ANTITRUST POLICY OF THE FERROVIE DELLO STATO ITALIANE GROUP

ANNEX 2

ANTITRUST COMPLIANCE

INTRODUCTION

Both Italian and European competition rules concerning restrictive agreements and abuse of dominant position ("**antitrust law**") have a central role in regulating undertakings that operate in all areas of economic life.

Breach of these rules exposes undertakings to: (i) significantly high administrative fines; (ii) the nullity of contracts entered into in violation of antitrust law; (iii) harm to reputation; (iv) the risk of receiving a court order to pay damages in civil proceedings; (v) the risk of being excluded from public tenders if the contracting authority holds that the antitrust infringement is "serious professional offense" under Art. 95, para. 1(e), of Legislative Decree No. 36/2023[1]; and – in some cases – (vi) the risk that administrative and criminal penalties are imposed directly on the managers and/or employees who actually committed the infringement.

Actions for breach of antitrust law – which can be lodged by both competition authorities (i.e., public enforcement) and the victims of competition infringements (i.e., private enforcement) – have increased considerably in recent years and are likely to intensify given the proclaimed commitment of the European Commission ("Commission") and of the national competition authorities – primarily the Italian Competition Authority ("ICA") – to continue the policy of repressing unfair competition.

In view of the foregoing, Ferrovie dello Stato S.p.A. ("FS") wishes to ensure that the business of group companies (collectively, the "Group") is conducted in full compliance with antitrust law. Therefore, the purpose of this manual ("Manual") is to: (a) describe the limits imposed by national and European Union antitrust law, and (b) illustrate the precautions to be taken and the conduct to be avoided to ensure full compliance with the legislation.

[1] For foreign companies, the relevant local regulations, if any, apply.

The Manual is accompanied by the Antitrust Code of Conduct, a practical guide that provides, for quick and timely reference, the main rules of conduct to be adopted in the event one of the following circumstances has to be addressed: (i) potential initiatives in violation of antitrust law; (ii) inspections carried out by a competition authority; (iii) management of a public tender procedure in the role of contracting authority.

FS thus requires that all Group employees and managers, in carrying out their job, strictly comply with the limits imposed by antitrust law and carefully follow the rules set out in this Manual.

TABLE OF CONTENTS

KEY:

 Relevant legislation[2]

 Recommendation

 Important information

[2] For foreign companies, the relevant local regulations, if any, apply.

PART I: AGREEMENTS AND CONCERTED PRACTICES

1. BASIC NOTIONS

1.1 PROHIBITIONS ON RESTRICTIVE AGREEMENTS

Art. 101, para. 1, of the Treaty on the Functioning of the European Union ("TFEU") and Art. 2 of Law No. 287/1990 ("Law") prohibit agreements between undertakings, decisions by associations of undertakings and concerted practices that have the purpose or the effect of preventing, restricting or distorting competition ("Agreements").

No comprehensive list of prohibited agreements is set out by antitrust law, but the **most serious ones** are those aimed at:

- fixing purchase or selling prices or other contractual conditions;
- allocating markets, customers, territory or supply sources;
- determining business strategies together; and
- applying dissimilar conditions for equivalent services that may, for example, have the purpose of boycotting certain customers or competitors.

Agreements of "minor importance", that consist in the following agreements, are exempted from the ban, as they are inadequate to consistently restrict competition: (a) agreements between competitors involving undertakings with a combined market share of less than 10%;

and (b) agreements between non-competitors involving undertakings with a market share of less than 15%[3]

[3] Provided that the "purpose" of these agreements is not to prevent, restrict or distort competition within the internal market (e.g., agreements that have the purpose of fixing prices when selling products to third parties, limiting production or sales, allocating markets or customers) or that these agreements do not contain "essential restrictions" or listed as such in the Commission's current or future exemption regulations by category (see §3 below).

1.2 THE NOTION OF "UNDERTAKING" AND INTERCOMPANY AGREEMENTS

Antitrust law considers any party engaged in an independent economic activity an undertaking, regardless of its legal status or the way in which it is organized and financed. The notion of undertaking when referring to legal persons means the economic unit to which the party in question belongs, which generally coincides with the group of belonging. Therefore, agreements between legal persons belonging to the same group are not relevant under Art. 101 of the TFEU or Art. 2 of the Law.

When applying this principle, we may exclude that agreements entered into between various Group companies might be considered "agreements" under antitrust terms, especially if they are intended to allocate tasks within the Group and if the participating undertakings pursue only one business strategy. A case-by-case analysis appears appropriate for agreements entered into between a Group company and an undertaking in which a Group company and a third-party undertaking participate.

1.3 THE NOTION OF "AGREEMENT"

All cases in which two or more undertakings express – even tacitly – a common intent to adopt certain conduct on the market, regardless of the manner in which the common intent is expressed, are included in the notion of agreement. Therefore, **any form of agreement**, whether written or oral, falls within the prohibition's scope of application of antitrust law, e.g.:

- agreements informally entered into, even by employees, without the power to commit the undertaking;
- gentlemen's agreements;
- agreements that are not legally binding;
- agreements that impose no specific obligations on the parties; and
- agreements that do not provide for penalties in the event of non-performance.

1.4 THE NOTION OF "CONCERTED PRACTICE"

Concerted practice is defined in antitrust law as the form of coordination between undertakings that, without materialising into a real agreement, constitutes conscious cooperation to the detriment of competition.

Essential characteristics of concerted practice are: (a) the existence of some form of direct or indirect "contact" between undertakings that would enable them to know their respective business strategies or, at the very least, to lessen the uncertainty on how a competitor will act in the market; and (b) a potential repercussion of this situation

on the conduct of the undertakings concerned, i.e., that they may take the information obtained into account when making business decisions.

A typical example of a concerted practice is the exchange of commercially sensitive information between competitors. This includes, for instance, information concerning sale price, discounts and/or other conditions applied or to be applied, price increases, promotional campaigns, production costs – including those related to employee remuneration –, supply sources, production levels, strategic development areas, customer identity, and investment strategies for commercial, advertising, production, research and development, etc. ("**Sensitive Information**").

To establish the existence of a concerted practice, it is relevant also only the evidence of a contact in the context of which Sensitive Information is exchanged. This because it is presumed that, without a clear demonstration of dissent regarding the exchange of information (dissociation), the undertaking that received the information will take this into account in determining its own commercial policy. Contact may consist of:

- meetings between competitors;
- discussions between competitors, even just informally (i.e., via email or phone calls), on matters relating to their respective commercial strategies;
- unilateral public announcements about the future commercial strategy of an undertaking (i.e., regarding a future price increase); or
- indirect exchange of information (i.e., through third parties).

Sensitive Information exchanges **through third parties** (e.g., customers, common suppliers or consultants to two or more competitors, or operators that manage databases through which information can be collected and shared) without direct contact between competitors fall under the category "indirect exchange of information" (known as Hub&Spoke)[4].

Moreover, in its most sophisticated versions, the exchange can also occur through the use of behavioural coordination algorithms that allow to agree on essential parameters for competition.

Competition authorities may also presume the evidence of a concerted practice based on the existence of parallel behaviours (i.e., contextual price increases of an equal amount or identical discounts and discount schemes) for which no possible explanation exists other than anti-competitive collusion.

This does not mean that parallelism is always prohibited, but merely that it may represent

[4] In this regard, the UK Court of Appeal held that, for information exchanged between two competitors through a third- party intermediary to constitute an anti-competition infringement, the existence of the following elements must be proved: (a) the exchange of information occurred through the intermediary, (b) the undertaking intended to provide information to the competitor, and (c) the competitor was aware of the source of the information and had used it to establish its commercial policy (see Case No. 1022/1/1/03, [2004] CAT 17 *JJB Sports plc v Office of Fair Trading* and the case *Argos limited and Littlewoods Ltd v OFT, JJB Sports plc v OFT* [2006])

a clear indication of anti-competitive collusion. In essence, parallelism is permitted only if it is the result of independent choices (and not preceded by contacts) to adapt intelligently to the structural conditions of the market, even if they are inspired, for example, by the choices made by competitors and observed on the market.

Although the alignment of commercial policy is not *per se* an infringement under antitrust law, close attention is needed to ensure that the conduct is not the culmination of direct or indirect communications, contact or exchanges of Sensitive Information with competitors.

EXAMPLE

In the *Trenitalia Supplies* case, the ICA established the existence of an agreement between 13 suppliers of electromechanical goods and services to the railway industry ("Parties") regarding tenders called by the contracting entity Trenitalia. To Trenitalia's detriment, the Parties agreed – through continuous contacts (email correspondence, shared data processing, phone calls, in-person meetings, etc.) and exchanges of Sensitive Information– on the methods of participating in these tenders to predetermine their outcomes and to divide the work orders and jointly set their prices. To better monitor the division of work orders, the Parties used schematic summary tables that recorded the credit or debit positions of the participants in the agreement. In this way, undertakings on credit for past tenders accrued rights for future tenders in the form of a commitment from the successful bidder: (a) to not participate in the future tenders; or (b) to assign part of the work order (through sub-contracts, specific consignments, cross-supplies, etc.).

1.5 DECISIONS OF ASSOCIATIONS OF UNDERTAKINGS

Competition rules do not prohibit companies from participating in meetings with their competitors within associations of undertakings; nor do they prohibit trade associations from operating.

The concept of association of undertakings is very broad and includes any type of organization or associative entity that, regardless of whether it pursues a profit or not, whether it has legal personality or not, and whether it is of a public or private nature, is capable of expressing the collective will of its member undertakings.

Regardless of the circumstance that they are binding on their members, decisions of associations of undertakings – whatever legal form they take (e.g., regulations, statutory rules, resolutions, circulars, recommendations) – are considered competition-restricting agreements when they lead members to concretely determine a coordination of their behaviour on the market.

This effect may originate, for example, from decisions that require members to adopt certain business strategies, to regularly exchange Sensitive Information, or to allocate customers or markets.

Associations of undertakings may, however, legitimately:

- engage in lobbying in activities that represent general interests, e.g., in relation to draft legislation;
- set common technical standards that do not restrict competition, taking into account the particular circumstances in which they are adopted, and represent the industry

  undertakings before the competent bodies (e.g., concerning security);
- frame general codes of conduct on condition that they do not concern the participating undertakings' commercial policy directly or indirectly;
- collect historical information on statistics of the performance of the associated undertakings' businesses, on condition that the information is processed on an aggregate basis and in a manner that does not allow knowledge on the individual undertakings' performance to be obtained;
- conduct market research on condition that it is not aimed at, and does not result in, standardising its members' business strategies;
- provide general information, assistance and support to its members;
- start collective bargaining with trade unions;
- conduct public relations activities in favour for its members; and
- run courses and professional training programmes.

If a breach of antitrust law occurs, both the association and its members may be held liable and may therefore be imposed of paying fines.

Within a trade association the undertakings must only discuss technical aspects or profiles relating to protecting interests of the whole category and they must avoid any exchange of Sensitive Information.

1.6 THE PRINCIPLE OF LEGAL EXEMPTION

When an agreement falls under the prohibition of Article 101, Para. 1, TFEU (or Article 2 of the Law), it might still benefit from an **exemption to such prohibition** if it meets the conditions set out in Article 101, Para. 3, TFEU.

For the agreement to satisfy said conditions, it must: i) contribute to improving the production or distribution of the products/services concerned by the agreement or to promoting technological or economic progress, while allowing users a fair share of the resulting benefit; ii) avoid imposing on the undertakings involved restrictions that are not indispensable to achieve these objectives; iii) not eliminate competition for a substantial part of the products in question.

Therefore, it will be up to the undertakings involved to evaluate, on a case-by-case basis, whether to refrain from implementing the agreement because it is not compatible with antitrust law, or to implement it because it is reasonably worthy the exemption under Article 101, Para. 3, TFEU.

2. HORIZONTAL RESTRICTIONS OF COMPETITION

Horizontal restrictions of competition – namely, those between undertakings that are in actual or potential[5] competitors – are usually considered more harmful to competition than vertical agreements because they can more easily result in competition restrictions to the detriment of consumers and can hardly be justified by benefits for consumers.

2.1 THE MOST SERIOUS CASES OF HORIZONTAL AGREEMENTS

Among horizontal agreements, are considered **serious breaches** of competition rules – such as to result in heavy sanctions – those whose purpose is to achieve one or more of the following objectives:

(a) *fixing prices*: current or future prices, discount levels, criteria for obtaining discounts, price increases, timing of price increases, adoption of different prices for different types of customers, profit margins;

> In the *Car Battery Recycling* case, the European Commission found that four companies in the lead recycling sector had engaged in an agreement involving price-fixing – both to reduce and to prevent an increase of prices – for the purchase of used lead-acid car batteries for recycling in Belgium, Germany, France, and the Netherlands. The involved companies coordinated their behaviour by exchanging information and agreeing on current or future prices offered to suppliers, on the anticipated volumes of purchases, on current stock levels, and on levels of activity (for example, temporary inactivity of smelting plants or temporary workforce reductions).

(b) *The standardization of contractual conditions other than price*, such as payment methods, general contract terms, and customer services;

> In the *Technical Support Services Market* case, the ICA established the existence of an anticompetitive agreement concerning the provision of corrective maintenance services that involved both prices and the contractual conditions of the service (such as guaranteed quality levels). The measure in question was annulled by the Council of State, for reasons unrelated to the contested behaviours.

(c) *The allocation of customers*: e.g., an agreement through which the members undertake not to target the other members' customers;

[5] A potential competitor is an operator who does not enter into a direct competitive relationship with the undertaking active in the target market because it produces a different but adjacent good or service, or because, even though it produces the same or a fungible good, it operates in another geographical area adjacent to the target one, or because it owns a developing product and it is about to enter the target market.

In the *Blocktrains* case, the Commission identified a cartel that lasted from 2004 to 2012 among three operators, K+N, EXIF, and Schenker, active in providing full-train (i.e., blocktrain) freight rail services between Central and Southeastern Europe. The cartel involved the allocation and "reservation" of certain customers or transport volumes and the coordination of prices, achieved through allocation agreements that allowed detailed monitoring of the agreed "reservation" plan for customers. More specifically, the parties involved in the cartel: (i) allocated among themselves both existing and new customers, (ii) established a "reservation" plan for customers, including a notification system for new customers, (iii) exchanged confidential information about specific customers' requests, (iv) shared transport volumes, and (v) directly coordinated prices by communicating to each other the offers to be applied to customers and discussing prices to be reserved for certain specific customers.

