ENTraNCe 2015

Block 3 CASE NOTE ON:
ICA Decision 9.5.2013 - Wind-Fastweb/Conducts Telecom Italia
Società Telecom Italia Spa v. Autorità Garante della Concorrenza e del Mercato (ICA) - case n. 6374-2013
THE REGIONAL ADMINISTRATIVE TRIBUNAL OF LATIUM 8.5.2014, n. 4801

1. *Introduction*

The *present* case concerns a recent and major controversy resulting from a very high fine (one of the highest ever applied by the ICA and the second highest imposed on Telecom) imposed on an incumbent operator of electronic communications for abuse of dominant position, in the form of the "vertical foreclosure", that is the elimination of competition in a downstream market.
The case is relevant as it pertains to the two types of conduct by which the exclusionary abusive behaviour of a firm reveal themselves, "refusal to deal" and "margin squeeze", and the abuse of dominant position is the focus of our Seminar.
Besides, considering that the types of conduct in question have been implemented in a regulated market, the case is also appealing as it poses the question of the delicate relationships between antitrust law and sector regulation, both being furthermore of European derivation.
Finally, it is interesting to recall that the case has raised bitter controversy and the ICA decision, as well as the TAR judgment upholding it, has undergone some criticism with regard to the alleged lack of a true and genuine economic analysis underlying the ICA decision.

2. *Proceedings before the Italian competition authority*

2.1 On May 9, 2013, the Italian Competition Authority ("ICA") imposed a fine of EUR 104 million on the Italian telecommunications incumbent operator, Telecom Italia ("Telecom"), for abuse of dominant position aimed at excluding competitors from the downstream markets for voice communications and broadband internet access services, thus violating Article 102 of the Treaty on the Functioning of the European Union ("TFEU").
The ICA opened formal proceedings on June 23, 2010, **following complaints** lodged by Telecom's competing operators, Wind and Fastweb, which had reported

allegedly anticompetitive behavior implemented by Telecom concerning: (i) an unjustifiably high number of rejections issued to competitors regarding activation of wholesale services, known as "KO", and failure to update the databases required for the development of the orders of activation; (ii) policies of deep discounts for access fees related to offers on the traditional narrowband line (POTS and ISDN) targeted at business customers in areas where it is supplied with local loop unbundling.
Following the start of the investigation, some competitors and other entities were admitted to intervene in the proceedings, in view of their concrete interest in participating.

On December 11, 2012, the **Statement of Objections** was served by the ICA on Telecom, accusing the incumbent operator of having hindered the expansion of competitors in the downstream markets of access to the fixed network, voice telephony services and broadband internet by means of the two kinds of conduct already indicated by competitors in the initial complaints.

2.2 At the outset, **Telecom argued** that the investigation had been conducted without a proper adversarial principle on the competition concerns brought forward by the competing operators.
2.2.1 On the merits, Telecom pointed out that - following the rejection in March 2012 of the commitments offered by Telecom – it had repeatedly invited the Authority to a constructive discussion on the findings of the preliminary investigation.
Besides, Telecom asked for a special hearing because of the exceptionally long duration of procedure which was meanwhile likely to affect organizational and investment decisions necessary for the fulfillment on the part of the incumbent operator of specific regulatory obligations.
Furthermore, Telecom, holding that the Statement of Objections did not contain enough information to allow a complete refutation of the allegations made in it, with specific regard to the individual items of cost and price quantified by the offices of the Authority, pointed out that it had already submitted requests for clarification, also highlighting the need to access the details of the calculations made by the Authority in order to verify the quantification of individual cost items.

2.2.2 The central point of the briefs of Telecom was the argument that the presence of a pervasive regulation – relating to the conduct investigated – did not justify intervention on the part of the Authority. In particular, Telecom argued that the evaluations of the results of the investigation were incompatible with the rules

of the industry, and with the numerous investigations conducted by the Italian Telecommunications Regulatory Authority ("AgCom") and by the Telecom Supervisory Body, according to which, during the reporting period : (i) with respect to the KO, the exterior and interior delivery procedures were considered respectful of the principles of equal treatment and non-discrimination; and (ii) with respect to margin squeeze, the prices charged by Telecom to business customers were higher than the costs of production and, therefore, replicable.

