The Public Competition Enforcement Review

Eighth Edition

Editor
Aidan Synnott

Law Business Research

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EDITOR'S PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention.

Cartel enforcement remains robust, particularly by the European Union and the United States, although the number of new enforcement decisions adopted by the EU dropped significantly in 2015. Other jurisdictions, including Greece and France, also report a decrease in the magnitude of fines or numbers of decisions rendered in cartel actions. China, however, saw a slight increase. In 2015, Australia, Brazil, China, Cyprus, the European Union, Germany and the United States have opened, continued or settled enforcement actions against automotive parts cartelists. Brazil, China, Germany, Spain, and Switzerland have each seen enforcement activity related to the distribution of automobiles. Additionally, several jurisdictions investigated food-related cartels in 2015, including dairy products (France and Spain), chocolate (Canada), eggs (Australia), poultry (France), bakeries (Finland), and sugarcane (Colombia).

In the area of restrictive agreements, several European jurisdictions (France, Germany, Italy and Sweden) moved against an online travel booking platform for its use of 'most-favoured nation' clauses with respect to the rates offered by hotels to the platform. However, as we see in the chapters that follow, the German authority did not accept the commitments made by the platform to the other jurisdictions, and required a more stringent remedy. These actions follow on a similar enforcement action in the United Kingdom in 2014. In addition, Brazil, France, and Sweden have examined taxi services. We also continue to see several examples of actions against manufacturer-imposed restrictions on retailer behaviour, particularly against resale price maintenance, including actions in Argentina (bleach), Colombia (rice), Switzerland (musical instruments), and the United Kingdom (refrigerator and bathroom suppliers). The apparent concern with resale price maintenance in these jurisdictions might be seen to contrast with the dearth of public enforcement actions against these arrangements in the United States, which itself may reflect a change in the interpretation of the relevant law by United States Supreme Court several years ago.

Merger review and enforcement activity remains robust, and the chapters that follow note activity in many sectors, including in the telecommunications area in the United

States, Spain, Greece, France, Croatia and Finland. We also see several reports of merger investigations in the healthcare area, including activity in Australia, Spain and the United States. Several of the reports, including the reports from the United States, Belgium and Germany, note enforcement activities arising out of merger process violations, such as the failure to properly report transactions.

Many jurisdictions continue to develop their approach to implementation of competition laws enacted in recent years. Of particular interest is the essay entitled 'The Damages Directive, in search of a balance between public and private enforcement of the competition rules in Europe,' which discusses the implementation of the 2014 European Commission Damages Directive.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2016

Chapter 18

ITALY

Giuseppe Scassellati-Sforzolini, Marco D'Ostuni, Luciana Bellia and Fabio Chiovini[1]

I OVERVIEW

Both European and national competition rules are enforced in Italy by the Italian Competition Authority (ICA). The ICA's antitrust enforcement powers encompass the prohibition on restrictive agreements and abuses of dominant position, as well as merger control.[2]

The ICA also plays an important antitrust advocacy role.[3] Pursuant to Article 21 of the Italian Competition Act (Law No. 287/90), the ICA reports to the parliament and the government any laws, regulations or general administrative acts that give rise to distortions of competition not justified by general interest considerations. Further, following a recent change in the Italian Competition Act (Article 21 *bis*), the ICA may challenge in court general administrative acts, regulations and decisions of public administrations on the basis that they are incompatible with competition law.

Finally, the ICA is empowered to address abuses of economic dependence (Law No. 192/1998), unfair commercial practices (Legislative Decree No. 206/2005) and conflicts of interest of government officials (Law No. 215/2004).

1 Giuseppe Scassellati-Sforzolini and Marco D'Ostuni are partners, Luciana Bellia is a senior attorney and Fabio Chiovini is an associate at Cleary Gottlieb Steen & Hamilton LLP.

2 ICA decisions may be appealed before the Italian Regional Administrative Court for Lazio (the TAR Lazio); the TAR Lazio's judgments may be appealed in full before the Italian Supreme Administrative Court (the Council of State).

3 *Antitrust: cresce adesione a segnalazioni e pareri. Il tasso di successo è pari al 56% e sale al 73% nel caso delle impugnative davanti alla Consulta* (http://www.agcm.it/stampa/news/7983-antitrust-cresce-adesione-a-segnalazioni-e-pareri-il-tasso-di-successo-%C3%A8-pari-al-56-e-sale-al-73-nel-caso-delle-impugnative-davanti-alla-consulta.html).

i Prioritisation and resource allocation of enforcement authorities

The ICA's competition directorate-general is composed of five directorates: (1) energy and basic industry; (2) communications; (3) financial services; (4) foodstuffs and transport; and (5) manufacturing and services. Each of them scrutinises mergers, abuses and restrictive practices relating to their respective business sector.

In 2015,[4] there were 13 proceedings concerning restrictive agreements or practices.[5] In particular, the ICA adopted nine decisions under Article 101 TFEU. In eight cases, fines were imposed, while in one case the ICA accepted the commitments proposed by the parties. The ICA also issued four decisions under Article 2 of the Italian Competition Act (which mirrors Article 101 TFEU), imposing fines in each case.

In 2015, there were three proceedings concerning dominance, all under Article 102 TFEU.[6] Two proceedings were closed by accepting the commitments offered by the parties, while in the third one the ICA imposed a fine on the dominant undertaking.

As to mergers, in 2015, the ICA reviewed 51 notified transactions (seven were scrutinised in depth).

ii Enforcement agenda

In 2015, the ICA's enforcement efforts were focused on anticompetitive behaviour in bidding markets for the provision of public services or other public tenders. Five final decisions on collusive practices were issued,[7] and two new investigations were initiated.[8] The prioritisation of these dossiers reflects the ICA's intention to tackle anticompetitive practices resulting in serious harm to public finances.

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4 A table summarising the ICA's activities from 1990 to 2015 is available at http://www.agcm.it/component/joomdoc/come-funziona/e27_file.pdf/download.html.

