Predatory Pricing

This questionnaire seeks information on ICN members' analysis and treatment of predatory pricing claims. Predatory pricing typically involves a practice by which a firm temporarily charges low prices in order to limit or eliminate competition, and thereby allows the firm to raise prices subsequently. This questionnaire concerns only treatment of single product discounts; rather than pricing practices involving multiple products (including bundling, tying, and related prices). Unless otherwise stated, the questions concern conduct by a dominant firm or firm with significant market power.

Respondents should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc., rather than speculation.

Analysis (elements and evidence)

1. PLEASE PROVIDE THE MAIN RELEVANT TEXTS (IN ENGLISH IF AVAILABLE) OF YOUR JURISDICTION'S LAWS AND GUIDELINES ON PREDATORY PRICING.

Italian law on predatory pricing is largely derived from the EC model.

The main provision on this matter - art. 3 of the Italian Antitrust Act (legge n. 287/1990, **"IAA"**) - is substantially identical to art. 82 of the EC Treaty. The text of art. 3 reads as follows:

"*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:*

a) directly or indirectly to impose unfair purchase or selling prices or other unfair contractual conditions;

b) to limit or restrict production, market outlets or market access, investment, technical development or technological progress, to the prejudice of consumers;

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

d) to make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

Following the introduction of EC regulation n. 1/2003, the Italian Competition Authority (**"ICA"**), as well as national courts, apply directly art. 82 of the EC Treaty when the predatory practice at issue may affect trade between member States.

In theory, predatory pricing practices may be considered illegal also under the Italian Civil Code, which forbids certain forms of "unfair competition". In particular, art. 2598 n. 3 of the Civil Code provides that *"[Every person who…] uses, directly or indirectly, any other means not in conformity with the principles of*

professional ethics, and able to damage another's enterprise, […commits an act of unfair competition]".

In the past, relevant case law interpreted this rule so as to outlaw some instances of pricing below cost, without regard to a formal antitrust analysis (i.e. no need to prove the existence of a dominant position, to identify specified measures of costs, or to demonstrate the possibility of recoupment).

However, albeit still in force, this provision started losing independent significance after the enactment of the IAA. Eventually, the Italian Supreme Court explicitly stated that pricing below cost infringes art. 2598 n.3 of the Civil Code only when a violation of art. 82 of the EC Treaty or art. 3 of the IAA occurs (see Cassazione n. 1636, 21 / 1/ 2006).

There is no formal guidelines on predatory pricing in the jurisdiction. However, national courts and the ICA should follow EC antitrust principles even when they apply only the IAA (see art. 1.4 of the IAA).

2. PLEASE LIST YOUR JURISDICTION'S CRITERIA FOR AN ABUSE OF DOMINANCE/MONOPOLIZATION BASED ON PREDATORY PRICING.

It should preliminary noted that only a few cases of "pure" predatory pricing[1] have been investigated by the ICA or litigated in national Courts (for a short summary of these cases see answer n. 16).

However, a landmark decision of the ICA rendered in April 2002 (*Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana,* case n. A267, hereinafter ***"Caronte"***) contains an in-depth discussion about the test to be applied in predatory pricing cases, with particular reference to the issue of the appropriate measure of the dominant firm's costs.

A) Finding of dominance.

Unless a company is found to be in dominant position on a relevant market, its pricing policy is free from antitrust restraints.

The definition of dominance is in line with the well-settled EC case law, namely "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors , its customers and ultimately of the consumers*".

In practice, market shares are often overly important in ascertaining the existence of a dominant position

[1] According to the instructions, in answering this questionnaire we do not take into account cases of exclusionary above-costs price cuts (such as margin squeeze practices by vertically integrated dominant firms).

B) Pricing below cost

The EU legal test laid down in *Akzo* - and essentially based on the Areeda / Turner test – has been occasionally applied in Italy. According to this test:

- a price below average variable cost (**"AVC"**) is regarded as predatory *per se*;
- a price above AVC but below average total costs (**"ATC"**) is regarded as predatory only if other circumstances indicate the existence of a plan to eliminate a competitor;
- a price above ATC cannot be considered predatory.

In *Caronte*, the ICA decided to use as a benchmark the dominant firm's incremental costs, instead of the average costs, therefore developing a slightly different legal test. According to the rule in *Caronte*:

- a price lower than the short-run average incremental (**"SRAIC"**) cost is predatory *per se*;
- a price higher than the long-run average incremental cost (**"LRAIC"**) is not predatory *per se*;
- if a price falls between these two levels, the ICA shall look at the competitive context, as well as other elements (typically, the evidence of the intent to eliminate a competitor), in order to assess the legality of the practice at issue.

C) No need to prove recoupment

There is no formal recoupment requirement under the existing case law, nor has the ICA taken any explicit position on this matter.

The older decisions (such as *Tekal/Italcementi*, case n. A76, hereinafter ***"Italcementi"***[2]) did not discuss the issue, while in *Caronte* the ICA established - through an analysis of the entry barriers and the reputation effect brought about by the predatory practice - that the dominant firm was likely to recoup the losses incurred during the predation period. However, this finding was used merely to confirm the rationality of the predatory behavior, which was qualified as abusive only on the basis of the comparison between prices and costs.

3. PLEASE EXPLAIN THE CIRCUMSTANCES UNDER WHICH A FIRM'S PRICING IS, OR MAY BE, CONSIDERED "PREDATORY" IN YOUR JURISDICTION, BY RESPONDING TO THE FOLLOWING QUESTIONS:

   a. AS PART OF YOUR ANALYSIS, DOES THE PRICE HAVE TO BE BELOW ONE OR MORE MEASURES OF COST? YES/NO

[2] It should be noted, however, that *Italcementi* was a peculiar case in so that Italcementi was dominant in the cement market, but the alleged predation took place in a different – and competitive – downstream market (the concrete market). For a description of the case, see below, answer n. 16.

Yes.

i. IF YES, PLEASE IDENTIFY WHICH OF THE FOLLOWING MEASURES IS/ARE USED, AS APPLICABLE:

Cost benchmark/measure	**Used?**		**Comment**
	Yes	**No**	
Below marginal cost (the cost of producing one more unit of output)		X	Marginal costs (“**MC**”) play an important role in the theory of predation. However, given the difficulties in measuring MC, the ICA tends to use other proxies (like AVC or incremental costs) in the decisional practice
Below average variable cost (cost that varies with output)	X		Prices below AVC have been presumed predatory by the ICA
Below average avoidable cost (all costs that can be avoided by not producing some or all output)	X		The ICA has not used the terminology of average avoidable costs (**“AAC”**). Nevertheless, the notion of SRAIC developed in *Caronte* is essentially equivalent to the notion of AAC used by the EU Commission in the discussion paper on the application of article 82 of the Treaty to exclusionary abuses (**“Discussion Paper”**).
Below average long run incremental cost (average variable costs and product-specific fixed costs)	X		If a price is below LRAIC, but above SRAIC, the presumption of predatory pricing does not arise (i.e. the ICA shall find other evidence to prove the predatory behavior)
Below average total cost (cost including variable, fixed and sunk – non-recoverable – costs)		X	ATC have been used in practice in order to exclude the existence of a predatory pricing (i.e. a price above ATC was considered not

			predatory, see *Consorzio Risposta/Ente Poste Italiane,* case n. A218, hereinafter ***"Poste"***)
Other measure of cost (Please identify)	SRAIC		A price below SRAIC is presumed predatory

b. FOR EACH COST MEASURE EMPLOYED, PLEASE PROVIDE THE DEFINITION OF THE MEASURE USED IN YOUR JURISDICTION.

AVC = costs that vary in proportion to output (e.g. raw materials) averaged over the amount of output produced.

MC = cost of producing one additional unit of output; it is a function of variable costs only.

SRAIC = average of the costs that could have been avoided if the company had not produced the extra output sold at the predatory price. SRAIC do not include sunk costs incurred before the period of predation.

LRAIC = average cost of producing the predatory increment of output whenever such costs were incurred. LRAIC thus includes all product-specific costs incurred in the research, development, and marketing of the predatory increment of sales, even if those costs were sunk before the period of predatory pricing.

c. IS THE SAME COST MEASURE APPLIED IN ALL CASES? YES/NO

As mentioned above, the decisional practice of the ICA evolved from an AVC standard to an incremental cost standard.

i. IF DIFFERENT COST MEASURES CAN BE APPLIED, FOR EXAMPLE ON THE BASIS OF INDUSTRY, PLEASE EXPLAIN AND PROVIDE EXAMPLES, AS AVAILABLE.

In *Caronte,* the ICA argued that an approach based on incremental costs is in general more refined than the traditional AVC test. Therefore, the evolution does not appear to be industrial-specific.

It should be noted, however, that the new test was developed in a case involving ferryboat services, i.e. an industry where the fixed costs were higher than in other industries examined in earlier investigations (like the cement market).

ii. IF MORE THAN ONE COST MEASURE CAN BE APPLIED IN ANY INDIVIDUAL CASE, PLEASE EXPLAIN WHY

AND WHETHER, IN PRACTICE, THIS HAS RAISED ISSUES.

Not applicable.

d. IF PRICE MUST BE SHOWN TO BE BELOW COST, FOR WHICH OF THE DOMINANT FIRM'S SALES MUST THIS BE SHOWN?

This issue has not been explicitly raised in the past cases. Usually, all the sales realized by the dominant firm in the relevant market are considered in the analysis (but see below).

i. IS THE ONLY RELEVANT COMPARISON BETWEEN THE COST MEASURE AND THE DOMINANT FIRM'S AVERAGE PRICE FOR ALL OF ITS SALES IN THE RELEVANT MARKET? YES/NO

No, not the only one.

