RECENT DEVELOPMENTS IN NATIONAL ANTITRUST PRACTICE AND CASE LAW: JANUARY 2012 – MAY 2013

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Abstract: In the period under review, the Italian Competition Authority and Administrative Courts analyzed many important cases in different economic sectors. Some of these cases raised extremely complex legal and economic issues. The analysis of decision practice and case law highlights some critical aspects of recent antitrust enforcement, namely: (i) the need to strengthen the fight against cartels; (ii) the need to refine the tools used in merger analysis, also through the use of modern econometric methods; (iii) the need to enhance the role of economic analysis in the assessment of unilateral exclusionary conduct, in line with the Commission’s Guidance on Article 102 TFEU; and (iv) the need to find a better balance between competition rules and sector-specific regulation, so as to avoid overlapping and inconsistencies. A further critical issue is the need to reinforce the protection of the rights of defense. In order to improve the current administrative enforcement system, it is necessary to enhance the procedural guarantees and to remove the limits on judicial review of antitrust decisions, thus enabling Administrative Courts to review fully, in fact and in law, any aspect of the ICA’s finding of infringement, and to pronounce also on the merits of the case.

1. INTRODUCTION: OVERVIEW OF ENFORCEMENT ACTIVITY

In the period from January 2012 to May 2013, the Italian Competition Authority (“ICA”) closed 19 proceedings concerning cartels and abuses of dominant position. In 11 cases, the ICA issued an infringement decision. In four cases, the ICA accepted the commitments offered by the parties, whereas in four other cases it found that there were no grounds for finding an infringement.

In the same period, Italian Administrative Courts delivered a ruling on ICA decisions in 17 cases. Only in five cases were the ICA decisions fully upheld. In six cases, the Administrative Courts quashed the entire decision. In three cases, the annulment concerned only some of the allegedly anti-competitive practices, whereas in three other cases the Administrative courts reduced or annulled the fine imposed by the ICA.

Thus, while the ICA’s decision practice is essentially in line with the traditional tendency to confirm, in the final decision, the charges contained in the decision to initiate

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proceedings, analysis of Administrative court case law shows that, in a significant number of cases, the ICA’s findings of infringement did not withstand judicial scrutiny.

2. **RECENT DEVELOPMENTS IN THE ENFORCEMENT OF COMPETITION RULES**

In the period under review, the ICA and the Administrative courts analyzed many important cases in different economic sectors. Some of the these cases – especially those concerning abuses of dominance – raised extremely complex legal and economic issues. The following sections analyze the main developments in the fields of restrictive agreements, abuse of dominance and merger control.

2.1. **Restrictive Agreements**

The ICA’s enforcement of the rules on restrictive agreements confirmed the focus on horizontal agreements. However, the ICA seems to face significant difficulties in the fight against cartels. Analysis of the ICA’s decisions and of Administrative court case law in this period reveals a limited application of Article 101 TFEU to genuine cartels, meaning secret agreements or concerted practices between competitors, which affect prices or the allocation of markets, customers or production quotas.

The restrictive agreements assessed by the ICA and the Administrative courts that come closest to the classic notion of cartels are those at issue in: *Prezzo del GPL per riscaldamento Regione Sardegna* (concerning the joint fixing of price lists of liquefied petroleum gas (LPG) in cylinders and small tanks in Italy from 1995 to 2005); *Intesa nel mercato delle barriere stradali* (concerning collusive behavior of the main players in the roadside barriers sector aimed at sharing markets and identifying reference prices, including through the exchange of sensitive information); and *Logistica internazionale* (concerning a restrictive agreement in the national market for international land shipment of goods, consisting of the exchange of data and information on the impact of a cost increase during the meetings of a sector association, in order to agree on price increases).

The other Article 101 TFEU cases concern practices different from classic cartels, such as information exchanges (*Vendita al dettaglio di prodotti cosmetici*), agreements between associations negotiated without any secrecy in the membership committees (*Servizi di agenzia marittima*), and agreements for participation in

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2 The decision was issued by the ICA in 2010 and was upheld by the Council of State in the relevant period under review. See Decision of March 24, 2010, No. 20931, Case I700, *Prezzo del GPL per riscaldamento Regione Sardegna*, Bulletin No. 12/2010, upheld by TAR Judgement of December 13, 2010, No. 36126, which was upheld, in turn, by Council of State Judgement of May 23, 2012, No. 3026.


public tendering procedures (Gara d’appalto per la sanità per le apparecchiature per la risonanza magnetica).\(^7\)

The decisions issued by the ICA and Administrative courts in the above-mentioned cases provide some interesting indications on several issues related to the enforcement of Article 101 TFUE.

In Servizi di agenzia marittima, the TAR quashed the ICA decision imposing a fine for an alleged restrictive agreement between the association of ships agents and freighter agents of Genoa (Assagenti), on the one side, and the association of freight forwarders and carriers couriers of the same city (Spediporto), on the other side.\(^8\) The ICA’s investigations concerned meetings held at Assagenti’s Port Committee to define a common position within the association, with a view to reaching an agreement with Spediporto on the price list for the services provided by ship agents to forwarders (namely, preparation and issue of documents, such as those necessary to load goods to be exported and to collect imported goods). The agreement between the two associations was provided for by law. The TAR stated that the meetings held at Assagenti’s Port Committee were not incompatible with competition rules.\(^9\) According to the Administrative court, the contested conduct did not amount to a horizontal agreement or concerted practice because it resulted only in a proposal that the sector association would have submitted to the other association. Consequently, it was a “lawful vertical agreement reached by the representatives of Assagenti and Spediporto”.\(^10\)

In Vendita al dettaglio di prodotti cosmetici,\(^11\) the ICA and the TAR analyzed the competitive dynamics in industries characterized by multimarket contacts. They both took the view that a collusive equilibrium was made highly likely by the fact that the main producers of cosmetics held leading market positions in one or more categories or macro-categories of products sold by large-scale commercial chains. In this scenario, no firm had real incentives to deviate from a collusive pricing strategy, since the simultaneous presence of the main producers in almost all product categories made the risk of retaliation a credible threat.

The Logistica internazionale case provides some interesting indications on different issues. Firstly, the ICA found that the legal advice on the lawfulness of the contested conduct given by a lawyer specializing in competition law did not exclude the firm’s awareness of infringing antitrust rules. The ICA noted that the legal advice requested had not assessed whether the content of the discussions within the association was compatible with competition rules. It was rather focused on “how to

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\(^7\) Decision of August 4, 2011, No. 22648, Case I729, Gara d’appalto per la sanità per le apparecchiature per la risonanza magnetica, Bulletin Nos. 33-34/2011. The decision was quashed by the TAR Lazio in the relevant period. See TAR Judgements of January 15, 2013, Nos. 362-363.

\(^8\) Decision of February 22, 2012, No. 23338, Servizi di agenzia marittima, supra.


