January 2023

Italian Competition Law Newsletter

Highlights

- The Council of State annuls ICA decision that fined Enel for alleged abuse of dominant position.
- The Council of State upholds ICA decision not to impose interim measures against TIM for alleged abuse of dominant position.

The TAR Lazio confirms an ICA decision concerning restrictive agreements in maritime transport of fuel and waste in the Gulf of Naples

On January 3, 2023[1], the Regional Administrative Court for Latium (the "TAR Lazio") upheld a decision of the Italian Competition Authority (the "ICA") dated December 21, 2021 (the "Decision")[2], imposing a €1.2 million overall fine on Medmar Navi S.p.A. ("Medmar"), together with its parent company Mediterranea Marittima S.p.A. ("Mediterranea Marittima"), Servizi Marittimi Liberi Giuffré e Lauro S.r.l. ("Servizi Marittimi"), Traspemar S.r.l. ("Traspemar"), GML Servizi Marittimi S.r.l. ("GML") and Consorzio Trasporti Speciali Infiammabili e Rifiuti (the "Consortium", and, together with Medmar, Mediterranea Marittima, Servizi Marittimi, Transpemar and GML, the "Parties"). According to the Decision, the Parties had infringed Article 2 of Law No. 287/1990 (the "Italian Competition Law") by setting up a cartel in the market for the transport of flammable material (in particular, fuel) and waste to and from the islands in the Gulf of Naples (Ischia, Procida and Capri).

The Decision

The ICA's investigation followed several complaints received since May 2018, filed by numerous shipping companies active in the Gulf of Naples. According to the ICA, in the maritime routes under investigation, in 2017 Medmar and Servizi Marittimi appeared to be the only firms active in fuel transportation, while Servizi Marittimi and Traspemar were the main operators active in waste transportation.

In May 2018, Medmar and Servizi Marittimi formed a joint venture, GML. In July 2018, GML

[1] TAR Lazio, Judgment of January 3, 2023, No. 125

[2] ICA Decision of December 21, 2021, No. 29961, Case I839 – Trasporti speciali infiammabili e rifiuti da e per le isole campane

and its competitor Traspemar established the Consortium. The Consortium eventually became the sole operator active on the routes being investigated, and this led to an increase in the prices for the transport of both fuel and waste disposal. In the ICA's view, this conduct amounted to an agreement restricting competition in violation of Article 2 of the Italian Competition Law.

During the investigation, the Parties proposed a number of commitments aimed at addressing the ICA's antitrust concerns. The commitments included the obligation to dissolve and wind up both the Consortium and GML, as well as to refrain in the future from taking any action aimed at entering into similar types of agreements, including consortiums. The Parties also committed to adopting a specific compliance program (to be updated on a yearly basis) and to setting up regular meetings with customers and local authorities to assess and enhance the quality of the services offered. However, in October 2020, the ICA rejected the proposed commitments, as it considered them insufficient to effectively remove its competition concerns.

In the Decision, the ICA concluded that setting up the Consortium resulted in a restrictive agreement, since it allowed the Parties to no longer compete with each other, and to allocate the market, fix prices, and divide the Consortium's revenues on the basis of the Parties' historical market shares. The ICA fined Medmar, Servizi Marittimi and Transpemar €1,032,682, €81,236 and €124,226, respectively. In setting the amount of the fines, the ICA also took into account the special circumstances created by the Covid-19 pandemic. The ICA only imposed a symbolic fine of €10,000 on GML and the Consortium, because they had been subsequently dissolved and placed in liquidation.

The TAR Lazio Judgement

On January 3, 2023, the TAR Lazio entirely rejected the appeals brought by the Parties against the Decision.

i. First, the TAR Lazio rejected the Parties' claim that the ICA had violated Article 14 of Italian Law No. 689/1981 because the pre-investigation phase had lasted for an unreasonable amount of time.

   Pursuant to Article 14 of Law No. 689/1981, "the infringement, to the extent possible, must be contested immediately vis-à-vis both the alleged infringer and the person which is jointly and severally liable for the payment of the penalty, if any. If immediate notification has not been made to all or some of such persons, the details of the infringement must be notified to the persons concerned [...] within 90 days." The TAR Lazio recalled that the 90-day period starts when the ICA has all the information necessary to support its allegation. The case-law is unsettled as to whether Article 14 of Law No. 689/1981 applies to antitrust proceedings. According to one interpretation, Article 14 does not apply when specific provisions apply (such as the Italian Competition Law, which, however, contains no provision setting out a time limit for the ICA to open an investigation). Pursuant to an alternative interpretation, Article 14 is a general rule that applies to any proceedings leading to the possible imposition of an administrative fine, including antitrust ones.

