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Italian Competition Law Newsletter

Highlights

— The Council of State partially reinstates an ICA decision fining railway companies for dilatory tactics

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In a judgment issued on February 2, 2021,¹ the Council of State confirmed that Rete Ferroviaria Italiana S.p.A. (the Italian railway network manager, “**RFI**”) and Trenitalia S.p.A. (an Italian railway transport operator, “**Trenitalia**”) abused market dominance by engaging in dilatory tactics in the context of proceedings with the competent authorities, thus hindering access of a new entrant, Arenaways S.p.A. (“**Arenaways**”), to the railway passenger transport sector.

However, the Council of State ruled that the parent company of both RFI and Trenitalia, Ferrovie dello Stato S.p.A. (“**FS**”), which the Italian Competition Authority (“**ICA**”) had also fined for abuse of dominance, could not be held personally liable for such conduct.

Background

The decision of the ICA

In a decision dated August 9, 2012,² the ICA found that FS, through and together with its wholly-owned subsidiaries RFI and Trenitalia, infringed Article 102 TFEU through a “*single and complex*” exclusionary strategy.

In particular, the ICA found that: (i) RFI engaged in dilatory tactics by misusing the relevant procedures triggered by Arenaways’ request for railway network capacity allocation, thus hindering its access to the infrastructure; and (ii) Trenitalia supplied misleading information to the railway services regulator and reorganized its offer to saturate the railway network capacity or to overlap with the routes and schedules that Arenaways had requested.

¹ Council of State, Judgment of February 2, 2021, No. 1101.

² ICA, Decision of July 25, 2012, No. 23770, Case A436, *Arenaways – Ostacoli all’accesso nel mercato dei servizi di trasporto ferroviario passeggeri*.

The ICA found no evidence that FS played an active role in the abuse, but nonetheless concluded that FS itself engaged in it through its subsidiaries RFI and Trenitalia, relying on the presumption stemming from FS's 100% shareholding in those subsidiaries.

The ICA imposed a €100,000 fine jointly on RFI and FS, and a €200,000 fine jointly on Trenitalia and FS.

The first-instance judgment

On March 27, 2014,³ the Lazio Regional Administrative Court (“**TAR Lazio**”) ruled in favor of the applicants and quashed the ICA decision.

The TAR Lazio held that the ICA wrongly characterized as dilatory tactics what was in fact a legitimate and genuine consultation that RFI opened with the authorities concerned in order to solve objective technical difficulties connected to Arenaways' requests. The TAR Lazio also found that the ICA encroached on the railway service regulator's competence by questioning the conclusions that the regulator had reached.

The Judgment of the Council of State

The Council of State partially upheld the appeal brought by the ICA against the judgment of the TAR Lazio.

With respect to the conduct of RFI and Trenitalia, the Council of State confirmed that it amounted to abuse of dominance.

In particular, the Council of State found that: (i) RFI unduly prolonged or initiated unnecessary consultation processes, thus stalemating Arenaways' request for railway network capacity allocation; and (ii) Trenitalia presented the information requested by the railway services regulator in a misleading way, so much so that the sector regulator could not avoid being misled and favoring Trenitalia to the detriment of Arenaways. The Council of State also noted that the ICA did not question the conclusions of the railway

services regulator, but merely assessed Trenitalia's misleading behavior.

The Council of State rejected RFI and Trenitalia's additional grounds of appeal (which the TAR Lazio had not considered in the first-instance proceedings) regarding the rejection of the commitments offered by the parties, the quantification of the fine, the legal basis for the infringement and RFI and Trenitalia's intent.

With respect to FS, the Council of State concluded that the ICA had erroneously established an exclusionary strategy implemented by FS itself through its subsidiaries RFI and Trenitalia.

According to the Council of State, in order to establish the personal liability of a parent company in cases where the abusive conduct is put in place by one of its wholly-owned subsidiaries, the ICA cannot merely rely on the control relationship between such companies. It also needs to prove that the parent company actually exercised influence over the specific abusive conduct of the subsidiary. In particular, the ICA must prove, even indirectly, that the parent company was actually involved in the abusive conduct, because it coordinated it, promoted it or participated in it. This is particularly so in cases where a subsidiary could engage in abusive conduct on its own, even if it is entirely owned by another entity and even if such controlling entity stood “*benevolently inert*.”

The Council of State held that FS was not involved at all, as coordinator, promoter or active participant, in the unlawful conduct carried out by its subsidiaries RFI and Trenitalia.

In particular, the Council of State underscored that: (i) FS did not have any power of direction and coordination over the specific management functions of RFI; (ii) the ICA did not prove that FS played a role in shaping the exclusionary strategy implemented by RFI and Trenitalia; (iii) each of FS, RFI and Trenitalia had its own company bodies, no interlocking directorates existed and the flow of information from the subsidiaries to the parent company was no different than is

³ TAR Lazio, Judgment of March 27, 2014, No. 3398.

customary in the case of a control relationship; and (iv) it was not evident that FS would have derived an economic and immediate advantage from (and thanks to) the abuse committed by its subsidiaries.

The Council of State further ruled that the only evidence of FS's knowledge about Arenaways' request and situation (such as its lobbying of one of the authorities involved in the various consultation processes) could not support a finding that FS was directly involved in the abusive conduct of RFI and Trenitalia.

Having ruled out a direct involvement of FS in the abuse of dominance found by the ICA, the Council of State halved the fines originally levied on RFI and Trenitalia jointly with FS.

The judgment at stake draws an important distinction between, on the one hand, anticompetitive conduct for which parent companies are jointly liable with their subsidiaries based on the parental liability presumption and, on the other hand, anticompetitive conduct for which parent companies are jointly liable with their subsidiaries and also personally liable in their own right. In the second case, the ICA has to meet a higher standard of proof to demonstrate the involvement of the parent company.

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