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Italian Competition Law Newsletter

Highlights

— Infringement with no fine for Milan Notarial Board in cartel case.

— Railway operators to pay symbolic fine for abuse of dominance.

— Council of State reduces fines in vending machines cartel.

ICA finds Milan notarial board liable for anticompetitive conduct but does not issue a fine

On July 24, 2019, the Italian Competition Authority (the "**ICA**") issued a decision[1] (the "**Decision**") finding that the Milan Notarial Board had violated Article 2 of Law No. 287/90 (the "**MNB**"). According to the ICA, the MNB allegedly collected disaggregated data on the performance of notaries in the Milan district in order to monitor their economic activity and discourage aggressive competition. However, the anticompetitive use of the data stopped when the ICA started the proceedings and, thus, the cartel did not have any anticompetitive effect. As a consequence, the ICA did not impose a fine.

The role of the MNB and the opening of proceedings

The MNB is an organization that supervises the activity of roughly 480 notaries active in the Milan district. According to Law No. 89/1913, Notarial Boards of each Italian district have specific monitoring and disciplinary powers, which enable them to control notaries' performance and compliance with deontological requirements.

In February 2016, one of the notaries in the Milan district reported to the ICA that the MNB had allegedly misused its monitoring powers with a view to discouraging competitive pricing and aggressive business strategies by some notaries. In January 2017, the ICA opened investigation proceedings on MNB's alleged anticompetitive practices.

The proceedings

During the proceedings, the ICA found that, in several annual reports, the MNB had raised concerns regarding the "*disproportion*" between the high volumes of work of a few notaries and the lower volumes of the rest. According to the ICA, the MNB tried to restrict or prevent the initiatives of notaries who by offering competitive prices based on innovative methods caused "*a high level of contraction of the volumes of other notaries*" in the district.

[1] ICA Decision of July 24, 2019, No. 27874, Case I803, *Condotte restrittive del Consiglio Notarile di Milano*.

The MNB sent out questionnaires in 2014 and 2015 to collect data on the number of documents prepared by each notary and the timing of the execution of the formalities for registrations. In 2016, the MNB decided to request more data on the notaries' economic activity and their organization. In particular, in the questionnaire sent out on September 21, 2016, the MNB specifically requested the notaries to provide information on: (i) fees for each type of document prepared; (ii) operating costs (*e.g.* rent, employees' wages, and payments made to external partners); and (iii) total revenues.

On the basis of the data collected, the MNB estimated the average time taken by each notary to prepare documents and the average number of documents prepared, and compared this data to the average of the district. In addition, it estimated the average price charged by each notary by calculating the ratio of turnover to notary fees of each notary. The MNB then held hearings during which it reproached the notaries who deviated from the average district values in terms of quantity of work, prices charged and innovative ways to offer the services.

The ICA's assessment

According to the ICA, collection and knowledge of detailed information on the quantity of services provided, the turnover achieved, the prices charged and the costs incurred were not related to the institutional objective of the MNB, which is to monitor the proper functioning of the profession.

In the ICA's view, the MNB had put in place several initiatives that constituted an anticompetitive decision of an association of undertakings in violation of Article 2 of Law No. 287/90. In this respect, the ICA points out that the notion of decision of an association of undertakings under EU and national competition law is very broad, as it includes any institutionalized form of cooperation between undertakings acting through a collective structure, on the basis of a common interest. As a consequence, the MNB's conduct constituted a single, complex and continuous restrictive practice.

However, the MNB stopped using the data it collected through the questionnaires when the ICA opened the proceedings. Therefore, the ICA considered that the MNB's conduct did not constitute a serious infringement because it had not had, *de facto*, any anticompetitive effect. For this reason, the ICA decided not to impose any fine on the MNB.

ICA issues symbolic fine in railway operator abuse case

On July 31, 2019, the ICA issued a decision stating that Ferrovie dello Stato Italiane S.p.A. ("**FS**"), Rete Ferroviaria Italiana S.p.A. ("**RFI**") and Trenitalia S.p.A. ("**Trenitalia**") had abused their dominant position in the markets for rail infrastructure management and regional rail passenger transportation services in Veneto (the "**Decision**").[2] However, the ICA imposed on the firms concerned a symbolic fine of only €1,000, taking into account the fact that the contested practices would ultimately lead to improvements and innovation in the railway infrastructure.

Factual background

FS, a company fully owned by the Italian Ministry of Economics and Finance, is the holding company of the FS Group and controls both RFI, which operates the Italian rail network in a monopoly regime, and Trenitalia, which is the main service provider for public rail transport in Italy.

On February 26, 2014, the Veneto Region launched an invitation to tender for the provision of regional railway services. On December 30, 2016, the Veneto Region withdrew the invitation to tender and instead issued a notice stating that Trenitalia

[2] ICA Decision of July 31, 2019, No. 27878, Case A519, *Affidamento del servizio di trasporto pubblico ferroviario nel Veneto*.

would be entrusted with the provision of regional railway services. On January 11, 2018, the Veneto Region directly entrusted Trenitalia with the provision of regional rail services from 2018 to 2032.

Following the direct award, on March 14, 2018, Arriva Italia Rail S.r.l. ("**Arriva**") complained to the ICA that the Veneto Region had entrusted Trenitalia with the provision of railway services only because, in exchange, RFI had promised to invest in infrastructure modernization in Veneto. According to Arriva, this violated European and national laws that impose structural separation between the owner of the rail network and the railway service provider.

On May 3, 2018, the ICA started the proceedings to investigate the contested conduct, alleging that the decision of the Veneto Region to entrust Trenitalia with the provision of regional rail services was not an independent choice, but the result of anticompetitive conduct implemented by the FS Group.

