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Italian Competition Law Newsletter

Highlights

— The Court of Milan dismisses a follow-on action for damages brought against the incumbent in the Italian electronic communications sector

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On February 21, 2024, the Court of Milan rejected an action for damages brought by Colt Technology Services S.p.A. ("**Colt**") against Telecom Italia S.p.A. ("**TIM**") for an alleged abuse of dominance in the provision of wholesale access services, which had been established and fined in 2013.[1]

Background

In order to provide electronic communications services to final customers, the other authorized operators ("**OAOs**") normally need access to TIM's fixed network. When the OAOs acquire new customers, they send TIM a request to activate the wholesale access services needed to provide users with retail services. This process can either have a positive outcome, leading to the provision of the retail service to final customers, or a negative one, when TIM communicates that the activation of the requested wholesale access services is prevented, under the circumstances, by one of the hindering factors envisaged by the relevant regulatory framework.

In a decision adopted on May 9, 2013 (the "**Decision**"), the Italian Competition Authority (the "**ICA**") found that, from 2009 to 2011, TIM abused its dominant position by communicating an unjustifiably high number of refusals to activate wholesale access services (**KOs**), in order to hinder the expansion of competitors in the markets for voice telephony services and broadband internet access.[2] In particular, the ICA found that the provision of wholesale access services to competitors and to TIM's commercial divisions, respectively, were subject to different procedures. In the ICA's view, although the differences between external and internal procedures were not as such unlawful, they had resulted, de facto, in higher percentages of KOs for competitors compared to TIM's commercial divisions.

[1] Court of Milan, Judgment No. 1867 of February 21, 2024.

[2] ICA Decision No. 24339 of May 9, 2013, in Case A428 *Wind-Fastweb/Condotte Telecom Italia*. The decision was subsequently upheld by the Regional Administrative Court for Latium (the "**TAR Lazio**", see Judgment No. 4801 of May 8, 2014), and the Council of State (see Judgment No. 2479 of May 15, 2015).

In the civil proceedings before the Court of Milan, Colt claimed that, as a result of TIM's damaging conduct, it had been hindered in growing its business by acquiring new customers and providing additional services to its existing customers. Colt therefore asked the Court to award it damages amounting to around €27,000,000 plus non-pecuniary damages for injury to its commercial image.

The Judgment

In its Judgment No. 1867 of February 21, 2024, the Court of Milan rejected Colt's requests and ordered it to reimburse the costs of the proceedings.

The Court analyzed the evidentiary value of the Decision, by reference to Article 7 (Effects of competition authorities' decisions) of Legislative Decree No. 3 of January 19, 2017, by which Article 9 of Directive 2014/104/EU was implemented in Italy.[3] The Court considered that the said Article 7 could not be applied retroactively to the facts of Case A428. Moreover, although Colt could rely on national case law, according to which an ICA decision may constitute "*privileged evidence*" in relation to the scope of the infringement established by such a decision, Colt had failed adequately to demonstrate the existence of the claimed damage and the causation link between such damage and TIM's unlawful conduct.

In particular, the Court found that a mere list of KOs communicated to Colt by TIM over a certain period of time was not sufficient to demonstrate the alleged harm, where there was no indication as to which of the KOs were erroneous or unjustified, or the actual consequences arising therefrom. Moreover, the Court reasoned that the lack of evidence on the part of Colt was particularly serious in the case concerned, considering that only Colt could have been in possession of the relevant evidence and could have submitted it to the Court.

For the same reasons, the Court did not request such evidence of its own motion (for example, by requiring TIM or other parties to disclose further evidence in the proceedings), nor could it award estimated damages on an equitable basis.

Other developments

The ICA opens investigation into postal incumbent's refusal to grant competitors access to its infrastructure

On January 30, 2024, the ICA opened an investigation into Poste Italiane S.p.A. ("**Poste Italiane**") – the provider of the universal postal service, enjoying exclusive access rights to the domestic postal offices and network – to ascertain whether its conduct amounted to a breach of Article 8, paragraph 2-*quater*, of Law No. 287/90 (the Italian Competition Law).

Under the said provision, where providers of services of general economic interest ("**SGEIs**") make available to their affiliates or subsidiaries goods or services which they have exclusive access to in their quality as SGEI providers, they must make such goods or services available also to competitors of their affiliates or subsidiaries, under equivalent terms. The ICA's investigation follows a recent reform of the retail electricity and natural gas markets in Italy, which prompted the entry of several new competitors. In January 2023 one of Poste Italiane's subsidiaries (PostePay S.p.A.; "**PostePay**") started marketing and promoting offers in the retail electricity and natural gas market using the abovementioned assets of Poste Italiane.

[3] See Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. According to the said Article 7, an infringement of competition law found by a final decision of a competition authority or review court is deemed to be irrefutably established in relation to its material, personal, temporal and territorial scope.

When it was requested to give PostePay's competitors (*i.e.*, in particular, A2A Energia S.p.A. and Iren Mercato S.p.A.) access to the assets that it made available to PostePay, Poste Italiane refused.

