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The standard of review by courts in competition cases – Note by Italy

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

Please contact Ms. Despina Pachnou if you have any questions about this document.

Email: Despina.Pachnou@oecd.org

JT03447452

Italy

1. Introduction

1. The OECD Roundtable on the standard of review by Courts offers a valuable opportunity to discuss about the intensity of judicial scrutiny in competition cases, which is a focal point for competition agencies in their enforcement practice.

2. In fact, it is undoubted that judicial review plays a central role in competition cases. Such control strongly influences the standard of antitrust enforcement, not only as a means to ensure that competition agencies comply with the required procedural rules, but also with regards to the standard of proof that should be satisfied in order to establish competition infringements. At the same time, because of the technical nature and complexity of evidence and the expertise required to assess them, the evaluation of competition decisions poses particular challenges to Courts.

3. This is particularly true where the competition's enforcement system is an administrative one, such as in Italy. The Italian Competition Authority ("ICA") is solely responsible for public enforcement and its decisions are fully effective; the parties involved have the right to challenge ICA's decisions before the administrative Courts. In addition, it should be considered that, with regards to private enforcement, the EU Directive 2014/104/EU provides that final decisions of competition authorities or judgments issued by the review Courts shall have binding effect for the purposes of an action for damages brought before their national courts; the Italian legislative decree transposing such Directive also specifies that, in the judicial review of the ICA's decisions, the administrative Courts shall have the power to fully verify the facts and technical profiles (of non-controversial nature) on which such decision is based¹.

4. In the Italian legal system, the judicial review of ICA's decisions is granted solely to the administrative judges. In particular, the review court of first instance is the Regional Tribunal of Latium, Rome (hereinafter, also the TAR Lazio)². The judgments issued by the TAR Lazio can be appealed before the Council of State, acting as a court of last instance. Both, the TAR Lazio and the Council of State, when deemed necessary, can make a referral to the European Court of Justice according to art. 267 TFEU³. Only for very limited reasons, narrowly interpreted by the case-law, Council of State's decisions may be challenged before the Corte di Cassazione, the Italian Supreme Court.

5. It is worth noting that the TAR Lazio and the Council of State have no competence on *private enforcement* issues, such as damages; pursuant to Article 18 of Legislative Decree no. 3 of 19 January 2017 ("Legislative Decree no. 3/2017"), which transposed the

¹ See Directive 2014/104/EU "on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance", Article 9; Legislative Decree n. 3 of 19 January 2017, Article 7.

² Articles 133 and 135 of the Code of Administrative Procedure, Legislative Decree 2 July 2010, no. 104.

³ Several referrals to the Court of Justice involving delicate legal issues were made during the judicial review of ICA's decisions, among which: case C-198/01, Consorzio Industrie Fiammiferi; case C-280/06, ETI; case C-428/14, DHL; case C-179/16: Roche-Novartis.

Antitrust Damages Directive 2014/104/UE (“Antitrust Damages Directive”), competition law disputes fall under the jurisdiction of the judicial sections specialized in company law of Milan, Rome and Naples.

6. With regard to the grounds on which an appeal may be sought, although within the range of legal flaws, the judicial control does not meet limitations. Administrative judge can quash the challenged decision if affected by breach of law, misuse or abuses of power, or lack of competence.

7. Judges may carry out a wide and thorough scrutiny to verify whether the ICA’s assessment stands judicial review.

8. Concerning the lengths of proceedings before the administrative Courts, in 2017 the average duration of proceedings between lodging of action and adoption of a decision by the TAR Lazio was less than one year, while between lodging of appeal against a TAR decision and adoption of a decision by the Council of State was less the one year and three months.

9. The ICA believes that judicial scrutiny may positively affect the antitrust enforcement activity and welcomes this opportunity to discuss the standard of review by Courts in competition cases and methods to ensure that judges have full access to technical evidence in competition cases.

