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Italian Competition Law Newsletter

Highlights

— The TAR Lazio orders the ICA to re-open the investigation into TIM and DAZN's exclusive distribution agreement concerning broadcasting rights

— The Italian Supreme Court rules on the invalidity of clauses in loan agreements that link the value of the interest rate to an index manipulated by an anticompetitive agreement

— The Council of State suspends the interim measures adopted by the ICA against Poste Italiane

The TAR Lazio orders the ICA to re-open the investigation into TIM and DAZN's exclusive distribution agreement concerning broadcasting rights

In a judgment delivered on May 11, 2024,[1] the Regional Administrative Court for Latium (the "**TAR Lazio**") partially annulled the decision of the Italian Competition Authority (the "**ICA**") that had imposed fines of approximately €760,000 on Telecom Italia S.p.A ("**TIM**") and €7.2 million on DAZN Limited and DAZN Media Services S.r.l ("**DAZN**" and, together with TIM, the "**Parties**") for entering into an exclusive distribution agreement concerning the broadcasting rights for the Italian Serie A football championship for the 2021-2022 to 2023-2024 seasons (the "**Final Decision**").[2] The TAR Lazio ordered the ICA to re-open the investigation with a view to addressing inconsistencies in the Final Decision.

Factual Background

The agreement between TIM and DAZN

On March 26, 2021, the Italian Serie A Football League awarded DAZN the two primary broadcasting rights packages for Serie A matches for the next three seasons. Prior to this award, on January 27, 2021, DAZN entered into a three-year partnership agreement with TIM for the distribution of DAZN's services and technological support related to the broadcasting of Serie A matches, which was renewable for an additional three years (the "**Agreement**").

[1] TAR Lazio, Judgment of May 11, 2024, No. 9315.

[2] ICA Decision No. 30699 of June 28, 2023, Case I857 – *Accordo TIM-DAZN Serie A 2021/2024* (the Final Decision is discussed in the June 2023 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-june-2023.pdf).

The rationale for the Agreement was both financial and technical. TIM, Italy's primary telecom operator (which also provides audiovisual services via the TimVision platform, offering TIM's proprietary content and third-party services like Netflix, Disney+, and DAZN), has extensive technical expertise. The Agreement allowed DAZN to minimize financial risks by optimizing its investments and enabled it to bid for the two main broadcasting packages for Serie A matches, ensuring distribution via the internet, in accordance with its business model.

The initiation of proceedings

Following complaints from several telecom operators,[3] the ICA opened an investigation on July 6, 2021, to determine whether certain clauses of the Agreement could restrict competition.[4] Specifically, the ICA considered that these clauses might: (i) limit DAZN's ability to offer discounts to end-users and to choose alternative transmission methods apart from those proposed by TIM; (ii) impede DAZN's incentives to invest in interconnection with fixed and mobile telecommunications operators, as well as in upgrading its content distribution network; and (iii) hinder TIM's competitors from engaging in alternative commercial initiatives.

The interim proceedings

On July 6, 2021, the ICA also initiated proceedings for the adoption of interim measures. In the course of the interim proceedings, the Parties offered a set of voluntary measures to address the ICA's concerns.

In particular, the Parties committed to: (i) make DAZN's content available to all users, irrespective of their Internet access provider; (ii) not bundle content and access services, including DAZN's content, in product and geographical markets where TIM held a dominant position; (iii) offer the TimVision platform service, which bundles, *inter alia*, TIM and DAZN's content services, at non-discriminatory prices, irrespective of the users' Internet access provider; (iv) set up a transmission back-up solution for users located in areas with limited access to broadband and ultra-broadband networks; and (v) negotiate multicast solutions (*i.e.,* Internet transmission solutions that minimize the use of network resources) with other telecom operators, and make available to them a number of different technical solutions for transporting the multicast signal.

The ICA found that the voluntary measures offered by the Parties pre-empted the need for precautionary intervention. Therefore, on July 27, 2021, the ICA closed the interim proceedings without adopting any measures.[5]

The Final Decision

On October 31, 2021, the Parties offered formal commitments in the context of the main proceedings, but the ICA found them to be insufficient to address its initial concerns. On June 28, 2023, the ICA issued the Final Decision.

The relevant market

In the ICA's view, the Agreement affected competition in the following relevant markets, considered national in geographical scope: (i) the retail market for pay-TV services; (ii) the market for wholesale fixed broadband and ultra-broadband access services; and (iii) the market for retail fixed broadband and ultra-broadband telecom services.

