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Italian Competition Law Newsletter

Highlights

— The Council of State annuls an ICA decision on an alleged abuse of dominant position in the retail supply of electricity

— The Court of Milan awards damages to prestressing steel buyers in a partly follow-on and partly standalone case.

The Council of State annuls an ICA decision on an alleged abuse of dominant position in the retail supply of electricity

On May 31, 2023, the Council of State annulled the decision of the Italian Competition Authority (the "ICA") finding that the Acea group ("Acea") – an Italian energy firm active, among other things, in the distribution and sale of electricity – had abused its dominant position in local markets for retail electricity supply[1].

Background

On December 20, 2018, in parallel proceedings against Acea and Enel S.p.A. ("Enel"), the ICA found that the two companies had implemented an abusive strategy based on their position as firms active in both the provision of the enhanced protection service ("EPS"; servizio di maggior tutela) and the retail supply of electricity at market prices[2].

The EPS is a regulated service reserved to domestic clients and small businesses that do not opt for offers at market prices. Under the EPS regime, firms supply electricity at a tariff set by the sector regulator. In Italy, the EPS was initially scheduled to end in 2019, following the full liberalization of the electricity market, but the deadline was then postponed to later dates.

Acea and Enel are in charge of providing the EPS in the local markets where they respectively manage the distribution of electricity. In addition, they are active in the retail supply of electricity at market prices. Acea entrusted the provision of both services to its subsidiary Acea Energia S.p.A. ("AE").

[1] Council of State, Judgment No. 5355 of May 31, 2023

[2] ICA decisions of December 20, 2018 No. 27496 (Case A513 – Acea/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica) and No. 27494 (Case A511 – Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica).

In the ICA's view, Acea and Enel took advantage of certain non-replicable advantages arising from their position as vertically integrated operators, active in both the distribution and the retail supply of electricity in their respective local markets, to exclude competitors active in the provision of deregulated services at market prices.

In particular, according to the ICA, Acea and Enel (i) collected from their EPS customers the privacy consent to be contacted for commercial purposes in a discriminatory manner, without allowing customers to separately provide their consent to be contacted for commercial purposes by other operators, and (ii) used these lists of customers to formulate targeted offers in the deregulated segment of the market.

In addition, AE allegedly used privileged and detailed information on the evolution of market shares and the positioning of competitors in the areas in which the Acea group provides the distribution service, through its subsidiary Areti S.p.A. ("Areti").

According to the ICA, the alleged practices were aimed at inducing Acea and Enel's respective EPS customers to switch to the incumbents' offers in the deregulated segment of the market, so as to avoid losing those customers to competitors following the full liberalization of the market.

In the decision concerning Acea (the "Decision"), the ICA found that Acea's alleged infringement had taken place between March 2014 and the end of 2017, and fined the company approximately €16 million. Instead, in the decision regarding Enel, the ICA found that the alleged abusive conduct had taken place between January 2012 and May 2017, and fined the company more than €93 million.[3]

The ruling of the TAR Lazio

On October 17, 2019, the Regional Administrative Court of Lazio (the "TAR Lazio") upheld the appeals lodged by different companies of the Acea group against the Decision.[4]

The TAR Lazio recalled the principles established by the CJEU in Intel, according to which, even when the incumbent's conduct may in principle fall within the scope of Article 102 TFEU, antitrust authorities are required to carry out "an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking[5]." As a consequence, the fact that a company holding a dominant position engages in customer retention activities during the liberalization of a given market does not per se amount to an abuse. On the contrary, antitrust authorities must prove the existence of a "discriminatory strategy, which may determine the foreclosure of competitors."

According to the TAR Lazio, the ICA's reasoning in the Decision did not meet the abovementioned standards. On the one hand, the ICA did not take into account the arguments submitted by Acea in relation to the first alleged abusive conduct, i.e. AE's discriminatory collection of EPS customers' contact details and the use of such contact details in its commercial activities on the deregulated segment of the market. In the Court's view, these arguments proved the absence of any discriminatory practice. Inter alia, the TAR Lazio found that EPS customers had been contacted with "standardized" offers designed by AE for its whole customer base, rather than offers specifically targeted at EPS clients. Accordingly, in the TAR's view, AE's alleged conduct could not be considered as capable of foreclosing competitors' access to the "free" market.

[3] The ICA decision regarding Enel was partially annulled by the TAR Lazio with regard to the duration of the alleged infringement (subsequently, the ICA redetermined the amount of the fine as €27.5 million). Following Enel's appeal against the ruling of the TAR Lazio, and a referral to the Court of Justice of the European Union ("**CJEU**") for a preliminary ruling on the interpretation of the concept of abusive conduct within the meaning of Article 102 TFEU, the Council of State fully annulled the ICA decision (Judgment No. 10571 of December 1, 2022, discussed in the December 2022 issue of this Newsletter, https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter---december-2022.pdf).

