The Dominance and Monopolies Review

Third Edition

Editor
Maurits Dolmans

Law Business Research

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Third Edition

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EDITOR'S PREFACE

As this new edition of *The Dominance and Monopolies Review* will show, several of the trends that were apparent in the previous few years have continued – except that commitment decisions in Europe seem to be falling out of favour and the Commission is returning to more old-fashioned punitive enforcement. Most obvious perhaps is the ongoing disruption of traditional sectors of the economy by the emergence of digital services and online distribution. This has led to a series of cases and pending investigations in various jurisdictions involving online and IT firms, including companies as diverse as Amazon (Germany, India); HRS (Germany); Booking.com (Germany, France); Expedia (Germany); Intel (EU); Motorola (EU); Samsung (EU); Google (EU, Brazil, Canada, India); PMU (France); Vente-privee.com (France); OnlinePizza Norden (Sweden); Snapdeal and Flipkart (India); Qualcomm (China, EU, Korea, Taiwan, US); IDC (China); and Tencent (China).[1]

Two trends in this context deserve special attention. The first is the threatened re-emergence of form-based analysis, at the expense of the economic analysis of dominance and foreclosure effect in abuse cases; the second is the ongoing politicisation of the competition process.

The first trend is perhaps the most surprising and disappointing. When the Commission adopted its decision in *Intel* in 2009, it followed in part its own guidance as set out in the notice on the application of Article 102 of the TFEU[2] by including a

1 The editor and his firm are involved in various cases discussed in this preface and chapters, but none of the comments are made on behalf, or at the request, of any client, and none bind any client or the firm.

2 European Commission, Guidance on enforcement priorities in applying Article 82 of the EC Treaty, 2009/C 45/02, available at: http://ec.europa.eu/competition/antitrust/art82/guidance.pdf.

detailed analysis of the restrictive effects of Intel's discounts. [3] Although there is debate about the finding of facts in the case, the Commission at least tried to demonstrate actual foreclosure of equally efficient competitors. On appeal, however, the General Court of the European Union held that this was unnecessary, because the rebates in question were 'by their very nature' abusive.[4] There was no need to review the exclusionary effects, the Court held, or to apply an 'equally efficient competitor' test.

The court thus threw cold water on the hopes of the antitrust community that the court would apply a 'more economic approach'. It can be argued that the judgment was no surprise since exclusivity discounts had always been considered an abuse, or that it was not as bad as it sounded since the judgment was still based on economic theories. It is true, for instance, that where it can be shown that a customer's full demand is contestable, the judgment can be distinguished on the facts because the dominant firm does not leverage market power.[5] Moreover, as pointed out in the EU chapter of this book, the court stated that the 'as-efficient competitor' test is still relevant for non-conditional pricing practices. Finally, we still have the *Post Danmark* case, where the court held that Article 102 does not 'seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market […]. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient.'[6]

Even that scant comfort, however, is now under threat. The recent opinion of the Advocate-General in *Post Danmark II*, which came out in May 2015, includes unhelpful statements.[7] Advocate-General Kokotte rejects arguments that the 'as-efficient competitor' test should be applied, fulminating not only against the test, but against 'expensive economic analyses' more generally and the 'disproportionate use of the resources of the competition authorities and the courts'.[8] The Advocate-General also opines that there is no need for foreclosure to exceed any *de minimis* threshold,[9] leaving open the question of why competition law should be applied to conduct that cannot be shown to have had much of an effect at all on competition. Perhaps she was impressed by the thought that the case involved retroactive discounts, leveraging a non-contestable share of 70 per cent protected by a statutory monopoly. It is to be hoped that this kind of thinking is applied only where 'the abusive nature is immediately shown' (i.e., in the

3 Case COMP/C-3 /37.990 *Intel*, Commission decision of 13 May 2009, paragraphs 1,002 to 1,577.

4 Case T-286/09 *Intel*, judgment of 12 June 2014, paragraphs 85, 88.

5 See various articles in the first issue of the *Competition Law & Policy Debate*, 2015/1 CLPD.

6 Case C-209/10, *Post Danmark A/S v. Konkurrenceradet*, judgment of 27 March 2012, EU:C:2012:172, paragraphs 21–22.

7 Case C-23/14, *Post Danmark A/S II*, Opinion of Advocate General Kokott delivered on 21 May 2015, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=164331&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=480796.

8 Ibid., paragraphs 66–73.

9 Ibid., paragraph 85-94.

case of clear *per se* abuses)[10] but recent developments in pending EU cases are worrying – with the Commission issuing a statement of objections in the *Google* case for supposed foreclosure in product comparison services in spite of the dynamic nature of that sector and the great success of competitors such as Amazon, eBay and others in the shopping sector, which dwarf Google's shopping service.

The chapter on US developments contains a similarly troubling case. In a judgment concerning an exclusive dealing policy of a pipe-fitting manufacturer – admittedly, under Section 5 of the Federal Trade Commission (FTC) Act – the US Court of Appeals for the Eleventh Circuit in April 2015 affirmed the FTC's decision that the conduct was illegal because: '[t]he governing Supreme Court precedent speaks not of "clear evidence" or definitive proof of anticompetitive harm, but of "probable effect".'

