014, No. 3398, according to which the ICA had erroneously held that the administrative procedures initiated by the dominant firm were merely dilatory.

57 See decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by TAR, 8 May 2014, No. 4801, which was upheld by Council of State, 15 May 2015, No. 2479.

58 Id.

59 See, for example, decision of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*.

60 See, for example, decisions of 8 February 2006, No. 15175, *Glaxo-Principi attivi*; 15 June 2005, No. 14388, A364, *Merck-Principi attivi*; TAR, 3 March 2006, No. 341; Court of Milan, 4 June 2013, No. 7825.

61 See, for example, decisions of 17 March 1993, No. 1017, A11, *IBAR/Aeroporti Roma*; 16 March 1994, No. 1845, A56, IBAR/SEA; 10 January 1995, No. 2662, A71, *Telsystem/Sip*; 2 March 1995, No. 2854, A61, *De Montis Catering Roma/Aeroporti di Roma*; 11 November 1996, No. 4398, A102, *Associazione Consumatori Utenti/Alitalia*; 30 October 1997, No. 5428, A178, *Albacom/Telecom Italia-Circuiti dedicati*; 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by TAR, 8 May 2014, No. 4801, upheld by Council of State, 15 May 2015, No. 2479; 19 February 2014, No. 24804, A443, *NTV/FS/Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri ad alta velocità*.

62 See, for example, decision of 15 June 2005, No. 14388, A364, *Merck-Principi attivi*; TAR, 3 March 2006, No. 341.

demand, the customer is insolvent or does not respect the contractual terms, or the firm requesting access does not meet the technical or security requirements needed to access an infrastructure.[63]

In principle, lack of capacity on a facility (capacity saturation) should constitute an objective justification.[64] In exceptional circumstances, however, a dominant firm may be obliged to invest in the development of the facility. Indeed, in Eni-TTPC,[65] the ICA held that the interruption of the expansion of a pipeline used for the international transport of gas and the termination of the 'ship or pay' agreements entered into by the firm managing the facility – a dominant firm's subsidiary – with independent shippers amounted to an abuse of dominant position. The ICA did not apply the essential facility doctrine since alternative infrastructures could be used to transport gas into Italy, and the dominant firm was not under an obligation to invest in the development of the pipeline. Nonetheless, the ICA held that the interruption of the expansion was abusive, due to the interference of the mother company in the subsidiary's investment decisions. In a similar case,[66] the Commission adopted a different approach, as it explicitly relied on the essential facility doctrine. In particular, the Commission held that the different infrastructures used to transport gas into Italy, taken as a whole, constituted a single essential facility, and stated that the incumbent may have an obligation to invest in the development of an infrastructure, if a system operator not vertically integrated in the sale of gas would do so.

iii Discrimination

Article 3(c) prohibits dominant firms from applying dissimilar conditions to equivalent transactions, thus placing a trading party at a competitive disadvantage. Charging different prices may be abusive only if it is not economically justifiable.[67]

63 See, for example, decision of 2 March 1995, No. 2854, A61, *De Montis Catering Roma/Aeroporti di Roma*.

64 However, the ICA has normally rejected the defence in the light of the specific facts of the case: see, for example, decisions of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*; 6 June 1996, No. 3953, A107, *Fina Italiana/Compagnia Italpetroli*; 2 March 1995, No. 2854, A61, *De Montis Catering Roma/Aeroporti di Roma*.

65 Decision of 15 February 2006, No. 15174, A358, *Eni-Trans Tunisian Pipeline*.

66 Commission decision of 29 September 2010, Case COMP/39.315, ENI.

67 For instance, in *Alitalia*, the ICA held that Alitalia's incentive schemes for travel agents were discriminatory because, in some cases, different commissions were granted to travel agents for reaching similar sales targets. Thus, the agreements placed some travel agents at a competitive disadvantage without an acceptable justification. See decision of 27 June 2001, No. 9693, A291, *Assoviaggi/Alitalia*. See also, *inter alia*, decisions of 17 March 1993, No. 1017, A11, *IBAR/Aeroporti Roma*; 10 April 1992, No. 452, A4, *Ancic/Cerved*.