5 *Gara CONSIP servizi di pulizia nelle scuole, Mercato dei servizi tecnici accessori, Gare per servizi di bonifica e smaltimento di materiali inquinanti e/o pericolosi presso gli arsenali di Taranto, La Spezia e Augusta, Mercato della produzione di poliuretano espanso flessibile, Arca/Novartis-Italfarmaco, Forniture Trenitalia, Procedure di affidamento dei servizi di ristoro su rete autostradale ASPI, Gare RCA per trasporto pubblico locale, Mercato del calcestruzzo Friuli Venezia Giulia, Mercato del calcestruzzo in Veneto, Ecoambiente-Bando di gara per lo smaltimento dei rifiuti da raccolta differenziata, Servizi di post-produzione di programmi televisivi RAI, Gare gestioni fanghi in Lombardia e Piemonte.*

6 *CONAI-Gestione rifiuti da imballaggi di plastica, Fornitura di acido colico, SEA/Convenzione ATA.*

7 *Gara CONSIP servizi di pulizia nelle scuole, Gare per servizi di bonifica e smaltimento di materiali inquinanti e/o pericolosi presso gli arsenali di Taranto, La Spezia e Augusta, Forniture Trenitalia, Procedure di affidamento dei servizi di ristoro su rete autostradale ASPI, Gare RCA per trasporto pubblico locale.*

8 *Gare ossigenoterapia e ventiloterapia, Vendita diritti televisivi Serie A 2015-2018.*

II CARTELS

i Significant cases

The ICA fined 12 companies active in the railway industry a total of almost €2 million for bid rigging in a case opened in the wake of separate criminal proceedings

By a decision of 27 May 2015,[9] the ICA found that 12 companies active in the railway industry were involved in an anticompetitive horizontal agreement with respect to several public tender procedures launched by Trenitalia (the main railway transportation operator in Italy) for the procurement of electromechanical goods and services. According to the ICA, the 12 companies engaged, between 2008 and 2011, in a secret bid-rigging agreement implemented by means of concerted practices, which consisted in the systematic allocation of public procurement contracts covering the whole national territory, as well as in price fixing. In the ICA's view, the coordination covered every aspect of the bidding procedures, and was achieved through systematic contact among the companies, leading to the exchange of sensitive information.

Interestingly, the alleged existence of the anticompetitive agreement first emerged in the context of separate criminal proceedings, and the ICA opened an investigation after news on the criminal proceedings was published in the press. The ICA then obtained from the Public Prosecutor access to relevant documentation from the criminal file, and used it (in particular, the wiretappings of telephone calls between executives of the companies involved) as evidence of the anticompetitive agreement. The ICA rejected objections raised against this modus operandi, including that it violated Article 8 of the European Convention of Human Rights, which provides for the right to respect for one's 'private and family life, his home and his correspondence'.

This case is noteworthy also because the ICA applied a reduction of 15 per cent to the fine imposed on one of the undertakings involved (Firema), because of its difficult financial situation (Firema was subject to an insolvency procedure known as *amministrazione straordinaria*). Its condition was found insufficient to justify a finding of inability to pay, but was considered as a mitigating circumstance warranting a fine reduction. In doing so, the ICA explained that the list of mitigating circumstances in its fining guidelines is not exhaustive, and that it could take into consideration additional circumstance in setting the amount of the fine.

The ICA fined eight concrete manufacturers and a consultancy firm a total of over €12.5 million for price fixing and market allocation in one of the first cases applying its new guidelines on the method of setting antitrust fines

In its decision on 25 March 2015,[10] the ICA found that nine companies active in the concrete industry and a consultancy firm had infringed Article 101 TFEU by participating in two anticompetitive agreements. The investigation was launched in January 2014, following the immunity application of Calcestruzzi Spa, which escaped fines by blowing the whistle on the cartel.

9 *Forniture Trenitalia* (Case I759).

10 *Mercato del calcestruzzo Friuli Venezia Giulia* (Case I772).

In its decision, the ICA applied its new fining guidelines for the first time.[11] To determine the basic amount of the fine, the ICA applied the minimum percentage (15 per cent of the value of sales) provided for in the new guidelines on secret cartels, due to the particularly serious and secret nature of the violation. The ICA also rejected the argument that it should derogate from the 15 per cent minimum for single-product companies, since the value of their sales coincides with their total turnover and, as a consequence, the automatic application of the 15 per cent minimum could lead to a disproportionately heavy fine. In doing so, the ICA clarified that Paragraph 14 of the fining guidelines, which provides additional criteria for evaluating the gravity of the conduct and which the ICA takes into account for the identification of the percentage to be applied to the value of sales, cannot be used to derogate from the 15 per cent minimum established for secret cartels.

With respect to mitigating circumstances, the ICA held that it could not take into consideration the parties' cooperation during the proceedings because the new guidelines exclude this possibility in cases where the leniency programme applies (although only one company, Calcestruzzi SpA, had applied for the programme). The ICA also refused to apply the mitigating circumstance relating to the adoption of a compliance programme. While some of the companies adopted compliance programmes, they only did so after the statement of objections; therefore, the ICA held that it could not appraise whether the compliance programs had been implemented effectively. The ICA also considered that the training seminars for personnel held before the adoption of the compliance programmes were irrelevant because they could not be considered as implementing the compliance programme itself. The economic conditions of the companies involved were taken into account by the ICA as a mitigating circumstance not expressly mentioned in the guidelines. The ICA considers this mitigating circumstance applicable where a company reports in each of the previous three financial periods both a net loss and negative operating income. Two companies fulfilled these criteria, and their fines were reduced by 15 per cent.

The final amount of the fine on each company was then capped at 10 per cent of the company's total annual turnover, thus significantly reducing the fines imposed on all but one company.

The ICA rejected the companies' claims of inability to pay, giving as grounds: (1) the low amount of the fine; (2) the low amount of the fine as compared to the size of the companies, in terms of net worth and total assets; and (3) the limited impact of the fine on the solvency and liquidity of the companies (including their controlling shareholders). Finally, it is worth mentioning that, in line with its previous practice, but in contrast to the practice of the European Commission (the Commission), the ICA did not calculate the fine that would have been applicable to the immunity applicant had it not received immunity.