Perhaps surprisingly, the chapter on China shows a spark of hope for economists. It discusses the case of *Qihoo 360 v. Tencent*, following Qihoo 360's accusing Tencent of abusive practices in instant messaging. The Supreme Court of China conducted a careful analysis, including a review of economic factors. It held that while the usage share of Tencent's instant messaging services was above 80 per cent, it nonetheless could not be found dominant in the market for instant messaging services. It took into account that in a two-sided market for free services, Tencent had no power over price, and had to keep innovating in order to counter dynamic competition, in a market where users engaged in multi-homing and could switch if the quality of Tencent's service deteriorated relative to that of its rivals. *Qihoo 360 v. Tencent* is rightly branded a landmark case and an example for other authorities and courts to consider.[11]

As to the second trend, politicians' attempts to influence competition cases are not new, of course. But 2014 saw a worrying intensification, at least at the European level. The French and German governments, for instance, at the instigation of national publishers and others, have put private and public pressure on the European Commission to pursue new and unprecedented theories of harm in the IT sector.[12] They are targeting in particular what is called the 'GAFA', an acronym for some of the main non-EU online service companies, demanding extraordinary remedies including trade secret disclosures and structural measures.[13] They solicited support from the

10 Ibid., paragraph 75.

11 Other such examples can be found in Germany and Brazil: *Verband Deutscher Wetterdienstleister eV v. Google*, Reference No. 408 HKO 36/13, Rechtbank Hamburg, 11 April 2013; *Buscape v. Google*, judgment of the 18th Civil Court of the State São Paulo – Case No. 583.00.2012.131958-7 (September 2012).

12 Joint Letter from Ministers Sigmar Gabriel (Germany) and Arnaud Montebourg (France), to Commissioner, Joaquin Almunia on 16 May 2014, available at www.magazinemedia.eu/wp-content/uploads/Translation_Letter_SG-AM_2014-05-28.pdf. See also the letter sent to the Commission by four German ministers in May 2015, available at www.bmwi.de/BMWi/Redaktion/PDF/A/anschreiben-der-minister-an-eu-kommissare,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.

13 'Projet de loi pour la croissance, l'activité et l'égalité des chances économiques (EINX1426821L)'; see: www.legifrance.gouv.fr/affichLoiPreparation.do;jsessionid=E1BDCC

European Parliament, which went as far as adopting a resolution requesting the break-up of an internet company based outside the EEA for alleged abuse of dominance, without any investigation (let alone proper review) of facts, law, or economics.[14] The notion of 'punishment before trial' may be amusing as literary entertainment,[15] but is profoundly troubling when coming from a European institution. Nor is the European Parliament alone in Brussels in raising questions. A commissioner was reported making statements in a pending case suggesting that complaints are 'well-founded' before a statement of objections was even sent.[16] He is said to have stated: 'We [Europe] need two to three global players. This applies to software, and hardware and all of these [online sectors].' 'If you look at America, which is comparable in size, or Korea, Japan, China, they have very strong powers and we need that too.'[17] On another occasion, he is quoted saying that 'The European Union should regulate internet platforms in a way that allows a new generation of European operators to overtake the dominant US players' and the goal was to 'replace today's web search engines, operating systems and social networks'.[18] Such statements could be understood not only to prejudge the outcome, but also to suggest protectionist objectives.

Competition Commissioner Vestager wisely tried to calm the waters,[19] and the President of the European Commission appears to be aware of the risks.[20] Nonetheless, every Commissioner has a vote in competition cases. Article 41 of the Charter of

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14 European Parliament resolution of 27 November 2014 on supporting consumer rights in the digital single market (2014/2973(RSP)), available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2014-0071+0+DOC+XML+V0//EN&language=EN.

15 'Let the jury consider their verdict,' the King said […]. 'No, no,' said the Queen. 'Sentence first — verdict afterwards.' *Alice's Adventures in Wonderland,* Lewis Carroll.

16 *Welt am Sonntag,* 12 April 2015, p. 1, 'EU will härter gegen Google vorgehen', available at www.welt.de/print/wams/article139419627/EU-will-haerter-gegen-Google-vorgehen.html.

17 29 September 2014, Oettinger's Comments to EU Parliament; video recording of the Parliament hearing: www.elections2014.eu/en/new-commission/hearing/20140917HEA64706, relevant statements at 2:04:50.

18 Speech by Commissioner Oettinger at Hannover Messe, 'Europe's future is digital', https://ec.europa.eu/commission/2014-2019/oettinger/announcements/speech-hannover-messe-europes-future-digital_en; *Economist*, 'Nothing to stand on', 18 April 2015, at www.economist.com/news/business-and-finance/21648606-google; *New York Times*, 'Europe's Google problem', 28 April 2015, www.nytimes.com/2015/04/28/opinion/joe-nocera-europes-google-problem.html?_r=0.

19 Statement by Commissioner Vestager on antitrust decisions concerning Google, Brussels, 15 April 2015. 'We will be exclusively guided by the facts, the evidence and by the EU's antitrust rules.' Available at: http://europa.eu/rapid/press-release_STATEMENT-15-4785_en.htm.

20 Minutes of the 2122nd meeting of the Commission held in Brussels (Berlaymont) on Wednesday 15 April 2015, http://ec.europa.eu/transparency/regdoc/rep/10061/2015/EN/10061-2015-2122-EN-F1-1.PDF.

Fundamental Rights of the European Union therefore requires every Commissioner, and the College as a whole, to handle proceedings impartially.[21] Thus, before a Commissioner reaches a conclusion, she or he should examine every element and each piece of evidence with an open mind, and reserve judgment until all rights of defence have been exhausted. Even the *appearance* of pre-judgment should be avoided.[22] And 'it is no answer to a charge of bias to look at the terms of a decision and to say that no actual bias is demonstrated or that the reasoning is clear, cogent and supported by the evidence'.[23]

Statements that appear to prejudge the outcome of the case, or even prejudge elements of a decision such as whether a defendant has a '*de facto* monopoly' before the firm has been fully heard, undermine the credibility of the law, the process and the European Commission itself.[24] A legitimate question arises whether a Commissioner in such a situation should not be recused from the decision-making, to avoid the appearance of bias. The Hon Justice Barling (now a chairman of the UK Competition Appeals Tribunal) recently set an example of integrity when he recused himself in *Sky v. Ofcom* merely on the ground that he had given a thoughtful speech on a relevant topic after the case had been decided by the CAT, and before it was remitted back to the CAT by the Court of Appeal.[25] He stated, appropriately, that 'my own view of whether I would deal with the remitted matter impartially and in accordance with my judicial oath is not relevant: it is the appearance which is important in this context'.[26]

Questions about appearance of pre-judgment are even more sensitive when, as in the European Commission, the team that investigates the defendant is also the one conducting the hearing, briefing the College of Commissioners, and writing the decision.[27] The requirement of impartiality encompasses not only 'subjective

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21 Article 41(1)(a) of the CFR guarantees 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'. Under Article 6(1) of the TFEU, the CFR 'shall have the same legal value as the Treaties'.

