Newsletter

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NEWSLETTER ANTITRUST

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***Servizio di prenotazione del trasporto mediante taxi - Milano*, decision of the Italian Competition Authority of 18 January 2017 (case No. I801B)**

By decisions dated 18 January 2017, the Italian Competition Authority ("ICA") launched two parallel investigations aimed at ascertaining whether the main taxi cooperatives in Rome and Milan infringed Art. 101 TFEU (or the national equivalent, Art. 2 of Law No. 287/90) by means of exclusivity clauses included in the agreements governing their relationships with taxi drivers.

The opening of the investigations follows a complaint filed by mytaxi. The complainant belongs to the Daimler group and has developed an app to book, pay and rate taxi rides via smartphones. Unlike other services, such as UberPop, only licensed taxi drivers adhere to mytaxi. Therefore, for mytaxi to effectively function, taxi drivers have to subscribe to mytaxi so as to be reachable by customers needing a ride. The app basically has the same functioning of Uber: the customer, who has previously downloaded and installed the app on the smartphone, requires a taxi ride and mytaxi localizes the nearest available driver and allows the customer to book him/her for the ride. Then the customer is provided with the taxi driver's name, phone and car description. It is also possible to track the arrival of the taxi on the smartphone. At the end of the ride, the customer can pay by credit card via the app and rate the driver.

In Italy, most taxi drivers belong to cooperatives who provide members with a centralized dispatch center service. The service provided by mytaxi thus competes with the one of the taxi cooperatives as both allow customers to find the nearest available taxi driver.

Taxi drivers belonging to the main six cooperatives in the cities of Rome and Milan are bound by exclusivity clauses which prevent drivers from being members of competing cooperatives or otherwise provide driving services in competition with the cooperative. As a result of these clauses, taxi drivers are not allowed to subscribe to the services provided by mytaxi. Given that taxi drivers subject to these exclusivity provisions account for around 75% of the taxi drivers in Rome and around 90% of those in Milan, such limitations actually limit mytaxi's capability of staying and developing its presence in the market.

Both investigations are expected to close by the end of March 2018.

The opening of these investigations confirms the ICA's interest for the competitive dynamics of the sector. Similarly to the openly favorable stand taken on UberPop services[1] in the past,[2] the ICA seems focused on extirpating any hurdle to an increased competition in the private transport sector.

RC Auto, decision of the Italian Competition Authority of 7 December 2016 (case No. I802)

By decision dated 7 December 2016, the ICA launched an investigation against twelve insurance companies[3] for an alleged violation of Art. 101 TFEU. The conduct under investigation consists in four public press statements made by the main insurance companies in Italy on general increases in the prices for motor vehicles insurance products as well as on the companies' respective current and future pricing strategies.

As per the decision opening the investigation, such public announcements could have eliminated uncertainties as to future commercial strategies and fueled other players' expectations in relation to forthcoming price increases.

According to the ICA, due to the significant market presence of the companies having made the statements (Generali and Unipol), the latter could prove to be a strategy for reaching a common understanding about the terms of coordination.

In addition, given that the announcements also referred to a general increase of market prices for motor vehicle insurance products, the ICA considered that the alleged anticompetitive agreement or concerted practice might involve also the other main players which could count on the price increase announced by Generali and Unipol so as to raise their own prices without fear of losing market shares.

The investigation is expected to close by the end of March 2018.

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[1] Contrary to regular Uber services which are provided through licensed drivers, car rides provided via UberPop are carried out by non-professional drivers.

