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Italian Competition Law Newsletter

Highlights

— ICA imposes fine in excess of € 3.6 million on the outgoing providers of local public transport service by road in Tuscany.

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On June 21, 2022, the Italian Competition Authority (the “ICA”) closed its investigation pursuant to Article 102 TFEU into the conduct of the incumbent providers of the local public transport service by road in the Tuscany Region (the “Region”), which jointly formed the ONE Scarl consortium (“ONE”).

The ICA found that ONE and its 15 member companies (the “Parties”) adopted a complex abusive strategy to hinder the takeover of the new entrant, Autolinee Toscane S.p.A. (“Autolinee Toscane”), a wholly-owned subsidiary of RATP Dev SA and RATP Dev Italia S.r.l., which are in turn controlled by Régie Autonome des Transports Parisiens, a public institution established and controlled by the French State.

Factual Background

In 2013, the Region launched a procedure for awarding a public local transport service concession contract concerning its territory (the “LPT Tuscany Contract”).

After the LPT Tuscany Contract was awarded to Autolinee Toscane, the other participating bidder, Consorzio Mobit (“Mobit”), a consortium company whose members included most of ONE’s members, challenged the award decision before the Regional Administrative Court of Tuscany². Autolinee Toscane lodged a counterclaim, seeking exclusion of the tender submitted by Mobit.

¹ ICA, Decision of June 21, 2022, No. 30205, Case A536, Regione Toscana/gara per l’affidamento del servizio di trasporto pubblico locale. The ICA opened the investigation on June 3, 2020, when it also imposed interim measures on the Parties, ordering them to share with Autolinee Toscane information which was deemed essential to allow the new entrant to start providing the relevant transport services, such as: (i) information concerning mortgages; (ii) data and documents required for property deeds; (iii) data and documents concerning automatic vehicle monitoring systems; and (iv) information concerning directory services. The ICA confirmed the interim measures by Decision of June 23, 2020, No. 28277

² In support of its action, Mobit challenged the lawfulness of the tendering procedure, alleging that it was unlawful for Autolinee Toscane to participate in the tendering procedure, that there were irregularities in the tender submitted by that company and, in the alternative, that the entire procedure was unlawful.

The Regional Administrative Court of Tuscany upheld both Mobit's main action and Autolinee Toscane's counterclaim, annulling the award decision, because of irregularities affecting the tenders submitted by both those entities in the light of the requirements laid down in the rules governing the invitation to tender.³

Both Mobit and Autolinee Toscane appealed against that judgment to the Council of State.

In support of its appeal, Mobit argued, in particular, that Autolinee Toscane ought to have been excluded from the award procedure pursuant to Article 5(2)(b) and (d) of Regulation No. 1370/2007, since it was controlled by an undertaking, RATP, which had been directly awarded a contract in France and should be classified as an "internal operator" within the meaning of Regulation No. 1370/2007⁴.

Considering that the interpretation of the provisions of Regulation No. 1370/2007 was necessary in order to resolve the disputes before it, the Council of State decided to stay proceedings and request a preliminary ruling to the Court of Justice of the EU ("ECJ") under Article 267 TFEU.⁵

While the preliminary reference procedure was pending, in December 2017, the Region had to enter into a bridge contract with ONE (the "Bridge Contract") in order to ensure the smooth provision of the services included in the LPT Tuscany Contract until the Council of State rendered its ruling. After the ECJ delivered its preliminary judgment on March 21, 2019, the Region adopted a final decision awarding the tender to Autolinee Toscane and set the deadline of January 1, 2020, by which the awardee had to start to perform the contract.⁶

On December 11, 2019, the Council of State dismissed the appeal, thereby confirming the lawfulness of the award in favor of Autolinee Toscane⁷.

The Decision

The relevant market and the incumbents' dominant position

The ICA defined the relevant market as the market for the provision of local public transport service by bus in the Tuscany Region.

According to the ICA, the Parties enjoyed a dominant position on this market, since:

- they were the only operators active in the respective catchment areas; and
- being the incumbents, the Parties had the exclusive availability of the assets and information indispensable to carry out the LPT Service.

As a result, the Parties were in a position to hinder Autolinee Toscane from effectively providing the LPT Service.