22 See, e.g., ECtHR, Appl. No. 22330/05, *Olujić v.Croatia*, 5 February 2009, paragraph 63 ('in respect of the question of objective impartiality even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done"').

23 See, e.g., ECtHR Appl. No. 58442/00, *Lavents v. Latvia*, 28 November 2002, paragraphs 118–121; and ECtHR Appl. No. 22330/05, *Olujić v. Croatia*, 5 February 2009, paragraphs 61–68.

24 See, e.g., Levy and Rimsa, 'Why Competition Commissioners Should Be Cautious in Commenting Publicly On Active Antitrust Cases', 36 *ECLR* 1 (2015).

25 Ruling (Constitutional Tribunal), 26 and 27 March 2014, *Sky UK Limited, Virgin Media, the Football Association Premier League and British Telecommunications plc v. Office of Communications & Ors*. Available at http://catribunal.org.uk/files/1156-59_Judgment_CAT_9_060515.pdf.

26 Ibid., paragraph 83.

27 See, e.g., *R v.Gough* [1993] UKHL 1 (Lord Goff) ('But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was

impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice' but also 'objective impartiality, insofar as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the *institution* concerned'.[28] Even with the best of intentions, and recognising the excellence and intellectual integrity of many Commission officials, is it humanly possible for a team that has spent one or two years intensely investigating and prosecuting a case, to avoid the risk of unconsciously interpreting and screening information in a way that confirms their beliefs or hypotheses? Where investigation, hearing and decision are prepared by the same team, there is a serious risk of confirmation bias.[29] Reinforcing this concern is the longstanding, but still surprising, fact that the College of Commisisoners does not read the parties' briefs and does not attend oral hearings. Not even the Commissioner for Competition participates. In other words, the decision is prepared by a Commissioner (and is adopted by a College) without direct personal knowledge of the facts and the proceedings, based on hearsay, set out in internal documents and summaries to which the parties have no access, and that are prepared by a team that has acted as detective and prosecutor. As the OECD warned, '[c]ombining the function of investigation and decision in a single institution can save costs but can also dampen internal critique'.[30] Incidental internal procedures, such as devil's advocate teams and peer review panels, are useful, but are only stopgaps. In light of the quasi-criminal nature of EU infringements proceedings, under Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms,[31] the proper solution would be to separate the investigative team from the team that prepares the Commission decision, which should include the Commissioner, and for the latter team to review the statement of objections and the response, as well as to attend the oral hearing. There is no chance that this will happen in the coming year, but it is hoped that the discussion on this topic will finally be taken seriously.

I would like to thank my colleagues Nicholas Levy and Andris Rimsa for their thoughts, as well as all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to this third edition of *The Dominance and Monopolies Review*. I look forward to seeing what evolutions 2015

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acting impartially, his mind may unconsciously be affected by bias […]').

28 Emphasis added, Case C-439/11 P *Ziegler v.Commission*, EU:C:2013:513, paragraphs 154–155; Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste v.UFEX and Others*, EU:C:2008:375, paragraph 54; and Case C-308/07 P *Gorostiaga Atxalandabaso v.Parliament*, EU:C:2009:103, paragraph 46.

29 See, e.g., RS Nickerson, 'Confirmation bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 *Review of General Psychology* 175–220 ('the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand').

30 'OECD Country Studies – Competition Law and Policy in the European Union' (2005), p. 62, see also pp. 61, 63–69, available at www.oecd.org/daf/competition/prosecutionandlawenforcement/35908641.pdf.

31 See, e.g., Forrester, 'Due process in EC competition cases: A distinguished institution with flawed procedures?' (2009) 34 *European Law Review* 817.

holds for the next edition of this book. Especially eagerly awaited are the European Court's judgment in *Intel* and *Post Danmark II* (conditional pricing) and the European Commission decision in *Gazprom* and *Google*, the *Qualcomm* investigations in various countries, and the US authorities' reviews of practices of patent assertion entities and privateers, which are also directly relevant for the EEA and other jurisdictions.

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June 2015

Chapter 14

ITALY

Matteo Beretta and Gianluca Faella[1]

I INTRODUCTION

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

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

1 Matteo Beretta is a partner and Gianluca Faella is an associate at Cleary Gottlieb Steen & Hamilton LLP.

2 In particular, it is prohibited to:

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

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

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

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

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

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

II YEAR IN REVIEW

In 2014, the ICA closed three investigations on abuse of dominance. In one case it found an infringement and imposed a fine.[5] In another case, the ICA accepted the commitments offered by the undertaking concerned and closed the proceedings without contesting the infringement.[6] In addition, the ICA closed the proceedings initiated in compliance with a judgment of the Latium Regional Administrative Tribunal (TAR), which had annulled a previous commitment decision, following the reversal of the first-instance judgment by the Supreme Administrative Court (Council of State).[7]

The TAR and the Council of State annulled two ICA decisions on abuse of dominance,[8] while in three cases they confirmed the finding of abuse.[9]

The main abuse cases in the period under review concerned discriminatory practices, refusal to grant access to essential facilities, alleged price abuses (price squeeze and predatory pricing) and abuse of rights. Judgments issued by administrative courts in the period under review also addressed the tricky issue of the relationship between competition law and regulation, which triggers an increasing risk of conflicts of jurisdiction and interference between authorities.