[2] See for example the speech delivered by the President of the ICA to the Italian Parliament on 28 October 2010 (available at http://www.agcm.it/segnalazioni/audizioni/8082-audizione-del-presidente-giovanni-pitruzzella-sulla-legge-annuale-per-il-mercato-e-la-concorrenza-2.html), where Mr Pitruzzella said that the development of new services providing private transport through non-professional drivers (such as UberPop) are beneficial to competition and end consumers. Therefore, he called for the setting forth of limited rules for UberPop-like platforms so as not to *de facto* limit their possibility to operate and increase their presence on the market. By contrast, the Court of Milan has recently ordered Uber to discontinue its UberPop services in Italy on grounds of unfair competition (*Taxiblu S.C. et al. v. Uber*, judgment of the Court of Milan of 25 May 2015, No. 16612/2015; upheld in *Uber v. Taxiblue et al*, judgment of the Court of Milan of 2 July 2015, No. 35445/2015 and 36491/2015). According to these rulings, UberPop (together with its affiliated drivers) has to be considered as a direct competitor of traditional taxi services, as both services involve passenger transportation (to a destination chosen by the user) against remuneration. As a consequence, these services should have been subject to the same legal requirements. Indeed, as UberPop drivers were not complying with the regulatory obligations imposed on taxi drivers (e.g. mandatory car maintenance checks, subscription of specific insurance policies) they were able to save costs and offer lower fares compared to traditional taxi services. This gave UberPop drivers an unfair advantage which could lead to the illegitimate poaching of passengers from taxi drivers.

[3] Unipol Gruppo Finanziario S.p.A., UnipolSai Assicurazioni S.p.A., Compagnia Assicuratrice Linear S.p.A., Allianz S.p.A., Genialloyd S.p.A., Assicurazioni Generali S.p.A., Generali Italia S.p.A., Genertel S.p.A., AXA Assicurazioni S.p.A., Società Cattolica di Assicurazione - Società Cooperativa, FATA Assicurazioni Danni S.p.A., TUA Assicurazioni S.p.A.. These companies together account for around 66% of the Italian market for motor vehicles insurance products.

This investigation might result in one of the few cases in which the ICA scrutinized a conduct of price signaling.[4] It will thus be interesting to see what will be the approach of the ICA vis-à-vis the insurance sector which is viewed as particularly transparent.

Abuse of dominance

Incremento prezzi farmaci Aspen, decision of the Italian Competition Authority of 29 September 2016 (Case No. A480)

On 29 September 2016, the ICA imposed a Euro 5.2 million fine on four companies belonging to the Aspen group for having charged excessive prices for the supply of four cancer-treating drugs (so-called Cosmos drugs) in breach of Art. 102 TFEU.

Aspen, who bought the relevant rights on these drugs from GSK back in 2009, was found dominant as it is the only undertaking authorized to commercialize such drugs in Italy. Potential competition by new players was excluded since the economic incentives to enter the relevant markets were considered low by the ICA.

According to the ICA, Aspen abused its dominant position by imposing to the Italian Medicines Agency (AIFA) the setting of significant increases (ranging from 300% to 1,500%) of the prices previously applied.

In order to assess the excessive and unfair nature of the prices charged by Aspen, the ICA applied a two-phase test: first, it analyzed whether the difference between the prices applied and the production costs was significant. Having concluded that this was the case, the ICA then assessed whether such difference could be justified.

To this end, the ICA took into account the following elements:

- Aspen had not incurred additional costs which could be covered through the price increase; as mentioned, GSK first made the R&D investments to produce and commercialize the Cosmos drugs which were then sold to Aspen;

- Aspen had not improved the drugs' formulation or quality, the only reason submitted to AIFA to justify the price increase being to align prices applied in Italy to those applied in other EU countries;

- Price inelasticity of demand due to the life-saving nature of the Cosmos drugs;

- The increased costs borne by the Italian National Health System (estimated by the ICA in around a 500% increase in the expenditure).

The ICA found that Aspen adopted an aggressive strategy against AIFA in order to obtain the setting of higher prices. In particular, Aspen first requested AIFA to have the Cosmos drugs re-categorized so that prices could be freely set by the manufacturer.[5] Following AIFA's refusal, Aspen requested a price increase, threatening to terminate supply of these drugs to the Italian market. Also, according to the ICA, Aspen artificially caused shortages of the products in the Italian market by making use of a specific stock allocation system.

[4] See ICA's decision of 20 December 2007 (case I681 – Prezzi del carburante in rete) in which the ICA closed with commitments a case concerning an alleged anticompetitive exchange of information among the main oil companies in Italy in the form of price signaling through specialized press.

