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Italian Competition Law Newsletter

Highlights

- The Council of State rejected the appeal filed by a water meter supplier against an ICA decision that fined it for its participation in a single and continuous bid-rigging strategy
- The TAR Lazio annuls an ICA decision imposing a €3 million fine for bid-rigging on providers of construction and civil engineering services

The Council of State rejected the appeal filed by a water meter supplier against an ICA decision that fined it for its participation in a single and continuous bid-rigging strategy

On October 31, 2023, the Council of State upheld the judgment of the Regional Administrative Court for Latium (the “**TAR Lazio**”), which rejected the application filed by water meter supplier Maddalena S.p.A. (“**Maddalena**”) for annulment of a 2022 decision, by which the Italian Competition Authority (the “**ICA**”) fined Maddalena and four competitors for allegedly engaging in bid-rigging conduct (the “**Decision**”).¹

Background

The ICA Decision

On February 1, 2022, the ICA imposed total fines of approximately €10 million on Maddalena, G2 Misuratori S.r.l., Itron Italia S.p.A., Sensus Italia

S.r.l. and WaterTech S.p.A. (the “**Parties**”) for their alleged participation, between December 2011 and September 2019, in an agreement restricting competition in at least 161 public tenders launched by national integrated water service operators for the procurement of meters to measure water consumption (the “**Tenders**”).

According to the ICA, by engaging in a single and continuous collusive strategy, the Parties were able to establish, for each Tender, the successful candidate as well as the course of conduct that the other Parties were to follow in the context of the procedure. As a result of the infringement, the Parties allegedly won more than 90% of the lots of the Tenders in the relevant period.

¹ See Council of State, Judgment No. 9380 of October 31, 2023; TAR Lazio, Judgment No. 3697 of March 6, 2023; and ICA Decision No. 29981 of February 1, 2022, Case 1835 – *Mercato dei contatori d'acqua* (the latter was discussed in the February-March 2022 issue of this Newsletter, <https://www.clearlygottlieb.com/cclp/italian-competition-law-newsletter>).

In the Decision, the ICA relied on a wide range of evidence, which included an anonymous complaint filed by an employee of one of the Parties, as well as an anonymous document sent to the ICA shortly after the opening of the investigation, comprising 70 faxes that the Parties had exchanged before the submission of certain bids. According to the ICA, its findings showed that the Parties coordinated their conduct ahead of the corresponding tenders, also through meetings between their representatives.

The judgment of the TAR Lazio

On March 6, 2023, the TAR Lazio fully upheld the Decision. First, the Court rejected Maddalena's claim that the duration of the preliminary investigation had been unreasonably long.² The TAR Lazio noted that: (i) the duration of the preliminary investigation – in the course of which the ICA collects initial evidence supporting the hypothesis of the existence of an infringement, before deciding whether the actual initiation of a formal investigation of the case, according to an adversarial procedure, is warranted on the basis of that evidence – cannot be rigidly fixed, and (ii) the 90-day time limit pursuant to Article 14 of Law No. 689/1981 starts running from the moment in which the ICA becomes “*fully aware*” of the allegedly unlawful act. Under these assumptions, the TAR Lazio noted that the ICA had promptly opened the investigation after 51 days, upon becoming fully aware of the allegedly illegal conduct on the basis of all relevant information it had collected from the contracting authorities.³

Secondly, the TAR Lazio stated that in bid-rigging cases, the relevant market is the specific public tender whose results were altered by the participants in the cartel. Accordingly, in the present case, the ICA correctly limited the relevant market to 161 lots, out of more than 800 lots tendered during the relevant period, since the ICA considered only those lots for which it could prove the misconduct.

Thirdly, the TAR Lazio found that the ICA had correctly established the existence of the cartel on the basis of the Parties' conduct (e.g., the Parties offered the same prices or the same discounts, and bids were shared selectively among the Parties). In the Court's view, these elements were confirmed by the relevant documents in the casefile (such as the anonymous complaint and documents that the ICA received shortly after opening the investigation, including several faxes, SMS and WhatsApp messages exchanged between the Parties before submitting the bids), which showed the existence of repeated contacts between the Parties.