In many cases, the ICA fined dominant firms for having favoured their subsidiaries or commercial divisions active in downstream markets to the detriment of competitors, by granting preferential access to certain resources,[68] or applying discriminatory conditions.[69] Non-price discrimination may also infringe Article 3.[70]

iv Exploitative abuses

A firm may abuse its dominant position if it directly or indirectly imposes unfair selling or purchasing prices. To establish an exploitative abuse, it may be necessary to engage in an in-depth cost analysis, aimed at verifying whether the difference between the costs actually incurred and the price actually charged is excessive.[71] If this analysis cannot be carried out or is inconclusive, the ICA compares the prices imposed by the dominant firm with those charged by the same firm or competitors for the same product or service in other markets.[72] The ICA may also apply both the aforementioned tests in the assessment of prices charged by the dominant firm.[73] In some cases, the ICA fined the dominant company for having charged prices remunerating activities or services that were not rendered.[74] In these cases, prices were considered by definition unfair. Article 3 also prohibits the direct or indirect imposition of unfair non-price trading conditions.[75]

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68 See, for example, decision of 27 February 2014, No. 24819, A444, *Akron-Gestione rifiuti urbani a base cellulosica*.

69 See, for example, decisions of 3 August 2007, No. 17131, A357, *Tele2/Tim-Vodafone-Wind*; 27 April 2001, No. 9472, A285, *Infostrada/Telecom Italia-Tecnologia ADSL*; 29 March 2006, No. 15310, A365, *Posta elettronica ibrida*; 24 February 2000, No. 8065, A227, *Cesare Fremura-Assologistica/Ferrovie dello Stato*.

70 See, for example, decisions of 27 April 2001, No. 9472, A285, *Infostrada/Telecom Italia-Tecnologia ADSL*; 29 March 2006, No. 15310, A365, *Posta elettronica ibrida*; 11 November 1996, No. 4398, A102, *Associazione Consumatori Utenti/Alitalia*.

71 See, for example, decisions of 23 October 2008, No. 19020, A376, *Aeroporti di Roma-Tariffe aeroportuali*; 26 November 2008, No. 19189, A377, *Sea-Tariffe aeroportuali*; 16 March 1994, No. 1845, A56, *IBAR/SEA*.

72 In that case, it is for the dominant firm to justify the price differential by showing objective differences between the situation in the markets concerned. See, for example, decision of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*. See also decision of 28 July 1995, No. 3195, A48, *SILB/SIAE*.

73 See, for example, decisions of 15 November 2001, No. 10115, A306, *Alitalia/Veraldi*; 10 April 1992, No. 452, A4, *Ancic/Cerved*.

74 See, for example, decision of 23 May 2007, No. 10763, A299, *International mail express/Poste Italiane*.

75 Examples of unfair trading conditions include the imposition of a contractual clause that prohibits customers from reselling products bought from a supplier (decision of 10 April 1992, No. 452, A4, *Ancic/Cerved*), the refusal, by a dominant firm providing toll payment services, to reimburse cards not used, or only partially used, after their expiration (decision of 26 July 2007, No. 17069, A382, *Autostrade/Carta prepagata Viacard*), and the request of payment of unpaid bills of former customers as a condition to enter into

V REMEDIES AND SANCTIONS

i Sanctions

Pursuant to Article 15 of the Competition Act, the ICA may impose on firms fines of up to 10 per cent of their total turnover. However, fines actually imposed by the ICA are normally significantly lower than the above-mentioned cap.

In setting the amount of the fine, the ICA normally applies the principles set out by the Commission guidelines.[76]

If a firm fails to comply with an order to cease an abusive conduct, the ICA may impose a fine of up to 10 per cent of the firm's total turnover. If the original infringement decision imposed a fine, the new sanction is at least twice the previous fine, up to 10 per cent of the turnover. If a firm repeatedly violates an order of the ICA, the latter may suspend the firm's activities for up to 30 days.

ii Behavioural remedies

Pursuant to Article 15(1) of the Competition Act, if the ICA finds a violation of antitrust rules, it orders the companies concerned to put an end to the infringement. The ICA typically asks the company involved to desist immediately from the anticompetitive conduct, to enact positive measures to restore conditions of effective competition in the affected markets within a certain time-limit, and to report on its progress.