1. IF NO, OVER WHICH OF THE DOMINANT FIRM'S SALES CAN COST BE COMPARED?

The ICA may also focus on prices specifically targeting those segments of the relevant market on which the dominant firm is more exposed to competition.

For instance, in *Caronte* the relevant market was defined as the market for ferryboat services across the strait of Messina (offered through two different routes, i.e. Villa San Giovanni-Messina and Reggio Calabria-Messina). The service was priced below cost only on the Reggio Calabria-Messina route, where the incumbent had to face the competition of a new entrant.

e. COULD A FIRM'S PRICE ABOVE AVERAGE TOTAL COST EVER BE FOUND TO BE PREDATORY? YES/NO

A price above ATC is not considered predatory (see *Poste*). Of course, this does not exclude that an above-cost pricing could be considered abusive under a different perspective (for instance, where an exclusionary margin-squeeze occurred[3]).

i. IF SO, PLEASE EXPLAIN THE INSTANCES IN WHICH THIS MIGHT OCCUR, AND IDENTIFY WHETHER THIS HAS BEEN THE BASIS FOR ACTUAL ENFORCEMENT.

Not applicable.

f. IF PRICES DO NOT HAVE TO BE BELOW A COST BENCHMARK TO BE CONSIDERED PREDATORY, PLEASE EXPLAIN THE CIRCUMSTANCES UNDER WHICH THE FIRM'S PRICES ARE CONSIDERED PREDATORY.

---

[3] See, among several cases, *Comportamenti abusivi di Telecom Italia,* case n. A351.

Not applicable.

4. TO BE UNLAWFUL, MUST THE ALLEGED PREDATORY PRICING OCCUR IN THE MARKET IN WHICH THE FIRM HOLDS A DOMINANT POSITION/SUBSTANTIAL MARKET POWER? YES/NO

No.

a. IF NO, PLEASE EXPLAIN.

Usually, predatory pricing is deemed abusive if it is applied by the incumbent in the market where it holds a dominant position.

However, if the predation occurs in a different market (even a competitive one), it might be still abusive, insofar there is a certain degree of economic interdependence with the dominated market, and the effect of the practice is to protect or strengthen the dominance in the latter (see *Italcementi*).

5. APART FROM THE COST CRITERIA REFERENCED IN QUESTION 3 ABOVE, MUST OTHER OBJECTIVE CRITERIA, SUCH AS THE DURATION OR CONTINUITY OF THE PRICING BEHAVIOR, BE DEMONSTRATED FOR A FINDING OF LIABILITY UNDER A PREDATORY PRICING THEORY? YES/NO

No. The duration of the pricing behavior as well as its impact on actual and potential competitors are considered by the ICA for the purposes of calculating the fine, but they are not necessary elements for a finding of liability.

a. IF SO, PLEASE EXPLAIN. FOR EXAMPLE, IF THE BEHAVIOR MUST BE SUSTAINED OVER A CERTAIN TIME PERIOD, WHY, AND FOR WHAT PERIOD?

Not applicable.

6. ON WHAT TYPE OF EVIDENCE DO YOU RELY TO PROVE PREDATORY PRICING? PLEASE EXPLAIN, INCLUDING EXAMPLES AS APPROPRIATE.

Price/cost analysis is an essential piece of evidence in a case for predatory pricing.

Furthermore, every other element relevant to prove the existence of an exclusionary intent is considered.

For instance, in *Italcementi* the ICA alleged that the local incumbent in the cement market – Italcementi - had a plan aimed at threatening concrete manufacturers (the major consumer of cement) by predatory pricing, in order to convince them to stop purchasing cement from importers. The existence of such a plan was proved also by documental evidence of a number of meetings between Italcementi and several concrete manufacturers.

In *Caronte*, the ICA considered as relevant evidence the fact that the pricing strategy of the incumbent was also supported by the practice of consistently changing the departure time of its ferries in order to precede the new entrant by a few minutes.

a. ARE COST DATA USED? YES/NOT

Yes.

i. IF SO, ARE COST DATA FROM THE FIRM USED? YES/NO

Yes

b. ARE THERE CIRCUMSTANCES WHEN COST DATA OF OTHER FIRMS CAN BE USED? YES/NO.

So far, in predatory pricing cases the ICA has always used cost data of the dominant firm. The dominant firm has a duty to provide the ICA with all the information requested during an antitrust proceeding (including cost data) and the ICA can also conduct dawn raids to obtain such information.

In absence of a discovery regime, accessing the cost data of the dominant firm might be a problem for a plaintiff in civil litigation. Arguably, cost data of other firms could be used as a benchmark in order to build a *prima facie* case of predatory pricing in civil Courts. However, we are not aware of any case dealing with this issue.

i. IF SO, PLEASE SPECIFY THE CIRCUMSTANCES.

Not applicable.

c. WHAT OTHER DATA OR INFORMATION IS USED, IF ANY? PLEASE PROVIDE EXAMPLES AS RELEVANT.

See above (answer n. 6).

7. DOES PRICING BELOW A PARTICULAR COST BENCHMARK CREATE A PRESUMPTION OF PREDATORY PRICING? YES/NO

Yes: prices below AVC or SRAIC have been presumed predatory. See above (answer n. 2, lett. B).

a. IF YES, IS THIS PRESUMPTION REBUTTABLE OR IRREBUTTABLE? PLEASE EXPLAIN.

The ICA never stated that pricing below AVC or SRAIC creates a conclusive presumption of abuse. As a matter of fact, however, the ICA always rejected alternative explanations offered by dominant firms, reasoning that the pricing behavior made sense only as a part of a predatory strategy.

b. IF THE PRESUMPTION IS REBUTTABLE, WHAT MUST BE SHOWN TO REBUT THE PRESUMPTION?

In rejecting the defenses raised by dominant companies, the ICA never made clear what it must be shown to rebut the presumption of abuse.

7. IS THERE A "SAFE HARBOR" FROM A FINDING OF PREDATORY PRICING FOR PRICING ABOVE A PARTICULAR COST BENCHMARK*?* YES/NO

   a. IF YES, PLEASE EXPLAIN, INCLUDING THE TERMS OF THE SAFE HARBOR.

Even though the ICA has not technically established the existence of a "safe harbor", normally a price above ATC will not be considered predatory. As already mentioned (see n. 3, lett. e), this does not rule out the possibility that an abuse might be found even in a case of above-cost price cutting.

9. IS RECOUPMENT (OBTAINING ADDITIONAL PROFITS THAT MORE THAN OFFSET PROFIT SACRIFICES STEMMING FROM PREDATORY PRICING) REQUIRED FOR A FINDING OF LIABILITY UNDER PREDATORY PRICING RULES IN YOUR JURISDICTION? YES/NO

No. See above, answer n. 2.

IF SO:

a. IS THIS ASSESSMENT CONDUCTED SEPARATELY FROM THE ANALYSIS OF THE FIRM'S MARKET POWER AND THE PREDATION? YES/NO

b. WHAT FACTORS ARE EMPLOYED IN ASSESSING RECOUPMENT IN YOUR JURISDICTION?

c. IS THERE A SPECIFIC RECOUPMENT CALCULATION OR AMOUNT TO BE SHOWN? YES/NO

   I. IF SO, WHAT IS THIS?

d. IS THERE A RELEVANT TIME PERIOD FOR RECOUPMENT? YES/NO

   I. IF SO, WHAT IS IT?

e. IS IT POSSIBLE FOR RECOUPMENT TO OCCUR IN A MARKET DIFFERENT THAN THE ONE IN WHICH THE PREDATORY PRICING TOOK PLACE? YES/NO

   I. IF SO, PLEASE EXPLAIN AND PROVIDE RELEVANT EXAMPLES.

f. WHAT DEGREE OF LIKELIHOOD OF RECOUPMENT IS REQUIRED (*E.G.,* POSSIBILITY OR PROBABILITY)?

i. PLEASE PROVIDE EXAMPLES OF THE RECOUPMENT STANDARD OF LIKELIHOOD EMPLOYED AS PART OF YOUR RECOUPMENT ASSESSMENT.

None of the above (from *a* to *f*) is applicable.

10. IS THE FIRM'S INTENT RELEVANT IN PREDATORY PRICING CASES? YES/NO

a. IF SO, PLEASE DESCRIBE THE RELEVANT TYPE(S) OF INTENT, AND THE EVIDENCE USED TO SHOW THE REQUIRED INTENT, PROVIDING AVAILABLE EXAMPLES.

Yes. See above (answer n. 6)

b. IF OBJECTIVE CONDITIONS FOR PREDATORY PRICING -- FOR EXAMPLE, PRICING EXCEEDING A CERTAIN COST BENCHMARK OR RECOUPMENT – ARE NOT DEMONSTRATED, DOES INTENT MATTER? YES/NO

Absent objective conditions, intent alone is not sufficient for a finding of abuse.

i. IF SO, PLEASE EXPLAIN.

Not applicable.

11. IN ADDITION TO PROVING BELOW-COST PRICING, MUST EFFECTS, SUCH AS MARKET FORECLOSURE OR CONSUMER HARM, BE DEMONSTRATED TO ESTABLISH LIABILITY? YES/NO

If the objective conditions are met and there are no other reasonable explanations (i.e. the below-cost pricing makes sense only as a part of a predatory strategy), the ICA is not required to prove the elimination of competition or an effect of market foreclosure.