2. The individuation of challengeable acts

2.1. Scope of the ICA’s final decisions judicial review

10. Acts that can be challenged in front of the Courts include any decision by which the ICA terminates an investigation such as, in cases involving restrictive agreements or abuses of dominant positions, decision establishing the existence of an infringement and imposing fines. They also include, in certain cases, decisions to dismiss a complaint and commitment decisions. In fact, such acts definitively lay down the ICA’s position, bringing about a distinct change in the legal position of the claimant, and may thus be challenged. Decisions in the field of merger control can also be challenged.

11. The Court has made clear that not only the addressees of the ICA’s decision have standing, but also other subjects that are directly and individually prejudiced by the decision⁴.

12. For instance, decision to dismiss a complaint and not to open an investigation may be appealed by complainants and consumer association; Courts may assess whether the information available to the ICA exclude that there are sufficient elements to find a violation and whether the decision is properly reasoned.

13. Also decisions accepting commitments to end the procedure without the finding of an infringement may, in certain cases, be challenged. In particular, according to the Italian case law, third parties whose rights are directly affected by the commitments of the undertakings are entitled to appeal⁵. However, it should be considered that the ICA retains

⁴ Council of State, VI, 14 June 2004, no. 3685, Motorola.

⁵ TAR Lazio, I, 9 May 2011, no. 3964, Conto TV and TAR Lazio, 7 April 2008, no. 2902, Eutelia.

wide discretion when deciding whether to accept or reject commitments offered by undertakings and only error of law or a manifest error of assessment will vitiate its decision.

14. The Parties notifying a merger may also have legal standing to challenge ICA's decision. It is worth noting, in this respect, that in Italy merger remedies can be unilaterally imposed by the ICA, with the consequence that the measures made binding in the final decision may differ from those proposed by the Parties. The Parties have in the past challenged such decisions on various grounds, for instance claiming that the measures imposed were not proportional, owing to an incorrect definition of the relevant market⁶, or on procedural grounds, with regards to the peremptory terms established to evaluate the transaction⁷.

15. In addition, decisions authorizing a merger subject to conditions can also be appealed by third parties if they can prove that their interests are directly and immediately negatively affected by the ICA's decision. This is generally true for the main competitors of the companies involved in the transactions. Third parties can raise both procedural or substantive ground allegations. For instance, with regards to procedural grounds, on one occasion the third party has challenged the ICA clearance decision on the basis that it was conditioned to remedies proposed by the notifying party during Phase I, while according to the Italian antitrust law remedies can be proposed only following a Phase II assessment. The claim was rejected by the Court, which held that the parties are free to amend the originally notified transaction by offering measures in order to eliminate competitive risks⁸. As for substantive issues, a third party has successfully challenged a clearance decision subject to behavioral measures on the basis that they were not sufficient to eliminate competitive concerns⁹.

2.2. The possibility to challenge the ICA's procedural decisions

16. According to the Italian case law, procedural decisions of the ICA, having only a preparatory character in relation to the final decision, do not directly affect the rights and legitimate interests of the parties and, consequently, are not subject to judicial review. Thus, any defects of such acts should be raised in the appeal against the final decision¹⁰.

17. For instance, the decision rejecting commitments proposed by the parties in the course of an antitrust proceeding cannot be autonomously appealed, but only with the final ICA decision ascertaining the violation. In such case, should the Court annul the ICA's decision to reject commitments, the ICA's final decision is not automatically void, but only

⁶ Tar Lazio, I, 10 February 2016, no. 1934, Enrico Preziosi. See also Council of State, VI, 12 February 2007, no. 550, Cassa Depositi e Prestiti, which partially annulled the ICA's decision as it found a measure imposed by the ICA concerning the corporate governance of the company to be excessively intrusive and not appropriate.

⁷ Council of State, VI, 20 February 2002, no. 1038, S.I.O. S.r.l..

⁸ TAR Lazio, I, 24 August 2010, no. 31278, confirmed by Council of State, VI, 14 July 2011, no. 4283, Groupe Adeo/Castorama Italia.

