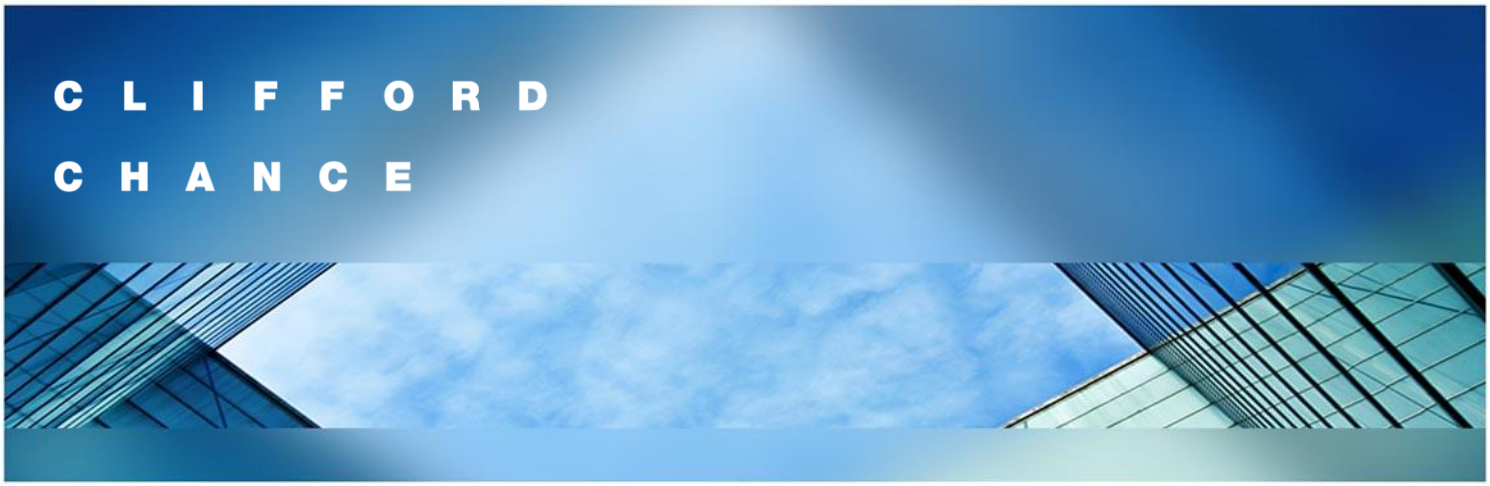

ITALIAN COMPETITION NEWSLETTER

3/2024

In this issue, dedicated to the ICA's decisions for the month of November 2024:

- Abuse of dominant position: the ICA fines HERA and COMOCALOR for excessive prices in district heating
- Concentrations: the ICA Approves Fincantieri's Acquisition of WASS Submarine Systems
- Unfair commercial practices: the ICA approves Ryanair's set of commitments regarding extra check-in costs
- Unfair Commercial Practices: the ICA approves GDL S.p.A.'s set of commitments regarding bathroom renovation bonus
- Unfair commercial practices: the ICA enforces Copytrack GmbH's commitments regarding legal assistance for online copyright

In this issue, dedicated to the Administrative Judiciary's rulings in antitrust and consumer protection matters for the month of November 2024:

- The Council of State reduces sanctions on TIM for abuse of dominant position in broadband network tenders
- The Council of State rules on the distinction between abuse of economic dependence and violations of the regulations on payment terms and commercial transactions
- The Council of State upholds sanctions imposed on MP Silva, IMG, and B4 Groups for restrictive agreements in the Lega Serie A tender for international broadcast rights
- The Council of State rules on the application of the "puffery clause" under Article 20(3) of the Consumer Code regulating hyperbolic promotional messages
- The Council of State rules on unfair commercial practices regarding producers and sellers hindering the exercise of legal warranty
- The Administrative Regional Court (TAR) upholds the appeals filed by Eni Plenitude, Enel Energia, and Acea Energia, annulling the ICA's decisions on alleged violations of Decree-Law no.115/2022