Fourthly, the TAR Lazio recalled that, where the ICA proves the existence of collusion by reference to elements pertaining to both the inherent features of the conduct and the content of the relevant documentation acquired, the burden of proof shifts to the accused undertaking, which needs to provide alternative explanations of the ICA's findings. The TAR Lazio found that the alternative explanations put forward by Maddalena in the course of the judicial proceedings – such as the different technical characteristics of the meters required by the contracting authorities and the diversity of the bidding procedures, which, according to Maddalena, meant that the ICA could not consider the alleged anticompetitive conduct as a single infringement – were implausible.

Fifthly, with regard to the possibility of relying on anonymous documents (which Maddalena challenged in its application for annulment), the TAR Lazio stated that such documents may be assessed as evidence in antitrust proceedings. According to the TAR Lazio, although the ICA's fines may be categorized as criminal in nature, the provisions of the Italian Code of Criminal Procedure regarding anonymous documents do not apply to antitrust proceedings, which are governed by specific rules.

² Pursuant to Article 14 of Law No. 689/1981, “*the infringement, to the extent possible, must be challenged 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.*”

³ See ICA Decision No. 27963 of October 29, 2019, Case 1835 – *Mercato dei contatori d'acqua*.

The TAR Lazio also found that the ICA had correctly established that the Parties named in the faxes as the designated winners of specific bids were generally the same companies that actually won the bid. Therefore, even without considering the anonymous character of the document, an experienced outside observer could have inferred anomalies in the behavior of the Parties. As such, the anonymous document merely confirmed the ICA's concerns about the existence of a bid-rigging agreement. In addition, the WhatsApp messages collected by the ICA in the course of the investigation confirmed the use of fax as a means of communication between the Parties. Therefore, the information reported in the anonymous document was found to be fully reliable, even if it came from an unidentified source.

Finally, the Court fully approved the amount of the fine as quantified by the ICA.

The judgment of the Council of State

The Council of State entirely dismissed the appeal brought by Maddalena.

First, the Court agreed with the TAR Lazio that the 90-day time limit for opening a formal investigation starts to run from the moment in which the ICA is “*fully aware*” of an alleged unlawful conduct. This occurs when the ICA discovers the essential elements of the infringement, which does not always coincide with the moment in which the ICA receives a complaint. In the case at hand, when the ICA received the anonymous document, it simply had information on the potential existence of unlawful conduct but did not have all the elements necessary to allege an infringement and open a formal investigation.

The Council of State also rejected the argument that the ICA had “*cherry-picked*” those lots which supported its theory of harm. On the contrary, the Council of State held that the ICA had correctly defined the relevant markets as the lots that were affected by the cartel, and not as the total number of Tenders and lots for the procurement of meters to measure water consumption. More specifically,

the Court found that the ICA was right to start with the bids listed in the anonymous document, and then expand the scope of the relevant markets to other Tenders that had similar characteristics. These other Tenders/lots were identified by the ICA on the basis of: (i) the application by the Parties of the same prices or discounts; (ii) the presence of an identical “*competitive pattern*,” consisting in the offer by the successful tenderer of a discount which was much higher than those offered by the “*supportive bidders*”; and (iii) the fact that the other bids in the relevant lots had been submitted only by certain of the Parties.

The Council of State then examined the alternative explanations put forward by Maddalena, according to which its decision not to submit bids for certain lots was justified by four factors: (i) the availability of the products; (ii) the cost of production; (iii) the profitability of the base bid; and (iv) the demands (in terms of customization) of the contracting authorities. The Court found these explanations insufficient. In particular, Maddalena did not explain the reasons for the alleged unavailability of the products, nor did it clarify whether, instead of choosing not to bid in a particular Tender, it could have participated in a temporary grouping of companies in order to overcome the alleged difficulties. In addition, Maddalena was not able to provide convincing evidence as to why in most cases the Party identified as the successful tenderer in the exchanges preceding the Tender was ultimately the winning company.

The Council of State then upheld the findings of the TAR Lazio with regard to the reliability and admissibility of the evidence contained in both the anonymous documents and the SMS and WhatsApp messages.

Finally, the Council of State also upheld the ICA's calculation of the fine it imposed on Maddalena.