⁹ Court of Appeal, VI, 21 March 2005, no. 1113, Fondiaria Industriale Romagnola.

¹⁰ Council of State, VI, no. 4211, 10 July 2018, Railway supplies.

where the grounds for annulment are capable to determine a different outcome of the proceedings¹¹.

18. However, certain decisions taken during the investigation phase are capable of having legal consequences for the recipients and may thus be immediately challenged. More in particular, these decisions include:

1. decision ordering undertakings to produce information, if they lack a legal basis, for instance with regards to the scope of the request. In fact, Courts clarified that information provided by undertakings following to an illegitimate request for information do not affect the validity of the final decision if such request were not immediately challenged¹²;
2. decisions to deny the access to ICA's documents/file (which are directly actionable under Section 116 of the Code of Administrative Procedure, "CPA");
3. decisions to open an investigation and to authorize an inspection, where the contested acts are *ex se* detrimental to the legitimate interest in dispute. Such requirement may be met in very limited cases, i.e. if the annulment of the act could produce an utility that would not be achieved through the annulment of the final decision (i.e. in the unlikely case of lack of competence to start an investigation). With regards to inspection decisions, the ICA is not required to state the reasons on which the decision is based, nor whether there are equally effective alternative to an inspection; the Court has in fact clarified that such assessments belong only to the discretionary power of the agency and are not subject to judicial review¹³. Such decisions can thus not be appealed on those grounds, but only on grounds of lack of competence.

3. The scope of review in competition cases

19. With regards to the scope of review in competition cases, Italian administrative Courts have unlimited jurisdiction to review decisions imposing fines or periodic penalty payments, according to the CPA¹⁴. In fact, Courts can replace the ICA's assessment with their own and adopt a new decision, either confirming, reducing or annulling the fine. They can also indicate the criteria and remit to the Authority a new determination of the fine.

20. In reviewing ICA's fine, the judge has in certain cases reduced the final amount of the sanction imposed by the ICA by indicating the relevant criteria, demanding the ICA to proceed with the concrete re-determination of the fine on the basis of the new criteria.

21. For instance, in one case the Council of State held that the ICA should have considered, in determining the proportion of the value of sales to be taken into account for the basic amount of the fine, that the administrative decision did not prove the existence of anticompetitive effects on the market. The judge thus reduced such proportion from 15%

¹¹ Council of State, VI, 22 February 2016, no. 744, Barclays Bank.

¹² Council of State, VI, 12 February 2001, no. 652, Universal Music Italia.

¹³ TAR Lazio, I, 26 January 2012, no. 865, Access to passenger rail services.

¹⁴ Article 134 of the CPA.

to 5% and remitted to the ICA to establish the amount on the basis of the criteria set out in the judgment (Council of State, 11 July 2016, no. 3047, Gare Fanghi).

22. In the following calculation of the sanction, the ICA may proceed either through a proceeding in which the parties are involved or through a mere re-calculation, when the criteria given by the judge are merely arithmetical. The final decision that re-determinates the fine can be appealed by the parties.

23. In other cases, the judge has directly re-determined the fines, even reducing them by a substantial amount. For instance, the Council of State upheld a bid rigging decision concerning a centralized procurement procedure for school cleaning but reduced the sanction by 70% in total. In particular, the Court did not share the criteria used by the ICA to calculate the value of sales to determine the basic amount of the fine, nor the assessment of the gravity of the offence. With regards to the proportion of the value of sales, the judge upheld the decision of first instance reducing it from 15% to 5% mainly on the basis of the lack of a secret agreement (Council of State, 20 February 2017, no. 740, Tender procedure for school cleaning).

24. A reduction of fines may take place also in the case the judge deems that the duration of the infringement was shorter.

25. With respect to the merit of the administrative decision, Courts will normally check its reasonableness and consistency, without substituting their own assessment to that of the Authority. The only remedy that can be ordered is to declare void, either partially or fully, the challenged act. Courts have no power to adopt a new act or to modify the challenged act, nor they can remit the case to the ICA for a new assessment.

