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COMPETITION COMMITTEE**

Licensing of IP rights and competition law – Note by Italy

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/licensing-of-ip-rights-and-competition-law.htm>

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Italy

1. Introduction

1. The OECD Roundtable on “*Licensing of IP Rights and Competition Law*” offers a valuable opportunity for the Italian Competition Authority (AGCM) to present its experience in relation to the licensing of Intellectual Property Rights (IPRs or IP).

2. The AGCM shares the view that competition’s enforcement when IPRs are involved requires to strike a case-by-case balance between static and dynamic considerations in order to ensure that both competition and IPRs policies play their complementary role in fostering innovation and economic growth. Indeed, on the one hand, IP law finds its rationale in the need to make inventions and innovations appropriable through excludability while, on the other hand, the power to exclude is generally looked at with suspicion from a competition perspective.

3. The power to exclude which is inherent in IPRs¹ does not raise competition concerns as such. Even though the possibility to scrutinize the anticompetitive exercise of IPRs is nowadays generally accepted, at least within the European legal system, it is only in exceptional circumstances that the power to exclude deriving from IPRs may be called into question on antitrust grounds. Competition policy and IPRs are rather complementary as they are both designed with the common objective to promote innovation and economic growth.

4. In the next paragraphs, before entering into AGCM’s case-law, the national legal framework on IPRs’ licensing is described. Afterwards, consistently with the approach outlined above, the present contribution describes the relatively limited enforcement interventions of AGCM in this specific field of IP. It mainly includes abuses of dominant positions consisting in refusals to deal where licensing conditions are a relevant consideration, as well as cases where licensing arrangements have been adopted as a possible remedy to merger and acquisitions raising competition concerns.

2. The national legal framework on IPRs’ licensing

5. In the Italian legal system all IPRs can be licensed, under certain conditions. Most of the provisions concerning the regulation of IPRs in Italy are outlined in the IPRs Code adopted in 2005² and in the Copyright Law of 1941³.

6. Trademarks can be licensed for all or part of the products or services for which they were obtained by the trademark holder, provided that the license does not deceive consumers in relation to the essential characteristics of the products or services. The license, even if not exclusive, can cover all or part of the products or services for which it

¹ IPRs, as a form of private property, are protected also at the European Union level, see, for example, Artt. 36, 118 and 345 of Treaty on Functioning of the European Union.

² Legislative Decree 10 February 2005, n. 30.

³ Law 22 April 1941, n. 633.

has been registered and for all or part of the territory of the State, provided that, in the event of non-exclusive license, the licensee expressly undertakes to use the trademark to distinguish products or services equal to the corresponding ones marketed or lent in the territory of the State under the same trademark by the owner or other licensees⁴.

7. Also copyrights can be licensed on payment of a fee or free of charge. Through the license the author grants the right to exploit the work for a certain period of time or for a certain purpose but retains full ownership of the content. Once the license agreement expires, the author returns to have all the rights to the work itself and may possibly license them to other parties. The license may cover all or part of the rights. The license can then be exclusive or non-exclusive. The Italian Copyright Law specifically governs two “typical” contractual cases of transfer of the right of the author: 1) the publishing contract, with which the author grants a publisher the exercise of the right to publish the work in print, a publication that will take place on behalf and at the expense of the publisher same; 2) the representation and execution contract with which the author grants the faculty of represent a work in public⁵.

8. Similar provisions characterize the license of patents. The patentee (licensor), without divesting himself of such ownership, grants a third party (licensee) the right to use the patented invention. By granting a license, the patent holder breaks the fullness of his exclusive right. This sacrifice is compensated by royalties that the licensee will pay, as well as from the fact that the license allows the patentee to improve the spread of the patented product or service, by placing the licensee’s products on other markets⁶. For this reason, patents’ license, in particular, are in principle considered very much pro-competitive unless the contract provides for very restrictive exclusivity clauses, which might cause restrictions that are problematic from the competition law point of view. The license is enforceable against third parties by the, exclusive and non-exclusive, licensee; from this point of view the Italian system differs from other systems, which attribute the legitimacy to start an infringement action only to the exclusive licensee.

