July 2020

Italian Competition Law Newsletter

Highlights

— The Council of State confirms the reduction by 60% of the fines imposed by the ICA on the members of an alleged cartel in the ready-mix concrete sector

— The TAR Lazio annuls the 2019 ICA decision concerning an alleged bid rigging cartel in facility maintenance services

— The TAR Lazio quashes an ICA decision fining alleged bid-rigging practices in integrated health and safety management

The Council of State confirms the reduction by 60% of the fines imposed by the ICA on the members of an alleged cartel in the ready-mix concrete sector

On July 24, 2020, the Council of State upheld three judgments issued by the Regional Administrative Court of Lazio (the "**TAR Lazio**") in 2017,[1] which reduced by 60% the amount of the fines imposed by the Italian Competition Authority (the "**ICA**")[2] in 2015 on three firms operating in the area of Belluno, in the Veneto Region (namely, Superbeton S.p.A., F.lli Romor S.r.l. and F.lli De Pra S.p.A., together the "**Companies**"). In contrast, the Council of State dismissed the cross-appeals submitted by the Companies that aimed to challenge the ICA's finding of infringement.[3]

Background

The ICA's findings

In December 2015, the ICA found that seven companies active in the production of ready-mix concrete entered into two distinct anticompetitive agreements by object, aimed at fixing prices and allocating customers among them, and imposed on those companies total fines of approximately €3 million (the "**Decision**"). The parties to the first collusive agreement, which was implemented since 2010 through 2013 in the area of Venezia Mare, were SuperBeton S.p.A., General Beton Triveneta S.p.A., Mosole S.p.A., Ilsa Pacifici Remo S.p.A., Jesolo

[1] TAR Lazio, Judgment Nos. 11885, 11886 and 11887 of December 1, 2017.

[2] ICA, Decision of December 22, 2015, No. 25801, Case I780 – *Mercato del calcestruzzo in Veneto*.

[3] Council of State, Judgment Nos. 4735, 4736 and 4737 of July 24, 2020.

Calcestruzzi S.p.A. and Intermodale S.r.l.. The second anticompetitive agreement established in the Decision was carried out between 2013 and 2014 by the Companies and consultancy firm Intermodale in the province of Belluno.

According to the ICA, the two agreements were aimed at allocating construction sites and fixing the sale prices of concrete in the two abovementioned geographical markets. In both cases, the coordination was designed by the participating firms to maintain their own historical clients and market shares.

According to the ICA, the companies involved coordinated their behavior through the activity carried out by Intermodale. Generally on a weekly-basis, each company informed Intermodale about all the construction sites about to be opened and the related quantities of concrete to be supplied. Intermodale collected and processed all this information in summary charts, which were then shared and discussed by the suppliers during regular meetings, held separately for the two agreements.

The TAR Lazio's judgments

In its judgments of December 2017, the TAR Lazio partially granted the Companies' applications for annulment, and ordered the ICA to reduce the amount of the original fines by 60%.[4]

In their applications to the TAR Lazio, the Companies took issue, *inter alia*, with: (i) the definition of the relevant market; (ii) the lack of evidence that the Companies took part in the second collusive agreement; and (iii) the calculation of the amount of the fines, which in their view was vitiated by the ICA's erroneous determination of the duration of the cartel, and its erroneous categorization of the infringement as "very serious".

The TAR Lazio dismissed all the claims submitted by the Companies, except for the last one. In particular, the Court held that the ICA failed to assess the detrimental effects of the parties' conduct on the relevant market, all the more so since the Companies represented only approximately 50% of the Belluno area market. Therefore, contrary to what the ICA established in the Decision, the unlawful conduct was capable of affecting the market "only in part". As a result, the TAR Lazio reduced the original amount of the fines.

The rulings of the Council of State

The Council of State upheld the TAR Lazio judgments in their entirety.

In their cross-appeals, the Companies claimed that the ICA had violated their fundamental right to a fair trial pursuant to Article 6 of the European Convention on Human Rights (the "**ECHR**"). In particular, they took issue with an alleged undue interference between the investigative and the decision-making functions of the ICA. The Court, however, relied on the distinction drawn by the European Court of Human Rights (the "**ECtHR**") between "hardcore" criminal cases and cases not strictly belonging to traditional categories of criminal law, such as antitrust cases.[5] For cases falling within the second category, it is not required that all the guarantees in Article 6 ECHR be offered at the administrative procedural stage, as long as they are ensured during a subsequent judicial stage. As a consequence, the Council of State held that the right to a fair trial may be deemed to be fully guaranteed when an administrative authority, such as the ICA, imposes criminal fines, even at the end of a procedure that does not satisfy all the procedural guarantees enshrined in Article 6 of the ECHR, provided that the possibility of a "full jurisdiction" review – i.e., a review characterized by the court's power to examine all questions of fact and law relevant to the dispute before it., as well as to quash in all respects, on questions of fact and law, the decision under review – is later ensured. Please note that the Court did not analyze the issue of whether the TAR Lazio's review of the Decision did satisfy the full jurisdiction criterion, so as to exclude the violation of the Companies' right to a fair trial, and noted that their pleas were formulated in abstract and theoretical terms, rather than with regard to the special features of the case in point.

