Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2024 – Italy

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This year's recap of the main developments of competition law and policy in Italy in 2024 will first provide a brief and general policy update, and then will discuss some of the main sector-specific developments (without any aspiration of being exhaustive). Then, we will provide some updates concerning the private enforcement of competition rules, as well as certain references for a preliminary ruling raised by Italian courts.

Policy developments

The 2023 Annual Competition Law entered into force on 18 December 2024. It focused largely on making the tendering of motorway concession contracts mandatory and on preventing their automatic renewal, but also included other provisions on, for example, car insurance, shrinkflation and waste management. The Law's content seems not to have embraced the more ambitious and wide-ranging approach proposed by the Italian Competition Authority ("**ICA**") to cover a variety of other sectors. The ICA also adopted its proposal for a new Annual Competition Law in December 2024, suggesting interventions in the sectors of infrastructures, public transport and public services more generally, and commercial distribution. In parallel, also the 2024 country-specific Council Recommendation on economic policiesadopted in the context of the European Semester urged Italy to "*Address remaining restrictions to competition, in particular in the retail sector, regulated professions and railways*" in 2024 and 2025.

In July 2024, following a public consultation, the ICA adopted a Regulation on the forms of cooperation and coordination pursuant to the Digital Markets Act, which requires close cooperation between the Commission and the Member States for the DMA's effective implementation. The Regulation will apply notably to the investigations initiated by the ICA on the gatekeepers' non-compliance with the DMA's obligations in Italy.

The ICA's powers were also affected by a further development in the course of 2024. More precisely, in January 2024, the Italian administrative court of second instance ("***Consiglio di Stato***") rendered an opinion concluding that the ICA could exercise a power granted to it in October 2023 (to impose any remedies that are necessary and proportionate to resolve distortions to competition affecting consumers and identified during a sector inquiry) without being limited to the air transport sector more directly concerned by the rest of the provision granting such power to the ICA. As a result, the ICA adopted in May 2024 a notice detailing the procedure for it to possibly impose remedial measures following sector inquiries. However, the application of such

powers remains controversial, and the Italian energy regulator decided to appeal against the ICA's notice of May 2024, probably because the regulator deems that the ICA's notice could interfere with its competences.

During 2024, the ICA also made some changes to its December 2022 guidelines detailing the parameters to determine for which below-threshold concentrations the ICA is more likely to request the notification under its call-in powers (which we described in this previous blog post). After the Court of Justice concluded in *Illumina/GRAIL* that the European Commission cannot accept referrals under Art. 22 of the Merger Regulation in relation to concentrations that do not meet national notification requirements, the ICA called-in and then referred to the Commission under Art. 22 the acquisition of Israeli startup Run:ai by NVIDIA (see this previous post). The Commission subsequently cleared unconditionally the concentration in phase I. This case suggests that – even after the Court of Justice's judgment in *Illumina/GRAIL* – national competition authorities such as the ICA could be ready to use their call-in powers so as to request the notification of (and potentially refer to the Commission) concentrations that would not otherwise meet the thresholds to be notified.

In addition to Run:ai's acquisition by NVIDIA, publicly available information suggests that the ICA assessed in 2024 at least eight below-threshold concentrations that were notified at the ICA's request (pursuant to its call-in powers). Two of such transactions were conditionally cleared in phase II (one of these will be further discussed below), one was abandoned after the ICA opened a phase II and five others were unconditionally cleared in phase I.

Digital and telecom

In the digital sector, the ICA closed an investigation into the alleged abuse of dominance by Booking (case A558-A558B), accepting the proposed commitments. The ICA had received a complaint alleging that, (i) by means of two different premium programs for accommodation facilities, Booking offered more visibility in search results in exchange for higher fees and the commitment to provide competitive pricing on Booking, and that (ii) Booking sometimes applied a discount on the facilities' rates in order to match the best rate available online, without prior approval from the facility. The ICA was concerned that, in this way, Booking may have effectively limited the autonomy of accommodation facilities to offer more competitive rates on other online sales channels. Booking offered 10-year commitments capable of addressing these concerns, notably by ensuring higher transparency and that prices offered on other online sales channels are not taken into account for the purposes of the abovementioned two programs or of Booking's discount. This case follows on the ICA's action on online platforms, pursued also through its consumer-protection powers (by way of example, see cases PS12543on TikTok and PS12566 on Meta).

