

Question A:

“To what extent should competition law be concerned with differences in prices, terms and conditions, or quality offered by suppliers to different purchasers”

ITALIAN JURISDICTION

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INDEX

I. General Introduction

This contribution is aimed at analyzing the issue regarding discriminatory practices within the Italian jurisdiction and the approaches adopted by the Italian Antitrust Authority in this respect.

As it will be seen below, the non-discrimination principle benefits of a very wide application in the Italian system, since the Italian Antitrust Authority has the power to prohibit and sanction discriminatory practices in the antitrust field (as well as in the consumers' protection area).

The contribution will focus on the Italian main regulations and provisions which prevent companies, especially companies detaining a dominant position in their respective markets, to discriminate their competitors and/or their contractor parties and on the most important case-law and practices, in which the Authority has crystalized the main principles and rules on this topic.

II. The notion of discrimination in the Italian substantive competition legal framework

Italian competition is governed by Law no. 287 of 10 October 1990 – *Norme per la tutela della concorrenza e del mercato* (Regulations to protect competition and the market, also known as Law 287/90). In compliance with Article 101 and 102 TFEU¹, the Italian antitrust law, *i.e.* Law no. 287/1990 includes two specific provisions regarding anticompetitive agreements and abuses of dominant position.

¹ Article 101 TFEU paragraph 1 d) 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (...) *d*) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

Article 102 TFEU Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may consist of: (...) *c*) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

Indeed, Article 2 (“*Agreements restricting freedom of competition*”) at paragraph 2. d) states that: “2. *Agreements are prohibited between undertakings which have as their object or effect appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it, including those that: (...) d) apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage. Therefore, apply dissimilar conditions for equivalent transactions is a form of discriminations*”. - Article 3 (“*Abuse of a dominant position*”) states that “1. *The abuse by one or more undertakings of a dominant position within the domestic market or in a substantial part of it is prohibited. It is also prohibited: (...) c) to apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage*”.

This wording clearly shows that not all discriminatory behaviours practiced by a dominant firm constitute an abuse (as it will be explained below, price discriminations may lead also to benefits and consumer welfare). Indeed, the person alleging abusive discrimination must demonstrate an effect on competition, in the form of a “*competitive disadvantage*” towards its competitors in the related market of the customers². Consequently, the final purposes of this provision are to avoid that the dominant company abuses of its contractual power in order to discriminate some commercial partners in favour of other partners, that are, for instance, in the same group.

- Outside the competition legal framework, the Italian civil legislator of 1942 has introduced in the Italian Civil Code (hereinafter only “ICC”), under Article 2597 ICC, the following obligations for companies having legal monopoly: (i) the obligation to reach an agreement with anyone requesting the services that are the subject of their activity and (ii) the obligation to apply equal conditions to contractual partners.

In this regard, it should be noted the fact that Article 2597 ICC’s scope is smaller than the scope of Article 3 of the Italian Antitrust Law. Indeed, the 1990 legislator deemed appropriate to impose the obligation to apply equal conditions not only to companies having a legal monopoly, but to anyone detaining a dominant position in the relevant market. This peculiarity of the competition legal context is strictly linked to the fact that an abuse of dominance may be put in place by every market player detaining a dominant position, not only by the monopolist³.

² To this extent, authoritative doctrine has affirmed that the requirement of “*competitive disadvantage*”, provided by Article 102(c) TFEU and Article 3(c) Law. no. 287/1990, is sometimes interpreted broadly (*i.e.* in cases where the discrimination is based on grounds of nationality). See BELLAMY & CHILD, *European Union Law of Competition*, edited by Vivien Rose and David Bailey, pages. 802 and following.

³ See GHEZZI – OLIVIERI, *Diritto Antitrust*, Giappichelli Editore.

Furthermore, Article 3 of the Antitrust Law, contrary to Article 2597 ICC, extends the requirement of equal conditions not only to customers, but also to suppliers, distributors and every competitor.

- Finally, it should be recalled also the provisions falling into the *consumer protection field*.

Indeed, the Italian Antitrust Authority (hereinafter only “IAA”) is in charge of the application not only of the above-mentioned Antitrust Law no. 287/1990, but also of the Consumer Code (Legislative Decree no. 206/2005), containing a series of provisions aimed to ensure consumers protection against any possible unfair commercial practices. According to Article 27 of the Consumer Code, therefore, the IAA has the power to inhibit the continuation of unfair commercial practices and eliminate their effects, also imposing administrative pecuniary sanctions.

In particular, Article 29 of the Italian Legislative Decree no. 59/2010 - implementing the Directive 2006/123/EC on services in the internal market⁴ - *prohibits any kind of discrimination based on the nationality or place of residence of the recipient*; the possibility of providing for differences in the conditions of access has to be directly justified by *objective criteria*.

In this context, Article 30, par. 1 *bis*, gives the IAA the power to intervene, under Article 27 of the Consumer Code, in case of violation of the above-mentioned prohibition of discriminations. To this extent, the IAA has adopted a specific Regulation no. 25411 dated 1 April 2015, in order to specifically regulate the procedures to be followed within the investigations concerning *inter alia* breaches of the principle of non-discrimination, thus ensuring to the parties the full respect of adversarial principles and the right to access documents of IAA files.

This means that the Authority takes into account discriminatory practices not only under the antitrust point of view, but also by virtue of the regulation regarding the consumer protection field.

III. The notion of discrimination in practice by competition authorities and courts

In the Italian case-law, conducts consisting of differences in prices, terms and conditions mainly regard the cases of abuse of dominance under Article 3 of the Italian Antitrust Law. Indeed, there are very few anticompetitive agreements cases; while, in merger cases, discriminatory practices are taken into account in the general assessment of operations, since the IAA is used to impose peculiar behavioural measures

⁴ For sake of completeness, it should be recalled that all this regulation is inspired by an important general principle of non-discrimination within the internal market, according to which the access by a recipient, and especially by a consumer, to a service on offer to the public may not be denied or restricted by application of a criterion, included in general conditions made available to the public, relating to the recipient’s nationality or place of residence.

when there is a concrete risk that the new entity may breach the general principle of non-discrimination in its future activities.

Generally - even if the Italian Antitrust Authority does not particularly insist on this difference - it is possible to identify two different types of discriminatory practices⁵:

- (i) the so-called *first line discriminations* occurring when the discrimination affect competition between the discriminating firm and its direct competitors, in order to exclude the latter from the market in which all of them are active; and
- (ii) the so-called *second line discriminations* aimed at treating differently trading partners that are in equivalent situations, without objective justifications.

In order to better understand this difference, it is important to stress out the fact that the second line discriminations are suitable to produce anticompetitive effects in the relevant market different from the one in which the discriminating firm is active (and often detains a dominant position). It follows that, with particular reference to abuse of dominance, the dominant position in the related market in which the anticompetitive effects are produced - contrary to what affirmed by some companies before the IAA in order to justify their conducts⁶ - is not an indispensable requirement in the assessment of discriminatory practices.