11 On the same day the ICA decided *SEA/Convenzione ATA* (Case A474), sanctioning SEA for an abuse of dominance comprising interfering in a tender process with the aim of keeping a potential competitor from entering into the market for the management of airport infrastructure and in the markets for handling services. The importance of this case for interpreting the application of the fining guidelines is, however, limited by the fact that the company's relevant turnover information and the percentages of the value of sales applied by the ICA to determine the fine were treated as confidential.

The ICA fined two manufacturers of flexible polyurethane foam a total of over €8.5 million for an anticompetitive agreement, but significantly reduced the fine levied on one undertaking in light of its difficult financial situation

In its decision on 10 June 2015,[12] the ICA found that two companies specialising in the production and marketing of flexible polyurethane foam (Orsa Foam and Olmo; together, the parties) had infringed Article 101 TFEU by taking part in a single, complex anticompetitive agreement, with the purpose of coordinating their respective commercial strategies, and of allocating customers through, *inter alia*, the exchange of sensitive business information. The exchange of information was enacted through three joint ventures controlled by the parties, as well as by means of an agreement for the allocation of their respective customers between them.

Although it rejected Orsa's argument that it was unable to pay, the ICA took into account evidence showing the exceptionally difficult financial and economic conditions of Orsa Foam's parent company (Orsa S.r.l.), which was party to a debt restructuring agreement pursuant to which Orsa Foam had undertaken to allocate dividends to repay Orsa S.r.l.'s debts. Orsa Foam argued that, if the ICA were to impose a full fine, it would be forced to use the dividends earmarked for the restructuring plan, thereby suspending its parent company's financial recovery and creating a serious risk of bankruptcy for the whole group. According to the ICA, such an outcome would be disproportionate in view of the deterrent effect that a fine should have in the specific case. Therefore, the ICA applied Paragraph 34 of its new fining guidelines, which allow it to take into account the specific circumstances of the case and, accordingly, reduced the fine by 75 per cent (i.e., from €6.2 million to €1.5 million).

The Council of State annuls two judgments by the TAR Lazio on the ICA's powers to redetermine fines and impose penalties for payment delays

On 14 August[13] and 4 September 2015,[14] the Council of State reversed two judgments rendered by the TAR Lazio,[15] stating that, if a fine is not annulled but only re-determined by the TAR Lazio, a payment delay can be sanctioned from the expiry of the deadline for payment set in the original decision. It also found that, if the TAR Lazio's decision reduces the fine, the basis for the calculation of the penalty for late payment is the amount so re-determined.

The Council of State further stated that the 10 per cent turnover cap is an upper limit aimed exclusively at correcting excessive fines in their final amount, and thus the last step in their quantification. When re-determining fines, it appears 'preferable' to deduct aggravating circumstances from the basic amount of the fine (rather than from the final capped amount) with the consequence that the final re-determined amount can lawfully remain unchanged compared to the original amount. However, on this specific issue, the companies asked the Council of State to refer the case to the ECJ for a preliminary ruling on the compatibility of this practice with the principle of proportionality enshrined in Article 49(3) of the Charter

12 *Mercato della produzione di poliuretano espanso flessibile* (Case I776).

13 Council of State, *ICA v. Italsempione S.p.A.*, judgment of 14 August 2015, No. 3944.

14 Council of State, *ICA v. Albini&Pitigliani S.p.A.*, judgment of 4 September 2015, No. 4114.

15 *Logistica internazionale-Albini & Pitigliani/Rideterminazione sanzione* (Case I722C), ICA decision of September 12, 2012; *Logistica internazionale-Italsempione/Rideterminazione sanzione* (Case I722D), ICA decision of 12 September 2012.

of Fundamental Rights of the European Union. The Council of State accepted the request, considering EU case law not sufficiently clear on this legal issue, and consequently ordered suspension of the proceedings and transmission of the case documents to the ECJ.

TAR Lazio annuls an ICA decision against two insurance companies for a concerted practice in the market of insurance services for civil liability of public transport vehicles

On 18 December 2015,[16] the TAR Lazio annulled the decision of the ICA of 25 March 2015,[17] sanctioning the insurance companies Generali Italia S.p.A. (Generali) and Unipol Assicurazioni S.p.A (Unipol) for bid-rigging practices in the market of insurance services for civil liability of public transport vehicles.

The TAR Lazio allowed the claims of Generali and Unipol, recognising that the ICA's decision was founded on circumstances lacking clear meaning and sufficient evidential value, that ICA had, by means of presumptions, artificially interpreted to better suit its accusations. The TAR Lazio found that a presumptive reasoning may lawfully be based only on clear and unequivocal elements, even if consisting of a mere logical or economical rule, which in the case at issue was actually lacking. The TAR Lazio stated that indirect evidence, according to settled European and national case law, should be subject to a global evaluation, which does not necessary require a meticulous analysis of each clue, but still requires the collected evidence to be consistent. The prosecuting Authority should have therefore collected corroborating evidence unequivocally confirming the interpretation of the undertakings' parallel behaviour in the tender procedures as the consequence of a collusive episode.

Moreover, TAR Lazio noted that the relevance of potential competitors not having submitted offers in the investigated tender procedures (having an aggregate market share of about 60–70 per cent) confirmed that, as Generali and Unipol argued, the affected market did not appear profitable enough for insurance companies or at least that Generali and Unipol's behaviour did not appear anomalous, unless considering that the other competitors were also part of the collusive practice. Consequently, the decision not to submit any offer in the investigated tender procedures could plausibly be an economically rational decision individually taken by each of the two companies, constituting an alternative explanation to collusion.

TAR Lazio further stated that an agreement between two undertakings not having, individually or jointly, a significant market power, is *per se* unable to produce a distortion of competition.

Recognition of the quasi-criminal nature of antitrust sanctions and reduction of an antitrust fine based on principles enshrined in the European Convention on Human Rights

In a judgement[18] regarding the ICA's decision to re-determine a previously issued fine against Calcestruzzi S.p.A. (Calcestruzzi),[19] the TAR Lazio recalled that antitrust sanctions are of a quasi-criminal nature and, thus, that the principle of *favor rei* and that of retroactivity

16 *Generali Italia S.p.A. v. ICA*, judgment of 18 December 2015, No. 14281/15; and *Unipol Assicurazioni S.p.A v. ICA*, judgment of 18 December 2015, No. 14282/15.

17 *Gare RCA per trasporto pubblico locale* (Case I744).