Nonetheless, effects are considered in order to quantify the fine.

a. IF YES, PLEASE EXPLAIN THE ELEMENTS ASSESSED (*E.G.,* EXIT OR DELAYED ENTRY OF COMPETITORS, PRICE INCREASES, PREVENTION OR DELAY OF PRICE DECREASES) AND THE TYPES OF EVIDENCE REQUIRED TO DO SO.

Not applicable.

Justifications and Defenses

12. WHAT TYPE OF JUSTIFICATIONS OR DEFENSES, IF ANY, ARE PERMITTED FOR PREDATORY PRICING, *E.G.,* AN EFFICIENCY, MEETING COMPETITION OR OBJECTIVE NECESSITY DEFENSE? PLEASE EXPLAIN AND PROVIDE EXAMPLES, AS RELEVANT.

A. WHAT IS THE STANDARD OF PROOF APPLICABLE TO THESE DEFENSES? WHO BEARS THE BURDEN OF PROOF? WHAT EVIDENCE IS REQUIRED TO DEMONSTRATE THAT THESE DEFENSES OR JUSTIFICATIONS ARE MET?

The decisional practice of the ICA is not well-developed as to the justifications and defenses.

The only case in which affirmative defenses came at issue is *Italcementi*[4], where the dominant firm raised a meeting competition defense, then rejected by the ICA on the merits.

There is no indication about the availability of an efficiency defense in predatory pricing cases, but it seems unlikely that the ICA would consider such a defense, also in light of the restrictive approach recently taken on this issue by the EU Commission in the Discussion Paper.

As to the burden of proof, it should be recalled that, when the dominance and the pricing below the cost-benchmark is proved, a presumption of abuse arises. Hence, it is up to the parties to demonstrate any additional defense in order to rebut this presumption.

Enforcement

13. PLEASE PROVIDE THE FOLLOWING INFORMATION FOR THE PAST TEN YEARS (AS INFORMATION IS AVAILABLE):

a. THE NUMBER OF PREDATORY PRICING CASES YOUR AGENCY REVIEWED (INVESTIGATED BEYOND A PRELIMINARY PHASE).

We are aware of three predatory pricing cases[5] investigated beyond a preliminary phase by the ICA (*Italcementi, Poste, Caronte*).

b. THE NUMBER OF THESE CASES THAT RESULTED IN (I) AN AGENCY DECISION THAT THE CONDUCT VIOLATES ANTITRUST RULES; (II) A SETTLEMENT WITH RELIEF.

Two of the cases mentioned above - *Italcementi* and *Caronte* - ended with a decision imposing fines.

c. THE NUMBER OF AGENCY DECISIONS ISSUED, IF ANY, THAT HELD THAT THE PRACTICE DID NOT VIOLATE YOUR JURISDICTION'S PREDATORY PRICING RULES (*I.E.,* "CLEARANCE DECISIONS").

---

[4] In *Caronte,* the arguments of the parties were largely focused on the type of costs to be included in the predatory analysis.

[5] As already mentioned, in answering this questionnaire we did not consider cases of exclusionary above-costs price cuts.

In *Poste,* the ICA held that the pricing practice was not predatory. However, a violation of the antitrust rules was found in the form of an abusive discriminatory conduct (see below, answer n. 16).

d. EACH OF THE NUMBER OF AGENCY DECISIONS OR SETTLEMENTS THAT WERE (I) CHALLENGED IN COURT AND, OF THOSE, EITHER (II) OVERTURNED BY COURT DECISION OR (III) CONFIRMED BY COURT DECISION.

One decision, namely *Italcementi*, was challenged in court.

The Court of First Instance – T.A.R. Lazio – initially quashed the decision on the following grounds: (i) the geographic market was wrongly defined, as evidenced by the strong presence of cement importers; (ii) *Italcementi* was not in dominant position and, therefore, (iii) the pricing practice was perfectly lawful from an antitrust standpoint; (iv) in any event, the fine was not correctly quantified.

Subsequently, the Appellate Court – Consiglio di Stato – overturned this judgment and confirmed the ICA decision as to all the substantive points, having concluded that the T.A.R. exceeded the scope of its judicial review and that the ICA had proved all the elements for an abuse of dominance.

14. DOES YOUR JURISDICTION ALLOW PRIVATE CASES CHALLENGING PREDATORY PRICING? YES/NO.

Yes. Private actions in civil courts are allowed for predatory pricing claims, as well as any other claim arising from antitrust rules.

a. PLEASE PROVIDE A SHORT DESCRIPTION OF REPRESENTATIVE EXAMPLES, AS AVAILABLE.

We are not aware of any private antitrust action founded on a predatory pricing claim.

15. IS PREDATORY PRICING A CIVIL AND/OR A CRIMINAL VIOLATION OF YOUR JURISDICTION'S ANTITRUST LAWS?

Any antitrust violation is considered a wrongful conduct that might justify a claim for damages if the conditions for standing and causation are proved.

There is no criminal liability for antitrust violations in Italy.

a. IF BOTH, WHAT ARE THE DIFFERENCES IN THE CRITERIA APPLIED TO THESE CATEGORIES?

Not applicable.

b. ON WHAT BASIS DOES THE AGENCY CHOOSE TO BRING A CRIMINAL OR CIVIL CASE?

The ICA does not bring actions in civil courts; its decisions are reviewed only by administrative tribunals.

16. AS RELEVANT, PLEASE PROVIDE A SHORT ENGLISH SUMMARY OF THE LEADING PREDATORY PRICING DECISIONS/CASES IN YOUR JURISDICTION, INCLUDING INFORMATION ON THE METHOD USED TO CALCULATE COSTS, TO THE EXTENT APPLICABLE, AND, IF POSSIBLE, A LINK TO THE ENGLISH TRANSLATION, AN EXECUTIVE SUMMARY OR PRESS RELEASE OF THE CASE.

Press releases of the cases can be found on the ICA website at http://www.agcm.it/eng/index.htm

A short summary of the decisions quoted in this questionnaire follows.

Caronte (2002)

In *Caronte,* the ICA found that a group of companies – namely Tourist Ferry Boat SpA ("Tourist"), Caronte SpA ("Caronte") and Navigazione Generale Italiana SpA ("NGI"), altogether considered a single economic entity – abused of the dominant position held in the ferry service across the strait of Messina by charging predatory prices on one of the two routes available to the public.

Until August 1998, the ferry service across the strait had been run by Ferrovie dello Stato, Tourist and Caronte on the route Villa S.Giovanni-Messina.

After Diano began to serve the Reggio Calabria-Messina route, the companies Tourist and Caronte started operating the same route through their common subsidiary - NGI - at fares that were roughly 50% lower than those applied on the Villa S.Giovanni-Messina route.

The Tourist-Caronte group was in dominant position in the market for car-ferry services (private and commercial vehicles) across the strait of Messina, with a share of approximately 80%, realized for the most part on the Villa S. Giovanni-Messina route. In fact, that route accounted for around 90% of the whole market and was difficult to contend because of high administrative and infrastructural barriers.

On the other route (Reggio Calabria-Messina) the Tourist-Caronte group held a 47% share through its subsidiary NGI. The newcomer Diano operated only the Reggio Calabria-Messina route, with a share of roughly 50%, equal to less than 4% of the whole market.

In order to assess whether the fares applied by the Tourist-Caronte group on the ReggioCalabria-Messina route were predatory, the ICA conducted an incremental costs analysis. This showed that the revenues from the Reggio Calabria-Messina route had not been sufficient, in 1999 and 2000, to cover either LRAIC or SRAIC.

Besides, the ICA took into account two further elements to confirm the existence of a predatory strategy.

First, the ICA noted that the revenue obtained on the main route (which was not contestable at that time) allowed the dominant firm to fix prices below the SRAIC on the Reggio Calabria-Messina route, yet obtaining a satisfactory overall result over the whole market.

Second, the ICA stated that the practice of consistently changing the departure time of the NGI ferries in order to precede Diano by a few minutes shed further light on the existence of an exclusionary intent.

The ICA deemed that the conduct of Tourist-Caronte represented a serious violation of Article 3 of the IAA, as it was likely to impede the development of actual and potential competition in the ferry service across the strait of Messina, thus imposing a fine equal to 4.5% of the dominant group's revenues on the relevant market.

Italcementi (1995)

In an investigation completed in February 1995, the ICA charged Italcementi - one of the major nationwide cement producers - with a predatory strategy in the cement market in Sardinia. The investigation showed that, from the early 1980s until 1992, Italcementi held a stable market share averaging 75 percent of cement sales in the region, with the residual demand being met by another cement producer, which also had manufacturing facilities on the island. Starting in March 1993, a number of other companies began marketing imported cement in Sardinia.

Although imports started eroding significantly Italcementi's market share (from 75 percent to 55 percent during 1993), Italcementi did not change its cement prices in response to these market developments. However, controlling a number of concrete production facilities right in the area where imported cement had started being heavily distributed, Italcementi began to sell concrete produced from these establishments at prices lower than the variable cost of production, amounting to a 40 percent reduction of the going market prices.

According to the ICA, this commercial policy on the concrete market, where Italcementi was not dominant, was designed to dissuade the many independent pre-packaging companies from purchasing cement from importers. This threat was made clear by Italcementi in a number of meetings with other ready made concrete producers. Having considered not reasonable the alternative explanations for such low prices offered by the parties, the ICA concluded that the conduct of Italcementi was aimed at threatening concrete manufacturers - the major consumer of cement - that they would have been forced out of the market by the aggressive pricing strategy of Italcementi, had they continued purchasing imported cement.