[4] ICA, Decision of April 11, 2018, No. 27123, Case I780B – *Mercato del calcestruzzo in Veneto-Rideterminazione sanzione.*

[5] European Court of Human Rights, Judgment of November 23, 2006, Case No. 73053/01, *Jussila v. Finland*.

As to the merits of the cross appeals, the Council of State found that the ICA's finding of the anticompetitive agreement to which the Companies were parties was supported by numerous pieces of evidence: in particular, the documentation found at Intermodale's premises clearly showed the unlawful intent of the Companies and their attendance at the cartel's periodic meetings.

Moreover, the Court confirmed that the ICA correctly identified two different markets – one for the Venezia Mare area and one for the Belluno area – due to the special characteristics of the cartelized product, including the perishability of concrete. Moreover, the Council of State pointed out that the activity of defining the product and geographic markets falls within the ICA's power to carry out technical assessments, which may be challenged by the parties only where the ICA manifestly breaches the principle of reasonableness. Finally, the Council of State upheld the TAR Lazio's judgments also with respect to the reduction in the amount of the original fines.[6] The Court held that, pursuant to the ICA Guidelines on the method of setting pecuniary administrative fines, although an anticompetitive agreement by object is likely to be considered as serious, a case-by-case assessment is always required to establish the gravity of the infringement.

In particular, where it is possible to estimate the effects stemming from an infringement, such effects must be taken into account to determine the gravity of the conduct.

The TAR Lazio annuls the 2019 ICA decision concerning an alleged bid-rigging cartel in facility maintenance services

On July 27, 2020, the TAR Lazio delivered 15 judgments concerning the 2019 ICA decision, by which 19 companies were found liable for participating in a cartel aimed at rigging a tender procedure in the facility maintenance sector in Italy (the "**Decision**").[7]

The TAR Lazio delivered two sets of rulings: on the one hand, it quashed the Decision with respect to three of the addressee companies;[8] on the other hand, with respect to the 12 other applicants, it upheld the finding of infringement, but ordered the ICA to re-determine the fines originally imposed on them.[9]

Background

On April 17, 2019, the ICA found that 19 companies allegedly participated in a cartel that affected the outcome of the so-called "Facility Management 4" tender procedure for the provision of cleaning and maintenance services for public offices throughout Italy. The said tender procedure, launched by Consip S.p.A. (the central purchasing agency owned by the Ministry for Economy and Finance), was divided into 18 geographical lots and had a total value of approximately €2.7 billion.

During the investigation, the ICA cooperated with public prosecutors in Rome, who were investigating the same conduct in connection with criminal proceedings, and relied on a leniency application submitted by one of the parties to the cartel.

[6] ICA Resolution No. 25152 of October 22, 2014 – Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15, paragraph 1, of Law No. 287/90.

[7] ICA, Decision of April 17, 2019, No. 27646, Case I808 – *Gara Consip FM4-Accordi tra i principali operatori del facility management*.

[8] TAR Lazio, Judgment Nos. 8765, 8767 and 8768 of July 27, 2020.

[9] TAR Lazio, Judgment Nos. 8762, 8769-8772, 8774-8779 and 8781 of July 27, 2020.

The ICA found that the four main market players led a number of distinct temporary associations of undertakings – so-called ATIs (i.e. *associazione temporanea di imprese*) – that exchanged information about their bidding strategies during meetings, and through subcontracting and consortia. These exchanges were part of a concerted practice by which the ATIs submitted bids that never overlapped, according to a so-called "chessboard" pattern.

The ICA concluded that the infringement constituted a hardcore restriction of competition under Article 101 TFEU, and issued fines against the investigated companies of approximately €235 million in total.

