ICLG

The International Comparative Legal Guide to:

Vertical Agreements and Dominant Firms 2019

3rd Edition

A practical cross-border insight into vertical agreements and dominant firms

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Italy

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Authority in charge is the Italian Antitrust Authority ("**IAA**") (*Autorità Garante della Concorrenza e del Mercato*).

Address: Piazza Verdi 6a, 00198 Rome, Italy. Website: www.agcm.it. Tel: +39 06 85 82 11. Fax: +39 06 85 82 12 56.

1.2 What investigative powers do the responsible competition authorities have?

The IAA may conduct dawn raids at the headquarters of the investigated company or even at the domicile of the company's directors (with the permission of a court). The IAA is also entitled to request information from the investigated companies and entities, which could be useful for the IAA's investigation.

During the dawn raids, the IAA can make copies of all the documents that are useful for the investigation, including emails and personal documents that are in the place where the dawn raid is conducted.

The Italian Antitrust Law (Law n° 287/90 – "**IAL**") provides a fine for an undertaking (and physical person) which: i) refuses to provide information required by the IAA; or ii) provides false or misleading information to the IAA.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The IAA normally, but not every time, initiates an in-depth investigation at the same time as the dawn raid. The decision to initiate an investigation is made public by the IAA via the IAA's Bulletin (the "**Bulletin**") and the IAA's website after a few days. Within 30 days of becoming aware of the decision to open an investigation, non-investigated entities may request to participate in the IAA proceedings if they are interested in the investigation.

After the IAA's decision to open an investigation, the parties to the proceedings (the "**Parties**") have the right to access non-confidential documents contained in the file of the proceedings. They also have the right to be heard by the IAA.

During the investigation, the Parties are entitled to submit memoranda.

At the end of the investigation phase (normally 12–16 months from the opening of the investigation), the IAA issues statements of objections (*contestazione delle risultanze istruttorie* – "**SO**"), and the Parties may reply to the SOs with a final defensive memorandum within a time limit set by the IAA.

After the SOs have been notified, the IAA allows the Parties to have access to documents from the file of the proceedings that are classified as confidential, which the IAA considers useful for establishing proof of antitrust infringements.

After the Parties have filed the final memos, the Parties may request to be heard by the IAA in a final hearing. After the final hearing, the IAA issues the final decision, taking into account the defences of the investigated Parties and the evaluation of non-investigated Parties which have been allowed to participate in the proceedings (for example, complainants).

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

In the event that the IAA ascertains an infringement of the antitrust law (cartels, concerted practices, abuses of dominance), it may impose a fine of up to 10% of the total turnover generated in the preceding business year on the undertaking considered liable for the antitrust law infringement.

If the IAA ascertains an antitrust infringement, the IAA orders the Parties to bring the anti-competitive conduct to an end. In its final decision, the IAA could also order the Parties to adopt measures aimed at restoring conditions of effective competition in the affected market(s) within a specific period, as well as to report on their progress in this respect.

In urgent cases, where there is a risk of serious and irreparable harm to competition and a cursory examination reveals the probable existence of an infringement, the IAA could order interim measures before the issuance of the final decision.

In the event that antitrust infringement results in a violation of criminal law (*e.g.* bid-rigging), the IAA is obliged to report the facts to the prosecution office (*Procura della Repubblica*).

1.5 How are those remedies determined and/or calculated?

The IAA recently adopted new guidelines on the calculation of antitrust fines (IAA decision of 22 October 2014, n° 25152 – the "**Notice**"). The Notice is quite similar to the European Union ("**EU**") Commission Guidelines on the method of setting fines imposed

pursuant to article 23(2)(a) of Regulation (EC) No. 1/2003 (*OJ*, C, 210, of September 2016).

On the basis of the Notice provisions, the fine is calculated taking into consideration the value of the undertaking's sales in the affected market during the last full year of its participation in the infringement. A percentage of up to 30% of this value is considered, depending on the gravity of the infringement (in the case of cartels, the percentage cannot be lower than 15%). The amount resulting from applying this percentage to the value of sales is multiplied by the number of years of participation in the infringement. The IAA can also decide to include in this basic amount an additional sum of between 15% and 25% of the value of sales in the case that there have been particularly serious restrictions of competition (a so-called "**entry fee**"). The Guidelines provide for the adjustment of the basic amount in consideration of certain aggravating or mitigating circumstances. The fine could be decreased by up to 50% if the undertaking provides decisive information concerning a distinct infringement of competition rules. The final amount of the fine cannot exceed 10% of the total turnover achieved in the last financial year preceding the adoption of the final IAA decision.

In a recent case, the IAA imposed a fine of up to 20% of the turnover, considering that the investigated company had committed two different infringements (price-fixing and bid-rigging) ascertained in the same IAA decision (case n° I/806, decision of 13 February 2019). This decision is under Court review.

Several concerns emerged after the implementation of the Notice. In particular, it gives rise to serious discrimination in the calculation of fines between single-product and multi-product companies. Several commentators have also highlighted that the Notice, in fact, does not encourage the Parties to submit commitments and/or compliance programmes during the investigation, given that the calculation criteria of the Notice do not allow an effective fine reduction.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

In the context of the Italian antitrust procedure (as well as the European one), both structural and behavioural commitments are allowed. The submission of commitments could lead to the closure of the investigation without the imposition of any fine.

The Parties can submit commitments to the IAA within three months from the decision to open the investigation.

Commitments that are not manifestly inadequate are published on the IAA website and on the Bulletin. Third parties are entitled to submit comments.

The IAA could also conduct a market test (for example, the IAA could issue a request for information to third parties). At the completion of the market test, the Parties may amend the commitments proposed, taking into consideration the market test results.

After assessing the suitability of the commitments, the IAA can make them binding on the undertakings concerned and close the investigation without ascertaining any infringement and without imposing any fine. The commitment decisions are published on the IAA's website and on the Bulletin.