\(^10\) Id., para. 4.4.2.

circumvent competition rules, by modifying the content of press releases.\textsuperscript{12}

Following the ICA decision and the TAR ruling, the opinion delivered by Advocate General Kokott in \textit{Schenkder} specifically addressed the issue of the conditions under which an error of law may be excusable. According to the opinion, an error of law excludes liability only when it is “unavoidable” (i.e., when the error is “excusable” or “unobjectable”).\textsuperscript{13} Advocate General Kokott held that this may be the case when the firm concerned has adopted all possible and reasonable measures to prevent antitrust infringements, by calling upon the expertise of an external lawyer specializing in competition law, who has carried out a scrupulous and comprehensive analysis on the basis of all relevant circumstances.\textsuperscript{14}

In the same case, the TAR also addressed the issue of the proof of the subjective element of a concerted action. In line with settled case law, the TAR noted that, when a full proof is not available (as it is usually the case in antitrust investigations concerning the most anticompetitive agreements), a finding of infringement may be grounded on serious, specific and consistent circumstantial evidence showing concertation and coordination. The court added that, in order to find an antitrust infringement, it is sufficient to ascertain a “general intent” to carry out the contested conduct. The TAR found that the proof of a concerted action may be based on circumstantial evidence, such as: the duration, uniformity and parallelism of behavior; meetings between firms; commitments, even if generic and apparently ambiguous, to implement common strategies and plans; reciprocal signals and information exchange; and the results achieved by the contested practice, which could not result from unilateral decisions, but only from concerted conduct.\textsuperscript{15}

Finally, the TAR provided clarification on the unitary and continuous nature of an agreement. It specified that those features are not excluded by the fact that the concertation at issue is not continuous, in so far as different kinds of behavior can be ascribed to the same anticompetitive objective.

In \textit{Prezzo del GPL per riscaldamento Regione Sardegna}, the administrative judges dealt with the issue of the probative value of leniency applicants’ statements that are not substantiated by documentary evidence.\textsuperscript{16} The Council of State found that the evidence collected by the ICA had not enabled it to prove a restrictive agreement. However, according to the Council of State, the value of a leniency applicant’s statements must be assessed by striking a careful balance between, on the one side, the need not to extend unduly the use of presumptions and, on the other side, the need to overcome the difficulties faced to prove infringements that normally cannot be proved through documentary evidence. Therefore, the leniency applicant’s statements

\begin{itemize}
\item \textsuperscript{12} Decision of June 15, 2011, No. 22521, \textit{Logistica Internazionale}, supra, para. 282.
\item \textsuperscript{13} Opinion of Advocate General Kokott of February 28, 2013, Case C-681/11, \textit{Bundeswettbewerbsbehörde and Bundeskartellamwalt/Schenker & Co. AG et al.}, not yet reported, para. 45.
\item \textsuperscript{14} \textit{Id.}, paras. 62-73.
\item \textsuperscript{15} TAR Judgements of March 29, 2012, Nos. 3025-3042, para. 4.3.7. See also, \textit{inter alia}, TAR Lazio Judgement of October 3, 2006, No. 9878.
\item \textsuperscript{16} TAR Judgement of December 13, 2010, No. 36126, and Council of State Judgement of May 23, 2012, No. 3026.
\end{itemize}
must be regarded as having a significant probative value. In this case, the court held that the leniency applicant’s allegations could not be regarded as full proof, since they were not detailed and substantiated by facts. Nonetheless, the Council of State held that the leniency applicant’s allegations were characterized by a *quid minimum* enabling them to provide “information or evidence … crucial to establish an infringement, possibly through a targeted inspection”.  

The Council of State added that, in most cases, in order to prove a restrictive agreement, the ICA does not have direct evidence (such as documents or testimonies of the authors of the infringement), but only indirect or circumstantial evidence, which, however, is not necessarily weaker than the former. In line with settled case law, the Administrative court distinguished endogenous circumstantial evidence, such as the lack of alternative explanations, from exogenous circumstantial evidence, such as contacts and information exchanges among the firms concerned.

In this case, the Administrative court endorsed the ICA’s view that endogenous circumstantial evidence pointed at the existence of a concertation. As to exogenous circumstantial evidence, the Council of State stated that the existence of contacts and information exchanges between competitors allows presumption of the existence of an anticompetitive agreement, thus reversing the burden of proof. In these circumstances, it is for the firms concerned to explain the economic rationale behind their parallel conduct. As the parties had not discharged their burden of proof, the ICA was right to conclude that the parallel conduct reflected an unlawful concertation.

### 2.2. Merger Control: the Dominance Test and the Analysis of Unilateral Effects

The recent decision practice confirms the ICA’s tendency to focus on the assessment of unilateral and coordinated effects by applying the dominance test provided for by Law No. 287/1990 in a flexible manner, so as to align the national merger control system with the EU system, which is based on the significant impediment to effective competition test.

In *Bolton Alimentari/Simmenthal*, the ICA analyzed a nearly merger-to-monopoly, with combined market shares equal to 80-90%. In response to the parties’ arguments, the ICA analyzed not only the structural impact of the concentration and other factors indicative of dominance, but also the likely price increase caused by the transaction, which was estimated using the upward pricing pressure (UPP) method. This method has been extensively discussed in economic literature in recent years and is explicitly mentioned by the recent US Horizontal Merger Guidelines. The ICA found that the concentration would have enabled the merged entity to increase its

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prices. In order to establish whether the concentration would have led to a price increase, the ICA assessed the degree of proximity between the merging firms’ products by estimating the diversion ratio. This measures the portion of a product’s total sales that is captured by a competitor’s product if the price of the first product increases. Then, the ICA calculated the Gross Upward Pricing Pressure Index (“GUPPI”), which estimates the merged entity’s incentive to increase prices as a result of the concentration and the consequent elimination of a competitive constraint, taking into account the incentive to lower prices arising from possible efficiencies.

In the past, the ICA had already used econometric techniques to estimate the possible impact of a concentration on prices. However, to our knowledge, *Bolton Alimentari/Simmenthal* is the first case in which the ICA applied the GUPPI test. The direct assessment of the likely effects of a concentration on price levels reduces the importance of structural factors: on the one side, indeed, concentrations resulting in substantial market shares may not necessarily be considered incompatible with competition rules; on the other side, transactions that do not lead to high market shares may nonetheless raise competition concerns if the products involved are close substitutes. In *Bolton Alimentari/Simmenthal*, the merged entity would have held an extremely high market share. Other factors also pointed at the constitution of a dominant position. In such a scenario, the estimate of diversion ratios and the GUPPI test were used to confirm and supplement the assessment based on structural indices by measuring in a more rigorous way the possible impact of the transaction on prices. Such an approach constitutes an appreciable refinement of the assessment traditionally carried out under the dominance test provided for by national merger control rules.