   According to the TAR Lazio, regardless of the scope of application of Article 14, in the case at issue the ICA initiated the investigation in a timely manner, since it acquired the elements needed to support its allegations only on November 22, 2019, when it received further information from the complainants, and decided to open the investigation on January 22, 2020 (62 days later). Interestingly, the TAR Lazio stated that the duration of the pre-investigation phase cannot be rigidly set, and that the ICA may, through its discretionary

assessment, decide which is the most suitable moment to open the investigation, also according to its operational priorities. Similarly, it falls within the discretion of the ICA to decide when it has all the information needed to define the elements of the violation. This discretionary assessment is not subject to judicial review by administrative courts, except in cases of clear excess of power on the part of the ICA.

ii. Second, the TAR Lazio rejected the Parties' claim based on the excessive duration of the investigation. In the TAR Lazio's view, the investigation was concluded in a reasonable time, especially considering the suspension due to the Covid-19 pandemic, the complexity of the case, the need to carry out a market test on the commitments offered by the Parties, and the economic relevance of the anticompetitive agreement.

iii. Third, with regard to the Parties' claim that the ICA had unlawfully rejected the commitments proposed by the Parties, the TAR Lazio clarified that the ICA has a significant degree of discretion in deciding whether to accept commitments. In the case at hand, after conducting a market test on the commitments, the ICA concluded that they were not suitable to address its antitrust concerns, as the Parties did not offer to immediately set minimum service standards or lower their rates. In the ICA's view, maintaining the same price level, even without a consortium structure, would fall short of eliminating the harm to competition.

In light of the above, and having found that the ICA had correctly established the amount of the fines, the TAR Lazio entirely dismissed the appeals brought by the Parties and upheld the Decision.

The Council of State partially rejected 16 appeals against TAR Lazio judgments confirming an ICA decision concerning two cartels in the corrugated cardboard sector, and upheld the appeals only with regard to the quantification of fines

In 16 judgments delivered between January 11, 2023 and January 31, 2023 (the "Judgments")[3], the Council of State partially rejected the appeals against judgments of the TAR Lazio that had confirmed an ICA decision imposing fines totalling approximately €287 million on over 20 undertakings for two anticompetitive agreements in the corrugated cardboard sector (the "Decision").[4]

The Council of State upheld the appeals only with regard to the quantification of the fines, on the ground that they were disproportionate, and referred the matter back to the ICA for a new quantification.

The Judgments follow an earlier ruling of the Council of State with a similar outcome (i.e., upholding the appeal only with respect to the quantification of the fine).[5]

Background: the Decision and the rulings of the TAR Lazio

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

In the Decision, the ICA concluded that the parties' conduct amounted to two separate, 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.

All the investigated parties applied to the TAR Lazio for annulment of the Decision, except for the leniency applicant that was granted full immunity from fines. In the rulings on the merits of the applications, however, the TAR Lazio rejected nearly all of them[6].

The judgments

In the Judgments, the Council of State sided with the ICA insofar as procedural and substantive issues were concerned[7], whereas it upheld the appeals of the undertakings concerned in relation to the amount of the fines imposed by the ICA

(i) Procedural arguments

As to the procedural issues, the Council of State ruled that the approximately 60 days that the appellants were given by the ICA to prepare their written replies to the statement of objections did

[3] Council of State, Judgments Nos. 376 of January 11, 2023, 417 of January 12, 2023, 461 and 462 of January 13, 2023, 670 and 671 of January 19, 2023, 688-691 of January 20, 2023, 831 of January 25, 2023, 938, 941, 949 and 951 of January 27, 2023, and 1080 of January 31, 2023

[4] 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).

[5] 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).

[6] TAR Lazio, Judgments Nos. 6040, 6047-6055, 6072-6073, 6075-6076, 6078-6080, 6082, 6084-6085 and 6087 of May 24, 2021. Only four applicants were acquitted by the TAR Lazio (Judgments Nos 6074, 6083, 6044 and 6090 of May 24, 2021). All these judgments are discussed in the May 2021 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--may-2021-pdf.pdf

[7] The Council of State even reinstated the liability of those four applicants which had been acquitted in the first instance (see previous note, and Judgments Nos 461-462 of January 13, 2023, 831 of January 25, 2023 and 938 of January 27, 2023

not breach the undertakings' rights of defense. According to the Council of State, the period granted by the ICA was twice the minimum term provided for by the law[8]. Moreover, taking into account the not full - but only quasi - criminal nature of antitrust fines, the possibility for the undertakings to appeal to a court with unlimited jurisdiction regarding penalties (such as the Council of State) ruled out any breach of the rights of defense in this respect.