III.1 – Abuse of dominance

As anticipated, regarding discriminatory practices, authors and case-law mainly focus on the abuse of dominant position under Article 102(c) TFEU and/or Article 3(c) Law no. 287/1990.

Generally, the most “common” discriminatory practice consists of *price discrimination*, which may be represented as (i) charging different customers different prices for goods or services whose costs are the same or, on the contrary, charging the same price to customers from whom supply costs are different; and (ii) reduction of prices (put in place by the dominant player) addressed only to competitors’ customers or customers approached by a competitor.

⁵ One of the most famous cases in which this distinction has been made is surely the *Post Denmark* case. Indeed, the Danish Antitrust Authority referred to “first line” and to “second line” price discrimination in the assessment of the case. However, the European Union Court of Justice (involved in the proceedings after the referral of preliminary ruling made by a Danish Court) did not deal with this differentiation, since the Danish Court referred a question regarding only the first line discrimination (case C-209/10, *Post Denmark* case, judgement 27 March 2012).

⁶ See for instance the Italian Antitrust Authority case A357 - *TELE2/TIM-VODAFONE-WIND*, decision no. 17131 dated 3 August 2007.

However, the scope of Article 102(c) TFEU and Article 3(c) Law no. 287/1990 is pretty large and *these rules may be applied in many different situations*: for instance, the prohibition of discrimination has also been applied in order to challenge the absence of procedural requirement designed to ensure the non-discriminatory application of provisions or in cases in which the dominant player use different (economic and/or technical) conditions in order to favourite companies owned by the dominant player itself⁷.

Even if in some circumstances this phenomenon may be grounded on economic justification (*i.e.* maximization of the economic efficiencies or consumer welfare, see *infra*), discriminatory practices generally lead to anticompetitive effects, especially when they entail below-cost sales and they are aimed at eliminating all competition, as it will be explained in the following paragraph.

III.1.a – The cases subject to the Italian Antitrust Authority

With specific reference to the Italian Antitrust Authority, it should be noted that the IAA has mainly focused on *(i)* behaviours of the public monopolist which entrusts the operation of a service to third parties on an exclusive basis without taking into account other offers from interested third parties (at least one); *(ii)* application of prices, discounts, tariffs and other contractual conditions structured in such a way as to give preference to certain contractors which are acceptable to the dominant undertaking, since they are linked to it by ties of stable cooperation, supply or group relations; *(iii)* the prevention of the access to “essential facilities” to some competitors or to make the access more difficult to some companies compared with others, such as telephone infrastructures, areas of airport to carry out handling services and so on⁸.

The Italian Antitrust Authority has developed an important practice regarding the *prevention of access and/or access on different conditions to several “essential” infrastructures and information* mainly detained by the dominant players.

Some of the discriminatory practices analyzed by the IAA are strictly linked to other abusive conducts, namely the so-called *margin squeeze*, as well as the *refusal to contract*.

- With specific reference to the *margin squeeze*, it is appropriate to recall that this conduct occurs when an undertaking dominant in an upstream market, where it provides a useful factor for the exercise of an economic activity in the downstream market, sells that factor to its competitors in the downstream market at a price which prevents them from having a sufficient margin to remain competitive, and ultimately on the downstream product market⁹.

⁷ See *Competition Law of the European Community*, VAN BAEL & BELLIS, pages 858 and following.

⁸ See GHEZZI – OLIVIERI, *Diritto antitrust*, cit.; and VANZETTI – DI CATALDO, *Manuale di diritto industriale*.

⁹ See C. CURTI GIALDINO, *Codice dell’Unione Europea operativo*, Gruppo Editoriale Simone, pages. 1030 et following.

Indeed, there are several cases, investigated by the IAA, regarding abusive conducts put in place by telecommunication companies suitable not only to discriminate their competitors in the downstream market (the so-called *first line discrimination*), but also to seriously squeezing their margins, in order to exclude them from the market. The co-existence of these two practices was made possible by the fact that the dominant player under investigation was represented by a *vertically integrated company*, which applied particularly favourable conditions to its internal divisions to the detriment of the direct competitors in the downstream market.

In this context, it should be mentioned the two recent IAA decisions, *A500A – VODAFONE / SMS INFORMATIVI AZIENDALI* and *A500B – TELECOM ITALIA – SMS INFORMATIVI AZIENDALI*¹⁰, where the IAA has ascertained two cases of abuse of dominant position by respectively Vodafone Italia S.p.A. and Telecom Italia S.p.A. (and its subsidiary) in the market for retail SMS bulk.

According to the Authority's reconstruction, Vodafone and Telecom detained a dominant position in their respective wholesales' markets of SMS termination¹¹, since the operators, which want to offer a service in the downstream market of retail SMS bulk or in the secondary market (so-called transit market), have to sign an agreement with these two companies, in order to ensure the delivery of the messages¹².

In the light of all the above, the Authority found that Vodafone and Telecom abused of their dominant position in this market, putting in place a so-called *internal / external discrimination* aimed at excluding competitors (generally communication operators) from the downstream market of retail SMS bulk. In particular, the two companies applied economic and technical conditions to the latter worse than those applied to their internal division operating in the same downstream market. This discriminatory practice was suitable not also to affect the competitive ability of Vodafone/Telecom's competitors since they were

¹⁰ See Decisions no. 20901, dated 13 December 2017, case *A500A – VODAFONE / SMS INFORMATIVI AZIENDALI*.

¹¹ For sake of completeness, it should be recalled that the IAA, in these two proceedings, identified the following levels of the SMS service chain:

1) the upstream market where the wholesale markets are identified according to the networks of the Mobile Network Operators ("MNOs", in Italy, TIM, Vodafone, Wind, H3G), or full MNOs;

2) the downstream market of retail SMS bulk, which includes *inter alia* the service of taking charge and sending a high volume of text messages from Vodafone/Telecom clients (such as banks or large enterprises) to clients' customers. Please note that this service is provided by the MNOs, which are vertically integrated market players providing services both in the downstream market of retail SMS bulk and in the upstream market of SMS termination service on their own network; communication operators ("OLO" or "D43 Operators"), operators equipped with infrastructures authorized to offer publicly available telephone services; and aggregators, operators without infrastructures that buy telephone traffic by MNOs and Operators D43 to sell it; and

3) the intermediary market (the so transit market), where some operators act as intermediaries between the MNOs (that offer the termination service) and *inter alia* SMS bulk operators.

¹² Indeed, MNOs are the only operators technically capable of delivering messages to their network users: this circumstance allows them to impose prices and interconnection conditions unilaterally.

not able to offer retail prices as convenient as those applied by the two companies, but also to entail a margin squeeze of equally efficient competitors.

Taking into consideration the seriousness of the infringement, the Authority rejected companies' commitments and fined Vodafone Italia S.p.A. for an amount of more than 5 million Euros and Telecom for an amount of 3 million Euros, stressing out their discriminatory conducts that have provoked a margin squeeze that prevents an efficient competitor in the downstream market from replying to the offers of Vodafone retail division.

- Another similar case, regarding first line discrimination linked to margin squeeze, is the one named A357 - TELE2/TIM-VODAFONE-WIND¹³, always regarding the telecommunication sector.

