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Italian Competition Law Newsletter

Highlights

— The Council of State annuls ICA decision that fined Enel for alleged abuse of dominant position.

— The Council of State upholds ICA decision not to impose interim measures against TIM for alleged abuse of dominant position.

The Council of State annuls ICA decision that fined Enel for alleged abuse of dominant position

On December 1, 2022, the Council of State ruled on an appeal brought by Enel S.p.A. ("Enel"), Servizio Elettrico Nazionale S.p.A. ("SEN"), and Enel Energia S.p.A. ("EE", and jointly the "Parties") against a judgment of the Regional Administrative Tribunal for Lazio (the "TAR Lazio"). The TAR Lazio ruling had partially upheld the decision by which the Italian Competition Authority (the "ICA") imposed a fine of approximately €93 million on the Parties.[1]

Background

The ICA Decision

On December 20, 2018, the ICA found that Enel (which was considered to form a single economic unit together with SEN and EE) had infringed Article 102 TFEU by carrying out an abusive strategy exploiting its position as a company active in both the enhanced protection service ("EPS") and the retail supply of electricity at market prices.[2]

The EPS is a regulatory regime, concerning the provision of electricity to household customers and small businesses that do not opt for offers at market prices. Under the EPS regime, electricity is supplied at a tariff set by the sector regulator. In Italy, the EPS was initially scheduled to end in July 2019, following full liberalization of the electricity market, but this time limit was extended several times.

Enel provides the EPS through its subsidiary SEN, and carries out the retail supply of electricity at market prices through its subsidiary EE.

According to the ICA, SEN collected from its EPS customers the privacy consent to be contacted for commercial purposes. In particular, SEN allowed customers to grant two types of consent, i.e., either exclusively to companies that were part of the Enel group, or also to third parties (which could purchase the lists of contact details from SEN). The ICA took the view that the lists

[1] Council of State, Judgment No. 10571 of December 1, 2022.

[2] ICA Decision of December 20, 2018, No. 27494, Case A511, Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica.

of customers – that were sold to EE in order to formulate targeted offers in the deregulated segment of the market – were strategic and impossible to replicate by competitors.

According to the ICA, this discriminatory practice was aimed at inducing SEN's EPS customers to switch to EE's offers in the deregulated market, so as to avoid losing those customers to competitors following the full liberalization of the market

The ICA imposed a fine of over €93 million on the Parties, jointly and severally.

The proceedings before the TAR Lazio

The Parties applied for annulment of the ICA decision before the TAR Lazio. On October 17, 2019, the Court only partially granted their application[3], annulling the ICA decision with regard to the duration of the alleged abuse. In compliance with the Court's order, the ICA redetermined the amount of the fine as €27.5 million.

The appeal before the Council of State and the preliminary reference to the Court of Justice

The Parties appealed against the TAR Lazio judgment, claiming, inter alia, that: (i) SEN offered its lists of customers also to third parties, on the same conditions as they were offered to EE; (ii) those lists did not contain a significant number of clients; (iii) similar client lists were available on the market; and (iv) the alleged conduct did not have any significant effects, as it only led to the acquisition by EE of a negligible number of clients (0.001% of potential clients).

On July 20, 2020, the Council of State referred the case to the Court of Justice for a preliminary ruling on the interpretation of the concept of abusive conduct within the meaning of Article 102 TFEU.[4]

The Council of State asked the Court of Justice to clarify, inter alia, whether, for an '*abusive exploitation*' to be such, its potential restrictive effects are sufficient or it should also include an additional element of illegality. The referring judge also asked whether the competition authority dealing with the case has an obligation to examine specifically any economic expert reports filed by the dominant undertaking in the course of the investigation, concerning the actual ability of the conduct under review to exclude its competitors from the market, and if the abusive conduct should be considered unlawful '*per se*' or if other elements should be taken into account (such as the intention of the alleged infringer).

