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Highlights

— TAR Lazio annuls ICA decision that fined Trenitalia, Ferrovie dello Stato and Rete Ferroviaria Italiana for an alleged abuse of dominant position.

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On September 6, 2023, the Regional Administrative Court of Lazio (“**TAR Lazio**”) annulled the decision of the Italian Competition Authority (“**ICA**”) imposing a symbolic fine of € 1,000 on Ferrovie dello Stato Italiane S.p.A. (“**FS**”), Rete Ferroviaria Italiana S.p.A. (“**RFI**”) and Trenitalia S.p.A. (“**Trenitalia**”) (jointly, the “**Parties**”) for having allegedly abused their dominant position in the markets for rail infrastructure management and regional rail passenger transportation services in Veneto.¹

Factual Background

The Parties

FS is the holding company of the FS Group and controls both RFI, which operates the Italian rail network in a monopoly regime, and Trenitalia, which is the main provider of public rail transport services in Italy.

The tender for the provision of regional railway services

On February 26, 2014, the Veneto Region launched an invitation to tender for the provision of regional railway services. On January 11, 2018, after withdrawing the invitation, the Veneto Region directly entrusted Trenitalia with the provision of these services for 15 years (i.e., until 2032).

Following the direct award, on March 14, 2018, Arriva Italia Rail S.r.l. (“**Arriva**”) complained to the ICA that the Veneto Region had entrusted Trenitalia with the provision of railway services only because, in exchange, RFI had promised to invest in infrastructure modernization in Veneto.

On May 3, 2018, the ICA opened proceedings to investigate the contested conduct.

¹ TAR Lazio, Judgment No. 13627 of September 6, 2023.

The ICA Decision

On July 31, 2019, the ICA issued a decision imposing fines on the Parties for having implemented a single and complex anti-competitive strategy, aimed at using RFI's legal monopoly in the market for the management, maintenance and development of the rail network to induce the Veneto Region to grant Trenitalia exclusive rights for the provision of regional railway services until 2032, without a public tender (the "**Decision**").²

The ICA found that the alleged anticompetitive conduct concerned two relevant markets: (i) the upstream market for the management, maintenance and development of the rail network, which is national in scope; and (ii) the downstream market for the provision of public regional rail passenger transport services, which is regional in scope.

According to the ICA, the FS Group was dominant in both markets, as: (i) RFI was the sole operator of the national rail network; and (ii) Trenitalia was the main provider of public rail transport services in Veneto.

According to the ICA, the Parties used their dominant position to avoid a competitive tender for the provision of regional railway services in the Veneto Region.

In particular, according to the ICA, in March 2016 the holding company FS held a meeting in which RFI and Trenitalia's representatives discussed with the Veneto Region matters falling within their respective competence. In this context, RFI and Trenitalia allegedly carried out a joint analysis to decide whether to invest in the electrification of a portion of the railway network in Veneto.

According to the ICA, RFI represented that it would not make this investment in the absence of a direct assignment of regional railway services to Trenitalia, as the investment was not economically viable. Moreover, the ICA held that Trenitalia had exploited confidential information related to such investment in negotiating its commercial offer with the Veneto Region. In the ICA's view, the behavior of RFI and Trenitalia led the Veneto Region to set aside the competitive tender and to directly entrust Trenitalia with the provision of the regional rail services.

In light of the above, the ICA considered that the FS Group had abused its dominant position. However, the ICA imposed a symbolic fine of only € 1,000 on the Parties, taking into account that the contested conduct would ultimately lead to improvements and innovations in the railway infrastructure.

The appeal before the TAR Lazio

The Parties challenged the ICA decision before the TAR Lazio,³ on the grounds that:

- i. the electrification of the railway lines and the award of the regional railway services were never linked during the meeting held in March 2016; moreover, the negotiations between the Veneto Region and Trenitalia concerning the modernisation of the railway infrastructure begun years before that meeting;
- ii. due to their content, the interactions between RFI and Trenitalia were not such as to infringe Article 11 of Legislative Decree No. 12/2015, pursuant to which, in case of vertically integrated companies, the company managing the railway infrastructure should keep any commercial information,⁴ or any information relating to its essential functions,⁵ strictly confidential towards other entities of the group;

² ICA Decision No. 27878 of July 31, 2019, Case A519, *Affidamento diretto del servizio di trasporto pubblico ferroviario nel Veneto* (as discussed in the Italian Competition Law newsletter of August 2019, available at this link: <https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-august-2019.pdf> and the Cleary Antitrust Watch of July 31, 2019, available at this link: <https://www.clearyantitrustwatch.com/2019/07/ica-issues-symbolic-fine-in-railway-operator-abuse-case/>).

³ Trenitalia (appeal No. 13291/2019), FS (appeal No. 13434/2019) and RFI (appeal No. 13880/2019) filed three separate appeals against the Decision, which were jointly decided by the TAR Lazio.

⁴ Such as information related to purchases of infrastructure capacity by other railway companies or the characteristics of their services.

⁵ Such as information related to track allocation and fees for the use of infrastructure.

- iii. the ICA failed to take into account that in all the regions (except one) where Arriva had expressed an interest in participating in the tender for the award of regional railway services, it subsequently either did not take part in the tender or merely expressed its interest into participating, without submitting a bid;
- iv. the Decision erroneously qualified the infringement as a “*serious breach of the rules protecting competition*”, as shown by the fact that the ICA itself considered it appropriate to impose only a symbolic fine of € 1,000.⁶

The TAR Lazio upheld the appeal and annulled the Decision, as it considered that the ICA had failed to prove the existence of abusive conduct in several respects.

First, the administrative court acknowledged that there was no evidence of any connection between RFI’s investment on the infrastructure and the award of the regional railway services to Trenitalia. In particular, no evidence could be inferred from the simultaneous presence of both institutional representatives of the Veneto Region and the Parties’ top management at the meeting held on March 2016. Similarly, no evidence could be inferred from the Veneto Region’s press releases on the event, which instead seemed to show that it was the Region that intended to make the direct award of regional railway services conditional on rail infrastructure innovation.

Second, the TAR Lazio considered that the exchange of information between RFI and Trenitalia was not *per se* indicative of an abusive practice. On the contrary, the information exchanged were neutral from an antitrust perspective and they could have been requested to RFI by any other operator competing with Trenitalia. Moreover, based on the content of such information exchange, it appeared to be legitimate pursuant to Article 11 of Legislative Decree 112/2015.

Third, the TAR Lazio found that the Decision did not sufficiently assess whether the conduct had the effect of excluding competitors from the market. The Decision did not take into account the market conditions at the time of the events and, in particular, the fact that Arriva did not engage in any activities, other than a mere expression of interest, in relation to the tenders’ award. Thus, according to the TAR Lazio, there was not sufficient evidence that the Parties’ conduct was capable of distorting competition.

Finally, the TAR Lazio also found it contradictory that the ICA had qualified the conduct as a serious infringement, while imposing a merely symbolic fine.

⁶ Decision, §230.

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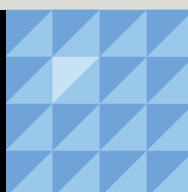
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