For our purposes, it should be noted that the discriminatory practice put in place by the MNOs was “very similar” to the one above analyzed. Indeed, it consisted of *offering fixed-mobile termination services to their commercial divisions, on their respective networks, at more favourable technical or economic conditions than those offered to third parties, which were therefore discriminated.*

In particular, the Authority ascertained that TIM and WIND had carried out conducts aimed at excluding their competitors from the retail market for F-M voice services for business customers; the abusive behaviors adopted in the wholesale markets for call termination on their respective networks represented two separate abuses in violation of Article 82 CE Treaty, individually carried out by each MNO in the markets in which they were dominant, in order to eliminate their competitors in the same wholesale termination markets and in the related downstream market for F-M services to business customers. Therefore, the IAA imposed a fine to the two MNOs, respectively of an amount of 20 million Euros to TELECOM and to an amount of 2 million Euros for Wind; while the proceedings against Vodafone was closed with the acceptance of the commitments proposed by the company.

- Furthermore, it should be recalled that this case gave rise to several follow on actions, promoted by other reporters, in order to obtain compensation for the antitrust damages, even before the entry into force of the

¹³ The present proceedings started thanks to a report submitted by TELE2 (an Italian company operating in the business of fixed telephony), according to which the main MNOs active in the business of mobile telephony - namely Telecom Italia Mobile S.p.A, Vodafone Omnitel and Wind Telecomunicazioni S.p.a. - have collectively abused of their dominant position *rejecting its requests to stipulate a commercial agreement regarding the access to their respective network infrastructures.* Please also note that both TAR Lazio (Judgement 2900/2010) and the Council of State (Judgement 2438/2011) rejected the appeal proposed by Wind Telecomunicazioni S.p.A. and Telecom Italia S.p.A. to obtain the annulment of IAA's Decision. TAR Lazio and the Council of State stated that in the case at stake the IAA's correctly sanctioned the abuse of dominance committed by the MNO's and that the arguments proposed by the MNO's in the appeals could not be accepted.

Damages Directive (2014/104/EU) and the respective implementation decree¹⁴. This had particular relevance in the Italian system, since our jurisdiction was not surely famous for being an important *forum* for antitrust follow on actions (such as the Netherlands' and the British's ones), particularly before the upgrade of the recent private enforcement regulation.

For instance, please note that BT Italia S.p.A., an undertaking active in the business of telecommunications, brought an action against Vodafone Omnitel before the Court of Milan, Section specialized in business matter, in order to be ascertained the alleged abuse of Vodafone Italia, in violation of art 102 TFEU and therefore to condemn Vodafone to compensate damages¹⁵. In particular, the appointed Technical Expert (hereinafter only "TE") for the quantification of the damages has confirmed the existence of a negative differential between the regulatory price of wholesale termination on the Vodafone network, as paid by BT Italia, and the fixed/mobile service price offered by Vodafone to its retail corporate customers. This confirmed the existence of abuse of dominance due to *discrimination and violation of the obligation of equal internal/external treatment*.

Moreover, the Court of Milan recognized the discriminatory element of the conduct taken in place, consisting in the *application of economic conditions for the F-M termination of calls on mobile numbers on net and intercom more favorable to its commercial divisions compared to the corresponding termination prices charged to its competitors, also through the use of particular technical solutions, in the absence of a corresponding wholesale offer for its competitors*. Therefore, the Court of Milan, stated that the conduct of Vodafone, took in place in the wholesale markets for call termination on their respective networks, consisting of the application of economic and/or technical conditions which are more favourable to its own commercial divisions than to its own competitors constitutes an abuse of a dominant position, represented

¹⁴ Please find herein-after the most important judgement issued in follow-on actions resulting from the IAA's case A357: Court of Milan, 13.2.2013, *OKCom/Telecom*; Court of Milan, 1.10.2013, *TeleUnit/Vodafone*, n. 12227, est. Massari; Court of Milan, Chamber Specialized in Business Matter, 27.12.2013, *Brennercom/Telecom*; Court of Milan, Chamber Specialized in Business Matter, 3.04.2014, *Uno Communications v. Vodafone Omnitel* (this judgement is particularly relevant because is one of the first cases in which the Italian Judges dealt with the limitation period issue in the antitrust follow on actions field: in particular, in this judgement, the Judge has declared extinguished the right to compensation for damages allegedly suffered by the plaintiff, having unnecessarily elapsed the five-year limitation period referred to in Articles. 2935 and 2947 of the Civil Code); Court of Milan, Chamber Specialized in Business Matter, 15.04.2014, *Uno Communications v. Vodafone Omnitel*; Court of Milan, Chamber Specialized in Business Matter, 15.10.2014, *Fastweb/Vodafone* (in this judgement, it is also specified that the fact that the proceedings were closed against Vodafone with the adoption of the commitments presented by the same, does not involve any immunity at the civil level, but only makes it more difficult the successful implementation of actions for damages); Court of Milan, Chamber Specialized in Business Matter, 28.07.2015, n. 9109, *BT Italia c. Vodafone*; Court of Rome, 23.11.2016, *Fastweb S.p.A. c. Wind Telecomunicazioni S.p.A.*

¹⁵ This specific case leads to the judgement of the Specialized Section in Business Matters of the Milan Court, dated 28 July 2015, n. 9109.

an abuse of dominant position in violation of art 102 TFEU and condemned Vodafone to compensate the damage to BT Italia S.pA. awarding such damages in the sum of € 12.000.000¹⁶.

- As anticipated, the Italian Antitrust Authority has also dealt with abuses of dominance comprising both discriminatory practices and *refusal to contract*. In brief, such abusive conduct consists inter alia in a refusal by a dominant operator to grant access to infrastructures, or networks or the so-called essential facilities¹⁷; as well as in making the supply of the goods or services in question subject to economically unreasonable conditions or undue delay¹⁸.

To this extent, it should be recalled a famous case decided by the IAA (*A351-Comportamenti Abusivi di Telecom Italia*¹⁹), in which the MNO involved in the investigation prevented its “downstream competitors” - in the production chain of the services of fix and mobile telecommunications - the access to the network infrastructures, absolutely essential to carry out their activities. Therefore, the Authority found a serious abuse of dominant position put in place by Telecom Italia - the ex-monopolist in the Italian markets of final and interim services of telecommunication - which had organized, at its central level, a *peculiar strategy aimed at maintaining its dominance after the liberalization of the said markets, thus preventing (or at least delaying) the entry of new competitors*²⁰.

For our purposes, it should be stressed out the fact that Telecom Italia *inter alia* offered to its final costumers' prices that cannot be replicated by competitors, due to the costs and the technical environments the latter had to support (contrary to Telecom). The IAA considered this behaviour as a “*discriminatory practice in the intermediate services markets*”, since it consisted in applying to Telecom’s competitors

¹⁶ In conclusion, the decision of the Authority regarding the abuse of dominance put in place by the MNOs was already considered a sufficient basis to ground a damages claims: useless to say that the possible convictions following the follow on actions may be always taken into account by companies (as well as by the Authority themselves in the quantification of the fines).