The relevant markets and the parties' dominant position

The ICA found that the anticompetitive conduct concerned two relevant product markets: (i) the upstream market for the management, maintenance and development of the rail network, which is national in scope; and (ii) the downstream market for the provision of public regional rail passenger transport services, which is regional in scope.

According to the ICA, RFI holds a dominant position in the first market, as it is the sole operator of the national rail network. Trenitalia is dominant in the second market, as it is the main service provider for public rail transport in Veneto.

The ICA's assessment

In the ICA's view, the parties implemented a single and complex anticompetitive strategy, aimed at leveraging RFI's legal monopoly power in the upstream market in order to induce the Veneto Region to grant Trenitalia exclusive rights for the provision of regional rail services in Veneto until 2032. According to the ICA, the anticompetitive strategy relied on RFI's allegedly wide discretionary powers in planning railway infrastructure interventions and allocating economic resources for their implementation.

In particular, according to the ICA, on March 9, 2016, the holding company FS held a preliminary joint meeting, in which RFI and Trenitalia's representatives jointly discussed with the Veneto Region matters falling respectively within the competence of the network operator (the modernization of a portion of the railway infrastructure in Veneto) and the rail transport service provider (the provision of regional rail services). In this context, RFI and Trenitalia allegedly carried out a joint analysis to decide whether to invest in the electrification of a portion of the railway network in Veneto, by examining the costs and benefits for both companies.

According to the ICA, RFI did not consider the electrification investment to be economically viable on a standalone basis. Nonetheless, it subsequently decided to proceed with the infrastructure intervention because it would have significant benefits for the FS Group as a whole. Moreover, Trenitalia unlawfully participated in the decision-making process concerning the modernization of the railway infrastructure in Veneto and, accordingly, gained a competitive advantage compared to other railway service providers by exploiting confidential information when negotiating its commercial offer with the Veneto Region.

In the ICA's view, the contested conduct led the Veneto Region to set aside the competitive tender procedure and to directly entrust Trenitalia with the provision of regional rail services.

The ICA concluded that FS, RFI and Trenitalia's conduct constituted an abuse of dominant position, in violation of Article 102 TFEU. However, it considered that the conduct would, "*in any case, lead to an improvement in the network in terms of technological innovation*" and, therefore, only imposed on the parties a symbolic fine of €1,000.

Council of State reduces fines in vending machines cartel

On August 5, 2019, the Council of State partially annulled several judgments delivered by the TAR Lazio in 2017,[3] which had upheld the ICA's decision to fine—among others—Gruppo Illiria S.p.A. ("**Illiria**") and Supermatic S.p.A. ("**Supermatic**") for having participated in an alleged cartel in the market for vending machines.

With respect to Illiria, the Council of State held that the ICA had not sufficiently substantiated its claims regarding Illiria's leadership role in the cartel and, accordingly, was wrong in applying the ring leader aggravating factor. The Council of State recalled that this aggravating factor is applicable only if, alternatively, the undertaking was: "*(i) a driving force and had a particular responsibility for* [the cartel's] *functioning; (ii) responsible for developing and suggesting the conduct, giving a fundamental impetus to the implementation of the agreement; (iii) committed to ensuring the stability and success of the unlawful agreements; or (iv) responsible for organizing meetings.*"[4]

With respect to Supermatic, the Council of State held that the ICA should have reduced the fine by 35%, because it should have considered as mitigating factors that Supermatic: (i) adopted an antitrust compliance program, and (ii) had a marginal role in the cartel. In addition, the ICA was wrong in including shareholders' assets in the assessment of the company's taxpaying capacity.[5]

The Council of State reduced the fine by 15% with respect to other cartelists as well, because it found that the ICA had not properly assessed their role in the cartel.[6]

The Milan Court of Appeal upholds judgment of Milan Court in airport luggage wrapping case

On July 30, 2019, the Milan Court of Appeal (the "**Court of Appeal**") fully upheld a ruling of the Milan Court finding that Società per Azioni Servizi Aeroportuali ("**SEA**") and Aeroporti di Roma ("**ADR**") had put in place several anticompetitive practices in violation of Articles 101 and 102 TFEU.[7]

In particular, the Court of Appeal found that SEA and ADR hold a dominant position in the market for the management of goods and spaces necessary to provide commercial services in (i) the airports of Milan Malpensa and Linate, and (ii) the airport of Rome Fiumicino, respectively. The Court of Appeal also confirmed that SEA and ADR had abused their dominant position because they had directly entrusted Truestar Group S.p.A. ("**Truestar**") with exclusive rights to provide luggage wrapping services in the airports concerned, instead of organizing a competitive tender, even though there was no specific obligation to do so. In addition, the Court of Appeal found that the contracts entered into by SEA and ADR with Truestar were anticompetitive vertical agreements aimed at hindering competition in the market for luggage wrapping, in violation of Article 101 TFEU, taking into account the presence of an exclusivity clause and the duration of the agreements.

However, the Court of Appeal dismissed Safe Bag S.p.A.'s—Truestar's main competitor's—claim for damages, on the ground that the plaintiff had not proven, to the required legal standard, that it would have had a reasonably high chance of winning the exclusive rights, had SEA and ADR organized competitive tenders.

[3] TAR Lazio, Judgment Nos. 9049/17 and 9062/17; and ICA Decision of June 8, 2016, No. 26064, Case I1783, *Accordo tra operatori del settore vending.*

[4] Council of State, Judgment No. 5563/19.

[5] Council of State, Judgment No. 5561/19.

[6] Council of State, Judgment Nos. 5564/19, 5562/19, 5560/19, 5559/19 and 5558/19.

[7] Milan Court of Appeal, Judgment No. 3362 of July 30, 2019.

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