ABUSE OF DOMINANT POSITION: THE ICA FINES HERA AND COMOCALOR FOR EXCESSIVE PRICES IN DISTRICT HEATING

On 26 November, with decisions no. 31384/2024, 31385/2024, and 31386/2024, the Italian Competition Authority (the "**ICA**" or the "**Authority**") concluded the proceedings opened against certain companies belonging to the Iren Group ("**Iren**"), the Hera Group ("**Hera**"), and the A2A Group (particularly ComoCalor S.p.A., "**ComoCalor**) (collectively, the "**Companies**") concerning allegations of abuse of dominant position in the district heating market. As a result, sanctions were imposed on the latter two companies, amounting to €1,984,736 and €286,600, respectively.

Between May and June 2023, numerous reports highlighted significant increases in the charges for district heating services in the networks of Ferrara (managed by Hera), Como (managed by ComoCalor), and Parma and Piacenza (managed by Iren), where each group operates as a monopolist, with the reported price increases occurring between 2021 and 2022.

Users reported that the prices charged for the service were not justified by any increase in the cost of raw materials. At the same time, they highlighted the impossibility of discontinuing the service or switching to alternative providers due to the high exit costs involved.

Indeed, the district heating market is inherently characterized by a vertically integrated natural monopoly. This is due, on the one hand, to the significant costs associated with the construction, maintenance, and operation of heat distribution networks, which render the presence of multiple operators in the same market inefficient. On the other hand, the market is constrained by the unavailability of specific durable components required to ensure the functionality of alternative heating systems.

While the ICA established that all three companies held a dominant position within their respective geographic areas of operation, it found that only Hera and ComoCalor had abused this position by imposing unjustifiably burdensome prices. In contrast, with regard to Iren, the Authority did not identify sufficient evidence during the investigation to substantiate abusive conduct.

In applying the test outlined by the Court of Justice of the European Union in the landmark United Brands judgment — which states that a price is abusive when (i) it bears no reasonable relation to the economic value of the service provided, and (ii) it is characterised by unfairness — the ICA determined that the tariffs imposed by Hera and ComoCalor did not reflect the actual costs of heat production. Notably, the heat was largely generated through waste-to-energy processes, the costs of which are not influenced by fluctuations in natural gas prices.

In this case, the Authority found that both elements of the test were satisfied, further noting that the pricing structure was unfair in itself, given the absence of any competitors in the market.

CONCENTRATIONS: THE ICA APPROVES FINCANTIERI'S ACQUISITION OF WASS SUBMARINE SYSTEMS

On 26 November 2024, by decision**no. 31388,** the Italian Competition Authority (the "**ICA**" or the "**Authority**") approved the acquisition by Fincantieri S.p.A. (**Fincantieri**), a key player in the shipbuilding sector, of: (a) the entire share capital of WASS Submarine Systems S.r.l. ("**WASS**"); and (b) the business unit

involved in the design, production, and sale of defence products and weapon systems for naval vessels and submarines, as well as the 50% shareholding in the EuroTorp G.E.I.E., established for the promotion and commercialization of the MU90 lightweight torpedo, which is being transferred to WASS as part of the transaction by its parent company, Leonardo S.p.A.

The transaction concerns the sector of integrated weapons and defence systems for naval units, where demand is predominantly institutional, stemming from Ministries of Defence and armed forces of countries not subject to embargoes. This sector encompasses command and control systems, detection and measurement systems, artillery and ammunition, as well as the design, manufacture, and sale of both heavy and light torpedoes and sonar systems.

In its analysis, the Authority identified the following relevant markets:

i. the national market for the production and commercialization of integrated underwater weapon systems;

ii. the market for the design, development, production, and commercialization of sonar systems for military use, both at a national and supranational level;

iii. the supranational market for the production of torpedo countermeasures; and

iv. in light of Fincantieri's activities, the market for military shipbuilding, encompassing the design and construction of military, paramilitary, and auxiliary vessels, also with a supranational geographic scope.

