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# Italian Competition Law Newsletter

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— The Council of State dismisses an appeal against a merger clearance decision

## The ICA accepts and makes Bosch's commitments binding, concluding an abuse-of-dominance investigation in the e-bikes ABS market

On July 30, 2024, the Italian Competition Authority ("**ICA**") closed the investigation initiated in September 2023 against Robert Bosch GmbH ("**Bosch**") for an alleged infringement of Article 102 TFEU in the market for anti-lock braking systems ("**ABSs**") for e-bikes.[1]

### Background

The investigation was initiated on the basis of a complaint in early 2023 by Blubrake, a competitor and manufacturer of ABSs. Blubrake alleged that Bosch had leveraged its dominant position in the market for electrification systems for e-bikes (the "**e-kit**" market) to restrict interoperability between

[1] ICA, Decision of July 30, 2024, No. 31296, A567 – *Mercato degli ABS nelle e-bike*.

Bosch's e-kits and Blubrake's ABSs, and that Blubrake was Bosch's only effective competitor in the ABS market.

The ICA identified two possible separate relevant markets, namely, the ABS market and the e-kit market. It also recognized that the effective operation of these systems requires functional interaction between the ABS and the e-kit through an electrical connection and a communication protocol to enable interoperability between the various components of the e-bike.

## Commitments

On March 8, 2024, Bosch submitted a set of commitments to the ICA. Under the first commitment, Bosch would supply an interoperability solution to allow the electrical and logical connections between Bosch's e-kit and third-party ABSs ("**Commitment 1**"). In particular, Bosch will provide ABS manufacturers with certain power supply cables, a controller area network communication standard, diagnostic cables, and all the technical specifications necessary to enable interoperability. In addition, Bosch undertook to support the acquisition of customers by ABS manufacturers and to initiate, free of charge, joint development projects with ABS producers to develop the interoperability solution. Bosch also committed to supply the ABS manufacturers concerned, upon completion of the interoperability development, with power cables at set prices, with a minimum of 3,000 units in the first year and 5,000 units annually thereafter. As per Commitment 1, the supply of cables will continue for as long as the generation of e-kit developed in the interoperability joint effort will be available in the market. Bosch shall also set up an internal task force toprovide technical support.

Bosch's second commitment concerns certain amendments to the contractual clauses in the agreements with e-bike manufacturers to clarify that modifications to, or replacements of, Bosch's e-kit components do not affect the warranty, unless the modification or third-party component objectively causes the relevant defect or damage. Bosch also committed to update the manuals it provides to independent dealers of e-bikes and to inform its clients of the new system responsibility clause.

The feedback from Blubrake to the subsequent market test of Bosch's commitments was in essence positive. Bosch addressed the complainant's minor concerns through certain amendments to its commitments, which it submitted to the ICA on June 10, 2024.

## The ICA's assessment

The ICA concluded that Bosch's undertakings, as revised following the market test, adequately addressed the competition concerns identified in the opening decision. These commitments include a the appointment of a monitoring trustee to act on behalf of the ICA with a view to assessing Bosch's timely implementation of, and compliance with, Commitment 1.

The commitments, in particular Commitment 1, are expected to ensure the interoperability between competing ABSs and Bosch's e-kits.

# The ICA clears a below-threshold M&A deal in the cement industry, subject to conditions

Alpacem Cementi Italia S.p.A. ("**Alpacem**"), a company engaged in the production and sale of cement, proposed to acquire direct and indirect control over certain production assets located in the Italian regions of Veneto and Friuli-Venezia Giulia (the "**Transaction**"). In particular, Alpacem would acquire from Buzzi S.p.A (or its subsidiaries; "**Buzzi**") direct control of an undertaking owning a cement production plant in Friuli-Venezia Giulia and indirect control of 17 concrete production facilities in Veneto and Friuli-Venezia Giulia (through long-term lease contracts). The Transaction was part of a broader framework agreement according to which: Alpacem would sell to Buzzi a 25% stake in an Austrian subsidiary; for many years Buzzi would provide Alpacem with clinker (a key input for cement production); and Buzzi would allow Alpacem to use its Marghera harbor terminal.

In January 2024 the ICArequired the parties to submit a notification of the Transaction under the revised rules on concentrations,[2] citing potential competition concerns in the Italian market.