In addition, the Council of State confirmed that the overall duration of the procedure[9] was proportionate to the complexity of the investigation. The following periods were also found to be proportionate: (i) the period between receipt of the initial complaint and opening of the investigation by the ICA (which amounted to approximately four months); and (ii) the period between opening of the investigation and its extension to additional undertakings (which amounted to almost two years in certain cases).

In particular, with regard to the period between receipt of the initial complaint and opening of the investigation, the Council of State noted that, while the ICA must in principle respect the 90-day term generally applicable to any fining administrative procedure, that period starts running from when the ICA has completed its activities aimed at verifying all the elements of the infringement, taking also into account the necessary time frame to adequately assess the elements acquired, as opposed to when the infringement is committed by the relevant undertaking(s).

The conclusions reached by the Council of State in the Judgments should be assessed also in light of the position taken by administrative courts in other recent cases.

In particular, in a recent case, the TAR Lazio found that a 45-day period to reply to a statement of objections of more than 100 pages was not proportionate[10]. In the case at hand, the statement of objections that preceded the Decision was more than 300 pages long. Nonetheless, the Council of State considered that the approximately 60-day period given to the undertakings was sufficient.

In another recent case, the Council of State concluded that the 90-day period to initiate a procedure for the imposition of administrative fines cannot be derogated and starts when the ICA receives a complaint, unless such complaint is not complete or truthful[11]. In the Judgments, the Council of State seems to consider that, in any case, the 90-day period does not start running until the ICA has collected enough elements to support its allegations. Moreover, the ICA formally involved the Parties in the investigation up to two years after its commencement. Nonetheless, even in this case, the Council of State did not find any procedural flaws.

(ii) Substantive arguments

As to the substantive issues, the Council of State confirmed the ICA's finding that the two cartels were separate (and not one single cartel, as argued by certain appellants fined for both), taking into account, among other things, the differences in the respective markets, conduct, and duration. The Council of State also noted that a decisive element in such assessment was that not all undertakings participating in one of the two cartels was, or could be deemed to be, aware of the conduct relating to the other cartel.

Furthermore, the Council of State generally confirmed that the evidence against the various undertakings was sufficient to consider them liable for the entire duration of the unlawful conduct, as found by the ICA. In this respect, the

[8] Article 14 of Decree of the President of the Republic No. 217/1998 provides that the ICA shall communicate the preliminary results of its investigation (i.e., the statement of objections) to the relevant undertakings at least 30 days before the end of the investigation

[9] As set forth in Article 14 of Law No. 689/1981

[10] TAR Lazio, Judgment No. 12507 of October 3, 2022 (this judgment is discussed in the October 2022 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionnewsletteroctober2022pdf.pdf

[11] Council of State, Judgment No. 8503 of October 4, 2022, according to which "[t]he completeness and reliability of a complaint [...] are the criteria that the court must apply in order to determine whether a notice of commencement of an investigation is timely

Council of State ruled that, even in cases where there is no specific evidence of the involvement of an undertaking in the infringement for a long intermediate period, a public distancing from the infringement is required for the participation to be considered interrupted.

Some findings of the Council of State in the Judgments do not seem entirely consistent with the indications provided by some precedents of EU courts.

In particular, with regard to the possibility to find a single and continuous infringement, some rulings of the EU Court of Justice ("CJEU") clarified that: (i) there can be a single and continuous infringement even if certain undertakings are not aware of all of its aspects[12]; and (ii) there can be a single infringement for which certain undertakings are liable in full and certain undertakings are liable only in part[13]. In light of these principles, it could be argued that the fact that certain undertakings were not fully aware of all the elements of the contested conduct does not exclude, as such, that there can be in fact one single cartel.

Similarly, with regard to participation in a cartel that operated over several years, the CJEU clarified that the public distancing is only one factor, amongst others, to take into consideration to establish whether an undertaking continued to participate in a cartel or ceased to do so[14]. Instead, in the Judgments, the Council of State considered the absence of public distancing to be the decisive aspect for this assessment.