The Authority concluded that the transaction does not significantly hinder competition or lead to the creation or reinforcement of a dominant position in the relevant markets. Specifically, Fincantieri is not active in the markets identified under (i), (ii), and (iii), where WASS holds relatively modest market shares at both the global and European levels, (below 10%). While WASS enjoys a stronger position at the national level, the market remains competitive due to the presence of diverse offerings.

Concerning the acquisition of the stake in EuroTorp, the Authority observed that EuroTorp is incapable of 'performing on a permanent basis all the functions of an autonomous economic entity' and is therefore unable to operate independently in the market. As a result, it does not qualify as a joint venture and is not subject to the provisions of Regulation (EU) 139/2004.

UNFAIR COMMERCIAL PRACTICES: THE ICA APPROVES RYANAIR'S SET OF COMMITMENTS REGARDING EXTRA CHECK-IN COSTS

On On 5 November 2024, with decision no. 31360/2024, the Italian Competition Authority (the "**ICA**" or the "**Authority**") concluded the proceedings initiated against Ryanair DAC ("**Ryanair**" or the "**Company**"), an Irish low-cost airline, accepting and making binding the commitments proposed by the Company in order to address potential violation identified in relation to certain commercial practices.

The Company was specifically challenged on two practices deemed likely to mislead consumers regarding the conditions for booking flights and related services via its website:

i. the lack of adequate information for consumers about the deadline, set at two hours before flight departure, within which online check-in could be completed free of charge. After this period, consumers would only be able to check in at the airport for an additional fee of €55. Indeed, this information was only available in the Terms & Conditions and FAQs on the Company's website, not in the booking confirmation email or the automatic reminder email to complete online check-in before departure; and

ii. the automatic application of the "priority and carry-on baggage" service, on both the outbound and return flights, without giving immediate visibility of the fare difference for each leg being provided. Indeed, the detailed indication of the costs was only made available at the time of payment, when viewing the reservation summary.

In order to correct the deceptiveness and omission profiles highlighted by the ICA, Ryanair has therefore decided to undertake to:

a) include all information regarding the check-in time and cost in the booking confirmation emails and ensure the possibility of making a separate selection of that service for each route – via app or the Company's website -, and displaying the respective price of the service;

b) pay a refund of: €15 to passengers who paid for the airport check-in service during the period 2021-2023, giving them the opportunity to convert the refund into a voucher worth €20; €55 for those who have complained to the Company during the same period stating that they were not aware of the time limit for free online check-in. Finally, Ryanair also undertook to grant a refund to consumers who complained that the additional price for the priority and hand baggage service for a round-trip flight was applied, equal to the price difference paid between the two routes.

UNFAIR COMMERCIAL PRACTICES: THE ICA APPROVES GDL S.P.A.'S SET OF COMMITMENTS REGARDING BATHROOM RENOVATION BONUS

On 12 November 2024, by decision no. 31373/2024, the Italian Competition Authority (the "**ICA**" or the "**Authority**") concluded its proceedings against GDL-Bagni Italiani (the "**Company**"), which operates in the sale, maintenance, production, and installation of sanitary ware. The proceedings were initiated for violations of the Consumer Code regarding unfair commercial practices, and the Authority accepted the set of commitments proposed by the Company.

The ICA challenged the Company on three unlawful conducts, constituting a single unfair commercial practice and consisting of:

i. disseminating incorrect and ambiguous information regarding the timelines and characteristics of bathroom renovation works;

ii. hindering the exercise of consumer rights, particularly the right to terminate the contract and request a partial or full refund of the deposit paid in the event of delays and non-fulfilments by the Company;

iii. failing to provide essential contract information, including the right of withdrawal, and not recognising this right in cases of off- premises sales.

During the investigation, the Company proposed a set of commitments deemed suitable by the ICA to address the identified illegitimacies, specifically:

a) introducing the right of withdrawal in contracts negotiated outside commercial premises;

b) clearly indicating the timelines for services and works to be performed;

c) developing a pre-contractual information document to be provided to consumers and a code of conduct related to sales processes outside commercial premises, to be disseminated among relevant staff;

d) facilitating access to customer care services by setting up a support channel via WhatsApp or SMS;

e) offering a financial remedy equivalent to the amount received by the Company, to consumers who requested withdrawal within 14 days of contract conclusion, or termination beyond 14 days, without receiving any refund of the deposit paid, and informing them of this possibility via email and regular mail.