Indeed, Italcementi revealed the existence of such a strategy in a number of meetings organized by the local trade association. For the small Sardinian

concrete producers, each controlling a single establishment, matching Italcementi pricing policy would have resulted in heavy losses and quick bankruptcy.

The ICA held that the conduct of Italcementi represented a serious violation of Article 3 of the IAA, hence imposing a fine of 3,750 billion lire (almost 2 millions euro).

Poste (1998)

Poste was an investigation regarding the so-called "hybrid electronic mail" services ("PT Postel") provided by Postel SpA (Postel), a downstream subsidiary of Poste Italiane SpA ("Poste Italiane"), which is the universal provider of mail services in Italy. The ICA held that the use of the postal network to supply this service at substantially lower prices than those charged to other hybrid electronic mail operators was an abuse of a dominant position under Section 3 of the IAA.

Hybrid mail is a service where mail is sent electronically from the sender to the postal operator, who prints it, wraps it, and delivers it[6]. As the delivery is still physical, access to a widespread delivery network is essential for an operator to be able to compete in this market. Poste Italiane operates the only delivery network that reaches all urban and extra-urban areas on the national territory. Hence, access to this delivery network is essential for all Postel's competitors, as the development of a proprietary network that assures a complete national coverage is not economically feasible.

According to the ICA, the revenues from the PT Postel service were sufficient to cover all the product-specific costs and the relevant part of the common costs. The claim for predatory pricing was therefore dismissed.

However, since Poste Italiane charged hybrid mail operators for access to its delivery network an amount which was equal to the retail price of its ordinary mail service, the ICA maintained that the margin earned by these operators was insufficient to allow them to cover their additional downstream costs. The ICA also claimed that the access charge was above the marginal cost of provision of the delivery service incurred by Poste Italiane (because it was equal to the retail price of ordinary mail service which covered also other costs), while Postel was accessing the network at marginal cost.

Hence, the ICA concluded that Poste Italiane was abusing its dominant position and was margin squeezing the competitors of its hybrid mail subsidiary. However, Poste Italiane was not fined, also in light of a commitment to offer access to the delivery network to all the operators interested on non-discriminatory terms.

---

[6] Hybrid mail is distinct from traditional mail in that it enables the senders to access and manage directly several additional functions, such as track and trace, data management of addresses to send mail batches (addressed bulk mail), proof of delivery, postponement and handling of loss and performance failure and the like. Hybrid mail customers are mainly businesses, which need to send periodically great volumes of paper mail (i.e. invoices, statements and time-sensitive notices) to residential and business clients.

17. PLEASE PROVIDE ANY ADDITIONAL COMMENTS THAT YOU WOULD LIKE TO MAKE ON YOUR EXPERIENCE WITH PREDATORY PRICING RULES AND THEIR ENFORCEMENT IN YOUR JURISDICTION, INCLUDING, AS APPROPRIATE BUT NOT LIMITED TO:

A. WHETHER THERE HAVE THERE BEEN OR YOU EXPECT THERE TO BE MAJOR DEVELOPMENTS OR SIGNIFICANT CHANGES IN THE CRITERIA BY WHICH YOU ASSESS PREDATORY PRICING, EXPLAINING THESE DEVELOPMENTS AS RELEVANT.

B. WHETHER THERE ARE SIGNIFICANT POLICY AND/OR PRACTICAL CONSIDERATIONS THAT MAY LEAD TO GREATER OR LESSER AGENCY ENFORCEMENT AGAINST PREDATORY PRICING PURSUANT TO UNILATERAL CONDUCT RULES IN YOUR JURISDICTION, *E.G.,* CONCERN WITH THE RISKS OF FALSE POSITIVES/FALSE NEGATIVES, THE EXISTENCE OF RELATED LAWS SUCH AS A GENERAL BAN ON BELOW-COST PRICING, LIMITED EVIDENCE OF CONSUMER HARM, AND/OR DIFFICULTIES IN OBTAINING RELIABLE COST DATA (PLEASE PROVIDE EXPLANATION AS RELEVANT).

In general, Italian rules on predatory pricing are relatively well-developed, having followed the EC model and, sometimes, even anticipated some major changes with cutting-edge decisions (e.g. *Caronte* was one of the first decisions in Europe applying an incremental cost analysis to a predatory pricing case).

However, like most areas in the field of unilateral conduct, predatory pricing law is in need of modernization, particularly as far as recoupment is concerned.

Many commentators have argued that recoupment shall be an essential part of the legal test for predatory pricing. The explicit prevision of a recoupment condition could be a useful way to focus on cases where consumer harm is actual or likely and to minimize the cost of errors.

Indeed, if the predation phase is not followed by a recovery phase, this means that rivals are able to thwart the effects of the price-cutting or that new entry is possible, thus keeping the price at a competitive level. In either case, consumers are not harmed and there should be no reason for an antitrust intervention.

Furthermore, since price/cost tests are difficult to apply in practice, a recoupment requirement provides an additional screen in order to minimize the risk of “false positives”, i.e. of condemning low prices that are not anticompetitive. As a matter of fact, the failure to pass a price/cost test might be the result of wrongful assumptions (relating, for example, to the allocation of common costs): hence, a recoupment analysis provides an extremely useful cross-check on whether the presumption of predation is plausible.

On the other side, unless the recovery phase already occurred, a recoupment analysis presents practical problems, for it is difficult to prove how the dominant firm could successfully behave in the future. This may lead to a situation of legal uncertainty, which cannot be easily corrected by an efficient allocation of the burden of proof. Indeed, if the burden of proof is to be on the dominant firm, this would be required to prove a negative (i.e. its inability to raise the prices should it try to do so), thus reducing the selectiveness of adding another element for the finding of liability. Conversely, if the burden of proof was on the party alleging the predatory price, it would be very difficult to bring a successful action (as seemingly happens in the US).

It may also be argued - as the EU Commission did in the Discussion Paper - that a separate proof of recoupment would not add much value to the competition analysis in the EU context, provided that it is normally sufficient to ascertain the existence of high entry barriers in order to show the likelihood of recoupment and such investigation is already carried out in the finding of dominance.

This last consideration, albeit appealing in theory, overlooks that in the practice of some Member States (among which we would include Italy) the economic analysis supporting the assessment of a dominant position is frequently inadequate (in particular, this is due to the excessive emphasis ascribed to market shares) and, therefore, does not represent a satisfactory alternative to a specific recoupment analysis. In this context, a recoupment analysis seems a rather useful tool to confirm the results of a finding of dominance.

In any event, we think that an evolution in the law of predatory pricing does not seem likely, at least in the short term.

Indeed, the legal test in Italy seems substantially in line with the position recently expressed by the EU Commission in the Discussion Paper.

Moreover, given the difficulties in obtaining reliable cost data and proving that the price is below the relevant cost benchmark, the ICA tends to pursue pricing abuses under a different perspective (typically, by building a case of margin squeeze or unlawful price discrimination).

In particular, the newly appointed ICA tends to apply the rules on abuse of dominance by focusing either on excessive prices or - especially in the case of regulated and vertically integrated industries - by requiring dominant firms to deal at the wholesale level on terms such to allow their competitors to be profitable on the downstream markets[7].

As a result, predatory pricing cases are marginalized, as evidenced by the lack of an in-depth investigation in the last five years.

Finally, as far as private litigation is concerned, it should be noted that the lack of a mandatory discovery regime renders predatory pricing cases particularly difficult for a

[7] Incidentally, it might be noted that the ICA approach to margin squeeze cases can be criticized as favouring competitors at the expenses of consumers, by creating incentives not to lower the retail prices. However, as already mentioned, we consider exclusionary above-cost price cuts to be outside of the scope of this questionnaire.

plaintiff to undertake. Also in this respect, however, an innovation of the relevant rules of civil procedure does not seem to be an issue under discussion.

<u>Exclusive Dealing/Single Branding</u>

This questionnaire seeks information on the analysis and treatment of exclusive dealing (referred to as single branding in some jurisdictions) by ICN member competition authorities. For purposes of this questionnaire, we refer to "exclusive dealing" and "single branding" as conduct that requires or induces customers or suppliers to deal solely or predominantly with that firm. Nevertheless, this questionnaire does not cover tying, bundling, loyalty discounts, rebates or related practices, which your responses should therefore not address. Unless otherwise stated, the questions concern conduct by a dominant firm or firm with significant market power.

Respondents should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc., rather than speculation.

Legal Basis and Specific Elements

1. PLEASE PROVIDE THE MAIN RELEVANT TEXTS (IN ENGLISH IF AVAILABLE) OF YOUR JURISDICTION'S LAWS AND GUIDELINES ON EXCLUSIVE DEALING/SINGLE BRANDING.

Under Italian competition law general rules exclusive dealing/single branding implemented by a dominant firm or a firm with significant market power falls within the scope of Art. 3 paragraph 1 b) of the Law 287/90 (hereinafter "**Italian Competition Act**") according to which:

"*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*:… *b) to limit or restrict production, market outlets or market access, investment, technical development or technological progress*".

The general criteria followed by the Italian Competition Authority (hereinafter "**ICA**") in assessing exclusive dealing/single branding by a dominant firm have been clarified in the decision adopted in the recent *Diritti calcistici* case (case n. A362, hereinafter "**Diritti calcistici**"). In particular, the ICA underlined that "*the stipulation of contracts containing exclusivity clauses (which, as it is widely acknowledged, do not imply* per se *a violation of antitrust rules) by a firm enjoying a dominant position on the market is liable to determine an abuse of dominant position thus infringing Art. 82 EU Treaty, as it is liable to prevent competition between Member States, in so far as such obligations are characterized by a wide scope as well as by a long duration. ..it has to be verified therefore to what extent the exclusivity contracts ..may distort competition on a market on which, due to the presence of a dominant firm, competition is already significantly reduced..* Furthermore, the ICA explicitly refers to the same approach toward exclusionary abuses and the notion of foreclosure which has been consistently taken by the European Court of Justice and confirmed by the EU Commission in its Discussion paper on the application of Article 82 EU Treaty.