Unfortunately, in other cases in which the structural indices were far less significant and, therefore, it would have been appropriate to conduct an in-depth inquiry, including through econometric tools and techniques, the ICA carried out a much less sophisticated analysis. In particular, in *UGF/Premafin*, the ICA contested a risk of creation or strengthening of a dominant position in many insurance markets, based on extremely low market share thresholds, equal to 25% at the national level and 30% at the local level. Moreover, in some markets, the main competitor held market shares substantially equivalent to those of the merged entity. Nonetheless, the ICA found that the transaction would have led to the creation of an individual dominant position held by only one of the two leading firms. In addition, the ICA’s charges in *UGF/Premafin* do not seem to be grounded on a rigorous analysis of the unilateral effects of the concentration. Firstly, the *UGF/Premafin* decision was not based on an in-depth analysis of the degree of product substitutability and possible capacity constraints capable of hindering an expansion of competitors’ output in response to a price increase, although those elements are usually considered important criteria in the assessment of unilateral effects.

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20 In particular, in *Sai/Fondiaria*, the ICA applied a complex methodology based on the PCAIDS (Proportionality Calibrated Almost Ideal Demand System) test to estimate the merged entity’s possible prices increase. Decision of December 17, 2002, No. 11475, Case C5422B, *Sai – Società Assicuratrice Industriale/La Fondiaria Assicurazioni*, Bulletin 51-52/2002, paras. 120-125.
Secondly, the ICA did not apply any econometric test to estimate the possible impact of the concentration on prices. It merely presumed that, as a result of the concentration, the acquirer would have raised its prices by approximately 6%, so as to align them with the prices of the acquired firm. However, based on economic theory, there is no reason to presume that the concentration would have resulted in such an alignment, since the actual impact on prices depends on a variety of factors, such as demand elasticity and the competitive constraints remaining on the market.

Thirdly, the ICA focused its analysis of the impact of the concentration on the motor vehicle liability insurance market. In the other markets, the ICA based its finding of dominance essentially on structural parameters (market shares and HHI), without carrying out in-depth analysis of the competitive dynamics and other conditions of the markets concerned. The ICA’s tendency to lower the dominance threshold with a view to align, de facto, the national merger control system with the EU one is open to question. On the one hand, it seems difficult to reconcile with Article 6 of Law No. 287/1990, which provides for a test different from that introduced at the EU level by Regulation No. 139/2004. On the other hand, the introduction in the national merger control system of a substantive standard similar to the EU one cannot be realized by merely lowering the dominance threshold. If market shares are relatively low, the prohibition of a concentration due to its unilateral effects should be based on a detailed analysis aimed at verifying, on the basis of a number of factors and, if possible, through appropriate econometric techniques, whether the transaction may nonetheless result in a significant restriction of competition.

2.3. Abuse Cases

In 2012 and the first months of 2013, the ICA and Administrative courts dealt with some important abuse of dominance cases.

(a) The Misuse of Rights and Legitimate Interests arising from Sector Rules To Create Legal or Administrative Obstacles: The Pfizer and Arenaways Cases

Some of the ICA’s investigations belong to the controversial line of cases concerning the misuse of rights and legitimate interests arising from sector rules through the initiation of judicial or administrative proceedings aimed at obstructing competitors’ activity. This line of cases has been inspired by the AstraZeneca case, in which the Commission and the General Court held that the firm concerned had abused its dominant position by obtaining a supplementary protection certificate on the basis of misleading information and representations provided to the competent authorities.\(^{21}\)

In Pfizer,\(^{22}\) the ICA found that a pharmaceutical company had implemented exclusionary conduct aimed at artificially extending the patent protection of the drug Xalatan in Italy, thus hindering commercialization of generic drugs through two different practices: (i) the misuse of patent procedures; and (ii) the initiation of legal actions aimed at creating a status of legal uncertainty that would have discouraged the commercialization of generic


latanoprost-based drugs, or at preventing such commercialization.

Regarding the first practice, the ICA held that the divisional patent application filed with the European Patent Office by the dominant firm pursued an exclusionary aim, as it was filed 13 years after the main patent application and at the same time as the entry of some equivalent drugs. According to the ICA, the fact that the firm concerned had not launched a new drug based on the divisional patent confirmed the exclusionary purpose. Moreover, the application for a supplementary protection certificate (SPC) filed with the Italian Patent Office by Pfizer was aimed at aligning the duration of the protection of the active ingredient (latanoprost) in Italy with the duration of the European protection. In the ICA’s view, a further confirmation of the exclusionary nature of the contested conduct came from the application for a patent extension for pediatric experimentation, which was filed by the dominant firm notwithstanding that it was aware that only 1% of glaucoma cases concerned children.

As to the second practice, the ICA did not attach any importance to the fact that the legal actions were actually initiated by generic manufacturers, since these lawsuits were a direct consequence of letters warning them not to market generic latanoprost-based drugs, as well as of several actions for damages, seizure and injunctive relief brought against them. The ICA’s decision was quashed by the TAR Lazio. The Administrative court held that “conduct by which, in both administrative and judicial proceedings, Pfizer protected its rights and legitimate interests” may be considered abusive only if it is “characterized by an evident exclusionary purpose in light of an additional factor that adds to the mere sum of lawful initiatives under the administrative and judicial systems”.

According to the TAR, the evidence gathered by the ICA was not sufficient to substantiate the allegations. In particular, the ICA had not taken into account that the divisional patent application (aimed, according to the ICA, at speciously extending the validity of the main patent) was filed seven years before (2002) the expected entry of generic manufacturers into the market (2009) and, in any case, two years before the deadline set by law. Thus, the filing of the application was a lawful exercise of a right, which cannot be considered, in itself, part of an “accurate exclusionary strategy”.

As to the judicial proceedings allegedly aimed at reducing legal certainty for generic manufacturers, the TAR noted that, in most cases, Pfizer was the defendant. The Administrative court considered that the fact that many cases were started by generic manufacturers following caution letters sent by Pfizer was not relevant, as those letters were based on the SPC obtained by the pharmaceutical company and therefore – contrary to the ICA’s assumption – they did not necessarily reflect an anticompetitive purpose.

Finally, the TAR also held that the application for a patent extension based on pediatric experimentation was not clearly exclusionary, since it was based on a divisional patent whose validity was subsequently confirmed by the European Patent Office (EPO).

Similar issues arose in Arenaways. In this case, the ICA held that Ferrovie dello Stato (FS) and

its subsidiaries Rete Ferroviaria Italiana (RFI), which manages access to the railway network, and Trenitalia, the incumbent in the railway passenger transport market, had obstructed Arenaways’ access to the railway network. Arenaways applied for access to the railway network in April 2008 in order to provide services on a route between Milan and Turin, with a series of intermediate stops. The application was reiterated one year later, but access was granted only in November 2010, following a decision by the Office for the Regulation of Railway Services (URSF).