In the telecom sector, the road to a Single Broadband Network infrastructure, merging the two competing infrastructure operators FiberCop and Open Fiber, kept the ICA busy. Following the spin-off of TIM's network infrastructure into FiberCop, controlled by KKR – a transaction authorised by the Commission in case M.11386– TIM (the former Telecom Italia) stopped being a vertically integrated operator and became a pure service company, whereas FiberCop became a pure wholesaler. As a consequence, the ICA revoked the remediesaccepted in case I850 on the agreements granting access to the broadband infrastructure of FiberCop, as they were superseded

by the current situation. At the same time, the ICA opened an investigation to assess the new master service agreement regulating the commercial relation between TIM and FiberCop (case I874). The next step in the project could be the possible merger between FiberCop and Open Fiber, if confirmed. Watch this space in 2025.

TIM's troubles in competition law did not end here. Indeed, the administrative court of first instance competent for competition matters ("***TAR Lazio***") rejected TIM's and Dazn's challenges of the fine issued by the ICA in case I857(discussed last year) by concurring with the ICA in qualifying the anti-competitive agreement as a restriction by object and as a horizontal agreement, not benefitting from any exemption under Article 101(3) TFEU. However, the *TAR Lazio* upheld the actions brought by Fastweb and Sky, and ordered the ICA to re-open the investigation due to inconsistencies in the period affected by the infringement and in the qualification of certain conducts. Interestingly, this judgment did not annul the ICA's decision, as it would have run contrary to the interests of the competitors Fastweb and Sky, but clarified that the previous decision will be effective as long as it will be modified or substituted by a new decision to be adopted by the ICA after its re-opened investigation.

Still in the telecom sector, the ICA cleared conditionally in December 2024 (case C12659) the acquisition of Vodafone's Italian branch by Swisscom, an ICT company (already active in Italy under the brand Fastweb) listed on the Swiss stock exchange and whose majority stake is held by Switzerland. After having concluded that the transaction was not capable of creating a significant impediment to effective competition for mobile telecommunication services, the ICA investigated whether such an impediment could be created in relation to (i) wholesale fixed-line access services (upstream), and (ii) retail fixed-line communication services (downstream), in turn distinguished by customer type among services provided to (a) households and small and home offices, (b) business customers, and (c) public administrations. Although the transaction resulted in horizontal overlaps in all these retail markets – an overlap capable of creating a significant impediment to effective competition – the ICA cleared the transaction not by requiring divestments but rather by accepting three-year access and behavioral remedies proposed by Swisscom. These remedies consist, essentially, in the provision of certain wholesale fixed-line access services (i.e., having primary effects on the upstream market) and in the provision to public administrations and interested competitors of certain information ahead of the public tenders to be called for telephony and connectivity services where Vodafone or Fastweb are the incumbents – all measures to be enacted under the supervision of a Monitoring Trustee. In the ICA's view, these remedies make it easier for competing firms to enter or expand in the abovementioned downstream markets, thereby compensating for the loss of competitive constraints resulting from the transaction.

Energy and transport

In the energy sector, the ICA closed three investigations into whether the prices applied for district heating in certain cities in northern Italy were excessive and amounted to abuses of dominance under Italian antitrust law. In particular, these investigations focussed on instances where the providers of district heating benchmarked their prices on that of natural gas but mostly generated/procured the necessary energy from other sources. This meant that, when the prices of natural gas spiked as from late 2021, the prices applied for district heating increased as well, despite the lack of a similar increase in costs. The ICA applied the *United Brands* test and concluded that the prices applied by two providers of district heating in 2022

(cases A564 and A565) were excessive and abusive. In one of these proceedings (case A565), the ICA found the provider of district heating liable despite the fact that the pricing formula was dictated by local authorities, because the agreement allowed the provider to propose amendments to such formula if the market conditions so required. As regards the third proceeding (case A563), the ICA concluded that the prices applied were not excessive, as the applicable economic variables showed a negative or, at most, a slightly positive profit for the dominant undertaking.

