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# Italian Competition Law Newsletter

## Highlights

- The Council of State upholds TAR Lazio judgments that set aside ICA Decision on Serie A Championship TV Broadcasting Rights
- TAR Lazio quashes ICA Decision on alleged abuse of dominant position in markets for the collection of waste paper in various municipalities in Emilia Romagna

## The Council of State upholds TAR Lazio judgments that set aside ICA Decision on Serie A Championship TV Broadcasting Rights

In four judgments issued on December 28 to 30, 2020,<sup>1</sup> the Council of State upheld four rulings of the Lazio Regional Administrative Court (“**TAR Lazio**”),<sup>2</sup> which had set aside an infringement decision issued by the Italian Competition Authority (“**ICA**”) against the Italian top tier football league (Lega Nazionale Professionisti Serie A, “**Lega**”), its advisor Infront Italy S.r.l. (“**Infront**”), and TV broadcasters Sky Italia S.r.l. (“**SKY**”), Reti Televisive Italiane S.p.A. and its subsidiary Mediaset Premium S.p.A. (jointly, “**Mediaset**”; together with Lega, Infront and Sky, the “**Parties**”), regarding an alleged anticompetitive agreement to alter the award of TV broadcasting rights for Lega’s 2015-2018 seasons (the “**ICA Decision**”).<sup>3</sup> The Council of State confirmed that the ICA failed to prove that

broadcasters colluded with Lega and Infront over the assignment of broadcasting rights.

### Background

#### *ICA Decision*

According to the ICA, the Parties colluded over the assignment of TV broadcasting rights for Lega’s 2015-2018 seasons, in breach of Article 101 of the Treaty on the Functioning of the European Union (the “**TFEU**”).

On May 19, 2014, Lega launched a tender procedure for the TV broadcasting rights of five different football packages. Despite the fact that SKY was the highest bidder for packages A and

<sup>1</sup> Council of State, judgments of December 28, 2020, No. 8358, and December 30, 2020, Nos. 8533, 8534 and 8535.

<sup>2</sup> TAR Lazio judgments of December 23, 2016, Nos. 12811, 12812, 12814 and 12816.

<sup>3</sup> ICA decision of April 19, 2016, No. 25966, Case 1790, *Vendita diritti televisivi serie A 2015-2018*.

B,<sup>4</sup> Lega and Infront decided to award package A to SKY and package B to Mediaset, on the assumption that the tender rules prevented the award of both packages to a single operator. Lega also awarded package D to Mediaset,<sup>5</sup> despite its bid being conditional and therefore invalid under the tender's rules. Mediaset then sub-licensed package D to SKY, upon authorization granted by the ICA under Article 19(1) of Legislative Decree No. 9/2008 (the "**Melandri Decree**").<sup>6</sup>

The ICA asserted that the parties had entered into a restrictive agreement, aimed at altering the "natural" outcome of the tender. In particular, it asserted that: (i) Lega and Infront should have awarded both packages A and B to SKY;<sup>7</sup> (ii) Lega should have launched a new tender procedure for package D because Mediaset's offer for the package was conditional and therefore void; (iii) the restrictive agreement was further implemented through the sub-license agreement for package D between Mediaset and SKY; and (iv) the restrictive agreement was entered into after the bids had already been presented but before the final award.

According to the ICA, Lega and Infront facilitated the infringement of Article 101 TFEU by unduly approving the sub-license agreement and by misapplying the tender rules, so that the actual award of the TV broadcasting rights substantially differed from the outcome of the tender. Mediaset was the main beneficiary of the restrictive agreement, while SKY played a marginal and defensive role aimed at obtaining one of the two packages it was entitled to under the tender rules. Overall, this was an infringement by object with the additional effects of freezing Mediaset's and SKY's market shares and foreclosing potential entrants.

### *The TAR Lazio judgment*

On December 23, 2016, the TAR Lazio upheld the appeals brought by the Parties and annulled the ICA Decision.