¹⁷ For sake of completeness, it should be noted that essential facilities are those infrastructures controlled by the dominant undertaking which cannot be duplicated by competitors and which are necessary for the exercise of economic activities in a downstream market.

¹⁸ See, CURTI GIALDINO, *Codice dell'Unione Europea operativo*, cit.

¹⁹ See *A351-Comportamenti Abusivi di Telecom Italia*, decision dated 16 November 2004, in which the IAA applied a very high fine - for a total of 152 million Euros (whose 76 million of Euros only for the above-described conduct) - because of the seriousness of this infringement, committed by an operator who bears a special responsibility due to its historic dominance in the relevant markets.

²⁰ Please note that IAA recognized the existence of two different cases of abuses. The conducts put in place by Telecom Italia and sanctioned by the Authority consisted in: (i) applying contractual conditions, namely excluding clauses, aiming at making more difficult or at preventing competitors from offering fixed telecommunication services; (ii) formulating economic and technical conditions in offers to customers which could not be replicated by competitors. For our purposes, the latter is the abusive conduct which is more relevant in this analysis, since it was suitable to result in a discriminatory practice in intermediate services markets. Indeed, Telecom Italia applied technical and economic conditions to their competitors worse than those applied to its own commercial division. However, both the conducts resulted in a violation of article 3 Law 287/1990.

worse technical and economic conditions than those applied to Telecom's commercial divisions in the formulation of such offers to final customers. According to the Authority, the purpose of such anticompetitive conduct was clearly to "*delay and hinder competitors' access to the markets for final services*". In particular, it should be stressed out that, by applying economic conditions to its commercial divisions, that are lower than those laid down by the sector regulation for the supply of intermediate factors essential for the supply of final services, to its competitors, *Telecom Italia has introduced a discrimination of network costs for its competitors*, which - in the medium/long term - significantly hampers (i) the achievement of effectively competitive market conditions and, as a result, (ii) an effective and lasting reduction in the prices charged to final customers²¹.

- Another case regarding both discriminatory practices and refusal to contract (in particular, the access to essential infrastructures) is the case *A411A - SORGENIA/ACEA*²², in which two companies active in the market of the distribution and the sale of electricity are involved. The conduct of *ACEA Distribuzione* ("AD") towards the incoming sellers would have been characterized by a *non-collaborative approach in the supply of information and in the performance of the services, as well as by a failure to respect the timing provided by the rules and to perform activities useful to correct mistakes in the data communicated by the incoming seller*. Therefore, the Authority considered that, in a market characterized by a lack of information available to new entrants, the behaviour of AD constituted an *abuse of dominance, discriminating the competitors in favour of ACEA Electrabel Elettricit  ( AEE ), the company of its own Group*. Such discriminatory conduct would have resulted in reducing the competition in the relevant markets and, consequently, in preventing and slowing down the procedure of liberalization of the retail markets of electricity's sales in which the ACEA Group detained a dominant position.

²¹ Please note that, in the judgement no 3655 of 11 May 2005, *TAR Lazio partially accepted the appeal proposed by Telecom Italia* to obtain the annulment of the IAA's Decision. The Administrative Judge of first instance annuls the IAA decision in so far as it lacks preliminary enquiries (i) in the assessment of abuse of dominance and (ii) in the assessment of the replicability of economic offers to large business customers. Furthermore, TAR Lazio affirmed that the IAA's decision lacks motivation with reference to the seriousness of the behaviour in the determination of the fine, thus considering the fine imposed by IAA disproportionate in relation to MNO's behaviours. The Authority has subsequently appealed TAR's judgement before the *Council of State*, which, by means of the decision no 1271 of 10 March 2006, *partially accepted the appeal*. Indeed, the Supreme Administrative Court reformed TAR's judgement, stating that Telecom Italian had violated the internal-external principle of equal treatment by applying different prices to its divisions. In particular, according to the Council of State, both the excluding clauses and the non-replicable offers resulted in two different abuse of dominance made by Telecom Italia. However, with reference to the assessment of the seriousness of the first infringement in the application of the fine (i.e. the abuse of dominance consisting of excluding clauses), the Council of State reduced the amount of the fine to a total of 115 million Euros.

²² The IAA opened an investigation against ACEA Group - especially ACEA Electrabel Elettricit  ("AEE") and ACEA Distribuzione ("AD") - aimed at verifying the existence of possible obstacles and delays for the entry in the market of sales to customers/small companies of the electricity, in which ACEA companies detained a dominant position. The procedure was closed with the decision 8 September 2010, without ascertaining the infringement, since it accepted the commitments proposed by ACEA and by AD, which aimed at introducing efficient procedures for the management of relations with sellers.

- Finally, even if the Authority is not used to insist on the difference between first line and second line discrimination, it is appropriate to recall a case having an object a *second line discrimination*, namely where the dominant player put in place a conduct aimed to treat differently its contractors that are in an equivalent position: *AII – AEROPORTI DI ROMA*²³.

Indeed, the Italian Antitrust Authority fined the Roma Fiumicino’s airport management company (“ADR”)²⁴ because of its *strategy aimed to discriminate air carries* (i) allowing only some of them to perform self-handling activities within the Rome airport and, among them, (ii) apply different tariff conditions unilaterally determined by the management company. Taking into consideration the importance of the ground-handling services for air carries²⁵, ADR’s refusal to grant air carries the necessary spaces in order to put in place such activities were considered unlawful, *a fortiori* when ADR had granted (for different reasons) this possibility to only two different air carries (Alitalia and Trans World Airlines), discriminating the others. Please also note that the discrimination also regards the conditions to which this possibility was granted to Alitalia and TWA.

In particular, the Authority considered as *discriminatory* not only the fact to allow only to two air carries the chance to put in place self-ground-handling activities; but also, the fact that ADR had granted only Alitalia and TWA a reduction on the ordinary handling tariff, which was not commensurate with the amount of handling actually carried out in self-production. Furthermore, the IAA found another discrimination among the two above-mentioned air carries themselves. Indeed, ADR applied different reductions on the price of ordinary handling services to Alitalia and TWA, based on criteria that are not economically homogeneous: they have also been required to pay for royalties, the amount of which was determined according to different criteria.

All these behaviours were considered as an abuse of dominance under Article 3 par. c) of the Italian Antitrust Law by the IAA, which imposed to ADR a fine of almost 2 billion Lire (which correspond to about 1 million Euros).

²³ The decision of 17 March 1993, no. 1017, *AII – Aeroporti di Roma*. Please note that both TAR Lazio (judgement 6167/2000) and the Council of State (judgement 1340/2001) *rejected the appeal* proposed by Aeroporti di Roma S.p.A. to obtain the annulment of IAA’s decision. Indeed, the Administrative Authorities stated that the decision issued by IAA must be confirmed, considering the existence of an abuse of dominance by Aeroporti di Roma S.p.A.

