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Alberto Pera
and Valentina Caticchio

Legislative Developments

In July 2009, new rules came into force in Italy concerning class actions brought by consumers and final users who are the victims of unfair trade practices or anti-competitive conduct. Under the new rules, collective damages actions may be brought either by individual class members or by associations empowered by them or committees of which they are members for claims based on breaches of competition law.¹ It should be noted that while such actions may be brought before the competent Italian courts from January 1, 2010, damages may be claimed in respect of infringements committed after August 15, 2009.

In June 2009, pursuant to the Council of State (the “CoS”) decision of March 2009 in Lidl (see below), the Italian Competition Authority (the “ICA”) amended the pre-merger Notification Form² which now expressly states that a concentration does not arise in cases where, cumulatively, the transaction consists merely in the acquisition of a commercial license and the vendor is not prevented – either by an agreement between the parties or a decision of a public entity – from continuing the commercial activity that was covered by the transferred license.³

Mergers

In March 2009, the ICA cleared the takeover by Istituto Centrale delle Banche Popolari Italiane (“ICBPI”) of SI Holding, after formally accepting the commitments presented by acquiring company. According to the ICA, the measures imposed were intended to prevent the takeover from creating a dominant position in various segments of credit card marketing (issuance, signing up

retailers and computerized processing of international cards used in Italy). In particular, the measures ensured transparent economic conditions and the unbundling of the services offered by ICBPI, thus giving banks a choice, provided certain parameters for pricing policy so as to restrain the merged company's market strength, guaranteed transparent methods of selection when choosing an IT service provider; and eliminated links with the main IT processing competitor.⁴

As from July 27, 2009, the prior notification thresholds for mergers and acquisitions have been raised by the ICA to (i) €461 million (approximately US\$642.5 million) for the aggregate national turnover of all the undertakings involved in the operation, and to (ii) €46 million (approximately US\$64 million) for the national turnover of the acquired or merged undertaking.⁵

Cartels and other Anticompetitive Practices

Cartels

Since late 2008, the ICA has imposed sanctions in the following six cartel cases.

In December 2008, the ICA imposed a total fine of €1.6 million (approximately US\$2.2 million) on a number of Italian banks in relation to anti-competitive arrangements consisting in coordinating tendering for the provision of the general cashier service (“servizio di cassa generale”) of the Istituto Nazionale Assicurazione Infortuni sul Lavoro (the “INAIL”).⁶

In January 2009, the ICA imposed a total fine of around €1.3 million (approximately US\$1.8 million) on Terminal

¹ See article 140-bis of the Consumer Code (Legislative Decree No. 206 of September 6, 2005, published in the Official Gazette No. 235 of October 8, 2005), as amended by Article 49 of Law No. 99 of July 23, 2009, published in the Official Gazette No. 176 of July 31, 2009.

² In particular, said amendments concern Section A, § 2, point d) of the ICA pre-merger Notification Form.

³ ICA, June 18, 2009, Decision No. 19964, “Modifiche alle modalità per la comunicazione di un'operazione di concentrazione fra imprese”, available in Italian at <http://www.agcm.it>

⁴ ICA, March 26, 2009, Decision No.19689, in Case C9817, Istituto Centrale delle Banche Popolari/Si Holding, available in Italian at <http://www.agcm.it>

⁵ This threshold increase, provided 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 2.84% in 2008.

⁶ ICA, December 11, 2008, Decision No. 19251, in Case I686, Inail/Affidamento servizio di cassa, available in Italian at <http://www.agcm.it>

Darsena Toscana S.r.l. and Sintermar S.p.A. for coordinating pricing policies in the market for container handling services in ports.⁷

In February 2009, the ICA imposed a total fine of €12.5 million (approximately US\$17.4 million) on 26 Italian pasta producers (accounting for some 90% of the domestic market) and the two relevant trade associations. According to the ICA, the purpose of the agreement was to coordinate price increases imposed by producers on distributors.⁸

In April 2009, the ICA imposed total fines of around €13.3 million (approximately US\$18.5 million) on two anti-competitive arrangements in the lead battery recycling industry respectively carried out by Cobat, a consortium of producers and recycling companies which originally held the exclusive rights to collect and recycle lead batteries (through adoption of a number of contractual provisions), on the one hand, and the recycling companies together with their industry association (through arrangement of a market share allocation system), on the other. According to the ICA, both arrangements were aimed at maintaining the *status quo* in the market and at avoiding the development of alternative means of supplying the service of collection and recycling of used lead batteries to the detriment of battery manufacturers who have had to pay high costs for scrap lead.⁹