First, the Parties successfully challenged the delay in initiating proceedings. Prior to the tender procedure, the ICA had issued a favorable opinion on the tender's rules. After the tender was concluded, the ICA specifically approved the sub-license agreement for package D. All in all, between April and September 2014, the ICA had assessed the tender four times (either on its own motion or following a complaint). Yet, the ICA opened proceedings only in February 2015, after the owner of a Lega club boasted about his ability to mediate an agreement between the Parties. The ICA went on to impose fines in April 2016. The TAR Lazio held that the delay in opening the proceedings infringed the 90-day term provided for by Article 14 of Law November 24, 1981, No. 689, also in light of the due process right protected by Article 6 of the European Convention on Human Rights and the right to good administration established by Article 41 of EU Charter of Fundamental Rights. By deciding on a case almost two years after the facts, the ICA infringed the Parties' rights of defense, taking into account that, in July 2014, it already had all the elements on which the decision to open proceedings was based. Indeed, the ICA decision does not mention the alleged mediation claim made by the club owner.

Second, the Parties successfully contested the ICA's conclusion that their behavior resulted in an infringement by object. The TAR Lazio reasoned that, before taking a position on the nature of an agreement, the ICA needs to assess whether a common interest exists for all the parties. Moreover, even when the ICA addresses possible restrictions by object, an assessment of the economic and legal context, as well as of the

<sup>4</sup> Packages A and B included the rights relating to eight football teams in the Italian top tier football league, to be broadcast via satellite and digital terrestrial TV, respectively.

<sup>5</sup> Package D included exclusive "cross-platform" rights for matches played by the remaining minor football teams and one of the eight top tier football teams.

<sup>6</sup> The Melandri Decree sets out the legal framework under which broadcasting rights for live sports events must be offered in Italy.

<sup>7</sup> According to the ICA, no explicit provision prohibited the award of both packages to a single operator. In particular, the tender rules did not mention any such prohibition and Article 9(4) of the Melandri Decree only prohibits a single operator from being awarded all packages concerning live events. In its view, a lawful alternative would have been for Lega and Infront to withdraw the tender procedure and publish a new tender, explicitly prohibiting the award of packages A and B to a single operator.

aim pursued through the parties' conduct, is required. In this case, according to the TAR Lazio, the ICA found that the agreement amounted to an infringement by object without assessing the economic and legal context and establishing the common interest pursued by the parties. In the TAR Lazio's view, the need to avoid long and expensive legal proceedings could represent a legitimate common interest. In fact, the Parties had reached an outcome that was more competitive than the one that would have followed the "natural" tender procedure. Accordingly, the agreement could not be considered as such an infringement by object.

In addition, the TAR Lazio found that the ICA had mistakenly defined the relevant market. The TAR Lazio considered that the market for pay-TV broadcasting rights in Italy has always been duopolistic (with SKY and Mediaset continuously holding almost 97% of the market). In its decision, the ICA fined the parties for foreclosing Eurosport, a potential entrant. However, the TAR Lazio found that Eurosport was not active in the same market as SKY and Mediaset, because it is only a "content provider", which operates at the upstream level of the pay TV market.

In light of the above, the TAR Lazio concluded that the agreement was not aimed at sharing the TV broadcasting rights and did not have the object or effect of restricting competition.

### **The Council of State's judgment**

The Council of State rejected the appeal brought by the ICA and upheld the TAR Lazio judgments, setting aside the ICA Decision mainly for: (1) failure to prove a restriction of competition "by object" under Article 101(1) of the TFEU; and (2) delay in initiating proceedings.

More specifically, according to the Council of State, the TAR Lazio correctly ruled out the existence of an anticompetitive agreement by object, in light of the relevant legal framework and factual background, based on the Parties' conduct.

In particular, the Council of State noted Article 9(4) of the Melandri Decree forbids one broadcaster from being awarded all the rights to Serie A matches (i.e. the no single buyer rule). In its view, the Melandri Decree sets forth a mandatory rule of public order to ensure the full "contestability" of TV rights. This rule automatically supplemented the tender rules. Therefore, Lega corrected the outcome of the tender accordingly, in order to comply with the Melandri Decree and avoid giving one broadcaster a dominant position.

Against this background, the ICA failed to closely analyze the market structure and its features in light of the Melandri Decree. In particular, the ICA overlooked the limited availability of the "contestable" products (i.e. packages), from time to time assignable. The relevant market was not only regulated *ex ante*, but also subject to specific rules and limits on: (i) the type of goods to be offered; (ii) the type of operators that may acquire them; and (iii) the amount of types of products that may be acquired.

