

THE ICA FINES TELECOM ITALIA FOR UNILATERAL PRACTICES IN THE MARKET FOR NETWORK INFRASTRUCTURE

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1. INTRODUCTION

On 9th May, 2013, the Italian Competition Authority (ICA) concluded an investigation for abuse of dominant position against Telecom Italia S.p.A. (Telecom) fining the company with 103.794 million Euros for its abusive conducts in the wholesale and retail markets for telecommunication in Italy.

Telecom is the Italian incumbent operator within the telecommunication markets. It operates in the ICT Italian and international markets and it is the owner of the public switch transmission network (PSTN) in Italy. Telecom is active on both at wholesale and retail level: at the wholesale level, Telecom provides OLOs (other licensed operators) with wholesale telecommunications services that constitute an input so as to provide services to final customers.

The case was opened pursuant to complaints filed by Fastweb S.p.A. (Fastweb) and Wind Telecomunicazioni S.p.A. (Wind). Fastweb and

Wind are two of the main telecommunications providers in Italy, both with a wide range of integrated services (voice fixed and mobile, data and video) for residential and business customers. Wind also manages mobile communications through its own mobile network, Fastweb is active in the same sector as a mobile virtual network operator (MVNO).

During the proceeding, started in June 2010, Telecom submitted commitments in order to remove the concerns highlighted by the ICA. The commitments were considered insufficient to overcome the competitive concerns and consequently they were rejected.

In its final decision, the ICA resolved that Telecom abused of its dominant position by means of two separate infringements of art. 102 TFEU.

2. THE REFUSAL TO ACTIVATE WHOLESALE SERVICES TO OLOS

The first abuse consisted in a “constructive” refusal to supply access to Telecom’s network, implemented through the refusal of a large proportion of competitors’ wholesale orders during the delivery process (so called “KOs”), whilst Telecom’s internal retail divisions did not receive such a high proportion of KOs.

The ICA pointed out that the excessively high level of KOs issued by Telecom to OLOs – even compared with the KOs issued to Telecom’s retail business– could not be ascribed to a sort of “physiological” phenomenon nor explained by OLOs’ inefficiency.

Such exceptionally high levels of KOs for OLOs were considered the result of specific structural choices, as well as the organization and procedures adopted by Telecom in managing of the process of supplying wholesale services to OLOs (delivery process).

The delivery process used by Telecom was indeed found to be different from the systems and processes used internally to serve Telecom’s retail business.

The ICA recognized that Telecom has a sufficient margin of discretion in defining the design of structures, systems and processes adopted for managing the delivery process of wholesale orders. Thus it is able to determine the level of efficiency with which the process is carried out and set up adequate conditions in order to provide access to its infrastructure respecting the non-discrimination principle.

Basically, despite the process was subject to sector regulation, the ICA and the telecommunications’ National Regulatory Authority (NRA) recognized that Telecom had sufficient scope to adjust its delivery process in order to reduce the level of KOs received by OLOs.

As regards the effects of Telecom’s conducts, the investigation carried out by the ICA

showed that the failed activations of wholesale services in the 2009-2011 period were likely to slacken the OLOs’ growth in the markets for retail access, voice calls and internet access broadband. This circumstance enabled Telecom to reduce the historical declining trend of its fixed telephony market share to the detriment of competitors.

Telecom’s behavior also hindered OLOs’ ability to gain new customers and raise their market share.

3. THE MARGIN SQUEEZE

As for the second abuse, the ICA resolved that Telecom had implemented a policy of discounts to medium/large business customers in the market for retail access to the fixed telephone network that did not allow an equally efficient competitor to operate cost-effectively and on a sustained basis in the same market.

Specifically, Telecom adopted a pricing policy – consisting of strong discounts on the above mentioned services– capable of producing restrictive effects on competition in the retail markets for access services to non-residential customers.

The discounts offered by Telecom were directed selectively to customers that: *i*) use procurement procedures for the selection of the supplier and *ii*) were located in areas where the LLU (local loop unbundling) service is available. In other words, under these two conditions, the discounts offered by Telecom

were actually directed to customers that were more contestable and exposed to competition.

In order to implement those pricing policies, Telecom pre-determined a table of percentage discounts, compared to the general list prices, that could be freely applied by its sales force to the different types of access lines supplied to those customers.

As the NRA pointed out, such kind of offers were not subject to any regulatory test in the period concerned, so that Telecom could not claim in this case any overlapping or contrast between regulatory and antitrust oversight.

The economic analysis undertaken – carried out according to the “as efficient” test – showed that the difference between the discounted prices set by Telecom and the wholesale prices it charged to OLOs for the essential inputs was not sufficient to cover the incremental (network and commercial) costs incurred by an equally efficient competitor in the provision of narrowband access services. In this regards, the ICA used as a benchmark the long-run average incremental cost of the dominant undertaking.

The ICA showed that, at least for the 2009-2011 period, Telecom had been able, through its discount policy, to squeeze the margins of an equally efficient competitor, with restrictive effects on competition in the retail market for access services to non-residential customers. Telecom would have been unable to profitably provide retail services at those discounted prices while incurring the same wholesale costs it charged to its own competitors.

Furthermore, the ICA resolved that the medium/large business customers market is strategic for competitors in order to achieve the economies of scale necessary to climb the “ladder of investments” and establish themselves in the market.

4. THE FINE

As a result of Telecom’s conducts, OLOs incurred additional costs and delays in accessing wholesale services provided by Telecom, and were unable to efficiently satisfy their customers’ requests. Their ability to compete effectively against the incumbent was thus severely impaired. By implementing this abusive strategy, Telecom was able to reduce the “natural” erosion of its market share.

The ICA considered Telecom’s infringements as particularly serious and imposed a fine of € 103,794,000, of which about € 88 million for the first infringement, and more than € 15.5 million for the second one.

In setting the amount of the fine for the first infringement, the ICA considered, as a mitigating factor, the activities undertaken by Telecom since 2009 to improve the procedures for providing wholesale services to competitors, and the adoption of the so-called “Open Access commitments” which Telecom submitted spontaneously to the National Regulatory Agency (NRA) at the end of 2008.

Furthermore, the company’s losses in its 2011 financial statements were also considered as a mitigating factor.

Finally, the fact that Telecom had abused of its dominant position on previous occasions through similar exclusionary conduct was held as an aggravating circumstance for both infringements