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The Italian Competition Authority imposes FRAND licensing to a local newspaper in a paradigm for the essential facility doctrine applied to copyrights *(Società Iniziative Editoriali)*

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On 20 December 2017, the Italian Competition Authority (or "**ICA**") issued a rare infringement decision in an abuse of dominance investigation against the publisher of a local daily newspaper ("**SIE**"), which refused to deal with a player (the "**complainant**" or "**Euregio**") in the downstream local market for daily media intelligence services.

SIE publishes *L'Adige*, a daily newspaper distributed almost entirely in the Province of Trento and Bolzano (or "**PTB**"), in the North-eastern Italian region of Alto Adige. PTB distinguishes from other provinces of Alto Adige for that its inhabitants speak primary Italian, whilst the remainders mostly speak German.

The investigation has found that L'Adige is dominant in the PTB because it makes 65% of the overall sales of daily newspaper in the area; and the second most read daily newspaper (*L'Alto Adige/Trentino*) in that area holds a 22.3% market share.

Euregio is a local player in the downstream market for daily media intelligence services. Media intelligence services consist in providing undertakings or other organizations with a customized press review of selected news or other sorts of printed or digital publications. Providers of these services operate either at national and local level, some of which (like Euregio) at local level only.

Euregio complained with the ICA that SIE abused its dominant position by refusing to negotiate a license to reproduce the content of L'Adige for media intelligence purposes. Such refusal occurred after L'Adige exited from a collective license scheme (namely, "**Rapporto Promopress**") with the Italian Federation of Newspaper Publishers (FIGC), under which Euregio was previously able to reproduce the content of L'Adige under standard conditions.

Further, the SIE's General Manager wrote a letter to Euregio's customers to warn them that, as of expiration of the agreement with Rapporto Promopress, the Intellectual Property (IP) of L'Adige would have been managed directly by the publisher on exclusive basis. Subsequently, SIE also visited Euregio's customers to introduce its own media intelligence service. As a result, the customers requested explanation to Euregio and threatened to terminate business with the latter if it were not able to guarantee its ability to legally provide L'Adige's content.

SIE justified the refusal to deal with Euregio with the decision to assign the IP in question to another trusted partner ("**Volocom**"). Also, SIE argued that the assignment to Volocom had a "defensive" nature since the Promopress scheme did not ensure an adequate protection from illicit use of its IP. In addition, it argued that the revenue-sharing agreement with Volocom occurred in the context of a settlement for past copyright infringements by the latter, which justified the exclusive nature of the agreement.

The ICA rejected that this constituted a legitimate "objective justification" for refusing to deal with Euregio. The ICA found that, since L'Adige is dominant in the local newspaper market, the ability to access and reproduce its content represents an "essential input" for local media intelligence services, as it is irreplaceable to satisfy the local customers' requirements. Indeed, the investigation has revealed that local customers would either refrain to buy or terminate any such service that does not include press review of L'Adige.

To remove the ICA's concerns, SIE also proposed to terminate the agreement with Volocom and to exit from the media intelligence market, arguing that by doing so no discrimination would have been possible against Euregio. The ICA rejected the commitment proposal, arguing that such measures could not justify a refusal to license L'Adige content at FRAND conditions since they would cause total eradication of a comprehensive media intelligence product in the PTB, with a net reduction of consumer welfare .

The ICA therefore relied on the "essential facility doctrine", as developed by the CGEU's case law, to assess that the refusal to license constituted a domestic abuse of dominance under Article 3 of Law 287/90. More specifically, the ICA found that the four-prong test set out in that case law was satisfied here since the refusal to deal:

- refers to a product which is objectively indispensable to compete effectively;
- precludes the realization of a new product for which there is a demand;
- precludes any form of actual or potential competition on the downstream market for that product; and
- it is not objectively justified. SIE contested, among others, that the license was not essential to provide "a new product", as the one offered by Euregio has no such characteristics. Again, the ICA objected that the input in question was indispensable to provide comprehensive media intelligence services, which include the whole set – printed or digital – of news sources with regard to content required by customers. Moreover, Euregio was trying to offer such comprehensive service in an innovative fashion.

Relying particularly on the *Magill* case, the ICA argued that (i) such a comprehensive product is different from the provision of separate press or digital reviews from distinct suppliers each holding IP rights for a single source of content; (ii) the fact that Euregio was providing this product before SIE's termination of its participation with Rapporto Promoress proves that a demand does exist for such product; and (iii) the refusal to license precluded Euregio to continue supplying the product, thus removing actual competition, which is even more harmful than precluding mere potential competition as was the case in *Magill*.

Hence, at the conclusion of the investigation the ICA imposed SIE a permanent FRAND licensing obligation towards any player in the media intelligence market that so requests. However, the ICA imposed a symbolic fine to SIE (€ 1,084) as it immediately reacted to cease the infringement and the overall value of the local market was reportedly below € 1 million.

Notably, at the outset of the proceedings the ICA also issued an interim urgent order requiring SIE to license access to the newspaper's content to Euregio at FRAND terms within 15 days from the order. The urgency of the measure was justified by the likelihood that complainant would have suffered an irreparable harm for being precluded to participate to important tenders for the purchase of local media intelligence services in the PTB; and by that existing customers threatened to terminate agreement with the complainant if it were not able to guarantee lawful reproduction of L'Adige's content.

Since Euregio refused to accept a license based on the revenue-sharing model, and the parties did not reach an agreement on what alternative licensing terms might be deemed FRAND within the prescribed timescale, the ICA decided to use the standard conditions under the Rapporto Promopress as reference FRAND terms and issued a supplementary interim order imposing SIE to immediately grant a license to Euregio under such terms.

The case stands as a rare instance where the ICA has applied the essential facility doctrine in connection with IP rights and has determined what licensing terms could be deemed FRAND.

It emerges that the ICA is unlikely to deem revenue-sharing to be a FRAND remuneration model. Further, it emerges that if certain standard terms are largely diffused within the industry, or are endorsed by most representative right-holders' associations, the ICA will probably take them as reference terms for FRAND licensing, at least provisionally for situations which require to be addressed urgently.

This case also teaches that the ICA does not shy away from imposing FRAND remedies as an urgent and interim measure, if third parties submit evidence of an imminent, irreparable harm – an attitude that has not been seen with the European Commission so far.