Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – Italy

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The year 2022 in Italy witnessed a major update of national competition law and new powers for the Italian Competition Authority ("**ICA**"). These developments are summarized below, together with a report of the ICA's practice in antitrust and merger control, and an account of the activity of Italian courts, both at the national level and in preliminary references to the Court of Justice.

The Law

As anticipated in our previous blog post, the 2021 Competition Law ("**Law**") was adopted on 5 August and entered into force on 27 August 2022. The Law is meant to revamp competition rules and remove barriers to entry in certain regulated sectors. Another post on this blog already highlighted its main novelties.

First, the Law introduced a settlement procedure in ICA's antitrust investigations, which, despite being used for some time by the European Commission, was not explicitly regulated by Italian competition law. Interestingly, the newly introduced settlement procedure is applicable not only to cartels (as before the Commission) but also in cases of abuse of dominant position. Second, Italian merger control is now based by law on the "significant impediment to effective competition" (SIEC) test, replacing the previous assessment based on verifying whether a concentration created or strengthened a dominant position (along the lines of the first EU merger regulation of 1989). Third, *ex officio* ICA's powers were broadened to allow the scrutiny of additional concentrations capable of impairing competition in the national market (or in a substantial part thereof). This new power will be further discussed below. Fourth, further adjustments aligned national rules to current EU rules and practices on (i) the turnover calculations for insurance, banking and financial institutions and (ii) the assessment of joint ventures. Finally, the Law provided for a rebuttable presumption of economic dependence of undertakings using intermediation services offered by digital platforms that play a crucial role in reaching end-users or suppliers.

The Practice: (i) Antitrust – Anticompetitive agreements

In 2022 the ICA closed with commitments the I850-I850B investigation (whose opening was reported in our post for 2020) on the agreements granting access to FiberCop's broadband infrastructure. FiberCop is a joint venture resulting from the contribution of the broadband

secondary networks of the former monopolist (Telecom Italia) and of other operators. There are projects for a potential merger of FiberCop with the other infrastructure operator active in Italy (Open Fiber), after which they could jointly manage a Single Broadband Network infrastructure, instead of duplicating the networks. The creation of FiberCop was carefully scrutinized by the ICA in order to ensure the openness of the broadband fixed-line network and prevent the foreclosure of the markets for wholesale access services and retail telecommunication services.

The ICA also closed with commitments to an investigation (case I856) against the main online comparison platforms for insurance policies and the main insurance companies present on such platforms. In the ICA's view, such undertakings could extensively and regularly exchange sensitive information so as to coordinate their business strategies in the direct sale of motor insurance policies, practising lower discounts to consumers thanks to the reciprocal knowledge of the sales conditions offered on the online comparison platforms (which, to facilitate such coordination, prepared periodic reports and organised "business review" meetings to discuss the data they gathered). Despite initially qualifying such exchanges of information as restrictive of competition "by object", the ICA subsequently acknowledged that they could also be aimed at making more competitive offers to consumers, and thus classified them as restrictive "by effect". The commitments accepted by the ICA indirectly recognise the importance of online comparison platforms for certain services and impose clear limits on the type of data that can be shared.

The Practice: (ii) Antitrust – Abuse of dominant position

In the pharmaceutical sector, in May 2022 the ICA fined Leadiant Biosciences and its controlling company for excessive prices in relation to an orphan drug (case A524). In line with the conclusions reached by the Dutch competition authority over the same drug (as also highlighted in a previous post on this blog), the ICA concluded that the medicine was essentially a repurposed drug, and the investments made by Leadiant to improve a former drug (that, in the meantime, had entered the public domain because of its patent's expiry) did not justify the significant increase in prices. This is the second time in a few years that the ICA intervenes against excessive pricing in the pharmaceutical sector, after fining Aspen in 2016 for "*excessively high*" prices (which later sparked a Commission investigation closed with commitments for all EEA national markets excluding Italy).

