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Italian Competition Law Newsletter

Highlights

- Consip: the ICA finds bid-rigging practices in integrated health and safety management in Italy
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The ICA finds bid-rigging practices in integrated health and safety management in Italy

On September 18, 2019, the Italian Competition Authority (the “ICA”) issued a decision¹ finding that Com Metodi S.p.A. (“**Com Metodi**”), Sintesi S.p.A. (“**Sintesi**”), Igeam S.r.l., Igeamed S.r.l. and Igeam Academy S.r.l. (jointly, “**Igeam**”) participated in a cartel affecting the outcome of the open tender procedure for the provision of integrated health and safety management services in the workplace at Italian public administrations, launched by Consip S.p.A. (“**Consip**”), the central purchasing agency owned by the Ministry of Economy and Finance, in December 2015 (the “**SIC 4 Tender**” and the “**Decision**”, respectively).

The SIC 4 Tender and the opening of the investigation

In December 2015 Consip launched the SIC 4 Tender, divided into 9 geographical lots and having a total value of approximately €100 million. In January 2018 Consip noted anomalies in the economic offers submitted

by certain tender participants and reported to the ICA its suspicions about possible collusive conducts. On March 14, 2018, the ICA started its investigation into whether the alleged bid-rigging violated Article 101 TFEU.

The ICA’s findings

According to the ICA, Com Metodi, Sintesi and Igeam – the three main market players – coordinated their bidding strategy according to a “chessboard” pattern. In some lots they strategically offered different discounts, while in others they did not submit any offer at all. In this way their bids never overlapped. Each of Com Metodi and Sintesi participated in the SIC 4 Tender as the respective representative of two *ad hoc* consortiums of undertakings (“**RTIs**”).² The ICA found that the undertakings that acted as their principals (i.e. Deloitte Consulting S.r.l. (in the case of Com Metodi) and Adecco Formazione S.r.l., Archè S.c.a.r.l., CSA Team S.r.l., Nier

¹ Consip/Gara Sicurezza e Salute 4 (Case I822).

² In Italian, *Raggruppamento Temporaneo di Imprese* (temporary associations of undertakings).

Ingegneria S.p.A. and Projit S.r.l. (in the case of Sintesi)) were not made aware of the RTIs' bidding strategies, since they knew neither the lots for which their RTI was bidding, nor the terms of the economic bids.³

The ICA found that Com Metodi, Sintesi and Igeam had exchanged sensitive information before and after submitting the bids. Moreover, the ICA held that the bidding strategies of Com Metodi, Sintesi and Igeam were economically irrational, and could only be explained by their participation in a collusive scheme.

According to the ICA, the cartel was aimed at sharing the lots between the participants in a way that allowed them to retain their historical market shares. However, the anticompetitive strategy was not fully implemented, as Com Metodi, Sintesi and Igeam faced aggressive competition from two undertakings that did not take part in the cartel, and lost certain lots to them.

The ICA held that the collusive conducts of Com Metodi, Sintesi and Igeam gave rise to a 'by object'

restriction of competition in violation of Article 101 TFEU, and did not investigate further their effects on the market.

The fines

The ICA considered the value of sales to be: (i) the amount awarded, where the undertaking won the bid; and (ii) the amount of the offer, where the undertaking was supposed to win the bid according to the anticompetitive plan, but actually did not, due to competition from outsiders. On this basis, the ICA applied a 15% increase on account of gravity because the undertakings carried out a hardcore restriction of competition. However, the ICA then reduced Com Metodi's and Igeam's fine by 5% each as they had adopted an antitrust compliance program. As a result, Com Metodi was fined €1,359,022, Igeam was fined €1,173,387, and Sintesi was fined €700,182. No fine was imposed on Deloitte Consulting S.r.l., Adecco Formazione S.r.l., Archè S.c.a.r.l., CSA Team S.r.l., Nier Ingegneria S.p.A. and Projit S.r.l., which were found not to be involved in the cartel.