[4] TAR Lazio, Judgment Nos. 11960 and 11976 of October 17, 2019, discussed in the October 2019 issue of this Newsletter, https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-newsletter-october-2019.pdf.

[5] Case C-413/14 P, Intel II, EU:C:2017:632, § 140

The TAR Lazio also annulled the decision in the part concerning the alleged use by AE of sensitive information on the market positioning and performance of its main competitors, exclusively available to Areti in its capacity as electricity distributor in certain areas, to better target its marketing strategy and monitor its effectiveness. In this respect, the TAR Lazio held that the ICA had failed to clarify how aggregated data on competitors' market positioning could be used by AE to guide (or monitor the effectiveness of) its business strategy of "retention" of EPS customers. According to the TAR Lazio, the ICA's reasoning was based on mere presumptions and did not adequately demonstrate the existence of anticompetitive conduct.

The ruling of the Council of State

The ICA challenged the ruling of the TAR Lazio before the Council of State. According to the ICA, the conclusions achieved by the TAR Lazio clashed with the evidence gathered during the proceedings, which clearly demonstrated Acea's alleged infringement. However, the Council of State held that the ICA's grounds of appeal were unfounded and upheld the ruling of the TAR Lazio in its entirety.

According to the Council of State, the ICA failed to adequately examine a number of aspects that affected the lawfulness of the Decision, as the TAR Lazio had already pointed out in its ruling. In particular:

a. athe customers contacted by Acea were not only those belonging to the EPS;

b. EPS customers were contacted with "standardized" offers, designed by AE for its whole customer base, rather than offers specifically targeted at EPS customers;

c. the customers contacted were largely from lists of contacts that were also present on the Pagine Bianche (i.e. the Italian public directory) or otherwise easily available on the market – and, therefore, also accessible to (and replicable by) Acea's competitors;

d. the ICA did not adequately prove that Acea collected from its EPS customers the privacy consent to be contacted for commercial purposes in a discriminatory manner (i.e., without allowing customers to separately provide their consent to be contacted for commercial purposes by other operators). In fact, according to the Court, Acea actually offered the possibility to give consent to also be contacted by third companies; and

e. the link between Areti's alleged market monitoring and the marketing strategy implemented by AE was unclear.

The Council of State considered that the ICA had not proved that Acea had used its customer list as part of a campaign aimed at such customers, and that the evidence relied on by the ICA in this respect was insufficient, since it did not relate to the actual conduct of Acea, but only to plans and strategies that Acea intended to implement, but never did. Indeed, Acea argued that its original business plans, which included the possibility of implementing specific actions aimed at transferring EPS customers to the deregulated segment of the market, were never actually implemented, due to a change in the company's management, following which the above-mentioned plans were abandoned. According to the Council of State, this circumstance appeared to be particularly significant and casted reasonable doubt on the existence of the alleged abuse.

In view of the serious lack of evidence in the Decision, the Council of State confirmed that the ICA had failed to prove an infringement of Article 102 TFEU and annulled the Decision in its entirety.

The Court of Milan awards damages to prestressing steel buyers in a partly follow-on and partly standalone case

In a judgment delivered on 15 May, 2023 (the "Judgment"[6]), the Court of Milan ruled on an action for antitrust damages brought by two purchasers of prestressing steel (the "Plaintiffs") against certain suppliers fined by the European Commission (the "Commission") for anticompetitive behavior in 2010 (the "Defendants")[7]

Background

In a decision issued on June 30, 2010 (the "Decision"), the Commission found that 17 steel producers in Europe had conspired to fix quotas for and individual prices of prestressing steel, allocated customers among them, and exchanged competitively sensitive information[8]. In particular, the Commission held that the steel producers had met in over 550 anticompetitive meetings from 1984 to 2002. As the first meetings of the cartel were held in Zurich, Switzerland, the cartel was named "Club Zurich", which was later changed to "Club Europe" (the "Pan-European Cartel").

The Plaintiffs are two companies active in the design and manufacturing of prefabricated products used in the construction of industrial and residential buildings and made of different materials, including steel and reinforced concrete.

In 2015, they brought a claim before the Court of Milan, arguing that they had paid an overcharge on prestressing steel purchased in Italy, as a consequence of the Pan-European Cartel found by the Commission, and of an additional and parallel cartel between certain members of the Pan-European Cartel.

In particular, according to the Plaintiffs, the Decision also described (although did not establish) the existence of the so-called "Club Italia", i.e. another cartel between the Italian members of the Pan-European Cartel aimed at setting quotas within the Italian market and for exports (the "Italian Cartel"). The Plaintiffs alleged that the Italian Cartel was a separate cartel until 1995, when it merged into the Pan-European Cartel.