9. The IPR Code⁷ disciplines the compulsory license of patents in relation to dependent inventions, stating that a compulsory license may be granted if the patent protected invention cannot be used without prejudice to the rights relating to another patent granted on the basis of a previous application. In this case, the license can be granted to the holder of this other previous patent to the extent necessary to exploit the invention, provided that this represents, with respect to the object of the previous patent, an important technical progress of considerable economic importance. It is worth noting that the license obtained is only transferable together with the patent on the dependent invention. The holder of the patent on the main invention is in turn entitled to grant a compulsory license on reasonable terms on the patent of the dependent invention.

10. The Code⁸ also disciplines compulsory license more in general, providing that whoever asks for the granting of a compulsory license must prove that he has previously

⁴ Art. 23, par. 2, of the IPRs Code.

⁵ Artt. 118 et ss. and 136 et ss. of the Copyright Law.

⁶ Art. 80 of the IPRs Code.

⁷ Art. 71 of the IPRs Code.

⁸ Art. 72 of the IPRs Code.

turned to the patentee and that he could not obtain a contractual license from her under fair conditions. The compulsory license can be granted only against payment, by the licensee and in favor of the patentee or his assignees, of a fair royalty and provided that the applicant for the license guarantees a satisfactory implementation of the invention according to the conditions established in the license itself. Similarly to other jurisdictions, compulsory license may not be granted to patent's infringers and may be granted for an exploitation of the invention that is mainly directed to the supply of the internal market.

11. Particular cases of compulsory license are also disciplined by the IPR Code⁹, which establishes that the Italian Patent and Trademark Office issues a compulsory license also in favor of: a) a breeder, for the non-exclusive exploitation of the invention protected by the patent, if such license is necessary for the exploitation of a plant variety; b) the holder of a patent concerning a biotechnological invention for the use of the patent on a plant discovery. The release of the license is subject to the demonstration by the applicant that: a) she/he turned in vain to the holder of the patent or of the plant variety right to obtain a contractual license; b) the plant variety or the invention constitutes a significant technical progress, of considerable economic interest with respect to the invention indicated in the patent or the protected plant variety.

12. With respect to the Italian's legal system, it might also be interesting to report the state of the debate concerning a possible criticality, from a competition law point of view, related to compulsory licenses, that lies in art. 69 of the IPRs Code. This provision contemplates a weaker burden of implementation of the patented invention, which is no longer sanctioned with the forfeiture. This sanction had the primary purpose of concretely finalizing the exclusive right, i.e. of effectively promoting innovation, which from an antitrust perspective, is the noble form of competition. To the contrary, the lack of a sanction for failure to implement the patent could favor defensive patent filing activities that have the sole purpose of obtaining patent coverage, without the real intention of proceeding to the development of the invention, i.e. for the sole purpose of excluding rivals.

13. A change in the Law in 1968 replaced the sanction of forfeiture, previously envisaged in the case of non-implementation of the patent, with the institution of the compulsory license, which can be requested, pursuant to art. 70 of the IPRs Code by the competitors of the patent holder if the latter does not use the patent for three years after obtaining it, and has confined the hypothesis of forfeiture to the case in which not even the licensee develops the invention within two years from the granting of the license. Some scholars, therefore, emphasized that if no one were to apply for a license on the non-implemented patent, the forfeiture could not operate and the exclusivity right would be granted without that any benefits in terms of actual innovation.

14. In sum, there is no institution that deals with the verification of the fulfillment of the obligation to implement the patent, as this task is left to enforcers on the initiative of the competitors of the holder of the right; however, the latter may never require a compulsory license either because they are not interested or because such request should also be made in relation to all the patents present in the network surrounding the main patent, which might entail a significant financial effort¹⁰.

⁹ Art. 81-octies of the IPRs Code.