[5] In particular, Aspen tried to have the Cosmos drugs included under the so-called class C. Drugs included in this class are generally used to cure less severe diseases and are not essential or life-saving drugs. The prices of these drugs are not negotiated between the manufacturer and AIFA, but are set by the manufacturer and entirely borne by patients. However, given that the Cosmos drugs are life-saving and irreplaceable they could not be included under class C.

Apart from being one of the few investigations concerning excessive prices, this case is of particular interest also because the ICA's decision quantifies the potential damages involved, so that follow-on damages actions appear likely to be brought against Aspen.[6]

Other excessive pricing investigations have been initiated by national competition authorities in the EU. For example, on 3 February 2017, the Spanish Competition Authority ("CNMC") has started an investigation against Aspen and its Spanish distributor for an alleged abuse of dominant position in the form of denial of supply of certain drugs, excessive prices, and agreements to limit distribution and cause deliberate shortages. According to the CNMC's press release,[7] the authority decided to launch the investigation after having received from the ICA information on possible abusive conduct on the Spanish market. As another example, on 7 December 2016, the UK's Competition and Markets Authority imposed a £89.4 million fine on pharmaceutical companies Pfizer and Flynn for having charged excessive prices (increases up to 2,600%) for an anti-epilepsy drug.[8]

PRIVATE ENFORCEMENT

Legislative Decree No. 3 of 19 January 2017, implementing Directive 2014/104/UE of 26 November 2014 on antitrust damage actions

On 3 February 2017, Legislative Decree No. 3/2017 ("Decree") entered into force, implementing in Italy Directive n. 2014/104/EU ("Directive"), and introducing a number of substantive and procedural provisions in order to facilitate damages claims by victims of antitrust violations.

A first change introduced by the Decree refers to the disclosure of evidence. National judges, upon a motivated request of a party to the proceedings, can now order to litigants or a third party to disclose relevant evidence in their possession.[9] In doing so, the ordering Court has to indicate as precisely as possible the evidence to be disclosed and, in case the order of disclosure has as its object confidential information, to adopt any necessary measure to protect such information (e.g. redacting sensitive information).[10] Furthermore, in case a piece of evidence cannot be produced by the litigants or any third party, a national judge can order the exhibition of the documents contained in the case-file of a national competition authority, provided that certain conditions depending on the type of evidence required are fulfilled. However, a national court cannot in any case order a litigant or a third party, including a national competition authority, to disclose leniency statements and settlement submissions.

The Decree also lowers the claimant's burden of proof by providing that the decisions of the ICA as well as the judgments of the administrative courts reviewing such decisions, which are no longer appealable, represent binding evidence of the existence of the antitrust violations ascertained therein and of the modalities in which such anticompetitive conducts have occurred (e.g. identity of the liable undertaking).[11] However, in accordance with settled case-law,[12] it is for the claimant to demonstrate the existence of a causal link between the damage allegedly

[6] The ICA's decision has been appealed before the Italian Administrative Court of First Instance.
[7] Press release available in Spanish at https://www.cnmc.es/2017-02-03-la-cnmc-incoa-expediente-sancionador-contra-el-grupo-aspen-y-su-distribuidor-en-espana.
[8] See press release at https://www.gov.uk/government/news/cma-fines-pfizer-and-flynn-90-million-for-drug-price-hike-to-nhs.
[9] The Decree expressly recognizes the confidentiality of external attorney-client communications.
[10] Please note that in case of failure of a party to comply with the evidence-related obligations set out in the Decree, a national judge can impose administrative sanctions on the concerned party.
[11] A weaker probative value has been recognized to decisions of foreign national competition authorities, which are only deemed to be evidence that an antitrust violation has occurred, but have to be assessed along with any other evidence produced.
[12] *Ex multis*, *Brennercom v. Telecom*, Judgment of the Tribunal of Milan of 27 December 2013, No. 16319 /2013.

suffered and the antitrust violation ascertained by the ICA. The Decree nonetheless provides for a rebuttable presumption that damages have occurred in presence of a cartel.