Pursuant to Article 15 of Law No. 287/1990, the leniency applicant – C.N.S. Consorzio Nazionale Servizi Società Cooperativa ("**CNS**") – was granted a 50% reduction in its fine. Ultimately, the ICA imposed no fine on Dussmann Service S.r.l. and its parent company Dussmann Service Holding GmbH, and Siram S.p.A. and its parent company Veolia Energies International SA, as it found that the evidence regarding these companies' alleged involvement in the cartel was insufficient.

The judgments of the TAR Lazio

Annulment of the Decision vis-a-vis three applicants

The TAR Lazio quashed the Decision to the extent that it was addressed to Engie Energy Services International SA and Engie Servizi S.p.A. (together referred to as "**Cofely**") and Consorzio Stabile Energie Locali S.c.a r.l. ("**CSEL**").[10]

According to the TAR Lazio, there was no significant evidence supporting the claim that CSEL and Cofely had jointly (i.e. in the context of a special purpose-ATI) participated in the tender with collusive purposes; conversely, there were sufficient grounds to conclude that both companies intended to bid competitively and lawfully.

The Court held that the Decision was manifestly unfounded. The ICA mainly focused on the type, timing and effects of the concertation among the main "players" of the cartel, without sufficiently explaining how the Cofely-CSEL ATI was involved in the unlawful conduct and the companies' alleged collusive intent. Moreover, all the economic and technical offers submitted by the Cofely-CSEL ATI were inherently aggressive and overlapped with the bids submitted by the cartelists.

Regarding the exogenous evidence relied upon by the ICA, the TAR Lazio concluded that the hand-written "pink post-it" of June 12, 2017, in which a manager of one of the alleged cartelists (i.e., Consorzio Nazionale Servizi Società Cooperativa – "**CNS**") wrote the name of the attendees at an anticompetitive meeting, was insufficient to prove the involvement of Cofely and CSEL in the alleged cartel. In particular, there was no evidence of any kind of agreement between the Cofely-CSEL ATI and the participants to the alleged collusive agreement (i.e., Manital S.c.p.a., Manutencoop Facility Management S.p.A., Romeo Gestioni S.p.A. CNS and STI S.p.A.).

Reduction of the fines imposed on 12 of the Decision's addressees

With respect to the remaining applications for annulment of the Decision, the TAR Lazio confirmed the ICA's finding of an infringement of Article 101 TFEU. However, it ordered the ICA to re-determine the fines imposed on the companies.[11]

In particular, the TAR Lazio found that the endogenous and exogenous evidence relied upon by the ICA was of "*absolute relevance and significance*". First, the ICA correctly found numerous anomalies in the bids submitted by the companies, which suggested the existence of a common strategy of participation in the tender procedure, with each party ranking first for the lot(s) attributed to that they were interested in. In addition, the ICA's findings

[10] TAR Lazio, Judgment Nos. 8765, 8767 and 8768 of July 27, 2020.

[11] TAR Lazio, Judgment Nos. 8762, 8769-8772, 8774-8779 and 8781 of July 27, 2020.

were based on documentary evidence (such as emails and documents seized at the companies' premises), as well as on wire-tapping records retrieved in the parallel criminal proceedings. In this regard, the TAR Lazio reiterated the principle that wiretapping records that have been lawfully acquired in the context of a criminal investigation pursuant to the procedural rulzes concerning the gathering of evidence may be used by the ICA in antitrust proceedings.

However, the TAR Lazio was persuaded by the parties' pleas concerning the determination of the percentages applied to the basic amount of the fines to reflect: (i) the gravity of the conduct, pursuant to Article 14 of Law No. 287/1990, and (ii) the so-called "entry fee", pursuant to Article 17 of Law No. 287/1990. Regarding the gravity of the conduct, the ICA had found that the alleged cartel had the effect of eliminating competition in each lot of the FM4 tender. However, according to the TAR Lazio, the ICA did not adequately take into account the circumstance that the FM4 tender was suspended and, accordingly, the lots were not awarded to the bidders. Regarding the entry fee, the judges stated that the ICA did not sufficiently justify the application of an additional amount as a deterrent effect. In light of the above, the TAR Lazio urged the ICA to re-determine the amount of the fines.

In addition, in certain of its judgments partially annulling the Decision,[12] the TAR Lazio rejected the claim that the ICA did not correctly take into account the "single economic unity" doctrine, thus wrongly fining some companies which declared they were not involved in the bid-rigging strategy. Referring to settled case-law, the Court stated that, under competition rules, two or more parties can be considered as a single undertaking, despite having separate legal personality, on the basis of a number of elements such as a controlling interest, or economic, functional or organizational links.[13] In particular, there must be two factors for the existence of a single economic unit: (i) a position of control that a parent company exercises over other companies; and (ii) the effective decisive influence of the parent company over these companies, so that the companies concerned do not determine independently their own conduct on the market. In the present case, with regard to Gruppo STI (which includes STI S.p.A., Exitone S.p.A., Gestione Integrata S.r.l. and Finanziaria Bigotti S.p.A.), the TAR Lazio held that the ICA correctly identified a single undertaking since, *inter alia*: (i) the companies had the same headquarters; (ii) some individuals held key roles both in the parent company STI and in the subsidiaries; and (iii) the tender office for all these companies was located within the parent company.