(d) *Market allocation*: mutual attribution of territories, product groups, or supply sources among competitors. For example: two companies agree to sell products/services, one in Northern Italy, the other in Southern Italy;

Market allocation may also occur in more sophisticated ways. In the *Teva/Cephalon* case, the Commission deemed that the settlement agreement in which the pharmaceutical companies Cephalon (patent holder of a particular active ingredient) and Teva (which had developed its generic version) agreed that the latter would delay the marketing of the generic drug for a certain period amounted to a prohibited market allocation agreement. Indeed, the agreed delay in the marketing of the generic drug was in exchange for significant payments and the granting of licenses on certain patents and clinical data sets by Cephalon.

(e) *cooperating on participation in tenders*: any coordination of the conduct of undertakings concerning participation in public and private tenders (see § 2.2);

In the *Public tenders issued by the Taranto Naval Arsenal* case, the ICA established the existence of an anti-competitive agreement aimed at the sharing of tenders through the participation, individually and/or in Temporary Association of Enterprises, in a scheme providing for the *ex ante* identification of the winning and losing undertakings for each tender. The ICA clarified that the contested conduct was not the participation in tenders in the form of temporary Temporary Association of Enterprises itself, but rather the coordination between potential competitors – single or grouped underatkings in Temporary Association of Enterprises – on how to participate in tenders.

(f) *allocating production or sales quotas*: those behaviours (e.g., agreements, concerted actions, parallelism) aimed at fixing target prices, increasing price levels up to agreed "targets" (including by reducing production), exchanging detailed information about market operations and production quotas, and sharing markets

based on "ideal" market shares or target quotas;

In the *Prices of corrugated fiberboard* case, the ICA found that the main producers of corrugated fiberboard sheets, with the involvement of the respective trade association, had agreed on the application of common prices and price increases, as well as the implementation of agreed shutdowns at production facilities in order to reduce product quantities. This was done in order to support the price increase and preserve profit margins.

(g) *adopting strategic decisions*: e.g., the launch of a new product or service or the definition of a product's technical features;

In the *Car Emissions* case, the Commission established the existence of a cartel among five automobile manufacturers that had participated in technical meetings with the goal of agreeing on technological developments related to selective catalytic reduction, necessary to eliminate harmful nitrogen oxide emissions from diesel engines. The manufacturers, despite already possessing technologies capable of reducing harmful emissions well beyond what was required by the law, had agreed not to achieve results that exceeded the regulatory requirements.

(h) *the determination of commercial conducts*: for example, boycotting certain customers or discriminating against certain types of customers.

In the *Obstacles to Free Film Arenas* case, the ICA established the existence of an anticompetitive agreement implemented by ANICA (the National Association of Cinematographic, Audiovisual and Multimedia Industries), ANEC (the National Association of Cinema Exhibitors), and ANEC Lazio which, exceeding the bounds of lawful associative activity, were found to have coordinated actions aimed at hindering the supply of films to free arenas. This boycott action consisted of standardizing the strategy of distribution companies towards denials and conditions in the issuance of licenses to the free arenas.

(i) *exchanging Sensitive Information* in any form with competitors.

In the *ANIA Anti-Fraud Project* case, the ICA investigated the agreement arising from an "anti-fraud project" for life and damage insurance branches pursued by the National Association of Insurance Companies (ANIA). The project included, among other things, the creation of databases and the development of common algorithms to determine indicators of fraud risk. The ICA considered that there was a risk that the development of common algorithms could have the effect of standardising the conduct of insurance companies in essential phases of the insurance activity and that the sharing of large amounts of data could facilitate collusion between competitors. In addition, there was a risk that the anti-fraud activity would not be carried out to the benefit of all stakeholders, thus leading to

a possible anti-competitive foreclosure. The case was closed with the acceptance of the commitments offered by ANIA.

Investments in joint ventures ("JV") with competitors and related activities, as well as contacts with competitors in the context of the assessment/negotiation/implementation of concentrations or lawful cooperation contracts need to be closely monitored, as they can – in theory – result in exchanges of Sensitive Information between the undertakings involved and other conducts significant for antitrust purposes. In any such cases, appropriate internal firewalls need to be introduced to prevent competitors from using the JV or the assessment/negotiation/implementation of concentrations or lawful cooperation contracts to exchange Sensitive Information other than and additional to the information strictly necessary to conduct the JV's business or perform the abovementioned activities.

2.2 AGREEMENTS BETWEEN COMPETITORS WITHIN TENDERS

The possible types of agreements between competitors participating in tenders deserve special attention. They can take various forms, including:

- the *division of tender lots* on which to bid ("chessboard bids");
- the *sharing of financial bids* submitted in the tender and/or submitting "backed bids"; and
- the *common choice not to participate in the tender*.

The above examples of conduct expose undertakings to the risk of incurring particularly high administrative fines but – in the case of public tenders – may also lead to the following additional risks:

(a) The opening of **criminal proceedings** against natural persons who, in implementing the agreement, committed the crime of collusive rigging. In January 2018, the ICA signed two Memoranda of Understanding with the Public Prosecutors' Offices of Rome and Milan[6], which established steady flows of information exchanges between the two offices regarding investigations and criminal and administrative proceedings in their respective remits and fostered greater coordination in the repression of this kind of conduct. It is thus clear that the ICA intends to make public enforcement in this area even more widespread[7].

(b) **Exclusion from future tenders** for three years from the assessment of the infringement and/or **termination of current contracts**. Under the new Code of Public Contracts[8], the grounds for exclusion from public tenders include "serious professional misconducts" that may cast doubt on the integrity or reliability of the undertaking participating in the tender, demonstrated by the contracting authority with appropriate means. Serious professional misconduct may be inferred from an enforceable sanction imposed by the ICA (or another sector authority) specifically related to the subject matter of the contract. Enforceable decisions imposing sanctions issued by the ICA (or another sector authority) are considered adequate evidence of serious professional misconduct. This exclusion cause is effective for three years from the date of the sanction, in cases where the exclusion is based on such an act. In other words, although the existence of an enforceable decision does not constitute an automatic cause for exclusion, for three years the contracting authority may consider it a relevant factor in assessing the integrity of the undertaking participating in the tender.

6 For more details see AGCM - Autorita' Garante della Concorrenza e del Mercato.
7 This is what occurred in the *Trenitalia Supplies* case.
8 See Articles 95 ff of Legislative Decree No. 36/2023.

The choice of undertakings to establish temporary associations of enterprises to participate in tenders also needs to be evaluated, especially if the enterprises that intend to join up are abstractly capable of participating in the tender on their own, as they meet the financial and technical requirements set out in the call for tenders ("**Excessive Temporary Associations of Enterprises**").

The ICA and administrative case law have made it clear that the mere establishment of an Excessive Temporary Association of Enterprises is not *per se* an infringement from an antitrust standpoint. To this end, the temporary association of enterprises would have had to have been implemented in a collusive context and exploited to alter competition.

To rule out the risk of unlawful conduct, a case-by-case analysis must be conducted to ascertain whether, despite the establishment of an Excessive Temporary Association of Enterprises, there are valid economic reasons unrelated to collusive exclusionary intent that justify its establishment.

In the *Consip FM4 tender - agreements between the main operators of facility management* case, the ICA established the existence of an anticompetitive agreement, whose aim was influencing the outcome of a public tender for national facility management services. According to the ICA, the agreement was executed, among other means, through a distorted use of Temporary Associations of Enterprises, subcontracts, and consortium mechanisms. Specifically, the ICA identified a general context marked by numerous shared interests among the parties and a tendency towards collaborative rather than competitive relationships. This manifested in a systematic misuse of subcontracts as a means to settle financial balances between parties (and, during the tender process, a distorted use of Temporary Associations of Enterprises, which were all unnecessary with respect to the leading companies). Furthermore, the ICA found no plausible legitimate justification, neither for the formulation of clearly non-competitive economic offers in the only lots where overlaps occurred, nor for the creation of unnecessary and/or illogical Temporary Associations of Enterprises.

2.3 HORIZONTAL COOPERATION AGREEMENTS

Cooperation agreements among competitors may give rise to antitrust problems insofar as their purpose is to fix prices or production, share markets or – if the cooperation freezes or strengthens their market power – trigger negative effects on prices, production, and variety and quality of the goods and services offered.

In other cases, however, cooperation agreements may have pro-competitive effects, e.g., if efficiency gains or other forms of benefits transferable to consumers are permitted (increased investments, higher quality and variety of goods and services, technological progress, etc.) without compromising competition (see, *supra*, § 1.6).

Cooperation agreements must therefore be evaluated on a case-by-case basis, taking into account the structural characteristics of the market in which they are reported and the market position of the undertakings concerned. Furthermore, the Commission has recently adopted new guidelines providing an analytical framework applicable to the most common forms of horizontal cooperation agreements and outlining the principles

to be applied to assess them under Art. 101 of the TFEU ("**Guidelines**")[9].

The Guidelines contain instructions regarding, among other things, **research and development** agreements related to products, technologies, or processes. These include (i) agreements where one party funds the R&D activities of another, (ii) agreements on joint improvement of existing products and technologies, and (iii) agreements on developing products and technologies that would create a completely new demand.

Such agreements, though often pro-competitive, can also restrict competition.

As part of the assessment for antitrust purposes of a research and development agreement, the category exemption from Article 101, paragraph 1 of the TFEU for R&D agreements is relevant.

This exemption applies to R&D agreements meeting certain conditions (some of which vary based on the agreement's subject) and if the parties' joint market share does not exceed 25% in the relevant product and technology markets at the time of the agreement's conclusion. The exemption does not apply to certain types of agreements that qualify as hardcore restrictions and some obligations where it cannot be sufficiently presumed that they meet the conditions of Article 101, paragraph 3 of the TFEU.

In addition, the Guidelines address the issue of ***data sharing***, highlighting the importance of data sharing as a means to guide decision-making through the use of megadata analysis techniques (i.e., Big Data) and machine learning and the possible risks related to the use of algorithms by companies to monitor competitors' prices, inform their pricing activities and/or monitor anticompetitive agreements between competitors.

Another application of data sharing that might be significant from a competition standpoint are shared databases, which could restrict competition depending on the market conditions and specific characteristics of the database. These characteristics include (i) purpose, (ii) conditions of access and participation, (iii) type of information exchanged. For instance, a database covering a significant part of the relevant market, with delayed or denied access to other competitors, could create informational asymmetry resulting in a competitive restriction. Hence, access criteria must be fair, objective, transparent, and non-discriminatory to avoid potential competition violations.

Additionally, among the most innovative issues addressed by the Guidelines there are **sustainability agreements**. Various types of cooperation agreements can be classified as

[9] See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C/2023/4752 final of 17 July 2023.
The most common forms of horizontal cooperation agreements covered by the Guidelines include (i) research and development agreements; (ii) production agreements; (iii) purchasing agreements; (iv) commercialization agreements; and (v) standardization agreements. The new Guidelines also include a chapter specifically devoted to so-called standard terms, previously covered in the chapter on standardization agreements, and provide guidance for the purpose of assessing the compatibility with antitrust law of information exchanges of sustainability agreements.

such when they also pursue a sustainability goal. For example, competing undertakings may agree to adopt and adhere to certain sustainability standards. These agreements can specify the sustainability parameters that producers, processors, distributors, retailers, and service providers in a supply chain must meet, such as the environmental impacts of production. However, such agreements could negatively impact competition, for example, through price coordination, foreclosure of alternative standards, and exclusion or discrimination against certain competitors. Examples of sustainability agreements that might restrict competition include:

i. an agreement among competitors on how to pass on cost increases from adopting a sustainability standard to customers in the form of price increases or on how to set prices for products subject to the sustainability standard;

ii. an agreement among parties on a sustainability rule aimed at directly pressuring third-party competitors to refrain from marketing non-compliant products;

iii. agreements among competitors to limit technological development to the minimum sustainability standards required by law (as in the *Car emissions* case, supra).

In the railway freight industry, however, this kind of agreement is subject to special rules contained in **Council Regulation (EC) No. 169/2009**, whereby:

> *Certain types of agreement, decision and concerted practice in the transport sector, the object and effect of which is merely to apply technical improvements or to achieve technical cooperation, may be exempted from the prohibition on restrictive agreements since they contribute to improving productivity.*

More specifically, the regulation endorses the inapplicability of Art. 101 of the TFEU to agreements, decisions or concerted practices between undertakings whose only purpose or effect is to apply **technical improvements** or **technical cooperation** through:

- the standardisation of equipment, transport supplies, vehicles or fixed installations;
- the exchange or the common use of staff, equipment, vehicles or fixed installations to operate transport services;
- the organisation and execution of successive, complementary, substitute or combined transport operations, and the fixing and application of inclusive rates and conditions

  for the operations, including special competitive rates;
- the use of the most rational routes from an operational point of view for journeys by a single mode of transport;
- the coordination of transport timetables for connecting routes; and
- the grouping of single deliveries.

In the *Rail cargo* case, the Commission recognized the existence of an agreement between three railway undertakings (ÖBB, DB and SNCB) specialized in conventional rail freight services under the load-sharing model, whereby the railway undertakings cooperating in a given cross-border rail freight service provide the customer with a single price for the entire service requested. Such cooperation is excluded from the scope of Article 101(1) TFEU by virtue of Regulation (EC) No. 169/2009. Nevertheless, in this case, the three undertakings went beyond the lawful contacts provided for in the Regulation, creating a cartel aimed at distributing customers by means of mutual recognition of the role of main carrier in 'existing activities'. This represented the core of the collusive scheme. Indeed, this system served to ensure that, both during the period of validity of the contracts and when they were renewed or extended, there would be no change of principal carrier.

2.4 RULES OF CONDUCT CONCERNING RELATIONSHIPS WITH COMPETITORS

In light of the above principles and to ensure compliance with antitrust legislation, all employees/managers of the Group must adhere to the following rules of conduct.