In March 2024[3] the ICA initiated an in-depth (Phase II) investigation into the Transaction, expressing concerns over potential anti-competitive effects at both the horizontal level in the cement market and across vertically-related markets, specifically the upstream market for clinker or cement and the downstream market for ready-mixed concrete. In particular, the ICA took the view that the Transaction would bring together under a single decision-making center cement and concrete plants located in close proximity and which are therefore likely to share a large part of their respective customer base (which usually represents a significant competitive constraint). Moreover, the ICA asserted that the Transaction might encourage Alpacem to sell cement or clinker to its concrete plants at a lower price than the one charged to its competitors.

Alpacem subsequently offered a set of structural and behavioral commitments aimed at preserving pre-merger purchase conditions for its customers over a period of up to three years. These commitments were also designed to mitigate Alpacem's post-merger incentive to unilaterally raise prices for ready-mixed concrete. In particular, Alpacem committed to offer, for up to 3 years, all eligible customers the right to purchase cement at pre-merger terms. In addition, Alpacem undertook to lease one of its production facilities to allow competitors to enter into, or expand their business in, one of the relevant markets in which the Transaction would have resulted in Alpacem holding significant market power. Finally, Alpacem and Buzzi agreed to drop the provisions concerning the Marghera harbor terminal out of the framework agreement.

The ICA considered that these commitments effectively addressed the competitive risks it had identified, and therefore authorized the Transaction subject to these conditions in a decision published in the ICA August 5, 2024 bulletin.

[2] In 2022, the ICA was granted the power to require notification of below-threshold concentrations under certain conditions (Article 16(1-bis) of Law No. 287/1990, introduced by Article 32(1)(b)(1) of Law No. 118/2022). In January 2023, the ICA issued guidelines on the implementation of these new rules (which were revised in February 2024), as discussed in the March-April 2024 issue of this Newsletter (https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-march-april-2024.pdf).

[3] ICA, Decision of March 26, 2024, No. 31137, C12615 – *Alpacem Cementi Italia / Ramo di azienda di Buzzi Unicem*.

# The Council of State requests the CJEU to interpret Articles 41 and 47 of the Charter of Fundamental Rights with regard to procedural deadlines in ICA's investigations

The Italian Council of State requested the Court of Justice of the European Union (the "CJEU") to deliver a preliminary ruling regarding the interpretation of Articles 41 and 47 of the Charter of Fundamental Rights of the European Union (the "**Charter**") and Article 6 of the European Convention on Human Rights (the "**ECHR**") in the context of antitrust enforcement procedures.[4]

The case involves Imballaggi Piemontesi S.r.l. ("**IP**"), which challenged a 2019 decision by which the ICA fined it in the amount of €6,147,746 fine for participating in a long-term restrictive agreement designed to significantly distort competition in the market for the production and marketing of corrugated board sheets. (the "**Sheet Agreement**") in the corrugated cardboard sheet market, in violation of Article 101 TFEU.[5] In the course of the litigation proceedings, IP argued, inter alia, that: the ICA's decision was adopted after an unreasonable extension of the investigation timeline; the time limit required under Italian and EU law was not observed; and IP's defense rights were thereby infringed.

The Council of State notes that under Italian law the ICA may set at its discretion the time limit for completing the investigation in any given case. The procedure at issue, which was initially set to close by May 31, 2018, was extended twice by the ICA (ultimately until July 19, 2019), due to the investigation's increasing complexity, given the objective and subjective widening of its scope.. IP challenged the lawfulness of these extensions, claiming that, since Italian law fails to establish a generally applicable time limit, the ICA can unilaterally extend the timeframe of its investigations, potentially infringing the company's right to a fair and timely process.

The Council of State found that the procedural complexity could justify the discretion afforded to the ICA in extending investigation time limits. However, given the implications of such lack of legal certainty for the effective enforcement of EU competition law, it decided that a preliminary reference to the CJEU was necessary. It sought clarifications on whether EU law requires a specific peremptory time limit in national competition investigations in order for the accused undertakings' rights of defense to be fully protected under Articles 41 and 47 of the Charter. In referring the matter to the CJEU, the Council of State pointed out that, even if the initial time limit set by the ICA for the conclusion of the proceedings were to be regarded as mandatory, the ICA would only be deprived of its power to impose penalties, as opposed to its power to establish the existence of an unlawful conduct and to order the addressee(s) of its final decision to cease and desist from such conduct.