18 *Calcestruzzi S.p.A. v. ICA*, judgment No. 5759.

19 *Mercato del Calcestruzzo-rideterminazione sanzione* (Case I559B), ICA decision of 10 December 2013.

in bonam partem, enshrined in Article 7 of the European Convention on Human Rights, apply. Consequently, in recalculating the fine, the ICA could (and should) have taken into account the lesser penalising parameters set out in the new formulation of Article 15 of Law No. 287/1990 and, as a consequence, could have gone below the 1 per cent turnover floor. Moreover, the ICA had violated the principle of proportionality in recalculating the fine, as it did not adequately take into account the requalification of the cartel conduct from 'very serious' to 'serious', the shorter infringement period, the generally unfavourable market conditions, and Calcestruzzi's critical financial situation at the time of the adoption of the new decision. Accordingly, the TAR Lazio recalculated the fine, reducing it by 60 per cent, to around €3.2 million in total. It also cancelled the payment of the surcharge fee on the grounds that the first TAR Lazio judgment had annulled the ICA decision before the expiry of the semester of tolerance granted for the payment of the fine.

ii Trends, developments and strategies

As noted, in 2015, the ICA's enforcement efforts were focused on anticompetitive behaviour in bidding markets for the provision of public services or other public tenders. In those decisions, the ICA applied for the first time a particular method of setting fines in the case of infringements affecting bidding markets, as provided for in the guidelines issued by the ICA in 2014. According to this method, for the purposes of determining the basic amount of the fine, the amount of sales affected by the infringement is presumed to be equal to the amount awarded during the tender procedure or, if no bid has been accepted, to the auction starting price. This criterion has been criticised as inaccurate and unfair, because the amounts taken into consideration in tender procedures may actually be maximum levels, which do not reflect the real value of the good offered, or services rendered, by the bidder(s).

iii Outlook

As apparent from the TAR Lazio judgment in case *Gare RCA per trasporto pubblico locale* (Case I744),[20] the ICA's decisions should be supported by objective and substantive evidence. However, the timing of the procedure before the ICA prevents reaching a decision through effective adversary proceedings.[21] A full judicial review on the merits would be necessary to offset the lack of guarantees arising from having the ICA as an investigator, prosecutor and decision-maker.

20 *Generali Italia S.p.A. v. ICA*, judgment of 18 December 2015, No. 14281/15; and *Unipol Assicurazioni S.p.A v. ICA*, judgment of 18 December 2015, No. 14282/15.

21 Deadlines to respond to the statement of objection are very narrow. Moreover, the ICA's deadline to adopt the final decision is too close to the hearing (and to the reply to the statement of objection), so that ICA's officials can hardly understand the parties' defences.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

The ICA, acting in consultation with the French and Swedish competition authorities, accepts commitments offered by Europe's largest online hotel booking platform with respect to parity clauses contained in its agreements with hotels

In its decision on 21 April 2015,[22] the ICA accepted commitments offered by Booking.com, one of the world's leading online travel agencies (OTAs), thereby closing proceedings in relation to a possible violation of Article 101 TFEU.[23]

It focused on their use of most favoured nation (MFN) clauses in standard contracts concluded with hotels that wished to be included in the online booking platforms. Through the MFN clauses, the OTA required hotels to offer them the same, or better, rates and conditions than those offered to any other client (including other OTAs). These clauses encompassed all other possible booking channels, online and offline (e.g., reservations made through traditional travel agencies as well as directly with hotels). According to the ICA, the restrictive effect of the MFN clauses was strengthened by the use of best price guarantee (BPG) clauses, through which the OTA guaranteed customers that the prices featured on its platform were, in fact, the best available, failing which hotels were required to refund the difference. In the ICA's view, the OTA used BPG clauses as a system to monitor deviations by hotel partners, and punished deviations in terms of ranking of hotels on their platforms. The ICA was also concerned by the OTA's market share (which amounted to 75 per cent). In light of the above, the ICA took the view that the OTA's conduct could seriously hamper competition, in particular by raising barriers to entry and by artificially aligning prices in the whole sector.

Booking.com mainly committed to apply a restricted version of the MFN clause, which requires hotels to guarantee parity only with respect to terms and conditions offered on the hotels' direct online channels. Similar commitments were accepted by the French[24] and Swedish[25] competition authorities in the context of parallel proceedings.

The decision is of particular significance because it was taken in consultation with two other national competition authorities (NCAs), within the framework of unprecedented cooperation. The Commission assisted the three NCAs, but did not start its own proceedings. The positive aspect of this joint action is that identical commitments were made binding in three different Member States, with important gains in terms of legal certainty. However, cooperation was not fully achieved, because another NCA (the German competition authority), which was also dealing with an investigation against the OTA for the use of parity clauses, refused to accept Booking.com's commitments and prohibited Booking.com from continuing to apply its 'best price' ordering it to completely delete the clauses from its contracts and general terms and conditions by 31 January 2016 as far as

22 *Mercato dei servizi turistici-Prenotazioni alberghiere on line* (Case I779).

23 The decision to open proceedings targeted not only Booking.com, but also Expedia, another leading online booking platform. The investigations are continuing against Expedia.

24 Autorité de la concurrence decision of 21 April 2015, 15-D-06.

25 Konkurrensverket decision of 15 April 2015, ref. No. 596/2013.

they affect hotels in Germany. The divergent approach taken by the German authority flows from the voluntary nature of the cooperation between NCAs in the framework of the EU Competition Network.[26]

The ICA accepts commitments offered by two consortia active in the management of plastic packaging waste with respect to potentially exclusionary conduct

Closing a proceedings under Article 102 TFEU, in its decision on 3 September 2015,[27] the ICA accepted commitments offered by CONAI and COREPLA, two consortia active in the management of waste produced by non-domestic users.

In its decision to open an investigation, the ICA found that CONAI had seemingly enacted the exclusionary strategy reported by the complainant Aliplast, a company active in the collection and recycling of plastic waste under the brand Sistema P.A.R.I.. First, CONAI had abused its advisory role with the government, by raising a number of objections with the exclusive purpose of hindering Sistema P.A.R.I.'s authorisation as a recycling consortium. Second, CONAI had refused to quantify the fee owed to it by Aliplast for its residual recycling activities. According to the ICA, this refusal to deal was instrumental, given that CONAI's agreement with Aliplast on this matter was an essential condition for Sistema P.A.R.I. to be recognised. Third, CONAI had disseminated disparaging remarks concerning Sistema P.A.R.I., which could negatively influence customers.