The ICA's analysis

The ICA proceedings focused on the exclusionary clauses of the Agreement that: (i) designated TIM as the sole telecom and media operator allowed to offer DAZN's services, thus prohibiting DAZN from entering into partnership agreements with any of TIM's competitors, which were listed by

[3] In particular, Vodafone Italia S.p.A., Wind Tre S.p.A., Fastweb S.p.A., and Sky Italia S.r.l., along with other telecom providers such as Open Fiber S.p.A., Colt Technology Services S.p.A., Irideos S.p.A., Iliad Italia S.p.A., and Linkem S.p.A., were admitted to participate in the investigation.

[4] ICA Decision No. 29778 of July 6, 2021, Case I857 – *Accordo TIM-DAZN Serie A 2021/2024*.

[5] ICA Decision No. 29778 of July 27, 2021.

name; (ii) prevented DAZN from offering its services through any platform other than the Internet, or from making its app and TV channel available on any of Sky's devices or services; (iii) prevented DAZN from renewing a non-exclusive distribution agreement that it had entered into with another telecom and media player; (iv) prevented DAZN from launching on Amazon TV promotions involving discounted rates or introductory offers in the 30 days immediately preceding, or at the start of, any relevant Serie A season; and (vi) provided for the integration of DAZN with TIM's Content Delivery Network (*i.e.*, transmission networks and servers, aimed at preventing network congestion).

The ICA also considered that some of the above clauses were addressed to competitors of TIM in the electronic communications markets, which were specifically identified by name. According to the ICA, this demonstrated the Parties' exclusionary intent, and made it irrelevant "*to identify whether the agreement had a restrictive object or effect*".[6]

The Parties claimed that the Agreement benefited from the block exemption under the EU Vertical Block Exemption Regulation.[7] However, the ICA held that the Agreement restricted competition both at the vertical and horizontal level. In its view, the Parties were not only potential competitors in the tenders for the TV rights for Serie A matches, but were also directly competing on the markets for the purchase of premium sports audiovisual content and for the retail sale of audiovisual content. The ICA also considered that the Agreement could not benefit from the exemption under the VBER because TIM's market share in the retail market for broadband and ultra-broadband access services was higher than 30%.

According to the ICA, the Agreement potentially prevented TIM's competitors from associating their connectivity services with competitively valuable content and restricted DAZN's commercial options for the distribution of audiovisual content through alternative technological platforms.

In particular, according to the ICA, the Agreement granted TIM the exclusive right to bundle connectivity services with Serie A matches, preventing final customers from subscribing to DAZN's broadcasting rights for Serie A matches without also subscribing to TIM's connectivity services. DAZN was only allowed to sell its services directly or through some authorized third parties (primarily, smart TV manufacturers, as well as Apple, Amazon, and Google, thus excluding telecommunications operators and audiovisual media service providers). Additionally, the ICA found that TIM was the sole operator authorized to offer discounts on DAZN's service, and this restricted DAZN's ability to independently choose the most advantageous economic and technical means for marketing its services.

In examining the effects of the Agreement, the ICA observed that they had remained largely potential, as any substantial impact of the restrictive clauses was mitigated by the initiation of proceedings and the implementation of voluntary measures during the interim proceedings. Nevertheless, the ICA concluded that the Agreement resulted in a significant restriction on competition.

In quantifying the fines imposed on TIM and DAZN, the ICA took into consideration the short duration of the Agreement (only 32 days, as the parties promptly implemented voluntary measures during the interim proceedings). The ICA also noted that, on August 4, 2022, TIM and DAZN had entered into a new non-exclusive agreement for the distribution of DAZN's content on the TimVision platform, which did not raise the competitive concerns identified in relation to the 2021 Agreement. The parties agreed not to renew the non-exclusive agreement before the next award of Serie A broadcasting rights. Consequently, the ICA recognized a mitigating circumstance and applied a 30% reduction in the fines.

[6] Decision, § 282.

[7] Commission Regulations (EU) No. 330/2010 of April 20, 2010 or No. 2022/720 of May 10, 2022 – as applicable *ratione temporis* – on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (the "**VBER**").