UNFAIR COMMERCIAL PRACTICES: THE ICA ENFORCES COPYTRACK GMBH'S COMMITMENTS REGARDING LEGAL ASSISTANCE FOR ONLINE COPYRIGHT

By decision no 31390/2024, the Italian Competition Authority (the "**ICA**" or the "**Authority**") concluded its proceedings against Copytrack GmbH (the "**Company**"), a provider of legal services for copyright protection of online images, by accepting and making binding the set of commitments proposed by the Company.

The Company was accused of engaging in practices that resulted in consumers incurring significant costs for reproducing copyrighted images online without obtaining prior authorisation from the rights holders. Specifically, the Company, acting on behalf of its clients, had:

i. sent emails demanding weekly payments to settle alleged copyright infringements;

ii. failed to adequately inform consumers about the basis of its mandate and claims, as well as the possibility of submitting licences for use or contesting any copyright restrictions;

iii. responded to objections with the same reminder email originally sent, creating a deterrent effect; and referenced the penal significance of the infringement in English, with references to foreign regulations.

In response to the ICA's initial objections, the Company voluntarily submitted, amended, and supplemented a set of commitments, which the Authority deemed suitable to mitigate the threatening nature of its communications.

During the proceedings, the Company revised its email communications to consumers, removing references to foreign regulations and providing the necessary information mentioned under (ii) within the reserved area of its website. Additionally, to ensure full engagement with the alleged infringer, the Company created a space on its website to receive comments or justifications related to the use of the images.

For Italian consumers only, the Company established a challenge procedure consisting of an initial communication requesting information on reproduction, that might be followed by a second communication in Italian, detailing the compensation claim or alternatively, offering an ex-post licence.

THE COUNCIL OF STATE REDUCES SANCTIONS ON TIM FOR ABUSE OF DOMINANT POSITION IN BROADBAND NETWORK TENDERS

On 13 November 2024, in judgment no. 9138/2024, the Council of State (*Consiglio di Stato*) reduced by 25% the sanction imposed by the Italian Competition Authority (the "**ICA**" or the "**Authority**") on TIM S.p.A. ("**TIM**")for abuse of a dominant position, (in violation of Article 102 TFUE), within the context of tenders issued by Infratel Italia S.p.A., after the Italian Government had notified the European Commission of a public aid plan related to these tenders.

The ICA accused TIM of implementing an exclusionary strategy designed to obstruct the entry of a new competitor, Open Fiber S.p.A. ("**Open Fiber**"), which had won one of the tenders, into the wholesale market for broadband and ultra-broadband fixed network access services. This strategy also negatively impacted the downstream market for retail telecommunications services.

TIM, after having justified its participation in one of the tenders due to the low profitability of independent investment, later chose to independently invest in developing UBB networks in the same areas, aiming to prompt Infratel to retract public subsidies and divert market demand away from Open Fiber. Additionally, to further disrupt the tenders and to hinder Open Fiber's expansion, TIM lodged complaints with the European Commission regarding the application of State aid rules and engaged in aggressive commercial practices both in the wholesale and retail markets.

After the Regional Administrative Court of Lazio dismissed TIM's appeal against the ICA's decision, TIM approached the Council of State, contesting, among other things, the validity of the complaints and their connection to a single unlawful strategy.

The Supreme Administrative Court acknowledged the abusive intent behind TIM's actions and found all of TIM's complaints to be unfounded. Nonetheless, the Court recognised that TIM's work in 2020 to develop a UBB network was vital in ensuring high-speed connectivity across the country during the COVID-19 pandemic. Consequently, it deemed a 25% reduction of the original penalty appropriate.