CONAI and COREPLA offered a number of commitments that the ICA considered sufficient to address its concerns. First, the consortia committed to entrusting an independent monitoring trustee to advise the Ministry of the Environment in the context of the recognition procedure. Second, the consortia committed to starting negotiations with Sistema P.A.R.I. in order to determine the fee for the portion of their packaging activities that still had to be handled by CONAI. Third, they committed to publishing on CONAI's website detailed information on autonomous systems and to avoid influencing users on the legitimacy of such systems.

The Italian Supreme Administrative Court upholds the TAR Lazio's ruling confirming the ICA's decision to fine the Italian telecommunications incumbent operator

On 9 May 2013 the ICA fined Telecom Italia (Telecom) €103.8 million for abusing its dominant position in the provision of wholesale access to the local network and broadband internet by hindering the expansion of its competitors (known as OLOs).[28]

According to the ICA, the abusive conduct comprised two distinct activities: (1) from 2009 to 2011 Telecom rejected an unjustifiably high number of OLO requests for the activation of wholesale services, treating them in a discriminatory manner as compared to those coming from its own internal divisions (constituting a refusal to supply); and (2) from 2009 to July 2011 Telecom designed a policy of discounts for large business clients that did not allow an equally efficient competitor to operate profitably in the retail market (constituting a margin squeeze).

26 Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101), paragraph 13.

27 *Conai-Gestione rifiuti da imballaggi in plastica* (Case A476).

28 *Wind-Fastweb/Condotte Telecom Italia* (Case A428).

Telecom brought an appeal before the TAR Lazio against the ICA's decision. Telecom argued: (1) that it had always complied with the pervasive sector-specific regulation set out by the Italian Telecommunications Authority (AgCom), and that the ICA's claims were not supported by evidence; and (2) that it had never implemented the contested discount policy and, had it done so, it would not have constituted a margin squeeze. Telecom's appeal against the decision was rejected.[29] The TAR Lazio took the view that there was no conflict between the ICA's decision and the regulatory framework, and that the investigation's findings supported the ICA's conclusions with respect to the alleged abusive behaviour. The TAR Lazio's judgment was appealed before the Council of State, which, in its judgment of 15 May 2015, upheld the finding of the lower court.[30]

Regarding the first abusive conduct, according to the Council of State, the constructive refusal to supply comprised specific procedures for the activation of services for OLOs, which were structurally different from those applicable to requests from Telecom's own divisions. Therefore, the Council of State maintained that evidence showing that the OLOs had in fact received better treatment than Telecom's internal divisions was not decisive. The Council of State also rejected Telecom's defence concerning the alleged compatibility of its procedures with the telecommunications regulatory framework. The Council of State maintained that competition and regulatory intervention are complementary, and that sector-specific *ex ante* regulation plays a different role from the *ex post* enforcement of competition law.

Regarding the second abusive conduct, the Council of State confirmed the ICA's view that, based on the margin squeeze test, Telecom's rebate policy to large business clients could not be replicated by an equally efficient competitor. Finally, the Council of State dismissed Telecom's claim that, as resulted from the ICA's own assessment, the discount policy had not been concretely implemented and, thus, could not amount to an abuse. It recalled case law of the Court of Justice of the European Union, according to which not only a concrete effect of foreclosure of competitors on the market, but also the mere possibility of such an effect, is sufficient for an abusive conduct to be challenged under Article 102 TFEU.

ii Trends, developments and strategies

The case *Conai-Gestione rifiuti da imballaggi in plastica* (Case A476) confirms the ICA's trend to consider relevant under Article 102 TFEU a party's abusing its role in an administrative procedure necessary for allowing a competitor to enter the market. This type of conduct has recently gained the attention of competition authorities as a novel means for an incumbent to abuse its position on the market.

iii Outlook

ICA's decisions in regulated sectors (such as that against Telecom) confirms the need for a closer cooperation between the sector regulators and the ICA. That would ensure greater legal certainty for all market players, including the dominant companies.

29 *Telecom Italia S.p.A. v. ICA*, judgment of 8 May 2014, No. 4801.

30 *Telecom Italia S.p.A. v. ICA*, judgment of 15 May 2015, No. 2479.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

In 2015, the ICA issued several decisions against undertakings active in the Italian market for waste management.[31] The competitive dynamics in this sector, at the level of both waste collection and recycling, were also carefully scrutinised during a sector inquiry that closed in January 2016.[32]

Other significant decisions have concerned the country's railway[33] and airport[34] infrastructure, as well as the pharmaceutical[35] and insurance[36] sectors.

ii Trends, developments and strategies

The ICA calls on the Italian government and parliament to introduce more pro-competitive provisions in sector-specific regulations

Within 60 days of receipt of the ICA's annual report, the Italian government is required to table a bill aimed at developing and supporting competition and protecting consumers (see Article 47 of Law 99/2009).

In June 2015, the Committee of the Chamber of Deputies discussing the government's bill heard the President of the ICA.[37] The President highlighted the main obstacles to effective competition still affecting different key sectors of the Italian economy, and put forward detailed proposals to address them.

Banking

Service providers would be required to publish prices offered for the most common financial services on a comparison. The President of the ICA acknowledged that the proposed bill would effectively enhance transparency and consumer awareness in the banking sector.

Telecommunications

Penalties for early termination of a contract would have to be proportionate to the value of the contract itself and the consumer would have to be made aware of the penalty amount before entering into the contract. Moreover, procedures for switching to a new service provider would be streamlined and simplified. The President of the ICA praised the bill's provisions on facilitating consumer mobility among different mobile service providers.

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31 *Gare per servizi di bonifica e smaltimento di materiali inquinanti e/o pericolosi presso gli arsenali di Taranto, La Spezia e Augusta* (Case I782); *CONAI-Gestione rifiuti da imballaggi di plastica* (Case A476); *Ecoambiente-Bando di gara per lo smaltimento dei rifiuti da raccolta differenziata* (Case I784); *Gare gestioni fanghi in Lombardia e Piemonte* (Case I765).