(a) **Do not enter into any kind of agreement with competitors** (whether direct or indirect, binding or non-binding, formal or informal, tacit or expressed) concerning the collusion of respective commercial policies to be adopted on the market.

Only Group companies that operate in **railway transport** may enter into agreements with competitors whose sole purpose and effect is to apply technical improvements or technical cooperation.

In either case, the Competent Structure of the Group company concerned must be contacted to assess the most appropriate initiatives to be taken.

(b) **Do not exchange Sensitive Information with competitors** that could limit uncertainty about the Group's current or future behaviour in the market (through meetings, formal and informal contact, emails, unilateral public announcements, third parties such as customers or suppliers, or through systems such as shared databases or algorithms, etc.).

If Sensitive Information (or requests to exchange Sensitive Information) is received from competitors, any further disclosure of information (or the request to do so) must be immediately and expressly refused, explaining that the Group condemns this conduct and will not – in any case whatsoever – take into account any information already acquired when it determines its commercial policy **("Opposition to the Exchange").** More specifically:

(i) if the information is received by email or otherwise in writing, a written response must be provided to expressly state the Opposition to the Exchange. In this case, keeping a copy of the response is also recommended; and

(ii) if the exchange takes place during a meeting, the Opposition to the Exchange must be recorded in the minutes and, if the exchange does not cease immediately, the participants must leave the meeting and have their departure recorded in the minutes. This is very important as any undertaking that passively participates in an anti-competitive meeting may be held liable for the infringement unless it can be proven that their disagreement was publicly expressed.

(iii) should the exchange take place orally and not be subject to minutes, the

discussion must be immediately interrupted, and it must be stated that there is no wish to discuss such matters.

In all the above cases, and if any doubts arise as to the steps to take in a specific case or regarding the sensitive nature of information from an antitrust perspective, the Competent Structure of the Group company concerned must be notified to assess the initiatives to be taken and/or to provide the appropriate indications.

(c) **Do not disclose the Group companies' Sensitive Information to customers or suppliers ("Third Parties")**, also through means such as shared databases or algorithms, to enable them to send the information to competitors.

We also suggest **not asking Third Parties for information** on the contractual terms and conditions implemented by a competitor. This does not prevent this type of information from being **spontaneously received** from Third Parties as part of negotiations to obtain more favourable contractual terms and conditions than those initially offered. In that case, when it becomes absolutely necessary to circulate the information received from the Third Party internally and/or to store it, **the source of the information must always be mentioned** to prove, as necessary, that no information was exchanged with a competitor (including indirectly).

(d) The prohibition to exchange Sensitive Information also applies in principle to contacts occurring in the context of participations to **JV** with competitors, in the context of the evaluation/negotiation/implementation of **concentration operations** or lawful **cooperation contracts**. Where the exchange of information is necessary to comply with legal obligations or for the negotiation, conclusion, performance of lawful transactions or contracts, the Competent Structure of the Group company concerned must be consulted in advance to:

(i) ensure that the exchange of information is preceded by a confidentiality agreement (NDA) that also regulates the purposes and limits of the exchange of information.

(ii) limit the exchange of information to what is necessary for pursuing lawful objectives and restrict access to information to a limited number of people who have a real need to access it by reason of their duties.

(e) Take the following measures, given that competition authorities frequently inspect trade associations (this because competition authorities consider **trade associations** the preferred venues to exchange Sensitive Information):

(i) review the agenda for the meeting in advance and, if it contains antitrust-relevant matters, send it to the Competent Structure of the Group company concerned, who will evaluate the appropriateness, the forms and the ways of participating and will describe the risks in terms of antitrust;

(ii) adopt the rules of conduct set out in point (b)(ii) – namely Opposition to the Exchange – if potentially critical issues are discussed during the meeting; and

(iii) provide the Competent Structure of the Group company involved of the following after each meeting in which particularly significant topics under competition legislation are discussed, to verify the meeting discussion's compliance with antitrust legislation: the agenda, every document distributed during the meeting, the list of participants and the undertakings they belong to, any meeting minutes, and any additional items discussed if the minutes are not comprehensive.

(iv) do not participate in statistical surveys or other projects involving the provision of Sensitive Information without prior consultation the Competent Structure of the Group company concerned.

(f) Avoid **publicly announcing the Group companies' business strategies**, especially if they are planned to be adopted a long time after their announcement and if their implementation could be detrimental to customers/consumers (e.g., price increases).

Before making public announcements concerning the Group companies' future business strategies, including Sensitive Information, contact the Competent Structure of the Group company concerned in order to enable them to check whether and to what extent it is appropriate to make the announcement.

If a competitor publicly announces its future business strategies, especially if they are potentially detrimental for customers/consumers:

(i) avoid replicating with similar announcements, as it is important not to give the impression that the undertakings are "conversing" through public announcements to coordinate their business strategies;

(ii) evaluate carefully the appropriacy of drawing up and internally releasing analyses that suggest adopting conduct similar to those proposed by the competing undertaking; and

(iii) assess any antitrust "reactions" to the initiatives taken by competitors with the Competent Structure of the Group company concerned.

(g) Do not engage in any collusion with competitors during the tender to determine respective participation strategies (arranging to divide up lots, boycott the tender, submit offers of support, etc.), as this is strictly prohibited. If **establishing a temporary association of enterprises** with competitors is being considered, <u>despite the fact that the Group company meets all the requirements to participate in the tender on its own</u>, the Competent Structure of the Group company concerned must

be informed in advance so he/she can verify that the joint participation complies with antitrust law.

In any event, we suggest keeping a written record of the company's economic and technical assessments regarding participations in tenders and choosing to set up a temporary association of enterprises (e.g., regarding the choice of lots on which to bid, rather than the rationale underlying the need to establish a temporary association of enterprises).

If there are well-founded suspicions that, in the context of a tender or other competitive procedure in which an FS Group company acts as a contracting authority, an anti-competitive infringement has been committed by the participating undertakings, the Competent Structure of the Group company concerned must be promptly informed to assess the possible actions that are to be taken in order to involve the competent Authorities, including, by way of example, for what is relevant here, the ICA.

3. VERTICAL RESTRICTIONS OF COMPETITION

Vertical agreements take place between companies active at different levels of the production and distribution chain. These are generally treated more favourably than horizontal ones. Indeed, unlike horizontal agreements, vertical agreements do not involve direct competitors and can more easily help increase efficiency due to the synergies and complementarity between the undertakings in the agreement, thus generating pro-competitive effects.

3.1 CASES OF VERTICAL AGREEMENTS

Under Commission Regulation No. 720/2022, vertical agreements concerning the purchase and resale of goods or services are not considered to restrict competition if the manufacturer and distributor each hold a market share of less than 30%.

However, this exemption does not apply, regardless of the parties' market shares, if the agreements contain restrictions considered to be particularly detrimental to competition (i.e., hardcore restrictions).

More precisely, antitrust law identifies as hardcore restrictions those agreements by which the manufacturer:

(i) *imposes on its distributors* **resale prices** *for the goods or services provided;* however, the manufacturer is free to set maximum prices or recommend suggested resale prices, provided that this does not result in imposing fixed or minimum resale prices due to pressure or incentives on its distributors[10];

In the *Sofar/Food Supplements* case, the ICA initiated proceedings to investigate a potentially anticompetitive agreement regarding the imposition of minimum resale prices and other unjustified restrictions on online sales by the supplement company in its dealings with online distributors. The case was closed with the acceptance of the commitments proposed by the company, which were deemed suitable to overcome the critical issues identified by the ICA.

(ii) *limits the* **territory** *where, or the* **persons** *to whom, the distributor may resell the products actively*[11] *or passively*[12]; however, agreements are considered **lawful** in either of the following

[10] Pressures and incentives may be direct (e.g., explicit request to comply with the suggested price) or indirect (e.g., refusal to grant certain discounts or to extend ongoing supplies if the distributor fails to comply with suggested prices).

[11] "Active selling" means selling actively solicited/promoted by the enterprise. Also constituting active selling is (i) the operation of an Internet site with a top-level domain that corresponds to certain territories; (ii) the offering on an Internet site of language options commonly used in certain territories, when those languages are different from those commonly used in the territory in which the buyer is established; and (iii) the use of price comparison tools or advertising associated with search engines, which are targeted at customers in certain territories or customer groups.

[12] Passive selling' means responding to unsolicited orders from individual customers, including the delivery of goods or the provision of services to such customers.

cases[13]:

(a) the manufacturer prohibits its exclusive distributors from actively selling products in the exclusive territory or to a customer group reserved to the manufacturer or other exclusive distributors (i.e., exclusive distribution); and

(b) the manufacturer prohibits its distributors from selling its products or services at wholesale level;

(iii) *prevents their distributors from* **effectively using** *the Internet* to sell the contract goods or services[14]. However, are deemed lawful the agreements by which the manufacturer imposes:

(a) other restrictions on online sales (e.g. (i) imposition of requirements aimed at ensuring the quality or a particular aspect of the buyer's online shop; (ii) an obligation for the buyer to sell offline an absolute minimum quantity (in terms of value or volume, but not as a proportion of total sales) of the contract goods or services in order to ensure the efficient operation of their non-virtual shop.

(b) restrictions on online advertising that are not intended to prevent the use of an entire online advertising channel (e.g. (i) a requirement that online advertising meets certain quality standards or includes specific content or information; (ii) an obligation for the purchaser to not use the services of specific online advertising providers that do not meet certain quality standards; (iii) an obligation for the purchaser to not use the provider's brand name in the domain name of its online shop.

In the *Guess* case, the Commission deemed unlawful the restrictions imposed by Guess on its authorized distributors concerning:

(a) the possibility of using Guess trade names and brands for advertising purposes in online search engines

(b) the possibility of selling products online without first obtaining a specific authorization from Guess online

(c) the possibility of selling to end users located outside the assigned territory or to authorized distributors

(d) the possibility of cross-selling between authorized wholesalers and retailers

(e) the possibility of setting resale prices independently

[13] Provided the manufacturer and distributor each hold a market share of less than 30%. Otherwise, a case-by-case assessment is required.

[14] The following are examples of obligations that indirectly have the object of preventing the buyer from effectively using the internet to sell contract goods or services in particular territories or customers (i) an obligation on the buyer to prevent customers located in another territory from viewing its website or online shop or to redirect customers to the manufacturer's or another seller's online shop; (ii) an obligation on the buyer to terminate consumers' online transactions if their credit card discloses an address outside the buyer's territory; (iii) an obligation on the buyer to sell the contract goods or services only in a physical space or in the presence of trained personnel; (iv) an obligation on the buyer to obtain the supplier's prior permission to engage in individual online sales transactions; (v) a prohibition on the buyer's use of an entire online advertising channel, such as search engines or price comparison services, or restrictions indirectly prohibiting the use of an entire online advertising channel, such as an obligation not to use the supplier's trademarks or brands for offers to be indexed in search engines or a prohibition on providing price information to price comparison services.

Potentially unlawful vertical agreements also include **non-compete obligations,** i.e., agreements whereby the distributor is persuaded (or forced) to concentrate at least 80% of its orders for a particular product and/or service type with a single manufacturer. More specifically, these obligations may be considered to restrict competition and their lawfulness must be assessed on a case-by-case basis if:

(i) the agreement has an indefinite term or a term of more than five years; Non-compete obligations that are tacitly renewable beyond five years may, on the other hand, be deemed lawful provided that the distributor can effectively renegotiate or terminate the vertical agreement containing the obligation with reasonable notice and at a reasonable cost, and is thus able to switch to another supplier after the expiration of the five-year period; or

(ii) the manufacturer or distributor holds a market share of above 30%.

Non-compete obligations for the distributor after the expiry of the agreement are potentially deemed unlawful, unless:

(a) The obligation is essential to protect know-how transferred from the manufacturer to the distributor;

(b) It is limited to the point of sale from which the distributor has operated during the duration of the contract;

(c) It is limited to a period of maximum one year.

In the *Problems concerning promotional activities in the school publishing market* case, the ICA initiated proceedings against a number of schoolbook publishers and two trade associations, for a possible vertical agreement restricting the operations of publishing promoters, with exclusionary effects in the school publishing market. The agreement allegedly stemmed from the inclusion, in contracts between publishers and promoters (drafted using the collective agreement prepared by the trade associations as a reference), of approval/non-competition clauses by virtue of which a promoter could not contract a new publisher without having received prior authorization from the publisher he already represented. The case was closed with the acceptance of the commitments proposed by the parties, consisting essentially in the

Agency contracts do not generally fall within the scope of antitrust legislation. This because it is usually the principal who bears the financial and commercial risks associated with the sale or purchase of the contract goods or services. In such cases, the principal therefore has the power to determine the scope of the agent's activities in relation to the contract goods or services as well as to determine the agent's commercial strategy in relation to (i) the limitations of the territory in which the agent may sell the contract goods or services; (ii) the limitations of the customers to whom the agent may sell the contract goods or services; and (iii) the price and conditions at which the agent must sell or purchase the contract goods or services.

However, it must be ascertained if the terms of an agency contract compromise the nature of the agency, leading them back to a traditional vertical agreement, regardless of their legal form. This occurs, for example, when the contract entails the agent assuming financial or commercial risks concerning the work carried out on the principal's behalf[15] or contains a non-competition clause in the principal's favour. In this case, agents are considered independent distributors.

[15] Indicators of risk-taking include: (a) the acquisition of ownership of the goods sold on the principal's behalf; (b) the obligation on the agent to invest in sales promotion; (c) the maintenance of stock at its own risk and cost; (d) the investment in equipment, premises or staff training; (e) the contribution to the expenditure for delivering the goods (e.g., transport costs); and (f) the assumption of liability for defective products or for breach of contract.

3.2 DUAL DISTRIBUTION

Generally, the Regulation's exemption does not apply to vertical agreements concluded between competing undertakings, the legality of which must be assessed on a case-by-case basis. The only exceptions to this rule concern **'dual distribution'** scenarios where the supplier, selling its goods both directly to final consumers and through independent distributors, is in direct competition with its distributors.