THE COUNCIL OF STATE RULES ON THE DISTINCTION BETWEEN ABUSE OF ECONOMIC DEPENDENCE AND VIOLATIONS OF THE REGULATIONS ON PAYMENT TERMS AND COMMERCIAL TRANSACTIONS

On 27 November 2024, in judgment no. 9520/2024, the Council of State (*Consiglio di Stato*) rejected the appeal filed by Hera S.p.A. (the "**Company**"), an energy and gas supplier, seeking to overturn the judgment of the Regional Administrative Court of Lazio ("**TAR**"), no. 2854/2023. The TAR had upheld decision no. 26251/2016 by the Italian Competition Authority's (the "**ICA**" or the "**Authority**"), which imposed an €800,000 fine on the Company for abuse of economic dependence, following findings of repeated and widespread

violations of payment terms and commercial transaction rules under Legislative Decree No. 31/2002.

Specifically, the ICA accused the Company of unilaterally imposing, in its tender documentation for the supply of second-generation gas meters ("smart meters"), an illegal payment term of 120 days for its suppliers. According to the Authority, this conduct constituted abuse of economic dependence under Article 9, paragraph 3-bis, of Law No. 192/1998, which governs subcontracting in production activities.

During the proceedings before the TAR, the Company argued that the ICA had failed to establish the economic dependence of the suppliers, which it contended was a prerequisite for applying the provision. However, the Authority maintained that such a finding was unnecessary in this case.

In its ruling, the Council of State clarified that Article 9, paragraph 3-bis, contains two distinct rules. The first, in the article's initial sentence, justifies the Authority's intervention when the abuse impacts competition and market protection, requiring the condition of economic dependence. The second rule, described in the article's subsequent sentence, addresses "abuse of contractual freedom to the detriment of creditors," which encompasses the conduct sanctioned by the ICA. This second rule does not require evidence of economic dependence but is instead based on the "repeated and widespread violation of Legislative Decree No. 31/2002," specifically its provisions on payment terms and commercial transactions.

The Council of State noted that while both rules are housed within the same article, they differ in their prerequisites and defining characteristics. Consequently, the second rule cannot be subsumed under the concept of abuse of economic dependence articulated in the first rule.

The Council of State ultimately upheld the ICA's sanctioning authority, affirming that the conduct in question did not fall under the scope of abuse of economic dependence and, therefore, the assessment demanded by the Company was unnecessary.

THE COUNCIL OF STATE UPHOLDS SANCTIONS IMPOSED ON MP SILVA, IMG, AND B4 GROUPS FOR RESTRICTIVE AGREEMENTS IN THE *LEGA SERIE A* TENDER FOR INTERNATIONAL BROADCAST RIGHTS

On 13 November 2024, through judgment no. 9104/2024, the Council of State (*Consiglio di Stato*) rejected the appeal filed by IMG Media Limited (the "**Company**"), active in the television sector, seeking to overturn the judgment of the Regional Administrative Court of Lazio ("**TAR"**), no. 8259/2023. The TAR had upheld the Italian Competition Authority's (the "**ICA**" or the "**Authority**") decision no. 27656/2019, which imposed sanctions on companies within the MP Silva, IMG, and B4 Capital groups amounting to €63,997,849, €343,645, and €3,136,292, respectively. These fines were based on the finding of a restrictive agreement designed to coordinate participation and the content of economic offers in the tender procedures organized by *Lega Serie A* for assigning TV broadcast rights for football competitions outside of Italy.

After losing in the first instance, the Company appealed the TAR's judgment, arguing that it failed to identify the procedural flaws in the ICA' decision, particularly regarding the delay in contesting the conduct and alleged

violations of its defense rights. The ICA, after issuing an initial statement of objections identifying two separate restrictive agreements, initiated a supplemental investigation. This additional inquiry resulted in a second statement of objections that, while based on the same evidentiary framework, recharacterized the allegations as a single restrictive agreement.