32 *Indagine conoscitiva sui rifiuti solidi urbani* (IC49).

33 *Forniture Trenitalia* (Case I759).

34 *SEA/Convenzione ATA* (Case A474).

35 *Arca/Novartis Italfarmaco* (Case I770).

36 *Gare RCA per trasporto pubblico locale* (Case I744).

37 The text of the speech given by the President of the ICA is available at: http://www.agcm.it/index.php?option=com_joomdoc&task=document.download&path=audizioni-parlamentari/Audizione-20151028.pdf.

Electricity and gas
The President of the ICA welcomed the bill's provisions on abolishing regulated tariffs (set by the Italian Regulatory Authority for Electricity, Gas and Water) in the retail supply of gas and electricity. The President observed that regulated tariffs inevitably represent a focal point in market price dynamics and therefore forestall the development of effective competition between energy suppliers.

Professional services
As already proposed in previous ICA policy papers, the bill would abolish some obstacles to the exercise of the legal profession by associations of lawyers. However, the President of the ICA noted that additional measures should be adopted to ensure effective competition in this sector. In particular, lawyers' fees should be further liberalised and law firms should no longer be prohibited from openly advertising their services. The President also welcomed the increase in the number of notaries, but emphasised that territorial limitations to the exercise of their activities still represents a significant obstacle to effective competition.

Pharmacies
The bill would liberalise some aspects of the regulations on pharmacies. In particular, companies would be allowed to run pharmaceutical shops and pharmacy owners would no longer be prevented from operating more than four shops. However, the President of the ICA stressed that the cap on the number of pharmacies allowed in each city should also be abolished.

Postal services
According to the President of the ICA, the bill does not adequately ensure the much needed liberalisation of the Italian postal sector. In particular, certain activities that could be profitably opened up to competition (such as the notification of judicial documents) would continue to be exclusively entrusted to the former monopolist Poste Italiane S.p.A. at least until 2017.

The Chamber of Deputies approved the bill in October 2015. The second branch of the Italian legislature, the Senate, is currently examining the text.

iii Outlook

In 2015, the ICA launched two sector inquiries into dairy products[38] and human vaccines.[39] Other ongoing inquiries concern the audiovisual sector trading and post-trading services[40] and competitive conditions in markets for local public transport.[41]

V STATE AID

The legal framework concerning state aid is set at the EU level. Below we summarise two of the cases involving Italian companies or rules that the Commission scrutinised last year.

38 *Indagine conoscitiva sul settore lattiero caseario* (IC51).

39 *Mercati dei vaccini per uso umano* (IC50).

40 *Indagine conoscitiva sul settore audiovisivo* (IC41).

41 *Condizioni concorrenziali nei mercati del trasporto pubblico locale* (IC47).

i Commission initiates in-depth investigation into the Italian support scheme in favour of the Ilva steel plant

Ilva in Taranto is the largest steel plant in Europe. Over the last years, Ilva has been facing economic hurdles due to aggressive competition from exports from low-cost countries, decrease in demand, increase in energy costs and chronic overcapacity.

Moreover, Ilva has been under the extraordinary administration of government-appointed commissioners since the former top management was indicted for alleged environmental damage due to the plant's toxic emissions. In 2013, Ilva's non-compliance with EU environmental rules also resulted in the Commission bringing infringement proceedings against Italy.

In 2015, the Italian government set out measures to support Ilva's financial condition. In particular, loans granted to Ilva to fund environmental projects would be guaranteed by the state and would benefit from a priority repayment in case of bankruptcy. Moreover, Ilva would receive funds temporarily seized during criminal proceedings carried out against its shareholders and managers and would use them for environmental improvement investments. According to the Commission, the overall financial support granted to Ilva would amount to approximately €2.17 billion.

On 20 January 2016, following the submission of several complaints from interested parties, the Commission initiated an in-depth investigation into these measures in order to assess their compatibility with European state aid rules. However, the Commission acknowledged that certain measures tabled by the Italian government might be necessary to fund urgent environmental clean-ups, as opposed to investments into the plant's compliance with emission levels. EU Competition Commissioner Vestager underlined that 'the Commission will not stand in the way of public subsidies to clean up the serious pollution problems at the Taranto site, on condition that the money is subsequently recovered in line with the 'polluter pays' principle.'[42]

ii Commission declares aid provided to failing bank to be incompatible with the internal market

On 23 December 2015, the Commission handed down a decision declaring the incompatibility with the internal market of an alleged non-notified aid granted by Italy to the failing bank Tercas.

The aid comprised a non-repayable contribution and two guarantees financed by the Fondo Interbancario di Tutela dei Depositi (FITD), a deposit guarantee scheme established under Directive 94/19/EC.[43] These types of measures fall outside the scope of state aid provisions insofar as they ensure that consumers' deposits are paid out when a bank is liquidated and exits the market. However, in the present case, FITD decided to intervene, as permitted by its by-laws, in order to avoid the liquidation of Tercas and the ensuing refund of depositors, by covering the capital deficit of Tercas, thereby facilitating its acquisition and recapitalisation by Banca Popolare di Bari.

42 The full text of Commissioner Vestager's statement is available at: http://europa.eu/rapid/press-release_STATEMENT-16-118_en.htm.

43 Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes.

The Commission considered that, although the FITD is organised as a consortium under private law and is entirely funded by the financial sector, its resources are mandated, managed, and apportioned according to public rules. Indeed, all Italian banks are required to become members of the FITD, are obliged to contribute to the funding of interventions undertaken by the consortium, and cannot veto or opt out from any such intervention. Moreover, the Commission argued that the Bank of Italy exercises a pervasive control and influence over the FITD, and its preliminary approval is required for any supporting intervention undertaken by the consortium. In these circumstances, the Commission concluded that the measures adopted in favour of Tercas were financed through public resources and were ultimately attributable to the Italian state.

The Commission also held that such aid did not meet the standards set out in the state aid rules established in response to the economic and financial crisis,[44] and therefore could not be considered as necessary to remedy a serious disturbance in the Italian economy under Article 107(3)(b) TFEU. The aid was therefore declared incompatible with the internal market, and Italy was ordered to immediately recover it.