The exemption thus applies to vertical agreements between a supplier that operates upstream as a manufacturer, importer or wholesaler and downstream as an importer, wholesaler or distributor of goods, and a buyer that operates downstream as an importer, wholesaler or distributor and is not an upstream competitor.

The exemption applies to all aspects of the vertical agreement that is part of a dual distribution scenario, including exchanges of information between the parties that are closely related to the implementation of the agreement and that contribute, inter alia, to the optimization of the production and distribution processes. Not all exchanges of information between supplier and buyer in a dual distribution scenario produce efficiency gains. For this reason, the Regulation expressly excludes from the exemption those exchanges of information between supplier and distributor which are not directly related to the execution of the vertical agreement or necessary to improve the production or distribution of the contract goods or services.

The following is an illustrative list of information the exchange of which is generally considered to be directly related to the performance of the contract or necessary to improve the production or distribution of the contract goods or services, and which could therefore, depending on the circumstances of the particular case, benefit from the exemption provided for in the Regulation. The list also illustrates information which is generally considered not to be directly related to the performance of the contract or necessary to improve the production or distribution of the contract goods or services:

AUTHORISED INFORMATION	UNAUTHORISED INFORMATION
➢ Technical Information ➢ Logistical information ➢ Information concerning customers' purchases of the contract goods or services, customer preferences and reactions, provided that the exchange of such information is not used to limit the territory in which, or the customers to whom, the buyer may sell the goods or services ➢ Sales prices charged by the supplier to the buyer ➢ The supplier's recommended or maximum resale prices charged for the contract goods or services and the prices at which the buyer resells the goods or services, provided that this exchange of information is not used to limit the buyer's ability to set its own selling price or to impose a fixed or minimum selling price ➢ Marketing and promotional information (not future prices) ➢ Market Information	➢ Information on future prices ➢ Information on end users unless such exchange of information is necessary (i) to enable the supplier or buyer to meet the requirements of a particular end user (e.g. to adapt the contract goods or services to the user's needs, to grant the user special conditions, etc.); (ii) to implement or monitor compliance with a selective or exclusive distribution agreement, which provides for the assignment of particular end users to the supplier or buyer ➢ Information on goods sold by a buyer under its own brand with a manufacturer of competing branded products, unless the manufacturer is also the manufacturer of the own-brand products

3.3 RULES OF CONDUCT FOR VERTICAL RELATIONSHIPS

In light of the above principles and to ensure compliance with antitrust law, all employees/managers of the Group must adhere to the following rules of conduct.

(a) Do not – when selling through distributors – pressure (or provide incentives to) the distributor to apply a suggested retail price ("**SRP**") or a minimum sale price, such as by:

- guaranteeing a discount or other type of incentive (e.g., advertising subsidies) only to distributors that apply the SRP or, anyway, to distributors that never sell the products/services below the SRP;
- blocking supplies to the distributor that charges (or is likely to charge) a lower price than the SRP; or
- threatening to impose penalties on any distributors that do not comply with the SRP (e.g., disconnection or termination of the supply of support with marketing).

(b) Clarify (as necessary) with the Competent Structure of the Group company concerned whether direct communications to the distributors contain indications that could result in prohibiting to advertise or sell products/services online.

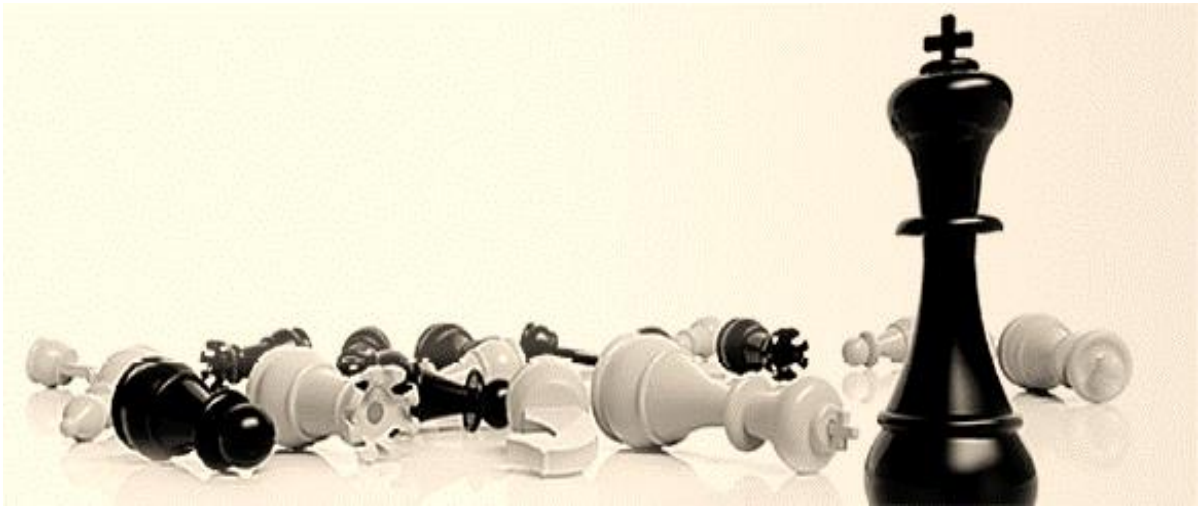
(c) Submit contracts and agreements in advance to the Competent Structure of the Group company concerned involving:

- restrictions of the territory where, or the customers to whom, the distributor may sell the goods or services in question;
- Obligations to purchase minimum quantities;
- non-compete obligations and/or exclusive supply clauses, especially those for an indefinite term or a term exceeding five years;
- dealings with agents and any amendments to existing contracts with them.

(d) In case of both direct sales and sales through distributors being direct competitors of the Group companies, limit the exchange of information with distributors to what is directly related to the performance of the agreement or necessary to improve the production or distribution of the contract goods or services. Examples of information the exchange of which is generally permitted concern suggested retail prices, technical, logistical, marketing and promotional information and customer feedback; examples of information generally considered not directly related to the performance of the agreement or necessary to improve the production or distribution of the contract goods or services the exchange of which is prohibited concern future prices

and information on specific customers of distributors.

PART II: ABUSE OF DOMINANT POSITION



4. BASIC NOTIONS

4.1 DOMINANT POSITION

An undertaking is considered to be in a dominant position when it has market power that enables it to act independently from competitors, customers and end consumers, and to considerably influence the main parameters of competition (price, terms of sale, etc.).

To determine whether an undertaking's market power is sufficient to constitute a dominant position, many factors must be taken into account, but the most important is its market share[16]. More specifically:

(i) if an undertaking's market share is **less than 30–40%,** it is unlikely to be considered dominant if further elements are absent, such as no competitors with significant market shares;

(ii) if an undertaking's market share is **40%–50%,** additional factors need to be taken into account, such as barriers to market entry, the undertaking's economic and financial capacity, the undertaking's level of vertical integration, economies of scale,

[16] It follows that, in order to ascertain whether or not an undertaking is in a dominant position, the first step is to identify the market in which it operates. For this purpose, both the product market and the geographic market must be identified. The product market includes all goods and services that are regarded as interchangeable with each other by reason of their characteristics, prices and intended use. The geographic market consists of the area in which the conditions of competition are homogeneous by reason of, inter alia, consumer characteristics and habits, transport costs and applicable regulations.

access to sources of supply, main resources, customer loyalty, and customer bargaining power; and

(iii) if an undertaking's market share **exceeds 50%,** it is presumed to be dominant and must therefore prove that it is unable to exercise significant market power in the market it operates.

Given that dominance must be assessed on a case-by-case basis and that an undertaking may be dominant in some markets and not in others, it is important to clarify that holding a dominant position is not unlawful *per se*.

What is prohibited is the abuse by dominant undertakings of their position to the detriment of competitors and, above all, customers and consumers. Therefore, dominant undertakings have a "special responsibility" that prohibits them from engaging in certain conduct that, conversely, its competitors may engage in.

4.2 POTENTIALLY ABUSIVE CONDUCT

Article 102 TFEU and Article 3 of the Law contain a non-exhaustive list, which is progressively updated by case law and decision-making practice, of abusive conduct that includes:

- the imposition (direct and indirect) of purchase prices, sales prices and other unfair contractual terms and conditions ("**T&Cs**");
- production limits, market outlets and technical developments to the detriment of consumers;
- discriminatory conduct that harms competition (namely, the application of dissimilar T&Cs to equivalent services); and
- tying practices (i.e., conduct whereby the execution of an agreement is dependent on the acceptance of supplementary services that, by their nature or according to commercial usage, have no connection with the subject matter of the agreement).

A brief description of the above examples of abusive conduct is provided below. Bear in mind that the railway transport industry is subject to both antitrust law, and the regulatory framework imposed by the Transportation Authority ("**ART**"). Compliance with regulatory legislation does not exclude the risk of conduct prohibited by antitrust law[17] .

This is particularly significant for the FS Group, which includes the company responsible for managing the railway infrastructure in Italy ("**Infrastructure Manager**") and the major Italian companies active in the transport of passengers and freights by rail. In addition to these companies' potential dominant position in their respective markets, an element of complexity must be considered concerning the accurate separation of the Infrastructure Manager's essential functions. Indeed, the Infrastructure Manager – in conducting its functions

[17] See, *ex multis,* Council of State, Judgment No. 1673/2014; Court of Justice, Judgment of 14 October 2010, C-280 - *Deutsche Telekom*; Court of Justice, Judgment of 6 December 2012, C-457/10, *Astrazeneca.*

– must prevent all forms of discrimination against competitors of the Group's railway undertakings.

4.2.1. IMPOSITION OF UNFAIR PRICES OR TRADING CONDITIONS

Dominant undertakings cannot apply the following prices or conditions:

(i) *Excessive prices*: this means prices that do not appear reasonable in relation to the product's economic value.

> In the *Leadiant Biosciences/Drug for the Treatment of Xanthomatosis Cerebrotendinea* case, the ICA sanctioned the Leadiant Group for abusing its dominant position by applying unjustifiably high prices to the National Health Service for the sale of an orphan drug. The abuse, moreover, was allegedly part of an articulated strategy that included the adoption of a dilatory and obstructive behavior (consisting in not providing information and documentation on the R&D activity that would have justified the price proposal submitted and in delaying the submission of economic offers corrective to the initial one) with respect to the negotiation of the drug's reimbursement price with the Italian Medicines Agency, so as to reduce the latter's negotiating power.

(ii) *"Predatory" prices*: this means sales prices at unreasonably low levels and below cost, charged for extended time periods, in absence of any justification of economic efficiency. Special attention is needed to ensure compliance with antitrust law on submitting bids in tenders. Bids submitted must be "replicable" and not "below cost"[18].

> In the *Diano/Tourist-Caronte* case, the ICA ruled that the dominant operator Caronte, which offered the transport service of rubber-tyred vehicles and passengers across the Strait of Messina, had practiced predatory (below cost) pricing with the aim of ousting Diano, a new entrant operator in one of the two routes where this service was provided. In particular, Caronte had offered the transport service directly at loss in the competitive segment in which the competitor Diano had begun to operate (Messina-Reggio Calabria), being able to compensate the losses made there with the wide margins guaranteed on the other route (Messina-Villa San Giovanni), on which it enjoyed a dominant position which was difficult to undermine, also in light of infrastructural (the landing stages) and administrative (State concessions and docking rights) barriers which reduced the contestability of the market.

(iii) *"Margin squeezing":* this occurs when a vertically integrated undertaking is in a dominant position in the market of a product/service ("Upstream Market") that is necessary to operate in another downstream market ("Downstream Market") and fixes sale prices for third parties for the product/service in the upstream market in a way that does not allow

[18] Therefore, operators in a dominant position must carefully assess their business costs to ensure their bids are not predatory. The topic intersects with that of unusually low bids, since even though not all incongruous bids can be considered below cost, all bids below cost are always considered incongruous.

a reasonably efficient competitor to conduct its business profitably in the downstream market.

For instance, in the *NTV/FS/Barriers to entry in the Market for High Speed passenger railway transport services* case, the ICA contested to FS an abuse practice of market squeezing – through its subsidiaries Rete Ferroviaria Italiana ("RFI") and Trenitalia – to the detriment of Nuovo Trasporto Viaggiatori S.p.A. ("NTV"). This practice consisted in: (a) toll costs that NTV paid to RFI for network access, and (b) the prices charged by Trenitalia for high-speed passenger railway transport services such as to force the new entry to operate with a negative margin. And this with the alleged purpose of weakening, if not destroying, NTV's capacity to compete in the market. The proceedings ended with the ICA's acceptance of the commitments submitted by the Group companies, without any infringement being established.

EXAMPLE

(iv) Other *unfair trade conditions*: this includes restrictions on exports or resale of goods, conducts consisting in conditioning the conclusion of supply contracts to the payment of unjustified fees, etc.

In the *Telecom/Previous arrears* case, the ICA considered *prima facie* abusive Telecom Italia's practices of making the request for the activation of a new user and the taking over of an already active user conditional upon the prior payment of the previous contracting party's past arrears and, therefore, upon the payment by the new holder of fees not related to any counter-performance by the company. The case was closed with commitments without a finding of infringement.

4.2.2 LIMITATIONS OF PRODUCTION, MARKET OUTLETS OR TECHNICAL DEVELOPMENT TO THE DETRIMENT OF CONSUMERS - REFUSAL TO CONTRACT

A second case of abuse concerns the limitation of outlets and technical development to the consumers' detriment.

In principle, dominant undertakings have no general obligation to contract, but they are still required to prove that refusal to supply is motivated by objective reasons, such as:

- protection of commercial interests,
- insufficient production capacity,
- unilateral decision to withdraw from the market,
- breach of contract by the counterparty, and
- counterparty's insolvency.

However, if a dominant undertaking controls **a facility that is needed** to provide certain products or services (i.e., an "essential facility"), it must allow access to that facility to all parties concerned, including potential competitors, at fair and non-discriminatory conditions.

For example, in the *NTV/FS/Barriers to entry in the Market for High Speed passenger railway transport services* case, the ICA objected to RFI: (a) not having granted NTV the tracks requested in the morning peak time slot for the Italo trains leaving Rome and heading north, and (b) not having triggered the planned coordination procedure requested by the PIR through tracks overlapping with the incumbent operator. More specifically, in the ICA's opinion, RFI precluded NTV's access to a more commercially profitable time slot by discriminating against NTV to the benefit of Trenitalia (whose requests were, by contrast, promptly met), which was given a more advantageous position in the same time slot.

