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Italian Competition Law Newsletter

Highlights

- The Council of State partially annuls ICA decision on a cartel for the assignment of broadcasting rights for football matches in countries other than Italy.
- The ICA clears with conditions the notified acquisition of joint control over Press-Di by Artoni and SHR

The Council of State partially annuls ICA decision on an alleged cartel for the assignment of broadcasting rights for football matches in countries other than Italy.

On June 9, 2022, the Council of State upheld appeals submitted by Media Partners & Silva Limited and MP Silva S.r.l. (jointly, “**MP Silva**”), by partially dismissing bid-rigging fines imposed by the ICA for the assignment of broadcasting rights for football matches in countries other than Italy.¹

Factual Background

The ICA decision

In April 2019, the ICA fined MP Silva, IMG Media UK Limited and IMG Worldwide LLC (jointly “**IMG**”), and B4 Capital SA and B4 Italia S.r.l (jointly “**B4 Capital**”) €67 million overall for

violating Article 101 TFEU.² According to the ICA, MP Silva, IMG and B4 Capital coordinated their behavior in tenders for the assignment of broadcasting rights for football matches in tournaments organized by the top Italian football league, Lega Nazionale Professionisti Serie A (“**LNPA**”), in countries other than Italy (so-called “international rights”).

On June 4, 2018, the ICA notified the parties concerned of its statement of objections, concerning two separate alleged cartel agreements. MP Silva repeatedly requested access to the file of the proceedings. The ICA partially rejected MP Silva’s requests. On February 22, 2019, the ICA issued a second statement of objections, alleging that the

¹ Council of State, Judgment No. 4696/2022.

² ICA Decision of April 24, 2019, No. 27656, 1814, *Diritti internazionali*.

parties had participated instead in a single and continuous infringement.

According to the ICA, prior to submitting the bids, the parties allocated the respective bids and agreed on sharing the revenues arising from the resale of TV rights. This conduct resulted in a decrease in the amounts offered for the broadcasting rights. The ICA asserted this anticompetitive conduct amounted to a restriction by object, and fined the participants €67 million overall.

The ICA based its findings on evidence provided by the Milan Public Prosecutor that belonged to the file of its criminal investigation into the same matter, and on additional evidence provided by cartel member IMG, which obtained a 40% fine reduction.

The judgment of the TAR Lazio

On March 16, 2020, the TAR Lazio rejected the parties' claim that the ICA had infringed their right of defense. The claim was based on the fact that, in the first statement of objections, the ICA had alleged that there were two separate anticompetitive agreements, while after the parties' replies to the statement of objections it issued a second statement of objections, alleging that the same conduct was instead as a single overall agreement³.

The TAR Lazio clarified that the ICA is not only allowed to change its allegations before imposing a fine, but that it can do so even without finding a new piece of evidence, through a mere reappraisal of the evidentiary elements that it had previously gathered. Moreover, according to the TAR Lazio, there was no infringement of the parties' right of defense, as the ICA issued a second statement of objections before the decision, to which the parties could reply.

With regard to the appeals lodged by companies of the B4 Capital Group, the TAR Lazio partially upheld the plea of the applicants concerning the quantification of the fine imposed on them. The TAR Lazio granted a 15% reduction in the fine on

the ground that the ICA should not have imposed an entry fee, whose purpose is to increase the deterrent effect of antitrust fines. According to the TAR Lazio, in the light of the small economic size of the undertakings, there was no need to increase the deterrent effect of the fine by applying an entry fee.

The findings of the Council of State

From a procedural standpoint, the Council of State confirmed the ruling of the TAR Lazio on the absence of a violation of the right of defense.

The Council of State held that the right to a fair hearing had not been impaired by the ICA by changing its appraisal of the anticompetitive conduct, which was eventually considered a single and continuous infringement, instead of two different cartels. The Council of State reasoned that the historical facts evidencing the collusive intent remained unaltered, regardless of the legal qualification of the conduct. Moreover, the Court held that the claimant did not identify any possible harm resulting from the alleged different qualification of the facts carried out by the ICA between the two statements of objections, given that the historical facts evidencing the collusive intent remained unaltered, regardless of the legal qualification of the conduct.

As concerns the alleged violation of the right of defense caused by the partial access to the confidential documentation submitted by IMG as a leniency applicant, the Council of State held that (i) such right had been safeguarded through the oral reading of the leniency statements, and (ii) on the issue pertaining to access to files the judgment could no longer be subject to review, since the contested decision was already final (i.e. *res judicata*).