The TAR Lazio Judgment

Several operators challenged the Final Decision before the TAR Lazio. Given the similarities between the appeals, they can be addressed in two groups:

i. DAZN and TIM requested the TAR Lazio to annul the Final Decision based on the following arguments: (i) factual and legal errors vitiating the Final Decision, in particular with regard to the legal categorization of the contested conduct; (ii) the absence of a causal link between the Agreement and the alleged anticompetitive effects; (iii) the lack of analysis of the counterfactual scenario proposed by the Parties; (iv) the failure to apply the safe harbors provided for in the VBER; and (v) the non-application of an individual exemption under Article 101(3) TFEU.

ii. Sky and Fastweb requested the TAR Lazio to order the ICA to issue a new decision to address several inconsistencies in the Final Decision, particularly regarding the commencement date of the infringement and the appropriateness of the voluntary measures intended to end the infringement.

The TAR Lazio dismissed in full the appeals lodged by TIM and DAZN, on the grounds that:

— The ICA correctly categorized the Agreement as a restriction by object, as the main purpose of the Agreement was to exclude several competitors from both the telecommunications and pay-TV markets. The TAR Lazio also found that the ICA had provided extensive evidence of the (at least potential) anticompetitive effects of the Agreement.

— The anticompetitive purpose of the exclusivity clause was demonstrated by the substantial elimination of competition in the telecommunications and pay-TV markets.[8]

— The counterfactual analysis proposed by TIM and DAZN did not invalidate the ICA's findings. The parties alleged that, in the absence of the Agreement, the tender for the TV rights would have been won again by the long-standing incumbent Sky. However, the TAR Lazio rejected this theory in light of the commitments made binding on Sky in another case,[9] which prevented the centralization of all football content transmission on Sky.

— The ICA correctly categorized the alleged cartel as horizontal, since both DAZN and TIM are active in the market for the provision of audiovisual services. This prevented the application of the VBER. In any case, even if the Agreement were considered to be vertical in nature, the restrictions contained in the Agreement could not benefit from the block exemption, given the high market shares of the parties and the presence of hardcore restrictions, which are not exempt under the VBER.

— The Agreement could not benefit from an individual exemption under Article 101(3) TFEU, as the alleged benefits of the Agreement did not outweigh the deterioration in service quality for some consumers, and the exclusivity clause could not be considered indispensable.

On the other hand, the TAR Lazio partially upheld the appeals brought by Sky and Fastweb.

The TAR Lazio rejected the claim that the ICA had erred in deciding not to fine TIM for abuse of a dominant position under Article 102 TFEU, as it agreed with the ICA's view that the evidence gathered during the investigation was insufficient to support this allegation. However, the TAR Lazio upheld the part of the appeals regarding the inconsistency between the statement of objections and the Final Decision. According to the statement of objections, the infringement occurred between

[8] The TAR Lazio pointed to several pieces of evidence, including an increase of [10-20%] in TIM's fibre customers, the termination of contractual relationships between DAZN and TIM's competitors as a result of the Agreement, and the fact that, as soon as the non-exclusive 2022 agreement was concluded, there was a significant increase in activations of the DAZN service by Sky customers.

[9] See Case C12207 – *Sky Italia/R2*. Due to the remedies imposed and made binding on the parties involved in the concentration, Sky could not have been granted exclusive broadcasting rights on the internet platform, as it would have been required to share the rights with another operator. The purpose of the commitments was to protect over the top operators from Sky, the latter having a significant competitive advantage as owner of satellite and digital terrestrial infrastructure. Therefore, Sky was prevented from being granted exclusive broadcasting rights on the internet platform.

January 27, 2021, and August 4, 2022, while according to the Final Decision it only occurred from July 1, 2021 (when commercialization of the rights under the Agreement commenced) to August 2021 (when voluntary measures were implemented). The TAR Lazio found several inconsistencies in this timeline:

— The ICA held that the start of the infringement coincided with the launch of TIM's bundled offer (from July 1, 2021). However, DAZN had already committed in January 2021 not to enter into partnerships with other operators competing with TIM.

— The ICA concluded that the restrictive effects on competition ceased in August 2021 with the implementation of the voluntary measures implemented during the interim proceedings. This decision contradicted the ICA's rejection of the commitments offered by the parties, which were essentially identical to the voluntary measures considered by the ICA capable of removing the competition concerns.

— The voluntary measures proposed by TIM and DAZN were limited to the markets for connectivity services, and this raised doubts about their effectiveness in addressing the ICA's concerns regarding pay-TV services.

— The alleged failure of the parties to implement the voluntary measures in a timely manner, reported by several operators to the ICA, did not appear to have been considered in the ICA's Final Decision.

In light of the above, the TAR Lazio partially annulled the Final Decision and instructed the ICA to reopen the investigation to address the above-mentioned inconsistencies.

