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Italian Competition Law Newsletter

Highlights

- The Council of State sets aside the TAR Lazio judgment that had annulled a 2019 ICA decision to fine Trenitalia, Ferrovie dello Stato and Rete Ferroviaria Italiana for abusing their dominant position in the markets for rail infrastructure management and regional passenger transportation services in Veneto.
- The TAR Lazio dismisses Ryanair's application for annulment of the ICA's request to the Irish Competition Authority ("**CCPC**") of assistance in connection with an inspection conducted at Ryanair's premises in Dublin.

The Council of State sets aside the TAR Lazio judgment that had annulled a 2019 ICA decision to fine Trenitalia, Ferrovie dello Stato and Rete Ferroviaria Italiana for abusing their dominant position in the markets for rail infrastructure management and regional passenger transportation services in Veneto

On April 9, 2025,¹ the Council of State set aside the judgment of the Regional Administrative Court of Lazio ("**TAR Lazio**") that had annulled the decision of the Italian Competition Authority ("**ICA**") finding that Ferrovie dello Stato Italiane

S.p.A. ("**FS**"), Rete Ferroviaria Italiana S.p.A. ("**RFI**") and Trenitalia S.p.A. ("**Trenitalia**") (jointly, the "**Parties**") had allegedly violated Article 102 TFEU.²

¹ Council of State, Judgment No. 3058 of April 9, 2025.

² TAR Lazio, Judgment No. 13627 of September 6, 2023, discussed in the September 2023 issue of this newsletter: <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-sept-2023.pdf>.

Background

The Parties

FS is the holding company of the FS Group and controls both RFI, which operates the Italian rail network in a monopoly regime, and Trenitalia, which is the main provider of public rail transport services in Italy.

The tender for the provision of regional railway services

On February 26, 2014, the Veneto Region launched an invitation to tender for the provision of regional railway services. On January 11, 2018, after withdrawing the invitation, the Veneto Region directly entrusted Trenitalia with the provision of these services for 15 years (*i.e.*, until 2032).

Following the direct award, on March 14, 2018, Arriva Italia Rail S.r.l. (“**Arriva**”) filed a complaint with the ICA alleging that the Veneto Region had entrusted Trenitalia with the provision of railway services only because, in exchange, RFI had promised to invest in infrastructure modernization in Veneto.

On May 3, 2018, the ICA opened proceedings to investigate the contested conduct.

The ICA Decision

On July 31, 2019, the ICA issued a decision imposing fines on the Parties for having implemented a single and complex anti-competitive strategy, aimed at using RFI’s legal monopoly in the market for the management, maintenance and development of the rail network to induce the Veneto Region to grant Trenitalia exclusive rights for the provision of regional railway services until 2032, without a public tender (the “**Decision**”).³

The ICA found that the alleged anticompetitive conduct concerned two relevant markets: (i) the upstream market for the management, maintenance and development of the rail network, which is national in scope; and (ii) the downstream market for the provision of public regional rail passenger transport services, which is regional in scope.

According to the ICA, the FS Group was dominant in both markets, as: (i) RFI was the sole operator of the national rail network; and (ii) Trenitalia was the main provider of public rail transport services in Veneto.

According to the ICA, the Parties used their dominant position to avoid a competitive tender for the provision of regional railway services in the Veneto Region.

In particular, according to the ICA, in March 2016 the holding company FS held a meeting in which RFI and Trenitalia’s representatives discussed with the Veneto Region matters falling within their respective competence. In this context, RFI and Trenitalia allegedly carried out a joint analysis to decide whether to invest in the electrification of a portion of the railway network in Veneto.

According to the ICA, RFI represented that it would not make this investment in the absence of a direct assignment of regional railway services to Trenitalia, as the investment was not economically viable. Moreover, the ICA held that Trenitalia had exploited confidential information related to such investment in negotiating its commercial offer with the Veneto Region. In the ICA’s view, the behavior of RFI and Trenitalia led the Veneto Region to set aside the competitive tender and to directly entrust Trenitalia with the provision of the regional rail services.

