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Italian Competition Law Newsletter

Highlights

- Council of State rules on appeals concerning ICA's decision to fine the "Big Four" for bid rigging in the context of a public tender
- TAR Lazio confirms fines imposed on five companies for rigging a tender for medical waste management in the Campania Region

Council of State rules on appeals concerning ICA's decision to fine the "Big Four" for bid rigging in the context of a public tender

On October 6, 2020,¹ the Council of State upheld the appeals filed by the Italian Competition Authority (the "ICA") against judgments issued by the Regional Administrative Court of Lazio (the "TAR Lazio") in 2018 and rejected the cross-appeals lodged by Ernst & Young S.p.A., Deloitte & Touche S.p.A., PricewaterhouseCoopers S.p.A., PricewaterhouseCoopers Advisory S.p.A. and KPMG S.p.A. (the "Big Four").² The Council of State's rulings concern a decision delivered by the ICA in 2017, which fined the Big Four and the consulting companies belonging to the Big Four networks³ for rigging a tender for the provision of technical assistance services to public authorities.⁴

Background

The ICA's findings

On October 18, 2017, the ICA found that the Italian branches of the Big Four had coordinated their participation in a tender procedure for the procurement of support and technical assistance services for audit authorities in the framework of programs co-financed by the European Union.

The nine-lot tender, launched in March 2015 by the Italian government procurement body Consip S.p.A. ("Consip"), was worth Euro 66.5 million. The Big Four were assigned five of the nine lots; other bidders won the remaining four.

¹ Council of State, Judgment Nos. 5883, 5884, 5885, 5897, 5898, 5899 and 5900 of October 6, 2020.

² TAR Lazio, Judgment Nos. 10966, 10977, 10999, 11000, 1002, 1003 and 1004 of November 14, 2018.

³ Deloitte Consulting S.r.l., Ernst & Young Financial Business Advisors S.p.A., KPMG Advisory S.p.A. and PricewaterhouseCoopers Advisory S.p.A.

⁴ ICA, decision of October 18, 2017, No. 26815, Case I796 – Servizi di Supporto e Assistenza Tecnica alla PA nei Programmi Cofinanziati dall'UE.

The investigation was prompted by a complaint lodged by Consip, which reported an anomalous chessboard pattern in the Big Four's bidding behavior. In particular, Consip noted that the most competitive bids submitted by the Big Four concerned always different lots, without any overlap.

In its investigation, the ICA found evidence of contacts between the Big Four, including e-mail correspondence and meetings. These contacts occurred before the publication of the call for tender (i.e., before the Big Four knew the number of lots and their value). The Big Four explicitly acknowledged their participation in these meetings but claimed that they had a legitimate purpose.

The ICA was not convinced by any of the alternative explanations put forward by the Big Four to justify their allegedly anomalous bidding behavior. Accordingly, it imposed fines amounting overall to Euro 23 million. The ICA fined not only the companies that had directly participated in the tender,⁵ but also the consulting companies belonging to the same international network, which were considered part of the same economic entity.⁶ In particular, the ICA found that these companies shared professional and structural resources, adopted joint communication strategies and presented themselves to the market as a single player, including with respect to the Consip tender.

The TAR Lazio's judgments

On November 14, 2018, the TAR Lazio decided on the appeals brought by the companies fined by the ICA. In two sets of rulings, the TAR Lazio distinguished between: (i) companies that had participated in the tender; and (ii) companies that, even if part of the same network, had not participated in the tender.

(i) Judgments regarding the bidding companies

The plaintiffs claimed that the ICA had not provided any convincing evidence of a concerted practice, and that they had determined their behavior autonomously from competitors as

well as the related companies. Furthermore, they questioned whether the alleged anticompetitive practice could be defined as secret and particularly serious.

The TAR Lazio was not convinced by the explanations provided by the parties, since the offers submitted followed the same pattern, and there was no overlap of competitive bids for the same lot. The TAR Lazio restated well-established case law according to which individual conduct must be evaluated taking into account the overall picture and not in an "atomistic" way. This means that the ICA must look at all the types of conduct as if they were "pieces of a mosaic". If the ICA finds elements showing a possible coordination (such as contacts and anomalous market conduct), and the parties do not provide plausible explanations for their course of action, this suffices for the finding of an unlawful concerted practice.