According to Article 14-bis of the Competition Act, in urgent cases, where there is a risk of serious and irreparable damage to competition and a cursory examination of the facts reveals the existence of an infringement, the ICA may order interim measures on its own motion.

iii Structural remedies

The Competition Act does not expressly empower the ICA to impose structural remedies. As a matter of principle, however, the administrative courts' case law seems to leave the door open to the imposition of structural remedies in competition law cases, subject to a strict proportionality requirement.[77]

VI PROCEDURE

The ICA may start proceedings after assessing the information at its disposal or brought to its attention by third parties, such as public authorities, consumer associations and competitors. The ICA may also start antitrust proceedings following a general sector investigation. Antitrust investigations are often triggered by third-party concerns, but this is not always the case.

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new agreements for the supply of electricity or communications services (decisions of 10 October 2007, No. 17481, A390, *Enel Distribuzione/Attivazione subordinata a pagamento morosità pregresse*; 21 August 2008, No. 18692, A398, *Telecom-Morosità pregresse*).

76 See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, 2006 OJ (C 210) 2.

77 See, in particular, TAR, 27 February 2007, No. 1745; 15 January 2007, No. 203.

The decision to start proceedings, which is published in the ICA's Bulletin and website, contains the essential elements of the alleged infringement. The ICA serves the decision upon the parties concerned (i.e., the parties whose conduct is at issue and third parties who submitted complaints or reports). The decision to start proceedings is sometimes served upon the firm under investigation during an unannounced inspection.

Companies under investigation have the right to:

a be heard by the ICA within the time limit indicated in the decision to open proceedings;

b obtain a final oral hearing before the end of the investigation;

c submit briefs and documents; and

d access the case file.

Within 30 days of publication of the decision to start proceedings in the Bulletin, interested third parties (individuals, consumer associations, competitors, or other bodies whose interests might be directly and immediately harmed by the alleged infringement or any measures adopted as a result of the investigation) may request to participate in the proceedings. Complainants and interveners may access the case file and submit briefs and documents. In addition, they may be heard by the ICA officials and be allowed to participate in the final oral hearing, if the latter is requested by the firms under investigation.

Following the opening of the proceedings, the ICA can exercise extensive investigative powers, such as the power to:

a require specific documents or information;

b carry out unannounced inspections at business premises (as opposed to residential premises);

c interview the companies' legal representatives;

d image computer hard drives by using forensic IT tools;

e require explanations about any documents or information supplied by the company concerned; and

f secure premises overnight by seal.

The ICA may impose fines on firms that fail to provide the information or exhibit the documents requested or, intentionally or negligently, supply incorrect or misleading information.

The Italian legal system does not provide for special rules on legal privilege in antitrust proceedings. In its decision practice, the ICA generally follows the principles and criteria established by EU case law.

Pursuant to Article 22 of Regulation (EC) No. 1/2003, the ICA may seek the assistance of other national competition authorities to carry out investigative activity in their jurisdiction on its behalf.

In urgent cases, the ICA may order interim measures, which cannot be renewed or extended. If the addressee of the interim measures does not comply with the decision, the ICA may impose a fine of up to 3 per cent of the annual turnover.

The investigations may last for several months and often more than one year. When the ICA considers that it has acquired sufficient evidence, it issues a statement of objections (SO), by which it notifies the companies concerned and any complainants of its objections, at least 30 days before the closing date of the investigation. The SO contains an extensive elaboration of the reasons underlying the ICA's assessment of the case.

If the companies being investigated request to be heard by the ICA, a final hearing takes place, typically on the date of closure of the investigation. After the final hearing, the ICA issues a decision. If the ICA finds that the contested conduct is abusive, it orders to put an end to the infringement within a given time limit. If the infringement is serious, the ICA can impose a fine.