The ICA found that FS had obstructed Arenaways’ access to the railway passenger transport sector through RFI and Trenitalia. In particular, the ICA stated that RFI’s conduct with respect to Arenaways’ application was dilatory. According to the ICA, after the application, RFI started a long consultation procedure (not required by applicable rules) with the Regions of Lombardy and Piedmont and the Ministry of Transport and Infrastructure. Notwithstanding the positive opinion of the Regions, RFI considered it necessary to refer the matter to the URSF on the ground that the presence of intermediate stops between Milan and Turin would jeopardize the economic stability of the public service agreements entered into by Trenitalia. Trenitalia, for its part, allegedly: (i) provided misleading information that led the URSF to forbid the new entrant to set up the intermediate stops (with a decision dated November 9, 2010); and (ii) enhanced its own supply of services on the routes concerned in order to significantly overlap – in terms of timetable and itinerary – with the services that Arenaways intended to provide.

The misuse of rights and legitimate interests lies at the boundary of antitrust liability. In some cases, these practices may prevent or hinder competitors’ access to the market. However, such a result is not due to economic barriers raised by commercial conduct, as usually happens in abuse cases, but to the creation of legal and administrative obstacles to competitors’ activities through the exercise of faculties provided for by law or legal actions aimed at protecting firms’ interests.

An abusive exercise of a right or legitimate interest may be found when the contested conduct is characterized by an additional element that is intrinsically objectionable, such as the provision of false or misleading information to a regulatory authority. However, the distinction between legitimate exercise and abuse of a right or legitimate interest becomes considerably more difficult and ambiguous when a dominant firm merely uses administrative or judicial procedures to protect its position and commercial interests. The distinction between abuse and legitimate conduct cannot be based merely on the dominant firm’s intent. Reference to the dominant firm’s exclusionary intent opens the door to considerable uncertainty and to a high margin of appreciation in the assessment of corporate statements, internal documents and commercial choices. In addition, a firm’s intent is not in itself sufficient to distinguish legitimate from anticompetitive conduct. Indeed, the aim pursued by any firm competing on the market is, in a way, to prevail against and, eventually, to exclude its competitors. Moreover, in many cases, the ratio of the rules invoked by the dominant firm is just to exclude or limit, to a certain extent, competition from other players. This is the case, for instance, with the rules granting and protecting intellectual property rights, as well as those allowing competitors to access a facility, or to
carry out an economic activity, only within certain limits and under certain conditions. In those cases, if a mere exclusionary intent was enough to find an abuse, the very function of the above-mentioned rules would be denied. Therefore, it is necessary to prove not only clear exclusionary intent, but also an anomalous exercise of the rights and legitimate interests concerned, aimed at achieving objectives different from those typically pursued by the relevant rules. This may the case, in particular, when the contested conduct is part of a broader anticompetitive practice. In this respect, it may be useful to recall the rulings delivered by the ECJ some decades ago in Volvo and Renault. In these cases, the ECJ found that the exercise of an intellectual property right to exclude third parties and a refusal to license were not as such abusive, since they were the very subject-matter of the rights concerned. According to the ECJ, the above-mentioned practices would have fallen within the scope of Article 102 TFUE only if they were part of a broader behavior that was abusive in itself, such as the imposition of excessive prices, the refusal to supply unauthorized repairers, and the refusal to produce spare parts for vehicles still in circulation. The same rationale may also apply to the abusive exercise of other rights and legitimate interests protected by the legal system.

(b) The Refusal to Grant Access to an Essential Facility: The Bayer Case

In Bayer, the TAR and the Council of State dealt with a particular case of refusal to grant access to an essential facility, and reached conflicting conclusions. The TAR quashed the ICA’s decision fining Bayer Cropscience Srl (BCS) for having abused its dominant position in the market for the production and sale of a fungicide based on the active ingredient fosetyl-aluminium (Fosetyl), which is used to protect vines from a disease. The ICA contested that BCS had repeatedly refused to grant the European Union Fosetyl-Aluminium Task Force, which represented several drug manufacturers, access to two scientific studies concerning Fosetyl’s impact on human health and the environment. Those studies were necessary to obtain or renew the authorization to market products based on the active ingredient concerned. According to the ICA, EU rules did not allow for replication of BCS’ studies, since they were carried out on vertebrate animals. Due to their non-replicability, those studies represented de facto an essential facility, which was necessary to access the relevant market.

A decree of the Ministry for Economic Development, issued on February 8, 2007, had introduced a conciliation and arbitration mechanism to be applied when parties do not reach an agreement on the sharing of the results of tests on vertebrate animals. However, the conciliation and arbitration procedure was not activated in time. As the negotiations did not lead to a positive outcome, the Ministry of Health eventually withdrew the Task Force’s authorizations. According to the ICA, during the negotiation and conciliation phases, BCS adopted a dilatory strategy, which reflected an exclusionary intent. Furthermore, BCS’ refusal was not justified.


26 TAR Judgement of May 16, 2012, No. 4403.
from an economic standpoint, since the applicable rules provided for the payment of a fair consideration, based on a sharing of the costs to carry out the studies. In this case, the Task Force had offered to compensate the entire cost sustained by the holder of the studies.

The TAR quashed the ICA’s decision. The Administrative court focused on the notion of essential facility. While recognizing that BCS had not had a cooperative attitude, the TAR noted that the dominant firm had not created a legitimate expectation on the granting of the studies, which could have led the Task Force not to activate in time the conciliation and arbitration procedure provided for by applicable rules. Thus, the fact that the Task Force had not used the procedures aimed at obtaining a renewal of the authorization could not be ascribed to BCS.

According to the TAR, the above-mentioned studies could not qualify as an essential facility because “the duty to grant access to a resource is certainly not unconditional, and it is limited in case of inadequate conduct” of the applicant. Since the very concept of essential facility “departs from indisputable principles on property rights, access to a resource, even for a consideration, must be imposed by an objective situation that makes such access essential, and thus that is not attributable to the applicant”. In this case, “the availability of a formal procedure for accessing a resource excludes that the holder of the resource is obliged to grant access to it when such procedure has not been initiated, except when it is objectively impossible to do so in the circumstances”.

Thus, in the TAR’s view, the Task Force had a specific procedure at its disposal, which it was not able to use adequately. The negative consequences of the unavailability of the resource had to be ascribed to the Task Force, and not to BCS. The TAR also rejected the ICA’s view that it was impossible to replicate the studies. According to the Administrative court, the applicable rules did not prohibit any replication, but only discouraged it and favoured the sharing of information on studies already realized. This was confirmed by the fact that the Task Force had already obtained marketing authorization in Portugal. In addition, the TAR stated that the alleged prohibition of replication was introduced by Regulation 1107/2009/CE, which entered into force after the contested facts. As a consequence, the ICA could not rely on this prohibition in order to condemn BCS’ refusal.