In March 2014, the ICA imposed a fine on Hera (a public utility company) and its subsidiary Herambiente for abusive conduct in the markets for the collection of waste

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

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

5 Decision of 27 February 2014, No. 24819, A444, *Akron-Gestione rifiuti urbani a base cellulosica*.

6 Decision of 19 February 2014, No. 24804, A4443, *NTV/FS/Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri ad alta velocità* .

7 Decision of 8 October 2014, No. 25122, A407C, *ContoTV/Sky Italia*.

8 TAR, 27 March 2014, No. 3398; Council of State, 6 May 2014, No. 2302.

9 TAR, 8 May 2014, No. 4801; Council of State, 8 April 2014, No. 1673; 18 July 2014, No. 3849.

paper in a number of municipalities in the region of Emilia-Romagna.[10] According to the ICA, Hera (which holds a monopoly in the collection of waste paper from public surfaces in several provinces) abused its dominant position by preventing access to cellulosic waste (a product resulting from urban recycling) by competitors of its subsidiary Akron, which is active in the production and sale of waste paper intended for paper mills. The ICA contested that the waste paper collected by Hera was transferred directly to Akron at a price lower than the market price, without any fair, transparent and non-discriminatory comparison with competitors' offers. The lower revenues earned by Hera resulted in an increase in the tariffs paid by residents for the urban hygiene services in the municipalities in which Hera managed waste collection. In addition, Akron, which had exclusive access to inexpensive supplies, was able to exercise significant market power in the sale of waste paper, which resulted in higher prices for paper mills.

In February 2014, the ICA accepted the commitments offered by a number of companies belonging to the Ferrovie dello Stato (FS) Group, the Italian incumbent railway operator, in proceedings concerning an alleged complex strategy aimed at hindering access to the market for high-speed train transportation services by Nuovo Trasporto Viaggiatori (NTV).[11] In particular, the contested conduct consisted of: (1) hindering access to the railway infrastructure, which was objectively necessary to compete in the downstream market for railway transport services, and making the offer of high-speed transportation services by NTV unprofitable by squeezing its margins; (2) discriminatory treatment and obstacles to NTV's activities in many stations; and (3) inefficiencies in the management of a number of stations served by NTV.

The commitments offered by the parties aimed at facilitating competitors' access to the market. In particular, the parties undertook, *inter alia*, to: (1) introduce appropriate signage in the stations to help travellers identify the services offered by different railway operators; (2) make available proper areas in the stations for competitors' information desks and ticket machines; (3) offer NTV the chance to buy advertising space at the stations; (4) reduce network access fees by 15 per cent; and (5) grant NTV all the high-speed routes requested for the period December 2013 to December 2014.[12]

In May 2014, the TAR upheld the ICA decision of 9 May 2013, which had imposed a fine of approximately €103.8 million on Telecom Italia, the incumbent in the electronic communications sector.[13] In *Wind-Fastweb/Condotte Telecom Italia*, the ICA had fined Telecom Italia for having: (1) restricted other operators' access to its fixed network by rejecting an unjustifiably high number of competitors' requests for the activation of wholesale services and treating them in a discriminatory fashion compared with those coming from its own internal divisions; and (2) adopted an anti-competitive discounting

10 Decision of 27 February 2014, No.24819, A444, *Akron-Gestione rifiuti urbani a base cellulosica*.

11 Decision of 19 February 2014, No. 24804, A443, *NTV/FS/Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri ad alta velocità*.

12 In addition, as a compensatory measure, the company of the FS Group managing the network (Rete Ferroviaria Italiana) waived the right to a substantial part of the payments due by NTV as a result of its failure to use certain railway routes.

13 TAR, 8 May 2014, No. 4801.

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

On appeal, Telecom argued, *inter alia*, that: (1) it had complied with the pervasive access regulation adopted by the Italian Telecommunications Authority (AGCom), and the data did not support the ICA's claims; and (2) it had not actually implemented the contested discount policy, which in any event had not led to any margin squeeze. The administrative court held that the ICA decision did not conflict with the regulatory framework. It noted that Telecom Italia owns an essential facility and, thus, it is under an obligation to grant access to its fixed network on fair, reasonable and non-discriminatory terms. According to the TAR, the evidence collected by the ICA showed that Telecom had treated competitors' requests for activation of wholesale access services in a discriminatory manner compared with requests originating from its own commercial divisions. Furthermore, the TAR upheld the ICA's view that Telecom Italia had implemented a discount policy capable of preventing equally efficient competitors from operating at a profit.

In May 2014, the Council of State upheld the judgment delivered by the TAR in 2012 in *TNT/Poste Italiane*.[15] In 2011, the ICA levied a €39.4 million fine on Poste Italiane (PI) for having implemented a complex strategy aimed at foreclosing TNT Post Italia (TNT) and other competitors from the markets for guaranteed time and date delivery services and notification services through messengers. In particular, the ICA found that PI abused its dominant position by: (1) handling the restitution of competing operators' postal items found in its network in such a way as to obstruct their activity (i.e., by directly contacting the sender, engaging in win-back activities and charging unfair prices for restitution of postal items); (2) offering its guaranteed time and date delivery service (PostaTime) at predatory prices to selected customers; and (3) charging predatory prices in two tender procedures.