(iii) Quantification of the fines

As to the quantification of the fines, first, the Council of State noted a lack of coordination between the law (according to which a fine cannot in any event exceed 10% of an undertaking's total turnover[15]) and the ICA's fining guidelines (according to which the starting point to calculate a fine is a percentage of the undertaking's value of sales affected by the infringement, to be determined in light of the gravity of the participation and which cannot be lower than 15%)[16]. In certain cases, the need to respect the 10% statutory cap and thus to impose reasonable fines, which takes precedence over the ICA's guidelines, limits the possibility to graduate the fine by adjusting it to the actual gravity of the infringer's liability.

Second, for the undertakings participating in both cartels, the Council of State noted that, while in principle the ICA can impose separate fines, each reaching the 10% statutory cap, in the case of the Decision this was not proportionate. In particular, according to the Council of State, in light of the "interconnection" between the two cartels at stake (including notably the fact that they related to vertically related markets and that certain undertakings participated in both of them), the ICA should have (i) imposed one fine reaching the 10% statutory cap, and (ii) added to such fine only a "proportionate amount."

It will now be up to the ICA to redetermine the fines in such a way as to allow a graduation of the liability of the various undertakings and to set the level of the "proportionate amount" mentioned above.

[12] Fresh Del Monte Produce (Joined Cases C-293/13 P and C-294/13 P) ECLI:EU:C:2015:416, para. 160: "the General Court did not err in law in finding that the fact that Weichert was unaware of the exchange of information between Dole and Chiquita and did not have to know about it was not such as to alter the finding of a single and continuous infringement, even though liability could not be attributed to that company in respect of all that infringement."

[13] Infineon Technologies (Case C-99/17 P) ECLI:EU:C:2018:773, para. 177: "given that the appellant was held liable for its participation in the infringement at issue not as a whole, but only to the extent that it participated directly in manifestations of that infringement, it was entirely unnecessary, in the present case, to establish that it was aware of the collusive conduct of the other members of that infringement."

[14] Silec Cable and General Cable (Case C-599/18 P) ECLI:EU:C:2019:966, para. 52

[15] As set forth in Article 15 of Law No. 287/1990

[16] The ICA's fining guidelines, which closely resemble those of the European Commission, are available (in English) at the following link: https://en.agcm.it/en/scope-of-activity/competition/detail?id=e3e5dde6-b76b-4215-9dca-c5fab68c5d96

Other developments

The Italian Supreme Court of Cassation rules on limitation periods in a follow-on action

On January 20, 2023[17], the Supreme Court fully upheld a judgment of the Milan Court of Appeal[18], which had dismissed the action for damages brought by Brussels Airlines, American Airlines, Royal Jordanian and Aegean Airlines (the "Airlines") against SEA S.p.A. ("SEA").

In 2008, the ICA fined SEA, the company operating the Milan airports of Linate and Malpensa, €1,549,900 for an abuse of dominant position consisting in the application of unfair and excessive prices. The ICA found that: (i) the airport fee imposed by SEA to access the aircraft refueling facilities was not set on the basis of the costs actually incurred by SEA, since it exceeded by 55% the value set by ENAC (the Italian Civil Aviation Authority) for that service; (ii) the fees imposed by SEA to access the facilities necessary to provide aircraft catering services were three times higher than the value of that service, as set by ENAC; and (iii) the fees imposed by SEA for the lease of airport office spaces to carriers for the provision of handling services were almost two times higher than those applied by SEA to cargo handlers.

In 2014, the Airlines brought an action against SEA before the Court of Milan, seeking compensation for the damages suffered as a result of SEA's alleged abuse of dominance established by the ICA. However, the Court ruled that the Airlines' claim was time-barred, due to the expiry of the five-year limitation period[19]. The Milan Court of Appeal later upheld the lower court's judgment.

The Airlines challenged the ruling of the Court of Appeal, and requested to refer to the CJEU, pursuant to Article 267 TFEU, the question whether internal rules on limitation periods in antitrust cases are compatible with EU law. According to the Airlines, the contested conduct was carried out within the framework of a contractual relationship between the dominant firm and the Airlines, and the time-limit for bringing an action seeking damages in a contractual claim is ten years. In such a scenario, the five-year limitation period would not ensure the effet utile of Article 102 TFEU.

The Supreme Court held that the appeal was inadmissible under Article 360-bis of the Italian Code of Civil Procedure, as the ruling of the Court of Appeal was consistent with the established case law of the Supreme Court according to which actions for antitrust damages are tort claims, subject to the limitation period of five years.