In the past, the IAA has closed investigations with commitments, even in cases of serious antitrust infringements. However, in recent years, the IAA has changed its approach, considering that an excessive use of commitment tools for serious antitrust infringements may undermine the antitrust law enforcement (and also discourage leniency). Since then, the IAA has ruled that commitments cannot lead to the closure of the investigation without any fine in the case of hard-core infringements.

However, with regard to vertical agreements, the IAA has recently accepted commitments (please see question 2.4) and has not fined an undertaking involved in a complex case of vertical agreements affecting prices and other hard-core restriction clauses.

For a reduction of a fine, the IAA could also consider commitments (for example, a compliance programme) filed during the proceedings. However, in the case of hard-core restrictions, the fine calculation mechanisms of the Notice could *de facto* impede a real fine reduction.

On 25 September 2018, the IAA has adopted **Guidelines on antitrust compliance** to provide undertakings with guidance on: i) the definition of the content of the compliance programme; ii) the request for an assessment of the programme for the purposes of awarding possible mitigation; and iii) the criteria that the Authority intends to adopt in its assessment for the purposes of awarding mitigation.

Compliance programmes adopted before the opening of proceedings may qualify for mitigation of up to:

- 15% for adequate compliance programmes that have worked effectively to enable the prompt detection and interruption of the infringement before the opening of proceedings. In cases eligible for leniency, such a reduction may be granted only if the undertaking has submitted a leniency application.
- 10% for programmes that are not manifestly inadequate, provided that the undertaking adequately amends the programme and begins its implementation after the opening of proceedings (and within six months from the opening of proceedings).
- 5% for programmes that are manifestly inadequate, only if the undertaking introduces substantial changes to the programme after the opening of proceedings (and within six months from the opening of proceedings).

Compliance programmes adopted *ex novo*, after the opening of proceedings, may qualify for a reduction of the fine up to 5%.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

IAA decisions can be appealed before the Administrative Tribunal (*Tribunale amministrativo regionale del Lazio* – "**TAR**"). TAR judicial reviews concern the coherence and logic of the reasoning of the IAA's decision, the adoption of sufficient probative standards to prove antitrust infringement, and the balance in the imposition of fines. The TAR does not have a competence of merit, but it could heavily review IAA decisions. The TAR may recall sanctions imposed by the IAA and may annul a decision of the IAA if it is illogical ("*eccesso di potere*") or violates the law.

The parties can also request interim measures to the TAR. Interim measures requests are usually decided by the TAR in one to three months from the submission of the request. The TAR's interim measures can be appealed before the second instance administrative court (*Consiglio di Stato* – "**CdS**").

1.8 What is the appeals process?

Undertakings may appeal the decisions of the IAA before the TAR within 60 days from notification of the final decision. IAA decisions can be also appealed before the President of the Republic (*Ricorso Straordinario al Presidente della Repubblica* – "**PR**") within 120 days from notification of the final decision. It is also possible to appeal IAA decisions that do not ascertain any breach of the antitrust law (in the latter case, the complainants or entities that suffered damages from an alleged antitrust violation that the IAA has not ascertained may appeal the IAA decision (*indicare decisione TAR*)).

The TAR and PR decisions can be appealed before the CdS. Judgments issued by the CdS can be appealed, in a few rare circumstances, before the Supreme Court (*Corte di Cassazione*) under article 110 of the *Codice Processo Amministrativo* ("**CPA**"), and to the CdS under article 106 CPA and article 396 of the Italian Civil Code of Procedure (*revocazione*).

The President of the TAR has stated that in the period from 2016 to April 2019, the TAR totally annulled 40% and partially annulled 30% of the IAA's decisions on antitrust cases (see https://www.aaiantitrustconference.it/gallery).

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

While the IAA (public enforcement) ascertains antitrust infringements and imposes fines (to be paid to the State), the civil courts (private enforcement) primarily seek to ascertain antitrust infringements for the purpose of restoring the damage allegedly suffered by the plaintiff. It should be noted that civil proceedings do not provide for punitive damages. The civil court does not have any power to impose fines for antitrust infringement.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

The IAA has adopted soft law, which provides a leniency programme consistent with Community law and principles. With regard to exceptions to the principles of free competition, the Community principles relating to *de minimis* as well as exemption provided for at Community level are applied in Italy. Hard-core restrictions normally cannot benefit from any exemption.

1.11 Does enforcement vary between industries or businesses?

No; it is possible that a particular feature of the market may affect the IAA market analysis, but there are no rules that regulate separately the power of the IAA to enforce antitrust law across particular industries or businesses.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

It is common for regulation, especially in sectors such as post, energy and telecommunications, to have a direct impact on the structure of the market; thus the IAA is required to carry out a careful analysis of the regulation to ascertain any violation of antitrust law. Sectoral regulation cannot, however, prevent or otherwise limit public antitrust enforcement, even in highly regulated industries.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The IAA is an authority independent from political power and from the government; any interference that the government should exert on the IAA would be unlawful.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The IAA has prioritised its interventions in the health sector and, in particular, in industries related to products or services purchased by the State, in order to avoid abusive or collusive behaviours that in fact cause an increase in public expenditure. The IAA is focusing its attention on pharmaceutical businesses, as well as on new network technology businesses. The IAA is also focusing its attention on big data issues, and on matters relating to the sharing economy.

1.15 Describe any notable case law developments in the past year.

Please refer to the cases outlined in the section below.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The approach of the IAA with regard to vertical agreements has been quite conservative over the past few years. Pursuant to article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") and article 2 IAL, investigation statistics show that only in a few cases did the IAA open an investigation on vertical agreements. This IAA approach is based on the view that vertical agreements are less harmful to competition than horizontal ones, especially if the vertically integrated undertaking does not have market power and/or a dominant position, or when similar vertical agreements are not being used by a number of competing companies, with the exclusion of possible concerns of horizontal collusion. The IAA is also aware of issues of protection of distribution systems from free-riding.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

A vertical agreement concerns companies operating at different stages of the production and distribution phases. It does not exclude competing undertakings from also being considered, in particular if the agreement covers different stages of production (a producer and a distributor, a producer of an end product and a company which produces raw material, etc.) if one of the two undertakings is vertically integrated.

