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GLOBAL COMPETITION REVIEW

Italian Telecoms and TV Broadcasting Regulation

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Telecoms regulatory framework: status of the analysis of the telecommunication markets as defined by the EC Recommendations No. 879 on 17 December 2007 and No. 311 on 8 May 2003

Over the past 12 months, the Italian Regulatory Authority (IRA or the Authority) has concluded the analysis of some markets defined by the EU Commission Recommendation on 17 December 2007 (2007/879/EC) 'on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation', in accordance with Directive 2002/21/EC of the European Parliament and of the Council, 'on a common regulatory framework for electronic communications networks and services' (2007 Recommendation), as well as the second cycle of the analysis of some markets which were identified under the former Recommendation No. 2003/311/EC (published in the Official Journal of the European Communities on 8 May 2003; 2003 Recommendation) no longer provided by the 2007 Recommendation,¹ given that in the IRA's view, some markets of the former Recommendation could still need an ex ante regulation in the light of the possible results of the triple test provided by the 2007 Recommendation.²

In particular, the Authority has concluded the examination of the market of 'local and/or domestic retail telephone services' (markets No. 3 and 5 of the 2003 Recommendation), and the market of 'radio and TV broadcasting transmission of contents to end-users' (market No. 18 of the 2003 Recommendation), both no longer included in the 2007 Recommendation, establishing they are no more susceptible of ex ante regulation with the consequent removal of the existing regulatory obligations. The Authority has also started, on December 2010, the third cycle of the analysis on market of 'voice call termination on individual mobile network' (market No. 7 of the 2007 Recommendation).

Further, the Authority – taking into consideration the EU Commission Recommendation on NGA (Next Generation Access) – has started a proceeding aimed at defying the regulatory conditions for access to NGN (Next Generation Networks), so indicting a public consultation for the purpose of asking TMT operators to evaluate the IRA position on NGA.

The analysis of the 'voice call termination on individual mobile network' (market No. 7 of the 2007 Recommendation)

Such market is currently regulated by IRA decision No. 667/08/CONS, adopted within the second cycle of the market analysis; given the time period necessary (18 months) in order to proceed on making a new analysis has expired, the IRA has started its third analysis of this market. The Authority published a public consultation aimed at identifying operators that have a substantial market power. The result of the public consultation and, more generally, of the analysis, confirmed the previous analysis that identified four relevant domestic markets, each one corresponding to the Italian MNO (ie, Telecom Italia, Vodafone, H3G and Wind); the IRA also confirmed the existing regulatory obligations imposed to such operators, which are:

- access and use of network resources;
- transparency;
- non-discrimination; and
- price control and costs accountancy.

The analysis of the 'local and/or domestic retail telephone services' (markets No. 3 and 5 of the 2003 Recommendation)

With decision No. 284/10/CONS, the Authority concluded its second analysis of such market. Such decision recalls the text of the document put under public consultation and contextually sent to the European Commission and to the Italian Competition Authority (AGCM) for their (favourable) opinion. This decision identifies two different domestic markets:

- the market of telephone services (local, domestic and fixed-mobile) available to the public supplied on fixed locations for residential customers; and
- the market of telephone services (local, domestic and fixed-mobile) available to the public supplied on fixed locations for non-residential customers.

The Authority decided that both markets are no longer susceptible to ex ante regulation since the '3 criteria test' provided by the 2007 Recommendation failed, therefore IRA has revoked all the regulatory obligations previously imposed to Telecom Italia with decision No. 642/06/CONS.

The analysis of the 'radio and TV broadcasting transmission of contents to end-users' (market No. 18 of the 2003 Recommendation)

IRA concluded its second analysis of such market with decision No. 24/11/CONS. The IRA, in order to verify whether such market was still susceptible to ex ante regulation, carried out the '3 criteria test'. As a result of its analysis, the IRA assessed the following product and geographical markets:

- i) a domestic market for TV transmission services on a terrestrial network, which included, compared to the previous analysis, analogue and digital transmission in consideration of the upcoming switch-over;
- ii) a domestic market for TV transmission services on a terrestrial network via DVB-H, assessed, compared to the previous analysis, as a new autonomous market by virtue of the evaluated lack of substitutability with DVB-T;
- iii) a domestic market for radio transmission services on a terrestrial network;
- iv) a domestic market for radio and TV broadcasting transmission services via fixed telecommunication networks;
- v) a transnational market for radio and TV broadcasting transmission services via satellite;
- vi) a local market for TV transmission services on terrestrial networks;
- vii) a local market for radio transmission services on terrestrial networks.

With particular reference to the market listed under (i), the IRA's analysis considers that it satisfies the first test since it has verified the occurrence of non-transitorily obstacles to the access of such market that are constituted by the scarcity of the available frequencies. The second test failed in consideration of: the evolving market structure; the upcoming switch-over to digital; the new regulation/legislation, which should lead to the entrance of new operators; and the strength of the position of existing minor operators. The same conclusions were made with reference to the markets listed under (ii).

In conclusion, the Authority considers the market of radio and TV broadcasting transmission of content to end-users no longer susceptible to ex ante regulation since it failed the '3 criteria test'. However, for the purpose of giving stronger guarantees to minor operators in view of the switch-over to the digital, the IRA decided to keep all the regulatory obligations established with decision No. 159/08/CONS until the switch-over is completed.