26. As for the review of facts grounding the ICA's decisions, they may be fully ascertained by the judge as to whether they are correct, without any limitation. Courts will thus check the soundness of the evidence relied upon by the ICA. If decisions are based on incorrect facts or insufficient evidence of them, Courts may set aside the ICA's assessments and annul the decision.

27. For instance, with regards to an ICA's decision that ascertained an illicit agreement in the payment card market with regards to Multilateral Interchange Fees ("MIFs") set by MasterCard, the Council of State has quashed the decision also censuring the evidence and facts examined by the ICA. In particular, the judge held that the ICA did not prove that in Italy MIF are set at an extremely high level. In this regards, the judge highlighted that, also on the basis of a comparison of the MIFs at issue with those applied in other countries or by the main MasterCard competitor, the ICA's could not conclude that MasterCard benefited a particular competitive advantage. In addition, according to the Court, the documentation acquired by the ICA was not adequate to demonstrate the existence of a common intention between the parties to pass on the MIF to the merchants (Council of State, VI, 24 February 2016, no. 743 and 744, Credit Cards).

28. For what concerns the review of technical appraisals of ICA's decisions, and in particular of complex economic assessments, the way Italian Courts have interpreted their role in exercising their supervisory jurisdiction has gradually evolved, in order to ensure a balance in the trade off of ensuring the effectiveness of judicial control and avoiding the risk to directly exercise a power entrusted to the ICA.

29. In fact, Courts have shown an increasing willingness to access and discuss the facts of the case, as well as the economic analysis of those fact carried out by the Authority, in order to ensure the effectiveness of the judicial review and the full safeguard of the rights

of defense of the parties. In this regards, the Council of State has clarified that the judge is vested with the task of ascertaining whether the power conferred to the ICA has been correctly exercised. Therefore, the scrutiny of substantive findings (facts and relevant evidence) by Italian administrative Courts is full and effective, and encompasses also the technical criteria and methods employed by the ICA in its economic assessment¹⁵. The judge may thus establish whether the evidence relied upon is accurate, reliable and consistent, whether the decision contains all the information that should be taken into account, and whether it is suitable to substantiate the conclusions drawn.

30. The European Court of Human Rights (ECHR), in its *Menarini* judgment, held that the Italian judicial review on the antitrust decisions is compliant with human rights insofar as the control exercised by the Council of State is a full jurisdiction control¹⁶. In particular, the ECHR highlighted that the Italian administrative Courts are able both to ascertain the appropriateness and proportionality of the measures adopted by the AGCM and to exercise control over assessments of technical nature. Also the Italian recent case law acknowledged that “with respect to antitrust fines, national law provides for a judicial scrutiny fully compliant with the right of fair trial before judges that [...] carry out a full review”¹⁷.

4. Courts’ access to competition expertise

4.1. Examination and assessment of evidence by Courts

31. As indicated above (see § 4), the judicial review of ICA’s decisions is granted solely to the TAR Lazio and the Council of State, thus *de facto* creating “specialized” administrative Courts for competition and consumer protection. In practice, these cases are discussed before specific Chambers, both at the TAR Lazio (Chamber I) and the Council of State (Chamber VI). Such Chambers focus their activity on competition law issues, as well as other forms of regulation and other subject-matters concerning the litigation of Public Administration, and have thus developed a certain expertise in the subject.

32. Courts may also be assisted by a technical consultant where such contribution is “indispensable”¹⁸, for instance in verifying and evaluating complex economic evidence. However, it should be noted that so far, a technical consultancy has never been arranged by the administrative judge in the field of antitrust.

33. In their review, Courts may directly ask to the ICA or to the parties legal clarifications or factual information on the case. For instance, in a case concerning a cartel in the cosmetic sector, the Court asked the ICA for a detailed report on the annual increases of list prices, in the aggregate form and for each company, in relation to each of the years for which the duration of the infringement had been ascertained¹⁹; in a case concerning an

¹⁵ Council of State, VI, 23 April 2004, n. 2199, RC-Auto.