With specific reference to the insurance sector, it must be noted that the recent

Legislative Decree 223/2006 (so called "*Bersani Decree*"), within a general framework of a new liberalization package, has introduced the prohibition for all insurance agents of exclusive distribution of auto third party liability insurance (RC) policies in order to develop multi-brand distribution and thus boost competition in the sector. This legislative reform was welcomed by the ICA which urged an extension of such prohibition of exclusive distribution to all kinds of insurance policies.

PLEASE LIST YOUR JURISDICTION'S CRITERIA FOR AN ABUSE OF DOMINANCE/MONOPOLIZATION BASED ON EXCLUSIVE DEALING.

In its decisional practice, in accordance with the case law at the EU level, the Italian Competition Authority has consistently maintained that a dominant firm which enters into agreements containing exclusive dealing provisions may abuse of its dominant position thus infringing Art. 82 EU Treaty/Art. 3 of the Italian Competition Act in so far as the scope as well as the duration of such clauses are such to prevent the access of competitors of the dominant firm.

Exclusive Purchasing and Supply Arrangements

2. HOW DOES YOUR JURISDICTION DEFINE SINGLE BRANDING OR EXCLUSIVE DEALING? FOR EXAMPLE: MUST A FIRM REQUIRE THAT ALL PURCHASES COME FROM IT OR THAT ALL SALES GO TO IT? CAN SOMETHING LESS THAN "ALL PURCHASES" OR "ALL SALES" BE CONSIDERED SINGLE BRANDING OR EXCLUSIVE DEALING? PLEASE SPECIFY (PROVIDING ACTUAL PERCENTAGES, AS RELEVANT).

No specific definition of single branding or exclusive dealing can be found within the Italian competition law legislative framework. However, both the ICA and the competent national courts (namely, *Tribunale Amministrativo Regionale* – hereinafter "**TAR**" and "**Consiglio di Stato**") have constantly repeated in their decisions that exclusive dealing occurs whenever, irrespective of the existence of a legal obligation or of an explicit contractual provision, the sale conditions applied by a dominant firm are liable to induce its clients to procure their supplies exclusively or mainly ("*prevalentemente*" in Italian) from the same firm.

3. IS THE DURATION OF THE ARRANGEMENT RELEVANT TO YOUR ASSESSMENT? YES/NO

YES. According to our review, in most cases relating to exclusive dealing/single branding implemented by a dominant firm the duration of the arrangements was relevant to the assessment carried out by the ICA.

A. IF SO, PLEASE EXPLAIN HOW AND WHY, PROVIDING EXAMPLES.

The duration of the clause providing an exclusive dealing obligation for the client of the dominant firm has often revealed to be essential for the outcome of the investigation carried out by the ICA.

Hints in this direction may be drawn from a decision concerning exclusivity by a non-dominant undertaking, S*AGIT- Contratti vendita e distribuzione del gelato* – (hereinafter "***Gelati II***")[8], in which the ICA details the criteria followed in the examination of exclusive dealings. In this case the ICA concluded that the "*freezer exclusivity*" by which the producers obliged the icecream retailers to use the freezer provided by them exclusively to preserve their ice creams did not restrict competition having regard not only to the fact that it was necessary to protect the investments made by the producer from the free riding of competitors, but also to the short duration – one year – of the bailment agreement containing such exclusivity.

In the decision adopted in the case *Stream /TELE+* (case A 274, hereinafter "***Stream /TELE+***"*)* the ICA considered that 6 years period for the duration of the exclusive dealing obligation binding most of the first division ("Serie A") football clubs to TELE+ - the operator which was dominant at that time in the Italian pay-tv market- with regard to the sale of pay-tv broadcasting rights – was extremely long and thus incompatible with competition law principles. In particular, the extension of the exclusivity obligation from 3 to 6 years was deemed to foreclose access to the market and to distort the competitive structure of the same.

In the *UNAPACE/ENEL* case (case A 263, hereinafter "***Unapace***") the ICA observed that the insertion by ENEL – the dominant operator enjoying a legal monopoly – in the agreements for the supply of electric energy entered into with its clients of a provision establishing a duration of 3 years and renewable up to 6 years amounted to an abuse of dominant position infringing Art. 82 EU Treaty. This was basically due to the fact that the expiration date of the supply contracts was set after the starting date of the liberalization of the market and thus ENEL would have been able through these exclusivity clauses to bind clients (so called "*clienti idonei*") which, as from 19 February 1999, would have been entitled to freely negotiate their procurement of energy with Italian and EU suppliers other than ENEL.

Further, also the conclusions reached by the ICA in the decision of the case "***Diritti calcistici***" put some emphasis on the duration of the football broadcasting rights license agreements originally stipulated by Mediaset Group – having a dominant position on the market for Tv advertising- and the major football clubs (i.e Juventus, Milan, Inter, Lazio, Roma) in the summer of 2004. In particular, such agreements were considered to give rise to an abuse of dominant position by Mediaset as long as they contained exclusives longer than 3 years, in conjunction with pre-emptive rights and rights of first refusal covering the whole range of broadcasting media.

[8] Even though I am aware that the questions in this questionnaire refer to conduct by a dominant firm, I believe that the leading decisions taken by the ICA with regard to the major non dominant companies of the ice cream sector sheds a light on the criteria followed by the ICA when assessing exclusive dealing.

5. MUST THE FIRM'S USE OF SUCH ARRANGEMENTS COVER A SUBSTANTIAL PORTION OF THE MARKET? YES/NO

YES

A. IF SO, HOW DO YOU INTERPRET THIS REQUIREMENT, INCLUDING ANY RELEVANT PERCENTAGE THRESHOLDS FOR THE PURCHASE OR SUPPLY COVERED, AND THE EVIDENCE NEEDED TO DETERMINE WHETHER THIS IS MET?

The ICA's decisional practice shows that exclusive dealing arrangements – either implemented by a dominant firm or applied by one or more non dominant firms- must cover a significant portion of the relevant market in order to determine anticompetitive effects.

It must be noted that, in the leading decisions adopted with regard to exclusivity contractual schemes applied by the major operators in the ice cream sector (case I 212 – *Contratti di Distribuzione esclusiva di gelati* – hereinafter "***Gelati I***" -and "***Gelati II***"), the ICA focused its analysis on the portion of the ice cream retailers bound by the exclusivity obligations imposed by the producers and thus on the cumulative foreclosure effects determined by the exclusive dealing arrangements.

In most decisions dealing with exclusive dealing by dominant firms, the portion of the market covered by the exclusivity was extremely high. In this regard, the clearest example is provided by *Diritti calcistici*" where the ICA emphasized that the exclusivity bound the major Serie A football clubs in terms of number of supporters and thus of capacity to attract TV audience. In particular, the exclusive dealing arrangements related to clubs which represented 70% of the aggregated turnover generated by Serie A teams and 80% of the total number of supporters.

In any event, the leading cases concerning the ice cream sector – which were related to exclusive dealing arrangements applied by non dominant firms – again shed some light on the approach taken by the ICA towards the requirement of a substantial portion of the market being covered by such arrangements.

In particular, the ICA found in *Gelati II* that the exclusivity applied by the market leader SAGIT and by the three other main players (Nestlè, Sammontana and Sanson) of the ice cream on the whole covered a total of 57% of the ice cream retailers. On that basis, the conclusion reached by the ICA was that a significant part of the market, i.e. 43% of the distributors, was not bound by exclusivity and thus accessible to new entrants. It followed that due to the conditions of the market, no cumulative foreclosure effect was determined by the investigated exclusive dealing arrangements. In addition, the ICA stated that the commitment of the market leader SAGIT not to

apply the exclusivity to more than 50% of its retailers let exclude that the portion of the market covered by the exclusivity was such to restrict competition.

On the contrary, the ICA had come to different conclusions in *Gelati I* as in that case the retailers bound by exclusivity to the main producers of ice cream represented 68% of the total number of ice cream retailers.

6. DOES IT MATTER WHETHER THE ARRANGEMENT WAS REQUESTED BY THE NON-DOMINANT CUSTOMER OR SUPPLIER? YES/NO

We are not aware of any cases where the arrangement was requested by the non dominant customer.

a) IF SO, HOW AND WHY?

Not applicable

7. MIGHT OTHERWISE LEGAL EXCLUSIVE DEALING/SINGLE BRANDING ARRANGEMENTS BE DEEMED ABUSIVE IF THEY CONTAIN OTHER PROVISIONS, *E.G.,* AN “ENGLISH CLAUSE” (REQUIRING *E.G.,* THE CUSTOMER TO REPORT ANY BETTER OFFERS TO THE SUPPLIER, AND PROHIBITING THE CUSTOMER FROM ACCEPTING THE OFFER UNLESS THE SUPPLIER DOES NOT MATCH IT), RIGHTS OF FIRST REFUSAL (RIGHT OF, *E.G.,* THE SUPPLIER TO ENTER INTO AN AGREEMENT WITH THE CUSTOMER ACCORDING TO SPECIFIED TERMS, BEFORE THE CUSTOMER IS ENTITLED TO ENTER INTO AN AGREEMENT WITH A THIRD PARTY)? YES/NO

YES

A. IF SO, PLEASE EXPLAIN AND PROVIDE EXAMPLES.

Based on a review of the ICA’s relevant decisions, it seems that exclusive dealing/single branding arrangements which also include “English clauses”, rights of first refusal or other form of pre-emptive rights are considered as restricting competition even more clearly than mere exclusivity obligations. Indeed, from the ICA’s perspective all these mechanisms pursue the aim of binding the clients to the dominant firm applying such contractual schemes, thus enhancing the exclusionary effects of single branding vis-à-vis the actual or potential competitors.