In light of the above, the ICA considered that the FS Group had abused its dominant position. However, the ICA imposed a symbolic fine of only € 1,000 on the Parties, taking into account

³ ICA Decision No. 27878 of July 31, 2019, Case A519, *Affidamento diretto del servizio di trasporto pubblico ferroviario nel Veneto* (as discussed in the Italian Competition Law newsletter of August 2019, available at this link: <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-august-2019.pdf> and the Cleary Antitrust Watch of July 31, 2019, available at this link: <https://www.clearyantitrustwatch.com/2019/07/ica-issues-symbolic-fine-in-railway-operator-abuse-case/>).

that the contested conduct would ultimately lead to improvements and innovations in the railway infrastructure.

The Parties challenged the ICA decision before the TAR Lazio⁴ on the grounds that:

- i. the electrification of the railway lines and the award of the regional railway services were never linked during the meeting held in March 2016; moreover, the negotiations between the Veneto Region and Trenitalia concerning the modernization of the railway infrastructure begun years before that meeting;
- ii. due to their content, the interactions between RFI and Trenitalia were not such as to infringe Article 11 of Legislative Decree No. 12/2015, pursuant to which, in case of vertically integrated companies, the company managing the railway infrastructure should keep any commercial information,⁵ or any information relating to its essential functions,⁶ strictly confidential from other entities of the group;
- iii. the ICA failed to take into account that in all the regions (except one) where Arriva had expressed an interest in participating in the tender for the award of regional railway services, it subsequently either did not take part in the tender or merely expressed its interest in participating, without submitting a bid;
- iv. the Decision erroneously qualified the infringement as a “*serious breach of the rules protecting competition*”, as shown by the fact that the ICA itself considered it appropriate to impose only a symbolic fine of € 1,000.⁷

The TAR Lazio upheld the appeal and annulled the Decision, finding that the ICA had failed to prove the existence of abusive conduct in several respects.

First, the administrative court acknowledged that there was no evidence of any connection between RFI’s investment on the infrastructure and the award of the regional railway services to Trenitalia. In particular, no evidence could be inferred from the simultaneous presence of both institutional representatives of the Veneto Region and the Parties’ top management at the meeting held in March 2016. Similarly, no evidence could be inferred from the Veneto Region’s press releases on the event, which instead seemed to show that it was the Region that intended to make the direct award of regional railway services conditional on rail infrastructure innovation.

Secondly, the TAR Lazio considered that the exchange of information between RFI and Trenitalia was not per se indicative of an abusive practice. On the contrary, the information exchanged was neutral from an antitrust perspective and could have been requested from RFI by any other operator competing with Trenitalia. Moreover, based on the content of such information exchange, it appeared to be legitimate pursuant to Article 11 of Legislative Decree No. 112/2015.

Thirdly, the TAR Lazio found that the Decision did not sufficiently assess whether the conduct had the effect of excluding competitors from the market. The Decision did not take into account the market conditions at the time of the events and, in particular, the fact that Arriva did not engage in any activities, other than a mere expression of interest, in relation to the tenders’ award. Thus, according to the TAR Lazio, there was not sufficient evidence that the Parties’ conduct was capable of distorting competition.

Finally, the TAR Lazio also found it contradictory that the ICA had qualified the conduct as a serious infringement while imposing a merely symbolic fine.

⁴ Trenitalia (appeal No. 13291/2019), FS (appeal No. 13434/2019) and RFI (appeal No. 13880/2019) filed three separate appeals against the Decision, which were jointly decided by the TAR Lazio.

⁵ Such as information related to purchases of infrastructure capacity by other railway companies or the characteristics of their services.

⁶ Such as information related to track allocation and fees for the use of infrastructure.

⁷ Decision, §230.

The appeal before the Council of State

On April 9, 2025, the Council of State overturned the TAR Lazio judgment and upheld the ICA Decision.

First, the Court's assessment of the regulatory framework confirmed that EU law allows the direct award of rail transport services under certain conditions pursuant to Article 5 of Regulation No. 1370/2007.⁸ However, the Court added that, in this case, the abusive conduct of the FS Group's entities stemmed from the exercise of their significant market power and the use of their vertical integration to influence the Region's decision, thereby distorting competition.

Secondly, the Council of State noted that the joint presence of Veneto Region officials and the Parties' top management at the March 2016 meeting was not, by itself, proof of anticompetitive conduct. However, it had to be assessed together with other elements of fact, such as evidence that the Parties had already begun discussing the electrification as a joint initiative before that meeting.

In this context, the Council of State found that, even if the exchanges between RFI and Trenitalia did not infringe Article 11 of Legislative Decree No. 12/2015, the exchange of information was inextricably linked to the Parties' anticompetitive strategy.