Nonetheless, the TAR Lazio shared the companies' view that the infringement was not particularly serious, and could not justify the imposition of fines calculated on the basis of a 25% entry fee and a 30% value of sales, especially because the ICA had not even looked at the effects of the concerted practice. Furthermore, the administrative court held that the ICA had not provided sufficient evidence to justify the finding of secrecy, notwithstanding the secrecy of the meetings and the attempt to keep to a minimum any written evidence of the existence of the cartel. Therefore, the TAR Lazio partially annulled the ICA decision, and ordered the ICA to recalculate the fine.

(ii) Judgments regarding the consulting companies that had not participated in the tender

Regarding the actions for annulment lodged by the non-bidding companies, the TAR Lazio agreed with the plaintiffs that the ICA did

⁵ Deloitte & Touche S.p.A., Ernst & Young S.p.A., KPMG S.p.A., PricewaterhouseCoopers Advisory S.p.A. and PricewaterhouseCoopers SpA.

⁶ Deloitte Consulting S.r.l., Ernst & Young Financial Business Advisors S.p.A. and KPMG Advisory S.p.A.

not provide any evidence of the existence of a control or coordination relationship between them and the companies that participated in the tender. According to the TAR Lazio, this element is essential to infer the existence of a single economic entity. In addition, the TAR Lazio found no evidence of any communications between the bidding companies and the non-bidding companies belonging to the same Big Four network capable of showing the existence of a common strategy.

For these reasons, the TAR Lazio held that the non-bidding companies were not involved in the concerted practice and could not be found jointly and severally liable with the bidding companies for the infringement. Accordingly, it annulled the ICA decisions with respect to the findings of liability of the related companies.

The rulings of the Council of State

On appeal, the Council of State partially overturned the TAR Lazio judgments with respect to the companies that participated in the tender, while it fully quashed the judgments adopted *vis-à-vis* the related companies.

(i) Judgments regarding the bidding companies

The Council of State concurred with the TAR Lazio that the parallelism of the companies' conduct could not be justified in the light of the explanations submitted by the parties. The lack of overlap in the most competitive bids, the fact that the economic offers submitted by the operators concerned in different tenders seemed to follow a common scheme (the most competitive bids were based on discounts up to 30-35%, while the non-competitive bids provided for discounts only up to 10-15%), the evidence of the meetings and the emails retrieved by the ICA were all elements that, considered as a whole, were sufficient to prove the anticompetitive explanation for the parallel behavior and shift the burden of proof to the companies. Eventually, according to the Council of State the companies did not provide credible alternative explanations for their conduct.

Moreover, with respect to the quantification of the fines, the Council of State upheld the appeal brought by the ICA against the TAR Lazio's judgments. In the Council of State's view, the secrecy of the collusive behavior was demonstrated by the fact that the concerted practice was not disclosed to the public, and in order to gather evidence of it the ICA had to seize the correspondence of the companies involved, which would have normally been kept confidential. Furthermore, the Court stated that, in light of the nature and the secrecy of the conduct, the ICA had correctly categorized the infringement as particularly serious, since bid rigging is considered one of the most anticompetitive practices under antitrust law. For these reasons, the Council of State partially annulled the TAR Lazio judgments with respect to the redetermination of the fine, and thus confirmed in its entirety the ICA decision.

(ii) Judgments regarding the consulting companies that had not participated in the tender

With regard to the appeals lodged by the ICA against the judgments involving the non-bidding companies, the Council of State agreed with the ICA that – although not having directly participated in the Consip tender – these companies were to be held liable for the infringement. In particular, in the Council of State's view, the ICA correctly found that also the non-bidding companies were nonetheless parties to the anticompetitive practice, since they had the opportunity to understand and follow the anticompetitive strategy pursued by the parties. Indeed, as already found by the ICA, the Council of State emphasized that the companies belonging to the same network: (i) are identified by the same mark, share professional and structural resources, implement common communication strategies, and present themselves to the market as a single entity; (ii) share some business functions (such as the tender office); and (iii) share some employees. In addition, the ICA found evidence linking the non-bidding companies to the