The alleged conduct

Under the ICA's theory of harm, the Parties pursued an abusive strategy with the aim of delaying Autolinee Toscane from starting to provide the LPT Service.

The ICA took issue with their refusal to share timely with Autolinee Toscane assets (such as real estate, vehicles, ticket offices, warehouses, equipment, spare parts, hardware and software) that were "*essential*" to the performance of the LPT Tuscany Contract. In the ICA's view, the alleged anticompetitive conduct was implemented through:

- i. a refusal to provide information and data indispensable for carrying out the preparatory activities related to the transfer of assets from

³ Regional Administrative Court of Tuscany, judgment of October 28, 2016, No. 1548

⁴ See Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of October 23, 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70 (OJ 2007 L 315, p. 1).

⁵ Joined Cases C-350/17 and C-351/17, Mobit, EU:C:2019:237.

⁶ Tuscany Region, Decree of April 19, 2019, No. 6585.

⁷ In compliance with the ECJ's interpretation of Articles 5 and 8(2) of Regulation No. 1370/2007, the Italian court held that Article 5 is not applicable to an award procedure that took place before December 3, 2019. In addition, the Council of State held that it could not rule on whether the RATP was an "internal operator" controlling Autolinee Toscane. See judgment of December 11, 2019, No. 8411

the outgoing providers to Autolinee Toscane;
and

- ii. a failure to enter into contracts aimed at transferring such assets (through sale or temporary lease).

The alleged conduct ultimately hindered Autolinee Toscane from starting to provide the LPT Service by the timelines set out in the Bridge Contract, and allowed the Parties to continue operating that service well beyond the final term of January 1, 2020.

Exclusive availability of indispensable assets and competition “for” the market

The ICA emphasized that the assets at issue were indispensable to the provision of the LPT Service not only because they were exclusively available to the incumbents, but also in light of the geographic distribution of those assets, which were located throughout the territory of the Region and were employed by each operator in its respective catchment areas.

In addition, in the ICA’s view, the “indispensability” of the assets in relation to the provision of the LPT Service stemmed from the national and regional regulatory framework concerning the entrustment of local public transport service.⁸

The relevant provisions reflect the fact that, as pointed out in the Decision, the transfer of assets from the outgoing operator to the new entrant entails several preparatory activities that are conducive and indispensable to the transfer itself, such as information gathering. It follows that information and data concerning the assets to be transferred need to be provided promptly by the outgoing operator to the winning bidder, thus avoiding disruptions in the provision of the service.

Accordingly, timely access to information on essential assets and the transfer of this information and assets to the successful bidder plays a crucial role in ensuring that the awardee is in a position to

successfully and seamlessly take on the provision of the service. Conversely, the denial of access to essential information and assets impedes the benefits of competitive tendering, thwarting competition “for” the market.

Based on these principles, the ICA established that, in the present case, the Parties’ alleged conduct harmed the interests of the Region (as it hampered the pro-competitive effects that the contracting authority expected to gain from the bidding process) as well as those of the consumers (as it led to higher costs and lower quality of services).

The fine

In the ICA’s view, the Parties’ conduct aimed at restricting or even eliminating the benefits of competitive tendering procedures so as to hinder and delay the opening of the market to competition, and thus amounted to a particularly serious violation of Article 102 TFEU.

However, the initial amount of the fine was reduced by 45-50% in light of the peculiar context in which the conduct under investigation took place, which involved complex litigation and negotiations for the transfer of the assets necessary for the performance of the LPT Tuscany Contract. The ICA further reduced the fine by 10-15%, taking into account the economic difficulties that the Parties had to face as a result of the Italian government’s restrictions on travel during the Covid-19 health crisis.

Against this background, the total fines imposed on the Parties amounted to € 3,697,773.

⁸ In particular, Italian law provides that the control of essential assets may not be an element of discrimination between competitors and, consequently, stipulates that the successful bidder in a tender procedure shall be provided with the assets necessary to provide the service put out to tender. In line with this provision, the Tuscany regional legal framework sets forth that, in the case of the awarding of local public transport service by competitive bidding, outgoing operators must transfer all the essential assets to the winning bidder.

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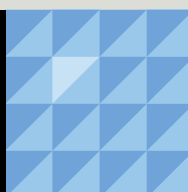
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