Thirdly, the Court ruled that the Parties' claim that their conduct produced no concrete effects was not enough to rule out a breach of Article 102 TFEU. To avoid liability, the Parties should have shown that the conduct at issue was unable to produce exclusionary effects to the detriment of potential third-party entrants under any circumstances. According to the Court, however, the implementation of the Parties' strategy did result in foreclosure of the market until 2032 by preventing Arriva and other potential operators from participating in a competitive bid for the provision of services to the Veneto Region.

Finally, the Council of State held that the symbolic fine of €1,000 imposed by the ICA on the Parties was justified. Despite their anticompetitive conduct, the infrastructure investment ultimately improved service quality for consumers. The Court commented that the seriousness of the conduct and the fine are separate issues and that a low fine does not mean the infringement was not serious.

⁸ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1-13.

The TAR Lazio dismisses Ryanair's application for annulment of the ICA's request to the Irish Competition Authority ("CCPC") for assistance in connection with an inspection conducted at Ryanair's premises in Dublin

On May 2, 2025,⁹ the TAR Lazio dismissed the application filed by Ryanair DAC and Ryanair Holding Plc. ("**Ryanair**") for annulment of the request for assistance that the ICA sent to the Irish Competition and Consumer Protection Commission ("**CCPC**") under Article 22(1) of Regulation 1/2003¹⁰ (the "**Request for Assistance**"), concerning an inspection to be carried out at Ryanair's premises in Dublin, as part of the ICA's investigation into an alleged abuse by Ryanair of its dominant position in the markets for passenger air transport services on individual domestic and European routes connecting points of origin or destination located in Italy ("**Case A568**").

The Request for Assistance

On September 29, 2023, the ICA notified Ryanair DAC of the opening of Case A568,¹¹ which was later extended to include Ryanair Plc. as an additional party.¹²

At the meeting of January 16, 2024 the ICA Board decided to request assistance from the CCPC to conduct an inspection in Ireland, without providing any reasons for such decision in the minutes of that meeting. Also, the ICA's Board failed to adopt a formal decision authorizing the inspection, as required under Article 10(1) of

Presidential Decree No. 217/1998.¹³ The Request for Assistance was sent to the CCPC on February 8, 2024.

On March 8, 2024, the CCPC – acting on behalf of the ICA and in accordance with Irish procedural rules – carried out an unannounced inspection at Ryanair's premises in Dublin. Under the Irish procedural rules, the inspection was conducted pursuant to a search warrant previously issued by the Dublin Metropolitan District Court. The Court's warrant was based on information provided by the CCPC, which was deemed to establish reasonable grounds to suspect that evidence of a competition law infringement could be found at Ryanair's offices.

After gaining access to the ICA's case file some weeks after the dawn raid, Ryanair requested full access to the Request for Assistance and to the ICA Board's formal decision authorizing the inspection. The ICA did not respond to this request and informed the company that no prior authorization had been issued. It gave Ryanair access to a redacted version of the Request for assistance, refusing to disclose the Template attached, which according to the ICA set out the justification for the Dublin dawn raid (the "**Template**").

⁹ TAR Lazio, Judgment No. 8507 of May 2, 2025.

¹⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

¹¹ ICA, Decision No. 30772 of September 14, 2023, Case A568, *Agenzie di viaggio/Prenotazioni voli Ryanair*. According to the said decision, the ICA suspected that Ryanair prevented online travel agencies from purchasing and reselling its airline tickets directly from the Ryanair website, and allowed only traditional 'brick and mortar' agencies to purchase its tickets through GDS (Global Distribution System) platforms at conditions that were far worse in terms of price, breadth of the offer and after-sales support.

¹² ICA, Decision No. 31027 of January 16, 2024, Case A568, *Agenzie di viaggio/Prenotazioni voli Ryanair*.

¹³ Presidential Decree of April 30, 1998, No. 217, laying down the ICA's rules on investigation procedures.

