[IT] First instance court annuls the decision by which the Italian competition authority imposed measures to remove the anti-competitive effects of Sky's acquisition of R2 from Mediaset

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Ernesto Apa & Enzo Marasà
Portolano Cavallo

On 5 March 2020, the Regional Administrative Tribunal of Lazio (TAR Lazio) annulled a decision by which, on 20 May 2019, the Italian Competition Authority (ICA) imposed measures on Sky Italian Holding SpA (Sky) to remove the anti-competitive effects created by its partially abandoned acquisition of the technical platform R2 Srl (R2) from Mediaset Premium S.p.A (MP) (Transaction). R2 provides technical platform services enabling broadcasters to retail a pay-TV offer on DTT.

Sky filed the Transaction with the ICA on 28 November 2018, and the ICA opened a Phase II investigation in March 2019. The parties had agreed to terminate the Transaction should the ICA deem it anti-competitive. When Sky was informed of the ICA's preliminary objections, it activated the termination clause, which provided for the returning of R2's assets to MP, along with certain DTT channel numbers (LCNs). However, the ICA found that these steps were insufficient to effectively undo the merger: in its view, the merger had generated certain "irreversible" effects which, pursuant to Article 18(3) of Law 287/90, required measures to remove competitive distortions caused by the implementation of a notified concentration. The ICA held that the Transaction was economically and functionally intertwined with commercial agreements concluded by the parties in March 2018, which, overall, constituted a single concentration, equivalent, in substance, to the suppression of MP as a competitor in the pay-TV market in Italy. Allegedly, these agreements included the exclusive sub-licensing of MP's DTT pay-TV channels to Sky and the transfer to Sky of the rights to use certain LCNs, in addition to exclusive arrangements for the provision of R2's technical platform services to Sky. The restitution of R2's assets to MP was deemed "partial" and the other arrangements concerning LCNs ineffective in light of the exclusive licensing of MP's pay-TV channels to Sky. Given the dominance of Sky in the markets for retail pay TV in Italy, the ICA prohibited Sky from purchasing audiovisual content from third parties on an exclusive basis for three years and imposed obligations to ensure third-party access to DTT's technical platform services, where the entity post-merger was dominant too. Sky challenged the decision before TAR Lazio, claiming procedural and substantive errors of law and assessment, which the TAR Lazio upheld on the following grounds.

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First, the ICA had breached Sky's rights of defence by acting against its own established practice on procedures applicable to the control of concentrations, ultimately depriving Sky of the opportunity to counter the substantive allegations in the decision. The court noted that while ICA's preliminary objections concerned the Transaction and only briefly speculated on the situation entailed by the hypothetical termination of the contract, the final decision was based on the effects on competition allegedly caused by the factual situation occurred after implementing the termination clause, which was significantly different from the Transaction and was not subject to full investigation. Furthermore, Sky was not given the opportunity to submit observations regarding these different facts and allegations. The ICA should have started new proceedings to correctly investigate the new situation.

Secondly, the decision was vitiated by lack of reasoning and errors in the factual assessment because the ICA: (a) did not sufficiently consider that the sub-licensing of MP's DTT channels to Sky was not exclusive, as MP retained the right to transmit on its remaining pay-TV platform "Infinity", and the duration of the agreement (two years) conflicted with the established principle that a concentration produces a non-transitory change of control and of the market's structure; (b) did not analyse in detail whether the activities and agreements connected to the Transaction constituted "the activities of an autonomous undertaking to which a market turnover could be attributed", as established by consolidated EU and national principles on the control of concentrations; (c) did not make a new assessment of the existence and amount of the turnovers attributable to the Transaction's remaining assets following the termination of the contract; and (d) found that separate operations constituted a single concentration despite not being completed simultaneously and without identifying a bond of interdependence between them, thus acting against the self-imposed criteria set out in the European Commission's consolidated notice (paragraphs 43-44) and which the ICA cannot disregard without stating the reasons. The judgment can be appealed before the Council of State.

TAR Lazio, Sez. I, del 5 marzo 2020 n. 7694/2019

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_rm&nrg=201907694&nomeFile=202002932_01.html&subDir=Provvedimenti

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Sky Italy Srl and Sky Italian Holding SPA c. AGCM (Judgment of the Regional Administrative Court of Lazio, Section I, of 5 March 2020 N. 7694/2019).

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