In addition, the Decree clarifies that damage claims stemming from antitrust violations are time-barred after five years.[13] This time period is suspended for the entire duration of the antitrust proceedings carried out by the ICA and for an additional year after the decision ascertaining the antitrust violation has become final or the proceedings terminates otherwise.

In line with the Directive, the Decree is based on the principle that everyone is entitled to obtain full compensation for the harm caused by antitrust infringements, regardless of the fact that they are direct or indirect purchasers of the infringer, on the condition that the actual loss at any level of the supply chain cannot exceed the overcharge suffered at that level. In this respect, the Decree provides that a defendant can invoke as a defense that the claimant has passed-on to its customers the whole or part of the overcharge resulting from the antitrust infringement.[14] In this scenario, the burden of proof lies with the defendant, who can require disclosure of evidence from the claimant or from third parties.

Furthermore, the Decree introduces two specific exceptions to the general principle that co-cartelists are jointly and severally liable to compensate the damages caused (i.e. an injured party can seek full compensation from any of the co-cartelists). These two exceptions are provided in favor of small and medium sized enterprises[15] ("SME")[16] and immunity recipients in the context of a leniency program.[17]

Finally, the Decree attributes exclusive jurisdiction over actions for antitrust damages to the specialized divisions of the Courts of Milan (for Northern Italy), Rome (for Central Italy and Sardinia) and Naples (for Southern Italy).

In conclusion, the Decree has broadly followed the text and the underlying principles of the Directive, although with some minor procedural adjustments (e.g. in respect of the disclosure of evidence). Whereas it is too early to evaluate its actual impact on the use of private enforcement in Italy, the importance of the Decree has to be appreciated in the fact that it clarifies the procedural framework governing the actions for damages, thus reducing the uncertainties that have so far discouraged the victims of antitrust violations from seeking compensation for the damages suffered.

[13] This five-year period starts from the date on which the illicit conduct has ceased and the victim of such a conduct is aware (or can reasonably be expected to be aware) of the following elements: (a) the existence of the illicit conduct and the fact that it constitutes an antitrust violation that caused damages, and (b) the identity of the infringer.

[14] Please note that the EU Commission has recently issued a study intended to provide national judges with practical guidance on how to assess evidence in damages proceedings where the defendant has invoked the pass-on defense. The study is available at the following link < http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf>.

[15] These are enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million (Art. 2(1) of Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises).

[16] According to this exception, a SME's joint liability is limited to the damages incurred by its own direct/indirect purchasers where: (a) its market share in the relevant market was below 5 % during the antitrust infringement; and (b) the application of the normal rules of joint and several liability would irretrievably jeopardize its economic viability and cause its assets to lose all their value. Notwithstanding the above, a SME will be jointly and severally liable towards any injured party when the latter cannot obtain full compensation for damages from the other undertakings involved in the same antitrust infringement, or the concerned SME (i) was a leader in the antitrust infringement or has coerced other undertakings to participate therein; or (ii) is found to be recidivist.

[17] This exception provides that an immunity recipient is jointly and severally liable towards its direct or indirect purchasers/ providers or other injured parties only where they cannot obtain full compensation for the damages suffered from the other undertakings involved in the same antitrust infringement.

ABUSE OF ECONOMIC DEPENDENCE

Attrakt vs. Google, Judgment of the Court of Milan of 17 June 2016 (No. 7638/2016)

Attrakt, a company specialised in the setting up and management of websites, including online advertising, concluded in July 2011 two distinct contracts with Google, one for the AdWords[18] service, and another one for AdSense.[19] The AdSense contract granted to Google wide control and monitoring powers, as a result of which Google was able to check ads, links, researches results on Attrakt's pages. In addition, Google retained the power, at its own discretion, to define the amount of revenues on the ads of the advertisers, and the payments were calculated on the basis of Google's accounts. Furthermore, the contract allowed both parties to terminate the contract for any reason without prior notice.

