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Highlights

- The TAR Lazio fully upholds an ICA decision that fined a legal monopolist in the local public passenger transport for refusal to supply essential information.
- The Council of State confirms a TAR Lazio judgment that upheld an ICA decision concerning a cartel in the helicopter transport services.
- The ICA fines a radio taxi company for abuse of dominance in the market for the collection and sorting of orders for taxi services in Turin but reduces the fine to take into account the economic consequences of the COVID-19 pandemic.
- The Council of State confirms the ICA's assessment of the "value of sales" and the "entry fee" in calculating the fines for a bid rigging case.
- The TAR Lazio almost entirely upholds a decision of the ICA that fined 23 companies and one trade association for two cartels in the corrugated cardboard sector.

The TAR Lazio fully upholds an ICA decision that fined a legal monopolist in the local public passenger transport for refusal to supply essential information

On May 17, 2021, the Regional Administrative Tribunal of Lazio ("**TAR Lazio**") rejected the application for annulment lodged by SAD – Trasporto Locale S.p.A. ("**SAD**"), a company entrusted by the Autonomous Province of Bolzano ("**APB**") with the provision of road passenger transport services in the Bolzano area,¹ against the 2019 decision by which the Italian Competition Authority ("**ICA**") fined SAD for abuse of dominance under Article 102 TFEU.²

Background

The APB entrusted SAD with the provision of public passenger land transport services in relation to certain suburban lines in the Bolzano area since the 1960s.

As the relevant concession agreement was due to expire in 2018, in 2017 the APB decided to reorganize the local public transport services

¹ TAR Lazio, Judgment No. 5801/2021.

² ICA Decision of April 10, 2019, No. 27635, Case A516, *Gara affidamento servizi TPL Bolzano*.

and award new concession agreements through a public tender procedure.

In January 2018, the APB complained to the ICA that SAD had unlawfully refused to provide information that was essential in order to carry out the public tender procedure (e.g., information on the number of buses and logistic facilities used by SAD, and information on personnel other than drivers). In particular, the APB maintained that the alleged refusal resulted in an information asymmetry such that the bidders other than SAD were placed at a competitive disadvantage vis-à-vis the incumbent.

The ICA took action in relation to APB's complaint and, after rejecting the commitments submitted by SAD, it concluded that SAD was dominant on account of its legal monopoly, and that its refusal to disclose essential information amounted to an abuse of dominance. The ICA imposed a €1.1 million fine on SAD.

The judgment of the TAR Lazio

In its application before the TAR Lazio, SAD argued that the ICA had erred: (i) in defining the relevant market (and finding that SAD held a dominant position); (ii) in establishing that its conduct was abusive; and (iii) in characterizing the infringement found as serious.

First, in relation to the market definition, SAD argued that the ICA should not have considered the market for the provision of suburban road passenger transport services in the Bolzano area as the relevant market in which SAD held a legal monopoly, because the APB was about to disrupt such monopoly by means of a public tender procedure.

The TAR Lazio, however, confirmed that the ICA was right in defining the relevant market by taking into account its features at the time of the conduct (i.e., the fact that the public tender procedure had not yet taken place when SAD refused to provide the APB with the information requested).

Secondly, in relation to the finding of an abuse of dominance, SAD argued that the conduct at issue did not cause any harm, whereas the alleged delay in providing the information was in fact due to APB's delay in launching the consultation for the tender.

The TAR Lazio was not convinced by these arguments, and noted that: (i) by refusing to disclose information that was essential in the context of the tender procedure, SAD hindered the entry of competitors into the market; and (ii) SAD's conduct lacked any objective justification.

Third, the TAR Lazio confirmed that the infringement was serious, considering that SAD's conduct effectively delayed the publication of the call for tenders by approximately four months.