Following Advocate General Rantos' Opinion of December 9, 2021,[5] on May 12, 2022, the Court of Justice issued its judgment.[6] It concluded that the burden of proving that SEN's conduct was capable of producing actual or potential exclusionary effects lies with the ICA. The ICA was therefore required to show that the procedure used by SEN in order to collect its customers' consent to the transfer of their information was indeed such as to favor the lists intended to be transferred to EE.

The judgment of the Council of State

The case was decided by the Council of State on December 1, 2022.

The Council of State referred to the Court of Justice's ruling, and reaffirmed that:

i. in order to establish whether a practice constitutes abuse of a dominant position, it is sufficient for a competition authority to prove that that practice is capable of impairing an effective competition structure on the relevant market, unless the dominant undertaking concerned submits that the exclusionary effects are counterbalanced or outweighed by positive effects for consumers;

[3] TAR Lazio, judgments of October 17, 2019, Nos. 11954 and 11958 (as discussed in the October 2019 issue of this Newsletter, https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-newsletter-october-2019.pdf).

[4] Council of State, order of July 20, 2020, *Enel v. ICA* (order No. 4646).

[5] Advocate General's Opinion of December 9, 2021, in Case C-377/20, *Servizio Elettrico Nazionale and Others* (see our EU Competition Law Newsletter of December-January 2022).

[6] Court of Justice, Judgment of May 12, 2022, in Case C-377/20, *Servizio Elettrico Nazionale and Other*.

ii. competition authorities are not required to show intent on the part of the undertaking in question to exclude its competitors by means other than those governing competition on the merits;

iii. as concerns practices not related to pricing, the choice of an undertaking in a dominant position to reserve to itself its own distribution network does not constitute conduct contrary to Article 102 TFEU where it is possible for a competitor to create a similar network for the distribution of its own goods;

iv. where an undertaking which holds exclusive rights uses resources (inaccessible, in principle, to a hypothetical competitor that is as efficient but does not enjoy a dominant position) for the purpose of extending the dominant market position which it holds as a result of those exclusive rights on another market, then that use must be considered to constitute use of means other than those which come within the scope of competition on the merits.

The Court noted that the Parties affirmed in the course of the proceedings that allowing the freedom to give separate consents (including in favor of third-party companies or only in favor of Enel group companies) is not an inherently discriminatory way of collecting consent, but a lawful way to allow users to express their preferences as broadly as possible. It also noted that SEN could not be challenged for having collected its customers' consents for their personal data to be transferred, since the protection of personal data is a fundamental right guaranteed by Article 8 of the Charter of Fundamental Rights of the EU.

Based on the Court of Justice's ruling that the ICA is required to show that the procedure used by SEN was such as to favor the lists intended to be transferred to EE, the Council of State then concluded that the ICA did not prove to the requisite legal standard that SEN's collection of its customers' consent was discriminatory. It observed that the ICA considered the fact that SEN requested a differentiated consent as being '*per se*' abusive, without providing any reasons why such request would have provided the Parties with a competitive advantage.

In the absence of any sufficient evidence, the Court found that the ICA had failed to demonstrate the existence of an infringement of Article 102 TFEU. It then annulled the ICA decision.

The Council of State upholds ICA decision not to impose interim measures for alleged abuse of dominant position

On December 20, 2022, the ICA decided not to impose interim measures for an alleged abuse of dominance by Telecom Italia S.p.A ("TIM").

Background

On October 31, 2022, Consip S.p.A. ("Consip"), a wholly-owned subsidiary of the Italian Ministry of Economy and Finance, launched a tender procedure for the provision of mobile telephony services to public administrations (the "Tender"). Participation requirements included, inter alia, an adequate coverage of the national territory. The coverage requirement had to be demonstrated by participants in relation to the percentage of territory covered by internet and mobile phone services for each municipality.