Under Article 14-ter of the Competition Act, firms may offer commitments aimed at removing the ICA's competition concerns, within three months from the opening of proceedings. After assessing the suitability of such commitments, including by means of a market test, the ICA may make them binding on the firms concerned and close the proceedings without ascertaining any infringement or imposing a fine. Commitment decisions have become a frequently used enforcement tool.

The ICA's decisions are subject to judicial review by the TAR. The parties may file an appeal within 60 days from receipt of the notifications of the decision. The parties can ask the TAR for a stay of execution of the ICA's decision. Hearings for interim measures are usually granted within a short time of the filing of a notice of appeal. A hearing on the merits of a case usually takes place within one year of the filing of an appeal. If the appeal is denied, the party may appeal to the Council of State.

ICA's decisions are subject to full judicial review with respect to the imposition of fines. Accordingly, administrative courts may also change the amount of the fine. However, they cannot increase the fine, since this would violate the *non ultra petita* rule.[78]

In principle, the judicial review of substantive findings is limited to a control of legality. Accordingly, courts must assess whether the ICA based its conclusions on accurately stated facts and supported its decision on adequate and coherent grounds.[79] The administrative courts have clarified that the judicial review of substantive findings is strong, effective and penetrating, and also covers the economic analysis carried out by the ICA.[80] However, when complex assessments carried out by the ICA remain questionable, the administrative court cannot substitute its own assessment for that of the ICA.[81]

In *Menarini*, in light of the judicial review actually exerted by the administrative courts, the European Court of Human Rights held that the Italian administrative enforcement system is compatible with the right to full and effective access to an independent and impartial tribunal established by Article 6(1) of the European Convention on Human Rights (ECHR).[82]

VII PRIVATE ENFORCEMENT

Victims of abusive conduct may bring private antitrust actions before the competent Italian civil courts to ask for compensation, declarations of nullity, restitution or injunctive relief.

78 See Council of State, 2 March 2009, No. 1190.

79 See Council of State, 19 July 2002, No. 4001 and, more recently, TAR, 10 March 2003, No. 1790.

80 See, for example, Council of State, 6 May 2014, No. 2302; 20 February 2008, No. 597; 8 February 2007, No. 515.

81 See, e.g., Council of State, 6 May 2014, No. 2302; 24 September 2012, No. 5067.

82 ECHR, Case No. 43509/08, *A. Menarini Diagnostics/Italy*.

Damages for breach of antitrust rules may be claimed by victims of anticompetitive conduct pursuant to Article 2043 of the Italian Civil Code, according to which 'any act committed with either intent or fault causing an unjustified injury to another person obliges the person who has committed the act to compensate the damages'. The Italian Supreme Court has clarified that consumers also have standing to bring damages actions in tort for breach of the Competition Act.[83]

A collective action system has been recently introduced in the Italian legal system.[84] Pursuant to Article 140-bis of the Consumer Code, in case of anticompetitive practices affecting a number of consumers or users, any of them has standing to file a class action with the competent court. At the end of the first hearing, the court decides whether the conditions for the certification of the class action are met.[85] If the class action is admitted, a notice about the lawsuit is published and all consumers or users who claim to have a right homogeneous to that for which the class has been established can join it. The opt-in declaration must be filed with the register of the competent court within a certain time.[86] Consumers and users who opt-in do not assume the role of parties to the proceedings and, thus, do not have procedural powers. If the court eventually finds that the class action is well founded, it orders the defendant to pay a certain sum to each member of the class or, alternatively, establishes the criteria on the basis of which these sums must be calculated.

In addition, pursuant to Articles 139 and 140 of the Italian Consumer Code, consumer associations registered with the Ministry for Productive Activities have standing to request cease-and-desist orders against certain practices that may harm consumer interests, and appropriate measures for correcting or eliminating the detrimental effects thereof.