The Italian Supreme Court rules on the invalidity of clauses in loan agreements that link the value of the interest rate to an index manipulated by an anticompetitive agreement

In a judgment dated May 3, 2024 (the "**Judgment**"),[10] the Supreme Court ruled on the validity of contractual clauses that linked the value of the interest rate paid by borrowers to the level of the Euro Inter-Bank Offered Rate ("**Euribor Clauses**") in the period during which the level of Euribor was allegedly manipulated by an anticompetitive agreement between certain banks.

The European Commission's *Euro Interest Rate Derivatives* case

In October 2011, the European Commission (the "**Commission**") launched an investigation into whether a group of investment banks had entered into an anticompetitive agreement relating to interest rate derivatives denominated in the euro currency (the "**EIRD Cartel**").[11]

[10] Italian Supreme Court, Judgment No. 12007, May 3, 2024.

[11] At the same time, the Commission opened a parallel investigation into Yen Interest Rate Derivatives ("**YIRDs**"), and found that between 2007 and 2010 five banks took part in seven distinct bilateral infringements. Traders from these banks allegedly discussed certain JPY LIBOR and Euroyen TIBOR submissions, which benefited their trading positions with respect to derivatives. In addition, the traders exchanged competitively sensitive information relating to their trading positions and future YIRD submissions. The Commission also found that an interdealer brokerage undertaking had facilitated one of the infringements by contacting the banks that did not participate in the infringement to influence their JPY LIBOR submissions. During the same investigation, the Commission opened separate proceedings against a cash broker which refused to take part in the settlement procedure, and fined it €14.9 million for facilitating the infringement. The Commission found that said cask broker directly contacted the banks that did not take part in the infringement, and provided them with misleading information aimed at influencing the banks' JPY LIBOR submissions. In addition, the cash broker served as a communication channel between certain participants to the infringement.

Interest rate derivatives (*e.g.* forward rate agreements, swaps, futures, and options) are financial products that are used by banks and companies to manage the risk of interest rate fluctuations. They derive their value from the level of a benchmark interest rate. For interest rate derivatives denominated in the euro currency the benchmark interest rate is the Euro Interbank Offered Rate ("**Euribor**"). Euribor is meant to reflect the cost of interbank lending in euro currency and serves as a basis for various financial derivatives. Investment banks compete with each other in the trading of these derivatives. The levels of Euribor may affect either the cash flows that a bank receives from a counterparty, or the cash flow it needs to pay to the counterparty under interest rate derivatives contracts.

The Commission concluded that the banks participated in a single and continuous infringement between September 2005 and May 2008 in the form of bilateral exchanges of information on their desired or future submissions for the Euribor and shared detailed information on their trading strategies that was not available to the public. Considering that, during the EIRD Cartel investigation, some of the undertakings involved decided to participate in a settlement procedure, the Commission adopted two different decisions:

— On December 4, 2013, the Commission fined the undertakings that participated in the settlement procedure over €1 billion in total;[12]

— On April 6, 2016, the Commission fined the undertakings that did not take part in the settlement procedure approximately €485 million under the standard cartel procedure.[13]

The Judgments of the Court of First Instance and the Court of Appeal

The Italian company Neemias S.r.l. ("**Neemias**"), which is active in the real estate sector, took out a loan with the bank Credito Valtellinese S.c.r.l. ("**Credito Valtellinese**") before 2005. The loan agreement between Neemias and Credito Valtellinese provided that the interest rate to be paid by Neemias on the amount borrowed would be calculated on the basis of a Euribor Clause. Subsequently, Credito Valtellinese transferred its credit from the loan granted to Neemias to the company Elrond NPL 2017 S.r.l. ("**Elrond**"). When Elrond demanded that Neemias repay the loan, including interest, Neemias refused.

Among other things, Neemias argued that it was not obliged to pay the interest that had accrued between September 2005 and May 2008, *i.e.*, the period in which, according to the Commission, the EIRD Cartel took place. According to Neemias, during that period the Euribor Clause was to be considered void as it was contrary to Article 101 TFEU because the level of the Euribor had been distorted by the anticompetitive agreement established by the Commission. According to Neemias, the fact that Credito Valtellinese was not involved in the EIRD Cartel was irrelevant for the purposes of determining whether the Euribor Clause was void.