Pending the CJEU's response, the Council of State has suspended the proceedings, emphasizing the need to: ensure the uniform application of EU competition law across Member States; and balance the rights of companies under investigation with the procedural efficiency of competition authorities.

[4] Council of State, Order of August 26, 2024, No. 7243.

[5] ICA, Decision of July 17, 2019, No. 27849, I805 – *Prezzi del cartone ondulato.*

# The TAR Lazio provides clarification on the calculation of the interest to be paid to the ICA in the event of re-adoption of an infringement decision

On September 30, 2024, the TAR Lazio provided clarification on how the ICA should calculate the interest on the fine to be paid in the event of an infringement decision re-adopted following a partial annulment by the administrative courts.[6] The judgment of the TAR Lazio brings to an end a long saga that began in 2019, when the ICA adopted a fine of more than € 67 million for anti-competitive agreements in tenders and price fixing in relation to certain helicopter transport services.[7]

## Background

### *The ICA decision*

On February 13, 2019, the ICA established the existence of two separate anticompetitive agreements, in breach of Article 101 TFEU.

First, the ICA found that the main players in the market – namely Airgreen S.r.l., Elifriulia S.r.l., Eliossola S.r.l., Elitellina S.r.l., Heliwest S.r.l. and Star Work Sky S.a.s – had engaged in bid-rigging practices aimed to influence tenders for helicopter forest fire-fighting services. In particular, the parties had agreed not to offer significant rebates (which in many cases were lower than 1%) in tenders for helicopter forest fire-fighting services between 2005 and 2018. As a result, contracting authorities ended up paying higher prices for the relevant services.

Second, the ICA found that the members of the Italian Helicopter Association discussed and agreed, at meetings of the Association, on a price list for aerial work services and passenger transport, based on the type of helicopter. The prices were set in advance of the time period they referred to. Following the adoption, the price list was then sent from the Association to all its members. The price list aimed to influence public procurement bodies with regard to the setting of prices for helicopter services in their invitations to tender, as well as to provide price indications to commercial customers. The ICA found that Airgreen S.r.l., Babcock Mission Critical Services Italia S.p.A. ("BMCS Italia") – jointly with its parent company Babcock Mission Critical Services International S.A. ("BMCS International") –, Elifriulia S.r.l., Eliossola S.r.l., Elitellina S.r.l., Heliwest S.r.l., Star Work Sky S.a.s. and Air Corporate S.r.l., jointly with its parent company Airi S.r.l., entered into a price-fixing agreement within the Italian Helicopter Association, of which they were all members of from 2001 to 2017.

The ICA fined the parties for a total amount of over € 67,000,000 for the two infringements. In particular, BMCS Italia and BMCS International were jointly fined for € 50,612,057.

### *The interim proceedings before the TAR Lazio*

BMCS Italia and BMCS International (the "Parties") applied for a stay of execution of the fine imposed by the ICA.

By order dated June 6, 2019,[8] the TAR Lazio granted the interim measure limited to the suspension of the fine, subject to the lodging of a security deposit equal to the fine imposed, also in the form of an appropriate guarantee, pursuant to Article 55(2) of the Italian Code of Civil Procedure.

As a result, BMCS Italia issued a first demand bank guarantee for a maximum amount of €51,000,000, also on behalf of BMCS International.

[6] TAR Lazio, Judgment of September 30, 2024, No. 16858.

[7] ICA, Decision of February 13, 2019, No. 27563, Case I806 – *Affidamento appalti per attività antincendio boschivo.*

[8] TAR Lazio, Order of June 6, 2019, No. 3732.

***The TAR Lazio judgments***

At the end of the proceedings on the merits of the case, the TAR Lazio substantially confirmed the ICA's decision.[9] In particular, the TAR Lazio confirmed that: (i) the decision complied with the principle of collegiality and the rules governing the functioning of the ICA, even though the decision was taken by two of the three members of the ICA's Board; (ii) the relevant market was national in geographic scope, although certain tenders of the first cartel were organized at the regional level; (iii) the evidence relied on by the ICA was sufficient to establish the unlawfulness of the conduct, for which the applicants failed to provide alternative – and lawful – explanations; and (iv) the bid-rigging and the price-fixing agreements were two separate infringements, mainly because the participants were different and the agreements pursued different goals and concerned partly different service. The TAR Lazio also confirmed the fine set by the ICA.

***The interim proceedings before the Council of State***

After the judgments of the TAR Lazio, BMCS Italia and BMCS International applied for a stay of execution of the fine imposed by the ICA also before the Council of State.