¹⁶ TAR Lazio, I, 20 February 2004, no. 1631, Mediobanca.

¹⁷ Council of State, VI, 22 March 2016, no. 1164, CNF. See also Council of State, VI, no. 4211, 10 July 2018, Railway supplies.

¹⁸ Article 63(4) of the CPA

¹⁹ TAR Lazio no. 8945 and others, 17 November 2011, Cosmetic case. The Final decision confirmed the existence of the infringement but not the evaluation of the gravity of the infringement. In

abuse of dominant position on the Italian market for drugs by delaying the market entry of generic versions of the medicine, the Council of State requested the parties to prove how the divisional patent had been exploited²⁰. Courts may also order the ICA and/or the parties to produce certain documents.

34. Also with regards to complex economic evidence, Courts may exercise a full and comprehensive control and have gradually set tighter criteria for their scrutiny, also on the basis of the nature of the infringement and the evidence to be reviewed.

35. More in particular, in reviewing economic evidence, Courts may verify:

1. the consistency and reliability of the ICA's technical assessments, also on the basis of those proposed by the parties and alternative to the one founding ICA's decision.

For instance, in a judgment concerning the legitimacy of a decision clearing a merger subject to remedies, the Court examined the arguments raised by the parties concerning the market definition but found that they were not “*logically acceptable*” (TAR Lazio, I, 10 February 2016, no. 1934, *Enrico Preziosi*).

In another case concerning a cartel, the Council of State confirmed the TAR judgment that annulled the ICA decision concerning an illicit agreement on the market for maritime passenger transport services on the routes to and from Sardinia. In particular, the ICA found price coordination of the parties which all applied significant price increases in the summer season. However, the Court did not share the methodology used by the ICA to calculate the price increases as it did not manage to describe the actual dynamics of the increases in the individual prices. In fact, in order to identify the percentage increase, the ICA considered as a “*a proxy of the tariffs actually applied*” the average unit revenue per passenger “*rather than the correct criteria, corresponding to the actual antitrust infringement the claimants have been charged, of a specific and detailed analysis of the tariffs actually applied by the various companies*” to the individual routes in the various seasons concerned (Council of State, VI, 4 September 2015, no. 4123, *Sardinia ferries*);

2. the logical consistency and coherence of the ICA's finding.

In this regards, an example is the decision of the Council of State that upheld the TAR ruling which had confirmed an ICA's decision sanctioning the incumbent telecom operator for an abuse of dominant position in the electronic communications sector. In particular, the Court went through and confirmed the assessment carried out by the ICA in order to ascertain that the incumbent operator had treated competitors' requests for activation of wholesale access services in a discriminatory manner and had implemented an illicit discount policy (Council of State, VI, 15 May 2015, no. 2479, *Wind-Fastweb/Condotte Telecom Italia*);

particular, the Court held that relevant documentation did not show a price increase for the entire infringement period and ordered the ICA to reduce by 25% the proportion of the value of sales considered to determine the basic amount of the fine (Tar Lazio, no. 3268 and others, 11 April 2012).

²⁰ Council of State, 22 May 2013, no. 2790, Pfizer. The evidence collected proved that no real and concrete use was made of such divisional patent, in contrast with the scope of patent law in the pharmaceutical field, which should be to make innovative drugs available to the public. The Council of State, in its final decision, reversed the TAR judgment and confirmed the ICA decision (12 February 2014, no. 693).

3. procedural or methodological flows in the ICA's decision.

For instance, in a case concerning predatory prices in tender procedures, the Council of State held that the ICA's analysis of long run incremental costs was erroneous due, *inter alia*, to (i) procedural flows, as the ICA did not consider the specific costs borne for the supply but allocated to these services resources used mainly for other services; (ii) methodology flows, as the ICA's analysis was based on regulatory accounts, without taking into account the increase in regulatory costs due to universal service obligations (Council of State, VI, 6 May 2015, no. 2302, *TNT Post Italia/Poste Italiane*).