For instance, in *Unapace* case the ICA considered that the use of “English clauses” allowed ENEL to obtain information on the behavior of its competitors which were not otherwise available from other sources and therefore to achieve an artificial transparency in relation to electricity market in the process of being liberalized.

The capacity of pre-emptive rights of seriously distorting competition when combined with exclusivity clauses is particularly emphasized in the decision in “*Diritti calcistici*”, where the ICA observed that “*…the insertion of an exclusivity clause, which per se is not capable of distorting the competitive structure of the market as long as the exclusivity is contained with certain time limit, is to be considered*

anticompetitive when, through the exercise of the specific first negotiation and pre-emption rights provided in the agreement, the duration of the exclusivity comes to be significantly extended, up to a maximum of nine sportive seasons, so as to prevent potential competitors for a long period of time from purchasing broadcasting rights which are essential in order to make a valuable offer…".

Nonetheless, in other cases exclusive dealing has been considered as abusive to the same extent of English clauses or equivalent provisions: in the well known decision of November 2004 fining Telecom Italia for more € 150 million (Case A 351-*Comportamenti abusivi di Telecom Italia*, hereinafter "***Telecom Italia***") the ICA made a separate assessment of exclusivity clauses and English clauses inserted by Telecom Italia in the contractual terms applied to its business clients concluding that both amount to serious infringements of Art. 3, paragraph b) of the Law 287/90.

Finally, the case *PEPSICO FOODS AND BEVERAGES INTERNATIONAL-IBG SUD/COCA COLA ITALIA* (Case A 224, hereinafter "***Pepsico Foods***") shows how in the ICA's practice exclusive dealing implemented by a dominant form might be abusive irrespective of the use by the same firm of other clauses aimed to prevent its clients from dealing with competitors.

Presumptions and Safe Harbors

8. ARE THERE CIRCUMSTANCES UNDER WHICH A FIRM'S USE OF SINGLE BRANDING OR EXCLUSIVE DEALING ARRANGEMENTS IS PRESUMED ILLEGAL? YES/NO

NO

In general, it can be said that the ICA's practice has not developed a true presumption of illegality in relation to this kind of arrangements.

It must be noted though that the ICA has generally been inclined to consider that exclusive dealing arrangements requested – or more often imposed- by a dominant firm either directly or indirectly through its wholesalers are likely to determine a serious infringement of Art. 82 EU Treaty/Art. 3 of the Italian Competition Act, as they are capable of impeding access of new entrants on the market. Nevertheless, even when the same were applied by a dominant firm, the ICA did not avoid to investigate to what extent they were actually capable of distorting competition especially taking into account their scope and their duration.

Only the decision adopted in *Pepsico Foods* could eventually suggest an approach towards exclusive dealing contractual schemes as rigorous as to infer a conclusive

presumption of illegality: the exclusivity clauses inserted by the authorized bottlers of cola products in their agreements with the wholesalers were deemed to be *per se* unlawful due to the dominant position enjoyed by each bottler in its local market for the distribution and sale of cola products.

B. IF SO, PLEASE IDENTIFY THE CIRCUMSTANCES

In *Pepsico Foods* (see paragraph 262), the ICA stated that the exclusivity clauses included in the agreements entered into by two authorized bottlers, i.e. the companies SOSIB and SOCIB, and their wholesalers represented a serious infringement of Art. 3 of the Italian Competition Act, as they were liable to foreclose access to the market to competitors and to limit the possibility of choice for the consumers.

C. IS THE PRESUMPTION REBUTTABLE? YES/NO

In *Pepsico Foods*, provided that a sort of presumption is to be inferred by the approach taken by the ICA towards the exclusive dealing arrangements by the two bottlers referred to above, such a possible presumption seemed to be not rebuttable. Indeed, the ICA rejected - as "*unfounded in point of law*"- the argument that the limited size and presence of wholesalers in the two relevant regions (Calabria and Sardinia) in which the bottlers were active implied that the application of exclusivity arrangements was actually deprived of any anticompetitive effect. In this respect, the ICA deemed sufficient to recall that "*in accordance with the consolidated community and national case law, the provision of exclusivity clauses amounts per se to an abuse, whenever it is applied by a firm holding a dominant position*".

I. IF SO, WHAT MUST BE SHOWN TO REBUT THE PRESUMPTION?

Not applicable.

9. IS THERE A "SAFE HARBOR" FROM A FINDING OF LIABILITY UNDER YOUR SINGLE BRANDING/EXCLUSIVE DEALING PROVISIONS? YES/NO

A. IF SO, PLEASE EXPLAIN, INCLUDING ITS TERMS.

The Italian competition law provisions do not include any specific "safe harbor". However, the ICA has generally assessed the arrangements entered into by non dominant firms having in mind the 30% market share threshold set out by the Commission Regulation 2790/99.

However, in relation to specific sector (e.g. ice creams, beer), the ICA has also considered the principle laid down by Article 6 of the same Commission Regulation, i.e. that the benefit of the block exemption may be withdrawn where access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel network of similar vertical restraints implemented by competing suppliers or buyers. Therefore, in relation to such sectors, irrespective of the market

shares of the investigated firms, the ICA assessed whether the arrangements gave rise to foreclosure effects. In this respect, it must be recalled that in *Gelati II* the ICA found that, notwithstanding the 50-60% market share held by the leader SAGIT, the contractual schemes applied by SAGIT to its retailers, as well as those applied by the three other main players of the market, did not infringe Art. 81 EU Treaty taking into account the portion of the market covered by exclusivity.

With regard to dominant operators, a sort of "safe harbor" might be identified – at least to a certain extent- in a duration of exclusivity clauses of less than 3 years provided that the same clauses are not combined with specific first negotiation and pre-emption rights which are liable to significantly extend the duration of the exclusivity and thus effectively exclude competitors (*Stream /TELE+, Diritti calcistici)*.

Effects

10. MUST A MARKET FORECLOSURE EFFECT BE SHOWN FOR AN ABUSE? YES/NO

The practice of the ICA does not appear univocal.

Indeed, on the one side, in some decisions the finding of potential foreclosure effects stemming from exclusive dealing/single branding conduct by a dominant firm seemed sufficient to conclude that such a conduct qualifies as an infringement of Art. 82 EU Treaty/Art. 3 of the Italian Competition Act, even though the ICA did not go into a detailed economic analysis in order to provide solid economic evidence for its conclusions. In such decisions, the foreclosure effects determined by exclusive dealing/single branding arrangements appeared potential rather than actual.

On the other side, however, the leading decisions adopted on cases involving non dominant firms, such as *Gelati I* and *Gelati II*, showed a more sounded economic reasoning aimed at providing evidence on whether exclusive dealing is liable to determine an actual restriction of competition.

A. HOW IS MARKET FORECLOSURE DEFINED IN YOUR JURISDICTION?

In *Diritti calcistici*, the ICA showed to take into account the approach toward "*foreclosure*" adopted by the European Court of Justice and proposed by the EU Commission in its Discussion paper on the application of Article 82 where it is underlined that "*By foreclosure is meant that actual or potential competitors are completely or partially denied profitable access to a market […] it is sufficient that the rivals are disadvantaged and consequently led to compete less aggressively.*

Rivals may be disadvantaged where the dominant company is able to directly raise rivals' costs or reduce demand for the rivals'products".

B. WHICH FACTORS ARE TAKEN INTO ACCOUNT TO ASSESS A MARKET FORECLOSURE EFFECT (LEVEL OF DOMINANCE, PERCENTAGE OF MARKET DEMAND/PURCHASES OR SUPPLY COVERED BY THE ARRANGEMENT, EXISTENCE OF ALTERNATIVE SOURCES OF SUPPLY, ENTRY BARRIERS, SCALE ECONOMIES, POSSIBILITY AND PRACTICABILITY OF SWITCHING, OTHERS)? PLEASE SPECIFY THE FACTORS CONSIDERED, INCLUDING, AS RELEVANT, THE PERCENTAGE OF DEMAND/SUPPLY COVERED.

In order to verify whether exclusive dealing/single branding obligations could determine foreclosure effects on the identified relevant market, the ICA has mainly focused on the following factors:

(i) the dominant position of the supplier (inter alia, *A.I.S./A.T.I./ITALKALI - case I 65, hereinafter "**Italkali**"*- and Pepsico Foods);

(ii) the percentage of the demand/supply covered by the exclusivity imposed by the dominant firm;

(iii) the duration of exclusive dealing/single branding obligation and its combination with various forms of pre-emptive rights (inter alia, in *Diritti calcistici*);

(iv) the possibility and practicability for clients of switching to other suppliers (inter alia, in ENEL Trade/Clienti Idonei**-** case A 333 hereinafter **"Enel Trade**").