In the transport sector, the ICA opened an investigation (case A551) against the main national railway company (Trenitalia) for allegedly tying its regional and long-distance rail passenger services (mostly still operated under monopoly) with its high-speed rail passenger services (operated in competition with the private operator NTV). According to the ICA, NTV would be precluded to sell tickets "combining" fares of its own high-speed rail passenger services with Trenitalia's regional routes, thus making NTV's services less appealing for passengers needing both transport services. In December 2022, the ICA launched the market test for a set of commitments proposed by Trenitalia, which are aimed at removing the disputed limitations and at enhancing the sale of "combined" tickets by NTV.

In the sector of waste management of electronic devices and in the context of an investigation opened in 2021, the ICA identified a single economic entity constituted of three legal entities active in different markets (case A544). The ICA had opened the investigation concerning the three legal entities to verify whether a set of allegedly abusive conducts – including (i) the insertion of

MFN clauses in contracts with waste management plants, (ii) the use of profits from past fiscal years to cover losses in order to keep the contributions of current and future members of a waste management consortium low and attractive, and (iii) an exclusivity clause included in the consortium's Articles of Association and applicable to the consortium's members – could be attributed to the single economic entity (and not only to the legal entity formally party to each conduct). At the initiation stage, the ICA stated that the three legal entities seemed to amount to a single economic entity due to (i) the contractual and shareholding links between them, and (ii) the fact that one of the entities was a service provider and did not operate autonomously. However, in April 2022, the ICA closed its investigation subject to a set of commitments offered by all three entities, which included the removal of the MFN clauses, together with the commitment not to replicate such or similar clauses in future contracts, and a modification of the waste management consortium's Articles of Association to remove the exclusivity clause and to avoid that the consortium's profits from past fiscal years could be exploited to attractively reduce the contributions of future members.

The Practice: (iii) Mergers

The most significant development in terms of merger control in Italy in 2022 is undoubtedly represented by the additional power granted to the ICA to request the undertakings concerned to notify – up to 6 months after closing – concentrations that are capable of impairing competition in the national market (or in a substantial part thereof) and that (i) meet just one of the two – otherwise cumulative – ordinary notification thresholds, or for which (ii) the aggregate worldwide turnover of the undertakings concerned is higher than 5 billion EUR. This additional power might partly echo the principles of the recent Commission's Guidance on the application of the referral mechanism set out in Art. 22 of the EU Merger Regulation ("**EUMR**"), and undoubtedly represents an additional tool for the ICA to tackle problematic concentrations, including the so-called "*killer acquisitions*". The new regime is now fully operational after the ICA adopted in December 2022 the guidelines detailing the parameters to determine for which concentrations it is likely to request notification. It is not entirely clear which will be the relationship between the newly granted power of the ICA and the Art. 22 EUMR referral mechanism. For example, while an Art. 22 referral request must be made "*within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned*", it is not clear if, should the ICA request a certain concentration to be notified under the new regime, such notification will make the Art. 22 referral deadline run afresh.

In relation to the retail sector, two cases are particularly noteworthy. In February 2022 the ICA conditionally cleared an acquisition of joint control over two chains totalling more than 500 shops specialized in the retail sale of pet products (case C12410B). The ICA approved the concentration only subject to the divestment of 50-70 stores. Similarly, in December 2022 the ICA cleared subject to conditions an acquisition of 62 shops in Sardinia specialized in the retail sale of home and personal care products, and cosmetics (case C12488). Also, in this case, the ICA approved the transaction subject to divestment of 10-20 stores.

In both cases, the ICA had to deal with local markets and commissioned a consumer survey, which allowed the ICA to reach more informed conclusions on the competitive dynamics of each relevant market. Additionally, in both cases, the ICA confirmed the preference for the divestments to be carried out with a view to strengthening suitable purchasers that already have experience in the

relevant sector.