The IAA's vertical agreement investigations were related to distribution agreements and contractual restrictions. Several decisions of the IAA (and of the Italian courts) stated that it is not necessary to have a formal agreement for an infringement of article 2 IAL or article 101 TFEU; however, all the IAA vertical restraint cases are related to agreements between companies which operate at different stages of the production and distribution phases.

2.3 What are the laws governing vertical agreements?

Law n° 287 of 10 October 1990 ("**IAL**") provides the main Italian antitrust rules. Article 2 IAL prohibits any form of collusion (that is, agreements between undertakings, concerted practices or decisions by associations of undertakings) that has as its object or effect the prevention, restriction or distortion of competition within the national market, or a substantial part of it, including conduct such as price-fixing, output limitation, market-sharing and discrimination among trading partners.

Article 1.4 IAL provides that IAL substantive provisions must be interpreted in accordance with well-established EU antitrust

principles. The IAA applies the Commission Regulation 330/2010 (the "**Vertical Regulation**") and the Commission Notice – Guidelines on Vertical Restraints, *OJ*, C, 130, of 9 May 2010 ("**EU Notice**").

The IAA can directly apply the EU provision (article 101 TFEU) to horizontal and vertical agreements and practices, which may affect not only the Italian territory but also trade between countries of the EU.

The procedural rules concerning the IAA investigation are regulated by D.p.r. 217/1998 and by Law n° 241/1990 (general regulation of administrative proceedings and access to the file of the proceedings).

The Notice regulates fine calculation; it must be applied in compliance with the principles set by Law n° 689/1981 (principle of legality and personality of responsibility).

Italian law does not provide for criminal sanctions for antitrust infringements.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

For vertical restraints, the IAA applies the Regulation and the EU Notice, thus *per se* illegal resale price maintenance ("**RPM**"). Suppliers (producers, manufacturers) are not allowed to fix the (minimum) price at which distributors can resell their products. They cannot impose restrictions to passive sales. Exclusivity clauses and selective distribution restrictions are allowed within the limits provided by the Vertical Regulation.

The IAA has intervened in cases of contractual clauses only falling within the black list clauses; in such cases, the IAA adopted a rule of reason approach, investigating the possible restrictions of the agreement with regard to competition concerns (both intra-brand and inter-brand competition).

In the *Power-One Italy* case (n° I/718/2014 – *Renewable Energy*), the IAA clarified that RPM is a hard-core restriction; thus, RPM could not be exempted under any *de minimis* rule, according to the principles set forth in the Commission *de minimis* Notice (Commission Notice *de minimis*, *OJ*, C, 368 of 22 December 2001), the IAA said.

However, the IAA has not ruled out the possibility of RPM benefitting from an individual exemption (*Power-One Italy* (case n° I/774/2013)), if certain conditions are met (see question 3.6).

In the *Enervit* case (n° I/718/2014), the IAA ascertained that Enervit imposed: i) a minimum selling price (RPM) in the form of a maximum percentage of consumer discount; ii) a ban on the sale of products manufactured in Italy outside the national borders; iii) a ban on passive sales outside the territory/customer group assigned exclusively; and iv) non-competition for an indefinite period clause.

The IAA closed the investigation after commitments proposed by Enervit, despite the fact that it had adopted hard-core infringement provisions in its distribution agreements. Also in the *Power-One Italy* case (n° I/718/2014 – Renewable Energy), hard-core violations did not impede the IAA from closing the investigation with commitments.

The IAA, in the decision of 18 April 2018, case n° I/813, *Cadel S.r.l.*, stated that a vertical agreement between a stove producer and its retailers which fixes a minimum resale price, imposes absolute territorial restrictions and forbids the sale of the products on the internet, could infringe article 101 TFEU. The investigated company submitted commitments. In particular, they agreed to eliminate all the clauses that gave rise to antitrust concerns. Thus the IAA accepted these commitments and closed the investigation without imposing any fine on the investigated companies. Also in this case, the IAA accepted commitments in an investigation when a hard-core infringement (price-fixing) was ascertained.

2.5 What is the analytical framework for assessing vertical agreements?

See the answer to question 2.6.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

Normally, the IAA adopts the "rule of reason" approach in analysing the effect of any vertical agreement. In case of hard-core restrictions, the IAA has a formalistic approach (*per se* rule); however, the IAA does not open an investigation if the undertakings involved have a low market share. In such circumstances, the IAA, using a moral suasion, suggests that the undertakings involved amend the hard-core clauses (for example, RPM).

We have seen a number of instances where the IAA has investigated several hard-core vertical restraint cases concerning small undertakings (with low market shares). In such cases, the IAA, instead of opening an investigation, contacted the undertakings, underlining breaches of compliance of the agreements with the IAL.

The contacted undertakings complied with the IAA's requests and amended the hard-core clause.

Thus, the IAA has never opened an in-depth investigation for hard-core restrictions against small undertakings with low market shares.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

These cases are normally analysed by the IAA, as a first step, taking into consideration the horizontal aspect of the agreements or concerted practice (collusion on price or other contractual conditions). In such circumstances, the IAA also considers the possible vertical effect, if this could give rise to discrimination or foreclosure effects against competitors (with harm to competition).

The foreclosure or discriminatory effects related to agreements which have both a horizontal and vertical structure are used in order to demonstrate the anticompetitive effect of the agreements (or concerted practice under investigation) in horizontal collusion investigations.