C. WHAT EVIDENCE IS USED TO DEMONSTRATE THESE EFFECTS AND MUST THE EFFECTS BE ACTUAL, LIKELY OR POTENTIAL EFFECTS?

The main evidence used by the ICA to demonstrate the foreclosure effects determined by exclusive dealing/single branding arrangements either applied by a dominant firm or by non dominant firms have been the following:

(i) the duration and the scope of the arrangements, assessed in light of the proportionality principle;

(ii) an overview of the regulatory framework of the market affected by the exclusivity arrangements in order to verify what barriers to entry prevented access to new players and to what extent clients were able to switch to alternative suppliers;

(iii) an economic analysis – although not a detailed one - of the market, having regard, *inter alia*, to the some crucial factors, such as the portion of retailers bound by the producers and to the total turnover represented by such retailers (e.g. *Gelati I* and *Gelati II*) or to the percentage of supporters and thus of potential TV audience represented on the whole by the football teams bound by the exclusivity.

11. MUST OTHER EFFECTS, *E.G.,* ON CONSUMER WELFARE, BE SHOWN FOR AN ABUSE? YES/NO

NO

The review of the decisional practice suggests that effects on the market other than foreclosure, such as effects on consumer welfare, must not be necessarily demonstrated in order to find that exclusive dealing/single branding violates Art. 82 EU Treaty/Art. 3 of the Italian Competition Act.

A. IF YES, PLEASE SPECIFY WHAT MUST BE DEMONSTRATED AND THE EVIDENCE REQUIRED.

Not applicable

Justifications/Defenses

12. WHAT JUSTIFICATIONS/DEFENSES ARE AVAILABLE TO THE DOMINANT FIRM, *E.G.,* AN EFFICIENCY, MEETING COMPETITION OR OBJECTIVE NECESSITY DEFENSE? PLEASE SPECIFY.

From a review of the ICA's case law it appears that very limited – if any- justification/defenses are available to the dominant firm when applying/imposing exclusive dealing arrangements which result prima facie *disproportionate* in light of their scope and duration, particularly when the foreclosure effects of the same are maximized by the use of further devices – such as English clauses and other forms of pre-emptive rights – which are generally interpreted by the ICA as a part of an exclusion strategy pursued by the dominant firm.

As far as non dominant firms are concerned, however, a justification/defense might rely on the actual foreclosure effects determined by the exclusive dealing arrangements applied to their clients. Such a defense might be based on the ICA's findings in *Gelati II*.

A. IF THERE IS AN EFFICIENCIES DEFENSE, WHAT EFFICIENCIES ARE CONSIDERED (*E.G.*, RELATIONSHIP-SPECIFIC INVESTMENTS, FACILITATING INNOVATION, REDUCED TRANSACTION COSTS)? HOW ARE CLAIMS OF IMPROVED SERVICE QUALITY OR REPUTATION ASSESSED?

Not applicable

B. ARE EFFICIENCIES BALANCED AGAINST COMPETITIVE HARM TO DETERMINE WHETHER LIABILITY ATTACHES, OR DO THEY PROVIDE A COMPLETE DEFENSE WITHOUT CONSIDERATION OF HARM?

Not applicable

C. IS THERE A MEETING COMPETITION DEFENSE? YES/ NO.

NO

I. IF YES, PLEASE EXPLAIN.

Not applicable

D. WHAT IS THE STANDARD OF PROOF APPLICABLE TO THESE DEFENSES? WHAT TYPE OF EVIDENCE IS REQUIRED TO DEMONSTRATE THAT THE DEFENSES ARE MET?

Not applicable

Enforcement

13. PLEASE PROVIDE THE FOLLOWING INFORMATION FOR THE PAST TEN YEARS (AS INFORMATION IS AVAILABLE):

B. THE NUMBER OF EXCLUSIVE DEALING/SINGLE BRANDING CASES YOUR AGENCY REVIEWED (INVESTIGATED BEYOND A PRELIMINARY PHASE).

Based on our review of the decisional practice from 1996, the ICA investigated beyond a preliminary phase seven (7) cases relating – at least in part- to exclusive dealing/single branding by a dominant firm (*Italkali, Unapace, Pepsico Foods, Stream /TELE+, Enel Trade, Telecom Italia, Diritti Calcistici)*.

C. THE NUMBER OF THESE CASES THAT RESULTED IN (I) AN AGENCY DECISION THAT THE CONDUCT VIOLATES ANTITRUST RULES; (II) A SETTLEMENT WITH RELIEF.

All cases referred to above resulted in a decision by the ICA that exclusive dealing/single branding violated either Art. 82 EU Treaty/Art. 3 of the Italian Competition Act. However, fines were imposed only in three cases (*Pepsico Foods, Enel Trade* and *Telecom Italia*), while the remaining cases were settled with relief of the investigated firm following the modification of their exclusive dealing/single branding arrangements.

D. THE NUMBER OF AGENCY DECISIONS ISSUED, IF ANY, THAT HELD THAT THE PRACTICE DID NOT VIOLATE YOUR JURISDICTION'S EXCLUSIVE DEALING/SINGLE BRANDING RULES (*I.E.,* "CLEARANCE DECISIONS").

None

E. EACH OF THE NUMBER OF AGENCY DECISIONS OR SETTLEMENTS THAT WERE (I) CHALLENGED IN COURT AND, OF THOSE, EITHER (II) OVERTURNED BY COURT DECISION OR (III) CONFIRMED BY COURT DECISION.

The three decisions imposing fines on the investigated firms (*Pepsico Foods, Enel Trade* and *Telecom Italia*) were appealed to the national administrative courts.

The decisions in *Pepsico Foods* and *Enel Trade* were entirely confirmed, while the one in *Telecom Italia* was partially confirmed and partially annulled with specific regard to the level of fine, which was finally reduced.

14. DOES YOUR JURISDICTION ALLOW PRIVATE CASES CHALLENGING EXCLUSIVE DEALING/SINGLE BRANDING? YES/NO

YES

Private actions before national civil courts against exclusive dealing/single branding conduct by a dominant firm are allowed under Italian jurisdiction.

a. PLEASE PROVIDE A SHORT DESCRIPTION OF REPRESENTATIVE EXAMPLES, AS AVAILABLE.

We are not aware of private antitrust actions before Italian civil courts founded on exclusive dealing/single branding conduct by a dominant firm.

15. AS RELEVANT, PLEASE PROVIDE A SHORT ENGLISH SUMMARY OF THE LEADING EXCLUSIVE DEALING/SINGLE BRANDING CASES IN YOUR JURISDICTION AND, IF POSSIBLE, A LINK TO THE ENGLISH TRANSLATION OF THE DECISION, AN EXECUTIVE SUMMARY OR THE PRESS RELEASE OF THE CASE.

Press releases of the cases referred to above can be found on the ICA website at http://www.agcm.it/eng/index.htm

We provide herein below a short summary of the decisions which we consider as leading among the decisions referred to in this questionnaire.

Gelati I

In Gelati I the ICA closed an investigation opened to ascertain whether the exclusive dealing arrangements applied by the main producers of ice cream on the Italian market (Nestlè Italiana, Unilever, Sammontana, Gelati Sanson) constituted a violation of Art. 2 of the Competition Act with respect to the exclusive distribution clauses.

The ICA preliminary focused its analysis on the general conditions of the ice cream sector in Italy and noted that the structure of supply was particularly concentrated: the first two companies, Unilever Italia (which was owner of the brands such as Algida, Sorbetteria di Ranieri, Eldorado) and Nestlè Italiana (which was owner of the brands

such as Motta, Antica Gelateria del Corso), jointly hold a market share of 70.1% and the first four companies cover altogether 89.1% of the whole ice cream sector. This market structure was due to a number of factors which limited market access possibilities to new competitors, such as high distribution costs and the need of significant financial capacities to develop technology and know-how, as well as to invest in advertising expenditure.

In the ICA's view, a relevant factor deterring the entry of new players on the market was also the ordinary commercial practice consisting of the ice cream producers supplying freezers on free bailment to retailers and obliging the ice cream retailers to use the freezer provided exclusively to preserve their ice creams.

The ICA found that the contracts arranged by the ice cream producers provided for the obligation on retailers to purchase and distribute only one brand, in such a way as to hamper dealers from selling rivals' products in their outlets.

According to the ICA the exclusive contractual tie was very binding, in light of the high penalties which were provided for the cases of non compliance by the retailers. In particular, the exclusive purchase contracts covered 162,000 outlets, accounting for 68.1% of the total of ice cream retailers. On the average, nearly 73% of the total retail sales derived from outlets covered by the exclusive dealing arrangements

Following to its analysis, the ICA concluded that the exclusive dealing arrangements applied by the investigated ice cream producers infringed Art. 2 of the Italian Competition Act as they had the effect to restrict competition on the Italian ice cream sector. The ICA ordered the parties concerned to cease immediately to undersign, advocate or apply the exclusive clause contained in their contracts, as well as to impose any penalty to dealers. In addition, the parties were required to file within180 days a report regarding the measures adopted to remove the infringements and restore effective conditions for competition on the market.

Pepsico Foods (1999)

By the decision *Pepsico Foods*, the ICA concluded an investigation opened during the previous year against Coca-Cola's Italian subsidiaries as well as a number of independent authorized Coca-Cola's bottlers in southern Italy and the islands: SOCIB (Società Calabrese Imbottigliamento Bevande), SOBIB (Società Barese Imbottigliamento Bevande), SOSIB Industriale e Commerciale (Società Sarda Imbottigliamento Bevande gassate), SIBEG (Società Imbottigliamento Bevande Gassate), SNIBEG (Società Napoletana Imbottigliamento Bevande Gassate).

In particular, the investigation had been opened following a complaint from two competitors, i.e. Pepsico Foods and Beverages International Ltd and IBG Sud S.p.A., which alleged abuses by the investigated firms of their dominant position in the wholesale sector, and a subsequent complaint from ESSELUNGA alleging that Coca-Cola Italia was abusing its dominant position to the detriment of the wholesale distribution players.

