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Italian Competition Law Newsletter

Highlights

- Abuse of dominance in management of plastic waste: ICA imposes interim measures on COREPLA
- Cement cartel case: Council of State halves fine

ICA imposes interim measures in abuse of dominance case in market for management of plastic waste recycling services

On October 29, 2019, the Italian Competition Authority (the “ICA”) issued a decision (the “Decision”)¹ imposing interim measures on the Italian Consortium for the Collection, Recycling and Recovery of Plastic Packaging (“COREPLA”) in the framework of the investigation it opened six months earlier into COREPLA’s alleged abuse of dominant position in the market for management of plastic waste recycling services. According to the ICA, the interim measures will prevent serious and irreparable harm to competition likely to be caused by COREPLA’s conduct, which *prima facie* constitutes an infringement of Article 102 TFEU.

Factual and legal background

Article 221 of the Consolidated Act on Environment² establishes the principle of Extended Producer Responsibility (“EPR”), under which manufacturers of plastic packaging are subject to significant financial responsibility for the treatment and disposal of post-consumer products. Plastic

packaging manufacturers can comply with their statutory obligations, including those of waste management and physical collection, by participating in consortia that treat and recycle plastic waste.

The recycling chain of plastic waste is organized into the following segments. First, local authorities collect household plastic waste and take it to so-called sorting plants. In these plants, the waste is processed and allocated to the consortia of plastic manufacturers according to quotas that reflect the plastic manufacturers’ participation in each consortium. The consortia then pay the local authorities and the sorting plants for their activity and auction off the plastic waste to start the treatment and disposal process.

COREPLA had been the only such consortium in Italy for a number of years, until certain plastic manufacturers decided to constitute another consortium, called CORIPET. In April 2018,

¹ ICA Decision No. 27961, Case A531, *Riciclo imballaggi primari/Condotte abusive COREPLA*.

² Legislative Decree No. 152/06.

the Italian Ministry of Environment granted CORIPET a temporary license subject to the achievement of the objectives of effectiveness, efficiency and self-sufficiency necessary for the granting of permanent authorization in two years' time. The temporary license was due to expire on April 24, 2020.

The opening of the investigation

On April 30, 2019, following a complaint by CORIPET, the ICA opened an investigation to assess whether COREPLA restricted competition in the relevant market by means of certain exclusionary practices, including claiming exclusive rights on all the household plastic waste, as well as enforcing exclusive clauses with the sorting plants.

At the same time, the ICA opened sub-proceedings pursuant to Article 14-*bis* of Law No. 187/90 to assess whether interim measures were required in order to prevent COREPLA's conduct from excluding its only competitor CORIPET from the market.

The ICA's preliminary assessment

According to the ICA, the relevant product market for the purpose of the interim measures decision can be defined as the market for the management of plastic waste recycling services in compliance with EPR obligations, even though the ICA may adopt a different product market definition in its substantive assessment of the case. COREPLA had been for years the sole operator in this market—which is national in scope—thus holding a *prima facie* dominant position.

In the ICA's preliminary view, COREPLA allegedly: (i) claimed ownership of all the plastic waste collected by local authorities and taken to sorting plants; (ii) did not agree with CORIPET regarding a way to establish the quotas of plastic waste to which each of them were entitled, claiming that CORIPET had to enter into *ad hoc* agreements with local authorities first; (iii) enforced exclusive clauses with sorting plants to avoid the allocation of plastic waste to CORIPET; and (iv) auctioned plastic waste that should have been managed by CORIPET.

The ICA held that COREPLA's conduct was *prima facie* aimed at hindering CORIPET's activity in the market and force its exit. It therefore came to the conclusion that COREPLA's behavior constituted an abuse of dominant position, in violation of Article 102 TFEU.

In addition, the ICA concluded that, if COREPLA's ongoing conduct were allowed to continue, CORIPET would likely fail to fulfill in time the objectives of effectiveness, efficiency and self-sufficiency necessary for the Ministry of Environment to grant it a permanent authorization. This would ultimately result in CORIPET's exit from the market, and thus in serious and irreparable harm to competition.