The Council of State did not uphold the TAR’s conclusions. On the contrary, it endorsed the ICA’s initial view that BCS had unlawfully denied access to its studies in order to exclude the Task Force from the market for Fosetyl-based fungicides. The administrative supreme court held that, due to special responsibility of dominant firms, BCS was obliged to put the studies at the competitors’ disposal. The Council of State stated that, in light of EU case law on refusal to deal, an obligation to share assets with competitors arises when the following conditions are met: (i) the resource cannot be replicated; (ii) no valid alternative is available on the market; (iii) the firm requesting access

27 Id.

intends to commercialize a new product; (iv) there is no objective justification for the refusal; and (v) competition is eliminated to the detriment of consumers. In the case at hand, according to the Council of State, those conditions were met:

(i) the studies could not be replicated. In this respect, the Council of State noted that Directive 91/414/CEE, implemented in the national legal system by Legislative Decree No. 194/1995, already contained some provisions that were basically against the duplication of toxicological tests on vertebrate animals. Regulation 1107/2009/CE merely confirmed that position;

(ii) there were no alternatives on the market, as it was necessary to attach BCS’ studies to the application for registration of Fosetyl-based products. As a consequence, the Task Force was obliged to “continue to operate only by relying on BCS’ supplies, or to commercialize fungicide products based on active ingredients other than Fosetil”. In both cases, it would not have effectively and directly competed with BCS;

(iii) as to the introduction of a new product, the Council of State noted that, “for the Task Force, the necessity to obtain a new registration of the product is tantamount to obtaining the authorization for a new product”;

(iv) the refusal to grant access to the studies was not justified. According to the Council of State, the failure to start the authorization procedure was essentially due to BCS’ obstructive conduct, which denied access to the essential facility notwithstanding the offer of a fair consideration correlated to the costs borne by BCS to complete the studies; (v) as a result of the withdrawal of the Task Force’s authorizations, companies belonging to the Bayer group remained the only vertical integrated operator active both in the upstream market for the sale of the active ingredient and in the downstream market for the sale of Fosetyl-based final products.

Thus, the Council of State held that the Task Force’s inactivity in starting the procedures provided for by applicable rules was not relevant in the assessment of BCS’ conduct, which was considered contrary to EU principles and rules in itself, regardless of other parties’ behavior.

The Council of State’s judgement also confirms the tendency to adopt a broad and flexible interpretation of the requirements set forth by EU case law on refusal to grant access to an essential facility, so as to widen the scope of antitrust duties to deal. This is shown, in particular, by the laconic grounds concerning the requirement of the introduction of a new product. This condition, which is required by EU case law in case of refusal to grant access to resources protected by intellectual property rights, aims at guaranteeing an adequate balance between the need to provide access to certain inputs, on the one hand, and the need to safeguard incentives to invest and innovate, on the other.

In Bayer, the Council of State seems to assess the new product requirement from the standpoint of firms that intend to carry out a certain activity on the market. However, EU case law requires verification of the innovative character of the good or service concerned with respect to the products already offered by
the dominant firm. A limitation of the IP right holder’s commercial freedom is justified only when competitors do not intend merely to supply the same product already marketed by the dominant firm, but want to launch an innovative product, for which a potential demand exists on the market. The firms participating in the Task Force planned to sell basically the same product already marketed by BCS. In such a scenario, the new product requirement does not seem to be met.

(c) Pricing Strategies: The “TNT Post Italia/Poste Italiane, Telecom” and “Applicazione dell’IVA sui Servizi Postali” Cases

In 2012, the TAR annulled the ICA’s decision imposing a fine of € 39.3 million on Poste Italiane for abuse of dominance. The TAR judgement provided important clarification on the criteria to be followed in the analysis of predatory pricing.

The ICA found that Poste had implemented an exclusionary strategy through, inter alia, the offer of below-costs prices for: (i) the guaranteed date and time delivery service “PostaTime”, which competed with TNT’s service “Formula Certa”; and (ii) a guaranteed date and time delivery service and notification services through messengers in two tenders issued by the Municipality of Milan and Equitalia.

In the analysis of the alleged predatory prices, the ICA used an incremental measure of cost (long-run average incremental cost, or “LRAIC”), in line with the most modern approach adopted in economic theory and EU competition practice. However, the ICA estimated a LRAIC exceeding or equal to average operating costs resulting from regulatory accounts, which include, by definition, not only the costs specifically borne to produce a given service, but also a share of common costs.

The Administrative court severely criticized the ICA’s analysis of predatory pricing. According to the TAR, the ICA had not adequately proved that the prices offered by Poste for the PostaTime service were below LRAIC. The TAR found, inter alia, that the ICA: (i) had erroneously identified the costs specifically borne for the provision of the PostaTime service, as it had qualified as incremental some resources that would have been in any case used for the provision of other services; and (ii) had verified whether the prices offered covered costs only with regard to the first full year of activity, without taking into account the likely reduction of unit costs after the increase in sales in the following years. Furthermore, the TAR noted that the absence of a predatory strategy was also confirmed by the fact that TNT had maintained its preeminent position in the market for guaranteed date and time delivery services.

The TAR reached similar conclusions with regard to the alleged predatory prices offered in the tenders issued by the Municipality of Milan and Equitalia. In particular, the Administrative court stated that: (i) the LRAIC cannot be presumed to be equal to the average operating cost resulting from regulatory accounts, since they include a share of common costs; (ii) if the characteristics and cost conditions of services provided to a particular customer differ from those of other similar services, the ICA cannot base its predation analysis on average national costs, but must take into account the specific cost conditions of the services concerned; and

(iii) if the agreement with a client is awarded on the basis of total prices offered for an integrated service including several services/activities, the predatory nature of the prices must be assessed with reference to the overall offer, instead of its components.

The TNT Post Italia/Poste Italiane case testifies to the need to adopt a cautious approach in the assessment of dominant firms’ pricing policies in order to avoid the risk that antitrust intervention prevents or discourages price competition.

However, in some recent cases, the ICA seemed to adopt a formalistic and intransigent approach, which is difficult to reconcile with the Commission’s attempt to introduce a more economic approach under Article 102 TFUE and a refinement of the criteria used in the analysis of price abuses.

In particular, in Wind-Fastweb/Condotte Telecom Italia, the ICA fined Telecom for, inter alia, having adopted a discount policy for business customers in the market for retail access to the fixed telephone network, which was capable of preventing an equally efficient competitor from profitably operating on a long-lasting basis in the same market, given the prices for wholesale access to the network charged by Telecom.\(^3\)

According to the ICA, the incumbent’s discount policy gave rise, at least in the period 2009-2011, to a squeeze of competitors’ margins, which restricted competition in the retail access market for non-residential customers. Such discounts would have been available only to customers who carried out selection procedures and were located in contestable geographical areas (i.e., those where the unbundling of the local loop was available). Based on the ICA’s analysis, Telecom would not have been able to sell retail services at the prices offered to its customers without incurring losses if it had to pay the wholesale price charged to its competitors.