The Italian Competition Authority opened a proceeding into companies managing the taxi service in Naples (case n° I832, decision of 13 February 2019) for a possible violation of articles 101 of the TFEU and 2 of Law n° 287/90. The investigation concerns a supposed anti-competitive agreement concerning the prohibition on taxi drivers belonging to the investigated companies from using third-party taxi booking applications.

For the same reasons, the IAA also fined a radio-taxi services company in Milan and Rome (case n° I/801A–I/801B of 27 June 2018). These are cases with both horizontal agreement (among companies managing radio-taxi services) and vertical agreement (between such companies and the taxi drivers which are independent individual undertakings). For a similar case, see also n° A/521 *Turin Taxi* of 10 October 2018 (opening of investigation), as discussed in question 3.12.

2.8 What is the role of market share in reviewing a vertical agreement?

The IAA applies the rules of the Vertical Regulation and of the EU Notice; thus, market share lower that 30% in the upstream and

downstream markets is taken into consideration. The market share safe harbour (lower than 30%) is not applicable for hard-core restrictions. Please refer to the hard-core cases in question 2.6.

2.9 What is the role of economic analysis in assessing vertical agreements?

In Italian national cases, the economic analysis of vertical restraints has always played a key role in assessing the unlawfulness of the conduct. Normally, the IAA has antitrust concerns if a vertical restraint involves undertakings in a dominant position or which owns an essential facility, or if the affected market is characterised by a barrier to entry and the vertical restraint could increase the barrier to entry into the market.

Thus, the IAA conducts a deep market analysis which requires an accurate definition of the product and geographic market involved, as well as the barrier to entry into the market.

With regard to the effect, the IAA will ascertain whether vertical restraint could give rise to foreclosure or discriminatory effects, and the existence of similar vertical agreements which, in fact, could give rise to foreclosure effects (also, if the single vertical agreement involves undertakings with a market share lower than 30% in the upstream and/or downstream markets).

2.10 What is the role of efficiencies in analysing vertical agreements?

The role of efficiencies is essential, especially for analysing vertical restraints without hard-core provisions. In certain exceptional circumstances, the RPM could be considered in compliance with law if all the provisions pursuant to article 101.3 TFEU and article 4 IAL are fulfilled (article 4 IAL is substantially similar to the provisions in article 101.3 TFEU).

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

There are no specific rules governing vertical agreements in the context of intellectual property rights. Italian legislation provides a specific law which regulates franchising agreements (Law n° 129/2004). This law allows certain contractual restrictions aimed at defending the franchisor's know-how and trademarks. The Italian Franchising Law must be interpreted in compliance with the Vertical Regulation and the EU Notice.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

The IAA is not required to test the effects of hard-core vertical restraint violations.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Yes, but within the rigid system of exemptions under article 101.3 TFEU or article 4 IAL. The IAL is reluctant to use efficiency arguments to justify hard-core provisions in vertical restraint cases.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

In case of hard-core infringement, the fulfilment of all of the conditions set forth in article 101.3 TFEU or article 4 IAL is the only possible defence.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

No, they have not.

2.16 How is resale price maintenance treated under the law?

In principle, although the IAA has not excluded an individual exemption for RPM, the IAA is, in fact, very restrictive and forbids any form of price-fixing in the context of vertical agreements.

In the *Enervit* case (n° I/718/2014), the IAA stated that there is a relative presumption regarding the restriction of RPMs. This means that in the case of an investigation into RPM, the investigated undertaking must demonstrate that the RPM satisfies all the conditions laid down in article 101.3 TFEU (or article 4 IAL). This is in fact a "*probatio diabolica*", which makes *de facto* RPM *per se* illegal.

The IAA allows a producer to suggest a minimum price to its distributors/resellers, but undertakings in the downstream market must be free to decide their price policy.

Also, the IAA evaluates with great suspicion a suggested price which in fact could produce the effects of making the prices uniform. The IAA allows the maximum resale prices.

With regard to RPM issues, we also refer to the IAA's decision of 18 April 2018 in case n° I/813 – *Cadel S.r.l.*, as described in question 2.4.

2.17 How do enforcers and courts examine exclusive dealing claims?

With regard to exclusive dealing and territorial restrictions, the IAA applies the EU principles within the limits set by the Vertical Regulation and by the EU Notice. The IAA is very strict in not allowing any kind of restriction on passive sales (see case n° I/718/2014 – *Enervit*). The IAA allows territorial restrictions (in compliance with the Vertical Regulation and the EU Notice provisions) when there is indeed a legitimate reason for the restrictions, *e.g.*, defending the distribution system from free-riding, and supporting the pre-sales and post-sales services granted by the sellers to final customers on the basis of the agreements with the manufacturer.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying/supplementary obligations are not relevant in the context of vertical restraints, with two exceptions:

a) When the tying/supplementary obligation is proposed by an undertaking (upstream or downstream markets) in a dominant position (i.e., a producer in a dominant position who unjustifiably imposes tying/supplementary obligations on its distributors, which do not have any legitimate business justification).

b) When the tying/supplementary obligations are applied by several competing undertakings (upstream or downstream markets) and such provision could collectively restrict competition.

With regard to the exclusivity clause adopted by the dominant firm, the *Unilever impulse ice cream* case is of relevance (n° A484, decision of 31 October 2017). The IAA fined Unilever over 60 million euros for an infringement of article 102 TFEU, where Unilever put in place an abuse of an exclusionary nature to hinder the growth of competitors in the market of individually-wrapped impulse-buy ice cream, in which Unilever holds a dominant position, mainly through products under the "Algida" brand. The IAA ascertained that Unilever's adopted exclusive product clauses and a series of further loyalty conditions, commercial policy instruments and overall conduct were aimed at imposing the exclusivity of Algida products on end-consumer retailers.

2.19 How do enforcers and courts examine price discrimination claims?

With regard to price discrimination in vertical relations, both the IAA and the civil courts (private enforcement) consider price discrimination unlawful only if a dominant undertaking discriminates or if horizontal profiles exist, such as, for example, vertical agreements with restrictions that are uniformly adopted by more competing manufacturers in agreements with their distributors or retailers.