²⁴ For sake of completeness, it should be recalled that the companies managing an airport are always considered detaining a dominant position in a geographic market limited to the sole airport, since these companies have won a tender and, consequently, they obtained the concession of all the airport area, which must be divided among the different operators, and therefore also among the air carries, with equity and fairness.

²⁵ According to the air carries, ground-handling services must be performed autonomously by the air carries themselves, because these activities involve the contact and the visibility with the companies’ passengers (i.e. their final clients) and therefore the companies’ images.

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III.2.- Anticompetitive agreements

As anticipated, there are few cases of anticompetitive agreements on this matter.

However, it is interesting to examine the IAA's decision no. 7115 – A248 *FORNITURA PEZZI DI RICAMBIO CALDAIE A GAS* in which the associated companies agreed *inter alia* to coordinate their commercial policies in order to *strictly regulate the commercial relationships with independent entities, thus discriminating them in favour of the retailers belonging to the respective groups.*

Indeed, the most important boilers manufacturers colluded in order to restrict the offer of spare parts to independent maintainers, through *inter alia* the supply of these parts at higher prices respect of the prices applied to their own network of authorized service centres. The Authority ascertained that this coordinating practice had relevant foreclosure effects of independent maintainers, since they had to face serious and significant difficulties in obtaining spare parts, which was sold to them at higher prices, fewer quantities and with longer procurement times and the companies involved colluded in order to exclude the independent retailers competing with their own ones.

III.3.- Merger cases

With reference to merger operations, it should be underlined that the Italian Antitrust Authority has the power to subordinate the clearance of operations to the fulfilment of measures / amendments aimed at reducing the possible anticompetitive effects. Consequently, the failure by undertakings to comply with the commitments taken within the proceedings may lead to the revocation of the previous authorization, with even possible sanctions.

In this respect, it should be noted that the merger regulation does not provide indications on the measures that the IAA can apply in such cases, in which there is a potential risk of anticompetitive effects of the operations: therefore, in compliance with the EC practice, the Authority has divided these corrective measures into two categories: behavioural measures and structural measures.

With specific reference to the behavioural measures - even if this kind of measures are less efficient and easier to circumvent by the undertaking - the Authority includes *inter alia* the obligations to sell at market prices and conditions. The IAA may impose this kind of measures to the Newco resulting from the operation to avoid discriminatory behaviour.

- In this context, it is interesting to examine the IAA's decision no 8877 – C4158 *Seat Pagine Gialle/ Cecchi Gori Communications* dated 23 January 2001. The operation concerned the acquisition by SEAT of the exclusive control of Cecchi Gori Communications by a participation of 75% of the share capital of the latter.

In brief, it should be recalled that SEAT Pagine Gialle S.p.A. is one of the principal EU operators in the business of the telephone directories which has been acquired by TELECOM S.p.A, namely the dominant player in the market for access to the local telecommunications network and the leading Italian operator in the provision of all Internet-related services both in terms of turnover and in relation to the number of customers; TELECOM, through its subsidiary SEAT, also carries out advertising sales on the official directory of subscribers to the telephone service and also holds a leading position in the supply of advertising space on other printed media and on the corresponding telematics support, also through the most visited Italian portals.

The operation's relevant market is the free television broadcasting market and the related market for television advertising: the merger had particular importance in this market, since it is part of the ongoing process of convergence between the telecommunications and television broadcasting sectors. Indeed, as a result of the merger, the TELECOM Group would have integrated its range of telecommunications products and services with the operation of two established free television broadcasters throughout the country, thus entering in all stages of the new "value chain" created by convergence (*i.e.* creation/supply of content, provision of the infrastructure necessary for the dissemination of content, provision of connectivity, distribution of content/service). Therefore, the operation would have strengthened the dominant position of the TELECOM Group in the markets for online advertising sales, printed yearbook advertising sales, the provision of Internet access services and the creation of a dominant position in the new markets resulting from the convergence, because of which competition would be eliminated or substantially and permanently reduced in the markets concerned.

Considering the relevance of the operation, the Authority submitted the authorization to the fulfilment of several measures, necessary to prevent the strengthening of the dominant position of the TELECOM Group. In particular, among the others, it is interesting to stressed out that the first measure provides that the TELECOM Group will have to *allow, on non-discriminatory terms and at a cost-oriented price, access to all infrastructure* (whether in the course of construction or already completed at the date of approval of the merger) *which TELECOM is entitled to use to lay fibre-optic cables for the provision of interactive and multimedia services to telecommunications operators requesting access.*

This is another example of the particular relevance of the markets regarding telephone infrastructures for prices/conditions discriminations practices, in any kind of antitrust field: infrastructures are considered

essential facilities and, therefore, the access must be ensured to every market operator without unjustified differences and discriminatory treatments.

- The IAA has imposed a very similar measure even in a very recent case. Indeed, on 20 May 2019, the concentration between Sky Italia S.r.l. (a television operator active in the offer of pay-tv services and in the offer of free television services) and R2 S.r.l. (a branch of Mediaset Premium, another content producer company primarily for the pay-tv market) - concerning the acquisition of some pay-tv assets of the digital terrestrial platform of Mediaset Premium S.p.A. by Sky Italian Holding S.p.A. (Sky Group) - was subject to the implementation of specific measures aimed at avoiding discriminatory practices in the access to Sky's platform.

The Authority observed that the implementation of the concentration had the effect of strengthening the dominant position of the Sky Group on the market for retail services for pay-tv (*i.e.* the pay-tv market), thus eliminating, or substantially and lastingly reducing, competition in this market and in the related markets because of the consequent disappearance of the competitive pressure exerted in past years by Mediaset Premium. For this reason, the Authority has decided to impose, for a period of three years, measures to restore competition in the pay-tv market, such as *inter alia* Sky's obligation - in the event of the creation of a new proprietary digital terrestrial platform that is compatible with the R2 assets modified during the period of control of the same - to grant them access to its own digital terrestrial platform at equal, reasonable and not discriminatory conditions; as well as a general prohibition on the use of information and assets held by R2 and already acquired for the purposes of proposing commercial pay-tv offers by the Sky Group.

In the light of all the above, the Italian Antitrust Authority, also in the field of competition law regarding merger operations, pay particular attention to possible discriminatory practices that could be potentially put in place by the NewCo in a dominant position²⁶. When the Authority deems the risk particularly high, it is used to impose specific measures to undertakings to avoid those operations may induce or facilitate discrimination towards the competitors. As we have seen, this exigence is even more actual in all the markets in which there are the so-called "essential facilities", namely some infrastructures or information

²⁶ For sake of completeness, it should be recalled also IAA's Decision no 27413 in the case C12183 – LUXOTTICA GROUP / BARBERINI of 19 November 2018 because also in this case the Authority submitted the authorization to the merger's operation to the fulfilment of specific measures aimed at avoiding discrimination among competitors. In particular, the operation consists in the acquisition by Luxottica of the entire share capital of Barberini S.p.A. Considering that (i) Luxottica is the strongest player in the market for the production and sale of sunglasses and it is the owner of important historical eyewear brands and that (ii) Barberini, developing over the years important technological innovations in the field, has become the principal supplier of all manufacturers of sunglasses with glass lenses; the operation could provoke a strengthen in the dominant position of Luxottica. Therefore, the Authority imposed, *inter alia*, to Luxottica to guarantee access to the supplies at non-discriminatory conditions.

that are indispensable to perform the relevant activity, especially for the new entrants, which must be protected from any possible exclusive abuse.

