THE ICA FINES BAYER FOR A REFUSAL TO DEAL IN THE MARKET FOR THE PRODUCTION AND COMMERCIALIZATION OF FOSETYL-BASED FUNGICIDE

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On 28th June 2011, following a complaint submitted by competitor companies (the so called fosetyl aluminium Task Force), the Italian Competition Authority (ICA) sanctioned Bayer Cropscience SRL (together with Bayer Cropscience AG, parent company of the Bayer Crop Protection division, hereinafter referred to as Bayer) for over 5,124 million Euros for an alleged infringement of art. 102 TFEU, consisting in an abuse of its dominant position in the Italian market for the production and commercialization of fosetyl-based fungicides, which protect grapevines from peronospora.

The first issue, in the ICA's analysis, was related to the definition of the relevant market, crucial matter when a company is considered in a dominant position in the relevant market especially as a result of the power it is conferred by an intellectual property right. On the basis of a specific evaluation of the market's complex economic assessment, the ICA assumed as relevant market the one of production of fosetyl-based fungicides.

Bayer's dominant position in the Italian fosetyl-based fungicide market was demonstrated in several ways: the company's high market share (in 2007, approximately 46% in direct sales alone); the fact that in the Italian market, Bayer was the only producer of the finished products and supplier of its own competitors with pure fosetyl as active ingredient and fosetyl-based formulas; the high degree of pricing policy independence showed by Bayer in the 2007-2010 period.

According to the ICA, Bayer undermined negotiation with competitors by denying access to certain studies in its possession which are required -i.e. necessary- so as to acquire market authorization by the competent Italian Authority for the production of fosetyl-based products. The studies were essential for obtaining market authorization renewals, especially because the current legislation[1] prohibits their replication due to the involvement of animal testing on vertebrates. The result of such a behaviour was that competitor companies were forced out of the market because of their inability to renew their authorizations for the production and commercialization of the alleged products.

[1] Directive 91/414/EEC.

The evidence gathered during the course of the proceeding showed that Bayer was well aware of the anti-competitive nature of its own tactics. According to said evidence, Bayer pursued an exclusionary strategy by blocking access to studies required for renewing market authorizations so as to sell fosetyl-based fungicides. The ICA qualified this conduct as an abuse that caused significant harm to consumers by excluding competitors from the market. The tactics caused an overall reduction in the supply side of the market and let to substantial increases in final sales prices for consumers.

The phito-pharmaceutical sector, as the pharmaceutical one, constitutes a typical area for tensions between intellectual property protection and competition. Protection is indispensable to promote innovation, but an abusive and instrumental use of patent rights can impede competition. In such cases, it is possible to keep a higher price artificially, with a negative impact on public interest. The ICA, in this case, highlighted the damage that competition can undergo in this area through regulatory gaming strategy. On this basis, the ICA closed the investigation stating that the pharmaceutical undertaking Bayer had exploited its intellectual property rights with the purpose to exclude competitors from the market[2].

The decision was fully confirmed by the Italian Supreme Administrative Court (hereinafter referred to as CS), in January 2013. The CS ruled on two appeals lodged by the ICA and the competitors against the prior judgment of the Italian Administrative Court of First Istance (TAR Lazio), that annulled the ICA's decision in 2012. The CS reformed the judgment under appeal and dismissed all of Bayer's claims against the contested decision[3].

The judgment gives some authoritative indications on the essential facility doctrine, which provides a useful contribution within the European debate with the Commission and the other competition Authorities.

First of all, the CS upheld the principle that a dominant firm's refusal to deal with an essential facility may constitute an abuse within the meaning of Article 102 TFEU, unless objectively justified. On the merit, the CS followed the approach of the Court of Justice in the Oscar Bronner case[4], quoted by the CS.

Secondly, in order to plead the existence of an abuse in such situation, the CS, inter alia, stated that, according to the European case-law, it is necessary that:

- the facility must be essential, meaning that it is indispensable for the carrying on of that company's business, inasmuch as there is no actual or potential substitute;
- the access to the facility must be necessary in order to create a new product;
- such refusal must be incapable of being objectively justified;
- the refusal is likely to eliminate competition in the market and to damage consumers.

Namely, the CS emphasized that the studies under matter were "indispensable" because, according to the law, it was substantially forbidden to duplicate them. On this regard, the CS stated that the legal obstacle was a

[2] See Decision n. 22558, 28 June 2011, A415-Sapec Agro/Bayer-Helm, Bulletin n. 26/2011.

[3] See CS Judgment n. 548, 29 January 2013, www.giustiziaamminstrativa.it.

[4] See, Court of Justice, 26 November 1998, Case C-7/97.

reason for making it impossible, or substantially difficult, for any other firm to duplicate them. On the other hand, as observed by the CS and relied on by the applicant, the fact that the Task Force had an inadequate behaviour with regard to the procedures for the marketing authorization in no way whatsoever causes the conduct to escape the prohibition laid down in Article 102.

Insofar, the CS clarified the specific circumstances whether or not a dominant firm has the duty to supply a competitor or a non-competing customer according with the case-law. In this connection, it is noteworthy that the CS confirmed, inter alia, the European interpretation according to which the illegality of an abusive conduct under Article 102 TFEU is unrelated to its compliance or non-compliance with other legal rules; while abuses of dominant positions consist, in the majority of cases, in behaviours which otherwise are lawful under branches of law other than competition law[5].

[5] See, General Court, 1 July 2010, caseT-321/05; Court of Justice, 6 December 2012, case C457/10, AstraZeneca AB.