In the *Akron* case (n° A/444/2015 – *Akron waste disposal recycling paper*), the IAA assessed that Hera abused its dominant position by, *inter alia*, offering a special price to its subsidiary Akron which was lower than the one available in a competitive market.

2.20 How do enforcers and courts examine loyalty discount claims?

Issues of loyalty discount are taken into account primarily in the context of an abuse of dominant position. In the context of vertical agreements, loyalty discount issues may be relevant, for example, when a dominant producer establishes, through its own distributors or retailers, loyalty discount policies that may harm the entry of other competing producers into the market. In such context, clauses concerning loyalty discount which are provided for in agreements between the producer and the distributors may be null and void and, as a consequence, not enforceable.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Multi-product or "bundled" discount claims are taken into account primarily in the context of an abuse of dominant position (in the upstream and/or downstream markets).

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Italian law does not prohibit any other types of vertical restraints.

2.23 How are MFNs treated under the law?

Under certain conditions, a most-favoured-nation ("**MFN**") clause could infringe article 2 IAL and/or article 101 TFEU. The IAA, in the recent *Booking and Expedia* case (n° I/779/2015 – *Hotel e-booking business*), stated that the MFN clause that obliged hotels in their network not to offer better prices, terms and conditions through other competitor online travel agencies and, in general, through any other channel infringed the antitrust law. The IAA proceeding was closed on 21 April 2015 with a commitment made by Booking to narrow the operating area of the MFN clause. Indeed, all offline reservation channels have been excluded from applying the tariff parity clause – provided prices charged in these channels are not published online – and have further expanded the ability of hotels to offer discounted rates directly to their customers. In effect, the parity clause of tariffs, terms and conditions would only apply to online sales made directly by the hotel.

This case is relevant as the IAA accepted commitments in an RPM hard-core infringement.

2.24 Describe any notable case developments concerning vertical merger analysis.

The IAA pays significant attention to the possible vertical effects of a merger and, in particular, risks of foreclosure effects caused by a vertical integration. The IAA cleared the Luxottica/Barberini merger with conditions (case n° C/12183, decision of 19 November 2019).

EssilorLuxottica Group, a global leader in the eyewear sector, active in all the main stages of production, acquired Barberini, an undertaking operating in the upstream market manufacturing of high-quality flat-glass lenses for sunglasses and glass blanks – the raw material for producing lenses. Among the various antitrust concerns, the IAA feared that the merger could impede EssilorLuxottica's competitors from having access to the lenses' raw material, considering the lack of actual and potential competition in the upstream market where the target (Barberini) operates.

The IAA authorised the merger with commitments; in particular, the merged entity must commit to supply Barberini's raw materials to competitors on a non-discriminatory basis, including Barberini's products which are a result of technological innovation and/or are covered by intellectual property rights.

Another merger case where vertical foreclosure antitrust concerns have been taken into consideration, is the acquisition by Sky Italian Holding S.p.A. (Sky Group) of certain assets in digital terrestrial pay-TV owned by Mediaset Premium S.p.A. (case n° C12207, decision of 20 May 2019). Sky Group is a dominant firm in the Italian retail pay-TV market. The target owns certain pay-TV content. The IAA feared that the merger would create antitrust concerns, not only on the pay-TV market but also in the related wholesale market for the supply of pre-packaged pay-TV channels, as well as the market for the licensing of broadcasting rights for TV content.

For this reason, the IAA decided to impose remedies to restore competition in the pay-TV market for a period of three years. Specifically, the remedies consist of a ban on the Sky Group from acquiring exclusive broadcasting rights for audio-visual content and linear channels for internet platforms in Italy.

The peculiarity of this case is that the parties had withdrawn the transaction before the closing of the phase II investigation. Nevertheless, the IAA continued the investigation and imposed remedies on the parties. In this case, the IAA clearly used merger control for regulatory purposes. The IAA's approach of using merger control for regulating the markets can also be seen in case n° C/12023 – *Mondadori/RCS*, decision of 26 May 2016, concerning the book publishing market.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

Almost all of the IAA interventions for abuse of dominant position concern unilateral conduct; the level of attention is extremely high, especially in telecoms, pharmaceuticals, postal services and energy businesses.

3.2 What are the laws governing dominant firms?

The abuse of dominance is regulated by article 3 IAL. It is basically consistent with article 102 TFEU. The IAA is entitled to apply article 102 TFEU in the case of an abuse of dominance related to the Italian territory, which could also affect trade within the EU.

Article 2597 of the Italian Civil Code applies to legal monopolies and imposes an obligation to conclude contracts with third parties upon their request under non-discriminatory conditions. Specific definitions of dominance are provided in regulated industries such as the telecoms and media industries (Law n° 249/1997).

3.3 What is the analytical framework for defining a market in dominant firm cases?

With regard to market definition in dominant cases, the IAA operates in accordance with European law (we refer to the Commission Notice on the definition of relevant market for the purposes of Community Competition Law (n° 97/C 372/03)).

Proper definition of the relevant market (from the product/service and geographic point of view) is essential when defining dominance. Indeed, all assessments of dominant position (market share held by competitors, level of market concentration, barriers to entry) are related to a specific market duly defined from an economic point of view.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

The IAL does not provide for market share thresholds with respect to the definition of dominance and of collective dominance. Market share is generally used by the IAA as a first indication of dominance; however, many other factors are to be taken into account. Specifically, an undertaking could be considered as dominant even with a market share of less than 40%, owing to its strength in the relevant market, its vertical integration, the high concentration of the relevant market, modest competitors' market share, etc.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

According to EU laws and principles, the simple dominant position on a relevant market does not constitute an abuse in Italy, but the dominant firm holds a 'special responsibility' not to allow distorting effects on the competitive structure of the market.