The TAR held that the ICA had failed to demonstrate to the required legal standard that the contested practices were abusive. In particular, the TAR ruled that the procedure for handling postal items found in the PI network was in compliance with the relevant sector regulation and, thus, could not be considered part of an exclusionary strategy. Furthermore, the ICA failed to prove that the prices offered by PI for the PostaTime service and in the two tender procedures were below long-run average incremental costs (LRAIC).

The Council of State upheld the findings of the lower court. In its ruling, the Council of State rejected, *inter alia*, the ground of appeal concerning the scope of the judicial review carried out by the TAR. The Supreme Administrative Court stated that the review of ICA decisions by the administrative judge is full and effective, and also

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

15 Council of State, 6 May 2014, No. 2302.

extends to technical criteria employed by the ICA in its economic assessment. According to the Court, in the case at hand, the TAR had carried out an extensive review of all factual and legal issues raised by the contested decision, including those involving complex economic assessments, and eventually adopted a decision grounded on sound economic arguments.

As to the alleged predatory prices, the Council of State stated that prices higher than competitors' prices – such as those charged by PI for its guaranteed time and date delivery service – are inherently incapable of giving rise to exclusionary effects. This was confirmed by the fact that TNT had maintained its dominant position in that market, with a share equal to 80 to 90 per cent. Furthermore, the analysis of LRAIC was erroneous in several respects. In particular, the Council of State stressed that: (1) the predation analysis should be carried out *ex ante*, on the basis of data and information available when the firm set its prices, and not *ex post*, on the basis of regulatory costs; (2) the ICA had based its analysis on regulatory accounts, without taking into account the increase in regulatory costs due to universal service obligations (higher common costs due to universal service obligations are allocated to all services, including non-universal ones); (3) the ICA had assessed the profitability of the PostaTime service over an excessively limited time period (the first year-and-a-half of activity) without considering the likely reduction in unit cost following the increase in sales and the fact that, in the launch of a new product, initial losses may be inevitable; and (4) the ICA had wrongfully identified the incremental costs borne for the supply of the services concerned by allocating to these services resources used mainly for other services.

The administrative courts have also analysed some cases of alleged misuse of rights and legitimate interests in administrative proceedings. In March 2014, the TAR quashed the ICA decision of 25 July 2012, which had imposed a fine of €300,000 on FS and its subsidiaries RFI (which manages the network) and Trenitalia (active in railway transport).[16] According to the ICA, FS and its subsidiaries obstructed access to the railway passenger infrastructure by Arenaways.[17] In particular, following Arenaways' request, RFI carried out dilatory activities. First, it started a long consultation procedure with the regions of Lombardy and Piedmont and the Ministry of Transport and Infrastructure. Second, notwithstanding the positive opinion of the two regions, RFI referred the matter to the Office for the Regulation of Railway Services (URSF) on the ground that the request could jeopardise the economic stability of the public service agreements entered into by Trenitalia. Access was granted only in November 2010, following a decision of the URSF.

In line with settled case law, according to which the existence of sector-specific rules regulating access to the market and that of a sectoral authority do not prevent the application of competition rules, the TAR rejected the grounds of appeal based on the alleged exclusive competence of the URSF on issues governed by railway transport regulation; however, the administrative court held that the ICA's assessment of the alleged dilatory activities carried out by RFI was erroneous. In particular, the TAR noted that

16 TAR, 27 March 2014, No. 3398.

17 Decision of July 25, 2012, No. 23770, A436, *Arenaways-Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri*.

none of the authorities involved considered that the RFI's requests were merely dilatory. On the contrary, the competent authorities carried out the assessments requested by RFI, and the URSF endorsed some of the concerns raised by the company. According to the TAR, by stating that RFI's requests were without merit and merely dilatory, the ICA had *de facto* substituted its own assessment of regulatory issues for that of the URSF. The administrative court noted also that, at the time of the request for access to the railway network, Arenaways did not possess the safety certification required by law and, thus, would not have been able to enter the market.

In April 2014, the Council of State reversed a 2013 judgment by the TAR,[18] which had annulled a previous ICA decision of June 2012, imposing a €4.6 million fine on supermarket chain Coop for exclusionary practices aimed at creating barriers to the opening of various supermarkets by its rival Esselunga.[19] The Council of State agreed with the ICA's view that the inability to open new outlets was not due to mere administrative impediments but to Coop's obstructive behaviour. According to the Council of State, even though Coop's behaviour was legitimate in formally administrative terms, it could still be considered illegal from a competition law standpoint.

Finally, in July 2014, the Council of State upheld the ICA's decision imposing a fine of around €1.8 million on Auditel Srl for having abused its dominant position in the Italian market for television audience measurement by implementing certain practices aimed at favouring its main shareholders (RAI and Mediaset).[20] One of the main arguments put forward by Auditel was that the ICA would not have been entitled to adopt the challenged decision since, pursuant to Law No. 249/1997, AGCom would have exclusive competence to monitor dominant positions in the electronic communications sector and to fine possible illegal conduct concerning the measurement of audience ratings. The TAR rejected such argument on the ground that AGCom's activity aims at guaranteeing pluralism of information, while the ICA protects competition. As a consequence, their competences are fully compatible, and compliance with sector-specific rules issued by AGCom does not preclude the ICA's intervention.[21] The Council of State confirmed that the contested conduct was not under AGCom's exclusive jurisdiction, since the latter has only the power to assess the fairness, coherence and impartiality of the methodologies used to collect data, while the assessment of abusive conduct under competition rules falls within the ICA's jurisdiction.[22]

III MARKET DEFINITION AND MARKET POWER

The first step in abuse of dominance cases is the definition of the relevant product and geographical market. The ICA's general approach to market definition is consistent with