The Court of First Instance of Busto Arsizio rejected Neemias's allegation concerning the invalidity of the Euribor Clause, on the grounds that the Euribor is calculated according to a mechanism ensuring that abnormal interest rates on interbank loans do not distort its value. Therefore, according to the Court, the interest rate to be paid by Neemias on the amount borrowed had not been affected by the anticompetitive agreement established in the EIRD Cartel decision.

Neemias raised the same plea of invalidity in its appeal before the Court of Appeal of Milan. However, the Court of Appeal found the plea to be inadmissible on the grounds that, in its appeal, Neemias had not specifically challenged the reasoning in the judgment of the Court of First Instance, which had expressly dealt with the issue

[12] Commission decision of December 4, 2013, Case AT.39914, *Euro Interest Rate Derivatives* (discussed in more detail in the quarterly report of our European Competition Law Newsletter available here: https://www.clearygottlieb.com/-/media/files/cleary-gottliebs-eu-competition-report-q2-2017.pdf).

[13] Commission decision of April 6, 2016, Case AT.39914, *Euro Interest Rate Derivatives*.

of the validity of the Euribor Clause.[14] Nonetheless, the Court of Appeal briefly discussed the merits of the plea of invalidity. According to the Court of Appeal, it could not be concluded that the interest rate was unilaterally determined by the lending party or that it was the result of the EIRD Cartel, also in light of the fact that the rate charged by the bank was not Euribor alone, but that index plus a spread of 1.5%. Moreover, the Court of Appeal stated that the addressees of competition rules are only the undertakings competing with those that took part in anticompetitive conduct, and not also the end users that may have indirectly suffered from such anticompetitive conduct. As a consequence, Neemias could not refuse to pay the interest agreed in the contract with Credito Valtellinese because of a competition law infringement carried out by third party banks that had participated in the EIRD Cartel.

The Judgment

The Supreme Court upheld the Court of Appeal's judgment finding Neemias's plea concerning the invalidity of the Euribor Clause inadmissible. However, the Court considered it appropriate to rule in any event on the validity of Euribor Clauses, in light of the particular legal and social significance of the issue.[15]

As a general principle, the Supreme Court disagreed with the Court of Appeal's findings that only undertakings competing with those that took part in an anticompetitive agreement may claim the unlawfulness of the anticompetitive agreement, while end users are not entitled to do so.

The Court then proceeded to illustrate two instances in which Euribor Clauses should be held invalid.

First, Euribor Clauses are void for violation of Article 101 TFEU and/or of the corresponding provision of Italian law (Article 2 of Law No. 287/1990) if they constitute 'an implementation' of an anticompetitive agreement or practice that led to the distortion of Euribor. In order for a downstream agreement to be considered 'an implementation' of an anticompetitive agreement or practice, it is necessary at the very least that one of the parties to the contract was aware of the existence of the anticompetitive agreement or practice (whether or not the party was aware of it being unlawful) and intended to take advantage of its effects. Thus, in case of loan agreements entered into by banking institutions, it is necessary to prove that, at the time of the conclusion of the loan agreement, the bank was either directly involved in the anticompetitive agreement or, at least, was aware of the existence of an anticompetitive agreement between other banks aimed at altering the value of Euribor, and that it intended to take advantage of the anticompetitive agreement.

Secondly, if none of the parties to the contract that included the Euribor Clause was aware of the existence of the unlawful agreement or practice, and intended to take advantage of its effects, the Euribor Clause may nonetheless be considered to be partially null and void due to the impossibility of determining the subject matter of the clause. According to the Supreme Court, if the benchmark for determining the interest rate initially agreed by the parties has been altered by the anticompetitive conduct of third parties, such benchmark no longer corresponds to the real intention of the parties.

However, for the Euribor Clause to be considered partially invalid for the impossibility of determining the subject matter of the clause, it is necessary to prove not only the existence of the agreement or practice aimed at altering the Euribor, but also the fact that such an agreement or practice has achieved its aim and, therefore, that the Euribor has been altered and cannot be used in the contract between the parties. This assessment must be conducted on a case-by-case basis, taking into account, *inter alia*:

a. whether the anticompetitive practices of the banks participating in the EIRD Cartel effectively altered the Euribor;

[14] Court of Appeal of Milan, Judgment No. 230, January 25, 2022.

[15] Pursuant to Article 363 of the Italian Code of Civil Procedure, the Supreme Court should ensure the uniform interpretation of the law. To this end, in relation to questions of fact or law of particular importance, the Supreme Court may exceptionally establish a principle of law that, while not affecting the outcome of the case at hand, may still serve as a criterion for deciding similar or analogous cases.

b. whether, for how long, and to what extent the alteration of the Euribor had a significant effect on the level of the interest rate agreed by the parties in the specific loan agreement.