III. Objective justifications to a discriminatory practice

With reference to possible justifications to discriminatory practices, it should be stressed out the fact that the parties involved in the proceedings before the Italian Antitrust Authority always try to find justifications specifically related to the relevant markets involved in the investigations. As expectable, the parties often try to enlarge the scope of the relevant markets under investigation, thus denying the detention of a dominant position and / or to challenge the economic tests used by the Authority in the assessment of the practices.

- For instance, in the above-mentioned described case A500A – *VODAFONE / SMS INFORMATIVI AZIENDALI*, Vodafone mainly ground its arguments on the fact that the company was not the only one able to supply services that allow the termination of the messages on its own network: according to Vodafone reconstruction, the service that allows SMS termination to Vodafone mobile users could be purchased alternatively from Vodafone itself or from other MNOs at minor prices. Consequently, its conduct not only would be unsuitable to unilaterally foreclose the development of competition in the downstream markets, but also would be far removed from the general cases of margin squeeze identified at European level. However, as anticipated, the IAA did not accept Vodafone's thesis, recalling that such company is the only one able to perform the termination of SMS (*i.e.* to deliver messages) to its final users, thus detaining a dominant position in the specific national wholesales market of SMS termination on Vodafone network (such as any other MNO in the market of SMS termination of its own network).

- Similar justifications were brought also by other MNOs in their investigation proceedings. In particular, in the case A357 - *TELE2/TIM-VODAFONE-WIND*, Wind insisted on the fact that there could not be competitors' price-squeeze where the vertically integrated undertaking is not dominant also in the provision of services in the downstream market for corporate telephony.

Nevertheless, the IAA, following the consolidated case-law of the European Union Court of Justice (EUCJ)²⁷ on this topic, did not accept this thesis, clarifying that *the existence of abusive conducts is not subordinated to undertaking's dominance or leading position in the neighbouring market in which infringement's effects are produced*. Indeed, to ascertain this kind of abuse of dominant position, it is

²⁷ For sake of completeness, it must be recalled that the IAA, to this extent, mentioned the following EUCJ cases: judgement of 6 March 1974 *Commercial Solvents*; judgement of 3 October 1988 *CBEM*; judgement 3 July 1991 *Akzo*; judgement of 1 April 1993 *BPB Industries & British Gypsum*. Furthermore, with reference to the necessity of a link between the dominance and the conduct allegedly abusive and, therefore, between the relevant markets in stake, the IAA recalled the famous case *Tetra Pak II*, EUCJ, C- 333/94, judgement dated 14 November 1996.

enough the existence of a link between the dominance and the alleged abuse and, therefore, a strong connection among the relevant markets involved by the abusive conducts. According to the Authority, Wind's arguments were wrong, since they confused abuse's effects with the abusive conduct itself: in the case at stake, the abuse consisted in the economic and technical discriminations put in place in the wholesale market of termination services - in which Wind detained a dominant position - having anticompetitive effects both in the same market and in the downstream retail market. Therefore, the Authority did not consider as relevant in the identification of the abusive practice the fact that Wind did not have a significant market share in the downstream market; this circumstance may be taken into consideration only in the assessment of the infringement's seriousness to quantify the possible fine.

IV. Objectives justifying to prohibit discriminatory practices

As anticipated, not all discriminatory practices may lead to an anticompetitive infringement.

Indeed, the discriminating firm has the possibility to demonstrate that its discriminatory conduct is objectively necessary and/or justified by the circumstances of the case at stake; or that the exclusionary effect produced by such conduct may be compensated by benefits (also from consumers) in terms of efficiency²⁸. For instance, discriminations are likely to be justified and admitted when based on differences in the costs of production or delivery (including savings resulting from economies of scale)²⁹. However, the case-law has not identified yet clear limits of the undertakings' possibility to offer differential prices within a wider strategy³⁰.

With specific reference to the Italian system, it should be recalled the case *I79 – TAV*³¹, in which the Authority, after the investigation, closed the proceedings ascertaining that Ferrovie dello Stato (the holder of a legal concession for the Italian rail transport service and, therefore, the main purchaser of high-speed rail transport infrastructures – “FS”) *did not commit any abusive discrimination* in the negotiation for the realization of the high-speed rail project in several Italian branches railway. Indeed, the IAA accepted all FS' arguments, affirming that the exceptional peculiarity of the high-speed rail system is suitable to enhance

²⁸ See BELLAMY & CHILD, cit., pages 806 and following.

²⁹ For instance, see the Cases IV/35.471 etc *Digital equipment Corp.*, 9 October 1997, in which the Commission considered the non-standard price reductions, operated by the undertakings, as a proportionate response to a competitor's strategy.

³⁰ See BELLAMY & CHILD, cit., in which the authors mentioned several cases where the companies arguments in this respect have been rejected: Cases C-395&396/96P *Compagnie Maritimes Belge v. European Commission*; T-228/97 *Irish Sugar v. Commission*; C-27/76 *United Brands v. Commission*. However, it should be noted that all these cases are characterized by very peculiar features which do not allow to consider them as laying down a general rule.

³¹ See Decision no. 1795, of 21 February 1994, *I79 – TAV*, issued after an investigation concerning *inter alia* an alleged abuse of dominant position, under Article 3 of Law no. 287/1990, committed by Ferrovie dello Stato which had indicated in the agreement with TAV not only the characteristic of the entities that would have to implement the project, but also their specifications in IRI, ENI and FIAT.

the trusting nature of the relationships between the purchaser of the infrastructures and its suppliers, which must ensure the unity and the success of the entire project. Therefore, the choice of the above-mentioned Italian companies (IRI, ENI and FIAT) as general contractors is based on assessments strictly linked to the trusting relationship existing between FS e these Groups. In other words, the IAA *excluded the discriminatory nature* of the choice made by FS towards other potential supplies, because of the trusting nature of the relationship among the companies involved, necessary to implement the peculiar project within the deadlines and the modalities required³².

V. The relevance of other legal "areas" to apprehend discriminatory practices

Starting from 2005/2007, the Italian Antitrust Authority has particularly strengthened its power in the consumer protection field. The Authority achieved the power to protect consumers against any kind of unfair commercial practice and also to fine companies committing these unlawful behaviours.

Even if the Authority's power in this field is weaker and the fines to be imposed are lower than in the antitrust field, we may consider the consumer protection as another relevant legal area in which the IAA is active to stop discriminatory practices.