Furthermore, in 2009 the ICA fined two professional associations for anticompetitive agreements. Thus, in October 2009 the Association of Medical and Dental Surgeons of the Province of Bolzano was fined €5,000 (approximately US\$6,900) for an anticompetitive agreement obstructing the efforts of a consumer advocacy group to facilitate price comparisons for different types of dental services,¹⁰ while in December 2009, the Soccer League was fined around €100,000 (approximately US\$139,370) for preventing broadcasters from acquiring rights to the 2007/2008 'Seria B' Championship games.¹¹

In addition to the above cases, in September 2009 the ICA closed an investigation into possible anticompetitive

agreements between Christie's International S.a. (Italian branch), Sotheby's Italia S.r.l. and the Association A.N.C.A. (Associazione Nazionale delle Case d'Aste) in the market for the sale of goods and treasure through public auction, having found no evidence of any anti-competitive conduct.¹²

Finally, among cartel cases which are currently pending before the ICA, it is worth highlighting the ICA investigation into the suspected anti-competitive behavior (in particular, exchange of sensitive information and coordination of resale prices to end clients) of major cosmetics and toiletry retailers. It should be noted that dawn raids into alleged anti-competitive conduct in the retail sector for detergents and/or personal care items have been simultaneously conducted by the EC Commission and a number of national competition authorities.¹³

Commitments cases

In 2009, the ICA resolved the following antitrust cases through acceptance of commitments (the cases in question have therefore been closed by the ICA without any finding that a violation of competition law exists and without fines being imposed on the companies involved). In April 2009, the ICA formally accepted the commitments proposed by the ABI association and the PattiChiari consortium during an investigation into possible anti-competitive conduct in the payment services market. Following the ICA decision, ABI had to cut interbank costs for checks and PattiChiari had to reduce clearing times for making available customers' funds.¹⁴

In May 2009, the ICA formally accepted the commitments proposed by FVH S.p.A., Liquigas S.p.A., Quiris S.a.p.A., Butangas S.p.A. e I.P.E.M. Industria Petroli Meridionale S.p.A. during an investigation into possible anti-competitive behavior in relation to a joint-venture agreement in the GPL trading and logistics market. According to the ICA, said agreement raised antitrust concerns related to potential risks of third party foreclosure and coordination between the parties in the downstream market of GPL sales to end

7 ICA, January 29, 2009, Decision No. 19462, in Case I685, Costa Container Lines/Sintermar-Terminal Darsena Toscana, available in Italian at <http://www.agcm.it>

8 ICA, February 25, 2009, Decision No. 19562, in case I694, Listino Prezzi Della Pasta, available in Italian at <http://www.agcm.it>

9 ICA, April 29, 2009, Decision No. 19814, in case I697, Riciclaggio delle batterie esauste, available in Italian at <http://www.agcm.it>

10 ICA, October 7, 2009, Decision No. 20363, in Case I706, Ordine dei medici chirurghi e degli odontoiatri della provincia di Bolzano, available in Italian at <http://www.agcm.it>

11 ICA, December 16, 2009, Decision No. 20575, in case A403, Lega Calcio/Chievo Verona, available in Italian at <http://www.agcm.it>

12 ICA, September 23, 2009, Decision No. 20318, in case I705, Case d'asta, available in Italian at <http://www.agcm.it>

13 See ICA pending case I701 - Vendita al dettaglio di prodotti cosmetici, available in Italian at <http://www.agcm.it>

14 ICA, April 9, 2009, Decision No.19726, in Case I704, Assegni Mav-Commissioni Interbancarie, available in Italian at <http://www.agcm.it>

consumers. Thus, the commitments focused on removing the non-compete agreement entered into by the parties and on changes to the joint venture governance rules in order to avoid exchanges of sensitive information between the joint venture and the parties.¹⁵

In June 2009, the ICA formally accepted the commitments proposed by ACI - Automobile Club d'Italia, a public entity under Italian law. The ICA investigation concerned possible anticompetitive agreements among ACI members in the automotive sporting events management market. ACI was also investigated by the ICA for possible abusive conduct in the sporting competitions management market, where it holds an 'institutional' role, since it is the only automotive sports federation recognized under the national sports regulations.¹⁶

Furthermore, during 2009 the ICA closed two cases after accepting commitments. The first case related to a possible anticompetitive agreement among major carriers in the market for sea passenger transport services in the ports of Naples and Salerno (October 2009),¹⁷ while the second concerned possible anticompetitive conduct by the Italian Psychological Association involving the coordination of professional fees in the market for psychologists' services in Italy (December 2009).¹⁸

Abuses of a Dominant Position

In 2009 there was only one ICA decision concerning abuse of a dominant position. In October 2009, Cantieri del Mediterraneo S.p.A. was fined €285,000 (approximately US\$397,200) for abuse in the market for dry dock supply services in the port of Naples.¹⁹

Among the pending cases, it is worth highlighting the investigation opened in August 2009 into an alleged abuse by Google Italy regarding the provision of online search services.²⁰ The ICA is examining whether Google Italy's conduct in exploiting its dominant position in online search services could adversely affect proper

competition in the online advertising market, with the further effect of consolidating its position as an intermediary in the sale of online advertising. In September 2009, the investigation was extended to include the US-based parent company, Google Inc.