The consequences of the invalidity of the interest rate clause on the overall loan agreement should be determined on the basis of civil law principles, including the possibility to automatically substitute the void interest rate with the interest rate established by the law. According to the Court, if it is possible to determine the genuine value of the Euribor (*i.e.* the value of Euribor stripped of the effects of the cartel which altered it), then such rate should be applied. If, on the other hand, it is not possible to understand what the genuine value of the Euribor would be, then the interest rate could be replaced by statutory rates, if available. In any case, the parties to contracts with Euribor Clauses who have been harmed by an anticompetitive agreement or practice aimed at manipulating the Euribor can bring an action for damages against the participants in the agreement or practice.

In the present case, the Supreme Court held that Neemias had failed to provide the necessary evidence to prove the invalidity of the interest rate clause, as the company had not provided evidence that the EIRD Cartel had significantly altered the Euribor.

Finally, the Court asserted that the present judgment does not conflict with the judgment delivered by the same Court in December 2023, in which the Supreme Court ruled that the Commission's EIRD Cartel decision constitutes evidence of an unlawful agreement.[16] The Court reasoned that the guidance given in the present case merely provides more detail, and sets out the legal test to be satisfied to prove the invalidity of a contractual clause that contains a reference to a benchmark altered by an anticompetitive agreement.

The Council of State suspends the interim measures adopted by the ICA against Poste Italiane

In a decision delivered on May 20, 2024,[17] the Council of State annulled an order issued by the TAR Lazio,[18] which had upheld the interim measures adopted by the ICA against Poste Italiane S.p.A. ("**Poste Italiane**") in the context of the investigation into Poste Italiane's alleged refusal to grant competitors access to its infrastructure.[19]

Background

Poste Italiane is the provider of the universal postal service in Italy. As it is entrusted to carry out a service of general economic interest (an "**SGEI**"), Poste Italiane is subject to specific obligations. In particular, pursuant to Article 8(2-*quater*) of Law No. 287/1990 ("**Article 8(2-*quater*)**"), if Poste Italiane makes available to its affiliates or subsidiaries goods or services which it has exclusive access to in its capacity as an SGEI provider, it must make such goods or services available also to competitors, on equivalent terms.

Since the beginning of 2023, PostePay S.p.A. (a subsidiary of Poste Italiane, "**PostePay**") has been promoting and selling electricity and natural gas services at the retail level under the brand Poste Energia. In carrying out this activity, PostePay has been exploiting, under a license from Poste Italiane, the entire network of post offices to which the latter has exclusive access in its capacity as an SGEI provider.

[16] Italian Supreme Court, Order No. 34889, December 13, 2023.

[17] Council of State, Order of May 20, 2024, No. 1881.

[18] TAR Lazio, Order of April 26, 2024, No. 1653 (discussed in more detail in the April 2024 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-march-april-2024.pdf).

[19] ICA Decision No. 31138 of March 26, 2025, Case SP182 – *Poste Italiane/Fornitura energia elettrica e gas.*

The ICA's Decision Imposing Interim Measures

Certain competitors of PostePay in the market for the retail supply of electricity and natural gas complained that Poste Italiane refused to grant them access to its infrastructure on the same conditions as PostePay. In January 2024, the ICA opened an investigation into Poste Italiane's conduct and, at the same time, initiated interim proceedings pursuant to Article 14-*bis* of Law No. 287/1990.[20] The investigation aimed at verifying whether Poste Italiane infringed Article 8(2-*quater*) by granting exclusively to PostePay an advantage that is almost impossible for competitors to replicate.

In its decision of March 26, 2024, the ICA imposed interim measures against Poste Italiane (the "**Decision**"). Contrary to the view expressed by Poste Italiane, the ICA held that its power to grant interim relief is not limited to proceedings relating to restrictive agreements and abuse of dominance, but also applies in relation to proceedings brought under Article 8 of Law No. 287/90. The ICA held that it is empowered to adopt interim measures in any case where the risk of serious and irreparable damage to competition exists, including in relation to Article 8 proceedings, which are also aimed at preserving the overall competitive structure of the market. In the present case:

— With regard to the *prima facie* case, the ICA rejected Poste Italiane's claim that it was exempt from the application of Article 8(2-*quater*) because of the so-called "**Polis Exemption**" under Article 1(6) of Decree Law No. 59/2021.[21] The ICA interpreted the Polis Exemption in the sense that it only exempts Poste Italiane from the application of Article 8(2-*quater*) in relation to the realization of a specific project for making changes in certain post offices in municipalities with less than 15,000 inhabitants, in order to allow public administration services to be offered in remote areas (the "**Polis Project**").[22] In the ICA's view, the Polis Exemption does not apply in relation to post offices located in municipalities with more than 15,000 inhabitants, or in any event not included in the scope of the Polis Project. As a result, the ICA concluded that Poste Italiane's refusal to grant access was likely to infringe Article 8(2-*quarter*).

— With regard to urgency, the ICA considered it necessary to allow PostePay's competitors to propose their energy supply offers to new potential customers before July 1, 2024, considering that, by that date, more than four million energy consumers had to switch from the protected regime to the free market, and to choose between their previous supplier and a new one.

In light of the above, the ICA ordered Poste Italiane to:

— allow PostePay's competitors' access to all post offices not included in the scope of Project Polis on the same conditions offered to PostePay;

— publish on its website a fair and non-discriminatory access procedure and a price list, and admit requesting operators to adequate physical spaces in which to set up promotional stands and carry out marketing activities for their supply offers; and

— respond to any access requests within 15 days from their receipt, granting access on a 'first come, first served' basis.

[20] Pursuant to Italian law, in order to impose interim measures, the ICA is required to establish: (i) the existence of an infringement on the basis of a summary examination (a *prima facie* case); and (ii) the urgency to intervene due to the fact that the alleged infringement is likely to cause serious and irreparable damage to the competitive dynamics in the markets concerned (urgency).

[21] The exemption provides that: "*for the purpose of facilitating the implementation of the interventions envisaged by [the Polis Project] from [7 July 2021] and until 31 December 2026, the provisions of Article 8(2-quater) of Law No. 287/90 do not apply to the entities identified for the implementation of the aforementioned interventions* (*i.e.* to Poste Italiane)" (the "**Polis Exemption**").

[22] The Polis Project is an initiative of the Italian government in cooperation with Poste Italiane that aims to give inhabitants of municipalities with fewer than 15,000 inhabitants digital access to public administration services through a software platform developed by Poste Italiane. The post offices involved in the Polis Project are subject to modernization work (*e.g.* the installation of new technological devices) from 2021 to 2026.

The TAR Lazio's Ruling

Poste Italiane applied to the TAR Lazio for annulment of the Decision. On April 26, 2024, the TAR Lazio rejected Poste Italiane's application. In particular, the TAR Lazio confirmed the ICA's interpretation of the scope of the Polis Exemption. The Court also confirmed that the ICA is empowered to impose interim measures in relation to proceedings brought under Article 8 of Law No. 287/90. In addition, the TAR Lazio considered that the interim measures imposed were not such as to irreparably harm Poste Italiane's interests. According to the administrative court, in balancing the opposing interests at stake, the need to ensure that a level playing field between competitors is maintained prevails over Poste Italiane's commercial interests.

The Council of State's Ruling

On April 27, 2024, Poste Italiane challenged the TAR Lazio's decision before the Council of State.

The Council of State observed that the exclusive availability of the post office network granted by Poste Italiane to PostePay facilitates contact with a wide range of potential customers and constitutes a competitive advantage in favor of PostePay, which could distort competition in the relevant markets to the detriment of other electricity and gas suppliers. However, the Council of State upheld Poste Italiane's appeal and thus suspended the application of the interim decision, on the basis of the following grounds:

— the Council of State questioned whether the ICA may impose interim measures in proceedings for infringement of Article 8(2-*quater*). The Council of State's doubt stemmed from the fact that Article 8(2-*quinquies*) of Law No. 287/1990 expressly extends to proceedings for infringement of Article 8 of Law No. 287//1990 the procedural rules that apply to proceedings for infringements of the rules on anti-competitive agreements and abuse of dominance, but not the procedural rule on the ICA's power to impose interim measures (Article 14-*bis* of Law No. 287//1990);

— the interim measures imposed on Poste Italiane would be difficult to reverse in the event of a favorable outcome for Poste Italiane in the main proceedings; and

— the interim measures imposed by the ICA could affect the operation of all post offices, including those directly involved in the Polis Project, as the post office network is an integrated structure and therefore the increased workload of the offices not involved in the Polis Project would also affect the operation of the offices involved in the Polis Project.