2.2.3 With reference to KO, Telecom reiterated how the provision and supply process and the conditions of wholesale access services by Telecom were conducted within the scope of the framework of functional separation of the access network, - spontaneously proposed by Telecom in 2008 and approved by AgCom with Resolution no. 718/08/CONS – based on the principle of "equivalence of output" which ensures the equivalence of the final results of the processes of supply in terms of equal treatment between the OLO and the retail divisions of Telecom. Therefore, Telecom held that the management of KO is regulated in detail, and that the Telecom Supervisory Body had repeatedly ruled out the existence of unlawful conduct by Telecom.

2.2.4 As to margin squeeze, Telecom claimed the full replicability of prices charged, highlighting how the firm would set its trade policy in constant compliance with the applicable regulatory framework, receiving repeatedly expressed approval by AgCom on pricing and discounts applied. As a result, in the opinion of Telecom, the Statement of Objections would propose assessments contrasting with the applicable testing regulations and price estimates of the costs of Telecom quantified and periodically updated in the period considered by AgCom.

2.2.5 Another argument made by Telecom was that the submission of the same conduct to a divergent evaluation by the ICA would also be contrary to the general principle of *ne bis in idem* valid for all public interventions, given that, pursuant to Article 4, Protocol. 7, ECHR, even the mere opening of a second assessment procedure entails breach of that principle. According to Telecom, with regard to the same facts, the ICA's assessments overlapped with those made by AgCom – who considered the conduct to be compatible with the principles of equal treatment and non-discrimination – yet drawing antithetical conclusions, though acting on the basis of regulations having the same substantial objective, i.e. guaranteeing equal treatment and non-discrimination.

Telecom further highlighted that the conduct under investigation did not amount to a "severe" breach of Article 102 TFEU, with the result that no sanctions could be imposed on Telecom under Article 15, paragraph 1, of Law no. 287/1990. Finally, Telecom claimed the existence of numerous circumstances mitigating its responsibility.

2.3. The duration of the infringement taken into account by ICA lasted from 2009 to 2011. **Concluding the investigation procedure** on May 9, 2013, the ICA confirmed that Telecom had conducted two forms of anticompetitive abuse:

(i) **A "constructive" refusal** to grant physical access to its telephone and broadband network. The network was deemed "essential" for competing operators active in the downstream market for telecommunication services in order to provide telecommunication services to end-users.

(ii) **A margin squeeze** by means of a selective application of large rebates to business clients operating in areas supplied with an unbundling local loop ("ULL").

2.3.1 With regard to the first exclusionary conduct, the ICA held that Telecom intentionally denied or hindered access to its wholesale services, including ULL and wholesale line rental ("WLR"), by issuing an unjustifiably high number of refusals to the activation (or delivery) procedures required for network access services by alternative operators. To this purpose the Authority individuated a series of conducts that substantiated the abusive behaviour:
- the number of rejections of activation requests from OLOs was much more elevated than the number of denials opposed by Telecom to its own internal commercial divisions; in particular, the delta number of rejections was extraordinarily high if one considers only refusals due to technical and administrative reasons;
- the activation process delivered for its own internal divisions was substantially different from the one provided for the OLOs' request for access to Telecom wholesale services: Telecom internal divisions directly interacted with Open Access (Telecom's separate network division), while the OLOs' interact with a different division, i.e., National Wholesale Services ("NWS"), which, after a first formal and administrative check, would transfer the OLOs' request to Open Access; the result of this is that the external process counts with an additional "check point" -

compared to the internal process – which increases the possibility for the OLOs' requests to be denied or delayed for formal or administrative reasons.
- in case of insufficient network resource, the OLO's request was immediately denied while the request from Telecom's internal divisions was only suspended until the requested network resource became available. This asymmetric treatment put the OLOs at a disadvantage, compared to Telecom's internal divisions: the former receive a technical KO and should apply again for the same activation request, losing, *de facto,* the priority acquired in the "waiting queue"; while the latter are placed in a "privileged" standby position, maintaining their priority for access to the requested resource when available.

As an effect, the ICA held that through all these types of conduct, Telecom realized a system of technical boycott which necessarily lead to an increase in operating and administrative costs for the OLOs, as well as to a loss of credibility towards end-users, with the consequence of an unavoidable tarnish of their competitive capacity in the downstream markets for voice and internet telecommunication services.