The Council of State confirms a TAR Lazio judgment that upheld an ICA decision concerning a cartel in the helicopter transport services

On May 6, 2021, the Council of State rejected the appeals lodged by Elifriulia S.r.l and Star Work Sky S.a.s. (the "**Parties**")³ against the TAR Lazio judgment⁴ that upheld the 2019 ICA decision

fining the Parties approximately €67 million for restrictive agreements concerning certain helicopter transport services.⁵

³ Council of State, Judgments Nos. 3555 and 3566/2021.

⁴ TAR Lazio, Judgments of May 18, 2020, Nos. 5261, 5263, 5265, 5266, 5264, 5267, 5272 and 5274.

⁵ ICA, Decision of February 13, 2019, No. 27563, Case 1806 – *Affidamento appalti per attività antincendio boschivo*.

Background

The ICA decision

The ICA found that the Parties had engaged in two separate cartels.

First, it found that the Parties – together with Airgreen S.r.l., Eliossola S.r.l., Elitellina S.r.l. and Heliwest S.r.l. – had agreed not to offer significant rebates (which in many cases were lower than 1%) in the context of tenders for helicopter forest fire-fighting services between 2005 and 2018. As a result, contracting authorities ended up paying higher prices for the relevant services.

Secondly, the ICA found that the Parties – together with Airgreen S.r.l., Babcock Mission Critical Services Italia S.p.A., Babcock Mission Critical Services International S.A., Eliossola S.r.l., Elitellina S.r.l., Heliwest S.r.l. and Air Corporate S.r.l. – entered into a price-fixing agreement within the Italian Helicopter Association, of which they were all members of from 2001 to 2017. In particular, the companies agreed on a price list for aerial work services and passenger transport, divided by type of helicopter.

The TAR Lazio judgments

The TAR Lazio substantially confirmed the ICA's assessment, although it ruled that Air Corporate S.r.l. could not be held liable for the infringements and annulled the fine that the ICA had imposed on it.⁶

In particular, the TAR Lazio: (i) confirmed the definition of the relevant market as national in geographic scope, although certain tenders of the first cartel were organized at the regional level; (ii) confirmed that the evidence relied on by the ICA was sufficient to establish the unlawfulness of the conduct, for which the applicants failed to provide alternative – and lawful – explanations; and (iii) confirmed that the bid-rigging and the price-fixing were two separate infringements, mainly because the participants were different and the agreements pursued different goals and concerned partly different services.

The ruling of the Council of State

The Council of State upheld the judgment of the TAR Lazio.

First, the Council of State dismissed the Parties' argument that the ICA decision should be set aside because it had been adopted by only two members of the Board and without the participation of the ICA's President (who had not yet been appointed by the Italian Parliament). The Council of State confirmed that the ICA decision complied with the principle of collegiality and the rules governing the functioning of the ICA.

Secondly, with respect to the bid-rigging conduct, the Court took the view that the ICA correctly found that the Parties' conduct was a single and complex infringement, and rejected the Parties' attempt to "break up" the overall unlawful conduct into a number of constituent elements, with a view to subjecting it to separate limitation periods.

Thirdly, the Council of State agreed with the ICA's findings also in relation to the price-fixing conduct. It noted that agreements which are capable of diminishing and altering the free determination of prices fall under the said category, and so do recommendations of associations of undertakings to maintain a certain price level.

Lastly, the Council of State upheld the ICA's finding that there was no overlap between the two cartels, which differed in terms of scope, duration, activities and participants affected. It therefore held that the ICA was right in concluding that the two cartels were separate, instead of one single and complex agreement.

⁶ TAR Lazio Judgment of May 18, 2020, No. 5275.

The ICA fines a radio taxi company for abuse of dominance in the market for the collection and sorting of orders for taxi services in Turin but reduces the fine to take into account the economic consequences of the COVID-19 pandemic

On April 27, 2021, the ICA imposed a fine on Società Cooperativa Taxi Torino, a cooperative of taxi operators (hereinafter “**Taxi Torino**”), for abusing its dominant position in the market for the collection and sorting of taxi orders in the municipality of Turin (the “**Decision**”).⁷ In particular, following a complaint submitted by a company that manages a mobile app connecting taxi drivers and consumers (Mytaxi Italia S.r.l.; “**Mytaxi**”), the ICA’s investigation focused on some clauses in Taxi Torino’s by-laws, which imposed a non-compete obligation on taxi drivers participating in Taxi Torino’s network and had the effect of foreclosing the market, also in light of Taxi Torino’s dominant position and the lack of actual competition.