By orders dated August 28, 2020, the Council of State granted an interim measure under the same conditions as those provided for by the TAR Lazio.[10]

***The ruling of the Council of State***

With two separate judgments issued on July 2, 2021 and August 18, 2021, the Council of State upheld the judgments of the TAR Lazio in most of their parts.

First, the Council of State dismissed the Parties' argument that the ICA decision should be set aside because it had been adopted by only two members of the Board and without the participation of the ICA's President (who had not yet been appointed by the Italian Parliament). The Council of State confirmed that the ICA decision complied with the principle of collegiality and the rules governing the functioning of the ICA.

Secondly, with respect to the bid-rigging conduct, the Court took the view that the ICA had correctly (i) found that the Parties' conduct was a single and complex infringement, and (ii) rejected the Parties' attempt to "break up" the overall unlawful conduct into a number of constituent elements, with a view to subjecting it to separate limitation periods.

Thirdly, the Council of State agreed with the ICA's findings also in relation to the price-fixing conduct. It noted that agreements which are capable of diminishing and altering the free determination of prices fall under the said category, and so do recommendations of associations of undertakings to maintain a certain price level.

Lastly, the Council of State upheld the ICA's finding that there was no overlap between the two cartels, which differed in terms of scope, duration, activities and participants affected. It therefore held that the ICA was right in concluding that the two cartels were separate, instead of one single and complex agreement.

However, with regard to the fine imposed on the Parties, the Council of State stated that in the case of a parent company involved in an infringement together with one of its subsidiaries, for the purpose of calculating the joint and several fines, the ICA cannot take into account the turnover of the other group companies that did not operate in Italy, did not carry out the infringement, and could not prevent it.[11] The Council of State therefore ordered the ICA to re-adopt its decision and to set the amount of the fine taking into account only the turnover of the undertakings of the group which operated in Italy at the time of the infringements.

[9] TAR Lazio, Judgments of May 18, 2020, Nos. 5261 and 5262, discussed in the May 2020 issue of this Newsletter:https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-news-letter-may-2020.pdf.

[10] Council of State, Orders of August 28, 2020, No. 4913 and 4915.

[11] Council of State, Judgments of July 2, 2021, No. 5058 and of August 18, 2021, Nos. 5918, discussed in the August 2021 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--august-2021-pdf.pdf.

***The events following the re-adoption of the infringement decision***

On February 15, 2022, the ICA re-adopted its infringement decision,[12] which re-calculated the fine on the basis of the turnover of BMSC International and BMSC Italia. The ICA excluded the turnover of other group companies that neither operated in Italy nor participated in the infringement. Ultimately, the ICA imposed a joint fine of € 18,049,410 on the Parties, which was less than one-third of the original fine of € 50,612,057.

On March 31, 2022, BMSC International paid the fine as re-calculated by the ICA. However, on February 23, 2022, the ICA ordered the undertakings to also pay the legal interest on the re-calculated fine, with interest accruing from the date of the originally imposed fine (May 27, 2019). While disputing the validity of this request, BMCS Italy paid the requested legal interest of €152,727.67 on April 8, 2022, to avoid a potential recovery procedure.

In parallel, the Parties challenged the ICA's request before the TAR Lazio, on the ground that interest on the re-calculated fine should only accrue from the due date of that fine and not from the due date of the original fine annulled by the Council of State.

The TAR Lazio found that:

— The Council of State had already annulled the initial infringement decision concerning the calculation of the fine, thus rendering the original fine null and void.

— Enforcement of the original fine had been suspended due to the interim measures granted by both the TAR Lazio and the Council of State.

— Payment of the fine only became due after the ICA's re-determined its amount, in accordance with the principles established by the Council of State.

As a result, the TAR Lazio concluded that the ICA was entitled to demand interest only from the date on which the fine became actually due.