infringement, e.g., because they either organized meetings or participated in meetings on behalf of their respective sister company. The fact that some of the related companies did not directly submit any bids was considered by the Council of State to be compatible with the existence of an overall anticompetitive concerted practice, since – within each network – the companies decided which of them was the best placed to submit a bid. For all these reasons, the Council of State found that all the companies involved in the proceedings had taken part in the anticompetitive scheme, regardless of whether they participated in the tender. Accordingly, the Court held that the TAR Lazio’s findings on the concepts of “group” and “single economic

entity” were unfounded, since each undertaking was individually and directly liable for the infringement.

The Council of State then followed the same line of reasoning adopted with respect to the companies that had directly participated in the tender, holding that even the related companies had not provided any alternative explanations capable of justifying their parallel behavior. Again, the Council of State categorized the concerted practice as secret and very serious. For these reasons, the Court quashed the TAR Lazio’s second set of judgments and confirmed in full the findings of the ICA.

TAR Lazio confirms fines imposed on five companies for rigging a tender for medical waste management in the Campania Region

On October 23, 2020,⁷ the TAR Lazio rejected the appeals filed by Ecosomma S.r.l., Bifolco & Co. S.r.l., Ecologica Sud S.r.l., Langella Mario S.r.l. (the “**Companies**”) and Green Light Servizi Ambientali S.r.l. (“**Green Light**”) against a decision issued by the ICA in 2019, finding that the Companies had coordinated their bidding behavior in a tender for medical waste management in the Campania Region, with the assistance of the third-party consulting firm Green Light.

Background

On January 30, 2019, the ICA found that the Companies rigged a 2016 public tender for the collection and disposal of medical waste in the Campania Region.⁸ According to the ICA, the anticompetitive collusion had been facilitated by a third-party consulting firm (Green Light), which had allegedly coordinated the Companies’ behavior by acting as an advisor in the context of the tender.

The investigation was prompted by complaints submitted by So.re.sa. S.p.A. (“**So.re.sa.**”), the central purchasing entity for the Campania Region with respect to the health sector. In particular, So.re.sa. alleged that there had been an anomalous pattern in the bidding behavior for the six lots of the tender. According to So.re.sa., the technical content of the bids submitted by the Companies (one for each lot) was identical. For this reason, So.re.sa. claimed that it could not be excluded that the offers had been drawn up in a coordinated manner. In addition, So.re.sa. alleged that the Companies had submitted bids (which did not overlap with each other) only with respect to the lots in which they were the incumbent provider.

Following an investigation, the ICA found that the Companies had unlawfully coordinated their bidding strategies in the So.re.sa. tender, also with the assistance of Green Light, which had acted as a third-party consultant to all of the Companies. According to the ICA, Green Light facilitated the anticompetitive scheme, by ensuring that the

⁷ TAR Lazio, Judgment No. 10765 of October 22, 2020 and Judgment Nos. 10789, 10790, 10791 and 10792 of October 23, 2020.

⁸ ICA, decision of January 31, 2019, No. 27546, Case I816 – *Gara SO.RE.SA. rifiuti sanitari Regione Campania*.

Companies would reciprocally respect the lots' allocation previously defined. This result had been made possible by the fact that, in order to avoid any conflict of interest, Green Light could not have assisted more than one company for the same lot. Accordingly, before assisting each company, Green Light had requested each company to undertake that they would not submit overlapping bids with the other companies. According to the ICA, the existence of an anticompetitive scheme was confirmed by conspicuous evidence, including the consultancy contracts entered into by each Company with Green Light, which indicated the lot for which each Company would bid and had been shared beforehand among the Companies.

The ICA categorized the agreement as a very serious restriction by object, since it had hindered the competitive process for the award of a tender. Accordingly, it fined the Companies and Green Light over Euro 1.3 million overall.

The rulings of the TAR Lazio

The TAR Lazio entirely dismissed the actions for annulment lodged by the Companies and Green Light against the ICA decision.

Procedural claims

First, the TAR Lazio rejected the procedural claims submitted by one of the Companies (Bifolco & Co. S.r.l.).