In addition, the TAR Lazio upheld the finding of joint and several liability of Esperia S.p.A. for the payment of the fine imposed on Kuadra S.r.l., whose activities (including those subject to the ICA's investigation) were transferred to Esperia, which did not take part in the collusive scheme. According to the Court, on the basis of the single economic unit principle, the person who constitutes the economic successor of the previous entity may be held liable for an antitrust infringement. Furthermore, this principle is not incompatible with the principle according to which liability for damage caused by infringement of competition rules is personal in nature, but aims to avoid that legal changes in the structure and identity of a company may allow it to go unpunished.

With specific reference to the leniency applicant, which challenged the ICA's decision to merely grant a 50% reduction in the fine, instead of the non-imposition of the fine or, alternatively, the application of a merely symbolic fine, the TAR Lazio confirmed that CNS made a significant contribution to the investigation, but ultimately simply completed and strengthened the evidence already available to the ICA (such as documents or wiretapping records retrieved from the parallel

[12] TAR Lazio, Judgment Nos. 8769, 8770, 8771 and 8772 of July 27, 2020.

[13] Court of Justice, Judgment of December 14, 2006, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, Case C-217/05, §41.

criminal proceedings).[14] Accordingly, in light of the ICA Notice on the non-imposition and reduction of fines,[15] it concluded that the ICA correctly granted CNS a reduction in the fine instead of total immunity.

The TAR Lazio quashes an ICA decision fining alleged bid-rigging practices in integrated health and safety management

On July 27, 2020, the TAR Lazio annulled an ICA decision of September 2019, which fined Com Metodi S.p.A. ("**Com Metodi**"), Sintesi S.p.A. ("**Sintesi**"), and Igeam S.r.l., Igeamed S.r.l. and Igeam Academy S.r.l. (jointly, "**Igeam**") (together, the "**Companies**") for participating in an alleged cartel which affected the outcome of the open tender procedure for the provision of integrated health and safety management services in the workplaces at Italian Public Administrations, launched by Consip S.p.A. ("**Consip**") in December 2015 (the "**SIC 4 Tender**").[16]

Background

In March 2018, after Consip reported to the ICA certain alleged anomalies in the economic offers submitted by certain participants to the SIC 4 Tender, the ICA started an investigation under Article 101 TFEU into the conduct of the companies competing in the said tender procedure.

In its final decision,[17] the ICA found that the Companies coordinated their bidding strategy according to a "chessboard" pattern. The ICA also found that the Companies had exchanged sensitive information before and after submitting their bids. Moreover, the Companies' bidding strategies 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 alleged anticompetitive strategy was not fully implemented, as the Companies faced aggressive competition from two undertakings that did not take part in the cartel, and lost certain lots to them.

As a result, the following fines were imposed on the Companies: €1,359,022 on Com Metodi, €1,173,387 on Igeam, and €700,182 on Sintesi.

The rulings of the TAR Lazio

The TAR Lazio annulled the ICA decision on the grounds that the key elements for establishing a concerted practice, as defined by the national and EU case-law, were missing in the present case. In the Court's view, the finding of infringement in the decision was not supported by sufficient evidence.

First, the TAR Lazio held that there was a lack of exogenous evidence of Sintesi's involvement. The ICA stated that Sintesi was part of the collusive scheme on the basis of a report found at Igeam's premises, which could actually be interpreted in various ways. Without any document to prove that Sintesi was involved in the collusive scheme, it was not possible to assume the existence of a bidding strategy among the Companies according to a "chessboard" pattern. In particular, if Sintesi was not involved in all the preparatory and strategic phases prior to the tender, it would be difficult to envisage its collusive connection with the two other companies.

[14] TAR Lazio, Judgment No. 8762 of July 27, 2020.

[15] ICA, Notice of September 9, 2013, on the non-imposition and reduction of fines, pursuant to Article 15 of Law No. 287/1990.

[16] TAR Lazio, Judgment Nos. 8764, 8773 and 8780 of July 27, 2020.