EXAMPLE

It is worth mentioning that access to infrastructure in the railway transport industry is now governed by Legislative Decree No. 112 of 15 July 2015 (as amended by the Legislative Decree No. 139/2018, i.e., the national piece of legislation enacting the so-called IV Railway Package - Market Pillar -EU Directive/2016/2370), ("**Decree**"), which enacted Directive No. 2012/34/EU of the European Parliament and of the Council of 21 December 2012, establishing a single European railway area (known as the "*Recast Directive*").

The Decree, in its current version, which entered into force on 23 December 2018, has largely reaffirmed the European principles of managerial, administrative and accounting autonomy and independence for railway undertakings independence of the Infrastructure Manager's essential duties and freedom to access markets for transporting goods and passengers by rail at fair, non- discriminatory and transparent conditions.

Under the Decree, the Infrastructure Manager exclusively carries out essential functions relating to: (a) the allocation of infrastructure capacity, in accordance with the principles of fairness, transparency and non-discrimination; and (b) the determination and collection of fees based on the criteria established by ART[19].

Therefore, given the current regulatory and legislative framework, it seems unlikely that the Infrastructure Manager could unlawfully refuse requests from Trenitalia's competitors to access the infrastructure, as the relevant procedure is precisely governed.

The 'Fourth Railway Package'.

Having regard to the regulatory framework relating to the railway system, the European institutions have adopted the so-called Fourth Railway Package ("The Fourth Package"), a set of legislative texts designed to amend the legislation.

The Fourth Package aims: i) to complete the single market for rail services (Single European Railway Area); ii) to strengthen the independence of the Infrastructure Manager, especially where it is part of a vertically integrated undertaking (as in the case of FS Group). In particular, the latter objective is to be achieved by ensuring legal independence of the Infrastructure Manager and by ensuring the independence of staff and decision-making powers

[19] See Resolution No. 95 of 31 May 2023 of the Italian Transport Regulatory Authority ("ART") "Conclusion of the procedure initiated with Resolution No. 11/2023. Approval of the regulatory act pertaining to the revision of the criteria for determining charges for access to and use of the railway infrastructure approved with Resolution No. 96/2015 and extension and specification of the same for interconnected regional networks". According to ART, a minimum access package ('PMdA') is defined, which will entitle the railway undertaking to operate its trains on the entire national network. This package is purchased by paying a 'toll' to RFI which includes the allocation of the train path, the use of lines and stations, and the control and regulation of traffic. The tariff system for the purchase of the PMdA is proposed by RFI and must be approved by ART, which will verify the compliance of the tariffs with the criteria and their sustainability vis-à-vis the market.

The Fourth Package, was adopted by the European institutions in December 2016 and consists of three regulations and three directives. At the national level, the Fourth Package has been implemented as follows:

i. Legislative Decree No. 50 of 14 May 2019 enacted Directive (EU) 2016/798 on railway safety;

ii. Legislative Decree No. 57 of 14 May 2019 enacted Directive (EU) 2016/797 on the interoperability of the European Union's railway system;

iii. Legislative Decree No 139 of 2018 enacted Directive (EU) 2016/2370 on the opening of the market for domestic rail passenger services and the governance of railway infrastructure.

This legislation consists of: *i)* a "*Technical Pillar*", relating to the safety and interoperability rules of the European railway system;[20] *ii)* a *"Political Pillar"*, which regulates aspects more specifically related to the structure of the EU railway market.

Part of the *Political Pillar* are: the EU Directive 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending the *Recast* Directive; the EU Regulation 2016/2337 of the European Parliament and of the Council of 14 December 2016 repealing Regulation EEC No. 1192/69 of the Council on common rules for the normalization of the accounts of railway undertakings (directly applicable); the EU Regulation 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation EC No. 1370/2007 with regard to the opening of the market for national rail transport services of passengers (directly applicable).

As far as it is of interest, the Fourth Package - *Political Pillar* envisages that, within a vertically integrated company,[21] so-called **"Chinese walls"** are to be established, in order to further ensure organizational and decision-making independence of the Manager's essential functions (*i.e.,* train path allocation and determination and collection of infrastructure access charges). The most relevant are:

a) the provision of the **absolute independence of the Infrastructure Manager in** relation to the choices that it is required to adopt in the context of the two essential functions. In this sense, neither the FS *holding company* nor the other FS Group companies can in any way direct the actions of RFI with regard to the allocation of train paths and the determination/collection of access charges;

b) the obligation of **legal separation between the** Infrastructure Manager and railway undertakings, as well as between the Infrastructure Manager and any other entity of a vertically integrated undertaking (as is already the case within the FS Group);

[20] The Technical Pillar consists of three pieces of legislation, namely: the EU Directive 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the European Union rail system; the EU Directive 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety; and the EU Regulation 2016/796 of the European Parliament and of the Council of 11 May 2016 establishing a European Union Agency for Railways and repealing Regulation (EC) No 881/2004.

[21] Pursuant to Art. 3(31) of the *Recast* Directive, as amended by EU Directive 2016/2370, 'vertically integrated undertaking' means an undertaking for which one of the following conditions is met: (a) an infrastructure manager is controlled by an undertaking which at the same time controls one or several railway undertakings that operate rail services on the infrastructure manager's network; (b) an infrastructure manager is controlled by one or several railway undertakings that operate rail services on the infrastructure manager's network; or (c) one or several railway undertakings that operate rail services on the infrastructure manager's network are controlled by an infrastructure manager.

c) the **prohibition of delegating the two essential functions of the Infrastructure Manager** to any entity within the vertically integrated undertaking;

d) the prohibition of appointing, at the same time, the same persons as members of the Board of Directors of the Infrastructure Manager and members of the Board Board of Directors of a railway undertaking, as well as the further prohibition to employ the same persons as decision-makers on the essential functions of the Infrastructure Manager and as members of the board of directors of a railway undertaking;

e) the fact that the public funds granted to the operator for the management of the infrastructure network can only be used by the operator to finance its own activities.

Regarding the rules on rail passenger services the Political Pillar of the Fourth Package provides for the complete liberalization of national markets, guaranteeing access to the infrastructure to all stakeholders. This provision will have no impact on the Italian market, which has already been fully liberalized since 2012.

Lastly, it should be noted that the *Political Pillar of* the Fourth Package changes the systems to award service contracts for public rail transport. As of 25 December 2023, pursuant to Article 8(2)(iii) of Regulation (EC) No. 1370/2007, service contracts will be awarded by means of public tendering procedures, except in certain strictly identified cases (including in-house awarding, *de minimis* awarding, awarding under exceptional circumstances, emergency measures in the event of service interruption or imminent danger of service interruption).

With regard to the key role played by the Infrastructure Manager in ensuring effective competition in the rail markets, the Baltic rail case is worth mentioning. In this case the Commission established the existence of an abuse of dominant position by the Lithuanian railway company, AB Lietuvos geležinkeliai, a vertically integrated operator acting as manager of the railway infrastructure - owned by the Lithuanian State - and provider of rail transport, freight and passenger services in Lithuania. The company abused its dominant position by completely dismantling a railway line - which was never rebuilt - in order to prevent a competing railway company of Latvian nationality from entering the Lithuanian market. Ruling on the case, the Court of Justice of the EU confirmed the abuse of a dominant position based on the set of circumstances surrounding the removal of the track. Indeed, the Lithuanian company, as operator of the railway infrastructure, had not only a regulatory obligation to ensure traffic safety, but also a regulatory obligation to minimize disruption and improve the efficiency of the railway network. In addition, being dominant on the relevant market, the undertaking also had a specific responsibility not to jeopardize effective and fair competition by its conduct: this should have resulted not in the dismantling, but in the phased reconstruction of the entire track.

A conduct that can be traced back to the case of abuse of dominant position *sub specie* of refusal to deal is the subject of the *High-Speed and Regional Rail Transport* case, in which the ICA opened an investigation following a complaint by NTV, in which it was alleged that Trenitalia had implemented an abusive commercial strategy, aimed at artificially linking regional and Intercity transport services, operated by Trenitalia under a monopoly regime, with market transport services operated on the High-Speed ("HS") network, where Trenitalia is in competition with NTV. This would take place through an indistinct, unitary and exclusive sales interface, which cannot be replicated by competitors, who are not allowed to sell tickets for subsidized connections. Subsequently, the two operators signed an agreement for the marketing, on NTV's sales channels, of tickets for regional railway services operated by Trenitalia in combination with Italo HS trains. However, this agreement contained clauses concerning access to and the processing of data relating to tickets for regional train services that were considered potentially capable of jeopardizing the effective operation of the agreement between the parties in terms of costs and timing. The case was closed without a finding of infringement with the acceptance of the commitments proposed by Trenitalia, concerning, among other things, the removal of the limitations on access to data that had given rise to NTV's complaint, and the extension of the agreement also to the sale of Intercity tickets in combination with NTV's HS connections[22] .

4.2.3 DISCRIMINATORY CONDUCT TO THE DETRIMENT OF CUSTOMERS OR UNDERTAKINGS OUTSIDE THE DOMINANT UNDERTAKING

The dominant undertaking cannot adopt, in similar negotiations, differentiated conduct (e.g., in terms of prices or sales conditions applied) that may lead to discriminating between one contracting party and another.

Undertakings in a dominant position must therefore carefully verify that different contractual prices or conditions are objectively and economically justified by the contracting parties' different conditions[23].

Furthermore, the non-discrimination obligation requires undertakings belonging to a group not to apply different conditions to the companies of its group, or to companies linked to them, compared to those applied to external applicants.

[22] The issue of refusal to deal is also the subject of the ongoing *Online rail ticket distribution in Spain* case, in which the Commission has opened proceedings against Renfe Viajeros for alleged abuse of a dominant position. In particular, Renfe allegedly refused to provide its content - including ticket types, discounts and functionalities (*e.g.*, reimbursement modalities) - and its real-time data (*e.g.*, track information or temporary service disruptions) to third-party ticketing platforms active in Spain. Renfe proposed commitments consisting in sharing all real-time content and data with the sales platforms, while at the same time informing them about the technical specifications necessary to adapt their systems well in advance.

[23] Indeed, the supply of a product to a customer at a price lower than that usually charged to other customers could depend on (among other things): (a) the transport costs of the product that could be proportionally less if ordered in larger quantities, (b) the terms of delivery of the product that could result in the dominant undertaking paying lower storage costs than usual, and/or (c) the fact that a customer undertakes to provide the supplier specific services or promotional activities.

In the *Amazon FBA* case, the ICA found that Amazon abused its dominant position on the Italian market for intermediation services on marketplaces, favoring its own logistics service (known as 'FBA') among sellers active on the platform, to the detriment of competing operators in the logistics sector. This was done by granting only to sellers who decided to use the FBA service advantages deemed essential to obtain visibility and better sales prospects on Amazon.it (e.g., the *Prime* label) and by applying to them less rigid performance measurement systems than those applied to sellers who decided to use other logistics operators.

With regard to companies of the FS Group, a potential risk of discrimination exists concerning the Infrastructure Manager's decisions in carrying out its tasks, as it must always guarantee fair and non-discriminatory management of the asset and the related rail traffic services.

In addition to the assumptions connected to operators' requests for infrastructure network access (which, as we have seen, is duly regulated), potential discriminatory practices can, in theory, be implemented through different types of conduct (e.g., if the Infrastructure Manager shared information in advance with the Group's companies – as compared to their competitors- that could confer to the Group's companies a competitive advantage).

In 2018, the Italian Transport Regulatory Authority ("ART") ascertained RFI's failure to comply with the information obligations imposed on the Infrastructure Manager by Legislative Decree No. 112 of 2015, and, more specifically, those relating to the accessibility and functionality of the infrastructure (Articles 11 and 12). According to the ART, RFI did not ensure fair, non-discriminatory and transparent conditions for the access to the railway infrastructure, because it failed to comply with the information obligation concerning the performance increase of the railway infrastructure beyond 300 km/h. The omission of the due information on the *upgrade* would have occurred in order to allow Trenitalia to operate on the HS lines the ETR1000 trains, duly purchased and proposed for homologation at 360 km/h, thus compromising the future access to the infrastructure by railway undertakings other than Trenitalia. The ART measure was annulled by the Council of State for purely procedural reasons.

4.2.4 TYING AND BUNDLING

It is considered an abuse the fact that a dominant undertaking conditions the sale of product X (for which it is generally dominant and for which the customer has no alternative) on the customer's purchase of product Y, without any need to perform a joint sale of the two products that can also be sold separately.

Through these practices (i.e., tying practices), the dominant undertaking can actually leverage its strong position in a particular market to extend it to neighbouring markets. This abuse can take one of two forms:

(a) "tying", i.e., conditioning the purchase of the requested product on the purchase of another product that is economically separate from the first; or

(b) "bundling", i.e., conditioning the granting of discounts, prizes or benefits of another nature on the joint purchase of the products;

Tying and bundling are, however, allowed for products that are inherently or generally twinned (e.g., the sale of vehicles, complete with tyres, including if from another manufacturing source, or the sale of hard disks and personal computers).

In the *Microsoft* case, the Commission found an abuse of a dominant position in the market for PC operating systems, achieved through a series of exclusionary conducts, including tying practices. More specifically, customers wishing to purchase the Windows operating system would necessarily have to purchase, together with it, the Microsoft Media Players program. The Commission therefore concluded that Microsoft, by acting in this way, foreclosed competition from alternative system providers to Microsoft Media Players.

4.2.5 EXCLUSIVITY OR MINIMUM PURCHASE OBLIGATIONS

A dominant undertaking cannot impose exclusive purchasing obligations on its customers or distributors. This practice is clearly intended to prevent the market entry of new competitors, to exclude competitors from the market in which they already operate, or to prevent competitors from strengthening relations with the dominant undertaking's customers.

For this case of abuse to occur, the customer does not have to be legally obliged to obtain supplies exclusively from the undertaking in question, as it is sufficient that the conditions of sale offered are likely to induce the customer to obtain supplies exclusively or mainly from it.