Together with the main investigation on the substance, the ICA also initiated proceedings for the potential adoption of interim measures vis-à-vis Poste Italiane.

The ICA opens a "phase II-investigation" into a below-threshold merger in the terminal services sector

On February 27, 2024, the ICA opened its first-ever in-depth investigation into a below-threshold concentration involving terminal service providers in the port of Genoa.[4] Since the parties' turnover meets one of the two cumulative turnover-based thresholds for mandatory pre-closing notification under Article 16(1) of Law No. 287/1990, and in light of the possible risks to competition in the national market or in a substantial part thereof (see below), the ICA made use of its power to require the concentration to be notified to it within six months of completion.

The transaction in question concerns the acquisition of Terminal San Giorgio S.r.l. ("**TSG**"), which operates as a third-party multipurpose terminal company in the port of Genoa, by Ignazio Messina & C. S.p.A., a company belonging to the MSC group ("**IM&C**"), which provides freight and container shipping services and also operates a multipurpose terminal in the port of Genoa (the "**Transaction**").

Following completion of the Transaction, IM&C would acquire all terminals operated by TSG in the port of Genoa.

The acquisition concerns the markets for: (i) break bulk cargo terminal services; (ii) container terminal services; and (iii) roll-on, roll-off ("**Ro-Ro**") terminal services. As terminal services can be an input for shipping services, the Transaction also concerns the upstream markets for: (i) container shipping services; and (ii) freight shipping services, in which both IM&C and the MSC group are active.

According to the ICA, the Transaction must be examined further because it will lead to the vertical integration of a (former) third-party terminal operator in the port of Genoa (TSG) with a shipping company (MSC group). Therefore, the ICA believes that the risk exists of creating an overly dominant entity able to charge higher prices for Ro-Ro freight shipping and terminal services. In particular, the ICA is concerned that competitors of MSC group which currently rely on TSG's terminal services would be unable to seek alternative options in response to a post-merger increase in cargo handling fees, due to insufficient capacity in Genoa or other neighboring ports.

The ICA is understood to have called in a handful of concentrations since it acquired the power to do so in August 2022. However, the opening of a "phase II-investigation" is a first.

The case is also the first time the new deadline for the ICA's "phase II-investigation" of concentrations (which was recently extended from 45 to 90 days) has been applied.[5]

[4] Since August 27, 2022, the ICA has the power to request companies to notify transactions – provided that certain conditions are met – even if the applicable turnover-based thresholds are not met. Pre-closing notification of a concentration is required under Italian law when: (i) the aggregate turnover achieved in Italy by the undertakings concerned exceeds €567 million; and (ii) the turnover achieved in Italy by each of at least two of the undertakings concerned exceeds €35 million (see Article 16(1) of Law No. 287/1990, and ICA Decision No. 31088, *Provvedimento relativo alle soglie di fatturato vigenti*, issued on March 5, 2024). For the conditions that must be met in order for the ICA to have the power to request notification of mergers falling below the national turnover thresholds, see Cleary Gottlieb's Alert Memorandum *Italian Competition Law Reform*, dated August 16, 2022, available at the following link: https://www.clearygottlieb.com/-/media/files/alert-memos-2022/italian-competition-law-reform.pdf.

[5] See Article 16(8) of Law No. 287/1990, as amended by Article 17 of Law No. 214/2023.

The Italian Supreme Court rules on limitation periods and the binding effect of settlement decisions in a follow-on action arising from the EU "*Trucks*" case

On February 28, 2024, the Italian Supreme Court upheld a judgment of the Milan Court of Appeal,[6] which had granted the follow-on claim for damages brought by the construction company Cave Marmi Vallestrona S.r.l. ("**Cave Marmi**") against one truck manufacturer.[7]

In a decision adopted on July 19, 2016 (the "**Trucks Decision**"),[8] the European Commission (the "**Commission**") fined five truck manufacturers for colluding for over 14 years on truck pricing and on the timing and the passing on of the costs of compliance with emission rules. The Trucks Decision was adopted under the EU settlement procedure, according to which parties admit their participation in an infringement in exchange for a 10% reduction in the fine that would otherwise have been imposed by the Commission.

On February 2, 2018, Cave Marmi brought an action against one of the truck manufacturers before the Court of Milan, seeking compensation for the damage suffered as a result ofthe latter's anticompetitive conduct established in the Trucks Decision. The Court ruled, among others, on: (i) the statute of limitation rules, holding that they are substantive in nature (and thus non-retroactive) and that, with regard to the present case, the period at issue could not start running from the initiation of the Commission's investigation as the Commission's press release did not provide Cave Marmi with reliable and full information about the unlawful conduct; and (ii) the binding effect of Commission's settlement decisions, holding that they have the same binding force as infringement decisions.[9] The Milan Court of Appeal upheld the lower court's judgment, and the Italian Supreme Court in turn upheld the Milan Court of Appeal's ruling in its entirety.

