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Antitrust 20^{Year} 10 in Review



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Italy

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Legislative Developments

There were no new legislative developments regarding competition law in 2010. However, it is worth mentioning that since January 1, 2010 consumers can bring class actions against illegal conduct that harms their interests, something that may be of relevance in the antitrust field.

The class action is available for anticompetitive conduct, unfair commercial practices, product liability and, in general, for business-to-consumer relationships. Seven class actions have been filed before the Italian courts; these proceedings are ongoing but none of them concerns anticompetitive conduct.¹

Mergers

2010 was characterized by a fall in the number of transactions reviewed by the ICA with respect to 2009. Furthermore, none of these mergers raised competition concerns and they were all authorized without the need to open formal proceedings.

Among the mergers was the acquisition by the Gruppo Coin S.p.A. of the entire share capital of UPIM S.r.l.² The transaction, which concerned the clothing and accessories retail distribution market, was unconditionally cleared by the ICA. Despite having a Community dimension, the European Commission referred it to the ICA under Article 4(4) of Regulation 139/04.

In April 2010, the ICA authorized the buy back by Eli Lilly and Company, a US-based company active in the field of medical products, of a trademark which was granted to Boehringer Ingelheim International GmbH, a German pharmaceutical company³, pursuant to a co-marketing agreement for the marketing of duloxetine.

The ICA also cleared the acquisition by Intesa Sanpaolo S.p.A. of a going concern consisting in 50 branches of Monte dei Paschi di Siena S.p.A.⁴ The assignment was made following the implementation of the commitments imposed by the ICA on MPS as a condition for clearing the acquisition of Banca Antonveneta in 2008.

It is worth noting that as from May 2010, the ICA set the turnover threshold for prior notification at (i) €472 million (approximately US\$656 million) for the aggregate national turnover of all the undertakings involved in the transaction and (ii) €47 million (approximately US\$65 million) for the national turnover of the acquired or merged company.⁵

Cartels and other Anticompetitive Practices

In 2010 the ICA opened nine cartels proceedings, one more than in 2009. Decisions were issued in three of these cases, one of which was examined under Article 2 of the Italian Competition and Fair Trading Act (Law 287/90) and the other two under Article 101 TFUE.

* The contribution for Italy was written by Alberto Pera, Valentina Caticchio and Aurora Muselli of Gianni, Origoni, Grippo & Partners.

1 The first decision on a class action filed against Intesa San Paolo S.p.A. concerning the overdraft applied to bank accounts was dismissed as inadmissible by the Tribunal of Turin (Decision of June 4, 2010) as there was no prejudice suffered by the claimant (whose definition as a "consumer" was also disputed) and therefore it lacked the procedural requirements to bring an action. Other actions are still pending: (i) against UniCredit Banca S.p.A. and Intesa San Paolo S.p.A. before the Court of Rome concerning interchange fees, (ii) an action filed against Voden Medical Instruments S.p.A. in respect of the money paid for the swine-flu vaccine before the Tribunal of Milan, (iii) an action brought against UniCredit Banca S.p.A. and Banca d'Italia concerning loan agreements, (iv) a class action brought against the British American Tobacco in the Court of Rome, (v) an action against a tour operator, Wecantour, for refunds in respect of ruined holidays and (vi) an action against Banca Popolare di Novara S.p.A. in respect of overdrafts applied to bank account holders.

2 ICA, January 1, 2010, Decision 20704, Case C10420, Gruppo Coin/Upim, available in Italian at www.agcm.it

3 ICA, April 22, 2010, Decision 21040, Case C10539, Eli Lilly and Company-Eli Lilly Export/Ramo d'Azienda di Boehringer Ingelheim International, available in Italian at www.agcm.it.

4 ICA, May 19, 2010, Decision 21151, Case C10510, Banca Cassa di Risparmio di Firenze/50 Sportelli di Banca Monte dei Paschi di Siena, available in Italian at www.agcm.it

5 ICA, May 26, 2010, Decision 21123, Rivalutazione soglie fatturato ex art. 16, comma 1, della legge n. 287/90. This threshold increase, introduced by Section 16 of the Italian Competition Act, is based on the increase in the GDP price deflator index which the General Report on the Economic Situation in Italy indicated as 2.15% in 2009.