4.2. Judges expertise in competition law

36. In order to provide Administrative and Civil Law judges dealing with competition cases with a deeper knowledge of technical topics, specific training have been organized in the last years.

37. In particular, from 2014 to 2016 the ICA actively participated to a training project for Italian and French judges (both administrative and civil ones) on competition rules in the European Union, co-financed by the European Commission. The project was led by the ICA and co-organised by two major Italian judicial bodies, namely the Council of State and the Scuola Superiore della Magistratura (Italian National School of the Judiciary), which is the public body enjoying exclusive competence for the training of the Italian civil and criminal judges. Pursuant to the Italian law, the Scuola Superiore organizes both introduction courses for new judges and advanced training for all judges²¹.

38. The main objective pursued by the project was to share with national judges legal and economics concepts and methodologies relevant to competition enforcement, thus contributing to increase legal certainty, promote efficiency and foster consistency across the EU.

39. Speakers at the events included the President and the Vice-President of the Council of State, Commissioners of the Italian Competition Authority, senior judges, as well as academics in both EU and antitrust law. Seminars focused on case studies and encouraged a lively interaction between the organizing institutions. Furthermore, participants had the opportunity to expand their knowledge thanks to a dedicated Internet site that provided didactic material as well as a forum that enabled an open discussion with the trainers and the other participants.

40. A second project, under the heading "*Antitrust economics for judges*", focused on the role of economics in the competition assessment, with the aim to provide judges with a technical expertise in the face of increasingly complex antitrust analysis. The final session of the project, held in 2016 on the premises of the Council of State, consisted of a mock trial, in which participants were encouraged to confront themselves with several aspects of a complex antitrust case.

41. The results achieved by the projects were twofold. On the one hand, the projects enabled national judges to better focus of the economic assessment of evidence and arguments when reviewing the legality of decisions issued by the national competition

²¹ In addition, also Courts autonomously provide specific training on the issue. For instance, in November 2019, the Council of State has organized in Rome a workshop dedicated to judicial review in competition cases and comprising sessions aimed at discussing specific topics of competition law.

agency, as well as when adjudicating private claims (including damages) involving competition-related issues. On the other hand, they provided national judges with advanced training on selected competition issues, notably market definition and market power, the economics of unilateral conduct, the judicial review of complex economic assessments in merger cases and antitrust damages actions.

5. Conclusions

42. The development of the competition case law in Italy confirms that the Italian administrative Courts, while not being strictly specialized in the competition realm, are fully aware that antitrust disputes typically imply a thorough economic analysis and take it in due account.

43. The review of ICA decisions carried out by Italian administrative Courts is full and effective and extends to all factual and legal issues raised by the decision under scrutiny, including technical criteria employed by the ICA in its economic assessment.

44. In particular, with regards to complex economic assessment, against the background that administrative Courts cannot substitute their own assessment for that of the ICA, Courts have gradually set out tighter criteria for their scrutiny and have also considered, in order to verify the reliability of the ICA's decision, the alternative technical assessment proposed by the parties.

45. In fact, the case law examined shows that the judge is gradually moving from a scrutiny of "*mere reliability*" to a scrutiny of "*greater reliability*", where the judge not only evaluates whether the analysis made by the ICA is *ex se* plausible and reliable, but also verifies its consistency and reliability in comparison with the alternative technical assessments suggested by the parties.

46. The ICA welcomes this type of scrutiny, as it may positively affect the antitrust enforcement activity, at least in two different ways. Indeed, on the one side, an *ex post* effective judicial review ensures compliance with procedural rules and full observance of due process rights, which also implies a transparent dialogue with the parties concerned and thus full accountability of competition enforcement decisions. On the other side, it directly impacts on the standard of proof that an antitrust authority must satisfy to establish competition infringements; in this respect, the ICA believes that the gradual expansion of the scope of review may also help to improve, over time, the quality of agencies output.