September 2020

Italian Competition Law Newsletter

Highlights

— ICA fines radio taxi companies for an anticompetitive agreement in the market for the collection and sorting of orders for taxi services in Naples

— The Council of State declares inadmissible an application for revocation of a previous judgment on grounds of error of fact

— The ICA fines several gas operators at national level for failure to notify a concentration

ICA fines radio taxi companies for an anticompetitive agreement in the market for the collection and sorting of orders for taxi services in Naples

On September 15, 2020, the Italian Competition Authority (the "**ICA**") imposed fines on Consortaxi, Taxi Napoli, Radio Taxi Partenope and Desa Radiotaxi (collectively, the "**Radio Taxi Companies**") for entering into an anticompetitive agreement in the market for the collection and sorting of orders for taxi services in Naples, in violation of Article 101 of the TFEU (the "**Decision**").[1] The Decision was taken after a series of other ICA decisions aimed at investigating and preventing anticompetitive practices of radio taxi companies foreclosing the entry of competing platforms in the market for the collection and sorting of orders for taxi services in other municipalities in Italy.[2]

Background

The ICA opened the investigation in February 2019, on the basis of complaints submitted by Mytaxi (now Free Now) and DigiTaxi. The two competitors argued that the Radio Taxi Companies had threatened drivers to discontinue their radio taxi service, with a view to preventing them from using the competing platforms in the market for the collection and sorting of orders for taxi services in Naples.

At the same time as the opening of the investigation, the ICA initiated a procedure for the adoption of interim measures, but it eventually closed it

[1] ICA Decision No. 28353, Case I832, *Servizi di prenotazione del trasporto taxi – Napoli.*

[2] See ICA Decision No. 27434, Case A521, *Attività di intermediazione della domanda di servizi taxi nel Comune di Torino* (ordering interim measures against the radio taxi company active in the Municipality of Turin, in the framework of an ongoing investigation into an alleged abuse of dominance); ICA Decision No. 27244, Case I801A, *Servizio di prenotazione del trasporto mediante taxi – Roma*; and ICA Decision No. 27245, Case I801B, *Servizio di prenotazione del trasporto mediante taxi – Milano* (both decisions closing cases relating to vertical agreements between radio taxi companies and taxi drivers).

without imposing any such measure because three of the four investigated Radio Taxi Companies withdrew from the disputed agreement. As a result of this withdrawal, the complainants could rely on a higher number of taxi drivers that could use their services so the requirement of irreparable damage that must be fulfilled in order to adopt interim measures was found to be no longer met.

The ICA's findings

The definition of the relevant market

The ICA found that the services for the collection and sorting of orders for taxi services offered through apps were substitutable with the similar services offered by phone and radio by the Radio Taxi Companies and were therefore part of the same relevant market.

First, according to the ICA, this was demonstrated by the fact that the agreement entered into by the Radio Taxi Companies showed that they viewed the complainants, which offered services for the collection and sorting of orders for taxi services through apps, as competitors.

Secondly, the ICA found that the fact that the apps allow users to order taxis in a different way than the more traditional means of ordering taxis, such as phone and radio, offered by the Radio Taxi Companies, did not make the apps a separate relevant market. According to the ICA, the features of all platforms offering services for the collection and sorting of orders for taxi services allow consumers to order taxi services in the same way. Therefore, the means used to order taxi services has no relevance for drivers, given that they choose among available platforms on the basis of the network effects associated with their use by consumers.

Lastly, the ICA held that the relevant geographic market was Naples. It did so because the agreement entered into by the Radio Taxi Companies concerned Naples and because the purpose of such services was to allow consumers and taxi drivers to be physically in the same place within the Naples area.

The agreement entered into by the Radio Taxi Companies

Under the contested agreement, the Radio Taxi Companies were bound not to allow their respective affiliated drivers to use any application or means to order taxi services other than those approved and used by the Radio Taxi Companies themselves. The ICA held that the agreement restricted competition "by object" to the extent that the parties effectively prevented taxi drivers from using the competing platforms that were trying to enter the market. Furthermore, the ICA established that the text of the agreement (which provided, inter alia, that "*taxi drivers affiliated to the above-mentioned radio taxi companies will not be able to use platforms other than those that are used by each radio taxi company*") clearly had an anticompetitive objective since it was aimed at protecting the market position of the Radio Taxi Companies and hindering the expansion and entry of competitors on the market.