¹⁰ AREZZO E., *Strategic patenting e diritto della concorrenza: riflessioni a margine della vicenda Ratiopharm*, in *Giurisprudenza Commerciale*, 2014, n. 2, p. 423.

15. In that regard, it is important to highlight that the number of patents granted in European Patent Office's (EPO) Member States - which include the 28 States of the European Union - has increased, between 2009 and 2018, from 27.589 to 57.906¹¹.

3. The competition case-law

16. IPRs are subject to competition law in the Italian jurisdiction and can be tackled both under the Law 287/90 (the national competition Law) and the Treaty on the Functioning of the European Union (TFEU) if trade between Member States is affected. Abuses of dominant position and illegal agreements fall within the scope, respectively, of article 3 and article 2 of the national competition Law as well as of article 102 and 101 of the TFEU.

17. The development of technological standards, as well as the inclusion of IPRs into the standards, generally has a supranational dimension. AGCM's interventions have been, so far, limited to cases where the specific national legislative framework, the need to facilitate the development of new products or the initial phase of opening to competition of a sector have justified an enforcement intervention at the national level. It has adopted a case-by-case approach, being generally cautious to intervene when IPRs, and more specifically licensing arrangements, are involved. In the specific circumstances considered, the risk of distorting dynamic competition, by antitrust intervention, was very limited, if non-existent, without impairing firms' *ex ante* incentives to invest in welfare-enhancing activities such as innovation.

18. Cases where licensing of IPRs are at stake constitute a niche area in the enforcement of competition law in Italy, the number of actual cases brought by AGCM being relatively limited and consisting mainly in abuses of dominant position related to refusals to deal.

19. In the paragraphs below will be described interventions (a) related to patents' licensing in the pharmaceutical sector, (b) concerning copyright in the news review services sector, as well as (c.i) in the audiovisual sector and (c.ii) where licensing of IPRs has been adopted as a remedy as part of merger control.

3.1. Interventions related to patents: the pharmaceutical sector

20. A specific field of intervention by the AGCM in the pharmaceutical sector has concerned Supplementary Protection Certificates (SPC) at a time when the specific national legislation had favored anti-competitive conducts.

21. SPC are a type of patent extension beyond the usual duration of a patent introduced to allow to recover, after a patent has been obtained, for the time lost before the conclusion of the process of authorization to commercialization. Originally, in 1991, the Italian legislation was more favorable to pharmaceutical companies granting a longer maximum extension of SPC than the one introduced at European level the successive year.

¹¹ European Patent Office, Annual Report 2018, available at: <https://www.epo.org/about-us/annual-reports-statistics/annual-report/2018/download-centre.html>. In Italy patents have increased, between 2012 and 2018, from 2.238 and 3.466.

22. In that legislative context AGCM has intervened, first of all, through advocacy¹² and, then, using its enforcement powers. These interventions have been presented in detail in the contribution submitted for the OECD's roundtable on "*Generic Pharmaceuticals*" held in October 2009¹³. Therefore the present contribution focuses on the main aspects of its enforcement interventions related to licensing.

23. The AGCM has investigated the conduct of two pharmaceutical companies¹⁴ aimed at delaying the entry of generics' competitors. In particular, the AGCM has assessed Merck's and Glaxo's refusals to grant licenses to chemical companies for the production of Active Pharmaceutical's Ingredients (API) to be supplied to generic companies in European countries where patents on the products considered had already expired.

24. More specifically, the interventions concerned conducts that took advantage of the Italian regulatory framework. More specifically, both companies:

- benefited from a regulatory framework that that did not impose to SPC holders an obligation to provide to requesting parties a license for export, but established a procedure for the grant of a voluntary license;
- refused to grant licenses, related to some active substances they produced, to chemical companies that intended to produce them in Italy in order to successively sell them to generics producers active in other Member States where the patent protection expired or did not exist.