According to the Council of State, the ICA failed to prove the existence of an anticompetitive agreement between the Parties and, in any case, erred in categorizing the agreement as a restriction by object, as there was no evidence that the four companies pursued a similar economic interest or a common plot through the alleged agreement.

In particular, there had never been a common interest between the Parties and/or a decision to enter into a market sharing agreement, either before or after the bidding. As a matter of fact, the Lega acted independently to correct the outcome of the tender in light of the no single buyer rule under Article 9(4) of the Melandri Decree. In addition, contrary to the ICA's view, Lega's intervention prevented the creation of a dominant position and ensured effective competition on the market.

The Council of State ruled that the ICA is required to follow a more rigorous approach in the assessment of restrictions by object. Even in case of hardcore restrictions, the ICA has to take into account the nature of the goods or services affected, as well as the market structure, and examine if specific events and circumstances could cast doubt on the alleged unlawful nature of the agreement and its potential effects. In this case, the ICA should have taken into account that the resource is limited in nature and must be assigned in the available amounts to different operators. As a matter of fact, according to the Council of State, the structure of the market and its particular aspects demonstrated that the alleged agreement could not have had an unlawful object. The ICA failed to assess the conduct against the relevant market in light of the Melandri Decree.

The misinterpretation of the legal framework and factual background also affected the assessment of the settlement agreements between SKY and RTI-Mediaset and between SKY and Lega, concerning, respectively, the final award and the sub-license following the award. According to the Council of State, none of them can be considered a market sharing agreement, as: (i) the settlement agreement between SKY and RTI-Mediaset (concerning the final award) reflected Lega's decision on the correct allocation

of TV broadcasting rights; and (ii) the settlement agreement between SKY and Lega (concerning the approval of the sub-license following the award) was expressly provided for by the Melandri Decree.

According to the Council of State, not even the analysis of the economic context revealed a sufficient degree of harm to competition. In this respect, the court noted that Article 9 of the Melandri Decree and the Lega's Guidelines are both aimed at ensuring the contestability of TV broadcasting rights and preventing the creation of a de facto monopoly on the market.

The Council of State also upheld the TAR Lazio's view on the effects of the conduct on the relevant market. According to the court, there was no evidence that rival broadcasters were prevented from accessing the market or that the price of TV package subscriptions increased.

Finally, the Council of State confirmed that the delay of the ICA in initiating proceedings against the Parties violated Article 14 of Law November 24, 1981, No. 689, also in light of the principles established by Article 6 of the European Convention on Human Rights and Article 41 of EU Charter of Fundamental Rights.

## TAR Lazio quashes ICA Decision on alleged abuse of dominant position in markets for the collection of waste paper in various municipalities in Emilia Romagna

On December 22, 2020, the TAR Lazio quashed an infringement decision issued by the ICA ("**ICA Decision**") against the public utility company Hera Holding Energia Risorse Ambiente S.p.A. ("**Hera**") and its subsidiary Herambiente S.p.A. ("**Herambiente**").<sup>8</sup> The ICA Decision found an alleged abuse of dominant position in

the markets for the collection of waste paper in a number of municipalities in the region of Emilia-Romagna, for having favored Akron S.p.A. ("**Akron**") – Herambiente's subsidiary active in downstream markets – to the detriment of competitors.<sup>9</sup>

<sup>8</sup> TAR Lazio judgments of December 22, 2020, No. 13886 and 13888.

<sup>9</sup> ICA decision of February 27, 2014, No. 24819, case A444, *Akron*. The ICA distinguished three relevant markets: (i) the market for waste paper collection; (ii) the market for used paper from mixed collection; and (3) the market for recovered paper of grade 1.02.

## Background

### *ICA Decision*

Hera holds a monopoly in the collection of waste paper from public surfaces in several provinces in Emilia Romagna. Herambiente's subsidiary Akron is active in the production and sale of waste paper intended for paper mills. According to the ICA, Hera abused its dominant position by preventing access to cellulosic waste (a product resulting from urban recycling) for competitors of Akron.

The ICA alleged that the dominant position of Hera in the upstream market for the collection of waste enabled Herambiente to have a dominant position in the downstream market for the sale of separated municipal waste in various municipalities in Emilia Romagna.