In order to establish a margin squeeze, the ICA used as a benchmark not the average prices actually charged at the retail level, nor the individual offers addressed to different customers, but the prices resulting from a hypothetical simultaneous application of the maximum discounts provided for by Telecom’s price lists for the different types of narrowband access services. In other words, the ICA seemed to contest a potential abuse, consisting of the margin squeeze that could have occurred had the incumbent’s commercial units applied the maximum discount level provided for by the price lists. It is at least open to question whether a finding of abuse may be grounded on a potential conduct which has not been carried out.

In Applicazione dell’IVA sui servizi postali,\(^3\) the ICA held that the internal tax rules were incompatible with the EU rules on VAT exemption, as interpreted by the ECJ, in that they exempted from VAT all universal postal services, even if they are provided on the basis of individually negotiated conditions. The ICA considered the non-application of VAT a discount granted by the incumbent to its clients. On this basis, the ICA found a violation of Articles 102 and 106 TFEU and Article 4 TEU. However, the ICA did not impose a fine because the contested conduct was necessitated by internal tax rules.

\(^3\) Decision of May 9, 2013, No. 24339, Case A428, Wind-Fastweb/Condotte Telecom Italia, Bulletin No. 20/2013.

\(^3\) Decision of March 27, 2013, No. 24293, Case A441, Applicazione dell’IVA sui servizi postali, Bulletin No. 16/2013.
In this case, there was no proof of the non-replicability of the incumbent’s VAT-exempted tariffs. Indeed, the prices including VAT offered by competitors were lower than the VAT-exempted tariffs charged by the incumbent. In its decision, the ICA stated that the replicability of the incumbent’s VAT-exempted tariffs was irrelevant, since the contested conduct was not a predatory practice, but the grant of a discount equal to the VAT not applied by the incumbent. This advantage was “a privilege exclusively conferred” on the universal service provider, and was “by definition not replicable” by competitors, which are obliged to apply VAT to their services. Accordingly, Poste’s conduct was considered “per se exclusionary”.34

The notion of per se price abuse adopted by the ICA seems to be difficult to reconcile with the more economic approach introduced by the Commission Guidance on exclusionary abuses,35 as well as with the principles established by EU case law. Indeed, in the recent Post Danmark case,36 the ECJ stated that the granting of discounts to certain customers cannot be considered per se unlawful, as it is necessary to analyze the relationship between prices and costs and the possible exclusionary effects of the contested conduct.

3. The Relationship between Competition and Regulation

Some decisions issued by the ICA and Administrative courts in the period under review concerned the controversial issue of the relationship between competition and regulation, which is characterized by an increasing risk of conflicts of jurisdiction and interferences between different authorities.

3.1. The Convergence between Competition and Regulation

The conventional distinction between regulation, which intervenes ex ante, and competition rules, which are applied ex post, seems to be increasingly blurred. The convergence between the two sets of rules is due to two main reasons: on the one hand, competition rules provide for important ex ante tools, such as merger control and commitment decisions; on the other hand, sector-specific regulation is often based on competition law criteria and principles, and gives regulatory authorities various ex post powers, including the power to fine certain infringements.

The issue of the relationship between the two sets of rules has arisen in two main types of case: (i) in some cases, the application of competition rules led to the imposition of obligations incompatible with sector-specific rules; (ii) in other cases, competition law seemed to supplement sector-specific regulation by imposing additional and stricter obligations.

34 Id., para. 212.
36 Case C-209/10, Post Danmark A/S v Konkurrencerådet, not yet reported.
3.2. The Conflict between Sector-Specific Regulation and Competition Law

In principle, the conflict between sector-specific regulation and competition law could be addressed through the application of different principles and legal tools.

Firstly, regulatory authorities must not introduce or maintain in force measures which may render ineffective the competition rules applicable to firms. Furthermore, based on the CIF judgement, administrative authorities are obliged to disapply national rules which may undermine the effectiveness of EU competition law.

Secondly, pursuant to Article 21 of Law No. 287/1990, the ICA can report to the Parliament and the Government any laws, regulations or general administrative acts that give rise to distortions of competition not justified by general interest considerations.

Thirdly, under Article 21-bis of Law No. 287/1990, the ICA may challenge general administrative acts, regulations and decisions of public administrations that are incompatible with competition law principles.

The conflict between competition law and sector-specific regulation has been the subject of two recent rulings of the TAR concerning the postal sector. In both cases, the TAR stated that the ICA had erred in fining the incumbent for conduct required by sectoral rules.

In particular, in PEIE, the ICA held that the incumbent had imposed restrictive conditions for access to hybrid mail services, thus hindering competitors’ entry into the market.

In TNT/Poste Italiane, the ICA contested that the procedure applied by the incumbent to handle competitors’ unstamped mail items found in the postal network was not compatible with competition rules, as the universal service provider directly contacted the sender rather than the competitor, and charged the full postal tariff for the restitution of these items to the sender. In both cases, the ICA stated that the contested practice was not justified by sector-specific rules, as the latter left the dominant firm with sufficient scope for autonomous conduct. The TAR, however, held that the incumbent had only applied sectoral rules.

Based on the principles established by the ECJ in CIF, the ICA could disapply national rules, and impose a penalty on the incumbent in respect of conduct subsequent to the decision to disapply the national legislation, but it could not fine the firm for past conduct, which the firm was required to do by national rules.

In TNT/Poste Italiane, the TAR seemed to take a critical stance towards the ICA’s tendency to use competition rules to implement regulatory interventions. It stated that, in the contested decision, the ICA had actually “criticized the legal system”, and that it could not modify or supplement sector-specific regulation, let alone through the imposition of fines.

Similar issues arose in Applicazione dell’IVA ai servizi postali. In this case, the ICA contested that the non-application of VAT to postal services provided on the basis of individual agreements (i.e., agreements deviating from the standard conditions of the universal service)
infringed EU principles on VAT exemption, as interpreted by the ECJ. According to the ICA, the contested conduct would have been required by national tax law, which provides for the exemption of all universal postal services, without excluding those that have been individually negotiated with customers. Unlike the approach adopted in PEIE and TNT/Poste Italiane, the ICA did not levy any sanction for the contested practice, and limited itself to disapply national rules, which were considered incompatible with Articles 102 and 106 TFEU and Article 4 TEU to the extent that they did not exclude individually negotiated services from the scope of the VAT exemption.

It is at least open to question whether the non-application of VAT can be considered a commercial conduct falling within the scope of Article 102 TFEU, or is just an effect of internal tax rules, which cannot be assessed, as such, under EU competition law. The ICA ultimately challenged the “exclusive privilege granted” to the universal service provider by internal tax rules. However, in the case of laws that create a distortion of competition not justified by general interest considerations, the ICA should report the distortion to the Parliament and the Government under Article 21-bis of Law No. 287/1990. Even in this case, the application of competition rules raises sensitive questions as to the limits of antitrust intervention in highly regulated sectors.