On May 20, 2024, Ryanair filed with the TAR Lazio an application for annulment of the Request for Assistance on the following grounds:

- i. the Request for Assistance had not been preceded by a formal ICA's Board resolution authorizing the inspection, in breach of Article 10(1) of Presidential Decree No. 217/1998, which makes no distinction between inspections to be carried out in Italy or in another Member State; and
- ii. a serious breach of Ryanair's fundamental rights of defense, due to the absence of any statement of reasons justifying the necessity and proportionality of the inspection, carried out almost six months after the ICA started the investigation.¹⁴

The interim measures proceedings

On May 22, 2024,¹⁵ the President of the TAR Lazio granted Ryanair's interim measures request, ordering the ICA not to use the acquired documentation and not to allow third-party access to it pending the TAR Lazio proceedings.

On June 13, 2024,¹⁶ the TAR Lazio confirmed the President's decision and ordered the ICA to file the Request for Assistance, including the Template.

On June 27, 2024,¹⁷ following the ICA's request to file the Template in hard copy with restricted access exclusively for the Court, the TAR Lazio decided to maintain the interim measure and ordered the ICA to lodge the Template by telematic means, making it also accessible to Ryanair (the "**Evidentiary Order**").¹⁸

On October 10, 2024,¹⁹ the TAR Lazio confirmed the interim measure prohibiting the ICA, pending the outcome of the proceedings, from using or allowing third-party access to the documents obtained during the inspection. The Court did not rule on the filing of the Template.

However, on November 29, 2024,²⁰ the Council of State upheld the appeal brought by the ICA against the TAR Lazio interim measure order of October 10, 2024. By annulling the interim order of the TAR Lazio, the Court allowed the ICA to use the documents obtained during the inspection.

Court's analysis started from the premise that the ICA Board was not required to adopt a formal resolution authorizing an inspection abroad, unlike in the case of inspections conducted within the Italian territory.

The Court agreed with the ICA's argument that a request for assistance from one national competition authority ("**NCA**") to another does not, in itself, affect the legal position of the inspected company, which is only impacted by the subsequent actions of the assisting NCA. Therefore, the assessment of the necessity and proportionality of the inspection has to be carried out by the requested authority (in this case, the CCPC, in its application to the District Court) and is subject to judicial review by the courts of the Member State from the requested authority (that is, the Irish courts under Irish law). The Council of State, however, added that the requested NCA's assessment must be conducted "*on the basis of the indications contained in the requesting NCA's request for assistance*".

¹⁴ Until then Ryanair had replied to three requests for information and documentation of the ICA. Moreover, by two judgments delivered on February 12, 2024, in civil proceedings brought against Ryanair by two OTAs, the Milan Court of Appeal had found that the air carrier's decision to reserve the sale of airline tickets for itself does not constitute an abuse of a dominant position within the meaning of Art. 102 TFEU. Ryanair also filed a second application to the TAR Lazio, requesting access to the Template, as well as an application for annulment of the search warrant before the Irish High Court, arguing that the said document had been issued based on insufficient evidence provided by the CCPC.

¹⁵ TAR Lazio, Presidential Decree No. 2067 of May 22, 2024.

¹⁶ TAR Lazio, Order No. 2477 of June 13, 2024.

¹⁷ TAR Lazio, Presidential Decree No. 2838 of June 27, 2024.

¹⁸ The Court considered that the Template could not be excluded from "*evidentiary acquisition in the proceedings, as it contains part of the statement of reasons ... of the contested Request for Assistance*", but ordered that the version of the Template to be disclosed to Ryanair be "*appropriately redacted in order to avoid any harm to the investigative activity and the disclosure of confidential data*".

¹⁹ TAR Lazio, Order No. 4540 of October 10, 2024.

²⁰ Council of State, Order No. 4535 of November 29, 2024.

The TAR Lazio judgment

On May 2, 2025, the TAR Lazio aligned with the Council of State's position and dismissed Ryanair's application, holding that the Request for Assistance did not require the prior authorization of the ICA's Board under Article 10(1) of Presidential Decree No. 217/1998.

In any case, the TAR Lazio noted that the ICA's Board had expressly authorized the decision to send the Request for Assistance, making it possible for the inspection activities to continue under the responsibility of the CCPC, in accordance with Irish law, on the

basis of the search warrant issued by the Dublin Metropolitan District Court at the request of the CCPC.

As a result, the Court concluded that any potential harm to Ryanair could only be caused by the actions of the CCPC as this was the foreign authority providing assistance to the requesting authority.

Accordingly, also the merit of the legal basis for the inspection must be assessed by the courts of the Member State of the requested authority, which apply their own domestic rules – in this case, the Irish courts under Irish law.

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