On the same date, Fastweb S.p.A., ("Fastweb"), another telecom operator and a party to an agreement with TIM for the provision of mobile services, submitted a complaint to the ICA, alleging that it was unable to take part in the Tender because of TIM's refusal to share its

mobile radio signal coverage maps, which Fastweb allegedly needed to draw up an offer. In support of its complaint, Fastweb argued, in particular, that while another operator, which Fastweb had a strategic agreement with, promptly granted access to its own maps, TIM allegedly refused to do the same.

On November 30, 2022, the ICA launched an investigation under Articles 14 and 14-bis of Law No. 287/90 into TIM's conduct, also with a view to adopting interim measures, should it find that the legal requirements were met.

The ICA's procedure concerned the potential violation by TIM of Article 102 TFEU on the ground that: (i) TIM's behavior had precluded Fastweb's participation in the Tender; (ii) such conduct, which amounted to an abuse of dominance, posed a risk of serious and irreparable damage to competition.

The decision on the interim measures

In its decision on interim measures[7], the ICA found that the requirements for the adoption of interim measures were not met.

In particular, the ICA found that no *prima facie case* had been established, because:

i. based on the rules of the Tender, participants would have to provide the maps related to mobile radio signal coverage only after submitting their offers, at Consip's request;

ii. the score which would be awarded for the coverage was modest compared to the total technical score;

iii. TIM had already provided Fastweb, following the signing of a non-disclosure agreement, with the information it needed to assess, for each municipality, the percentage of territory covered by internet and mobile phone services; and

iv. TIM committed to sharing its maps directly with Consip in case the latter would award the Tender to Fastweb.

In addition, due to several extensions of the time limit for the submission of bids in the Tender and the evolving interactions with Consip, the ICA found that the risk of irreparable damage to Fastweb had also not been established.

Therefore, on December 20, 2022, the ICA decided not to impose on TIM any interim measures.

The judgment of the TAR Lazio

Fastweb applied to the TAR Lazio for annulment of the ICA decision, arguing, in essence, that the decision on interim measures was based on an erroneous interpretation of the Tender, with regard to (i) the importance of TIM's mobile radio signal coverage maps and the need to receive a copy of them before presenting the offer; (ii) the relevance of the score to be awarded for territorial coverage; and (iii) the consideration of the evolving interactions with Consip.

By a ruling delivered on January 11, 2023, the TAR Lazio dismissed Fastweb's application on the ground that the applicant had failed to prove that the requirements for issuing the requested interim measures were met.

In particular, the TAR Lazio agreed with the ICA's finding that no *prima facie* case existed since Fastweb was not precluded from presenting its offer in the Tender. According to the Court, the issue whether Fastweb was deprived of the ability to present its best offer should be assessed in the ongoing parallel proceedings before the TAR Lazio, in which Fastweb challenged Consip's failure to: (i) provide TIM's mobile radio signal coverage maps; (ii) provide for an expulsion mechanism in the event of anti-competitive conduct by participants (qualifying TIM's conduct as such).

The judgment of the Council of State

Fastweb appealed to the Council of State against the TAR Lazio judgment, arguing that the ICA erred in law by ensuring it only the abstract possibility to present a bid in the Tender, but not the possibility of doing so in an effective

[7] ICA Decision No. 30435 dated December 20, 2022, Case A556.

matter, through an offer capable of obtaining the highest technical score. Furthermore, Fastweb argued that TIM's refusal to exhibit the mobile radio signal coverage maps would be aimed at preserving its dominant position in the relevant market.

On February 6, 2023, the Council of State dismissed the appeal, thereby confirming the ICA decision. The Court held that: (i) the ICA did not define the relevant market and did not fully substantiate TIM's alleged dominant position; (ii) it is, in any case, unlikely that such a dominant position would have any effect in the Tender; (iii) negotiating practices among operators in the case of network access agreements do not include contractual obligations to display the mobile radio signal coverage maps, due to the need to protect trade secrets; (iv) Fastweb's claim should be assessed in the ongoing parallel proceeding regarding the Tender; and (v) the indication of the percentage of territory covered by internet and mobile phone services, which TIM already provided to Fastweb, appeared to be sufficient to enable it effectively to participate in the Tender