The ICA also provided evidence of the various measures taken by the Radio Taxi Companies to implement the anticompetitive agreement. In this respect, it placed considerable weight on the communications – which took place in e-mail and other forms – that the parties sent to their drivers to force them to choose between their platforms and the so-called "*open platforms*" (such as the platforms operated by the complainants), under the threat of their exclusion from the parties' ones.

The impact of COVID-19 on the amount of the fine

In calculating the amount of the fine, the ICA took into account the impact of COVID-19 on the parties' revenues, on the basis of paragraph 34 of its Fining Guidelines. According to paragraph 34, the specific circumstances of a case may allow justified exceptions from strict application of the Guidelines, which must be expressly referred to in the statement of reasons of the infringement decision.

In this respect, the Decision noted that, due to the ongoing COVID-19 outbreak, demand for taxi services dropped dramatically – both at the local (-80%) and at the national level – during the

pandemic, causing an extremely serious economic crisis in the sector affected by the collusive conduct. As a result, the fines imposed on the Radio Taxi Companies were reduced by 80% compared to the amounts that would have resulted from the calculation without the specific and exceptional occurrence that the ICA relied on.

The Council of State declares inadmissible an application for revocation of a previous judgment on grounds of error of fact

On September 28, 2020, the Council of State[3] dismissed the appeal brought by Buzzi Unicem S.p.A. ("**Buzzi**") for the revocation of a judgment previously delivered by the same court, which upheld the lower court's ruling as well as an ICA decision fining an alleged cartel in the cement sector.[4] Buzzi challenged the judgment before the Council of State on grounds of error of fact.[5]

The Council of State ruled that an error of fact which may give rise to revocation must: (i) result from an erroneous or omitted perception of the material content of the documents submitted in the proceedings, which led the judicial body to take a decision on the basis of a false factual assumption, i.e. to consider proven a fact which is actually non-existent, or to consider non-existent a fact which has been proven; (ii) relate to a contentious point on which the decision did not expressly state reasons; and (iii) regard a decisive element in the decision to be revoked, so that the latter was caused by the court's mistake.

According to Buzzi, the error of fact committed by the adjudicating court in its previous judgment referred to: (a) Buzzi's alleged participation in the cartel; and (b) Buzzi's ground of appeal concerning the methodology followed by the ICA in setting the fine.

Regarding its alleged participation in the cartel, Buzzi claimed that the Council of State based its decision on an erroneous perception of the material content of the documents submitted in the proceedings. In its view, even if such documents could in the abstract prove the existence of a cartel, they did not refer to Buzzi and, in any event, did not prove that the applicant took part in the infringement. In this respect, according to Buzzi, the Council of State erroneously assumed that the parts of the ICA fining decision referring also to Buzzi constituted evidence against it. Also, the court overlooked Buzzi's defenses, taking the view that they were mainly relevant with regard to secondary and minor aspects of the infringement.

The Council of State held that Buzzi extensively put forward its arguments concerning the alleged cartel and its non-participation in it in the appeal proceedings for the annulment of the TAR Lazio judgment. Therefore, by having abusive recourse to the revocation remedy, Buzzi merely reiterated its defenses to call into question the Council of State assessment. According to the Council of State, what Buzzi claimed to be an erroneous perception by the court of the material content of the documents submitted in the proceedings constituted instead, at the most, an error of assessment or of interpretation of the facts, concerning an issue that the judgment fully covered, which as such could not be challenged by an application for revocation. Moreover, the Council of State recalled that, according to settled case law, the fact that a court does not expressly rule on every single argument put forward by a party in support of its claim does not constitute a ground for revocation.

On similar grounds, the Council of State declared Buzzi's application inadmissible also with regard to the alleged flaws in the ICA's calculation of the fine.

[3] Council of State No. 5684/2020.

[4] Council of State No. 6985/2019.

