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Italian Competition Law Newsletter

Highlights

— The Council of State further upholds an ICA decision concerning two cartels in the corrugated cardboard sector

— The Council of State rejects the appeal brought by SIAE against the TAR Lazio judgment that upheld an ICA decision concerning the undertaking's exclusionary abuse of dominant position in the domestic market for managing authors' rights

— The Council of State rejects the appeals against the TAR Lazio judgments that annulled an ICA decision concerning an agreement on remuneration for the SEDA service

— The Council of State adopts final judgments in the medical oxygen cartel case

The Council of State further upholds an ICA decision concerning two cartels in the corrugated cardboard sector

In two judgments delivered on February 1 and 2, 2023,[1] the Council of State fully rejected the appeal filed by Laveggia S.r.l. ("**Laveggia**") and partially rejected the appeal filed by Smurfit Kappa Italia S.p.A. ("**SKI**") against the respective judgments of the TAR Lazio that upheld an ICA decision imposing fines totalling approximately €287 million on over 20 undertakings for two anticompetitive agreements in the corrugated cardboard sector (the "**Decision**").[2]

The judgments follow 17 earlier rulings of the Council of State with a similar outcome (*i.e.*, granting the appeal only with respect to the quantification of the fines and referring the matter back to the ICA for a new calculation).[3]

[1] Council of State, Judgment Nos. 1118 of February 1, 2023 and 1159 of February 2, 2023. The Council of State also rejected entirely the appeal filed by Laveggia, which had not challenged the amount of the fine imposed on it by the ICA.

[2] ICA Decision No. 27849 of July 17, 2019, I805 – *Prezzi del cartone ondulato* (the Decision is discussed in the July 2019 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjuly2019pd-pdf.pdf).

[3] Council of State, Judgment No. 10159 of November 18, 2022 (this judgment is discussed in the November 2022 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-november-2022.pdf) and Nos. 376 of January 11, 2023, 417 of January 12, 2023, 670 and 671 of January 19, 2023, 688 to 691 of January 20, 2023, 941, 949 and 951 of January 27, 2023, and 1080 of January 31, 2023 (these judgments are discussed in the January 2023 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-jan-2023.pdf). For sake of completeness, in four cases the Council of State reinstated the liability of the four applicants which had been acquitted in the first instance (see respectively Council of State, Judgment Nos. 461 and 462 of January 13, 2023, 831 of January 25, 2023 and 938 of January 27, 2023 and TAR Lazio, Judgments Nos. 6074, 6083, 6044 and 6090 of May 24, 2021).

The Court sided with the ICA insofar as the procedural and substantive issues raised by the appellants were concerned. For instance, the Council of State held that the timing for opening or extending the investigation was not excessive, and that the undertakings' rights of defense were respected. Moreover, it confirmed that the two anticompetitive agreements found by the ICA were separate (as opposed to one and the same, as certain appellants had argued) and that the ICA was right in attributing liability for long intermediate periods with little / insufficient evidence of participation in an infringement on the ground that the relevant undertakings had not publicly distanced themselves from the infringement.

As mentioned above, the Council of State found, however, that the fines imposed by the ICA were disproportionate because they (i) were not adjusted to the actual gravity of the infringer's liability, and (ii) for those undertakings that received a fine for each of the two distinct infringements, did not duly consider the "*interconnection*" between the two cartels (including notably the fact that they related to vertically related markets).

The Council of State rejects the appeal brought by SIAE against the TAR Lazio judgment that upheld an ICA decision concerning the undertaking's exclusionary abuse of dominant position in the domestic market for managing authors' rights

On February 15, 2023, the Council of State rejected the appeal brought by Società Italiana degli Autori ed Editori ("**SIAE**") – the Italian copyright collecting society – [4] against the TAR Lazio judgment[5] that had upheld the 2018 decision[6] by which the ICA imposed on SIAE 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.

In its decision, the ICA found that SIAE engaged in anticompetitive conduct – targeting authors, users of copyrighted works, as well as foreign collective societies – resulting in a complex abusive strategy aimed at: (i) preventing 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. According to the ICA, SIAE abused its dominance 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, 1942 (the "**Copyright Act**"). This strategy was implemented by means of, *inter alia*, exclusivity clauses in management contracts and the bundling of different copyright management services with services concerning the protection of works against plagiarism and the online use of works. In addition, the ICA found that SIAE engaged in exclusionary conduct when granting licenses to TV broadcasters and concert organizers.