Nonetheless, the Commission praised the initiative of some other Italian banks that recently manifested their intention to voluntarily step in to save Tercas from bankruptcy.[45]

VI MERGER REVIEW

i Significant cases

The ICA consolidates its case law on bid rigging markets, as confirmed by the Italian Supreme Administrative Court

On 26 January 2015 the Council of State reversed two 2014 TAR Lazio judgments[46] that had annulled a decision of 17 April 2013 of the ICA[47] prohibiting the acquisition by Italgas (the main national gas distributor) and Hera/Acegas-Aps (a major local distributor in the north eastern Italian regions) of joint control over a local gas provider, Isontina Reti Gas (IRG) operating in certain geographical areas (Padua 1, Padua 2, Padua 3, Pordenone, Trieste and Gorizia) (the ATEMs).[48] The transaction assessed by the ICA comprised two phases: (1) the acquisition by Italgas and Hera/Acegas-Aps of IRG; and (2) the transfer to IRG of Italgas and Hera/Acegas-Aps distribution concessions related to the ATEMs. Moreover, Italgas and Hera/Acegas-Aps agreed not to participate in any tender that would occur in the ATEMs.

In its decision, the ICA stated that the transaction was aimed at creating a vehicle to participate in competitive tenders for gas distribution concessions in the ATEMs. The ICA also took the view that the relevant product and geographic markets should be defined as individual tenders for the exclusive distribution concessions in a given ATEM (as the competitive procedures were the only moment in which undertakings would compete against

44 See, *inter alia*, the Communication from the Commission on the application, from 1 August 2013, of state aid rules to support measures in favour of banks in the context of the financial crisis.

45 The Commission's press release is available at: http://europa.eu/rapid/press-release_IP-15-6395_en.htm.

46 *Acegas-Aps* (judgment No. 3046/14) and *Italgas* (judgment No. 3047/14), of 20 March 2014.

47 *Italgas – Acegas-Aps/Isontina Reti Gas* (Case C11878).

48 *Italgas – Acegas-Aps*, judgment of 18 December 2014, No. 334/15.

each other), instead of the gas distribution market. According to the ICA, because the Italian gas distribution market is a legal monopoly, competition is limited to tenders for local gas distribution concessions. In addition, because the merger was intended to take place after the enactment of new sector regulation, the ICA could not rely on past tenders for its analysis of the competitive conditions of the tender procedures (i.e., which and how many undertakings would actually participate). The ICA's analysis to identify potential competitors was therefore mainly based on information received in response to its market test, and focused not on identifying all companies in possession of the formal requirements for participation in the tenders, but rather only on those that could have an actual chance of participating.

In 2014, the TAR Lazio set aside the ICA decision on the basis, *inter alia*, of the following arguments concerning the definition of the relevant market: (1) the mere existence of a legal monopoly is not sufficient to qualify a tender aimed at granting a local gas distribution concession a relevant product market, nor is the geographical scope of such a tender sufficient to define the geographic market; and (2) the ATEMs at issue represented minor parts of the national gas distribution market that cannot be distinguished from the national gas distribution market as autonomous markets and thus cannot represent relevant markets. Moreover, the TAR Lazio held that, when prohibiting a merger, the ICA must prove not only that the transaction limits the degree of competition, but also that it negatively affects competition.

Upon appeal brought by the ICA, the Council of State reversed the TAR Lazio judgment, finding that the definition of the relevant geographic market is not necessarily a territorial definition and, as a consequence, cannot be assessed in advance in a merely geographical manner. On the contrary, that definition may be inferred from the outcome of the examination of the potentially anticompetitive conduct, and correspondingly may coincide with the single tender that the conduct affects. Furthermore, an ATEM cannot be considered a minor part of the national gas distribution market because tenders do not exist at the national level. Finally, the ICA correctly found that, in the absence of the transaction, the parties would have attempted to obtain the relevant concessions in competition with one another. This was sufficient to prove that the merger should be prohibited, as it was not necessary to also demonstrate actual negative effects on competition. In light of this reasoning, the Council of State upheld the ICA's decision prohibiting the merger, finding that the transaction would negatively affect the competitiveness of the tender process by consistently reducing the number of participants.

On 15 July 2015 the ICA adopted a second decision applying the market definition validated by the Council of State.[49] In particular, the ICA defined a relevant geographic market for each individual tender for the distribution of gas in a given ATEM. It also used the same criteria with respect to tenders for the operation of hydropower plants. In this case the merger was cleared, subject to commitments.

49 *SEL – Società Elettrica Altoatesina/Azienda Energetica* (Case C11990).

ii Trends, developments and strategies

Amendments to the Italian merger control thresholds

Pursuant to Article 16(1) of Law No. 287/1990, as of 16 March 2015,[50] concentrations not falling under the EU jurisdiction must be reported to the ICA if the following turnover tests were met in the preceding fiscal year: (1) the aggregate Italian turnover of all undertakings concerned exceeded €492 million (€489 million under the 2014 rules), and (2) the Italian turnover of the target undertaking exceeded €49 million (by a resolution dated 15 March 2016, thresholds have been increased to €495 million and €50 million, respectively).

Since 1 January 2013, these thresholds are cumulative and no longer alternative. This amendment led to a drop in the number of notified concentrations from 459 in 2012 to 80 in 2013, 45 in 2014, and 51 in 2015. Consequently, on 10 February 2014, roughly one year after this amendment, the ICA proposed revising the notification thresholds and launched a public consultation, because a number of important concentrations escaped the ICA's review as they did not exceed the target undertaking threshold.

In its consultation, the ICA proposed amending the cumulative thresholds as follows: (1) the aggregate turnover threshold would remain unchanged, while the turnover threshold of the target undertaking would decrease from €49 to €10 million; and (2) a third threshold would be introduced, whereby the Italian turnover generated by each of at least two undertakings concerned would have to exceed €10 million. The public consultation lasted 20 days. Following the comments received, the ICA decided to continue to monitor the operation of the current notification system.

