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Italian Competition Law Newsletter

Highlights

- ICA opens Phase II investigation into Intesa/UBI planned concentration
- TAR Lazio confirms ICA's decision concerning two helicopter service cartels

The ICA opens phase II investigation into Intesa San Paolo/UBI merger

On May 11, 2020, the Italian Competition Authority (the “**ICA**”) adopted a decision to open an in-depth (“Phase II”) investigation into the proposed concentration between Intesa SanPaolo S.p.A. (“**ISP**”) and UBI Banca - Unione di Banche Italiane S.p.A. (“**UBI**”; the “**Decision**”).¹

The notified concentration

On February 17, 2020, ISP announced a voluntary public exchange offer for the entire share capital of UBI by offering to pay 17 of ISP's newly-issued shares for every 10 UBI shares tendered. With the offer, ISP aimed to delist UBI and subsequently merge with it.

On the same date, ISP entered into two separate agreements, respectively: (i) with BPER Banca S.p.A. (“**BPER**”) pursuant to which BPER would purchase from ISP a going concern comprising, among other things, “*approximately between 400 and 500*” bank branches previously owned by UBI (the “**Going Concern**”); and (ii) with UnipolSai

Assicurazioni S.p.A. (“**Unipol**”) pursuant to which Unipol would purchase from ISP certain assets relating to the insurance sector previously owned by UBI.

On February 17, 2020, ISP also notified the concentration to the ICA. ISP stressed that the agreement with BPER was binding and that it would be carried out “*within a short period of time.*” As a result, ISP would not acquire control over the Going Concern on a long-term basis.

The ICA's decision to open a Phase II investigation

The ICA took the view that it had to assess the concentration as if ISP intended to purchase the whole of UBI. In particular, the Going Concern could not be excluded from the proposed concentration since, at the moment of the notification, “*there [were] still significant uncertainties as to the exact definition of the perimeter of the assets being sold,*” with specific

¹ ICA Decision No. 28328, Case C12287 – *Intesa SanPaolo/UBI Banca - Unione di Banche Italiane*.

regard to the exact number and location of the bank branches to be transferred to BPER.

As to the theory of harm outlined in the Decision, the ICA expressed its concerns at a “*general level*”, noting that in Italy there are two main banking groups: ISP and UniCredit S.p.A. (“**UniCredit**”). UBI is a smaller group which, according to the ICA, nonetheless has the potential to become in the near future a “*pooling hub*” for smaller banks, creating a third group that could compete with ISP and UniCredit. For this reason, the ICA held that the proposed concentration could strengthen ISP by “*disrupting the symmetry between ISP and Unicredit.*”

With respect to specific relevant markets, according to the ICA, the proposed concentration could create or strengthen a dominant position in the markets for consumer deposit and loans to both small and medium sized households and enterprises, as well as in the markets for asset

management and investment funds, due to their regional dimension and the lack of competitors. On the other hand, in the ICA’s view, the presence of several qualified competitors would sufficiently mitigate the concentration effects of the proposed merger in the market for consumer credit, factoring, leasing and payment services. With regard to the insurance markets, the ICA stated that UBI’s role had to be further investigated.

The Statement of Objections and the hearing of the parties

According to public sources, the ICA issued a Statement of Objections in which it allegedly stated that the proposed concentration “*would significantly undermine competition in certain regions, including the industrialised north-east and parts of the south such as Calabria and Abruzzo.*”² On June 18, 2020, the final hearing of the parties before the ICA Board took place and a final decision on the matter is expected shortly.

The TAR Lazio upholds ICA decision concerning the helicopter service cartels.

On May 18, 2020,³ the TAR Lazio rejected the applications for annulment of the ICA decision of February 13, 2019, brought by Airgreen S.r.l., Star Work Sky S.a.s., Elitellina S.r.l., Elifriulia S.r.l., Babcock Mission Critical Services Italia Sau, Heliwest S.r.l., Eliossola S.r.l. and the Italian Helicopter Association. By the said decision, the applicants were fined in a total amount of approx. €67,000,000 for anticompetitive conduct infringing Article 101 TFEU with regard to the award of contracts for forest fire-fighting activities.⁴

The TAR Lazio, however, upheld the application filed by Air Corporate S.r.l. and annulled the Decision in its regard.⁵

The ICA decision

The ICA established the existence and operation of two separate cartels. First, Airgreen, Elifriulia, Eliossola, Elitellina, Heliwest and Star Work Sky were found liable of market-sharing conduct in the context of tenders for helicopter forest fire-fighting services, by rigging bids in the tenders organized between 2005 and 2018 at the regional level by the *Dipartimento della Protezione Civile* (Civil Protection Department), *i.e.* the national body in Italy that deals with the prediction, prevention and management of emergency events in Italy. The cartel members agreed not to offer significant rebates (which in many cases were lower than 1%). As a result, contracting authorities ended up paying higher prices for the relevant services.