# The TAR Lazio rejects Althea's application for annulment of an ICA decision to dismiss allegations of abuse of dominance in the market for maintenance of high-tech diagnostic imaging devices

On October 22, 2024,[13] the Regional Administrative Court of Lazio (the "**TAR Lazio**") rejected the application filed in 2021 by Althea Group S.p.A. ("**Althea**") for annulment of the decision of the Italian Competition Authority (the "**ICA**") to close an Article 102 TFEU investigation into three equipment manufacturers active in the market for maintenance of high-tech diagnostic imaging devices, without a finding that they abused their dominance (the "**Decision**").[14]

## Background

Following a complaint by Althea, on January 31, 2018, the ICA initiated proceedings in relation to an alleged abuse of dominance by GE Medical Systems Italia S.p.A. and its parent companies GE Healthcare Italia S.r.l. and GE Italia Holding S.r.l. (jointly, "**GE**"), Siemens Healthcare S.r.l. and its parent company Siemens Healthineers Holding III B.V. (jointly, "**Siemens**"), and Philips S.p.A. and

[12] ICA, Decision of February 15, 2022, No. 30019, Case I806C – *Affidamento appalti per attività antincendio boschivo – Rettifica sanzione Babcock Mission Critical Services Italia e Babcock Mission Critical Services International.*

[13] See TAR Lazio, Judgment No. 18308 of October 22, 2024.

[14] See ICA, Decision No. 28620 of March 30, 2021, A517 - *Mercati di manutenzione di dispositivi diagnostici* (discussed in the April 2021 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--april-2021-pdf.pdf).

its parent companies Philips SAECO S.p.A. and Koninklijke Philips N.V. (jointly, "**Philips**").

The ICA alleged that GE, Siemens and Philips, as original equipment manufacturers ("**OEMs**") of high-end diagnostic imaging devices (including computer tomography and magnetic resonance devices; "**DI Devices**"), may have put in place exclusionary strategies, each with respect to their own branded DI Devices, to hinder the provision of maintenance services by independent services providers ("**ISOs**"). In particular, the ICA was concerned about a possible refusal by the parties to: (i) provide access to service software and information; and (ii) supply spare parts to ISOs.

## The ICA Decision

In the Decision the ICA identified a primary market for the production and commercialization of DI Devices, and three distinct secondary markets for maintenance services (one for each brand of DI Device). Furthermore, the ICA found that the primary market was highly concentrated, while each OEM (GE, Siemens and Philips) was dominant in its own branded aftermarket.

Against this background, the ICA found that the evidence collected during the proceedings was insufficient to demonstrate an abuse of dominance under Article 102 TFEU. In particular, the ICA found that there was no abusive refusal to grant access to the maintenance software of the so-called "*minimum set*" and the supply of spare parts. Moreover, the ICA considered that restricting access to the so-called "*advanced set*" of software and services manuals did not infringe antitrust rules as such products were covered by intellectual property rights and were not indispensable for ISOs to conduct their maintenance activities.

## Althea's application for annulment to the TAR Lazio

In its application to the TAR Lazio, Althea requested the annulment of the Decision and the reopening of the ICA's proceedings, on the basis that: (i) the ICA had erred in finding that the OEMs did not restrict access to the minimum set of maintenance software and spare parts contrary to Article 102 TFEU; (ii) the ICA had erred in finding that restricting access to the advanced set of software and services manuals, which was essential to the maintenance services, was not abusive; and (iii) the ICA had failed to rule on other alleged conduct of the OEMs regarding disparaging activities *vis-à-vis* the ISOs, which had been criticized in the Statement of Objections ("**SO**").

## The TAR Lazio Judgment

On October 22, 2024, the TAR Lazio dismissed Althea's application.

In its ruling, the Court confirmed the well-established case-law according to which final decisions of the ICA do not need to strictly follow the conclusions in the SO. The TAR Lazio observed in this regard that the purpose of the SO is to clarify the scope of the evidence gathered by the ICA during the investigation. As regards the OEMs' alleged refusal to deal, the TAR Lazio confirmed that the evidence collected by the ICA was insufficient to demonstrate that the parties had put in place a strategy aimed at hindering access to the minimum set of maintenance software and spare parts for ID Devices contrary to Article 102 TFEU. The TAR Lazio considered that the OEMs provided access to the necessary information with very limited exceptions and supplied spare parts on a non-discriminatory basis.

As regards the alleged refusal to license the advanced set of software, the TAR Lazio upheld the Decision and clarified that the refusal to license was connected with the exercise of intellectual property rights in the healthcare sector. In the circumstances the TAR Lazio considered that the OEMs' exclusive rights should prevail as research and development activities in the healthcare sector are essential. Granting access to such a protected set of information would undermine the need to foster innovation. The TAR Lazio also found that the protected information was not essential and that the ISOs could have developed their own alternative solutions at a reasonable cost.

