Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2020: Italy

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The Italian Competition Authority ("**ICA**") and Italian courts – and also the Italian legislator – have been quite active in 2020, despite the disruptions caused by the Covid-19 outbreak.

Covid-19

Covid-19 was of course one of the main factors driving competition law and policy developments in Italy in 2020, bringing to light existing trends and revamping past enforcement strategies.

In fact, as soon as the emergency started, the ICA made extensive use of its consumer protection competences through the tool of unfair business-to-consumer commercial practices, privileging them over traditional competition law. The ICA mainly focused its attention on the need for transparency in the sale of pharmaceuticals and medical equipment. In particular, the ICA issued requests for information, opened probes and often resorted to interim measures against misleading claims relating to products allegedly effective for Covid-19 diagnosis and prevention, or against unjustified price increases. It also dealt with charges on donations to hospitals applied by an online platform.

The ICA thus found in unfair commercial practices a flexible tool ready to be deployed in front of the emergency. Also, compared to antitrust probes, unfair commercial practices proceedings present a number of advantages to provide a quick response, including the absence of the need for a market definition.

Covid-19 and its associated inability-to-pay scenarios were the reasons why in April 2020 payment of fines for competition-law infringements was deferred to 1 October 2020 (and the investigations' timeframes suspended for approximately three months). Then, on 15 December the ICA decided that payments of fines may be deferred, upon request of the undertaking(s) concerned, to 31 March 2021.

Beyond these rapid-response actions, the Italian legislator addressed another typical competition tool in times of crisis: the failing-firm defence. Copy-pasting a similar

provision that allowed struggling airline Alitalia to merge with rival AirOne back in 2008 (C9812 – *CAI/Alitalia-AirOne*), the so-called August Decree provided that mergers of national dimension concerning undertakings active in the provision of labour-intensive or general economic interest services, which registered balance-sheet losses in the last three years and risk going bankrupt "also" because of the Covid-19 crisis, are automatically cleared as long as they are notified to the ICA by 31 December 2020. The ICA is left with the possibility of imposing only behavioural remedies. This measure clashes with the usual narrow interpretation of the failing-firm defence given by the European Commission and, for example, it could benefit the acquisition by the national mail company Poste Italiane of its main rival Nexive.

Consolidation path, outdated remedies?

Talking of concentrations, 2020 witnessed a consolidation trend in two crucial sectors that came under the scrutiny of the ICA.

In the telecommunication sector, the government-backed project of a Single Broadband Network is slowly putting together its pieces. Due to the need for massive investments to ensure ubiquitous broadband connectivity across Italy, the former national monopolist Telecom Italia is joining forces with rivals Fastweb and Tiscali (and with the investment company KKR) in a joint venture called FiberCop, which will manage Telecom Italia's fiber network. After this step, it is envisaged that FiberCop and the other infrastructure operator (Open Fiber) will merge and manage jointly a single broadband infrastructure (instead of doubling the networks). The European Commission has already affirmed that the first step of the transaction (i.e., the creation of FiberCop) is not a concentration under the EUMR. However, the ICA opened an investigation on the contracts between Telecom Italia and its co-investors which could qualify as anticompetitive agreements under Art. 101 TFEU. Indeed, the ICA is concerned about the risk of foreclosing access to operators in the markets for wholesale access services and retail telecommunication services on the broadband fixed-line network. It remains to be seen how the ICA intends to make sure that Telecom Italia guarantees the openness of the network.

In the banking sector, while the ECB endorsed consolidation, Intesa SanPaolo won a takeover bid on smaller UBI bank, cleared by the ICA subject to commitments (C12287 – *Intesa SanPaolo/UBI-Unione di Banche Italiane*). Remedies included the divestment of 500 bank branches to the benefit of rival BPER. The question arises on whether such a remedy could still be regarded as effective and updated in times of online banking, with a steady growth of cashless transactions. In broader terms, depending on the market, the importance of online activities can affect the market power corresponding to transferred brick-and-mortar stores and branches. This question could be addressed in the review of the 1997 Notice on Market Definition, as recalled by Lena Hornkohl in this blog. In the meantime, the ICA may face again the issue in the same banking sector, when the State will sell its stake in the bank Monte dei Paschi di Siena, acquired pursuant to a bailout plan authorized by the Commission in SA.47677.

Digital markets and new frontiers of competition law

In any case, digital issues were at the very core of the ICA's activities in 2020.

In February 2020, the ICA published the results of a Survey on Big Data that is conducted jointly with the Italian Data Protection Authority and the Italian Communications Authority. In the Survey, the ICA noted that data may play an essential role in certain markets, depending on the fundamental features of the goods/services concerned. In digital markets, characterized by a high degree of concentration, dominant market operators, economies of scale, network effects and switching costs due to the lack of interoperability, data become a barrier to entry. This reinforces the trend towards a winner-takes-all scenario in digital markets. The three regulatory authorities identified also a possible balance with privacy in the dynamic consent from the user. This tool would allow the user to give initially his/her consent on the general processing of data, and then in relation to data processing for specific usages. Indeed, the more consumers are well-informed and aware, the more undertakings will compete in terms of the level of privacy secured to consumers.