3.3. The Application of Competition Law To Impose Additional and Stricter Obligations than Those Stemming from Sectoral Rules

In some cases, antitrust intervention imposes additional and stricter obligations than those stemming from sectoral rules. This leads to an overlap between competition law and sector-specific regulation, which may give rise to significant doubts on the relationship between the two sets of rules.

The concurrent application of competition law and sector-specific regulation is usually justified on the basis of the principle of complementarity: competition rules apply even in highly regulated markets because regulation pursues different goals and may leave firms with sufficient scope for anticompetitive conduct, which should be prohibited under antitrust law.

This principle has been applied by administrative authorities – and, for a certain period, endorsed by the TAR – in the field of unfair commercial practices. However, the ICA’s tendency to apply general rules on unfair commercial practices also to cases already brought to the attention of regulatory authorities led, in 2012, to a series of rulings of the Council of State (Plenary Session) that significantly limited the scope for overlap between different sets of rules. The Council of State held that, pursuant to the principle of speciality, sector-specific regulation prevails over general consumer protection rules if the former: (i) is aimed at protecting the same interest as consumer protection law; (ii) is detailed and exhaustive; and (iii) is enforced by an authority with sufficient fining powers. If this is the case, general rules do not apply.42

Administrative case law, however, still permits the concurrent application of competition rules

42 See Council of State, Plenary Session, Judgements of May 11, 2012 Nos. 11, 12, 13, 15, 16, regarding the division of jurisdiction between the ICA and the Italian Communications Authority and, No. 14, regarding the division of jurisdiction between the ICA and the Bank of Italy.
and regulation, on the basis of the above-mentioned principle of complementarity. However, an interventionist attitude of the ICA, based on an extensive application of antitrust rules to practices and areas subject to specific and detailed regulation and to a close supervision by regulatory authorities, might lead to a negative reaction of administrative judges. Signs of such a reaction can be already found in some recent cases.

In *Auditel*, the TAR rejected the argument that the Italian Communications Authority (AgCom) had exclusive competence to monitor dominant positions in the electronic communications sector and to fine possible illegal acts concerning the measurement of audience ratings. The Administrative court noted that the AgCom’s activity aims at guaranteeing pluralism of information, while the ICA protects competition and free market. As the AgCom and the ICA pursue different goals, their competences are fully compatible. As a consequence, full compliance with sector-specific rules issued by the AgCom did not prevent the ICA’s intervention.

However, the Administrative court noted also that the issue of the *actio finium regundorum* between the competences of two independent administrative authorities that may in principle intervene, on the basis of two different sets of rules, must be analyzed in light of the needs to: (i) avoid duplication of intervention and infringements of the *ne bis in idem* principle; (ii) preserve legal certainty; and (iii) comply with the principle of legality of administrative action, which is also connected to the general principle of freedom. The aforementioned criteria prevent any reiteration of the same intervention by different authorities for the enforcement of the same substantive rules.

In *Snam-ENI/AGCM*, the TAR quashed the ICA’s decision, finding an infringement of Article 3 of Law No. 287/1990. The contested conduct, consisting of a refusal to grant access to an essential facility, took place in a regulatory framework characterized by a detailed set of rules, which regulated the timing and conditions for market opening and competitors’ access to the facility, under the supervision of a sector authority. The ICA held that the contested conduct was abusive, despite the fact that it complied with sector-specific regulation.

In the TAR’s view, the ICA had implicitly disapplied sectoral rules in order to “impose [on the dominant firm] a general obligation to grant unconditional access to its network to any firm requesting it, thus rapidly opening the market”. Accordingly, the ICA had assumed functions assigned to the Electricity and Gas Authority. The TAR then concluded that the ICA’s decision not to apply sector-specific rules and to rely on general antitrust rules was unlawful.

Thus, the TAR did not endorse the application of competition law to impose more rigorous obligations than those stemming from sector-specific regulation, so as to accelerate market opening. Given the existence of detailed and comprehensive regulatory provisions, which specified the timing and conditions of access to the network, the principle of speciality implied that sectoral rules ought to prevail.

In this hand, the ICA applied Article 3 of Law No. 287/1990. Had the ICA applied Article 102 TFEU, the outcome of the case might

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44 TAR Judgement of September 3, 2012, No. 7481.
have been different, as the primacy of EU law requires national courts and administrative authorities to disapply any provision of national law in breach of competition rules. However, on the one hand, under Article 106 TFEU, firms entrusted with the operation of services of general economic interest are subject to competition rules only in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. On the other hand, if sector-specific rules implement EU directives, a need to coordinate different sets of rules, both stemming from EU law, arises. Thus, even if EU competition rules apply, it is necessary to verify whether, in the case at hand, the application of these rules thwart the aims pursued by the regulatory framework or unduly interfere with it.

Similar issues arose recently in Wind-Fastweb/Condotte Telecom Italia. In this case, the ICA found that Telecom had issued an excessively high number of rejections of activation (KO) of wholesale access services requested by competitors. According to the ICA, Telecom had treated competitors’ activation requests in a discriminatory way compared to similar requests coming from its own commercial divisions, with regard to both active and inactive lines. By making the activation of network access services requested by competitors more difficult, the dominant firm had restricted their access to the network. Access to Telecom’s network was highly regulated by AgCom’s regulatory measures, as well as by a series of commitments offered by the incumbent a few years ago. These commitments led to the creation of Open Access, a separate division established to ensure internal/external equal treatment and to prevent any forms of non-price discrimination.

Sector-specific rules and the commitments offered by the incumbent, subsequently converted into regulatory measures by the AgCom, provide for a detailed set of obligations and guarantees. Compliance with these rules is monitored by the AgCom and a supervisory body, established by the incumbent to ensure that the guarantees of equal treatment are fully respected. In such a scenario, the enforcement of competition rules to impose additional and stricter obligations on the firm concerned raises delicate issues as to the interference and overlapping between antitrust and sector-specific regulation.

3.4. The TAR Declared Admissible, but Rejected, the Appeal against the Decision to Initiate Proceedings in Arenaways

In light of the increasing risk of conflicts of jurisdiction caused by the overlap between competition law and regulation, it is worth mentioning a ruling delivered by the TAR in 2012, which declared admissible an appeal against a decision to initiate proceedings based on lack of competence.45 FS had appealed the decision to initiate proceedings and the inspection decision issued by the ICA in Arenaways. Arenaways and Codacons, supported by the Avvocatura Generale dello Stato, had objected that infra-proceeding decisions could not be appealed, as they do not cause autonomous and direct harm.

The TAR declared the appeal admissible, but rejected it on the merits. The TAR noted that there is an interest in appealing when the appealed decision caused direct, actual and

concrete harm to its addressee. In the case of decisions to initiate proceedings, it is usually stated that these conditions are not met, given that a negative impact on the addressee will possibly, but not necessarily, take place only following the ICA’s final decision.