Damages are limited to the plaintiff's actual losses (i.e., 'out-of-pocket' losses plus loss of profits). Punitive or exemplary damages are not available in the Italian legal system. Plaintiffs can only claim damages that they actually incurred. Where a precise amount cannot be determined, the court may also calculate damages on an equity basis.[87]

The calculation of damages based on loss of income is especially difficult when the injured company could not enter the market due to the abusive conduct. In *Telsystem*,[88] the court commissioned an expert report on losses suffered by a potential first mover into the sector for leased-lines services, which failed to enter this new market because of the dominant firm's refusal to grant access to certain essential facilities. The damage liquidation was based, *inter alia*, on the advantage that the plaintiff would have had as first entrant into the sector for leased-lines services. However, the court considered also that, in a free market economy, monopoly rent, such as that of a first mover, tends to be neutralised by competition within a certain time frame.

83 Supreme Court, 4 February 2005, No. 2207.

84 See Article 140-bis of Legislative Decree No. 206/2005 (Consumer Code). The collective action is applicable only with respect to infringements committed after 15 August 2009.

85 The collective action can be rejected by the court for a number of reasons. For instance, it can be dismissed when the consumer or user concerned has interests conflicting with those of the proposed class or does not seem to be able to protect adequately the class's interests.

86 Individuals can decide not to join the class and file a separate lawsuit on their own.

87 Court of Appeal of Naples, 28 June 2007, No. 2513.

88 Court of Appeal of Milan, 18 July 1995 and 24 December 1996.

Contractual clauses amounting to an abuse of dominant position may be found void. In Avir, the Court of Appeals of Milan stated that the clauses provided for by a gas supply agreement, which imposed an excessive price, were void because they were incompatible with Article 3(a) of the Competition Act, and granted restitution of the abusive overcharge paid by the customer.[89]

As a matter of principle, civil courts do not have the power to permanently enjoin the defendant from repeating the anticompetitive conduct in their final judgments, unless the antitrust violations are also qualified as unfair competition acts pursuant to Article 2598 of the Italian Civil Code.

A plaintiff may obtain interim remedies, including temporary injunctions and any other remedy that the court may deem appropriate to preserve the plaintiff's rights until a final judgment is issued. To this end, the claimant must provide sufficient factual and legal grounds to establish a *prima facie* case, as well as the risk of imminent and irreparable damage.

In some cases, the Italian Supreme Court stated that findings contained in an ICA decision constitute privileged evidence, from which a court may legitimately infer the existence of the alleged infringement, damage and causal link. In principle, the presumption is rebuttable. However, the nature of privileged evidence of the ICA's findings prevents the defendant from arguing against the very same facts and grounds that the ICA relied upon to find a violation of antitrust rules.[90] In a judgment delivered in 2014, the Supreme Court stated that, in principle, the ICA's findings are not binding on civil courts and there is no legal category of privileged evidence distinct from that of legal proof.[91] Nonetheless, the Court confirmed that the findings contained in an ICA decision have 'high evidentiary value' in proceedings before civil courts.[92] According to lower courts, commitment decisions may also have evidentiary value, as they imply at least that an abuse was considered likely on the basis of the investigation carried out by the ICA.[93]

As to stand-alone private actions, the Supreme Court stated that, in light of the information asymmetry between claimants and defendants and the complexity of antitrust cases, civil courts should not adopt a strict application of the burden-of-proof principle.[94] To ensure an effective application of competition rules in private actions for damages, national courts should use the procedural tools available under Italian law (such as orders to submit documents, requests for information from administrative authorities and expert opinions) to acquire and evaluate data and information useful for establishing the alleged anticompetitive conduct.

89 Court of Appeal of Milan, 16 September 2006.

90 Supreme Court, 20 June 2011, No. 13486. As a consequence, the defendant can rebut, for instance, the presumption of a causal link by alleging and proving different and specific factors, which were *ex se* capable of causing the damage or contributed to its causation, but it cannot rely on factors already examined and dismissed by the ICA. See Supreme Court, 10 May 2011, No. 10211.

91 Supreme Court, 28 May 2014, No. 11904.

92 In the case at hand, the Court held that the ICA decision was sufficient to prove the alleged infringement, its capability to harm customers and the existence of damage to customers in general.