Even the imposition of minimum purchase obligations (whereby customers must purchase at least a predetermined amount of a product from the dominant undertaking) constitutes an abuse if the purchase obligation: (a) covers a significant part of the customer's needs, and (b) is applied for a long time.

In the *Poste Italiane/Delivery prices* case, the ICA fined Poste Italiane for having abused its dominant position in the market of the delivery of multiple items of ordinary mail by implementing a complex exclusionary strategy, which included purchasing obligations formulated in terms of volumes comparable to exclusivity clauses.

4.2.6 DISCOUNT SCHEMES

A dominant undertaking is not prohibited from granting discounts, provided that it does not do so to retain customers (creating a sort of exclusivity obligation), thus preventing or making it more burdensome for other competitors to enter a market.

More specifically, the following discounts are considered unlawful:

(i) *Loyalty discounts*: These are discounts granted only to customers who agree not to buy from dominant undertaking's competitors, and discounts granted only to customers who buy a large part of the products necessary for their needs from the dominant undertaking (these discounts actually produce a result similar to that of exclusivity obligations);

(ii) *Target discounts*: These are discounts granted to customers who achieve certain purchase goals. Discount target systems are unlawful if they are organised in ways that induce customers to gradually increase the volume of products and/or services purchased from the dominant undertaking;

(iii) *The "English clause":* This is the clause that imposes an obligation on the customer to inform the dominant undertaking of any other advantageous offers it receives from other suppliers and to accept those offers only if the dominant undertaking decides not to offer equivalent conditions.

In the *Unilever/ice cream distribution* case, the ICA fined Unilever Italia MKT. Operations S.r.l. for having abused its dominant position in the market for the distribution and marketing of ice cream, for the implementation, *inter alia*, of a system of payments and discounts provided for by Unilever in its product distribution contracts, which were conditional on compliance with specific obligations or the achievement of turnover targets.
In this regard, the ICA observed, *inter alia*, how the discount policies implemented by Unilever could make it "less attractive" for customers to obtain supplies from another operator, as this could lead to the forfeiture of the discount. In addition, the ICA noted how supply contracts with trade associations appeared likely to result in their "strong loyalty" to Unilever.
The ICA therefore concluded that the system of discounts and payments implemented by Unilever, an undertaking in a dominant position in the relevant market, was capable of constituting an abuse, prohibited under Article 102 TFEU.

However, discount systems based solely on the quantity of purchases made are lawful. To be classified as purely quantitative they must in principle comply with the following requirements:

- the discount must be granted to all potential customers without discrimination and be fixed objectively and transparently beforehand;
- the discount must derive from an efficiency increase (e.g., cost savings for large orders); and
- the discount must not be retroactive, i.e., it must not be structured in such a way as to result in the discount being applied to previously purchased products.

Given the absence of clear guidelines for discount schemes that dominant undertakings can apply, the Group company concerned must carefully analyse with its Competent Structure the discount schemes that the Group company wishes to offer to ensure they comply with competition law.

4.2.7 ATYPICAL ABUSE

The non-exhaustive list of abusive conduct provided by Art. 102 TFEU and Art. 3 of the Law has been supplemented by the decision-making practice of the competition authorities and by case law, which has brought within the scope of so-called atypical abuses:

- The systematic use of *sham litigation against* a competitor;

In the *Multidiameter Sealing Systems for Cables and Tubes* case, the ICA sanctioned Roxtec, a leading company in the sector, for having carried out a complex abusive strategy to the detriment of its main competitor, aimed at allowing itself to maintain its market position even after the expiry of one of its own patents. This conduct had consisted in: (i) filing with the EUIPO nine trademark registration applications relating to the design, in different colors, of the patented product, thus pre-establishing a series of intellectual property rights to be enforced in court; (ii) the promotion of various pretextual legal actions (so-called *sham litigation*) to oppose the competitor's entry into the markets in which it was active; and (iii) actions aimed at disparaging the competitor in front of consumers and third parties.

- *abuse of law and regulation*, as well as abuse *of intellectual property rights* and *essential patents*;

In the *AstraZeneca* case, the Commission found two abuses of regulatory process. The first concerned the provision of false information to national patent and judicial authorities in order to mislead the authorities and obtain an extension of patent protection for a drug (otherwise not due), to the detriment of competitors active in the production of generic drugs. The second conduct concerned, on the other hand, the deregistration of a pharmaceutical product with subsequent reintroduction on the market in a different form, in order to preclude competitors producing generic drugs from activating an easier and faster authorization procedure.

- abuse through *innovations, modifications or degradation of the product*;

In the *T-Link/Grandi Navi Veloci* case, the ICA considered the increase in freight transport capacity by the dominant undertaking to be abusive, insofar as it was merely instrumental in hindering the new entrant's market success. Moreover, the abusive conduct had also consisted in threats of commercial retaliation to the detriment of haulage companies that, following Grandi Navi Veloci's commercial proposals, had intended to continue to use T-Link's services; as well as in activities of disruption and denigration to the detriment of T-Link.

- *The abusive exercise of a contractual right*.

In the *Selecta/Poste Italiane* case, the ICA opened an investigation into an alleged abuse consisting in the sudden demand for the repayment of sums owed, combined with the refusal to accept repayment plans proposed by the debtor. The investigation was opened because this conduct represented a sudden change in the conduct of the dominant operator who had tolerated and allowed the accumulation of a significant debt exposure and then suddenly proceeded to demand the immediate payment of the past due amounts under penalty of not providing the service. The case ended with the acceptance of the commitments proposed by Poste italiane without a finding of infringement.

4.3 THE ABUSE OF ECONOMIC DEPENDENCE

Even outside the cases where an undertaking holds a dominant position in the market, in the presence of a 'relative dominance', certain commercial conducts may be considered abusive and therefore sanctioned.

In particular, pursuant to Article 9 of Law No. 192/1998, the abuse by one or more undertakings of the state of economic dependence is prohibited. This defined as the situation in which an undertaking is able to determine, in its commercial relations with another undertaking, an excessive imbalance of rights and obligations, also taking into account the real possibility for the party subjected to the abuse to find satisfactory alternatives on the market.

Abuse of economic dependence may also consist in refusing to sell or buy, imposing unjustifiably onerous or discriminatory contractual terms, and arbitrarily breaking off existing business relations.

The agreement through which the abuse of economic dependence is realized is null and void.

The ICA activates its powers of investigation and the imposition of orders and fines if it finds that the conduct of abuse of economic dependence is relevant to the protection of competition and the market.

For the sake of completeness, it should be noted that, regardless of the relevance requirement (which is a prerequisite for the ICA's jurisdiction), the civil courts have jurisdiction to apply the rules on the abuse of economic dependence to commercial relationships between companies.

In the *Original Marines Franchising Chain* case, the ICA initiated proceedings for a possible abuse of economic dependence by Original Marines ('**OM**') to the detriment of its *franchisees* that allegedly made it difficult, if not impossible, for franchisees to find 'real and satisfactory' commercial alternatives.
The economic dependence was allegedly found in certain contractual clauses providing for substantial economic commitments on the part of the *franchisees* capable of unduly conditioning their business activities, including: (i) the bearing of the costs for the training of personnel and for the fitting out of the shop according to the standards imposed by OM; (ii) the installation and maintenance of a computer system that allowed daily transmission to OM of the shop's sales data; (iii) the prohibition to transfer the contract without OM's prior consent and the prohibition to transfer the store to third parties without offering pre-emption to OM.
The abusive conduct, in the opinion of the ICA, resulted from the imposition on the franchisees of clauses that provided for the impossibility of adopting promotional campaigns independently; the imposition of automatic re-stocking mechanisms; and the commitment to periodically purchase a minimum quantity of products.
The case was closed without a finding of infringement with the acceptance of the commitments proposed by OM.

4.4 CORPORATE SEPARATION AND OBLIGATION TO NOTIFY THE AUTHORITY IN ADVANCE

Article 8 of the Law imposes certain obligations when an undertaking, that **by legal provision**[24] **operates services of general economic interest** or operates as a **monopoly in** the market, intends to start up and carry out activities in markets other than those in which it operates by virtue of the aforementioned legal provision ('Different Markets').

In particular, Art. 8 requires that activities in the Different Markets must be carried out through the establishment of **separate companies**.

Pursuant to Article 8(*2*)(b), the establishment of companies and the acquisition of controlling positions in companies operating in the Different Markets is subject to mandatory **prior notification** to the ICA. In the event of a breach of these obligations, the ICA may apply a pecuniary administrative sanction.

In addition, in order to guarantee equal opportunities for economic initiative, undertakings that by virtue of legal provisions are entrusted with the operation of services of general economic interest or operate under a monopoly regime on the market, where they **make available to companies in which they hold shares or to their subsidiaries being active in the Different Markets any goods or services,** including information services, of which they have exclusive access by virtue of their activities, are obliged to make those goods or services available, under equivalent conditions, to other directly competing undertakings.

In the *Rete Ferroviaria Italiana/Bluferries* case, the ICA ascertained a violation of Article 8 of the Law by RFI on the occasion of a tender called by the Ministry of Infrastructure and Transport ("MIT") for the establishment of a fast maritime connection between the cities of Messina, Reggio Calabria and Villa San Giovanni, in which RFI had participated (within a temporary associations of enterprises), but without resorting to the corporate separation provided for by Article 8 of the Law, which it had only done at a later stage with the establishment of Bluferries. Having won the tender, RFI started to carry out maritime passenger transport activities on the Messina/Reggio Calabria, Messina/Reggio Calabria-airport and Messina/Villa San Giovanni routes without having implemented the corporate separation (since Bluferries still lacked direct operational capacity), nor having sent a prior communication to the ICA. The case ended with the finding that RFI had breached its obligations to (i) implement corporate separation and (ii) send prior notification to the ICA RFI was subject to these obligations being the manager of the Italian railway infrastructure by virtue of a concession.

4.5 RULES OF CONDUCT IN MARKETS IN WHICH THE GROUP IS DOMINANT AND IN DEALINGS WITH UNDERTAKINGS IN A POSITION OF ECONOMIC DEPENDENCE

In light of the foregoing, the limits imposed by antitrust law must be strictly complied with in markets in which the Group companies hold a dominant position and in dealings with undertakings in a position of economic dependence.

Identifying the markets in which the Group companies hold a dominant position, and the

[24] It is considered that this provision is to be interpreted as also covering cases in which an undertaking operates services of general economic interest or operates as a monopoly on the market by virtue of a concession.

commercial relations in which they might have a "relative dominance" is a complex process that must necessarily be conducted with the support of the Group companies' Competent Structures, and the results could also vary depending on the period taken as a reference.

The following rules of conduct must be complied with regarding the products/services of the market in which the undertaking is dominant and the dealings with undertakings in which a position of economic dependence is present:

a) check in advance with the Competent Structure of the Group company concerned the procedures for establishing prices for products or services when their real market value is not taken into account (because it is either too high or too low);

b) check in advance with the Competent Structure of the Group company concerned any promotions, discounts or incentives that might be incompatible with antitrust law;

c) check in advance with the Competent Structure of the Group company concerned that contractual conditions other than price (e.g., payment terms, restrictions on exports or resale of goods, etc.) are supported by clear economic/commercial justification;

d) refrain from imposing on customers the obligation to inform the dominant undertaking of any better offers received from competitors, and refrain from prohibiting customers from accepting them if the dominant undertaking is willing to match the offer;

e) refrain from obliging customers to buy products/services exclusively or mainly from the dominant undertaking;

f) check in advance with the Competent Structure of the Group company concerned any initiatives to sell related products (tying/bundling) that may be incompatible with antitrust law;

g) avoid discrimination among customers and among Group companies and third-party undertakings that is not objectively justifiable. It is therefore advisable to check in advance with the Competent Structure of the Group company concerned that granting discounts or more favourable commercial terms to certain customers is justified by cost savings or efficiency gains and based on objective and transparent criteria; and

h) check in advance with the Competent Structure of the Group company concerned any refusals to supply (or long and unjustified delays in answering to the related requests) undertakings that require the Group company's supplies to operate in a market in which they compete with the dominant undertaking.

i) With reference only to those Group companies which, by virtue of a provision of law or by virtue of a concession, manage services of general economic interest, or operate under a monopoly regime on the market, verify in advance with the Competent Structure of the Group company concerned the fulfilment of the obligations relating to the performance of activities on markets other than those in which they operate by virtue of the aforementioned provision of law or concession.

PART III: CONCENTRATIONS

5. BASIC NOTIONS

Pursuant to Regulation (EC) No. 139/2004 and Article 6 of Law No. 287/90, certain corporate transactions between undertakings must be notified to the competent antitrust authorities in order to allow a **preventive control** aimed at verifying whether the implementation of the transaction in question would significantly impede effective competition in the EU or national market or in a relevant part thereof, in particular due to the creation or strengthening of a dominant position.

In order to grant an effective and timely control that can protect the competitive structure of the market, competent antitrust authorities must therefore be mandatorily notified **before** completion of transactions that:

(i) lead to a "concentration between undertakings" under antitrust law; and

(ii) in which the undertakings involved exceed certain turnover thresholds.

5.1 DEFINITION OF "CONCENTRATION"

Concentrations are defined as all transactions that bring about a **lasting change in the control** of the undertakings concerned, as a result of:

- a merger between previously independent undertakings;
- the acquisition of direct or indirect control of another undertaking or part of it[25]; or
- the establishment of a joint venture[26].

[25] For the sake of completeness, it should be noted that transactions leading to changes in the quality of control also lead to a concentration (such as, for example, changes from sole to joint control or vice versa).

[26] Antitrust law distinguishes between joint ventures also known as "full function" joint ventures from those that are not. The burden of notifying the competition authority lies with the parties only for the creation of full function joint ventures. Only full function joint ventures are capable of regularly exercising the tasks of an autonomous economic entity. In assessing whether the joint venture warrants

Lasting changes of control arising out of the transfer of: (a) business units; or (b) assets or capital income to which a potential turnover may be attributed (administrative authorisations, concessions, patents, trademarks, know-how, etc.) are also considered "concentrations".