The Company contended that the recharacterisation of the accusations violated its right to a timely and fair process, as protected by Article 14 of Law No. 681/1989 and Article 6 of the European Convention on Human Rights (ECHR). On the one hand, the supplemental investigation unnecessarily caused "a significant extension of the proceedings' duration," rendering the second communication effectively untimely; on the other hand, the amendments in the allegations against the Company occurred without ensuring the Company's right to be heard. Regarding the alleged delay in contesting the conduct, the Council of State clarified that the supplemental investigation occurred during a "intra-procedural" phase, which excluded the applicability of Article 14 of Law No. 689/1981, as this provision applies only to the preliminary phase of an investigation.

Similarly, it was determined that the recharacterisation of the charges, although based on a pre-existing evidentiary framework, did not constitute a violation of the Company's right to defense. Indeed, the Authority merely redefined the legal characterization of the historical facts, clarifying the scope of the investigative activity while fully respecting the principle of correspondence between the charges brought and the charges forming the basis of the sanction, which prevents the Authority from introducing new circumstances that were not previously subjected to adversarial proceedings and that would require a different evaluation of the alleged facts.

THE COUNCIL OF STATE RULES ON THE APPLICATION OF THE "PUFFERY CLAUSE" UNDER ARTICLE 20(3) OF THE CONSUMER CODE REGULATING HYPERBOLIC PROMOTIONAL MESSAGES

Through judgments no. 9206/2024 and no. 9478/2024, the Council of State (*Consiglio di Stato*) rejected the appeals filed by Telecom Italia S.p.A. and Vodafone Italia S.p.A. (the "**Companies**") against the decisions of the Regional Administrative Court of Lazio ("**TAR**"), no. 16240/2022 and no. 16242/2022. These earlier rulings had upheld the Italian Competition Authority's (the "**ICA**" or the "**Authority**") decisions no. 27062/2018 and no. 27134/2018, which imposed fines of €4,800,000 and €4,600,000 on the Companies, respectively.

The ICA had accused the Companies of employing advertising claims that exaggerated the use of fiber optics and emphasized the highest levels of speed and reliability in internet connections. These claims, often described as "ultrafast," were deemed hyperbolic and omitted critical information about the limitations of the transmission technology used and the actual capabilities of the services offered. Furthermore, the Companies failed to clearly disclose that achieving the advertised maximum speeds required activating a specific option, which, after an initial one-year free period, would incur additional costs.

After their appeals to the TAR were rejected, the Companies escalated the matter to the Council of State. They argued primarily that the advertisements were not misleading and, alternatively, that the use of hyperbolic expressions was fully protected under the so-called "puffery clause" in Article 20(3) of the Consumer Code. This clause excludes from being deemed unlawful "*the*

common and legitimate practice of exaggerated statements or statements not intended to be taken literally."

Firstly, the Council of State emphasized that the messages conveyed in the commercial advertisements were designed to suggest exceedingly high performance without clarifying that such performance could be subject to limitations (deriving, for instance, from the transmission technology used or from geographical restrictions related to the network). Consequently, these messages were deemed misleading and omissive, as they failed to provide the average consumer—lacking specific technical knowledge—with all the necessary elements to make an informed choice.

Secondly, the Council underscored that the "puffery clause" applies only when the advertising practice can be considered common, i.e., directed at the generality of consumers, rather than at categories of individuals vulnerable to the practice or product due to their mental or physical infirmities, age, or naivety.

In the case at hand, according to the Council of State, the promotional messages were specifically targeted at a narrower group of consumers, namely, those interested in obtaining the highest performance from their devices for Internet navigation. Without adequate technical knowledge, these consumers were likely to naively take the advertised claims at face value.

THE COUNCIL OF STATE RULES ON UNFAIR COMMERCIAL PRACTICES REGARDING PRODUCERS AND SELLERS HINDERING THE EXERCISE OF LEGAL WARRANTY

On 20 November 2024, by judgment no. 9341/2024, the Council of State (Consiglio di Stato) dismissed the action brought by ASUS Europe B.V., ASUS Holland B.V., and Asustek Italia S.r.l. ("**ASUS**") for the reform of judgment no. 10943/2022 of the Regional Administrative Court of Lazio, which confirmed decision no. 28010/2019 by which the Italian Competition Authority (the "**ICA**" or the "**Authority**") imposed a sanction of €3,100,000 on ASUS for unfair commercial practices hindering consumers' exercise of their right to warranty.