[17] ICA, Decision of September 18, 2019, No. 27908, Case I822 – *Consip/Gara Sicurezza e Salute 4*.

Secondly, the TAR Lazio held that the Companies provided an alternative and plausible explanation of the facts relied upon by the ICA to establish the existence of the alleged anticompetitive conduct. For example, the TAR Lazio agreed with the Companies that the offers submitted for certain lots did not pursue a bid-rigging scheme, but rather an efficiency objective, to the extent that their respective offers were targeted to regions that they already covered in their commercial activities, in order to pursue an optimization of customer management costs, by taking advantage of their previous knowledge of these customers. Furthermore, the TAR Lazio noted that Sintesi had submitted a plausible explanation of its conduct based on technical andmathematical statements, which were not taken into account by the ICA.

Thirdly, the TAR Lazio held that the ICA did not properly assess the conduct of the other participants to the SIC 4 Tender, as well as the overall number of the participants in the tender procedure. In particular, in light of the significant number of competitors which were not parties to the alleged cartel, the latter could not have plausibly been successful.

Other developments

The Council of State upholds an ICA decision refusing to review the amount of a fine

On July 31, 2020, the Council of State upheld a judgment[18] in which the TAR Lazio confirmed an ICA decision rejecting a request to review the amount of a cartel fine imposed on Industria Meccanica Varricchio – I.Me.Va. S.p.A. ("**I.Me.Va.**") in 2012.[19]

In 2012, the ICA sanctioned seven companies (including I.Me.Va., which was fined in the amount of approximately €4.8 million) for participating in an alleged cartel aimed at sharing the Italian market for road safety barriers and fixing prices.[20] In 2013, following an application for annulment by I.Me.Va., the TAR Lazio annulled the ICA decision.[21] The Court accepted the applicant's plea of excessive length of the administrative proceedings, since the ICA's investigation has lasted approximately three years, with three subsequent decisions extending the initial deadline set by the ICA. The TAR Lazio affirmed the principle according to which the ICA is bound to respect investigation deadlines, noting that, otherwise, multiple and unjustified delays would render procedural deadlines ineffective. The TAR Lazio noted that the ICA acted as "*if it could complete its investigation without being subject to a definite time limit*", thus causing unjustifiable and unreasonable delays.

However, in 2018 the Council of State overturned the judgment of the TAR Lazio and, ultimately, confirmed the 2012 infringement decision.[22] In particular, relying on Article 6 of Presidential Decree No. 217 of April 30, 1998, the Council of State held that there is no mandatory time limit for the conclusion of proceedings before the ICA, as their duration may be extended if necessary, provided that it is done before the expiry of the initial deadline and by a duly reasoned decision.

Following the Council of State's ruling, I.Me.Va. submitted a request to the ICA to review the fine or, alternatively, to provide for the possibility to pay the fine in instalments. The ICA rejected the request to review the amount of the fine,[23] but granted the request to pay the fine in 30 monthly instalments.[24]

I.Me.Va applied for the annulment of the ICA decision rejecting its request to review the fine, but its action was dismissed by the TAR Lazio and, ultimately, by the Council of State in July 2020.

[18] TAR Lazio, Judgment No. 6089 of May 16, 2019.

[19] Council of State, Judgment No. 4867 of July 31, 2020.

[20] ICA, Decision of September 28, 2012, No. 23931, Case I723 – *Intesa nel mercato delle barriere stradali*.

[21] TAR Lazio, Judgment No. 8672 of October 7, 2013.

[22] Council of State, Judgment No. 3197 of May 29, 2018.

[23] ICA, Decision of July 27, 2018, No. 57207, Case I723 – *Intesa nel mercato delle barriere stradali*.

[24] ICA, Decision of August 2, 2018, No. 57678, Case I723 – *Intesa nel mercato delle barriere stradali*.

First, both courts reaffirmed the nature of the fining decision as an act "with immediate effect", whose effects are exhausted at the moment of their adoption, resulting in an obligation on the addressee to pay the amount of the fine. Any possible extension of time in the enforcement of the decision by the ICA may depend, *inter alia*, on the addressee's failure to comply with the decision, procedural events or possible instalments for the payment granted by the ICA. The Council of State also emphasized that the needs raised by the applicant to support its request for a review of the fine, based on alleged economic difficulties, may be asserted in the context of the applicant's compliance with its obligation to pay the fine previously imposed. A case-by-case assessment of any potential "further circumstances" must be carried out by the ICA only in the context of the compliance phase, in order to assess whether the payment of the fine has become objectively unenforceable, in light of the evidence submitted by the debtor undertaking.

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