More specifically, in June 2010, the ICA imposed a fine of €14,254 (approximately US\$19,863) on the Consiglio Nazionale dei Geologi (National Council of Geologists) for inducing, through the Code of Conduct, an alignment of the tariff applicable to the relevant services in breach of Article 101 TFEU.⁶

On May 2010, another case concerned an infringement of article 2 of Law no. 287/90 by TransCoop (a consortium providing local public transport for disabled people) which used certain clauses contained in the consortium regulation as well as the service assignment mechanism to impede the exit of the companies from the consortium and, as a result, their access to a local market. TransCoop was ordered to cease the anticompetitive conduct but no fine was imposed.⁷

In March 2010, the ICA found that Butangas S.p.A., Liguigas S.p.A. and Eni S.p.A. had engaged in anticompetitive conduct consisting in jointly fixing a retail price for bottled LPG sold throughout the national territory in the 1995-2005 period. As a result, the ICA imposed a sanction of around €7 million (approximately US\$9.5 million) on Butangas and around €17 million (approximately US\$ 23 million) on Liguigas, while Eni was exempted from a fine by virtue of its leniency application.⁸

On October 2010, the ICA accepted the commitments proposed by Associazione Bancaria Italiana and Consorzio Bancomat consisting in a reduction in the value of the interchange fees applicable to the provisions of payment and cash withdrawal services.⁹ At the same time, the ICA closed another case involving Consorzio Bancomat that concerned the conditions applicable to transactions concluded with debit cards after certain commitments were given.¹⁰

In November 2010, the ICA sanctioned Mastercard as well as eight banks for entering into an anticompetitive agreement aimed at maintaining the commission applied to credit card payments at an unreasonably high level.¹¹

In December 2010, the ICA fined 15 cosmetic companies for infringement of Article 101 TFEU.¹² In particular, the companies were found to have coordinated the increase in the prices communicated annually to the operators in the large-scale retail channel. According to the ICA, the Italian Association of Brand Industries, Centromarca, was also involved in the cartel as it had facilitated the coordination among its members.

In December 2010, ICA closed, subject to commitments, an investigation which it had opened in January 2010 against Edipower (a joint venture controlled by Edison in which other tollers companies have a stake) and the tollers themselves for alleged coordination of supply strategies and capacity withholding. The antitrust investigation began following a report by the Italian Energy Regulator, which had pointed out anomalous trends in prices in a local wholesale electricity market characterized by rising demand and a lack of supply. The tollers companies committed themselves to entrusting solely to Edipower the fuel procurement activities and the preparation of electricity offers on the power exchanges, in order to avoid any risk of coordination of the respective supply strategy. This commitment specifically concerned a power plant which is generally essential for meeting local demand during peak hours. Further, the tollers undertook to opt for a regulatory regime under which certain electricity producers (whose capacity is essential for grid security at certain times) were bound to submit bids in the energy exchange markets in accordance with instructions determined by the transmission network operator. Such a regime prevented producers from freely determining price and quantities (and thus also remuneration) for such bids.¹³

Among the proceedings still pending, the following are particularly of note: (i) two investigations into suspected coordination among, respectively, companies producing medical equipment¹⁴ and medical insurance companies¹⁵ in the context of public tenders; (ii) a proceeding opened in respect of the Consorzio Nazionale Recupero e Riciclo degli Imballaggi a base Cellulosica (Comieco) to evaluate whether a waste assignment mechanism was in breach of

6 ICA, June 23, 2010, Decision 21279, Case I713, Consiglio Nazionale dei Geologi/Restrizioni Deontologiche sulla Determinazione dei Compensi, available in Italian at www.agcm.it.

7 ICA, May 26, 2010, Decision 21162, Case I717, TransCoop/Servizio Trasporto Disabili, available in Italian at www.agcm.it.

8 ICA, March 24, 2010, Decision 20931, Case I700, Prezzi per il GPL da Riscaldamento Regione Sardegna, available in Italian at www.agcm.it.

9 ICA, September 30, 2010, Case I725, Accordi Interbancari "RIBA - RID - BANCOMAT", available in Italian at www.agcm.it.

10 ICA, September 30, 2010, Case I724, Commissione Interbancaria PagoBancomat, available in Italian at www.agcm.it.

11 ICA, November 3, 2010, Case I720, Carte di Credito, available in Italian at www.agcm.it. In relation to this case, see section E below.

12 ICA, December 15, 2010, Case I701, Vendita al dettaglio di prodotti cosmetici, available in Italian at www.agcm.it.

13 ICA, December 22, 2010, Decision 21962, Case I 72, Tolling Edipower, available in Italian at www.agcm.it.

14 See ICA, pending Case I729, Gara d'appalto per la sanità per le apparecchiature per la risonanza magnetica, available in Italian at www.agcm.it.