The Decision

For these reasons, the ICA ordered COREPLA to: (i) modify the contracts with local authorities so as to allow the allocation of plastic waste to consortia other than COREPLA; (ii) modify the contracts with sorting plants so as to allow the allocation of plastic waste to consortia other than COREPLA; (iii) cease auctioning plastic waste that should have been allocated to CORIPET; (iv) cooperate with CORIPET in order to reach agreements on preliminary management issues, such as the determination of quotas; (v) assign to CORIPET by April 24, 2020, the portion of plastic waste to which it is entitled; and (vi) assign to CORIPET all the plastic waste that should have been allocated to it from January 1, 2019, until the date of implementation of measure (v).

COREPLA was ordered to comply within 45 days, which the ICA deemed feasible and proportionate.

Council of State reduces fine in cement cartel case

On November 29, 2019, the Council of State partially annulled³ a judgment delivered by the TAR Lazio in 2018⁴, which had upheld the ICA's decision to impose on Holcim Italia S.p.A. ("Holcim") a fine amounting to €2,381,252 for participating in a price-fixing cartel concerning the Italian cement market.⁵

Holcim's appeal and the judgment of the Council of State

In its appeal, Holcim argued that both the ICA and the TAR Lazio were wrong in assessing the following elements: (i) the geographic market definition, (ii) the existence of the cartel, and (iii) the quantification of the fine.

With respect to the geographic market definition, the Council of State held that even though some undertakings—such as Holcim—were active only in small areas of Italy, they were indeed "*affected by competition in the other areas of the Country*". Therefore, the ICA was right in finding the geographical market national in scope.

With respect to Holcim's participation in the cartel, the Council of State confirmed its case law and stated that, where the ICA finds evidence of unlawful contacts among rival market players aimed at restricting competition, the burden is on the accused undertakings of proving that their parallel behavior in the market can be explained in a way other than collusion. The Council of State sided with the TAR Lazio and confirmed the ICA's finding that Holcim failed to provide a rational explanation of its conduct.

The Council of State, however, upheld Holcim's appeal with regard to the quantification of the fine. The court found that Holcim's business activity in 2015 was restricted to Northern Italy, in which it held only a 4.8% market share. Disregarding the "*economic reality*" in which Holcim operated, the ICA set a disproportionate amount when calculating the company's fine. In addition, the Council of State held that the ICA failed properly to justify its decision not to accept Holcim's commitments during the investigation. According to the Court, the ICA—because of its highly discretionary powers in this phase of the investigation—had to specifically state the reasons why it decided not to accept the commitments. The Court added in this respect that both the European Commission and the UK Competition and Markets Authority had accepted commitments in similar cases. This flaw—even though it did not affect the validity of the final decision—vitiating the ICA's assessment of Holcim's "*overall behavior*" and contributed to the wrongful quantification of the fine. For these reasons, the Council of State reduced Holcim's fine by half.

³ Council of State, Judgment No. 8191 of November 29, 2019.

⁴ TAR Lazio, Judgment No. 8540 of July 30, 2018.

⁵ ICA Decision of July 25, 2017, No. 26705, Case 1793, *Aumento prezzi cemento*. The ICA fined Holcim €2,381,252. The ICA also fined Italcementi S.p.A., Buzzi Unicem S.p.A., Colacem S.p.A., Cementir Italia S.p.A., Sacci S.p.A., Cementi Rossi S.p.A., Cementeria Aldo Barbetti S.p.A., Cementeria di Monselice S.p.A., CAL.ME. S.p.A., Cementi Moccia S.p.A., T.S.C. S.r.l., and AITEC. All of these companies applied for annulment of the ICA decision before the TAR Lazio – which fully upheld the ICA's decision – and then appealed against the decision of the court of first instance before the Council of State. The latter reduced the fines imposed by the ICA on Italcementi S.p.A. (Judgment No. 7320 of December 31, 2018) and Cementi Rossi S.p.A. (Judgment No. 1551 of March 6, 2019), but confirmed the ICA decision with respect to Sacci S.p.A. (Judgment No. 1160 of February 19, 2019), Buzzi Unicem S.p.A. (Judgment No. 6973 of October 14, 2019), Cementir S.p.A. (Judgment No. 1883 of March 21, 2019), Cementi Moccia S.p.A. (Judgment No. 6974 of October 14, 2019), and CAL.ME. S.p.A. (Judgment No. 1900 of March 21, 2019). The Council of State has not yet issued a final judgment on Cementeria Aldo Barbetti S.p.A.'s and AITEC's appeals.

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