2.3.2 As to the margin squeeze abuse, **the ICA held** that Telecom applied an aggressive pricing policy with respect to business customers based in the ULL areas, which are those where the level of competition pressure is higher. More precisely, following an *ad hoc* "marketing guidelines" providing for minimum and maximum discount thresholds, Telecom made a selective recourse to large discounts to ULL business clients on the access component of retail offers deliberately aimed at making it impossible for an "as efficient competitor" to replicate them.
Under this respect, the ICA held that Telecom itself would not be capable of providing retail telecommunication services to business customers in ULL areas at the established retail prices without incurring a loss, if the cost for the access component would be the same applied to alternative operators. Indeed, the price applied by Telecom to the 'selected customers' (in case of application of the maximum level of discounts on the access component provided by the "Marketing guidelines") would have always been below the total network and commercial costs incurred by an "as efficient" alternative operator.
In the ICA's opinion, the maximum discount level of the marketing guidelines represents an index of the potential aggressiveness of Telecom's pricing policy, and it is therefore on this potential level which one should evaluate the exclusionary capacity of the incumbent's commercial strategy.

2.3.3 In regard to **the quantification of the fine**, the ICA calculated the amount by considering the two different types of conduct separately. It applied a fine of approximately EUR 88.2 million, for the 'constructive' refusal to supply, and approximately EUR 15.6 million for the margin squeeze abuse. In both cases the ICA took into account the aggravating factor of recidivism (i.e. more 1-10% of the basic amount of the fine) and the mitigating factor of financial loss (i.e. less 20-30%). It should be pointed out that, solely for the first type of conduct, the ICA also considered as a mitigating factor Telecom's activities to improve the external delivery procedure (i.e. less 20-30%).

3. *Proceedings before the regional administrative tribunal of Latium*

3.1 Telecom opposed the ICA's final decision and filed a claim before the Administrative Regional Tribunal of Latium ("TAR"), making a number of complaints, widely and extensively argued.

3.1.1 In brief, it put forward in the first place that the conduct attributed to it was imposed by industry regulatory discipline and that, for this reason, the ICA had invaded areas covered by the regulation of the telecommunications industry and infringed **the principle of *ne bis in idem***, without regard for the regulatory framework and assessments of AgCom.

Telecom then articulated a number of complaints relating to procedural violations of **the right to defense,** related, in particular, to the block of access to documents used by the claimants, the compression of time for the proceedings, and discrepancies between the Statement of Objections and the final decisions taken as a result of the investigation.

3.1.2 On the KO, Telecom challenged the argument of the ICA, considering it inadequate to prove the existence of discrimination towards OLO, as being based only on data mirroring the number of orders discarded and regardless of the analysis of the actual activation processes. In particular, Telecom argued that information provided by the ICA on the number of discarded orders was not significant, since it incorrectly aggregated heterogeneous situations.

3.1.3 Telecom also claimed the inaccuracy of the findings which led to the second allegation, the one concerning **margin squeeze**, contesting as erroneous the ICA's methodological approach, which did not demonstrate that the difference between the retail prices charged to end customers and the wholesale prices charged to competitors is such that it does not cover the costs of those competitors in order to allow them to provide the services in question in the downstream market.

3.2 All those pleas were contradicted by the ICA.

3.2.1 First, **the ICA** noted that, according to well-established case law, the relationship between the antitrust and regulation sectors is not considered in terms of exclusion, but of complementarity. So, the ICA must take regulation into account as the framework within which operators operate, even though this does not prevent the ICA from carrying out an independent evaluation of their conduct. The European Commission, in the Deutsche Telekom case, expressly stated that the applicability of competition rules is not excluded in all cases in which the regulations leave open the possibility for undertakings to adopt autonomous conduct designed to obstruct, restrict or distort competition, thus confirming the existence of a dual control, antitrust and regulatory.

3.2.2 As for Telecom's complaints on the merits, the ICA remarked that, given Telecom's failure to refute the undeniable difference in treatment favoring its sales divisions, the incumbent went into the detail of the technical aspects, and proposed methodological solutions as alternatives to those adopted by the ICA in its assessment, thus implying a judicial review on the merits of the case which would go beyond the limits allowed to the Court.