The Decision follows a series of previous ICA decisions concerning anticompetitive practices of radio taxi companies, which foreclosed the entry of competing platforms in the market for the collection and sorting of orders for taxi services in other municipalities in Italy.⁸ However, in contrast to previous decisions which focused on alleged infringement of Article 101 TFEU, the present case concerned an abuse of dominance by Taxi Torino.

The ICA’s findings

Considering that Taxi Torino comprised almost 90-95% of all taxi drivers operating in Turin, the ICA concluded that Taxi Torino’s non-compete clause resulted in an “*absolute ban*” on members of the cooperative joining competing platforms or even using their services on an occasional basis. According to the ICA, non-compete obligations on the taxi drivers would have been justified

only to the extent that they aimed at protecting, immediately and directly, the members’ commitment to support the cooperative. However, Taxi Torino’s non-compete clause went way beyond this lawful objective and unduly restricted taxi drivers’ entrepreneurial freedom.

Moreover, compliance with the non-compete obligations was ensured by the threat of exclusion from the cooperative for non-complying operators. The ICA found that Taxi Torino enforced this provision at least six times between 2017 and 2018 against those taxi drivers that had downloaded a competing app and used it occasionally.

According to the ICA, Taxi Torino’s clauses hindered the development of new innovative tools for the management of taxi demand (such as the Mytaxi app), thus preventing entry in the market for taxi demand management services in Turin and impairing consumer choice.

The impact of COVID-19 on the amount of the fine

The ICA imposed on Taxi Torino a fine of approximately €46,000. In calculating the amount of the sanction, the ICA took into account the impact that the COVID-19 pandemic had on the revenues of the cooperative’s members. Since demand for taxi services dropped dramatically during the pandemic (not only at the national level but also at the local level, decreasing by as much as 80%), the ICA reduced by 80% the fine that it would have otherwise imposed on Taxi Torino pursuant to its general methodology.

⁷ ICA, Decision of April 27, 2021, No. 29644, A521, *Attività di intermediazione della domanda di servizi taxi nel comune di Torino*.

⁸ ICA Decision of June 27, 2018, No. 27244, Case I801A, *Servizio di prenotazione del trasporto mediante taxi - Roma*; ICA Decision of June 27, 2018, No. 27245, Case I801B, *Servizio di prenotazione del trasporto mediante taxi - Milano* (both decisions closing cases relating to vertical agreements between radio taxi companies and taxi drivers); and ICA Decision of September 15, 2020, No. 28353, I832, *Servizi di prenotazione del trasporto taxi - Napoli*.

The Council of State confirms the ICA's assessment of the “*value of sales*” and the “*entry fee*” in calculating the fines for a bid rigging case

In two judgments delivered on May 20, 2021,⁹ the Council of State reinstated the original amounts of the fines that the ICA imposed on Fertitalia S.r.l. (“**Fertitalia**”) and Ni.Mar. S.r.l. (“**Nimar**”), which the TAR Lazio had reduced at first instance.¹⁰

In particular, the ICA found that Fertitalia and Nimar (as well as Nuova Amit S.r.l. and S.E.S.A. S.p.A.) infringed Article 101 TFEU by rigging a public tender procedure launched by Ecoambiente S.r.l., a company controlled by the Rovigo Municipality, to award the service of separate collection and recycling of waste in the province of Rovigo, Italy.¹¹ The ICA fined Fertitalia approximately €215,000 and Nimar approximately €260,000.