Finally, on the wave of the consolidation that invested the banking sector, the ICA cleared the acquisition of Carige by BPER (case C12443) only on the assumption that 48 retail branches were divested to another pre-identified bank (thereby implementing a kind of fix-it-first remedy). This raises again the question of whether divestments are still effective in a market that, in another antitrust investigation, the ICA itself found increasingly characterized by the reduction of brick-and-mortar bank branches (case I849 – *Bancomat-Prelievi contanti*).

The Case-Law: When in Rome

In Italy, while direct challenges against ICA's decisions belong to the jurisdiction of administrative courts, antitrust damage actions – including follow-on actions – are heard by civil judges. Before directive 2014/104/EU ("**Damages Directive**") was implemented into Italian law, follow-on actions had to be initiated by a general limitation period of 5 years based on the Italian Civil Code, but the starting date of the such period was controversial. This was recently confirmed when the Italian Supreme Court, in its judgment No. 112 of 2022, held that, in cases where the claimants are not consumers but undertakings active in the same sector as the antitrust infringer and for which the Damages Directive is not yet applicable, the starting date for the 5-year limitation period is generally considered the date of the publication of the decision opening the ICA's investigation, rather than the date of the publication of the ICA's final decision. This judgment underscored the importance of the Damages Directive which – by ensuring that the 5-year limitation period is suspended from the opening of an ICA's investigation until one year after the ICA's infringement decision has become final or after the ICA's investigation is otherwise terminated – promoted legal certainty and enhanced the possibility for victims of antitrust infringements to claim and obtain full compensation for the harm they suffered.

As regards administrative courts, the first and second-instance judges reached different conclusions concerning the relationship between the EUMR and Art. 102 TFEU. In December 2020 the ICA fined the Eventim-TicketOne group for an exclusionary strategy enacted, among others, through the acquisition of four of the main national promoters of pop-music live events. The first instance judgment No. 3334 of 2022 annulled the ICA decision on several grounds, including the fact that, after the entry into force of the EUMR, competition authorities could not use any more Art. 102 TFEU to tackle anticompetitive acquisitions. On appeal, judgment No. 9035 of 2022 confirmed the annulment of the ICA decision but found that concentrations not notified to competition authorities could still be investigated as abuse of a dominant position. The differing views of the two administrative courts on the relationship between the EUMR and Art. 102 TFEU remind the question at stake in case C-449/21 – *Towercast*, which was pending at the time before the Court of Justice.

In 2022 the Court of Justice registered 5 new preliminary references raised by Italian courts on competition matters (C-70/22, C-186/22, C-558/22, C-560/22 and C-660/22) and delivered 6 preliminary rulings on competition law originating from Italian courts. Among these judgments, the one rendered in case C-377/20 – *Servizio Elettrico Nazionale* is particularly noteworthy (as already discussed in this blog). In December 2022, based on the Court of Justice's preliminary ruling, the administrative court of last instance ("*Consiglio di Stato")* annulled the ICA decision that had fined Servizio Elettrico Nazionale ("**SEN**") and other companies of the Enel group for

allegedly implementing an exclusionary strategy aimed at preserving the clients from the regulated market (where SEN held a monopoly) while transitioning to the free market. In essence (as also already discussed in this blog), the *Consiglio di Stato* found that the ICA had not fully taken into account certain elements which could suggest that the conduct under investigation was incapable of having exclusionary effects. In addition, the judges found that the ICA had not sufficiently shown that the conduct under investigation was discriminatory and could go to the detriment of Enel group's competitors.

Finally, in 2023, we will probably see another significant national court's judgment of abuse of dominance, after the Court of Justice rendered on 19 January 2023 its preliminary ruling in C-680/20 – *Unilever Italia*.

Conclusion

This non-exhaustive recollection of decisions and cases shaping competition law and policy in Italy in 2022 is open to discussion and integration. We are looking forward to your comments and views. And if this was 2022, no less is expected from 2023.

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** The information and views set out in this post are the authors' own and do not necessarily reflect the official opinion of the European Commission.*

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