Lastly, the TAR Lazio acknowledged that the ICA had raised the issue of the alleged disparaging conduct of the OEMs in the SO, but found it unnecessary to consider it further given that the main conduct investigated was unfounded. This element of the Court's statement of reasons does not seem entirely convincing and might play a role in Althea's decision on whether to appeal the Judgment.

# The Council of State dismisses an appeal against a merger clearance decision

On October 9, 2024,[15] the Council of State rejected the appeal brought by Masotina S.p.A. ("**Masotina**"), an undertaking operating in the waste collection and sorting market, setting aside the 2023 TAR Lazio judgment,[16] which upheld the ICA decision of July 28, 2020 (the "**Decision**") to clear the acquisition by Iren Ambiente S.p.A. ("**Iren**") of sole control over I.Blu S.r.l. ("**I.Blu**" and, jointly with Iren, the "**Parties**"), without opening an in-depth (Phase II) investigation.[17]

## Background

On April 17, 2020, Iren notified the ICA of its acquisition of sole control over I.Blu (the "**Transaction**"). As part of the Transaction, the Parties also entered into two non-compete agreements, a framework agreement and a partnership agreement.

The ICA decided not to open an in-depth (Phase II) investigation into the Transaction.

Masotina, a competitor of I.Blu, did not intervene in the procedure, although it could have done so as an interested third party.

## The ICA Decision

In the Decision, the ICA identified two relevant markets concerned by the Transaction: (i) the upstream market for the sorting and treatment of plastics from municipal waste; and (ii) the downstream market for the production and commercialization of recycled materials.

The ICA found that the Parties' activities did not overlap in either market, as I.Blu was active only in the downstream market, in which it held a *de minimis* market share.

Against this background, the ICA concluded that the Transaction was not likely to create a dominant position or to significantly affect competition in the relevant markets.

In addition, the ICA considered that one of the two non-compete agreements, the framework agreement and the partnership agreement between the Parties were not ancillary to the Transaction as they were not directly related to it. As such, these agreements were not assessed by the ICA.

## The Council of State's ruling

In its judgment, the Council of State emphasized the wide discretion that the ICA enjoys when it makes complex economic assessments. Moreover, Masotina abstained from intervening in the course of the ICA investigation, although the ICA – following its standard practice – had published a notice on its website informing potentially interested third parties of the notification of the Transaction and of their right to submit observations. Instead, Masotina raised its concerns about the Transaction – concerning (i) the definition of the relevant markets; (ii) the assessment of the effects of the Transaction; and (iii) the non-ancillary nature of the non-compete agreements between the Parties – for the first time in its application to the TAR Lazio, at a moment

[15] See Council of State, Judgment No. 8104 of October 9, 2024.

[16] See TAR Lazio, Judgment No. 601 of January 13, 2023.

[17] See ICA, Decision No. 28320 of July 28, 2020, C12292 – *Iren Ambiente/I.Blu*.

when the effects of the Transaction and the new market structure had already materialized.

The Council of State reasoned, in somewhat ambiguous terms, that this circumstance alone would theoretically be sufficient to dismiss Masotina's appeal claiming that the ICA erred in failing to open a Phase II investigation., although it did not go so far as to state that its application was inadmissible. The Court noted that the concerns raised by Masotina for the first time in its application to the TAR Lazio could not be addressed by the ICA in its investigation, whereas under the case law the legality of the decision being challenged can be assessed only in light of the information that was available to the ICA on the date of its adoption. The Council of State added that, if the TAR Lazio had addressed the applicant's concerns, the risk would have existed that it would substitute its judgment for that of the ICA, thereby exceeding its review powers, although the Court did not clarify what would have prevented the ICA from responding to the applicant's pleas in fact and in law in the course of the adversarial judicial proceedings, so as to allow the ICA to exercise in full its rights of defense.

The Council of State rejected Masotina's ground of appeal concerning the alleged insufficiency of the statement of reasons in the ICA Decision, noting that it was necessarily impacted by Masotina's failure to intervene in the investigation and referring to the case-law of the EU Court of Justice,[18] according to which "*the European Commission* [as well as the ICA] *is not required* [...] *to anticipate potential objections*" to its assessment.On the merits of the case, in any event, the Council upheld the ICA's assessment.

[18] The Council of State refers to *Bertelsmann and Sony Corporation of America v. Impala* (Case C-413/06 P), ECLI:EU:C:2008:392, para. 167.

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