On 11 January 2013, Google communicated to Attrakt a breach of the AdSense contract in that on Attrakt pages there were links to adults' websites. Google ordered Attrakt to eliminate such breach within 72 hours, and Attrakt did amend its pages immediately after. Nonetheless, on 16 January 2013 Google notified Attrakt to have disabled the AdSense account due to "*invalid click activities*" by Attrakt. When repeatedly requested by Attrakt to explain the reasons for the dissolution of the contract, Google refused to provide further clarifications due to the need to "*protect* [their] *proprietary detection systems*". Moreover, Google did retain the sums due to Attrakt as a compensation for the AdSense contract. The court found that Attrakt was in a position of economic dependence vis-à-vis Google pursuant to Law 192/1998;[20] the findings of the court were based on either the content of the AdSense contract (which, as outlined earlier, granted wide powers to Google), the correspondence between the parties, or the exclusive nature of the relationship between Attrakt and Google; in this respect, the court found that the whole turnover of Attrakt was referred to the relationship with Google, and was then completely reset after the termination of the contract by Google.

The court then ascertained that Google abused its position by abruptly terminating the relationship with Attrakt, without providing explanations. The abuse was aggravated by the fact that Google retained the amounts due to Attrakt as a compensation for the services provided under the AdSense contract. The judge also concluded that Google's behaviour was contrary to good faith and condemned Google to pay to Attrakt damages for approximately Euro 500,000 (plus legal interests).

Despite the limited amount of damages awarded to Attrakt, this judgment is interesting because the court found an economic dependence arising from a contract lasting for only one and a half year, whereas usually a long-term contractual relationship is required to prove a situation of economic dependence.

HERA-Payment terms, decision of the Italian Competition Authority of 23 November 2016 (case No. RP1)

On 23 November 2016, the ICA has applied for the first time its powers to fine companies for violating rules that forbid the abuse of economic dependence. A sanction of Euro 0.8 million has been imposed on the multi-utility company Hera for infringing national rules regulating payment terms for suppliers of gas meters.

[18] AdWords allows companies willing to advertise themselves on Google, to buy keywords so as to appear on top on Google searches.
[19] Through AdSense, Attrakt was providing advertising spaces on its website to Google who was then selling such spaces to advertisers.
[20] According to Law 192/1998 economic dependence is defined as the setting in which one company is able to determine an excessive unbalance of rights and obligations in the relationship with its contractual counterpart. Economic dependence is defined also based on the ability of the "weak" party to find on the market alternative supply solutions. The status of economic dependence is not prohibited as such, but also where there is an abuse such as for example "*the refusal to sell or to buy and the arbitrary interruption of a commercial relationship*".

Article 9, para 3-*bis*, of Law no. 192/1998 provides that a company that repeatedly infringes Italian rules on payment terms is liable of abuse of economic dependence. This is a specific type of abuse of economic dependence that was introduced in 2011 in the framework of the transposition of Directive 2011/7/EU on late payments in commercial transactions. In case of repeated violation of rules on payment terms, the victim of late payments is considered to be *ex se* the "weak" party of the contractual relationship and the ICA does not have to demonstrate its status of economic dependence.

Following a complaint by the trade association ANIMA, the ICA launched the probe in March 2016 and investigated the payment terms provided for in Hera's calls for tender in relation to the supply of gas meters. The ICA found that Hera violated Art. 9, para 3-*bis* of Law no. 192/1008, since the company, for more than three and a half years, systematically paid its gas meter suppliers within 120 days, instead of the 60-day term provided by national law for commercial transactions.

Hera submitted remedies and proposed to reduce its payment terms to 60 days, but the remedies were rejected and the ICA applied a fine of Euro 0.8 million. The amount of the fine has been exceptionally reduced (compared to the original amount of Euro 3.2 million) since this case marks the first occasion in which the ICA applied its powers to fine companies under Article 9, para 3-*bis*, of Law no. 192/1998.

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The EU, Antitrust and Regulation department of Legance is available to provide further clarifications, also in respect of any specific situation which may be of interest to you.

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