In particular, the Company claimed that the decision had been unlawfully adopted by only two members of the Board of the ICA (instead of three), due to delays in the appointment of the new President. The TAR Lazio rejected this claim on the ground that, even though, pursuant to Law No. 287/90, the Board of the ICA is a collegial body composed of three members (including the President), there are no requirements as to the quorum for validly adopting a decision. Accordingly, it is for the ICA to autonomously decide on the composition of the Board and to define the majorities required for the purposes of adopting valid decisions. In the TAR Lazio's view, the fact that, in the absence of the President, the

vote of the eldest member of the Board prevails in case of tie does not invalidate the decision, as this can be justified in the exceptional and temporary circumstances related to the need to appoint a new President. Moreover, the applicant had not provided any evidence that the two members of the Board had voted differently. Finally, the TAR noted that, even under the ordinary regime provided for by ICA Resolution No. 26614/2017, it is possible that a decision is taken by one member of the Board, as the vote of the President is counted twice in case of tie.

The concerted practice

After recalling well-established case law on the standard of proof required for the existence of a concerted practice, the TAR Lazio held that the analysis carried out by the ICA in the case at hand was correct.

In particular, according to the TAR Lazio, the ICA correctly held that the Companies had carried out a complex concerted practice. The ICA clearly identified its anticompetitive purpose, i.e., the Companies' intention to rig the results of the So.re.sa. tender by eliminating competition and allocating the lots, also based on their position as the incumbent operator in the lot concerned. In this respect, the TAR Lazio found that the Companies had failed to provide any alternative acceptable explanation for their bidding behavior, especially in light of the fact that they clearly had the resources necessary to submit offers for more than one lot.

Furthermore, the TAR Lazio found that the ICA provided substantial evidence of the involvement of Green Light, which had facilitated the collusive scheme and ensured the avoidance of any bidding overlap between the Companies. In particular, the TAR Lazio held that the draft agreement between one of the Companies and Green Light, which had been shared among all the Companies before each of them signed an autonomous agreement with the consultancy firm, amounted in practice to an indirect non-compete agreement between the Companies. This was due to the fact that the Companies knew that Green Light could not assist

them in connection with offers submitted for the same lots. Accordingly, once the Companies had entered into consultancy agreements with Green Light, they clearly knew that they were not competing for the same lots. In the TAR Lazio's view, the sharing between the Companies of a draft contract including an implicit non-compete clause amounted to "qualified contact" between them, thereby constituting exogenous evidence of the existence of anticompetitive behavior.

The TAR Lazio also held that the ICA correctly defined the bid rigging as a restriction by object, and for this reason there was no need to engage in an analysis of the possible anticompetitive effects of the concerted practice.

The fines

Finally, the TAR Lazio confirmed the ICA decision also with respect to the quantification of the fines imposed on the Companies and Green Light, as well as the rejection of the arguments alleging inability to pay submitted by some Companies, for lack of sufficient evidence.

Other developments

The ICA fined an association of driving schools for price fixing

On October 13, 2020,⁹ the ICA imposed a Euro 10,059 fine on "Calabria 1", a consortium of 40 driving schools active in the province of Cosenza (the "**Consortium**"), for an anticompetitive decision of association of undertakings aimed at fixing the minimum fees to be applied by the driving schools for the provision of their professional services. In particular, the ICA found that since 2017 the Consortium had adopted a detailed pricing list setting fixed minimum fees for services to be provided by the driving schools.

The ICA noted that agreements aimed at setting minimum prices are anticompetitive regardless of their binding nature (as the price indications they contain may in any event influence behavior, thereby distorting market conditions). According to the ICA, in the case at hand there was proof that the pricing list adopted by the Consortium actually bound the associated driving schools to respect the rates contained therein. This circumstance, together with the fact that the Consortium refused to amend its conduct following the ICA's requests, and the fact that the driving schools participating in the Consortium accounted for approximately 40% of the relevant market, led the ICA to conclude that the violation was particularly serious.

⁹ ICA, decision of October 13, 2020, No. 28380, Case I836 - *Tariffe autoscuole nella provincia di Cosenza*.

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