Article 101 TFUE;¹⁶ (iii) an investigation into several shipping companies' conduct consisting in the exchange of information on costs with the purpose of coordinating the increase in the price charged to consumers;¹⁷ (iv) a proceeding concerning alleged anticompetitive conduct by several oil companies to coordinate their commercial strategies in the bitumen market.¹⁸

Abuses of a Dominant Position

In 2010, the ICA concluded only one case with a finding of infringement, while two cases were dismissed and the remaining ones closed following acceptance of commitments.

More specifically, in June 2010, Saint-Gobain Ppc Italia S.p.A. was found to have breached Article 102 TFUE in respect of exclusionary conduct aimed at impeding the entry of another company into the market for the production of slabs or plasterboard.¹⁹ As a result, the company was fined around €2 million (approximately US\$2.8 million)

In 2010, the ICA concluded six proceedings after accepting commitments. These concerned: i) an alleged abuse by Sky Italia S.r.l. consisting in the application of more favorable conditions of access to its satellite platform to its internal division with respect to other TV operators;²⁰ ii) possible abuse by Grandi Navi Veloci involving an aggressive policy aimed at excluding T-Link from the ferry transport of vehicles market;²¹ (iii) alleged abuse of a dominant position by the Lega Calcio with reference to the selling of the broadcasting rights relating to the football championship;²² iv) possible abuse by several gas and electricity supplier companies consisting in impeding, or delaying, the entry of new operators into the gas and electricity supply

market²³; v) possible abuse by Google Italy S.r.l. consisting in using non-transparent criteria for news ranking within the "Google News" service in order to favor certain operators to the detriment of others²⁴; and vi) possible abuse by ENEL consisting in a limitation of its energy production in order to determine the scarcity of energy ultimately resulting in a price increase in the price of energy.²⁵

Among the pending cases, it is worth highlighting: i) an alleged abuse by Poste Italiane S.p.A. consisting in impeding, or making burdensome, the production and supply of postal services by other operators;²⁶ ii) alleged anticompetitive behavior by Telecom Italia aimed at impeding the participation of other operators in competitive tenders;²⁷ iii) alleged abusive conduct by Ferrovie dello Stato and Rete Ferroviaria Italiana aimed at impeding access to the national railway infrastructure by new entrants;²⁸ iv) possible anticompetitive conduct by Messinambiente consisting in the refusal to supply a contractor with information deemed to be necessary to submit a bid for the assignment of waste collection in Messina;²⁹ and v) alleged abuse of a dominant position by Pfizer consisting in artificially extending the length of the patent for an active ingredient.³¹

Court Decisions

In March 2010, the Lazio Regional Administrative Tribunal quashed a decision adopted by the ICA in April 2009 according to which COBAT (*Consorzio Nazionale Batterie al Piombo Esauste e Rifiuti Piombosi*) and other companies affiliated to the consortium were found to have violated Article 101 TFUE. More specifically, the ICA contested the functioning of the consortium as impeding the development of autonomous systems of battery collection,

15 See ICA, pending Case I731, Gare Assicurative ASL e Az. Osp. Campane, available in Italian at www.agcm.it.

16 See ICA pending Case I730, Gestione dei rifiuti cartacei-Comieco, available in Italian at www.agcm.it.

17 See ICA pending Case I722, Logistica Internazionale, available in Italian at www.agcm.it.

18 See ICA, pending Case I732, Aumento prezzi bitumen, available in Italian at www.agcm.it.

19 ICA, June 30, 2010, Decision 21297, Case A383, Mercato del Cartongesso, available in Italian at www.agcm.it.

20 ICA, July 7, 2010, Decision 21316, Case A407, Conto Tv/Sky Italia, available in Italian at www.agcm.it.

21 ICA, May 19, 2010, Decision 21124, Case A417, T-Link/Grandi Navi Veloci, available in Italian at www.agcm.it.

22 ICA, January 18, 2010, Decision 20687, Case A 418, Procedure Selettive Lega Nazionale Professionisti Campionati 2010/11 and 2011/12, available in Italian at www.agcm.it.

23 ICA, September 8, 2010, Decision 21528, Case A411, Sorigenia/A2A; ICA, September 8, 2010, Decision 21529, Case A411A, Sorigenia/ACEA; ICA, September 8, 2010, Decision 21530, Case A411B, Sorigenia/Italgas; ICA, September 8, 2010, Decision 21531, Case A 411D Sorigenia/Iride; ICA October 21, 2010, Decision 21726, Case A 411C Sorigenia/Hera. All decisions are available in Italian at www.agcm.it.

24 ICA, December 22, 2010, Decision 21959, Case A420, FIEG-Federazione Italiana editori giornali/Google, available in Italian at www.agcm.it.