Copyright: the TAR Lazio upholds an ICA decision against Società Italiana degli Autori ed Editori for abuse of dominance

On September 26, 2019, the Regional Administrative Court of Lazio (the "**TAR Lazio**") rejected the appeal submitted by Società Italiana degli Autori ed Editori ("**SIAE**") – the Italian copyright collecting society – against the 2018 decision by which the ICA imposed on the said undertaking a symbolic fine of €1,000 for abusing its dominant position in the market for the provision of copyright management services, in violation of Article 102 TFEU.⁴

The 2018 ICA Decision

According to the ICA, SIAE engaged in

anticompetitive conduct – targeting authors and users of copyrighted works, as well as foreign collective societies – resulting in a complex abusive strategy aimed at: (i) excluding other undertakings engaged in the management of copyright from entering the market; and (ii) preventing the entry and development of new and more innovative market players. In its view, SIAE abused its dominant position with the aim of strengthening its market position and extending it outside the scope of the statutory monopoly it enjoyed in light of Article 180 of Law No. 633 of April 22, 1941 (the "**Copyright**

³ Decision, § 336.

⁴ TAR Lazio, Judgment No. 11330/2019 (setting aside ICA Decision of September 25, 2018, in Case A508).

Law”).⁵ This strategy was implemented by means of, *inter alia*, exclusivity clauses in management contracts and the bundling of different copyright management services. In addition, the ICA found that SIAE engaged in exclusionary conducts when granting licenses to TV broadcasters and concert organizers.

The TAR Lazio judgment

(a) The notion of “public administration”

By its first ground of appeal, SIAE argued that the ICA had mistakenly launched an investigation against a public administration. According to SIAE, the ICA should have instead adopted a reasoned opinion addressed to SIAE to highlight the alleged competition violations and indicate any adequate remedies aimed at removing them.

The TAR Lazio disagreed and held that: (i) the notion of “public administration” must be read in light of antitrust law purposes, considering the nature of SIAE’s business, carried out in a competitive market, rather than SIAE’s formal qualification as a public administration; (ii) SIAE was involved in the investigation because it held a dominant position in the relevant markets in the copyright management sector; (iii) the investigation did not concern SIAE’s public functions but the application of antitrust rules, and the conduct of SIAE fell within their scope; (iv) any conduct theoretically lawful, involving the exercise of powers and prerogatives specifically provided for by law, may turn out to be anticompetitive in specific cases.

(b) Services of general economic interest: the application of antitrust rules

SIAE also argued that the ICA had erroneously found an abuse under Article 102 TFEU by a public entity that performs services of general economic interest. In its view, the ICA had mistakenly held that the copyright management activities could not be considered as services of general economic interest, according to the principles laid down in the EU Court of Justice’s OSA preliminary judgment (C-351/12, February 27, 2014).

According to the TAR Lazio, it is the conduct itself that matters, rather than the abstract structure of the entity to which that conduct is referred. Moreover, it took the view that the Court of Justice intended to highlight that Article 102 TFEU is also applicable in the case of the exercise of special or exclusive rights entrusted by law, unless the relevant conduct is strictly linked to the fulfillment of the specific tasks the company is entrusted with, in the pursuit of a general economic interest.

(c) Due process and the ICA decision-making process

By its third plea, SIAE argued that the ICA violated the principles of collegiality, proportionality and adequacy. In particular, it asserted that, despite the fact that the ICA is a collegiate body, its final decision had been adopted by the only two members in office at the time and in the absence of the president, by application of the rule under which the vote cast by the president (in this case, that of the acting president) is worth double. As a result, in SIAE’s view, the ICA adopted a decision as a single judge.

The TAR Lazio disagreed, holding that the decision was adopted in full compliance with the rules governing the functioning of the ICA (i.e., Article 10 of Law No. 287/90 and ICA Resolution No. 26614/2017). It added that SIAE had not

⁵ According to the version of Article 180 of the Copyright Law in force when most of the contested conduct was carried out, SIAE enjoyed an exclusive right “to act as an intermediary in any manner, whether directly or indirectly, by mediation, agency or representation, or by assignment of the exercise of the rights of performance, recitation, broadcasting, including communication to the public by satellite, and mechanical and cinematographic reproduction of protected works.”