First, the Court rejected the truck manufacturer's arguments regarding the limitation period. The Court analyzed the applicability *ratione temporis* of the new rules provided for by Article 8 of Legislative Decree No. 3 of January 19, 2017 ("**Article 8**"),[10] which implemented Directive 2014/104/EU in Italy. The Court concluded that: (i) limitation rules are substantive in nature and do not apply retroactively; (ii) nonetheless, depending on the specific circumstances of each case, Article 8 may apply to claims for damages that were not time-barred at the time of expiry of the time limit for the implementation of Directive 2014/104/EU by Member States (*i.e.*, December 27, 2016). In the case of Cave Marmi, the Court found that it could not have had sufficient knowledge about the infringement before the adoption of the Trucks Decision in July 2016. Therefore, it held that the limitation period in the case of Cave Marmi's claim should be assessed under the new rules provided for in Article 8. In light of this and of the fact that Cave Marmi brought its claim in 2018, the Court concluded that the claim was not time-barred.

Secondly, the Court rejected the truck manufacturer's arguments concerning the binding effect of Commission settlement decisions and the alleged violation of it's rights of defence. In particular, the Court confirmed that the settlement procedure ensures respect for the guarantees of a fair trial including because it was the truck manufacturer's own choice to waive the jurisdictional remedies available to it to challenge the Trucks Decision.

[6] Milan Court of Appeal, Judgment No. 188 of January 21, 2020.

[7] Italian Supreme Court, Judgment No. 5232 of February 28, 2024.

[8] European Commission, Decision of July 19, 2016, Case AT.39824 – *Trucks* (as discussed in the EU Competition Report Q3, available at this link: https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/european-competition-report-q3-2016.pdf).

[9] Milan Court of First Instance, Judgment No. 9759 of October 4, 2018.

[10] See *supra*, note 3. In essence, Article 8 provides that the right to claim damages arising from an infringement of competition law is time-barred after five years, and that the limitation period shall not begin to run until the infringement of competition law has ceased and before the plaintiff is (or should be) aware of (i) the relevant conduct and the fact that it infringes competition law, (ii) the fact that the infringement may have caused harm to the plaintiff, and (iii) the identity of the infringer(s). In addition, Article 8 provides that the limitation period is suspended for as long as the relevant conduct is being investigated by a competition authority, and until one year after the infringement decision is final.

Interestingly, the Court did not take a position on whether the findings in a Commission settlement decision may bind a national court in a follow-on damages case. However, it did state that a national court can rely on various types of evidence in order to assess the claim for damages pending before it, including the preliminary evidence gathered by the Commission during a settlement procedure. In this regard, the Court specifically mentioned the content of the Commission's Statement of Objections, although it observed that undertakings can still put forward evidence to the contrary. In the specific case before it, the Supreme Court agreed with the conclusion of the Milan Court of Appeal that the defendant did not provide evidence supporting its case.

The Council of State rules on misleading information

On February 5, 2024, the Council of State confirmed a 2020 decision in which the ICA fined Vivo Concerti S.r.l. ("**Vivo Concerti**") for providing it with misleading information in the context of an abuse of dominance investigation in violation of the duties imposed on economic operators under Article 14(5) of Law No. 287/90.[11]

The ICA had asked Vivo Concerti to provide copies of all agreements entered into with the CTS-Eventim corporate group, as well as those between its managing director (who was also the sole director of Cledaz Edizione S.r.l., a partner of Vivo Concerti) and the CTS-Eventim corporate group. Vivo Concerti claimed that it neither possessed nor had the right to provide or hold any documentation related to agreements made by its partners or third parties. The ICA rejected this claim on the basis that it was contrary to the findings of the ICA's investigation and fined Vivo Concerti accordingly.

First, the Council of State restated the undertakings' duty of cooperation and loyalty when complying with ICA requests for information and documents. Secondly, the Council of State confirmed the ICA's power to impose fines when undertakings provide misleading information, given the importance of undertakings' cooperation with its investigations of potential infringements of competition law.

The Council of State held that it is misleading to deny the existence of documents that in fact exist and are relevant for that purpose. In particular, the Council of State found that Vivo Concerti unlawfully failed to provide the ICA with agreements to which it was not a party, but which were in any case useful to the investigation (in particular, those concerning its own managing director).

According to the Council of State, the obligation to provide such agreements did not constitute an extension of the duties of cooperation imposed by law, but simply the proper fulfilment of the obligations outlined in the ICA's request. In this regard, the Council of State emphasized the principle of good faith that underpins the relationship between private parties and the public administration.

The Council of State, moreover, held that, in order to assess the fulfilment of the duties in question, the relevant information and documents of an undertaking are not limited to the acts and facts involving it but also include those relating to the activities performed by its director(s). Therefore, according to the Council of State, the relevant information and documents requested from Vivo Concerti, which concerned its director, also included documents transmitted to the director even in his role as sole director of another undertaking (Cledaz Edizione S.r.l.).

[11] ICA Decision No. 28188 of March 17, 2020, Case A523C *Ticketone/condotte escludenti nella vendita di biglietti-Vivo Concerti*. The decision was annulled at the first instance by the TAR Lazio (see Judgment No. 3346 of March 24, 2022).

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