In light of the above, the Council of State annulled the ICA's interim decision, while clarifying that the ICA may adopt, in its final decision at the end of the main proceedings, adequate measures to ensure the effectiveness of the principle of equal opportunity in relation to freedom of economic initiative pursuant to Article 41 of the Italian Constitution.

Other developments

The ICA adopts a communication on procedural rules for market studies

On May 7, 2024, the ICA adopted a communication on the procedural rules for the exercise of the powers introduced by Decree Law No. 104/2023 (the "**Asset Decree**"), converted into law by Law No. 136/2023, in relation to market studies (the "**Communication**").[23]

The Asset Decree supplemented and expanded the powers of the ICA in conducting market studies. In particular, under the decree, the ICA has the power to: (i) identify 'structural risks' to competition in a given market or sector

[23] ICA, "*Communication on the application of Article 1(5) of Decree-Law No. 104 of August 10, 2023, converted with amendments by Law No. 136 of 9 October 2023*", Decision No. 31190 of May 7, 2024.

which, in its assessment, cannot be remedied by competitive forces or traditional competition law enforcement under Articles 101 and 102 TFEU (and their counterparts in Italian competition law) and merger control; and (ii) impose structural or behavioral remedies that the ICA considers appropriate to address the concerns for the future, without having to prove any competition law infringement. The ICA can also accept commitments, and impose fines up to 10% of the global turnover of the undertakings in the event of non-compliance.

The new market investigation powers were introduced, *inter alia*, to tackle alleged excessive price increases for flights on certain Italian routes during the holiday season. To this end, the Italian Government had initially introduced price regulation,[24] which was later replaced by a provision declaring that certain algorithmic price-setting practices amount to unfair commercial practices in violation of Legislative Decree No. 206/2005 (the "**Consumer Code**") and, at the same time, introducing the new market investigation and remedy powers.[25]

Following the entry into force of the Asset Decree, the scope of the new powers has given rise to significant uncertainty. Notably, it was unclear whether the new market investigation powers applied to any economic sector or only in relation to air passenger transport services. On January 29, 2024, the Council of State issued an opinion clarifying that the new powers are general in scope and not limited to a specific sector or industry.[26] In particular, they allow the ICA to intervene in all circumstances where harm to competition and consumers does not arise from specific unlawful conduct, but rather from the structure of the market.

In the Communication, the ICA sets out the procedural rules for sector inquiries and divides the procedure into two main phases: (i) the sector inquiry and, eventually, (ii) the remedies phase.

The first phase begins with the decision to open the sector inquiry. During this phase, the ICA can:

— Make written requests for information and documents from undertakings, summon and hear any person, order expert reports and economic and statistical analyses, arrange for consultations with experts, and carry out dawn raids;

— Organize a call for input from stakeholders;

— Issue a preliminary report that highlights the results of the investigation conducted up to that point. In the preliminary report, the ICA sets a time limit of not less than 30 days within which interested parties may submit their observations;

— Consult with the regulatory authorities if the sector inquiry concerns a regulated sector.

At the end of the sector inquiry, the ICA may close the procedure if it considers that there are no competition concerns. Otherwise, it may adopt a Statement of Objections (*delibera delle risultanze conoscitive*, "**DRC**"), in which it sets out: (i) the competition problems that hinder or distort the proper functioning of the market to the detriment of consumers; (ii) the measures the ICA considers necessary, proportionate, and appropriate to address the competition concerns; and (iii) the undertakings on which these measures could be imposed.

After being notified of the DRC, the undertakings concerned may offer commitments to address the competition concerns raised by the ICA. If the commitment proposal is not manifestly inadequate, the ICA publishes the commitments in order to subject them to a market test. Third parties can then submit their observations. If the ICA considers that the commitments are capable of removing its competition concerns, it makes them binding and closes the sector inquiry (after

[24] Asset Decree, Article 1(5).

[25] Law No. 136/2023.

[26] Council of State, Opinion of January 29, 2024, No. 61 (the Opinion is discussed in the January issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-nov-january-2024.pdf).

obtaining the opinion of the relevant regulatory authority responsible for the markets or sectors covered by the sector inquiry).

If the commitments are rejected, or the undertakings concerned do not offer commitments, the ICA informs such undertakings of its intention to impose structural or behavioral measures. The undertakings may then submit written briefs and documents and may be heard before the ICA's Board. After the hearing, the ICA adopts its final decision and publishes it on its website.

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