Access services to NGA regulation

Following the EU Commission Recommendation on NGA of 20 September 2010 and the basis of the Guidelines for passing to NGA networks issued by the Italian NGN Committee, IRA has started a proceeding aimed at defying the regulatory conditions of such market.

With decision No. 1/11/CONS, the IRA has published a decision scheme intended for public consultation, given the importance of the matter. Such decision scheme draws a balanced regulatory approach with reference to themes of competition and promotion of the investments within markets of the access to fixed networks (markets No. 4 and 5 of the 2007 Recommendation). In particular, the decision scheme is aimed at assessing the principles of the investment ladder and at taking into account the existing differences for competition conditions within different geographic areas. The Authority also, with such decision scheme, expresses the need to apply symmetrical access to network bottlenecks, to provide for a 'risky bonus' for covering risk investment, and to give incentives for co-investing in initiatives for the creation of NGA networks. Further, the decision

scheme, while establishing the development of fair competition as the main driver of investments, provides for the obligation addressed to Telecom Italia to make all access to products offered on copper network available, also with reference to the market of physical access (market No. 4) and virtual access (market No. 5) also in the new NGA contest.

Following the ending of public consultation on the decision scheme, the IRA, with decision No. 301/11/CONS, has approved the decision scheme to be notified to the EU Commission in order to get its approval and, at the same time, the IRA indicted a new public consultation for the purpose of asking the operators' opinion with reference to the new elements provided by the new decision scheme. The decision scheme provides for a combination of active and passive remedies that absorb all the European best practices in consideration of the Italian market. In particular, these new rules point at: granting a high level of network opening; approving the creation of alternative networks even if using different architectural solution (ie, P2P, GPON, etc); allowing alternative operators to choose the best solution in order to offer access services in consideration of their own infrastructures; and facilitating the implementation of retail services supported by different levels of quality of services.

Notes

- 1 The 2007 Recommendation has repealed the former 2003 Recommendation and has identified just seven markets instead of the 18 listed in the former Recommendation since, in the view of the European Commission, just these seven markets need an ex ante regulation.
- 2 As for the mentioned test, the European Commission has elaborated three criteria which have to be cumulatively met in order to identify markets that are susceptible to ex ante regulation. These criteria are:
 - the presence of high and non-transitory barriers to entry;
 - the unlikelihood of a development of the market structure towards effective competition within the relevant time limit; and
 - the ineffectiveness of the only competition law to straighten out the market failure or failures.

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CMS Adonno Ascoli & Cavasola Scamoni has operated in Italy since 1901. Over 110 years of highly regarded assistance have helped us become one of the major legal and tax firms in Italy, with primary national and international clients. In 2002 we joined CMS, recognised as one of the best European providers of legal and tax services operating in Europe, Asia, Africa and South America, with 54 offices in 48 cities covering 29 jurisdictions. This alliance has enhanced our international reach and provided the capacity and experience to assist clients in Italy and abroad.

The direct involvement of our professionals at all levels in transactions, reliable advice and in-depth know-how of our team members ensure we answer promptly and efficiently to any legal and tax issue. We currently have over 80 lawyers and tax experts, with a total team of over 110 people.

Our client list includes many large international companies operating in various industry sectors, as well as national companies and public entities which we assist on both contentious and non-contentious matters.

Our clients include major companies operating in industries ranging from energy (oil & gas, electricity and renewable energies), telecommunications, construction and real estate, publishing and printing, steel, automotive, transportation, pharmaceuticals and electronics, in addition to insurance and banking.



Eutimio Monaco

CMS Adonnino Ascoli & Cavasola Scamoni

Eutimio Monaco is a partner and leader of the telecommunication competition and regulated markets department at CMS Adonnino Ascoli & Cavasola Scamoni. He joined the firm in 2011 in order to endow the firm with this department.

Before joining CMS, Mr Monaco was, for over 6 years (since 2005), the partner responsible for the telecommunication competition and regulated markets department of Bird & Bird, for which he founded the Rome office.

Before joining Bird & Bird, he worked for a number of highly reputed Italian law firms, developing significant experience in anti-trust and the communications sector.

Mr Monaco's reputation was primarily earned by winning numerous high profile antitrust cases. In particular, he filed many claims before the Antitrust Authority and competent civil and administrative courts on competition issues, and is currently involved in several proceedings filed on behalf of several relevant telecoms operators, particularly on the grounds of abuse of dominant position of the incumbent operator.

For example, he assisted several Italian communications operators within a relevant proceeding before the Italian antitrust authority (A/357) against the Italian mobile operators to ascertain their abuse of collective dominant position in the mobile access market.

Mr Monaco also assists major Italian companies before the competent Authorities in connection to concentration operations (with relevant domestic and EC impacts) and in connection to the conclusion of contracts relating to joint venture deals with a domestic and inter-state relevance.

He is widely recognised as true expert in the Telecoms sector.



Sara Santaloia

CMS Adonnino Ascoli & Cavasola Scamoni

Sara Santaloia is an associate at CMS Adonnino Ascoli & Cavasola Scamoni. She works within the telecommunication, competition and regulated market department, where she arrived following Mr Eutimio Monaco in order to create this new department within the firm.

Before joined CMS, Mrs Santaloia worked for Bird & Bird's telecommunication, competition and regulated markets department. She joined the Bird & Bird Rome office in 2009.

Prior to join Bird & Bird, she worked for CMS Adonnino Ascoli & Cavasola Scamoni in the Rome office, where she dealt with corporate, commercial and compliance matters.

She graduated in Rome at LUISS Guido Carli University.



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