From an antitrust perspective, however, the notion of control includes – in addition to the case referred to in Art. 2359 of the Italian Civil Code – all cases in which an undertaking has the opportunity – by right, contract or any other legal relationship – to exercise in a stable and lasting manner a decisive influence over another undertaking's business, thereby determining its strategic and commercial choices.

Control can be exercised exclusively or jointly and, in both cases, can be acquired by law or otherwise.

Exclusive control is obtained when an undertaking is able to exercise a decisive influence on its own over another undertaking, or in the cases in which:

- the undertaking acquires the majority of the share capital and voting rights in the general meeting;
- the undertaking holds a minority interest with specific rights that enable it to decide for itself the strategic business management (such as a majority of the voting rights or the power to appoint the majority of the members of the board of directors); or
- only one shareholder can prevent (with its veto) decisions made by the undertaking, but this shareholder does not have the power to impose a particular decision on its own (i.e., blocking minority)[27] .

Alternatively, exclusive control held by a minority shareholder can be inferred from factual situations, as in the case of public companies, in which it is highly probable that the minority shareholder can obtain the majority in the general meeting, because the shares are dispersed among a multitude of shareholders.

Joint control is obtained when two or more undertakings (i.e., parent undertakings) share power over major decisions that determine the strategic direction of the subsidiary's business. This occurs when:

- the parent undertakings equally share the voting rights at the general meeting or the power to appoint members of the subsidiary's decision-making bodies;

being classified as a full function joint venture, the authorities must consider whether: (a) it is active on the market as an independent entity from both the supply side and the demand side; (b) it is capable of conducting its own trade policy; and (c) it is designed to conduct its business indefinitely or, at least, for an extended period.

[27] Indeed, by exercising its veto right, a minority shareholder can bring about a stalemate in the decision-making processes of an undertaking, thereby acquiring decisive influence over the undertaking. According to consolidated national and European practice, veto rights are considered to provide exclusive control only when they concern matters of strategic importance for the life of the undertaking (approval of the financial statements, the business plan, strategic investments, appointment and removal of members of the board of directors and senior management, etc.). This is not the case for veto rights generally reserved for minority shareholders to protect their investment (i.e., rights concerning the amendment of the articles of association, capital increases and reductions, or liquidation of the company).

– two or more minority shareholders agree on the procedures for exercising their voting rights through binding agreements (e.g., through shareholders' agreements) or by establishing corporate vehicles to which the parent undertakings contribute their shareholdings; or

– two or more minority shareholders enjoy veto rights on adopting certain resolutions, thus making it necessary for shareholders to reach an agreement to determine the subsidiary's business strategy[28] .

Finally, cases exist in which the control of an undertaking is exercised using atypical means, – e.g., incisive contractual constraints that create forms (whether sole or joint) of economic dependency, which allow for long-lasting, decisive influence over the undertaking's business (i.e., contractual control)[29] .

5.2 NOTIFICATION THRESHOLDS (EU/ITA DIFFERENCE)

Not all concentrations are subject to the scrutiny of antitrust authorities, but only those that – exceeding certain thresholds – are assumed to affect the competitive balance of the markets concerned.

According to the national and European guidelines, the relevant thresholds are identified in relation to the turnover achieved by the undertakings concerned, these are:

- in cases of acquisition of exclusive control: the acquiring undertaking and the acquired undertaking;
- in cases of acquisition of joint control: the parent companies and the controlled company.

It should also be considered that, **where an undertaking concerned by the transaction belongs to a group**, not only the turnover of the undertaking concerned, but also that of its subsidiaries and/or parent companies will have to be taken into account for the purpose of calculating whether the notification thresholds are exceeded.

A concentration has a European Community dimension – and must therefore be notified to the Commission – when both the following two conditions are met:

– the combined aggregate worldwide turnover of all the undertakings involved in the operation is more than EUR 5 billion; and

– the aggregate European Community-wide turnover of each of at least two of the undertakings involved in the operation is more than EUR 250 million.

[28] In this case, to grant joint control, the veto rights should cover matters of strategic importance for the life of the undertaking (i.e. those already listed *in* footnote 27).
[29] For example, a branch of business leasing agreement with a sufficiently long term.

Even if the above conditions are met, however, cases in which each undertaking concerned achieves more than two-thirds of its aggregate European Union-wide turnover within the same member state are expressly excluded. Indeed, under these circumstances, the relevant national competition authority must be notified [30].

Conversely, the ICA must be notified in advance of concentrations if both of the following conditions are met:

- the total national turnover of all the undertakings involved in the operation is more than EUR 532 million; and
- the total national turnover achieved individually by at least two of the undertakings involved in the operation is more than EUR 32 million[31]

Outside these hypotheses, the ICA has the power to nonetheless require the companies involved to notify the concentration[32] . This may happen provided that:

i. either one of the above turnover thresholds is exceeded **or** the aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 billion;

ii. no more than six months have elapsed since the completion of the transaction;

iii. the Authority considers that there are concrete risks for competition in the national market or in a relevant part thereof, also taking into account the detrimental effects on the development and diffusion of small enterprises characterised by innovative strategies.

Lastly, over 130 countries aside from the European Union and Italy have adopted antitrust law to control concentrations, with differing turnover thresholds. Therefore, we recommend consulting the Competent Structure of the Group company concerned to assess whether the concentration transaction is likely to trigger notification requirements in other countries (both within and outside Europe).

5.3 POSSIBLE OUTCOMES OF THE CONCENTRATION CONTROL PROCEDURE

When a concentration is notified to the ICA or the European Commission, proceedings are started to verify whether the completion of the concentration would significantly hinder effective competition in the EU or national market or in a relevant part thereof, in particular through the creation or strengthening of a dominant position. Such proceedings may end with:

- unconditional authorisation;

[30] See Art. 1 of Reg. 139/2004. A concentration that does not meet the above thresholds is, however, deemed to have a European dimension if all of the following conditions are met simultaneously: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,5 billion; (b) in each of at least three Member States, the aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included in point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million (d) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million; (e) each of the undertakings concerned achieves more than 2/3 of its aggregate EU-wide turnover within one and the same Member State.

[31] See Article 16 of Law No. 287/90. Please note that the notification thresholds are subject to periodic changes by the Authority, so it is always advisable to check its website for the most up-to-date information (http://www.agcm.it/competenze/tutela-della-concorrenza/operazioni-di-concentrazione/soglie-di-fatturato).

[32] See Art. 16(1-bis) of the Act.

- authorisation subject to compliance with certain corrective measures to the original plan of the concentration;
- a prohibition to proceed with the implementation of the concentration.

5.4 RISKS ARISING FROM THE FAILURE TO NOTIFY

If an undertaking fails to comply with the duty of prior notification of concentrations, it will face the following risks:

– sanctions, as the Commission and the ICA may impose **fines**, the amounts of which may reach up to 10% or 1%, respectively, of the undertaking's aggregate turnover in the year preceding that in which the undertaking failed to notify the competent competition authority[33] ; and

– business, because if – at the outcome of the final assessment – the concentration was to raise critical issues and thus be prohibited, both the Commission and the ICA could order the undertakings affected by the transaction to adopt all **measures necessary to restore the situation that existed before** and, if not possible, any other measure to restore the previous situation of effective competition.

Please also bear in mind that outside of Italy, in the rest of Europe and most other countries, concentrations may be realized only after obtaining permission from the competent competition authority (i.e., standstill obligation).

5.5 FOREIGN SUBSIDIES REGULATION ('FSR')

On the 12th of October 2023, the new rules on **foreign subsidies** introduced by Regulation (EU) 2022/2560 and Implementing Regulation (EU) 2023/1441 came into force. With these rules, the European legislator aims to prevent financial contributions granted to companies active in the EU by non-EU States from distorting competition in the single market.

Under the new rules, companies active in the EU that have received financial contributions (defined very broadly by the rule) from non-EU states in the last three years are required to submit a prior notification to the Commission:

(i) in the case of a **concentration,** if at least one of the undertakings participating in the operation has a turnover in the EU of at least EUR 500 million and the undertakings participating in the operation have received, in aggregate, at least EUR 50 million in financial contributions from non-EU countries in the previous three years;

[33] The same sanctions also apply if the undertakings (i) implement a concentration in breach of the prohibition order; (ii) fail to comply with conditions imposed by conditional authorisation orders; (iii) fail to comply with the requirements to restore the *status quo ante*; (iv) implement the transaction before having received the authorisation order (only for concentrations under the Commission's jurisdiction).

(ii) companies that intend to participate in **public tenders**, where the estimated value of this contract (or framework agreement net of VAT) is EUR 250 million or more and the economic operator[34] has received third-country financial contributions of EUR 4 million or more in the previous three years.

Upon receipt of the notification, the Commission will initiate proceedings which, similarly to concentration control, may result in either an authorisation (conditional or unconditional) or a prohibition of the concentration/award of the tender.

5.6 RULES OF CONDUCT REGARDING CONCENTRATIONS AND FSR

In consideration of the above principles and to ensure compliance with antitrust law, all Group employees/managers must comply with the following rules of conduct.

In all cases in which the Group companies intend to carry out corporate transactions involving: (a) the acquisition of shareholdings in other companies, (b) the establishment of a joint venture, or (c) a merger with other companies, the Competent Structure of the Group company concerned must be informed with **adequate notice** to verify whether:

(i) the transaction constitutes a concentration from an antitrust perspective; and, if so,
(ii) the transaction is subject to mandatory notification obligations to the competent competition authorities, including those provided by the Foreign Subsidies Regulation (FSR)

In all cases where the Group companies intend to participate in public tenders, the Competent Structure of the Group company concerned must be informed with adequate notice, in order to verify whether participation is subject to the notification obligation provided by the FSR.

[34] Pursuant to Art. 28 of Regulation (EU) 2022/2560, for the calculation of financial contributions, in addition to the economic operator, the following are to be taken into account: its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender in the public procurement procedure.

PART IV: POWERS OF THE COMPETITION AUTHORITIES

6. INVESTIGATION POWERS

European and Italian competition legislations grant the Commission and the ICA respectively, broad powers to conduct investigations. In particular, the competition authorities have the power to:

- request information and documents from the undertakings concerned and third parties;
- conduct unannounced inspections;
- order expert opinions and economic and statistical analyses as well as the consultation of experts on any element relevant to the investigation;
- summon any person who may be in possession of relevant information to a hearing;
- take precautionary measures (and renew them where necessary).

6.1 INSPECTIONS AND ENQUIRIES

Competition authorities may conduct **unannounced** inspections at the premises of undertakings that are believed to be in possession of documents relevant to their investigation.

More specifically, the Commission and the ICA's officials have the power to inspect the premises, land and means of transport of undertakings or associations of undertakings, as well as premises, land and means of transport in which there is reason to believe that documents connected with the undertaking and the subject-matter of the investigation are to be found, including the homes of managers, directors and other staff members, subject to prior authorisation by the judge.

During inspections, officials may:

- ask any representative or member of staff of the undertaking or association of undertakings for explanations of facts or documents relating to the subject matter and purpose of the inspection and record the answers;

- inspect books and documents stored on any medium (e.g., memory stick, WhatsApp conversations) and extract copies;
- seal off premises, books and company documents (e.g., when the inspection lasts several days).

In conducting the inspection, the ICA and the Commission generally use the collaboration of **agents from the financial police** (*Guardia di Finanza*) who, in conducting inspections, have the same powers provided for tax police investigations. The financial police may use force to gain access to offices, rooms, wardrobes, computers, etc., if the individuals under investigation object to it.

Competition authorities also have the power to direct **requests for information** to undertakings, associations of undertakings or natural and legal persons at any time, and thus also outside of an investigation procedure. However, since requests are often used to obtain information useful to start or conduct an investigation, replies should be prepared carefully.

In the case of inspections, requests for information and invitations to hearings, the company's managers and employees must **cooperate with competition authorities officials** also in order to avoid the imposition of severe sanctions.

When the recipients of requests:

- Refuse without justification to provide the information or produce the requested documents or submit false information or documents;
- obstruct inspections; or
- do not appear when summoned to a hearing (only for proceedings before the ICA)

the following sanctions may be applied:

- in the case of proceedings brought by the Commission or the ICA, up to **1% of the** worldwide turnover of the undertaking concerned plus periodic penalty payments of up to 5% of the undertaking's average daily turnover for each day of delay in complying with the competition authority's requests;
- in the event of proceedings before the ICA, sanctions of between EUR 150 and EUR 25,823 may also be imposed on the **natural persons** involved;

An undertaking's failure to cooperate in the investigation is considered an aggravating circumstance that may lead to an increase in the penalty for competition law infringements.

The investigative powers of the Commission and the ICA are, in any event, subject to the following **limitations**:

(a) *Prohibition of self-incrimination*: The undertaking is required to provide the Commission or the ICA any information the authority considers useful to understand the matter under investigation and, thus, even documents that may serve to prove anticompetitive conduct. However, the Commission and the ICA cannot compel the alleged transgressor to admit the existence of the infringement or testify against himself/herself.

(b) *Lawyer-client correspondence*: According to European practice, the Commission cannot request to produce external legal counsel's correspondence or other documents addressed to the undertaking. Although the Law is silent on this aspect, the ICA follows the same approach. More specifically, European caselaw provides **legal privilege** (the right to professional secrecy) only to:

(i) documents or correspondence between independent legal counsel (i.e., not bound by labour relations with the company such as an in-house lawyer) and the company, concerning matters relating to the subject of the investigation opened by competition authorities; and

(ii) internal company documents that contain the content of the correspondence or documents from outside legal counsel referred to in point (i).

These documents lose this protection if they include opinions, comments or further assessment profiles other than the opinion of outside legal counsels.

In view of the above principles, particular attention must be paid:

- to specify in all correspondence with external legal counsels (including e-mails) that it is "***Confidential - Client-Lawyer Correspondence***";
- to ensure that all sensitive internal information is exchanged only orally or through external legal counsels; and
- to not comment in writing – whether in correspondence or in documents addressed internally to the company – or change the legal opinions or documents from external legal counsels concerning issues relevant for antitrust purposes.

6.2 COOPERATION WITH OTHER AUTHORITIES

The Commission, the ICA and other European Union competition authorities have regular contact, also including to exchange evidence and information concerning possible violations of European Union antitrust law.