18 Council of State, 8 April 2014, No. 1673; TAR, 2 August 2013, No. 7826.

19 Decision of 6 June 2012, No. 23639, A437, *Esselunga/Coop Estense*.

20 Decision of 14 December 2011, No. 23112, A422, *Sky Italia/Auditel* .

21 TAR, 21 June 2012, No. 5689.

22 Council of State, 18 July 2014, No. 3849.

the Commission's practice (in particular, the ICA typically focuses on demand-side[23] and supply-side substitutability[24]). Similarly, the ICA follows the EU notion of dominance.[25]

Market shares are a key factor in the assessment of dominance.[26] Market shares exceeding 40 per cent are normally considered an indication of dominance. However, firms holding market shares lower than 40 per cent may also be dominant if the remaining part of the market is composed of small competitors.[27] The stability of market shares is also important,[28] but the fact that the market share is decreasing does not necessarily preclude a finding of dominance.[29] In the assessment of dominance, the ICA and national courts may consider a number of additional factors, which give the firm concerned a competitive advantage or raise barriers to entry.

A dominant position may be held by one or more firms. In accordance with EU case law, collective dominance may be based not only on structural or contractual links between the companies concerned, but also on the economic interdependence among firms active in an oligopolistic market.[30]

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

IV ABUSE

i Overview

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

Dominant firms have a special responsibility not to impair undistorted competition in the relevant market.[31] As a consequence, conduct that would normally be lawful may be considered anti-competitive if engaged in by a dominant firm.

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23 See, for example, decision of 28 June 2011, No. 22558, A415, *Sapec Agro/Bayer-Helm*.

24 See, for example, decision of 17 December 1998, No. 6697, A 209, *Goriziane/Fiat Ferroviaria*.

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

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

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

28 See, for example, decision of 30 June 2010, No. 21297, A383, *Mercato del cartongesso*.

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

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

31 See, for example, Council of State, 19 July 2002, No. 4001; TAR, 14 April 2008, No. 3163; decision of 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*.

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

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

Behaviour is considered unlawful if it may hinder the (limited) level of competition still existing in the market or the development of that competition. To establish an abuse, it is sufficient to demonstrate a potential prejudice to competition. It is not necessary to prove that the conduct had actual anti-competitive effects.[32]

Abuse is an objective concept. An anti-competitive intent is not a prerequisite for a finding of abuse.[33] However, the existence of an exclusionary intent may play an important role in the assessment of an alleged abuse, in particular when the contested conduct is part of a plan aimed at eliminating competitors.[34] An exclusionary intent may also justify a finding of abuse when the dominant firm exercises a right in an objectionable manner to pursue an objective different from that for which the right was granted in the first place.[35]

A conduct does not infringe Article 3 if it is objectively justified. This may be the case, in particular, if the conduct is objectively necessary to protect the dominant firm's or third parties' legitimate interests or leads to a cost reduction.[36]

ii Exclusionary abuses

Exclusionary pricing

The ICA issued its first decision on predatory pricing in 1995 in *Tekal/Italcementi*.[37] In accordance with EU case law,[38] the ICA held that prices below average variable cost (AVC) must be presumed unlawful, while prices between AVC and average total cost (ATC) are unlawful if they are part of an anti-competitive plan. The contested conduct was considered abusive even though it was not proven that the dominant firm was able to recoup the losses incurred by selling at below-cost prices. The ICA's view

32 See, for example, TAR, 30 August 2006 , No. 7807; October 20, 2006, No. 10678.

33 See, for example, Council of State, 19 July 2002, No. 4001.

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

35 See Council of State, 12 February 2014, No. 693; 8 April 2014, No. 1673; TAR, 27 March 2014, No. 3398 (see Section II, *supra*).

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

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

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

is consistent with the principles established by the ECJ,[39] and contrasts with US case law, which requires the proof of a reasonable likelihood of recouping the losses suffered by selling below cost.[40]

In *Caronte*,[41] the ICA used different cost benchmarks. Instead of relying on AVC and ATC, the ICA focused on short-run average incremental cost (SRAIC) and LRAIC. According to the decision, prices below SRAIC must be presumed exclusionary, while prices at least equal to SRAIC, but below LRAIC, are unlawful if they are part of an anti-competitive plan. However, a few years later, in *Mercato del calcestruzzo cellulare autoclavato*, the ICA made reference to average avoidable cost (which was considered equal to AVC) and ATC.[42]

More recently, in *TNT/Poste Italiane*,[43] the ICA used the LRAIC benchmark in the analysis of the pricing policies of the incumbent in the postal sector. However, the ICA adopted a strict approach in calculating LRAIC. The latter was considered essentially equal to average operating cost reported by regulatory accounts, which typically also include a share of common costs. The decision was annulled by the TAR,[44] whose judgment was upheld by the Council of State (see Section II, *supra*).[45]

In a few cases, the ICA and national courts have held that even above-cost prices offered to strategic customers (selective discounts) may be abusive. This may be the case, in particular, if they are part of a broader exclusionary strategy, implemented through different abusive practices,[46] or the dominant firm uses privileged information, which it holds because of its status of incumbent and vertically integrated operator, but is not available to rivals, to implement win-back or retention policies.[47] Furthermore, according to the ICA and the TAR, a discount may be *per se* abusive, regardless of the relationship between price and cost, if it is the result of a privilege exclusively conferred on the dominant firm by sector-specific rules incompatible with EU rules.[48]

A vertically integrated firm, active in the supply of an input and a final product, may infringe competition rules if it sets its upstream or downstream prices so as to squeeze competitors' margins. For instance, in *Telecom*, the ICA held that the Italian incumbent in the electronic communications sector abused its dominant position by

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

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

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

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

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

44 TAR, 25 June 2012, No. 5769.

45 Council of State, 6 May 2014, No. 2302.

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

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

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

charging competitors more than it charged its commercial divisions for the relevant inputs, thus reducing rivals' margins and excluding equally efficient firms.[49] A price squeeze may also be the result of discounts offered to retail customers.[50]