The ICA accused ASUS of failing to adequately inform consumers that the warranty it provided as the manufacturer was a conventional warranty, and that this did not affect consumers' statutory rights to seek remedies directly from the retailer under the legal warranty. The online sales of ASUS products and the conclusion of agreements for sale in physical premises in the Italian market were, in fact, entrusted to a reseller, Arvato Distribution GmbH.

Secondly, ASUS had set up a network of technical assistance centres which, on the basis of agreements with the sellers and under its direction, offered repair, reimbursement, or replacement services for products under legal or conventional warranty. In this respect, ASUS was held responsible for conduct that hindered consumers' legitimate exercise of their right to guarantee through excessive waiting times, pretextual reasons, standardized and delayed responses to complaints received, and systematically repairing products rather than replacing them or providing refunds, using the latter instruments only as a last resort and, in any event, with significant delays.

ASUS defended itself before the TAR by arguing that, as a producer, it would not be obliged to provide any warranty, which would be borne solely by the seller. Therefore, it would not only have no duty to inform consumers about

the existence of the legal guarantee but also no liability for any defects linked to it. Following the rejection by the Court of first instance, which said that the responsibility would be shared between the two entities, ASUS appealed to the Council of State.

The latter, rejecting ASUS's grievances, found that the ambiguity in the distinction between legal and conventional guarantees, which could lead to confusion among consumers, together with ASUS's direct involvement in the management of the assistance services, justified shared responsibility between the producer and the seller. Indeed, although the seller is formally responsible for the legal guarantee, the Council of State stressed that, since the sellers involved in the provision of the assistance services would ultimately be subject to ASUS's instructions, the company could not avoid liability for hindering consumers from exercising their guarantee rights.

THE ADMINISTRATIVE REGIONAL COURT (TAR) UPHOLDS THE APPEALS FILED BY ENI PLENITUDE, ENEL ENERGIA, AND ACEA ENERGIA, ANNULLING THE ICA'S DECISIONS ON ALLEGED VIOLATIONS OF DECREE-LAW NO.115/2022

In judgments nos. 20401/2024, 20404/2024, and 20405/2024, the Regional Administrative Court of Lazio ("**TAR**") upheld the appeals lodged by ACEA Energia S.p.A., Eni Plenitude S.p.A., and Enel Energia S.p.A. (collectively, the "**Companies**"), annulling the sanctions imposed by the Italian Competition Authority (the "**ICA**" or the "**Authority**") through decisions nos. 30426/2022, 30429/2022, and 30428/2022. These sanctions, amounting to €560,000, €10,000,000, and €5,000,000 respectively, were levied on the grounds that the Companies had unilaterally amended the general conditions for the supply of energy and gas, allegedly in violation of Article 3 of Decree-Law no. 115/2022 ("Decre-Law"), which came into effect on 10 August 2022.

The Decree-Law had suspended the enforceability of any contractual clauses permitting electricity and natural gas suppliers to unilaterally alter the general terms and conditions for price setting until 30 April 2023, a period later extended to 30 June 2023. This legislative measure aimed to curb potential speculative practices by energy suppliers amidst the sector's crisis following the Russian-Ukrainian conflict.

The ICA contended that the Companies had contravened the Decree by unilaterally modifying the economic terms of contracts after their tacit renewal for an initial period. The Authority argued that any tariff changes following the expiry of an initial period should be regarded as ius variandi rather than, as the Companies asserted, a mere exercise of the power to update economic conditions upon renewal.

The TAR, in siding with the Companies, deemed that the Decree-Law, designed to shift the burden of rising energy costs from consumers to suppliers, only prohibited the alteration of contractual terms for ongoing agreements. On the contrary, it preserved the parties' contractual freedom to revise economic conditions upon the expiration of the initial term.

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