The TAR Lazio concluded that the ICA had erroneously calculated the fines imposed on the applicants and reduced them accordingly. According to the TAR Lazio, the ICA: (i) should have considered as “value of sales” the value of the contract awarded (the duration of which was one year), irrespective of its possible one-year extension; and (ii) could not lawfully include in the fine a so-called “entry fee” of 15% without sufficiently demonstrating why this additional amount was needed, taking it into account that the economic offers by Fertitalia and Nimar were higher than, but “*essentially close*” to, the average market prices.

On appeal, the Council of State partially annulled the TAR Lazio's ruling.

In relation to the value of sales, the Council of State observed that the contract to be awarded by Ecoambiente S.r.l. could be extended and it was in fact extended. It added the following: (i) the possibility of extension was expressly mentioned in the tender documents; (ii) the tenderers should have taken into account the possible extension of the contract when submitting their offers; (iii) contracting authorities are likely to extend the duration of a contract as a matter of practice, when the extension is contemplated in the tender documents. Therefore, the ICA had correctly considered the actual two-year duration of the awarded contract for fining purposes.

In relation to the entry fee, the Council of State found that the ICA had correctly taken into account the particular aspects of the case. In particular, the ICA correctly found that the infringement was “very serious”, took place in the context of a public tender procedure, and (ii) effectively resulted in higher economic offers submitted by the parties. Therefore, the Council of State agreed with the ICA that the need to ensure a sufficiently deterrent effect justified the inclusion of the entry fee in the fines applied to Fertitalia and Nimar.

⁹ Council of State, Judgments Nos. 3900 and 3901/2021.

¹⁰ TAR Lazio, Judgments of December 5, 2017, Nos. 1194 and 1195.

¹¹ ICA, Decision of July 29, 2015, No. 25589, I784, *Ecoambiente-Bando di gara per lo smaltimento dei rifiuti da raccolta differenziata*.

The TAR Lazio almost entirely upholds a decision of the ICA that fined 23 companies and one trade association for two cartels in the corrugated cardboard sector

In a series of judgments delivered on May 24, 2021,¹² the TAR Lazio almost entirely upheld an ICA decision that imposed over €287 million in fines on 23 companies and one trade association for two distinct anticompetitive agreements in the corrugated cardboard sector.¹³

Background: the ICA decision

The ICA's investigation originated from a complaint filed in October 2016 by a trade association of non-vertically integrated box manufacturers, concerning an alleged anticompetitive agreement in the corrugated cardboard sector. Before and during the formal investigation opened by the ICA in March 2017, four companies submitted leniency applications.

In its decision of July 2019, the ICA concluded that the investigated parties' conduct amounted to two separate single, complex and continuous infringements, implemented in two different markets, which were vertically related to each other, namely the (upstream) market for corrugated cardboard sheets and the (downstream) market for corrugated cardboard boxes. The two cartels took place from 2004 and 2005, respectively, to 2017.

In particular, according to the ICA, the upstream cartel was aimed at: (i) fixing the price of corrugated cardboard sheets for non-integrated manufacturers of corrugated cardboard boxes; and (ii) fixing and coordinating the volume of production, as well as the production plant downtime and shut-downs, in order to reduce output so as to support the increase in the price of the sheets and preserve profitability.

The downstream cartel was aimed at: (i) fixing the level of general increases in the prices of corrugated cardboard boxes for all customers; (ii) partitioning clients and supply contracts; and (iii) defining other relevant contractual terms, such as payment terms.

Despite several similarities between the two cartels (*e.g.*, in terms of structure, methods, duration, sector and parties involved), the ICA found that they were “*clearly separate*”, including because they: (i) were implemented in two different (albeit vertically related) product markets; (ii) mostly involved different parties; and (iii) were different in their respective content and functioning.

The finding of two distinct infringements led the ICA to impose two sets of fines: (i) a total fine of approximately €110 million on the companies that participated in the upstream cartel; and (ii) a total fine of approximately €178 million on the members of the downstream cartel. Due to the long duration of many parties' involvement in one or both of the cartels, the level of most fines was capped to 10% of the total turnover of each of the parties.¹⁴

The judgments of the TAR Lazio

All the investigated parties (except for the leniency applicant, which was granted full immunity from fines) applied to the TAR Lazio for annulment of the ICA decision and requested that its effects be suspended by means of an interim measure, which the Court granted in November 2019. In the rulings on the merits of the applications, however, the TAR Lazio rejected nearly all of them.