The TAR Lazio rejected the application brought by SIAE for the annulment of the ICA decision, on the following grounds: (i) SIAE could be investigated since it is not a "*public administration*" for the purposes of competition rules; (ii) Article 102 TFEU can be applied also to undertakings performing services of general economic interest unless the relevant conduct is strictly linked to the fulfilment of the specific tasks that the company is

[4] Council of State, Judgment No. 1580 of February 15, 2023.

[5] TAR Lazio, Judgment No. 11330 of September 26, 2019 (this judgment is discussed in the September 2019 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--september-2019-pdf.pdf).

[6] ICA, Decision No. 27359 of September 25, 2018, Case A508 – *SIAE/Servizi Intermediazione Diritti d'Autore*.

entrusted with; (iii) the ICA decision was adopted in full compliance with the rules governing the collegiality of the ICA decision-making process; (iv) the ICA did not violate the principle of due process since a long preliminary phase was justified by the complexity of the case and the changes that had occurred in the applicable law; (v) SIAE was aware of the implications of its conduct for the exclusion of potential competitors from the market; and (vi) SIAE's exclusionary conduct was not covered by Article 180 of the Copyright Act.

The Council of State upheld the TAR Lazio judgment with regard to the finding of a violation of Article 102 TFEU and the imposition of a symbolic fine. However, the Council of State considered that the ICA had not provided sufficient evidence of the existence of contractual clauses requiring the bundled acceptance of SIAE's management services and its services related to the protection of works against plagiarism. In addition, according to the Court, SIAE allowed the authors to limit the scope of their contracts in order to exclude services related to the online use of their works.

Finally, the Council of State considered that the anticompetitive effects of SIAE's conduct were not outweighed by any efficiencies that could benefit the consumers in terms of price, level of choice, quality or innovation.

The Council of State rejects the appeals against the TAR Lazio judgments that annulled an ICA decision concerning an agreement on remuneration for the SEDA service

On February 10, 2023, the Council of State rejected the appeals[7] brought by the ICA against the TAR Lazio judgments[8] that annulled a 2017 ICA decision finding a violation of Article 101 TFEU by eleven Italian banks[9] and the Italian Banking Association (the "**ABI**", and together with the ABI, the "**Parties**").[10]

The ICA decision concerned an alleged anticompetitive agreement aimed at coordinating the undertakings' business strategies in order to determine the remuneration model for the *Sepa Compliant Electronic Database Alignment* ("**SEDA**") service, *i.e.*, the service set up in the context of the Single European Payment Area ("**SEPA**") allowing consumers to pay periodic charges (for example for household bills) directly through a withdrawal from their bank account. In particular, according to the ICA, the Parties had agreed to coordinate their commercial strategies in order to increase the price of the SEDA service. According to the said agreement: (i) the price of the SEDA service would be defined freely by each bank and only its maximum value would be agreed on by the banks and published on the SEPA website; (ii) in the absence of a specific negotiation, the beneficiary of the final payment would pay the maximum fee to the debtor's bank directly, through the adoption of a so-called "*1 to many*" mechanism; and (iii) the Parties would coordinate the methods of application of the SEDA commission fees to the direct debit system for bills previously applied before the entry into force of the SEPA.

[7] Council of State, Judgments Nos. 1457, 1458, 1463-1466 of February 10, 2023.

[8] TAR Lazio, Judgments Nos. 7708-7710, 7713 and 7714 of June 30, 2021, and No. 7795 of July 1, 2021 (these judgments are discussed in the June 2021 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjune2021-pdf.pdf).

[9] Banca del Piemonte S.p.a., Banca Monte dei Paschi di Siena S.p.A., Banca Nazionale del Lavoro S.p.A. ("**BNL**"), Cassa di risparmio di Parma e Piacenza S.p.A., Banca Piccolo Credito Valtellinese S.p.A., Istituto Centrale delle Banche Popolari Italiane S.p.A., ICCREA Banca, Intesa SanPaolo S.p.A., Banca Sella S.p.A., UBI Banca S.p.A., Unicredit S.p.A.