3.3 The ICA decision was upheld by the TAR.

3.3.1 In its decision, the Court confirmed the ICA's evaluation took the view that there did not exist the alleged conflict between the measures applied to combat the abuse of dominant position and the regulatory framework of the sector, and that therefore there was no conflict between the contested Authority order and assessments of competence expressed by AgCom, although it was admissible that an intervention for the protection of competition and a regulatory initiative, as having different aims and perspectives, might bring to diverse conclusions.
In any case, the Court clarified, the EU directives on the liberalization of electronic communications services (Directive 2002/21 / EC "Framework Directive", and Directive 2002/19 / EC "Access Directive") and the national legislation transposing them, contained in Legislative Decree No. 259/2003 (the Electronic Communications Code), have imposed precise obligations regarding access and use by competitors of certain network resources specifically aimed at promoting competition and protecting the interests of newcomers and, as an effect, of consumers, and have implemented the principle of non-discrimination between internal and external activities, so that firms with significant market power, also active in the downstream markets of one of the essential infrastructures, do not distort competition to the detriment of third parties.

3.3.2 The TAR also held that the abusive behaviour regarding the high number of **KOs** was objectively demonstrated by the ICA. The Court recalled that, following the Community guidance, in order to have an actual refusal on the part of a dominant undertaking, 'constructive refusal' is sufficient, clarifying that constructive refusal could, for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply (Communication from the

Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings).

To this end, the TAR disregarded the attempt made by Telecom to meticulously atomize the abusive conduct at hand and reconstruct it as a variety of initiatives not having an independent anti-competitive nature; then the Court recalled the constant guidance of the administrative judges considering a series of consistent circumstantial evidence to be sufficient to prove the existence of an antitrust infringement, and appreciated the huge amount of data that had been gathered during the investigation of the case.

3.3.3 The TAR further considered the above complaints relating to the practice of **margin squeeze** in order to hinder competitive pressure in the ULL markets, open to competition from new entrants.
Telecom's argument on this point was refuted in the first place by the Commission decisions relating to telecommunications markets, in which the existence of a margin squeeze was determined in light of the fact that the difference between the retail prices charged by the vertically integrated incumbent to end-users and the wholesale prices, constitutes abuse of dominant position when it is not sufficient to cover the specific costs that competitors bear in order to provide the same services in the downstream markets.

3.3.4 Telecom's argument criticizing the use on the part of the Authority of a benchmark relating to merely hypothetical and potential prices was rebutted because the Court considered the contested conduct able to undermine the economic capacity of an "as efficient" competitor and, therefore, falling within the scope of art. 102 TFUE when affecting, as in this case, the intra-Community commerce.
More specifically, following the arguments made by the ICA, the TAR considered decisive the provision of large rebates to business clients made in an ad hoc "marketing guidelines", which had been circulated amongst Telecom's agents to be used for the supply and delivery of the service; then the Court appreciated the results of the investigation revealing the application of the aforesaid guidelines from January 2008 until July 2011 and emphasized the outcome of on-site inspections recovering contracts stipulated by Telecom with important business clients applying the planned discounts, and some cases even bigger ones.
In conclusion, TAR held that the ICA had operated under an established procedure in line with previous EU decisions, and determined that the discount policy had been effectively pursued by means of the Marketing Guidelines.

4. *Final remarks*

4.1 The present case is an example of the limited role played by the economic analysis in the assessment of abuse of dominance.

The ICA and national courts usually consider it sufficient to show that the contested conduct tends to restrict competition or is capable of having anticompetitive effects on the basis of an abstract analysis, without carrying out a comprehensive economic assessment of the impact of the practice, in some cases coming to apply per se rules.

In reference to the second type of conduct sanctioned, to establish whether there had been 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 service.
That's to say that the ICA seemed to find a "potential" abuse, consisting of the margin squeeze that could have occurred if the incumbent's commercial units had applied the maximum discount level provided for by the price lists.
And it is relevant to notice that the notion of per se price abuse is difficult to reconcile, not only with the more economic approach introduced by the Guidance, but also with the principles established by the ECJ in Post Danmark, according to which 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.

4.2 From another point of view, the delay in the transition towards an effects-based approach results in a very limited scope for analysis of possible efficiencies in abuse cases under Article 102.

As a matter of fact, the developments in the analysis of unilateral conduct and efficiencies at the EU level - i.e. the introduction of an effects-based approach by the Commission Guidance on exclusionary conduct (24 February 2009), confirmed by ECJ, realizing an attempt to insert into abuse of dominance cases a test akin to that provided for by Article 101(3) - have not yet had a relevant impact on Italian administrative and judicial practice, which still draw attention to a formal and traditional approach.
As a consequence, as in the case at hand, firms tend to focus their defences on the finding of an exclusionary practice instead of alleging efficiencies.

Regional Administrative Tribunal of Latium — Ms Justice Rosa Perna
Rome
24 February 2015