[5] Pursuant to Articles 106 of the Italian Code of Administrative Procedure and 395(4) of the Italian Code of Civil Procedure.

The ICA fines several gas operators at national level for failure to notify a concentration

On September 15, 2020, the ICA imposed total fines of approximately €150,000 on Acea S.p.A. ("**Acea**"), Mediterranea Energia Soc. Cons. a r.l. ("**Mediterranea**") and Alma C.I.S. S.r.l. ("**Alma**" and, together with Acea and Mediterranea, the "**Parties**")[6] for failure to notify their acquisition of joint control over Pescara Distribuzione Gas S.r.l. ("**Pescara Distribuzione**")[7] before implementing the transaction, in violation of Article 16(1) of Italian Law No. 287/90.[8]

On May 18, 2020, the Parties notified two transactions to the ICA, namely: (i) the acquisition of joint control over Pescara Distribuzione (the "**First Acquisition**"), pursuant to a preliminary purchase and sale agreement signed by the Parties on October 11, 2018 and executed on March 18, 2019; and (ii) the acquisition of joint control over Alto Sangro Distribuzione Gas. S.r.l. ("**Alto Sangro Distribuzione**")[9] (the "**Second Acquisition**"), pursuant to a preliminary agreement signed by the Parties on March 10, 2020.

In the Parties' view, the two transactions were interdependent within the meaning of Article 5(2) of EU Regulation No. 139/2004 (the "**EU Merger Regulation**")[10] as they were part of Acea's expansion project in the distribution of natural gas in central Italy (and in Abruzzo in particular). Moreover, they did not violate the obligation of prior notification as they notified the First Acquisition before the closing of the Second Acquisition.

The ICA took the opposite view, noting that the First Acquisition was an above-threshold transaction and, therefore, should have been notified before its closing, as required by Italian Law No. 287/90. Moreover, even if they had been part of one and the same concentration, they should have been notified before the closing of the First Acquisition, rather than the closing of the Second Acquisition. It reasoned that this conclusion was consistent with Article 5(2) of the EU Merger Regulation, which is aimed at capturing various sub-threshold transactions and parallel agreements that are spread over time by parties with a view to eluding merger control.

[6] The transaction concerns the natural gas distribution sector. Acea is a multi-utility leader in the water sector and one of the top operators in the electricity distribution, energy and environment sectors. Mediterranea is active in the distribution of methane gas, LPG and propane air. Alma is a leading provider of innovative and sustainable solutions for energy systems, building and infrastructure.

[7] Pescara Distribuzione manages the gas distribution service in the municipality of Pescara.

[8] ICA Decision No. 28350, Case C12295B, *Acea-Mediterranea-Alma C.I.S./Pescara Distribuzione Gas*.

[9] Alto Sangro manages the gas distribution service in the municipalities of Alto Sangro and of Parco Nazionale d'Abruzzo and all related infrastructure activities.

[10] According to which "*two or more transactions ... which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction*."

AUTHORS

Alessandro Comino
+39 02 7260 8264
acomino@cgsh.com

Natalia Latronico
+39 02 7260 8666
nlatronico@cgsh.com

Chiara Militello
+39 06 6952 2613
cmilitello@cgsh.com

Chiara Neirotti
+39 02 7260 8644
cneirotti@cgsh.com

Michael Tagliavini
+39 06 6952 2824
mtagliavini@cgsh.com

Ilaria Tucci
+39 06 6952 2674
itucci@cgsh.com

EDITORS

Giulio Cesare Rizza
+39 06 6952 2237
crizza@cgsh.com

Gianluca Faella
+39 06 6952 2690
gfaella@cgsh.com

PARTNERS, COUNSEL AND SENIOR ATTORNEYS, ITALY

Marco D'Ostuni
mdostuni@cgsh.com

Matteo Beretta
mberetta@cgsh.com

Giulio Cesare Rizza
crizza@cgsh.com

Gianluca Faella
gfaella@cgsh.com

Saverio Valentino
svalentino@cgsh.com

Fausto Caronna
fcaronna@cgsh.com

Luciana Bellia
lbellia@cgsh.com

Marco Zotta
mzotta@cgsh.com

20.110214_110220