Article 3 IAL does not define the concept of abuse of dominance, but lists the following examples of abusive behaviour that relate to both exploitative and exclusionary practices:

i. to directly or indirectly impose unfair purchase or selling prices or other unfair contractual conditions;

ii. to limit or restrict production, market outlets or market access, investment, technical development or technological progress;

iii. to apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; and

iv. to agree contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Abuse of dominance occurs when an undertaking in a dominant position engages in practices that influence the structure of a relevant market by reducing, hampering or eliminating competition.

Abuse of dominance is defined more in terms of the effects of conduct on the market, rather than in relation to the form or type of conduct. The IAA, in compliance with EU Commission law and practice, defines abuse as conduct that has the ability, by its nature, to foreclose actual or potential competitors from the market, and thus has the likely effect that, ultimately, prices will increase or remain at a supra-competitive level. If conduct has exclusionary effects and does not create any efficiency, such conduct is presumed to be abusive (see case n° A/431/2012 – *Pfizer*).

In several 2018 cases, the IAA investigated several incumbents (former legal monopolists) for actions aimed at leveraging their dominant position in other markets.

The IAA, on 25 September 2018 (case n° A508 – *SIAE/Management of Copyrights*), ascertained that SIAE (the State entity that managed certain copyright rights in Italy on a basis of legal monopoly provisions) had tried to keep its dominant position concerning the management of certain IP rights in areas of business that are totally liberalised.

The IAA ascertained that certain information, achieved by a legal monopolist, that has been used for competing in other downstream markets, could give rise to antitrust concerns, and that these behaviours give rise to an abuse of dominant position. In particular, in cases n° A511 (*Enel*) and n° A513 (*ACEA*) (*Unlawful conduct in the electricity market*) of 20 December 2018, the IAA fined the two incumbents in several local distributors of electricity markets (natural monopoly), because they used commercial data, collected for the provision of distribution services, for marketing purposes in the downstream market of electricity sales (ACEA: 16,199,879.09 euros; Enel S.p.a., Servizio Elettrico Nazionale S.p.a. e Enel Energia S.p.a.: 93,084,790.50 euros). (A2A discharged – case n° A512.)

On 10 April 2019, the IAA fined the incumbent local transport operators in the Province of Bolzano (case n° A510 – *SAD Trasporti Locali S.p.a.* – "**SAD**") for a violation of article 102 TFEU. The IAA ascertained that SAD had refused to provide certain information (concerning the characteristics of its services that are essential for preparing tender documents) to the procuring entity. This kind of behaviour on the part of SAD was aimed at delaying the tender for the awarding of the Concession until the SAD concession had expired and a new tender procedure for such concession would have to be put in place by the procuring entity.

On 12 March 2019, the Italian Competition Authority ("**ICA**") (case n° 527) opened an investigation to assess whether Ireti Spa, Italgas Reti Spa and 2i Rete Gas Spa – the incumbent gas distribution operators in several municipalities of the Province of Genoa – have individually infringed article 102 TFEU by abusing their dominant position, as current exclusive concessionaires, in order to inhibit or at least significantly delay the planned competitive procedure for awarding the gas distribution service in a captive area (ATEM Genoa 1, a territorial district that includes the Genoa municipality).

In particular, the Municipality of Genoa, as the tender authority, reported to the IAA that the aforesaid three operators had refused to provide certain information on the characteristics of their distribution networks which is essential for preparing the tender documents. The supply of this information from all three operators is crucial to the drafting of the call for tender, and to the carrying out of the tender procedure. As a consequence of the delay in awarding the new concession contract, each operator continues to provide the gas distribution service according to the previous concession. The investigation shall be concluded by 30 March 2020.

On 30 April 2019, the Italian Competition Authority opened an investigation against COREPLA – the National Consortium for the Collection, Recycling and Recovery of Plastic Packaging – to assess an alleged abuse of dominant position in violation of article 102 TFEU. In particular, COREPLA is currently the only operator active in the market for compliance services of household plastic packaging waste, where it thus holds a dominant position. The IAA is investigating whether COREPLA would have allegedly hindered the market entrance of a potential competitor, CoRiPET, a new association set up by producers of PET bottles. The allegedly abusive conduct would consist in COREPLA claiming exclusive rights on all the household plastic packaging waste, wherever it is collected in Italy, as well as enforcing exclusive clauses with the selection platforms and auctioning all the material thus obtained. COREPLA, in fact, refused to negotiate a temporary agreement with CoRiPET to allow the latter to obtain the plastic PET packaging waste originating from market operators belonging to its consortium. COREPLA's conduct appears to be deliberately aimed at preventing the newcomer from developing its activity, and at preserving its market position, the IAA said. The investigation shall be concluded by 30 April 2020.

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis is crucial to market definition and to analysing the restrictive effects of abusive behaviours. The IAA must prove that the behaviours of the dominant firm give rise to a reduction in the level of competition and cause poorer conditions for consumers. However, as in some previous cases, the IAA tends to presume the abuse in the presence of a dominant position and of abusive conduct listed in article 3 IAL.

3.7 What is the role of market share in assessing market dominance?

Market share is only one of the elements considered by the IAA when analysing dominance; other relevant factors are taken into consideration, such as market access, sunk costs, barriers on entry into the market, maturity of the market, level of innovation, potential competition, specific regulation of the market, etc.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Defences typically focus on market definition (the IAA tends to restrict markets to more easily determine dominance), as well as the absence of the restrictive effects caused by the behaviour of the investigated undertakings. Sometimes the defence could also be focused on the correct reconstruction of the facts concerning the investigation.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiency is an assessment that is the basis for evaluating the effects of abusive behaviours. As a rule, the IAA does not evaluate the efficiency as an element that justifies abusive behaviours if it does not, however, result in a tangible benefit for consumer welfare.