Exclusive dealing

Exclusive dealing obligations may constitute an abuse under Article 3 when the conduct may significantly foreclose access to the market. In *Diritti calcistici*,[51] the ICA found that Mediaset, the main Italian TV operator, violated Article 102 of the TFEU on the market for the sale of TV advertising lots. In 2004, Mediaset concluded with the major Italian soccer clubs various contracts concerning the broadcasting rights of their home matches for the 2004 to 2007 seasons. Moreover, Mediaset negotiated with the same clubs exclusive pre-emption rights for the broadcasting of their matches through all platforms from 2007 to 2016. Through exclusivity, 'English clauses' and pre-emption rights, Mediaset rendered the relevant TV content *de facto* unavailable for a long period for its competitors.

The ICA has also held that loyalty discounts and rebates, conditioned upon the customer obtaining all or most of its requirements from a dominant supplier, or reaching a given target, may infringe competition rules, because they tend to eliminate or restrict the purchasers' freedom to choose their supply sources, thus hindering rivals' access to the market or development.[52] The loyalty-inducing effect is stronger when loyalty discounts are applied retroactively to all units purchased during a given reference period.[53]

Furthermore, according to the ICA, loyalty discounts may be anti-competitive because they imply a discrimination among customers.[54]

The treatment of loyalty discounts is consistent with the traditional formalistic approach of the EU institutions. The ICA does not apply any price-cost test to establish whether a loyalty discount scheme is anti-competitive. It remains to be seen whether

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

50 See, *e.g.*, decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by the TAR, 8 May 2014, No. 4801. On this case, see Section II, *supra*.

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

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

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

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

the ICA will apply the as-efficient test introduced by the Commission Guidance on exclusionary abuses in the future.

Leveraging

Article 3(d) of the Competition Act prohibits firms in a dominant position in the market for a particular product or service (the tying product or service) from conditioning the sale of that product or service upon the purchase of another (the tied product or service). Tying may also be obtained through price incentives, such as, in particular, bundled discounts and rebates. For instance, in *Albacom Servizio Executive*,[55] the ICA found that the incumbent in the telecommunications sector infringed Article 3 by making certain rebates on the price of a monopolised service conditional upon attaining certain traffic volumes in a liberalised service.

Refusal to deal

Refusal to deal may amount to an abuse when it may substantially weaken competition in the market where the dominant firm operates or in a different market and is not objectively justified. Refusal to deal encompasses a considerable range of practices, including the refusal to supply products or services, to provide information and to grant access to an essential facility. Practices such as refusal to begin negotiations, refusal to renew a contract or unilateral termination of a contract may be considered instances of refusal to deal. The imposition of onerous conditions by a dominant firm,[56] dilatory strategies,[57] and other forms of constructive refusal to deal,[58] might have the same effect as an outright refusal to deal.

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

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

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

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

58 See Decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia,* confirmed by TAR, 8 May 2014, No. 4801.

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

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

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

A refusal to deal is not abusive if it is objectively justified. This may be the case, for instance, when the dominant firm does not have enough capacity to satisfy third parties' demand, the customer is insolvent or does not respect the contractual terms, or the firm requesting access does not meet the technical or security requirements needed to access an infrastructure.[63]

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

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

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

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

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

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

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

iii Discrimination

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

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

iv Exploitative abuses

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

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

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

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

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

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

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

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

rendered.[74] In these cases, prices were considered by definition unfair. Article 3 also prohibits the direct or indirect imposition of unfair non-price trading conditions.[75]

V REMEDIES AND SANCTIONS

i Sanctions

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

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

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

ii Behavioural remedies

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

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

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

75 Examples of unfair trading conditions include the imposition of a contractual clause that prohibits customers from reselling products bought from a supplier (decision of 10 April 1992, No. 452, A4, *Ancic/Cerved*), the refusal, by a dominant firm providing toll payment services, to reimburse cards not used, or only partially used, after their expiration (decision of 26 July 2007, No. 17069, A382, *Autostrade/Carta prepagata Viacard*), and the request of payment of unpaid bills of former customers as a condition to enter into new agreements for the supply of electricity or communications services (decisions of 10 October 2007, No. 17481, A390, *Enel Distribuzione/Attivazione subordinata a pagamento morosità pregresse*; 21 August 2008, No. 18692, A398, *Telecom-Morosità pregresse*).

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

iii Structural remedies

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

VI PROCEDURE

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

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

Companies under investigation have the right to:

a be heard by the ICA within the time limit indicated in the decision to open proceedings;
b obtain a final oral hearing before the end of the investigation;
c submit briefs and documents; and
d access the case file.

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

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

a require specific documents or information;
b carry out unannounced inspections at business premises (as opposed to residential premises);
c interview the companies' legal representatives;
d image computer hard drives by using forensic IT tools;
e require explanations about any documents or information supplied by the company concerned; and
f secure premises overnight by seal.

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

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

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

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

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

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

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

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

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

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

In principle, the judicial review of substantive findings is limited to a control of legality. Accordingly, courts must assess whether the ICA based its conclusions on accurately stated facts and supported its decision on adequate and coherent grounds.[79]

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

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

The administrative courts have clarified that the judicial review of substantive findings is strong, effective and penetrating, and also covers the economic analysis carried out by the ICA.[80] However, when complex assessments carried out by the ICA remain questionable, the administrative court cannot substitute its own assessment for that of the ICA.[81]

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

VII PRIVATE ENFORCEMENT

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

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

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

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

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

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

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

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

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

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

well founded, it orders the defendant to pay a certain sum to each member of the class or, alternatively, establishes the criteria on the basis of which these sums must be calculated.