Moreover, the ICA also considered whether a simplified procedure should be introduced for concentrations that do not give rise to serious competition concerns.

iii Outlook

On 21 January 2016 the ICA initiated an in-depth investigation into the proposed concentration between Mondadori and RCS, two of the strongest and closest competitors in the Italian book publishing industry. The ICA's concerns focused on the high level of concentration in the relevant markets, with five players controlling around 60 per cent of generic book sales. The ICA also noted that all of these players are vertically integrated to some extent, with activities spanning production, wholesale distribution, and retail sales. The ICA will hand down its final decision after consulting with the Italian Telecommunications Authority.

At the end of February 2016 the ICA requested the Commission's permission to examine the proposed concentration between Wind and 3 Italia, the third and fourth mobile service operators in the Italian telecommunications industry, respectively. According to the ICA, this transaction would only affect competition on the Italian market and is not transnational in nature. The Commission's decision is pending, although it has already rejected a similar request for referral, put forward in 2014 by the German Competition Authority, with respect to the acquisition of E-Plus by Telefonica Deutschland.

50 The ICA annually amends the turnover thresholds based on the gross national product price deflator index.

VII CONCLUSIONS

i Pending cases and legislation

Pending legislation on full-function co-operative joint ventures

The old EU law distinction between cooperative and concentrative joint ventures remains applicable under Italian competition rules. Accordingly, all joint ventures (including full-function ones) whose main object or effect is the coordination of their parent companies behaviour do not constitute a 'concentration' within the meaning of Article 5 of Law No. 287/1990. These joint ventures must be assessed under the restrictive agreements and/or market dominance provisions of Law No. 287/1990. The ICA presented a reform proposal to the Italian government through Recommendation No. AS988 of 2 October 2012. The ICA proposed adding to Article 5 of Law No. 287/1990 an explicit reference to the applicability of merger control rules also to full-function cooperative joint ventures.

ii Analysis

The ICA has continued to pursue its approach in terms of both advocacy and enforcement, in particular in regulated sectors. In light of the new fining guidelines, fine amounts have increased, particularly in the context of bidding markets. 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 substantive test analysis (moving from the dominance test to the significant impediment to effective competition test). Moreover, in line with EU rules, efficiency should formally become part of the ICA's assessment.

Appendix 1

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Giuseppe Scassellati-Sforzolini is a partner based in Cleary Gottlieb's Rome office. He is active in public and private M&A and capital markets transactions, corporate governance, securities and banking regulation, competition law and EU state aid law. His corporate work focuses on regulated sectors, such as financial services, energy, media, telecoms and airlines. He also assists companies in enforcement and private investigation matters, including litigation.

Mr Scassellati-Sforzolini is the co-author of publications on business and antitrust law issues, including: 'Italian and EC Competition Law: A New Relationship - Reciprocal Exclusivity and Common Principles' 29 Common Market Law Review 1992, 93-131; 'Liability of Successor Undertakings for Infringements of EC Competition Law Committed Prior to Corporate Reorganisations' 16 European Competition Law Review 1995, 348-353; 'La tensione fra regole di concorrenza comunitarie e regole professionali e deontologiche nazionali' Giurisprudenza Commerciale, 2003, II 5-40; 'Contingent Fee Arrangements in the United States / I patti di quota lite negli Stati Uniti' *Compenso professionale e patto di quota lite* (R Danovi ed.) Giuffrè Editore 2009; and *The Foreign Investment Regulation Review*, Italy Chapter, 161-174, Law Business Research 2013.

Mr Scassellati-Sforzolini worked in the Brussels office from January 1988 until the summer of 1998 when he transferred to Rome to open the firm's first Italian office. He has been a partner since January 1996. He graduated in law with honours from the University of Bologna in 1984 and obtained an LLM degree from the University of Michigan Law School in 1987. In 1985–1986, he worked as a trainee at the Legal Service of the Commission. He has been a member of the Bar in Italy since 1986 and a member of the New York Bar since 1988. He is admitted to practise before the Italian higher courts. He is a native Italian speaker and is fluent in English, French and Spanish.

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Marco D'Ostuni is a partner based in the Rome office. Mr D'Ostuni is distinguished as a leading lawyer in competition/antitrust (Italy) and in TMT: telecommunications by *Chambers Europe*. His practice focuses on antitrust, telecommunications, media and energy law. He has represented clients before the Commission and the Italian Antitrust Authority in antitrust investigations and merger filings; in proceedings before the Italian Communications Authority (AgCom) and the Italian Energy Authority; and in arbitration and litigation before civil and administrative courts involving complex antitrust or sector regulation issues.

Mr D'Ostuni is the co-author of many publications on antitrust matters. He joined Cleary Gottlieb Steen & Hamilton LLP in 2000 and until June 2001 was based in the New York office. He became partner in 2009. He graduated with honours from Naples University Law School in 1996. He obtained an LLM in Advanced European Legal Studies from the College of Europe of Bruges in 1998. In the same year, he won the Best Advocate General prize in the European Law Moot Court Competition, awarded by the European Court of Justice (where he later interned briefly). He obtained an LLM from the Columbia University School of Law, where he was a Harlan Fiske Stone Scholar, in 2000, after receiving a Fulbright Scholarship. In 2008, he obtained a PhD in competition law from the University of Perugia, Italy. Prior to joining Cleary Gottlieb, Mr D'Ostuni was a trainee at an administrative law firm in Naples from 1996 to 1997. From 1998 to 2000, he was an associate at a major international competition law firm in Brussels. Mr D'Ostuni has been a member of the Naples Bar since 2001, and of the New York Bar since December 2003. He is a native Italian speaker, is fluent in English, French and Spanish, and has a basic knowledge of Portuguese.

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She joined Cleary Gottlieb Steen & Hamilton LLP in 2006 and until June 2008 was based in the Brussels office. She graduated with honours from Luiss Guido Carli University Law School in 2001. While at Law School she was a visiting student at the Georgetown University Law Center for a semester on a scholarship granted by the University of Rome. She obtained an LLM in Advanced European Legal Studies from the College of Europe (Bruges) in 2006. Prior to joining Cleary Gottlieb, Ms Bellia was an associate at a major international competition law firm in Rome. Ms Bellia has been a member of the Palermo Bar since 2004. She is a native Italian speaker and is fluent in English and French.

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