3.10 Do the governing laws apply to "collective" dominance?

In merger control cases, the IAA has mainly used the notion of the collective dominance doctrine. The IAA has rarely used the concept of collective dominance in cases of abuse; however, in an old precedent (case n° A/3S7/2005 – *Tele2/Tim-Vodafone-Wind wholesale market, access to mobile network*), the IAA investigated mobile telecoms operators for an alleged collective abuse of dominant position. In its final decision, the IAA closed the proceedings without being able to prove that collective dominance existed. It should be noted that in some cases it is difficult to distinguish the abuse of collective dominance from a concerted practice.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

The IAA has rarely considered the possibility of a dominant position on the demand side. There is a precedent concerning rail equipment businesses (case n° A80/1993, *Consorzio Trevi e Capri*), as well as a precedent concerning the grocery retail market, where the IAA considered the buying power (case n° I/184/1997, *GS/Standa – Supercentrale*).

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Both exploitative and exclusionary practices could constitute an abuse of dominant position pursuant to article 3 IAL. Almost all of the IAA's precedents over the last decade concern this kind of abuse.

The IAA, at the completion of an investigation against Vodafone Italia ("**VI**") and Telecom Italia ("**TI**") in the bulk SMS market (cases n° A/500A/2016 – *Vodafone-Sms* and n° A/500B/2016 – *Telecom Italia-Sms*, decision of 13 December 2017), stated that VI and TI abused their dominant position by implementing internal/external discriminatory conducts, both technical and economic, resulting in a margin squeeze to the detriment of competitors in the downstream market. VI and TI applied tariffs on both the upstream and downstream markets of mass SMS services, which make the potential margin for competitors in the retail market insufficient to cover specific costs for providing services to end-customers, the IAA said (TAR).

The IAA ascertained that two dominant firms (*Compagnia Italiana di Navigazione* and *Moby*) adopted commercial strategies aimed at boycotting and discriminating clients that used competitors' services (imposing higher prices and worse contractual conditions – case n° A/487 – *Shipping freight transport from and to Sardinia*, decision of 28 February 2018).

With regard to exclusionary practices, the opening of an investigation concerning the market of maintenance of diagnostic imaging devices ("**DID**") is of relevance (case n° A/517). The IAA, on 31 January 2018, opened an in-depth investigation aimed at ascertaining whether certain DID manufacturers impeded the purchase of DID spare parts and access to the source code essential for the full maintenance of the

DID, for independent repairers. The IAA has to ascertain if the DID's manufacturers intended to impede the access to the secondary market of DID maintenance and repairs to independent operators.

With regard to price discrimination and competitor margin squeeze, on 7 March 2019 the IAA closed with commitments an in-depth investigation (case n° A/505 – *Monte Titoli/Servizi di Post-Trading*) concerning an alleged abuse of dominant position carried out by Monte Titoli ("**MT**" – belonging to London Stock Exchange Group) in the market of post-trading services, with specific regard to financial settlement and custody services. The IAA investigated whether the price policy applied by MT to settlement services could be designed with the aim of favouring its financial custody services against the services offered by competitor banks. The IAA closed the investigation after the submission from the investigated companies of commitments aimed at eliminating any possible discrimination concern against downstream market competitors.

With regard to abuse related to possible discrimination, the *Amazon* case is of relevance. On 10 April 2019, the IAA opened an in-depth investigation against five companies of the Amazon group ("**Amazon**") (case n° A/528) for alleged abuse of dominant position in breach of article 102 TFEU. The IAA is investigating whether Amazon would allegedly discriminate on its e-commerce platform in favour of third-party merchants who use Amazon's logistics services.

In particular, Amazon would grant improved visibility of the seller's offerings, higher search rankings and better access to consumers on Amazon.com only to third-party sellers that subscribe to "Amazon Logistics" or "Fulfilment by Amazon" ("**FBA**"), putting other third-party merchants at a disadvantage. Such practice seems to be outside competition on the merits, as the benefits are not necessarily related to the efficiency and quality of the service provided by the seller, and are only based on its subscription to Amazon's FBA ("self-preferencing").

In such a way, Amazon would unduly exploit its dominant position in the market for e-commerce platform intermediary services in order to significantly restrict competition in the e-commerce logistics market, as well as – potentially – in the e-commerce platform market, to the detriment of final consumers, the IAA said. Investigation shall be concluded by 15 April 2020.

With regard to the entry barrier issue, a pending investigation against Google is of relevance. On 8 May 2019, the IAA opened an in-depth investigation into Alphabet Inc., Google LLC and Google Italy S.r.l. ("**Google**") for an alleged violation of article 102 TFEU. The IAA is investigating whether Google's refusal to integrate the "Enel X Recharge" app into the Android Auto environment could represent an abuse of dominant position.

Google holds a dominant position in the market of operating systems for smart devices, the IAA said; this dominant position is due to Google's control of the Android operating system. Enel X Recharge was developed by Enel (the Italian former incumbent of the electricity production and distribution). This app provides information and services to end-users for recharging electric car batteries.

Android Auto allows owners of Android smartphones to easily and safely use certain apps and mobile phone features when driving a vehicle. The exclusion of Enel X Recharge from Android Auto could reduce the usability of this app by users and restricts their ability to use the utilities of the app, including booking charging columns, the IAA said.

The IAA is evaluating a possible Google exclusionary strategy aimed at defending the Google Maps app, which offers a wide range of services to end-users, including information on the location of columns for charging electric cars and directions on how to reach them.

Google Maps also represents a point of access to end-users as well as to the data stream generated by their activities, the IAA said. The investigation shall be concluded by 30 May 2020.

With regard to the foreclosure effect related to an exclusivity clause in an upstream market, the *TicketOne* case has to be mentioned. On 20 September 2018, the Italian Competition Authority decided to open an in-depth investigation into several companies of the TicketOne group ("**TicketOne**") in order to ascertain a possible abuse of dominant position pursuant to article 102 TFEU.