² S. Sciorilli Borrelli, *Italy’s antitrust regulator warns Intesa over UBI takeover* (Financial Times, June 9, 2020).

³ TAR Lazio Judgments Nos. 5261, 5263, 5265, 5266, 5264, 5267, 5272 and 5274/20.

⁴ ICA Decision No. 27563, Case 1806 – *Affidamento appalti per attività antincendio boschivo*.

⁵ TAR Lazio Judgment No. 5275 of May 18, 2020.

Secondly, Airgreen, Babcock Mission Critical Services Italia S.p.A. (jointly with its parent company Babcock Mission Critical Services International S.A.), Elifriulia, Eliossola, Elitellina, Heliwest, Star Work Sky and Air Corporate entered into a price-fixing agreement within the Italian Helicopter Association, of which they were all members. The said companies agreed on a price list for aerial work services and passenger transport, divided by type of helicopter. In particular, the price list aimed to influence contracting authorities with regard to the setting of prices for helicopter services in their invitations to tender, as well as to provide indications to commercial customers. The ICA found that the cartel operated since 2001 through until August 2017.

The TAR Lazio judgments

The TAR Lazio upheld most of the ICA's assessment. It took the view that the ICA correctly defined the relevant product market as national in geographic scope. With respect to the first agreement, even though the tenders were organized at the regional level, the ICA showed that companies participated in tenders even far away from their place of establishment. With respect to the second cartel, the TAR Lazio concluded that the price-fixing agreement applied uniformly to several services offered throughout the whole country.

The TAR Lazio, moreover, took the view that the ICA provided sufficient evidence of the wrongful conduct, in particular, e-mail communications between the cartel members. In addition, the ICA analyzed their bidding behavior in several tenders and found a "chessboard pattern", for which the applicants failed to provide persuasive explanations other than their plan to distort competition.

The TAR Lazio clarified that the price-fixing cartel did not overlap with the bid rigging one. Not only were the parties different, but also the two agreements pursued different goals. Moreover, the price-fixing cartel was found to have anticompetitive effects even on tenders for helicopter rescue services, with regard to which the ICA did not find any bid rigging conduct. The TAR Lazio upheld the ICA's demonstration that the price fixing scheme achieved its objective in both the Sardinia and Liguria Regions. Indeed, the contracting authorities of both Regions referred to the tariffs set by the Italian Helicopter Association as benchmarks to determine the budget for their procurement procedures concerning fire-fighting and helicopter rescue services.

As a consequence, the TAR Lazio upheld the ICA decision and ordered the applicants to pay costs.

As to the annulment of the decision with respect to Air Corporate, a company active mainly in the market for the provision of helicopter transport services to private clients, the TAR Lazio held that the ICA failed to indicate the harm to competition caused by the applicant's conduct. In its assessment the ICA focused on the harm to competition on the markets for the provision of fire-fighting services. Although it also referred in passing to "*passenger transport services*", the ICA decision failed to explain whether the price-fixing agreement (the only anticompetitive conduct of which Air Corporate was accused) concerned also the provision of transport services to private clients, or whether the market for transport of private clients was to be considered distinct from the market for "*passenger transport services*" in which the other cartelists operated.

Other Developments

The ICA opens investigation into Italgas for alleged abuse of dominance

On May 27, 2020, the ICA opened an investigation pursuant to Article 102 TFEU into the conduct of Italgas Reti S.p.A. (“**Italgas**”), a fully-owned subsidiary of Italgas S.p.A.⁶ The supply of gas distribution services in Italy is organized by areas comprising small groups of municipalities, called ‘minimum territorial areas’ (“**ATEM**”s).⁷ In the ICA’s view, Italgas abused the dominant position it holds in the Venice ATEM market, comprising eight municipalities, in which it is currently the exclusive licensee of the gas distribution services in four municipalities (including Venice).

The Municipality of Venice reported to the ICA that, since July 2019, Italgas refused to provide updated and detailed information regarding

certain steel pipes of the gas distribution network that were built before the liberalization of the distribution services and that belong to the Municipality itself. According to the complaint, this information is crucial in order to enable the Municipality of Venice, as the contracting authority for the whole ATEM, to draw up the tender documents for the award of the distribution license in the upcoming years.

In its preliminary assessment, the ICA considered that Italgas may have abused its market power by delaying the launch of a competitive tender aimed at selecting the licensee of the gas distribution services in the ATEM. Such delay allows Italgas to continue to operate the service in the municipality of Venice and in the other municipalities included in the Venice ATEM. The ICA should complete its investigation by May 31, 2021.

⁶ ICA’s Decision of May 27, 2020, No.28249, Case A540 – *Condotta abusive Italgas/ATEM Venezia 1*.

⁷ In Italian, *Ambiti Territoriali Minimi*.

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