- It should be mentioned a very recent case, regarding consumer protection, in which the Authority has sanctioned, with two different decisions, several telephone companies for discrimination practices having as object their customers' condition of payment. On 10 April 2010, the IAA has stopped and sanctioned different conducts carried out by the Vodafone and Wind³³ consisting in, from one side, allowing customers to pay telephony services through current accounts of banks based in European Union countries other than Italy, but, from the other, *discriminating between Italian bank accounts and foreign bank accounts, in violation of non-discrimination obligations among payment instruments within the European Union*. The investigations performed by the Authority have confirmed that a customer, who has activated a telephone service, is prevented from choosing a payment system with automatic debiting in a foreign bank account: indeed, the system created by the two telephone companies allowed customers to choose payment with direct debit on a current account *only* if this current account is opened in an Italian bank or in a bank based in San Marino, thus excluding current accounts opened with foreign banks established in other European

³² However, the IAA has declared that the procedures adopted to identify the general contractors could have been more transparent: even if the modalities adopted by FS have not raised problems under the competition point of view, this does not exclude a further exam, under a different point of view, by the competent judicial or administrative authorities.

³³ Please note that the Authority, which have started the preliminary investigation on 15 November 2018 also against Telecom Italia SpA (another company operating in the electronic communications business) which had carried out the same conduct described above, decided to close the proceedings without ascertaining the infringement, having considered that the commitments presented by Telecom were suitable to eliminate the possible illicit profiles of the conduct under investigation.

Union countries. These decisions are relevant because they stress out the actual importance of the elimination of geographical discrimination in the use of bank transfers and direct debits in European Union, as it is an obstacle to the creation of the single payment market, which represents an important European goal.

Therefore, the Authority stated that the conducts put in place by Vodafone, Wind, and Fastweb represent *serious discrimination between Italian bank accounts and foreign bank accounts in violation of the non-discrimination obligations between payment instruments within the European Union, and in particular in violation of Article 9 of Regulation (EU) No 260/2012*. For these reasons, the Authority imposed fines to the two telephone companies, in the amount of respectively of 800,000 Euros for Vodafone Italia SpA and Wind Tre S.p.A. and 600,000 Euros for Fastweb SpA.

- In the light of all the above, the issue related to discriminatory practices concerns not only the antitrust field.

Indeed, the IAA's fight against this kind of discrimination perfectly fits into the European Union's goal to (create, at the beginning) maintain and strengthen (now) the *European internal and single market*, which cannot materially exist if there continue to be discriminations based on grounds of nationality or any indirect discriminations based on other grounds but capable of producing the same result.

In this context, it should be also recalled the recent European Regulation no. 302/2018, which finally prevents every unjustified form of geo-blocking in the e-commerce in order to *create also a digital single market*. The importance given by the European legislator to this principle shows that this must be respected in every activity conducted within the Member States.

Therefore, the general principle of non-discrimination (granted not only in different provisions of the European treaties, but also in the Italian Constitution) within the internal market must inspire the Authority in each field of its activity, since this is the only way to avoid unjustified different treatments and application of different conditions, to the detriment of consumers and, at the end, of the general and fundamental European Union goals.

VI. Relevant sector regulations

As seen above, in the majority of the cases investigated by the IAA, the infringement consisted of a general prohibition to access and/or discriminatory access to infrastructures networks put in place by the dominant player in one of the relevant markets, enjoying both of a vertical integration and substantial availability of the infrastructure's networks. This kind of abuses is clearly aimed at excluding any potential competitor and strengthening the operator's dominant position.

In this context, it is important to focus also on the connection between peculiar regulations of services of general economic interest and competition law. Indeed, it should be recalled that the physiological interconnection between these two disciplines, in the field of the services of general economic interest, is grounded on a series of general principles set out by the European Union Court of Justice, including (i) the principle of the separation of network management activities; (ii) the third party access; (iii) the corporate, account and owner unbundling in cases of vertical integration; as well as (iv) the essential facility doctrine.

- For instance, with reference to *the gas market*, Article 8 of the Legislative Decree no. 164/2000 expressly states that "*companies that carry out transport and dispatching activities are required to connect to their own network users who request it if the system they have has suitable capacity, and provided that the works necessary to connect the user are technically and economically feasible on the basis of criteria established by resolution of the Authority for Electricity and Gas within twelve months of the date of entry into force of this decree*". Furthermore, the Authority for Electricity and Gas has to control that these activities are carried out so as not to impede equal conditions of access to the system, setting out the conditions to be met in order to ensure freedom of access for all network users on an equal footing (article 24, par. 5 of the same Legislative Decree).

- Similar obligations are provided also in the *rail transport sector* and in the *airport market*.

With reference to the first market, it should be recalled that Directives n. 91/440/EC, 95/18/EC, 95/19/EC, 2001/12/EC, 2001/13/EC, 2001/14/EC - implemented in Italy by Presidential Decree n. 277/98 and n. 146/99 and by Legislative Decree n. 188/03 (Decree repealed by Article 42, paragraph 1, letter a), of Legislative Decree no. 15 May 2015, n. 112) - provide that the manager of the railway network, after verifying the existence of the conditions provided for by law, is required to allow national and international railway undertakings that so request access to and use of the railway infrastructure for the purpose of carrying out the transport activity.

Instead, in the airport market the Civil Aviation Authority, pursuant to art. 10 of Legislative Decree no. 18/99, ensures *inter alia* that the access to airport facilities is guaranteed at adequate, transparent, objective and non-discriminatory conditions. Similarly, also the necessary space for ground-handling, including self-handling has to be allocated on the basis of appropriate, transparent, objective and non-discriminatory criteria.

- Also, the *electronic communications market* has its own Code, establishing specific sector rules. For our purposes, it should be recalled Article 47, which provides a clear obligation of non-discrimination for the operator having the total availability of the infrastructures network: in particular, non-discrimination obligations ensure that the operator (i) applies equivalent conditions in equivalent circumstances to other

operators offering equivalent services and also (ii) provides services and information to third parties under the same conditions and of the same quality as it provides for its own services or those of its subsidiaries or trading partners.

- In the light of all the above, it is clear that the Italian system has provided the operators with specific sector regulations, imposing an *ex-ante* obligation of non-discrimination to the dominant player. However, in practice, the latter always finds a way to circumvent these provisions, in order to exclude new competitors and/or maintain its dominance, often resulting from *ex de jure* monopolism ended after the liberalization of the relevant market. These infringements, therefore, lead to situations that fall inside the scope of IAA's competences and powers of investigation, thus creating all the interesting cases analyzed above.

- Another interesting sector to analyze is the *audiovisual rights market*.

Indeed, the Italian Legislative Decree no. 9/2008 provides both the tender organizer and the independent intermediary (*i.e.* the assignee of the audiovisual rights) with several provisions prohibiting any kind of discrimination. In particular, according to Articles 6 and 7 of such Legislative Decree, tender organizers must allow all participating operators to compete for audiovisual rights under *conditions of absolute fairness, transparency and non-discrimination*; furthermore, the Legislative Decree, in this context, gives the IAA the power to intervene (i) *ex-ante* in order to assess the guidelines drawn up by the organizer before the starting of the tender procedure; and (ii) *ex post*, namely in the event that the tender organizer does not respect the IAA's indications or adopts behaviours suitable to affect the competition in the relevant markets (with the possibility to harm consumers), thus applying antitrust Law no. 287/1990 and Articles 101 and 102 TFEU.