At the EU level, collective management of copyright is regulated by Directive 2014/26/EU (the “**Barnier Directive**”), which aims at ensuring that providers of collective management of copyright and related rights enjoy the freedoms established in the TFEU. More specifically, according to Article 5 of the Barnier Directive, “rightsholders shall have the right to authorize a collective management organization of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organization or the right holder”.

The Italian government implemented the Barnier Directive by Legislative Decree No. 35 of March 15, 2017 (“**Legislative Decree No. 35**”). Article 4, para. 2, of Legislative Decree No. 35 introduces in the national legal framework, *inter alia*, the principle of freedom of choice enshrined in Article 5 of the Barnier Directive. However, this was “without prejudice to”

Article 180 of the Copyright Law. Article 180 of the Copyright Law was eventually amended by Article 19 of Law Decree No. 148 of October 16, 2017, converted into Law No. 172 of December 4, 2017, extending SIAE’s exclusive rights to other collective management organizations.

provided any evidence that the other member of the ICA disagreed with the acting president.

(d) Due process and excessive duration of the investigation

In SIAE's view, the ICA violated the principle of due process also in terms of the excessive duration of the procedure. The TAR Lazio disagreed once again.

According to the Court, no procedural rule provides for any time limit – from the date of filing of a complaint to the ICA – within which the ICA must initiate an investigation into the possible violation. In this respect, the duration of the preliminary investigation is left to the ICA's discretion. Furthermore, in order to appreciate the reasonableness of the duration of a preliminary investigation, it is necessary to take into account not only when the violation was committed, but also the time necessary to ascertain it, referring not to the mere fact that a fine may hypothetically be imposed, but to the ICA's full knowledge of the unlawful conduct. In addition, the TAR Lazio took the view that, in light of the complexity of the case and of the changes having occurred in the law, a somewhat long preliminary phase was justified in the circumstances.

SIAE also argued that the ICA prevented SIAE from participating in the preliminary investigation, contrary to what was the case for third-party complainants, which played an active role therein, and failed to take into account SIAE's defenses as set out in a submission filed before the opening of the investigation. In this respect, the TAR Lazio held that, prior to the initiation of a formal investigation, there is no obligation to inform the interested party/ies. In addition, in the context of an investigation (including its preliminary phase),

the ICA's duty to analyze the parties' defenses entails no obligation to analytically rebut each argument they may have submitted. It is sufficient for the ICA to provide reasoning that as a whole supports, in an understandable way, the rejection of those defenses.

(e) The subjective element

According to SIAE, the subjective element of the violation had not been proved by the ICA.

The TAR Lazio recalled that the dominant undertaking has a "special responsibility", in light of which an abuse may occur also in the absence of willful misconduct or negligence. Moreover, SIAE was aware of the implications of its conduct for the exclusion of potential competitors from the market, as proved by the objective, precise and consistent evidence in the ICA's casefile.

(f) Abusive conducts

In its last plea SIAE developed its arguments against the ICA's findings concerning the various abusive conducts of which it was declared liable.

The TAR Lazio rejected it with a succinct statement of reasons, noting that SIAE abused of its dominant position through conducts that were not covered by the exclusivity set forth by Article 180 of the Copyright Act. Moreover, the "atomistic" evaluation of each conduct separately from the others, suggested by SIAE in its defenses, was found incapable automatically to rule out that a violation of Article 102 TFEU could be established on the basis of all of SIAE's actions in their combination, which in the ICA's view prevented or hindered the development of competitive dynamics in the copyright management sector.

Access to file: the TAR Lazio emphasizes the boundary between the rights of defense and the right of access to leniency applications

On September 16, 2019, the TAR Lazio rejected the application for annulment filed by MP Silva S.r.l. (“**MP Silva**”) against an ICA decision that had denied the applicant access to the file in an Article 101 TFEU investigation.⁶

Factual background

In April 2019 the ICA fined MP Silva, IMG and B4 Capital in the overall amount of €67 million for violating Article 101 TFEU.⁷ According to the ICA, MP Silva, IMG and B4 Capital agreed on tenders for the assignment of broadcasting rights for football matches in tournaments organized by the top Italian football league, the Lega Nazionale Professionisti Serie A in countries other than Italy (so-called “international rights”).