With regard to Coca-Cola Italian subsidiaries the ICA found that, in the framework of general strategy pursued by Coca-Cola – which had a dominant position on the cola beverages market with some 80% market share- to exclude its main competitor from the cola beverages sector in Italy, they had granted illegal discounts and other incentives to wholesalers so as to induce them to convert Pepsi's draft beverage equipment and resell Coca-Cola products. In addition, the Coca-Cola subsidiaries had implemented a a system of discriminatory discounts and loyalty bonuses based on a selective and non-transparent classification of wholesalers. According to the ICA, such practices had represented a serious infringement of Art. 3 of the Italian Competition Act and therefore Coca-Cola was fined of some € 15 million approximately.

As far as exclusive dealing conduct is concerned, the ICA focused on the exclusivity clauses inserted in the contracts concluded by SOCIB and SOSIB prior to 1998 with wholesalers working in their respective zones.

According to the ICA's assessment, the imposition of exclusivity clauses in contracts with wholesalers by companies occupying a dominant position in the relevant geographic market -such as these authorized bottlers- constituted a further serious infringement of Art. 3 of the Italian Competition Act, in that it restricted access to the distribution channels and ultimately to the retail distribution market.

However, considering that both SOSIB and SOCIB had removed the investigated clauses from their contracts before the notification of the statement of objections, the ICA imposed as a minimum fine amounting to approximately €200,000.00 to each of the two bottlers.

Stream /Tele+ (2000)

The ICA closed an investigation opened against Tele+ (a subsidiary of Canal+) in order to verify whether its conduct was liable to distort competition on the pay-TV market, resolving that it had committed an abuse of a dominant position under Article 82(b) of the EC Treaty, in that since May 1998 it had implemented a commercial policy for a period in excess of three years for the exclusive acquisition of the rights for the encrypted broadcasting of the most important Serie A and Serie B football championship matches.

In 1998 and 1999, Tele+ concluded exclusive contracts with seven Serie A football clubs (Juventus, Milan, Inter, Bologna, Cagliari, Empoli, Bari) and with two Serie B soccer clubs (Napoli and Torino) to purchase the encryted TV rights for matches played in the 1999-2005 football seasons. For the 1998-99 season, these football broadcasting rights accounted for 70-80% of the total subscription revenues for the Serie A matches, and 60-70% of the aggregate value of revenues paid for the Serie B matches. In addition, TELEPIU' owned exclusive rights for the *première* screening of motion pictures distributed by the leading motion picture corporations, both foreign

(Columbia-Tristar, Paramount, 20th Century Fox, Universal, Warner Bros., Dreamworks and Disney Buena Vista) and Italian (the Cecchi Gori Group).

Since the football broadcasting rights and the most popular movies are needed to create a supply of so-called "premium" programmes, in other words, programmes which will attract viewers to take out subscriptions and renew them subsequently, the ICA intended to ascertain whether long-term exclusive contracts for most important broadcasting rights could lead to a foreclosure of the pay-TV market, to the detriment of actual and potential competitors. Further, in the ICA's view some clauses of the contract entered into between TELE+ and Stream on 8 August 1996 appeared to be potentially restrictive of competition, in particular preventing Stream from effectively competing on the pay-tv market with negative repercussions for the consumers in terms of price, product quality and technological improvements.

The investigation had revealed that Tele+ occupied a dominant position on the pay-TV market due a number of factors: 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 programmes (in addition to its football broadcasting rights Tele+ owned some 60% of the rights to broadcast movies attracting the highest theatre box office revenues).

In its final decision, the ICA ruled out that exclusive dealing arrangements under investigation allowed Tele+ to abuse of its dominant position on the pay-TV market, as it had purchased exclusive rights for the encrypted broadcasting of the bulk of the Serie A and Serie B football matches for a six-years period (1999-2005), thereby extending – and indeed doubling- the period of exclusive broadcasting rights that had been previous the standard practice in football rights broadcasting agreements.

In the ICA's view such conduct preventing Tele+'s actual and potential competitors from being able to offer the premium programmes for a particularly long period of time.

The ICA also stated that Tele+ had abused its dominant position by including several anticompetitive clauses in the contract for the cable distribution of football packages and programmes concluded with Stream in 1996. In particular, it had obliged Stream to agree that it would only broadcast via cable the football matches over which it had which it had already purchased the broadcasting rights.

Gelati II (2003)

The ICA closed a second investigation opened against the major ice cream producers on the Italian market, on the basis of a standard contractual model which the leading player SAGIT (former Unilever Italia) had notified to the ICA in order to request an exemption from the application of Art. 2 of the Italian Competition Act. In particular, taking into account the presence of exclusive contracts similar to those communicated by SAGIT, i.e. the presence of parallel networks suitable to give rise to market foreclosure for potential competitors, the ICA had extended the investigation to the three other companies which, together with Sagit, account for about 98% of the market.

Also in this case the assessment made by the ICA was aimed at ascertaining whether the parallel exclusivity bindings by the four main producers had as their consequence a network effect, by which market entry by more efficient potential competitors was prevented or substantially hindered.

However, in the ICA's view, the changes in the market situation justified in this case a different outcome of the analysis and thus different conclusions from those reached in the Gelati I (see above for the summary of the decision).

More specifically, the ICA observed that exclusivity did not seem to constitute a barrier to entry for new entrants because of the massive presence of independent distributors on the Italian territory, as pointed out by all minor producers during the investigation and that "*freezer exclusivity*" was basically aimed at protecting an investment from free riding. not preventing retailers from installing two or more cabinets (of different size, if the case) in the outlet and leaving the retailer substantially free to enter into a similar arrangement with a different producer within a short time.

With specific regard to the potential foreclosure effect produced by exclusive dealing, the ICA noted that SAGIT, in line with a general market trend, had experienced a reduction in exclusive contracts applied on the total, down to 51% from 67% in 1996

(thus about [30-40%] of total outlets and [30-40%] of total market value).Therefore, exclusivity bindings did not represent for SAGIT the prevailing standard contract, since it supplied to a large extent outlets also selling other manufacturers' ice-creams. As to the other three major players which applied exclusive contracts with their outlets, the data collected by the ICA showed that such contracts bound about 27% of total outlets dealing with industrial impulse ice-creams in Italy; this figure, as added to the outlets exclusively supplied by SAGIT, led a general foreclosure effect concerning 57% of distributors.

In light of the above, the ICA concluded that: (i) there was no network effect restricting competition, in so far as a considerable market share, equal to 43% of outlets, was not exclusively bound and may be considered accessible to new competitors, if any, especially in the light of the increasing phenomenon of mixed supplies; (ii) the contracts entered into by SAGIT and the other major ice cream producers did not appear capable of infringing Art 81 EU Treaty.

Diritti calcistici (2006)

By a decision taken on 28 June 2006, the ICA closed an investigation opened under Article 82 EU Treaty against the Mediaset Group ("***Mediaset***"), the media conglomerate controlling, *inter alia*, the three main private free-to-air channels in Italy.

The ICA focused on the exclusive dealing arrangements relating to football broadcasting rights which Mediaset – having a dominant position on the market for Tv advertising- had stipulated with the major football clubs (i.e. Juventus, Milan, Inter, Lazio, Roma) in the summer of 2004.

In particular, such agreements were considered to give rise to an abuse of dominant position falling within the scope of Article 82 EU Treaty as long as they contained exclusives longer than 3 years, in conjunction with pre-emptive rights and rights of first refusal covering the whole range of broadcasting media, covering the whole range of broadcasting media.

During the course of the investigation, Mediaset committed, with respect to all the clubs under contract, to maintain the exclusive from 2007 on only for transmissions via the digital terrestrial platform, and to sell the rights for the transmission on other broadcasting platforms to third parties in an equitable, transparent and non-discriminatory fashion. By doing so, in contrast with the original contractual arrangements, Mediaset made it possible to broadcast football matches from 2007 on platforms other than digital terrestrial, thus making such content available to third-party operators and giving them the opportunity to attract a significant audience share.

Exercising in advance its right of first negotiation, Mediaset also set up agreements with Juventus, Inter, Milan, Lazio, Roma and Livorno in which the duration of the rights acquired from 2007 on was significantly reduced to a maximum of two years with an option to renew for one further season.

Finally, Mediaset committed that starting from the 2007-2008 football season, it would not include any further clauses regarding right of first refusal or right of pre-emption in agreements for television broadcasting rights.

16. PLEASE PROVIDE ANY ADDITIONAL COMMENTS THAT YOU WOULD LIKE TO MAKE ON YOUR EXPERIENCE WITH EXCLUSIVE DEALING/SINGLE BRANDING RULES AND THEIR ENFORCEMENT IN YOUR JURISDICTION, INCLUDING, AS APPROPRIATE BUT NOT LIMITED TO WHETHER THERE HAVE THERE BEEN OR YOU EXPECT THERE TO BE MAJOR DEVELOPMENTS OR SIGNIFICANT CHANGES IN THE CRITERIA BY WHICH YOU ASSESS EXCLUSIVE DEALING/SINGLE BRANDING, EXPLAINING THESE DEVELOPMENTS AS RELEVANT.

In general, Italian rules on exclusive dealing/single branding arrangements by a dominant firm do not appear well-developed as the ICA has effectively investigated a few cases, some of which only partially concerned this form of abuse.

It must be noted that the legal test applied to assess exclusive dealing/single branding arrangements by a dominant firm has been so far rather consistent with the approach taken by EU Commission towards exclusionary abuses and the concept of market foreclosure which is required to determine such form of abuses.