The TAR stated that, even in the case of infra-proceedings decisions, there may be an immediate interest in lodging an appeal, although the result pursued by the plaintiff is different. Indeed, when an appeal is lodged against a final infringement decision imposing a fine, the result pursued by the plaintiff is a decision declaring the conduct lawful and annulling the fine. On the contrary, if a decision to initiate proceedings is appealed, the plaintiff’s objective is to stop the proceedings in order not to be subject to the procedural burdens and duties to cooperate, which are particularly onerous in antitrust proceedings, and may lead to the imposition of significant fines under Article 14, para. 5, of Law No. 287/1990, in the case of unjustified omission or refusal. Similarly, in the case of an appeal lodged against the inspection decision, the plaintiff has an interest in avoiding that its documents seized by the ICA officials are disclosed to the complainants, even though this is done within the limits set forth by Article 13 of Decree No. 217/1998.

As a result, an appeal against infra-proceedings decisions should be granted when the appealed decision on itself harms the addressee’s legitimate interests, so that its annulment could secure a result that would not be achieved through the annulment of the final infringement decision. In this case, the decision had given rise to an immediate and autonomous negative effect on the plaintiff’s interests since the ICA had: (i) declared its competence, thus imposing on the private parties the duties set out by Article 14, para. 5, of Law No. 287/1990; and (ii) authorized the inspection that led to the acquisition of documents accessible to the complainants. However, the TAR specified that its review of the decision to initiate proceedings was limited to the existence of the administrative power and did not extend to the way in which that power is exercised. It could analyze only claims concerning the ICA’s competence to initiate proceedings. On the merits, the TAR rejected the claim concerning the lack of competence of the ICA on the ground that, according to settled case law, the existence of sector-specific rules regulating access to the market and of a sectoral authority does not prevent the application of competition rules.

4. Final Remarks

The analysis of decision practice and case law in the period covered by this paper highlights some critical aspects of recent antitrust enforcement, namely: (i) the need to strengthen the fight against cartels, which represent one of the main dangers of modern market economies; (ii) the need to refine the tools used in merger analysis, also through the use of modern econometric methods, in order to bring national practice into line with the Commission’s standards; (iii) the need to enhance the role of economic analysis in the assessment of unilateral exclusionary conduct, also through a more consistent application of the Commission’s Guidance on Article 102 TFEU; and (iv) the need to find a better balance in the relationship between the ICA and sector authorities, so as to avoid overlapping and inconsistencies. A further critical issue is the need to reinforce the protection of the rights of defense. Recent
competition cases seem to be in line with the ICA’s traditional tendency to confirm, in the final decision, allegations made in the decision to initiate proceedings and developed in the statement of objections. The ICA rarely closes the proceedings through a decision finding that there are no grounds for action. However, in many cases, the charges do not stand judicial scrutiny.

The significant number of decisions annulled by courts reflects the limits of the current administrative enforcement system. In its decision practice, the ICA seems to act mainly as investigator and prosecutor, but in the current administrative system it also plays the role of adjudicator. The combination of different powers within one authority creates an anomalous situation. The concerns arising from the combination of powers have increased following the introduction of commitment decisions, as the power to impose heavy fines significantly strengthens the ICA’s negotiating power. This may induce firms to offer commitments even if they face charges that would probably not survive judicial scrutiny, in order to avoid the costs and risks associated with the continuation of proceedings and the subsequent judicial phase.

Psychology and behavioral economics studies suggest that the combination of investigative, prosecutorial and adjudicative functions may result in prosecutorial bias. Competition authorities tend to act, in good faith and often involuntarily, more as prosecutors than as independent adjudicators, thus focusing on evidence supporting the charges and giving less importance to factual and legal elements that are not consistent with the initial allegations.46

The ICA’s role as investigator and prosecutor is crucial to ensuring effective enforcement of competition rules. Nonetheless, in order to modernize and improve the current enforcement system, it would be necessary to review the institutional design of antitrust functions and competences. The current administrative enforcement system should be replaced by a different model, based on the separation between prosecutorial and adjudicative functions.

However, as a radical change in the current institutional design seems to be unlikely and might be difficult to implement, we should at least consider possible improvements of the current administrative enforcement system. These amendments should be aimed at strengthening, on the one hand, procedural guarantees and, on the other hand, judicial review. First, it is necessary to enhance the procedural guarantees aimed at protecting the rights of defense and to separate the prosecutorial and adjudicative phases through measures such as:


46 See W.P.J. Wils, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC.
(i) the creation of different divisions within the ICA in charge of, respectively, prosecutorial and adjudicative functions; (ii) the introduction of adequate guarantees of independence and separation of the two divisions; (iii) the introduction of hearing officers similar to those established at the EU level; and (iv) allowing cross-examination of third parties heard by ICA officials.

Allowing cross-examination seems particularly necessary to guarantee the protection of the rights of defense. In many cases, third parties’ statements, used by the ICA as evidence of infringement, are made by complainants, competitors or clients with interests in conflict with those of the firm under investigation. These statements are made in the absence of the firm under investigation, which is prevented: (i) from asking for clarification on the facts reported and the views expressed by third parties; and (ii) from asking third parties additional questions aimed at demonstrating that the charges are groundless. This obstructs full exercise of the rights of defense.

Secondly, it is necessary to remove the limits on judicial review of antitrust decisions, thus enabling Administrative courts to review fully, in fact and in law, any aspect of the ICA’s finding of infringement, and to pronounce also on the merits of the case. Only a full review of all aspects of antitrust decisions, including complex economic assessments, may be considered compatible with the fundamental right of access to an independent and impartial tribunal established by the ECHR, as interpreted by the ECtHR in Menarini.47 A full judicial review of the merits of the case, carried out ex post by an independent and impartial tribunal, would substantially reduce the risk of prosecutorial bias that is inherent in an administrative enforcement system.

Full judicial review of the merits of antitrust cases should come along with an amendment of the rules on fines: the obligation to pay the fine should be suspended until the decision has become definitive. Limiting the effects of infringement decisions during the judicial phase would avoid exposing firms to a potentially huge financial burden before a full review of the infringement decision is carried out by an independent and impartial tribunal. Moreover, this amendment would allow firms to exercise fully their rights of defense in antitrust proceedings and the subsequent judicial phase, as it would reduce the pressure that may induce them to offer and negotiate commitments not considered necessary or proportionate in order to avoid the serious consequences of an infringement decision.

An improvement of the current enforcement system would not only strengthen the protection of the parties’ rights of defense, but would also contribute to a more effective and efficient enforcement of competition rules, thus reinforcing the ICA’s role and increasing its prestige.

47 See judgment of the ECtHR of September 27, 2011, A. Menarini Diagnostics S.R.L. v Italy, Application No. 43509/08; see also C. Smith, D. Waelbroeck, When the Judge Prosecutes, Power Prevails over Law, in I. Goavere, R. Quick, M. Bronckers (eds), Trade and Competition Law in the EU and Beyond, Edward Elgar Publishing, Cheltenham, 2011 (holding that “the court or the tribunal must proceed with a de novo review of all facts and evidence considered by the Commission”).
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