25 ICA, December 22, 2010, Decision 21960, Case A 423, ENEL – Dinamiche Formazioneprezzi mercato energia elettrica in Sicilia, available in Italian at www.agcm.it.

26 See ICA, pending Case A413, TNT Post Italia/Poste Italiane, available in Italian at www.agcm.it.

27 See ICA, pending Case A426, Telecom Italia-Gare affidamentoservizi telefonia fissa e connettività IP, available in Italian at www.agcm.it.

28 See ICA, pending Case A436, Arenaways – Ostacoli all'accesso nel mercato servizi di trasporto ferroviario passeggeri, available in Italian at www.agcm.it.

29 See ICA pending Case A433, Affidamento del servizio di gestione integrata dei rifiuti solidi urbani nel comune di Messina, available in Italian at www.agcm.it.

30 See ICA pending Case A 431, Ratiopharm/Pfizer, available in Italian at www.agcm.it.

31 See Lazio Regional Administrative Tribunal, Judgment 3578, January 27, 2010, COBAT v. AGCM, available in Italian at www.giustizia-amministrativa.it.

thereby going beyond what was necessary for the pursuit of its statutory goal. The Tribunal rejected the interpretation proposed by the ICA and confirmed the conformity of the conduct concerned with the purpose of the consortium.³¹

In May 2010, the Lazio Regional Administrative Tribunal annulled a decision by the ICA to close a proceeding with commitments.³² The Tribunal concluded that the Authority can only accept commitments when they eliminate any competitive concerns raised by the conduct in question.³³

In September, the Lazio Regional Administrative Court rejected an appeal brought by the company against the ICA's refusal to open a case in respect of Colgate Palmolive Commerciale S.r.l. for abuse of a dominant position and abuse of economic dependence. On the first point, the Court excluded the recurrence of any dominant position and found that such an evaluation necessarily presumes a previous definition of the relevant market which was not carried out in the complaint by the party. Further, the Court excluded the recurrence of any abuse of economic dependence as this is limited to subcontracting which was not recurrent in the present case.³⁴

In November 2010, the Lazio Regional Administrative Court adopted a remarkable verdict annulling the ICA decision which rejected the commitments presented by Mastercard in proceeding I 720³⁵ and, as a result, ordered the ICA to conduct a new analysis of the commitments proposed. This ruling will have a significant effect on the foreseeable

appeal against the ICA's final decision in case I720, in which Mastercard and eight banks were sanctioned for infringement of Article 101 TFEU.³⁶

In December 2010, the Lazio Regional Administrative Court rejected the appeal brought against an ICA decision sanctioning two gas companies for operating a cartel. In the decision, the Tribunal clarified the probative value of the information provided by the leniency applicant affirming that the sole declaration of the whistleblower is not enough to prove an infringement but it should be supported by other evidence.³⁷

On a point of procedure, the Council of State clarified in March 2010 the cases in which the ICA must follow the procedure contained in Article 14 of the Italian Competition and Fair Trading Act. These include those cases investigated pursuant to Article 8, Section 2-bis of the Act, relating to undertakings entrusted with the operation of services of general economic interest or those operating in the market in a monopoly situation, which should act through a separate company if they intend to act outside their special purpose.³⁸

Finally, in a recent decision, the Council of State upheld the appeal brought by the ICA and, as a consequence, overturned the Lazio Regional Administrative Court ruling annulling the ICA decision sanctioning IAMA Consulting for a concerted practice consisting in the exchange of sensitive information concerning insurance companies.³⁹

³² The ICA proceeding referred to is Decision 20687, January 18, 2010, supra note 15.

³³ See Lazio Regional Administrative Tribunal, Judgment 10572, May 10, 2010, Conto TV S.r.l. v. AGCM, available in Italian at www.giustizia-amministrativa.it.

³⁴ See Lazio Regional Administrative Tribunal, Judgment 32364, September 20, 2010, G.M.F. S.r.l. v. AGCM, available in Italian at www.giustizia-amministrativa.it.

³⁵ See Lazio Regional Administrative Tribunal, Judgment 33474, November 16, 2010, Mastercard v. AGCM, available in Italian at www.giustizia-amministrativa.it.

³⁶ See supra note 11.

³⁷ See Lazio Regional Administrative Tribunal, Judgment 36126, December 13, 2010, Liguigas, Butangas v. AGCM, available in Italian at www.giustizia-amministrativa.it.

³⁸ See Council of State, Judgment 1307, March 8, 2010, AGCM v. Italgas S.p.A. available in Italian at www.giustizia-amministrativa.it.

³⁹ See Council of State, Judgment 9565, December 29, 2010, AGCM v. IAMA Consulting, available in Italian at www.giustizia-amministrativa.it.

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