25. The theory of competitive harm established in relation to the Glaxo's case is based on the absence of objective justifications to the refusal to grant access to third parties to essential inputs to operate in a market¹⁵. More specifically, the anti-competitive conduct consisted in the refusal to grant a license for the production in Italy of an essential input - the API considered - to generics producers, potential competitors of Glaxo, to access export markets where IPRs expired or did not exist.

26. The very specific circumstances of the case are characterized, above all, by the absence of any trade-off between competition and IPRs since the access to the API would not have hindered the possibility to recoup costly investments in R&D in the export markets where IPRs were absent.

¹² Opinion of 30 May 2002, *AS239 Durata della Copertura Brevettuale Complementare dei Farmaci*,

[http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/E5E8F112F35E36B3C1256BCE0034E2E1/\\$File/AS239.pdf](http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/E5E8F112F35E36B3C1256BCE0034E2E1/$File/AS239.pdf).

¹³ Generic pharmaceuticals, note by Italy, OECD, Competition Committee, October 2009; <http://www.oecd.org/competition/sectors/46138891.pdf>;

¹⁴ Decision of 8 February 2006, A363 Glaxo – Principi Attivi, [http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/F6DE3DE75F12767CC12571220055E7E1/\\$File/p15175.pdf](http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/F6DE3DE75F12767CC12571220055E7E1/$File/p15175.pdf); Decision of 21 March 2007, A364 Merck Principi Attivi, [http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/EE6153D52C3DB5CCC12572B300343157/\\$File/p16597.pdf](http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/EE6153D52C3DB5CCC12572B300343157/$File/p16597.pdf).

¹⁵ Court of Justice of the European Union, Case C-7/97, Oscar Bronner GmbH & Co. KG.

27. Despite having ascertained the abusive nature of the conduct, the Authority did not impose any fine since, well before the end of the investigation, Glaxo had not only granted the licenses originally requested by Fabbrica Sintetici Italiana (FIS), a chemical-pharmaceutical undertaking, but had also set conditions allowing that company to save the time required to research and test an efficient production process for obtaining the API considered. As a result, a producer of generic drugs based on this API had succeeded in entering the Spanish market.

28. With regards to the Merck's case, AGCM has adopted a compulsory license as an interim measure, against the payment of an adequate remuneration, to manufacture the active ingredient Imipenem Cilastatina used for broad spectrum antibiotics. The AGCM, indeed, concluded that the statutory conditions of "*fumus boni iuris*" and "*periculum in mora*" to adopt the interim measure were met. More specifically, the conduct was considered capable of causing a serious and irreparable damage to competition hindering the access of generics producers to the markets where Merck had already lost patent protection. To comply with the interim measure, Merck issued, six months before the expiration of its SPC, the license to a chemical firm to manufacture the API considered¹⁶.

3.2. Interventions related to copyright: the news review services sector

29. The AGCM has also recently intervened in a case at the intersection between copyright and competition. In the news review service in the Autonomous Province of Trento (APT) case not only the doctrine of essential facilities has been applied to a refusal to grant a copyright license, but also it is the first time that AGCM has determined, as an interim measure, a compulsory license under specific FRAND conditions. The relevance of the principles that can be derived therefrom largely outweigh the size of the case's market dimension¹⁷.

Box 1. A503 News Review Service*

SIE is the publisher of "L'Adige", the most widely read daily newspaper in the local market of the Trentino Province. Euregio is active in the downstream news review service market providing personalized online news review. Originally Euregio reproduced "L'Adige" contents through their inclusion in the RP system. SIE, then, decided to withdraw from RP and settled a partnership with Volocom, a player active in the news review services, with the aim of entering the downstream market. Consequently, news review service operators are now obliged to negotiate bilaterally licenses directly with SIE. After several attempts to negotiate copyright licenses, and the denials opposed by SIE, Euregio filed a complaint before the AGCM.

AGCM opened an investigation for abuse of dominant position. SIE holds a dominant position (64% market share) in the upstream market for daily newspapers in the Trentino

¹⁶ AGCM established that should have the parties failed to find an economic agreement in relation to the compulsory license, it would have been defined by an expert appointed by the Authority (Decision of 15 June 2005, *A364 Merck Principi Attivi*, [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/5D12F9D21F9201DEC125702700351A82/\\$File/p14388.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/5D12F9D21F9201DEC125702700351A82/$File/p14388.pdf)).