93 Tribunal of Milan, 28 July 2015, No. 9109.

94 Court of Cassation, 4 June 2015, No. 11564.

VIII FUTURE DEVELOPMENTS

The effects-based approach to abuse of dominance cases does not seem to have established itself in Italian decision practice and case law. The ICA's and national courts' decisions frequently rely on certain traditional statements of EU case law, which reflect the formalistic and structural approach adopted in the past. They usually consider it sufficient to show that the contested conduct tends to restrict competition or is capable of having anticompetitive effects on the basis of an abstract analysis, without carrying out a comprehensive economic assessment of the impact of the practice. The transition towards an effects-based approach will require a stronger and more penetrating judicial review by administrative courts. The approach of administrative courts in the review of antitrust decisions still seems erratic. In some cases, such as *TNT/Poste Italiane*, they have engaged in an in-depth review of the decision, also taking into account grounds of appeal raising complex economic issues. In other cases, however, the administrative courts seemed to limit themselves to reiterating the ICA's views, also through extensive references to the contested decision, or have simply overlooked some of the arguments put forward by the parties, without providing adequate explanations as to why they should have been dismissed. A more stringent judicial review of antitrust decisions is necessary not only to foster the transition towards an effects-based approach but also to guarantee full compliance with the fundamental right of access to an independent and impartial tribunal established by Article 6(1) of the ECHR, as interpreted by the European Court of Human Rights in *Menarini*.[95]

Many cases decided by the ICA and national courts in the past few years have concerned highly regulated sectors. The interaction between competition law and sector-specific regulation seems to give rise to an increasing risk of conflicts of jurisdiction and interferences between different authorities. In some cases, the application of competition rules has led to the imposition of obligations incompatible with sector-specific rules, which has often been criticised by administrative courts. In other cases, the application of competition rules seemed to supplement sector-specific regulation by imposing additional and stricter obligations. The use of competition law to impose additional and stricter obligations on firms already subject to pervasive sector-specific regulation also raises delicate issues as to the interference and overlapping between the two sets of rules.

The *Wind-Fastweb/Condotte Telecom Italia* case is a notable example of the risk of conflicts and inconsistencies between the two sets of rules. Access regulation in the electronic communications sector in Italy is based on the equivalence of output principle, according to which access services offered by the incumbent to alternative operators must be comparable to the services it provides to its retail division in terms of functionality and price, but they may be provided through different systems and processes. By contrast, in its 2015 ruling,[96] the Council of State seemed to consider that differences in supply processes (provided for by sector regulation) are problematic in themselves, because they inevitably entail a different treatment of external and internal requests for access services.

In the past few years, the ICA and Italian courts have also shown more activism in the assessment of new types of abuse. Some decisions belong to the controversial line of

95 Judgment of 27 September 2011, *A. Menarini Diagnostics SRL v. Italy*, Application No. 43509/08.

96 Council of State, 15 May 2015, No. 2479; TAR, 8 May 2014, No. 4801.

cases concerning the misuse of rights and legitimate interests arising from sector-specific rules, through the initiation of administrative or judicial proceedings aimed at obstructing competitors' activity. In Pfizer, the Council of State clarified that this type of abuse – which has been inspired by EU case law[97] – is:

> *[…] nothing but the specification of the broader category of abuse of right, whose precondition is the existence of a right which is used artificially, for a purpose which is incoherent with that for which that right is granted: in the case at issue, the exclusion of competitors from the market.*[98]

Even the exercise of contractual rights, such as the right to termination of a contract, has been considered abusive on the ground that it was strategically exercised with the only purpose of excluding a competitor.[99]

The misuse of rights and legitimate interests lies at the boundary of antitrust liability. An abusive exercise of a right or legitimate interest may be found when the contested conduct is characterised by an additional element that is intrinsically objectionable, such as the provision of false or misleading information to a regulatory authority, or when it is part of a broader exclusionary strategy, implemented also through other anticompetitive practices.[100] The distinction between legitimate exercise and abuse of right becomes much more complex, however, when a dominant firm merely exercises its rights in administrative or judicial proceedings to (artificially) protect its position and interests.