In the transport sector, 2024 recorded a new episode in the saga of ITA Airways – heir to ailing Alitalia – with the Commission authorising the acquisition of joint control by Lufthansa and the Italian Ministry of Economy, subject to conditions (case M.11071). For its part, the ICA did not sit back in the transport sector and requested a merger control notification for the acquisition of a company managing a terminal in the port of Genoa by freight shipping company Ignazio Messina (case C12586) due to risks of foreclosure in the market for transport of freight on rail. Eventually, the ICA cleared the acquisition subject to conditions, including ensuring access to the terminal services in a non-discriminatory way.

As for the judiciary, the *Consiglio di Stato*, in an interesting interaction between merger control and State aid, annulled a decree of the Italian Ministry of Transport transferring the ailing train company Ferrovie del Sud-Est to Ferrovie dello Stato Italiane in exchange for no price but cleaning up the asset imbalance of Ferrovie del Sud-Est, to which the 2016 Italian budgetary law had already granted EUR 70 million, to be thus recovered. The ICA had cleared the merger in phase I, given that it did not entail the creation or strengthening of a dominant position (case C12067). However, the Court of Justice confirmed by way of preliminary ruling in C-385/18 that both the amount granted and the transfer were to be regarded as unlawful State aids in breach of the notification obligation under Article 108(3) TFEU. Now, the *Consiglio di Stato*, with the support of an expert, ascertained that Ferrovie del Sud-Est's value was negative, even factoring in the EUR 70 million aid, which was below the amount needed to remedy the asset imbalance. So, the transaction failed the market economic operator (MEO) test and, as a result, a selective benefit was conferred on Ferrovie del Sud-Est. It remains to be seen how the judgment will be implemented.

Basic industries, manufacturing, and pharmaceuticals

In the manufacturing sector, following a referral to the ICA pursuant to Article 4(4) of the EU Merger Regulation, in April 2024 the ICA opened an in-depth investigation into the acquisition of joint control over two companies active in the manufacture of ice cream and of bakery/farinaceous products (case C12625). At the same time, the ICA ordered the parties not to implement the transaction before its clearance (a standstill obligation which does not otherwise follow from Italian rules on merger control). The ICA's investigation showed that the transaction could significantly impede effective competition, in particular by creating a dominant position in the national market for frozen bakery breakfast products sold in the food service channel. As a result, the ICA cleared the transaction only subject to divestment and 3-to-5-year non-acquisition commitments, complemented by the elimination of exclusivity provisions and the free-up of storage capacity with the agents and logistics partners of the merged entity in certain Italian regions.

In the pharmaceutical sector, the *Consiglio di Stato* upheld the ICA's decision finding that Leadiant Biosciences had applied excessive prices in relation to an orphan drug called "CDCA

Leadiant" (we had already discussed the ICA's finding and the following ruling by the *TAR Lazio* respectively in this and this previous posts on this blog). The *Consiglio di Stato* found that the ICA had correctly defined the relevant product market at the molecule level, and that the ICA and the TAR Lazio had correctly applied the case law of EU Courts on excessive pricing (including the *United Brands* test) to the specific circumstances of the case, for example by finding that the price for CDCA Leadiant was unfair in itself and that no comparison with other products or markets could be relevant.

On this basis, and following the agreement of a new (significantly lower) price for CDCA Leadiant between Leadiant and the Italian medicines agency in January 2024, the ICA concluded that there were no reasons to impose a fine on Leadiant for non-compliance with the ICA's decision of May 2022 finding the above-mentioned abuse of dominance. It is worth noting that the new price agreement (i) was not retroactive, (ii) applied for only one year, and (iii) was also supported by an overall expense cap that made the Italian national health service not spend yearly more than approximately 1.5 million Euro for CDCA Leadiant.

Private enforcement and updates on preliminary references

In the field of private enforcement but still in the pharmaceutical sector, in January 2024 the Italian Supreme Court ("***Corte di Cassazione***") upheld an appeal judgment finding that Pfizer had to compensate the Italian national health service for a damage of approx. 13 million Euro arising from an exclusionary abuse found in an ICA decision of January 2012. The *Corte di Cassazione* confirmed that, prior to the transposition of the Damages Directive, the ICA's decisions were not binding in actions for damages but nonetheless amounted to "*a privileged source of evidence*" as to the facts and arguments discussed therein, as well as their legal qualification as an antitrust infringement. The *Corte di Cassazione* also found that Italian courts can consider additional indicia included in ICA decisions that may contribute to showing that the anticompetitive conduct at stake was not just capable of producing but also actually generated certain effects (such as a delay in a competitor's market entry). Lastly, the *Corte di Cassazione* found that Italian courts may apply presumptions and other ordinary rules on evidence to quantify the damages resulting from antitrust infringements. In the case at stake, the appeal court had quantified the damages by using an estimate also indicated in the ICA decision and by decreasing it by 5% to take into account possible instances in which the reimbursement of the medicine in question might have not been requested.