In 2009 the ICA closed the following abuse cases after accepting commitments: (i) alleged abuse of a dominant position by Rete Ferroviaria Italiana in the national market for access to essential maintenance facilities for high speed railway passenger transport services (October 2009);²¹ (ii) possible abusive conduct by some ENEL Group companies aimed at restricting the retail electric power market for non-residential customers (December 2009);²² and (iii) possible abuse of a dominant position by Poste Italiane S.p.A. in the collection and payment services sector (December 2009).²³

Court Decisions

In March 2009, the CoS stated that the mere acquisition of a commercial license does not automatically constitute a concentration under the Italian Competition Act, since, in order for a transaction to be deemed to be a concentration, it must give rise to a permanent change in the control of an undertaking or parts thereof. Indeed, according to the CoS, an acquisition of exclusively commercial licenses – without including any further economic assets – only concerns goods (i.e. licenses) which have an economic value, but mere licenses do not constitute 'an undertaking or a part of an undertaking' in the sense of a business to which market turnover can be clearly attributed.²⁴

In April 2009, the Lazio Regional Administrative Court quashed the decision on anti-competitive conduct in which the ICA had previously rendered binding the commitments proposed by some motorway management companies.²⁵ According to the Court, the commitments were deemed not to be proportionate to the scope of antitrust regulation, under which measures imposed by the ICA aimed at

¹⁵ ICA, May 20, 2009, Decision No.19886, in Case I707, FVH-Liquigas-Butagas-Quiris/I.Pe.M, available in Italian at <http://www.agcm.it>

¹⁶ ICA, June 11, 2009, Decision No.19946, in Case A396, Gargano Corse/Aci, available in Italian at <http://www.agcm.it>

¹⁷ ICA, October 15, 2009, Decision No. 20378, in Case I689, Organizzazione servizi marittimi nel golfo di Napoli, available in Italian at <http://www.agcm.it>

¹⁸ ICA, December 22, 2009, Decision No. 20613, in Case I716, Ordine Nazionale Psicologi-Restrizioni deontologiche sulla determinazione dei compensi, available in Italian at <http://www.agcm.it>

¹⁹ ICA, October 28, 2009, Decision No. 20412, in Case A405 - La Nuova Meccanica Navale/Cantieri Del Mediterraneo, available in Italian at <http://www.agcm.it>

²⁰ ICA, August 26, 2009, Decision No.20224, in Case A420 - Fieg - Federazione Italiana Editori Giornali /Google, available in Italian at <http://www.agcm.it>

²¹ ICA, October 22, 2009, Decision No. 20392, in Case A409, NTV/RFI- Accesso al nodo di Napoli, available in Italian at <http://www.agcm.it>

²² ICA, December 10, 2009, Decision No. 20549, in Case A410, Exergia/ENEL-Servizio di salvaguardia, available in Italian at <http://www.agcm.it>

²³ ICA, December 16, 2009, Decision No. 20576, in Case A414, Poste Italiane-Aumento commissione bollettini c/c, available in Italian at <http://www.agcm.it>

²⁴ See CoS Judgment No. 1894 of March 31 2009, Lidl, which quashed the first instance ruling of Lazio Regional Administrative Court (Judgment No. 2478 of January 9 2008) and the ICA's initial decision (Decision No. 16809 of May 10, 2007, in Case C8094, Lidl Italia/Rami D'azienda), available in Italian at <http://www.giustizia-amministrativa.it>.

²⁵ ICA, October 23, 2008, Decision No. 19021, in Case A391, Servizi di soccorso autostradale, available in Italian at <http://www.agcm.it>

closing investigations without ultimately deciding on the existence of a breach of competition law need to be strictly addressed to resolving the antitrust concerns raised during the investigation. Indeed, the Court highlighted the fact

that the ICA does not have the task of regulating the market and measures which are imposed on companies involved in a merger case do not have to represent an indirect way of regulating market dynamics.²⁶

26 See Lazio Regional Administrative Court Judgment No. 4994, May 8, 2009, available in Italian at <http://www.giustizia-amministrativa.it>

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