The Supreme Court also rejected the request for a referral to the CJEU. In this respect, the Court noted that Article 102 TFEU does not regulate the limitation period and, therefore, there are no doubts as to the compatibility of internal rules on limitation period with Article 102 TFUE. According to the Supreme Court, since the Courage judgment, the CJEU has held that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from EU law, provided that such rules are not less favorable than those governing similar domestic actions[20]. In particular, in Manfredi, the CJEU stated that "it is for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed[21]".

[17] Italian Supreme Court, Judgment of January 20, 2023, No. 1816

[18] Milan Court of Appeal, Judgment of July 27, 2018, No. 3643

[19] Court of Milan, Judgment of June 27, 2016, No. 7992

[20] Case C-453/99, Courage, ECLI:EU:C:2001:465, § 29

[21] Joined Cases C-295/04 to C-298/04, Manfredi, ECLI:EU:C:2006:461, § 64

Directive 2014/104/EU (the "Damages Directive")[22], concerning actions for damages caused by antitrust infringements, provides that "the limitation periods for bringing actions for damages are at least five years". Legislative Decree No. 3 of January 19, 2017, which implemented the Damages Directive in Italy, confirms that actions for damages (i) are tort claims, and (ii) are time-barred after five years. According to the Supreme Court, even if Legislative Decree No. 3 of January 19, 2017, did not apply in the case at the hand, as the infringement ceased before the date of expiry of the time-limit for the transposition of the Damages Directive, it nonetheless supported the established case-law regarding the nature of the claim and the duration of the limitation period.

Based on the above, the Supreme Court entirely rejected the appeal brought by the Airlines and confirmed the judgments of the lower courts.

The Italian Supreme Court of Cassation dismisses the appeal against the Council of State judgment in the Gara So.Re.Sa. Rifiuti Sanitari Regione Campania case as inadmissible.

On January 13, 2023[23], the Supreme Court of Cassation held that the appeal filed by Ecosumma S.r.l. ("Ecosumma") against a judgment issued in 2021 by the Council of State was inadmissible[24].

On January 30, 2019[25], the ICA found that four companies, including Ecosumma, had rigged a 2016 public tender for the collection and disposal of medical waste in the Campania Region. According to the ICA, the unlawful coordination of the companies' bidding strategies was facilitated by a third-party consulting firm, which ensured that they would reciprocally respect the lots' allocation previously defined. The ICA considered that the agreement constituted a very serious restriction by object, and fined the four companies and the third-party consultant over €1.3 million overall.

The ICA's decision was fully upheld by the TAR Lazio[26] and the Council of State[27].

In its appeal before the Italian Supreme Court, Ecosumma claimed that the Council of State had not only failed to take proper account of EU case-law concerning anti-competitive practices and determination of fines, but had also failed to exercise its right, and comply with its duty (as a court of final instance), to refer the case to the CJEU for a preliminary ruling on the interpretation of EU competition law.

The Supreme Court fully dismissed the appeal brought by Ecosumma as inadmissible, finding that (i) appeals before the Supreme Court against judgments of the Council of State can only be brought on 'grounds relating to jurisdiction'; (ii) such appeals can only concern "absolute" or "relative" lack of jurisdiction and cannot extend to the review of judgments that have allegedly misapplied national or EU law; (iii) the appellant's request to make a reference to the CJEU for a preliminary ruling, aimed at finding alleged errors committed by the Council of State in the interpretation of competition rules, cannot be granted by the Supreme Court since it does not concern a 'ground relating to jurisdiction'; and (iv) the appeal was aimed at questioning how the Council of State defined the infringement and determined the fine, which is clearly a substantive ground of appeal, falling outside the Supreme Court's competence.

[22] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, L 349/1

[23] Italian Supreme Court, Judgment of January 13, 2023, No. 970

[24] Council of State, Judgment of July 16, 2021, No. 5373

[25] ICA, Decision of January 30, 2019, No. 27546, Case I816 - Gara So.Re.Sa. Rifiuti Sanitari Regione Campania.

[26] TAR Lazio, Judgment of October 23, 2020, No. 10792. The judgment is discussed in the October 2020 issue of this Newsletter: https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-october-2020.pdf

[27] Council of State, Judgment of July 16, 2021, No. 5373

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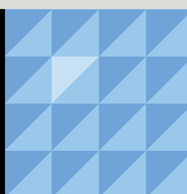

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