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

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

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

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

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

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

In some cases, the Italian Supreme Court stated that findings contained in an ICA decision constitute privileged evidence, from which a court may legitimately infer the existence of the alleged infringement, damage and causal link. In principle, the presumption is rebuttable. However, the nature of privileged evidence of the ICA's findings prevents the defendant from arguing against the very same facts and grounds

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

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

89 Court of Appeal of Milan, 16 September 2006.

that the ICA relied upon to find a violation of antitrust rules.[90] In a judgment delivered in 2014, the Supreme Court stated that, in principle, the ICA's findings are not binding on civil courts and there is no legal category of privileged evidence distinct from that of legal proof.[91] Nonetheless, the Court confirmed that the findings contained in an ICA decision have '*high evidentiary value*' in proceedings before civil courts.[92]

VIII FUTURE DEVELOPMENTS

The effects-based approach to abuse of dominance cases does not seem to have established itself in Italian decision practice and case law. The ICA's and national courts' decisions frequently rely on certain traditional statements of EU case law, which reflect the formalistic and structural approach adopted in the past. They usually consider it sufficient to show that the contested conduct tends to restrict competition or is capable of having anti-competitive effects on the basis of an abstract analysis, without carrying out a comprehensive economic assessment of the impact of the practice. The transition towards an effects-based approach will require a stronger and more penetrating judicial review by administrative courts. The approach of administrative courts in the review of antitrust decisions still seems erratic. In some cases, such as *TNT/Poste Italiane*, they have engaged in an in-depth review of the decision, also taking into account grounds of appeal raising complex economic issues. In other cases, however, the administrative courts seemed to limit themselves to reiterating the ICA's views, also through extensive references to the contested decision, or have simply overlooked some of the arguments put forward by the parties, without providing adequate explanations as to why they should have been dismissed. A more stringent judicial review of antitrust decisions is necessary not only to foster the transition towards an effects-based approach but also to guarantee full compliance with the fundamental right of access to an independent and impartial tribunal established by Article 6(1) of the ECHR, as interpreted by the European Court of Human Rights in *Menarini*.[93]

Many cases decided by the ICA and national courts in the past few years have concerned highly regulated sectors. The interaction between competition law and sector-specific regulation seems to give rise to an increasing risk of conflicts of jurisdiction and interferences between different authorities. In some cases, the

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

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

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

93 Judgment of 27 September 2011, *A. Menarini Diagnostics S.R.L. v Italy*, Application No. 43509/08.

application of competition rules has led to the imposition of obligations incompatible with sector-specific rules, which has often been criticised by administrative courts. In other cases, the application of competition rules seemed to supplement sector-specific regulation by imposing additional and stricter obligations. The use of competition law to impose additional and stricter obligations on firms already subject to pervasive sector-specific regulation also raises delicate issues as to the interference and overlapping between the two sets of rules.

In the past few years, the ICA and the Italian courts have also shown more activism in the assessment of new types of abuse. Some decisions belong to the controversial line of cases concerning the misuse of rights and legitimate interests arising from sector-specific rules through the initiation of administrative or judicial proceedings aimed at obstructing competitors' activity. In *Pfizer*, the Council of State clarified that this type of abuse – which has been inspired by EU case law[94] – is:

> *[…] nothing but the specification of the broader category of abuse of right, whose precondition is the existence of a right which is used artificially, for a purpose which is incoherent with that for which that right is granted: in the case at issue, the exclusion of competitors from the market.*[95]

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

The ICA and administrative courts have often emphasised the dominant firm's alleged exclusionary intent, which seems to be a crucial factor in the assessment of the alleged abuse;[96] however, the distinction between abuse and legitimate exercise of right should not be based merely on the dominant firm's intent. Reference to the dominant firm's exclusionary intent opens the door to considerable uncertainty and to a high margin of appreciation in the assessment of corporate statements, internal documents and commercial choices. In addition, a firm's intent is not in itself sufficient to distinguish legitimate from anti-competitive conduct. Indeed, the aim pursued by any firm competing on the market is, in a sense, to prevail against, and eventually to exclude, its competitors. Moreover, in many cases, the rationale behind the rules invoked by the dominant firm is just to exclude or limit competition from other players. This is the case, for instance, with the rules granting and protecting intellectual property rights, as well as

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

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

96 *Id.* See also, *inter alia*, Council of State, 8 April 2014, No.1673.

those allowing competitors to access a facility or to carry out an economic activity only within certain limits and under certain conditions.[97]

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

As to the enforcement policy, it seems likely that the ICA will continue to adopt a more rigorous approach in the assessment of commitments offered by parties. In the past, the ICA has often used the commitment procedure to exercise *lato sensu* regulatory functions, by negotiating and making legally binding measures aimed at improving the competitive conditions or at benefiting consumers, even in the absence of a clear and direct link between the commitments and the competitive concerns identified by the ICA. From the introduction of commitments procedures, in 2006, to December 2010, the ICA made extensive use of commitment decisions, which represented around 85 per cent of decisions concluding abuse of dominance cases (28 out of 33), but this trend reversed a few years ago, also due to some rulings by the administrative courts, which have constrained the ICA's discretion in commitment procedures. In the period from 2011 to 2014, the ICA issued commitment decisions only in slightly more than 30 per cent of investigations concerning abuses of dominance.[98] In comparison with the past, the ICA now seems to pay much more attention to the nexus between the competitive concerns and the commitments offered by the parties.

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

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

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

Appendix 1

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He graduated from the University of Milan in 1991 and obtained an LLM degree from the Institut d'Études Européennes de l'Université Libre de Bruxelles in 1992, as well as an LLM from the New York University School of Law in 1999. He has been a member of the Bergamo Bar since 1995.

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