In addition, separate Chambers of the *Corte di Cassazione* reached in 2024 different conclusions as to whether certain loans were null and void pursuant to Article 101(2) TFEU. The interests arising from such loans were generally based on the EURIBOR index, i.e. one of the Euro Interest Rate Derivatives which could have been distorted as a result of a cartel among banks that the Commission found to have taken place between 2005 and 2008 (see case AT.39914). First, in May 2024 a Chamber of the *Corte di Cassazione* found that the clause to calculate the interests of a loan based on the EURIBOR could be null and void if it amounts to the execution of the anticompetitive agreement mentioned above (namely, because one of the parties knew of that agreement and aimed at profiting from it). In addition, the same Chamber found that it should be considered whether the validity of such clauses may anyway be affected by the tortious conduct of third parties, which may have caused the interest-setting mechanism to essentially diverge from the will of the parties to the loan. Conversely, in July 2024, a separate Chamber of the *Corte di Cassazione* disagreed

with such conclusions and found (i) that no loan can amount to the execution of the anticompetitive agreement found by the Commission, because the affected markets were different and loans were not necessary for that agreement to distort competition, and (ii) that the tortious conduct of third parties may not cause the nullity of the interest-setting clause but, at most, its voidability, and may be used as a basis for a damages claim against the parties to the cartel found by the Commission. The matter may now be discussed by the Grand Chamber of the *Corte di Cassazione*, to possibly reconcile these positions.

In turn, preliminary references originating from Italian courts may further contribute to address procedural issues in antitrust enforcement. More precisely, as we previously reported on this blog, two preliminary references were awaiting in 2024 a final judgement as to whether Article 102 TFEU, read in conjunction with the principles of protection of competition and effectiveness of administrative action, must be interpreted as precluding the requirement under Italian legislation for the ICA to open proceedings for abuses of dominance within 90 days from when the ICA has knowledge of the essential elements of the infringement (case C-511/23 for antitrust enforcement and case C-510/23 for consumer protection investigations). In September 2024, Advocate General Pikamäe delivered his opinion on the matter. The Advocate General suggested that the Court of Justice should find that the effectiveness of EU law may be compromised by the "*too short*" and "*rigid*" 90-day period for the ICA to complete the pre-investigation stage. We now know that that the Court ultimately did follow the Advocate General's suggestion in its judgment of 30 January 2025 (a development to be covered in next year's post – stay tuned!).

Before the Advocate General could deliver his Opinion, a new request for a preliminary ruling issued by the *Consiglio di Stato* on the same issue reached the Court of Justice (case C-491/24, see this previous post). The new request advocates for the defence of the 90-day period, suggesting that it would not violate the principle of effectiveness and would anyway only limit the ICA's power to impose fines (so, notably, not also its power to order the investigated parties to cease and desist from the antitrust infringement in question and not to reiterate in the future the same or similar infringements). It remains to be seen which position the Court of Justice will adopt on this reference.

In addition, in August 2024, the same *Consiglio di Stato* requested a preliminary ruling from the Court of Justice in relation to a different procedural aspect. More precisely, the procedural rules applicable to the ICA require it – when opening proceedings and differently from the European Commission and other national competition authorities – to set a deadline for each investigation to be completed. The deadline, which is set on the basis of the specific circumstances of each case, may subsequently be extended by reasoned decision of the ICA. The *Consiglio di Stato* essentially asked the Court of Justice to indicate whether Articles 41 and 47 of the Charter of Fundamental Rights of the European Union preclude such procedural rules (case C-588/24). While the order for reference seems to argue in favor of the ICA's procedural rules' conformity with EU law, it remains to be seen whether the Court of Justice will decide to discuss the case in detail.

Conclusion

This non-exhaustive review of decisions and cases shaping competition law and policy in Italy in 2024 is open to discussion and integration. We are looking forward to your comments and views. And if this was 2024, no less is expected from 2025.

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

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