Other developments

The Council of State partially reduces the fine imposed on COREPLA for abuse of dominance

On December 15, 2022, the Council of State partially granted the appeal filed by the Italian Consortium for the Collection, Recycling and Recovery of Plastic Packaging ("COREPLA") against a judgment of the TAR Lazio, which had upheld an ICA decision finding an infringement of Article 102 TFEU.[8]

On April 30, 2019, the ICA opened an investigation into the conduct of COREPLA – a *de facto* monopolist in the market for the management and start-up of recycling of PET plastic packaging – which it suspected had obstructed the entry into the market of its only (potential) competitor CORIPET, a consortium established to offer an innovative plastic collection system.[9] At the same time, the ICA opened interim proceedings to assess whether urgent measures were required to prevent COREPLA from eliminating any competition from CORIPET during the time necessary for completion of the investigation.

The ICA adopted interim measures on October 29, 2019.[10] The ICA decision was challenged by COREPLA before the TAR Lazio, which rejected its application for annulment on July 24, 2020.[11] The TAR Lazio judgment was upheld by the Council of State on December 16, 2021.[12]

On October 27, 2020, the ICA issued its final decision in Case A531, fining COREPLA in an amount of over €27 million for abusing its dominant position in the market for the provision of plastic waste recycling services (the "Decision").[13] The company brought a judicial action for annulment of the Decision, too.

On November 11, 2021, the TAR Lazio dismissed the application for annulment lodged by COREPLA. The TAR Lazio agreed with the ICA that the practices concerned were part of a single exclusionary strategy, by which COREPLA sought to delay CORIPET's market entry for as long as possible, including by signaling to any other potential competitors that COREPLA would vigorously fight any such entry attempt.[14]

[8] Council of State, Judgment No. 10993 of December 15, 2022.

[9] ICA Decision of April 30, 2019, No. 27662, Case A531, *Riciclo imballaggi primari/condotte abusive COREPLA*.

[10] ICA Decision of October 29, 2019, No. 27961.

[11] TAR Lazio, Judgment No. 8731 of July 24, 2020.

[12] Council of State, Judgment No. 8402 of December 16, 2021 (discussed in the December 2021 issue of this Newsletter, https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---december-2021.pdf)

[13] ICA Decision of October 27, 2020, No. 28430 (discussed in the November 2020 issue of this Newsletter, https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-november-2020.pdf).

[14] TAR Lazio, Judgment No. 11997 of November 22, 2021 (as discussed in the November 2021 issue of this Newsletter, https://client.clearygottlieb.com/72/2039/uploads/italian-competition-law-newsletter---november-2021.pdf).

Adjudicating on the appeal filed by COREPLA, the Council of State has now confirmed the Decision, although the amount of the fine imposed on the appellant was significantly reduced.

Interestingly, the Council of State rejected CORIPET's claim that the action brought by COREPLA violated the principle of *ne bis in idem*, as the conduct had already been the subject of judicial scrutiny in the context of the judgment concerning the interim decision. The Council of State clarified that a judgment on an interim decision cannot preclude the applicant from later initiating judicial proceedings against the ICA's final decision, as only the latter concerns the actual existence of the infringement, while the former only concerns the existence of a *prima facie* case.

The Council of State referred to the ruling of the Court of Justice in Case C-377/20, *Servizio Elettrico Nazionale*, and found that COREPLA's conduct did not amount to competition on the merits, as it had the effect of making it more difficult for the new competitor to penetrate the market without any reasonable economic justification.

However, the Council of State the reduced to €10 million, down from €27.4 million, the amount of the fine that the ICA imposed on COREPLA. The Court noted that the ICA erred in failing to take account of the fact that COREPLA's conduct ceased on the day the company implemented the interim measures imposed by the ICA. Moreover, the Court held that the ICA should have considered the existing mitigating circumstances, such as COREPLA's failure, as a non-profit entity, to gain any profits from its infringing conduct.

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