Rivista Italiana di Antitrust
Italian Antitrust Review
N. 3 (2015)
Sectoral Columns
Antitrust Law and Jurisprudence Observatory

# THE ADMINISTRATIVE SUPREME COURT CONFIRMS THE ICA'S DECISION TO SANCTION TELECOM FOR HAVING ABUSED ITS DOMINANT POSITION

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**Keywords:** abuse of dominant position, regulated sectors, refusal for access, essential infrastructure, margin squeezes as efficient competition test

## 1. THE ICA'S DECISION

On 9 May 2013, the Italian Competition Authority (ICA) sanctioned the Italian TLC incumbent company (Telecom Italian S.p.A., hereinafter 'Telecom') for two infringements of Article 102 TFEU, imposing two fines, respectively amounting to € 88,182.000 and € 15,612.00.

The investigation started in June 2010 – following complaints from two competitors – and was related to Telecom's anti-competitive practices aimed at: 1) refusing wholesale access services requested by competitors in order to supply retail services to final consumers, and 2) squeezing competitors' margins when applying a rebates scheme for retail access services to business customers in ULL[2] areas.

## 2. THE JUDICIAL REVIEW

In May 2014, the Court of First Instance (the regional Administrative Court of Lazio) fully confirmed the ICA's decision.

Telecom lodged an appeal before the Council of State, the Administrative Court of Second Instance on competition, against the TAR's decision. With judgment No. 2479 of May 2015, the Council of State confirmed the TAR's decision and the decision of the ICA.

[1] Italian Competition Authority.

[2] Unbundling of Local Loop.

As a preliminary issue, the Council of State recognized that the existence of *ex ante* regulation does not prevent the application of competition law, as long as the regulation does not fully eliminate the autonomous behaviour of undertakings and this, even if such conduct has been subject to previous authorization by the regulator. According to the Council of State, the institutional duties of the two Authorities involved in this case (the ICA and the AGCom – the TLC regulator) do not overlap and do not exclude each other respectively but rather, are complementary.

After these general preliminary remarks concerning the rationale of the powers attributed to the ICA, the Judge: i) firstly, held that the ICA's findings in its decision on Telecom's dominant position in the wholesale market of network access services (ULL, WLR[3], bitstream) was legitimate and well-reasoned, as no alternative upstream essential infrastructure exists, and ii) secondly, confirmed that Telecom has committed two abuses in violation of Art. 102 TFEU.

With regard to the first infringement, the Council of State declared that Telecom had abused its dominant position from 2009 to 2011 by dealing under a "constructive refusal" to OLOs (Other Licensed Operators) who sought access to Telecom's network in order to sell retail access services to fixed communication networks of voice telephony and broadband internet access. As stated by the EU Commission in the Guidance on its enforcement priorities in the application of Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings[4], para. 79, "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 for the supply.

According to the Supreme Administrative Judge in the assessment of Telecom's abuse through "constructive refusal" for access, not only is the *quantitative* factor of the number of opposed refusals relevant, but so is the unjustified *qualitative* structural difference between delivery procedures, depending on the subjective nature of the applicant (in particular, depending on whether the applicant is an internal division of Telecom itself or an OLO).

Carrying out the latter analysis, the Council of State underlined the discriminatory *qualitative* complexity of Telecom's *external* delivery process in comparison to the *internal* one, irrespective of the number of definitive refusals opposed to OLOs. In particular, the ICA correctly assessed that only delivery orders from the OLOs are subject to a formal test, with risks of interruption of the delivery process. Furthermore, in the case of network unavailability (the so-called "KO"), OLOs are obliged to re-submit a new order, thus losing delivery priority. On the contrary, Telecom's internal departments can more easily correct formal mistakes of the delivery order by calling the call center and, therefore, not

[3] Wholesale Line Rental.

[4] OJ C 45, 24.2.2009, p. 7–20.

risking the interruption while, in the case of network unavailability, they are only subject to suspension, thereby keeping the acquired priority.

The Council of State confirmed that Telecom, in defining the rebates scheme applicable to large business customers for retail access in its 2007 Marketing Guidelines, fixed its prices at a level that was able to cause a *margin squeeze*.

The Judge confirmed that a *margin squeeze* is a typical infringement of a vertically-integrated company, namely a company that operates at different levels of the production chain and that sells wholesale inputs which are necessary to produce final services and to compete in the retail market.

According to the Council of State, it was appropriate to base the assessment of Telecom's anti-competitive exclusionary conduct created by the rebates scheme on the "as-efficient competitor" test involving a comparison of the dominant undertaking's prices and costs (this test was specifically applied by the EU Court of Justice to margin squeeze conducts in the judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09). Such abuse in the form of margin squeeze namely exists when the price differential between the input and the final service is negative or so small that an as-efficient competitor cannot rely on the dominant firm's offers (see EU Commission decision of 4 July 2007, COMP/38.784, *Wanadoo Espana v. Telefonica*, confirmed by the General Court in the judgments of 29 March 2012, T-336/07, *Telefonica v. Commission* and T-398/07, *Spain v. Commission*, as well as by the EU Court of Justice in the judgment on the same case of 10 July 2014, C-295/12P).

As clearly stated by the EU Court of Justice in the judgment *TeliaSonera Sverige*, in order to establish whether a margin squeeze practice is abusive, that practice must be "capable" of having an exclusionary effect, but the effect does not necessarily have to be concrete as it is sufficient to demonstrate that the conduct "may potentially exclude" competitors who are at least as efficient as the dominant undertaking.

It is worth mentioning that this principle, broadly settled in EU case-law (see Court of Justice, 9 April 2012, C-549/2012P, *Tomra*), has been recently re-affirmed by the Court of Justice in the judgment of 6 October 2015, C-23/14, *Post Danmark*, according to which Art. 102 TFEU must be interpreted as meaning that, in order to fall within the scope of this Article, it is sufficient that the anti-competitive effect of a rebates scheme operated by a dominant undertaking must be "probable", while it is not necessary that such an effect is "actual".

Finally, after having confirmed the two abuses of dominant position under Art. 102 TFEU, the Council of State also upheld the amount of the two fines imposed for these conducts – which were, in absolute value, some of the highest fines ever imposed by the ICA even if they respectively correspond to only 0.3% and 0.05% of Telecom's total turnover. According to the Judge, such fines have correctly not been reduced for Telecom's proposed commitments during the investigation under Art. 14-*ter* of

Italian Antitrust Law[5] - as these have been considered unsuitable by the ICA; moreover, the Judge confirmed the finding of Telecom's recidivism as aggravating circumstances.

[5] Law no. 287 dated 10 October 1990.