In certain cases, the information exchanged between member states' authorities may be used as evidence also in investigation proceedings for infringement of national competition law. These exchanges have intensified following the creation of a network between all member states' competition authorities (the European Competition Network), as envisaged by Council Regulation (EC) 1/2003. This Regulation also establishes that the ICA can carry out unannounced inspections on behalf of other National Competition Authorities.

6.3 RULES OF CONDUCT DURING INSPECTIONS

If an inspection is conducted by the ICA or the Commission, the **Group companies** must, with the help of the Competent Structure:

a) ensure the head of the department under inspection and the Competent Structure of the Group company concerned are present for the entire inspection. The Competent Structure will be sure to involve any other required parties;

b) verify the subject matter and the purpose of the investigation carefully, both of which should be specified in the document that the officials are required to show at the start of the inspection (undertakings have the right to refuse inspections relating to investigations of which they have not been notified);

c) ensure that, at every stage of the inspection, the documents being examined fully correspond to the subject matter, the time period and the purpose of the inspection (e.g., the competition authority is not allowed to examine documents for product K if it is investigating possible restrictive practices relating to product Z);

d) ensure that the officials in charge are not obstructed in the performance of the inspection and that the integrity of any seals, if affixed, is not compromised;

e) allow the officials in charge access to all legitimately requested documentation, as well as to extract hard and/or digital copies;

f) ensure that, if officials request information from them, managers and employees answer truthfully and completely, to the best of their knowledge and without prejudice to the right not to make self-accusatory statements, and that, in the event of doubts about an answer, they reserve the right to provide elements/clarifications at a later date;

g) verify that the officials in charge acquire only the documents relevant to the notified investigation, paying attention also to any correspondence with external lawyers, covered by the so-called legal privilege, and that they draw up and sign minutes of the inspection, listing and identifying, with the utmost precision, all the documents they have copied.

For further support, the FS Group's internal procedures that outline the conduct that must be followed in the event of inspections and/or interactions with administrative authorities apply.

PART V: CONSEQUENCES OF VIOLATIONS OF COMPETITION LAW

7. CONSEQUENCES OF VIOLATIONS OF COMPETITION LAW

When, as a result of an investigation pursuant to Articles 101 or 102 TFEU or Articles 2 or 3 of the Law, the ICA or the Commission recognize an infringement of antitrust rules, they require the undertaking(s) concerned to refrain from the unlawful conduct. At the same time, they may apply sanctions and, if necessary, behavioural or structural measures.

Moreover, it may happen that investigative proceedings may be closed without a finding of an infringement if the undertaking(s) part of the proceedings offer commitments that are deemed suitable by the competition authorities to overcome the competition concerns that had led to the opening of the proceedings. Such commitments are then made binding by order of the competition authority and undertakings will be required to comply with them, under penalty of sanctions.

7.1 FINES

Antitrust law imposes heavy fines on undertakings responsible for breaching Arts. 101 and 102 of the TFEU or Arts. 2 or 3 of the Law.

The Commission and ICA may impose fines up to **10% of the total worldwide turnover** achieved during the previous financial year by the group to which the undertaking held liable for the infringement belongs[35]. Sanctions must be paid within the period set by the Commission or the ICA (normally 90 days).

Particular attention should be paid to circumstances in which a parent company exercises a decisive influence (under antitrust law) over the undertaking that committed the competition infringement[36]. In that case, the Commission and the ICA may hold the parent company liable for the infringement and extend

[35] Where the infringement is attributable (also) to an association of undertakings and concerns the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.
[36] The condition concerning the exercise of decisive influence is presumed in the event that the *parent company* holds 100% or nearly 100% of the share capital of another company.

the investigation to include the parent company, therefore increasing the amount of the fine.

In recent years, the level of fines imposed by the Commission and the ICA has gradually increased in line with the policy of greater severity against competition law infringements.

Fines are calculated by the Commission and the ICA taking into account the necessary deterrent effect and the following conditions:

- nature and subject matter of the infringements;
- breadth of the market concerned;
- market share of the undertakings responsible for the infringements;
- harm caused to actual or potential competitors, consumers, and end users;
- duration of the infringements; and
- repeated infringements.

7.2 COMMISSION GUIDELINES

In 2006, the Commission published **Guidelines** (entitled "Guidelines on the method of setting fines") to inform undertakings of the methodology used to calculate fines.

The Commission's methodology consists of the following two phases:

(a) Phase 1: Calculating the **base amount**, taking into account the following elements:

(i) **Seriousness**: A gap of 0%–30% of the sales value of the goods/services in question achieved by the undertaking in the geographical area concerned is applied. When the infringement is committed (also) by an association of undertakings and that infringement involves the activities of its members, the value of sales will generally correspond to the sum of the values of the sales realised by its members. For particularly serious infringements (price fixing, market sharing and limiting production), an additional increase of 15–25% of the sales value is applied to further deter undertakings from taking part in those types of infringements (i.e., entry fee).

(ii) **Duration of the infringement**: The amount so calculated is multiplied by the number of years the undertaking participated in the infringement.

(b) Phase 2: The base amount determined in Phase 1 is then increased or decreased based on the following aspects:

(i) **Aggravating circumstances**

- Role of instigator or leader in the cartel

- Repeated infringement
- Obstruction during the investigation, etc.

(ii) **Mitigating circumstances**

- Immediate attempt to put an end to the infringement or committing the infringement because of negligence
- Marginal role
- Effective collaboration (outside the leniency programme, see below)
- Anticompetitive conduct authorised or encouraged by the public authorities or by the Law

(iii) **Specific increase**

This is applied to ensure the fines act as a sufficient deterrent in cases in which the undertakings concerned have a particularly significant turnover or the profits unlawfully obtained through the infringement are particularly high.

The final calculation of fines can therefore be summarised in the following steps:

Base amount (seriousness + duration)
+ aggravating circumstances
– mitigating circumstances
(+ any specific increase)

In calculating a fine, the authorities also take into account the fact that large undertakings usually have legal and economic knowledge and infrastructures that enable them to be more aware of the illegal nature of their conduct and the consequences arising from it under antitrust law.

7.3 ICA GUIDELINES

In 2014, the ICA adopted its guidelines for calculating fines ("**Guidelines**")[37], which essentially mirror the provisions contained in the Commission Guidelines.

Additionally, the ICA introduced the possibility to obtain up to a 15% reduction of a fine by adopting and implementing an antitrust compliance programme in line with best European and national practices.[38]

[37] ICA, Order No. 25152, dated 22 October 2014, on '*Guidelines on the method of application of the criteria for quantifying administrative penalties*'.
[38] See the last *bullet point* of paragraph 23 of the Guidelines.

It is therefore very important that compliance programmes are designed and conducted to respond to the highest standards and take into account the specific needs of the undertaking adopting them. Compliance programmes are considered to meet these requirements when they envisage:

- *fully involving management* to ensure that individuals inside the undertaking understand the importance of compliance with antitrust law;
- *identifying staff members to be responsible for the programme*;
- *identifying and assessing the risks based on the area of business and the operating context*;
- *organising training activities tailored to the size of the undertaking* so as to constantly and effectively foster antitrust culture within the undertaking;
- *providing incentives for compliance with the programme and disincentives for non-compliance* (such as the application of disciplinary penalties); and
- *implementing monitoring and auditing systems* to prevent potential violations.

7.4 LENIENCY

The Commission and the ICA grant benefits (immunity from or reduction of fines) for undertakings that provide useful information to help identify and penalise price cartels and other serious anticompetitive agreements.

The conditions of these benefits are set out in specific notices (e.g., a leniency notice)[39] which state that total immunity from fines will be granted to the undertaking that first provides information or sufficient evidence to conduct an inspection or ascertain an infringement.

However, to qualify for immunity, the undertaking must: (a) guarantee the Commission (or the ICA, depending on the authority to which information is provided) that it will cooperate fully and continuously; (b) cease to participate in the infringement, without informing the other participants in the agreement; and (c) haverefrained from forcing other undertakings to participate in the agreement (condition required only by the Commission).

Fine reductions are also envisaged for undertakings that fail to comply with the requirements to obtain immunity but that provide an effective contribution to the Commission or the ICA establishing the infringement. The reduction can be up to 50% of the fine depending on when the undertaking provided the contribution that proved the infringement.

The leniency programme could establish an important element of assessment for undertakings involved in cartels. However, because the benefits of reducing fines do not extend to removing

[39] See *Commission Notice on Immunity from fines and reduction of fines in cartel cases* (OJEU 2006/C-298/11), (as amended by a subsequent Commission Notice published in OJEU 2015/C 256/01), and ICA, "*Notice on the non-imposition and reduction of fines pursuant to Article 15 of Law No. 287*" (as amended by Resolution No. 24219 of 31 January 2013, published in Bulletin No. 11 of 25 March 2013 and Resolution No. 24506 of 31 July 2013, published in Bulletin No. 35 of 9 September 2013).

the perpetrator from any pending civil actions for compensation for damage, the implications of the use of leniency are complex, especially in the case of international cartels.

Therefore, careful assessment is required – together with the Competent Structure of the Group company concerned and making use of specific skills – of whether it is advisable to apply to a leniency programme.

The ICA's Guidelines also introduced Amnesty Plus.

Under this provision, an undertaking under investigation by the ICA may benefit from a reduction of up to 50% of the fine applicable to the infringement under investigation if it provides information that is decisive to ascertain an infringement other than that under investigation.

In doing so, the undertaking concerned will be able to obtain: (a) a reduction of the fine in the ongoing proceedings, and (b) immunity from the fine for the infringement disclosed through the leniency programme.

Participation in a leniency programme does not eliminate the risks associated with the possible application of criminal sanctions, the nullity of agreements, compensation for damages and damage to the company's image.

7.5 THE SETTLEMENT PROCEDURE

The Annual Law on the Market and Competition (Law No. 118/2022) introduced the possibility of settlement in proceedings before the ICA aimed at detecting an infringement of the prohibition of anticompetitive agreements and abuse of dominant position[40] .

More specifically, during the course of the investigation the ICA may set a time limit within which the undertakings concerned may indicate in writing their willingness to participate in discussions aimed at possibly submitting propositions of settlement. In the event of a favourable outcome of such discussions, the ICA may set a time limit within which the undertakings concerned may commit to follow the settlement procedure by filing settlement submissions which reflect the results of the discussions held and in which they acknowledge their participation in an infringement pursuant to Articles 101 or 102 TFEU and/or Articles 2 or 3 of the Law.

If the settlement procedure is successfully concluded, the ICA will reduce the amount of the fine:

[40] See Article 14-quater of the Law and the Notice on the Application of Article *14-quater* of Law No. 287 of 10 October 1990 of 22 May 2023.

- by 20% in proceedings not involving a secret cartel;
- by 10% in proceedings involving a secret cartel.

A similar procedure is available in proceedings before the Commission, although it is limited to cartel proceedings only, and in the event of a successful outcome it leads to a 10% reduction in the amount of the fine.

8. CRIMINAL PENALTIES FOR DIRECTORS AND EMPLOYEES

Unlike other jurisdictions (primarily the UK and the US), neither European nor Italian antitrust law envisage criminal penalties for directors or employees of undertakings guilty of violating competition rules.

However, as mentioned (see § 2.2), if the antitrust infringement occurred when the undertaking was participating in a public tender, a risk exists of the parties involved being exposed to criminal investigations to ascertain whether the crime of collusive rigging was committed.

9. INVALIDITY OF AGREEMENTS AND COMPENSATION

Agreements (and terms) that conflict with Art. 101 of the TFEU or Art. 2 of the Law are void and thus ineffective.

Violation of these rules may also give rise to the **right to compensation for damage** (in civil courts) for customers, competitors, consumers or consumer groups harmed by the unlawful conduct, and for the contracting party of an anticompetitive agreement held not liable for the violation (e.g., the licensee of an undertaking with significant market power).

The courts of the member states – and not the Commission or the ICA – establish whether an agreement is invalid and whether (and if so, how much) compensation is due as a result of a competition rule violation. Since December 2014, actions for nullity and compensation for damage (i.e., private enforcement actions) brought in Italy fall under the jurisdiction of the **specialised divisions of the Courts of Milan, Rome and Naples**.

The Supreme Court of Cassation expressly recognised also for end users the right to file an action with the competent court seeking compensation for damage. Civil actions against

Italian undertakings may also be brought before the courts of foreign countries that potentially have jurisdiction over the specific dispute.

Directive 2014/104/EU of the European Parliament and of the Council (i.e., Private Enforcement Directive) came into force in December 2014 and was subsequently enacted in Italy with Legislative Decree No. 3/2017.

The Private Enforcement Directive introduced important changes to private enforcement rules by requiring member states to adopt legislation for which, in the case of final decisions (i.e., that can no longer be appealed or that have been confirmed by the administrative courts) issued by competition authorities ("**Final Decision**"), the court must:

- consider the contested infringements definitively ascertained;
- assume the existence of a causal link between the breach and the damage but leave the perpetrators of the infringement the full right to rebut that assumption; and
- verify that the perpetrator can quantify the damage suffered.

However, if quantification is impossible or excessively difficult, the court may quantify the damage based on estimates.

In Italy, Legislative Decree No. 3/2017 envisaged that if a Final Decision is issued whereby a violation of antitrust law is established, the court must:

(a) consider the infringement definitively ascertained regarding the nature of the breach and its material, personal, temporal and territorial scope. On the contrary, the decision of another member state's competition authority has only an attenuated evidentiary value, as the national court may assess it together with the other evidence;

(b) presume – in the case of agreements between competitors (i.e., a cartel) – the existence of damage unless otherwise proven by the perpetrator of the infringement; and

(c) verify – in the case of agreements other than those mentioned in point (b) – that the perpetrator can prove the damage and the causal link.

10. DAMAGE TO THE UNDERTAKING'S IMAGE

In recent years, the perception of the seriousness of infringing competition rules has increased and, accordingly, so too has the negative impact on the image and reputation of undertakings both nationally and internationally.

Decisions establishing infringements are widely covered in the media. The Commission and the ICA publish the full text of decisions on their websites and publicise proceedings in press releases and annual reports.