¹⁷ An appeal against the case is still pending at the First Instance Administrative Court (Lazio's Tribunale Regionale Amministrativo).

Province. The theory of harm consisted in the refusal to supply Euregio the right to use the contents of “L’Adige”, an essential input to operate in the downstream market of news review services. AGCM also concluded that the statutory conditions - serious and irreparable damage to competition - to adopt interim measures were met, SIE had, consequently, to grant a compulsory license under FRAND conditions. As the parties did not agree, AGCM determined the FRAND conditions. The benchmark consisted in Reportorio Promopress’ conditions (8% of the revenues of news review services) to be adapted to the bilateral situation at hand. More specifically, the fee was calculated proportionally to the number of articles extracted from “L’Adige” over the total articles reviewed. AGCM closed the investigation in the main proceedings ascertaining an abuse of dominant position.

* Decision of 20 December 2017, A503 Società Iniziative Editoriali/Servizi di Rassegna Stampa nella Provincia di Trento, [http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/389A6F7BCE9ED81BC1258210003BDA5A/\\$File/p26907.pdf](http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/389A6F7BCE9ED81BC1258210003BDA5A/$File/p26907.pdf).

30. To establish whether the SIE’s denial to give Euregio a copyright license amounted to an abusive conduct in the form of a refusal to supply, the AGCM considered the doctrine of essential facility. In the competitive assessment of the case, consistently with EC’s Communication concerning abusive exclusionary conducts¹⁸, the AGCM, indeed, considered that the refusal to grant the copyright license breached competition because it (i) related to a service objectively necessary to compete effectively on the downstream market, (ii) likely to lead to the elimination of effective competition in that market, (iii) determining consumer harm.

31. It also met the further condition, specifically established by European Courts in relation to IPRs¹⁹, that the refusal should prevent the appearance of a new product for which there is a potential consumer demand. In that regard, Euregio was considered offering a new digital personalized product, more complex than the upstream inputs, to existing customers.

32. Furthermore, even if Courts and arbitrators are in general well placed to set economic conditions in cases of disputes²⁰, the specific circumstances of the case warranted an intervention by the AGCM. In its first interim measure, AGCM has asked the parties to find an agreement by themselves. It is only because of the disagreement between the parties that AGCM directly intervened defining specific economic conditions.

33. In that exercise, AGCM was facilitated by the existence of a clear benchmark, the “*Repertorio Promopress*” (RP) system, that just needed to be adapted to the situation at hand. More specifically, the AGCM observed that the RP system - which collectively

¹⁸ European Commission, Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN).

¹⁹ Court of Justice of the European Union, C-241/91 P and C-242/91, Radio Telefis Eireann (RTE) and Independent Television Publications (ITP)/ Commission (Magill); C-418/01, IMS Health/NDC Health; T-201/04, Microsoft/Commission.

²⁰ European Commission, “*Antitrust decisions on standard essential patents (SEPs)—Motorola Mobility and Samsung Electronics—Frequently asked questions*”, MEMO, 29 April 2014, http://europa.eu/rapid/press-release_MEMO-14-322_en.htm.

manages the rights of the contents of publishers in relation to the dailies and periodicals included - is accepted both by editors and news review services operators. It just needed to be adapted to the bilateral situation at hand that is different from the typical multilateral one characterizing the RP system, where on the supply side also other publishers are included²¹.

34. More in general, the parties are best placed to arrive to a common understanding of appropriate licensing conditions and rates. Divergences in the interpretation of transaction terms may exist and there is room to achieve further shared clarification. Until this objective is reached, Competition Authorities, in some very specific circumstances, can play a role, complementarily to Courts and arbitrators that are well placed to deal with this issues²².