The Judgement

The Court sided with the Plaintiffs and found the Defendants liable for antitrust damages for €3.5 million.

The Judgment is the first known ruling in Italy based (at least in part) on the Decision and provides some interesting indications on follow-on claims, which are increasingly on the rise in Italy.

(i) Statute of limitations

The Court rejected the Defendants' arguments regarding the statute of limitations. The Court assessed the alleged expiry of the limitation period under the general rules of the Italian civil code, as the new rules provided for by Article 8 of Legislative Decree No. 3 of 19 January 2017, which implemented Directive 2014/104/EU in Italy[9], did not apply ratione temporis.

According to the Court, while in principle all market operators have a duty under Italian law principles to "observe and monitor" the conduct of other undertakings in the market to spot potential

[6] Court of Milan, Judgment No. 3914 of May 15, 2023.

[7] The Plaintiffs initially brought the proceedings against three companies. At the beginning of the proceedings, the Plaintiffs asked and were authorized by the Court to summon additional companies on the ground that they had supplied the Plaintiffs with the products in relation to which damages were claimed. All these companies are referred to as Defendants in the present document

[8] *Prestressing Steel* (Case COMP/38344), Commission decision of June 30, 2010

[9] 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

anticompetitive conduct that may damage them, their actual ability to do so needs to be assessed on a case-by-case basis. In the present case, the fact that some of the fined undertakings had disclosed the existence of the Commission's investigation in their annual reports, and the publication of the Commission's press release confirming the sending of the statement of objections, were not considered sufficient for the Plaintiffs to acquire sufficient knowledge about the infringement and the resulting damages.

The Court concluded that the limitation period in this case started to run on the day when a summary of the Decision was published in the EU official journal. Accordingly, the Plaintiffs' claims were not statute barred.

(ii) Damages quantification

The Court appointed an expert ("Expert") to quantify not only the damages arising from the Pan-European Cartel, but also those arising from the Italian Cartel. According to the Court, the existence of the Italian Cartel could be derived from the wording of the Decision, from certain documents that one of the Defendants was ordered to disclose, and from the Expert's analyses themselves.

In particular, based on a "difference in differences" approach[10], the Expert concluded that the prices of prestressing steel in Italy overcharged on average between 20% and 32% in the 1984 to 2002 period, and to a smaller extent also in the 2003 to 2004 period (due to the so-called "lingering" effect)[11].

Based on the above findings, as well as on the fact that the infringement lasted several years and involved the main manufacturers in Italy, the Court concluded that all prices in Italy had been unduly affected by the collusion from 1984 to 2004, including those of undertakings that were not found to participate in any cartel (under the so-called "umbrella pricing" theory). Accordingly, the Court rejected the argument raised by some Defendants that they should not be liable for damages vis-à-vis the Plaintiffs on the ground that the Plaintiffs had not been (at least for a certain period) their customers.

The Defendants also argued that, in any event, the Plaintiffs had passed any alleged overcharge on to their own customers, thus eliminating or at least reducing the alleged damages. In this respect, also as a result of the limited data available, the Expert concluded that there was not sufficient evidence of the "activation of a pass-on mechanism on the part of the plaintiff companies". The Court observed that, while passing-on was "somehow inevitable" in theory (being a normal market behavior), it was not demonstrated in practice, and therefore rejected the passing-on defense.

As to the actual quantification of the damages, the Court eventually quantified them "based on equitable principles, although supported by data" resulting from the complex analyses of the Expert. The damages were eventually reduced to account for the fact that the Plaintiffs had settled their claims with two Defendants before the Court's ruling.

The Court found that the Defendants were jointly and severally liable for the damages vis-à-vis the Plaintiffs. On the internal allocation of liability, the Court ruled that it had to be evenly shared among the Defendants

[10] See Commission SWD (2013) 205, Practical guide – Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, paras. 56 onwards. The "*difference in differences*" method looks at the development of the relevant economic variable in the infringement market during a certain period and compares it to the development of the same variable during the same time period on an unaffected comparator market; the comparison shows the difference between these two differences over time, and therefore allows to possibly identify an infringement effect.

[11] It is common for plaintiffs in follow-on claims to argue that the alleged effects of an anticompetitive conduct continued (*i.e., "lingered"*) for some time after the end of the infringement as established by the relevant competition authority. In this case, the Plaintiffs claimed damages also in connection with steel they bought in 2003 and 2004, despite the existence of the Pan-European Cartel and of the Italian Cartel having been ascertained only until 2002. The analyses of the Expert found that prices of steel sold in Italy in 2003 and 2004 were not significantly different from those up until 2002, and therefore that the cartels ceased to have an effect on prices only starting in 2005.

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