TicketOne holds a dominant position in the market for ticketing services for live music events (pop and rock concerts) in Italy.

The IAA fears that TicketOne has allegedly implemented an exclusive strategy to tie the most important promoters of live music events active in Italy to its ticketing platform, thereby preventing its competitors from gaining access to tickets, i.e. to the necessary input to compete on the market.

The exclusivity clause contained in the contracts between promoters and TicketOne is particularly stringent with respect to the online channel, which is currently the main means of selling tickets for this type of events, the IAA said.

This alleged abusive strategy could also harm final consumers, as by hindering the presence of competing platforms, TicketOne is able to charge higher pre-sale prices for live music event tickets and limit consumers' choice between different ticketing service providers, the IAA said. It is relevant that most of the promoters belong to companies controlled by Ticket One, thus one of the main issues of this investigation is whether decisions to internalise business within the TicketOne group constitute a legitimate group strategy or could represent an abuse. The investigation will be concluded by 31 December 2019.

With regard to the artificial creation of entry barriers, case n° A/521 – *Turin Taxi* has to be mentioned; the IAA, on the 10 October 2018, opened an investigation in order to ascertain if the prohibition on taxi drivers belonging to the investigated company (the main company that manages taxi services in Turin) from using third-party taxi booking applications, could give rise to an abuse of dominant position. The investigation will be completed at the end of 2019.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The availability of intellectual property rights could give rise to a dominant position. For example, in the pharmaceutical industry, the IAA considers each active principle as an autonomous product market; thus, the owner of the patented Anatomical Therapeutic Chemical ("**ATC**") class has a dominant position (see case n° I/480/2016 – *Aspen*). In *Roche-Novartis* (case n° I/760/2014 – *farmaci Avastin e Lucentis*), the IAA stated that two drugs (owned by Avastin and Lucentis) in different ATC classes are part of the same market; the IAA based the said definition on the medical practice of using the oncologic drug (Avastin) off-label for treatment in the ophthalmic field.

The principle that intellectual property rights cannot be exercised in such a way as to reduce competition is now consolidated in the IAA precedents. The IAA fined a pharmaceutical patent holder for excessive pricing (*Aspen* case n° 1/480/2016), pursuant to article 102 TFEU, when it increased the price of irreplaceable drugs for haematological or oncological patients by up to 1,500%.

With regard to the scope and limits in the use of the patent system by pharmaceutical companies, the IAA, in the *Pfizer* case (n° A/431/2012, confirmed by the CdS in decision n° 116/2014), stated

that certain behaviours of pharmaceutical companies which own an expired patent (or a patent that is going to expire) which delays the entrance of generic producers into the market (using the ATC of the expired patent) are abusing their dominant position.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

The IAA considers "direct effects" evidence of market power (see case n° I/480/2016 – *Aspen*).

3.15 How is "platform dominance" assessed in your jurisdiction?

The IAA has adopted a careful approach in analysing "platform dominance"; for example, in the e-booking case (n° I/779/2015 – *Hotel e-booking business*), the IAA preferred the adoption of commitments that were appropriate in striking a balance between preventing potential restrictions to competition while preserving the operators' ability to offer and develop innovative services that are valuable to consumers. For issues related to "platform dominance", the IAA tends to coordinate its investigative power with other authorities of the European Competition Network, considering that such platforms operate at a multinational level.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

On the basis of the IAA precedent, the refusal to deal could give rise to an antitrust infringement only if a dominant undertaking (or an undertaking which holds an essential facility) refuses to deal in the absence of a legitimate business reason (see question 4.1 below with regard to abuse of economic dependence).

In the *Acido colico* case (n° 1/473/2015 – *Fornitura acido colico*), the IAA investigated whether an undertaking abused its dominant position in the market of production and sale of cholic acid (used to produce a drug for liver disease) by refusing to supply the input (the cholic acid) for the production of an active ingredient based on such acid, to competitors. The proceeding was closed with the acceptance of the commitments proposed by the investigated parties.

The IAA investigated a possible abuse consisting of a refusal to grant access to an airport facility in Bergamo airport (airport handling) to a competitor (case n° A/507 – *Jet fuel refuelling Bergamo Airport*, decision of 14 March 2018). The IAA accepted commitments proposed by the investigated company (to grant competitors access to the facility on a non-discriminatory basis) and closed the investigation without imposing any fine.

With regard to the "refusal to deal" issue, the IAA opened (on 19 December 2018) an investigation into a newspaper distribution company (case n° A525 – *M DIS Distribution and Media*) which had allegedly limited the distribution of newspapers in a local area (municipality of Genoa and Trigullio) with unjustified discriminatory refusal to deal, to the detriment of certain local retailers.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regards to vertical agreements and dominant firms.

Article 9 of Law n° 192/1998 states that the IAA may fine undertakings which abuse the economic dependency of other undertakings. Economic dependence exists when an undertaking finds itself in a position to bring about excessive imbalances in the rights and obligations pertaining to its commercial relations with another undertaking. The assessment of economic dependence also accounts for any real possibility for the dependant undertaking to find satisfactory alternatives elsewhere in the market. An abuse may consist of the refusal to sell or refusal to buy, the imposition of unjustifiably burdensome or discriminatory contract conditions or the arbitrary interruption of established commercial relations (the IAA has recently applied this law in one case – n° RP1/2016 *Hera*). It is often discussed whether these provisions are aimed at protecting competition or small companies only.

Article 62 of Decree Law n° 1/2012, which governs trade relations in the agro-food sector, states that the IAA could fine undertakings which put in place unfair practices in the agro-food sector (abuse of commercial strength). In the last few years, the IAA has opened several investigations on the basis of this new competence: *Distribution of milk in Sardinia* (case n° AL21/2019); *Wheat seeds* (case n° AL22/2019); and *Supermakets' bread return policies* (case n° AL15/2018).

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