As concerns the ICA's qualification of the anticompetitive conduct as a single and continuous infringement, the Council of State considered irrelevant the fact that different parties participated in separate tenders, since the different episodes should not be analyzed individually, but

³ TAR Lazio, Judgments Nos. 3260, 3261 and 3264/2020; ICA Decision of April 24, 2019, No. 27656, 1814, *Diritti internazionali*.

considered as a component of an overall scheme that consolidated over time. According to the Council of State, for the purposes of antitrust law, what matters is not necessarily the lawfulness (or unlawfulness) of each act, but rather the anticompetitive significance of a series of acts and initiatives that, despite being lawful, might be indicative of anticompetitive intent or effect.

Nevertheless, the Council of State partially upheld MP's plea alleging that the fine imposed by the ICA violated the principle of proportionality and reasonableness, as the ICA did not adequately take into account the applicant's actual unfavorable economic situation. To this end, the Council of State took the opportunity to shed light on different aspects regarding the calculation of fines.

In calculating the amount of the fine, the ICA referred to the turnover figures included in the 2016 financial statements (i.e., three fiscal years prior to the reference year). This was due to the fact that the company had failed to file financial statements since 2016, as it had been subjected to several judgments of insolvency and, subsequently, liquidation.

Other Developments

The ICA clears with conditions the notified acquisition of joint control over Press-Di by Artoni and SHR

In a decision published on June 13, 2022, the ICA cleared the acquisition of 51% of the share capital of Press-Di Distribuzione Stampa e Multimedia S.r.l. ("**Press-Di**" or the "**Target**") by Artoni Group S.p.A. ("**Artoni**") and SHR S.r.l. ("**SHR**" and, jointly, the "**Parties**"). As a result, the Parties acquired joint control over the Target together with the seller Mondadori Media S.p.A. (the "**Transaction**").⁶

The Transaction was cleared after an in-depth review, subject to the behavioral remedies proposed by the Parties.

Pursuant to Article 15(1) of the Italian Competition Law,⁴ the fine shall not, in any event, exceed ten per cent of the total worldwide turnover achieved by the undertaking in the last financial year "closed before the date of the infringement decision". Therefore, according to the Council of State, the basis for calculating the fine in the case concerned was the turnover of the "last financial year closed", and not the turnover resulting from the last filed financial statements.

This approach is also consistent with the principles established by a ruling delivered by the Italian Constitutional Court in 2019, referred to in the Council of State's judgment, which extended to administrative fines the principle that penalties must be specific to the offender pursuant to Article 27 of the Italian Constitution.⁵

Consequently, the Council of State ordered the ICA to re-calculate the administrative fine against MP Silva.

The Target is the second largest operator in the Italian market for national distribution of newspapers and periodicals, with market shares of 20-25%. The Parties are active in the market for local distribution of newspapers and periodicals, operating as monopolists in several Italian provinces.

The activity of local distributors includes distributing newspapers and periodicals on behalf of national distributors. Local distributors also collect from retailers the revenues from sales of newspapers and periodicals, and transfer them to national distributors, net of their own fee.

In the ICA's view, the vertical integration between the Target and the Parties could have had negative effects on competition in both the national and

⁴ Law No. 287/1990.

⁵ Italian Constitutional Court, Judgment No. 112/2019.

⁶ ICA, Decision of May 24, 2022, No. 30170, Case C12422B, *Mondadori Media-Artoni Group-SRH/Press-Di Distribuzione Stampa e Multimedia*

local markets for distribution of newspapers and periodicals.

Notably, according to the ICA's the Transaction could have led to a significant reduction in potential competition in the market for local distribution of newspapers and periodicals. In particular, Press-Di could have allegedly supported the Parties' expansion by withdrawing its distribution arrangements with other local distributors. The ICA considered that, by doing this, Press-Di could have not only caused the exit from the market of the Parties' competitors, but also a significant reduction in their commercial value. Furthermore, the Parties' could have hindered access to the markets for local distribution of newspapers and periodicals by other players competing with Press-Di in the market for national distribution, by refusing to distribute their products.

In order to mitigate the ICA's competition concerns, the Parties and the Target proposed a comprehensive set of behavioral remedies, with a duration of 5 years. In particular, they committed to not withdrawing any distribution arrangements for the mere purpose of facilitating the Parties' expansion, and included a six-month notice period for cases of legitimate revocation (i.e., revocation based on purely commercial reasons, such as late payments and deliveries). In addition, they made the application of express termination clauses that were already present in existing contracts conditional upon the failure to meet certain Key Performance Indicators. Finally, the Parties and the Target committed to blocking the flow of information between themselves concerning their relationships with each other's respective competitors, and Press-Di committed to not discriminating against local distributors when renewing their distribution arrangements.

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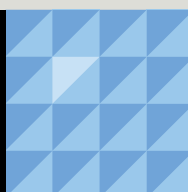
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