The TAR Lazio annuls an ICA decision imposing a €3 million fine for bid-rigging on providers of construction and civil engineering services

By a judgment delivered on October 9, 2023, the TAR Lazio granted the applications filed by Sintexcal S.p.A., General Beton Triveneta S.p.A., Impresa Bacchi S.r.l. and Itinera S.p.A. (the “**Parties**”) for annulment of a 2022 ICA decision that imposed on them a total fine of approximately €3 million for their alleged involvement in a bid-rigging cartel (the “**Decision**”).⁴

Background

The Decision

In the Decision the ICA established that the Parties allegedly coordinated their respective participation in a public tender of March 2019 for the procurement of ordinary maintenance and repair services for a section of the urban highway around Milan (the “**Tender**”) by sharing among them the Tender’s lots. As a result, each Party was awarded one lot and competition from the other candidates was eliminated. The ICA based its findings on a comprehensive set of evidence, comprising a complaint from the contracting authority, requests for information, and various internal documents seized during dawn raids at the Parties’ premises. The ICA concluded that the investigation revealed that the Parties engaged in a covert horizontal conspiracy, disrupting competition in a EU-wide tender and constituting a very serious infringement of Article 101 TFEU.

The judgment of the TAR Lazio

In their applications, the Parties submitted, first, that the ICA had initiated its investigation after the mandatory 90-day time limit set by Article 14 of Law No. 689/1981.⁵ In particular, they argued

that the duration of its preliminary investigation exceeded two years after the infringement was first reported to the ICA.

The Court acknowledged the inconsistency of the case law regarding the applicability of Article 14 of Law No. 689/1981 in antitrust proceedings. Under the two conflicting interpretations that have been emerging to date, Article 14 is a general provision that: (a) does not apply where a special provision has been enacted, such as the one under the Italian competition statute; or in the alternative, (b) applies in any proceedings potentially resulting in the imposition of an administrative fine, including in antitrust matters.

According to the latter, and most recent, line of case law, the mandatory 90-day time limit does not necessarily start running from the first report of the infringement, but rather upon the completion of the ICA’s assessment in the preliminary-investigation stage, *i.e.*, when all the factual evidence necessary to challenge the infringement has been collected. The determination of when, according to the ICA, the ICA’s assessment is concluded is subject to review by administrative courts, which can evaluate whether, at a specific date, it is reasonable to initiate a formal investigation on the basis of the elements in the ICA’s possession.

The TAR Lazio also noted that a preliminary reference in this matter was made by the same court to the Court of Justice of the European Union (“**CJEU**”), and that the procedure is currently pending.⁶ The question that the TAR Lazio asked the CJEU is whether Article 102 TFEU, read in the light of the principle OF the effectiveness of administrative action, must be

⁴ See TAR Lazio, Judgment No. 14838 of October 9, 2023; and ICA Decision No. 30419 of December 13, 2022, Case I845 – *Gara manutenzione pavimentazioni tratte autostradali di Milano Serravalle – Milano tangenziali*.

⁵ See *supra*, note 2. The Parties also raised a number of substantive pleas concerning the notion of anticompetitive agreement, which however were not assessed by the TAR Lazio in its ruling.

⁶ See Case C-511/23, *Caronte & Tourist*, lodged on August 8, 2023 (pending).

interpreted as precluding national legislation, such as Article 14 of Law No. 689/1981, which, according to the most recent domestic case law, provides that the investigation procedure is to be initiated within 90 days of the date on which the authority becomes fully aware of the essential elements of an infringement.

The TAR Lazio held that it was not necessary to stay the proceedings pending the ruling of the CJEU. It held that, regardless of whether the time limit established by the said Article 14 is applicable in antitrust proceedings in relation to preliminary investigations, the ICA is required to conclude the procedure within a “*reasonable time*”, to be determined case by case according to the complexity of the case, in the light of the general principles of legality, good functioning and efficiency of administrative action, as well as of Articles 6 ECHR and Article 41 of the Charter of EU Fundamental Rights.

According to the TAR Lazio, in the case before it, the ICA could have collected all the necessary information to “*outline the basic elements of the offense*” and decide whether to initiate the investigation in a significantly shorter time than it actually did. In particular, all the information that the ICA needed to start the formal investigation was already included in the complaint, which was filed with it on May 16, 2019.⁷ Therefore, in the Court’s view, an unreasonably long period had already elapsed when the ICA opened its formal investigation procedure, which required the annulment of the Decision.

⁷ After addressing an initial request for information to the contracting authority (which responded in October 2019) five months after receiving the report of the infringement, the ICA issued a second request for information not earlier than on October 13, 2020 (i.e., after 12 more months had elapsed), to which that contracting authority responded on October 23, 2020. Nevertheless, the ICA did not initiate its formal investigation before May 2021.

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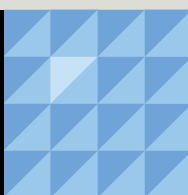
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