On October 5, 2017, one of the parties submitted a leniency application to the European Commission and, simultaneously, a summary application to the ICA.

On June 4, 2018 the ICA notified the parties concerned of its Statement of Objections, concerning two separate 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, under which the parties were accused of participating instead in a single and continuous infringement. Five days later 2019 MP Silva reiterated its request to access the file of the proceedings, also with respect to the documents to which the ICA previously refused to grant access. More specifically, MP Silva requested access to: (a) the oral statements submitted by the leniency applicant, and (b) certain documents that, in its view, were crucial to allow it fully to exercise its right of defense (especially in light of the second statement of objections).

The ICA rejected again MP Silva’s request on the following grounds: (a) in relation to the documents that MP Silva requested for the first time on

February 27, 2019, confidentiality reasons and the irrelevance for the purpose of the proceedings; (b) regarding the documents that the ICA already denied access to in the past, the absence of new elements of law or fact. MP Silva then challenged in court the ICA’s refusal.

The judgment

The TAR Lazio upheld the ICA decision, based on the following statement of reasons:

- in antitrust proceedings, the need to ensure the equality of arms and to protect the rights of defense must be balanced against the confidentiality of information provided in the context of a leniency application, in order not to undermine the attractiveness of the ICA’s leniency program;
- as MP Silva reiterated previous requests to access the file without new supporting arguments, and the ICA reiterated the previous denials on the same grounds, MP Silva’s previous failure to challenge in court the ICA’s previous access refusal was held unjustified, and even capable of proving that: (a) access to such documents was not necessary for MP Silva in order to defend itself against the first Statement of Objections; (b) the leniency application did not affect the ICA’s allegations as stated in the second Statement of Objections. Therefore, those documents were not necessary for MP Silva’s defense;
- access to documents that, in the ICA’s view, are outside the scope of the investigation can be denied independently of the existence of confidentiality reasons. This follows from the principle that access to the file aims at protecting an interest strictly linked to the relevant documents for the purposes of the requesting party’s defense. In the absence of a relevant interest to be protected, access can be denied;
- access to documents that, according to the ICA, are clearly outside the scope of the investigation

⁶ TAR Lazio, Judgment No. 10985/2019.

⁷ International Broadcasting Rights for the Main Football Competitions in Italy (Serie A, Serie B, Italian Cup and Italian Super Cup) (Case I814), ICA Decision of April 24, 2019.

can be granted only in so far as the party requesting access to the file can prove that the ICA made a “gross mistake” in so characterizing them.

Other developments

The TAR Lazio upholds an ICA decision rejecting a request to extend the effects of a judgment to an addressee of a previous fining decision which failed to challenge it in court

The TAR Lazio⁸ upheld an ICA decision that rejected the request by B.M. S.r.l. (“**B.M.**”) to benefit from the effect of a final judgment in relation to the fine that the ICA had imposed on the said company in 2018 in the framework of a cartel decision.⁹

Adjudicating on the applications for annulment of the ICA decision in the *Modeling Agencies* case brought by its addressees, the TAR Lazio reduced the amount of the fines imposed on the parties, except for B.M., whose application, according to the Court, was time barred. As a consequence, B.M. submitted a request to the ICA to reduce its fine in light of the principle of *res judicata*. The ICA rejected B.M.’s request, and when B.M. challenged the new ICA decision, the TAR Lazio agreed with the ICA.

According to the TAR Lazio, although the ICA decision finding an anticompetitive agreement referred to anticompetitive conduct involving several parties, it conferred on each party an individual position, which in turn could only be subject to distinct legal actions.

As a result, the TAR Lazio decision ordering the ICA to reduce the amount of the fines did not cover the part of the *Modeling Agencies* decision fining B.M., and the ICA was thus not required to reduce the fine imposed on B.M.

⁸ TAR Lazio, Judgment No. 10838/2019.

⁹ *Modeling Agencies* (Case 1789), ICA Decision of October 25, 2018.

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