Moreover, Article 11 of the same Legislative Decree, specifically regarding the procedures for exercising the audiovisual rights assigned, impose on the independent intermediary the obligation to resell such rights in a *fair, transparent and non-discriminatory manner*. In particular, this sector regulation requires also the absence of editorial responsibility and of vertical integration of the independent intermediary (Article 7 par. 4): this provision aims at avoiding the establishment competitive relationships between the latter and the communication operators active in the downstream market, thus excluding anticompetitive risks of foreclosure nature³⁴.

³⁴ To this extent, see Italian Antitrust Authority's Decision no. 27065, dated 14 March 2018, case SR33 – *LEGA CALCIO SERIE A – ASSEGNAZIONE DIRITTI AUDIOVISIVI CAMPIONATI CALCIO 2018/2019, 2019/2020 E 2020/2021*. In this Decision, the IAA considered the tender procedure, organized by Lega Nazionale Professionisti di Serie A for the assignment of audiovisual rights in the Italian territory in favor of the company Mediapro S.r.l., in line with the regulation provided by the Legislative Decree no. 9/2008. In particular, in order to approve the operation, the IAA has considered *inter alia* that (i) the audiovisual rights were assigned after a tender in which all the intermediaries had had the possibility to compete on fair basis; (ii) the interpretation of independent intermediaries, given by Lega

VII. Future of the prohibition of discriminatory practices on a competition law perspective

2019 can be considered an important year for cases before the IAA regarding discriminatory practices. Indeed, the Authority has recently opened two important investigations against two of the so-called Big Four - GAFA: namely, Google and Amazon.

The main peculiarity of these proceedings - which, as anticipated, are still in the investigation phase - consists in the instrumental exploitation of their advanced technologies, in order to maintain (and even strengthen) their dominance and exclude any possible competitor.

- With specific reference to the *Amazon* case, the Italian Antitrust Authority stated to open a preliminary proceeding against five companies of the Amazon Group, *i.e.* Amazon Services Europe S.r.l., Amazon Europe Core S.r.l., Amazon EU S.r.l., Amazon Italia Services S.r.l. and Amazon Italia Logistica S.r.l., in order to ascertain an alleged abuse of a dominant position in violation of art. 102 of TFEU.

According to the IAA's thesis, Amazon would grant only to third-party sellers, who had joined the logistics service offered by Amazon itself ("Amazon Logistics" or "Fulfillment by Amazon"), *advantages in terms of visibility of their offer and improvement of their sales on Amazon.com*, compared to sellers who are not Amazon Logistics customers. Such conduct may not be proper to a competitive comparison based on merit, but rather on the possibility of Amazon to discriminate companies based on whether or not the sellers adhere to the FBA logistics service (the so-called "self-preferencing"). Through these behaviors, Amazon would be able to unduly exploit its dominant position in the market of intermediation services on platforms for electronic commerce to (i) significantly restrict competition in the market for warehouse management services and (ii) ship orders for e-commerce operators (logistics services market), as well as potentially in the marketplace brokerage services market, to the detriment of final consumers.

- With respect to the other new proceedings, the *Google* case, Italian Antitrust Authority has decided to open a preliminary proceeding against Alphabet Inc., Google LLC and Google Italy S.r.l. to ascertain an alleged another abuse of a dominant position in breach of art. 102 of the TFEU.

According to the IAA's reconstruction, Google - via the Android operating system -, holding a dominant position in the market of operating systems for smart devices and allegedly, refused to integrate the app

Calcio, seemed in line both with general competition principles and the provisions under Legislative Decree no. 9/2008, since it avoided any risk related to the possible connection between independent intermediaries and communication operator; (iii) Mediapro was not an entity linked or controlled by a communication operator.

"Enel X Recharge", developed by Enel in order to provide end users with information and services for recharging electric car batteries, into the Android Auto environment.

The conduct of Google is likely to restrict competition, as *the use of the app through Android Auto appears necessary to effectively compete in the offer to the final customers of the electric mobility services*, since Android Auto allows owners of Android smartphones to easily and safely use certain apps and mobile phone features when driving a vehicle. Therefore, the exclusion of the app Enel X Recharge from Android Auto would reduce the usability of the Enel app by users and restricts their ability to use the utilities of the app, including booking charging columns.

- These two cases are still under investigation and we will probably know the final decision next year. However, it is very important the interest that the IAA is showing for the actual and practical application of the new technologies, as well as big data and algorithms in the markets and, in particular, the negative consequences that they may have under an antitrust point of view. It is undeniable that the rapid (and often uncontrolled) development of the new technologies is suitable to create new situations in the market, new types of anticompetitive conducts that sometimes are not even easily includable in the previous and "regular" behaviours created in the authorities' practice.

Another sector in which the IAA has always been active in the prohibition and sanctioning of discriminatory practices in the telecommunications market (see above). However, the Authority may further focus on this market due to the development of 5G networks, which may lead to stiff competition among the market players, thus increasing the risk of abuse of dominance by the dominant companies - such as Vodafone Italia and Telecom Italia (TIM) namely the most important MNOs in the Italian territory – regarding for instance the access of these networks.

In this regard, it is very likely that the Italian Antitrust Authority will soon deal with possible discriminatory practices in this peculiar market. Indeed, it should be recalled the specific report transmitted by Iliad to the IAA and to the Italian Communication Authority (so-called AGCOM): in this letter, the French telecommunication operator - recently entered in the Italian market - has expressed its concerns regarding the networks sharing operation between TIM and Vodafone recently announced by the two companies themselves. According to Iliad, the merger operation - having specifically as object the aggregation into a single entity of the respective passive network infrastructures (those of Vodafone and those of Inwit, the tower company controlled by Tim) – may give rise to several critical issues under the antitrust point of view. Therefore, Iliad has already asked the competent authorities (the IAA and the AGCOM) to pay attention to the potential anticompetitive and discriminatory effects towards the other (smaller) operators which may be prevented to realize new networks.

VI. Final Remarks

In the light of all the above, it is clear that the IAA has mainly dealt with discriminatory practices from the point of view of abuses of a dominant position.

This contribution has shown as, in general, the Italian Antitrust Authority is used to prohibit and fine infringements composed by several different conducts, including also discriminatory practices. In other words, it is very rare for this particular abuse to be detected individually and not in concert with other types of abusive conducts, such as price discrimination, excessive or predatory pricing, application of fidelity and loyalty rebates or of unfair trading conditions, exclusive dealing and refusal to supply, refusal to contract or margin squeeze, etc.: all these behaviours are in practice strictly linked and closed among each other and represent exclusionary abuses, that may be committed by a dominant player in order to exclude competitors (even potential ones) from the relevant market in which they detain the dominance or also from the contiguous markets.

We look forward to seeing how the IAA will develop its approach in the new high-tech markets, in which as it has been underlined above, the access to the new and peculiar essential facilities must be granted to all market operators at fair and equal conditions. In an ever-globalized context, in which there are no borders or limits any more, it is important to avoid and delete any possible discriminations, in particular, the ones based on nationality or place of residence.