¹² TAR Lazio, Judgments Nos. 6040, 6044, 6047-6055, 6072-6076, 6078-6080, 6082-6085, 6087 and 6090/2021.

¹³ ICA Decision of July 17, 2019 No. 27849, I805, *Prezzi del cartone ondulato*.

¹⁴ Pursuant to Article 15 of Law No. 287/1990, which provides that, for each undertaking and association of undertakings participating in an infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

Only four applicants¹⁵ succeeded in having the ICA decision annulled as far as the imposition of the fine was concerned. The said companies were found by the ICA to have participated in only one of the two cartels and, in any event, for a very short period. The Court concluded that, all things considered, the evidence against these four companies was mainly circumstantial and, in any case, not objective, precise and consistent enough to establish a breach of Article 101 TFEU.

Except for the above, the TAR Lazio upheld the ICA decision.

Among other things, the TAR Lazio confirmed that: (i) the fact that the parties could access the leniency statements only after they received the statement of objections did not breach their rights of defense, which in any event were respected because the parties were given 60 days to prepare their written replies to the statement of objections; (ii) the fact that a company participated only in some but not all aspects of a complex infringement was irrelevant to the extent that such company was or should have been aware of the other aspects of the infringement in which it did not participate directly; and (iii) the ICA could lawfully establish a company's participation in an infringement based on either a leniency statement corroborated by documentary evidence, or two converging leniency statements.

A particular feature of this case was the issue whether the two cartels were effectively distinct, as the ICA concluded.

As mentioned, the ICA imposed two fines on the companies found to have participated in both cartels. Each fine was capped at 10% of their respective total turnover, with the result that the overall fine imposed on these companies amounted to 20% of their total turnover. Instead, had the cartels been characterized as being part of one and the same infringement, also the overall fine would have been one, subject to the ceiling of 10% of the total turnover.

The companies fined for the two cartels thus claimed before the TAR Lazio that there existed only one comprehensive cartel, noting, among other things, that the alleged two cartels: (i) shared a common plan to push the price increases in raw material as downstream along the production chain as possible; (ii) interacted and supported one another; (iii) took place in two directly and vertically related markets; (iv) overlapped in time; and, to some extent, (v) overlapped in terms of legal as well as natural persons participating in them. Moreover, even some leniency statements supported the view that the two cartels were actually one and the same.

The TAR Lazio rejected also these claims. It noted that the crucial issue was whether the overall conduct under investigation pursued the same plan. All the other criteria, including those indicated by the applicants, could only help establishing the existence of a common plan, whose absence would make them irrelevant.

That said, while the TAR Lazio seemed to acknowledge that the two cartels could have shared a common plan to pass on price increases in raw materials, it ruled that this was not sufficient to conclude that the two cartels found by the ICA were in fact a single cartel. In particular, according to the TAR Lazio, for there to be a single cartel, the undertakings that only participated in the downstream cartel had to share the same plan of passing on price increases in raw materials to their own customers and also be aware that the upstream cartel contributed to this plan.

Although some evidence could point at least to some degree of such awareness, the TAR Lazio ruled that this requirement was not met. In particular, the elements relied upon by the applicants to show that the two cartels were a single infringement were not sufficient to establish, "*with certainty*", that all participants in the downstream cartel (particularly those that were not also part of the upstream cartel) were aware of the existence of, and the plan pursued by, the members of the upstream cartel.

¹⁵ I.e., Alliabox Italia S.p.A., Ondulati del Savio S.r.l., Sandra S.p.A., and Toppazzini S.p.A.. See TAR Lazio, Judgments of May 24, 2021, Nos. 6044, 6074, 6083 and 6090.

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