3.3. Other interventions

3.3.1. Audiovisual sector

35. In the audiovisual sector, licenses for premium content can play a relevant role in the competition among both existing and potential players.

36. In 2000, the AGCM found that the acquisition of exclusive rights for the broadcasting of top sports events for a long duration, just at the time when the conditions for effective competition in pay TV market were being established - as shown by the entry of a new operator and the approaching expire of Telepiù's exclusive rights to league matches - raised the already high barriers to entry into the relevant market, amounting to an abuse of dominant position²³. The Authority ruled that Telepiù's conduct restricted competition, because it had acquired exclusive rights for the encrypted broadcasting of the bulk of the Serie A and Serie B soccer championship matches for a six-years period (1999-2005), thereby extending, indeed doubling, the period of exclusive broadcasting rights that had been previous standard practice in football broadcasting contracts, preventing its competitors - already operating on the market and possible new market entrants - from being able to offer the most popular programs for a particularly long period of time²⁴.

²² In another case, concerning a refusal to deal in the management of copyright-related rights in music and audio-visual works, the AGCM accepted commitments that, among others, concerned the alleged denial of access to the database, managed by Nuovo IMAIE, containing works and artists. More specifically, licensing access to the database was addressed in two different ways: allowing free access to the database updated as of mid-March 2014 or access to the full, constantly updated, database on FRAND terms, against an annual license fee of 4.5% of the total royalties managed (Decision of 22 March 2017, *A489 Nuovo Imaie Condotte anticoncorrenziali*, [http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/B1E178CF09524058C12580FE00500734/\\$File/p26497.pdf](http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/B1E178CF09524058C12580FE00500734/$File/p26497.pdf))

²³ Decision of 14 June 2000, A274 Stream/Telepiù, [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/652EFAE97345B5E9C1256906003CC839/\\$File/p8386.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/652EFAE97345B5E9C1256906003CC839/$File/p8386.pdf).

²⁴ More recently, even if licenses were not the core object of the procedure, but nevertheless constituted its background, it also worth mentioning that AGCM ascertained that Sky and RTI/Mediaset Premium, the main television operators in the pay-tv market, as well as the Italian Football League (Lega Calcio) and its advisor Infront, infringed Article 101 TFEU as they entered into a bid-rigging agreement concerning the award of the Serie A broadcasting rights for the

37. More specifically, the investigation, first of all, had revealed that Telepiù occupied a dominant position on the pay-TV market for various reasons: its huge market share (82% of total subscribers, but over 92% of the turnover in 1999); the fact that for over six years it had been the sole broadcasting company on the market (largely independent of consumers, and de facto obliging television rights suppliers to deal with it); and its easier access to the most popular programs (in addition to its soccer broadcasting rights Telepiù owns some 60% of the rights to broadcast movies attracting the highest theatre box office revenues).

38. The Authority concluded that Telepiù had violated Article 82 of the Treaty (now Article 102 TFEU), first of all by signing long-term contracts (for periods longer than three years) for exclusive encoded broadcasting rights to a significant portion of Italian A and B League soccer matches, including the home matches of the most popular teams. The Authority also deemed Article 82 of the Treaty (now Article 102 TFEU) to be violated by the clause according a right of preemption to Telepiù or its subsidiaries for acquisition of exclusive rights for the period following the expire of the initial rights, as this would enable the dominant firm to further prevent competitors from gaining access to the most important program contents. Lastly, the Authority ruled that Telepiù had abused its dominant position by including several anticompetitive clauses in the contract for the cable distribution of soccer packages and programs concluded with Stream in 1996. In particular, it had obliged Stream to agree that it would only broadcast via cable the soccer championship matches over which it had already acquired the broadcasting rights.

39. Successively, in February 2017, AGCM also published the results of its inquiry into the audiovisual sector²⁵. The inquiry was aimed at assessing the effects of technological developments on competition and consumers in the audiovisual market. In particular, AGCM analyzed whether the switch from analogic to digital broadcasting and the emergence of internet as a new transmission platform have created bottlenecks in the value chain concerning both the access to content and the access to transmission platforms.