The ICA and administrative courts have often emphasised the dominant firm's alleged exclusionary intent, which seems to be a crucial factor in the assessment of the alleged abuse;[101] however, the distinction between abuse and legitimate exercise of right should not be based merely on the dominant firm's intent. Reference to the dominant firm's exclusionary intent opens the door to considerable uncertainty and to a high margin of appreciation in the assessment of corporate statements, internal documents and commercial choices. In addition, a firm's intent is not in itself sufficient to distinguish legitimate from anticompetitive conduct. Indeed, the aim pursued by any firm competing on the market is, in a sense, to prevail against, and eventually to exclude, its competitors. Moreover, in many cases, the rationale behind the rules invoked by the dominant firm is just to exclude or limit competition from

97 In particular, in *AstraZeneca*, the Commission and the General Court held that the firm concerned had abused its dominant position by obtaining a supplementary protection certificate on the basis of misleading information and representations provided to the competent authorities. See Case C-457/10 P, *AstraZeneca v. Commission*, ECLI:EU:C:2012:770.

98 Council of State, 12 February 2014, No. 693.

99 Decision of 25 March 2015, No. 25387, A474, *SEA/Convenzione ATA*.

100 See, e.g., decision of 3 September 2015, No. 25035, A476, *Conai-Gestione rifiuti da imballaggi in plastica*.

101 Council of State, 12 February 2014, No. 693. See also, *inter alia*, Council of State, 8 April 2014, No.1673.

other players. This is the case, for instance, with the rules granting and protecting intellectual property rights, as well as those allowing competitors to access a facility or to carry out an economic activity only within certain limits and under certain conditions.[102]

The judgment delivered by the TAR in *Arenaways* seems to confirm that, as a general rule, firms may not be deprived of the chance to exercise their rights and legitimate interests, even though this may negatively affect competitors' access to the market; however, the boundaries between legitimate exercise and abuse of right remain unclear and need to be clarified by the competent authorities in the coming years.

As to the enforcement policy, in the last few years the ICA has adopted a more rigorous approach in the assessment of commitments offered by parties. In the past, the ICA often used the commitment procedure to exercise *lato sensu* regulatory functions, by negotiating and making legally binding measures aimed at improving the competitive conditions or at benefiting consumers, even in the absence of a clear and direct link between the commitments and the competitive concerns identified by the ICA. From the introduction of commitments procedures, in 2006, to December 2010, the ICA made extensive use of commitment decisions, which represented around 85 per cent of decisions concluding abuse of dominance cases (28 out of 33), but this trend reversed a few years ago, also due to some rulings by the administrative courts, which have constrained the ICA's discretion in commitment procedures. In the period from 2011 to 2014, the ICA issued commitment decisions only in slightly more than 30 per cent of investigations concerning abuses of dominance.[103]

In 2015, commitment decisions represented the majority of abuse of dominance cases closed by the ICA. The latter accepted the commitments offered by the parties in two out of three cases, and issued an additional commitment decision at the beginning of 2016. However, compared to in the past, the ICA now seems to pay more attention to the nexus between the competitive concerns and the commitments offered by the parties. Furthermore, the fact that lower courts tend to consider that commitment decisions may also have evidentiary value may reduce the incentive of firms to offer voluntary remedies.[104] It remains to be seen whether negotiated enforcement will again play a leading role in the future.

Finally, the private enforcement system will be subject to important changes following the implementation of Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. *Inter alia*, the rules implementing the EU directive will have to clarify definitively that a finding of infringement of Article 102 of the TFEU in a final decision by the ICA or a review court must be deemed irrefutably established in actions for damages brought before the civil courts. According to the EU directive, however, the binding effect of a finding of abuse should cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by

102 A narrower interpretation of the concept of abuse of dominance is necessary, in particular, in cases concerning the exercise of fundamental rights enshrined in the EU Charter of Fundamental Rights or Member States' constitutional tradition, such as the right of access to justice.

103 Two out of six, three out of nine, one out of five and one out of two, respectively.

104 Tribunal of Milan, 28 July 2015, No. 9109.

the competition authority or review court in the exercise of its jurisdiction. For other aspects, such as the existence of damages and the causal link, the principles established by national case law will still be relevant.

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