The ICA asserted that the waste paper collected by Hera was transferred directly to Akron at a price lower than the market price, without any fair, transparent and non-discriminatory comparison with competitors' offers. In the ICA's view, such conduct resulted, respectively, in:

- an exclusionary abuse, in the form of input foreclosure, carried out by Herambiente in favor of its own downstream subsidiary Akron. According to the ICA, this conduct prevented Akron's competitors from competing in the downstream markets for the sale of pulp to the paper mills;
- an exploitative abuse, arising from the transfer of waste paper to Akron at a price lower than the market price. The lower revenues earned by Hera resulted in an increase in the tariffs paid by residents for the urban hygiene services in the municipalities in which Hera managed waste collection. In addition, Akron, which had exclusive access to inexpensive supplies, was able to exercise significant market power in the sale of waste paper, which resulted in higher prices for paper mills.

## The TAR Lazio judgments

According to the TAR Lazio, the ICA overlooked the fact that Hera was entrusted with the provision of a public service and the definition of the relevant markets did not take that into account.

In particular, the court upheld Hera's argument that, at the time, the market for the recovery of cellulosic waste from urban separate collection was not fully liberalized. As a matter of law, the public service to be entrusted following a tender procedure did not have to include the recovery phase. Hera was entrusted with the provision of the public service and, thus, had to ensure – for reasons of urban hygiene, health and environmental protection – continuity, safety and efficiency of the entire waste cycle, including the final recovery phase.

The TAR Lazio referred to the European Court of Justice judgment in the Intel case, according to which, “*in the case where the undertaking [which is in a dominant position] submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects ... the Commission is not only required to analyze, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice ... it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market*”.<sup>10</sup>

However, the ICA asserted an infringement of competition law only due to the fact that Hera had not adopted competitive procedures for the selection of the entity responsible for the recovery phase. The ICA did not take into account the arguments put forward by Hera, according to which, among other things:

- the decision to entrust the waste recovery service to a company belonging to the same group represented the most efficient way of

<sup>10</sup> European Court of Justice, judgment of September 6, 2017, C-413/14, *Intel*, §§ 138-139.

fulfilling Hera's legal duty. In particular, it was the only way to maintain the quality of the management service under Hera's direction, planning and control, to the advantage of the public interest in terms of greater environmental sustainability;

- a number of technologically-advanced waste treatment facilities were available to Akron, but not to any other operator active in the same area;
- Akron had high-level economic and financial standing in the long term, unlike its potential competitors.

Against this background, the TAR Lazio held that the ICA should have established whether or not Hera's decision to entrust the service within the group only aimed at excluding Akron's as efficient competitors from the market. However, the ICA did not carry out this analysis. Nor had the ICA proved that competitors submitted offers comparable, in terms of quality, to the service Akron could provide.

## Other developments

On December 10, 2020, the Council of State rejected an appeal lodged by Tubosider S.p.A. ("**Tubosider**") against a TAR Lazio judgment that upheld an ICA decision to reject an application to revise a fine imposed in 2012 on, among others, Tubosider.<sup>11</sup> The fine concerned an alleged infringement of Article 101 TFEU in the national road crash barrier sector. The Council of State also rejected Tubosider's argument that the ICA's Fining Guidelines (ICA decision of October 22, 2014, No. 25152) do not provide, unlawfully, for an obligation on the ICA to revise a fine in the case of exceptional and extraordinary circumstances concerning the relevant market or the financial situation of the undertaking concerned.

Firstly, the Council of State held that the ICA is not required to take a decision on such a request, a power that it may instead exercise at its own discretion. Secondly, the Council of State held that the worsening of the financial situation of a firm cannot affect the lawfulness, enforceability and finality of a fine previously imposed and upheld.

As a matter of law, in setting the amount of a fine, the ICA has to take into account only the relevant factors at the time the fine is imposed. The law and the ICA's Fining Guidelines do not provide for the possibility to consider the worsening of a financial situation to adjust the amount of a fine. Nor can such a possibility be inferred from EU or national case law.

Finally, in the Council of State's view, allowing the continuous revision of a final fine would undermine the effectiveness and the deterrent effect of competition rules, and would carry the risk of introducing a further inadmissible level of appeal, to the detriment of legal certainty.

<sup>11</sup> Council of State, judgment of December 10, 2020, No. 7874; TAR Lazio, judgment of May 16, 2020, No. 6087.

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