40. In its conclusions, AGCM highlighted, among other aspects, that practices in the licensing of TV rights based on exclusivity and holdback agreements, which ensure that rights for different platforms are not licensed, could impair the development of new market players, especially non-linear service providers.

3.4. Licensing of IP Rights in Italy as remedies in merger control

41. Licensing arrangements have sometimes been adopted by AGCM as a possible remedy to merger and acquisitions raising competition concerns.

following three years 2015-2018 (Decision of 19 April 2016, I790 Vendita Diritti Televisivi Serie A 2015-2018, [http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/5D7467EF6EF317B0C1257FA100583822/\\$File/p25966.pdf](http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/5D7467EF6EF317B0C1257FA100583822/$File/p25966.pdf). The First Instance Tribunal (TAR Lazio) annulled AGCM's decision (*Judgement 7121/2016*) and AGCM's appeal is still pending at the Council of State.

²⁵ Sector Enquiry closed the 30 November 2016, IC41 - Indagine conoscitiva sul settore audiovisivo, [http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12564CE0049D161/0/3DA69755C54A401CC1258098004EB09E/\\$File/IC41.pdf](http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12564CE0049D161/0/3DA69755C54A401CC1258098004EB09E/$File/IC41.pdf).

42. In the context of the recent authorisation of the acquisition of Barberini by the Luxottica Group, measures imposed on the parties include access to the innovation of the acquired firm, even when covered by IPRs.

Box 2. C12183 Luxottica Group / Barberini*

The AGCM adopted a conditional clearance decision for the exclusive control of Barberini S.p.A. by Luxottica Group S.p.A.. After a detailed analysis of the structure and functioning of the markets concerned, the Authority concluded that the merger is liable to lead to the creation or strengthening of a dominant position of Luxottica in the markets for the production of glass blanks for plano lenses, the production of plano lenses and the production and distribution of sunglasses, liable to have a significant and lasting negative effect on the competitive dynamics in these markets.

Authorization was granted by Authority under the condition of a series of measures imposed on Luxottica to resolve the concerns raised in the course of the investigation of the possible vertical anti-competitive effects of the operation in question. In particular, Luxottica must enter into contracts for the supply by Barberini of glass blanks and plano lenses with all market operators who so request, with no minimum purchase requirements for these companies. In addition, the contracts must allow Barberini customers to access, where requested, products resulting from the innovation and technological developments of Barberini S.p.A. and Barberini GmbH, even where such products are covered by IPRs.

* Decision of 19 November 2018, C12183 Luxottica Group/Barberini, [http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/9C6BD2370BFBAEB7C1258351005BC67F/\\$File/p27413.pdf](http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/9C6BD2370BFBAEB7C1258351005BC67F/$File/p27413.pdf).

43. In the past, AGCM has also intervened adopting the licensing of copyright as a remedy. For example, in relation to the assessment of the acquisition of Loctite by Henkel, the authorisation was conditional on the sale of some trademarks²⁶.

4. Conclusions

44. As in relation to IPRs in general, AGCM has adopted a cautious approach also in the field of their licensing, intervening only in exceptional circumstances where the specificities of the case required to impose limitations to the otherwise legitimate power to exclude granted by IPRs. Antitrust intervention should not, indeed, distort dynamic competition altering firms incentives to invest.

45. Enforcement mainly includes abuses of dominant position consisting in refusals to deal where licensing conditions are a relevant consideration. AGCM's approach suggests that the licensing of different IPRs - in terms of patents and copyright - or their licensing in different sectors - such as the pharmaceutical or the news review services ones - does not give rise to differing concerns in terms of their possible anticompetitive effects.

²⁶ Decision of 9 May 1997, C2641 Henkel/Loctite, [http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/61E10BE53F52A2DBC12564A3004661DD/\\$File/p4993.pdf](http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/61E10BE53F52A2DBC12564A3004661DD/$File/p4993.pdf).