No surprise that, against such innovated background, the ICA joined the crowded group of competition watchdogs investigating Google and its activities. Notably, the ICA initiated its proceedings for an alleged abuse of dominant position in the Italian market for online advertising (A542 – *Google nel mercato italiano del display advertising*, reported in this blog by Johannes Persch) on 20 October 2020, the very same day in which the US Department of Justice filed an antitrust lawsuit to stop Google from unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the search and search advertising markets. The Italian proceedings are significant because the ICA focused its attention on the potential foreclosure consisting of the restriction of access to Google's own tracking data and tools. This could possibly result in an obligation for Google to share data and opens the door to tension between competition and data protection.

Procedures and sanctions

Also, Italian courts played their part in 2020. Competition cases against ICA's decisions are heard before the competent administrative courts, i.e. the Regional Administrative Tribunal in Rome ("***TAR Lazio***") in the first instance and the Council of State in second and last instance. In particular, three judgments rendered by the two administrative courts deserve being mentioned.

First, on 27 July 2020, the *TAR Lazio* partially annulled an ICA decision that had sanctioned an anticompetitive agreement that took place in a public tender for the facility management services to be rendered in favour of Italian public administrations (I808 – *Gara Consip FM4 – accordi tra i principali operatori del facility management*). Among the many interesting aspects of this case, it is worth mentioning that the ICA received a leniency application after it had initiated its investigation and granted the leniency applicant a reduction of 50% of the fine. The *TAR Lazio* confirmed that the

leniency applicant did not qualify for total immunity from fines, having provided the ICA with evidence (of significant added value but) non-essential to demonstrate the infringement. However, the *TAR Lazio* also imposed the ICA to apply a further reduction of 15% of the fine because the leniency applicant had withdrawn its offer from the public tender under the ICA's lens, thereby publicly distancing from the agreement and avoiding that it produced any further effects. It remains to be seen whether the Council of State (to which the judgments have been appealed) will confirm the *TAR Lazio*'s imposition of such mitigating circumstance.

Second, on 24 November 2020, the *TAR Lazio* annulled a decision of the ICA that had found an anticompetitive agreement among captive banks in the automotive sector (I811 – *Finanziamenti auto*). The ICA decision was significant not only because of the high amount of the imposed sanctions (higher than 670 million euros) but also because it brought the ICA's practice in line with the EU's interpretation of the notion of a single economic entity, applying fines also to the parent companies of joint ventures involved in anticompetitive conducts. In essence, this decision anticipated the future transposition of Article 13(5) of the ECN+ Directive. However, the *TAR Lazio* annulled the ICA decision because the proceedings were initiated after an unreasonably long period (the ICA had received a leniency application in 2014 but started its official investigation only in 2017) and because of flaws in the ICA's substantive assessment. Also, in this case, it remains to be seen whether the Council of State (to which the judgments will probably be appealed) will uphold the *TAR Lazio*'s findings.

Finally, on 28 December 2020, the Council of State annulled definitively the ICA's sanctions amounting to approx. 66 million euros imposed on TV broadcasters, the football top division League ("***Lega Serie A***") and its advisor for an anticompetitive agreement in the bid for the broadcasting rights of the *Lega Serie A* football matches resulting in a restriction by object (I790 – *Vendita diritti televisivi Serie A 2015-2018*). According to the court, no anticompetitive agreement and thus no restriction by object could be found, based on the parties' conduct. Instead, the *Lega Serie A* decided over the bid within its powers and prevented the creation of a dominant position for one of the TV broadcasters.

From Rome with love

Lastly, Italian courts are keeping the Court of Justice busy with their preliminary references. A couple of them, lodged in 2020 and referred by the Council of State, promise to be quite an interesting double in the matter of abuse.

The first one concerns an ICA decision finding that the Enel group abused its dominant position for an allegedly exclusionary gathering and use of contact details provided by its customers (C-377/20, *Servizio Elettrico Nazionale*). Questions to the Court of Justice relate, *inter alia*, to the possibility for the undertakings concerned to prove that the investigated conduct is unable to produce any effect in light of the specific economic and legal context in which it took place, and to the criteria that should be used to distinguish between "normal" and "distorted" competition. To reply

to this preliminary reference, the Court of Justice is likely to trace back its past glorious caselaw on abuses of dominance: a landmark ruling must be expected then.

The second case regards instead an abuse undertaken through exclusivity clauses by the local distributors of Unilever Italia in respect of ice-cream retailers (C-680/20, *Unilever Italia*). The issues at stake are, on the one side, the possibility to hold Unilever Italia liable for its distributors' conduct by identifying a single economic entity among them, and, on the other, the application of the as-efficient competitor test in instances different from exclusivity and loyalty-inducing rebates (analysed by the Court of Justice in its *Intel* judgment).

Final disclaimer: the cases selected here are not exhaustive, many other ICA's decisions and court judgments contributed to competition developments in Italy in 2020. We discussed here those that we thought shaped law and policy the most and that can give a hint as to the next developments. So, if that is all from 2020, keep an eye on Italy in 2021.

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