[10] ICA Decision No. 26565 of April 28, 2017, Case I794 – *ABI/SEDA*.

The ICA considered that the agreement had a broad impact on the market, resulting in a general increase in prices. However, the ICA held that the infringement was not serious, also in light of the regulatory and economic context, as well as the fact that, during the proceedings, the parties had proposed a new system of remuneration capable of reducing the overall cost of the SEDA service, and decided not to impose any financial penalties on the addressees of the decision.

The TAR Lazio upheld the applications for annulment brought by the Parties and annulled the ICA decision, on the following grounds: (i) the ICA decision to start the investigation two years after becoming aware of all the details of the conduct was contrary to the principles of good management and efficiency of administrative action; and (ii) in light of the available evidence, the Parties' intention was to establish an appropriate remuneration mechanism for the new service, as opposed to restrict competition.

The Council of State rejected the appeals brought by the ICA against the TAR Lazio judgments, thus confirming the annulment of the ICA decision. In particular, according to the Council of State, the contacts that took place between the banks amounted to no more than a legitimate discussion aimed at defining a new system of common management of payment services. The Court also held that the various banks imposed SEDA fees of different amounts during the period under consideration, which confirmed the absence of collusion on pricing. In addition, the Council of State clarified that mere membership of a trade association (such as the ABI) does not automatically imply that the trade association's anticompetitive conduct can be imputed also to the member undertakings, in the absence of any evidence – which it is up to the ICA to provide – of their individual participation in the anticompetitive conduct.

The Council of State adopts final judgments in the medical oxygen cartel case

On February 24 and 28, 2023,[11] the Council of State published four final judgments in the revocation proceeding concerning a medical oxygen cartel case.[12]

In particular, in a series of non-final judgments published between February 15 and 25, 2022, the Council of State had upheld – in the so called "*fase rescindente*" – the appeals brought by Medicair Italia S.r.l., Medigas S.r.l., Linde Medicale S.r.l., Sapio Life S.r.l. and Vivisol S.r.l. (the "**Parties**"),[13] finding that a number of material errors affected the initial rulings of the Council of State.[14]

When examining the case in the so-called "*fase rescissoria*", the Council of State confirmed that the documentary evidence collected by the ICA was overall capable of demonstrating collusive behavior, on the basis of objective, specific and consistent evidence such as: (i) the anomaly of the Parties' bidding behavior, in a so-called "checkboard" pattern, which, according to common experience, is unlikely to be achieved without collusion; and (ii) significant documentary evidence of the existence of an agreement between the Parties on the repartition of the lots.

[11] Council of State, Judgment Nos. 1944, 1946 and 1947 of February 24, 2023 and No. 2031 of February 28, 2023.

[12] ICA Decision No. 26316 of December 21, 2016, Case I792 – *Gare ossigenoterapia e ventiloterapia*.

[13] Council of State, non-final Judgment Nos. 1089 to 1091, 1094 and 1096 of February 15, 2022; Nos. 1263, 1265, 1267 and 1269 of February 22, 2022; and Nos. 1351, 1353, 1354 and 1355 of February 25, 2022 (these judgments are discussed in the February-March 2022 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---feb-march-2022.pdf).

[14] Council of State, Judgment Nos. 8583 to 8591 of December 19, 2019 and Nos. 50 to 53 of January 3, 2020 (these judgments are discussed in the December 2019 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterdecember2019pd-pdf.pdf).

With regard to the quantification of the fine, the Council of State partially upheld one of the Parties' appeals in relation to the quantification of the fine in the case of joint bidders. In particular, the ICA had determined the amount of the fine starting from a sum corresponding to the amount awarded by the tender, without properly taking into account the fact that the undertaking concerned participated in the tender jointly with other undertakings. The Council of State confirmed that, in the case of joint bidding, the ICA should instead determine the amount of the fine based on the specific part of the value of the bid to be attributed to each individual undertaking concerned, corresponding to the respective percentage share of the joint bid.[15]

[15] Council of State, Judgment No. 1944 of February 24, 2023.

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